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“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 (2019)

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“FAIR AND OPEN COMPETITION” OR DEATH TO THE UNION? PROJECT LABOR AGREEMENTS IN TODAY’S POLITICALLY CONTENTIOUS ATMOSPHERE

CHELSEA BUTTON*

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Abstract

Many federally-funded construction projects include project labor agreements that include working with specific unions to complete a project. The uniqueness of the construction industry was recognized in the National Labor Relations Act, which allowed project labor agreements on construction projects. PLAs came back to the forefront in 1992 when President Bush issued an executive order prohibiting PLAs on federal construction projects. Since then, a number of presidential executive orders have been issued changing whether project labor agreements may be used. This Comment analyzes the arguments for and against project labor agreements in the construction industry, use of presidential executive orders, precedential cases, and proposed congressional activity.

[E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and *ad hoc* sort, analogous to ever-changing commands on the battlefield.¹

I. INTRODUCTION

Federal construction projects are battlefields funded by hundreds of billions of dollars spent annually by the United States government in contracting goods and services.² Although President

* Juris Doctor Candidate, The John Marshall Law School, 2019. Many thanks to my family, mentors, and editors on The John Marshall Law Review, all who helped make this Comment possible. All views and errors of this paper are my own.

1. *Blake Constr. Co. v. C. J. Coakley Co.*, 431 A.2d 569, 575 (D.C. 1981).

2. James F. Nagel, *Gov’t Contracting*, in *FUNDAMENTALS OF CONSTR. LAW* 278, 278 (John W. Ralls, L. Franklin Elmore, Lauren Elizabeth Catoe eds., 2d ed. 2013) (explaining that the US government spent over \$500 billion in 2014);

Trump promised a \$1.5 trillion infrastructure plan,³ public works spending fell over the past five years.⁴ However, in 2017, natural disasters caused monumental damage which brought the battleground to the front lawns of United States citizens.⁵ Fifteen separate weather and climate disasters across the U.S. resulted in \$367.2 billion of damage.⁶ Cities and towns in Puerto Rico, Texas, Florida, and California endured the devastating effects of natural disasters.⁷ In an effort to rebuild their infrastructure, these cities turn to contractors, thus begging the question: should government agencies turn to project labor agreements (“PLAs”)?⁸

A PLA between a labor organization, an owner, and sometimes a general contractor guarantees the use of union labor on one or a series of construction projects.⁹ PLAs supersede all other union

Contracting Data Analysis, U.S. GOV'T ACCT. OFF., www.gao.gov/products/GAO-17-244SP (last visited Mar. 24, 2019) (stating in 2015, federal agencies spent over \$430 billion on contracts).

3. Press Release, Tammy Duckworth, Duckworth Asks for Details on Trump Administration's Long Awaited Infrastructure Plan (Oct. 5, 2017) www.duckworth.senate.gov/news/press-releases/duckworth-asks-for-details-on-trump-administrations-long-awaited-infrastructure-plan. However, when Trump unveiled his \$1.5 trillion plan, only \$200 billion would come directly from federal spending, and the other \$1.3 trillion would come from state and local governments. Lydia DePillis, *Trump unveils infrastructure plan*, CNN BUSINESS (Feb. 12, 2018), money.cnn.com/2018/02/11/news/economy/trump-infrastructure-plan-details/index.html.

4. Binyamin Appelbaum, *Public Works Funding Falls as Infrastructure Deteriorates*, N.Y. TIMES (Aug. 8, 2017), www.nytimes.com/2017/08/08/us/politics/infrastructure-trump.html.

5. Doyle Rice, Jim Sergent, George Petras, Janet Loehrke, *2017 could tie record for billion-dollar disasters in a year. Here's why*, USA TODAY (Oct. 18, 2017), www.usatoday.com/story/weather/2017/10/18/2017-could-tie-record-billion-dollar-disasters-year-heres-why/763406001/ (explaining as of October 8, 2017, 1,391 tornadoes have torn through the U.S., “332 more than in all of 2016,” with an estimated cost of \$5 billion.) The flooding in California, Missouri, Arkansas, Illinois and other states is estimated to have cause \$3.2 billion in damage. *Id.* Hurricanes Harvey, Irma, and Maria are estimated to have caused between \$294 – \$362 billion. *Id.* The wildfires in California from October 8, 2017 to October 18, 2017 are estimated at \$65 billion in damages. *Id.*

6. *Id.*

7. Doyle Rice, *It's been a stormy start to 2017 in the U.S., tying the 2nd-most natural disasters on record*, USA TODAY (July 17, 2017), www.usatoday.com/story/weather/2017/07/18/u-s-battered-2nd-most-natural-disasters-record-so-far-2017/485167001/; see also Sean McGarvey, *U.S. Economy, contractors, and American workers benefit from PLAs*, THE HILL (Apr. 24, 2017), thehill.com/blogs/congress-blog/economy-budget/330274-project-labor-agreements-a-win-win-us-economy-contractors (explaining that when it comes to infrastructure contracts, PLAs deliver results – “namely, the need to recruit and train a qualified skilled workforce to do the work, coupled with the need to safeguard community wage and benefit standards”).

8. *Id.*

9. The two union labor organizations generally involved in PLA suits include the Building and Construction Trades Council (referred to as “BCTC” in this comment) or American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”). The first Building Trades Council was founded in

agreements and exclusively deal with only one union council or federation to hire employees and negotiate benefits.¹⁰ While terms vary, most PLAs include a prohibition on strikes and lockouts.¹¹ Parties enter into a PLA after the architect or engineer determines the scope of a project and before the owner extends an invitation to bid.¹² Contractors submit their bids and the project is awarded to

Chicago in 1890. BCTC is usually affiliated with a number of labor organizations, including:

International Brotherhood of Boilermakers, United Brotherhood of Carpenters, International Brotherhood of Electrical Workers, International Union of Elevator Constructors, International Association of Heat and Frost Insulators and Allied Workers, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Laborers' International Union of North America, International Union of Operating Engineers, International Union of Painters and Allied Trades, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, United Union of Roofers, Waterproofers and Allied Workers, Sheet Metal Workers' International Association, International Brotherhood of Teamsters, and International Union of Bricklayers and Allied Craftworkers.

