

WE BUILT THIS CITY: THE LEGALITY OF COMMUNITY BENEFIT AGREEMENTS FOR BIG BOX CONSTRUCTION UNDER TITLE VII AND THE EQUAL PROTECTION CLAUSE

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Community groups have begun to employ Community Benefit Agreements (CBAs) to combat the legacy of discrimination and segregation in the construction industry. The U.S. Government as well as state and city governments have implemented various plans since the 1960s to try to eradicate discrimination and segregation with a varied pattern of success. In light of the Supreme Court's decisions in Adarand v. Peña and City of Richmond v. J.A. Croson, it is nearly impossible for a governmental entity to impose a hiring quota or percentage for minority groups. Therefore, without state intervention, the best way for communities to secure adequate opportunities may be to negotiate with the developers directly. This is where CBAs come in. CBAs, however, can take a couple of forms: private-private between private community groups and private developers or private-public between a private developer and some state actor. CBAs in each category may also have either geography-based hiring criteria, or race-based. This Note examines seven CBAs that fit under these different categories and measures them against the Supreme Court's Title VII and Equal Protection jurisprudence. This Note ultimately seeks to suggest strategies for making CBAs successful against possible legal challenges.

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I. INTRODUCTION

As of December 2011, African American unemployment was twice that of white Americans.¹ Even before the Great Recession, African American unemployment rates were typically twice that of white Americans.² This disparity cannot be traced to one or even a few main causes. But the construction industry in particular has erected some of the most structural barriers to employment for minorities. Within the industry, unions, although generally in decline throughout the country, remain a crucial source of training, hiring, and bargaining power between contractors and developers. But the unions often become exclusive clubs, impenetrable to minorities seeking construction work. Furthermore, legislation aimed at reducing the employment disparity has pitted governments and courts, acting on behalf of minorities, against the unions and further hardened their intransigence.

In addition to these employment barriers, minorities face increasing economic inequality within their own communities. Urban gentrification can increase the polarization between low-wage and high-wage jobs within their communities.³ Current scholarship in urban politics and development shows that developers are essential to growth and economic success in cities, but also that urban development has exacerbated racial, economic, and geographic inequities.⁴ To resolve this tension, some community groups have joined together to create Community Benefits Agreements (“CBAs”)—legally binding agreements between a coalition of community-based organizations and developers or governmental bodies. The community groups pledge support for the development in return for, *inter alia*, priority in jobs, low-income housing, and living wages.⁵

CBAs are relatively new and show incredible promise. However, there is little legal scholarship on their *legal* strengths and weaknesses, especially in light of historical efforts to reduce discrimination

¹ Statistics are seasonally adjusted. See *Table A-2. Employment status of the civilian population by race, sex, and age*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/empstat02.htm> (last visited Mar. 31, 2013).

² Christian E. Weller & Jaryn Fields, *The Black and White Labor Gap in America*, CTR. FOR AMERICAN PROGRESS (July 25, 2011), <http://www.americanprogress.org/issues/labor/report/2011/07/25/9992/the-black-and-white-labor-gap-in-america>.

³ Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as a Tactic of the New Accountable Development Movement*, 17 J. CMTY. PRACTICE 88, 89 (2009). For the purposes of this Note, I use “urban gentrification” to mean an influx of capital into a neighborhood that can improve the quality of residential and commercial areas of that neighborhood, but also displace low-income residents that previously resided there. For a more comprehensive overview of gentrification, see Maureen Kennedy & Paul Leonard, *Dealing with Neighborhood Change: A Primer on Gentrification and Policy Choices*, THE BROOKINGS INSTITUTE (Apr. 2001), <http://www.brookings.edu/~media/research/files/reports/2001/4/metropolitanpolicy/gentrification>.

⁴ Parks & Warren, *supra* note 3, at 91.

⁵ *Id.* at 89.

against minorities in construction and development.⁶ This Note will examine some current CBAs in the context of the legal history of integration within urban minority communities, particularly within the construction trade. Part II will outline historical efforts to integrate the construction industry, starting with the Philadelphia Plan in 1969 and ending with the Supreme Court decisions of *City of Richmond v. J.A. Croson* and *Adarand Construction v. Peña* in 1988 and 1995, respectively. Part III will examine the employment provisions of a few CBAs primarily negotiated by groups affiliated with the Partnerships for Working Families.⁷ Part IV will then analyze potential legal challenges to the CBAs and how groups can best structure these agreements to withstand or avoid such challenges.

II. BACKGROUND

A. Unemployment for Minorities in Construction and Service Sectors

Although the construction industry is a particularly salient example of employment discrimination against African Americans, it certainly is not the only industry in which such discrimination has occurred. CBAs include provisions for permanent hiring in retail and service sector positions within the new project area. Discrimination in the service sector, although less historically documented and analyzed, is nevertheless real and also relevant to CBAs.⁸ This Note uses the construction industry to contextualize the history and evolution of Title VII and Equal Protection analysis, but that analysis extends to other industries as well.

B. Past Legislative and Judicial Efforts to End Discrimination

1. Philadelphia Plan

After President Johnson signed the Civil Rights Act of 1964, the Office of Federal Contract Compliance (OFCC) led the effort to reduce discrimination among private companies with government contracts. The construction industry was one of the hardest to regulate because the unions wielded so

⁶ There are, however, many articles analyzing different aspects of CBAs. See, e.g., Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010) (examining the benefits and drawbacks of using CBAs in the land use approval process); Michael L. Nadler, *The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem*, 43 URB. LAW. 587 (2011) (analyzing the potential of CBAs to violate the Takings Clause); Christine A Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 FORDHAM ENVTL. L. REV. 543 (2010) (broadly analyzing the benefits and drawbacks to CBAs, particularly fairness to communities, developers, and taxpayers and the question of whether developers can negotiate concessions outside of local law); Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL'Y 157 (2009) (analyzing the effects of CBAs on comprehensive municipal urban planning); Debra Bechtel, *Forming Entities to Negotiate Community Benefits Agreements*, 17 WTR J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 145 (2008) (discussing options for creating corporate entities to negotiate CBAs to increase the enforceability and credibility of CBAs).

⁷ The CBAs negotiated by groups within the Partnership for Working Families represent only a percentage of the total CBAs in the United States, but they are typically the most successful. Parks & Warren refer to these as “strong” CBAs, as compared to “weak” CBAs negotiated primarily in New York and New Jersey. Parks & Warren, *supra* note 3, at 91–92.

⁸ For a discussion of racial discrimination in the service sector, see generally Devah Pager, Bruce Western, & David Pedulla, *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 1 U. CHI. LEGAL F. 317 (2009).

much power.⁹ Each union determined which employees would work on particular projects, and selections were usually based on union membership and seniority.¹⁰ The unions also limited their membership to ensure that all members had sufficient work opportunities and had strict qualification requirements that usually precluded African Americans from joining in the first place.¹¹ Without sufficient apprenticeship or journeyman experience, African Americans could neither get into unions nor obtain sufficient seniority to be contracted out for lucrative construction work. Because of these practices, the OFCC sought to enforce antidiscrimination in construction contracts through experimental “special area plans” in St. Louis, San Francisco, Cleveland, and Philadelphia throughout 1966 and 1967.¹² The St. Louis and San Francisco plans loosely required contractors to work with unions to develop and provide equal opportunities for minority groups in employment and in journeyman and apprenticeship programs.¹³ Though the contractors drafted detailed statements of their plans to cooperate with these requirements, the programs never showed actual improvement in minority placement rates.¹⁴

After the failures of the St. Louis and San Francisco plans, a group of regional federal officials developed the Philadelphia Plan in November 1967. The Plan created a system to review unions’ affirmative action programs before the government awarded them contracts. The Plan also established a numbers-based model for these programs by compiling basic information on racial population ratios, the construction workforce, sources of minority recruitment, and the expected amount of construction in a particular area.¹⁵ However, the Comptroller General struck down this holistic approach for being too vague. He stated that the Plan was defective because the basis for approval or disapproval of the affirmative action plans was unclear.¹⁶ The Nixon administration revised the Plan in 1969 by giving

⁹ JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 136 (1996).

¹⁰ *Id.*

¹¹ Damon Stetson, *Negro Groups Step Up Militancy in Drive to Join Building Unions*, N.Y. TIMES, Aug. 28, 1969, at 27 available at <http://select.nytimes.com/gst/abstract.html?res=FA0717FE3B551B7B93CAAB1783D85F4D8685F9>. Stetson also mentions that when civil rights groups demanded that the building trade unions hire more African Americans as journeymen, a union official said, “Would you want your house wired by an amateur?” *Id.* See also Peter Millones, *Labor; Building Trades Say, ‘Enter, Negroes?’* N.Y. TIMES, Feb. 18, 1968, at E4, available at <http://select.nytimes.com/gst/abstract.html?res=F10817FC3F5E1A7B93CAA81789D85F4C8685F9> (describing an example of discrimination when a group of African American youths in New York scored extremely high in a test for a sheet metal apprenticeship program, but the union nevertheless tossed out their scores and delayed their entry into the program); SKRENTNY, *supra* note 9, at 197–98 (discussing the building trades’ contestation of the allegations of discrimination and quoting renowned labor union leader George Meany’s assertion that “the Building Trades [are] being singled out as being . . . the last bastion of discrimination. . . . [T]his is an amazing statement, when you figure how small participation of Negroes . . . is in, for instance, the banks in this country, the press, on the payroll for newspapers and communications media”); David R. Jones, *U.S. Aides Will Discuss Bias With Officials of Building Trades*, N.Y. TIMES, June 18, 1967, at 32, available at <http://select.nytimes.com/gst/abstract.html?res=FB0915F73B5B1A7B93CAA8178DD85F438685F9> (regardless of whether the discrimination was intentional, the government sought to increase minority membership in building trade unions first through dialogue and eventually through government-mandated action).

¹² SKRENTNY, *supra* note 9, at 136.

¹³ *Id.* at 136–37.

¹⁴ *Id.*

¹⁵ *Id.* at 137.

¹⁶ *Id.* at 138.

contractors specific percentage targets for minority employees.¹⁷ This revision sought simultaneously to remedy the shortcomings of the ambiguous 1967 Plan and to avoid the argument that the “targets” were quotas, which Title VII forbade.¹⁸ The Solicitor of Labor even tried to justify the targets by analogizing the Plan to permissible school integration plans that also had numerical goals.¹⁹ By revising the Plan, Nixon emphasized that he specifically intended to target the discriminatory practices of the building trade unions, stating, “[W]e cannot have construction unions which deny the right of all Americans to have those positions. America needs more construction workers, and . . . all Americans are entitled to an equal right to be a member of a union.”²⁰ Despite vicious opposition to the Plan from the building trade unions and other contractors, the Third Circuit upheld the validity of the Plan. The Supreme Court denied certiorari, implicitly sanctioning the Third Circuit’s holding.²¹

2. Hometown Approach

Before officially revising the Philadelphia Plan, Nixon also sanctioned another plan, called the “hometown approach,” to integrate the construction trade and improve minority recruitment.²² Under the hometown approach, the parties voluntarily negotiated agreements with each other. For example, through private negotiation, the unions willingly accepted the same racial quotas they had rallied against under the Philadelphia Plan. This approach produced more actual integration than the Philadelphia Plan because employers had to accept minority apprentices into the unions as “trainees.”²³ In addition, the hometown approach made sure that minorities were direct signatories on these agreements, which increased the likelihood of successful implementation.

3. Title VII Lawsuits

¹⁷ The plan required that bidders on any federal or federally assisted construction contract for projects exceeding \$500,000 must submit an acceptable affirmative action program with specific goals for employing minority employees in specific skilled crafts. The Executive Order applied to the five-county Philadelphia area. The Department of Labor held public hearings in Philadelphia and determined various employment ranges for minority workers, including five to nine percent for ironworkers in 1970, eleven to fifteen percent in 1971, sixteen to twenty percent in 1972, and twenty-two to twenty-six percent in 1973. *Contractors Ass’n of E. Pa. v. Sec’y of Labor*, 442 F.2d 159, 163–64 (3d Cir. 1971) *cert. denied*, 404 U.S. 854 (1971).

¹⁸ *Id.* at 172–73. Specifically, if a contractor failed to hire within the range of targeted percentage of minority employees, it would have to demonstrate “good faith” that it had tried as hard as possible to achieve that range. If the contractor failed to convince the OFCC of its good faith, the contract could be canceled or denied. *Id.* For a more in-depth discussion of the political debate surrounding the Philadelphia Plan, see SKRENTNY, *supra* note 9, at 177–221.

¹⁹ SKRENTNY, *supra* note 9, at 195.

²⁰ *Id.* at 197.

²¹ *Contractors Ass’n*, 442 F.2d at 159.

²² William B. Gould, *The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry*, 26 STAN. L. REV. 773, 778 (1974).

²³ WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS 302 (1977). Becoming a trainee would place minorities on a track to get the coveted journeyman’s card, which would give them relative economic security in the area of the union’s jurisdiction. However, unions could satisfy the Plan by hiring non-union minority workers, thereby failing to allow minorities to get footholds into seniority within the unions. See also Paul Good, *The Bricks and Mortar of Racism*, N.Y. TIMES, May 12, 1972, at SM24, available at <http://select.nytimes.com/gst/abstract.html?res=FA0C15FA3F5F117B93C3AB178ED85F468785F9> (quoting Curtis Alexander, a black with a journeyman or union card that he obtained because of federally funded job training, who said that without such a card, “[Y]ou get no respect.”).

