

# Articles & Essays

## **PREEMPTION’S MARKET PARTICIPANT IMMUNITY – A CONSTITUTIONAL INTERPRETATION: IMPLICATIONS FOR LIVING WAGE AND LABOR PEACE POLICIES**

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### I. INTRODUCTION

Nationwide, state and local governments are adopting policies that oblige their private-sector business partners to pay employees a “living wage” and/or to agree in various ways not to use public funds to finance anti-union activities. Conventional labor preemption principles would invalidate many of these conditional business arrangements unless they are immunized by preemption’s market participant doctrine, first applied in the now decade-old *Boston Harbor* case.<sup>1</sup> Accordingly, the focus of preemption litigation challenging living wage and labor peace policies ordinarily is the immunity’s applicability. Because its reach is subject to widely varying interpretations, there exists a need to fix workable and principled limits for the immunity’s operation. This article addresses that need.

Part II briefly describes labor law preemption but moves straightaway into a discussion of the market participant immunity doctrine. This examination shows that consistent administration of the immunity is thwarted by deep divisions among the lower courts. Coherency depends on resolving several discernible categories of disagreement.

Part III proposes a solution. It argues that the immunity serves the

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1. See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors*, 507 U.S. 218 (1993) [hereinafter *Boston Harbor*].

constitutional function of restraining Congress's preemptive authority to assure states an equality of treatment with the private sector. Stated otherwise, my thesis is that the outcome in *Boston Harbor* was constitutionally prescribed. From this interpretation I demonstrate that disputes regarding a state's assertion of the immunity should be resolved by inquiring first into whether federal labor law would privilege a similarly situated private-sector employer to engage in the activity for which local government claims immunity protection. If so, then the outcome should turn on whether local government's purpose was to promote its own proprietary self-interest or whether it engaged in that activity as a pretext for setting labor policy.

Part IV applies this two-part standard to analyze living wage and labor peace policies. Some are valid because they fall within a well-established labor preemption exception having nothing to do with market participant theory. Others are likely to be found invalid because they regulate within labor law's protected zones and courts are not likely to extend the market participant immunity to them. For the rest, I show that while the state may be acting within a zone also occupied by federal labor law, market participant immunity provides a safe harbor.

## II. LABOR PREEMPTION, MARKET PARTICIPANT IMMUNITY, AND THE LOWER COURTS' STRUGGLE TO FIND COHERENCE

### A. *An Overview of Labor Preemption*

The Labor-Management Relations Act of 1947 (Taft-Hartley Act)<sup>2</sup> contains no express preemption provision.<sup>3</sup> Hence, the Act does not preempt state law "unless it conflicts with federal law or would frustrate the federal scheme, or unless the [Court] discern[s] from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."<sup>4</sup> Most labor preemption is either conflict or frustration (obstacle) preemption because the NLRA has been interpreted as not generally occupying the entire field of labor relations.<sup>5</sup>

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2. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§141-197 [hereinafter referred to as the Taft-Hartley Act].

3. See Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469, 560 & n.508 (1993) (providing a thorough review of labor preemption and the academic literature).

4. *Metro. Life Ins. v. Mass.*, 471 U.S. 724, 747-48 (1985) (citations omitted, internal quotations omitted).

5. Section 301 preemption is the exception. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220-21 (1985).

State law can conflict with the Act by adopting standards of conduct inconsistent with the substantive requirements of federal labor law by, for example, requiring what federal law prohibits. In such cases, the U.S. Constitution's Supremacy Clause<sup>6</sup> alone trumps state law, obviating the need for inquiry into congressional intent.<sup>7</sup> Most labor preemption, however, entails state action that does not literally contravene a federal right or prohibition. State law is preempted because, notwithstanding Congressional silence, the Court has determined that Congress so intends to preempt since state law frustrates federal labor policy.<sup>8</sup>

What has come to be known as *Garmon* preemption protects the supremacy of federal rights and the integrity of the National Labor Relations Board's ("NLRB") primary jurisdiction.<sup>9</sup> With certain exceptions, it preempts state and local law that regulates conduct actually or even arguably protected by section 7 of the Act or prohibited by section 8.<sup>10</sup> *Machinists* preemption<sup>11</sup> advances a different congressional policy: that certain conduct should be left unregulated by any governmental body. It prohibits state and local regulation that the courts conclude "upset[s] the balance of power between labor and management expressed in our national labor policy"<sup>12</sup> by "introduc[ing] some standard of properly 'balanced' bargaining power . . . [or defining] what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."<sup>13</sup>

The Court conceptualizes these above-described labor preemption principles as follows: "When we say that the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected

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6. U.S. CONST., art. VI, cl. 2 ("This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

7. The Supremacy Clause also trumps state law that prohibits what federal law permits, even though simultaneous compliance with both laws is literally possible. See *infra* note 10 and accompanying text.

8. See *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 623 (1986) (Golden State I) (Rehnquist, J., dissenting) (discussing how labor preemption developed from "a series of implications" regarding congressional intent "in the face of congressional silence").

9. *San Diego Bldg. & Constr. Trades Council v. Garmon*, 359 U.S. 236 (1959).

10. 29 U.S.C.A. §151 *et. seq.* Section 7 of the Act creates rights of employees to self-organization (including the right to refrain from self-organization). See discussion *infra* note 115 and accompanying text. Section 8 describes various employer and union unfair labor practices.

11. See *Lodge 76, Int'l Assoc. of Machinists v. Wis. Employee Relations Comm'n*, 427 U.S. 132, 140 (1976).

12. *Id.* at 146 (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 500 (1953)).

13. *Golden State Transit Corp.*, 475 U.S. at 619 (Golden State I) (quoting *Machinists*, 427 U.S. at 149-150).

zone, whether it be a zone protected and reserved for market freedom . . . or for NLRB jurisdiction . . . .”<sup>14</sup> What is left are “many areas in which states may appropriately intercede in the relationships between employees and employers.”<sup>15</sup>

One important labor preemption exception is found in *Metropolitan Life Insurance Co. v. Massachusetts*.<sup>16</sup> There, the Court considered, and rejected, a preemption challenge to a state statute that provided for minimum health care protection for all workers in the state. The Court concluded that when a state enacts legislation intended to provide minimum benefits for employees, and not designed to interfere with the process of collective bargaining, it does not upset the balance of economic weapons built into our labor law.<sup>17</sup>

### B. *Incoherence in the Market Participant Immunity Doctrine*

*Boston Harbor*'s contribution to labor preemption was privileging the States, for the first time, to take action directly affecting matters within labor preemption's protected zones. The Court stressed that labor preemption comes into play only when government is regulating within a protected zone and not when government acts as a proprietor, “interact[ing] with private participants in the marketplace.”<sup>18</sup> This autonomy to participate freely in the marketplace, the Court concluded in *Boston Harbor*, is “consistent with [labor] preemption principles.”<sup>19</sup>

Unfortunately, the *Boston Harbor* decision neither describes these labor preemption principles nor explains why or how they entitle the states to a certain degree of autonomy to “participate freely in the marketplace.”<sup>20</sup> This absence of doctrinal foundation for the market participant immunity has caused the lower courts to seek guidance elsewhere, primarily in the facts of *Boston Harbor*. The result has been widely disparate approaches for determining when government acts as a regulator versus market participant.

*Boston Harbor* was an ideal litigation vehicle for establishing labor preemption's market participant immunity. There, the Massachusetts Water Resources Authority (“MWRA”) contracted for the construction of sewage treatment and other facilities within Boston Harbor, facilities it

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14. See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 226-27 (1993).

15. *Babler Bros. v. Roberts*, 995 F.2d 911, 914 (9th Cir. 1993).

16. 471 U.S. 724 (1985).

17. See *id.* at 757.

18. See *Bldg. & Constr. Trades Council of the Metro. Dist.*, 507 U.S. at 227.

19. *Id.* at 230.

20. *Id.* at 230-31.

would own and manage upon completion of construction.<sup>21</sup> The MWRA entered into a project labor agreement with the local Building and Construction Trades Council (“BCTC”) that “was specifically tailored to one particular job, the Boston Harbor cleanup project”<sup>22</sup> and, therefore, did not affect the labor relations choices on any other public or private construction site. The PLA recognized the BCTC as the exclusive bargaining representative of all employees on the project “to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost.”<sup>23</sup> This project labor agreement, if it had been entered into by parties subject to the jurisdiction of the NLRA, would have been lawful.<sup>24</sup> Acting “in the role of purchaser of construction services . . . [the MWRA] act[ed] just like a private contractor would act, and condition[ed] its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find . . . .”<sup>25</sup>

In these circumstances, the Court held in *Boston Harbor* that “[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, [the Supreme Court] will not infer such a restriction.”<sup>26</sup> The Court has not subsequently clarified the immunity. Incoherence reigns in the lower courts because of differences with respect to the point where variation from *Boston Harbor*’s facts removes the immunity.

This disarray in the lower courts falls into several discernable categories. Most courts do seem to follow the Supreme Court’s example by examining whether the government’s purpose was proprietary or based on a desire to set labor policy.<sup>27</sup> The lower courts are divided, however,

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21. *Id.* at 221.