Affiliated Unions, BCTC OF GREATER N.Y., www.nycbuildingtrades.org/html/unions.html (last visited Mar. 23, 2019). The AFL-CIO consists of 56 unions working together in state federations and local labor councils. *Our Unions and Allies*, AFLCIO, aflcio.org/about/our-unions-and-allies (last visited Mar 23, 2019). See Nagel, *supra* note 2 (describing that an owner is traditionally the entity that is funding the project and can be a governmental or private entity). A general contractor traditionally ensures that plans and specifications become a tangible structure suitable to the owner, by managing schedules, coordinating with subcontractors, procuring materials, and maintaining the cash flow. *Id.* See Moran *infra* note 104 (explaining that governments can require recipients of government funding use PLAs for a specific construction project). Private sector companies such as Toyota and Wal-Mart have used PLAs during a series of construction projects. *Id.*

10. Se. La. Bldg. & Constr. Trades Council v. La. ex rel. Jindal, 107 F. Supp. 3d 584, 592 (E.D. La. 2015) (“*Jindal*”); GERALD MAYER, CONG. RESEARCH SERV., 7-5700, PROJECT LABOR AGREEMENTS 4 (2010); Johnson v. Rancho Santiago Cmty. College Dist., 623 F.3d 1011, 1017 (9th Cir. 2010) (“*Rancho Santiago*”). For example, the Northwestern Indiana Building and Construction Trades Council combines thirty local unions. *Affiliates*, NW. IND. BLD. & CONSTR. TRADES COUNCIL, nwibuildingtrades.com/affiliates/ (last visited Mar. 23, 2019).

11. Mayer, *supra* note 10, at 4.

12. John T. Clappison, *Government Contracting*, in FUNDAMENTALS OF CONSTR. LAW 88, 88-89 (John W. Ralls, L. Franklin Elmore, Lauren Elizabeth Catoe eds., 2d ed. 2013) (explaining that bidding a traditional design-bid-build project begins when the owner contracts with an architect or engineer who creates plans for a building that suits the owner’s needs). Those plans are included with other bid documents which include a scope of work, qualifications necessary (work experience, technological capabilities, financial capacity, etc.), and procedural plans (how, when, and where the bids should be submitted). *Id.* The owner then issues a “notice to bidders,” “invitation to bid,” or “advertisement” published in a public newspaper. *Id.* The “notice to bidders” states when bids are due, relevant contract documents, where to bid, and

the lowest responsible bidder, contingent on signing the PLA.¹³ PLAs require all contractors to hire certain union workers or, alternatively, require employees to join the union.¹⁴

Construction projects are either private or public.¹⁵ In private construction projects, the owners are private individuals or companies who hold proprietary control over important decisions, including whether to hire union labor.¹⁶ The government can only regulate private projects.¹⁷ However, publicly-funded projects are both financed and regulated by either the federal or state government.¹⁸ Sometimes the distinction between regulator and proprietor becomes unclear.¹⁹ Disputes may have civil or criminal penalties.²⁰ State courts traditionally resolve disputes by referencing persuasive federal precedent.²¹ One main issue courts consider is whether to require the hiring of unions on public construction projects.²² Requiring or prohibiting unions on construction projects, especially on large-scale projects, strongly impacts the national economy.²³

instructions on completing bid documents. *Id.* General contractors then “bid” on the project after identifying costs for hiring subcontractors and procuring materials. *Id.* See also David E. Rosengren & Thomas G. Librizzi, *Bid Protests: Substance and Procedure on Publicly Funded Construction Projects*, CONSTR. LAW., 1, 1 (1987) (explaining that competitive bidding encourages the lowest price and best quality while also discouraging corruption, favoritism, and abuse of discretion by public officials).

13. David J. Langworthy, *Project-Labor Agreements After Boston Harbor: Do They Violate Competitive Bidding Laws?* 21 WM. MITCHELL L. REV. 1103, 1111 (1996) (qualifying “lowest responsible bidder” as a “responsible” contractor – reputable, financially stable, experienced, and capable to perform the contract – and provide the “lowest” bid – numerically the least cost). The government is given great deference in determining which bidders are “responsible.” *Id.*

14. See *id.* at 1111. (stating employees must join the union council or federation within seven days of the beginning of the project).

15. Nagel, *supra* note 2.

16. STEVEN M. SIEGFRIED, INTRODUCTION INTO CONSTR. LAW 1-2 (1987) (citing *Wester v. Belote*, 103 Fla. 976, 982 (Fla. 1931)). While private contracts have few restrictions, government contracts involve extensive regulation. *Id.* Government contracts are inherently political and may favor certain businesses over others. *Id.* See Nagel, *supra* note 2 (explaining that public government construction projects constitute most of the high-dollar amount, high-profile projects, including the Hoover Dam and the Big Dig in Boston).

17. See Nagel, *supra* note 2 (explaining that regulations include issuing permits and zoning ordinances, outlining disposal methods and noise levels).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Pacific Architects Collaborative v. State of California*, 100 Cal. App. 3d 110, 125 (1979) (stating that the court is strongly persuaded by decisions relating to federal procurement bidding).

22. Siegfried, *supra* note 16 and accompanying text.

23. *Project Labor Agreements Examined, Hearing Before the Subcomm. On Employment, Safety, and Training, of the Committee on Health, Education, Labor, and Pensions*, 106th Cong. 6 (2000) (statement of Gary C. Miller, Congressional Representative from California):

This Comment focuses on the politics involved in federally-funded public construction projects. The background will outline the history of PLAs, including applicable federal law. Then, this Comment will analyze whether the President has the authority to execute orders in this area of law. Next, this Comment will analyze whether state action is preempted by federal law. Then, this Comment will discuss the current bills in Congress regarding PLAs and their possible unforeseen ramifications. Finally, this Comment will propose multiple solutions for PLAs in future construction projects.

II. BACKGROUND

This Comment focuses on the question whether state legislation frustrates the NLRA by considering various court opinions. First, this section discusses the relationship between the NLRA and PLAs. Second, this section delves into Supreme Court decisions regarding PLAs and how those decisions shaped public construction projects. Third, this section considers executive orders and the separation of power between the executive and legislative branches. Fourth, this section considers different responses from the states. Finally, this section looks at whether the NLRA preempts the state responses.