In addition to the Philadelphia Plan and the hometown approach, changes within the courts directly affected integration within the unions. First, Federal Rule of Civil Procedure 23 was amended in 1966, making it easier for lawyers to represent large classes of individual minority construction and trade workers.²⁴ This development encouraged civil rights groups to file many more Title VII lawsuits against the unions' discriminatory practices. By 1974, the unions had suffered multiple defeats in federal courts and began to fear that more lawsuits would threaten their solvency.²⁵ Fear of future defeats led the unions to sign consent decrees with various companies and the federal government to provide black workers financial compensation or institute affirmative action programs.²⁶ The increasing number of Title VII cases also required more federal judges; the appellate bench increased by forty-three percent during the 1960s and thirty-six percent during the 1970s.²⁷ Finally, federal courts—including the Supreme Court—expansively interpreted the provisions of Title VII to support affirmative action and dismantle seniority systems, job requirements, or entrance examinations ostensibly targeted at entrenching the segregated status quo.²⁸

The Philadelphia Plan, hometown approaches, and Title VII lawsuits were powerful foes to the forces of union discrimination. However, their momentum was relatively short-lived. By the 1970s, conservatives began to combat all aspects of the civil rights groups' successes, with powerful results.²⁹

C. Changing Tides: *Croson* and *Adarand*

The 1980s and 1990s brought a more conservative judicial bench that significantly constrained the integration victories of the prior two decades. The Supreme Court decided to hear two cases—*City of*

²⁴ Class-action litigation represented only a few dozen cases in 1965 and more than a thousand cases a decade later. PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT AND THE DECLINE OF THE DEMOCRATIC PARTY* 85 (2008).

²⁵ *Id.* at 70–71.

²⁶ Specifically, the United Steelworkers of America signed a consent decree with nine steel companies and the federal government to pay 55,000 black workers who had filed a class action suit against the union. *Id.* Peter Schoemann, president of the Building Trades in 1968, gave a speech supporting affirmative action programs, but only out of fear of pattern-or-practice Title VII suits. “[W]e carried the fight just about as far as we could.’ But to avoid further lawsuits, ‘the building trades need a single policy in this area.’” *Id.* at 70. Another cause of the expansion of consent decrees was a change in how the courts used Rule 53, which provided for special masters. Courts let the masters play a more expansive role in enforcing consent agreements between civil rights groups and unions. The special masters directly supervised and reported on unions’ affirmative action programs and enabled courts to invoke fines against unions that did not comply. Through this program, judges effectively replaced the EEOC and DOL as agencies overseeing enforcement of integration, which Frymer argues often went beyond legislative intent. *Id.* at 85–86.

²⁷ *Id.* at 86. The Federal Magistrates Act of 1968 allowed federal judges to appoint magistrates whenever necessary to help them with their caseload.

²⁸ *Id.* at 87–88. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Contractors Ass’n of E. Pa. v. Sec’y of Labor* 442 F.2d 159 (3d Cir. 1971); *Quarles v. Philip Morris*, 279 F. Supp. 505 (E.D. Va. 1968).

²⁹ FRYMER, *supra* note 24, at 94–95. Conservatives started their own advocacy-driven law firms, targeted changes to the Federal Rules of Civil Procedure, and encouraged Congress to pay more attention to and stay active in the process of legal rule making. Congress also restricted attorney fee opportunities for lawyers bringing Title VII lawsuits to reduce incentives to bring many cases with large damages. *Id.* at 94–95.

Richmond v. J.A. Croson and *Adarand Constructors, Inc. v. Pena*³⁰—in which statutes required general contractors to hire socially disadvantaged subcontractors for a specific monetary percentage of each total awarded contract. In *Croson*, the city of Richmond passed a local plan that required any general contractor that received a construction contract from the city to subcontract at least thirty percent of a contract’s value to qualifying minority business enterprises.³¹ The Supreme Court held that the program was unconstitutional under the Equal Protection Clause because it awarded those contracts on the basis of race without showing a compelling state interest in doing so.³² Although *Croson* applied only to state and local programs,³³ *Adarand* required federal programs that considered race to undergo strict scrutiny as well.³⁴

These decisions had a significant effect on state, local, and federal efforts to reduce discrimination in government contracting. By 2009, sixteen state and federal courts had applied strict scrutiny to affirmative action programs.³⁵ Twelve had invalidated programs under the Equal Protection

³⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

³¹ *Croson*, 488 U.S. at 469. Richmond’s Plan defined minority group members to be “Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts.” *Croson*, 488 U.S. at 477–78. Richmond’s Minority Business Utilization Plan was similar to the federal Public Works Employment Act of 1977, which was the first federal act to require at least ten percent of every federal construction grant to be expended for “minority business enterprises.” Pub. L. No. 95-28, Tit. I, § 103, 91 Stat. 116 (1977) (codified as amended at 42 U.S.C. § 6705 (2006)).

³² *Croson*, 488 U.S. at 490–92. The Supreme Court evaluates whether state or federal legislation violates the Equal Protection Clause by using different levels of judicial scrutiny.

At a minimum, a statutory classification must be rationally related to a legitimate government purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are given [strict] scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

Clark v. Jeter, 486 U.S. 456, 461 (1988) (internal citations omitted). Before the Court decided *Adarand* and *Croson*, it was implicitly understood that strict scrutiny only applied to legislation that *discriminated* on the basis of race, not to legislation that aimed to help minorities (also known as “benign racial discrimination”). *Adarand* and *Croson* clarified that *any* classification on the basis of race is cause to apply strict scrutiny. See Mary J. Reyburn, *Strict Scrutiny Across the Board: The Effect of Adarand Constructors, Inc. v. Pena on Race-Based Affirmative Action Programs*, 45 CATH. U. L. REV. 1413, 1416 (1996). For a law to survive under strict scrutiny, the legislating government must show the legislation fulfills a “compelling governmental interest,” and the legislation is “narrowly tailored” to that interest. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

³³ *Croson*, 488 U.S. at 490 (“That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate.”).

³⁴ *Adarand*, 515 U.S. at 200. *Adarand* analyzed section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 as well as the Small Business Act of 1953. The former offered states financial assistance with highway construction if the state gave ten percent of the amount to small businesses owned and controlled by socially and economically disadvantaged individuals, which was usually defined in terms of race. Lynn Ridegeway Zehrt, *A Decade Later: Adarand and Croson and the Status of Minority Preferences in Government Contracting*, 21 NAT’L BLACK L.J. 1, 5 (2009).

³⁵ Zehrt, *supra* note 34, at 2.

Clause. Of the four that validated such programs, three focused primarily on federal affirmative action statutes in the highway construction industry, not on state or local development.³⁶

The foregoing history demonstrates a clear pattern since at least the 1960s: integration in the construction industry has been cyclical, with booms and busts. The late 1960s saw tremendous momentum within the civil rights community and political establishment to integrate the construction unions. However, by the 1970s and 80s, political support had waned and those opposed to integration had obtained greater political strength. This change led in turn to a decline in enforcement of affirmative action programs and a slide back to pre-Plan segregation. A more conservative judicial bench in the last twenty-five years has constrained the scope of state and federally mandated affirmative action programs with cases like *Croson* and *Adarand*. And current labor advocates must contend with big-box retailers like Wal-Mart, Target, and Costco. These retailers have a history of discriminating against minorities, offering low wages, imposing bad working conditions, and being staunchly anti-union.³⁷ This state of affairs leaves a mystifying path for African American construction workers to follow: should they set their efforts toward integrating trade unions, which would increase their general bargaining power and wages for a larger number of jobs, or should they abstain from joining a union in the hope of obtaining nonunion work with large, anti-union employers?³⁸ And, in light of Supreme Court jurisprudence on the legality of affirmative action programs both under Title VII and the Equal Protection Clause, what role should federal, state, or local governments play in this process?

The next Section examines how community groups have developed CBAs as an innovative response to four major shifts in labor activism and urban development. First, union membership and political presence has declined precipitously in the last fifty years.³⁹ Second, a dramatic rise in the service sector (as compared to manufacturing) has increased the proportion of non-exportable jobs in urban areas. This rise should increase the bargaining power of labor groups and employees; however, a third major shift, the simultaneous rise of anti-union big-box retailers has served to undermine rather than

³⁶ *Id.* The only case that validated a program was in Denver. I will explore these cases more in Part IV, *infra*.

³⁷ FRYMER, *supra* note 24, at 1–2. See also Dan Frosch, *Immigrants Claim Wal-Mart Fired Them to Provide Jobs for Local Residents*, N.Y. TIMES (Feb. 8, 2010), <http://www.nytimes.com/2010/02/09/us/09walmart.html>; Reuters, *Wal-Mart Settles Lawsuit on Hiring*, N.Y. TIMES (Feb. 20, 2009), <http://www.nytimes.com/2009/02/21/business/21walmart.html> (Wal-Mart settles lawsuit claiming it discriminated against African-Americans in hiring for \$17.5 million); *Target Corp. to Pay \$500,000 for Race Discrimination*, EEOC (Dec. 10, 2007), <http://eeoc.gov/eeoc/newsroom/release/12-10-07a.cfm>; *Target Corp. to Pay \$775,000 for Racial Harassment*, EEOC (Jan. 26, 2007), <http://www.eeoc.gov/eeoc/newsroom/release/1-26-07.cfm>; Steven Greenhouse, *Trying to Overcome Embarrassment, Labor Opens a Drive to Organize Wal-Mart*, N.Y. TIMES (Nov. 8, 2002), <http://www.nytimes.com/2002/11/08/us/trying-to-overcome-embarrassment-labor-opens-a-drive-to-organize-wal-mart.html> (stating that not one of Wal-Mart's one million workers is a union member and that the retailer has crushed the only successful effort to organize a group of butchers that lasted a mere two weeks).

³⁸ Nor are these approaches necessarily mutually exclusive. For example, labor unions and local politicians in Chicago got Wal-Mart to agree that in order to allow its stores into the city, they would have to be union-built. Stephanie Clifford, *Wal-Mart Gains in Its Wooing of Chicago*, N.Y. TIMES (June 24, 2010), <http://www.nytimes.com/2010/06/25/business/25walmart.html>. Wal-Mart reached the same deal with the Building and Construction Trades Council union in New York City, even though the project has yet to be approved. Elizabeth A. Harris, *Wal-Mart Skips Council Hearing as Impact of Stores is Assailed*, N.Y. TIMES (Feb. 3, 2011), <http://www.nytimes.com/2011/02/04/nyregion/04walmart.html>.

³⁹ Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1933 (2007).

encourage labor activism. Finally, an increasingly conservative federal judiciary and a large number of judicial vacancies⁴⁰ have made litigation a less-tenable option. As a result, CBAs have become a hopeful and often successful shift for minorities from targeting union discrimination to targeting non-exportable industries and large retailers who seek to build in local areas.⁴¹

III. A MODERN HOMETOWN APPROACH WITH LEGAL TEETH: COMMUNITY BENEFIT AGREEMENTS

CBAs are contracts negotiated between prospective private developers and individuals or groups representing the affected community.⁴² They can also be contracts between private entities and the State.⁴³ By negotiating CBAs, community groups gain a developer's promises to directly benefit the local community through means including affordable housing, employment provisions, public space, monitoring provisions, and potential remedies for breach.⁴⁴ The developer gains the community's support for the development, which in turn helps avoid costly delays or cancellation of the project.⁴⁵

Often the most important and politically salient features of CBAs are their employment-related provisions, which promise to provide job access and job quality.⁴⁶ Many CBAs have provisions for "targeted hiring programs," which require that employers in a development promise to hire certain individuals through some combination of a tiered priority system, a "first source" office, or local job training programs.⁴⁷ The individuals that usually benefit from the program are those harmed by the

⁴⁰ As of March 31, 2013, there were eighty-four vacancies out of 874 total federal judgeships, representing almost ten percent of judgeships. *Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Mar. 31, 2013); *Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited Mar. 31, 2013). Increased vacancies mean it is harder to get employment cases into and through the already-backlogged courts.

⁴¹ For a more thorough discussion of how localism is an effective alternative labor strategy to twentieth century federal union efforts, see Cummings, *supra* note 39, at 1942–51.

⁴² JULIAN GROSS, GREG LEROY & MADELINE JANIS-APARICIO, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9–10 (2002) (Good Jobs First & The California Partnership for Working Families 2005), available at <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf>. Julian Gross, the director of the Community Benefits Law Center, also created a precise definition of a CBA: "A CBA is a legally binding contract (or set of related contracts), setting forth a range of community benefits regarding a development project, and resulting from substantial community involvement." Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING 35, 37 (2008), available at http://www.forworkingfamilies.org/sites/pwf/files/publications/CBAs_Definitions_Gross_2008.pdf.

⁴³ See discussion *infra* Part III.B.

⁴⁴ Barbara Bezdek, *Putting Community Equity in Community Development: Resident Equity Participation in Urban Redevelopment*, in LAW, PROPERTY AND SOCIETY: AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 93, 109 (Robin Paul Malloy & Nestor M. Davison eds., 2009).

⁴⁵ *Community Benefits Agreements*, GOOD JOBS NEW YORK, <http://www.goodjobsny.org/resources-tools/community-benefits-agreements> (last visited May 3, 2013).

⁴⁶ Parks & Warren, *supra* note 3, at 92. Job access means both providing residents relevant training and getting residents into jobs, while job quality means that those jobs provide a decent, or even "living wage."

