

Journal of Law and Policy

Volume 18 | Issue 1

Article 1

2009

Using Government Policy to Create Middle Class Green Construction Careers

Benjamin S. Beach

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Benjamin S. Beach, *Using Government Policy to Create Middle Class Green Construction Careers*, 18 J. L. & Pol'y (2009).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol18/iss1/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

USING GOVERNMENT POLICY TO CREATE MIDDLE CLASS GREEN CONSTRUCTION CAREERS

*Benjamin S. Beach**

INTRODUCTION

In the last several years, investment has flowed at significant scale into what has come to be called the “green economy.”¹ In particular, the development sector, which encompasses construction and rehabilitation of commercial, residential and other facilities and infrastructure, has embraced “green” in its materials, processes and products.² At the same time, federal,

* Staff Attorney, Community Benefits Law Center. The author would like to thank Scott Cummings, Evan Denerstein, Joanna Lee, Julian Gross and Adrian Martinez for comments on drafts and helpful conversations.

¹ Joel Makower et al., *The State of Green Business 2009*, GREENER WORLD MEDIA, Feb. 2009, at 28. Venture capital investment in green technologies soared to a record \$7.6 billion, double the previous year, according to Greentech Media.

Defining the “green economy” is beyond the scope of this article, which focuses specifically on green building and construction. A number of interesting, accessible articles have addressed the question of what constitutes a “green job,” including: Bryan Walsh, *What Is a Green Collar Job, Exactly?*, TIME, May 26, 2008, available at <http://www.time.com/time/health/article/0,8599,1809506,00.html>, and Raquel Pinderhughes, *Green Collar Jobs*, CITY OF BERKELEY, OFF. OF ENERGY & SUSTAINABLE DEV. (2007), available at http://www.michigan.gov/documents/nwlb/Green_Collar_Jos_236013_7.pdf.

² Makower, *supra* note 1, at 22. The number of Energy Star-certified buildings has increased from 90 buildings certified in 1999 to more than 3,200 in 2008. In 2009 alone, that number grew 230 percent, more than doubling from the 1,400 buildings that certified in 2007. For the last several years, the growth in certified projects in LEED for New Construction, LEED

state and local governments have entered the green development sector as funders, developers and regulators.³ Indeed, in 2009, billions of dollars flowed from public coffers to fund “green” development projects.⁴ This sudden and massive influx of funds should prompt stakeholders at every level to consider what policies will govern the expenditure of such funds, and what goals will be served by such policies.

Supporters have rightly justified government facilitation of green development on environmental grounds.⁵ But increasingly, in advancing arguments for this government activity, proponents, including the Obama administration, have focused on that most meaningful of economic benefits: jobs.⁶

Community-based and labor organizations around the country

for Existing Buildings, and LEED for Commercial Interiors, has enjoyed an annual growth rate of anywhere from 10 to 90 percent.

³ According to the U.S. Green Building Council’s website, “various LEED initiatives including legislation, executive orders, resolutions, ordinances, policies, and initiatives are found in 43 states, including 190 localities (126 cities, 36 counties, and 28 towns), 36 state governments (including the Commonwealth of Puerto Rico), 12 federal agencies or departments, 16 public school jurisdictions, and 39 institutions of higher education across the United States.” U.S. GREEN BUILDING COUNCIL: GOVERNMENT RESOURCES (2009), <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779> [hereinafter *USGBC Website*].

⁴ U.S. Green Building Council, *Select Highlights of Provisions Relevant to Green Building in the American Recovery and Reinvestment Act of 2009*, <https://www.usgbc.org/ShowFile.aspx?DocumentID=5458>. According to the U.S. Green Building Council’s website, the federal government has 2,831 projects pursuing LEED certification, state governments have 1,890 projects pursuing LEED certification and local governments have 2889 projects pursuing LEED certification. *USGBC Website, supra* note 3.

⁵ U.S. Env’tl. Protection Agency, *Why Build Green*, <http://www.epa.gov/greenbuilding/pubs/whybuild.htm> (last visited Dec. 1, 2009).

⁶ Joseph R. Biden, *Green Jobs Are a Way to Aid the Middle Class*, PHILADELPHIA ENQUIRER, Feb. 27, 2009; Reuters, *More Green Building and Energy Efficiency Could Save U.S. Economy \$1.2 Trillion*, REUTERS, July 30, 2009, available at <http://www.reuters.com/article/pressRelease/idUS242898+30-Jul-2009+BW20090730> (stating that a targeted investment in green building of \$50 billion a year for a 10-year period could create as many as 900,000 jobs).

USING GOVERNMENT POLICY

3

have for some time observed a significant gap between the job-related promises that attend government-facilitated development and the reality of low-road construction work with negligible opportunities for low-income communities and communities of color.⁷ In addition, environmental justice groups have long exposed the fact that these same communities tend to experience most severely the very environmental harms that green development aims to address.⁸

A number of these organizations have come together to successfully advocate for local, state and federal policy that addresses these concerns and treats a career in green construction as a pathway out of poverty.⁹ Much of this work builds off a “Construction Careers” model pioneered in Los Angeles and Oakland¹⁰ that advances the values of job quality

⁷ See, e.g., Kate Davis et al., *Subsidizing the Low Road: Economic Development in Baltimore*, GOOD JOBS FIRST (2002), available at <http://www.goodjobsfirst.org/pdf/balt.pdf>; Greg LeRoy et al., *Economic Development in Minnesota: High Subsidies, Low Wages, Absent Standards*, GOOD JOBS FIRST (1999), available at <http://www.goodjobsfirst.org/pdf/mngjf.pdf>; Los Angeles Alliance for a New Economy, *Who Benefits from Redevelopment in Los Angeles?*, http://74.10.59.52/laane/docs/research/Who_Benefits_es.pdf.

⁸ Nancy D. Perkins, *Livability, Regional Equity and Capability: Closing In on Sustainable Land Use*, 37 U. BALT. L. REV 157, 157 (2008) (“Deeper reforms are now being encouraged, due in part to the persistence of environmental justice advocates, whose calls for fairness in the distribution of environmental burdens and benefits have begun to infiltrate land use decision-making.”).

⁹ Michael Burnham, *Jobs at Issue as Labor-Enviro Coalitions Stump for Climate Bill*, N.Y. TIMES, Apr. 16, 2009, available at <http://www.nytimes.com/gwire/2009/04/16/16greenwire-jobs-at-issue-as-laborenviro-coalitions-stump-10548.html>; Leo Gerard & Michael Peck, Op-Ed., *Green Jobs, Good Jobs: Business, Labor and Government are Working Together to Revitalize Pennsylvania*, PITTSBURGH POST-GAZETTE, Mar. 25, 2009, available at <http://www.post-gazette.com/pg/09084/957972-109.stm>; *LA Passes Ordinance for Green Building Retrofits*, SUSTAINABLEBUSINESS.COM, Apr. 14, 2009, available at <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/17995>.

¹⁰ See *infra* Section III; see also Ronald D. White, *Program Would Help At-Risk L.A. Residents Get Construction Jobs*, L.A. TIMES, Sept. 1, 2008, at

and equitable access in the construction sector, and which itself is an example of the growing movement of localized advances in organizing successful campaigns for policy change led by community-labor coalitions¹¹ As described below, this model has shown favorable results for facilitating the movement of individuals from low-income communities into sustained careers in the construction sector.

The objective of this article is to point the way toward policy that meaningfully and lawfully addresses the important concerns with green development and results in middle class careers in green construction for all segments of a community. Part I examines the green development sector's salient features, with particular focus on jobs, workforce development and environmental justice. Part II describes and analyzes the government's role in that sector and its responsiveness to the issues explored in Part I. Part III proposes a model "Green Construction Careers" policy based on examples brought about by the advocacy of coalitions containing community, labor and environmental organizations. This model centers on a career pipeline that starts with community-based outreach and intake, includes high-quality training and concludes with entry into a construction trades union. Part IV examines some of the numerous and significant legal considerations that arise in connection with the adoption and/or application of such policy. In particular, measures relating to labor standards, apprenticeship and targeted hiring each give rise to a constellation of issues under the Federal Constitution and Federal statutes. However, with appropriate findings and careful drafting, policymakers may readily avoid legal obstacles to

C1, available at <http://articles.latimes.com/2008/sep/01/business/fi-apprentice1>.

¹¹ See Scott Cummings & Steven A. Boutcher, *Mobilizing Government Law for Low-Wage Workers*, U. CHI. LEGAL F. (Forthcoming); Peter Dreier, *Good Jobs, Healthy Cities*, AMERICAN PROSPECT, Sept. 21, 2009, available at http://www.prospect.org/cs/articles?article=good_jobs_healthy_city; Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL. REV. 375 (2007); Richard Schragger, *Mobile Capital, Local Economic Regulation and the Democratic City*, 123 HARV. L. REV. at 29-39 (F 2009).

USING GOVERNMENT POLICY

5

meaningful, effective policy.

I. THE GREEN DEVELOPMENT SECTOR

For purposes of this article, “green development” means construction, rehabilitation or retrofitting of commercial, residential and other facilities and infrastructure for the purposes of improving the environmental impact thereof. This definition is thus focused particularly on green building, which the U.S. Environmental Protection Agency (EPA) has defined as “the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle from siting to design, construction, operation, maintenance, renovation and deconstruction.”¹² Expanding on this definition, the EPA explains that “green buildings are designed to reduce the overall impact of the built environment on human health and the natural environment” by: (a) efficiently using energy, water, and other resources; (b) protecting occupant health and improving employee productivity; and (c) reducing waste, pollution and environmental degradation.¹³

While there is vigorous debate about whether certain kinds of projects should be called “green” due to their net environmental impact, there is little doubt as to the overall environmental value of green development. In the U.S., commercial and residential building operations account for about 40 percent of the primary energy consumption, 20 to 25 percent of the landfill waste and 5 to 12 percent of the water consumption.¹⁴ A number of credible studies demonstrate that green buildings substantially reduce energy use, carbon

¹² U.S. Env’tl. Protection Agency, *Basic Information, Definition of Green Building*, <http://www.epa.gov/greenbuilding/pubs/about.htm#1> (last visited Dec. 1, 2009).

¹³ *Id.*

¹⁴ SECRETARIAT OF THE COMMISSION FOR ENVTL. COOPERATION, *GREEN BUILDINGS IN NORTH AMERICA: OPPORTUNITIES AND CHALLENGES 4* (2008), available at http://www.cec.org/files/PDF//GB_Report_EN.pdf.

emissions and water use, and generate significant waste cost savings.¹⁵ In addition, green buildings have been found to contribute to the health and productivity of their occupants.¹⁶

Investments in the green development sector also appear to offer notable returns in the area of job creation. One recent study concluded that green-building retrofits would generate 7 direct jobs and 4.9 indirect jobs for every \$1 million in expenditure, vastly outpacing the job-creating capacity of comparable investment in oil and gas.¹⁷ Another study modeled a hypothetical scenario in which green building measures were undertaken in an amount sufficient to reduce energy

¹⁵ See, e.g., CATHY TURNER ET AL., NEW BUILDINGS INSTITUTE, ENERGY PERFORMANCE OF LEED FOR NEW CONSTRUCTION BUILDINGS 5 (2008), available at http://newbuildings.org/sites/default/files/Energy_Performance_of_LEED-NC_Buildings-Final_3-4-08b.pdf (stating that LEED-NC Certified buildings deliver energy savings of between 25 to 30 percent of the national average); ROB WATSON, GREENER WORLD MEDIA, GREEN BUILDING IMPACT REPORT 10–12 (2008) (finding that LEED Certified green buildings have already produced energy savings equivalent to burning 1.3 million tons of coal for electricity, saved 9.5 billion gallons of water, and reduced CO₂ emissions by 7 million tons); GREG KATZ, SUSTAINABLE BUILDING TASK FORCE, THE COSTS AND FINANCIAL BENEFITS OF GREEN BUILDINGS: A REPORT TO CALIFORNIA'S SUSTAINABLE BUILDING TASK FORCE 19, 40, 52 (2003) (finding that green buildings generate 30% energy savings on landscaping and 50–75% waste diversion).

¹⁶ See William J. Fisk, *Health And Productivity Gains from Better Indoor Environments and Their Relationship with Building Energy Efficiency*, 25 ANN. REV. ENERGY ENVTL. 537 (2000); Judith Heerwagen, *Green Buildings, Organizational Success, and Occupant Productivity*, 28 BLDG. RES. & INFO. 353–367 (2000).

¹⁷ ROBERT POLLIN ET AL., POLITICAL ECON. RESEARCH INST. & CTR. FOR AM. PROGRESS, THE ECONOMIC BENEFITS OF INVESTING IN CLEAN ENERGY 28 (2009); see also SARAH WHITE & JASON WALSH, CTR. ON WISCONSIN STRATEGY, GREENER PATHWAYS: JOBS AND WORKFORCE DEVELOPMENT IN THE GREEN ECONOMY 15 (2008) (“Most credible estimates calculate eight to eleven direct jobs per \$1 million invested. A 2004 Apollo Alliance paper counted roughly 10 jobs per \$1 million invested in high-performance buildings; a forthcoming study by COWS and the University of Florida’s Powell Center for Construction and Environment projects 10 on-site jobs per \$1 million invested in a typical owner-occupied residential efficiency retrofit in Wisconsin.”).

USING GOVERNMENT POLICY

7

consumption levels of American residential and commercial buildings by 35% over 30 years and concluded that the scenario would require nearly 81,000 green jobs, approximately 36,000 in the residential sector and 45,000 in the commercial sector.¹⁸

However, from the standpoint of job quality and equitable access, there appears to be little that distinguishes “green” construction from conventional construction.¹⁹ This fact gives rise to a fundamental challenge for policymakers seeking to create good jobs for all segments of a community through green development for several reasons.