A. *The Unique Circumstances of Construction Law*

1. *The National Labor Relations Act*

Since the 1930s, owners and general contractors have commonly used PLAs in construction projects.²⁴ The success of PLAs on private construction projects led to implementation in the public sector.²⁵ The government used PLAs to neutralize the intensely fragmented relationship between management and unions, and to ensure the timeliness of construction projects.²⁶ PLAs were originally considered illegal because PLAs required the

If the PLA requires an owner to hire union craftsmen only, the owner cannot even use their own employees. In addition, the owner will have to make contribution to the union pension and health plans despite the fact that the owner may offer their own plans. These requirements create an economic barrier that prevent open shops from effectively competing for PLAs. *Id.*

24. *See id.* (explaining that “[PLAs] have been around since the 1930s, beginning with the Grand Coulee Dam, Hanford Nuclear Test Site, Department of Energy’s Oak Ridge Reservation, and Cape Canaveral Air Station”).

25. Henry H. Perritt, Jr., *Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court’s Boston Harbor Decision*, 12 LAB. LAW. 69, 70 (1996).

26. *Id.* at 69.

appointment of a single union representative even before an election had taken place.²⁷

Congress passed the National Labor Relations Act (“NLRA”) in 1935 to promote commerce and prevent industrial hardships caused by labor-management disputes.²⁸ Congress desired orderly and peaceful procedures in labor-relations to protect employee rights and deter labor disputes.²⁹ However, when drafting the NLRA, Congress failed to consider the nature of the construction industry.³⁰

Practically, PLAs address unique circumstances in the construction industry, including short-term employment, the employer’s need to set labor costs in advance of a project before making an accurate bid, and the employer’s need for a steady supply of labor for referral.³¹ During construction projects, short-term hiring prevents employees from formally electing a bargaining representative.³² Therefore, Congress expressly provided that PLAs could contain “7-day union-security clauses, exclusive hiring-hall referral procedures, and training and seniority requirements as hiring priorities,” and employees could demand an election pursuant to §§ 9(c) or 9(e) despite having a PLA in effect.³³

Because of the strong impact this procedure had on the construction industry, Congress amended the NLRA with the Landrum-Griffin Act in 1959.³⁴ The NLRA allows PLAs, which require contractors to perform work only if they agree to become

27. See Langworthy, *supra* note 13, at 1106 (citing *George Harms Constr. Co v. New Jersey Turnpike Auth.*, 644 A.2d 76, 84 (N.J. 1994)).

28. National Labor Relations Act, PL 115-281 as codified in 29 U.S.C. §§ 151-169 (1947) (“NLRA”).

29. Labor disputes affecting interstate commerce are heard by the National Labor Relation Board (“NLRB”). The NLRA guarantees employees the right to join unions, bargain collectively through representatives, and engage in certain concerted activities. NLRA, 29 U.S.C. § 157 (1947). Congress amended the NLRA with the Taft-Harley Act, outlawing closed shops, curtailing strikes and boycotts, and giving employees the right to refrain from union activity. NLRA, 29 U.S.C. § 141, *et seq.* (1947). Congress further amended the NLRA with the Landrum-Griffin Act, which restricted picketing and boycotting, regulated internal union affairs, and limited “top down” organizing campaigns by unions to force employer recognition. NLRA, 29 U.S.C. § 401 (1947); *Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 615, 632 (1975).

30. NLRA, 29 U.S.C. §§ 151-169 (1947).

31. H.R. Rep. No. 86-741 at 19 (1959), 1 Leg. Hist. 777; *reprinted in* 1959 U.S.C.C.A.N., 2424, 2442.

32. *NLRB v. Int’l Ass’n of Bridge*, 434 U.S. 335, 349 (1978). S. Rep. 86-187 at 55 (1959), 1 Leg. Hist. 541-542; History 341-342, U.S. Code Cong. & Admin. News 1959, pp. 2318, 2373. Langworthy, *infra* note 34 and accompanying text.

33. *John Deklewa & Sons*, 282 N.L.R.B. 1375, 1380-81 (2015).

34. Landrum-Griffin Act, NLRA, 29 U.S.C. §§ 158(e) and (f) (1959); see Langworthy, *supra* note 13, at 1107 (explaining that because of the short-term nature of construction worker employment, it was extremely difficult to certify a bargaining agent for a group of construction employees prior to the project start date). In 1959, an exemption was passed for the construction industry. *Id.*

bound by its terms.³⁵ The NLRA also permits for pre-hire agreements in the construction industry between employers and labor organizations covering employees who have not yet been hired.³⁶ Without these exceptions, PLAs might have constituted an unfair labor practice either by interfering with employees' rights to choose a representative or discriminating against non-union members.³⁷

35. *Jindal*, 107 F. Supp. 3d at 591.

36. NLRA, 29 U.S.C. § 158(f); *Todd v. Jim McNeff, Inc.*, 667 F.2d 800, 801-02 (9th Cir. 1982) *aff'd*, 459 U.S. 1013 (1982) and *aff'd*, 461 U.S. 260 (1983) (explaining that PLAs may be signed before the union represents a majority of the employer's employees, and may continue through more than one project, even if the new project has high employee turnover).

37. NLRA 29 U.S.C. § 158(f) (1959); *Jindal*, 107 F. Supp. 3d at 590; *see also Todd*, 667 F.2d at 801-02:

for such an agreement (naming the unions to which all employees of all contractors and subcontractors must belong) might be interfering with employees' rights to bargain through representatives of their own choosing, in violation of §§ 8(a)(1) and 7, *see id.* §§ 158(a)(1) & 157, or unreasonably discriminating against those who are not union members, in violation of § 8(a)(3), [*see id.* § 158(a)(3)].

Id. Rarely used in the 1950s, renewed interest in PLAs encouraged use in the 1960s. Perritt, *supra* note 2525, at 69-70. PLAs were commonly used in the 1970s, when wage inflation led to general price inflation of costs on construction projects across the entire industry. *Id.* at 70.

Project labor agreements probably were first used in the 1930s on large government-funded projects such as flood control and hydroelectric dams. In the later 1940s the agreements were a regular feature of projects at atomic energy facilities. There was a lull . . . during the 1950s. However, . . . in the 1960s . . . there was the Walt Disney World Construction Project Agreement, and large managers, such as Bechtel, began to use project agreements.