⁴⁷ Gross, *supra* note 42, at 43. A "first source" office receives notice of job openings from employers, maintains contact with a variety of job training organizations to access their applicant pools, and refers qualified workers to employers. A first source office can benefit job training organizations and targeted individuals by giving them reliable access to information about job openings. It can help the targeted hiring program meet its goals. *Id.* at 46. For a

development in the first place: those whose jobs or homes are displaced by the development and residents of the neighborhoods around the development. But these programs often also target residents of low-income neighborhoods within the entire metropolitan area or individuals referred by community job training organizations.⁴⁸

CBA's create provisions to provide these individuals with jobs in a variety of ways. Some implement referral and hiring processes. These include requiring employers to target prioritized individuals on their own by giving notice of job openings through certain channels or in certain geographic areas, interviewing only priority candidates for a limited period of time after they notify those candidates of openings, interviewing only people referred by designated sources, or meeting percentages of priority candidates hired in order to be in compliance with the program.⁴⁹

The next few Sections consider the employment provisions of some existing CBA's to highlight a few of the forms they can take. The CBA's chosen for this Note met certain criteria. First, the Note examines both historically significant or publicly controversial CBA's. The Staples CBA is an example of the former and the Atlantic Yards CBA the latter. Second are CBA's that appeared to have more direct involvement by local, state, or federal governments and are therefore more easily subject to constitutional challenges. The Cherokee-Gates CBA and LAX CBA met these criteria. Finally are CBA's with clear hiring quotas for minority employees that implicate cases involving affirmative action plans. The Atlantic Yards and San Francisco CBA's are examples of this type of CBA. The CBA's discussed in this Note are neither wholly illustrative of the many kinds of CBA's in the country nor are they meant to indicate "important" or "better" CBA's. Rather, their provisions are potential signposts for legal analyses of whether different combinations of factors are more or less permissible under Title VII and the Fourteenth Amendment.⁵⁰

A. Private-Private Agreements with First Source Offices, Targeted Hiring, and Quotas Based on Geography and Income

CBA's between two private actors with hiring practices based on geography or income could be subject to disparate impact challenges under Title VII.⁵¹ If attributable to state action, however, such

description of a tiered priority system, see *First Source Hiring Policy, Section IV: Responsibilities of First Source Referral System*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/sites/pwf/files/documents/StaplesCBA.pdf>.

⁴⁸ These organizations are often called first source offices. Gross, *supra* note 42, at 43.

⁴⁹ *Id.* at 45–46.

⁵⁰ For an introduction to the broad range of issues facing CBA's, see *Community Benefits*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/campaigns/CBA> (last visited May 3, 2013); Amy Lavine, *National Survey on CBA's*, COMMUNITY BENEFITS AGREEMENTS (Aug. 12, 2010), <http://communitybenefits.blogspot.com/2010/08/national-survey-on-cbas.html>.

⁵¹ Suits for disparate impact do not require proof of intentional discrimination, but rather proof that an employment policy—whether intentional or unintentional—had a disparate impact on a particular minority group.

Title VII of the Civil Rights Act of 1964 . . . prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact').

Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

challenges would also receive an equal protection analysis.⁵² If a potential plaintiff has a case for both disparate impact, and it involves some state action, disparate impact alone will not bring a CBA within a strict scrutiny analysis without a discriminatory motive.⁵³ Rather, the claimant would have to show that the relevant actors had a discriminatory purpose regarding him personally⁵⁴ or that, given proof of a disparate impact, the relevant actors maintained the policy because of, not in spite of, the disparate impact.⁵⁵ In short, it generally would be easier to prove a violation of Title VII's disparate impact provisions than to prove a constitutional violation under the Equal Protection Clause. These factors will receive deeper analysis in Part IV.

1. Bayview CBA

In May 2008, a coalition of three San Francisco community groups entered into a CBA with Lennar, a national housing developer.⁵⁶ Under the agreement, Lennar promised to provide low-income housing, housing assistance funds, and specific hiring goals under a “first source hiring program.”⁵⁷ The articulated purpose of the hiring program was to “facilitate the employment of targeted job applicants by employers in the project . . . through a non-exclusive referral system.”⁵⁸ The agreement defines “employer” as a “non-governmental business or nonprofit corporation that conducts any portion of its operations in the Project Site with at least eight (8) regular full time equivalent employees.”⁵⁹ The definition includes contractors but not construction contractors.⁶⁰ The agreement defines a “targeted job

⁵² See discussion *infra* Part IV.B.

⁵³ See, e.g., *McClesky v. Kemp*, 481 U.S. 279 (1987) (holding that the state of Georgia's sentencing to death of more black defendants and killers of white victims than white defendants and killers of black victims did not manifest a discriminatory purpose in violation of the equal protection clause). See also *Washington v. Davis*, 426 U.S. 229, 246–48 (1976).

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved[.] . . . However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution[.] . . . We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.

Id.

⁵⁴ *McCleskey*, 481 U.S. at 292.

⁵⁵ *Id.* at 298–99. (Claimant would have to prove that the “Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect . . . [or] because of the racially disproportionate impact”) (emphasis in original).

⁵⁶ The three San Francisco groups were the San Francisco Labor Council, ACORN, and the San Francisco Organizing Project (SFOP). *San Francisco Labor Council Pens Affordable Housing Agreement with Lennar*, FOGCITYJOURNAL.COM (May 16, 2008), <http://www.fogcityjournal.com/wordpress/455/san-francisco-labor-council-pens-affordable-housing-agreement-with-lennar>.

⁵⁷ See *Core Community Benefits Agreement: Hunters Point Shipyard/Candlestick Point Integrated Development Project*, PARTNERSHIP FOR WORKING FAMILIES (May 30, 2008), <http://www.forworkingfamilies.org/sites/pwf/files/documents/BayviewHuntersPointCBA.pdf>.

⁵⁸ *Id.* at 26.

⁵⁹ *Id.*

⁶⁰ *Id.* The exclusion of construction contractors is usually due to the way the industry is structured, which has led to low-bid contracting. The Partnership for Working Families seeks to remedy these discrepancies in the

applicant” as an individual referred to any employer by a “first source referral system,” which is the agency designated to implement the first source hiring program.⁶¹ The CBA sets three tiers of targeted job applicants that an employer must prioritize above other applicants: first, individuals whose residence or place of employment will be displaced because of the project; second, low- and moderate-income individuals living in the area of the project; and third, low- and moderate-income individuals living in zip codes within the city.⁶²

The agreement defines its goal for covered jobs for a six-month period to be fifty percent targeted job applicants for entry-level jobs.⁶³ If an employer meets this goal, it will be considered in compliance with the first source hiring program.⁶⁴ But an employer will also be in compliance with the Program if it has observed the plan’s other provisions even if it has not met the goal.⁶⁵

2. Staples CBA

The Staples Center CBA, though not officially the first CBA, is typically considered the preeminent and groundbreaking CBA negotiated between community groups and a large private developer. In May 2001, a coalition of over thirty labor groups negotiated a comprehensive CBA covering the area surrounding the Staples Center in Los Angeles.⁶⁶ This CBA pioneered the first source hiring program to benefit “targeted job applicants” as well as employers by providing a pool of qualified job applicants. Many other California community group coalitions modeled their CBAs directly on the Staples example.⁶⁷

construction industry in addition to its other CBA work. See *Construction Career Opportunities Project*, THE PARTNERSHIP FOR WORKING FAMILIES, <https://communitybenefits.rdsecure.org/section.php?id=168> (last visited Mar. 31, 2013).

⁶¹ *Id.* at 27.

⁶² *Id.* The agreement also requires a specific process for covered employers to hire targeted job applicants. First, at least six months before initial hiring, each employer must notify the referral system of the best estimate of the approximate number and type of jobs that will need to be filled. As new jobs arise, an employer must also notify the referral system of available job openings and the skills and qualifications required. For three weeks after notifying the referral system of job opportunities, the employer may only hire qualified targeted job applicants as long as operations on the project site have not yet started. Once operations have started, the employer can only hire targeted job applicants for five days after notifying the referral system of job opportunities. When both exclusive time periods are over, the employer must still make good-faith efforts to hire targeted job applicants, but may also hire any applicant recruited or referred from any source. *Id.* at 28.

⁶³ *Id.* at 27.

⁶⁴ *Id.* at 28.

⁶⁵ *Id.*

⁶⁶ See Staples CBA, *supra* note 47.

⁶⁷ The Bayview CBA was partially based on the Staples CBA. See also *North Hollywood Mixed-Use Redevelopment Project Community Benefits Program*, PARTNERSHIP FOR WORKING FAMILIES (Nov. 2001), <http://www.forworkingfamilies.org/sites/pwf/files/documents/NoHoCBA.pdf>; *Marlton Square Redevelopment Project Developer Community Benefits Program*, PARTNERSHIP FOR WORKING FAMILIES, http://www.forworkingfamilies.org/sites/pwf/files/documents/cba_marltonsquare.pdf (last visited May 3, 2013); and *Hollywood & Vine Mixed-Use Development Project Community Benefits Agreement Gatehouse Hollywood Development, L.P.*, PARTNERSHIP FOR WORKING FAMILIES, <https://communitybenefits.rdsecure.org/downloads/CBA%20Gatehouse%20FINAL%205-7-04.pdf> (last visited May 3, 2013).

In the Staples CBA, like the Bayview CBA, targeted job applicants are also separated into a tiered priority system with three levels with a more specific stratification of local geography: the first priority goes to individuals whose place of residence or employment has been displaced by the Staples Center project and to low-income individuals living within a half-mile radius of the project.⁶⁸ The second priority goes to low-income individuals living within a three-mile radius of the project.⁶⁹ The third priority goes to low-income individuals living in any area throughout Los Angeles.⁷⁰ An employer is also required to use the first source referral system when hiring for any jobs located within the project area.⁷¹

B. Private-Public with Hiring Quotas Based on Geography

As opposed to completely private CBAs, in private-public CBAs the action is already attributable to the state as a direct participant and signatory of the CBA. Therefore, legally, both the Equal Protection Clause and Title VII will apply. The level of scrutiny under equal protection analysis will be subject the previous caveats: proof of a disparate impact maintained precisely because of its impact, or a discriminatory implementation with respect to one or more individuals. Without this showing, the CBAs would receive a rational basis analysis.

1. Cherokee-Gates CBA

The Cherokee-Gates Project in Denver is similar to many other CBAs, providing affordable housing and first source hiring, but it also includes an unprecedented agreement to pay prevailing wages to every construction worker who engages in the publicly funded construction of site infrastructure and maintenance of public spaces and facilities.⁷² The first source local hiring program promises to maximize both job opportunities for disadvantaged residents and the outcome of public investments.⁷³ The biggest difference between the Cherokee-Gates CBA and other CBAs is the amount of public funding used for the project. The Front Range Economic Strategy Center (FRESC) led a coalition of community groups and union organizations to negotiate for \$126 million in subsidies from the city of Denver to the developer of the project, Cherokee Denver, LLC.⁷⁴ In return, Cherokee Denver agreed to a variety of conditions, including good wages for construction workers and first source hiring for nearby residents.⁷⁵ In this case, negotiation between the community groups and the developer proved difficult and often

⁶⁸ Staples CBA, *supra* note 47, at A-16.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Community Benefits Achievements at the Cherokee-Gates Project*, THE CAMPAIGN FOR RESPONSIBLE DEVELOPMENT, <http://www.forworkingfamilies.org/sites/pwf/files/documents/CherokeeGates.pdf> (last visited May 3, 2013) [hereinafter *Community Benefits Achievements*].

⁷³ *First Source Local Hiring: Overview & History of Denver's First Source Policy*, THE FRONT RANGE ECONOMIC STRATEGY CENTER, <http://www.fresc.org/downloads/First%20Source%20Local%20Hiring%20-%20Overview%20and%20Denver%20History.pdf> (last visited May 3, 2013).

⁷⁴ Tory Read, *The Gates Cherokee Redevelopment Project: "A huge step forward for low-income people in Denver,"* THE FRONT RANGE ECONOMIC STRATEGY CENTER (2006), <http://www.fresc.org/downloads/Gates%20Report%20MCD.pdf> (last visited May 3, 2013). The total subsidy included \$85 million in tax increment financing and \$41 million in metro district financing subsidies. The \$126 million represented about thirteen percent of the total project budget of \$1 billion. *Id.* at 15.

⁷⁵ *Id.* at 2–3.

frustrating, so the city stepped in to incentivize Cherokee Denver to agree to the groups' conditions in return for subsidies.⁷⁶ However, even though the city provided the crucial link, it was not a signatory to the agreement. Therefore, including the Gates CBA under the private-public heading is slightly misleading. This CBA will not necessarily qualify as state action, but the enormity of the subsidies and the city's involvement in the CBA necessitate a searching legal inquiry into whether this amount of governmental support would make this agreement appear more private-public than private-private.⁷⁷

2. LAX Project CBA

The 2004 Los Angeles Airport CBA is the largest CBA to date, encompassing an \$11 billion modernization plan.⁷⁸ The CBA was signed by the LAX Coalition for Economic, Environmental and Educational Justice and the Los Angeles World Airports (LAWA), the governmental entity that operates the airport.⁷⁹ The employment provisions of the CBA look almost identical to those of the Staples Center CBA, the predominant difference being the size and scope of the project. The targeted job applicants in the LAX project are divided into only two tiers: first, low-income individuals living in the "Project Impact Area"—an area defined by the project's environmental impact report—and, second, low-income individuals residing in the entire city of Los Angeles.⁸⁰ Unlike the Staples and Bayview CBAs, however, the LAX CBA does not include a goal of targeted job applicants to be hired for LAWA to be in compliance with the agreement. Rather, LAWA must only hire targeted applicants for a set period of time when making initial hires for the commencement of operations and when making hires after the commencement of operations.⁸¹ Here, the CBA definitely involves state action, but the hiring criteria are facially neutral without an obvious discriminatory purpose. Therefore, this CBA is at most subject to a Title VII disparate impact attack based on the demographics of Los Angeles.

C. Private-Private and Private-Public with Hiring Based on Race or Gender

Finally, some private-private or private-public CBAs have racial or gender-based quotas. As opposed to the geographically-based hiring goals of other CBAs, these CBAs impose affirmative action goals on the basis of race and gender. They are, therefore, subject to a disparate treatment analysis under Title VII, but may fall within the permissible scope of voluntary affirmative action plans first analyzed in *United Steelworkers v. Weber*.⁸² The CBAs in this category that are attributable to state action will most likely be facially discriminatory and subject to strict scrutiny. Again, they will receive deeper analysis in Part IV.

1. Atlantic Yards

⁷⁶ *Id.* at 21–23.

⁷⁷ See discussion *infra* Part IV.B.

⁷⁸ John M. Broder, *Los Angeles Groups Agree to Airport Growth, for a Price*, N.Y. TIMES (Dec. 17, 2004), <http://www.nytimes.com/2004/12/17/national/17lax.html>.