First, the conventional construction sector is very much divided between low road non-union and high road union employers. Data on construction wages indicates a significant wage gap between union and non-union construction workers.²⁰ An Economic Policy Institute analysis of nonunion laborers, carpenters, painters, roofers and other non-licensed trades found that half of the 3.5 million workers in this category earned less than \$12.50 an hour and one third earned less than the federal poverty wage for a family of four.²¹ This is the same group of workers most likely to undertake the energy-efficiency retrofits and/or weatherization projects that, as described below, have received tremendous attention from government entities looking to participate in the green economy.²²

¹⁸ GLOBAL INSIGHT, U.S. METRO ECONOMIES: CURRENT AND POTENTIAL JOBS IN THE U.S. GREEN ECONOMY 15 (2008) (report prepared for the United States Conference of Mayors and the Mayors Climate Protection Center).

¹⁹ *Id.* (“Many of the workers required to complete the renovation work and installations of efficiency upgrades fall under the classifications of the traditional construction trades that comprise this category. Ultimately, increasing demand for green building work can be expected to generate new employment opportunities for electricians, HVAC technicians, carpenters, plumbers, roofers, laborers, and insulation workers, among others.”); White & Walsh, *supra* note 17, at 16 (“Jobs in energy efficiency retrofitting look a lot like traditional construction jobs.”).

²⁰ PHILIP MATTERA ET AL., HIGH ROAD OR LOW ROAD: JOB QUALITY IN THE NEW GREEN ECONOMY 5 (Good Jobs First 2009).

²¹ *Id.* at 21.

²² *Id.* at 25 (“In order to meet the President’s stimulus objectives, the residential energy efficiency sector must find ways to train thousands of

Second, the construction sector is plagued by long-established underrepresentation of certain demographic groups.²³ In particular, African-Americans residing in major metropolitan areas with high concentrations of African-Americans have substantially lower levels of participation in the construction workforce than they have in the general workforce,²⁴ and women make up less than 3% of the construction workforce²⁵.

Third, there is a significant need to invest in training a new generation of construction workers. In a recent energy utility sector survey, nearly half of respondents said that more than 20 percent of their work force—mostly skilled tradespeople—would retire within the next five to seven years.²⁶ Providing this training seems plausible: many jobs in the industry require a significant amount of postsecondary education, but not a four-year degree.²⁷ Yet, the construction training available outside of union apprenticeship programs may often be ill-suited to the task.²⁸

Finally, the complex labyrinth of legal and contractual requirements, customs, practices, entities, politics and interpersonal relationships that characterize the high road

workers and raise standards in what is currently a low-wage industry.”).

²³ See Jason Parkin, *Constructing Meaningful Access to Work: Lessons from the Port of Oakland Project Labor Agreement*, 35 COLUM. HUMAN RIGHTS L. REV. 375, 377–383 (discussing history of exclusion of minorities and women from construction sector).

²⁴ TODD SWANSTROM, PUBLIC POLICY RESEARCH CENTER, UNIV. OF MO., ST. LOUIS, *THE ROAD TO GOOD JOBS: PATTERNS OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY 5* (2008).

²⁵ BUREAU OF LABOR STATISTICS, EMPLOYED PERSONS BY DETAILED OCCUPATION AND SEX, 2008 ANNUAL AVERAGES, *available at* www.bls.gov/cps/wlf-table11-2009.pdf (indicating that the percentage of women in “Construction and Extraction” occupations is 2.5%).

²⁶ *Id.* (citing AMERICAN PUBLIC POWER ASSOCIATION, *WORKFORCE PLANNING FOR PUBLIC POWER UTILITIES: ENSURING RESOURCES TO MEET PROJECTED NEEDS* (2005)).

²⁷ White & Walsh, *supra* note 17, at 4.

²⁸ See BUSINESS ROUNDTABLE, *TRAINING PROBLEMS IN OPEN SHOP CONSTRUCTION: A CONSTRUCTION INDUSTRY COST EFFECTIVENESS PROJECT REPORT 4* (1990).

USING GOVERNMENT POLICY

9

unionized construction trades can stymie even the most well-intentioned of policies. A new worker must first decide which trade to enter and then obtain admission to the appropriate union apprenticeship²⁹ program.³⁰ Admissions standards and practices (including the frequency of openings) vary across programs, as do the durations of the apprenticeships.³¹ The actual hiring of an apprentice can be a function of contractor preferences, union hiring hall practices, referral rules, union bylaws, collective bargaining agreements³² and state or federal apprenticeship standards³³, among other things.

Notably, one tool that has gained use in the construction sector to create uniform standards across a project, and which is discussed below, is the project labor agreement or PLA. This is a comprehensive agreement ensuring labor peace for a

²⁹ An apprentice is a worker new to the construction trades and participating in an “on the job” training program unique to a particular trade or craft. Building and Construction Trades unions operate apprenticeship programs in many jurisdictions, sometimes in conjunction with employers through Joint Apprenticeship Training Councils.

³⁰ Kathleen Mulligan-Hansel, *Making Development Work for Local Residents*, PARTNERSHIP FOR WORKING FAMILIES, July 2008, at 50.

³¹ *Id.*

³² A “collective bargaining agreement” is a contract between an employer and a union representing employees, regarding conditions of employment for a particular bargaining unit; covers wages, hours, benefits, and many other terms and conditions of employment, such as protection from termination of employment without just cause. Collective bargaining agreements usually also establish grievance resolution procedures.

³³ Under the Fitzgerald Act-National Apprenticeship Act (29 U.S.C. § 50), the Labor Standards for the Registration of Apprenticeship Programs (29 C.F.R. § 29), and the Equal Employment Opportunity in Apprenticeship regulations (29 C.F.R. § 30), the U.S. Department of Labor’s Office of Apprenticeship establishes basic standards for all apprenticeship programs, including provisions regarding recruitment, selection, and training of apprentices. These laws and regulations establish criteria for registering apprenticeship programs with the federal government in order to “safeguard the welfare of apprentices.” (29 U.S.C. § 50). They also determine how State Apprenticeship Councils (SACs) can be created. SACs must be approved by the federal government and meet certain minimum federal standards. (29 CFR § 29.1).

construction project by establishing ahead of time key terms of hiring procedures and working conditions, generally with reference to terms of local collective bargaining agreements in various trades. Neither contractors nor workers need be unionized in order to work on PLA projects. Public and private entities overseeing large construction projects often require PLAs to be in place in order to avoid costly delays due to labor unrest, to facilitate high-road employment practices, and sometimes to facilitate targeted hiring programs. Critically, where properly drafted, a PLA's uniform rules for hiring—including targeted hiring—can cut across and supersede the complex labyrinth of rules referred to above that may otherwise govern a project.

In addition to the jobs-related challenge, policymakers must also confront an environmental justice³⁴ issue. From the standpoint of environmental justice, it is, ironically, difficult to distinguish green development as currently practiced in the U.S. from conventional development. One community development corporation, or “CDC,” that develops in low-income communities in New York found that available green building subsidy programs “do not include preference, set aside, or other accommodations based on the affordability of the housing to low-income purchasers or tenants or its not-for-profit community-based auspices.”³⁵ Further, the CDC found the particular green building certification process, required by funders, “costly and time consuming, especially for a not-for-profit affordable housing developer operating on a shoestring budget.”³⁶ At the same time, prevailing “green building” standards are silent as to the siting of green facilities in low-

³⁴ The term “environmental justice” as used in this article includes the concept that healthy or green buildings should be sited in low-income communities and communities of color, which is a direct corollary of the more traditional meaning of the term associated with concept of the preventing the siting of environmentally harmful uses in such communities.

³⁵ Carmen Huertas-Noble, Jessica Rose & Brian Glick, *The Greening of Community Economic Development: Dispatches from New York City*, 31 W. NEW ENG. L. REV. 645, 662 (2009).

³⁶ *Id.* at 663.

USING GOVERNMENT POLICY

11

income communities or communities with concentrations of negative environmental impacts.³⁷ This combination of obstacles to green development and a lack of proactive policy to encourage such development in disadvantaged communities makes it less likely that green buildings will arise where they are most needed.

Thus, as government enters the green development sector, policymakers must either confront or ignore the significant jobs and environmental justice issues discussed above. As the next section explains, they have not yet done so on a scale commensurate with the new investment in green development, and are therefore missing a major opportunity to obtain better social and economic outcomes.

II. THE GOVERNMENT ROLE IN GREEN DEVELOPMENT

The last several years have witnessed an explosion of government efforts to encourage and participate in green development, and a relative decline in private sector investment.³⁸ Every level of American government has either adopted green building standards or allocated funds to support green development, or both. This vast expansion of the

³⁷ Nancy J. King et. al., *Creating Incentives For Sustainable Buildings: A Comparative Law Approach Featuring the United States and the European Union*, 23 VA. ENVTL. L.J. 397, 404–405 (2005) (citing Jude L. Fernando et al., *Rethinking Sustainable Development: Toward Just Sustainability in Urban Communities, Building Equity Rights with Sustainable Solutions*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 36 (2003)) (contrasting “green building” with “sustainable construction” and noting “many definitions of sustainable construction incorporate progressive social concepts, such as environmental justice, not directly addressed by green building standards. To include environmental justice in sustainable construction is to more fully recognize the social responsibility component of sustainable development. For example, a broad view of sustainable construction would consider the impact of building construction on the equitable distribution of environmental resources, along with other issues of social responsibility”).

³⁸ See Nathaniel Gronewold, *Clean Tech Frets as Power of Government’s Purse Grows*, GREENWIRE, June 25, 2009, <http://www.eenews.net/public/Greenwire/2009/06/25/11>.

government role in green development, of course, heralds a significant opportunity to shape the emerging sector through government policy. Indeed, there is some indication already of the efficacy of such policy: at least one study has found significant correlations between the presence of a municipal green building policy and the number of green buildings per capita.³⁹

A. Green Building Standards

Government entities at every level have promoted green development through the adoption of green building standards. Forty-three states have adopted energy-efficiency codes for residential buildings and forty-one have adopted such codes for commercial buildings.⁴⁰ At the same time, many building codes have been supplemented by green-building rating systems. Two rating systems have dominated the market: the Leadership in Energy and Environmental Design (“LEED”) (from the U.S. Green Building Council (“USGBC”)) and Green Globe.⁴¹ The USGBC indicates that various LEED initiatives including legislation, executive orders, resolutions, ordinances, policies, and initiatives are found in 43 states, including 190 localities, 36 state governments, 12 federal agencies or departments, 16 public school jurisdictions, and 39 institutions of higher education.⁴²

³⁹ Julie Cidell, *The Role of Public Policy in Private Sector Decisions to Build Green*, INDUSTRY STUDIES ASSOC., May 28, 2009, available at <http://www.industrystudies.pitt.edu/chicago09/docs/Cidell%202.3.pdf>.

⁴⁰ David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 872 (2008).

⁴¹ *Id.* at 873 (“The LEED standards are based on building performance in the following categories: site selection; water efficiency; energy and atmosphere; materials and resources; indoor environmental quality and innovation; and design quality. LEED has been particularly criticized for its vulnerability to manipulation given the broad range of features that count towards obtaining green certification and thus the ease with which a building with mediocre green credentials in its major features might nevertheless obtain a LEED certification.”).

⁴² *USGBC Website*, *supra* note 3.

USING GOVERNMENT POLICY

13

Unfortunately, the LEED standards are silent with respect to job quality and labor practices.⁴³ As noted, green buildings have been shown to improve the productivity and health of occupying workers.⁴⁴ Further, LEED standards for Existing Buildings do award points toward certification for the purchase of environmentally sound cleaning products,⁴⁵ which may create fewer health risks for custodial workers. Yet, nothing on the face of the LEED standards prevents a building from receiving LEED certification, despite its having been constructed by workers receiving low wages, no benefits and poor training. Further, nothing in the LEED standards compels the hiring of local residents for construction jobs, despite the rather obvious potential environmental benefit of reduced emissions associated with worker commutes. In fairness, the LEED standards may well not have been designed to address these issues, which may not fall squarely within the expertise of the U.S.G.B.C.

B. Funding

Recently, the Federal government has dramatically expanded funding for green construction. According to the Apollo Alliance,⁴⁶ the American Reinvestment and Recovery Act (“ARRA”), which became law in February 2009, contained approximately \$110 billion in funding for the green sector, including \$34 billion to improve energy efficiency, \$17.7 billion to modernize and expand the transit systems, \$7.9 billion to scale up renewable energy development, \$10.9 billion to modernize and expand the electric grid, and \$29.14 billion on

⁴³ See Mattera, *supra* note 20, at 21.

⁴⁴ See generally Fisk, *supra* note 16.

⁴⁵ U.S. Green Building Council, *LEED for Existing Buildings: Operations and Maintenance Rating System*, Sept. 2008, at 77.

⁴⁶ The Apollo Alliance describes itself as “a coalition of labor, business, environmental, and community leaders working to catalyze a clean energy revolution that will put millions of Americans to work in a new generation of high-quality, green-collar jobs.” See Apollo Alliance, About, www.apolloalliance.org/about (last visited Oct. 12, 2009).

roads and bridges.⁴⁷ Funds allocated for energy efficiency can reasonably be expected to flow directly into green construction, as more than \$20 billion is directed to the construction or rehabilitation of federally-owned or funded buildings.⁴⁸ In addition, energy efficiency retrofits of residential buildings received a massive boost in the ARRA, which allocated \$5 billion to the Department of Energy's Weatherization Assistance Program ("WAP").⁴⁹ The WAP's purpose is "to increase the energy efficiency of dwellings owned or occupied by low-income persons, reduce their total residential expenditures, and improve their health and safety."⁵⁰

Fortunately, the Federal government has also seen fit to address the issues of job quality and equitable access in connection with these new outlays for green construction. In April 2009, the Office of Management and Budget issued a memorandum to federal departments and agencies setting forth "government-wide guidance for carrying out programs and

⁴⁷ Elena Foshay & Keith Schneider, *Congress Approves Clean Energy Provisions of Stimulus; Consistent With Apollo Economic Recovery Act*, Feb. 13, 2009, <http://apolloalliance.org/rebuild-america/energy-efficiency-rebuild-america/data-points-energy-efficiency/clean-energy-provisions-of-stimulus-are-consistent-with-apollo-economic-recovery-act/>.