Id. at 69-70. PLAs have generally gone legally uncontested until the 1990s where their use on public projects reached the Supreme Court. Robert W. Kopp & John Gaal, *The Case for Project Labor Agreements*, THE CONSTR. LAW. 1, 5 (1999). In *Woelke*, the U.S. Supreme Court upheld union signatory subcontracting clauses in construction agreements. *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 456 U.S. 645, 646 (1982). The Court held that Congress clearly intended to protect these clauses as evidenced by both the plain language and legislative history of § 8(e) and accepted "top-down" pressure for unionization. *Id.* Congress intended to accommodate construction-specific conditions when it modified § 8(e) added § 8(f) including the short-term nature of employment, the contractor's need for predictable costs and steady qualified labor, and the custom of using PLAs in the construction industry. *Id.* In *Boston Harbor*, the Supreme Court quoted Appellate Chief Judge Breyer, "this [PLA] is 'the very sort of labor agreement that Congress explicitly authorized and expected frequently to find.'" *Associated Builders & Contractors of Mass./R.I., Inc. v. Mass. Water Res. Auth.*, 935 F.2d 345, 347 (1st Cir. 1991). However, Congress has not preempted the entire field of labor relations nor clearly outlined which state regulations are preempted by the NLRA. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480-81 (1955). (Associated Builders & Contractors will be referred to as "ABC" throughout this Comment).

2. *The Supreme Court: Is the Government Acting as a Proprietor or Regulator on Public Projects?*

The Supreme Court addressed PLAs in *Boston Harbor*, creating a distinction between when the government acts as a proprietor or as a regulator.³⁸ In *Boston Harbor*, an independent government agency (“MWRA”) hired a project manager (“Kaiser”) to clean up the harbor.³⁹ The project had a budget of \$6.1 billion over ten years, with no allowance for delays.⁴⁰

Kaiser signed a PLA with a union council (“BCTC”) where BCTC exclusively bargained for all current employees, and any future employees must join the council’s union as a condition of hiring.⁴¹ The parties agreed not to strike, or otherwise cause delay, for the duration of the project.⁴² A third party, opposed to union labor, filed an action with the National Labor Relations Board (“NLRB”).⁴³ The NLRB determined the parties validly entered into the PLA under the NLRA.⁴⁴ Soon after, another third party opposed to the use of union labor (“ABC”)⁴⁵ sued the parties alleging the NLRA prohibits the parties’ pre-hire agreement.⁴⁶ The D.C. District

38. Bldg. & Constr. Trades Council of Metro. Dist. v. ABC of Mass./R.I., Inc., 507 U.S. 218, 222 (1993) (“*Boston Harbor*”).

39. *Id.*; MASS. GEN. LAWS ch. 92, § 1-1 *et seq.* (1993); Fed. Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (1972). Litigation which brought about this clean-up project can be found at U.S. v. Metro. Dist. Comm’n, 757 F. Supp. 121, 123 (Mass. 1991).

40. *See Boston Harbor*, 507 U.S. at 222 (citing MASS. GEN. LAWS ch. 92, § 1-1 *et seq.* (1993); MASS. GEN. LAWS ch. 149, § 44A - 44I; MASS. GEN. LAWS ch. 30 § 39M (1990) and describing statutory authority for MWRA’s responsibilities as an owner).

41. The Boston Harbor Wastewater Treatment Facilities Project Labor Agreement was approved and adopted by MWRA’s Board of Directors “in May 1989 and incorporated into its solicitation of bids for work on the project.” *Mass. Water Res. Auth.*, 935 F.2d at 347, *rev’d sub nom. Boston Harbor*, 507 U.S. 218 and *see* MWRA Pet. App. 107a (including the full text of Agreement).

42. *Boston Harbor*, 507 U.S. at 222 (showing that the District Court gave no allowances for delays or interruptions.) The project manager must promote worksite harmony, labor-management peace, and overall stability throughout the project. *Id.* As a condition of the contract, all bidders agreed and were bound by the provisions of the PLA. *Id.*

43. The non-party in this action was a contractors’ association who filed a charge with the NLRB claiming the PLA violated the NLRA. *Id.* at 222.

44. Perritt, *supra* note 25, at 1-3; *Boston Harbor*, 507 U.S. at 222.

45. *See* Lund & Oswald, *infra* note 100, at 2 (describing that since 1999, the Associated Builders and Contractors (“ABC”) have run well-financed and well-coordinated national campaigns against PLAs including a legal and regulatory team, a lobbying team, and a grassroots campaign).

46. ABC alleged preemption under the Employee Retirement Income Security Act of 1974 and violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, conspiracy to reduce competition, and various state law claims. The U.S. District Court for the District of Massachusetts rejected all of these claims and denied the requested injunction. *Boston Harbor*, 507 U.S. at 222.

Court rejected those allegations; however, the First Circuit reversed, by allowing the injunction.⁴⁷

On appeal, the Supreme Court outlined two distinct NLRA preemption principles based on two cases: *Garmon*⁴⁸ and *Machinists*.⁴⁹ Under *Garmon*, a state cannot require standards inconsistent with the NLRA or provide their own regulatory or judicial remedies for conduct prohibited under the NLRA.⁵⁰ Any inconsistent state regulation, general or specific, frustrates the congressional purpose and would be preempted by the NLRA.⁵¹ Under *Machinists*, states cannot regulate an area that has been left “to be controlled by the free play of economic forces” and must preserve the intentional congressional balance between management and labor.⁵² Congress intended for this gap to remain unregulated by the NLRA and the states.⁵³ State efforts to impose further regulation regarding economic pressure in labor disputes would be invalid under the *Machinists* principle.⁵⁴

In *Boston Harbor*, the Supreme Court found neither *Garmon* nor *Machinists* applied because MWRA acted as a purchaser of construction services, validly entered into a PLA to ensure efficient and timely completion of the project at the lowest cost, and tailored the PLA to one project.⁵⁵ State actions are not tantamount to regulation as a proprietor or owner because, as a market participant, the state can act without being preempted by the NLRA.⁵⁶ In contrast, if the government acted to regulate construction projects, the government would be far more powerful than a private actor performing the same regulation.⁵⁷

47. See *Boston Harbor*, 507 U.S. at 224 (explaining that the Circuit Court held that MWRA’s pervasive intrusion in the bargaining process led to impermissible regulation.) The PLA was preempted because MWRA was attempting to regulate activities that Congress intended to be remain unrestricted. *Id. Mass. Water Res. Auth.*, 935 F.2d at 359-60; *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (“*Garmon*”); *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976) (“*Machinists*”).

48. *Garmon*, 359 U.S. 236.

49. *Machinists*, 427 U.S. 132.

50. *Boston Harbor*, 507 U.S. at 224; *Garmon*, 359 U.S. 236.

51. *Garmon*, 359 U.S. at 244; see also *Jindal*, 107 F. Supp. 3d at 597 (citing *Wis. Dep’t of Indus., Lab. & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) (“*Gould*”): “Preemption should not be inferred where policies address conduct of peripheral concern to the NLRA or deeply rooted in local interests”).

