In Croson’s Wake: Affirmative Action, Local Hiring, and the Ongoing Struggle to Diversify America’s Building & Construction Trades

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ARTICLES

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I. INTRODUCTION: HISTORY REPEATING

For more than a century, workers of color in the construction industry have faced systemic discriminatory barriers that have curtailed their access to well-paying skilled jobs. In particular, skilled building and construction trade unions—which, unlike unions in most other industries, play a unique intermediary role in controlling access to jobs—have resisted integrating workers of colors on job sites, in the streets, and in the courts. That resistance has made the path to a diverse workforce much more difficult in building and construction than in other industries, which have arguably largely overcome these ‘first-generation’ discrimination challenges.¹

¹. A note on terminology: throughout this article I refer to the building and construction industry variously as the “building and construction industry,” the “building industry,” and the “construction industry.” For purposes of my analysis, I use the terms interchangeably. Similarly, I will sometimes
In the early 1960s, Northern civil rights activists built a mass movement with the aim of opening up new pathways for black workers into these jobs.3 Those efforts became increasingly militant as the decade wore on, and were even dubbed the “crusade against the craft unions” by Ebony magazine in 1969.4 Yet half a century later, white men still disproportionately dominate the ranks of America’s building and construction trades unions.5 Their dominance is also reflected in their virtually all-white elected national leaderships.6 Moreover, even where workers of color have overcome access barriers to become members of construction unions, they have faced other forms of systemic discrimination.7 In addition, because some of the lower-skilled trades are significantly larger than others, it is not clear that studies which report refer to the building and construction trades unions variously as the “building and construction trades unions,” “building and construction trades,” “building trades,” “construction trades,” “building trade unions,” “construction trade unions,” “construction unions,” etc. Again, for purposes of my analysis, I use the terms interchangeably.

2. See Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 468–79 (2001) (comparing first-generation employment discrimination, which involves the maintenance of overt workplace segregation, with second-generation employment discrimination, which occurs on a subtler structural level, and explaining why the latter is more difficult to remedy through a rule-based enforcement approach).

3. See, e.g., Nancy MacLean, Freedom is Not Enough: The Opening of the American Workplace 91 (2006) (“As their southern counterparts focused on the textile industry, northern civil rights activists set their sights on construction in the early 1960s. . . . Even more than the South’s textile industry, construction seemed to offer hope of upward mobility to working-class African Americans.”); see also infra Part III.A.

4. See Alex Poinsett, Crusade Against the Craft Unions, EBONY (Dec. 1969).

5. See infra Part II.F.


7. See, e.g., Rachel L. Swarns, New York Sheet Metal Workers Case Highlights Persistence of Workplace Discrimination, N.Y. Times (Dec. 20, 2015) (describing the sheet metal workers union’s practices of consistently denying work opportunities to black and Hispanic members through more subtle and complex bias than in the first generation of litigation and deeming them “a case study of how workplace discrimination has persisted in corners of the construction trades”), https://www.nytimes.com/2015/12/21/nyregion/minority-sheet-metal-workers-in-new-york-start-getting-back-pay-after-decades-of-bias.html; see also infra Part II.F.
increased diversity in the unions’ ranks actually reflect gains made throughout the skilled trades.  

One might conclude, from this account, that there has been virtually no progress in the nearly fifty years since *Ebony* documented black workers’ crusade to enter the ranks of the trades. Indeed, many contemporary commentators have said as much. For many historians, too, the story of affirmative action in the building trades effectively ended in the mid-1970s. Such narratives are echoed by legal academics who note that the Supreme Court significantly curtailed publicly-funded entities’ use of affirmative action in the late 1980s. For example, one scholar has argued that these court decisions and public backlash to affirmative action have caused “a decline in enforcement of affirmative action programs and a slide back to pre-[Philadelphia Plan] segregation” in the construction trades. Another has written that “[f]ollowing the Supreme Court’s decision in *Croson*, state and local governments have scaled back or eliminated

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8. For example, the Economic Policy Institute recently released a study indicating that 55.1% of construction union members in New York City are workers of color, but based its data on a broad Current Population Survey occupational classification and did not differentiate between the different occupational classifications. See infra Part II.F.


10. See, e.g., David Goldberg & Trevor Griffey, *Conclusion: White Male Identity Politics, in Black Power at Work*, supra note 10, at 194 (“Once the building trades were able to blunt the enforcement of affirmative action by reducing it to being localized and voluntary, they could more or less maintain the informal hiring and training practices that had preserved their racial exclusivity. . . . [T]he resulting ‘wages of whiteness’ have impaired the standing of the unions in the industry and retarded their ability to organize the twenty-first-century workplace.”).

altogether affirmative action programs that had been adopted precisely to overcome discriminatory barriers to minority participation.”

These narratives obscure how worker advocates have persisted in their push to open up the ranks of America’s building and construction trades and—in some cases—achieved real progress. For several decades now their efforts have been grounded in a facially race-neutral strategy: local hiring. In the wake of affirmative action’s curtailment by the Supreme Court in City of Richmond v. J.A. Croson Company, local hiring became a central tool used by advocates to diversify the building and construction trades. Activists have successfully pressed cities to adopt local hiring programs to create pathways into the skilled construction trades for communities of color, particularly for black and Latino men.

This article aims to offer both a historical and doctrinal corrective to accounts of the decline of equal opportunity initiatives targeting the building and construction trades. Commentators who predicted that the Supreme Court’s anti-affirmative action decisions in Croson and Adarand would bring efforts to diversify the trades to a crashing halt have been proven wrong. Cities today have robust tools, in the form of local and targeted hiring laws, that can confront discrimination in the building trades.


13. 488 U.S. 469 (1989) (holding for the first time that strict scrutiny must apply to determinations of the constitutionality of race-conscious affirmative action programs, and finding that “generalized assertions” of past racial discrimination were not a sufficient justification for the use of strict racial quotas in the award of public construction contracts at the state and local level).

14. While the experiences of women, including women of color, are critical to the story of the fight to open up building trades careers beyond white men, my analysis in this article will primarily take up efforts to create pathways for working-class men of color into the skilled construction trades. Much of the history here is one of black workers, but that has also shifted in recent years as immigration has created an alternative, largely non-union, Latino and immigrant construction workforce. These Latino workers are, however, primarily found in lower-paying jobs, and have—like other workers of color—struggled to gain access to full-fledged union jobs in the higher-skilled building and construction trade unions. See infra Part II.F.


For an important perspective on the particular challenges that sexuality, and perceptions of sexuality, have created for women workers in the building and construction trades, see MIRIAM FRANK, OUT IN THE UNION: A LABOR HISTORY OF QUEER AMERICA 22–27 (2015).
and ensure that government-backed construction will boost hiring for workers of color in the skilled trades, rather than reinforcing existing inequities.

In offering this corrective, this article seeks to bridge two histories that have often been told in isolation: the story of affirmative action in the building and construction trades, and the story of local, resident and targeted hiring strategies at the city level. Because local and targeted hiring strategies are facially race-neutral, many observers have failed to recognize that they were primarily undertaken as part of an effort to bring greater diversity to the building and construction trades. This view has spilled over, moreover, into legal and academic analysis of the two major Supreme Court cases dealing with local hiring: *White v. Mass. Council of Construction Employers* 15 and *United Building and Construction Trades Council v. Camden*. 16 I aim to show, however, that the earliest local hiring strategies pursued in Boston—and at issue in *White*—emerged as a direct activist response to the racial resentment that race-based affirmative action mandates had generated among working-class whites. Local hiring was not only not race-neutral but was, from activists’ and city officials’ perspectives, critical to ensuring the success of race-based affirmative action in Boston. Thus, I argue that local hiring has been an important and overlooked chapter in the history of affirmative action in the building and construction trades.

This is not to say that the story of local hiring has been entirely rosy. Indeed, local hiring faced an early setback in the Supreme Court. 17 Many political leaders and commentators have, in turn, voiced skepticism about the durability of local hiring. 18 This article’s second goal, then, is to set the doctrinal record straight, as local hiring stands on much stronger legal footing than is widely understood. What’s more, advocates have further built on local hiring by pursuing more sophisticated targeted hiring strategies, which provide for consideration of factors beyond residency, further increasing the effectiveness of these programs in removing barriers to accessing construction jobs. To date, there appear to have been no successful legal challenges brought to upend targeted hiring programs.

This article proceeds in five parts. Part II provides an overview of the unique role played by building and construction trades unions in the construction industry, highlighting several factors that made them each a

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17. Id.
prime target of civil rights activists and, at the same time, exceptionally
difficult to integrate. Part III then fleshes out the early history of the
strategies activists pursued to open them up to black workers, which
culminated in the introduction of the Philadelphia Plan at the federal level.
After discussing the Plan and its subsequent demise, Part III returns to the
local level, showing how local activists continued to pursue affirmative
action through city governments and through litigation.

Part IV explains how local hiring first developed in Boston as a
strategy to mitigate some of the perceived unfairness of affirmative action
and promote the hiring of lower-income white residents who were
themselves victims of exclusion from the building trades, and against the
backdrop of construction site violence. In light of the Supreme Court’s
rejection of race-conscious contracting set-asides in *City of Richmond v.
J.A. Croson Company*, local hiring evolved into a facially race-neutral
strategy to increase minority hiring. Part IV concludes by surveying how
cities have overcome challenges to local hiring, including those brought
under the Privileges and Immunities Clause in the wake of the Supreme
Court’s 1984 decision in *United Building and Construction Trades Council
v. Camden*.

Part V then turns to the rise of targeted hiring programs, which account
for more factors than just geography in prioritizing who should be hired
onto publicly-backed construction jobs. I use the example of Seattle to
illustrate the potential of targeted hiring, which seeks to establish hiring
targets for a broad set of disadvantaged workers, beyond simply “local”
residents.

Part VI concludes by noting that cities have a unique opportunity
before them in light of the increased national attention on infrastructure
spending. That attention is likely to continue whether or not the Trump
administration succeeds in moving a national infrastructure investment bill
through Congress. Cities would thus do well not to squander the
opportunity they have to ensure that public investment benefits the residents
most in need of well-paying jobs—especially given that targeted hiring

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19. The Boston local hiring requirement was made law by Boston Mayor Kevin White in 1979,
and was upheld by the U.S. Supreme Court in 1983 against a facial constitutional challenge brought
See infra Part IV.
and political shifts have undercut the viability of affirmative action in the employment context, hopes of
improving these programs have also diminished. In response, many policymakers have turned to other
initiatives, including residence-based hiring programs, to secure access for individuals who might
otherwise be shut out.”)
programs have, for now, flipped the historic script of union opposition to affirmative action on its head.

II. THE EVOLUTION OF THE CONSTRUCTION INDUSTRY

In the early 1960s, many Northern civil rights advocates placed a heavy emphasis on winning access to building and construction jobs.23 This focus was the result of a convergence of developments in the industry, including a structure of work that required near-constant hiring onto different projects, the success of building and construction trades unions in previous decades in transforming construction jobs into middle-class careers,24 and the high visibility of all-white construction crews on publicly-funded construction projects in or near heavily black urban centers.25 The sections that follow situate the movement’s focus on the construction sector in its historical context.

A. Job Structure of the Construction Industry

Construction jobs span dozens of occupational classifications,26 ranging from lower-skilled27 and lower-paid positions (such as construction...
laborers and helpers) to higher-skilled and better-paid positions (such as sheet metal workers, ironworkers, and elevator installers and repairers). Common to all these jobs is the reality that construction remains a highly dangerous industry, as workers regularly “engage in many activities that may expose them to serious hazards, such as falling from rooftops, unguarded machinery, being struck by heavy construction equipment, electrocutions, silica dust, and asbestos.”

This means that all workers need some kind of training to enter the industry. Importantly, however, construction jobs do not require a college education, and traditionally most trades did not even require a high school education. Thus skilled construction jobs have been, in theory, within the reach of many workers, regardless of prior educational background.

The extent of training a worker needs depends on a given job’s skill requirements. Workers in more generalized occupations, such as construction laborers and helpers, are largely trained on the job, while those in more specialized occupations typically go through more substantive apprenticeship programs. Similarly, when and how workers are engaged to come onto a given construction jobsite depends on both their particular trade and specialized skills as well as the specific needs of the project in question.

The project-based nature of construction means that contractors frequently hire different sets of workers at various stages throughout the project; moreover, despite technical advances in the industry, the reality is
that “no two projects are identical,” 32 meaning specific labor demands over
the life of a project are often hard to accurately predict. Some workers get
engaged at multiple points during a construction job, while others perform
work specific only to a few stages. All of these structural realities put great
pressure on construction contractors, who must constantly adapt to the new
conditions posed by particular jobs. 33 Contractors must be “continuously
matching jobs and available” workers, which makes them highly dependent
on “the area pool of labor.” 34

B. The Apprenticeship & Hiring Hall Models

These pressures enabled construction unions to leverage their
economic value to contractors as organizations of highly skilled workers.
As historian Grace Palladino argues, construction workers’ skills have
“always set the building trades apart” (“the economic power of skill”) and
were “the key to their early organization and their proven ability to bargain
collectively with employers.” 35 The economic power of these skills
increased as construction work itself became more complex with the advent
of the skyscraper at the turn of the 20th century. 36

Over time, the building and construction trades turned their economic
power into a virtual monopoly on skill by developing (and controlling
access to) extensive apprenticeship and training programs. Apprentices can
typically spend years learning the trade before they can claim the full wage
of a fully-trained journeyman. 37 This kind of craft training is not firm-
specific. Workers must learn skills on jobs that they then deploy on jobs
with other competing contractors. Their skills are, as a result, portable, 38 but
this very portability means that individual construction firms and
contractors have “a disincentive to invest in worker training,” 39 unlike firms
in other industries with workforces that have traditionally remained stable
over time.

Unions stepped up to fill this gap with their training programs;
contractors, in turn, largely delegated apprenticeship and on-the-job training
to them, utilizing joint labor-management funds to finance such programs

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32. John T. Dunlop, The Industrial Relations System in Construction, in The Structure of
33. See id.
34. Id.
35. Grace Palladino, Skilled Hands, Strong Spirits: A Century of Building Trades
History 141 (2005).
36. See David Weil, The Contemporary Industrial Relations System in Construction: Analysis,
37. Palladino, supra note 35, at 141–42.
38. Weil, supra note 36, at 461.
39. Id.
and maintain a continuous area supply of skilled labor.\textsuperscript{40} The funds ensured that “the cost of the apprenticeship programs was spread out across the employer community so that no single contractor had to bear the financial burden of training employees.”\textsuperscript{41} Thus, over time, union-led apprenticeship and training programs became the primary way that contractors could verify that the workers who were hired onto their projects were fully trained and prepared for their highly skilled—and still highly dangerous\textsuperscript{42}—work.

To facilitate and streamline the hiring of workers, unions also developed hiring halls. Hiring halls allowed contractors to gain access to a union’s trained, skilled members who were not currently assigned to a job.\textsuperscript{43} They serve as “a central pool of labor for each craft or trade,” maintaining information about both projects in the area and the training, skills and availability of their members and matching contractors and workers accordingly.\textsuperscript{44} Contractors came to depend on the union hiring halls for “skilled craftsmen as needed on short notice” who they can trust to “meet the necessary standards.”\textsuperscript{45}

Having a union hiring hall to help place workers did not, on its own, lift job standards. Exclusive hiring hall arrangements, on the other hand, grant the union in question an “exclusive right to refer employees” while assuring contractors a steady stream of skilled workers, so long as they agree not to hire workers from any other source.\textsuperscript{46} If employers were to violate the exclusivity provision, the union could bring a grievance for the lost work under the terms of its collective bargaining agreement.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Mark Erlich & Jeff Grabelsky, \textit{Standing at a Crossroads: The Building Trades in the Twenty-First Century}, 46 LAB. HIST. 421, 422 (2005).
\item \textsuperscript{42} As Nancy MacLean points out, despite the advances in improving construction, “rates of accidental injury and death ran higher in construction than in any other American industry. Workers needed to trust one another to feel secure where risk was so routine; ensuring high-quality work was a safety precaution as much as a matter of pride.” \textit{MACLEAN, supra} note 3, at 93.
\item \textsuperscript{43} Robert S. Giolito, \textit{A Hiring Hall Primer} (revised 2014), http://giolitolaw.com/a-hiring-hall-primer.
\item \textsuperscript{44} Id. Most hiring halls maintain a strict set of rules that determine how workers are to be referred for jobs when contractors call on them, which are often set out amongst the members as part of a contract or the union’s bylaws and are enforceable should the union fail to properly follow them to the detriment of some members. While these rules may vary somewhat, they typically “enable the union to establish one or more referral lists, define how employees are entered onto and removed from the lists, and impose penalties for non-performance or other violations of the rules.” Id. The union must also notify workers of how the referral system works, along with any changes in that system. \textit{See Hiring Halls, NAT’L LABOR RELATIONS BD.}, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/hiring-halls (last visited Mar. 11, 2018).
\item \textsuperscript{45} HERBERT A. APPLEBAUM, CONSTRUCTION WORKERS U.S.A. 125–26 (1999).
\item \textsuperscript{46} These agreements typically include some kind of exception or understanding that, should the union be unable to supply the workers needed, the employer could seek workers elsewhere.
\item \textsuperscript{47} Giolito, \textit{supra} note 43. While employers fought to challenge the legality of the exclusive hiring hall, the Supreme Court ultimately affirmed the right of unions to enter into exclusive hiring hall arrangements with employers—so long as they do not discriminate against nonmembers. \textit{See Teamsters
The combination of the unique training structure and the rise of the hiring hall model historically gave construction unions control over core “labor market functions” like worker training and referral power that were typically reserved for employers. This, in turn, gave them significant leverage in negotiations with employers in “terms of their control of both people and skill.”\textsuperscript{48} As Palladino explains, “Whether through formal apprenticeships or work opportunities, building trades unions generally controlled training for construction workers, and that made all the difference in a boom and bust industry.”\textsuperscript{49}

Solidarity among construction workers further forced contractors to accede to union demands around exclusive hiring hall agreements. The “basic trades” whose work was needed throughout the project, such as laborers and operating engineers, became an “anchor” for other trades: they negotiated collective bargaining agreements that “included requirement[s] that all work on the project would be done by unionized subcontractors.”\textsuperscript{50} In this way, they were able to create “a platform for collective bargaining for other trades on the site,”\textsuperscript{51} which strengthened their own bargaining position with the general contractors.

\textbf{C. The Trades Win Key Legal Protections}

While these conditions all contributed to the growth of unions in the industry, the reality is that, prior to the New Deal, construction work was still “insecure, sensitive to economic fluctuations, dangerous, and seasonal.”\textsuperscript{52} Employer associations frequently locked horns with the building trades unions, and, at various points, actively attempted to destroy or marginalize them altogether.\textsuperscript{53} Given that the courts and law enforcement left unionization unprotected in this period, it was not obvious that unions would dominate the construction sector. Indeed, even the critical exclusive hiring hall agreement was largely unregulated and probably unenforceable during the \textit{Lochner} era; it was instead up to the workers to use their

\begin{itemize}
\item \textsuperscript{48} \text{Weil, supra note 36, at 461.}
\item \textsuperscript{49} \text{PALLADINO, supra note 35, at 141–42.}
\item \textsuperscript{50} \text{DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 355 n.40 (2014).}
\item \textsuperscript{51} \text{Weil, supra note 36, at 452 (noting that in recent decades this structural leverage has largely faded as general contractors have been replaced, in the interests of maximizing business efficiency for end users, by construction managers who do not directly employ anybody).}
\item \textsuperscript{52} \text{Thomas J. Sugrue, \textit{Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969}, 91 J. AM. HIST. 145, 155 (June 2004).}
\item \textsuperscript{53} \text{See generally PALLADINO, supra note 35.}
\end{itemize}
economic power to enforce them. This remained the case even after enactment of the National Labor Relations Act of 1935 (NLRA), which codified workers’ rights to organizing and collective bargaining. The National Labor Relations Board (NLRB), the agency dedicated to enforcing those rights, declined to assert jurisdiction over the construction industry until 1948.54 In 1947, the Taft-Hartley Act made it illegal for a union to accept exclusive representation of a bargaining unit before workers were on a job.55

Two additional legal developments helped to secure the position of building and construction trades unions. First, unions persuaded Congress to amend the NLRA,56 allowing construction unions to negotiate pre-hire agreements with particular contractors.57 These pre-hire agreements


55. NLRA § 8(b)(1)(A) made it illegal for a union to restrain or coerce employees in the exercise of the rights guaranteed in section 7. See NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (2012). The NLRB, “with court approval, has determined that it is a violation of this provision for a Union which does not represent a majority to accept recognition from and enter into an agreement with an employer.” Walsh, supra note 54, at E2-2 (citing Ladies’ Garment Workers v. NLRB, 366 U.S. 731 (1961); Hadden House Food Prods., 269 NLRB 338 (1984), enforced, 764 F.2d 182 (3d Cir.1985)). Enacted prior to Taft-Hartley, NLRA § 8(a)(2) prohibits employers from recognizing or bargaining with unions that do not represent a majority of employees in an appropriate unit. See NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (2012); see also Richard Murphy, Pre-Hire Agreements and Section 8(f) of the NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability, 50 Fordham L. Rev. 1014, 1015–17 nn.10–20 and accompanying text (1982).

