NOTE

LABOR-PEACE AGREEMENTS IN EMERGING INDUSTRIES

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Labor unrest poses serious challenges to the development of new industries and to the implementation of public investment projects such as the Inflation Reduction Act. One way to converge the interests of employers, workers, and the public is through labor-peace agreements (LPAs). Because federal and state government actors are some of the biggest investors in the recent development projects, proponents of LPAs argue that these federal and state government actors should have the power to require, or at least incentivize, LPAs on the projects they invest in. To that effect, former President Joseph Biden issued an executive order that requires project labor agreements, a form of LPAs unique to the construction industry, on federally funded projects worth $35 million or more.

But opponents claim that this act is preempted by federal labor law, and the federal courts of appeals have split on what state action constitutes permissible nonregulation. While the circuits agree that there is a market participant exception to federal labor preemption, they disagree as to the test—and whether other forms of nonregulation can survive. This Note demonstrates why the Seventh Circuit's interpretation—which allows conditional spending to circumvent preemption so long as it's not coercive—is the most consistent with Supreme Court precedent in the field of labor preemption and other similar doctrines.

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INTRODUCTION

On August 16, 2022, President Joseph Biden signed the Inflation Reduction Act (IRA)[1] into law to "deliver[] progress and prosperity to American families."[2] The IRA allocates billions of dollars for investment in

1. Pub. L. No. 117-169, 136 Stat. 1818 (2022) (codified as amended in scattered titles of the U.S.C.).

2. Joseph R. Biden Jr., President, Remarks by President Biden at Signing of H.R. 5376, The Inflation Reduction Act of 2022 (Aug. 16, 2022), https://www.whitehouse.gov/briefing-

clean energy infrastructure.[3] As a result of this statute, a tremendous amount of money is now flowing to states to undertake major infrastructure projects.[4] But what will the jobs look like on such projects? And, in an era of rising labor unrest,[5] to what extent will labor peace be assured on such projects?

Labor-peace agreements (LPAs) can serve as key tools in achieving good jobs, ensuring labor peace, and procuring timely completion of large-scale projects. Project labor agreements (PLAs), a type of LPA specific to the construction industry, can help in the initial stages of the implementation of the IRA by "promoting efficient, timely construction of clean energy projects."[6] Neutrality and card check agreements, common provisions in LPAs, can provide fair terms for laborers to select unions to represent them in a less hostile environment for all parties.[7] Unlike PLAs, neutrality and card check agreements can exist in nonconstruction contexts.[8]

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room/speeches-remarks/2022/08/16/remarks-by-president-biden-at-signing-of-h-r-5376-the-inflation-reduction-act-of-2022/ [https://perma.cc/7VQE-NPXQ].

3. Chris Chyung, Sam Ricketts, Kirsten Jurich, Elisia Hoffman, Frances Sawyer, Justin Balik & Kate Johnson, How States and Cities Can Benefit From Climate Investments in the Inflation Reduction Act, Ctr. for Am. Progress (Aug. 25, 2022), https://www.americanprogress.org/article/how-states-and-cities-can-benefit-from-climate-investments-in-the-inflation-reduction-act/ (on file with the *Columbia Law Review*).

4. See Summary of Inflation Reduction Act Provisions Related to Renewable Energy, EPA, https://www.epa.gov/green-power-markets/summary-inflation-reduction-act-provisions-related-renewable-energy [https://perma.cc/NT8W-5KA9] (last updated Jan. 28, 2025) (noting that money from the IRA will flow to states in the form of investment and tax credits).

5. See Margaret Poydock & Jennifer Sherer, Econ. Pol'y Inst., Major Strike Activity Increased by 280% in 2023 (2024), https://files.epi.org/uploads/279299.pdf [https://perma.cc/5VQY-7ANK] ("Last year saw a resurgence in collective action among workers.").

6. The Inflation Reduction Act and Qualifying Project Labor Agreements, DOL, https://www.dol.gov/general/inflation-reduction-act-tax-credit/project-labor-agreements [https://perma.cc/9UXK-ZPV7] (last visited Oct. 5, 2024).

7. See James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 Iowa L. Rev. 819, 827 (2005) ("[M]ore than 90% of the agreements called for some form of dispute resolution, most often arbitration, to address differences about unit determination or allegations of non-neutral conduct by one of the parties."); James Y. Moore & Richard A. Bales, Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy, 87 Ind. L.J. 147, 157 (2012) (noting that neutrality agreements may prevent employers and unions from making negative comments against each other or may require a hostility-free environment).

8. See Howard Stutz, With Contracts Settled, Culinary Union Eyes Aggressive Growth in 2024, Nev. Indep. (Mar. 31, 2024), https://thenevadaindependent.com/article/with-contracts-settled-culinary-union-eyes-aggressive-growth-in-2024 (on file with the *Columbia Law Review*) (reporting on a culinary union's neutrality agreements with restaurants in Las Vegas).

Some governmental units have attempted to achieve these ends by requiring LPAs.[9] These mandates have faced significant legal challenges.[10] Opponents argue that the National Labor Relations Act (NLRA)[11] preempts states, localities, and federal executive agencies from engaging in or requiring these agreements.[12] But in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (*Boston Harbor*), the Supreme Court held that the NLRA doesn't preempt states or local governments when they act as market participants.[13] Since that case was decided, the federal circuits have consistently recognized the market participant exception to the NLRA.[14] But the circuits split on how broad that exception is and what test they use to determine if the government is acting as a market participant or as a regulator.[15] This circuit split causes uncertainty for federal, state, and local policymakers,[16] which

9. See, e.g., Chi., Ill., Ordinance SO2019-9497 (Dec. 18, 2019) (requiring labor-peace agreements for Chicago-funded nonprofits that provide health and social services to Chicago residents and communities).

10. See, e.g., Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1077 (9th Cir. 2017) ("The associations contend that [the municipal provision requiring LPAs] . . . is preempted by two federal labor statutes . . . ."); N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1005 (7th Cir. 2005) ("An association of non-union contractors (and one of its members) filed this suit . . . seeking a declaratory judgment that the requirement of a project labor agreement is preempted by federal law.").

11. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

12. See, e.g., Robert C. Nagle, NYC 'Labor Peace' Order May Clash With Federal Law, Law360 (Aug. 9, 2016), https://www.law360.com/articles/826157/nyc-labor-peace-order-may-clash-with-federal-law (on file with the *Columbia Law Review*) (explaining that an LPA could be challenged on the grounds of being a local regulatory measure in conflict with the NLRA).

13. Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 227 (1993) ("We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor.").

14. See, e.g., Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1022–23 (9th Cir. 2010) ("In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant."); *Lavin*, 431 F.3d at 1006 ("A city or state acting as proprietor, however, is a market participant rather than a market regulator." (citing *Boston Harbor*, 507 U.S. at 230–31)); Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 213 (3d Cir. 2004) ("But a state will not be subject to preemption analysis when it acts as a 'market participant.'"); Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28, 34–35 (D.C. Cir. 2002) (recognizing a market participant exception).

15. See Chelsea Button, Comment, "Fair and Open Competition" or Death to the Union? Project Labor Agreements in Today's Politically Contentious Atmosphere, 52 UIC J. Marshall L. Rev. 531, 561 (2019).

16. See Michael John Garcia, Craig W. Canetti, Alexander H. Pepper & Jimmy Balser, Cong. Rsch. Serv., R47899, The United States Courts of Appeals: Background and Circuit Splits From 2023, at 7 & n.47, https://crsreports.congress.gov/product/pdf/R/R47899 (on file with the *Columbia Law Review*) (last updated Apr. 1, 2024) (observing that circuit splits may "lead to greater uncertainty," result "in the non-uniform treatment of similarly situated

in turn decreases the use of innovative labor-peace tools that could help workers obtain protections while efficiently providing public benefits.

The courts of appeals have applied three different market participant tests. The Third Circuit interprets *Boston Harbor* to require two jointly necessary conditions.[17] First, the state or municipality must have a proprietary interest.[18] Second, the policy must be narrowly tailored to avoid a regulatory effect.[19] The Ninth Circuit uses essentially the same conditions but holds that they are independently sufficient—a state need only have a proprietary interest or narrowly tailor its policy to avoid regulatory effects.[20] The Seventh Circuit's *Northern Illinois Chapter of Associated Builders & Contractors, Inc. v. Lavin*[21] decision is a third wing of the circuit split. *Lavin* held that even when a state doesn't act as a proprietor, it can nonetheless condition spending in a way that may avoid preemption under the principles of *Boston Harbor*.[22] The court explained that preemption prevents conflicting *regulation*, and conditional spending is almost never regulation under the Supreme Court's precedent.[23] The D.C. Circuit has not offered a clear test, instead opting for a piecemeal approach to the market participation exception.

This Note provides two primary contributions. First, it offers a resolution to the circuit split regarding the market participant exception to federal labor preemption. Second, it demonstrates how that resolution could enable actors in all levels of government to use LPAs to support laborers in emerging industries.

Part I considers the types and benefits of labor-peace agreements, then provides a few examples of how these agreements appear in emerging industries. Part II explains NLRA preemption and the circuit split regarding the market participant exception. Part III offers a resolution to the split by looking at other constitutional doctrines. Finally, Part IV applies the resolution in Part III to modern uses of labor-peace agreements in emerging industries.

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litigants," and affect governmental bodies "responsible for implementing statutes and regulations subject to conflicting judicial rulings").

17. See Associated Builders & Contractors Inc. v. City of Jersey City, 836 F.3d 412, 418 (3d Cir. 2016) ("Only if both conditions are met is a government acting as a market participant." (citing *Sage*, 390 F.3d at 216)).

18. *Sage*, 390 F.3d at 216.

19. Id.

20. See Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024 (9th Cir. 2010) ("[S]tate action need only satisfy one of the two . . . prongs to qualify as market participation not subject to preemption.").

21. 431 F.3d 1004 (7th Cir. 2005).

22. See id. at 1006 (distinguishing between conditional spending and regulation).

23. See id. ("The question 'is a condition on the receipt of a grant a form of regulation?' comes up frequently, and the answer almost always is negative.").

I. LABOR-PEACE AGREEMENTS AND WHY THEY MATTER

Federal labor law generally prohibits employers from making agreements with a union before a majority of employees elect that union to represent them.[24] For the purposes of this Note, the term "labor-peace agreement" describes the type of agreements that seek to circumvent that general prohibition. This Note focuses on neutrality, card check, and project labor agreements.

Section I.A elaborates on typical LPAs and how they benefit workers, employers, and the general public. Then, section I.B examines three recent applications of LPAs—one entirely in the private sector and two required by a state or local government. Those examples provide a baseline for Part IV, which argues that government actors should explore expanded, creative uses of LPAs to support emerging industries.

A. *The Concept and History of LPAs*

Project labor agreements have existed since the 1930s,[25] but neutrality and card check agreements developed somewhat more recently.[26] These later agreements grew out of union experiments to combat declining unionization rates.[27]

Unionization rates have continued to decline. In the 1950s, one in three workers was represented by a union.[28] By the 1980s, that rate was one in five, and now it is one in ten.[29] Unionization rates even slightly dropped in 2022,[30] despite the recent developments concerning labor victories at

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24. 29 U.S.C. § 158(e) (2018). But see id. § 158(f) (establishing the construction industry exception to the bar on prehire agreements).

25. See Kimberly Johnston-Dodds, Constructing California: A Review of Project Labor Agreements 9 (2001), https://alamedamgr.files.wordpress.com/2015/06/california-research-bureau-article-on-plas.pdf [https://perma.cc/PF87-GT4A] ("The first use of a public project labor agreement in California occurred on the construction of the Shasta Dam . . . .").

26. See Brudney, supra note 7, at 825 (noting that neutrality agreements began appearing in the 1970s and were negotiated "with greater frequency" by the late 1990s).

27. See Andrew M. Kramer, Lee E. Miller & Leonard Bierman, Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?, 23 B.C. L. Rev. 39, 42 (1981) ("The recent emergence of neutrality agreements as a significant organizing tool parallels organized labor's frustration in other arenas.").

28. Sarah Chernikoff, Here's Why the US Labor Movement Is So Popular but Union Membership Is Dwindling, USA Today (Sept. 4, 2023), https://www.usatoday.com/story/money/nation-now/2023/09/04/us-union-membership-shrinking/70740125007/ [https://perma.cc/J3ZV-QEX8] (last updated Sept. 7, 2023).

29. See Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022, U.S. Bureau of Lab. Stat. (Jan. 24, 2023), https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm [https://perma.cc/H86F-THGV].