⁷⁹ *Policy & Tools: Community Benefits Agreements & Policies in Effect*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect#cbas> (last visited Mar. 29, 2013).

⁸⁰ *Exhibit C to Community Benefits Agreement: First Source Hiring Program for Airport Employers*, PARTNERSHIP FOR WORKING FAMILIES (2004), <http://www.forworkingfamilies.org/sites/pwf/files/documents/LAXFirstSourceFinal12-6-04.pdf>.

⁸¹ *Id.* at 3.

⁸² See *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

Negotiated in 2004 and 2005, the Atlantic Yards CBA in Brooklyn, New York concerns the Atlantic Yards development, including the new Barclays Center stadium, housing, and retail space.⁸³ However, due to extensive controversy and lack of adequate enforcement, Atlantic Yards has become the paradigm example of a “weak CBA.”⁸⁴ Despite being modeled on the successful Staples Center project and negotiated by prominent Brooklyn and minority community groups, the CBA has failed to deliver some of its key promises to minority construction workers.⁸⁵ Nevertheless, a lawsuit filed by seven construction workers illustrates how specific promises within an enforceable CBA can enable putative beneficiaries to sue for breach.⁸⁶

The employment provisions of Atlantic Yards have simultaneous goals. First, they provide that developers would use good faith efforts to employ or cause to be employed at least thirty-five percent minority and ten percent women construction workers during construction of the arena and the project as a whole.⁸⁷ Second, the CBA envisions that enrollment priority for the broader employment provisions and first source hiring program will extend first to residents of city-owned apartments and second to low-income members of the neighboring community, and then will expand outward both geographically and to individuals of higher income.⁸⁸ The Atlantic Yards CBA thereby creates a combination of quotas for minority and female employment, particularly during construction, as well as facially neutral geographic and income-based requirements.⁸⁹

The most directly challengeable aspects of the Atlantic Yards CBA would likely be the quota requirements for minority and female hiring. However, the geographic requirements could also be challenged if they imposed a disparate impact on non-minority residents seeking jobs in the large development.

2. Milwaukee Park East Redevelopment Area

⁸³Community Benefits Agreement, BENEFITING BVHP, http://www.benefitingbvhp.org/docs/docs/cba/ATLANTIC_YARDS_CBA.pdf (last visited May 3, 2013) [hereinafter Atlantic Yards CBA].

⁸⁴ See *supra* note 7.

⁸⁵ John Marzulli & Erin Durkin, *Promise of union jobs a lie by Atlantic Yards, suit by construction workers charge*, NY DAILY NEWS (Nov. 15, 2011), <http://www.nydailynews.com/new-york/promise-union-jobs-a-lie-atlantic-yards-suit-construction-workers-charge-article-1.977604>. Members of the coalition of community groups include, *inter alia*, the New York State Association of Minority Contractors, Brooklyn United for Innovative Local Development, and Downtown Brooklyn Neighborhood Alliance. Atlantic Yards CBA, *supra* note 83, at 1.

⁸⁶ Enforcement of CBAs is beyond the scope of this Note, but will remain a challenge for beneficiaries, especially among the “weak CBAs.” Parks & Warren, *supra* note 3, at 92 (“[T]hree core features separate strong from weak CBAs. A broad scope, high level of transparency, and explicit and robust monitoring and enforcement mechanisms are the core characteristics of strong CBAs.”).

⁸⁷ Atlantic Yards CBA, *supra* note 83, at 13.

⁸⁸ *Id.* at 4, 12.

⁸⁹ However, census data from Kings County shows that the majority of Brooklyn residents are non-white. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/36047.html> (last visited Mar. 27, 2013). The areas immediately surrounding the development, such as Clinton Hill and Fort Greene, are sixty-four percent minority, though many minorities are leaving the area. Tamy Cozier & Annesofie Brochstedt, *Census 2010: A Dramatic Decline in Black Residents*, FORT GREENE/CLINTON HILL NEWS (May 23, 2011), <http://fort-greene.thelocal.nytimes.com/2011/05/23/census-2010-a-dramatic-decline-in-black-residents/#more-57249>.

The Milwaukee Park East Redevelopment Compact (PERC) in Milwaukee, Wisconsin was implemented in 2005 as part of the redevelopment of county land in downtown Milwaukee. The CBA required that during construction of the redevelopment, at least twenty-five percent of jobs would be in “Disadvantaged Business Enterprises/Minority Business Enterprises” (DBEs/MBEs)—defined as businesses that are at least fifty-one percent minority-owned and controlled—and at least twenty-five percent of employees would be minorities.⁹⁰ However, the sixteen-acre project faced a significant obstacle when the city could not find a developer, so local community groups rallied around the Board of Supervisors and obtained the first CBA passed by legislation instead of negotiations with a private developer.⁹¹ This CBA therefore includes both state action and racial quotas, automatically requiring a strict scrutiny analysis.

3. Christina Avenue Composting Facility CBA

Finally, Peninsula Compost Company, a private developer, and members of a coalition of South Wilmington, Delaware community groups signed the Christina Avenue Composting Facility CBA in 2007. The CBA maintained quotas by setting a goal that twenty percent of the subcontracted construction work on the Project was to be performed by DBEs. The CBA defines “Minority” as a person with origins in any of the Black African or Caribbean, Hispanic, Native American or Alaskan native, or Asian and Pacific Islander racial groups, and any other individual deemed to be disadvantaged.⁹² It also aims to have twenty percent of the labor employed during the construction phase to be performed by community residents.⁹³ Paradoxically, the CBA acknowledges that the goal of twenty percent subcontracted work done by DBEs has never been achieved by any large urban development project in the community.⁹⁴ Nevertheless, the CBA imposes quotas similar to those in *Adarand* by mandating that subcontracting work go to firms predominantly owned or controlled by minorities.

⁹⁰ *Community Benefits Agreement Outline, Park East Redevelopment Area*, INSTITUTE FOR WISCONSIN’S FUTURE, http://www.wisconsinfuture.org/past_projects/econdev/gjln_agreement.htm (last visited May 3, 2013); *Minority Business Certification Program*, STATE OF WISCONSIN – DEPARTMENT OF ADMINISTRATION, <http://www.doa.state.wi.us/section.asp?linkid=225&locid=171> (last visited May 3, 2013).

⁹¹ The CBA was passed by the Milwaukee Board of Supervisors on Dec. 16, 2004. *See Park East Redevelopment Compact (PERC)*, PARTNERSHIP FOR WORKING FAMILIES (Dec. 16, 2004), http://www.forworkingfamilies.org/sites/pwf/files/documents/PERC_0.pdf; Amy Lavine, *Milwaukee Park East Redevelopment CBA*, COMMUNITY BENEFITS AGREEMENTS (Jan. 30, 2008), <http://communitybenefits.blogspot.com/2010/08/national-survey-on-cbas.html>. The PERC states that the “Milwaukee County Board and the community asks and expects businesses and contractors to make a good faith effort to employ racial minorities consistent with their numbers in the County’s workforce[.] (The 2000 county census population . . . was 68.7% White, 20.4% Black, 7.2% Hispanic and 3.7% other[.]”). Note, however, that the CBA on the Institute for Wisconsin’s Future website shows an employment requirement of twenty-five percent minority. *Community Benefits Agreement Outline, Park East Redevelopment Area*, INSTITUTE FOR WISCONSIN’S FUTURE, http://www.wisconsinfuture.org/past_projects/econdev/gjln_agreement.htm (last visited May 3, 2013).

⁹² *Christina Avenue Composting Facility Community Benefits Agreement*, NEW YORK CITY COMPTROLLER, 3–4, <http://www.comptroller.nyc.gov/bureaus/opm/pba/pdf/CommunityBenefitsAgree-PCC-So-Wilmington-Coalition.pdf> (last visited May 3, 2013) [hereinafter Christina Avenue CBA].

⁹³ *Id.* at 5. As of the 2010 census, the population of the relevant communities covered by the CBA was 67.4% non-white in Wilmington, DE. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/10/1077580.html> (last visited Mar. 27, 2013).

⁹⁴ Christina Avenue CBA, *supra* note 92, at 4.

Naturally, these three generalized buckets of CBA structures still vary widely from place to place. The circumstances of Title VII or constitutional challenges to their provisions will also vary widely and ultimately depend on the facts unique to each case. However, given the general trends that have emerged, these groupings help to outline the possible scope of CBA challenges and their ultimate viability under Title VII and the Fourteenth Amendment.

IV. POTENTIAL LEGAL CHALLENGES TO CBAS AND HOW TO AVOID THESE CHALLENGES

A. Title VII Challenges

In the private sector, employers occasionally manipulate the gender or racial balance of their employees in favor of minority applicants when neutrally selecting from a qualified applicant pool would otherwise produce a different balance. These manipulations have a few judicially relevant manifestations. The first are affirmative action plans voluntarily negotiated between an employer and a union or group of employees. Under such a plan, the employer agrees with the union to hire or train a certain quota or percentage of minority applicants.⁹⁵ In the second manifestation, an employer adopts a facially neutral hiring or promotion standard, then discovers that it may have a disparate impact on a minority population. For fear of disparate impact liability, the employer decides to invalidate or abandon the standard, to the detriment of those who met it.⁹⁶ Whenever an employer makes an “adverse employment decision” on the basis of race, even if intended to avoid potential disparate impact liability, the employer violates Title VII.⁹⁷ The Supreme Court has held that neither approach is *per se* invalid, but both are subject to narrow limitations that could affect the structure and implementation of CBAs, particularly those with racial quotas.⁹⁸

1. What are Affirmative Action Plans and do CBAs Meet Their Criteria?

⁹⁵ See *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979). The employer and the union bargained for a plan that reserved fifty percent of the openings in an in-plant craft training program to African Americans until the percentage of African Americans in the program was commensurate with the percentage in the local labor market. *Id.* at 198–99.

⁹⁶ See *Ricci v. DeStefano*, 557 U.S. 557 (2009). The city of New Haven tried to fill vacant lieutenant and captain jobs in its fire department by employing a promotional examination. Seven out of nine candidates eligible for the captain position based on exam performance were white; the other two were Hispanic. The department threw out the tests for fear of being found liable for adopting a practice with a disparate impact on minority firefighters. *Id.* at 557, 562.

⁹⁷ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a), (j) (2006). These claims fall under a disparate treatment analysis because they make distinctions on the basis of race. Affirmative actions that are facially neutral but have the *effect* of creating more minority applicants or employees than exist in the relevant labor market would be subject to a disparate impact analysis. See also *Ricci*, 557 U.S. at 578–79 (city’s refusal to certify the test results violated disparate treatment provision of Title VII absent some strong basis in evidence that the city would be subject to disparate impact liability had they retained the test); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (Title VII prohibits discrimination against whites as well as non-whites).

⁹⁸ In *Ricci*, the Supreme Court applied the rule that the city was required to demonstrate with a “strong basis in evidence” that it would be subject to disparate impact liability if it failed to take a race-conscious action. Under the disparate impact test, the Court held that the city officials lacked a strong basis in evidence both for the proposition that the tests were not job related and consistent with business necessity and for the belief that there existed an equally valid, less-discriminatory alternative to using examinations that adequately met the city’s needs. *Ricci*, 557 U.S. at 584–93.

Most cases take for granted that the employer plan at issue is an affirmative action plan. However, the Second Circuit in *United States v. Brennan* recently sought to define the threshold issue of what actually constitutes an affirmative action plan.⁹⁹ The court determined that in order to be an affirmative action plan, the employer action must benefit all members of a protected class and cannot be individualized.¹⁰⁰ In other words, “when an employer, acting *ex ante*, although in the light of past discrimination, establishes hiring or promotion procedures designed to promote equal opportunity and eradicate future discrimination, that may constitute an affirmative action plan.”¹⁰¹ However, when an employer with established procedures changes those procedures *ex post* because of the racial composition of the results, the individualized remedy (also known as “make-whole relief” intended to remedy the effects of discrimination) does not warrant the affirmative action defense.¹⁰² Whether or not the plan is legally characterized as an affirmative action plan affects the relevant Supreme Court analysis. A voluntary affirmative action plan can be permissible under *Weber* and its progeny. However, an employer’s affirmative action remedy requires a different analysis under *Ricci* when the employer can justify that remedy only with a “strong basis in evidence” that the particular employment action caused a disparate impact in the first instance.¹⁰³

When considered with *Brennan*’s distinction in mind, all the CBAs discussed in this Note appear to create *ex ante* plans, in light of past discrimination, to promote equal opportunity and eliminate future discrimination. CBAs are designed to go into effect before the developer breaks ground on a new project, which means that the plans do not seek to remedy any current practice that may have had a discriminatory effect on individuals who previously applied for jobs with the developer. However, it is also debatable whether the CBAs could be affirmative action plans, given that some do not directly extend to “members of a racial or gender class.”¹⁰⁴ Many CBAs, particularly those in San Francisco and Los Angeles, will have the effect of targeting minority candidates because the relevant geographic areas in the plans have majority minority populations.¹⁰⁵ But because the criteria themselves are facially neutral, the CBAs might not be characterized as affirmative action plans. However, characterizing them as facially neutral is ultimately more beneficial to such agreements in the face of potential legal challenges. Therefore, assuming that potential plaintiffs will try to characterize them as affirmative action plans, the next two sections analyze CBAs in that light.

2. Voluntarily Negotiated Affirmative Action Plans

⁹⁹ *United States v. Brennan*, 650 F.3d 65, 99–104 (2d Cir. 2011).

¹⁰⁰ *Id.* at 99.

¹⁰¹ *Id.* at 102.

¹⁰² *Id.* at 102–04. The court is directly referring to the situation in *Ricci* where the employer implemented a test as a prerequisite for promotions then threw out the test when it feared it would have a disparate impact on minority applicants. The action was individualized, the Second Circuit said, “for what it did, in essence, was to give promotion—or at least another chance at promotion—to the individual black firefighters who had taken the test, at the expense of those . . . who would have [otherwise been eligible for promotion].” *Id.* at 102.