56. Richard Murphy describes this amendment as Congress legitimizing pre-hire agreements, given that prior to its enactment, “The General Counsel for the Board recognized the need of the construction industry to have a skilled work force available for quick referral and adopted a policy of not issue complaints against construction employers and unions entering into pre-hire agreements.” Murphy, supra note 55, at 1017. There was, however, real legal trouble that led Congress to push for the amendment: “Shortly after the General Counsel’s announcement that he would not issue complaints for the practice of entering into pre-hire agreements, the Board issued a statement that it would still enforce the existing law ‘[i]f and when . . . any such case reaches the Board members. When private parties complained to the Board of pre-hire agreements, the Board found the agreements illegal.” Id. at 1017 n.22 (citations omitted). “Principals of the construction industry feared that the inability of construction contractors and unions to enter into contracts prior to actual hiring would throw the industry into chaos. Because the construction industry employer needs to know his labor costs prior to making a bid on a project, and to be assured a ready supply of skilled labor, it was apparent that the stability of the industry depended on making valid pre-hire agreements available.” Id. at 1022 n.48 (internal citations omitted).

57. See NLRA § 8(f), 29 U.S.C. § 158(f) (2012) (enacted in the Landrum-Griffin amendments of 1959); Stanton Fuel & Material, 335 NLRB 717, 718 (2001) (“Section 8(f) permits unions and employers in the construction industry to enter into collective-bargaining agreements without the union’s having established that it has the support of a majority of the employees in the covered unit. The provision therefore creates an exception to Section 9(a)’s general rule requiring a showing of majority support. Section 8(f) also creates an exception to the general rule of Section 8(a)(2) and Section 8(b)(1)(A) that an employer and a union lacking majority support of unit employees may not enter into a bargaining relationship with respect to those employees.”)

As one casebook explains, “In the building and construction industry, a given employer works on different jobs in different localities, performs work of brief duration and hires a transient workforce
typically require the contractor to hire through union hiring halls, and set the wages and conditions that would govern those jobs, without requiring the union to wait until any workers are hired to first demonstrate majority support among the workers on any given site.58

Second, unions won passage of minimum labor standards laws that enabled them to establish a high labor standards floor in the market for construction employment. Crucial among these was the Davis-Bacon Act, which mandated that contractors on government-backed projects pay minimum wages “based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision . . . in which the work is to be performed.”59 This wage level became known as the “prevailing wage,” and that concept proved successful in lifting wages across the sector. Davis-Bacon’s passage at the federal level also led unions to push for state-level prevailing wage laws;60 ultimately, forty-two states passed prevailing wage laws.61 The combined effect of these prevailing wage laws was to guarantee high wages and benefits in government-funded construction.62

The importance of prevailing wage laws cannot be overstated: they fundamentally altered the structure of bidding in public construction by providing a basic level of stability. As David Weil explains, “To the extent that prevailing wage laws where enacted are enforced, wage and benefit policies are taken out of competition in public work, in theory making bids for a project differ on the basis of efficiency, quality, and lower material and overhead costs.”63 In other words, contractors were no longer able to

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58. Fred B. Kotler, Project Labor Agreements in New York State: In the Public Interest 2 (2009) (“Pre-hire bargaining means that construction unions and contractors have bargaining rights and can enter into agreements before any workers are hired and without a particular union having to demonstrate majority support among employees of an ascertained bargaining unit. Most pre-hire agreements cover work within a geographically defined jurisdiction for a particular craft and continue from project to project.”)
60. See, e.g., N.Y. LAB. LAW § 220(3)(a) (McKinney 2011).
61. WAGE & HOUR DIV., U.S. DEP’T OF LAB., DOLLAR THRESHOLD AMOUNT FOR CONTRACT COVERAGE UNDER STATE PREVAILING WAGE LAWS (Jan. 1, 2017), https://www.dol.gov/whd/state/dollar.htm (listing states without prevailing wage laws and showing which ones have repealed such laws). The states that never passed prevailing wage laws are: Georgia, Iowa, Mississippi, North Carolina, North Dakota, South Carolina, South Dakota, and Virginia. Id.
62. Sugrue, supra note 52, at 156.
63. Weil, supra note 36, at 456.
game the public bidding system by low-balling their proposed labor costs and forcing unions to go along or go without work for their members. At the same time, Davis-Bacon incentivized unions to keep organizing, both to win higher wage rates and to claim the lion’s share of construction work in any given area so that union rates would, over time, increase the prevailing wage rates.

D. Union Dominance, Black Exclusion

By the late 1940s the building and construction trades unions had come to dominate the construction industry and hold a uniquely powerful role in defining who got hired into skilled construction positions. Union membership became a near-requirement for any worker seeking employment in any skilled construction trade in most well-developed urban construction markets. Without it, workers were typically unable to access the training or apprenticeship opportunities required for particular trades; exclusive hiring hall agreements made it nearly impossible to secure a position without a union referral.

Federal government construction spending also reached its apex in the 1950s, channeling billions of dollars into the construction industry and solidifying the dominant position of the building trades. These investments and heightened visibility brought the full extent of ongoing discrimination in the building trades unions into public view, particularly against black workers and, in some cities like New York, Puerto Rican or Latino workers. Many of these unions had for decades operated in blatantly discriminatory ways. Most American Federation of Labor (AFL) local unions, including in the building trades, rigorously excluded black

64. See id.
65. Jeff Grabelsky, Construction or De-Construction? The Road to Revival in the Building Trades, 16 NEW LAB. F. 47, 47 (2007) (“In the period immediately after World War II, their power in the construction industry was legendary, controlling over 80 percent of the work and setting standards that were the envy of workers everywhere.”).
67. Sugrue, supra note 52, at 156 (“Congress created the Federal Housing Administration, the Home Owners’ Loan Corporation, and the Federal Public Housing Authority in large part to revitalize the flagging construction industry. Federal, state, and local tax incentives also spurred new construction . . . . An expansive government channeled billions of dollars into airports and military bases, federal offices, urban renewal projects, hospitals, universities, and schools. Big government was the health of the building trades.”); JOSHUA B. FREEMAN, WORKING-CLASS NEW YORK: LIFE AND LABOR SINCE WORLD WAR II 242 (2000) (“A labor shortage, strong unions, and an extended building boom . . . enabled them to raise their hourly wages to the point that the overpaid construction worker became a stock figure in postwar culture. More than other workers, building tradesmen seemed to enjoy their work, with the independence it afforded them and the pride it allowed them to take in their skills and the structures they erected.”).
workers, in contrast to the Congress of Industrial Organizations (CIO), whose inclusiveness and willingness to organize workers across racial lines vastly accelerated the growth of the labor movement. During the fight to pass the Wagner Act, the AFL blocked proposed language that would have made racial discrimination an unfair labor practice. Given that the AFL building and construction trades unions largely controlled hiring referrals during this time period, black workers were shut out of these occupations altogether.

At the local level, nearly all building and construction trades unions had, for decades, either denied membership to black workers or segregated them into separate “auxiliaries.” Contractors themselves wholeheartedly encouraged this exclusion. To the extent that there were black workers in the construction industry, they were largely confined to the “trowel trades”—jobs typically considered “low-skilled, menial” labor. While these jobs may have offered “good wages hauling materials, excavating rock, or performing other low-end construction work,” they were typically more temporary and dangerous than the higher-skilled building and construction trades positions. Black and Puerto Rican workers in the trowel trades “found it almost impossible to advance to positions that


69. See ROBERT H. ZIEGER, THE CIO: 1935–1955, at 8283 (1996) (“CIO leaders were not caught in the racist hiring and recruitment practices that characterized the AFL’s building and metal trades unions or the railroad brotherhoods. Industrial unionism, whether in its Knights of Labor or IWW incarnations, had featured cooperation across racial lines. The circumstances of mass production industry, in which increasing numbers of blacks were integral to production processes, made obvious the need for colorblind unionism. The institutional father of the CIO, the UMWA, had a long, if spotty, record of biracial organizing and, along with the other founding CIO unions such as the ACWA and the ILGWU, rejected the racial exclusivism that characterized most of the railroad, craft, and construction unions. . . . [T]he men who founded the CIO, the importance of black workers in industrial America was clear.”).

70. Goldberg & Griffey, supra note 66, at 13.

71. The extent to which unions could explicitly write discrimination into their collective bargaining agreements was successfully challenged by early civil rights advocates on the grounds that allowing this would violate the union’s duty of fair representation, under the NLRA, to all of its members. See Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 200–02 (1944). But that decision did not stop construction unions from utilizing discriminatory membership criteria to exclude workers of color in the labor pool.

72. See Goldberg & Griffey, supra note 66, at 13 (describing how labor and contractor federations “generally colluded at the local level to refuse to admit black workers to skilled trades and to marginalize their voluntary worker and contractor organizations”); Sugrue, supra note 52, at 157 (describing requests from Philadelphia contractors “not to ‘send any N—gers to this job’”).

73. PALLADINO, supra note 35.

74. Brian Purnell, “Revolution Has Come to Brooklyn”: Construction Trades Protests and the Negro Revolt of 1963, in BLACK POWER AT WORK, supra note 10, at 23, 26. Today, these positions might often be considered “day laborer” positions.

75. Id.
required more skills,” obtain apprenticeships, and become experienced union journeymen. Thus black and Puerto Rican workers could not “use construction work to climb the economic and social ladder into the American middle class” like their white colleagues.76

E. Industry Changes: The Decline in Union Density

By the early 2000s, the construction industry had seen a steep decline in union representation in the construction industry and a sharp increase in the number of non-union contractors. Today, only 13.9% of workers in the construction industry belong to a union,77 as opposed to nearly 50% in 1966.78 The causes of this decline have been debated extensively by advocates and scholars79—as have the larger causes of decline in the American labor movement80—but for the purposes of this article, it is sufficient to highlight a few significant details about this shift.

As the sections below will detail, construction unions resisted efforts to diversify their ranks for years, operating with what former Wage and Hour Administrator David Weil has called a “country club mentality” and “focus[ing] on existing members while excluding a large—and growing—set of nonunion workers who were trained in union sector apprentice systems but were prevented from attaining full membership rights—and access to jobs—in that sector.”81 These workers, possessing needed skills but lacking union hiring hall referrals, began to find employment with nonunion contractors out of necessity. At the same time, the perceived high cost of labor led corporate end users to increasingly support “the nonunion sector’s capacities to undertake larger and more complex projects in both

76. Id.
78. Weil, supra note 36, at 448 (“Nationally, the percentage of unionized construction fell from almost 50 percent in 1966 to less than 33 percent in 1983 and from 18.3 percent in 2000 to below 15 percent by 2004.”) (citing Steven Allen, Declining Unionization in Construction: The Facts and the Reasons, 41 INDUS. & LAB. RELS. REV. 343–59 (1988)).
81. Weil, supra note 36, at 448.
private and public markets." Thus, in excluding workers of color from their ranks, unions helped sow the ground for a nonunion labor force.

Corporate end users also launched an organization, the Construction Users Anti-Inflation Roundtable in 1969, which began active efforts to fight the building and construction trades and roll back protections for construction unions. Today, the organization Associated Builders and Contractors (ABC) continues these efforts. Prevailing wage laws now cover only twenty-six states, as opposed to forty-two states (plus the District of Columbia) at their peak. Congressional Republicans have backed efforts to fully or partially repeal Davis-Bacon for the last several legislative sessions. Meanwhile, legislative and administrative changes have weakened the role of prevailing wage laws in setting a wage floor during bidding processes.

There have also been important changes with respect to how employers structure themselves. One trend has been the increasing use of construction managers (CMs) instead of general contractors. Unlike the general contractor, CMs do not directly employ any workers, but instead contract with basic trades and specialty trades alike. This shift decoupled the role of "project management" from construction work itself, as the CM does not have any direct responsibility for employing workers. The rise of CMs significantly eroded the traditional leverage construction unions possessed to create wall-to-wall agreements through the general contractor’s agreement with the basic trades. Another trend has been the "falling cost[] of information—from the internet to cell phones." The reduced cost of

82. Id.
83. Erlich & Grabelsky, supra note 41, at 423; see also SAMUEL COOK, FREEDOM IN THE WORKPLACE: THE UNTOLD STORY OF MERIT SHOP CONSTRUCTION’S CRUSADE AGAINST COMPULSORY TRADE UNIONISM (2005) (account of contractors’ efforts in this vein from the perspective of the contractors).
84. Erlich & Grabelsky, supra note 41, at 423.
86. For a list of all states which had prevailing wage laws at their peak, see MICHAEL P. KELSAY, THE ADVERSE ECONOMIC IMPACT FROM REPEAL OF THE PREVAILING WAGE LAW IN WEST VIRGINIA 17 tbl. II.1 (Prevailing Wage Laws, by State) (2015); see also WAGE & HOUR DIV., supra note 61.
88. Weil, supra note 36, at 456.
89. Id. at 452.
90. Id.
91. Id. at 457.
92. Id. at 458.
information has broken down some of the localization that defined the construction market for many decades and increased the level of competition “to a regional or even national level.”93

Overall, the legal and economic landscape has shifted so as to significantly “increase competitive pressure on union contractors.”94 This competition has allowed small nonunion contractors to move beyond the markets they traditionally dominated (small residential and housing construction, landscaping and renovation) and to gain an increasing foothold in smaller-scale public-sector projects in many markets.95

Nonunion contractors, moreover, rely on more temporary and insecure labor sources, such as day laborer agencies, since they cannot access union hiring halls. Day laborers themselves are increasingly Latino immigrants, and often undocumented—a fact that makes them more vulnerable to exploitation by employers. They also tend to be, like workers of color in the earlier era of construction, concentrated in lower-paying, “lower-skilled” occupations. Thus, while there has been significant growth in the number of Latinos working in the non-union construction sector, and it may therefore appear that the non-union sector offers more opportunities for workers of color, that growth has been primarily concentrated in the lowest-paying, lowest-skilled, and often most dangerous jobs.

Because construction is an industry with so many fixed costs, however, the only true place for a nonunion contractor to achieve “savings” is by paying lower wages or cutting corners with respect to worker safety, such as through improper training and equipment. This means that while workers of color, particularly Latino immigrant workers, may in theory have an easier time accessing jobs in the nonunion sector through day laborer agencies, they typically face lower pay and more insecure working conditions. This has been documented in numerous studies: one review of OSHA investigations of construction accidents, for example, found that in New York City 74% of fatal falls from a construction site involved Latino or immigrant workers, and that 86% of those falls occurred while working for a nonunion employer.96

93. Id. at 457–58.
94. Id. at 457.
95. Id. at 457–58.
96. CTR. FOR POPULAR DEMOCRACY, FATAL INEQUALITY: WORKPLACE SAFETY ELUDES CONSTRUCTION WORKERS OF COLOR IN NEW YORK STATE (2013), https://populardemocracy.org/sites/default/files/fatalinequality_report.pdf; see also CHARLENE OBERNAUER, N.Y. COMM. ON OCCUPATIONAL SAFETY AND HEALTH, DEADLY SKYLINE: AN ANNUAL REPORT ON CONSTRUCTION FATALITIES IN NEW YORK STATE 23–25 (2018), http://nycosh.org/wp-content/uploads/2018/02/DeadlySkyline-2018_Online_Final.pdf (noting that “NYCOSH reports have consistently shown that Latino and/or immigrant workers are repeatedly exploited by employers who willfully violate safety and health regulations on the job and disproportionately die as a result”).
F. Evaluating the Diversity of Today’s Building and Construction Trades

Today, reliable statistics about the memberships of the building and construction trades unions are hard to come by, but most advocates for communities of color continue to believe that white men dominate the skilled trades. For example, in recent comments on proposed changes to the Department of Labor’s Apprenticeship Program Equal Employment Opportunity (EEO) regulations, the National Urban League cited an analysis showing black workers were underrepresented in a majority of apprenticeable construction occupations. Specifically, they were underrepresented in the highest paying of these occupations (such as electricians and plumbers) while heavily represented in lower paying occupations (such as construction laborers).97 The group further cited data showing that even if people of color enter apprenticeships in the skilled construction trades, they are much less likely to complete their programs than white workers; the completion rate for black construction apprentices in 2013 was 30.3%, compared with 46.7% for white construction apprentices.98

Local data yield inconsistent results. For example, in Buffalo, New York, one recent analysis found that workers of color—more than half of the city’s population and 17% of the county’s workforce—account for only 11% of unionized construction workers.99 In New York City, however, labor leaders100 and the Economic Policy Institute101 have claimed significant progress in diversifying the trades.102 But uncertainty over

98. Id.
102. EPI found that minorities held 55.1% of construction occupation jobs in the union construction sector between 2006 and 2015, compared with 75.3% of occupation jobs in the nonunion sector. Id. They argue the lag behind the nonunion sector is primarily due to the fact that Latino immigrant workers, often paid extremely low wages, are the dominant group of workers in the nonunion sector. Id. Their data concludes that black workers today represent a higher percentage of construction occupation jobs in the union sector, 22.2%, than in the nonunion sector, 15.8%. Id. Finally, EPI cites another study by Columbia’s School of Public and International Affairs, which concluded that 61.8% of union apprentices in New York City were people of color, compared with 2% in 1960. See id., at 5 (citing N.Y. STATE COMM’N AGAINST DISCRIMINATION, APPRENTICES, SKILLED CRAFTSMEN & THE NEGRO: AN ANALYSIS (1960)). But the debate over these numbers has been quite vociferous, with anti-
numbers remains, in part because the building trades are not always transparent in releasing their membership numbers to the general public.\textsuperscript{103} What limited data we do have, moreover, is often not separated out by skill level. For example, in Philadelphia, 2008–2012 data from the city’s Office of Housing & Community Development indicate that of construction union members working on projects the Office funds, 24\% were non-white. On the surface, that looks like progress. But when members of the local Laborers union—a majority black union and one of the lower-paid trades—were excluded, the percentage dropped to 19\%.\textsuperscript{104} This decrease suggests that claims of progress that do not separate out the skill level of the trades involved—as is the case with EPI’s study of New York City trades—do not provide a full picture of the state of workers of color across the skilled trades.