30. Id.

certain Starbucks and Amazon workplaces.[31] The continued decrease in unionization may seem surprising given that unions retain fairly high levels of support from the American public.[32]

To explain the decline, commentators have pointed to the lack of support from federal labor law, and in particular, the NLRA's weak enforcement mechanisms.[33] In a space that is thus often underregulated, the asymmetry in capital between management and labor allows management to exploit its capital to engage in anti-union tactics.[34] Large companies can turn to their deep purses to fund expensive and extreme union busting techniques. Amazon alone spent more than $14 million on anti-labor consultants in 2022, according to its own disclosures.[35]

1. *Neutrality and Card Check Agreements.* — Since the NLRA's election laws and enforcement mechanisms provide labor with limited support, labor has turned to private agreements with employers to set ground rules for the duration of the organizing and election period.[36] In a neutrality

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31. See Kalie Drago, 70 Starbucks Locations Have Now Voted to Unionize, Forbes (May 13, 2022), https://www.forbes.com/sites/kaliedrago/2022/05/13/70-starbucks-locations-have-now-voted-to-unionize/ (on file with the *Columbia Law Review*) (last updated May 16, 2022); Rachel Lerman, Greg Jaffe, Jeff Stein & Anna Betts, Amazon Workers Vote to Join a Union in New York in Historic Move, Wash. Post (Apr. 1, 2022), https://www.washingtonpost.com/technology/2022/04/01/amazon-union-staten-island/ (on file with the *Columbia Law Review*) (last updated Apr. 2, 2022).

32. Gallup has run a poll every year since at least 2001 that simply asks, "Do you approve or disapprove of labor unions?" Unions have received more than fifty percent support in every year except for 2009, when the United States was reeling from the Great Recession. See Labor Unions, Gallup, https://news.gallup.com/poll/12751/Labor-Unions.aspx [https://perma.cc/295K-L3Y4] (last visited Oct. 10, 2024). Although some associate the labor movement with Democratic ideology, forty-three percent of Republicans and GOP leaners say the decline of union membership is bad for working people. See Ted Van Green, Majorities of Adults See Decline of Union Membership as Bad for the U.S. and Working People, Pew Rsch. Ctr. (Feb. 18, 2022), https://www.pewresearch.org/short-reads/2023/04/19/majorities-of-adults-see-decline-of-union-membership-as-bad-for-the-u-s-and-working-people/ [https://perma.cc/HC3C-VFSL] (last updated Mar. 12, 2024).

33. See, e.g., Kate Andrias, The New Labor Law, 126 Yale L.J. 2, 6 (2016) (highlighting the traditional explanation for workers' declining influence over their workplaces, which is that "the National Labor Relations Act's (NLRA) weak enforcement mechanisms, slight penalties, and lengthy delays—all of which are routinely exploited by employers resisting unionization—fail to protect workers' ability to organize and bargain collectively with their employers").

34. For a documentation of the "explosion of employer unfair labor practices" and the relation of this phenomenon to unionization election results, see Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1770, 1781 (1983).

35. See Dave Jamieson, Amazon Spent $14 Million on Anti-Union Consultants in 2022, HuffPost (Mar. 31, 2023), https://www.huffpost.com/entry/amazon-anti-union-spending-2022_n_6426fd1fe4b02a8d518e7010 [https://perma.cc/WQN3-UPCX].

36. See Laura J. Cooper, Lecture, Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator, 83 Ind. L.J. 1589, 1590–92 (2008) ("The failure to achieve statutory reform approximately coincides with the rise of union self-help measures in the form of neutrality agreements.").

agreement, an employer agrees to remain neutral as its employees determine whether they want union representation.[37] To win this important concession from an employer, unions have to give up something in return—typically in the form of a no-strike pledge.[38]

Unions have negotiated neutrality agreements since the 1970s. In 1976, the United Auto Workers Union (UAW) negotiated what is considered to be the first such agreement with General Motors.[39] There, General Motors agreed to "neither discourage nor encourage the [UAW's] efforts in organizing production and maintenance employe[e]s" while UAW agreed to "not misrepresent to employe[e]s the facts and circumstances surrounding their employment."[40] This and other early neutrality agreements weren't required by the government. Rather, they were built on mutual respect that had been developed between auto worker unions and automotive employers over the preceding forty years.[41]

Many LPAs additionally, or exclusively, contain a card check provision.[42] To understand these provisions, some background information about unionization campaign procedures is necessary. During a unionization campaign, the union distributes "cards" to employees that allow the employees to designate that union as their bargaining representative.[43] Once a majority of employees have signed cards, the union can request official recognition from the employer.[44] But employers typically don't have to consent to that request; instead, they can assert their right to

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37. Id. at 1590.

38. See Sophie Peel, Contractors Say a City Policy to Boost Workers' Rights Is Benefiting an Embattled, Out-of-Town Security Giant, Willamette Wk. (June 15, 2022), https://www.wweek.com/news/2022/06/15/contractors-say-a-city-policy-to-boost-workers-rights-is-benefiting-an-embattled-out-of-town-security-giant/ [https://perma.cc/NN7G-74CC] ("In such an agreement, companies pledge to remain neutral in any union negotiations and not to block labor organizing. In return, workers pledge not to strike or create a work stoppage.").

39. See Kramer et al., supra note 27, at 40–41 ("Labor neutrality agreements are of relatively recent origin. It was not until 1976 that the United Automobile, Aerospace, and Agricultural Implement Workers Union (UAW) and the General Motors Corporation (GM) entered into the first such agreement.").

40. Id. at 40–41 n.6 (quoting Letter from George B. Morris, Jr., Vice President, United Auto Workers, to Irving Bluestone, Vice President, Gen. Motors (Dec. 8, 1976)).

41. See id. ("Over the years General Motors has developed constructive and harmonious relationships based upon trust, integrity, and mutual respect with the various unions which currently represent its employe[e]s. These relationships date back, in the case of the UAW, nearly 40 years." (quoting Letter from George B. Morris, Jr., Vice President, United Auto Workers, to Irving Bluestone, Vice President, Gen. Motors (Dec. 8, 1976))).

42. See Cooper, supra note 36, at 1590 ("Although including both [a neutrality provision and a card check] is most typical, an organizing agreement could include one and not the other.").

43. See Nat'l Lab. Rels. Bd. v. Gissel Packing Co., 395 U.S. 575, 580, 595 (1969) (describing the process of gathering cards).

44. Brudney, supra note 7, at 824.

a representation election.[45] A card check provision in a labor-peace agreement bypasses this process by guaranteeing that the employer will recognize union majority status once a majority of its employees have signed union membership cards.[46] This helps unions avoid costly elections and the concurrent union-busting tactics.[47]

Neutrality and card check agreements benefit unions by making unionization easier, especially for workplaces with a large number of employees.[48] But how do unions help employers, workers, and the public? First, unions typically improve employee retention, which helps employers.[49] Second, they can raise wages, which helps workers.[50] Third, they increase civic engagement, which helps the general public.[51]

Even if unionization isn't preferrable for all parties, LPAs may still be net beneficial for a couple of reasons. First, they create a less hostile environment during attempts at unionization.[52] A less hostile environment leads to fewer resources being spent on concerns beyond the scope of the

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45. Id. at 824–25.

46. What Is Card Check Neutrality?, Teamsters Loc. 492 (Oct. 4, 2017), https://www.teamsters492.org/?zone=/unionactive/view_subarticle.cfm&subHomeID=124704&topHomeID=220607&page=49220Welcome20Message [https://perma.cc/M2PU-FMKE].

47. Hayley Brown & Sylvia Allegretto, Workers, Unchecked: The Case for Card Check This Labor Day, Ctr. for Econ. & Pol'y Rsch. (Aug. 21, 2024), https://www.cepr.net/workers-unchecked-the-case-for-card-check-this-labor-day/ [https://perma.cc/Y9PV-KS9J] (arguing that a card check agreement is a "quick and efficient way for workers to indicate whether they want to be represented by a union" and that having a card check agreement "reduces opportunities for employer interference").

48. See Brudney, supra note 7, at 830 (describing how success rates in union elections tend to decrease as the size of the bargaining unit increases).

49. Leonard Bierman, Rafael Gely & William B. Gould IV, Achieving the Achievable: Realistic Labor Law Reform, 88 Mo. L. Rev. 311, 358 (2023) ("[T]he presence of a union and an effective union-management collective bargaining agreement could make it easier to recruit, train, and retain employees.").

50. See Asha Banerjee, Margaret Poydock, Celine McNicholas, Ihna Mangundayao & Ali Sait, Econ. Pol'y Inst., Unions Are Not Only Good for Workers, They're Good for Communities and for Democracy 2–3 (2021), https://files.epi.org/uploads/236748.pdf [https://perma.cc/7HWL-FJRW] ("When union density is high, nonunion workers benefit, too, because unions effectively set broader standards—including higher wages . . . .").

51. Cf. id. at 4 ("[W]eakening unions . . . has significant long-term political and economic effects, such as lower voter turnout, lowered organized labor contributions, less voter mobilization, fewer working-class candidates serving in state legislatures and Congress, and more conservative state policy." (citing James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws (Nat'l Bureau of Econ. Rsch., Working Paper No. 24,259, 2018))).

52. See Adrienne E. Eaton & Jill Kriesky, Union Organizing Under Neutrality and Card Check Agreements, 55 Indus. & Lab. Rels. Rev. 42, 49–50 (2001) (finding that the frequency and intensity of anti-union campaigns was reduced under card check agreements, and neutrality agreements reduce "some, but not all, management tactics").

industry.[53] That is, it prevents money from being wasted on anti-union consultants, which allows more money to be allocated toward higher-quality production and services.[54] Second, LPAs force parties to negotiate. This allows the parties to tailor terms that are more relevant to their specific industry than the NLRA's one-size-fits-all procedure. Also, neutrality agreements allow "the parties to concretely discuss the type of terms achievable in case the union obtains majority support and thus provides employees the opportunity to assess—at a very granular level—the advantages and disadvantages of union representation."[55]

Local governments seeking to support labor have begun to require LPAs in certain circumstances.[56] Typically, the requirement for a neutrality or card check provision—each of which is thought to favor unions[57]—is counterbalanced with a no-strike provision, which gives employers a benefit.[58] Though this balance seems to disproportionately hurt workers by stripping them of their most powerful advocacy mechanism,[59] it forces employers to the bargaining table, which in turn allows labor to win concessions.[60] The employer needs to sign an LPA, and labor won't give up the right to strike for nothing in return, so labor can win concessions such as neutrality agreements.

2. *Project Labor Agreements.* — Section 8(f) of the NLRA allows construction industry employers to make prehire agreements[61] with

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53. See Bierman et al., supra note 49, at 358 (noting that neutrality agreements may prevent "the costs of mounting a vigorous anti-union campaign").

54. Id.

55. Id. at 356.

56. See, e.g., Alejandro Figueroa, Measure 119 Will Ask Oregon Whether to Give Cannabis Workers an Easier Route to Unionize, Or. Pub. Broad. (Sept. 30, 2024), https://www.opb.org/article/2024/09/30/cannabis-workers-unions-unionize-marijuana-labor-peace-agreement/ [https://perma.cc/2RAT-UDCA] (reporting on a ballot measure that would require "employers at cannabis retail and processing businesses" to sign LPAs).

57. Bierman et al., supra note 49, at 356–58 (noting that the benefits of neutrality agreements to unions "can easily be identified").

58. See, e.g., Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1077 (9th Cir. 2017) (considering a Los Angeles policy that mandated LPAs and required them to contain prohibitions on picketing, boycotting, or stopping work).

59. For example, the Great Steel Strike of 1919–1920 famously brought the American steel industry to a halt and contributed to the Supreme Court's support of the NLRA in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See Diana S. Reddy, "There Is No Such Thing as an Illegal Strike": Reconceptualizing the Strike in Law and Political Economy, 130 Yale L.J. Forum 421, 432–33 (2021), https://www.yalelawjournal.org/pdf/ReddyEssay_8dhue31d.pdf [https://perma.cc/CWN2-5H4V].

60. See *L.A. World Airports*, 873 F.3d at 1077 ("[I]f an employer may not operate without such an agreement, the employer may need to give benefits to its employees to induce them to enter the agreement.").