22. *Id.* at 232.

23. *Id.* at 232.

24. *Id.* at 222, 230.

25. *Id.*, at 233 (quoting *Associated Builders & Contractors of Mass./R.I. v. Mass. Water Resources Auth.*, 935 F.2d 345, 361 (1st Cir. 1991) (Breyer, C.J. *dissenting*), *rev’d*, *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R. I. (Boston Harbor)*, 507 U.S. 218 (1993)).

26. *Id.* at 231-32 (citation omitted).

27. *See Wisc. Dep’t of Indus. v. Gould, Inc.*, 475 U.S. 282, 291 (1986) (holding that a statute disqualifying persons from doing business with the State, when such persons had violated the Taft-Hartley Act three times within a five-year period, is not immunity-protected because “[t]he manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA”); *see also Bldg. & Constr. Trades Council of the Metro. Dist.*, 507 U.S. at 229 (distinguishing *Gould* because the agency had “no interest in setting [labor] policy”)(emphasis added).

The lower courts generally follow this invocation to examine purpose. *See Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034, 1038 (9th Cir. 1999) (holding that California’s apprenticeship minimum wage law does not qualify for the immunity because its purpose was “to regulate apprenticeship programs and wages paid on

with respect to the validity of applying a per se test that categorically excludes from the immunity's protection any government-wide procurement policy.<sup>28</sup> In *Building & Construction Trades Department v.*

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public works projects" and the policy requires the continued involvement of the state after the public works contract is executed; but nevertheless holding that the law is not preempted because it qualified as minimum standards legislation); *see also* *Cardinal Towing & Auto Repair v. City of Bedford, Tx.*, 180 F.3d 686, 691-93 (5th Cir. 1999) (holding that the market participant/regulator distinction is best understood as an analytical mechanism for "isolat[ing] a class of government involvements in the market . . . [where] a regulatory impulse can be safely ruled out" because the totality of circumstances shows that government acted to "serve the government's own needs rather than those of society as a whole"); *Associated Builders & Contractors v. City of Seward*, 966 F.2d 492, 495-96 (9th Cir. 1992) (holding that a city's requirement that contractors on a public works project agree to a work preservation clause protecting jobs of the city's own employees was not preempted because "there [was] no reason to believe that the work preservation clause was motivated by labor regulatory goals"); *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 992 F. Supp. 1149, 1179 (N.D. Cal. 1998) (preempting a city ordinance that prohibited the city from contracting with companies whose employee benefits policies discriminated between employees with spouses and employees with domestic partners because "the City undoubtedly passed the Ordinance with the policy goals in mind . . . to stop discrimina[tion] in the provision of employee benefits.")

28. *Compare* *Chamber of Commerce v. Reich (Reich I)*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (holding President Clinton's Executive Order disqualifying from certain federal contracts employers who hire permanent replacement workers during a lawful strike was preempted by the NLRA, and adopting the view that "the result [in *Boston Harbor*] would have been entirely different. . . if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all construction contractors doing business with the state to enter into [project labor agreements]"); *and* *Bldg. & Constr. Trades Dep't v. Allbaugh*, 172 F. Supp. 2d 138, 170 (D.D.C. 2001) (interpreting the NLRA as finding that project labor agreements may neither be required nor prohibited on federally funded projects and that President Bush's Executive Order is "clearly a regulatory act rather than the government act[ing] just like a private contractor would act [because the executive order] 'sets a blanket rule and does not require government agencies to act on a project-by-project basis, as was the case in *Boston Harbor*.'" (citation omitted.), *rev'd*, 295 F.3d 28, (D.C. Cir. 2002); *and* *Associated Builders & Contractors of R.I. v. City of Providence*, 108 F. Supp. 2d 73, 84 (D.R.I. 2000) (rejecting the city's immunity, and noting that "[t]he City's action in this case is not limited to one particular project . . ." and that "[t]his distinction has been important to courts refusing to apply the market participant exception, because a policy, regardless of the motive behind it, is more 'regulatory' than 'proprietary' in nature than a single contracting . . . decision") (citations omitted); *with* *Chamber of Commerce v. Reich (Reich II)*, 83 F.3d 439, 440-41 (D.C. Cir. 1996) (denying rehearing *en banc* in *Reich I*, and reporting that the *Reich I* panel's reasoning in its original decision turned not on the fact that the government had promulgated a general policy but that the purpose and effect of the policy promulgated was to alter the balance of power in collective bargaining) *rehearing en banc denied*, *Chamber of Commerce v. Reich*, 83 F.3d 442 (D.C. Cir. 1996); *Lott Constructors, Inc. v. Camden County Bd. of Chosen Freeholders*, No. 93-5636, 1994 WL 263851, at \*5 (D.N.J. Jan. 31, 1994) (upholding as immunity-protected a government-wide procurement policy requiring project labor agreements on public works projects in the context of specific findings "project agreements advance the interest of efficiency, quality, and timeliness . . .").

*Allbaugh*,<sup>29</sup> the D.C. Circuit categorically rejected as irrational the exclusion of a government-wide procurement policy from the immunity's protection just because the policy was incorporated in a "blanket rule." As the court stated: "[T]here simply is no logical justification for holding that if an executive order establishes a consistent practice regarding the use of PLAs, it is regulatory even though the only decisions governed by the executive order are those that the federal government makes as [a] market participant."<sup>30</sup> Or, courts may limit the immunity to market participation in the purchase of goods and services, excluding all other types of market participation by government entities.<sup>31</sup> Finally, there is the question of what demonstration, if any, is needed to show that private actors in fact do engage in the activities that the government wishes to pursue.<sup>32</sup> The only thing that most of the lower court decisions have in common is their lack of a coherent theoretical foundation from which to make these determinations. Part III suggests a method to resolve that defect.

### III. INTERPRETING LABOR PREEMPTION'S MARKET PARTICIPANT IMMUNITY AS A CONSTITUTIONAL REQUIREMENT

It has been almost a decade since Stephen Gardbaum published his

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29. *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002).

30. *Id.* at 35 (quotations omitted).

31. See *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950, 956-58 (N.D. Cal. 2001) (denying immunity in context of challenge to policy of requiring labor peace agreements from all employers and their subcontractors who perform work at the city-owned airport, concluding that, notwithstanding that "[t]he airport commission may have intended the rule solely as a device for increasing the airport's revenues" by averting labor unrest, the immunity is denied because the policy extends beyond "enabl[ing] the city [itself] to procure goods or services in order to operate as a business"); *Associated Builders & Contractors of R.I. v. City of Providence*, 108 F. Supp. 2d 73, 82-83 (D.R.I. 2000) (denying immunity to city that provided a tax stabilization agreement to a developer constructing a downtown hotel, reasoning that the "City in this case is not 'purchasing' construction services or otherwise exhibiting behavior analogous to that of private parties in the marketplace."); *Hudson County Bldg. & Constr. Trades Council v. City of Jersey City*, 960 F. Supp. 823, 833 (D.N.J. 1996) (limiting market participation to "interacting in the market as the owner or manager of property"). *But see Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 35, (D.C. Cir. 2002) (holding that "the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity . . . [even when] Government is a lender to or a benefactor of, rather than the owner of, a project . . .").

32. See *Chamber of Commerce v. Reich (Reich I)*, 74 F.3d 1322, 1336 (D.C. Cir. 1996) (referring to three possible approaches, without resolving the issues: 1) a "permissibility" test: would a private actor be "permitted" to engage in the activity the government entity wishes to pursue; 2) a "typicality" test: what activity a "typical" private actor "ordinarily would" engage in; and 3) a compromise "rationality" test: whether the government entity has "'go[ne] beyond the conduct that would be normally or economically rational for a private party").

influential article *The Nature of Preemption*.<sup>33</sup> In it he showed: 1) that Congress's power to preempt does not derive from the Supremacy Clause but rather the Necessary and Proper Clause<sup>34</sup> and 2) that certain federalism constraints apply to the exercise of the preemption power. Although Gardbaum did not link these insights to preemption's market participant immunity, they are nevertheless linked, and from that connection emerges a framework for understanding better the scope of the immunity.

Gardbaum's argument cuts against the grain of conventional wisdom that "preemption derives automatically and straightforwardly from the Supremacy Clause."<sup>35</sup> Gardbaum reasons that this standard view "fails to explain how the [Supremacy] Clause can be understood to grant any powers at all [when it] functions as the Constitution's dispute resolution mechanism, resolving . . . conflicts resulting from concurrent state and federal powers."<sup>36</sup> The need to find an independent source for Congress's preemptive authority is developing an academic following.<sup>37</sup> Gardbaum finds Congressional preemptive authority in the Necessary and Proper Clause.<sup>38</sup> That conclusion reveals the contingent nature of Congressional preemptive authority. The prerequisite of "proper" in the Necessary and

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33. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) [hereinafter *Nature of Preemption*]. Gardbaum expanded on this article in Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996) [hereinafter *Rethinking Federalism*].

34. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

35. *Rethinking Federalism*, *supra* note 33 at 803; *see id.* at n. 28; *Rethinking Federalism*, *supra* note 33 at 797 n.11 (citing authority for the conventional view that the issue in preemption is not congressional power but rather congressional intent).