¹⁰³ *Ricci*, 557 U.S. at 563.

¹⁰⁴ *Brennan*, 650 F.3d at 104.

¹⁰⁵ See, e.g., William H. Frey, *The New Metro Minority Map: Regional Shifts in Hispanics, Asians, and Blacks from Census 2010*, THE BROOKINGS INSTITUTE (Aug. 2011), http://www.brookings.edu/~media/research/files/papers/2011/8/31%20census%20race%20frey/0831_census_race_frey.pdf.

The affirmative action plan in *United Steelworkers v. Weber* arose at the same time as the Philadelphia Plan, hometown approaches, and the wave of Title VII litigation in the late 1960s and early 1970s.¹⁰⁶ The steelworkers union and the employer negotiated the affirmative action plan to apply to the employer's fifteen national plants. White workers at the employer's Louisiana plant then sued for reverse discrimination. Before the employer negotiated and implemented the plan only 1.83% of the employees at the Louisiana plant were black, even though the local workforce was approximately thirty-nine percent black.¹⁰⁷ Both the district court and a divided Fifth Circuit held for the plaintiffs and granted a permanent injunction prohibiting the plan on the grounds that it violated Title VII's prohibition against race-based decisions in employment.¹⁰⁸ The Supreme Court reversed and held that Title VII permits some voluntary race-conscious affirmative action plans in the private workplace. However, the Court also explicitly stated that its decision was based on the case's narrow facts, including the fact that the union and private employer voluntarily agreed to the bona fide affirmative action plan.¹⁰⁹ Although *Weber* held that some affirmative action plans are permissible, the Court did not give clear guidance as to which plans would be permissible and which would not.¹¹⁰ Nevertheless, the Court tried to be instructive to future plans by recognizing three factors important to the *Weber* plan. First, despite its narrow holding, the Court gave judicial notice to plans designed to remedy past discrimination or obvious racial imbalances in traditionally segregated job categories. Second, the plan did not "trammel the interests of the white employees" in that it did not fire white employees in order to hire black employees, nor did it serve as an "absolute bar" to white advancement because "half of those trained in the program would be white."¹¹¹ Third, the plan was a temporary measure intended to eradicate the racial imbalance rather than maintain a racial balance between blacks and whites.¹¹² In *Johnson v. Transportation Agency, Santa Clara County*, the Court clarified *Weber* by stipulating that an employer does not need to have personally discriminated in the past in order to implement an affirmative action plan.¹¹³ Rather, the employer need only point to an obvious "imbalance in traditionally segregated job categories."¹¹⁴ This ruling expanded *Weber's* scope to include more employers in traditionally segregated industries, even if the segregation was unintentional.

¹⁰⁶ See Part II *supra* for this background.

¹⁰⁷ *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193, 198–99 (1979).

¹⁰⁸ *Id.* at 200.

¹⁰⁹ *Id.* at 200–01:

The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. That question was expressly left open . . . in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination.

(internal citations omitted). Because the plan did not involve state action, it did not implicate the Equal Protection Clause of the Fourteenth Amendment.

¹¹⁰ *Id.* at 208 ("We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line.").

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Johnson v. Transp. Ag'y Santa Clara Cty.*, 480 U.S. 616, 617 (1987).

¹¹⁴ *Id.* at 630 (quoting *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193, 209 (1979)). The requirements from *Weber* and *Johnson* are known as the "purpose, impact and duration standards." Richard N. Appel, Alison L. Gray & Nilufer Loy, *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 564 (2005).

Significant gaps remain in the *Weber* and *Johnson* standards despite three decades of case law. First, it is unclear exactly what the Supreme Court would consider a “traditionally segregated” job category or those jobs in which past discrimination was sufficient to warrant current remedial action. Second, even if the Court did clearly establish what traditionally segregated job categories are, it is unclear what proof would be required to show whether a specific job falls into one of those categories. Third, it is unclear whether a non-remedial purpose could justify a voluntary affirmative action plan by a private employer.

Even though the Supreme Court has never addressed whether a non-remedial purpose could justify a voluntary affirmative action plan, one circuit court has. In *Schurr v. Resorts Intern. Hotel, Inc.*, the Third Circuit held that an affirmative action plan that was not based in any finding of historical or current discrimination in the casino industry or in the plaintiff’s particular job category violated Title VII under the *Weber* standard.¹¹⁵ In that case, a New Jersey casino director hired a qualified black male as a technician instead of a qualified white male because the director believed that such a decision was required by the casino’s affirmative action plan, which itself was required by the state of New Jersey for every casino licensee.¹¹⁶ The court observed that neither the New Jersey Casino Commission nor the defendant casino had designed the plans to correct a manifest imbalance in response to a job category that had ever been affected by segregation or in response to a finding that any relevant job category had been affected by segregation.¹¹⁷ Rather, the Casino Commission stated that the Casino Control Act was promulgated because the tourist area of Atlantic City had become “blighted” and when casino development resurged, the legislature wanted to benefit the large minority population through significant job creation.¹¹⁸

CBAs with specific racial targets implicate both the issue of whether the affirmative action plan is in a “traditionally segregated industry” and whether a non-remedial purpose could ever warrant an

¹¹⁵ *Schurr v. Resorts Intern. Hotel, Inc.*, 196 F.3d 486 (3d Cir. 1999). The Third Circuit cited its decision in an earlier case for the rule that “unless the affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and . . . cannot satisfy the first prong of [*Weber*].” *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1557 (3d Cir. 1996).

¹¹⁶ *Schurr*, 480 U.S. at 488–90. The Casino Control Act required that every casino license holder undertake affirmative measures to ensure equal employment opportunities. A New Jersey regulation set specific minority and female percentage goals for particular job categories within the casinos and required casinos to file quarterly and annual reports on their affirmative actions efforts, including documentation of efforts to hire or promote a woman or minority to positions with a salary of \$35,000 or higher. Furthermore, casino licensees would be subject to periodic hearings about the affirmative action plans to demonstrate compliance. *Id.* All of this indicates the extent of the state’s coercive power to enforce the affirmative action plans.

¹¹⁷ *Id.* at 497–98.

¹¹⁸ *Id.* at 498. The only other circuit court cases that analyzed non-remedial purposes involved public employees and an employer whose preferential treatment sought to promote racial diversity. *See Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990) (court upheld a claim of reverse discrimination under Title VII because there was no prior discrimination in the school district, there was no statistical imbalance that would give rise to an inference of discrimination, and the plan was designed to maintain—not achieve—a racial balance, in contravention of the rule in *Johnson*); *Taxman*, 91 F.3d at 1547 (Board’s affirmative action plan preferring minority teachers over nonminority teachers in layoff decisions violated Title VII since it was adopted to promote racial diversity rather than to remedy past discrimination and it unnecessarily trammled nonminority interests). However, these decisions predate the Supreme Court’s decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003), which held that racial diversity in higher education—at least among the student population—can be a compelling state interest.

affirmative action plan. Although the construction industry has a long and well-documented history of discrimination, most CBAs also affect jobs in the service sector, which do not necessarily have the same history.¹¹⁹ Cases like *Schurr* suggest, however, that a CBA could benefit from including both clear findings of historical segregation in the included job categories and an explicit intent to remedy discrimination in those categories.¹²⁰ Some scholars theorize that a non-remedial purpose like racial diversity in the workplace could justify a voluntary affirmative action plan.¹²¹ However, if that were the case, the program would need to articulate how its plan is consistent with Title VII's objectives of breaking down patterns of racial segregation and hierarchy and is not intended to maintain a specific racial balance.¹²²

The final remaining discrepancy after *Weber* is the duration of the affirmative action plan and how to measure whether a plan is truly “temporary” within the meaning of *Weber*. The idea of maintaining a racial balance usually comes into play after an employer has implemented an affirmative action plan and a minority employee has subsequently left a position. The employer will likely interview

¹¹⁹ See, e.g., Gross, LeRoy & Janis-Aparicio, *supra* note 42, at 49 (“Collective bargaining agreements in retail, service, and manufacturing generally do not conflict with targeted hiring requirements”); *id.* at 63 (CBAs can implement protections similar to “worker retention” laws that “provide job security to long-term service workers when city contracts change hands. . . . This ensures that the service workers get to keep their jobs even when the specific hotel or theater operator changes.”). This is not to say the service industry has not had pervasive discrimination. See, e.g., Bonnie Kwon, *Restaurants and Race: Discrimination and Disparity in the Food Service Sector*, RESTAURANT OPPORTUNITIES CENTERS UNITED (Aug. 16, 2011), <http://rocunited.org/restaurants-and-race-discrimination-and-disparity-in-the-food-service-sector/>; Sue Sturgis, *Chick-fil-A’s history of workplace discrimination*, THE INSTITUTE FOR SOUTHERN STUDIES (Aug. 2, 2011), <http://www.southernstudies.org/2012/08/chick-fil-as-history-of-workplace-discrimination.html>; Amanda Holpuch, *Disney sued for discrimination by former employee over Muslim hijab*, THE GUARDIAN (Aug. 14, 2012), <http://www.guardian.co.uk/world/2012/aug/14/disney-sued-discrimination-muslim-employee>.

¹²⁰ Although *Johnson* said that proof of the historical discrimination does not have to be from the actor imposing the affirmative action plan, *Croson* suggests that proof of historical discrimination should at least be localized and not based on national findings of discrimination in that industry. For a more in-depth discussion of *Croson*, see *infra* Part IV.

¹²¹ Appel et al., *supra* note 114, at 570–73. *Grutter* and *Gratz* stated that there is a compelling state interest in promoting racial diversity in higher education. Some scholars have sought to extrapolate that argument into the employment context. For a more detailed analysis of these issues, see Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451 (2004) (concluding that even if *Grutter* may have laid the foundation for more expansive use of affirmative action in employment, the current paradigm used to examine affirmative action in private employment will likely prevent *Grutter* from having a large impact) and Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 272 (2003) (stating that it “appears likely” that the Supreme Court would view a public employer’s need to take race into account for certain employment decisions as compelling). The irony of *Grutter*’s effect on Title VII jurisprudence is that the “Equal Protection Clause [imposes] fewer restraints on the government than Title VII imposes on private employers . . . because . . . private employer[s] would not be permitted to adopt an affirmative action plan to better community relations, or referring more directly back to *Grutter*, to sustain the ‘political and cultural heritage,’ ensure ‘[e]ffective participation by members of all racial and ethnic groups in . . . civic life,’ train ‘our Nation’s leaders,’ or ‘to cultivate a set of leaders with legitimacy.’”). Tilles at 463. White suggests differently—that Title VII will permit employers more flexibility than is constitutionally available. White, *supra*, at 275.

¹²² *United States v. Weber*, 443 U.S. at 208. One of the stated reasons the Court upheld *Weber* plan was because the “plan [was] a temporary measure . . . not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance.”

both minority and nonminority candidates for the position. Failure to hire a minority candidate risks going against an affirmative action plan, while hiring a minority replacement could be seen as maintaining the new racial balance that now exists because of the affirmative action plan.

In *Sharkey v. Dixie Electricity Membership Corporation*, the Fifth Circuit held that even though an employer had not explicitly stated when the affirmative action plan would end, it did not necessarily follow that the plan was intended to maintain a racial balance.¹²³ Furthermore, the employer's policies indicated that race was merely a "plus" to an otherwise qualified candidate's application, not something that could transform an almost-qualified candidate into a qualified candidate.¹²⁴

For CBAs, this issue is only relevant for the permanent service-sector jobs generated by a given project. However, none of the aforementioned CBAs with racial quotas imposes those quotas for permanent jobs. Therefore, this inquiry is not entirely relevant. However, assuming *arguendo* that a CBA applies a racial quota to permanent jobs, *Weber* remains instructive. The Court stressed that the plan was aimed at eradicating a racial imbalance rather than maintaining a specific racial balance. Specifically, the plan's preferential selection of black candidates would end as soon as the percentage of black workers in the plant approximated that of the local labor force.

Some difficulties arise in applying this analysis to CBAs. First, in some areas surrounding a CBA project, the minority community is the majority. In such a situation, it is not entirely feasible to have the percentage of minority workers in the workforce equal that of the percentage of the minority in the surrounding community. If that outcome were the goal, the affirmative action program could continue in perpetuity, which could affect its viability under *Weber*. Instead, quotas like those in Milwaukee, Atlantic Yards, or Wilmington that applied to permanent jobs would be more realistic. However, to avoid challenges under the *Weber* rubric, those hypothetical CBAs should include a provision stating that once the employer reaches the quotas in the given job, it will not seek to maintain the racial balance but will instead evaluate further candidates on the merits, as the Fifth Circuit mentioned in *Sharkey*.

3. Disparate Impact Liability

If a plaintiff cannot prove disparate treatment on the basis of race, gender, or any other prohibited category, he may still make a claim for Title VII liability under the theory of disparate impact.¹²⁵ The disparate impact standard provides that if an employer has a facially neutral hiring standard or policy—like a written test, for example—that has a disparate impact on a particular group, the Court can strike down the test as violating Title VII unless the standard is directly related to future job performance.¹²⁶ The reasoning underlying this theory is that the disparate impact is an effective proxy for finding “artificial, arbitrary, and unnecessary barriers to employment when . . . [such barriers] operate invidiously to discriminate on the basis of [race].”¹²⁷

¹²³ *Sharkey v. Dixie Elec. Membership Corp.*, 262 Fed. App'x. 598, 604–08 (5th Cir. 2008).

¹²⁴ *Id.* at 606.

¹²⁵ This test was first articulated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹²⁶ *Id.* at 431.

¹²⁷ *Id.* But intent is ultimately irrelevant to the disparate impact analysis. “[A]bsence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” *Id.* at 432.