61. Prehire agreements are contracts "agreed to by an employer and a union before the workers to be covered by the contract have been hired." Harold S. Roberts, Roberts' Dictionary of Industrial Relations 562 (3d ed. 1986).

unions that haven't been elected by the employees.[62] These exclusive prehire bargaining agreements typically last for the duration of the project and are called PLAs.[63] PLAs have existed at least since the construction of the Shasta Dam in California, which began in 1938.[64] PLAs bind all contractors and subcontractors and, unlike default labor law, allow employers to negotiate with a union before a majority of employees affirmatively select a union as their representative.[65] Generally, PLAs grant employees better working conditions, benefits, and union-scale pay in exchange for provisions that guarantee against strikes and lockouts.[66]

When a bid solicitation stipulates that parties will be bound to a PLA, transaction costs are reduced.[67] Prospective contractors and subcontractors can more accurately weigh the costs and benefits of bidding on a project when they know the wage and workplace safety requirements. All stakeholders benefit from the fact that PLAs help ensure projects are completed on budget.[68] Although enhanced wage and safety standards may add to the initial cost of a project, studies indicate that enhanced standards don't increase the overall cost because they lead to efficiency and quality gains that offset the initial cost.[69] Similarly, all stakeholders

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62. See 29 U.S.C. § 158(f) (2018) ("It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make [PLA] agreement[s] . . . .").

63. Cong. Rsch. Serv., R41310, Project Labor Agreements 1 (2012) https://www.everycrsreport.com/files/20120628_R41310_731846eb1c5bc373a7ea40ebd566f72ded8a8771.pdf [https://perma.cc/F5Y6-YVXW] ("A project labor agreement (PLA) is a collective bargaining agreement that applies to a specific construction project and lasts only for the duration of the project.").

64. See Johnston-Dodds, supra note 25, at 9 (documenting the construction of the Shasta Dam, which occurred between 1938 and 1944).

65. See Button, supra note 15, at 533–34.

66. See, e.g., Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1016–17 (9th Cir. 2010) (analyzing an agreement that "prohibited strikes, picketing, and other disruptions" and required contractors to "contribute to union vacation, pension, and health plans"); see also Cong. Rsch. Serv., supra note 63, at 1–2; Dale Belman, Matthew M. Bodah & Peter Philips, Project Labor Agreements 8–9 (2007), https://files.epi.org/page/-/pdf/031611-earn-pla.pdf [https://perma.cc/N8BJ-D3PS] (noting that "PLAs set wages and benefits close to or at the local union rates" and "have no-strike clauses").

67. See Fred B. Kotler, Project Labor Agreements in New York State: In the Public Interest 3 (2009), https://faircontracting.org/wp-content/uploads/2019/05/Project-Labor-Agreements-in-New-York-State-In-the-Public-Interest-Kotler-2009.pdf [https://perma.cc/S6WW-4HZY] (noting that PLAs can reduce costs through standardization).

68. Aurelia Glass & Karla Walter, How Project Labor Agreements and Community Workforce Agreements Are Good for the Biden Administration's Investment Agenda, Ctr. for Am. Progress (July 21, 2023), https://www.americanprogress.org/article/how-project-labor-agreements-and-community-workforce-agreements-are-good-for-the-biden-administrations-investment-agenda/ (on file with the *Columbia Law Review*).

69. See, e.g., Kotler, supra note 67, at 35–36 (examining a suite of four New York PLAs and noting that fifteen studies found there would be substantial cost savings for the city).

benefit from the relative gains in predictability and on-time completion of large-scale construction projects.

Not everybody considers PLAs beneficial, and some states have even banned local governments from requiring PLAs.[70] Michigan passed such a bill in 2011, but a federal district judge struck it down, finding it was preempted by the NLRA.[71] In response, Michigan passed an amended version of the act that superseded the 2011 version and specified that the act's intent was to "provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services."[72] In his successful defense of the revised act, then-Governor Rick Snyder cited reports written by conservative think tanks such as the Cato Institute and the Beacon Hill Institute.[73] These reports suggest the costs of public projects *increase* as a result of PLAs.[74] These reports are hotly contested.[75]

B. *Examples of Labor-Peace Agreements in Emerging Industries*

This section surveys three different ways in which labor-peace agreements are being used in emerging industries. Two of these examples are government initiated: the Biden Administration's requirement of PLAs on federally funded projects costing more than $35 million[76] and various state policies requiring or incentivizing neutrality agreements for cannabis

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70. See, e.g., Open Competition Law, La. Stat. Ann. § 38:2225.5 (2024) (banning Louisiana public entities from requiring key PLA terms such as prevailing wages on state or locally funded projects).

71. See Mich. Bldg. & Constr. Trades Council v. Snyder (*Snyder I*), 846 F. Supp. 2d 766, 783 (E.D. Mich. 2012) ("Because the NLRA and the Act 'cannot move freely within the orbits of their respective purposes without impinging upon one another,' the Act is preempted." (quoting Hill v. Florida, 325 U.S. 538, 543 (1945))).

72. See 2012 Mich. Pub. Acts 238 (codified at Mich. Comp. Laws § 408.872 (2024)); see also Mich. Bldg. & Constr. Trades Council v. Snyder (*Snyder II*), 729 F.3d 572, 574 (6th Cir. 2013) ("[T]he act furthers Michigan's proprietary goal of improving efficiency in public construction projects, and the act is no broader than is necessary to meet those goals. Thus, the law is not preempted by the NLRA.").

73. See *Snyder II*, 729 F.3d at 574 n.1 (noting the reports cited by Governor Snyder).

74. David G. Tuerck, Sarah Glassman & Paul Bachman, Beacon Hill Inst., Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem 21–22 (2009), https://www.beaconhill.org/BHIStudies/PLA2009/PLAFinal090923.pdf (on file with the *Columbia Law Review*) ("The Massachusetts PLA Study found that PLAs add 12% to the cost of construction while the Connecticut PLA Study found that PLAs add 18% to the cost of construction.").

75. See supra note 69 and accompanying text.

76. Exec. Order No. 14,063, 87 Fed. Reg. 7363 (Feb. 9, 2022) (requiring PLAs for "large-scale construction projects," which are defined as federal construction projects "for which the total estimated cost of the construction contract to the Federal Government is $35 million or more").

licensees.[77] Part IV of this Note returns to these government actions to consider their legality.

The third example is that of a private company, Akash Systems, which reached an LPA with the Communication Workers of America that includes project labor and neutrality provisions.[78] The Akash example is relevant because some courts, when considering whether a government can condition spending on the inclusion of a labor-peace agreement, seek a finding that private parties have entered into similar agreements.[79]

1. *Biden's Project Labor Agreement Executive Order.* — In 2022, President Biden signed an executive order that required PLAs on federally funded projects valued over $35 million.[80] According to Biden, project labor agreements "ensure that major projects are handled by well-trained, well-prepared, highly skilled workers."[81] Acting Labor Secretary Julie Su announced final regulations to implement the executive order in December 2023.[82] Labor allies have praised this move as a step in the right direction but urged further action.[83]

Some open-shop contractor associations, such as Associated Builders and Contractors, oppose this rule.[84] These opponents claim that the rule

77. See, e.g., Figueroa, supra note 56 (outlining an Oregon ballot measure that would require employers in the cannabis industry to sign labor peace agreements with unions).

78. See Press Release, Commc'ns Workers of Am., First-Ever Comprehensive Labor Neutrality Agreement in Semiconductor Industry Sets Historic New Precedent on Brink of $52 Billion Allocation of Federal CHIPS Funding (Nov. 27, 2023), https://cwa-union.org/news/releases/first-ever-comprehensive-labor-neutrality-agreement-semiconductor-industry-sets [https://perma.cc/32LR-Z2GT].

79. For discussion of a court that put stock in whether a method was "tried and true" in the private sector when making a market participant exception determination, see infra note 189 and accompanying text.

80. Exec. Order No. 14,063, 87 Fed. Reg. 7363; see also Press Release, Joseph R. Biden Jr., President, Executive Order on Use of Project Labor Agreements for Federal Construction Projects, (Feb. 4, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/04/executive-order-on-use-of-project-labor-agreements-for-federal-construction-projects/ [https://perma.cc/3VDE-AJWJ].

81. Ian Kullgren & Josh Wingrove, Biden's Labor Order Aims to Raise Wages on Infrastructure Jobs, Bloomberg (Feb. 4, 2022), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X97B91NK000000 (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting President Biden).

82. See Rebecca Rainey, Biden Cements Labor Agreement Rules for Federal Projects (1), Bloomberg (Dec. 18, 2023), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X5FD3ORG000000?bna_news_filter=daily-labor-report (on file with the *Columbia Law Review*) (reporting on the "new requirements announced by Acting Labor Secretary Julie Su").

83. See, e.g., Glass & Walter, supra note 68 (arguing that by passing the IRA and related legislation, "the Biden administration has an opportunity to create tens of thousands of good jobs nationwide" but that the federal government must continue to encourage businesses "to commit to adopting project labor agreements").

84. See Letter from Am. Concrete Pumping Ass'n et al. to U.S. Cong. 1 (Jan. 4, 2024), https://www.abc.org/Portals/1/PLA/Construction%20Coalition%20Letter%20to%20Congress%20Supporting%20FOCA%20Opposing%20Biden%20Project%20Labor%20Agreeme

affects 120 construction projects, supplements the IRA tax incentives to include PLAs, and coerces contractors to use union labor.[85] The Associated Builders and Contractors have sued to enjoin the executive order and complementary regulations from going into effect.[86]

2. *Cannabis Licensing*. — Although marijuana possession and distribution is still illegal federally, thirty-eight states have legalized the medical use of cannabis and twenty-four have created schemes to regulate recreational use.[87] Since 2012, when Colorado and Washington became the first states to legalize recreational marijuana,[88] the (regulated) cannabis sector has budded into a multibillion-dollar industry.[89] One report found that the legal cannabis industry supports more than four hundred thousand full-time jobs.[90]

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nt%20Final%20Rule%20010424.pdf (on file with the *Columbia Law Review*) ("The undersigned diverse group of construction and business associations . . . write to ask for your leadership opposing the new rule and other policies pushing controversial PLAs on federal and federally assisted construction projects funded by taxpayers.").

85. Id. at 3 ("President Biden's new policy mandat[es] PLAs on an estimated 120 construction projects . . . .").

86. See Complaint at 47, Associated Builders & Contractors v. Clark, No. 24-cv-318-WWB-MCR (M.D. Fla. filed Mar. 28, 2024) [hereinafter *Clark* Complaint] (requesting "a preliminary injunction pending a final decision on the merits, enjoining Defendants from further implementing the challenged [Executive Order and] PLA Rule"). The legality of this executive order may become moot over the course of the second Trump Administration. As of this Note's publication, Trump has yet to rescind this executive order. But an Article I court held that the executive order violates federal contract competition rules. See MVL USA, Inc. v. United States, 174 Fed. Cl. 437, 470 (2025). Nevertheless, since the "executive orders surrounding the use of project labor agreements in government construction have 'ping-ponged'" for the last thirty years, id. at 441, the issue is likely to become relevant again in the future.

87. Alex Leeds Matthews & Christopher Hickey, More US States Are Regulating Marijuana. See Where It's Legal Across the Country, CNN, https://www.cnn.com/us/us-states-where-marijuana-is-legal-dg [https://perma.cc/AY7V-SK64] (last updated Apr. 19, 2024). Puerto Rico and the U.S. Virgin Islands have legalized the medical use of cannabis, and Washington, D.C., has legalized both recreational and medical cannabis. See State Medical Cannabis Laws, Nat'l Conf. State Legislatures, https://www.ncsl.org/health/state-medical-cannabis-laws [https://perma.cc/769U-E64F] (last updated July 12, 2024).

88. Aaron Smith, Marijuana Legalization Passes in Colorado, Washington, CNN (Nov. 8, 2012), https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html [https://perma.cc/Y58W-AEMT].

89. See Market Insights: Cannabis – United States, Statista, https://www.statista.com/outlook/hmo/cannabis/united-states [https://perma.cc/3F8R-GD2A] (last visited Oct. 4, 2024) (noting that the "Global Legal Adult-Use Cannabis Market" stands at $16.5 billion and that North America has 96.8% of the market share). For a state-by-state analysis of recreational marijuana sales in 2023, see Andrew Long, Adult-Use Marijuana Sales Growth in 2023 Varied by Market Age, MJBizDaily (Jan. 10, 2024), https://mjbizdaily.com/state-by-state-review-of-adult-use-marijuana-sales-2023/ [https://perma.cc/GT6Y-CLMM] (last updated Mar. 7, 2024).

90. Bruce Barcott & Beau Whitney, Vangst, Jobs Report 2024: Positive Growth Returns 3 (2024), https://5711383.fs1.hubspotusercontent-na1.net/hubfs/5711383/VangstJobs Report2024-WEB-FINALFINAL.pdf [https://perma.cc/DRV2-ACQY] (identifying 440,445 jobs in the legalized-cannabis industry).