⁴⁸ *Id.* (\$4.5 billion for renovations and repairs to federal buildings including focused on increasing energy efficiency, \$4 billion to HUD for public housing building repair and modernization, including critical safety repairs and energy efficiency upgrades, \$2.25 billion for a new program to upgrade HUD sponsored low-income housing to increase energy efficiency, including new insulation, windows, and furnaces, \$2.25 billion to the HOME Program to help local communities build and rehabilitate low-income housing using green technologies, \$4.23 billion for energy efficiency improvements to Department of Defense and Veterans Administration facilities, \$1.45 billion for military hospital construction and energy efficiency improvements, \$3.2 billion increase on limitation on Qualified Energy Conservation Bonds (QECSBs), which eligibility for QECSBs to include green community programs that use loans or repayment mechanisms to support such programs, and \$510 million for energy-efficient retrofits for Native American housing).

⁴⁹ See U.S. DEP'T OF ENERGY, FUNDING OPPORTUNITY ANNOUNCEMENT FOR WEATHERIZATION FORMULA GRANTS 5 (2009).

⁵⁰ *Id.*

USING GOVERNMENT POLICY

15

activities” enacted in ARRA.⁵¹ The memorandum, among other things, encouraged agencies to: support entities with “sound track records” of compliance with wage and hour, occupational safety and health, and collective bargaining laws and that “are creating good jobs”; support projects that “seek to ensure that the people who live in the local community get the job opportunities that accompany the investment”; and support projects “that make effective use of community-based organizations in connecting disadvantaged people with economic opportunities.”⁵²

States and localities have also entered the green development sector as funders. Numerous state and local laws provide financial incentives for businesses to adopt green construction or renovation practices.⁵³ States have also established subsidy programs to reduce the cost of residential solar panel installation.⁵⁴ Local governments have established programs to reduce permit fees or grant property tax exemptions to owners that build LEED-certified green buildings.⁵⁵ Apart from the examples described below, however, it appears that few states or localities have attached jobs-related standards to these programs.

III. THE GREEN CONSTRUCTION CAREERS MODEL

The Green Construction Careers Model proposed in this

⁵¹ Memorandum from Peter R. Orzag, Dir. Office of Mgmt. and Budget, Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, (Apr. 3, 2009) *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf.

⁵² *Id.* at 5–6.

⁵³ King et al., *supra* note 37, at 418; *New Energy for States*, Feb. 2006, APOLLO ALLIANCE 15 (describing tax credit programs in New York, Maryland and Oregon for energy efficient buildings).

⁵⁴ *See, e.g.*, James Hohmann, *Subsidies Help Residents Go Solar*, WASH. POST, Aug. 14, 2009, at 10; Marc Lifsher, *California Solar-Power Subsidy Program Approaches Its Limit*, L.A. TIMES, July 6, 2009, at B1.

⁵⁵ Adelman & Engel, *supra* note 40, at 873–874; Tanya Batallas, *N.J. Small Businesses Losing Out as State Supports Larger Solar Ventures*, NEW JERSEY STAR-LEDGER, Aug. 27, 2009.

article offers an important tool for advancing the values of job quality, equitable access and environmental justice in the green development sector. It aims to have substantial numbers of formerly disadvantaged workers solidly advancing in sustained high-road careers in green construction. It operates by ensuring high-quality training and employment for these workers, cutting through legal and bureaucratic obstacles, and bringing sometimes divided constituencies together in collaborative working relationships.

The model derives much of its content from the Construction Careers model pioneered in Los Angeles and Oakland by community and labor organizations, construction employers and local officials.⁵⁶ This model couples specific measures that facilitate the hiring of targeted workers with the use of project labor agreements that ensure job quality and labor peace.

There are several examples of the Construction Careers model now at work. The Los Angeles Unified School District (“LAUSD”) established a targeted hiring program for its \$19 billion school site modernization and construction program via a Project Stabilization Agreement, which established a goal that 50% of the construction workforce consist of workers residing within the district.⁵⁷ A 2008 study by the University of California at Los Angeles determined that LAUSD’s program resulted in targeted workers comprising 41% of apprentices, 39% of journey-level workers,⁵⁸ and 23% of foremen on LAUSD

⁵⁶ Cummings & Boutcher, *supra* note 11, at 22. For more information on the Construction Careers model, see generally Kathleen Mulligan-Hansel, *Making Development Work for Local Residents*, PARTNERSHIP FOR WORKING FAMILIES (2008).

⁵⁷ LOS ANGELES UNIFIED SCH. DIST. PROJECT STABILIZATION AGREEMENT—NEW CONSTRUCTION AND MAJOR REHABILITATION FUNDED BY PROPOSITION BB AND/OR MEASURE K §3.5 (May 12, 2003), *available at* http://www.laschools.org/contractor/fca/fs-fca/download/psa/documents/Project_Stabilization_Agreement.pdf.

⁵⁸ A journey-level worker is an individual who has completed an apprenticeship in the construction trades and is therefore eligible for certain wages, benefits and seniority on construction jobs.

USING GOVERNMENT POLICY

17

projects.⁵⁹ The Los Angeles Department of Public Works has negotiated a number of Project Labor Agreements for major projects that include a goal that 30-40% of the construction workforce consists of targeted workers.⁶⁰ As of June 2009, targeted workers made up between 19 and 35% of the respective workforces on these projects.⁶¹

The Port of Oakland, California established a targeted hiring program for its \$1.2 billion modernization via a Project Labor Agreement that set a goal that 50% of work hours be performed by residents of a designated local impact area.⁶² The PLA also set a goal that 20% of all construction work be performed by apprentice-level workers, all of whom should reside in the local

⁵⁹ Memorandum from Veronica Soto, Dir. Of Contractor Relations & Small Bus., to Ramon Cortines, Superintendent of the Los Angeles Unified Sch. Dist. Facilities (Jan. 28, 2009), *available at* <http://www.laschoolboard.org/files/14.%20We%20Build%20Annual%20Report.pdf>.

⁶⁰ CITY OF LOS ANGELES DEP'T OF PUBLIC WORKS, BUREAU OF ENGINEERING, PROJECT LABOR AGREEMENT FOR FIRE STATION NO. 64—SOUTH LOS ANGELES § 7.6, *available at* <http://bca.lacity.org/site/pdf/hiring/Fire%20Station%2064%20PLA.pdf>; CITY OF LOS ANGELES DEP'T OF PUBLIC WORKS, BUREAU OF ENGINEERING, PROJECT LABOR AGREEMENT FOR AVENUE 45 & ARROYO DR. RELIEF SEWER § 7.6, *available at* <http://bca.lacity.org/site/pdf/hiring/Avenue%2045%20pla.pdf>; CITY OF LOS ANGELES DEP'T OF PUBLIC WORKS, BUREAU OF ENGINEERING PROJECT LABOR AGREEMENT FOR POLICE ADMINISTRATION BUILDING § 7.6, *available at* <http://bca.lacity.org/site/pdf/hiring/PAB%20Signed%20PLA.pdf>.

⁶¹ LOS ANGELES DEP'T OF PUBLIC WORKS, OFFICE OF CONTRACT COMPLIANCE, BUREAU OF CONTRACT ADMIN., FIRE STATION #64: SUMMARY OF LOCAL HIRING @ 99% COMPLETION, *available at* <http://bca.lacity.org/site/pdf/hiring/PLA%20Fire%20Station%2064.pdf>; LOS ANGELES DEP'T OF PUBLIC WORKS, OFFICE OF CONTRACT COMPLIANCE, BUREAU OF CONTRACT ADMIN., AVENUE 45 & ARROYO DR. RELIEF SEWER: SUMMARY OF LOCAL HIRING AT @ 53% COMPLETION, *available at* <http://bca.lacity.org/site/pdf/hiring/PLA%20Avenue%2045.pdf>; LOS ANGELES DEP'T OF PUBLIC WORKS, OFFICE OF CONTRACT COMPLIANCE, BUREAU OF CONTRACT ADMINISTRATION, POLICE ADMINISTRATION BUILDING, SUMMARY OF LOCAL HIRING AT @ 99% COMPLETION, *available at* <http://bca.lacity.org/site/pdf/hiring/PLA%20PHQ.pdf>.

⁶² PORT OF OAKLAND MARITIME & AVIATION PROJECT LABOR AGREEMENT, Art. V, § 6, *available at* <http://www.communitybenefits.org/downloads/Project%20Labor%20Agreement.pdf>.

impact area.⁶³ Between 2001 and 2007, the program resulted in 31% of targeted worker hours having been performed by these targeted workers.⁶⁴

The Community Redevelopment Agency of the City of Los Angeles has also adopted a Construction Careers and Project Stabilization policy for construction projects that it undertakes and subsidizes.⁶⁵ This policy requires that developers or prime contractors on major projects undertaken or subsidized by the agency reserve 30% of construction work hours for local residents, 10% of construction work hours for local, low-income or otherwise disadvantaged residents, and 50% of apprentice work hours for local residents.⁶⁶ The policy further requires contractors and subcontractors to become signatory to a master Project Labor Agreement negotiated between the construction trades unions and the agency that contains a set of targeted hiring measures.⁶⁷ The policy also calls on developers and prime contractors to submit a targeted hiring schedule that establishes the approximate hiring timetable of construction workers by trade in order to satisfy the policy's targeted hiring requirements.⁶⁸

It is worth noting that the Construction Careers model was designed principally for large, government-subsidized projects. The model may well have to be adjusted to better fit smaller projects and smaller employers. In addition, the model emerged from settings featuring strong community-labor partnerships and high-quality training resources. The model may take longer to implement in a less politically or programmatically supportive environment. Indeed, there may be settings for which the model is not appropriate.

⁶³ *Id.*, Art. XIII, § 2.

⁶⁴ Mulligan-Hansel, *supra* note 56, at 54.

⁶⁵ *See* White & Walsh, *supra* note 17.

⁶⁶ CMTY. REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, CAL., RESOLUTION ADOPTING A POLICY REGARDING CONSTRUCTION CAREERS AND PROJECT STABILIZATION § III(I) [hereinafter CONSTRUCTION CAREERS POLICY].

⁶⁷ *Id.* at § IV.

⁶⁸ *Id.* at § V(2).

USING GOVERNMENT POLICY

19

A. Tenets

The Green Construction Careers model, which expands on the model above by incorporating principles associated with environmental justice, follows four basic and interrelated tenets: (1) meaningful green development in low-income communities; (2) high quality jobs; (3) opportunity for low-income communities and communities of color to obtain sustained employment in the construction sector; and (4) high-quality job training. The essence of the model is to address each of these tenets, but a range of factors, including legal considerations, should contribute to the specific policy measures adopted in any particular jurisdiction. Accordingly, the discussion below sets forth a number of policy approaches available to advance each of the tenets.

1. Meaningful Green Development in Low-Income Communities

One core function of the Green Construction Careers model is to make “green” development relevant and effective in low-income communities. This starts with steering investment in green development to these communities. Fortunately, government policy has begun to lead the way with its own capital, thereby, one hopes, incentivizing the movement of private capital in this direction.⁶⁹ This approach is reflected in the rapidly expanding low-income weatherization programs, which target low-income homes and neighborhoods for government-funded residential retrofits that enhance energy efficiency.⁷⁰ Focusing investment in these areas helps directly address the health impacts of all types of pollution, which are more concentrated in low-income communities.⁷¹ Further, it may

⁶⁹ See U.S. Green Building Council, *supra* note 4.

⁷⁰ See Foshay & Schneider, *supra* note 47.

⁷¹ See, e.g., Sam Magavern, *Affordable Housing and the Environment*, In *Buffalo, New York*, (Legal Studies Research Paper No. 2008-07 July 9, 2007 at 21), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=

result in higher marginal energy-efficiency gains because older buildings, which tend to be the least efficient, are also more heavily concentrated in these communities.⁷²

In order to maximize the impact of green development policy, the model also focuses investment within low-income communities on buildings that receive high levels of use by community members. These buildings, whether major centers of employment, recreation, or other public use, offer higher returns on environmental investment. For example, fixing a “sick” building can result in major improvements in the productivity and overall health of occupants.⁷³ And, logically, a building that generates high levels of energy usage should be among the first to be made more energy-efficient.

Finally, “greening the ghetto”⁷⁴ isn’t just about making buildings more environmentally sound, especially under existing USGBC standards. The Green Construction Careers model calls for green building standards that substantially improve the environmental impact of buildings and that generate significant amounts of high-quality work in green construction, operations

1091549 (“Buffalo’s housing and environmental problems are not evenly distributed: they fall most heavily on people with low incomes and especially people of color. For example, the four zip codes with the highest rates of lead poisoning are on the predominantly African-American east side of the City of Buffalo, with incidence rates between three and five times higher than Erie County’s average.”); Douglas Houston et al., *Structural Disparities of Urban Traffic in Southern California: Implications for Vehicle-Related Air Pollution Exposure in Minority and High-Poverty Neighborhoods*, 26 J. URB. AFF. 565, 568 (2004) (“Minority and low-income areas in the Los Angeles region have borne a disproportionate level of stationary sources of air pollution including hazardous waste storage and disposal facilities (TSDFs) and Toxic Release Inventory (TRI) facilities.”).

⁷² Houston, *supra* note 71, at 578–80 (describing disproportionate concentration of older buildings in poor and minority communities).

⁷³ Fisk, *supra* note 16, at 552–53.