Even full, vetted membership numbers would only provide one piece of data with respect to the trades: the extent to which barriers to membership themselves have fallen. Where workers of color have broken down these initial barriers to entry, they continue to face many other forms of ‘first-generation’ employment discrimination that prevent them from realizing the benefits of equal employment opportunity, for reasons that will be familiar to workplace diversity advocates and researchers.\textsuperscript{105} Membership numbers alone, for example, do not tell us whether workers of color are getting the same amount of work referrals as white workers; this has been an ongoing issue in many locals.\textsuperscript{106} Similarly, while the finding that minorities accounted for 61.8\% of union apprenticeships in New York City in 2014, compared with 36.3\% in 1994\textsuperscript{107} seems like major progress, apprentices of color are still far more likely to ultimately drop out of union advocates releasing their own counter-studies and calling into question the funding of the EPI study. See Rey Mashayekhi, Building Trades-Backed Report Claims Greater Diversity in Union Construction, N.Y. OBSERVER (Mar. 8, 2017), https://commercialobserver.com/2017/03/building-trades-backed-report-claims-greater-diversity-in-union-construction/.


\textsuperscript{105}. Employment discrimination means “more than personal bias and Jim Crow rules. It also mean[s] rules and practices that [are] unfair in their consequences.” FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 131 (2011); see also EEOC, Prohibited Employment Policies/Practices (last visited Mar. 11, 2018), https://www.eeoc.gov/laws/practices/ (listing the wide range of policies and practices that constitute employment discrimination beyond the initial decision to hire).

\textsuperscript{106}. See, e.g., discussion of the Sheet Metal Workers local union in New York City, infra Part III.D.ii.

\textsuperscript{107}. MISHEL, supra note 101, at 2.
apprenticeship programs than white apprentices. Finally, the fact that white men almost entirely dominate the national leadership ranks of building and construction trades unions suggests that increased rank-and-file diversity has yet to translate into opportunities for advancement within the union itself.

III. AFFIRMATIVE ACTION BATTLES

A. Local Civil Rights Activists Home in on the Building Trades

With public investment flooding into cities like New York and Philadelphia to support a wide range of construction projects in the 1950s and 1960s, black workers saw themselves literally face-to-face with their exclusion from a major source of good-paying jobs. As historian David Golland writes, “Given the high visibility of public construction projects, the building trades became a focal point for civil rights leaders looking for symbolic as well as substantive victories against discrimination. . . . [Y]oung blacks were constantly reminded of their second-class status whenever they passed one of the many construction sites in their cities and saw only white faces under hard hats.” Their exclusion from these jobs, moreover, occurred irrespective of the fact that many black workers did have experience in the industry.

These realities led the National Association for the Advancement of Colored People, the National Urban League, and other civil rights organizations to focus painstaking efforts on these disparities and to press the federal government to act. In 1951, these organizations successfully lobbied President Harry Truman to issue an executive order. It required that all federally-funded contracts contain non-discrimination language and established a federal contract compliance committee, the President’s Committee on Government Contract Compliance (PCGCC), charged with

108. See Morial, supra note 97.
109. See supra note 6.
110. These investments stemmed from a variety of federal, state and local efforts, including those broadly considered part of the period of “urban renewal” as well as other major public infrastructure investment programs such as the Federal Interstate Highway program. See generally TOM LEWIS, DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE (2013).
111. As Thomas Sugrue writes, “Particularly galling to blacks—26 percent of the city’s population in 1960—was that the work crews on Philadelphia’s unionized construction sites were overwhelmingly white. Compounding black discontent at ‘Negro removal’ (as urban renewal was derisively nicknamed), projects seldom created jobs in black neighborhoods.” Sugrue, supra note 52, at 156–57.
112. GOLLAND, supra note 68, at 21.
113. For example, “More than 10 percent of Philadelphia’s black men had experience in construction—most in non-union jobs.” Sugrue, supra note 52, at 157. Discrimination against the few blacks who had achieved union membership was also common, Sugrue notes, even in unions with sizable black memberships. Id.
its enforcement. But the executive order was only minimally enforced, and was soon deemed to be unenforceable against unions that had no direct contractual relationship with the federal government.

Thus, to the extent contractors were asked to account for the lack of workers of color on their federally-funded projects, they were able to plausibly shift the blame onto the building trades unions. For example, in 1956 the Cleveland Community Relations Board submitted a complaint to the Eisenhower-era successor to the PCGCC that an electrical workers local union was not referring blacks to work on federally subsidized construction of public schools. The PCGCC agreed to urge the contractor to persuade the local union either to admit black workers or to let it directly hire black workers who were not members of the union. When nothing came to pass from this effort, the PCGCC threw up its hands, saying that it had “no jurisdiction over the unions” because the unions were not signatories to federal contracts. By the end of the 1950s, these early federal dealings with construction contractors around jobs led to very few new black workers being employed, and never led to any action to penalize a single contractor for discrimination, even though the agency had received hundreds of complaints from individuals and civil rights organizations.

The 1955 merger of the AFL unions (including the building trades) and the CIO unions into one federation, the AFL-CIO, brought with it the potential for further changes, given the CIO’s far more developed history as a coalition of unions in integrated workplaces. In short order all of the newly merged federation’s national unions abandoned their formal membership bars. National civil rights leaders thus attempted to pursue gradualist efforts to bring union leaders to the table directly, and they managed to convince some of the building trades unions to recognize the problems of discrimination. Nevertheless, locals pursued “informal

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115. Golland, supra note 68, at 13 (“In June 1952, however, after six months of operation, the committee had failed to act against any government contractor and had not even hired an executive director.”).
116. Id. at 21.
117. Id.
118. Id.
119. Id. at 17 (“In 1958 NAACP labor director Herbert Hill… noted that the PCGC [the successor to the PCGCC] had failed to take action against even one government contractor.”); Kotlowski, Nixon’s Civil Rights: Politics, Principle, and Policy 100 (2002) (“The committee… never canceled a contract of an employer suspected of discrimination… Nixon did not press for integration of unions. As a result, Nixon’s committee secured few skilled jobs for blacks.”) (internal citations omitted).
120. Golland, supra note 68, at 8 (“[B]y 1958, all unions affiliated with the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) were officially egalitarian, accepting members without regard to race, creed, or color.”).
means” of excluding black workers: including agreements not to sponsor them for membership, refusal to admit them into apprenticeship programs, refusal to accept or review their applications, “general understandings” to vote against their memberships, subjection to exams not given to white applicants, and rigged exam results. Exclusion by informal means was “not restricted to any particular geographic area” of the country, either.

Gradualist efforts thus gave way to more radical forms of direct action in the early sixties, particularly in the wake of the growing and dramatic resistance to Jim Crow in the South that had transfixed the nation. Local groups of activists—not national civil rights leaders—led many of these direct action campaigns, which targeted specific projects, such as the Municipal Services Building in Philadelphia, the Downstate Medical Center in Brooklyn, and the Gateway Arch in St. Louis. Several of these actions led to nasty, even violent, confrontations with white construction workers. Some actions, such as the campaign to win construction jobs for black Newark residents at the New Jersey College of Medicine and Dentistry, were either primary or contributing causes of the urban riots that famously gripped many Northern cities in the 1960s.

The campaigns took on an even higher level of urgency in the wake of the 1964 enactment of Title VII and the creation of a new federal bureaucracy to combat employment discrimination. Title VII’s prohibition on racial discrimination explicitly applied to unions, as well as to training locals and in 1962 the international union included a non-discrimination clause in its national agreement covering large contractors. In 1963, 18 building trades unions agreed to take steps to eliminate discrimination in their unions.

122. Id. at 376.
123. Id.
124. Sugrue, supra note 52, at 149–55 (describing gradualist efforts in Philadelphia to integrate employers behind the scenes, and activists’ turn to more direct forms of action including selective patronage campaigns and, ultimately, in targeting state sponsorship of discrimination in the construction trades perpetuated through government contracting).
126. Sugrue, supra note 52, at 162.
127. See Purnell, supra note 74, at 47.
129. Julia Rabig, “The Laboratory of Democracy”: Construction Industry Racism in Newark and the Limits of Liberalism, in BLACK POWER AT WORK, supra note 10, at 48 (“The proximate and underlying causes of the Newark uprising are numerous, but nearly all accounts assign significant blame to local, state, and federal officials who dismissed residents’ opposition to the Medical School and helped create the conditions and frustrations that boiled over in July 1967.”) (internal citations omitted).
130. 42 U.S.C. § 2000e-2(c) (2012) (“It shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any
Construction unions were now legally accountable for their racial discrimination. Meanwhile, activists “kept the heat on the federal government. In 1964, 1965, 1966, and 1967, construction site protests erupted in Philadelphia, Newark, New York, New Rochelle, Cleveland, Cincinnati, Oakland, and St. Louis, where, in a dramatic act of civil disobedience, a protestor chained himself to the top of the Gateway Arch.”

B. The Philadelphia Plan

According to historian Thomas Sugrue, “The threat of disruption had its intended effect. Federal officials took notice of the protests” and recognized the lack of equal opportunity in the skilled construction trades as “a focal point for racial unrest.” The local efforts thus ultimately brought about one of the earliest and most prominent federal interventions to break discriminatory hiring practices in hiring: the Philadelphia Plan. Labor Department officials in President Lyndon Johnson’s administration first proposed the Plan as part of an overall effort to implement Executive Order 11246, which banned discrimination in federal contracting. Internal divides within the Johnson administration prevented the first Plan’s full implementation, as did a legal opinion from the Comptroller General that claimed it violated statutory competitive bidding requirements.

President Richard Nixon’s administration then revived the Plan in 1969. Historians have sharply debated Nixon’s motives. Many contend that
Nixon cynically believed implementing the Plan could fracture the Democratic base, pitting large swaths of the labor and civil rights movements against one another.\textsuperscript{138} Others argue, however, that he was genuinely trying to appeal to and serve black voters—and to mitigate the underlying economic causes of the urban race riots of the 1960s.\textsuperscript{139} At this point in time Nixon had not fully wedded himself to what would become known as the “Southern Strategy.”\textsuperscript{140} He had only barely prevailed in the 1968 election, and thus initially governed “as if he still believed the federal government had some role to play in helping out nonwhites.”\textsuperscript{141}

Assistant Secretary of Labor Arthur Fletcher, a black Republican dedicated to promoting black entrepreneurialism, believed in the Philadelphia Plan; indeed, he subsequently came to be known as “the father of affirmative action.”\textsuperscript{142} Fletcher conducted public hearings in late August 1969 that led him to establish specific numerical hiring goals for minority employees, which he deemed essential given the many years of exclusion and discrimination in the industry.\textsuperscript{143} His initial order establishing the Plan detailed that, in seven of Philadelphia’s skilled construction trades—the ironworkers, plumbers and pipefitters, steamfitters, sheet metal workers, electrical workers, roofers, and elevator construction workers—minorities represented one percent of workers, compared with thirty percent of...
workers in the construction industry overall. Those numbers, Fletcher found, were the result of the exclusionary practices of the unions in these trades.

The Philadelphia Plan applied to any federal or federally assisted construction project, and required that all contractors bidding for federal or federally-assisted construction in the Philadelphia region costing the government more than $500,000 submit affirmative action plans detailing their intention to meet the Plan’s hiring goals for each of the trades, as part of their bidding documents for federal construction contracts. The Plan’s goals, which were slightly different for each trade, aimed to quickly increase the share of black workers in these trades over four years, from between 4% and 8% by the end of 1970 to between 19% and 26% by the end of 1973. The Plan further required that employers provide statistical evidence of their compliance, stipulating that noncompliance “could lead to the loss of federal contracts or litigation and legal penalties under federal civil rights laws.”

The Philadelphia Plan sparked an uproar from the building trades unions and their white members. It also quickly prompted contractors to

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<td>Ironworkers</td>
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<td>Plumbers &amp; Pipefitters</td>
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<td>Sheetmetal Workers</td>
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Contractors Ass’n of E. Pa., 442 F.2d at 159, 164 n.8, 173 (3d Cir. 1971).

The number goals differed slightly for each trade. This chart, taken from the Third Circuit’s opinion, summarizes the Plan’s goals:

144. Contractors Ass’n of E. Pa. v. Sec’y of Lab., 442 F.2d 159, 164 n.8, 173 (3d Cir. 1971).
145. Id. at 173 (noting that “It is the practice of building contractors to rely on union hiring halls as the prime source for employees.”).
147. The number goals differed slightly for each trade. This chart, taken from the Third Circuit’s opinion, summarizes the Plan’s goals:
148. Sugrue, supra note 52, at 146.
149. See Trevor Griffey, “The Blacks Should Not be Administering the Philadelphia Plan”: Nixon, the Hard Hats, and “Voluntary” Affirmative Action, in BLACK POWER AT WORK, supra note 10, at 134, 139–40 (“The resistance of the building trades unions to the Philadelphia Plan and its expansion was immediate and intense. Union leaders marshaled their allies in the Department of Labor and Congress in an attempt to quash the plan. They also organized massive counterdemonstrations against the extension of the plan to other cities, at which they demanded compensation for wages lost during the protests and
sue in the United States District Court for the Eastern District of Pennsylvania, arguing that the Plan’s provisions constituted reverse discrimination and was illegal under Title VII and the Equal Protection Clause. The district court rejected their claims, finding the Plan did not require the contractors to hire a definite percentage of a minority group but instead just make a good faith effort to meet that goal. The court held that “if this plan is properly administered it will be a plan of inclusion rather than exclusion.”

Dissatisfied, the contractors appealed to the Third Circuit, which affirmed the district court’s ruling. While the case was pending, construction and building trades union leaders around the country mobilized to head off implementation of mandatory plans like the Philadelphia Plan, first by attempting to persuade Congress to invalidate the Plan and then by looking to broker local voluntary plans instead.

C. Backlash to the Philadelphia Plan

While the courts upheld the Philadelphia Plan, fierce opposition against it ultimately led to its undoing. When white union workers who had struck their jobs in response to the Plan were forced to return to work, “hostile union journeymen hazed new black journeymen off jobs with impunity, and others simply refused to teach black apprentices.” The structure of the Philadelphia Plan—with its emphasis on combating discrimination in access to jobs—was not designed to respond to this kind of on-the-job harassment.

On May 8, 1970, two to three hundred white construction workers in New York City attacked a crowd of students protesting the May 4 Kent State disturbances, calling on politicians to use the police to protect their workplaces.”


151. Id. at 1010.

152. Contractors Ass’n of E. Pa., 442 F.2d at 177.

153. The Senate actually voted to end the Philadelphia Plan in 1969 by allowing the Comptroller General, who had declared the Philadelphia Plan to be invalid, not to pay contracts issued under it. However, the Senate later reversed itself. 115 Cong. Rec. 40, 736–49 (1969).


155. Trevor Griffey, supra note 149, at 135 (“The fact that the building trades unions were not able to completely stop affirmative action has caused historians to overlook the effect that union resistance had on the evolution of public policy.”).

156. Id.

157. See id.
State shootings and the U.S. invasion of Cambodia. The resulting riot left dozens injured, and this “spectacle of the proletariat bludgeoning leftists” helped give birth to the symbol of the hard hat.

It was a moment of historically low support for the United States’ war efforts in Southeast Asia. Thus, Nixon, seeing an opportunity, invited New York building trades leader Peter Brennan and others to the White House to thank them for their efforts; Brennan gave Nixon a hard hat with “Commander-in-Chief” printed on it. Soon thereafter, Nixon realized that he could win the support of white construction workers and their union leaders for his re-election—in part by backing away from the Philadelphia Plan.


159. GOLIAND, supra note 68, at 149.

160. See Joshua B. Freeman, Hardhats: Construction Workers, Manliness, and the 1970 Pro-War Demonstrations, 26 J. OF SOC. HIST. 725, 725 (1993) (“The hardhat image was of considerable importance because the construction worker was commonly presented in the mass media, public discourse, and commercial iconography as the archetypical proletarian. . . . By the 1970s, the hardhat itself became—and still is—the central symbol of American labor, a role earlier filled by the leather apron, the lunch pail, and the worker’s cap.”); Penny Lewis, The Myth of the Hardhat Hawk, JACOBIN (Sept. 2, 2013), https://www.jacobinmag.com/2013/09/the-myth-of-the-hardhat-hawk (describing how, in the wake of the May 8 riot, “Hardhats’ facing off against entitled “hippie” youth became a dominant image from the era, a shorthand for what became the ruling narrative about the class dynamics of antiwar sentiment.”).


162. See Griffey, supra note 149, at 136 (“Although the hard hat movement did not explicitly evoke the politics of race, the subversion of the Philadelphia Plan was the essential precondition that made it possible for the unions to ally themselves with Nixon. The New York building trades unions made their support for Nixon’s reelection in 1972 contingent on his backing off from enforcing the desegregation of the construction industry. Forced to choose between the Philadelphia Plan and an alliance with the building trades unions on support for his foreign policy, Nixon chose the unions. It was this choice, forced by union pressure and not the inevitable result of a coherent domestic political program against the unions or the civil rights movement, that finalized Nixon’s decision to court the support of the unions instead of trying to smash them.”)

Indeed, Nixon was able to prevent the AFL-CIO from endorsing the Democrat in the 1972 general election, largely through the efforts of George Meany, the AFL-CIO president, a former construction union leader. See Paul Frymer & John David Skrentny, Coalition-Building and the Politics of Electoral Capture During the Nixon Administration: African Americans, Labor, Latinos, 12 STUDIES IN AM. POL. DEVEL. 131, 151–53 (1998) (describing the riot and resulting demonstrations as a key turning point for Nixon in building the New Majority, as “Opportunities now became apparent for the Republicans to appeal to substantial numbers of white labor workers without disrupting their existing coalition . . . . Having come to believe that racial liberalism was antithetical to a winning electoral coalition, Nixon backed away from support of pro-black policies in the North as well as the South . . . . [Nixon advisor] Haldeman was reporting to Charles Colson that Nixon now felt that ‘there is a great deal of gold to be mined’ in labor, and that the ‘President wants you to take on the responsibility for working on developing our strength with the labor unions and union leadership.’”)
Nixon quickly “stopped talking about the Philadelphia Plan.”\textsuperscript{163} The administration ultimately eliminated the Department of Labor’s role in its enforcement, instead emphasizing what became known as “hometown plans,” which were “voluntary programs for self-monitoring by unions and contractors.”\textsuperscript{164} While the Department of Labor approved a few additional mandatory plans,\textsuperscript{165} it only approved hometown plans for most cities.

In New York, Brennan managed to push forward a hometown plan that resembled an apprenticeship training plan. It was hardly an affirmative action plan and was rejected by civil rights and community-based organizations,\textsuperscript{166} but Nixon ordered the Department to certify the plan—over Fletcher’s objections.\textsuperscript{167}

In the end most cities’ hometown plans could boast of very little success.\textsuperscript{168} Nearly all of them (such as Boston\textsuperscript{169}) lost the support of the local black community.\textsuperscript{170} NAACP leader Herbert Hill condemned the hometown plans as “a meaningless hodgepodge of quackery and deception, of doubletalk and doublethink.”\textsuperscript{171}

Nixon eventually disavowed the Philadelphia Plan in the lead up to his reelection campaign, and was rewarded with the support of nine construction union leaders and the neutrality of the AFL-CIO.\textsuperscript{172} In the wake of his reelection he fired Fletcher and installed Brennan himself as the new Secretary of Labor; Brennan, in turn, declared the Philadelphia Plan a failure.

\begin{footnotesize}
\begin{enumerate}
\item[163.] \textsc{Golland, supra} note 68, at 151.
\item[164.] \textsc{Maclean, supra} note 3, at 101–02.
\item[165.] These included Seattle, St. Louis, and Washington, D.C. \textsc{Golland, supra} note 68, at 154–55.
\item[166.] \textit{See} Griffin, \textsc{supra} note 149, at 152 (“A plan had been finalized in December 1970, but had a number of weaknesses as a result of the unions, contractors, and politicians locking civil rights groups out of the negotiations. The plan caused immediate outrage among freedom movement activists, who labeled it a fraud. Mayor Lindsay, swayed by the pressure, opposed the plan in January and requested that the Department of Labor not certify it.”).
\item[167.] \textsc{Golland, supra} note 68, at 153–54.
\item[168.] \textit{Id.} at 155. (“By the summer of 1971 it was clear that the hometown solutions were not working as well as the mandatory plans . . . [and were] failing abysmally to meet their stated goals.”).
\item[169.] \textit{See} Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 13 (1st Cir. 1973) (“Although [the Boston hometown plan] fulfilled its first-year goal of training and placing three hundred sixty minority workers, relationships with the minority community representatives deteriorated to the extent that the Department of Labor withheld second year funding until a revised plan could be negotiated. The new plan, beginning operations in January, 1972, did not have the participation of representatives of Boston’s minority communities. In addition, although put into effect two years after the original Boston Plan had commenced, the revised plan retained the same minority employment goal as that of the original plan.”).
\item[170.] \textit{See} Robert J. Weiss, \textsc{We Want Jobs: A History of Affirmative Action} 140 (1997).
\item[171.] \textsc{Golland, supra} note 68, at 159–60.
\item[172.] \textit{Id.} at 156; Griffin, \textit{supra} note 149, at 154–57.
\end{enumerate}
\end{footnotesize}
**D. Local Leaders Fight to Keep Affirmative Action Going**

With the demise of federally-backed, mandatory affirmative action plans like the Philadelphia Plan, local leaders began to take matters into their own hands, through both local city governments and federal courts. With respect to cities, civil rights leaders pressed for measures to assure that city contracts supported jobs for African-American workers. This pressure alone, however, could not overcome union resistance to admitting African-Americans for membership, which undermined the ability of contractors—who were often largely dependent on construction unions for skilled labor—to comply with these goals. This meant it was also necessary to pursue other efforts to integrate the trades, which led to a series of court challenges under Title VII to integrate specific building and construction trades union locals.