The cannabis industry appears to be a ripe target for unionization. Cannabis jobs, such as those in the agricultural or processing sectors, can expose workers to health and safety risks.[91] And since cannabis cultivation is not legal at the federal level, there aren't federal protections for workers in the industry, inspiring some unions to target this newly regulated industry for unionization.[92]

States have increasingly supported this objective by encouraging licensees to negotiate LPAs with bona fide unions.[93] Some states, such as Rhode Island and New York, *require* licensees to negotiate LPAs whereas others, such as Illinois, provide noncompulsory incentives.

Rhode Island enacted its Cannabis Act in 2022, which legalized the possession of small amounts of marijuana and created a licensing scheme for legal distribution.[94] One section of Rhode Island's Cannabis Act requires retail licensees and compassion centers to "enter into, maintain, and abide by the terms of a labor peace agreement."[95] The law requires that the LPAs, at a minimum, prohibit labor unions and members from picketing and boycotting.[96]

Greenleaf, a nonprofit medical marijuana dispensary, sued Rhode Island, alleging that the policy is preempted by the NLRA and the Supremacy Clause of the Constitution.[97] Section IV.B of this Note returns

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91. See Michelle Berger, The Cannabis Industry and Labor Unions, OnLabor (Jan. 9, 2024), https://onlabor.org/the-cannabis-industry-and-labor-unions/ [https://perma.cc/RWC7-9R3T] (documenting reasons to support the claim that "[a]ll three sectors" of the cannabis industry "can be challenging places to work").

92. See, e.g., Local 338 - Ensuring that Cannabis Jobs Are Good Careers!, Local 338, https://www.local338.org/cannabisunion [https://perma.cc/58RX-E7SB] (last visited Oct. 4, 2024) ("Since New York's medical cannabis program officially launched in 2015, Local 338 has been successfully engaged in organizing efforts to ensure that the jobs in this emerging industry set a standard for what cannabis careers can and should be, by providing family sustaining wages and benefits.").

93. See Unions & Labor Peace Agreement Laws in the Cannabis Industry, Justia, https://www.justia.com/cannabis-law/unions-in-the-cannabis-industry/ [https://perma.cc/5F5M-H936] (last visited Oct. 4, 2024) ("As legalized marijuana spreads across the United States, . . . laws often require a business to reach a 'labor peace agreement' or adopt a similar stance toward unions in exchange for receiving a cannabis license from the state.").

94. See Rhode Island Cannabis Act, 21 R.I. Gen. Laws § 21-28.11-1–32 (2024).

95. Id. § 21-28.11-12.2.

96. Id. § 21-28.11-12.2(a)(2) ("'Labor peace agreement' means an agreement between a licensee and a bona fide labor organization that, at a minimum, protects the state's proprietary interests by prohibiting labor organizations and members from engaging in picketing, work stoppages, boycotts, and any other economic interference with the entity."). Although requiring an LPA with a no-strike clause seems one-sided against laborers, this requirement forces employers to the table where laborers can win concessions. For discussion of this phenomenon, see supra note 60 and accompanying text.

97. Complaint at 1–2, Greenleaf Compassion Care Ctr. v. Santacroce, No. 1:23-cv-00282-MSM-LDA (D.R.I. filed July 10, 2023) (seeking "injunctive and declaratory relief because the Rhode Island Cannabis Act . . . is preempted by the Supremacy Clause . . . and

to Greenleaf's challenge and concludes that, had the case gone to the merits, it probably would have succeeded.

But Illinois's scheme is quite different. Instead of requiring businesses to sign LPAs, it incentivizes them to do so by awarding five points in its scoring system.[98] The scoring system helps the Illinois Department of Financial and Professional Regulation and the Illinois Department of Agriculture determine which cannabis businesses receive licenses to operate in Illinois.[99] Applicants compete for a finite number of licenses, and the applicants with the highest points receive the licenses.[100] An applicant can earn up to 250 points, with the most points being awarded based on the applicant's business plan (65 points) as well as its security and recordkeeping (also 65 points).[101]

3. *Semiconductors.* — Semiconductor production and research is also a burgeoning industry in the United States. Semiconductors are crucial to the modern supply chain.[102] One week before President Biden signed the IRA into law, he signed the CHIPS and Science Act,[103] which allocates more than $50 billion towards semiconductor production and research.[104] One of the greatest challenges in developing a thriving, stable semiconductor industry in the United States is building a skilled workforce,[105] with

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the National Labor Relations Act"); see also Nancy Lavin, Cannabis Dispensary Lawsuit Challenges Labor Provisions of Recreational Marijuana Law, R.I. Current (July 11, 2023), https://rhodeislandcurrent.com/2023/07/11/cannabis-dispensary-lawsuit-challenges-labor-provisions-of-recreational-marijuana-law/ [https://perma.cc/5L84-35AY] ("Greenleaf Compassion Center filed a complaint in federal court on Monday, contending that the marijuana legalization law signed in May 2022 violates the U.S. Constitution and national labor standards.").

98. See Cannabis Regulation and Tax Act, 410 Ill. Comp. Stat. Ann. 705 / 15-30(c)(6) (West 2024) (explaining that an applicant can earn five points by describing its "plans to provide a safe, healthy, and economically beneficial working environment for its agents, including, but not limited to . . . entering a labor peace agreement with employees").

99. See 410 Ill. Comp. Stat. Ann. 705 / 5-10; id. 705 / 5-15; id. 705 / 15-5.

100. Id. 705 / 15-25(a).

101. See id. 705 / 15-30(c)(2)–(3).

102. See Cassie D. Roberts, Note, The Gap-Filling Role of Private Environmental Governance: A Case Study of Semiconductor Supply Chain Contracting, 51 Vand. J. Transnat'l L. 591, 605 (2018) (noting that "highly successful brand-name merchandisers," like "Apple and Google," have products that "all rely on semiconductors").

103. CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (codified as amended in scattered titles of the U.S.C.).

104. See Lamar Johnson, Biden Ends Slog on Semiconductor Bill With Signature, Politico (Aug. 9, 2022), https://www.politico.com/news/2022/08/09/biden-ends-slog-on-semiconductor-bill-with-signature-00050530 (on file with the *Columbia Law Review*) ("President Joe Biden signed the CHIPS and Science bill into law Tuesday, authorizing $52 billion in subsidies for semiconductor production and boosting funding for research.").

105. See Ariz. Com. Auth., A Roadmap to Success for the U.S. Semiconductor Industry, Harv. Bus. Rev. (May 30, 2023), https://hbr.org/sponsored/2023/05/a-roadmap-to-success-for-the-u-s-semiconductor-industry [https://perma.cc/HT6B-MQS3] ("One of the semiconductor industry's greatest challenges is building its workforce. In the U.S., the sector employs roughly 277,000 workers. To meet the future demands [the National

some predicting the industry needs "more than one million additional skilled workers" by 2030.[106]

Akash Systems, a space tech company, is one of hundreds of firms vying for CHIPS funding.[107] Akash plans to build a $432 million semiconductor factory in Oakland, California.[108] In November 2023, Akash signed an LPA with a division of the Communications Workers of America and the Alameda County Building Trades Council.[109] Cooperating with the labor community made Akash's application for funding more appealing to the Biden Administration, and the agreement demonstrated its commitment to "empower[ing] West Oakland through sustainable advancements in space and green technology."[110] Although the parties didn't publish the precise terms of the agreement, their press releases suggest there were two major components: a project labor agreement for the construction of the factory and a neutrality agreement for the operation of the facility once constructed.[111]

II. WHEN STATES CAN REQUIRE LABOR-PEACE AGREEMENTS: A CIRCUIT SPLIT

Private parties, like Akash, are free to enter into LPAs with unions, so long as they don't grant exclusive recognition to a minority union.[112] But

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Semiconductor Economic Roadmap] envisions, that labor pool would need to grow by hundreds of thousands of people over the next decade.").

106. See, e.g., The Global Semiconductor Talent Shortage: How to Solve Semiconductor Workforce Challenges, Deloitte, https://www2.deloitte.com/us/en/pages/technology/articles/global-semiconductor-talent-shortage.html [https://perma.cc/GZM6-47KV] (last visited Oct. 4, 2024).

107. See Akash Under Consideration for the Transformative CHIPS & Science Act Funding, Akash Sys. (Aug. 10, 2023), https://akashsystems.com/akash-under-consideration-for-funding/ [https://perma.cc/45JS-QYC8].

108. Press Release, Commc'n Workers of Am., supra note 78 (announcing a "first-in-the-industry labor neutrality agreement for semiconductor production workers at a new $432 million Akash Systems factory set for construction in West Oakland, California").

109. See Mackenzie Hawkins, Chipmaker Vying for US Funds Pledges to Hire Unionized Workers, Bloomberg (Nov. 28, 2023), https://www.bloomberg.com/news/articles/2023-11-28/chipmaker-vying-for-us-funds-enters-rare-union-agreement?embedded-checkout=true (on file with the *Columbia Law Review*).

110. Akash Under Consideration for the Transformative CHIPS & Science Act Funding, supra note 107 (internal quotation marks omitted) (quoting Felix Ejeckam, CEO, Akash Systems); see also Hawkins, supra note 109 ("We are aware that the Biden administration's excited about [unions] and so we're certainly leaning into that." (internal quotation marks omitted) (quoting Ejeckam)).

111. Press Release, Commc'n Workers of Am., supra note 78.

112. See Dana Corp. (*Dana II*), 356 N.L.R.B. 256, 256–57, 264 (2010) (upholding the lawfulness of an LPA—entered into by a private company and a union—that contained a no-strike clause and a neutrality provision). But see Majestic Weaving Co. of N.Y., 147 N.L.R.B. 859, 860 (1964) (finding that a private company's "contract negotiation with a nonmajority union constituted unlawful support within the meaning of Section 8(a)(2) of the [NLRA]"), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966).

when states, local governments, or the executive seek to *require* LPAs, they face further restrictions. This Part first provides the background of federal labor preemption and then considers when various circuits allow governmental units to require LPAs.

Congress created much of the existing federal regulatory scheme for labor law by enacting the NLRA in 1935 and the Taft–Hartley Act of 1947.[113] The NLRA, enacted by the pro-labor Roosevelt Administration, sought to strengthen the rights of workers and their ability to organize.[114] The Taft–Hartley Act, which was opposed by unions, rendered a less favorable environment for organized labor.[115]

With one exception, the NLRA itself remains silent on the extent of its preemption, or lack thereof.[116] Thus, defining the scope of NLRA preemption has been a court-led endeavor. The Supreme Court has developed an expansive regime of NLRA preemption.[117] This regime prevents states and localities from making labor law through traditional regulatory means.[118]

For an account that seeks to reconcile *Dana II* and *Majestic Weaving*, see Jonah J. Lalas, Recent Cases, Taking the Fear Out of Organizing: *Dana II* and Union Neutrality Agreements, 32 Berkeley J. Emp. & Lab. L. 541, 549–50 (2011) (noting that *Dana II* "affirmed neutrality agreements as an appropriate vehicle for unionization" and limited *Majestic Weaving* to situations in which there was "exclusive recognition of a minority union"). But see *Dana II*, 356 N.L.R.B. at 265 (Member Hayes, dissenting) ("[P]remature recognition is *not* a prerequisite for finding unlawful support in dealings between an employer and a minority union.").

113. National Labor Relations (Wagner) Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)); Labor–Management Relations (Taft–Hartley) Act, ch. 114, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.); Labor–Management Reporting and Disclosure (Landrum–Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.)).

114. 29 U.S.C. § 151 (finding that commerce was burdened by the "denial by some employers of the right of employees to organize" and the "inequality of bargaining power between employees who do not possess full freedom of association . . . and employers").

115. See Henry H. Drummonds, Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy, 70 La. L. Rev. 97, 100 (2009) (claiming that the Taft–Hartley Act was "vociferously opposed by the unions").

116. See 29 U.S.C. § 164(b) (empowering states to promulgate right-to-work laws by allowing them to prohibit "agreements requiring membership in a labor organization as a condition of employment").

117. See infra section II.A; see also Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 Yale J. on Regul. 355, 374–76 (1990) (describing the "overbreadth" of the Supreme Court's NLRA preemption rules).

118. See Benjamin I. Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 Harv. L. Rev. 1153, 1155 (2011) [hereinafter Sachs, Despite Preemption] ("Preemption rules have, aside from a few narrow exceptions, eliminated traditional forms of labor law in cities and states . . . ." (footnote omitted)).