52. *Boston Harbor*, 507 U.S. at 225; *Machinists*, 427 U.S. at 147.

53. *Boston Harbor*, 507 U.S. at 226 (citing *Golden State*, 475 U.S. at 614: “*Machinists* pre-emption preserves Congress’ intentional balance ‘between the uncontrolled power of management and labor to further their respective interests’”).

54. *Id.*

55. *Id.* at 229.

56. *Id.*

57. See *id.* (explaining the government plays a pivotally different role than private parties). A private party may regulate by boycotting a certain supplier

The *Boston Harbor* case legitimized PLAs for public projects and implicitly recognized the ability of the government to act akin to a private owner when acting as a proprietor in public construction projects.⁵⁸ Further, *Boston Harbor* recognized Congress's intent to accommodate construction industry-specific conditions, including the short-term nature of employment, the contractor's need for predictable costs, and the need for a steady labor supply.⁵⁹

3. *Life After Boston Harbor: Gould and Brown Further Define Regulation*

Following *Boston Harbor*, the Supreme Court further defined government actions as a regulator in subsequent cases.⁶⁰ States play a qualitatively different role than private parties when acting as a regulator.⁶¹ Preemption only occurs when a state regulates in a protected zone under either *Garmon* or *Machinists*.⁶² Therefore, courts have found that Congress intended to preempt only state regulation and not state action taken as a proprietor or market participant.⁶³

a. *Gould*: Government Boycotts are Tantamount to Regulation

In *Gould*, the Supreme Court held that a Wisconsin statute using spending power instead of police power to regulate was preempted by the NLRA.⁶⁴ The statute forbade state agents from conducting business with any person or company who violated the NLRA at least three times within five years.⁶⁵ Although nothing in the NLRA prevents private parties from boycotting, government boycotts have greater ramifications.⁶⁶ By express prohibition of state purchases from repeat labor law violators, Wisconsin's action

or however they please without violating the Supremacy Clause. *Id.* However, when governments boycotts, this action is in violation with NLRA preemption. *Id.*

58. See Perritt, *supra* note 25, at 70 (citing Charles E. Murphy & Robert P. Casey, *A Detailed Policy and Legal Analysis of Public Owner Project Labor Agreements* iii (no date)).

59. *Rancho Santiago*, 623 F.3d at 1027 (referencing *Boston Harbor*, 507 U.S. at 231).

60. *Gould*, 475 U.S. at 286.

61. *Jindal*, 107 F. Supp. 3d at 598 (referencing *Boston Harbor*, 507 U.S. at 231).

62. *Boston Harbor*, 507 U.S. at 226-27; see also *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir. 1996) (describing a prerequisite to NLRA preemption is finding that the government action in question constitutes regulation of labor relations between employers and employees).

63. *Rancho Santiago*, 623 F.3d at 1022; *Cardinal Towing*, 180 F.3d at 691.

64. *Gould*, 475 U.S. at 289.

65. *Id.*

66. *Id.*

became tantamount to regulation.⁶⁷

Thus, the pivotal difference between *Boston Harbor* and *Gould* is that the interest in *Boston Harbor* was proprietary, whereas the interest in *Gould* was regulatory.⁶⁸ In *Boston Harbor*, “the public agency limited its spending conditions to the protection of its investment or proprietary interest.”⁶⁹ In *Gould*, the state “deployed its spending authority to achieve a goal far broader than merely protecting or fostering its own investment or proprietary interest.”⁷⁰

b. *Brown*: States Cannot Use Regulation to Further a Labor Policy

The Supreme Court held in *Brown* that a California statute was subject to the *Machinists* preemption.⁷¹ The statute prohibited certain employers who received state funding from using those funds to assist, promote, or deter union organization.⁷² Although the statute acknowledged its policy to not interfere with an employee’s choice regarding union membership, the Court found “beyond dispute” that the state was regulating.⁷³

The Court found the legislative purpose furthered a labor policy, which is not a legitimate response to local economic needs, and failed to promote the efficient procurement of goods and services.⁷⁴ This viewpoint discriminatory statute negatively restricted employer speech and only applied when an employer discouraged unions.⁷⁵

Under the analysis of *Machinists*, the statute regulated the employer’s non-coercive speech about unionization, which is an area Congress intentionally left unregulated.⁷⁶ *Brown* thus clarified the *Machinists* exception to the *Boston Harbor* analysis and prevented the government regulation.⁷⁷

67. *Id.*

68. *Hotel Emp. & Rest. Emp. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 214 (3rd Cir. 2004) (discussing *Boston Harbor*).

69. *Id.*

70. *Id.*

71. *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 63 (2008) (“*Brown*”).

72. *Id.*

73. *Id.*

74. *Id.* at 70.

75. *Id.*

76. *Id.*

77. The Supreme Court rejected the neutral statement of policy and instead relied on the substance of the statute and its effects. While the Supreme Court found that although this law was facially neutral, the law was regulatory in effect, and therefore not valid under the market participant exception. *Brown*, 554 U.S. at 70 (quoting “[i]t is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant”).

B. Presidential Orders Regarding Project Labor Agreements

1. Do Presidents Have the Authority to Issue these Executive Orders?

During four consecutive administrations, presidents issued executive orders regarding PLAs.⁷⁸ Yet, the tenor of each executive order changed depending on the political party in power.⁷⁹

A presidential executive order directs officers and agencies to either perform or not perform certain tasks.⁸⁰ Although no language in the U.S. Constitution expressly authorizes executive orders, the basis lies in Article II of the Constitution.⁸¹ Article II, Section 1, Clause 1 mentions “executive power” which is further detailed in Section 3 to “take Care that the Laws be faithfully executed.”⁸² Together, these constitutional provisions allow the executive branch to issue orders and Congress further reinforces presidential executive orders regarding procurement.⁸³ Every President has issued executive orders in various ways and many Presidents used them to make significant policy decisions.⁸⁴

Justice Jackson’s concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer* (“*Youngstown*”) gave the three levels of presidential power used in determining executive overreach: 1) if