*i. Municipally-Led Affirmative Action*

Hartford, Connecticut provides a case study of how cities tried to keep affirmative action going with more forceful local measures. Initially, the City of Hartford had developed a voluntary hometown plan in which contractors, unions, and civil rights leaders pledged a good faith effort to achieve 15% minority and female representation in construction employment. The lack of an enforcement mechanism, however, led activists to push Hartford further. Hartford’s city council eventually enacted an enforceable affirmative action ordinance in February 1975.

The ordinance, and the implementation plan the City adopted pursuant to it, required all construction contracts of at least $10,000 to incorporate the City’s affirmative action goals of 15% minority and female employment. The ordinance put prime contractors on the hook for enforcement by requiring that they obtain affidavits agreeing to the plan from any subcontractors, as well as from unions or other employment referral organizations. However, if a union declined to adopt the implementation plan as a contractual provision, the City created an alternative process by allowing them to sign an affidavit stating that it

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173. Griffey, supra note 149, at 159 (“Absent support from the Department of Labor, the 1970s activist campaigns to desegregate the U.S. workplace became increasingly dependent on . . . Title VII litigation . . . [and] the enforcement of local fair employment laws.”).


176. Id. at 418–19.

177. Id.
agreed with and would make a good faith effort to comply with the implementation plan.\textsuperscript{178}

Initially, contractors and unions largely agreed to the proposals, at least in theory. But then an International Brotherhood of Electrical Workers (IBEW) local failed to comply with the requirements, only referring existing union members from its “Out of Work” list in the order in which they had signed the list.\textsuperscript{179} Hartford began enforcement proceedings, leading the union to sue in federal court to invalidate the ordinance as a violation of the Equal Protection Clause with respect to its predominantly white membership.\textsuperscript{180} The district court stayed the action until the Supreme Court had decided \textit{Regents of the University of California v. Bakke};\textsuperscript{181} after that, it ruled for the City.\textsuperscript{182} The union then appealed to the Second Circuit, arguing in part that the city council had made “no legislative finding that it had discriminated in the past.”\textsuperscript{183}

The Second Circuit, noting that a governmentally imposed affirmative action plan “can only be sustained if its purpose and effect are to remedy the consequences of present or past discrimination,”\textsuperscript{184} upheld Hartford’s plan. The Court found that it was acceptable to target specific industries based on determinations of past discrimination on the industry level (and not on “a particularized finding of past discrimination by every employer or union affected”), and that the city council had sufficiently documented that discrimination in the industry.\textsuperscript{185} The Court noted in particular, “Previous efforts to mitigate or eliminate discrimination had clearly met with failure.”

The Court continued,

\begin{quote}
[When the contractors and the unions negotiated the voluntary plan and later assisted in drafting the Ordinance they acknowledged that minority workers were seriously under-represented in the building trades. That under-representation was documented in studies by the University of Connecticut, the Connecticut Labor Department and the City’s Human Relations Commission.\textsuperscript{186}

The Second Circuit thus recognized that the Hartford plan was a legally justified response to pervasive discrimination in the construction sector. Two commentators recently note that this case exemplified how, post-\textit{Bakke}, courts were willing “to broadly construe the remedial purpose
\end{quote}
justification and to defer to the legislature’s determination that race-conscious affirmative action programs were necessary.\textsuperscript{187} When the IBEW local attempted to appeal to the Supreme Court, its request for certiorari was denied.\textsuperscript{188}

\textit{ii. Court-Ordered Affirmative Action Efforts}

With regulatory agencies newly formed and emboldened to pursue Title VII claims, activists in multiple cities pressed for investigation and enforcement actions against a number of local unions. In New York City, Local 28 of the Sheet Metal Workers union came into regulators’ crosshairs. The local union had resisted state efforts to get it to admit black workers since 1964, and had even refused to participate in New York City’s weak hometown plan.\textsuperscript{189} In 1971 the Justice Department sued the union in the United States District Court for the Southern District of New York, alleging a pattern and practice of discrimination against nonwhite applicants in violation of Title VII.\textsuperscript{190}

The district court ultimately found extensive evidence of this discrimination, as well as discrimination in the union’s apprentice program. It also found extensive evidence of bad faith.\textsuperscript{191} Thus, the Court ordered a

\begin{quote}
(a) Failing and refusing to admit nonwhite workmen . . . as journeymen members on the same basis as whites are admitted;
(b) Failing and refusing to refer nonwhite workmen for employment . . . (within its jurisdiction) . . . on the same basis as whites are referred by applying standards for referral which have the purpose and effect of ensuring referral priority to . . . (its) . . . members . . . ;
(c) Failing and refusing to recruit blacks for membership in and employment through . . . (Local 28) . . . on the same basis as whites are recruited;
(d) Failing and refusing to permit contractors with whom . . . (Local 28) . . . has collective bargaining agreements to fulfill the affirmative action obligations imposed upon those contractors by Executive Order 11246 by refusing to refer out blacks whom such contractors wish to employ;
(e) Failing and refusing to take reasonable steps to make known to non-white workmen the opportunities for employment in the . . . (sheetmetal trade) . . . , or otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices.

\end{quote}

\textsuperscript{189} Local 28 Sheet Metal Workers Int’l Ass’n v. EEOC, 478 U.S. 421, 427–28 (1986).
\textsuperscript{190} EEOC v. Local 638, 401 F. Supp. 467, 471 (S.D.N.Y. 1975). The complaint charged the union with:

\begin{itemize}
\item[(a)] Failing and refusing to admit nonwhite workmen . . . as journeymen members on the same basis as whites are admitted;
\item[(b)] Failing and refusing to refer nonwhite workmen for employment . . . (within its jurisdiction) . . . on the same basis as whites are referred by applying standards for referral which have the purpose and effect of ensuring referral priority to . . . (its) . . . members . . . ;
\item[(c)] Failing and refusing to recruit blacks for membership in and employment through . . . (Local 28) . . . on the same basis as whites are recruited;
\item[(d)] Failing and refusing to permit contractors with whom . . . (Local 28) . . . has collective bargaining agreements to fulfill the affirmative action obligations imposed upon those contractors by Executive Order 11246 by refusing to refer out blacks whom such contractors wish to employ;
\item[(e)] Failing and refusing to take reasonable steps to make known to non-white workmen the opportunities for employment in the . . . (sheetmetal trade) . . . , or otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices.
\end{itemize}

\textsuperscript{191} Id. at 488 (“The record in both state and federal court against these defendants is replete with instances of their bad faith attempts to prevent or delay affirmative action. After Justice Markowitz ordered implementation of the Corrected Fifth Draft, with the intent and hope that it would create ‘a truly nondiscriminatory union.’ Local 28 flouted the court’s mandate by expending union funds to subsidize special training sessions designed to give union members’ friends and relatives a competitive edge in taking the JAC battery. JAC obtained an exemption from state affirmative action regulations directed towards the administration of apprenticeship programs on the ground that its program was operating pursuant to court order; yet Justice Markowitz had specifically provided that all such subsequent regulations to the extent not inconsistent with his order, were to be incorporated therein and applied to JAC’s program. More recently, the defendants unilaterally suspended court-ordered time
strong remedy: it placed the union under court supervision and ordered it to open its doors, setting a goal that "the combined union and apprentice program membership achieve a non-white percentage of 29%" by July 1, 1981. While acknowledging the difficulty of precision in setting such goals, the Court determined that this percentage reflected "the relevant labor force in New York City." The Court further ordered the union hiring hall and apprenticeship program to implement a series of specific procedures to ensure accountability, and authorized a court-appointed administrator to oversee the entire affirmative action plan.

The union appealed the initial grant of relief, but the Second Circuit affirmed, finding the union had "consistently and egregiously violated Title VII" and that the district court's appointment of an administrator with broad powers was "clearly appropriate" given the union's refusal to change its membership practices in the face of prior court orders. Still, the union persisted in its resistance, leading the district court to enter multiple findings of contempt for the union's noncompliance. Ultimately the local sought review at the Supreme Court, arguing the district court had gone beyond the remedies contemplated under Title VII.

The Court's decision in 1986 affirmed the district court's relief. It did not take up more sweeping equal protection claims, but instead targeted whether such orders were within the power of the courts as Title VII contemplated. In the years that followed, Local 28 slowly complied with court-ordered membership requirements. But winning union membership did not mean the end of discrimination against workers of color. The EEOC ended up pursuing several additional rounds of litigation, as union members of color still faced systemic discrimination when it came to referrals for sufficient hours and jobs. They struggled to make ends meet even as their white counterparts racked up copious amounts of overtime pay.

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192. Id. at 489.
193. Id.
194. Id. at 488–90 (detailing specific procedures to be required, including developing recruitment practices designed to dispel their discriminatory reputation, and administering a non-discriminatory hands-on journeyman’s test developed and validated in accord with EEOC guidelines).
195. EEOC v. Local 638, 532 F.2d 821, 825, 829 (2d Cir. 1976) ("[O]ur interest in union self-government cannot immunize Local 28 from the consequences of its actions. The apparent failure of the New York court order to change Local 28’s membership practices to an appreciable extent and the rather reluctant response made by Local 28 to Judge Gurfein’s orders convince us that it is necessary for a court-appointed administrator to exercise day-to-day oversight of the union’s affairs.").
197. Id. at 483.
198. See Swarns, supra note 7 (describing the sheet metal workers union’s practices of consistently denying work opportunities to black and Hispanic members through more subtle and complex bias than
E. The Supreme Court Brings Race-Conscious Affirmative Action to a Screeching Halt

With the Supreme Court’s composition shifting further under President Reagan, however, contractors brought new challenges to race-conscious affirmative action statutes, taking particular aim at contracting requirements that set aside a certain percentage of city contracts for minority-owned business enterprises. The Court had previously upheld this type of minority set-aside requirement in its 1980 *Fullilove v. Klutznick* decision. However, by the time *Richmond v. Croson* came before the Court, Justices Burger and Powell—who had been part of the *Fullilove* majority—were gone, and three new jurists, Justices Sandra Day O’Connor, Antonin Scalia and Anthony Kennedy, brought a very different analysis to such cases.

The ordinance at issue in *Croson* provided set-asides in the awarding of contracts themselves; it did not provide affirmative action for the workers employed pursuant to those contracts. Black contractors had made set-asides a priority for the national civil rights movement, in Richmond and elsewhere, and pursued a parallel strategy for minority wealth and job creation. Their broad argument was that mandates for black contractors would both help them overcome structural barriers to their full participation in the construction market (including discrimination in the availability of loans and bonds) and would generate more job opportunities for black construction workers, as black contractors would be interested in employing members of their community.

The City of Richmond, Virginia had, by ordinance, required that non-minority prime contractors set aside 30% of their subcontracts’ value to one or more minority business enterprises (“MBEs”), businesses owned and controlled by minority group members. Richmond’s ordinance, seemingly

in the first generation of litigation and deeming them “a case study of how workplace discrimination has persisted in corners of the construction trades”).

199.  *Fullilove v. Klutznick*, 448 U.S. 448, 451 (1980) (holding that Congress could use its spending power to mandate that at least 10% of federal funds granted for local public works programs be directed to minority business enterprises, without violating the Equal Protection Clause, given that such spending was being undertaken to remedy past discrimination).


202.  Id.

203.  In government contracting, a “prime contractor” is a person or entity that has directly entered into the contractual relationship with a government agency. A “subcontractor,” on the other hand, is a person or entity that enters into a contractual relationship with a prime contractor over some specific task or portion of the larger contract. Generally speaking, when a prime contractor bids on a particular government contract, it is responsible for gathering bids from subcontractors and combining these into one bid. See, e.g., 41 U.S.C. § 8701 (defining “prime contract,” “prime contractor,” and “subcontractor”).
drawing on language Congress used in crafting the federal contracting set-asides that *Fullilove* upheld, defined “minorities” to include “Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.” The ordinance did not apply to minority prime contractors. While Richmond’s implementation plan had expired in 1988, the case was not mooted (according to the Court) because the plaintiff, J.A. Croson Co., was still pursuing damages for Richmond’s refusal to award a contract based on an unconstitutional ordinance.

J.A. Croson made two primary arguments, both of which the Court ultimately endorsed. First, it argued that the ordinance was not lawfully enacted because it was not really remedial, insofar as it was not primarily designed to respond to identified past discrimination by the City of Richmond but “societal discrimination” more generally; thus, the city council lacked a compelling interest in adopting the remedy. Second, J.A. Croson argued that the ordinance’s race-conscious remedy had not been narrowly tailored to remedy prior discrimination, and that it would therefore fail under this second prong of a strict scrutiny analysis.

Justice O’Connor, writing for the majority, took particular aim at Richmond’s argument that the ordinance was remedial. First, she pointed out that the ordinance’s preference for members of communities of color, such as Eskimos and Aleuts, who were not historical victims of discrimination in Richmond signaled that the ordinance was not genuinely enacted with an eye toward curing historic racial inequities particular to Richmond. It is worth pausing here to note that the ordinance was indeed, in this respect, rather crudely crafted. The ahistorical language suggested that the legislators likely engaged in something of a copy-paste job when they passed their ordinance, undercutting any argument that the Richmond City Council had engaged in a thoughtful response to local evils. Further, it made Richmond more substantively vulnerable to the argument that when it adopted its ordinance it was not looking closely at particularized local problems at all, but was merely looking to follow a national trend.

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205. *Id.* at 478 & n.1.
207. *Id.* at *26–30.
209. When asked where the definition had come from, the city’s lawyer said “The reason the description of minorities that exists in this ordinance is there is that it is the same description of minorities the exists in the Federal program in Fullilove, and in fact, it’s the same description of minorities that exists in the Virginia code that defines what a minority business enterprise is. I don’t think that it really matters that much.” Oral Argument at 7:50, *Croson*, 488 U.S. 469 (No. 87-998), https://www.oyez.org/cases/1988/87-998.
210. *See*, e.g., Brief on Behalf of the Appellee, *supra* note 206, at *7* (“The most that can be said for the process employed by [the] City Council is that it afforded the public the chance to comment on
At the same time, this definition alone would not have been enough to sink the ordinance. If this was the only problem, the court could have simply severed the preference for minority communities unaffected by historic discrimination from the statute. Justice O'Connor believed the statute was not actually remedial for another key reason. The City, in its legislative process, had “relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city’s prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983.” This study, she felt, did not provide any “direct evidence of race discrimination on the part of the city in letting contracts . . . . or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”

While under a lower standard of review (such as rational basis) this justification would likely have sufficed to uphold the City’s ordinance, Justice O’Connor felt that this ordinance called for strict scrutiny. In her view, the City’s black political majority (five of nine members of the city council) had essentially imposed an illegitimate racial quota favoring their group in a way that hurt white residents’ opportunities. She felt this was the exact situation John Hart Ely identified as requiring strict scrutiny by the judiciary—to protect discrete and insular minorities from majoritarian prejudice or indifference. Justice O’Connor, citing Ely’s statement that “a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature,” found that the strict scrutiny-triggering “concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts” was indeed present here. Therefore, the situation “would seem to militate for, not against, the application of strict scrutiny.” Justice O’Connor maintained this position even though Ely himself joined an amicus brief with the ACLU arguing against applying strict scrutiny, instead calling for intermediate scrutiny.

the Plan before it was put to a vote . . . . The hearing was not held for the purpose of ascertaining the nature of any problem which may require remedial action.

211. See id. (“Neither of the two proponents [who testified at the hearing] was connected with the construction industry. The tenor of the remarks of the first speaker was that other cities had such Plans and it was time for Richmond to have one.”).
212. See Oral Argument, supra note 209, at 7:24 (Justice O’Connor, after raising a question about evidence of discrimination against Eskimos & Aleuts, asks the lawyer for the city whether the ordinance is valid “as to those groups”).
213. Croson, 488 U.S. at 480.
214. Id.
216. Id.
217. See Brief for the American Civil Liberties Union, et al. as Amici Curiae Supporting Appellant, Croson, 488 U.S. 469 (No. 87-998), 1987 WL 880105, at *6–17 (“Those concerns do not
Thus, while the City argued it was “attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry,” including discrimination in the skilled trades, Justice O’Connor felt the City tried to offer big picture national evidence to obscure a lack of local, specific evidence of discrimination perpetuated by the City’s involvement in construction contracting. Thus, she found that “the sorry history of both private and public discrimination in this country,” standing alone, did not “justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia,” holding that “an amorphous claim that there has been discrimination in a particular industry cannot justify the use of an unyielding racial quota.” This language echoed that of Justice Powell, whose influential opinion in the early affirmative action case Bakke defined “societal discrimination” as “an amorphous concept of injury that may be ageless in its reach into the past.”

In doctrinal terms, the Court held that such broader claims of societal discrimination were no longer satisfactory as a “compelling interest” that would justify a state or local government entity enacting a racial preference. Going forward, cities would have to offer a “strong basis in evidence” for their conclusion “that remedial action was necessary.” That evidence, moreover, would have to draw upon “the relevant statistical pool for purposes of demonstrating discriminatory exclusion,” i.e. the number of minorities “qualified to undertake the particular task,” rather than the share of minorities in the general population. (The statistical study cited by Richmond had used this second metric.) Finally, cities would have to narrowly tailor their programs to remedy this more specific, local discrimination.

Justice O’Connor’s description of the weakness of evidence of discrimination in Richmond’s construction industry may simply have been a product of the City Council’s initial sloppiness in enacting its ordinance. This began with its lazy legislative drafting and extended to its failure to provide an adequate contemporaneous account of the need for set-asides. As described in Croson, it does not appear that advocates made a significant effort to justify the need for the ordinance during the legislative debate. For example, only seven members of the public actually testified on the merits

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218. Id. at 498.
219. Id.
222. Id. at 501–02.
of the ordinance, and five were in opposition; their testimony largely focused on the study and the lack of MBE membership in contractor associations. According to Justice O’Connor, the testimony offered “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”

The Court’s account of Richmond’s legislative debate has been sharply criticized by scholars Reginald Oh and Thomas Ross. They argue that Justice O’Connor deliberately elided local and regional complexities and “obfuscated the very tensions that gave rise to the set-aside program, a limited effort to ameliorate some of the devastating effects caused by white flight and by suburban domination of metropolitan politics in the Richmond area.” Such alternative perspectives have done little, however, to dampen the force of the decision’s scathing narrative of the legislative debate.