A. *Labor Law Preemption Background*

The NLRA created an administrative body, the National Labor Relations Board (NLRB),[119] to determine representation-related disputes between parties through case proceedings, which are subject to review by federal courts of appeals.[120] From the creation of the NLRB, the Supreme Court quickly inferred Congressional intent "to obtain uniform application of [Congress's] substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."[121]

There are two main threads of federal labor preemption doctrine that yield an unusually expansive preemption regime.[122] First, the Court in *San Diego Building Trades Council v. Garmon* found that the NLRA preempts all state regulation of labor activities that it "arguably" protects or prohibits.[123] Scholars have called *Garmon* preemption "one of the broadest rules of preemption in any field of federal law."[124] *Garmon* preemption protects the NLRB's ability to determine what constitutes fair labor practices.[125]

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119. See 29 U.S.C. § 153 (creating the NLRB).

120. Id. § 160(f) ("Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . .").

121. Garner v. Teamsters Loc. Union No. 776, 346 U.S. 485, 490 (1953).

122. See Stephen F. Befort & Bryan N. Smith, At the Cutting Edge of Labor Law Preemption: A Critique of *Chamber of Commerce v. Lockyer*, 20 Lab. Law. 107, 107 ("These cases have yielded two distinct theories of labor law preemption."); Sachs, Despite Preemption, supra note 118, at 1154–55 (calling labor preemption "one of the most expansive preemption regimes in American law"). There is a third strain of labor preemption that arises out of section 301 of the Taft–Hartley Act. See 29 U.S.C. § 185 (2018). The Supreme Court has found that section 301 preempts state-law-based contractual lawsuits related to a collective bargaining agreement. See Phillip J. Closius, Protecting Common Law Rights of the Unionized Worker: Demystifying Section 301 Preemption, 46 U. Balt. L. Rev. 107, 109 (2016) ("[T]he Court also has held that § 301 preempts any state lawsuit alleging a contractual breach of a collective bargaining agreement."). This Note, however, does not discuss this third strain of preemption since it lacks relevance to LPAs.

123. See 359 U.S. 236, 245 (1959) ("When an activity is arguably subject to [the NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."). Justice Clarence Thomas recently indicated a willingness to hear a challenge to the legitimacy of *Garmon* preemption. See Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404, 1417 (2023) (Thomas, J., concurring in the judgment) ("[I]n an appropriate case, we should carefully reexamine whether the law supports *Garmon*'s 'unusual' pre-emption regime.").

124. Michael Shultz & John Husband, Federal Preemption Under the NLRA: A Rule in Search of a Reason, 62 Denv. U. L. Rev. 531, 535 (1985).

125. See Robert Rachal, *Machinists* Preemption Under the NLRA: A Powerful Tool to Protect an Employer's Freedom to Bargain, 58 La. L. Rev. 1065, 1066–67 (1998) ("*Garmon* preemption is thus based on a 'primary jurisdiction' theory, that determination of whether conduct is an 'unfair labor practice' under the NLRA is for the NLRB." (quoting *Garmon*, 359 U.S. at 245)).

Seventeen years later, the Court extended labor preemption further in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, holding that federal law preempts all state regulation of activities that Congress intended to leave to the market of economic forces.[126]

Although this Note often uses the term "state action" for concision, NLRA preemption applies to actions beyond those taken by states. The Supreme Court has extended its labor preemption doctrine equally to local government action.[127] The D.C. Circuit has extended *Machinists* preemption even further, holding in *Chamber of Commerce v. Reich* that exercises of federal executive power that conflicted with the NLRA were preempted.[128]

B. *Market Participant Exception:* Gould*,* Boston Harbor*, and* Brown

Not all state action, however, constitutes regulation that is preempted by federal labor law. The Supreme Court has held that when a state acts as a "market participant"—that is, when it participates in the market like a private party instead of as a regulator—its actions fall into the market participant exception and thus aren't preempted.[129] A typical example of this is the purchase of goods or services.[130] To avail themselves of the market participant exception, states often rely on their spending power rather than police power to show that they are participating in the market.

The Supreme Court has considered three cases in which states have attempted to circumvent NLRA preemption by relying on their spending power. First, the Supreme Court considered a Wisconsin statute that prohibited "certain repeat violators of the [NLRA] from doing business

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126. 427 U.S. 132, 150–51 (1976) (finding impermissible any state regulation that impedes on the area "left for the free play of contending economic forces" (internal quotation marks omitted) (quoting Howard Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*, 72 Colum. L. Rev. 469, 478 (1972))).

127. See Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 619 (1986) (applying *Machinists* preemption to local government action).

128. 74 F.3d 1322, 1334 (D.C. Cir. 1996) ("Nor, as we have noted, is there any doubt that *Machinists* 'pre-emption' applies to federal as well as state action."). For a critique of this decision and the assumptions it made when extending *Machinists* preemption to the executive branch, see Charles Thomas Kimmett, Note, Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in *Chamber of Commerce v. Reich*, 106 Yale L.J. 811, 829–32 (1996).

129. See *Boston Harbor*, 507 U.S. 218, 229 (1993). This is similar to the market participant exception in the context of the Dormant Commerce Clause. For further discussion, see infra section III.B.3.

130. See, e.g., Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 212–13 (3d Cir. 2004) ("To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same." (quoting *Boston Harbor*, 507 U.S. at 231)).

with the State" in *Wisconsin Department of Industry v. Gould, Inc.*[131] Wisconsin argued that its law should survive preemption because not doing business with certain entities was an exercise of the state's spending rather than police powers.[132] Justice Harry Blackmun, writing for a unanimous Supreme Court, explained that reliance on spending rather than police powers wasn't a get-out-of-jail free card for preemption.[133] To reach this conclusion, Blackmun endorsed a functional rather than formalist approach: Wisconsin's law conflicts with Congressional intent to leave the enforcement of the NLRA to the NLRB "[b]ecause Wisconsin's debarment law *functions* unambiguously as a supplemental sanction for violations of the NLRA."[134] Thus, the NLRA preempted Wisconsin's law under *Garmon* preemption.[135]

Six years later, Blackmun would once again endorse a functional approach while writing for a unanimous Court in *Boston Harbor*.[136] There, nonunion construction employers challenged the enforcement of a state bidding requirement, Bid Specification 13.1, related to the state's multibillion dollar effort to clean the Boston Harbor.[137] Bid Specification 13.1 conditioned the award of a contract related to the clean-up efforts on the contractor agreeing to be bound by a PLA.[138] This time, the Court found against preemption.[139] Blackmun explained that if a state acted as a market participant rather than as a regulator, it would not be preempted.[140] "When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*."[141]

Finally, and most recently, the Court considered whether a California law that sought to enforce labor neutrality by prohibiting some employers from spending state money "to assist, promote, or deter union organizing"

131. 475 U.S. 282, 283 (1986).

132. Id. at 287.

133. See id. at 289 ("That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict . . . .").

134. See id. at 288 (emphasis added).

135. Id.

136. *Boston Harbor*, 507 U.S. 218 (1993).

137. Id. at 221–23.

138. Id. at 222 ("[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement . . . ." (first alteration in original) (internal quotation marks omitted) (quoting Appendix to Petition for Writ of Certiorari at 141a–142a, *Boston Harbor*, 507 U.S. 218 (No. 91-261))).

139. See id. at 232.

140. See id. at 227.

141. Id.

was preempted by the NLRA in *Chamber of Commerce v. Brown*.[142] The law required detailed records maintenance and reporting, and it provided taxpayers with a private right of action through which they could seek double damages.[143] The Ninth Circuit had held that the law wasn't covered by the market participant doctrine because it was regulatory[144] but that it nevertheless survived *Machinists* preemption since "the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces."[145]

The Supreme Court disagreed.[146] In doing so, the Court first agreed with the Ninth Circuit that the law was regulatory in nature.[147] Then, Justice John Paul Stevens—writing for the Court—proceeded to follow Blackmun's functional approach: "[The California law] couples its 'use' restriction with compliance costs and litigation risks that are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds."[148] In other words, California exercised its spending power *coercively*.

C. *The Circuit Split:* Rancho Santiago, Sage, *and* Lavin

The Supreme Court hasn't synthesized a test for lower courts to determine when a state acts as a market participant so that its actions aren't preempted by the NLRA. Thus, lower courts have taken varied approaches.[149] One of the first courts to consider the question after *Boston Harbor* was the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*.[150] There, the court synthesized a two-question inquiry:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its

142. 554 U.S. 60, 62 (2008) (internal quotation marks omitted) (quoting Cal. Gov't Code §§ 16645–16649 (2008)).

143. Id. at 63–64.

144. See Chamber of Com. v. Lockyer, 463 F.3d 1076, 1084 (9th Cir. 2006), rev'd sub nom. *Brown*, 554 U.S. 60.

145. See id. at 1087 (citing *Boston Harbor*, 507 U.S. at 225–26).

146. See *Brown*, 554 U.S. at 69.

147. See id. at 70 ("It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant.").

148. See id. at 71.

149. See City of Chicago v. IBEW, Local No. 9, 239 N.E.3d 526, 531 n.1 (Ill. App. Ct. 2022) ("Illinois courts have not addressed what constitutes a 'market participant' for the purposes of NLRA preemption. The federal circuits apply slightly different tests.").

150. 180 F.3d 686 (5th Cir. 1999).

> primary goal was to encourage a general policy rather than address a specific proprietary problem?[151]

Many other lower courts have adopted this test, but they differ on whether the prongs are jointly necessary or independently sufficient. The Third Circuit requires states to fulfill both prongs to be exempted from preemption, whereas the Ninth Circuit exempts the state if their action satisfies either prong.[152] The Seventh Circuit, meanwhile, follows a different approach by asking only whether the state is merely incentivizing or instead compelling private action—if the latter, it is impermissibly regulating.[153]

1. *The Third Circuit's Conjunctive Test.* — The Third Circuit has developed its approach to the market participant exception over two decisions: *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage*[154] and *Associated Builders & Contractors Inc. New Jersey Chapter v. City of Jersey City*.[155] In *Sage*, the court upheld a City of Pittsburgh policy (Ordinance 22) that conditioned "a grant of tax increment financing upon the recipient's acceptance of labor neutrality agreement."[156] When discussing the two *Cardinal Towing* prongs, the court indicated they are jointly necessary:

> If a condition of procurement satisfies the[] two steps, then it reflects the government's action as a market participant and escapes preemption review. But if the funding condition does not serve, or sweeps more broadly than, a government agency's proprietary economic interest, it must submit to review under labor law preemption standards.[157]

The court thus began by addressing whether Ordinance 22 was designed to further a proprietary interest beyond merely raising tax revenue (which would not be a comparable interest to a private market

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151. See id. at 693.

152. Compare Associated Builders & Contractors Inc. v. City of Jersey City, 836 F.3d 412, 418 (3d Cir. 2016) ("Only if both conditions are met is a government acting as a market participant." (citing Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 216 (3d Cir. 2004))), with Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024 (9th Cir. 2010) (finding "a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption").

153. See N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1006 (7th Cir. 2005) (explaining that permissible conditions, unlike regulations, maintain a party's ability to "decline the offer").

154. 390 F.3d 206.

155. 836 F.3d 412.

156. See *Sage*, 390 F.3d at 207. Some commentators believe Ordinance 22 would also survive scrutiny after the Supreme Court's *Brown* decision. See Benjamin Sachs, Revitalizing Labor Law, 31 Berkeley J. Emp. & Lab. L. 333, 342 (2010) (noting that decisions such as *Sage* "seem viable" after *Brown*).

157. See *Sage*, 390 F.3d at 216.

participant).[158] The court explained that sixty percent of the tax revenues were sent to the Urban Redevelopment Authority of Pittsburgh (URA), which relied on the funds to "support debt service, repay bonds, and finance other development" like any other developer would.[159]

Finally, the court held that Ordinance 22 wasn't unduly broad.[160] The court emphasized that the requirement of signing a labor agreement was limited to hotels and hospitality projects that received tax increment financing from the URA.[161]

Twelve years later in *Associated Builders & Contractors v. City of Jersey City*, the Third Circuit considered a New Jersey policy offering tax exemptions for private developers that executed PLAs.[162] The court reaffirmed *Sage*'s two-prong test and explicated its conjunctive nature.[163] In doing so, the Third Circuit acknowledged that its approach differed from those of the Seventh and Ninth Circuits.[164] Unlike in *Sage*, the conjunctive nature of the test was material here, as the court found that no further inquiry was necessary once the policy failed the first prong of the test.[165] The court held that the tax breaks failed the first prong of the test since they didn't constitute a proprietary interest.[166] The court distinguished the facts from *Sage* on the basis that, in *Jersey City*, no money was being loaned or spent.[167] Had the court instead followed the tests of either the Ninth or the Seventh Circuit, the inquiry wouldn't have been complete and the policy may have survived preemption analysis.