⁷⁴ Elizabeth Kolbert, *Greening the Ghetto*, NEW YORKER, Jan. 12, 2009, available at http://www.newyorker.com/reporting/2009/01/12/090112fa_fact_kolbert (“The group’s goal is to broaden the appeal of the environmental movement and, at the same time, bring jobs to poor neighborhoods. Jones often says that he is trying to “green the ghetto.”).

USING GOVERNMENT POLICY

21

and maintenance. For example, while locating a building near major public transit lines is important, it does not have as much value within the Green Construction Careers framework as it does within the LEED standards, which do not place a priority on the type or number of jobs created by green projects.⁷⁵ In contrast, installation of photovoltaic solar panels, where appropriate, because of its substantial impact on pollution and efficiency⁷⁶ and its skilled work intensity, has high value in the model.

2. High Quality Jobs

The model promotes high quality jobs in the construction sector for the benefit of workers, communities and investors alike. Of course, high quality jobs start with decent wages and benefits. In setting policy for the construction sector, government entities may rely on federal or state prevailing wage laws to help set a baseline. These laws establish wage standards based on the hourly wage, usual benefits and overtime paid in the largest city in each county to the majority of workers, laborers, and mechanics, and many units of government are already well equipped to enforce them.⁷⁷

Community Workforce Agreements—project labor agreements containing provisions to ensure meaningful hiring of targeted workers—among unions and employers involved in green construction projects are also important to success. Under the Green Construction Careers model, the entity with overall responsibility for the project requires that all contractors and

⁷⁵ MATTERA ET AL., *supra* note 20, at 21.

⁷⁶ See generally Soteris A. Kalogirou, *Environmental Benefits of Domestic Solar Energy Systems*, 45 ENERGY CONVERSION & MGMT. 3075 (2004).

⁷⁷ Prevailing wages are set by the federal and state governments for each trade and occupation. The Davis-Bacon act requires the payment of prevailing wages on federally funded or assisted projects. 40 U.S.C.A. § 3142. Some states have similar statutes. See, e.g., CAL. LAB. CODE § 1770 *et seq.*, 820 ILL. COMP. STAT. ANN. 130/0.01 *et seq.*, N.Y. LABOR § 220, TEX. GOV'T CODE ANN. §§ 2258.021–.023.

subcontractors, before bidding on construction work on the project, become signatory to a Community Workforce Agreement that contains all of the equitable access measures described below. Such agreements establish uniform rules for hiring across entire projects and help to ensure labor peace. In the absence of such agreements, pre-existing hiring arrangements may—and often do—conflict with targeted hiring policies, creating obstacles to implementation. Moreover, successful targeted hiring initiatives such as the Port of Oakland, the Los Angeles Unified School District and the City of Los Angeles Construction Careers Policy have all relied on these kinds of agreements.⁷⁸ In most cases, these agreements provide that union hiring halls serve as the primary source of all craft labor on a project,⁷⁹ thereby providing an important assurance to unions that their membership will obtain work on the project. This assurance is vital to the basic political bargain at the heart of the model,⁸⁰ and allows unions to open their ranks to new members.

“Responsible contractor” measures offer a final, but equally important, means of ensuring job quality. These measures ensure that construction contractors with significant or repeated violations of workplace, tax and other laws are not utilized on construction projects on which the measures apply. The National Employment Law Project (NELP) has recently published a useful guide for policymakers seeking to adopt such measures.⁸¹ Based on a review of responsible contractor programs across the country, NELP recommends: (a) making responsibility review the first step in the bidder evaluation process, where

⁷⁸ See *supra* notes 57, 66.

⁷⁹ *Id.*

⁸⁰ See Mulligan-Hansel, *supra* note 56, at 20 (“Getting more low income workers and workers of color into union apprenticeship required increasing union contractors’ access to work”); Parkin, *supra* note 23, at 395 (“[T]he unions’ interest in opening up construction work to local residents served as a springboard for collaboration with a community that was skeptical as to whether unions with an exclusionary history should be trusted.”).

⁸¹ Paul K. Sonn & Tsedeye Gebreselassie, *The Road to Responsible Contracting*, NATI’L EMPLOYMENT LAW PROJECT, June 2009.

USING GOVERNMENT POLICY

23

appropriate, through a “prequalification” system; (b) using a standardized responsibility questionnaire and quantified point system for contractors; and (c) publishing the names of firms seeking to bid or prequalify, in order to allow the public to report relevant information.⁸²

*3. Equitable Access to Construction
Employment Opportunities*

The goal of careers in green construction for low-income individuals lies at the heart of the Green Construction Careers model. When designed and implemented properly, targeted hiring measures are an effective means of achieving this goal through policy.⁸³ Federal, State and local policy have utilized different measures of this type.⁸⁴ However, the successful policies, some of which are discussed above, have all set strict, high standards for construction work hours performed by targeted workers.⁸⁵ Accordingly, the Green Construction Careers model reserves a specific percentage of construction work hours for low-income residents that reside in the same labor market as the project in question. There are myriad formulations of this standard, but the core components are: (a) a clear definition of the targeted beneficiary group based on income, barriers to employment and/or geography; (b) a percentage of construction work hours on the project reserved for workers from this group at the apprentice level, journey level or both; and (c) where a residency-based approach is adopted by state or local government, some means of accommodating the Privileges and

⁸² *Id.* at 10.

⁸³ Mulligan-Hansel, *supra* note 56, at 4.

⁸⁴ See Parkin, *supra* note 23, at 383–384 (“Hiring preferences for local residents have become popular at all levels of government, with almost half the states and a number of local governments enacting some sort of local-hire legislation.”).

⁸⁵ See *supra* notes 58–61, 63, 67 and accompanying text; Mulligan-Hansel, *supra* note 56, at 51 (describing “clear requirements for local hiring” as among core components of local hire policies).

Immunities Clause issues discussed below.⁸⁶

Another kind of policy measure aimed at facilitating the entry of disadvantaged individuals into the green construction involves targeted hiring from specially certified training programs. For example, a jurisdiction's policy may set aside construction work hours for graduates of weatherization training programs certified by the jurisdiction based on standards for quality and enrollment of targeted individuals. This approach has emerged in the newly expanded residential weatherization sector, for which conventional apprenticeship training formats have not fully developed. In addition to New Jersey and Delaware, which are discussed below, the City of Portland recently adopted this approach for its Clean Energy Works home retrofit program.⁸⁷

Because the local, low-income individuals targeted by the model are likely to be new to the construction trades, it is important to ensure that contractors on the subject project employ substantial numbers of apprentice-level workers. On projects in which contractors are utilizing state or federally-registered apprenticeship programs, the standards governing those programs must contain ratios for the number of journey-

⁸⁶ See, e.g., CONSTRUCTION CAREERS POLICY, *supra* note 66 (requiring that developers or prime contractors on major projects undertaken or subsidized by the agency reserve 30% of construction work hours for local residents, 10% of construction work hours for local, low-income or otherwise disadvantaged residents, and 50% of apprentice work hours for local residents). *Id.* § III(1). The policy also addresses the Privileges and Immunities Clause issue by excluding out-of-state workers from the targeted hiring calculation. *Id.* § III(3).

⁸⁷ City of Portland, Bureau of Planning and Sustainability, *Portland City Council Approves Community Workforce Agreement To Support Equity And Workforce Goals For Clean Energy Works Portland*, Sept. 30, 2009, <http://www.portlandonline.com/bps/index.cfm?c=44851&a=265154>; COMMUNITY WORKFORCE AGREEMENT ON STANDARDS AND COMMUNITY BENEFITS IN THE CLEAN ENERGY WORKS PORTLAND PILOT PROJECT, <http://www.portlandonline.com/bps/index.cfm?c=50152&a=265161> § II(c) (“[C]ontractors and sub contractors will hire 100% of new worker/installer weatherization employees from a designated training program, as described in section IV, until 50% of contractor’s total non supervisory worker/installer weatherization employee monthly work hours on covered projects are performed by graduates of a designated training program.”).

USING GOVERNMENT POLICY

25

level workers to the number of apprentice-level workers in each craft.⁸⁸ The Green Construction Careers model relies on a standard under which contractors must employ apprentice-level workers on the project in question to the maximum extent allowed by the applicable apprenticeship standards.

Used in connection with Community Workforce Agreements, craft request forms offer an additional helpful tool in facilitating the referral of targeted workers between unions and contractors. These forms provide a standardized method for contractors to request that qualified targeted workers be admitted to the appropriate union and referred by that union for work on the project in question.⁸⁹ Under the model, contractors are required to use, and unions are required to accept, such forms where they are properly completed and refer to a qualified targeted worker.

Finally, the model relies upon a central coordinator to facilitate the interactions among the various parties and ensure that targeted workers progress smoothly through the system. Government entities may perform this function themselves, contract this function out, or require the entity with overall responsibility for the project to contract with a pre-qualified entity to perform this function. At a minimum, this central coordinator should: (a) establish a single point of contact for employers, unions, training providers, community organizations and targeted workers; (b) maintain an up-to-date list of qualified targeted workers; (c) facilitate outreach to targeted workers by qualified pre-apprenticeship training programs; (d) facilitate relationships among qualified apprenticeship and other training programs and employers to enable prompt referrals of targeted workers; and (e) where necessary, refer targeted workers to employers, qualified apprenticeship and other training programs and hiring halls.

⁸⁸ 29 C.F.R. § 29.5(b)(7).

⁸⁹ *See, e.g.*, CONSTRUCTION CAREERS POLICY, *supra* note 66, at § IV(4)(d) (including among the terms for inclusion in a PLA, a requirement that Developer, Contractors, and Unions use and accept a standardized Craft Request Form and the procedures written therein to request any and all workers from Unions, including workers qualified as general dispatch and targeted workers).

Policymakers should also be aware that the mechanics of targeted hiring measures require close attention. Effective measures hold the key actors, such as developers and contractors, accountable to meaningful standards while affording flexibility to accommodate variations in performance across a project. For example, policymakers may wish to hold a developer or prime contractor ultimately responsible for numeric targets, including through monetary penalties, while holding individual contractors to more specific, straightforward “best efforts” requirements.

4. High Quality Training

Construction work—done well—is physically and mentally demanding, and requires substantial knowledge and skill. In low-income communities, high quality training is a fundamental necessity. Successful Green Construction Careers programs must offer specialized training and preparation to ensure equitable access.⁹⁰

This starts with high quality pre-apprenticeship programs. Such programs are characterized by (a) well-established partnerships with high-quality apprenticeship programs that ensure the pre-apprenticeship program will properly prepare targeted workers for apprenticeships and (b) strong track records of placing targeted workers into sustained careers in the construction trades.⁹¹ One example may be found in Newark, New Jersey, where the City, the Laborers’ International Union of North America and Garden State Alliance for a New

⁹⁰ Kate Rubin & Doug Slater, *Winning Construction Jobs for Local Residents*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, July 2005, at 31, available at http://www.brennancenter.org/content/resource/winning_construction_jobs_for_local_residents_a_users_guide_for_community_o/ (“Experience with innovative workforce development programs around the country has shown that a comprehensive pre-apprenticeship program—one that includes recruitment, pre-apprenticeship training, case management, support services, job placement, and mentoring—is key for helping workers from diverse backgrounds succeed as construction trades apprentices.”).

⁹¹ *Id.* at 34.

USING GOVERNMENT POLICY

27

Economy, a community organization, sponsor a six-week pre-apprenticeship training program focused on improving environmental quality and reducing waste and leading to entry into the Laborers' union.⁹² Note that this is the kind of training program that can provide a foundation for the alternative targeted hiring model discussed above in Sec. III(a)(iii).

Of course, low-income individuals cannot be expected to drop everything and enroll in a pre-apprenticeship program that prevents them from holding down a regular job. Here, the model promotes the use of employment positions that compliment pre-apprenticeship training. For example, local governments may create or utilize existing pre-craft-helper or entry-level operations and maintenance positions for targeted workers. Ideally, employment in such positions will expose targeted workers to green construction and operations and maintenance practices followed by environmentally-sound government entities.

Effective training programs will also accommodate participants' particular needs, which may include childcare and other supportive services as well as record expungement.

Because of the pivotal role of apprenticeship programs in the model, it is important that each construction contractor or subcontractor participate in an apprenticeship or other training program that meets fundamental standards for quality. For starters, apprenticeship programs that meet certain standards may register with the state or federal government.⁹³ However, some registered programs—particularly those administered unilaterally by employers—have shown relatively poor results, including for integration of minorities and women.⁹⁴ Thus,

⁹² Ralph Ortega, *Newark Dons a 'Green Collar' with Construction Training Program*, NEW JERSEY STAR-LEDGER, Jan. 13, 2009, available at <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-12/1231824966124410.xml&coll=1>.

⁹³ Robert W. Glover & Cihan Bilginsoy, *Registered Apprenticeship Training in the U.S. Construction Industry*, 47 EDUC. & TRAINING 337, 339 (2005).

⁹⁴ *Id.* at 342 (showing that jointly administered union apprenticeship programs have higher graduation and lower cancellation rates than non-union

policymakers should supplement this baseline. For example, policy can focus on the length of time over which a program has successfully operated and the number of individuals that a program has placed into sustained employment in the construction trades.

Under the model, apprenticeship programs must also take steps to ensure that targeted workers progress through the system. These steps can include agreeing to admit particular numbers of targeted workers based on the needs of the project in question and/or to establish formalized relationships with pre-apprenticeship programs training targeted workers. Policymakers can ease the burden on apprenticeships participating in the Green Construction Careers program by either contributing to the cost of training targeted workers or requiring contractors to do so.

B. Examples

In the last year, coalitions of community, labor and environmental organizations have succeeded in advancing the Green Construction Careers model as a part of local, state and federal policy. The following examples, which cover a range of types of green development, each incorporate core components of the model. None have been in existence long enough to evaluate for effectiveness. Note that in some cases, the kind of development projects covered, including small scale residential weatherization, differ in important ways from the typically large-scale, multi-trade construction projects covered by the Construction Careers policies discussed above.