78. Exec. Order 12,800, 57 Fed. Reg. § 12985 (1992 revoked by Exec. Order 12,836, 58 Fed. Reg. § 7045 (1993)); Exec. Order 12,818, 57 Fed. Reg. § 48713 (1992 revoked by Exec. Order 12,836, 58 Fed. Reg. § 7045 (1993)); Exec. Order 12,836, 58 Fed. Reg. 7045 (1993 revoked by Exec. Order 13,201, 66 Fed. Reg. § 11221 (2001) (in part) and Exec. Order 13,202, 66 Fed. Reg. § 11225 (2001)); Exec. Order No. 12,954, 60 Fed. Reg. § 13023 (1995 revoked by Chamber of Com. of the U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)) (“*Reich*”); Exec. Order 13,201, 66 Fed. Reg. § 11221 (2001 revoked by Exec. Order 13,496, 74 Fed. Reg. § 6107 (2009)); Exec. Order 13,202, 66 Fed. Reg. § 11225 (2001 amended by Exec. Order 13,208 66 Fed. Reg. § 18399 (2001) and revoked by Exec. Order 13,502, 74 Fed. Reg. § 6985 (2009)); Exec. Order 13,208, 66 Fed. Reg. § 18399 (2001 revoked by Exec. Order 13,502, 74 Fed. Reg. § 6589 (2009)); Exec Order 13,496, 74 Fed. Reg. § 6107 (2009). Exec Order 13,502, 74 Fed. Reg. § 6589 (2009) (collectively referred to as “Exec. Orders”).

79. *Id.*

80. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (“*Youngstown*”).

81. U.S. Const. art. II.

82. U.S. Const. art. II, § 1, cl. 1 and U.S. Const. art. II, § 3.

83. See Fed. Prop. and Admin. Serv. Act, 40 U.S.C. § 471 *et seq.* (“Procurement Act”) (describing “[i]t is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees”).

84. NCC Staff, *Executive Orders 101: What are they and how do Presidents use them?*, CONST. DAILY (Jan. 23, 2017), constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/.

the President is acting in accordance with Congress's will, then presidential power is at its highest; 2) if the President is acting in an area Congress has been silent, then presidential power is determined by the facts of the case; and 3) if the President is acting contrary to Congress's will, then presidential power is at its lowest.⁸⁵

2. *Presidential Executive Orders Regarding PLAs*

In 1992, President George H. W. Bush issued the first two executive orders concerning PLAs.⁸⁶ These orders prohibited contractors from entering into PLAs on all public construction projects.⁸⁷ President William J. Clinton rescinded both orders and enacted his own executive order that prohibited government

85. *Youngstown*, 343 U.S. at 635–38 (breaking down the analysis):

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. (Jackson, concurring).

86. Exec. Order 12,800, 57 Fed. Reg. § 12985 (1992 revoked by Exec. Order 12,836, 58 Fed. Reg. § 7045 (1993)); *see also* Exec. Order 12,818, 57 Fed. Reg. § 48713 (1992 revoked by Exec. Order 12,836, 58 Fed. Reg. § 7045 (1993)) (prohibiting government contractors from entering into pre-hire agreements in the construction industry); Fed. Prop. and Admin. Serv. Act, 40 U.S.C. § 471 *et seq.* (“Procurement Act”).

87. *Id.*

agencies from using contractors who permanently replaced striking workers.⁸⁸ The D.C. Circuit Court of Appeals held the NLRA preempted President Clinton's executive order because the regulatory order was tantamount to policy making, as further discussed in the analysis section.⁸⁹

In 2001, President George W. Bush signed three executive orders⁹⁰ that prohibited federal agencies from requiring or prohibiting project labor agreements on future federally funded construction projects.⁹¹ Although a union challenged the President's authority to issue these orders, the D.C. Circuit Court of Appeals held that the President validly issued these orders under both constitutional and legislative authority.⁹² Similar to Clinton's

88. This prohibition was limited to public projects over \$100,000. Exec. Order No. 12,954, 60 Fed. Reg. § 13023 (1995 revoked by *Reich*, 74 F.3d 1322); Exec. Order 12,836, 58 Fed. Reg. 7045 (1993 revoked by Exec. Order 13,201, 66 Fed. Reg. § 11221 (2001) (in part) and Exec. Order 13,202, 66 Fed. Reg. § 11225 (2001)).

89. In 1995, the Chamber of Commerce and other employer associations challenged Clinton's executive order in the D.C. District Court. *Chamber of Com. of the U.S. v. Reich*, 897 F. Supp. 570, 579 (D.D.C. 1995) (*rev'd sub. nom.* by *Reich*, 74 F.3d 1322). The court determined that order was not judicially reviewable or legal. *Id.* On appeal, the Court of Appeals asked only whether there was a "reasonable nexus between the [president's] actions and the pursuit of economy and efficiency in the management of federal property." *Id.* The Court held that the President had the authority to issue these executive orders under the Procurement Act, but that the executive order was regulatory in nature and preempted by the NLRA. *Reich*, 74 F.3d at 1339; *see also* *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc), *cert. denied* 443 U.S. 915 (1979) (holding that the President did not have "a blank check . . . to fill in at his will" but the President "make procurement policy decisions based on considerations of economy and efficiency.") "[T]his standard can be applied generally to the President's actions to determine whether those actions are within the legislative delegation." *Id.* at 793.

90. Exec. Order 13,201, 66 Fed. Reg. § 11221 (2001 revoked by Exec. Order 13,496, 74 Fed. Reg. § 6107 (2009)); Exec. Order 13,202, 66 Fed. Reg. § 11225 (2001 amended by Exec. Order 13,208 66 Fed. Reg. § 18399 (2001) and revoked by Exec. Order 13,502, 74 Fed. Reg. § 6985 (2009)); Exec. Order 13,208, 66 Fed. Reg. § 18399 (2001 revoked by Exec. Order 13,502, 74 Fed. Reg. § 6589 (2009)).

91. When these executive orders were signed, the Governors of Maryland and Virginia disagreed about whether to hire union-only workers on the Woodrow Wilson Bridge, which connected to both states. After the signing of these orders, the parties chose to use non-union crews. *The Bridge Impasse*, WASH. TIMES, Feb. 1, 2001, at A16 (noting that Bush's executive order is a contentious one between Maryland and Virginia, which were splitting the costs of the project); Michael D. Shear, *Wilson Bridge Labor Talks to Resume*, WASH. POST, Aug. 14, 2001, at B1.