2. *The Ninth Circuit's Disjunctive Test.* — Unlike the Third Circuit, the Ninth Circuit considers each *Cardinal Towing* question to be independently sufficient. That is, to successfully avoid NLRA preemption under the market participant exception, a state's policy can *either* ensure

158. See id.

159. See id. at 217.

160. See id.

161. See id. at 217–18.

162. See 836 F.3d 412, 414 (3d Cir. 2016).

163. See id. at 418 ("Only if both conditions are met is a government acting as a market participant." (citing *Sage*, 390 F.3d at 216)).

164. See id. at 418 n.8 ("[T]he Seventh Circuit has held that . . . the NLRA forbids only actions that are regulatory . . . [and] the Ninth Circuit holds that a government acts as a market participant when . . . it meets either prong of our *Sage* test.").

165. See id. at 413–14. The developers who challenged New Jersey's tax policy argued that it was preempted by the NLRA and ERISA. Id. at 415–16. They also argued that the policy violated the Dormant Commerce Clause. Id.

166. See id. at 418 ("We resolve this case at the first step of the *Sage* test, for we conclude that the City lacks a proprietary interest . . . ."). The court narrowed its holding to the question of whether the policy could be protected by the market participant exception. See id. at 421 ("We offer no comment on, much less do we decide, whether the challenged Ordinance is in fact preempted by the NLRA or ERISA, or whether it runs afoul of the dormant Commerce Clause.").

167. See id. at 420.

the efficient procurement of goods *or* address a specific proprietary problem with a narrow scope.[168]

The Ninth Circuit first articulated its rule in *Chamber of Commerce v. Lockyer*.[169] There, the court induced that the first *Cardinal Towing* inquiry concerned the *nature* of the state action while the second concerned the *scope*.[170] The first category, the court said, "protects comprehensive state policies with wide application from preemption, so long as the type of state action is essentially proprietary."[171] The second category "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation."[172] There, the Ninth Circuit concluded that the challenged state action was "regulatory and [thus] not protected by the market participant exception," but it upheld the state action after finding the action "not preempted under either *Machinists* or *Garmon*."[173] The Supreme Court, however, reversed and remanded *Lockyer* in *Chamber of Commerce v. Brown*, finding the state action to be preempted under *Machinists*.[174]

Thus, the Ninth Circuit had a clean slate when it considered *Johnson v. Rancho Santiago Community College District*.[175] While *Lockyer* had lost its precedential effect, it maintained its persuasiveness: The Ninth Circuit readopted *Lockyer*'s disjunctive test.[176] In doing so, the court in *Rancho Santiago* somewhat reformulated the second prong. Instead of repeating *Cardinal Towing*'s formulation of the second question (whether the action

168. See Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1024–25 (9th Cir. 2010).

169. 463 F.3d 1076, 1083 (9th Cir. 2006) ("We have applied these cases in a number of contexts without formulating a general rule about when the market participant exception applies."), rev'd sub nom. Chamber of Com. v. Brown, 554 U.S. 60 (2008).

170. See id. at 1084.

171. Id. (citing N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005)). The Ninth Circuit's decision to cite *Lavin* as an example of this phenomenon is questionable since, in *Lavin*, the Seventh Circuit explicitly held that Illinois was *not* acting as a proprietor. See *Lavin*, 431 F.3d at 1006 ("Illinois is not acting as a proprietor . . . .").

172. *Lockyer*, 463 F.3d at 1084.

173. See id. at 1084–85.

174. See 554 U.S. at 66 ("Today we hold that §§ 16645.2 and 16645.7 are pre-empted under *Machinists* because they regulate within 'a zone protected and reserved for market freedom.'" (quoting *Boston Harbor*, 507 U.S. 218, 227 (1993))). For more about the Supreme Court's *Brown* decision, see supra notes 142–148 and accompanying text.

175. 623 F.3d 1011, 1024 (9th Cir. 2010) ("[W]e are not bound by our vacated decision in *Lockyer* . . . .").

176. See id. at 1024 ("[W]e find [*Lockyer*'s] reasoning persuasive and accordingly hold that a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption.").

addressed a "specific proprietary problem"[177]), the court said a state could fulfill the second prong "by pointing to the narrow scope of the challenged action" to show that the action wasn't regulatory.[178] Initially, the question of whether a state's action is regulatory appears similar to the inquiry adopted by the Seventh Circuit, but unlike the bulk of the Seventh Circuit's precedent, the Ninth Circuit seems preoccupied with whether "a regulatory impulse can be safely ruled out."[179]

3. *The Seventh Circuit's Nondichotomous Approach.* — The Seventh Circuit adds to the NLRA preemption discussion in two relevant ways. First, it asserts that participating in the market as a proprietor, as was the case in *Boston Harbor*, is just one example of when a state is not regulating.[180] Second, it confronts whether regulatory intentions should matter.[181]

In *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, the Seventh Circuit considered a Milwaukee County ordinance that required LPAs for firms contracting with the County for "the provision of transportation and other services for elderly and disabled [people]."[182] One particularly contentious provision that was required in those PLAs was a prohibition on employer speech regarding the selection of a bargaining representative.[183]

Judge Richard Posner, writing for the panel, expressed concern over the ordinance's spillover effects.[184] Much of the ordinance applied to all of an employer's employees, rather than just those who worked on county

177. See Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999).

178. *Rancho Santiago*, 623 F.3d at 1024.

179. See id. (internal quotation marks omitted) (quoting *Cardinal Towing*, 180 F.3d at 693). For discussion of the Seventh Circuit's stance on whether a regulatory purpose disqualifies an action from market participant protection, see infra notes 190–192 and accompanying text.

180. N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005) ("*Boston Harbor* is just one illustration of the proposition that states may act in commerce without regulating commerce.").

181. Compare id. (noting that federal preemption doctrine doesn't evaluate legislation on what motivations led to its enactment), with Metro. Milwaukee Ass'n of Com. v. Milwaukee Cnty., 431 F.3d 277, 279 (7th Cir. 2005) ("[T]he spending power may not be used as a pretext for regulating labor relations.").

182. 431 F.3d at 277–78.

183. See id. (noting the ordinance's requirement for "language and procedures prohibiting the employer or the labor organization from coercing or intimidating employees, explicitly or implicitly, in selecting or not selecting a bargaining representative" (internal quotation marks omitted) (quoting Milwaukee, Wis., Code of Ordinances § 31.02(f)(7) (2024))).

184. See id. at 279 ("Any doubt that the agreements have a spillover effect on labor disputes arising out of the contractors' non-County contracts is dispelled by the language of the ordinance.").

projects.[185] Posner feared that the requirement thus regulated "employees who may never work on a County contract."[186] That the obligation to negotiate a PLA only kicked in once a union sought to represent employees working on County projects didn't matter.[187]

The court also noted that the agreements at issue were "labor-peace" agreements rather than "pre-hire" agreements.[188] That distinction matters because labor-peace agreements, unlike construction prehire agreements, are not "tried and true" in Posner's view.[189] Posner also claimed to extract a deeper principle from *Gould*: NLRA preemption prohibits states from using state spending powers as pretext for regulating labor relations.[190] That inference was not supported by the Seventh Circuit's precedents at the time[191] and has not been supported since.[192]

The Seventh Circuit again considered NLRA preemption in *Northern Illinois Chapter of Associated Builders & Contractors, Inc. v. Lavin*.[193] There, the court considered whether Illinois could attach a PLA requirement to its subsidies for the construction or renovation of renewable-fuel plants.[194] The district court below held that Illinois could because it acted as a proprietor.[195] Judge Frank Easterbrook identified a problem with that reasoning: Illinois didn't own anything before or after the subsidies were

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185. Id. (noting that "all but one of the terms that the agreement must contain" apply to all of an employer's employees).

186. See id. (internal quotation marks omitted).

187. See id.

188. See id. at 281–82.

189. See id. at 282.

190. See id. ("But the principle of [*Gould*] goes deeper; it is that the spending power may not be used as a pretext for regulating labor relations." (citing Wis. Dep't of Indus., Lab., & Hum. Rels., 475 U.S. 282 (1986))).

191. The Seventh Circuit rejected the premise that pretextual motivation could disqualify a state from asserting the market participant exception in Colfax Corp. v. Illinois State Toll Highway Authority, 79 F.3d 631, 634–35 (7th Cir. 1996). There, the court explained, "[W]e will not go behind the contract to determine whether the Authority's real, but secret, motive was to regulate labor." Id. at 635.

192. See N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment."). The Second Circuit has also rejected Posner's reasoning regarding pretext. In *Building Industry Electrical Contractors Ass'n v. City of New York*, contractors challenged New York PLA requirements on two grounds—the second being impermissible political cronyism. 678 F.3d 184, 188 (2d Cir. 2012). Judge Gerard Lynch dismissed that argument, explaining, "We will not search for an impermissible motive where a permissible purpose is apparent, because '[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment.'" See id. at 191 (alteration in original) (quoting *Lavin*, 431 F.3d at 1007).

193. 431 F.3d 1004.

194. See id. at 1005.

195. Id.

granted.[196] In the Third Circuit, that would have negated a necessary condition and resolved the ultimate question.[197]

Easterbrook, however, read *Boston Harbor* as holding that "*if* a state acts as a proprietor, then it may insist on the sort of prehire agreements that federal labor law permits private owners to adopt. It does not hold that *only if* a state acts in this capacity is its decision compatible with federal law."[198] In *Boston Harbor*, the Court established a market participant exception since the factual record before it featured a state that acted as a market participant.[199] But the Court's theme in *Boston Harbor* was the "need to distinguish regulation from other governmental activity."[200]

The question thus became whether a "conditional offer of a subsidy for renewable-fuels plants [is] a form of regulation."[201] In answering that, Easterbrook noted that this question arises frequently in other areas of the law, like the conditional spending exception to the anticommandeering doctrine and the unconstitutional conditions cases.[202] A condition on the receipt of funding can merely be an incentive, which would be permissible under the Court's precedent.[203] From that benchmark, he concluded that the Illinois policy is permissible because firms are free to "spurn the state's largesse" and complete projects without PLAs—and the state's subsidies.[204]

4. *The Lack of a Clear Test in the D.C. Circuit.* — Over the last six presidential administrations, the executive has flipped its position on labor, and project labor agreements in particular, numerous times via executive orders.[205] Most recently, in February 2022, Biden signed an executive order to require PLAs for all federal construction projects for

196. See id. at 1006. Easterbrook contrasts this with the bond investments in *Sage*. Id. (citing Hotel Emps. & Rest. Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC, 390 F.3d 206 (3d Cir. 2004)).

197. Cf. Associated Builders & Contractors Inc. v. City of Jersey City, 836 F.3d 412, 418 (3d Cir. 2016) ("We resolve this case at the first step of the *Sage* test, for we conclude that the City lacks a proprietary interest . . . .").

198. *Lavin*, 431 F.3d at 1006.

199. See Roger C. Hartley, Preemption's Market Participant Immunity—A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies, 5 U. Pa. J. Lab. & Emp. L. 229, 232 (2003) ("*Boston Harbor* was an ideal litigation vehicle for establishing labor preemption's market participant immunity.").

200. *Lavin*, 431 F.3d at 1006.

201. Id.

202. See id. ("The question 'is a condition on the receipt of a grant a form of regulation?' comes up frequently . . . .").

203. See id. at 1007 ("[Subsidies] may lead firms at the margin to reach labor agreements that they would not otherwise have signed, but if an incentive to change one's conduct is a form of 'regulation' then *South Dakota v. Dole*, *Rust v. Sullivan*, and many other cases were wrongly decided.").

204. Id.

205. See Button, supra note 15, at 543.

which the federal government spends $35 million or more.[206] Shortly after the rule effectuating the executive order was finalized, the Associated Builders and Contractors announced it would challenge the rule.[207] This section discusses the D.C. Circuit's previous decisions involving NLRA preemption of executive orders. The discussion reveals the D.C. Circuit's piecemeal approach to the market participant exception.