In disparate impact cases, plaintiffs bear the initial burden of proving that a particular employment practice caused a disparate impact on the basis of race, color, religion, sex, or national origin.¹²⁸ One way of showing an adverse impact from an employer's hiring or promotion policies is by using the EEOC Guidelines' "four-fifths" rule of thumb.¹²⁹ If the selection rate for a protected group is less than four-fifths of the selection rate of the rest of the applicant pool, the process will be presumed to have an adverse impact.

As a practical matter, cases brought under CBAs would presumably be disparate impact cases brought by white individuals, specifically white males, based on the disparate impact of facially neutral local hiring policies.¹³⁰ Although whites bringing disparate impact claims may seem out of line with the initial policy behind the Civil Rights Act of 1964, the Supreme Court has held that disparate impact claims can be made by any race, not just minorities.¹³¹ A CBA that gives hiring preference to individuals in the area immediately surrounding a project as well as low-income individuals the larger area around the project could have a disparate impact on nonminority individuals who also live in the city but not in the targeted areas. For example, imagine a relatively segregated city of 100,000 with an eighty percent nonminority population and a twenty percent minority population. The smaller area immediately surrounding the CBA project has 20,000 people and is seventy-five percent minority, twenty-five percent nonminority.¹³² These numbers mean that the targeted applicants for the CBA project jobs would first be the 15,000 minority and 5,000 non-minority individuals around the project site, and then any low-income individuals in the city, presumably also members of the larger minority population that does not live in the project area. In this hypothetical, the "facially-neutral" localized hiring plan would have an adverse impact on non-minority job seekers because of the racial demographics of the town.

This situation is not uncommon. Many cities have areas dominated by one or a few racial groups that could stand to benefit greatly from these programs to the detriment of groups outside that immediate location. Furthermore, a localized hiring plan standing alone is not job-related or of business necessity, which is the legitimate defense to adverse impact claims. Therefore, CBAs that appear neutral need to be careful about unintentionally causing an adverse impact. CBAs like San Francisco's Bayview and the Staples Center CBA are instructive because they suggest a quota of fifty percent of the targeted job applicants but allow employers to avoid liability for failing to meet that goal if they meet the other

¹²⁸ 42 U.S.C. §2000e-2(k)(1)(A) (2006).

¹²⁹ Information on Impact, 29 C.F.R. §1607.4(D) (2013) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact"). However, the Supreme Court has noted that this standard has not provided much more than a "rule of thumb" for the courts. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 n.3 (1988).

¹³⁰ See *supra* notes 91 (for Brooklyn, NY), 93 (for Milwaukee, WI), and 95 (for Wilmington, DE) for evidence of the racial balance of certain areas where CBAs with local hiring policies are in effect.

¹³¹ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII prohibits discrimination in private employment to people of any race).

¹³² Therefore, the city's population is comprised of 80,000 non-minority and 20,000 minority individuals. However, 15,000 of these minority individuals live in the area around the development and only 5,000 non-minority individuals live in that area. Furthermore, of the remaining 5,000 minority individuals who do not live around the project area, perhaps about fifty percent of them are low-income. These low-income minority individuals will get job priority over the 75,000 non-minority individuals living outside the project area.

provisions of the CBA. By providing an “out” for employers, some CBAs can ameliorate the potential adverse impacts of localized hiring policies.

B. Constitutional Challenges to Race-Based CBAs Under the Equal Protection Clause

An equal protection analysis logically follows the Title VII analysis because it is likely to be harder to withstand than Title VII challenges. Supreme Court jurisprudence is historically more permissive of race-based affirmative action programs under Title VII than under the Equal Protection Clause.¹³³ Even though state action could create additional legal challenges, state sanction can also provide crucial enforcement and execution benefits. Therefore, the benefits of enforcement must be a well-planned trade off to the risks of subjecting these agreements to constitutional challenge.

1. Government as Signer of or Party to the Agreement

If the government—city, state, or federal—is a direct signatory or party to a CBA, any challenge objecting to racial and ethnic based affirmative action initiatives within the CBA will require a constitutional analysis under the Equal Protection Clause.¹³⁴ *Croson* and *Adarand* require that hiring requirements for government contracts that are based on race will be subject to strict scrutiny; to withstand such scrutiny, they must be narrowly tailored to a compelling state interest.¹³⁵ Part C of this Section will address whether current CBAs are likely to withstand this analysis.

2. State Action Doctrine¹³⁶

¹³³ See, e.g., Ronald W. Adelman, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause*, 56 FORDHAM L. REV. 403, 421–22 (1987). Adelman points out that for most courts, the equal protection standard for affirmative action plans is stricter than the Title VII standard:

Earlier lower court cases that address both Title VII and the equal protection clause appear to fall into three camps. One view recognizes the disparity and, concluding that the stricter equal protection standard ultimately will govern, subsumes the Title VII standard into its equal protection analysis. A more common view sees the standards as distinct, the equal protection standard being stricter, but no court subscribing to this view has yet found a plan valid under Title VII and invalid under equal protection. Discussing this apparent disparity between statutory and constitutional standards, a court of appeals judge stated: “although I readily concede that interpreting Title VII to permit personnel practices that the Constitution prohibits seems anomalous, the Supreme Court has nevertheless concluded that Congress intended just that state of affairs.”

Id. (internal citations omitted). The Supreme Court has also explicitly pointed out that the standard for a private employer under Title VII is not coextensive with the Constitution: “The fact that a public employer [under Title VII] must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.” *Johnson v. Transp. Ag’y Santa Clara Cty.*, 480 U.S. 616, 627 n.6 (1987) (emphasis in original). For a more in-depth analysis, see Chris Engels, *Voluntary Affirmative Action in Employment for Women and Minorities Under Title VII of the Civil Rights Act: Extending Possibilities for Employers to Engage in Preferential Treatment to Achieve Equal Employment Opportunity*, 24 J. MARSHALL L. REV. 731, 748 n.75 (1991).

¹³⁴ See Zehrt, *supra* note 34, at 5–6.

¹³⁵ See *id.* at 6–8.

¹³⁶ For a comprehensive analysis of all components of the state action doctrine, see G. Sidley Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997)

If the government is not an express signatory to a CBA, its involvement in funding and regulating parties to the agreement could nevertheless subject the CBA to a constitutional analysis under the state action doctrine.¹³⁷ The state action doctrine first observes that the Constitution will not typically apply to private action that is not “fairly attributable” to the government.¹³⁸ The doctrine nevertheless notes that the government is at least partially involved in many aspects of private activity, from land use to taxation, to subsidies and regulation, among others. Therefore, the doctrine contemplates a spectrum of government involvement with completely private action at one pole and completely governmental action at the other. A court will then use the state action doctrine to scan this spectrum of governmental involvement to determine when there is sufficient governmental involvement to render the private action now “fairly attributable” to the government and therefore subject to the relevant constitutional analysis. There are many analytical frameworks under which a private actor’s actions could sufficiently implicate governmental action to warrant a constitutional analysis.¹³⁹ The structure and context of most CBAs most closely align with the state nexus issue: where one or more links exist between the government and the private actor such that the court must ask whether the amount or nature of those links is extensive enough to fairly attribute the private actor’s actions to the government.¹⁴⁰

The modern test for state action comes from the Supreme Court’s analysis in *Lugar v. Edmondson*.¹⁴¹ There, the Court established that the state action doctrine requires 1) a constitutional deprivation “caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State,” and 2) that the party charged with the deprivation is considered a state actor.¹⁴²

The Court later applied this *Lugar* test in *Edmonson v. Leesville* to address whether a defendant’s use of peremptory challenges could be considered state action for purposes of an equal protection violation.¹⁴³ Applying the first *Lugar* prong, the Court found that the use of peremptory challenges was granted by Congress and had no purpose outside a court of law.¹⁴⁴ Therefore, the ability to engage in the challenged act owed its origin and sanction to Congress itself.¹⁴⁵

Though the second prong of the *Lugar* state action test turns on a factual analysis, the Court in *Edmonson* observed principles of general application.¹⁴⁶ To determine if an individual or organization’s

[hereinafter State Action Doctrine I] and G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility [Part II of II]*, 34 HOUS. L. REV. 665 (1997) [hereinafter State Action Doctrine II].

¹³⁷ The state action doctrine owes its origin to Justice Bradley’s opinion in the Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment.”). This means that private acts of discrimination or infringement of due process rights under the Fourteenth Amendment would not warrant a constitutional analysis because they are not state action.)

¹³⁸ State Action Doctrine I, *supra* note 136, at 335.

¹³⁹ *Id.* at 333–34; State Action Doctrine II, *supra* note 136, at 665–67 (discussing each component of the state action doctrine, including the public function issue, the state nexus issue, the beyond-state-authority issue, the projection-of-state-authority issue, the state authorization issue, and the state inaction issue).

¹⁴⁰ State Action Doctrine I, *supra* note 136, at 346–47.

¹⁴¹ *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982).

¹⁴² *Id.* at 937.

¹⁴³ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 621.

¹⁴⁶ *Id.*

action is attributable to the state, several factors are relevant: first, “the extent to which the actor relies on governmental assistance and benefits;” second, “whether the actor is performing a traditional governmental function;” and third, “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”¹⁴⁷

Applying the first factor, the Court found that the private actor had sufficient governmental assistance and benefits because peremptory challenges require “extensive use of state procedures with ‘the overt, significant assistance of state officials.’”¹⁴⁸ The peremptory challenge system could not exist without significant participation by the government.¹⁴⁹ Second, the Court found that selecting a jury is a traditional government function because a jury is a “quintessential governmental body, having no attributes of a private actor.”¹⁵⁰ It asserted that “[i]f a government confers on a private body the power to choose the government’s employees or officials”—in this case, jurors—“the private body will be bound by the constitutional mandate of race neutrality.”¹⁵¹ Finally, the Court found that the alleged injury of discriminatory peremptory challenges was “made more severe” by its occurrence in a courtroom, which raised serious questions about the neutrality of the decisions made in that courtroom.¹⁵² Given that all these conditions were decisively met, the Court held that a defendant’s use of peremptory challenges could be attributable to state action.

Despite *Edmonson*, however, an earlier Supreme Court decision applied a more constrained approach with a different analysis. In *NCAA v. Tarkanian*,¹⁵³ the University of Nevada, Las Vegas fired its basketball coach, Mr. Tarkanian, at the behest of the NCAA.¹⁵⁴ Tarkanian sued both the university and the NCAA alleging violations of his Fourteenth Amendment due process rights.¹⁵⁵ Though the university was clearly a state actor, the Court considered whether the NCAA, too, could be considered a state actor based on its involvement in the case.¹⁵⁶ The Court applied the first prong of the *Lugar* test, but analyzed different factors under the second prong to determine when the decisive action taken

¹⁴⁷ *Id.* at 621–22, 624. The *Edmonson* Court did not mention if these factors standing alone are dispositive of state action. Rather, the Court examined all aspects sequentially and found that they all apply to a defendant’s use of preemptory challenges on the basis of race during the voir dire process.

¹⁴⁸ *Id.* at 622.

¹⁴⁹ *Edmonson*, 500 U.S. at 622–24 (stating that Congress established the qualifications for jury service and the processes by which jurors are selected, that the procedures prescribed by the Administrative Office of the United States Courts also apply, that private parties can only exercise peremptory challenges with the assistance of the court itself, and that the judge, as a state actor, makes himself a party to the alleged discrimination).

¹⁵⁰ *Id.* at 624.

¹⁵¹ *Id.* at 625.

¹⁵² *Id.* at 628 (“Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.”).

¹⁵³ *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988). The Court held that the NCAA was not a state actor because its rules, ultimately executed by the University, did not originate in state law. Rather, the NCAA took its power from state law, but developed its rules and regulations on its own. Furthermore, the NCAA took no direct action against the coach; it could only threaten sanctions against the University actor. The University did not thereby delegate any power to the NCAA to make the decision. Finally, the Court said that even assuming the NCAA’s ability to sanction the university was so great that it effectively coerced the University to fire the coach, it did not follow that the NCAA was acting under color of state law.

¹⁵⁴ *Id.* at 180–81.

¹⁵⁵ *Id.* at 181.

¹⁵⁶ *Id.* at 181–82.

against an individual may be deemed to be state action.¹⁵⁷ The Court said such an attribution may be appropriate “if the State creates the legal framework governing the conduct, . . . if it delegates its authority to a private actor, . . . or . . . if it knowingly accepts the benefits derived from the unconstitutional behavior.”¹⁵⁸ Although these factors differ from those later applied in *Edmonson*, the *Edmonson* Court did not seek to dismantle the *Tarkanian* analysis. Therefore, these factors still apply and overlap with those in *Edmonson*.

An example of the first *Tarkanian* scenario occurs when the state compels or mandates the unconstitutional action. For example, in *American Manufacturers Mutual Insurance Company v. Sullivan*,¹⁵⁹ the issue was whether a private insurer’s decision to refuse payment for medical treatment could be attributed to the state for purposes of the Fourteenth Amendment because the insurer was permitted to withhold that treatment under state law.¹⁶⁰ The Court held that the insurer’s act was not state action because it is not enough that the state “authorized” or “encouraged” the act without more proof that it specifically wanted the insurers to withhold payment for medical treatment.¹⁶¹ Finding a “close nexus” between a state and the challenged action, the Court explained, requires the state to exert sufficient coercive power or to have provided significant overt or covert encouragement such that the action *must* have been that of the state.¹⁶² When the decision to withhold payment was made entirely by the judgment of the private party, the plaintiff would be hard-pressed to show a sufficient nexus for state action even though the state extensively regulated the insurer.¹⁶³ By failing to show this nexus, the plaintiff in *Sullivan* failed to attribute the insurer’s conduct to the state.¹⁶⁴

The second *Tarkanian* scenario is when a state delegates power to a private individual. A common example is when the state delegates its Eighth Amendment obligation to provide medical treatment to incarcerated individuals to a private physician. In *West v. Atkins*, a doctor who contracted with the state to provide medical services to a prisoner was a state actor in light of his assumption of the state’s duty to provide constitutionally adequate medical care.¹⁶⁵

The third *Tarkanian* factor—whether the state knowingly accepts the benefits derived from unconstitutional behavior—comes from one of the earliest cases of the modern state action doctrine, *Burton v. Wilmington Parking Authority*.¹⁶⁶ *Burton* more or less established the conceptual framework that guided most of the subsequent case law. In *Burton*, a restaurant located within a parking building owned by a Delaware state agency refused to serve an African American man because of his race.¹⁶⁷ The plaintiff argued that because the restaurant leased its space from the state, its action was subject to the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁸ The Court ultimately agreed with the

¹⁵⁷ *Id.* at 192–94.