1. Los Angeles Green Retrofit and Workforce Ordinance

On April 15, 2009, the City of Los Angeles enacted an ordinance establishing a “Green Retrofit and Workforce Program.”⁹⁵ Building on the City’s existing Construction Careers

programs, including for women and minorities.)

⁹⁵ CITY OF LOS ANGELES, CAL., ORDINANCE NO. 180633 (2009).

USING GOVERNMENT POLICY

29

policies⁹⁶ and green building standards for large projects,⁹⁷ the ordinance was the first in the nation to combine both green building and jobs standards. The ordinance was an important victory for the Los Angeles Apollo Alliance, which had campaigned for more than two years for its adoption.⁹⁸

The ordinance requires the City to develop a comprehensive plan to retrofit all City-owned buildings over 7,500 square feet or constructed prior to 1978 with a goal of attaining at least a LEED-EB Silver rating⁹⁹ and incorporating thirteen specific elements that ensure substantial environmental and health improvements as well as significant job creation.¹⁰⁰ The ordinance prioritizes buildings located in low-income areas, buildings that pose health and safety risks, and buildings that provide direct services to residents.¹⁰¹

Under the guidance of a new Director in the Mayor's office, an interagency taskforce and an advisory council of outside experts, including representatives of community, labor and environmental groups, the City will develop an innovative workforce system for the program.¹⁰² The system includes agreements with building trades unions to ensure job quality and labor peace on all retrofit work, targeted hiring measures

⁹⁶ See *supra* note 19.

⁹⁷ CITY OF LOS ANGELES, CAL., ORDINANCE NO. 179820 (2008) (prohibiting issuance of building permit for projects at or above 50,000 gross square feet of floor area unless “[t]he project applicant . . . demonstrates that the Project meets the intent [emphasis added] of the criteria for certification at the LEED certified level”).

⁹⁸ Strategic Concepts in Organizing and Policy Education, *Green Jobs: The Los Angeles Apollo Alliance*, <http://www.scopela.org/article.php?list=type&type=35>.

⁹⁹ The LEED rating system offers different levels of certification, including “certified,” “silver,” “gold” and “platinum” based on the number of points earned in the LEED scoring system. See *How to Achieve Certification*, USGBC, available at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1991>.

¹⁰⁰ CITY OF LOS ANGELES, CAL., ORDINANCE NO. 180633, § 7.302(B) (2009).

¹⁰¹ *Id.* § 7.302(C).

¹⁰² *Id.* §§ 7.303, 7.304.

focused on low-income neighborhoods, and specialized green construction training programs.¹⁰³

While the Los Angeles ordinance represents an important and path-breaking policy development, it certainly leaves room for policymakers to improve on the original. First and foremost, the ordinance neither requires the City to retrofit any building nor provides funding for the performance of retrofits. Further, the ordinance defers a number of important policy and program details for future discussion, including what targeted hiring measures, if any, will apply and what programs will be eligible to provide training. Standards for the retrofits are to be set forth in a “Plan,”¹⁰⁴ which, as of this writing, has not yet been issued.

2. *New Jersey State Weatherization Assistance Program Plan*

As noted, the American Recovery and Reinvestment Act (ARRA) recently passed by Congress and signed by President Barack Obama included a \$5 billion dollar investment in the Weatherization Assistance Program (WAP), administered by the Department of Energy (DOE).¹⁰⁵ The Weatherization Assistance Program is the largest residential energy conservation program in the nation and its funds are used to improve the energy efficiency of low-income dwellings. In New Jersey, nearly 4000 multi-family units will be weatherized under the program.¹⁰⁶

In order to receive WAP funds, states are required to submit to the DOE a State “WAP Plan” setting forth in detail the weatherization program and how it will be implemented.¹⁰⁷ New

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 7.302(B).

¹⁰⁵ AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, at 24.

¹⁰⁶ See OFFICE OF LOW-INCOME ENERGY CONSERVATION, N.J. DEP’T OF CMTY. AFFAIRS, 2009–2012 N.J. STATE PLAN AND GRANT APPLICATION FOR U.S. DEPARTMENT OF ENERGY’S AMERICAN RECOVERY AND REINVESTMENT ACT WEATHERIZATION ASSISTANCE PROGRAM GRANT, at 23, available at <http://www.nj.gov/dca/divisions/dhcr/offices/docs/wapdraftarraplan.pdf>.

¹⁰⁷ 10. C.F.R. § 440.14.

(c) After the hearing, the State must prepare a final State plan that

USING GOVERNMENT POLICY

31

Jersey's WAP Plan for 2009-2012 incorporates a number of Green Construction Careers principles.¹⁰⁸ First, the program is focused on low-income communities.¹⁰⁹ To be eligible, a multi-unit building must contain at least 66% low-income households.¹¹⁰

Second, the Plan integrates targeted hiring and high-quality training.¹¹¹ Contractors must utilize a workforce that consists of at least 50% individuals that have graduated from certified weatherization training programs.¹¹² Such programs are those that offer unrestricted enrollment and in which at least 50% of participants meet all of the following criteria:

- (1) Is a low-income individual;
- (2) Resides in a zip code containing at least one census tract with a rate of unemployment exceeding 150% of the unemployment rate for the state in which it is located; and
- (3) In the year prior to commencing work on the project in question, has not registered as an apprentice in a certified apprenticeship program or performed craft labor

identifies and describes:

- (1) The production schedule for the State indicating projected expenditures and the number of dwelling units, including previously weatherized units which are expected to be weatherized annually during the program year;
- (2) The climatic conditions within the State;
- (3) The type of weatherization work to be done;
- (4) An estimate of the amount of energy to be conserved;
- (5) Each area to be served by a weatherization project within the State . . .
- (6) How the State plan is to be implemented.

Id. § 440.14(c).

¹⁰⁸ See OFFICE OF LOW-INCOME ENERGY CONSERVATION, N.J. DEP'T OF CMTY. AFFAIRS, *supra* note 106, at 38-39.

¹⁰⁹ See *id.* at 23-24.

¹¹⁰ See *id.* at 24.

¹¹¹ See *id.* at 39.

¹¹² *Id.*

as a licensed journeyman.¹¹³

Finally, the Plan contains several strong measures to ensure job quality. All contractors performing weatherization work must pay employees the higher of (a) a state living wage estimated at \$17.40 per hour or (b) the federal prevailing wage.¹¹⁴ Contractors must also provide “quality, affordable employer sponsored health insurance”¹¹⁵ and must attest that they meet an extensive and detailed set of responsible contractor requirements.¹¹⁶ All employees must complete at least 10 hours of OSHA safety training.¹¹⁷ Finally, all contractors are required to sign a labor peace agreement.¹¹⁸

The New Jersey plan incorporates most of the components of the Green Construction Careers Model. In addition to obtaining jobs for targeted workers, it also focuses on entry into specialized training programs, on which employers must in turn rely for workers. This approach seems appropriate where the primary objective is to move entry-level workers into entry-level construction positions. However, this approach also relies entirely on training programs that can effectively accomplish the plan’s goals, which may or may not exist in the jurisdiction in question.

3. Delaware State Weatherization Assistance Program Plan

Delaware has also built the core principles of the Green Construction Careers model into its WAP Plan for years 2009 to 2012, which will govern \$13,733,668 in federal funds and weatherization of a minimum of 1,526 homes.¹¹⁹ First, the

¹¹³ *Id.*

¹¹⁴ *Id.* at 38.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 39.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ DEL. HEALTH AND SOCIAL SERV., AMERICAN RECOVERY AND REINVESTMENT ACT WEATHERIZATION PROGRAM STATE PLAN PROGRAM

USING GOVERNMENT POLICY

33

program targets investment to low-income residences.¹²⁰ Buildings qualifying for weatherization assistance are dwelling units occupied by a family whose income is at or below 200 percent of poverty as determined in accordance with criteria established by the Director of the U.S. Office of Management and Budget and adopted by the State of Delaware.¹²¹

Second, the Plan also integrates targeted hiring measures.¹²² Under the Plan, all employers receiving Recovery Act funds to provide residential energy efficiency services are required to utilize currently enrolled trainees or graduates of programs that serve low-income communities to perform at least 33% of work hours.¹²³ Third, the Plan helps ensure job quality by requiring that employer-paid family health coverage is provided “to all energy auditors, supervisors and installers whose wages are paid in whole or in part with Recovery Act funds.”¹²⁴ The plan also requires employees supervising or performing energy audit or installation work to complete a state-recognized training program.¹²⁵

Finally, high quality training is also a key piece of the plan. The Delaware Weatherization Assistance Program (WAP) has formed a partnership with the Laborers International Union of North America Local 55 to provide specialized workforce training.¹²⁶ This training, in the form of 5-week intensive training modules, will be performed at a new training facility purchased by the union for this purpose.¹²⁷ In addition, the WAP is participating in a statewide consortium that includes educational institutions, contractors, labor unions, the state’s

YEAR 2009–2012, at 4, *available at* <http://recovery.delaware.gov/documents/grant-applications/Weatherization-Assistance-Program.pdf> [hereinafter DELAWARE WEATHERIZATION PROGRAM].

¹²⁰ *Id.* at 15.

¹²¹ *Id.*

¹²² *Id.* at 22.

¹²³ *Id.*

¹²⁴ *Id.* at 58

¹²⁵ *Id.*

¹²⁶ *Id.* at 20.

¹²⁷ *Id.*

utility industry, and state and local government to “build a ‘career ladder’ for the weatherization sector.”¹²⁸ The consortium is chaired by a senior official of Delaware Technical and Community College and is preparing a coordinated program of certificate training, associate and 4-year degree opportunities.¹²⁹

This program, while similar to New Jersey’s, also strays a bit further from the model in terms of its approach to targeted hiring. As noted, the targeted hiring requirement relates to enrolled trainees or graduates of programs that merely serve low-income communities.¹³⁰ Any number of training programs might reasonably meet that criteria. Fortunately, it appears that the specialized LIUNA training program will play a prominent role in Delaware’s Plan implementation, ideally crowding out any low-road training operators.¹³¹

4. *The American Clean Energy and Security Act of 2009 (H.R. 2454)*

In June 2009, the U.S. House of Representatives passed H.R. 2454, the American Clean Energy and Security Act, which included a Green Construction Careers Demonstration Project (“GCCDP”). The purpose of the GCCDP is to “promote middle class careers and quality employment practices in the green construction sector among targeted workers.”¹³² The Act establishes programs and legal standards relating to a vast universe of green construction projects, including, to name just a few: construction of facilities related to carbon capture and sequestration;¹³³ construction of facilities that manufacture plug-in vehicles or their batteries;¹³⁴ manufacturing of energy efficient

¹²⁸ *Id.* at 7.

¹²⁹ *Id.*

¹³⁰ See Cummings & Boutcher, *supra* note 11 and accompanying text.

¹³¹ See DELAWARE WEATHERIZATION PROGRAM, *supra* note 119, at 1.

¹³² American Clean Energy and Security Act, H.R. 2454, 111th Cong. § 424A(a) (2009).

¹³³ See *id.* at §§ 114, 115.

¹³⁴ *Id.* § 116.

USING GOVERNMENT POLICY

35

homes;¹³⁵ and energy efficiency building retrofits.¹³⁶ Any project, “including residential retrofitting projects, funded directly by or assisted in whole or in part by or through the Federal Government pursuant to [the] Act or by any other entity established in accordance with [the] Act” is eligible for inclusion in the GCCDP.¹³⁷

The Act, while incorporating core components of the Green Construction Careers model, gives substantial discretion to the Secretary of Labor to structure and administer the GCCDP. For starters, the Secretary, in consultation with the Secretaries of Energy, must establish which projects will be a part of the GCCDP.¹³⁸ There is no limitation on the number, size or cost of projects that may be covered, and the Secretaries may expand the project in the future.¹³⁹ The Secretaries are specifically empowered to set a percentage of targeted workers to be hired on covered projects.¹⁴⁰

The Act devotes several provisions to ensuring both job quality and high quality training. The Secretaries are explicitly permitted to require Project Labor Agreements on GCCDP projects.¹⁴¹ On covered projects, contractors and subcontractors must have a written agreement with quality apprenticeship or training programs, which are those defined in § 3(1) of the Employee Retirement Income Security Act of 1974.¹⁴² The

¹³⁵ See *id.* § 203.

¹³⁶ See *id.* § 202.

¹³⁷ *Id.* § 424A(a).

¹³⁸ *Id.* § 424A(a).

¹³⁹ See *id.* § 424A(c).

¹⁴⁰ See *id.* § 424A(b). The Act defines targeted workers to include groups targeted under the Work Opportunity Tax Credit (including youth, veterans and public benefits recipients), those in low-income families and households, and displaced homemakers. *Id.* § 424A(e).

¹⁴¹ *Id.* § 424A(h).

¹⁴² *Id.* § 424A(g). The statute for the Act, 29 U.S.C. 1002(1), defines an “employee benefit welfare plan” as “any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or

apprenticeship and training programs must, in turn, have written agreements with pre-apprenticeship programs that have a demonstrated ability to recruit and prepare targeted workers for apprenticeship program admission.¹⁴³

As with the Los Angeles ordinance, the GCCDP reflects the core principles of the Green Construction Careers model, but leaves many vital matters to the discretion of the implementing agency. For example, the Department could elect not to include any construction projects in the GCCDP, or to not require meaningful targeted hiring measures or community workforce agreements. In addition, the Department may encounter a political and/or bureaucratic thicket in trying to implement the program, which focuses on projects funded by other agencies through a variety of administrative channels.