92. *Bldg. & Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002) ("*Allbaugh*") (analyzing the *Youngstown* standard that the President's authority "must stem either from an act of Congress or from the Constitution itself"). The District Court invalidated § 3 of Exec. Order 13,202 as going beyond the scope of the President's authority. *Allbaugh*, 172 F. Supp. 2d at 162. The Appellate Court determined that the President had the authority over "any agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects." *Allbaugh*, 295 F.3d at 32.

rescinding of H.W. Bush's orders, President Barack H. Obama rescinded the 2001 executive orders and replaced them with his own.⁹³ Obama's executive order allowed, but did not require, federal agencies to use project labor agreements on any construction project over \$25 million.⁹⁴ As this Comment will further discuss, Congress introduced bills in response to Obama's order, but none left their respective subcommittees.⁹⁵

Although President Trump issued many executive orders,⁹⁶ he has yet to rescind Obama's executive order despite publicly promising to do so and increase infrastructure spending.⁹⁷ With the Atlanta I-85 highway collapse in March 2017 and natural disasters in Texas, Florida, California, and Puerto Rico, any potential executive order by President Trump would likely be reminiscent of the prior Bush executive orders.⁹⁸

With these differing executive orders changing the policies on PLAs, union and non-union stance strengthens and weakens dependent on the party in power.⁹⁹ Without consistency, contractors are left to pick up the pieces while attorneys must deal with the ramifications of continual changes in the law.

C. State Reactions to Project Labor Agreements

In response to these executive orders, many states have passed legislation concerning PLAs while others remain silent.¹⁰⁰ Below, a map of the United States separates the states into three categories: states with pro-PLA responses (blue), anti-PLA responses (red), and states that have remained silent regarding PLAs (gray). These issues will be further discussed below.

93. Exec Order 13,496, 74 Fed. Reg. § 6107 (2009); Exec Order 13,502, 74 Fed. Reg. § 6589 (2009).

94. Peters, *supra* note 27.

95. H.R. 735 – 112th Congress (2011-2012) introduced by Rep. John Sullivan (R-OK) called "Government Neutrality in Contracting Act." S.B. 119, 112th Congress (2011-2012) introduced by Sen. David Vitter (R-LA) called "Government Neutrality in Contracting Act."

96. Trump has issued 64 executive orders since assuming the presidency, none of them dealing with construction contracts other than building the wall. Exec. Order 13,767, 82 Fed. Reg. § 8793 (Jan. 25, 2017).

97. Juliet Eilperin & Darla Cameron, *How Trump is rolling back Obama's legacy*, WASH. POST (Oct. 4, 2017), www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.33bda9b5c198.

98. Umair Tariq, *What the Atlanta Highway Collapse Signals About American Infrastructure*, VALUEWALK (Apr. 7, 2017), www.valuewalk.com/2017/04/atlanta-highway-collapse-infrastructure/.

99. Exec. Orders, *supra* note 78.

100. John Lund & Joe Oswald, *Public Project Labor Agreements: Lessons Learned, New Directions*, 26 LAB. STUD. J. 1, 10-11 (2001) (citing Robert A. Jordan, *PLAs as a Benefit to Contractors*, BOSTON GLOBE (Apr. 6, 1999)).

1. PLAs provide uniform wages, benefits, overtime pay, hours, working conditions, and work rules for work on major construction projects.¹⁰⁶
2. PLAs provide contractors and the owner with a reliable and uninterrupted supply of qualified workers at predictable costs.¹⁰⁷
3. PLAs seek to ensure that a project will be completed on time and on budget due to the supply of qualified labor and relative ease of project management.¹⁰⁸
4. PLAs help ensure minimal or no labor strife by prohibiting strikes and lockouts and including binding procedures to resolve labor disputes.¹⁰⁹
5. PLAs make large projects easier to manage by placing unions under one contract, rather than separately bargaining with several unions that may have different wage and benefit structures.¹¹⁰
6. PLAs may include provisions to recruit and train workers by requiring contractors to participate in recruitment, apprenticeship, and training programs for women, minorities, veterans, and other under-represented groups.¹¹¹

106. *Id.*; Congress enacted the Davis Bacon Act, requiring employers on federally-funded projects to pay their workers a prevailing wage. Davis Bacon Act, 40 U.S.C. §1341, *et seq.* (formerly 40 U.S.C. §276(a) (1931); WILLIAM G. WITTAKER, CONG. RESEARCH SERV., THE DAVIS-BACON ACT: SUSPENSION 15 (2005). Davis-Bacon requires the Secretary of Labor to determine the minimum hourly rate and fringe benefits for each class of mechanic and laborer for a particular geographic area called the “prevailing wage.” Davis Bacon Act, 40 U.S.C. §3142(a) (1931); Contract provisions and related matters, 29 C.F.R. §5.5(a) (2000); *see also* George Campbell Painting Corp. v. Chao, 2006 U.S. Dist. LEXIS 3318 (D. Conn., Jan. 23, 2006) (explaining that a contractor can satisfy its prevailing wage obligation by: paying workers in cash equal to prevailing wage and benefits; pay the basic hourly rate and contribute additional specified amounts to an employee fringe benefit program; or a combination of the two so long as the total meets the prevailing wage amount determined by the Secretary of Labor); ELIZABETH H. CONNALLY, *Key Labor and Employment Clauses for Construction Agreements* in CONSTR. LAW. GUIDE TO LAB. & EMP’T LAW 316, 316 (2d ed. 2016).

107. Moran, *supra* note 104.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

7. PLAs reduce misclassification of workers and the related underpayment of payroll taxes, workers compensation, and other requirements.¹¹²

8. PLAs indicate a larger percentage of construction wages stay in-state.¹¹³

9. PLAs may improve worker safety by requiring contractors and insisting compliance with OSHA and additional project safety rules.¹¹⁴

PLA proponents note the positive impact of creating career paths for women, minorities, veterans, and other under-represented populations.¹¹⁵ Developing qualified workers in the construction trades along with the inclusion of people historically underrepresented in the trades has a positive long-term economic benefit for the individuals who not only receive the jobs, but for the construction industry as a whole.¹¹⁶ Owners and general contractors who favor PLAs know the specific wages, benefits, worker quality, and deadlines before the project begins.¹¹⁷ PLAs include procedures that minimize labor disputes, one of the reasons for the creation of these agreements.¹¹⁸

2. States Opposing PLAs

Twenty-two states have passed legislation, passed constitutional amendments, or issued executive orders that are facially neutral or outright ban PLAs.¹¹⁹ Senator Jeff Flake (R-AZ)

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*; Project Labor Agreements, CRS R41310 (2010).

118. Moran, *supra* note 104.

119. Alabama – Fair and Open Competition in Gov't Constr. Act., ALA. CODE § 39-8-1 (2014).

Arizona – Fair and Open Competition Act, H. R. 115-1068, 115th Congress, 2d Sess. (Ariz. 2011).