36. *Id.* at 804. *See also Nature of Preemption*, *supra* note 33 at 774 (arguing that "the Supremacy Clause does not empower, but rather resolves a particular problem arising out of the powers granted by other parts of the Constitution; namely, conflicts resulting from concurrent state and federal powers"); *id.* at 774-76 (concluding that the Supremacy Clause operates only to trump state law that actually contravenes a federal right or prohibition, as opposed to providing Congress legislative authority to occupy a field of regulation).

37. *See, e.g.,* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2090 (2000) ("The power to preempt state law, if one exists, must be found elsewhere" than in the Supremacy Clause); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265 (2000) (finding in Supreme Court preemption cases a "tacit recognition" that obstacle preemption does not originate directly from the Supremacy Clause but rather from Congress's preemptive authority).

38. Just because Congress has the power to regulate interstate commerce, it does not follow that Congress automatically also has the power to preempt state lawmaking capacity touching all objects of federal Commerce Clause regulation. *Nature of Preemption*, *supra* note 33 at 777, 806 (emphasizing that the text of the Commerce Clause does not contain any included federal power to abolish concurrent state authority); *see also Rethinking Federalism*, *supra* note 33 at 805 n.35 (summarizing why the Commerce Clause by its own force does not include preemptive authority).



Proper Clause imposes a federalism-based constraint on Congress, as the Court recently has noted.<sup>39</sup> Without relying on the Necessary and Proper Clause, one still might find such constraints in implicit federalism-based structural limitations on Congress's exercise of its preemptive authority, identical to those that operate on any exercise of federal regulation of the States as States.<sup>40</sup> I show next that *Boston Harbor's* market participant immunity functions as such a federalism-based restraint on Congress's power to preempt.

*Garcia v. San Antonio Metropolitan Transit Authority*<sup>41</sup> abandoned the effort, first taken up in *National League of Cities v. Usery*,<sup>42</sup> to limit congressional authority over the States by carving out areas of exclusive state power. Instead, the court adopted a vision that "the limits [on congressional power] are structural, not substantive - *i.e.* that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."<sup>43</sup>

*Garcia's* confidence in the efficacy of the national political process soon waned. Without re-embracing *Usery*, the Court soon resumed an active role as arbiter of federalism constraints on the Congress. Over the past decade, the Court has restricted severely Congress's authority to provide a private right of action against the States for damages in both federal courts and state courts. It has declared twice that Congress exceeded its Commerce Clause power by regulating non-economic intrastate activity touching areas of traditional local concerns, and twice the Court has struck down federal statutes because Congress unconstitutionally had "commandeered" either states' legislative or executive processes as a means of enforcing federal law.<sup>44</sup>

39. See *Printz v. United States*, 521 U.S. 898, 923-24 (1997) (concluding that federal legislation that "violates the principle of state sovereignty reflected in the various constitutional provisions . . . is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause' . . ." (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 297-326 (1993) (emphasis in original)).

40. See *Rethinking Federalism*, *supra* note 33 at 814-17 (arguing that even *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) limited legislative authority to that which is "plainly adapted" to effect federal enumerated concerns and "appropriate" and consistent "with the letter and spirit of the Constitution").

41. 469 U.S. 528 (1985).

42. 426 U.S. 833 (1976).

43. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (characterizing the holding in *Garcia*).

44. See Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 41-43 (2001) (collecting cases and critiquing the contraction of private remedies against the States under the ADA); Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323, 328-36 (2000) (citing authority evaluating the "new federalism" and evaluating remedies against the States other than

But even as the Court reemerged as an ardent champion of judicial activism to promote constitutional federalism, its federalism decisions continued to foster the efficacy of federalism's non-judicial, political safeguards. One example is the "clear statement" rule.<sup>45</sup> An even more prominent example is the Court's nondiscrimination rule, whose pedigree can be traced to dicta in *Garcia*. In *Garcia*, the Court left open the possibility of judicial intervention if "the internal safeguards of the political process have [not] performed as intended."<sup>46</sup> Three years later, in *South Carolina v. Baker*,<sup>47</sup> the Court reaffirmed that "*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."<sup>48</sup> In *South Carolina v. Baker*, the Court upheld federal legislation regulating the States' issuance of bonds, concluding that the national political process in that case was not defective since South Carolina had not "alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."<sup>49</sup>

Then, in 1992, one year before *Boston Harbor*, the Court decided *New York v. United States*.<sup>50</sup> *New York* clarified how the national political process might malfunction to cause the political powerlessness and isolation of the States referred to in *South Carolina v. Baker*. In *New York*, the Court invalidated the take-title provision of a federal regulatory program to dispose of nuclear waste because the provision required the state either to legislate a solution to the accumulation of low-level nuclear waste or claim ownership and liability for the waste. The Court held this provision unconstitutional because Congress has no authority to "commandeer[r] the legislative processes of the States."<sup>51</sup> The Court distinguished *Garcia* as a case that concerned the authority of Congress to "subject state governments to generally applicable laws"<sup>52</sup> that impose the same obligations on the States and similarly situated private actors.

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private damage actions); Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity From Private Damage Suits After Boerne*, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 486-96 (1998) (evaluating the "new federalism").

45. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (reasoning that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the [Congress] has in fact faced [the competing interests of the States]'" (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

46. *Garcia*, 469 U.S. at 556.

47. 485 U.S. 505 (1988).

48. *Id.* at 512.

49. *Id.* at 513.

50. 505 U.S. 144 (1992).

51. *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

52. *Id.* at 160.

Finally, in *Reno v. Condon*,<sup>53</sup> the Court unanimously upheld a federal law barring state motor vehicle departments from disclosing (or selling) personal information obtained from individuals applying for a driver's license or car registration. The justices reasoned that the statute does not require state legislatures to legislate, does not require state officials to assist in enforcing federal law regulating private citizens, and does not “regulate the States exclusively.”<sup>54</sup>

These cases show that the generally-applicable-laws doctrine is a means of distinguishing between valid and invalid federal commandeering. If the Congress were to impose different obligations on otherwise similarly situated states and private actors, then the anti-commandeering rules would apply. Since preemption operates as negative commandeering (state is barred from acting),<sup>55</sup> the generally-applicable-laws doctrine then also distinguishes between valid and invalid efforts to preempt.<sup>56</sup>

Professor Tribe in his treatise has offered an explanation for a related constitutional nondiscrimination rule that may explain why the Court has been so insistent that federal legislation not “regulate the States exclusively,” but instead subject them to “generally applicable laws.” The nondiscrimination rule discussed by Professor Tribe is found in a mid-century tax case that, somewhat ironically, also is captioned “*New York v. United States*.”<sup>57</sup> Its precedential value is weakened by the absence of a majority opinion, but there the Court reasoned that Congress may not levy a tax that falls only on the States. As Professor Tribe explains,

Such discriminatory taxation (although the Justices did not develop this rationale) would deprive the states of their natural non-governmental allies in the legislative process, and thus weaken the political check upon Congress to the point that judicial intervention could perhaps be justified under *Garcia* . . . . Plainly, the Court could apply [the nondiscrimination rule] in cases concerning congressional taxes or regulation.<sup>58</sup>

Discriminatory preemption rules that bar states from market participation lawfully engaged in by similarly situated private actors also

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53. 528 U.S. 141 (2000).

54. *Id.* at 151. (emphasis added).

55. See Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 14-15 (2000) (discussing how “preemption law . . . operates as a sort of negative commandeering by foreclosing state legislatures from pursuing the policies they prefer”).

56. See Carlos Manuel Vazquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1285 (in the context of international relations, and relying on *College Savings Bank v. Florida Prepaid Postsecondary Education Board.*, 527 U.S. 666 (1999), concluding that “Congress lacks the power to prohibit the states from engaging in . . . activity unless it also prohibits private parties from engaging in the activity . . .”).

57. 326 U.S. 572 (1946).

58. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 915-16 (2000).

threaten to “deprive the States of their natural non-governmental allies” and create the political powerlessness and isolation of the States referred to in *South Carolina v. Baker*.<sup>59</sup>

The above discussion illuminates the plausibility that constitutional considerations grounded in federalism shape *Boston Harbor*'s market participant immunity.<sup>60</sup> If this constitutional interpretation of the immunity is accurate, then it is necessary to explain why, in the dormant commerce power cases, the Court repeatedly states that Congress is at liberty to dispense with the immunity.<sup>61</sup> That, of course, can be true only if the immunity is not constitutionally required.

In the preemption context the immunity serves the federalism function of assuring that when Congress legislates, it does not “regulate the States exclusively,” but instead subjects them to “generally applicable laws.” None of this reasoning, of course, applies in dormant commerce power cases since there the courts limit state autonomy in the absence of federal legislation. As one commentator has put it, in the domain of dormant Commerce Clause methodology, the function of the market participant immunity is “not [to] affect the power of Congress, but merely [to] restrict[] the power of [the] courts to strike down state action . . . .”<sup>62</sup> Since it is not a structural limitation on the Congress, it makes sense that Congress reserves the power to eliminate the dormant Commerce Clause market participant immunity if it wishes.