IV. LEGAL CONSIDERATIONS FOR STATE AND LOCAL GOVERNMENTS ADOPTING GREEN CONSTRUCTION CAREERS POLICIES

The core provisions of the Green Construction Careers model, if adopted as state or local regulation, give rise to a number of noteworthy legal considerations. Counsel for policymakers wishing to adopt some version of the model should be well apprised of these issues, while appreciating that none have yet created an obstacle to adoption or implementation in the cases discussed above. The legal issues implicated by the model and discussed in this section include: pre-emption of labor-related standards by the National Labor Relations Act; and

otherwise . . . apprenticeship or other training programs” 29 U.S.C. § 1002(1). This standard allows both union and non-union programs to participate. The California Supreme Court has held that an apprenticeship program created by a nonunion group of contractors (including a trust established to receive and manage employer contributions to fund program, and written standards under which program operates) was an “employee welfare benefit plan” under ERISA. *S. Cal. Chapter of Associated Builders v. Calif. Apprenticeship Council*, 841 P.2d 1011, 1019–20 (1992).

¹⁴³ American Clean Energy and Security Act, H.R. 2454, 111th Cong. § 424A(g)(1).

USING GOVERNMENT POLICY

37

conflict of residency-based targeted hiring measures with the Privileges and Immunities Clause of Article VI of the U.S. Constitution, the Commerce Clause of Article I of the U.S. Constitution, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and the Federal Highway Administration's regulatory prohibition against local hiring preferences. This section discusses each of these legal issues and explores ways that policymakers seeking to adopt Green Construction Careers measures in states and municipalities can avert obstacles the issues may raise.

Note that a jurisdiction may follow the tenets of the construction careers model using policy measures that do not implicate the legal issues discussed below. For example, a jurisdiction could address job quality using measures such as living wage requirements or modest responsible contractor standards that do not give rise to significant National Labor Relations Act pre-emption concerns. Or a jurisdiction could have a targeted hiring program without the geographically-based residency requirements that implicate a number of legal issues. But policymakers rightly want measures that implicate the legal issues discussed below because of effectiveness of measures like Community Workforce Agreements and political and policy desirability of certain types of geography-based targeting. Fortunately, in general, proper findings and careful drafting will enable avoidance of the issues discussed below, especially where the jurisdiction has adopted Green Construction Careers measures in connection with its role as a market participant.

A. Pre-emption of Labor-Related Provisions by National Labor Relations Act

The National Labor Relations Act ("NLRA"),¹⁴⁴ which governs labor organizing and the relationship between unions and employers, contains no express pre-emption provision.¹⁴⁵

¹⁴⁴ 29 U.S.C. § 151-69.

¹⁴⁵ Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408, 2412 (2008).

However, the U.S. Supreme Court has articulated two implied pre-emption doctrines.¹⁴⁶ The first, known as *Garmon* pre-emption,¹⁴⁷ “is intended to preclude state interference with the National Labor Relations Board’s interpretation and active enforcement of the ‘integrated scheme of regulation’ established by the NLRA.”¹⁴⁸ The *Garmon* pre-emption doctrine forbids state regulation of activities that the NLRA (a) protects, (b) makes an unfair labor practice, or (c) arguably protects or prohibits.¹⁴⁹ The second, known as *Machinists* pre-emption, prohibits state regulation of conduct that Congress intended be unregulated and left to be controlled by the “free play of economic forces.”¹⁵⁰ The *Machinists* doctrine focuses on state regulation of economic weapons available to employers and workers.¹⁵¹ However, as discussed below, two important exceptions limit the scope of the *Garmon* and *Machinists* doctrines.

The NLRA will only pre-empt *regulatory actions* of states and subdivisions thereof. The U.S. Supreme Court and several circuit courts have recognized that a state or municipality acting as a participant in the market that is the subject of the government-adopted standard at issue will not be subject to NLRA pre-emption.¹⁵² It is worth noting that the Green

¹⁴⁶ *Id.*

¹⁴⁷ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

¹⁴⁸ *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986).

¹⁴⁹ *Wis. Dep’t of Indus., Labor & Human Relations. v. Gould, Inc.*, 475 U.S. 282 (1986).

¹⁵⁰ *Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971)).

¹⁵¹ See *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (overturning a city’s decision not to renew company’s cab license unless the company resolved a labor dispute with its employees); *Machinists*, 427 U.S. at 155 (invalidating state order enjoining union and its members from continuing to refuse to work overtime); *Chamber of Commerce of the U.S. v. Bragdon*, 64 F.3d 497, 504 (9th Cir. 1995) (invalidating a wage increase regulation that applied to employees working on private projects costing over \$500,000).

¹⁵² *Bldg. & Construction Trades Council v. Associated Builders &*

USING GOVERNMENT POLICY

39

Construction Careers model seems most likely to be applied in contexts in which the policymaking entity is acting as a market participant. The Los Angeles Green Retrofit ordinance and the New Jersey and Delaware weatherization program plans discussed above each provide an example of standards governing market participation. In Los Angeles, the ordinance establishes rules related to the City's own retrofitting ((i.e., retrofitting undertaken by city employees or contractors) of City buildings.¹⁵³ The New Jersey and Delaware program plans describe state rules governing the expenditure of state and federal funds for weatherization.¹⁵⁴ In each case, the government entity is acting as a participant in the building retrofit market to which its standards apply and should thus qualify as a market participant for purposes of NLRA pre-emption analysis.

State and local governments seeking to adopt the Green Construction Careers model in connection with the provision of subsidies,¹⁵⁵ or the leasing of land or space should take note of varied case law on the question of whether these actions provide a basis for qualifying as a market participant.¹⁵⁶ Further, the

Contractors of the Metro. Dist., 507 U.S. 218, 227, 229 (1993) (“[NLRA] pre-emption doctrines apply only to state *regulation* [and] a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor.”).

¹⁵³ See *supra* Part III(b)(i).

¹⁵⁴ See *supra* Part III(b)(ii) and (iii).

¹⁵⁵ In *Associated Builders & Contractors v. City of Providence*, the court examined a local regulation that required the execution of a PLA for private projects in exchange for favorable tax treatment. 108 F. Supp. 2d 73 (D.R.I. 2000). The court reasoned that because favorable tax treatment did not constitute direct market participation akin to purchasing/selling goods/services, the local tax regulation was pre-empted by the NLRA. *Id.* However, in *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res.*, the court held that the City was not preempted from requiring parties receiving tax increment financing to sign a labor neutrality agreement. 390 F.3d 206, 207–208 (3rd Cir. 2004).

¹⁵⁶ See, e.g., *Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997) (holding that airport participating in rental car market by renting counter space and parking spaces to rental car companies); *Transport Limousine of Long Island, Inc. v. Port Auth. of N.Y. and N.J.*, 571 F. Supp 576 (E.D.N.Y. 1983) (holding that Port Authority's imposition

U.S. Supreme Court has indicated that the mere granting of a franchise is not adequate to qualify a government entity as a participant in the market for which the franchise is granted.¹⁵⁷ This issue is more apt to occur in the service contract context, but could be important where, for example, a private party is engaged in building operations and maintenance under a franchise agreement.

At bottom, while this area of law is complex, and, on some questions, unclear, the basic rule established in the *Boston Harbor* case¹⁵⁸—that government entities applying standards to their sponsored projects may avoid NLRA pre-emption—should give policymakers solid footing from which to shape green development.

Policymakers should also be aware that the basis of the policy in dispute is an important component of pre-emption analysis.¹⁵⁹ For example, in *Associated Builders & Contractors*,

of fees on limousine services in exchange for counter space qualified Port Authority as participant in market for ground transportation services). Compare *J.L. Smith v. Dept. of Agric. of the State of Ga.*, 630 F.2d 1081, 1083 (5th Cir. 1981) (holding that market participant doctrine did not apply to state regulation of space assignment at state-owned farmer's market); *Aeroground v. City and County of San Francisco*, 170 F. Supp. 2d. 950 (N.D. Cal. 2001) (holding that airport not acting as market participant in promulgating rule requiring certain employers on the airport site to enter into card check agreements with registered unions).

¹⁵⁷ See *Golden State*, 475 U.S. at 615, 618 (the Court explicitly rejected the argument that a state regulation was immune from Machinists pre-emption because the regulation took the form of a traditional use of local authority to grant a benefit, and pre-empted an exercise of a city's decision to grant a taxi franchise).

¹⁵⁸ See *Bldg. & Construction Trades Council v. Associated Builders & Contractors of the Metro. Dist.*, 507 U.S. 218, 227, 229 (1993).

¹⁵⁹ In *Building & Construction Trades Council*, the U.S. Supreme Court examined a state bid specification for a state owned and managed project that required contractors and subcontractors to agree to a Project Labor Agreement (PLA) containing particular terms. 507 U.S. 218, 221–22 (1993). The court found that the state was acting as a purchaser of services; that the state was “attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost;” that the bid specification was specifically tailored to one particular job; and that project

USING GOVERNMENT POLICY

41

Inc. v. City of Seward, the Ninth Circuit determined that the state acted as a market participant when it required the winning bidder on a public works project to comply with a work preservation clause contained in the City's contract.¹⁶⁰ The court noted that the City "was not driven by regulatory concerns, but by *legitimate management concerns* that may lead any employer, public or private, to agree to a work preservation clause."¹⁶¹

The *Machinists* and *Garmon* doctrines are also limited by the principle that minimum standards that merely create a background for collective bargaining are not pre-empted by the NLRA. In *Fort Halifax Packing Co. v. Coyne*¹⁶² and *Metropolitan Life Insurance v. Massachusetts*,¹⁶³ the Supreme Court held that laws setting minimum health benefits and minimum severance payments were not pre-empted.¹⁶⁴ Many of the core components of the Green Construction Careers model may also be characterized as falling into this category of regulation.

The following discusses more specifically the risk of NLRA pre-emption associated with some of the core components of the Green Construction Careers model.

labor agreements were specifically contemplated under the NLRA. *Id.* at 232. The Court concluded that there was therefore "no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry" and held that the state acted as a market participant, not as a regulator. *Id.*

¹⁶⁰ 966 F.2d 492, 496-98 (9th Cir. 1992).

¹⁶¹ *Id.* at 496 (emphasis added).

¹⁶² 482 U.S. 1, 22 (1987) (holding that the NLRA did not pre-empt a state law requiring minimum severance payments when a factory closes).

¹⁶³ 471 U.S. 724, 758 (1985) (holding NLRA did not pre-empt state law that set minimum health care benefits).

¹⁶⁴ *Id.*; see also *Dillingham Constr. N.A. v. County of Sonoma*, 190 F.3d 1034, 1038-39 (9th Cir. 1999) (holding NLRA did not pre-empt California law that required public works employers to pay prevailing wages to apprentices); *Contract Servs. Network v. Aubry*, 62 F.3d 294, 298-99 (9th Cir. 1995) (holding NLRA did not pre-empt California law that required employers to contribute to unemployment and workers' compensation funds).

1. Targeted Hiring

In order to withstand a legal challenge under the NLRA pre-emption doctrines, it is important that the targeted hiring measures not have a direct effect on the collective bargaining process. In *Hudson County Building and Construction Trades Council, AFL-CIO v. City of Jersey City*, the court reviewed a motion for summary judgment by plaintiff Trades Council, which had challenged a city targeted hiring ordinance. The ordinance required subsidized developers to employ 51% Jersey City residents (51% of whom had to be minority and 7% of whom had to be women) and to require subcontractors to enter local hiring agreements containing good faith obligations.¹⁶⁵ The ordinance further required unions with whom subcontractors had referral agreements to submit signed statements that the unions would act consistently with the good faith obligations.¹⁶⁶ If an employer could not meet its good faith obligations because of the non-compliance of a union, the employer was required to notify the City of its referral needs to meet the goal and consider those referred by the City without regard to any agreement it had with a union.¹⁶⁷

The court considered plaintiff's argument that the *Garmon* doctrine applied because the ordinance required a unilateral change in the hiring hall procedure designated in the collective bargaining agreement, and that such a unilateral change was an unfair labor practice prohibited by the NLRA.¹⁶⁸ The court held that there were issues of material fact that prevented it from granting summary judgment, noting in particular that *Garmon* pre-emption depends on the factual determination of whether and how the city ordinance regulates the collective bargaining *process*, rather than on the substantive terms of the bargain that is struck.¹⁶⁹

¹⁶⁵ 960 F. Supp. 823, 826-27 (D.N.J. 1996).

¹⁶⁶ *Id.* at 827.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 833.

¹⁶⁹ *Id.* at 834.

USING GOVERNMENT POLICY

43

The court also considered the argument that the ordinance was subject to *Machinists* pre-emption because hiring hall provisions, a mandatory subject of negotiations, had been left to the “free play of economic forces.”¹⁷⁰ The court denied summary judgment, noting that a factual question remained as to whether the ordinance affected the conduct of unions and employers in the collective bargaining process.¹⁷¹ Thus, even though the court found that Congress left these types of provisions to the free play of economic forces, the court would not automatically find *Machinist* pre-emption in the absence of evidence of an actual effect on collective bargaining.