Richmond certainly made a better showing for its arguments in the courts, forcefully defending its justifications for the ordinance. For example, in its brief for the Supreme Court, Richmond highlighted the impact of discrimination in the building and construction trades, arguing that “pervasive racial discrimination in Richmond’s local construction industry” had “impaired minority entry and advancement and had substantially foreclosed minority opportunities to compete for city construction contracts.” In particular, longtime discrimination in the building and construction trades meant that “[w]hites have dominated the skilled construction trades, and blacks have been prevented from following the traditional path from laborer to entrepreneur.” As a result, most contractors were owned and managed by whites, creating a business system that excluded reasonable minority participation.

While this account is more coherent than that offered by the city’s statistical evidence alone, it still cited no Richmond-specific evidence of construction union discrimination. It was also barely referenced in oral argument, only emerging in its final minutes, when the city’s lawyer John Payton finally broached the theory under Justice Byron White’s insistent questioning:

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223. Id. at 479–80.
225. See infra note 243.
227. Id. at *23–24.
228. Id. at *24.
229. Instead, the City leaned heavily in its brief on national discussions of discrimination in the industry by Congress and by scholars. See id. at *23 nn.38–39. The only Richmond-specific data offered was about the membership of contractor associations. See id. at *22.
WHITE: The discrimination was practiced by... who discriminated against the minority contractors?

PAYTON: —I think it was a closed business system, as described by—

WHITE: Well, that doesn’t help me very much. Who? Who did the discriminating? The city?

PAYTON: —No, it’s not the city. It’s not the city. It is all aspects of the construction industry itself, from the trades... one of the ways you become a construction contractor is to enter as a member of a trade and then leave that and become a small construction contractor. That’s blocked for Black members.

WHITE: Well, I suppose you could say that about any industry.

PAYTON: No, you can’t.

WHITE: In the past? Way back in the past?

PAYTON: No, you can’t. With the construction industry, we know a lot about what we speak here, and there have been studies and studies and judicial findings that establish that there is a closed business system in the construction industry that was being remedied by Richmond, here.230

Payton’s decision to otherwise ignore the construction unions’ role in oral argument is somewhat surprising, given that Justice O’Connor had joined with a majority in Local 28 Sheet Metal Workers just a few years before.231 Based on her position in Local 28, it is reasonable to suspect she

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231. See supra Part III.D.ii.
was sympathetic to the idea that discrimination in construction unions was a serious issue in the industry.\textsuperscript{232} Indeed, in her \textit{Croson} opinion, Justice O’Connor observed that “if the city could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system,” as “[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”\textsuperscript{233}

It is challenging to know what to make of this language,\textsuperscript{234} in light of much contradictory language in the rest of the opinion that insists the government may only act to remedy discrimination that they have themselves participated in.\textsuperscript{235} That language built on the Court’s prior plurality opinion in \textit{Wygant v. Jackson Board of Education},\textsuperscript{236} and was what the litigants believed was decisive to the case.\textsuperscript{237} This perhaps explains Payton’s decision not to focus too much on what the unions were doing.

While a more forceful showing of more profound ongoing discrimination on the part of local unions might have been enough to convert Richmond into a \textit{passive participant} in a system of racial exclusion, I suspect such a showing would not have swayed the Court absent evidence of truly egregious, and ongoing, first-generation discrimination. Justice O’Connor did, after all, cite Richmond’s argument about “exclusion of blacks from skilled construction trade unions and training programs,” but categorized it as one of “various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry.”\textsuperscript{238} She found, in turn, that it was “sheer

\begin{thebibliography}{9}
\bibitem{232} See Local 28 Sheet Metal Workers Int’l Ass’n v. EEOC, 478 U.S. 421, 489–99 (O’Connor, J., concurring).
\bibitem{234} In his dissent, Justice Thurgood Marshall called these words “only lipservice to this additional government interest” in “preventing the city’s own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination.” \textit{Id.} at 537 (Marshall, J., dissenting). To Marshall, “there can be no doubt that when Richmond acted affirmatively to stem the perpetuation of patterns of discrimination through its own decisionmaking, it served an interest of the highest order.” \textit{Id.} at 538–39.
\bibitem{235} See, e.g., Ian Ayres & Fredrick E. Vars, \textit{When Does Private Discrimination Justify Public Affirmative Action?}, 98 COLUM. L. REV. 1577 (1998) (example of scholars grappling with, and trying to extend the meaning of, what remains possible under the “passive participant” rationale post-\textit{Croson}).
\bibitem{236} Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–83 (1986) (applying heightened scrutiny to a collective bargaining provision that resulted in minority teachers with less seniority being laid off ahead of white teachers with more seniority).
\bibitem{237} See Brief of Appellant City of Richmond, \textit{supra} note 226, at *14 (the City defined the central issue in the case as “whether the court of appeals erred in holding Richmond’s [MBE] plan unconstitutional on the basis of language in the plurality opinion in \textit{Wygant v. Jackson Board of Education}, which it construed to require a governmental entity to demonstrate its own discrimination in order to justify an affirmative action plan.”).
\bibitem{238} \textit{Croson}, 488 U.S. at 498.
\end{thebibliography}
speculation how many minority firms there would be in Richmond absent past societal discrimination. . . . Defining these sorts of injuries as ‘identified discrimination’ would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.” Thus, she ruled that “[n]one of these ‘findings,’ singly or together, provide the city of Richmond with a ‘strong basis in evidence for its conclusion that remedial action was necessary.’”

With those words, the Court took the bad facts of *Croson*—Richmond’s crude and arguably lazy efforts at justifying the ordinance in the legislative record, and its strained effort at defending it before the Court—and sharply raised the burdens on cities and states looking to pursue affirmative action.

The Court in *Croson* thus brought questions of accountability for union discrimination against workers of color full circle, to the time of the Eisenhower-era PCGC, when contractors were able to disclaim responsibility by pointing the finger at the construction unions. What Justice Marshall called “the continuing impact of government acceptance or use of private institutions or structures once wrought by discrimination” is no longer a sufficient basis for remedial, race-conscious affirmative action. Now, post-*Croson*, contractors are again able to shift the blame for discrimination in the building and construction trades, as cities may no longer use race-conscious measures to hold their contractors to account for past discrimination by the unions they utilized.

In *Croson*’s wake, cities with similar set-aside programs around the country faced an onslaught of lawsuits from contractors and their associations. To defend themselves against these suits, or to fashion new programs, they commissioned new and detailed disparity studies (which came to be called “*Croson* studies”) of the construction industry in their cities or regions.

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239. *Id.* at 499.

240. *Id.* at 500.

241. *See supra* Part III.A.


244. *See* Denise E. Farris, Patricia A. Meagher & Larry D. Harris, American Bar Association Forum on the Construction Industry: Diversity in Government Contracting, at 4–5 (2012), http://www.americanbar.org/content/dam/aba/directories/construction_industry_knowledge_base/vegas_2012_plenary_5.authcheckdam.pdf (“*Croson*’s focus on the statistical underpinnings justifying creation of such programs spawned the creation of companies specializing in the performance of ‘*Croson* Studies,’’ i.e. the detailed statistical studies now legally required to justify not only the existence of an MW/DBE program, but also the various utilization goals identified within that program. Such studies continue to be key to the ongoing success of any program at both the local, state and federal levels.”) (internal citations omitted); DRAKE & HOLSWORTH, * supra* note 243, at 156 (“[B]y March 1991, 29 states and local jurisdictions had completed some sort of post-*Croson* MBE study . . . [and] another 37 studies were underway.”) (internal citations and quotation marks omitted).
value, even rejecting them as an insufficient evidentiary basis for a program if they use poor methodology or analysis. But they still fared better than race-conscious set aside programs that simply “compared the availability of disadvantaged businesses to the percentage of contract dollars awarded to such businesses.” Courts have consistently rejected programs justified on this basis and without any statistical studies since *Croson*.246

Today, where exactly the bar falls for demonstrating a compelling government interest—as well as what constitutes a “strong basis in evidence” to justify it—remains unclear. We know from *Croson* that national-level industry evidence will not suffice, nor will evidence of past discrimination in a local industry. Still, both *Croson* and *Adarand Constructors, Inc. v. Pena*, the Supreme Court’s subsequent decision applying *Croson*’s strict scrutiny standard to race-conscious measures instituted by the federal government, suggest that there must be some circumstances in which a government entity could justify use of race-conscious means to remedy past discrimination.247 But we know from the education cases that for such programs to survive they must also regularly update their data to justify their continued existence.248 This line of jurisprudence has created a negative feedback loop insofar as successful

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245. *See Drake & Holsworth, supra* note 243, at 158–59 (explaining the mixed reception MBE ordinances backed by *Croson* studies initially received in the courts and that it remains unclear to what extent the studies were sufficient grounds for continuing race-conscious affirmative action policies). Not all *Croson* studies, however, have been rejected. *See, e.g.*, Concrete Works of Colo., Inc. v. City & Cty. of Denver, 321 F.3d 950, 962–69, 990–92 (10th Cir. 2003) (discussing a variety of disparity studies commissioned by the City and concluding that it had met its initial burden of producing strong evidence of racial discrimination in the Denver construction industry, including before it had enacted its ordinances).


247. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 270 (1995) (Souter, J., dissenting) ("Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination."); *Id.* at 273 (Ginsburg, J., dissenting) ("The divisions in this difficult case should not obscure the Court’s recognition of the persistence of racial inequality and a majority’s acknowledgment of Congress’ authority to act affirmatively, not only to end discrimination, but also to counteract discrimination’s lingering effects.").

248. *See Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) ("Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all ‘race-conscious programs must have reasonable durational limits.’ In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.") (internal citations omitted).
programs will, in theory, demonstrate results that undermine a government’s ability to continue the program.

Indeed, many commentators suggest that remedial justifications for affirmative action have been so severely restricted as to be a virtually dead letter, except to remedy direct discrimination by the entity promulgating the policy.249 This line of cases has left cities in something of a bind. Cities continue to face a construction industry they believe is rife with discrimination. Yet they are now unable to direct precisely targeted, race conscious tools at the problem. This bind, along with other state-level prohibitions against affirmative action, has led many cities who might otherwise have aimed for race-conscious affirmative action measures to improve hiring among residents of color to instead pursue local hiring policies.250

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249. As Kenji Yoshino has pointed out, this creates a perverse incentive for government actors, effectively asking them to invite lawsuits against them as a pre-condition for pursuing affirmative action. This is part of why he argues that the space for a remediation rationale post-Croson is an extremely narrow aperture. Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law, N.Y.U. School of Law, Constitutional Law, Class 24 (Mar. 23, 2016) (notes on file with author); see Laurence H. Tribe et al., Constitutional Scholars’ Statement on Affirmative Action After City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711, 1714 (1989) (urging that courts and governmental officials developing further standards for affirmative action keep in mind the principle that “When asking local governments to establish a factual record of past discrimination, it is essential not to deter voluntary efforts by forcing such governments to point fingers needlessly or to make compromising public admissions in order to establish the necessary predicate for race conscious remedies. To do so would be to reopen old wounds, not to heal them.”); see also David S. Cohen, The Evidentiary Predicate for Affirmative Action after Croson: A Proposal for Shifting the Burdens of Proof, 7 YALE L. & POLICY REV. 510–11 (1989) (noting that commentators, and even O’Connor herself, recognized that a requirement of contemporaneous evidentiary findings by public entities that they have engaged in illegal discrimination before they could engage in affirmative action could expose the public actor to liability, thereby impeding the effort to remedy discrimination); Lisa E. Chang, Remedial Purpose and Affirmative Action: False Limits and Real Harms, 16 YALE L. & POLICY REV. 59, 90 n.169 (1997) ("One of the greatest ironies to arise within the remedial purpose framework is the fact that a political body obtains the power to wield the allegedly fearsome tool of race-based action only if it can virtually prove that it has acted in a biased and discriminatory manner in the past.");

250. See, e.g., Mike Tobin, Cleveland insists on more jobs for residents: legislation will require more to benefit from city contracts, CLEVELAND PLAIN DEALER, May 9, 2003, at B1 (explaining that Cleveland’s inability to complete a complete study of minority representation in city work meant it could not defend legal challenges to programs that considered race, but that councilmembers felt that after decades of discussions of how to increase hiring of minorities and city residents council finally reached a solution through local hiring law); CHINESE FOR AFFIRMATIVE ACTION & BRIGHTLINE DEFENSE PROJECT, THE FAILURE OF GOOD FAITH: LOCAL HIRING POLICY ANALYSIS AND RECOMMENDATIONS FOR SAN FRANCISCO 19 (2010) (noting that race-conscious avenues were foreclosed to San Francisco by California Proposition 209, passed in 1996, which prohibited government from actions that discriminate or grant preferential treatment on the basis of race, sex, color, ethnicity or national origin and thus curtailed the majority of affirmative action programs in California that sought to address past and current discrimination); see also P'SHIP FOR WORKING FAMILIES, CONSTRUCTION CAREERS HANDBOOK 49 (2013), http://www.forworkingfamilies.org/sites/pwf/files/publications/0413%20Const%20Careers%20HBook_f_web.pdf (explaining that local elected leaders are often reluctant to pass race-based targeting programs because of the real or perceived threat of a lawsuit, but that cities and local governments are shifting their focus to local and targeted hiring programs); Patrick Sullivan, In Defense of Resident Hiring Preferences: A Public Spending Exception to
IV. LOCAL HIRING’S EMERGENCE

A. A New Strategy to Counter Backlash

Despite their successful legal defense of race-conscious municipal affirmative action plans like Hartford’s in the pre-Croson era, civil rights advocates increasingly faced severe backlash against their efforts. The City of Boston’s 1975 affirmative action plan, for example, stoked a wave of resistance from white union construction workers, coming on the heels of years of turbulent battles over desegregation orders.251 The 1975 plan also stirred up low-income working-class white Boston residents who were themselves shut out of the trades. In an environment where whites already felt their livelihoods were in peril, reserving so many jobs for non-white workers looked, to many low-income working-class white workers in particular, like an effort to prefer black workers over white workers.

These charged dynamics are described in an insightful amicus brief later filed in White v. Massachusetts Council of Construction Employers by the Affirmative Action Coordinating Center, the National Conference of Black Lawyers, the National Lawyers Guild, the Center for Constitutional Rights and the Community Renewal Society of Chicago, and joined by several dozen additional national and local organizations.252 Many working-class white workers in Boston “perceived minorities as a favored class who were stealing jobs from unemployed whites.”253 The 1975 plan’s success in increasing minority employment on city-funded construction thus stoked conflict between angry white workers and newly-employed black workers.254 As the amici explained, the 1975 plan “exacerbated the well-known high level of racial tension in the city and actually resulted in several hostile physical confrontations between white and minority construction workers which were well publicized by the local media.”255 In one particularly prominent action, more than two thousand white union construction workers descended on Boston City Hall on May 4, 1976,
calling for the Third World Jobs Clearing House, a major community partner for the city in implementing its affirmative action order, to be defunded.\textsuperscript{256}

It was in this environment that the Boston Jobs Coalition decided to push the City of Boston to adopt a commitment to hire local residents. As Chuck Turner, a former leader of the Coalition, insightfully explained:

\begin{quote}
[T]he unions, with the majority of their members living in the suburbs, seemed to close the doors on White Boston workers as well as workers of color. As the advocates for integration of the trades assessed the situation, there seemed to be only one possible solution—an alliance between the communities of color and White communities in Boston. Such an alliance, it was theorized, could lead to a policy that would combine hiring requirements for workers of color and women with hiring requirements for Boston residents. Such a policy, unheard of anywhere in the country then, seemed to be the only way to create a political force that could advance affirmative action for workers of color and women. Otherwise, the unions, in an era when the Boston economy was moving from manufacturing to service, would use the frustration of unemployed White Boston workers to politically block any movement to seriously integrate the trades.\textsuperscript{257}
\end{quote}

The Coalition pressed Mayor Kevin White for action, and while he took his time, he went forward with the proposal in 1979, issuing a new executive order:

\begin{quote}
On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed, in accordance with the contract documents established herewith, as follows:

a) at least 50\% by bona fide Boston residents;

b) at least 25\% by minorities;

c) at least 10\% by women.\textsuperscript{258}
\end{quote}

The \textit{Boston Globe} hailed Mayor White’s executive order for “incorporat[ing] the issue of affirmative action and minority hiring on construction work in the city but mov[in]g beyond that issue to a unifying citywide strategy . . . .”\textsuperscript{259} Advocates also praised Mayor White’s move, declaring the resident hiring goal “integral” to the affirmative action goals of the City.\textsuperscript{260} As the \textit{Bay State Banner} reported in 1978,

The Coalition hopes to increase the number of jobs available to both white and minority workers in Boston and feels there should be a fair division of

\textsuperscript{257} Id. at 82.
\textsuperscript{260} Id.
those jobs between the two groups. Whites and minority workers have long been at odds over the scarcity of jobs, but the Coalition believes that unity will better serve both groups interest.  

B. Boston Contractors & Unions Fight Back—and Lose

Boston’s construction trade unions and contractors felt quite differently. Almost immediately after the executive order was issued, the unions and contractors banded together to challenge the local hiring requirement in state court, suing Mayor White and the City of Boston. While they were not formally challenging the race-based affirmative action requirements, it was clear to local observers that the unions and contractors understood the expansion of the law to white Boston residents to be a cornerstone of a strategy to link together the causes of white, black and brown Bostonians. The unions and contractors thus hoped to break that strategy in court.

It was also clear to the contractors that the policy was working. Within one year, city residents represented forty percent of the construction jobs—progress that was then halted by the contractors’ success in court. The case first went to the Massachusetts Supreme Judicial Court, which declared the executive order unconstitutional under the “Dormant Commerce Clause” doctrine.

The “Dormant Commerce Clause” is how the U.S. Supreme Court, and scholars, have come to refer to the limits that the Commerce Clause places on state regulation of interstate commerce. Since the late nineteenth century, the Supreme Court has repeatedly recognized that the Constitution’s Commerce Clause explicit grant of authority to Congress also implicitly limits the authority of the states to regulate interstate commerce. The Dormant Commerce Clause has therefore been invoked

262. See Mass. Council of Constr. Emp’rs, Inc. v. Mayor of Boston, 425 N.E.2d 346, 348 n.8 (Mass. 1981) (“No challenge has been made to those aspects of the order setting out hiring guidelines based on race and sex.”), rev’d, White, 460 U.S. 204 (1983); White, 460 U.S. at 205 n.1 (“Only the residency requirement is being challenged.”).
263. See Turner, supra note 256, at 84 (“Their actions made it clear that sharing the job base with White Boston residents was as objectionable as, sharing it with workers of color and women.”).
264. Mayor of Boston, 425 N.E.2d at 353.
265. The Dormant Commerce Clause doctrine has provoked considerable consternation among conservative jurists and legal scholars, particularly from originalists who see it as a pure creature of judicial imagination. See, e.g., Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1807–08 (2015) (Scalia, J., dissenting) (excoriating the majority for “invoking the negative Commerce Clause, a judge-invented rule under which judges may set aside state laws that they think impose too much of a burden upon interstate commerce[,]” and calling the Dormant Commerce Clause a “judicial fraud” and a “judicial economic veto.”).
by the Court to strike down state laws that either facially regulate interstate commerce or unduly burden interstate commerce (such as market protections that discriminate against out-of-state businesses). 267

Boston appealed to the U.S. Supreme Court, which reversed the Massachusetts Supreme Judicial Court’s decision and upheld the executive order. 268 The City did not, however, argue for the local hiring requirement’s legitimacy as a strategy for achieving affirmative action; it instead defended it mostly in race-neutral terms, as being squarely within the “market participant” exception to the Dormant Commerce Clause. 269 This exception allows state or local governments to take actions that would otherwise violate the Dormant Commerce Clause so long as they are acting not as market regulators but as market participants (i.e., buyers or sellers). 270 Thus Boston argued that because any private market participant contracting in the local construction industry could legally choose to enact a preference for local workers, Boston could do so when similarly acting as a market participant. The Massachusetts Supreme Judicial Court rejected this argument, finding that “it is doubtful that the city is acting in its proprietary capacity in all the activities affected by the executive order.” 271

The Supreme Court’s opinion never explicitly mentions the affirmative action rationale of the local hiring requirement, only going so far as to say that the City’s ordinance was not out of step with federal regulations providing that Housing and Urban Development projects “will alleviate economic distress by helping the poor, minorities, and unemployed.” 272 The Court upheld the executive order under the Dormant Commerce Clause’s market participant exception, holding that the City’s decisions with respect to resident preferences were legitimate decisions a market participant could make:

If the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than

267. Sullivan, supra note 250, at 1349.
268. White, 460 U.S. at 206.
269. See Brief for Affirmative Action Coordinating Center, supra note 252, at *6 (“The narrow Commerce Clause arguments advanced by the court below and the briefs of the parties ignore or minimize the integral relationship between the challenged residents’ preference and the more explicit affirmative action goals of the Mayoral Executive Order.”).
270. See, e.g., Reeves, Inc. v. Stake, 447 U.S. 429, 440–47 (1980) (upholding right of a state-owned cement plant to favor in-state buyers in times of shortage because the state was acting as a market participant, not as a regulator).
272. White, 460 U.S. at 213, 213 n.11. In its context, however, this line does not actually seem addressed to the affirmative action rationale; instead, it indicates that concern for unemployed Bostoners was within the scope of the federal regulations.
participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.\textsuperscript{273}

Nonetheless, the justices could not have been wholly unaware of the context in which the local hiring requirement was introduced. After all, there is explicit language in the footnotes of the Massachusetts Supreme Court’s decision\textsuperscript{274} addressing it:

The city states that if this action came to trial, evidence would be presented to demonstrate that some members of Boston’s nonminority population resented attempts to ensure certain minimal levels of minority and female employment on construction projects. The fifty percent quota was thus established in part to ensure that all segments of the city’s population received some of the jobs, thereby alleviating any hostility.