A constitutional interpretation of the immunity also requires an explanation of why in *Boston Harbor* the Court cited the absence of a congressional intent to deny the immunity.<sup>63</sup> If the immunity is constitutionally required, then is congressional intent to provide it not immaterial? Not necessarily. The Court has developed methods to avoid unnecessary adjudication of constitutional questions.<sup>64</sup> Concluding that

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59. 485 U.S. 505 (1988).

60. This plausibility is reinforced by a recent federalism-induced reluctance by the Court to infer preemption from congressional silence. See Drummonds, *supra* note 3, at 563.

61. See, e.g., Dan T. Coenen, *The Impact of the Garcia Decision on the Market-Participant Exception to the Dormant Commerce Clause*, 1995 U. ILL. L. REV. 727, 742 (1995) (“A long line of Supreme Court cases has established that Congress may overturn dormant Commerce Clause decisions by mere bicameral action, without resort to the cumbersome [constitutional] amendment process. The Court, moreover, squarely has held that this principle extends to decisions concerning the market-participant exception.”).

62. See *id.* at 755.

63. See *supra* notes 21 - 25 and accompanying text.

64. See *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). The technique has been employed often in labor law cases. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) (avoiding potential free speech issues, the Court held that the Act does not prohibit peaceful handbilling); *NLRB v. Catholic Bishops*, 440 U.S. 490, 507 (1979) (holding that that Board

labor law includes an implicit congressionally approved market participant immunity nicely avoids reaching the constitutional issues presented by the absence of such approval. Finding a congressionally intended market participant immunity thus leaves for another day what to do if such an intent were ever found wanting.

Several important consequences flow from rooting the market participant immunity in the Constitution. First, it is unwarranted for the immunity to provide local government less autonomy to participate in the market than labor law provides private actors. Accordingly, the first thing that should matter in a labor preemption market participant dispute is whether federal labor law would privilege a similarly situated private sector employer to engage in the activity for which local government is claiming immunity protection.

But it also is appropriate to inquire into the local government's purpose.<sup>65</sup> In *Boston Harbor*, the Court, quoting from its previous decision in *Gould*, reasoned that "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints."<sup>66</sup> The Constitution's non-discrimination principle, therefore, does not prescribe absolute parity between government and the private sector. While a private actor might lawfully engage in a boycott "on the basis of a labor policy concern rather than a profit motive,"<sup>67</sup> this is not true for government entities. "States have a qualitatively different role to play from private parties. . . . [A]s regulator of private conduct, the State is more powerful than private parties."<sup>68</sup> Accordingly, it is appropriate for the immunity to test for the purpose to determine when government's "actions [are] taken to serve the government's own needs rather than those of society as a whole."<sup>69</sup>

In sum, rooting labor preemption's market participant immunity in the Constitution requires inquiry into the scope of permissible activities by private sector employers as well as local government's purpose. There are other implications: Because a constitutional right is at stake, the analysis of

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lacks jurisdiction over lay teachers in a "church-operated" school, while avoiding "difficult and sensitive" questions dealing with separation of church and state); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (avoiding difficult free speech issues, the Court held that the Act does not prohibit point of sale picketing when the purpose is to induce consumers to boycott products produced by primary employer and sold at a neutral employer's place of business).

65. See *supra* notes 27 - 28 and accompanying text.

66. *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 228 (1993) (quoting *Wisc. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 290 (1986)).

67. *Id.* at 229.

68. *Id.*

69. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691 (5th Cir. 1999).

a state's purpose should eschew reliance on per se rules such as denying the immunity if government promulgates a government-wide policy or chooses strategies to advance its proprietary interests that would be unusual for similarly situated private sector businesses.<sup>70</sup> Such per se rules deny the States the strict judicial scrutiny normally provided when deprivation of a constitutional right is at stake.

#### IV. PREEMPTION OF LIVING WAGE AND LABOR PEACE POLICIES

##### A. *The Living Wage Movement*

Nationwide, a community-based movement for economic justice has coalesced around three premises. First, "anyone who works for a living should earn enough money to raise a family outside of poverty."<sup>71</sup> Second, governmental expenditures should not be used to finance substandard wages that preclude full-time workers from moving out of poverty.<sup>72</sup> Third, when citizen tax dollars finance substandard wages, "taxpayers encounter a forced subsidy to cover the needs that businesses fail to provide through wages, including healthcare, food stamps, tax credits, housing assistance, and other social costs of the wage gap and inequality."<sup>73</sup>

Acting on these premises, local governments have enacted living wage ordinances that typically "cover employers who hold large city or county service contracts or [otherwise] benefit from public tax dollars [such as] tax abatements or other economic development subsidies"<sup>74</sup> or lease of public land.<sup>75</sup> Normally, living wage ordinances "require private businesses that benefit from public money to pay their workers . . . at least enough to bring a family of four to the federal poverty line, currently \$8.20 an hour."<sup>76</sup> Presently, eighty-three cities, counties, and school districts have adopted living wage policies and an estimated seventy-five campaigns are underway nationwide to secure them in other local jurisdictions.<sup>77</sup>

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70. For lower court decisions that take contrasting views on these issues, see *supra* notes 27 - 30 and accompanying text.

71. See MaryBeth Lipp, *Legislators' Obligation to Support a Living Wage: A Comparative Constitutional Vision of Justice*, 75 S. CAL. L. REV. 475, 486-87 (2002).

72. *Id.* at 487.

73. *Id.* Living wage policies also benefit to the local economy from increased disposable income and a broadening of the tax base. *Id.* at 488-90.

74. Jen Kern, *Working for a Living Wage*, MULTINATIONAL MONITOR at \*1, Jan. 1, 2001, available at 2001 WL 15520440.

75. Lipp, *supra* note 71 at 487.

76. Kern, *supra* note 74 at \*2.

77. For an up-to-date listing, see ACORN Living Wage Resource Ctr., *The Living Wage Movement: Building Power in Our Workplaces and Neighborhoods*, available at <http://www.livingwagecampaign.org/introcontent.htm> (last visited Nov. 25, 2002).

### B. Preemption of Living Wage Policies

It seems unlikely that living wage policies will be found immune from preemption by operation of the market participant doctrine. The case for living wage ordinances, as shown, revolves primarily around moral claims and it is unlikely that a state or municipal government could demonstrate that their purpose is advancement of government's proprietary interests.

Living wage policies, nevertheless, are likely to escape preemption because they are minimum wage statutes, falling within the rule of *Metropolitan Life Insurance Co. v. Massachusetts Travelers Insurance Co.*<sup>78</sup> The fact that a living wage ordinance is applicable only to employees engaged in tasks related to a state's procurement needs should not require a contrary result. That was the court's conclusion in *Babler Bros. v. Roberts*<sup>79</sup> where the state set overtime provisions for work done on publicly financed construction projects unless the workers are covered for overtime provisions in a collective bargaining agreement.<sup>80</sup> The court refused to distinguish *Metropolitan Life* on the ground that, unlike the legislation in that case, the statute did not apply to all employees.<sup>81</sup> Nor did the court fault the state for exempting employers bound to collective bargaining agreements, reasoning that the exemption would avoid "interfer[ing] with collective bargaining."<sup>82</sup>

### C. The Labor Peace Movement

Fearing that labor disputes will interfere with the delivery of goods, depreciate the value of purchased services, interfere with the profitability of joint-venture real estate development contracts, or otherwise threaten publicly financed programs, government entities have adopted various labor peace strategies. Public entities are taking their lead from the private sector, where unions and employers are adopting labor peace agreements, without any governmental involvement, as a means of harmonizing their

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78. 471 U.S. 724, 753 (1985); see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (upholding a statute that provided for a one-time severance payment on the occasion of a plant closing, concluding that it was immaterial that the statutory grant applied only to employees not covered by a contract provision providing such severance pay and rejecting the argument that the state had sided with employees by granting them by statute something for which they otherwise would need to bargain). See discussion *supra* notes 16 - 17 and accompanying text.

79. 995 F.2d 911 (9th Cir. 1993).

80. *Id.* at 912-13.

81. *Id.* at 914.

82. *Id.* at 915. The court added that "the state here has not endeavored to regulate the bargaining relationship of employers or employees. Rather, the state is enforcing proscribed working conditions on public projects in which the state and local jurisdictions have a proprietary interest." *Id.* at 916.

labor relations.

### 1. No-State-Money Legislation

Following the lead of other states, California has enacted legislation restricting the use of public money to pro- or anti-union organizations. The so-called AB 1889 (the Cedillo Act) was enacted in 2000.<sup>83</sup> The legislation regulates state agencies, public employers that receive state funds, and several categories of private employers either receiving state funds or conducting business on state property.<sup>84</sup>

Employers covered by the statute are barred from using state funds to assist, promote, or deter union organizing.<sup>85</sup> In addition, state contractors are prohibited from assisting, promoting, or deterring union organizing by employees performing work on a service contract, including a public works contract, negotiated with the state or a state agency.<sup>86</sup> Also, employers conducting business on state property pursuant to a contract or concession with the state may not use state property to hold a meeting with any employees to assist, promote, or deter union organizing.<sup>87</sup>

These limits on the use of state funds and property are enforced by a requirement that employers maintain records sufficient to substantiate compliance with AB 1889 and make these records available for inspection by the California Attorney General.<sup>88</sup> Violation of the statute is remedied by an order to reimburse the state for the unlawfully expended funds, plus a civil penalty equal to twice the amount of the unlawfully used State funds.<sup>89</sup> Suits to enforce AB 1889 may be brought by the California Attorney General or a state taxpayer, after giving the Attorney General 60 days notice and the first opportunity to sue.<sup>90</sup>

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83. CAL. GOV. CODE §§ 16645-16649 (West 2002) (hereinafter AB 1889). The bill was authored by Representative Gil Cedillo from Los Angeles.