Policymakers and their counsel should also consider the perspective in addressing this issue that, following the holdings in *Metropolitan Life* and *Fort Halifax*, modest targeted hiring requirements like those at issue in *Jersey City* will almost never directly impact the collective bargaining process in a way that triggers NLRA pre-emption. As to *Garmon* pre-emption, *Metropolitan Life* may be read to say that, while an issue may be the subject of collective bargaining, where the NLRA is silent as to that issue, as it is regarding hiring hall referral procedures, the jurisdiction cannot be said to have sought to interfere with the National Labor Relations Board’s interpretation and enforcement of the NLRA.¹⁷² As to *Machinists* pre-emption, *Metropolitan Life* and *Fort Halifax* also mean that the NLRA is not concerned with regulations that, like targeted hiring

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² In *Metropolitan Life*, plaintiffs challenged a Massachusetts statute requiring that certain health insurance policies purchased by employers provide minimum mental health benefits. Because some of these plans were purchased pursuant to collective bargaining agreements, the terms of the plans were subject to collective bargaining, and plaintiffs argued that the statute “mandate[d] the terms of collective-bargaining agreements.” 471 U.S. 724, 749 (1985). The Court rejected the *Garmon* argument, stating, “there is no claim here that Massachusetts has sought to regulate or prohibit any conduct subject to the regulatory jurisdiction of the NLRB, since the [NLRA] is silent as to the substantive provisions of welfare-benefit plans.” *Id.* at 748–49.

measures, may affect the substantive terms of a collective bargaining agreement, but do not affect the relative positions of the parties to that agreement.¹⁷³

2. *Project Labor Agreements*

Community Workforce Agreements—project labor agreements containing targeted hiring provisions—are central to the Green Construction Careers model. However, requiring the use of such agreements outside the market participant context may create substantial risk of pre-emption by the NLRA. In *Associated Builders & Contractors v. Providence*, the federal district court applied the *Machinists* pre-emption doctrine to hold that the NLRA pre-empted a local regulation requiring the execution of a project labor agreement for private project receiving favorable tax treatment from the City.¹⁷⁴ The court reasoned that by influencing the decisions of private employers and employees as to whether or not, and with whom, to bargain, the city clearly implicated conduct Congress meant to leave unregulated.¹⁷⁵

3. *Apprenticeship Program Participation*

Requiring contractors to participate in high-quality apprenticeship programs is crucial to ensuring that targeted workers obtain sustained careers in green construction. On its face, a requirement that contractors obtain apprentices from, and provide support to, apprenticeship programs meeting high standards for quality would not appear to be pre-empted by the NLRA. The Ninth Circuit has held that a state prevailing wage

¹⁷³ In *Metropolitan Life*, the Court opined, “[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions.” *Id.* at 753; see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987).

¹⁷⁴ 108 F. Supp. 2d 73, 84 (D.R.I. 2000).

¹⁷⁵ *Id.* at 81.

USING GOVERNMENT POLICY

45

law for apprentices was not pre-empted under the *Machinists* doctrine in part because “federal law contemplates and permits regulation of apprenticeship standards.”¹⁷⁶

4. Responsible Contractor

Many states and localities have used responsible contractor requirements in connection with their procurement and other market participation activities.¹⁷⁷ However, policymakers designing such requirements should be aware of *Wisconsin Dept. of Industry v. Gould Inc.*, in which the U.S. Supreme Court held that the NLRA pre-empted a Wisconsin statute that forbade state procurement agents from using state funds to purchase products made or sold by NLRA violators.¹⁷⁸ The court reasoned that because the statute functioned as a supplemental sanction for violations of the NLRA, it conflicted with the National Labor Relations Board’s comprehensive regulation of industrial relations in precisely the same way as would a prohibition against private parties within the State doing business with repeat labor law violators.¹⁷⁹ Thus, policymakers should avoid creating such supplemental sanctions for NLRA violations in designing responsible contractor requirements.

*5. Minimum Wage, Benefit
and Workplace Standards*

As noted, the NLRA does not pre-empt generally applicable minimum wage, benefit or other minimum labor standards that affect union and non-union employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA.¹⁸⁰ States and localities wishing

¹⁷⁶ *Dillingham Constr. N.A. v. County of Sonoma*, 190 F.3d 1034, 1039 (9th Cir. 1999).

¹⁷⁷ *Sonn & Gebrelassie*, *supra* note 81, at 8.

¹⁷⁸ 475 U.S. 282 (1986).

¹⁷⁹ *Id.* at 286–87.

¹⁸⁰ *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755

to include such minimum standards in green construction careers measures may look to *Associated Builders & Contractors of Southern California v. Nunn*, in which the Ninth Circuit held that California regulations establishing minimum wages and benefits on public and private construction projects for state-registered apprentices survived *Machinists* pre-emption because the law only established minimum labor standards and because federal law permits state regulation of apprenticeship standards.¹⁸¹ However, policymakers must also take note of *Chamber of Commerce of the United States v. Bragdon*, in which the Ninth Circuit determined that a Contra Costa county ordinance requiring payment of prevailing wages on certain types of private industrial construction projects costing over \$ 500,000 was pre-empted by the NLRA.¹⁸²

B. Conflict of Targeted Hiring Measures with the Privileges and Immunities Clause of Article IV of the U.S. Constitution

The Privileges and Immunities Clause of Article IV of the United States Constitution provides that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁸³ The targeted hiring measures described in the Green Construction Careers model, to the extent they result in a preference scheme adverse to out-of-state workers, might be said to interfere with those workers’ ability to pursue private employment, which the U.S. Supreme Court has held is a fundamental right for purposes of the Privileges and Immunities Clause.¹⁸⁴ The Court has rejected the argument that discrimination based on municipal—as opposed to state—

(1985).

¹⁸¹ 356 F.3d 979, 990–91 (9th Cir. 2004).

¹⁸² 64 F.3d 497 (9th Cir. 1995); *see also* 520 South Michigan Avenue Associates, LTD. v. Congress Plaza Hotel & Convention Center, 549 F. 3d 1119 (2008).

¹⁸³ U.S. CONST. art. IV, § 2, cl. 1.

¹⁸⁴ *See* United Bldg. & Construction Trades Council of Camden v. Mayor of Camden, 465 U.S. 208, 219 (1984).

USING GOVERNMENT POLICY

47

residency does not implicate the Clause.¹⁸⁵

However, the Privileges and Immunities Clause only precludes discrimination against non-residents when the governmental action burdens one of the privileges and immunities protected under the clause, *and* the government does not have a “substantial reason” for the difference in treatment or the discrimination practiced against the nonresidents does not bear a “substantial relationship” to the government’s objectives.¹⁸⁶ In accordance with this deferential standard, local governments have adopted targeted hiring measures based on an explicitly stated desire to address poverty and unemployment.¹⁸⁷ Wisely, these entities have made extensive findings about the poverty and unemployment they hope to address and the way in which targeted hiring measures accomplish that goal.¹⁸⁸

¹⁸⁵ *Id.* at 215–16.

¹⁸⁶ Supreme Court of N.H. v. Piper, 470 U.S. 274, 284 (1985).

¹⁸⁷ See, e.g., CONSTRUCTION CAREERS POLICY, *supra* note 66, at 1 (“[R]edvelopment objectives will be advanced by targeting construction employment and training opportunities in ways calculated (i) to mitigate the harms caused by geographically-concentrated poverty, (ii) to fight unemployment and underemployment in vulnerable populations and neighborhoods, including under-represented populations, populations with employment barriers and youth, (iii) to advance the skills of the local labor pool, including youth, to enable workers to earn wages that will assist them in moving out of poverty, (iv) to provide links to career paths for vulnerable populations and Local Residents . . .”).

¹⁸⁸ For example, in Jersey City, the City defended its ordinance by pointing to poverty and unemployment rates there that were higher than those of surrounding municipalities. Hudson County Bldg. & Constr. Trades Council v. Jersey City, 960 F. Supp. 823, 830–31 (D.N.J. 1996). The court, in declining summary judgment against the City, noted that the City still needed to show that “out-of-state workers are a source of unemployment and poverty within its borders.” *Id.* at 831. In *W.C.M. Window Co. v. Bernardi*, the Seventh Circuit invalidated an Illinois statute that provided that the contractor on “any public works project or improvement for the State of Illinois or any political subdivision, municipal corporation or other governmental unit thereof shall employ only Illinois laborers on such project or improvement,” unless the contractor certifies, and the contracting officer finds, that Illinois laborers either “are not available, or are incapable of performing the particular type of work involved” 730 F.2d 486, 489

In *United Building & Construction Trades Council of Camden County v. Mayor & City of Camden*, the U.S. Supreme Court examined a Privileges and Immunities challenge¹⁸⁹ to an ordinance of the City of Camden, New Jersey that required at least 40% of the employees of contractors and subcontractors working on city-funded construction projects to be Camden residents.¹⁹⁰ During the course of litigation, the ordinance was amended to apply to any construction project “funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant.”¹⁹¹ Additionally, “the 40% resident-hiring requirement was changed from a strict ‘quota’ to a ‘goal’ with which developers and

(7th Cir. 1984) (omission in original) (quoting the Illinois statute). The statute defined “Illinois laborers” as a worker who had been a resident of Illinois for at least a year. *Id.* at 494. The court found that the state had not put forth any evidence regarding benefits of a residents-preference law in dealing with a problem created by nonresidents. *Id.* at 497. In *Util. Contrs. Ass’n of New Eng. v. City of Worcester*, the court invalidated an ordinance reserving 50% of work hours on city public works projects for city residents, despite evidence of high unemployment, because the city had not shown that the unemployment was caused by out-of-state residents. 236 F. Supp. 2d 113, 115 (2002).

¹⁸⁹ Initially, the appellant trade union raised Commerce Clause and Equal Protection arguments as well. *United Bldg. & Construction Trades Council of Camden County*, 465 U.S. at 212. Appellant abandoned its Commerce Clause argument in light of the Supreme Court’s decision in *White v. Mass. Council of Constr. Employers*, which held a mayor’s executive order immune from scrutiny under a “market participation” exception to the Commerce Clause. 460 U.S. 204, 213 (1983) (relying upon the decision in 460 U.S. 204 (1983)). Appellants abandoned their Equal Protection argument when the ordinance was amended to eliminate a one-year residency requirement. *Id.*

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

¹⁹¹ *Id.* at 214 (quoting the appellees’ brief).

USING GOVERNMENT POLICY

49

contractors were to make ‘every good faith effort’” to comply.¹⁹² Having concluded that the ordinance burdened a fundamental right, the Court analyzed the ordinance’s relationship to the government’s objectives.¹⁹³ The City argued that “the ordinance [was] necessary to counteract grave economic and social ills [such as] unemployment, a sharp decline in population, and a reduction in the number of businesses located in the city, [each of which resulted in] eroded property values and a depleted . . . tax base.”¹⁹⁴ The resident-hiring preference was designed, the city contended, to increase the number of employed persons living in Camden and to arrest the “middle-class flight” plaguing the city.¹⁹⁵ The city also argued that all non-Camden residents employed on city public works projects, whether they reside in New Jersey or Pennsylvania, constitute a “source of the evil at which the statute is aimed.”¹⁹⁶ The Court reversed the New Jersey Supreme Court’s decision to uphold the ordinance on the ground that the record contained insufficient facts to evaluate the City’s justification because there had never been a trial or findings of fact.¹⁹⁷ The case ultimately settled on remand, without a determination of whether the ordinance would have violated the Privileges and Immunities clause.

The U.S. Supreme Court does accord deference to states and localities in analyzing “local evils” and prescribing “appropriate cures.”¹⁹⁸ In particular, the Court has given deference to state and local governments that are “merely setting conditions on the expenditure of funds” that they control.¹⁹⁹ One district court has followed that doctrine to hold that a city-contract term requiring airport security contractors to hire Detroit residents did not run afoul of the Privileges and Immunities Clause because the city

¹⁹² *Id.* (quoting the appellees’ brief).

¹⁹³ *Id.* at 222.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 223.

¹⁹⁷ *Id.*

¹⁹⁸ *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

¹⁹⁹ *United Bldg. & Construction Trades Council of Camden County*, 465 U.S. at 223.

used only its own monies to purchase the services.²⁰⁰ However, the *Camden* case, which involved projects “funded in whole or in part by the city”, suggests there are limits to this deference.²⁰¹ Importantly, the Privileges and Immunities Clause does not apply to direct public employment because there is no privilege or fundamental right to direct employment with a governmental institution.²⁰²

States and localities seeking to adopt targeted hiring measures that may discriminate against out-of-state workers may thus wish to use such measures to remedy unemployment or poverty in areas where those “local evils” can be shown to be (a) higher than in other areas and (b) caused by out-of-state workers occupying employment positions in the targeted sector. However, states and localities may have more leeway than *Camden* seems to suggest. The Seventh Circuit has noted several kinds of evidence that a jurisdiction might use to justify discrimination against out-of-state workers in the construction sector, each relating principally to the benefit to the jurisdiction.²⁰³ This evidence included: the unemployment rate in [the jurisdiction’s] construction industry; what such unemployment cost the jurisdiction; whether it would be significantly increased by throwing open public construction projects to nonresidents; and whether the costs—if any—to the jurisdiction of allowing nonresident labor on such projects, costs in higher unemployment or welfare benefits paid unemployed construction workers or their families, were likely to exceed any cost savings in public construction from hiring nonresident workers.²⁰⁴

An approach that likely creates a complete defense to a

²⁰⁰ Jones v. J.J. Sec., Inc. 767 F.Supp. 151 (E.D. Mich. 1991).

²⁰¹ *United Bldg. & Construction Trades Council of Camden County*, 465 U.S. at 221.

²⁰² *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Salem Blue Collar Workers Ass’n v. City of Salem* 33 F.3d 265, 270 (3rd Cir. 1994).

²⁰³ *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 498 (7th Cir. 1984).

²⁰⁴ *Id.*

USING GOVERNMENT POLICY

51

Privileges and Immunities challenge is to simply exempt out-of-state workers from targeted hiring calculations, as the City of Cleveland has done in its “Resident Employment Law.”²⁰⁵ That law requires that contracts related to construction projects under which the city provides more than \$100,000 in assistance contain a provision ensuring that city residents will perform at least twenty percent of all “Construction Worker Hours.”²⁰⁶ The law simply excludes hours worked by non-Ohio residents from the definition of “Construction Worker Hours.”²⁰⁷ The Sixth Circuit has held that the Cleveland Resident Employment Law does not violate Title 23 C.F.R. § 635.117(b), which bars contract requirements that discriminate against labor from other states or territories.²⁰⁸ Notably, the court looked to Privileges and Immunities jurisprudence to establish the vital distinction between interstate and intrastate discrimination based on residency.²⁰⁹

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

²⁰⁵ CLEVELAND, OH. ADMIN. CODE tit. XV, ch. 188 (2009).

²⁰⁶ *Id.* § 188.02.

²⁰⁷ *Id.* § 188.01(c).