In addition to this language, the amici’s brief provided a detailed explanation of the executive order’s origins, while also flagging why this history was missing from the briefs.\textsuperscript{275} The amici claimed that the absence of affirmative action from the argument of the case was due to the contractors, who aggressively have resisted any attempts by Petitioners to introduce the alleviation of the aggravation of racial tension in the City of Boston as one of several purposes of the challenged Executive Order. In fact, Petitioners were forced to compromise significantly on this purpose in order to obtain

\begin{itemize}
  \item \textsuperscript{273} White, 460 U.S. at 210.
  \item \textsuperscript{274} Mayor of Boston, 425 N.E.2d at 350 (“As an additional reason for the mayor’s order the city describes a desire to ensure adequate representation of city residents in construction union jobs and a lessening of racial tensions.”); id. at 350 n.15 (“The city states that if this action came to trial, evidence would be presented to demonstrate that some members of Boston’s nonminority population resented attempts to ensure certain minimal levels of minority and female employment on construction projects. The fifty percent quota was thus established in part to ensure that all segments of the city’s population received some of the jobs, thereby alleviating any hostility.”); Petition for Writ of Certiorari, at Appendix D: Agreed Statement of Facts, ¶¶ 10(a)-(d), 11, White, 460 U.S. 204 (No. 81-1003), 1981 U.S. S. Ct. Briefs LEXIS 1395.
  \item \textsuperscript{275} Unlike more contemporary cases, this was not a case in which the Court was deluged by a multitude of amicus briefs. Only four amicus briefs were filed in White. See White, 460 U.S. at 205 n.9. This was in line with the general trend of Supreme Court practice at the time. See Allison Orr Larsen & Neal Devins, The Amicus Machine, 102 Va. L. Rev. 1901, 1911 (explaining that amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s). Today, in contrast, amicus practice is exploding, resulting in an explosion of briefs—many of which are themselves actively solicited by the parties. See id. at 1915-1926 (documenting how, with the rise of the elite Supreme Court bar, soliciting and coordinating amicus briefs has become “absolutely essential” for parties arguing before the Supreme Court.).

Putting aside the question of the contemporary impact of amicus briefs, the fact remains that with so few briefs, it is likely the Affirmative Action Coordinating Center brief was read and considered—at least by the justices’ clerks, if not by the justices themselves. It was also, notably, the only amicus brief urging reversal. See White, 460 U.S. at 205 n.9.

The brief was, at a minimum, on the radar screen of Justice Harry Blackmun. See Bench Memorandum for White Oral Argument, dated Oct. 20, 1982, at 14 n.10 (found in the Harry A. Blackmun Papers, Library of Congress, Box 371, and on file with the author).
an Agreed Statement of Facts . . . . As a result only two paragraphs in the [Agreed Statement of Facts] address this critical issue.\footnote{276}

The amici, comparing the limited presentation of the facts to the one made in \textit{Bakke}, urged the Court “not [to] allow a patent miscarriage of justice to occur because of Respondents’ questionable tactics in shaping the factual presentation of this case.”\footnote{277}

The Court did not engage explicitly with amici’s characterization of the factual background.\footnote{278} Still, the Court cannot have been unaware of the backstory, the reality that “the residency provisions have never had an existence or purpose separate from the minority and women preference provisions.”\footnote{279} The Court acknowledged the broader aims of the executive order in a footnote citing the minority and women preference provisions, observing that “Only the residency requirement is being challenged.”\footnote{280}

Regardless of the opinion’s singular focus on the resident hiring provision, advocates embraced a broader reading of \textit{White} as an endorsement of a local hiring strategy coupled with an affirmative action

\footnote{276}{Brief for Affirmative Action Coordinating Center, \textit{supra} note 252, at *22.}
\footnote{277}{\textit{Id.}}
\footnote{278}{In part, this may have been because amici’s argument that the local hiring plan was legitimate as a complement to a race-conscious affirmative action strategy argued that this strategy was authorized by the Thirteenth Amendment’s “badges and incidents” provision. \textit{See id.} at *15, *18–19. This was an argument which the Court has been historically skeptical of. \textit{See} \textit{The Civil Rights Cases}, 109 U.S. 3, 23–25 (1883) (“Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law, or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the posse comitatus without regular trial, or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. . . . The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.”).}
\footnote{279}{Brief for Affirmative Action Coordinating Center, \textit{supra} note 252, at *24.}
\footnote{280}{\textit{White}, 460 U.S. at 205 n.1.}
strategy, hailing it as a major victory.\textsuperscript{281} Even before \textit{White} was handed down, the \textit{Boston Globe} described the executive order as a pioneering economic strategy that has enabled Boston and other urban centers to confront two of the biggest problems of American cities: high unemployment and racial tension.

In recent years, an estimated 25 cities with significant construction and rehabilitation under way have followed Boston in attempting to get construction work for urban minorities and hardcore unemployed.\textsuperscript{282}

Based on the statements of interest the amici filed in \textit{White}, organizations in at least thirteen cities were actively looking to the result in \textit{White} for guidance on their own strategies going forward.\textsuperscript{283} Thus, in the following months, as cities adopted laws modeled on the Boston executive order, they did so under a very broad reading of \textit{White}.\textsuperscript{284}

\textbf{C. Overcoming Subsequent Privileges & Immunities Challenges to Local Hiring}

\textbf{i. Privileges & Immunities Objections Gain a Foothold}

It came as a major surprise to activists when the Supreme Court ruled against a local hiring policy in Camden, New Jersey the following year. The Court found that Camden’s plan, designed to increase local employment in publicly-backed construction jobs, raised concerns under the Privileges and Immunities Clause of Article IV (henceforth, the “P&I Clause”),\textsuperscript{285} and remanded it to the New Jersey Supreme Court for consideration of whether

\textsuperscript{281} Mayor Kevin White, for example, called the decision “the single biggest leverage for jobs for people living in the city and a victory for every other major city in America.” Charles E. Claffey, \textit{A Lifeline for City’s Resident Jobs Plan}, \textit{BOS. GLOBE}, Apr. 10, 1983, at 1. Laurence H. Tribe, who argued the case for the city, said the ruling “means that cities now have the option of using local hiring quotas to deal with unemployment, racial tension and urban decay.” Nick King, \textit{High Court Backs Hub on Jobs for Residents}, \textit{BOS. GLOBE}, Mar. 1, 1983, at 1.


\textsuperscript{283} Those cities include: Aurora; Atlanta; Oakland; Denver; Hartford; Dayton; New York; Richmond, California; Pittsburgh; St. Louis, San Diego and Wilmington. See \textit{Brief for Affirmative Action Coordinating Center, supra} note 252, at *31–51.

\textsuperscript{284} See, e.g., Thom Shanker, \textit{Council committee passes law on resident hiring}, \textit{CHI. TRIB.}, Nov. 4, 1983, at A17 (“[Alderman Gerald M. McLaughlin] said that a recent U.S. Supreme Court decision upholds the rights of a city to dictate employment makeup on municipal construction contracts.”). We might compare this to the way that some advocates of “religious freedom” have hailed the supposed breadth of the Court’s recent decision in \textit{Masterpiece Cakeshop}, despite the fact that the decision is widely acknowledged to have, on its face, avoided the most hotly-contested and far-reaching issues. See, e.g., Kristen Waggoner, \textit{Supreme Court’s same-sex wedding cake decision—a significant victory for freedom}, \textit{FOX NEWS} (June 4, 2018), https://www.foxnews.com/opinion/supreme-courts-same-sex-wedding-cake-decision-a-significant-victory-for-freedom.

\textsuperscript{285} The P&I clause provides that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. \textit{CONST.} art IV, § 2, cl. 1.
the City’s reason for infringing this core liberty was significant enough.286 Most startling to many observers was that the very same Justices who upheld the White Executive Order joined together in this decision.

The Camden City Council passed its ordinance in 1980, acting pursuant to a statewide affirmative-action program. Camden set a minority hiring goal of 25% and a resident hiring preference of 40% based on a one-year residence requirement. Initially the ordinance went beyond publicly-backed construction and covered private residential housing development,287 but by the time it came before the Supreme Court the Council had amended the ordinance to remove that coverage. On its face, the ordinance that appeared before the Court did not look terribly different from the White Executive Order.

Evidence suggests that many of the players thought Camden was basically the same case as White.288 Indeed, the Affirmative Action Coordinating Center did not, this time, file an amicus brief, nor did any of the many local organizations that had signed onto its White brief. But the Court found the Camden ordinance and the Boston executive order to be doctrinally distinct. Justice Rehnquist, again writing for the majority (which notably included Justice Thurgood Marshall in both cases), explained the distinction the Court was drawing by emphasizing that while Camden was a market participant, this fact was not dispositive with respect to the P&I Clause. The Court found that “discrimination against out-of-state residents on matters of fundamental concern” would violate the P&I Clause, and that while “Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents . . . that same exercise of power to bias the employment decisions of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause.”289

288. See Brief for City of Camden, United Bldg. and Constr. Trades Council v. Camden, 465 U.S. 208 (1984) (No. 81-2110), 1983 U.S. S. Ct. Briefs LEXIS 262, at *32–33 (“The Boston Order and the Camden Ordinance are virtually identical. Thus, because of the decision in White, appellant has now formally withdrawn its Interstate Commerce argument. Purportedly, it now relies solely on the Privileges and Immunities Clause. However, appellant’s brief, as well as the brief of amicus New England Legal Foundation, is suffused with arguments normally made under the Interstate Commerce Clause. Appellant and amicus thus repeatedly claim that Camden’s ordinance is protectionist, will lead to interstate rivalries and retaliation, and will cause Balkanization of the national economic unit. Much of their claims are, indeed, an Interstate Commerce Clause argument disguised as a Privileges and Immunities argument. To uphold their claims would effectively nullify the recent White decision—which would lose all meaning less than one year after being delivered.”).
Because both the decisions in *Camden* and *White* make virtually no mention of affirmative action, scholars and commentators have primarily viewed them as a moment of doctrinal clarification. The seemingly contradictory results on the same facts, they argue, were simply a function of the different standards applied under the Dormant Commerce Clause and the P&I Clause. This does not, however, account for the fact that the P&I Clause was discussed, though rejected as a basis for decision, by the Massachusetts Supreme Judicial Court in *White*. Yet even though the Massachusetts Supreme Court stated it was resting its holding on the Dormant Commerce Clause, it actually further supported its result by citing to the holding of *Hicklin v. Orbeck*, a P&I Clause case where the U.S. Supreme Court struck down an Alaska ordinance that required Alaska residents be given absolute preference in hiring. The Court in *Hicklin* struck down the ordinance under the P&I Clause, finding that it swept too broadly by imposing requirements on “employers who have no connection whatsoever with the State’s oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the state.”

The Massachusetts Supreme Court in *White* cited this same idea as additional support for striking down the executive order: “Finally, as in *Hicklin*, supra, there is a broadly drawn statute which sweeps far wider than merely favoring unemployed or underemployed residents . . . . Given the order’s negative impact on interstate commerce linked with this broad application, it must fall.”

The Court in *White* was certainly aware that a P&I Clause issue was raised below, and made a point of distinguishing the facts of *Hicklin*:

Even though respondents no longer press the Privileges and Immunities Clause holding of *Hicklin* in support of their Commerce Clause argument, we note that on the record before us the application of the Mayor’s executive order to contracts involving only city funds does not represent the sort of ‘attempt to force virtually all businesses that benefit in some way from the economic ripple effect’ of the city’s decision to enter into contracts for construction projects ‘to bias their employment practices in favor of the [city’s] residents.’

What is crucial to note in all of this is the way in which the Justices themselves did not treat these two doctrines as wholly distinct, but rather as intertwined and mutually reinforcing. The Court in *Hicklin*, for example, went out of its way to discuss the Dormant Commerce Clause, finding that...

291.  *Hicklin*, 437 U.S. at 529.
“Although appellants raise no Commerce Clause challenge to the Act, the mutually reinforcing relationship between the Privileges Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from their common origin in the Fourth Articles of Confederation and their shared vision of federalism—renders several Commerce Clause decisions appropriate support for our conclusion.” 294 Given how intertwined these doctrines were—and still are—I do not believe that doctrinal differences alone can fully account for the different outcomes in these cases. 295

One explanation for the divergence in outcome may be that Camden’s goals in enacting a local hiring ordinance were quite different than Boston’s. Camden pursued a strategy in which local hiring goals were set out as a race-neutral means to achieve a race-conscious end: increased hiring of workers of color. In other words, whereas the local hiring requirement in Boston was a strategy to ensure the employment of low-income white workers in addition to black workers, and thus was an integral part of ensuring the success of the affirmative action policy, here the Court was faced with local hiring requirements that were technically race-neutral but were actually designed to result in greater employment of people of color.

While there could be overlap between the two categories (residents and people of color), the language of the ordinance suggests that the 40% local hiring number was targeted at the “economic well-being and status of minority citizens of the City of Camden,” with the goal of significantly reducing the unemployment of black and Hispanic residents. 296 In contrast, White’s local hiring requirement was a complement designed to ensure jobs for white workers as well as workers of color. 297

The history of the Philadelphia Plan may have also played an important role in shaping the different outcome of Camden. Camden is located fewer than four miles from Philadelphia, just across the Delaware River. Such geographic proximity has been, doctrinally speaking, a factor that makes the Court more likely to invalidate residency requirements under the P&I Clause. 298 Here, the petitioners—who claimed not to oppose the minority

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294. Hicklin, 437 U.S. at 531–32 (internal citations omitted).
295. At least one other commentator has noted that the Court’s divergent analyses in White and Camden present a doctrinal divergence that is out of step with the overarching concerns for interstate comity and economic unity embodied in the Dormant Commerce Clause and the P&I Clause doctrines. See, e.g., Patrick Sullivan, In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges & Immunities Clause, 86 Cal. L. Rev. 1335 (1998) (arguing that the divergent outcomes in White and Camden illustrate why the Court should recognize a public spending exception to the P&I Clause to bring the doctrines into harmony).
297. See discussion supra Part IV.A.
hiring requirement—suggested that the local hiring requirement would serve as a bar to black Philadelphians’ employment on Camden construction jobs. They claimed that “an out-of-state resident is excluded from access to a significant segment of private sector employment opportunities, regardless of whether he or she is unemployed, a minority, or possesses more skills for the requisite job. Similarly, a long-term Camden resident is preferred over a new arrival, solely on the basis of length of residence within the municipality.”

In oral argument, the lawyer for the trades—responding to a question of why the P&I Clause still applied even though the ordinance also adversely affected New Jersey residents—argued that “specifically we believe that more non-residents, given the location of Camden, two miles from the center of Philadelphia, the fourth largest city in the country, are going to be adversely impacted.” The petitioners’ lawyer also took aim at the fact that Camden had not demonstrated by sufficient evidence that non-residents were a source of the evil that Camden was trying to remedy with respect to minority unemployment, pointing out that “the City of Philadelphia has suffered many of those same problems over the last decade. There is no evidence and no basis for assuming that Philadelphians or Pennsylvanians or Delawarians [sic] have caused any of these problems to be suffered by Camden.”

In this way, Camden was put in a lose-lose posture in the case, as it was required either to show that the burden its policy placed on out-of-state residents was sufficiently justified by evidence as to the harm they were causing, or to show that its policy did not really place such a burden on non-residents. If the City presented evidence (if it had any at all) that non-residents would not be burdened because it expected to hire more black Philadelphians who were themselves products of the Philadelphia Plan and subsequent affirmative action efforts, it would have to admit that it was actually seeking close to 65% minority employment—i.e., 25% out-of-state workers of color and 40% city residents of color. A perceived effort to reserve nearly 2/3 of jobs for black workers would likely have rankled the justices, even those sympathetic to affirmative action. However, if Camden presented no evidence of the harm caused by non-Camden residents, it would have appeared to lack sufficient evidentiary justification for the

calling; the plaintiff challenging the requirement lived in “Lower Waterford, Vermont, about 400 yards from the New Hampshire border.”)


301. Id.
ordinance to overcome the burden it was placing on the fundamental rights of non-resident workers, including on workers of color in Philadelphia.

**ii. Options After Camden**

To pursue local hiring as a race-neutral alternative to affirmative action, cities have grappled with how to overcome the P&I Clause issues raised in *Camden*, taking one of two approaches: narrowing their scope to eliminate the impact on out-of-state workers, or bolstering them with a “substantial justification.”

One approach has been to narrowly define the scope of the local hiring calculation to exclude out-of-state workers. This approach has appeared to provide a total defense to P&I Clause-based challenges. Cleveland’s Resident Hiring Law, for example, requires that Cleveland residents perform 20% or more of the total construction worker hours on city-backed contracts, with construction worker hours defined as excluding “the number of hours of work performed by non-Ohio residents.”

Such approaches are viable in constitutional terms because the P&I Clause does not grant standing to in-state workers, which the Court explicitly recognized in *Camden*. The P&I clause’s sole aim is preventing states from discriminating against *out-of-state* residents in core privileges of citizenship, such as the right to pursue a common calling. Excluding out-of-state residents from the reach of a local hiring measure thus appears sufficient to overcome any P&I Clause difficulties. Indeed, the Sixth Circuit Court of Appeals confirmed as much in a case in which Cleveland challenged the federal highway and transportation agency’s withdrawal of funds from a project based on a contract provision the City inserted because of the Resident Hiring law. While the Court of Appeals upheld the agency’s decision as a reasonable interpretation of its regulation barring cities from introducing such provisions into bidding processes, it stated plainly that the wording of Cleveland’s law, by excluding out-of-state residents from its calculation of construction work hours, took it outside *Camden*’s holding with respect to the P&I Clause.