84. *See id.* §§ 16645.1-16645.7.

85. *See id.* §§ 16645.1(a), 16645.4(a). The bar does not apply to the expenditure of money to address grievances, negotiate collective bargaining agreements, permit unions access to an employer's facilities or property, or negotiate or carry into effect the provisions of a voluntary recognition agreement. *See id.* § 16647(a)-(d).

86. *See id.* § 16645.3(a).

87. *See id.* § 16645.5(a).

88. *See id.* §§ 16645.1-16645.7. Non-state funds co-mingled with state funds in a single account are all considered state funds. *See id.* § 16645.8(a).

89. *See id.* §§ 16645.1 - 16645.7. Employers using public land unlawfully are liable for a \$1,000 fine. *See id.* § 16645.5(b).

90. *Id.* §§ 16645.8(b)-(c). In December 2001, the NLRB was asked to initiate an injunction action in federal court alleging that AB 1889 is preempted by the Act. *See National Labor Relations Board, Office of the General Counsel, California Assembly Bill 1889 (AB 1889) (Prohibition on the Use of State Funds And Facilities to Promote or Deter Union Organizing)* (May 20, 2002) (reporting the request and requesting an expression of views from interested parties). For an analysis of whether AB 1889 should be held



## 2. State Procurement Policy that Requires a Labor Peace Agreement.

Ordinances requiring companies doing business with local government to enter into labor peace agreements with a union, in the event a union initiates an organizing campaign, are unusual but they do exist.<sup>91</sup> In October 2000, Milwaukee County enacted the first of the ordinances.<sup>92</sup> The Milwaukee ordinance covers “businesses providing social services or specialized transportation services under county contracts [in excess of \$250,000].”<sup>93</sup> The covered firms are required to sign agreements with unions seeking to organize their workers that will prohibit the business from giving workers misleading information in an attempt to dissuade them from choosing unionization. These agreements will also permit union organizers to distribute information at the workplace.<sup>94</sup> In addition, it requires such firms to provide employee address lists to the union, and forbids the firms from holding captive audience meetings.<sup>95</sup> In return, unions may not give workers misleading information, and they are forbidden to strike, boycott or picket to achieve recognition.<sup>96</sup> The first legal challenge under the statute, alleging violations of free speech, association, due process, and labor preemption, was dismissed as moot.<sup>97</sup>

## 3. Labor Peace Policies Related to Urban Redevelopment Subsidies

Local governments compete with one another to attract the investment of private capital into the community by offering incentive packages that include direct grants, low-interest loans, and what is sometimes referred to as “tax expenditures.”<sup>98</sup> Providing economic incentives to private real

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preempted by the Act, see discussion *infra* notes 114-121 and accompanying text.

91. Arch Stokes, Robert L. Murphy, Paul E. Wagner, & David S. Sherwyn, *Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot*, 42 CORNELL HOTEL & RESTAURANT ADMIN. Q., 86 (Oct. 1, 2001) at \*3 & n.5 (reporting the “labor-peace . . . ordinances [were] passed by a number of local governments in recent years . . .”).

92. See David Glenn, *Labor of Love: Milwaukee’s Home-Care Workers Discover Each Other*, THE NATION, Sept. 3, 2001, at 30, available at 2001 WL 2132832 (reporting the Milwaukee ordinance was the first in the Wisconsin).

93. Linda Spice, *Milwaukee – Area Home Health Care Workers Vote for Union*, MILWAUKEE J. SENTINEL, June 7, 2001, available at 2001 WL 22768791 (hereinafter *Vote for Union*).

94. *Id.* at \*3.

95. David Glenn, *supra* note 92, at \*3.

96. *Vote for Union*, *supra* note 93, at \*3.

97. See *Metro. Milwaukee Ass’n of Commerce v. Milwaukee County*, 201 F. Supp. 2d 942, 951-52 (E.D. Wis. 2002).

98. See Rachel Weber, Note, *Why Local Economic Development Incentives Don’t Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97, 100 (2000) (defining tax expenditures as “forgone revenues or uncollected taxes,” and reporting that they are the

estate developers has “become almost a necessity [in order] to attract certain types of development, particularly development that will create public good . . . .”<sup>99</sup> When the local government offers subsidies to private real estate developers, it often requires that the private developer enter into a labor peace agreement as part of the deal.<sup>100</sup>

The term “labor peace agreements” connotes more of a generic concept than a description of any agreement’s actual provisions. These agreements, which are becoming standard labor relations practice in some sectors of the private economy, have literally dozens of variations.<sup>101</sup> What they have in common is that they permit unions and employers to avoid the contentious pitched battles of a former era. These agreements typically address three categories of potential conflict.

*Civility:* Labor peace agreements usually require both unions and employers to structure the union organizing campaign around reasoned arguments rather than mutual disparagement. Unions often agree not to malign the employer, and sometimes to give the employer notice of an intent to begin organizing among its employees.<sup>102</sup> The employer typically agrees either not to speak against the union that is organizing its employees, or not to attack or demean the union when expressing its views about unionization.<sup>103</sup>

*Access:* Usually an employer also agrees to provide employee name and address information.<sup>104</sup> Or, the employer may agree to grant the union

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most popular form of economic incentive because they “include different forms of tax abatements, exemptions and reductions, such as corporate income or excise tax exemptions, property tax abatements, and investment tax credits”).

99. See Ira J. Waldman, *Public/Private Development Partnerships – The Long-Term Ground Lease*, SG019 ALI-ABA 241, 243 (2001) (concluding that the past two decades have witnessed a “dramatic increase in [such] public participation in traditionally private entrepreneurial activities”).

100. See Stewart Yerton, *N.O. Airport Hotel Deal a Winner for Union; Project is to Include “Labor Peace Agreements”*, TIMES-PICAYUNE, Apr. 26, 2000, at A1 (“Labor peace agreements are not uncommon in public projects.”); *id.* (relating the view of the president of a major corporation engaged in real estate redevelopment financed partially through public funds that labor peace agreements are “common” and they “happen[] all over the country”).

101. See Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 377-87 (2001) (hereinafter *The Newest Civil Rights Movement*) (reviewing the development of and variations within neutrality agreements).

102. See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 48 (2001) (discussing labor peace agreements regulating neutrality in union collective bargaining).

103. See *id.* at 47 (reporting that ninety-three percent of the labor peace agreements surveyed “contained explicit neutrality language” and sometimes defining neutrality as “‘neither helping nor hindering’ the union’s organizing effort”, or a concession “that the employer would not communicate opposition”).

104. See generally Eaton & Kriesky, *supra* note 102 at 48. See also *The Newest Civil Right Movement*, *supra* note 101 at 384-385.

access to its' physical property in order to enable the union to communicate directly with employees.<sup>105</sup>

*Recognition:* A labor peace agreement also may provide for union recognition upon the union's demonstration of majority support of the bargaining unit employees. This usually is manifested by the union presenting signed authorization cards.<sup>106</sup> One of the most interesting conclusions uncovered by recent empirical research is that when a union is able to secure a labor peace agreement, organized success levels increase considerably and when employees choose unionization the union almost always is able to obtain a first contract.<sup>107</sup>

Because there may be different legal consequences, it is useful to distinguish two contexts when a state or municipal government might require some type of labor peace agreement from a real-estate developer as a condition to its receiving public financial subsidies.

The first is when government and a private real estate developer enter into a business relationship that provides for the governmental entity to share in the profitability of, and assume part of the risk of, the venture. Often, a redevelopment agency or a convention authority negotiates a ground lease that provides for both a minimum rent and a higher "percentage rent" that varies depending on the profitability of the venture.<sup>108</sup> This was the case in the construction of a convention center and hotel in San Francisco.<sup>109</sup> In other cities it might be the state convention authority that owns land that it wants to lease to a private developer for the purpose of building a convention hotel that will support the operations of a government-owned convention center.<sup>110</sup>

The second context when a labor peace agreement becomes part of the negotiations is when a private developer is seeking from government either

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105. See *id.* at 385 n.84 (citing cases of examples of circumstances in which union access must legally be denied).

106. Seventy-three percent of the agreements in Eaton and Kriesky's sample of agreements (81 of 111) provided for card-check recognition. See Eaton & Kriesky, *supra* note 102 at 47-48.

107. See *id.* at 52 (finding that labor peace agreements that pair a neutrality pledge and card check recognition result in recognition 78.2 percent of the time).