²⁰⁸ *City of Cleveland v. Ohio Dept. of Transport.*, 508 F.3d 827, 847 (6th Cir. 2007) (“Cleveland’s ordinance was drafted to avoid reaching contractors who hire only out-of-state workers, so it does not ‘discriminate against the employment of labor from [another] state.’”) (internal citation omitted).

²⁰⁹ *Id.* at 847 (noting that in *United Building & Construction Trades Council v. City of Camden*, 465 U.S. 208 (1984), the Court held that the local hiring ordinance “could violate the Privileges and Immunities Clause because it disadvantaged both in-state and out-of-state residents alike”).

“source of evil” at which the targeted hiring measures are properly aimed.

C. Conflict of Targeted Hiring Measures with the Commerce Clause of Article I of the U.S. Constitution

State or local laws that burden or discriminate against interstate or foreign commerce may be invalidated on the ground that they violate the dormant or negative Commerce Clause. “When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, it will generally be struck down without further inquiry.”²¹⁰ “When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, a court should examine whether the state’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.”²¹¹

Targeted hiring measures that contain a preference for local residents may run afoul of the dormant Commerce Clause. In *W.C.M. Window Co. v. Bernardi*, the Seventh Circuit held that an Illinois statute requiring preference for Illinois residents in hiring for all public works projects violated the dormant Commerce Clause.²¹² The court observed that the statute had the same general effect on the flow into Illinois of labor services supplied by individuals unwilling to change their residence to Illinois at least a year before beginning to work in the state as an

²¹⁰ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

²¹¹ *Id.* The Ninth Circuit has opined, “[e]ven in the context of dormant commerce clause analysis, the Supreme Court has frequently admonished that courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation.” *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994) (internal quotation omitted); *see also Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991) (“For a facially neutral statute to violate the commerce clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational.”).

²¹² 730 F.2d 486, 494 (7th Cir. 1984).

USING GOVERNMENT POLICY

53

Illinois import tariff on coal would have on the flow of coal into the state.²¹³ After concluding that the market participation exception was inapplicable, the Court held that the statute violated the dormant Commerce Clause, reasoning that the state had made no showing of actual or probable harm resulting from non-residents obtaining public works construction jobs.²¹⁴

The Supreme Court has recognized a market participation exception to the application of the Commerce Clause.²¹⁵ In *White v. Mass. Council of Construction Employers*, the Supreme Court considered a commerce clause challenge to an executive order by the Mayor of Boston,²¹⁶ which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half bona fide residents of Boston.²¹⁷ With respect to projects funded wholly with city funds, the Court held that the city was acting as a market participant and therefore immune from challenge under

²¹³ *Id.*

²¹⁴ *Id.* at 496.

²¹⁵ See *Reeves v. Stake*, 447 U.S. 429, 436–37 (1980) (“The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.” (internal citations omitted)).

²¹⁶ The Executive Order specifically provided, “[o]n 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.” Only the residency requirement was challenged in the case reviewed by the Court. *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 205 n.1 (1983).

²¹⁷ Significantly, the Court found that, as a factual matter, none of the city’s funds had been used to partially finance private projects. Thus the Court limited its review to the propriety of applying the Mayor’s executive order to projects funded wholly with city funds and projects funded in part with federal funds. *Id.* at 209.

the Commerce Clause.²¹⁸ The Court observed that the executive order covered “a discrete, identifiable class of economic activity in which the city is a major participant,” such that “[e]veryone affected by the order is, in a substantial if informal sense, ‘working for the city.’”²¹⁹

States and localities wishing to apply targeted hiring measures to green construction projects assisted with federal Housing and Urban Development funds may also have some insulation against dormant Commerce Clause challenges. With respect to projects funded in part with federal funds, the Court in *White* opined that where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.²²⁰ The Court examined applicable statutes related to the funding from the U.S. Department of Housing and Urban Development at issue²²¹ and found that the funding was “intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed.”²²² The Court concluded that, “the Mayor’s executive order sounds a harmonious note; the federal regulations for each program affirmatively permit the type of parochial favoritism expressed in the order.”²²³

Thus, as with the Privileges and Immunities issue, policymakers have a number of ways to avoid a dormant

²¹⁸ *Id.* at 214–15.

²¹⁹ *Id.* at 211, n.7.

²²⁰ *Id.* at 213 (citing *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)).

²²¹ The regulations provided that the city must “comply with . . . Section 3 of the Housing and Urban Development Act of 1968, as amended, and implementing regulations at 24 C.F.R. Part 135.” 24 C.F.R. § 570.458(c)(14)(ix)(D) (1982). The regulations implementing that Act provide that “to the greatest extent feasible opportunities for training and employment arising in connection with the planning and carrying out of any project assisted under any such program be given to lower income persons residing in the area of such project” 24 C.F.R. § 135.1(a)(2)(i) (1982).

²²² *White*, 460 U.S. at 213.

²²³ *Id.*

USING GOVERNMENT POLICY

55

Commerce Clause challenge. They may simply adopt targeted hiring measures that are not residency-based, or may adopt the Cleveland approach described above. Further, as one might expect would occur in many cases, the targeted hiring measure may properly be adopted as a part of market participation by the subject locality.

D. Conflict of Targeted Hiring Measures with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”²²⁴ A strict scrutiny standard of review applies to government policies or laws that either (1) make distinctions on the basis of certain inherently suspect characteristics (such as race, ethnicity, national origin, and religion); or (2) restrict the exercise of certain “fundamental” rights (such as the right to vote or of access to the courts).²²⁵ If no suspect class or fundamental right is involved, however, the statute at issue is evaluated under a rational relationship test, and it is valid if “it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.”²²⁶

Accordingly, targeted hiring measures that contain preferences based on inherently suspect characteristics such as race or ethnicity, if challenged, would likely be subject to strict scrutiny review and may be unlikely to survive in the absence of

²²⁴ U.S. CONST. amend. XIV, § 1.

²²⁵ *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). If strict scrutiny is required, the state must demonstrate that the statute at issue is narrowly tailored to serve legitimate objectives and it is the least restrictive means of accomplishing these objectives. *Id.*

²²⁶ *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Under this standard, “[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

a disparity study demonstrating past discrimination in the relevant market.²²⁷ Perhaps in part for this reason, few targeted hiring measures contain such preferences.

Far more common among targeted hiring standards, but still implicating the Equal Protection clause, are preferences based on residency. Such measures are likely to survive an Equal Protection challenge. The Supreme Court has held that municipal laws establishing local residency requirements for city employment are subject to “rational basis” review under the Equal Protection Clause²²⁸ and that, under that lenient standard, such measures are constitutional.²²⁹ In *Jersey City*, the district court denied a motion for summary judgment by the party challenging on Equal Protection grounds the city ordinance requiring subsidized developers to employ city residents.²³⁰ The Court found that in the Equal Protection context, the right to pursue a particular line of employment is not a fundamental right²³¹ and that non-residents do not constitute a suspect class.²³²

²²⁷ In *Richmond v. J. A. Croson Co.*, the Supreme Court struck down a city-adopted plan that required prime contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more Minority Business Enterprises. 488 U.S. 469 (1989). The purpose of the plan was to promote wider participation by minority business enterprises in the construction of public projects. *Id.* at 470. Applying the two prongs of the strict scrutiny standard, the Court found that the evidence did not point to any identified discrimination in the construction industry. *Id.* at 471. The Court held that the city had failed to demonstrate a compelling governmental interest in apportioning public contracting opportunities on the basis of race or that its remedy had been narrowly tailored to the achievement of that interest. *Id.* at 470.

²²⁸ *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *see also Salem Blue Collar Workers Ass’n v. City of Salem*, 33 F.3d 265, 271 (3d Cir. 1994).

²²⁹ *McCarthy v. Philadelphia Civil Serv. Comm’n*, 424 U.S. 645, 647 (1976); *accord Salem Blue Collar Workers Ass’n v. City of Salem*, 33 F.3d 265, 271 (3d Cir. 1994).

²³⁰ *Hudson Country Bldg. & Construction Trades Council v. City of Jersey City*, 960 F. Supp. 823, 831 (D.N.J. 1996).

²³¹ *Id.* (citing *Oklahoma Educ. Ass’n v. Alcoholic Beverage Laws Enforcement Comm’n*, 889 F.2d 929, 932 (10th Cir. 1989)).

²³² *Id.* at 832.

USING GOVERNMENT POLICY

57

Applying a rational basis test, the court concluded that the asserted purpose of reducing unemployment among city residents was legitimate and held that a factual question remained as to whether the ordinance rationally furthered that purpose, such that summary judgment was improper.²³³

E. Conflict of Targeted Hiring Measures with Federal Highway Administration Competitive Bidding Statute and Regulations

Policymakers seeking to adopt residency-based targeted hiring measures for projects funded by the Federal Highway Administration (“FHWA”) confront a special set of concerns. The federal statute governing funds administered by the FHWA provides that the Secretary of Transportation must “require such plans and specifications and such methods of bidding as shall be effective in securing competition.”²³⁴ The FHWA has promulgated regulations implementing this statutory provision that may create obstacles to residency-based targeted hiring measures: Title 23 C.F.R § 635.110(b) prohibits contract requirements for bonds and other features that might restrict competition; Title 23 C.F.R § 635.112(d) renders inapplicable to federal-aid projects bidding procedures that discriminate, *inter alia*, on the basis of national, state, or local boundaries;²³⁵ and

²³³ *Id.*

²³⁴ 23 U.S.C.S. § 112(a) (2009); *see also* §112(b) (2009) (“[C]onstruction of each project . . . shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility.”).

²³⁵ Title 23 C.F.R § 635.112(d) states:

Nondiscriminatory bidding procedures shall be afforded to all qualified bidders regardless of National, State or local boundaries and without regard to race, color, religion, sex, national origin, age, or handicap. If any provisions of State laws, specifications, regulations, or policies may operate in any manner contrary to

Title 23 C.F.R. § 635.117(b) bars contract requirements that discriminate against labor from other states or territories.²³⁶

The Sixth Circuit has held that the Cleveland residents' preference ordinance discussed above does not violate § 635.117(b) because, by design, it does not discriminate against out-of-state residents.²³⁷ However, in a recent letter to the Mayor of Cleveland, the Secretary of Transportation determined that permitting an application of the Cleveland ordinance to FHWA-funded projects would be "inconsistent with the requirement to secure competition."²³⁸ The Secretary reasoned that "mandatory local hiring preferences" in the ordinance would "discourage contractors who are not based in the Cleveland area from bidding" because they may have to hire and train a new workforce.²³⁹

Federal requirements, including title VI of the Civil Rights Act of 1964, to prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible bidder appropriately qualified in accordance with § 635.110, such provisions shall not be applicable to Federal-aid projects. Where such nonapplicable provisions exist, notices of advertising, specifications, special provisions or other governing documents shall include a positive statement to advise prospective bidders of those provisions that are not applicable.

Id.

²³⁶ Title 23 C.F.R. § 635.117(b) (2009) states that "[n]o procedures or requirement shall be imposed by any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a Federal-aid project."

²³⁷ *City of Cleveland v. Ohio Dept. of Transport.*, 508 F.3d 827, 847 (6th Cir. 2007) ("Cleveland's ordinance was drafted to avoid reaching contractors who hire only out-of-state workers, so it does not 'discriminate against the employment of labor from [another] state.' 23 C.F.R. § 635.117(b) (2009). The plain text of the regulation certainly prohibits much geographically-based discrimination, but it does not prohibit all such discrimination. Conspicuously absent from the list 'State, possession or territory,' is the phrase 'or political subdivision,' the word 'locality,' and any other such term that would express an intent to proscribe intrastate discrimination.").

²³⁸ Letter from Ray LaHood, Sec'y of Transp., to Frank G. Jackson, Mayor of Cleveland (June 5, 2009)(on file with the author).

²³⁹ *Id.*

USING GOVERNMENT POLICY

59

This reasoning seems excessively cautious given Cleveland's modest requirement that a mere 20% of the workforce be made up of local residents, with out-of-state workers excluded from the calculation.²⁴⁰ Moreover, any number of existing policies—including small business subcontracting or outreach requirements, certain bonding and insurance requirements, requirements related to supply chain or construction materials—might be said to inhibit competition by discouraging bidding by contractors to at least the degree that the Cleveland ordinance does. Notably, at least one court has managed to reconcile anti-competitive bidding measures with local policy requiring utilization of women and minority-owned businesses.²⁴¹ And the effect of a modest targeted hiring program on contractors competing for work is arguably far more speculative than the effect of the MBE/WBE utilization requirements at issue in that case.

Nevertheless, until the Agency is persuaded to change its “longstanding position” that “mandatory local hiring preferences” run afoul of the anti-competitive bidding provisions of the federal statute, policymakers would be well advised to avoid applying residency-based targeted hiring measures to projects funded with FHWA funds.

As the analysis above reveals, while the legal considerations are several and not insubstantial, states and localities may adopt lawful Green Construction Careers measures as policy. States and localities may act with some assurance in adopting policies that squarely advance the subject locality's proprietary interests. Further, with careful drafting properly tailored to the context, policymakers may safely address many of the legal issues discussed above.

CONCLUSION

As the concept of “green jobs” percolates through popular

²⁴⁰ See *supra* notes 205–06.

²⁴¹ See *generally* *Domar Electric, Inc. v. City of Los Angeles*, 885 P.2d 934 (1994).

consciousness, serious policymakers would do well to focus on the fundamental questions: *What jobs do we wish to create?*, *Where?* and *For whom?* With government initiatives rightly focused on the green construction sector, a number of best practices may be drawn from construction careers models, even though they may be recently developed. As the above policy examples and analysis of legal issues reveals, innovative and lawful Green Construction Careers measures are available to policymakers concerned with these questions. With the right combination of carefully constructed policies, the term “green jobs” may come to have real meaning in every corner of society, as noteworthy numbers of low-income and otherwise disadvantaged men and women embark on middle class green construction careers.