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302. CLEVELAND, OHIO, CODE OF ORDINANCES § 188.02 (2016).
303. CLEVELAND, OHIO, CODE OF ORDINANCES § 188.01(c) (2016).
304. *Camden*, 465 U.S. at 217 (“And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause.”) (citing *The Slaughter-House Cases*, 86 U.S. 36 (1872)).
305. *Camden*, 465 U.S. at 221 (“Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents. But that same exercise of power to bias the employment decisions of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause.”).
306. City of Cleveland v. Ohio Dep’t of Transp., 508 F.3d 827, 850 (6th Cir. 2007) (“Although the legality of local hiring preferences that discriminate against interstate employers has been undermined
One prominent supporter of local hiring, the Partnership for Working Families, advises policymakers investigating local hiring approaches to consider adopting Cleveland’s approach when data shows that “few out-of-state workers are employed in the sector...thereby creating a legal defense to a Privileges and Immunities challenge while causing minimal disruption to targeted hiring goals.”  

Cleveland’s approach has, in turn, been adopted by a variety of other major cities, such as San Francisco and Seattle.  

If, however, excluding out-of-state workers is not an option—which, for many cities, it may not be, given geographic realities and the ease of travel from other states—cities looking to use local hiring measures must otherwise overcome the P&I Clause hurdle by demonstrating a “substantial justification” for discriminating against out-of-state residents. This second approach is risky, and the Partnership for Working Families advises policymakers that they face a very high burden in doing so.  

The case law in this area confirms that analysis. The Supreme Court has held that “the inquiry in each [P&I Clause] case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them,” with the proviso that “[t]he inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.” Despite this language about deference, however, a number of courts have focused narrowly on the need for cities to prove causation. In those post-Camden cases where cities have failed to demonstrate that out of state residents are a source of unemployment, courts have ruled against the ordinances. This has been the case even where the Supreme Court’s decision in United Building and Construction Trades Council v. City of Camden, discussed earlier, the Lewis Law does not fall within that prohibition, and it is not clear that Congress would condemn it.  


308. S.F., CAL., ADMIN. CODE § 6.22(g)(3)(E) (2018) (“Project work hours performed by residents of states other than California shall not be considered in calculation of the number of project work hours to which the local hiring requirements apply.”).  

309. SEATTLE, WASH., MUN. CODE § 20.37.040(H) (2018) (“In determining compliance with the percentage hiring requirements of sections 20.37.050 (A) and (B), the Director shall exclude from the calculation Labor Hours performed by Residents of states other than the State of Washington.”).  

310. For example, if a New York City law were to exclude non-New Yorkers from these calculations, it would have zero impact on contractors’ ability to use near-at-hand workers from New Jersey and Connecticut.  

311. P’SHP FOR WORKING FAMILIES, supra note 307, at 2 (“Entities of government wishing to put forth a “substantial reason” in defense of targeted hiring measures that discriminate against out of state residents have their work cut out for them.”).  


313. See, e.g., Hudson Cty. Bldg. & Constr. Trades Council v. Jersey City, 960 F. Supp. 823, 830–31 (D. N.J. 1996) (“It is necessary to inquire whether City Ordinance 96–022 bears a close relation to a substantial reason for the difference in treatment and whether the actions of nonresidents are a source of
cities have offered evidence of extensive alternative efforts to increase the employment of city workers. 314

One exception to this trend was in a challenge to the District of Columbia’s First Source Employment Agreement Act, first passed in 1984 and updated in 2011 by the D.C. City Council. 315 The ordinance required that all beneficiaries of a government-assisted project, including all construction projects receiving $300,000 or more in benefits from the District, enter a first source hiring agreement with the District, requiring that they (1) first attempt to hire off of D.C.’s first source hiring list for all jobs created by the project or vacancies occurring during the project, and (2) ensure that 51% of employees hired onto the project are D.C. residents, unless the Mayor grants a waiver based on an employer’s good faith effort to comply. 316 There are even stricter requirements set out for projects of $5 million or more, including that D.C. residents be employed for 20% of journey worker hours, 60% of apprentice hours, 51% of skilled laborer hours, and 70% of common laborer hours. 317

Contractors challenged the First Source law on a number of grounds, including as a violation of the P&I Clause. Rather than rest on the argument that the Clause did not apply to a non-state, however, D.C. defended its action by arguing that, even if the P&I Clause applied to it, the First Source law was a valid residence preference because of “the grave economic disparity that it faces as a result of its inability to levy a commuter tax on non-residents, who hold 70 percent of jobs in the District,” a situation “legally mandated by Congress in the Home Rule Act” which “creates a structural imbalance unlike that faced by any other jurisdiction in the country, one which the First Source Act aims to alleviate.” 318 The Court

the evil which the ordinance combats . . . . Jersey City has demonstrated its problems with unemployment and poverty, but it has not shown that out-of-state workers are a source of unemployment and poverty within its borders. It is unlikely that Jersey City can make such a showing."

314. See Util. Contractors Ass’n of New England, Inc. v. City of Worcester, 236 F. Supp. 2d 113, 119–20 (2002) (“Though I am deeply moved by the City’s arguments and the submissions of amici describing in detail the efforts Worcester has made, through the RRO and otherwise, to empower its residents, the case law compels me to find that the plaintiffs are likely to succeed on the merits of this claim. Even if I were to accept that poor economic conditions are a sufficiently substantial reason to defeat the plaintiffs’ claim (and I have seen no case that has so held), I cannot accept that nonresidents are the peculiar source of the evils Worcester has described as the Camden case requires. It is more than a stretch to suggest that nonresident employment on public construction projects—or in the construction sector generally—is responsible for the far-reaching economic problems the City describes. Discrimination predicated on such a finding smacks of the very interstate protectionism that the Privileges and Immunities Clause is intended to combat.”) (internal citations omitted).


accepted the premise that the District faced a unique situation unlike that in any previous P&I Clause challenge to a local hiring law, but ultimately denied the motion to dismiss the P&I Clause claim on this basis alone, finding that it would be premature to do so absent a full factual showing as to whether the requirements were justified by the inability to levy the commuter tax. As of this writing, the First Source law survives intact.

Still, the fact that the Court in Camden remanded the factual determination as to whether the City had a substantial justification for its ordinance suggests that there must be some way for a city to meet its burden here. It seems hard to believe that the District of Columbia could be the only city that could do so. Unfortunately, the lack of clear judicial guidance as to how much “proof” one has to offer to establish a substantial justification for burdening the P&I Clause has led cities that presumably cannot effectively adopt the Cleveland approach to be wary of enacting broader local hiring requirements. In New York City, for example, the city’s Economic Development Corporation has cited the P&I Clause “as the reason New York City cannot impose legal mandates.” The City has apparently extended a “HireNYC” policy that requires certain Economic Development Corporation projects to make a good faith effort to hire locally, but it appears uneasy about enacting actual requirements due to its concerns about challenges under the P&I Clause.

D. State Preemption of Local Hiring

An additional layer of challenges for cities has recently emerged in state legislatures: preemption statutes that seek to block municipalities from enacting local hiring requirements and to undo ordinances already on the books. While states have used preemption statutes for years to thwart local innovation in areas like the minimum wage, there was no concerted push to use preemption statutes to thwart local hiring programs until fairly

319. Id. at 25–26 (“At this stage in the litigation, the District has not provided sufficient substantive evidence for the Court to determine whether the First Source Act’s residential hiring preferences for construction projects funding in whole or in part by the District are narrowly tailored to address the unique evil of the District’s inability to levy a commuter tax. This is a fact-intensive inquiry that cannot be resolved on a motion to dismiss—there have been no findings of fact made in this case, nor has there been any discovery and no declarations have been filed by anyone.”).


321. Id.

Recently, however, the fact that preemption has arrived in this area is perhaps not surprising, given the increasingly-documented economic disparities between urban centers and rural communities, and the growing sentiment among some that cities may be to blame.

In the spring of 2016 the Ohio state legislature, spurred by the Ohio Contractors Association and two Republican legislators who “ argued that local hiring rules shut out workers in their regions from getting construction work in big cities,” set out to undo Cleveland’s longstanding local hiring ordinance. In May 2016 the legislature passed H.B. 180, banning municipal governments from enacting local hiring laws. Republican Governor Kasich subsequently signed H.B. 180 into law.

To date, however, Cleveland has been able to successfully block enforcement of the law. The City quickly sued for and won a preliminary injunction from a state court judge, before the law went into effect, arguing that it was enacted in violation of the Ohio State Constitution’s home rule provisions. In January 2017, the judge granted a permanent injunction, agreeing with the City’s home rule argument. The state appealed, but lost again before a three-judge state appellate panel.

Arguments grounded in home rule, however, will only prevail in states with well-developed home rule doctrines; thus, these decisions really offer no controlling guidance for cities in other states. Members of the Ohio Legislative Black Caucus, however, pointed to another possible argument, when they argued (before Gov. Kasich signed the law) that H.B. 180 would “disproportionately harm African American workers and minority

327. Id.; H.B. 180, 131st Gen. Assembly (Ohio 2016).
329. See OHIO CONST. art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”); Leila Atassi, City of Cleveland Sues State Over Law Banning Local Hiring Requirements, CLEVELAND.COM (Aug. 23, 2016), http://www.cleveland.com/metro/index.ssf/2016/08/city_of_cleveland_sues_state_o.html.
communities while jeopardizing infrastructure projects in Cincinnati, Toledo, Akron and Cleveland.” If a city facing such a state preemption law argued that it was designed to hurt workers of color, it could challenge the law as being passed with discriminatory animus. Such an approach is currently being tested in Alabama with respect to the state’s minimum wage preemption law. While a federal district court rejected the argument, holding plaintiffs lacked standing and had failed to state a claim, a three-judge panel of the Eleventh Circuit reversed, finding plaintiffs had stated a plausible claim that the preemption law had the purpose and effect of depriving Birmingham’s black citizens equal economic opportunities on the basis of race and allowing their claims to proceed.

The City of New Orleans, which enacted a local hiring ordinance in 2015, was able to avoid Cleveland’s fate (at least temporarily), persuading state legislators not to enact their proposed local hiring preemption statute. Nashville, Tennessee, on the other hand, has not fared so well in the face of state opposition. After voters overwhelmingly approved an amendment to the city charter in August 2015—with a 40% Davidson County local hiring requirement and a requirement for a significant effort to ensure 10% total construction worker hours were performed by low income residents—state lawmakers swiftly passed a preemption law in early 2016. As of this writing, that state pre-emption bill still stands, and Nashville appears to have largely abandoned its effort.

334. See Lewis v. Governor of Ala., 896 F.3d 1282, 1299 (11th Cir. 2018), reh’g en banc granted, No. 17-11009 (Jan. 31, 2019).
336. The bill’s failure may have been the result of poor legislative drafting, which led LGBT advocates (among others) to oppose the bill, arguing that it would invalidate municipal non-discrimination ordinances, as the bill banned any requirements for contracting more restrictive than the state’s. See Jarvis Deberry, LGBT Advocates Say Bill Reversing ‘Hire NOLA’ Would Void Anti-Discrimination Laws, NOLA.COM (Apr. 7, 2016), http://www.nola.com/politics/index.ssf/2016/04/louisiana_lgbt.html.
V. TARGETED HIRING

A. Embracing a Multi-Factor Approach

Perhaps in response to the perceived arbitrariness of preferring workers based solely on where they live, advocates are increasingly shifting away from “local hiring” and toward adoption of a more multi-factor approach: “targeted hiring.” A recent report from the UCLA Labor Center explains that while local hiring programs “require direct hiring of residents of specific local areas,” targeted hiring “refers to hiring requirements for target groups, such as minorities, women, or low-income workers...encompassing different segments of the population across geographic regions.”340 Targeted hiring programs, unlike local hiring programs, “target[] workers who are traditionally underserved and underrepresented in the industry, including both those who are new and those who are struggling to stay on a career track in construction.”341 The report notes that many initiatives have adopted elements of both local and targeted hiring, and includes Cleveland in this category.342

Targeted hiring programs first emerged in the cities of Oakland and Los Angeles, in the context of major redevelopment projects including the Port of Oakland343 and the Los Angeles Unified School District’s school rebuilding program.344 The City of Seattle, however, appears to have gone the furthest to date in experimenting with a citywide targeted hiring program;345 for this reason, the sections that follow focus in on Seattle’s implementation of targeted hiring, “Seattle Priority Hire.”

i. Seattle Studies the Sector, Legislates

Seattle, a progressive city that has emerged as a national leader on issues of economic justice such as the minimum wage,346 is leading the

341. Id. at 13–14 (emphasis added).
342. See id.
343. Parkin, supra note 21, at 394–95.
move toward targeted hiring. Community organizers with the Construction Jobs Equity Coalition pushed hard for a local hiring program after watching Seattle develop a new community center “in a community where there was disproportionate unemployment and a real clamor for job opportunities,” where “there were plenty of talented, skilled, trained and ready to work folks.” The city, in turn, commissioned studies confirming that low numbers of residents, people of color and women were employed on city-backed projects. The data led Seattle to pursue a pilot targeted hiring program for the Elliot Bay Seawall Project, the largest public works project in Seattle history. The pilot’s success served as a “stepping stone” which led the city to adopt a citywide program. As a result, the Seattle City Council passed a Priority Hire ordinance, which was signed by Mayor Ed Murray in January 2015, establishing Seattle Priority Hire.

Rather than simply mandate hiring of “Seattle workers,” the ordinance targets “disadvantaged workers,” giving that term a more capacious meaning than would be possible under a local hiring scheme. First, Seattle has identified target zip codes, both within the city and within King County, which it identifies as “economically distressed ZIP codes” based on three indicators: (1) percentage of residents living under two-hundred percent of the federal poverty level; (2) the unemployment rate; and (3) percentage of residents over twenty-five years old without a college degree. Under the ordinance, workers from these areas are considered “Priority Workers.” The ordinance set a goal that, by 2016, no less than 20% of hours per covered project be performed by priority workers, and empowers the Director of Finance and Administrative Services to set higher goals per-

350. See id.
352. In 2017 this means single residents making less than $24,120 annually, families of two making less than $32,480 annually, families of three making less than $40,840 annually, and families of four making less than $49,200 annually. I derived these estimates by multiplying the federal poverty level for the 48 contiguous states and the by 2. See U.S. DEP’T. OF HEALTH AND HUMAN SERVS., HHS POVERTY GUIDELINES FOR 2017, https://aspe.hhs.gov/2017-poverty-guidelines.
project “to maximize the impact of this program in Economically Distressed Areas.” 354 It further aims for priority workers to work 40% of all hours on covered projects by 2025. Covered projects are defined as those worth $5 million or more. 355

These are not strict quotas, nor do they require any single contractor to abide by a fixed goal. Seattle thus retains the flexibility to work with contractors, recognizing that different jobs may require skills for which sufficient local workers may not be available, particularly in smaller trades. It also empowers the Director to reduce or waive the requirements altogether when impracticable, on a case by case basis. 356

Finally, the ordinance gives the Director the ability to establish aspirational goals for the employment of women and racial minorities on specific projects, the “greatest practicable aspirational goals, using the average of past utilization on similar projects in the previous three calendar years and increasing that percentage by no less than two full percentage points beyond past performance.” 357 And, it specifically requires bidders to evidence “good faith efforts” to achieve those goals. 358 The lack of fixed statutory targets seems designed—at least in theory—to avoid the problem the Court identified in Croson of an “unyielding” racial quota.

ii. Securing Union Support

A notable aspect of Seattle Priority Hire is its partnership with building and construction trades unions—no easy feat considering the history of conflict between civil rights activists and construction trade unionists in the City. 359 Winning this support was a priority for Seattle. The UCLA study Seattle commissioned highlighted the example of East Palo Alto, which had experimented with targeted hire but had lacked buy-in from its unions. As the study notes, an ordinance on its own “cannot influence or change the union hiring hall priority referral system.” 360 and in East Palo Alto this meant that unions “continued to dispatch workers based on seniority, and not by residency.” 361

Seattle’s ordinance therefore directed the program to negotiate an agreement with unions that represented workers who typically work on city projects; Seattle subsequently negotiated a master “Community Workforce

358. Id.
361. Id.
Agreement” (“CWA”) with the Seattle-King County Building and Construction Trades Council and the Northwest National Construction Alliance II.362

This was not just an agreement with one progressive union leader: it was signed by leaders of fifteen different building and construction trades unions.363 Two major factors drove the unions to support the Priority Hire effort. First, unlike in the early 1970s, Seattle is currently in the midst of a building boom, so much so that the city’s construction workforce cannot keep up with the new job opportunities.364 As a result, the dynamic of fear and retrenchment among white union workers appears to have diminished, at least in the current moment.365 The second factor was the larger shift in the industry as a whole, particularly the rise of non-union contractors, described above.366 These changes mean that, unlike in the early 1970s, the union sector faces stiff competition from non-union contractors.367 Faced with these new realities, building and construction trades unions around the country pushed government entities to make the signing of Project Labor Agreements (PLAs) a condition of working on taxpayer-funded work,368 and began working to win them on projects throughout the country.

Unlike traditional pre-hire agreements, which were negotiated by craft, PLAs are “project-specific, uniform agreement covering all the crafts on a project, and lasting only as long as the project, serving as a kind of “job site constitution” that “governs over various area craft agreements, setting


365. See id.

366. See discussion supra Part II.

367. See Weil, supra note 36, at 458 (explaining that for various reasons the market advantage of union contractors “has diminished as other nonunion players have built their capacity to undertake work”).

A typical PLA “covers wages, benefits, and other terms and conditions; standardizes otherwise incompatible work schedules and apprentice-journey-level ratios; and provides for dispute resolution on the covered project.” Both non-union and union contractors can win work under a project governed by a PLA, but they must agree to abide by its terms. Compliance is often a steeper lift for non-union contractors whose business models depend on lower labor costs. PLA requirements have been a source of much litigation, but they have largely been upheld by courts; they are used widely today at local, state, and federal levels.

The Seattle CWA reflects a new type of PLA—one that “include[s] provisions to promote social investment and to create career opportunities for economically disadvantaged populations.” CWAs first originated in Los Angeles and Oakland, where “construction unionists and community leaders came together—often after contentious campaigns—to explore ways to simultaneously address building trades’ interests in capturing work and community interests in expanding access to unionized construction careers.” Unions have also been forced to the table with the community due to increased skepticism of PLAs and by their declining membership share of the construction workforce.

The Seattle CWA marries the city’s interest in promoting targeted hiring with the unions’ interest in protecting job standards. The CWA sets

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370. Id. at 3.
374. Maria Figueroa, Jeff Grabelsky, & J. Ryan Lamare, Community Workforce Agreements: A Tool to Grow the Union Market and to Expand Access to Lifetime Careers in the Unionized Building Trades, 38 LAB. STUDIES J. 7, 8 (2013).
375. Id.; see also Parkin, supra note 21, at 394–95.
376. Figueroa, Grabelsky & Lamare, supra note 374, at 8. (“It has, therefore, become a strategic imperative for building trades leaders to make a persuasive and compelling case that PLAs serve the public interest. That case cannot be made simply by touting cost efficiencies alone. Arguing that PLAs encourage safer job sites or discourage work stoppages—both demonstrably true claims—has proven largely unconvincing to elected leaders and the general public. Likewise, showing that unionized construction jobs are high quality, family supporting, and economically stimulating is unlikely to engender broad community support if those communities have no confidence that there will be fair and equitable access to those jobs. Because CWAs appear to be an effective tool to ensure both job quality and job access, they offer an argument likely to resonate in the public domain.”) Some cities, such as San Diego, have banned their use altogether.
377. See Parkin, supra note 21, at 394 (“After experiencing years of declining membership and witnessing the rise of the non-union construction labor force, union leaders understood that they lacked the power to simply demand that the Port’s construction jobs go to union labor.”).
out procedures that the unions agree to follow for referring workers to projects:

Unions shall first dispatch Priority Workers, and shall continue to prioritize the dispatch of such workers even after the required percentages are stabilized and suggest the Prime Contractor will achieve the requirements. The Union shall prioritize dispatch of Priority Workers who are residents of Seattle ZIP codes first, and then dispatch Priority Workers from ZIP codes in King County, and then Priority Workers from any other economically distressed ZIP code.\(^{378}\)

The unions further agree that they “will dispatch women and people of color in a manner that best supports the aspirational goals for their utilization as agreed upon within the contract for the Covered Project,”\(^{379}\) and that they will employ apprentices for between 15 and 20% of the project hours,\(^{380}\) with a focus on meeting City-set goals for utilization of people of color, women and persons from economically distressed areas.\(^{381}\)

### iii. Compliance Monitoring

Seattle also recognized that the complexity of the Priority Hire program would require a sophisticated and capable compliance effort. To meet this challenge, it empowered the city’s Director of Finance and Administrative Services to monitor and staff the program, and also gave him or her broad enforcement powers—including actions such as withholding invoice payments or debarring contractors.\(^{382}\) It also empowered the Director to establish a Priority Hire Implementation and Advisory Committee that included representatives of labor, community organizations, contractors and apprenticeship programs, and provided that it would play “an advisory role to the City regarding the implementation and effectiveness of the Priority Hire policy.”\(^{383}\) The group must meet on at least a quarterly basis, receive staff support from the Director, and submit an annual compliance report.\(^{384}\)

The city also established a new Office of Labor Equity within the Finance & Administrative Services Department to oversee the program, which will have “eight people working in a variety of roles, including program operations, enforcement, job and training coordination, and oversight functions.”\(^{385}\) It also invested an additional $610,000 annually to

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378. SEATTLE CWA, supra note 362, at 17.
379. Id.
380. Id. at 17–18.
381. Id. at 18.
384. Id.
385. BUILDING AMERICA WHILE BUILDING OUR MIDDLE CLASS, supra note 349, at 15.
support pre-apprenticeship programs and other resources “that help residents enter and stay in the construction industry.”