108. For an excellent discussion and analysis of government's use of ground leases to facilitate urban redevelopment, see Waldman, *supra* note 99 at 243-44 (concluding that in the past local government tended to sell excess property but "[i]n the past ten to fifteen years the trend has shifted and now [local governments] look at their real estate holdings from a profit potential, perspective . . . [and utilizing] [t]he long-term ground lease has become a primary tool . . . in their asset management and income maximization activities").

109. See *infra* notes 133-37 and accompanying text.

110. See Gregory Smith, *Agency Would Finance Hotel*, PROVIDENCE J., Dec. 5, 2001 at A1, available at 2001 WL 29797973 (reporting a requested \$10 to \$16 million loan from a convention authority to finance the construction of a convention hotel to be built on land owned by the convention authority).

a direct cash subsidy, loan, or loan guarantee.<sup>111</sup> Sometimes the offer of tax abatement for a set term (often ten years) provides the impetus for a local government to request security for its investment by insisting that a developer agree to a labor peace agreement as part of the deal.<sup>112</sup>

#### D. Preemption of Labor Peace Policies

##### 1. Preemption of no-state-money policies

It is not likely that federal labor law preempts “no-state-money policies”: legislation that prohibits recipients of public funds from using those funds to promote or deter union organizing.<sup>113</sup> It is possible, though unlikely, that these policies could qualify for preemption’s market participant immunity.<sup>114</sup> But even if they do not, a state’s preference to remain neutral by not permitting its money to be used to promote or deter unionization does not contravene any of the values advanced by either the *Garmon* or *Machinist* preemption doctrines.

First, *Garmon*’s protected/arguably protected wing is ill-suited as a preemption theory because that wing of *Garmon* addresses interference with Section 7 rights and employers do not have Section 7-protected rights.<sup>115</sup> Therefore, even if denying a private sector employer the use of public funds to promote or deter unionization were viewed as having some

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111. See, e.g. Jim Weiker, *Union Demand Threatens Denver Marriott Convention Center Hotel*, KNIGHT-RIDDER TRIB. BUS. NEWS, June 6, 2000, available at 2000 WL 22619928 (reporting a labor peace agreement as part of a \$55.3 million tax subsidy (one-quarter of the cost of the hotel)). In New Haven, the city made \$10 million available to help finance the renovation of a hotel and in return the developer agreed to enter into a labor peace agreement with the union representing the hotel’s employees. See Lab. Rel. Rep. No. 243, at A-8 (Dec. 18, 1997).

112. See Gregory Smith, *Hotel Developers In Line For \$7.75 Million Tax Break*, PROVIDENCE J., Feb. 12, 1999, at C1 (reporting a labor peace agreement involved in negotiations for city agreement to waive taxes for ten years, a concession worth an estimated \$7.75 million to the developer).

113. See *supra* notes 83-90 and accompanying text.

114. No-state-money policies do not necessarily diminish labor strife; government simply refuses to finance it. States, though able to advance persuasive moral claims on behalf of such policies, will be hard pressed to demonstrate a proprietary self-interested motivation.

115. Section 7 of the Taft-Hartley Act, titled “Rights of employees as to organization, collective bargaining, etc.” provides that “Employees shall have the right to self-organization . . . and to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . .” 29 U.S.C. § 157 (2002). See Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE L.J. 355, 379 (1990) (“Section 7 protects only conduct of employees, not of employers. Indeed, the Act nowhere vests employers with protected rights; on its face, it forbids certain employer actions, but protects none.”). *But see* discussion *infra* note 10.

adverse effect on an employer's ability to oppose unionization, the employer has suffered no interference with section 7 rights. Nor is *Garmon's* prohibited/arguably prohibited wing implicated.<sup>116</sup>

*Machinists* preemption theory also is not suitable. As noted above,<sup>117</sup> *Machinists* preemption assures that in a labor dispute the parties may deploy freely the "self-help" economic weapons that labor law leaves unregulated because Congress intends them "to be controlled by the free play of economic forces."<sup>118</sup> Congress did not intend that union representation decisions should be left to the uncontrolled exercise of either party's relative economic might. To the contrary, the Act favors unencumbered employee free choice.<sup>119</sup>

The result would be the same were courts to conclude that *Machinists* preemption reaches state action affecting representation election outcomes. The Act's representation election policies are not frustrated by no-state-money policies. Employers remain free to exercise all of the options federal law permits for opposing unionization.<sup>120</sup> The State's private sector business partners are simply precluded from using state funds or property for persuader activities.<sup>121</sup>

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116. Legislation barring the use of public funds to encourage or discourage unionization does not remotely regulate any activity that even arguably is prohibited by federal law.

117. See *supra* note 11 and accompanying text.

118. See *Machinists Lodge 76 v. Wis. Emp. Rel. Comm'n.*, 427 U.S. 132, 140-42 (1976).

119. For example, section 8(b)(7) of the Act denies unions the unbridled use of recognition and organizational picketing. The Court in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), held the Act bars an employer from using its superior economic position to influence election outcomes by making an unconditional grant of benefits. Indeed, labor law restricts the parties from deploying many strategies to influence employee choice that are not necessarily coercive but disrupt "laboratory conditions." See, e.g., *In re General Shoe Corp.*, 77 NLRB 124, 127 (1948).

120. See *N.Y. Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 532 n.21 (1979) (holding that labor preemption analysis must focus only on the "the scope, purport, and impact of the state program"); *id.* at 531-32 (holding that only state action that alters the economic balance between labor and management is subject to preemption). In *Chamber of Commerce v. Lockyer*, 2002 WL 31207130 (C.D. Cal. 2002), the district court found California's AB 1889 is preempted under the *Machinists* doctrine. The Court reasoned that section 8(c) of the Taft-Hartley Act "manifests a congressional intent to encourage free debate on issues dividing labor and management" (internal quotations omitted), AB 1889 "prevents free debate," and, therefore, AB 1889 is preempted because it "regulates speech." In October 2002, the NLRB General Counsel signaled his "serious concern" that recently adopted no-state-money policies in New York may be preempted because they "will effectively regulate conduct that is intended by Congress to be free from governmental interference" and interfere with employer free speech rights shielded by the Taft-Hartley Act. See *NLRB Asks New York, New Jersey Officials to Explain Their Labor Neutrality Laws*, DAILY LAB. REP. (BNA) no. 236 at A-1 (Dec. 9, 2002).

121. Litigation involving city council resolutions in support of unions is instructive in this regard. See *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1416 (9th Cir. 1996) (holding that resolution to discontinue \$40,000 per year in official advertising in a

## 2. Preemption of state procurement policies that require a labor peace agreement

A state adopts a qualitatively different sort of labor peace policy when it goes beyond measures designed to secure its own neutrality and adopts ones requiring a commitment of neutrality from its business partners. Absent market participant immunity, most of these policies would be unlawful by operation of *Machinists*, though not *Garmon*, preemption.<sup>122</sup> Nor would *Garmon*'s arguably prohibited wing apply. The normal provisions of a labor neutrality agreement do not violate section 8(a)(2) or any other section of the Act.<sup>123</sup> *Garmon*'s arguably prohibited wing would not support preemption in either event, however, because it exists to protect the NLRB's primary jurisdiction to remedy unfair labor practices.<sup>124</sup> Conditional business relationships that require business partners to agree under certain circumstances to labor peace policies create "no realistic risk of [state] interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices."<sup>125</sup> Any person believing that a labor peace agreement violates the Act can test that belief by filing an unfair labor practice petition with the NLRB.

*Machinists* offers a more promising preemption theory. As noted above, conventional *Machinists* principles would not likely support preemption because Congress did not intend to leave employee choice regarding unionization to "the free play of economic forces."<sup>126</sup> However,

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newspaper involved in a labor dispute was not preempted. The court reasons that workers have a time-honored right to request consumer boycotts, consumers have a time-honored right to honor such requests, and preempting a local government's decision to withdraw support from a struck employer amounts to "declar[ing] that cities must, notwithstanding their wishes, involuntarily patronize struck or boycotted businesses." This is a declaration a court should not make "at least in cases in which [government] action [does] not have some 'real effect' or practical economic impact on the employer that is either different from that of the ordinary consumer or is otherwise governmental in nature."); see also *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994) (reasoning that labor preemption is limited to governmental actions that have a "real effect on federal rights").

122. *Garmon*'s protected/arguably protected wing would not support preemption of a state's financial inducement to forego conduct the Act permits because an employer possesses no section 7 rights. See *supra* note 115 and accompanying text. But see *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950, 955 (N.D. Cal. 2001) (applying *Garmon* "to conduct related to the activities regulated by section 9 of the act"). See also discussion, *infra* note 127.

123. See *The Newest Civil Rights Movement*, *supra* note 101, at 401-04. But see *id.* at nn.170, 174 (collecting commentary taking a contrary view).

124. See *Sears, Roebuck & Co. v. S.D. County Dist. Council of Carpenters*, 436 U.S. 180, 198 (1978).

125. *Id.* at 198.

126. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). See *supra* notes 11, 117 and accompanying text.

it is reasonable to assume that most courts would be inclined to expand *Machinists* if a state were to adopt policies that would alter substantially national labor policy's customary methods for determining employee free choice. Courts so inclined to expand *Machinists* probably would conclude that a typical labor peace agreement would fall within *Machinists*'s proscriptions by requiring some or all of the following: employer neutrality, access to employer property, and card-check recognition.<sup>127</sup> If this is an accurate prediction, qualification for the immunity then becomes the crucial issue. That question is taken up next.

Certainly, there is nothing in federal labor law prohibiting a private-sector actor from deciding voluntarily not to do business except with employers who, for example, agree to stay neutral during a union organizing campaign.<sup>128</sup> Accordingly, whether the immunity applies when a government entity does this depends on an evaluation of purpose.

Government is likely to have a difficult task persuading a court that its proprietary interest was the motivating force when it enacts an across-the-board requirement of a labor peace agreement from all those doing business with it (even if limited to transactions exceeding a certain dollar amount). It is hard to imagine what credible demonstration could confirm government's proprietary motivation for such broad legislation.<sup>129</sup>

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127. See discussion of typical provisions of labor peace agreements *supra* notes 98-103 and accompanying text. Section 16645.3(a) of AB 1889, the California legislation, prohibits state contractors from assisting, promoting, or deterring union organizing by employees performing work on a contract negotiated with the state. See *supra* note 86 and accompanying text. While this does not require executing a labor peace agreement, it does prohibit all behaviors included in the phrase "detering union organizing." The applicability of *Machinists*' preemption theory would seem to depend on how great a "thumb on the scale" a court perceives this limitation to be.

In October 2002, the NLRB General Counsel signaled a recently adopted New Jersey executive order may be preempted. The order requires state contractors providing uniforms for state employees to "adopt a neutrality position with respect to attempts to organize by their employees" and requires the state contractors to "agree to voluntarily recognize a union when a majority of workers have signed cards authorizing representation." In a letter to the State, the NLRB General Counsel stated that the executive order "appears to regulate conduct that is both within the [NLRB's] jurisdiction and intended by Congress to be free from governmental interference" and also "appear[s] to interfere with rights under the NLRA to freely discuss labor relations issues and to access the [NLRB] through the filing of charges or participation in representation proceedings." See *NLRB Asks New York, New Jersey Officials to Explain Their Labor Neutrality Laws*, DAILY LAB. REP. (BNA) no. 236 at A-1 (Dec. 9, 2002).

128. Indeed a company could have a policy to do business only with unionized employers. See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 229 (1993) ("A private actor . . . can participate in a boycott of a supplier on the basis of [either] a labor policy concern [or] a profit motive . . .").

129. See also *New England Health Care Employees Union v. Rowland*, No. 3-01-CV-464 (JCH), slip op. at 18 (D. Conn. May 7, 2002) (finding insufficient evidence of proprietary need for public funding to hire striker replacements for struck nursing homes).

More narrowly tailored labor peace legislation, such as Milwaukee's, presents a very different situation. As noted above,<sup>130</sup> the Milwaukee labor peace ordinance encompasses only social service agencies and specialized transportation services for the elderly and disabled when the County contract exceeds \$250,000. The covered firms are not required to remain silent in the face of a union organizing drive but rather must refrain from providing misleading information; the companies may not hold captive audience meetings; they must provide union organizers name and address information; and they must provide the union workplace access. For their part, unions may not attempt to promote the union by giving workers misleading information and they are forbidden to strike, boycott or picket to obtain representation rights. While the inquiry into purpose inevitably is fact-specific, the County may well be able to demonstrate that this legislation is narrowly designed to protect from disruption certain city services delivered to a particularly vulnerable segment of the community: the disabled, seniors and other vulnerable citizens.<sup>131</sup>

### 3. Labor peace policies related to economic development subsidies

State or municipal government might choose to include a labor peace agreement as part of an urban redevelopment plan that also includes providing a real-estate developer a public subsidy to encourage investment in the community.<sup>132</sup> Then government is not participating in the market for goods and services, as in *Boston Harbor*, but is participating in the real estate or capital markets. Can participation in these markets ever qualify for the market participant immunity? The analysis developed in this article demonstrates that the answer should be yes.

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130. See *supra* note 93 and accompanying text.

131. Making such detailed inquiries into the circumstances surrounding legislative enactment is something courts are quite adept at doing. See, e.g., *New York State Chapter, Inc. v. New State Thruway Auth.*, 88 N.Y.2d 56, 666 N.E.2d 185, 643 N.Y.S.2d 480 (Ct. App. 1996) (examining record to determine if it demonstrates that the state agency made a focused inquiry into whether a required project labor agreement would advance the interests in a state competitive bidding statute). The causality inquiry can result in the conclusion that the government had a mixed motive: both a proprietary interest and a desire to respond to political pressure. Then the likely resolution will be that government has the burden of showing that it would have taken the same action for proprietary reasons regardless of the political pressure. See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983) (using a similar approach to resolve mixed-motive issues in cases alleging personnel action motivated by union animus); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (using a similar approach to resolve mixed-motive cases involving constitutionally protected conduct); see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (using a similar approach to resolve mixed-motive cases involving facially neutral legislation having a discriminatory effect when the issue is government's motive in enacting the legislation).

132. See *supra* notes 99, 100 and accompanying text.



Some cases of government sponsorship of labor peace agreements in the context of real-estate transactions do fit snugly, if not exactly, into the *Boston Harbor* paradigm. San Francisco's experience makes the point.

The San Francisco Redevelopment Agency acquired large parcels of land to build a mixed use development.<sup>133</sup> It awarded a hotel chain and its development partner a contract to build a hotel and convention center on the land the Agency owned. The Agency required a labor peace agreement to be assured that the project would not cause labor strife. Unlike *Boston Harbor*, the Agency did not own or manage the hotel covered by the labor peace agreement. However, the Agency retained a residual interest in the success of the hotel because the long-term ground lease it negotiated provided that the hotel's developer would provide "a constant stream of income [to the city] to support the operation and maintenance of the entire Yerba Buena facility, especially those areas such as the public gardens, and cultural amenities which were not expected to generate income."<sup>134</sup> "The lease was structured so that the hotel would pay the Agency a fixed 'minimum rent' as well as a 'percentage rent'" calculated on the basis of the hotel's gross proceeds.<sup>135</sup> In upholding the legality of this conditional business relationship, the court in the *Marriott* case concluded that the Agency was acting as a market participant:

In light of this financial arrangement, it is no wonder that in selecting a developer, the Agency sought to avoid any labor strife that might delay the opening of the hotel or jeopardize its economic success. . . . [T]he Agency was acting as any private landowner would have in protecting a multimillion dollar real estate investment.<sup>136</sup>

This model of government sponsorship of a labor peace agreement comes as close to the paradigm of *Boston Harbor* as one is likely to find in litigation challenging a government-sponsored labor peace agreement. In many other cases, the fit with *Boston Harbor* is less tight, such as when the government spends the public's money by offering tax incentives, low-interest loans, a tax stabilization agreement, or some other financial inducement to invest financially in the community and in return insists on a

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133. See *Hotel Employees & Restaurant Employees, Local 2 v. Marriott Corp.*, No. C-89-2707, 1993 WL 341286 (N.D. Cal. Aug. 23, 1993), *on remand from*, 961 F.2d 1464 (9th Cir. 1992).

134. *Id.* at \*6.

135. *Id.* at \*1.

136. *Id.* at \*7. In *Boston Harbor*, the Court never stated that the rule of the case *only* applies when government manages the facilities built with public funds. What the Court said was that when a local government "owns and manages property, for example, it must interact with private participants in the marketplace." *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993).

labor peace agreement.<sup>137</sup> Here government also has a multimillion-dollar public investment to protect but, unlike the San Francisco Redevelopment Agency, may not have reserved an ownership interest or established a profit-sharing relationship with private developers whose investment it has attracted through the public subsidies.

One can anticipate that some courts might be inclined to rely on this difference to deny the market participant immunity. In the *Marriott* case itself, the district court, in dicta, stated:

This would be a different case if the Agency sold a parcel of land to Marriott, but conditioned the sale on Marriott's guarantee that they would not oppose unionization efforts at the hotel. In that situation, [the condition of sale would be preempted] because once the land was sold, the city's proprietary interest would vanish, and therefore the condition of sale would only be serving the city's [labor] policy goals.<sup>138</sup>

This needs to be examined carefully in light of the reasoning in *Boston Harbor* and its constitutional underpinnings.

In *Marriott*, the Redevelopment Agency had a legitimate interest in "protecting [its] multimillion dollar real estate investment."<sup>139</sup> There is no reason to conclude that, as a matter of law, this interest cannot survive the sale of public land to a private developer. The constitutional interpretation of market participant immunity, and indeed *Boston Harbor* itself, teach that state and municipal governments are assured an equality of treatment with the private sector, a right of parity that is lost only when a government acts with a purpose to regulate rather than to advance its own proprietary needs. Even after the sale of public land, the government's purpose in requiring a labor peace agreement may still have nothing to do with setting labor policy but have everything to do with serving its own need to protect its investment and the economic development it hopes that investment will yield.