In 1995, President Clinton attempted to prohibit the federal government from contracting with employers who hired permanent replacements during strikes through Executive Order 12,954.[208] The government tried to defend the order by arguing that the President's authority to pursue "efficient and economic" procurement trumped NLRA preemption.[209] The D.C. Circuit struck the order down, however, in *Chamber of Commerce v. Reich*.[210] In doing so, the court first relied on *NLRB v. Mackay Radio & Telephone Co.*,[211] which held employers have the right to hire and retain replacement workers during strikes.[212]

The court noted that *Boston Harbor* was decided because Boston was a market participant rather than a regulator but refused to adopt a dichotomous view of the government as either a market participant or regulator.[213] Although the court declined to define a doctrinal test, it found that the effect of the executive order was inevitably regulatory due to its overreaching effects.[214] After all, the Order applied to all contracts over $100,000 and would affect twenty-six million workers.[215] Thus,

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206. Executive Order on Use of Project Labor Agreements for Federal Construction Projects, Exec. Order No. 14,063, 87 Fed. Reg. 7363, 7363 (Feb. 9, 2022).

207. Press Release, Associated Builders & Contractors, President Biden's Final Rule Forcing Corrupt Project Labor Agreements Will Face Legal Challenges (Dec. 18, 2022), https://www.abc.org/News-Media/News-Releases/abc-president-bidens-final-rule-forcing-corrupt-project-labor-agreements-will-face-legal-challenges [https://perma.cc/SW57-VYHL] ("ABC plans to challenge this Biden administration scheme in the courts . . . ." (internal quotation marks omitted) (quoting Ben Brubeck, Vice President of Regulatory, Labor, and State Affairs, Associated Builders & Contractors)).

208. Exec. Order No. 12,954, 60 Fed. Reg. 13023 (1995), invalidated by Chamber of Com. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

209. See *Reich*, 74 F.3d at 1333 ("The government explains '[t]here can be no conflict between the President's legitimate exercise of authority under the Procurement Act and [the NLRA rights] relied on by appellants [sic].'" (alterations in original) (quoting Appellee's Brief at 38, *Reich*, 74 F.3d 1322) (misquotation)).

210. Id. at 1324.

211. 304 U.S. 333 (1938).

212. See *Reich*, 74 F.3d at 1332.

213. See id. at 1335–36 ("We do not think we are bound to that dichotomy . . . .").

214. See id. at 1338.

215. Id. ("Not only do the Executive Order and the Secretary's regulations have a substantial impact on American corporations, it appears that the Secretary's regulations promise a direct conflict with the NLRA . . . .").

because the Order was regulatory in nature and conflicted with the NLRA, it was preempted.[216]

In *Building & Construction Trades Department v. Allbaugh*,[217] the D.C. Circuit considered the validity of George Bush's executive order[218] that provided, "to the extent permitted by law, no federal agency, and no entity that receives federal assistance for a construction project, may either require bidders or contractors to enter, or prohibit them from entering, into a project labor agreement."[219] The court upheld the order because it constituted proprietary rather than regulatory action.[220]

In rebutting the plaintiff's claim that the Order was regulatory rather than proprietary, the D.C. Circuit made two interesting observations. "First, 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."[221] Second, an actor's status as a lender to, "rather than the owner of, a project is not inconsistent with its acting just as would a private entity," who would also have an interest in ensuring the efficient use of its resources.[222] Thus, the court reaffirmed *Boston Harbor*'s core principle: "A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when . . . it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government].'"[223] This decision was surprising. In *Reich*, just six years earlier, the D.C. Circuit said it "very much doubt[ed] the legality" of President George H.W. Bush's similar order.[224]

III. WHY THE SEVENTH CIRCUIT'S APPROACH PROVIDES THE BEST ANSWER

The Seventh Circuit offers the best answer for doctrinal, principled, and pragmatic reasons. The Seventh Circuit's inquiry is consistent with binding precedent, upholds balanced federalism, and is administrable. Section III.A explains how the Seventh Circuit's test is consistent with the Supreme Court's inconclusive case law on the NLRA market participant

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216. Id.

217. 295 F.3d 28 (D.C. Cir. 2002).

218. Exec. Order No. 13,202, 66 Fed. Reg. 11225 (Feb. 2, 2001).

219. See *Allbaugh*, 295 F.3d at 29.

220. See id. at 34.

221. Id. at 35. The Supreme Court's reasoning in *Brown* supports the idea that states have a proprietary interest in the use of their funds but seems to limit the extent of a state's proprietary interest to "ensuring that state funds are spent in accordance with the purpose for which they are appropriated." Chamber of Com. v. Brown, 554 U.S. 60, 70 (2008).

222. *Allbaugh*, 295 F.3d at 35.

223. See id. at 36 (alterations in original) (quoting *Boston Harbor*, 507 U.S. 218, 228–29 (1993)).

224. Chamber of Com. v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996).

exception. Section III.B looks to three other doctrinal fields that consider whether government conditions constitute impermissible regulation.

A. *The Seventh Circuit's Test Is Consistent With Supreme Court Precedent*

As discussed in section II.B, the Supreme Court has considered the market participant exception to NLRA preemption on three occasions: *Gould*,[225] *Boston Harbor*,[226] and *Brown*.[227] The Seventh Circuit's *Lavin* decision is literally and logically consistent with those decisions. Like the Seventh Circuit—and unlike the Third and Ninth Circuits—the Supreme Court has consistently relied on functional rather than formalistic logic.

First, *Gould* only ruled against Wisconsin's disbarment law because it was functionally equivalent to regulation. Scholars have quoted *Gould* as saying that, for the purposes of NLRA preemption, the exercise of spending powers versus the exercise of regulatory powers is a "distinction without a difference."[228] While that phrase does appear in the opinion, the full sentence in which it appears provides vital context:

> [Wisconsin] contends, however, that the statutory scheme invoked against Gould escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power. But that seems to us a distinction without a difference, at least in this case, *because on its face the debarment statute serves plainly as a means of enforcing the NLRA*.[229]

The text of the opinion shows that Blackmun qualifies the holding by explaining why, in this particular situation, the exercise of Wisconsin's spending power amounted to regulation.

Gould did not hold that all spending is necessarily equivalent to regulation. If Blackmun intended that, he would not have also decided that the state spending in *Boston Harbor* wasn't preempted for the reason that it was nonregulatory. Rather, *Gould* stands for the proposition that reliance on spending power doesn't automatically exempt a state from preemption analysis.[230]

Boston Harbor built on *Gould*'s functional reasoning and held that if a state acts as a market participant, then it is not preempted because it is not regulating.[231] But crucially, *Boston Harbor* only recognized market

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225. Wis. Dep't of Indus. v. Gould Inc., 475 U.S. 282 (1986).

226. 507 U.S. 218.

227. Chamber of Com. v. Brown, 554 U.S. 60 (2008).

228. See Sachs, Despite Preemption, supra note 118, at 1168 (internal quotation marks omitted) (quoting *Gould*, 475 U.S. at 287).

229. *Gould*, 475 U.S. at 287 (emphasis added).

230. See id.

231. See *Boston Harbor*, 507 U.S. at 227 ("A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace.").

participant behavior as *an* example—not the *only* example—of state action that didn't constitute regulation.[232]

Brown, like *Gould*, has been cited for the proposition that reliance on spending powers is a "distinction without a difference."[233] *Brown* quoted that exact language from *Gould*, but it once again contextualized that the exercise of the spending power in *Gould* was regulatory because it was "tantamount to regulation."[234] The spending conditions at issue in *Brown* can easily be distinguished from most LPAs. In *Brown*, the private actors had extensive, ongoing obligations to the state.[235]

Even if the average LPA imposes extensive obligations,[236] states, localities, and the executive could present a more compelling case by crafting conditions that are more limited in scope than those in *Brown*. The Court in *Brown* criticized the California statute for making it "exceedingly difficult for employers to demonstrate that they have not used state funds and by imposing punitive sanctions for noncompliance."[237] That observation was relevant to the Court's finding that the statute reached beyond California's proprietary interest.[238] The statute in *Brown* also caused issues because it selectively restricted employer speech about regulation.[239]

B. *Other Doctrinal Fields Support the Seventh Circuit's Conclusion*

NLRA preemption isn't the only constitutional context that requires the inquiry of whether a government-imposed condition is regulatory, nor is it the only doctrine with a market participant exception. Section III.B.1 identifies the Supreme Court's distinction between reasonable conditional spending and regulation (or coercive spending) in anticommandeering cases such as *South Dakota v. Dole*[240] and *National Federation of Independent Businesses v. Sebelius*.[241] Section III.B.2 considers a couple of the Court's unconstitutional conditions cases. Section III.B.3 looks at the market participant doctrine in the context of the Dormant Commerce Clause. The analysis in this section identifies a throughline in the relevant

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232. See N. Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1006 (7th Cir. 2005) ("[*Boston Harbor*] does not hold that *only if* a state acts in this capacity is its decision compatible with federal law.").

233. See, e.g., Sachs, Despite Preemption, supra note 118, at 1168 & n.71.

234. Chamber of Com. v. Brown, 554 U.S. 60, 70 (2008) (internal quotation marks omitted) (quoting *Gould*, 475 U.S. at 287).

235. See id.

236. Those who disagree would argue that LPA requirements do result in ongoing obligations because the LPA is a binding contract.

237. *Brown*, 554 U.S. at 71.

238. See id.

239. Id.

240. 483 U.S. 203 (1987).

241. 567 U.S. 519 (2012).

Supreme Court doctrines: Conditions that leave room for a meaningful choice are generally considered constitutional.

1. *Conditional Spending Exception to Anticommandeering.* — *Lavin*'s analysis mirrors the Supreme Court's approach to the anticommandeering doctrine. The anticommandeering doctrine, rooted in the Tenth Amendment, proscribes the federal government from forcing states to make, or enforce, regulations[242]—and from prohibiting states from doing so.[243] In *Printz v. United States*, for example, the Supreme Court struck down provisions of the Brady Act[244] that required state law enforcement officials to execute handgun regulations by performing background checks.[245]

The federal government can, however, leverage Congress's spending power to encourage states to act in regulatory-adjacent ways. That is, Congress can condition funds on the states' fulfillment of certain requirements. In *South Dakota v. Dole*, for example, the Court upheld the National Minimum Drinking Age Act of 1984, which withheld a small portion of federal highway funds from states that didn't implement a minimum legal drinking age of at least twenty-one.[246]

Just like in the NLRA preemption context, however, reliance on spending powers doesn't automatically ensure that a governmental act will survive anticommandeering analysis. In *Dole*, the Court outlined five requirements that a federal conditional spending program must satisfy to avoid violating the anticommandeering doctrine: (1) "the exercise of the spending power must be in pursuit of 'the general welfare,'" (2) the condition must be expressed unambiguously, (3) conditions must be related to a particular government interest, (4) there can be no separate constitutional prohibition, and (5) the financial inducement cannot "be so coercive as to pass the point at which 'pressure turns into compulsion.'"[247]

For decades, many scholars thought that the conditional spending exception "represented a virtual blank check to Congress."[248] The

242. New York v. United States, 505 U.S. 144 (1992).

243. Murphy v. NCAA, 138 S. Ct. 1461 (2018).

244. Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536.

245. 521 U.S. 898, 902–04, 933–35 (1997) (holding that the Brady Act's "mandatory obligation imposed on [state law enforcement officers] to perform background checks on prospective handgun purchasers runs afoul" of the anticommandeering principle (citing *New York*, 505 U.S. at 188)).

246. See 483 U.S. 203, 206 (1987) ("Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.").

247. Id. at 207–08, 210–11 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

248. See, e.g., Andrew B. Coan, Commandeering, Coercion, and the Deep Structure of American Federalism, 95 B.U. L. Rev. 1, 11 (2015).

Supreme Court dismissed that notion in *NFIB v. Sebelius* by invalidating the conditional spending provision of the Affordable Care Act[249] concerning Medicaid expansion.[250] Chief Justice John Roberts explained that the conditional spending provision failed the fifth requirement—noncoercion. The sum of money at issue was massive.[251] Unlike the law in *Dole*, in which only five percent of federal highway funds were to be withheld,[252] states stood to lose forty percent of all Medicaid funding—which Roberts estimated constitutes over ten percent of most states' *total* revenue.[253] Roberts characterized this incentive structure as "a gun to the head" that exceeded the point at which pressure became compulsion.[254]

These conditional spending cases demonstrate that the federal government can, with conditional funding, incentivize states to regulate. But that power isn't without limitation. Once the pressure from the incentives reaches *compulsion*, the conditional spending amounts to impermissible commandeering.

2. *Constitutional Conditions: Speech and Funding*. — The doctrine of unconstitutional conditions prevents the government from using its coercive power to condition benefits on the forfeiture of constitutional rights in certain circumstances.[255] Some commentators take positions at the extremes of this doctrine, arguing that conditioning benefits on the forfeiture of constitutional rights is either always or never permissible.[256] But the resolution of that debate is beyond the scope of this Note. What is relevant is that, in practice, the Court has upheld funding conditioned on

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249. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119.