**B. Assessing Seattle’s Results to Date**

Overall, the City of Seattle appears pleased about the success of Priority Hire to date, so much so that Mayor Murray issued an Executive Order seeking to expand its reach to additional projects not currently covered by the statute. In early 2017 Seattle’s Purchasing and Contracting Department released its first annual report on the program, covering implementation results over three years—which includes both the period since the ordinance’s enactment as well as that of the Seawall pilot project. As of February 2017, seven large projects were covered by the Priority Hire ordinance and Community Workforce Agreement. The Department anticipated nine more projects would be added in 2017.

The Department’s numbers are encouraging, suggesting an overall picture of progress to date. Disadvantaged workers (i.e., from all of the target economically distressed zip codes) have performed 21% of the work on covered projects, compared with past performance (based on a sample of comparable projects from 2009–13) of 12%. As the report noted nearly 80% of the population of these zip codes are people of color. Black workers saw their share of journeymen hours increase from 3% prior to Priority Hire to 7%. Latino workers saw a small decrease, though the city

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386. Id.
388. 2016 ANNUAL REPORT, supra note 362.
389. Id. at 21, Ex. 16.
390. Id. at 21, Ex. 17.
391. Id. at 14.
392. Id. at 15.
393. Id. at 16, Ex. 9.
attributes this to changes in how it has tracked race/ethnicity for them.\(^\text{394}\) On the whole, journey workers of color did not experience an overall increase in their share of hours, though the report notes that there has been a slight uptick in the share since June 2016.\(^\text{395}\) Apprentices of color, however, worked 47% of apprentice hours on covered projects, compared to 32% prior to the ordinance, and all but two of the projects were exceeding their minimum apprentice utilization goal.\(^\text{396}\) This bodes well, the report notes, as the goals for journey worker utilization will increase over the coming years, as apprentices graduate from their programs and into full journey worker status. All of these increases were observed among both union and non-union contractors; further, Seattle observed increases in diversity on non-covered projects as well, which “eliminates the theory that a contractor is simply shifting diverse workers” onto covered projects.\(^\text{397}\)

The Department’s report outlined a number of areas for potential improvement. For one, it indicated that it had updated the targeted hiring zip codes, adding additional areas in King County with “notable people of color population densities.”\(^\text{398}\) It also indicated it was planning to take more aggressive steps to recruit and retain apprentices of color, including by filling income gaps between apprenticeships and jobs, and to boost hiring of already-trained journeymen of color.\(^\text{399}\)

While the city was primarily focused on numbers and other problems with respect to job access, the Priority Hire Advisory Committee suggested further areas for improvement with respect to industry culture, in order to foster a “culture change” that would “transform the construction industry so that all people can succeed and thrive in their chosen vocation.”\(^\text{400}\) The Committee particularly noted that, “In order to succeed once on the job, the construction culture needs to change so that experiences such as poor treatment, inequitable job assignments and/or limited training options to develop necessary skills do not continue to impact retention or career advancement for Priority Hire workers.”\(^\text{401}\) It noted, in particular, that many priority workers encounter “poor treatment on the jobsite,” “aren’t given

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\(^{394}\) Id. at 16 (“The data metrics were adjusted to accommodate new software, which added some new ethnicity reporting options (Other and Not Specified). As a result, people of color may be reported under Not Specified. . . . Latino journey workers registered the greater recorded drop in the share of hours worked (See Exhibit 9). However, that is the population most likely to be affected by the change in ethnicity options and less likely to be a result of fewer worker placements.”).

\(^{395}\) Id. at 16.

\(^{396}\) Id. at 16.

\(^{397}\) Id. at 14.

\(^{398}\) Id. at 16.

\(^{399}\) Id. at 12–14.


\(^{401}\) Id.
equitable opportunities for meaningful on-the-job experience” and “aren’t retained after job completion,” recommending that the city do more to provide incentives for contractors to provide good experiences and also institute additional enforcement tools, such as pursuing liquidated damages and creating a poor performer list.

The Advisory Committee did, however, seem to indicate that the city has been very responsive to the challenges it has identified; each of its recommendations includes a list of responsive city actions already taken to date. Moreover, many of the challenges found their way into the Department’s report, particularly with respect to workplace environment and its impact on apprenticeship retention. The Department described plans to pursue a significantly stepped-up enforcement strategy to combat worksite harassment and improve worker experiences.

VI. CONCLUSION: PUSHING TARGETED HIRING TO ITS LIMITS

A. Flipping the Script of Union Opposition

Several commentators have argued that one of the major reasons that affirmative action policies in employment became so divisive is that they hit the economy at a point of overall contraction. The construction sector was a potent example of this. For decades, construction jobs seemed to be growing and growing, along with government investment in infrastructure. Yet at the very moment that African-Americans finally, through affirmative action policies, forced their way into the sector, job opportunities contracted. This was the economic dynamic that fueled much of the racial resentment of white building and construction union members.

402. Id. at 8–9.
403. Id. at 9.
404. 2016 ANNUAL REPORT, supra note 400, at 11–12.
405. See, e.g., WEISS, WE WANT JOBS, supra note 170, at 134–35 (“In the economy in general, and in the construction industry in particular, the economic decline following 1968 increased the stakes and transformed the context of the struggle over affirmative action. By 1969, black demonstrators and white construction workers were engaged in a bitter struggle for increasingly scarce resources.”); Goldberg & Griffey, supra note 10, at 194 (“The reaction of many white tradesmen to the gradual inclusion of black workers in the industry blamed affirmative action for something it had nothing to do with—the extremely high rates of unemployment that devastated the entire construction industry during the 1970s. There is no doubt that there were a few years in the early 1970s when the hometown plans prevented the unions from providing jobs or apprenticeships to white workers. And in the mid- to late 1970s, the court-ordered desegregation of unions that resisted the home-town plans resulted in some white workers not having access to the jobs and apprenticeships they felt entitled to. But these losses were minor compared to the massive injuries inflicted on all construction workers during the 1970s by a recession that left more than three-quarters of tradesmen in some cities regularly out of work. The tacit acceptance of the normalcy of economic downturns in a capitalist system minimized this understanding, however. And the growing threat of nonunion labor made new construction workers—first nonwhite men, then nonwhite women, and then white women—easy scapegoats for white men during prolonged periods of unemployment.”).
The fact that we are currently in a moment of expansion in construction opportunities, as in Seattle, has made it possible for unions to support targeted hiring in the current moment. This support is not, moreover, exclusive to targeted hiring, as building trades unions have more recently started supporting some local hiring programs as well.406

Whether or not President Donald J. Trump’s proposals for infrastructure spending are adopted, the sad state of the nation’s core infrastructure407 and the continued sluggishness of the American economy408 suggest that national political leaders are likely to continue to press for increased national infrastructure investment for years to come. Yet contemporary national discussions about the construction sector, including those surrounding the proposals of President Trump and other leaders looking to boost infrastructure spending, tend to ignore or elide the realities of continued discrimination in the building and construction trades.409

President Trump’s descriptions of his plans, however—as well as his aggressive courtship of the building trades unions410—make clear that he, a former real estate developer, fully appreciates the continued racial disparities of the construction workforce. His actions also suggest that he fully intends for his plan to primarily benefit the core white male demographic that propelled him to victory, rather than creating career pathways and opportunities for workers of color. The most visible sign of this approach to date is the Department of Transportation’s decision to

406. See, e.g., Joshua Sabatini, Local Hiring Law Succeeding Despite Concerns over Skilled-Labor Supply, S.F. EXAMINER (June 7, 2016) (quoting Supervisor John Avalos explaining that “Now labor organizations, like the electrical workers, who opposed passage of local hiring have embraced the ordinance which serves as a model for the rest of the country.”), http://www.sfexaminer.com/local-hiring-law-succeeding-despite-concerns-skilled-labor-supply/.
rescind a proposed rule change that has allowed cities to use local hiring preferences on DOT-funded construction projects since 2015, so long as those preferences did not violate federal law. 411 At the same time, Trump has declined to extend his administration’s efforts to undo labor protections to construction workers, holding off (for now) on a full-scale effort to kill prevailing wage laws. 412 Given the administration’s history of attempting to pit groups against one another, it would not be much of a stretch to imagine Trump asserting, in the future, that there is a zero-sum proposition here for infrastructure spending, telling construction unions that they can have prevailing wages or local/targeted hiring, but not both.

To be clear, the DOT’s decision to drop the rule change does not endanger most existing local hiring programs, which are currently by and large not applied to federal spending. 413 But it does create a real limit on local lawmakers’ ability to apply such programs to future federal investments. Rather than turn away in the face of this rule change, however, it is critical that advocates and cities press ahead to leverage the current growing economic environment and attempt to avoid the historic dynamic of entrenched union opposition to policies promoting hiring access for workers of color. As discussed above, to the extent that they preserve high labor standards, local and targeted hiring programs pursued during moments of growth for the construction sector should be able to win union support. A potential federal infrastructure package thus offers one opportunity for advocates to build such support by forming a coalition to press for inclusion of both prevailing wage and local/targeted hiring provisions in any bill Congress passes. This would effectively override the effects of the DOT’s withdrawal of the rule change. 414

It would be foolish, however, to suppose that union support alone would insulate or protect local and targeted hiring programs from further challenges. As the programs move outside of large, progressive west coast
cities, we are likely to see challenges brought by non-union contractors. And in areas with weaker union construction markets, unions may very well oppose the programs if they are enacted without assurances of high labor standards.

B. Legal Questions Facing Targeted Hiring Programs

To date, there do not appear to have been any major challenges brought to targeted hiring in particular. Does this mean that targeted hiring has solved the challenges created by the Court’s jurisprudence in the affirmative action and local hiring arena? Could it provide a way to unite a multitude of goals under one banner, making a statute more comprehensive and, in turn, less susceptible to challenge? In short, are they carrying forward the promise of the local hiring as race-neutral complement that was upheld in White?

Though the White Court never ruled expressly on the race-based hiring aspect of the Boston executive order, it chose to overlook its mixture of race-based goals in legislating both a race-based hiring requirement and a local hiring requirement. Again, it is important not to over-read White. But there appears to be no other case where interrelated goals such as those at issue in the White executive order have been squarely challenged; White is thus likely the best case on point.

Targeted hiring can offer a rationale that local hiring alone could not (at least in Camden): one of combating a persistent and interlocking set of inequities that have no one cause, no one “source of evil.” To be sure, this kind of argument about whether out-of-state workers, or out-of-town workers, constitute a source of evil is a legal formalism, but it is one that should have valence for courts with respect to their P&I Clause concerns. Indeed, it seems the more that cities can demonstrate that their programs are complex, sensitive, and multi-factor, the more they should be able to justify their existence from a Privileges & Immunities perspective. While this is not a necessary path for Seattle, which for now exempts out-of-state worker hours from its priority hire calculations, it will be critical for cities like New York and Philadelphia which straddle state lines and thus cannot use the Cleveland approach to shield any potential targeted hiring programs from P&I Clause challenges.

Perhaps what is most unclear, however, is how far cities can take race-conscious goals into account under the Equal Protection Clause as they craft targeted hiring programs. Seattle’s “aspirational” race-conscious goals are undefined in the statute, but may be set out on a per-project basis by the city purchasing department. It remains to be seen what will transpire if one of these goals were challenged in court. Would they be accepted because they are only aspirational? Would they be rejected if the City had not shown they were a last resort?
Seattle’s choice of who counts as a disadvantaged worker, which mainly stems from living in an economically distressed zip code, is by no means the only race-neutral category that advocates have proposed be used in targeted hiring programs. One notable example is the community workforce agreement brokered in Los Angeles in 2011, which covers a light rail project expected to generate 6,700 construction jobs. That agreement allocated 30% of the jobs to high-unemployment communities and an additional 10% to individuals who faced “barriers to employment.” Those barriers include: “(1) being homeless; (2) being a custodial single parent; (3) receiving public assistance; (4) lacking a GED or high school diploma; (5) having a criminal record; or (6) suffering from chronic unemployment.” These factors are clearly intended to serve as race-neutral criteria that will nonetheless open up more opportunities for workers of color.

Based on the current state of the case law, the targeted hiring approach—which uses race-neutral means and more limited, “aspirational” race-conscious goals—may very well be the best that advocates in this moment can do, no matter what we may think of how that case law was decided. Still, I am struck by the extent to which all of the targeted hiring categories, primarily those that measure economic disadvantage, are imperfect proxies for race. What happens if, having pursued targeted hiring programs vigorously, cities still find that workers of color are being left behind because the systemic racial inequities in the system cannot be overcome without race-conscious solutions? At what point may they go further than Seattle has and introduce mandatory race-conscious goals—or, at the very least, more concrete race-conscious goals—back into the mix of targeted hiring?

Ben Beach of the Partnership for Working Families advises that “targeted hiring measures that contain explicitly race-based preferences would be unlikely to survive legal challenge unless (a) supported by a substantial disparity study demonstrating past discrimination in the relevant market and (b) narrowly tailored to remedy the disparities identified in the study.” While Beach is undoubtedly correct as to how racial preferences would be viewed on their own, it is unclear how they would be treated as part of a larger, comprehensive targeted hiring policy, as this question has not been tested in the courts. Unlike the affirmative action in the Supreme Court’s college admissions cases, which have upheld holistic race-conscious policies, affirmative action in employment based on a multifactor

415. BUILDING AMERICA WHILE BUILDING OUR MIDDLE CLASS, supra note 349, at 15.
416. Id.
417. Id.
418. Ben Beach, Missed Opportunities, P’SHP FOR WORKING FAMILIES BLOG (June 29, 2012), https://www.forworkingfamilies.org/blog/missed-opportunities.
or holistic approach has not been sufficiently litigated at the Court in a way that would shed light on how such a policy would be treated.

But is the time ripe for such a challenge? Justice Ruth Bader Ginsburg has in numerous instances expressed the view that we should be honest about our goals in using race-neutral criteria to advance race-conscious ends, rather than feigning indifference to their impact.\footnote{See, e.g., Gratz v. Bollinger, 539 U.S. 244, 305 (Ginsburg, J., dissenting) (“If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting) (“only an ostrich could regard the supposedly neutral alternatives as race unconscious. . . . [government actors] need not be blind to the lingering effects of ‘an overtly discriminatory past,’ the legacy of ‘centuries of law-sanctioned inequality’. . . . Among constitutionally permissible options, I remain convinced, ‘those that candidly disclose their consideration of race [are] preferable to those that conceal it.’”) (internal citations omitted).} For years, the Supreme Court’s elision of Ginsburg’s argument has resulted in the complex scaffolding we see currently erected in local and targeted hiring programs. The Court’s recent decision by Justice Anthony Kennedy in Fisher II, however, may reflect a new willingness (at least on his part) to rethink whether race-neutral criteria used to advance race-conscious ends are not really acceptable forms of race-conscious affirmative action. Kennedy noted that Texas’s 10% plan—which was not before the Court—could not truly be considered a race-neutral plan; nevertheless, his description of it suggested that he did not find it to be impermissibly race-conscious.\footnote{See Fisher v. Univ. of Tex. (Fisher II), 579 U.S. ___ (2016), slip op. at 16–17 (“Petitioner’s final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University’s students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are ‘adopted with racially segregated neighborhoods and schools front and center stage.’ ‘It is race consciousness, not blindness to race, that drives such plans.’ Consequently, petitioner cannot assert simply that increasing the University’s reliance on a percentage plan would make its admissions policy more race neutral.”) (quoting Fisher v. Univ. of Tex. (Fisher I), 570 U.S., at ___ (2013), slip op. at 2 (Ginsburg, J., dissenting)).}

Putting aside the question of what happens on a post-Kennedy court, I nonetheless suspect that given how firmly entrenched Croson is in our case law, it would be a near-impossible evidentiary burden for a city to overcome to show that it had really exhausted its race-neutral alternatives. Thus, today’s advocates for workers of color must—if they wish to overcome systemic discrimination in the building and construction trade unions—continue to embrace the complexity of targeted hiring and commit themselves to maximizing its benefits.

This complexity, to be sure, requires sophisticated compliance systems to ensure success, which raises the cost of entry for cities interested in addressing ongoing racial disparities in the skilled building and construction trades. As demonstrated by Seattle’s program, those compliance efforts require meaningful investment to succeed. But cities must not let these
complexities be barriers to action, nor should they wait till infrastructure spending becomes a reality to implement them.

C. Looking Forward: Local and Targeted Hiring’s Triumph Against the Odds

I wish to underscore, in closing, my feelings of optimism toward the ongoing struggle to achieve equal employment opportunity in the construction sector. Given Croson’s curtailment of race-conscious affirmative action, the fact that local and targeted hiring programs have continued to be designed, implemented, and upheld in court is a powerful testament to the creativity and persistence of advocates in this area, no matter what we may think of the limitations inherent in their facial race neutrality.

This work has created the legal and policy platform for workers of color to continue to pursue real pathways into the middle class through the construction sector. This has also made it possible for workers to reject the perspective pushed by low-road employers, who claim that the solution to discrimination in the building and construction trades is busting construction unions, eliminate the prevailing wage, and accepting a return to substandard working conditions.

A report released in early May 2017 that surveyed construction workers in six cities in the southern United States, where one in ten construction workers live and where union density is at its absolute lowest, provides a window into that alternative.421 More than half of construction workers surveyed earned less than $15/hour, and 36% of workers struggled to pay for basic necessities.422 One in seven of those workers was seriously injured at least once during the course of their career, 38% of them in the last 12 months.423 Most troublingly, more than one-third of these workers reported that their worksites did not provide them with access to drinking water as required by law.424

Workers of color and their advocates, by championing local and targeted hiring, have rejected that reality as their future. Their continued insistence that workers of color deserve the middle-class lives that white union construction workers attained in the twentieth century should be celebrated as a victory against incredibly long odds in the long struggle for equal employment opportunity. Workers of color and their advocates refused to accept Croson’s conclusion that cities could not remedy union

422. Id. at x.
423. Id. at 19.
424. Id. at 23.
structures that were, as Justice Marshall put it, wrought by discrimination. They simply found another way. Because of their collective leadership and struggle, the tools of local and targeted hiring, carefully honed in Croson’s wake, are here to stay, ready to be pressed into use.