Typically, when the government provides incentive subsidies for urban redevelopment, it expects to reap the benefits of certain positive externalities – such as increased business, income, property, and sales taxes – as well as reduced public service costs associated with decreased crime, lower unemployment, and reduced costs incurred by the illness and injury associated with urban blight.<sup>140</sup> In addition, a local jurisdiction might hope not only for more jobs but also for better ones than the minimum-wage jobs

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137. For a discussion of these types of incentive arrangements and their linkage to labor peace agreements, see *supra* text accompanying notes 111-12.

138. *Hotel Employees*, 1993 WL 341286 at \*7.

139. *Id.* at \*7.

140. See Weber, *supra* note 98 at 101 (suggesting that government expects also to reap "[n]onpecuniary public benefits, such as enhanced image and higher quality of life").

currently available in the inner city.

A labor peace agreement can be instrumental in achieving all of these goals. By promoting workplace efficiency, labor relations peace, and overall industrial stability throughout the duration of the facilities' productive life, these agreements substitute partnership between labor and management for the archetype of the two as antagonists, sometimes fighting each other to the finish. Such labor stability in turn reasonably can be expected to encourage additional economic development in the form of new capital investment and increased patronage of existing businesses. If in a given case, a local jurisdiction's purpose in requiring a labor peace agreement is to achieve these economic goals, preemption's market participant immunity should attach.<sup>141</sup>

The court disagreed in *Associated Builders & Contractors of Rhode Island v. City of Providence*.<sup>142</sup> There, the city granted a hotel developer a tax stabilization agreement that froze property valuation and tax rates for 12 years. In return the city required a project labor agreement. The court found the PLA condition not protected by the market participant immunity. Because "[t]he Supreme Court has rejected the argument that a grant of favorable tax treatment constitutes market participation in its dormant Commerce Clause jurisprudence," the court reasoned, it necessarily follows that "a grant of favorable tax treatment is not sufficient participation in the marketplace to shield the action from federal preemption."<sup>143</sup> The court stressed that the city "is not 'purchasing' construction services or otherwise exhibiting behavior analogous to that of private parties in the marketplace. It is carrying out its 'primeval governmental activity' of assessing taxes . . . ."<sup>144</sup> This reasoning misconstrues the Supreme Court's dormant Commerce Clause jurisprudence as well as the nature of preemption's market participant immunity.

The Court's dormant Commerce Clause cases stand for the sensible proposition that the act of "tax assessment or computation" is not in and of itself market participation.<sup>145</sup> Even if a grant of favorable tax treatment

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141. For resolution of mixed-motive situations, see *supra* text accompanying notes 27, 28, 29.

142. 108 F. Supp. 2d 73, 84 (D.R.I. 2000).

143. *Id.* at 82-83 (citing *Hudson County Bldg. & Constr. Trades Council v. City of Jersey City*, 960 F. Supp. 823, 833 (D.N.J. 1996)).

144. *Id.* at 83. *Accord Hudson County* 960 F. Supp. at 833 (rejecting immunity in a case alleging preemption of an ordinance requiring recipients of publicly financed economic incentives to make a good faith effort to hire city residents, minorities, and women, reasoning that the city "is not interacting in the market as the owner or manager of property").

145. *See Camp Nfld./Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 593 (1997) (noting that a "discriminatory tax credit program [for] 'the purpose and effect of subsidizing a particular [local] industry [is not] a form of state participation in the free market'" (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988))).

could never qualify as market participation under dormant Commerce Clause doctrine, that conclusion should not control preemption's market participant immunity. State and local tax policies are often challenged under dormant Commerce Clause principles because usually, if not always, these tax policies discriminate against out-of-state commerce. Such tax discrimination animated early dormant Commerce Clause doctrine<sup>146</sup> and it continues to pose grave threats to free interstate trade.<sup>147</sup> By contrast, when the state acts as the buyer or seller of goods and gives preferences to its own citizens, the state is considered not to pose substantial free trade risks.<sup>148</sup> It makes sense, therefore, that dormant Commerce Clause jurisprudence, which is designed to guard against internal division, provides market participant immunity when local governments buy or sell goods, but not when they adopt discriminatory tax policies. By its very nature, tax discrimination threatens "'economic Balkanization' and the retaliatory acts of other States . . . ."<sup>149</sup>

These sensible reasons for excluding "tax assessment and computation" from the dormant Commerce Clause's market participant doctrine do not support the same conclusion with respect to preemption's market participant immunity. First, unlike the tax policies at issue in the dormant Commerce Clause cases, those at issue in preemption cases are not discriminatory.

Second, *Boston Harbor* teaches that frustration with national labor policy can only occur when states "regulate." It is senseless formalism to argue that no "regulation" occurs when a state participates in the market for the purchase or sale of goods or services or when it retains an ownership interest in the land being redeveloped but that regulation does occur as a matter of law when a state participates in any other market, such as participation in the real estate market or capital markets as lender or benefactor.<sup>150</sup>

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146. See *Welton v. Missouri*, 91 U.S. 275 (1875) (invalidating a state tax that discriminated against goods produced out-of-state).

147. See *Camp Nfld./Owatonna, Inc.*, 520 U.S. at 594-95 (explaining that "discriminatory [tax] schemes" pose a serious threat to our 'national solidarity'").

148. See Coenen, *supra* note 61 at 744 (explaining that the Supreme Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) concludes that "marketplace preferences for local concerns . . . pose less of a danger to commerce clause values than do . . . discriminatory . . . taxes").

149. *Camp Nfld./Owatonna, Inc.*, 520 U.S. at 577 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)); see *id.* at 595 (concluding that "even the smallest scale discrimination can interfere with the project of our Federal Union").

150. See *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 29, 35 (D.C. Cir. 2002) (holding that "when [government] acts to ensure the most effective use of [its] funds, it is acting in a proprietary capacity" and "that the Government is a lender to or a benefactor of, rather than the owner of, a project is not inconsistent with its acting just as would a private

Third, in the preemption cases, unlike the dormant Commerce Clause cases, the state already acts as a market participant; participating in the real estate and/or capital markets through the sale, leasing, or financing of buildings or land and the challenged tax policy is merely a strategy for optimizing the state's interests as a market participant. Adding contractual provisions to protect one's investments is exactly what private sector actors do every day.

Finally, limiting preemption's market participant immunity to scenarios where local government retains an ownership in land or a managerial interest in facilities erected on leased public property can distort local decision-making away from optimum financing arrangements. Such an outcome stands *Garcia* on its head. The majority in *Garcia* reversed *League of Cities* in large part to free the States from this very kind of "added price," incurred when local governments were induced to make sub-optimal decisions in order to fit spending or regulatory decisions into one of the *League of Cities* categories that the Court exempted from federal control.<sup>151</sup> Preemption's market participant immunity is a post-*Garcia* mechanism designed to fortify federalism. It would be a bitter irony indeed if this immunity were to be cabined in ways that cause the same distorted policymaking from which *Garcia* attempted to free the States.

#### IV. CONCLUSION

This outwardly coherent system of shared sovereignty we call labor preemption has been characterized as "a morass of exceptions, limitations, refinements, and qualifications."<sup>152</sup> Perhaps this is the inevitable result of a doctrine that purports to be bottomed on congressional intent but in fact is based on judicial elucidation of its own understanding of national labor policy.<sup>153</sup> In this article, I have chosen to assume that labor preemption can

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entity; a private lender or benefactor also would be concerned that its financial backing be used efficiently").

151. See *Garcia*, 469 U.S. 528, 546-47 (1985) (holding that the goal of reserving for the States the freedom to engage in any activity that their citizens choose for the commonwealth cannot be realized by a system, like that in *League of Cities*, that depends on "judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'").

152. Drummonds, *supra* note 3, at 565.

153. See *id.* at 533 (concluding that "[t]oo often, the courts use the rubric of fidelity to the 'full purposes and objectives' of Congress to justify judicial activism in the preemption field" and that "[s]uch judicial policymaking violates . . . the constitutional scheme of federalism . . ."); David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 516-17 (1986) ("The core reality in preemption doctrine is judicial policymaking in the face of congressional silence, disguised by the occasional cosmetic judicial 'divination of congressional purpose' and 'fabrication of intent.'"); Eileen Silverstein, *Against Preemption in Labor Law*, 24 CONN. L. REV. 1, 13-15 (1991) (arguing that Court's "rhetoric of preemption obscures the reality of

be principled. The principle I highlight is the States' constitutional right to equality of treatment with the private sector when Congress negatively commandeers a State's legislative processes through the exercise of its preemptive authority. That act of federal regulation must conform to the Constitution's nondiscrimination principle, and market participant immunity is the analytical vehicle for assuring this occurs. There are significant implications that flow from a constitutional interpretation of market participant immunity. The most important, perhaps, is that the immunity cannot be denied when federal law permits private actors to engage in conduct that the States desire to engage in unless the States act with a regulatory, rather than a proprietary purpose. Moreover, the techniques for ascertaining such a purpose must eschew reliance on simplistic *per se* tests in favor of a sensitive inquiry into the circumstances of a governmental entity's decision to engage in the activities for which it claims preemption's market participant immunity. The Constitution countenances no less.