250. 567 U.S. 519, 530–31 (2012) ("Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, . . . and the Medicaid expansion . . . .").

251. Id. at 542 ("Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.").

252. National Minimum Drinking Age Amendment of 1984, 23 U.S.C. § 158 (2018); *Dole*, 483 U.S. at 211.

253. See *Sebelius*, 567 U.S. at 523, 582 ("The threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."); Kenneth R. Thomas, Cong. Rsch. Serv., R42367, Medicaid and Federal Grant Conditions After *NFIB v. Sebelius*: Constitutional Issues and Analysis 2 (Feb. 21, 2012), https://crsreports.congress.gov/product/pdf/R/R42367 (on file with the *Columbia Law Review*) (last updated July 17, 2012) ("Medicaid represents 40% of all federal funds that states receive . . . .").

254. See *Sebelius*, 567 U.S. at 581.

255. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right . . . .").

256. See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, Protecting State Constitutional Rights From Unconstitutional Conditions, 56 U.C. Davis L. Rev. 247, 259 (2022) (citing Justice Oliver Wendell Holmes as a proponent of the "always permissible" position and Professor Philip Hamburger for the "never permissible" position).

the loss of rights in some circumstances.[257] This section considers *Rust v. Sullivan*[258] and *National Endowment for the Arts v. Finley*,[259] two examples of that phenomenon.

In *Rust v. Sullivan*, the Supreme Court considered an HHS regulation that prevented recipients of Title X funding from engaging in abortion-related counseling.[260] The petitioners challenged that regulation, claiming the forfeiture of a healthcare professional's right to discuss abortion was an unconstitutional condition.[261] Chief Justice Rehnquist, writing for the Court, disagreed.[262] Rehnquist dismissed the First Amendment concerns raised by the petitioners by explaining that the regulation didn't force Title X recipients to outright forfeit abortion-related speech or conduct, rather, it didn't allow that speech in relation to Title X projects.[263]

First Amendment concerns were also present in *National Endowment for the Arts v. Finley*.[264] There, the Court considered a National Endowment for the Arts policy that required recipients to conform to "general standards of decency and respect."[265] The Court upheld this provision, finding that funding one kind of activity didn't bind the government to funding all kinds of activities.[266]

Two principles connect *Rust* and *Finley* to this Note. First, governments have latitude to choose what they spend their money on. Second, if those affected by the conditions for funding aren't *coerced* into their decision, the condition is permissible.

3. *Dormant Commerce Clause.* — Before the Court endorsed the market participant exception to NLRA preemption, it recognized a market participant exception in the context of the Dormant Commerce Clause (DCC).[267] The DCC generally prohibits states from discriminating against interstate commerce.[268] That is, states and cities can't favor their own

257. For a nonexhaustive list of cases, see id. at 250 n.6.

258. 500 U.S. 173 (1991).

259. 524 U.S. 569 (1998).

260. See *Rust*, 500 U.S. at 180.

261. See id. at 196 ("Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling.").

262. See id. at 178.

263. Id. at 196 ("The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.").

264. 524 U.S. 569.

265. See id. at 576–77.

266. See id. at 588.

267. See Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

268. See Note, The Dormant Commerce Clause and Moral Complicity in a National Marketplace, 137 Harv. L. Rev. 980, 983 (2024).

citizens over citizens from elsewhere. For example, in *Dean Milk Co. v. City of Madison*, the Supreme Court struck down an ordinance that required all milk sold in the city of Madison to be from a plant within five miles of the city.[269] A state doesn't, however, violate the DCC when it acts as a market participant—even if it prefers its citizens.[270] For example, in *Reeves, Inc. v. Stake*, the Supreme Court upheld a South Dakota policy of selling state-produced cement that preferred its own citizens.[271]

The market participant doctrine for purposes of the DCC can be deemed messy or unpredictable due to the Court's lack of an "overarching theory of the market-participant rule."[272] Professor Donald H. Regan identified a unifying principle in the seemingly scattered decisions, stating "[t]here is an obvious feature that is common to all these instances of permissible discrimination in favor of locals: The state is spending money."[273] Regan offers a few possible explanations for this.[274] The most relevant explanation to this Note is that state spending has the capacity to be less coercive than other forms of discriminatory regulations.[275]

* * *

These doctrinal areas all support the principle at the heart of *Lavin*'s decision: Governments cannot *compel* private action through spending that they couldn't require by regulation, but they may *incentivize* that action.[276] One may argue that this principle isn't that administrable in practice.[277] It's true there isn't much precedent, even in the Seventh Circuit, to provide lower courts with guidance. Thus, this Note argues that lower courts should begin with a true presumption against preemption and then apply the fifth prong of the conditional spending test (i.e., determine whether the incentive is impermissibly coercive) when considering whether the NLRA preempts a conditional spending policy.

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269. See 340 U.S. 349, 354 (1951).

270. See Daniel Francis, The Decline of the Dormant Commerce Clause, 94 Denv. L. Rev. 255, 303–06 (2017) (discussing canonical market participant exception cases).

271. See 447 U.S. 429, 446–47 (1980).

272. Dan T. Coenen, Untangling the Market-Participant Exemption to the Dormant Commerce Clause, 88 Mich. L. Rev. 395, 405 (1989).

273. Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1193 (1986).

274. Id. at 1194.

275. See id. ("For the most part, state spending programs are less coercive than regulatory programs or taxes with similar purposes.").

276. See supra note 203 and accompanying text.

277. Though surely the alternatives aren't better—especially not a subjective inquiry that ferrets out so-called "regulatory intent."

IV. APPLYING THE SEVENTH CIRCUIT'S TEST TO LPAS IN EMERGING INDUSTRIES

A. *Utilizing LPAs to Implement the IRA*

A broad application of *Lavin*'s test unlocks the implementation of the IRA in two crucial ways. First, it shows that the federal executive can require PLAs and incentivize other labor-peace agreements. Second, it shows that states and localities that receive IRA funds—or seek to complement IRA investment—can condition spending on the inclusion of PLAs and other labor-peace agreements.

1. *Implementing the IRA Through Executive Order.* — Under Supreme Court precedent and *Lavin*, Biden's executive order should be upheld as permissible. On March 28, 2024, the Associated Builders and Contractors filed suit to enjoin Executive Order 14,063 and the PLA Rule.[278] Among other grounds,[279] the plaintiffs claim that the executive order and the rule violate the NLRA.[280] As opponents note, it only reaches 120 construction projects,[281] so the order doesn't capture an entire industry. Contractors who don't wish to use PLAs are free not to in the vast majority of projects that they complete. The presence of a real choice means that the executive order is not coercive under the test explained in Part III.

2. *Implementing the IRA Through Local Investment and Complementary LPAs.* — But even if a court strikes down Biden's executive order and the complementary regulation, the purpose of the IRA can be realized by state and local action.[282] There are two relevant actions that states and localities can take to ensure the IRA's success. State and local governments can first use funds they receive from the IRA to negotiate and require PLAs. Second, state and local governments can use their own funds to complement IRA investment.

Several provisions in the IRA incentivize development of electricity-transmission infrastructure, which stakeholders believe can play a vital role in enabling increased reliance on wind and solar energy.[283] Section 50152,

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278. *Clark* Complaint, supra note 86, at 47.

279. Plaintiffs also argue that the order and rule exceed executive authority under the Major Questions Doctrine, violate competitive bidding laws, and that the rule violates the Administrative Procedure Act. See Plaintiffs' Motion for Expedited Summary Judgment and Preliminary Injunction, and Memorandum of Law in Support at 2, 11, 15, *Clark*, No. 3:24-cv-318-WWB-MCR (M.D. Fla. filed Sept. 9, 2024). This Note limits its analysis of the NLRA claim. Because the plaintiffs assert so many theories, they devote only two paragraphs in their motion for summary judgment to their NLRA claim. See id. at 22–23.

280. See id. at 2, 22.

281. See Letter from Am. Concrete Pumping Ass'n et al., to U.S. Cong., supra note 84.

282. See Chyung et al., supra note 3.

283. Ashley J. Lawson, Cong. Rsch. Serv., IN11981, Electricity Transmission Provisions in the Inflation Reduction Act of 2022 (Aug. 23, 2022), https://crsreports.congress.gov/

for example, directly makes $760,000,000 available for state and local governments who facilitate the siting of transmission lines.[284] One approved use of these funds is particularly relevant to this Note; section 50152 authorizes grants for "measures and actions that may improve the chances of, and shorten the time required for, approval by the siting authority of the application relating to the siting or permitting of the covered transmission project, as the Secretary determines appropriate."[285]

If the Seventh Circuit's understanding of the market participant exception is correct, states and localities could thus use IRA funds to negotiate LPAs for electric transmission line projects. That would not be the case under the Third Circuit's interpretation. States don't have a proprietary interest in federal funds, so that application would fail the first prong.

The IRA also makes billions of dollars available for energy-efficiency and electrification rebate programs, but the IRA depends on state and tribal agencies to disburse those funds.[286] The relevant section of the IRA subsidizes entities that carry out "qualified electrification projects" for low- or moderate-income households and multifamily buildings with at least half low- or moderate-income housing residents.[287] Qualified electrification projects under that section include the purchases and installations of electric heat pumps, electric stoves and ovens, and insulation.[288]

The huge influx of investment in electrification projects will presumably involve the coordination of hundreds of contractors and subcontractors in each state. State environmental agencies could condition contractors' participation in their respective rebate programs on agreement to LPAs, which once again provide a creative way to ensure efficient implementation of projects while standardizing pay and safety conditions. Using LPAs in this way is similar to how Illinois and unions used PLAs to undergo a project of asbestos abatement and building repair and to secure labor peace.[289]

Here, the states could, with the help of the federal government, bear some of the costs of any PLA provision dealing with training contractors. Section 50123 appropriates money to states to develop education and training programs for contractors seeking to install home energy efficiency and electrification improvements.[290] By providing the training,

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product/pdf/IN/IN11981 (on file with the *Columbia Law Review*) (last updated Jan. 4, 2024).

284. See Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 50152, 136 Stat. 1818, 2046–48.

285. Id. § 50152(b)(1)(E).

286. See id. § 50122.

287. See id.

288. See id. § 50122(d)(6)(A)(i).

289. See Colfax Corp. v. Ill. State Toll Highway Auth., 79 F.3d 631, 632 (7th Cir. 1996).

290. See Inflation Reduction Act § 50123.

the state could help make some provisions, such as apprenticeship requirements, less burdensome on employers. The public, meanwhile, benefits in the short and long term when there is a newly skilled and cared-for workforce.

B. *Cannabis*

Contrasting the cannabis labor-peace agreement requirement in Rhode Island to that in Illinois provides a clear application of the principles articulated in this Note.

As noted in section I.B, the Rhode Island statute requires *all* cannabis-license applicants to have an LPA.[291] Since cannabis firms can only operate through state schemes, they would either have to accede to this requirement or shut down their business. Since this requirement amounts to the "gun to the head" compulsion discussed in *NFIB v. Sebelius*,[292] Greenleaf's merits challenge has force.

In the Third or Ninth Circuit, a challenge to Illinois law would succeed. Illinois doesn't have a proprietary interest in the cannabis firms its policy affects nor is the policy aimed at solving a proprietary problem. But, as a conditional benefit, it survives *Lavin*. Unlike Rhode Island's policy, Illinois's incentive lacks coercive force. The five points awarded to firms with an LPA gives a small boost in their application for a license, but those five points constitute only two percent of available points.[293]

Thus, Illinois's conditioning is not coercive and is permissible. States looking to implement a labor-peace condition in their cannabis licensing schemes should follow Illinois's lead to avoid NLRA preemption.

CONCLUSION

As billions of public dollars are invested in clean energy infrastructure and cannabis, the American public stands to benefit from the efficient completion of development projects. LPAs not only attract a skilled labor force but also ensure stability by relieving labor tensions and increasing worker retention. While the federal government has required PLAs for some specific situations, state and local governments need to also be equipped with these tools as they execute the disbursement of funds that have been allocated to them in the Inflation Reduction Act. Some of these government entities may fear NLRA preemption. This Note has established, however, that conditioning spending on the inclusion of LPAs is not regulation—so long as it's not coercive—and thus is not preempted by the NLRA.

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291. See Rhode Island Cannabis Act, 21 R.I. Gen. Laws § 21-28.11-12.2 (2024).

292. 567 U.S. 519, 581 (2012).

293. See Cannabis Regulation and Tax Act, 410 Ill. Comp. Stat. Ann. 705 / 15-30(c)(6) (West 2024).