¹⁵⁸ *Id.* at 192.

¹⁵⁹ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

¹⁶⁰ *Id.* at 51.

¹⁶¹ *Id.* at 51–53.

¹⁶² *Id.* at 52.

¹⁶³ *Id.* at 57–58.

¹⁶⁴ *Id.* at 58.

¹⁶⁵ *West v. Atkins*, 487 U.S. 42, 56–57 (1988).

¹⁶⁶ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). *See also* State Action Doctrine I, *supra* note 136, at 395.

¹⁶⁷ *Burton*, 365 U.S. at 716.

¹⁶⁸ *Id.*

plaintiff, conducting a fact-specific analysis that weighed several “contact factors” to determine that the restaurant had sufficient contact with the state to merit a constitutional analysis. First, the land and building were publicly owned and “dedicated to ‘public uses’ in performance of . . . ‘essential government functions.’”¹⁶⁹ Second, the land and building were not “surplus state property” but rather integral—both financially and physically—to the state’s plan to operate a self-sustaining project.¹⁷⁰ Third, the “peculiar relationship” of the restaurant and the parking facility “confer[red] on each an incidental variety of mutual benefits.”¹⁷¹ Finally, the Court found that it would be a “grave injustice” for the government to idly permit discrimination of a citizen in a government building, even if in good faith.¹⁷²

Under this analysis, even if the state were not directly aware of the discriminatory conduct of the private actor, by virtue of the state’s physical and fiscal relationship to that actor, the conduct could become state action. The “knowingly accepting benefits” prong has been subject to judicial constraint. For example, in *Rendell-Baker v. Kohn*, the Supreme Court held that extensive government regulation and funding were generally not enough to qualify as state action.¹⁷³ Even though the nonprofit school in question received almost all of its funding from and was heavily regulated by the state, the Court found that those factors did not override the school’s private judgment.¹⁷⁴ The petitioners also claimed that because the school performs a “public function,” it is a state actor. The Court rejected that claim on the grounds that the function performed not only had to be “traditional,” but traditionally the “exclusive prerogative of the State.”¹⁷⁵ Finally, in contrast to its decision in *Burton*, the Court found an insufficient “symbiotic relationship” between the school and the state in *Rendell-Baker*. Whereas in *Burton* the restaurant’s profits contributed to the support of the state-owned garage, the school in *Rendell-Baker* was unilaterally dependent on the government for support, but did not fiscally contribute to the government in return.¹⁷⁶

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the most recent case on this issue, the Court said that “no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient.”¹⁷⁷ Here, the Court indicated a return

¹⁶⁹ *Id.* at 723.

¹⁷⁰ *Id.* at 723–24.

¹⁷¹ *Id.* at 724.

¹⁷² *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724–25 (1961). Buchanan refers to these factors as 1) the government and ownership factor, 2) the financial integration with government factor, 3) the symbiotic relationship factor, and 4) the governmental encouragement or endorsement factors. State Action Doctrine I, *supra* note 136, at 396.

¹⁷³ See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (nonprofit school receiving most of its funding from the state, subject to extensive state regulations, performing a “public function” and having a “symbiotic relationship” with the government did not rise to the level of state action).

¹⁷⁴ *Id.* at 841 (“Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation”). However, while regulation alone is not usually enough to prove state action, it may be sufficient where regulatory activity of a nominally private actor is sufficiently intertwined with the state. See *Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass’n*, 531 U.S. 288 (2001) (holding that regulatory activity of a statewide association made up primarily of public school officials and funded mostly by their dues, and that had traditionally regulated in lieu of the state Board of Education, was considered state action). However, mere receipt of dues from member universities who receive federal financial assistance will not subject the NCAA to constitutional requirements. See *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999).

¹⁷⁵ *Rendell-Baker*, 457 U.S. at 842 (emphasis in original).

¹⁷⁶ *Id.* at 842–43.

¹⁷⁷ *Brentwood Acad.*, 531 U.S. at 295.

to *Burton's* totality of the circumstances test for whether the combination of factors serves to push private action over the threshold into state action. In *Brentwood*, the persuasive thread running through precedent to its holding was the amount of management and control the State exerted over the private actor. The “pervasive entwinement” of the statewide association with state officials and institutions justified the Court’s holding that “there is no substantial reason to claim unfairness in applying constitutional standards to it.”¹⁷⁸ However, the Court astutely noted that what is “fairly attributable” to the State “is a matter of normative judgment, and the criteria lack rigid simplicity.”¹⁷⁹ Therefore, any honest analysis must be fact-specific. Still, the aforementioned examples provide some signposts as to relevant points of inquiry.

3. Analysis of the State Action Doctrine as Applied to Atlantic Yards

As a threshold matter, significant governmental funding for, regulation of, and authorization of a development and a CBA will not be enough to turn the developer into a state actor. Therefore, any direct hiring decision made by the developer or any private employer on the development site will not fall under the state action doctrine. This is true even when the project would be impossible but for governmental funding and regulation of the project.¹⁸⁰ In the CBA context, this means that even the terms of a CBA such as Cherokee-Gates, according to which the community could not find a developer until the city agreed to significant subsidies, do not necessarily turn a developer action into state action. Furthermore, even where the building sites are subject to extensive regulation and approval processes, the *Rendell-Baker* and *Sullivan* analyses make it unlikely that any specific hiring decisions would be traced to state action when the state did not directly make or mandate those decisions.

Nevertheless, legislation has been passed and is being contemplated that mandates CBAs between developers and the community for new projects.¹⁸¹ The legislation itself would only satisfy the first prong of the *Lugar* test; far more contact with the state than mere state legislation is required for the actual hiring action to be attributable to the state. However, if, as in the Milwaukee CBA example, the state legislation envisions racial or gender quotas for the CBA itself, those requirements would provide the requisite link between state action and the private developer’s hiring decisions.

The trickier analysis is whether there are enough links between the private actor and the state to satisfy the *Burton* analysis. For the purposes of this analysis, I chose to look at the Atlantic Yards CBA because it involves a private developer, racial quotas, and significant New York City involvement. A project of this scope, although privately negotiated and executed, is ripe for a state action analysis to see if its racial hiring provisions require an equal protection analysis.

The first *Burton* factor was that the city owned the land while the building and the restaurant leased its space. According to the 2009 Atlantic Yards lease agreement, Empire State Development Corporation (EDSC)—a New York State entity—is the landlord for the interim leases, ground leases, arena development, and non-arena development leases. For all except the Ground Leases, affiliates of Bruce Ratner’s private development company are the tenants. The Brooklyn Arena Local Development

¹⁷⁸ *Id.* at 298.

¹⁷⁹ *Id.* at 295.

¹⁸⁰ See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

¹⁸¹ See Milwaukee CBA, *supra* note 91. See also Proposed Michigan Senate Bill 379 (May 12, 2011), available at <http://legiscan.com/MI/text/SB0379/2011> (requiring the developer of a new Detroit River bridge to sign a CBA with local governments and community representatives).

Corporation (BALDC) leases the Ground Lease from the ESDC and then leases the Arena Development lease to a Ratner affiliate.¹⁸² The Arena lease is set to last for at least thirty-five years. This means that not only will the city own the land, but also will nominally own the arena and lease it to BALDC, which in turn will lease it to the developer.¹⁸³ However, instead of paying money to the city or BALDC in rent or taxes, Ratner's company will pay only a nominal dollar amount for "rent" and the rest will go toward the construction, operation, and maintenance of the arena in lieu of taxes.¹⁸⁴ New York City is thus not getting the same fiscal return for the arena as the city received from the restaurant in *Burton*. However, to the extent that the *Burton* requirement envisions the apparent governmental sanction of private activity conducted on its property, this arrangement could satisfy that factor.

The second *Burton* requirement was that the land not be "surplus" but rather financially integral to the city's plan to operate a self-sustaining project. Without a doubt, the Barclays Center is an integral part of the city. The arena hosts the New Jersey Nets, an NBA basketball team. The land is located in the heart of Brooklyn, and includes multiple housing units and retail space. However, in contrast to *Burton*, FCR and not the city owns those buildings. Nevertheless, the project is still funded with at least \$100 million of ESDC funds and \$100 million of city funds, and its plan envisions more city and state funding depending on further needs of the project.¹⁸⁵

The third *Burton* factor—the so-called "symbiotic relationship" factor—looks to the exchange of mutual benefits between the state and the private actor. In *Burton*, the Court looked to how the State's parking garage gave guests of the parking facility an accessible place to park their cars and how that convenience for diners could, in return, increase demand for the city's parking facilities.¹⁸⁶ Similarly with the Barclays Center, the links between the city and this large-scale housing, stadium, and retail complex are multitudinous. In addition, although scholars and commentators remain divided about the net benefits of stadiums on local economic growth,¹⁸⁷ the city and developer nevertheless project the benefits of the project with unified force.¹⁸⁸

¹⁸² *Exhibit D: Project Leases Abstract*, available at <http://www.scribd.com/doc/78517384/2009-ESDC-Atlantic-Yards-Lease-Abstract> (last visited May 3, 2013) [hereinafter *Atlantic Yards Abstract*].

¹⁸³ Norman Oder, *Prokhorov filled arena financing gap not by buying bonds but offering a loan*, ATLANTIC YARDS REPORT (Feb. 24, 2010), <http://atlanticyardsreport.blogspot.com/2010/05/prokhorov-filled-arena-financing-gap.html>; *History of Empire State Development*, EMPIRE STATE DEVELOPMENT, <http://www.esd.ny.gov/AboutUs/History.html> (last visited Mar. 31, 2013).

¹⁸⁴ *Atlantic Yards Abstract*, *supra* note 182. See also *Atlantic Yards Land Use Improvement and Civil Project Modified General Project Plan* 25–26, EMPIRE STATE DEVELOPMENT (June 23, 2009), http://www.esd.ny.gov/Subsidiaries_Projects/AYP/AtlanticYards/ModifiedGPP2009.pdf.

¹⁸⁵ *Id.* at 27–29.

¹⁸⁶ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

¹⁸⁷ Roger G. Noll & Andrew Zimbalist, *Sports, Jobs & Taxes: Are New Stadiums Worth the Cost?*, THE BROOKINGS INSTITUTE (Summer 1997), <http://www.brookings.edu/research/articles/1997/06/summer-taxes-noll.aspx> (discussing how local sports stadiums may not actually be as economically beneficial to New York City as typically claimed).

¹⁸⁸ Kareem Fahim, *Ground Broken on Atlantic Yards Project*, N.Y. TIMES (Mar. 11, 2010), <http://cityroom.blogs.nytimes.com/2010/03/11/ground-broken-on-atlantic-yards-project> (showing Mayor Bloomberg and Governor Paterson shoveling dirt for the groundbreaking at Atlantic Yards); Nicholas Confessore, *To Build Arena in Brooklyn, Developer First Builds Bridges*, N.Y. TIMES (Oct. 14, 2005), <http://www.nytimes.com/2005/10/14/nyregion/14yards.html?ref=atlanticyardsbrooklyn> (discussing the way in which

The final *Burton* factor is whether, by virtue of the city's implicit approval of the project and the CBA, it is putting its imprimatur on a "grave injustice" perpetrated by the private actor. Though maintaining racial quotas for a large-scale project is less grave than forbidding any African Americans from eating at a restaurant, the Supreme Court has upheld the notion that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."¹⁸⁹ In *Burton*, the restaurant affirmatively alleged that its business would be injured if it served African Americans, and the Court found this indicative of the government's direct benefit, through the lease, from discriminatory action.¹⁹⁰

The totality of the circumstances does not evince an obvious answer to the question of whether the Atlantic Yards CBA will be required to withstand strict scrutiny. Some commentators suggest that the state action analysis ultimately comes down to whether a reasonable person would think the private actor is actually a state actor.¹⁹¹ Cases like *Sullivan*, *Brentwood Academy*, and *Tarkanian* all also seem to adopt this pragmatic approach. When state officials are so involved in the decisions of a nominally private actor, the private actor's judgments and decisions effectively become those of the state. When the appearance of state authority is so omnipresent and a private actor is literally encapsulated within a state building, its actions appear to be those of the state. However, the mere presence of state funding and regulation of an institution, without more, does not substitute state action for the independent judgments and decisions of private actors within that institution. Under the scope of this bigger picture, even a project like Atlantic Yards does not appear to have sufficient state entanglement to transform the private developer into a state actor for the purposes of the state action doctrine.

4. Would a Race-Based CBA Withstand Strict Scrutiny?

Even if the race-based programs in the Atlantic Yards, Milwaukee, and Peninsula CBAs likely do not meet the high bar of the state action doctrine, a thorough assessment requires a determination of whether if they would pass strict scrutiny. After *Adarand*, the Seventh, Eighth, and Ninth Circuits said that if a state is implementing a federal program within its jurisdiction, it does not have to provide its own compelling interest to satisfy strict scrutiny.¹⁹² But, because *Croson* applies to state and local programs akin to the localized provisions of CBAs, its analysis is more relevant. In 1983, Richmond, Virginia adopted a plan that required prime contractors with the city to subcontract at least thirty percent of the value of the contract to at least one Minority Business Enterprise (MBE).¹⁹³ The Court struck down the plan on the grounds that it failed to show a compelling state interest in both imposing the plan and in arriving at the thirty percent quota.¹⁹⁴ The Court observed that while a state or locality has the

Bruce Ratner's ability to get support from prominent community figures helped move the Atlantic Yards development forward).

¹⁸⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201 (1995).

¹⁹⁰ *Burton*, 365 U.S. at 724.

¹⁹¹ See, e.g., John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1155 (1997) ("The reasonable person probably would believe that a coffee shop in a public parking structure was somehow owned by the state.")

¹⁹² Zehrt, *supra* note 34, at 14. The cases in these circuits all examined congressional findings regarding race discrimination in government highway contracting. The congressional findings were sufficient for the compelling state interest prong.

¹⁹³ *Id.* at 7. See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1988).

¹⁹⁴ *Croson*, 488 U.S. at 507–11.

authority to remedy the effects of past discrimination within its jurisdiction, that authority must be strictly confined when making racial distinctions.¹⁹⁵ In order to withstand strict scrutiny, the state or locality has to prove with enough evidence that it is remedying discrimination specifically within its jurisdiction.

Richmond supplied evidence about the disparity between the number of prime contracts awarded to minority firms and the minority population of the city, but the Court found the comparison to be improper. It stated that when specific qualifications were necessary to fill certain jobs, the relevant comparison should instead be between *qualified* individuals and the current pool of minority contractors awarded prime contracts.¹⁹⁶ The Court also did not accept the low MBE membership in local contractors' associations because it found that low participation could be credited to a variety of explanations.¹⁹⁷ Furthermore, the Court did not accept congressional findings of nationwide discrimination in the construction industry as sufficient justification for the Plan.¹⁹⁸ On these grounds, the *Croson* Court held that Richmond had failed to supply sufficient evidence of any identified discrimination in the city's construction industry sufficient to warrant a remedial plan.¹⁹⁹ The Richmond Plan thus failed to identify a compelling state interest.

However, the Court also observed many ways in which a city like Richmond *could* have shown a compelling state interest in creating the quota. First, instead of comparing contracts awarded to minority firms with the general minority population in the city, Richmond should have looked at qualified minority contractors.²⁰⁰ Second, instead of looking only at the fact that black membership in the trade organizations was low, the city should have linked low minority membership to the number of local MBEs eligible for membership. If the statistical disparity were great enough, an inference of discrimination could arise.²⁰¹ Finally, instead of looking at nationwide discrimination in the construction industry, Richmond needed to determine if its own spending practices were exacerbating the pattern of prior discrimination, identify that discrimination with specificity, and then fashion relief based on its findings.²⁰² Relying on Congress's nationwide findings was not enough.

Croson covers some of the field regarding how to prove a compelling state interest to remedy prior discrimination in a particular industry, but most of the battle has been waged in the Circuits. Professor Lynn Ridgeway Zehrt examined all the circuit court cases analyzing regional affirmative action plans and found that only one out of ten passed strict scrutiny.²⁰³ The Ninth Circuit held that statewide

¹⁹⁵ *Id.* at 491.

¹⁹⁶ *Id.* at 501–02. The Court looks to Title VII cases for these examples of relevant comparisons. *See, e.g.*, *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). In *Croson*, the city did not even know how many MBEs in the market were qualified to undertake prime or subcontracting work nor the percentage of total city construction dollars minority firms received at the time as subcontractors on prime contracts by the city. *Croson*, 488 U.S. at 502.

¹⁹⁷ *Croson*, 488 U.S. at 503 (“The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination.”).

¹⁹⁸ *Id.* at 504 (“Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.”).

¹⁹⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1988).

²⁰⁰ *Id.* at 503.

²⁰¹ *Id.*

²⁰² *Id.* at 504.

²⁰³ Zehrt, *supra* note 34, at 21.

findings of discrimination were insufficient to justify an affirmative action plan within a state university. Instead, the university had to independently offer its own evidentiary support documenting how it had previously discriminated against the protected groups within the university. In the Sixth circuit, Ohio had dispatched a state task force that extensively studied the relationship between minorities and the state contracting industry and held numerous public hearings about the state's historical exclusionary practices in construction.²⁰⁴ The task force determined that the legislature should adopt a statewide ten percent goal for construction contracts, and the Supreme Court of Ohio agreed.²⁰⁵ However, another group of plaintiffs filed a claim in the Sixth Circuit, which found the program not to be compelling because the statistical evidence was mostly outdated and either too limited in scope or irrelevant to the case.²⁰⁶

Of the programs that had a compelling state interest, many were not narrowly tailored. The Supreme Court held that in order for a plan to be narrowly tailored, the relevant factors were “the necessity for the relief and efficacy of alternative remedies; the flexibility or duration of the relief[;] . . . the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of the parties.”²⁰⁷ The cases that have failed in the Circuits were unsuccessful either because the government had not considered race-neutral alternatives or because the term “minority” was overinclusive and not limited to minorities that had actually suffered discrimination in the jurisdiction.²⁰⁸ The *Croson* Court even gave some suggestions of race-neutral ways to increase accessibility of contracting opportunities for minority contractors, including “simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races[.]”²⁰⁹

For CBAs like the Milwaukee Park East Redevelopment Compact that directly involve the state and involve race-based quotas, the case law suggests that the city should conduct extensive studies to find proof of discrimination in the construction industry in the city or the surrounding area. The city of Denver proved a compelling state interest to the Tenth Circuit by presenting evidence of grievances filed by minority contractors, several public hearings and extensive testimony of racial discrimination within the city's construction industry, several statistical disparity studies, telephone and mail surveys of local construction businesses, as well as a trial run of a voluntary program that ultimately failed.²¹⁰ That this is the only program to prove a compelling interest indicates that the bar is set quite high. It suggests that a city needs to adopt a race-neutral program first before attempting to impose a racial quota and that the city must use a variety of survey methods to prove that discrimination actually exists. For those cities who have signed or legislatively enacted CBAs, this proof will be incredibly costly and burdensome. The better alternative is to let the private developer negotiate the CBA with the community groups directly to avoid a constitutional analysis. However, if having the city participate in the CBA is the only way to enforce the plan, then the quotas should not be race-based, but instead should follow the model of the Staples and San Francisco CBAs, which focuses on training and hiring local and low-income residents.

Also, doing extensive research about the causes of local disparities is not enough. The city's remedy must also be narrowly tailored to the problem. First, the program cannot be overinclusive of other groups not subject to historical discrimination. In *Croson*, this requirement meant that “Spanish-

²⁰⁴ *Id.* at 22.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 23.

²⁰⁷ *Id.* at 24.

²⁰⁸ *Id.*

²⁰⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1988).

²¹⁰ Zehrt, *supra* note 34, at 19–20.

speaking, Oriental, Indian, Eskimo, or Aleut persons” could not benefit from the plan without this kind of proof even if there was proof of African-American discrimination.²¹¹ For a program like the Christina Avenue Compositing Facility CBA in Delaware, this point is directly relevant. Although the city is seventy-seven percent African American and the nature of historical discrimination seems confined to this group, the quota applies to minorities defined to include Hispanic persons, Native Americans or Alaskan natives, and Asian and Pacific Islander groups. Without any proof that these groups were similarly disadvantaged, this CBA could face a downfall similar to that of the plan in *Croson*.

Finally, *Croson* also suggests that it is not enough to find that there was discrimination in the local area in the specific industry; there needs to be a reason for the targeted number.²¹² The Court did not say that percentage quotas were *per se* unconstitutional, but struck out strongly against them.²¹³ At most, the decision suggests that where there is evidence of extreme discrimination, a “narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion,” but only after all race-neutral non-numeric options have been exhausted.²¹⁴ Unfortunately, this analysis strongly suggests that programs like the Compositing Facility and the Milwaukee CBAs will not withstand a strict scrutiny analysis. Only the most thorough and iterative program has ever withstood this analysis, and these CBAs do not meet its high bar.

V. CONCLUSION

Community benefit agreements have heretofore been the most promising approach to remedying discrimination against minority contractors and construction workers in urban communities. Nevertheless, these agreements require extensive safeguards to insulate them from potential legal challenges. Percentage goals will likely create the most cause for legal challenge, and CBAs probably should not include them. First source offices may well withstand legal challenge because they are not facially discriminatory and technically benefit all members of the community equally. Private CBAs are also more likely to withstand legal challenges than public CBAs in light of the Supreme Court’s decisions in *Adarand* and *Croson*.

Furthermore, despite the benefit of these agreements, significant enforcement problems remain. In 2011, seven Brooklyn construction workers filed a lawsuit against developer Bruce Ratner and local group Brooklyn United for Innovative Local Development (BUILD) for failing to deliver 1,500 annual jobs and job training promised to mostly African American BUILD members who supported the project.²¹⁵ In the CBA between Columbia University administrators and Harlem residents for the

²¹¹ *Croson*, 488 U.S. at 506.

²¹² *Id.* at 507 (“[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the ‘completely unrealistic’ assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.”).

²¹³ *Id.* at 508 (“Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota.”).

²¹⁴ *Id.* at 509.

²¹⁵ Daniel Bush, *Out of Work! Ratner ally BUILD got just 15 jobs for black Yard supporters*, THE BROOKLYN PAPER (Dec. 1, 2011), http://www.brooklynpaper.com/stories/34/48/dtg_buildjobsrecord_2011_12_02_bk.html. One claimant stated, “I would never have joined this pre-apprenticeship program if it wasn’t agreed (guaranteed) to me that I would have a union card upon completion;” Amy Sara Clark, *Construction Workers Sue Atlantic Yards Developer, Claiming They Were “Duped,”* PROSPECT HEIGHTS PATCH (Nov. 15, 2011), <http://prospectheights.patch.com/articles/construction-workers-sue-atlantic-yards-developer-claiming-they-were->

Manhattanville project, many local minority architects claim they were offered fewer, smaller projects while European architects received the more lucrative ones.²¹⁶ Lack of enforcement will likely remain the greatest problem facing CBAs—bigger than any of these legal challenges—particularly for New York-based CBAs.

This does not mean, however, that CBAs are not worthwhile. CBAs continue to break impressive ground all over the country.²¹⁷ CBAs offer a promising approach to remedying past and precluding present discrimination against minority contractors and construction workers in areas of new development. They can promote normative values like democratic participation and cooperation within communities by encouraging community involvement in development projects.²¹⁸ Contracts between private and public actors can promote accountability and flexibility in decision-making processes that affect local communities.²¹⁹ CBAs also promote transparency, by letting private actors, public officials, and the local media keep track of the progress of a project and how it meets the promises set out in the agreement.²²⁰ Finally, CBAs provide clarity about potential outcomes. This is crucial when local governments want to point to the successes of a particular project in terms of job creation or revenue

duped. See also Heather Haddon, *Brooklyn Arena Criticized on Hiring*, WALL STREET JOURNAL (Jan. 23, 2012), <http://online.wsj.com/article/SB10001424052970203718504577177390852461060.html>. As of November 2012, BUILD dissolved its operations citing funding difficulties, tax arrears and complaints about spending irregularities. Cate, *Barclays Restaurant Unionizes, BUILD Dissolves*, BROWNSTONER (Nov. 7, 2012), <http://www.brownstoner.com/blog/2012/11/barclays-restaurant-unionizes-build-dissolves>.

²¹⁶ Kimberly Shen & Chris Meyer, *Black architects claim that they were passed over for Manhattanville*, COLUM. DAILY SPECTATOR (Jan. 28, 2013), <http://www.columbiaspectator.com/2013/01/28/black-architects-claim-they-were-passed-over-manhattanville> (“[The administrators] offer a project on Broadway that is worth \$20,000, which is a drop in the bucket for professional architects like us. . . . Even after we have offered to work collectively and pair up with architects already hired for the project, the administrators still turned us down.”).

²¹⁷ For a new CBA on Long Island, see Aisha Al-Muslim, *Hempstead Oks controversial agreement on downtown plan*, NEWSDAY (Jan. 15, 2013), <http://www.newsday.com/long-island/towns/hempstead-oks-controversial-agreement-on-downtown-plan-1.4453020>. For one in New Haven, see Thomas MacMillan, *It's a Deal—And a Sale*, NEW HAVEN INDEPENDENT (Dec. 18, 2012), http://www.newhavenindependent.org/index.php/archives/entry/mlk-amistad_community_benefits_deal_reached/id_53497 (CBA to sell an abandoned school to a not-for-profit charter school to rebuild a new high school). For one in Cleveland, see *GCP Board votes to support establishment of Community Benefits Agreement*, GREATER CLEVELAND PARTNERSHIP (Dec. 10, 2012), <http://www.gcpartnership.com/News/2012/GCP-Board-votes-to-support-establishment-of-Community-Benefits-Agreement-12-10-12.aspx>. For one in Portland, Oregon, see Don McIntosh, *City of Portland commits to build union and use minority workers and contractors*, NWLABORPRESS.ORG (Sept. 18, 2012), <http://nwlaborpress.org/2012/09/cba-2/> (describing a “Model Community Benefits Agreement” where the City of Portland agrees that on future City construction projects, unions will represent workers and women and minority workers will have better opportunities).

²¹⁸ See Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Unchartered Terrain of Community Participation in Economic Development*, 66 BROOKLYN L. REV. 861, 910 (2000) (discussing the transformational benefits of democratic participation beyond the ballot box to the “process of participation [of] citizens themselves being involved in priority-setting, as well as decision-making, dialogue and deliberation.”). See also Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL’Y 157, 157 (2009) (“Often low-income and minority communities are not fully engaged in the [land use regulatory] process, even when it may result in decisions negatively impacting their neighborhoods.”).

²¹⁹ See generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

²²⁰ Gross, LeRoy & Janis-Aparicio, *supra* note 42, at 22.

brought into a local area.²²¹ In light of these possible benefits, the most immediate upcoming challenge will be ensuring that CBAs have the teeth they need to be successful. This will take significant commitment from both the developer and the community groups involved. Until then, the legal issues mentioned in this Article may not even manifest. And, with enough endorsement and participation from the entire community, they may not have to.

²²¹ *Id.*