Arkansas – Fair and Open Competition in Gov't Constr. Act, ARK. CODE ANN. § 22-9-801 (2015).

Florida – Legislative Intent, FLA. STAT. § 287.001 (2017).

Georgia – Public Works Constr. Contracts, GA. CODE ANN. § 13-10-3(d)(1)(A) (2013).

Idaho – Public works -- Wages, IDAHO CODE § 44-2013(4) (2012).

Iowa – Fair and Open Competition in Gov't Constr. Act, IOWA CODE § 73A.25 (2017).

Kansas – Competitive Bid Protection Act, KAN. STAT. ANN. § 16-2002 (2012).

Louisiana – Contracts in which Public Entities are Participants;

is a strong opponent to PLAs.¹²⁰ “The federal government should not support policies that discriminate against Arizona businesses and artificially inflate construction costs,” Flake stated after introducing an anti-PLA bill in the U.S. Senate in March 2017.¹²¹ “By expanding opportunities for Arizona’s non-union firms, this bill will help drive down costs on federal construction projects and ensure that taxpayer dollars are invested in construction and job creation, not lining the coffers of politically-connected unions.”¹²² Flake’s anti-PLA bill failed to pass during the 115th Congress.¹²³

Prohibitions and Duties; Contractors’ rights, LA. STAT. ANN. § 38:2225.5 (2014).
Michigan – Fair And Open Competition In Gov’t Constr. Act, MICH. COMP. LAWS SERV. § 408.871-883 (2011).

Mississippi – Miss. Emp’t Fairness Act, MISS. CODE ANN. § 71-15-1 *et al.* (2014).

Missouri – Requirements for Certain Contracts for Constr. of Projects [Effective until August 28, 2017], MO. REV. STAT. § 34.209 (2017).

Montana – Prohibition – Project Lab. Agreement, MONT. CODE ANN. § 18-2-425 (1999).

Nevada – Contract for public work for which estimated cost exceeds \$250,000 must be awarded to contractor who submits best bid, NEV. REV. STAT. § 338.147 (2015). “Project labor agreements are not absolutely prohibited and will be upheld if adopted in conformity the objectives of the Nevada competitive bidding laws.” *ABC, Inc. v. S. Nev. Water Auth.*, 979 P.2d 224 (Nev.1999).

North Dakota – Competition in Gov’t Constr. Contracts, N.D. CENT. CODE §48-12-01 *et al.* (2013).

Oklahoma – Fair and Open Competition in Gov’t Constr. Act, OKLA. STAT. tit. 61, § 86, *et al.* (2012).

South Carolina – Non-Discriminatory Procurement of Constr.-Related Serv. by the State, Exemptions, S.C. CODE ANN. § 8-15-70 (2013).

South Dakota – Pub. Pol’y for Fair and Open Competition in Gov’t Contracts Act, S.D. CODIFIED LAWS §5-18A-42 (2014).

Tennessee – Freedom in Contracting Act, Prohibited Provisions in Bid Specifications, Project Agreements, and Other Documents, TENN. CODE ANN. § 12-4-903 (2011).

Utah – Emp’t. on Pub. Works, UTAH CODE ANN. § 34-30-14(3) (1995).

Virginia – Contract Formation and Admin., Pub. Works Contract Requirements, VA. CODE ANN. §2.2-4321.2(B)(1) (2012).

West Virginia – Gov’t Constr. Projects, Certain Lab. Requirements not to be Imposed on Contractor or Subcontractor, W. VA. CODE § 5-22-3, *et al.* (2015).

Wisconsin – Pub. Works and Projects, WIS. STAT. § 66.0901(6m) (2017).

Contrary to the excel spreadsheet provided on The Truth About PLAs’ website, North Carolina’s H.B. 110 did not pass the Senate and was not signed into law. *Compare House Bill (2017-2018 Session)*, N.C. Gen. Assembly, www.ncleg.gov/BillLookup/2017/h110 (last visited Mar. 23, 2019) *with A Total of 24 States Restrict Government Mandated Project Labor Agreements*, THE TRUTH ABOUT PLAS (Jan. 28, 2018), thetruthaboutplas.com/2018/01/26/a-total-of-24-states-restrict-government-mandated-project-labor-agreements/.

120. *Flake Introduces Bill to Lower Federal Construction Costs and Increase Opportunities for Underrepresented Contractors*, FLAKE (Mar. 14, 2017), www.flake.senate.gov/public/index.cfm/press-releases?ID=13B2DE46-B590-4A77-8EE9-532DCE35DC62.

121. *Id.*

122. *Id.*

123. *All Info*, CONGRESS, www.congress.gov/bill/115th-congress/senate-bill/622/all-info (last visited Mar. 21, 2019).

An organization dedicated to non-union labor, Associated Builders and Contractors (“ABC”), is another vocal opponent of PLAs, offering numerous arguments against PLAs.¹²⁴

1. PLAs drive up project costs by attracting fewer bidders.¹²⁵ Not all bidders use union labor and are therefore excluded from bidding.¹²⁶

2. PLAs increase project costs by requiring high union wages.¹²⁷ Third, PLAs violate “lowest responsible bidder” laws.¹²⁸ The lowest responsible bidder is a bidder who is qualified, offers the lowest or best bid, capable of completing the project, and can meet the standards required by the project.¹²⁹ PLAs can violate these laws by changing who can

124. Moran, *supra* note 104; Lund & Oswald, *supra* note 100, at 10.

125. *Get The Truth*, THE TRUTH ABOUT PLAS, thetruthaboutplas.com/get-the-truth/ (last visited Mar. 22, 2019).

126. However, this claim is more inflammatory than scientific. Unfortunately, increased costs are a reality on many projects and are not insulated by PLAs. Cost overruns on union-only PLA construction projects include Boston Central Artery (\$2.5 billion over), East Side Reservoir in Los Angeles (\$220 million over), Justice Center in Parma, Ohio (\$2 million over), St. Louis Federal Courthouse (unknown, but damages claimed for over \$2 million). ARMAND J. THIEBLOT, MARYLAND FOUND. FOR RESEARCH AND ECON. EDUC., REVIEW OF THE GUIDANCE FOR A UNION-ONLY PROJECT LABOR AGREEMENTS FOR CONSTRUCTION OF WILSON BRIDGE (2000).

The *Seattle Times* reported the Western Washington ABC Chapter argued using PLAs on the Puget Sound Transit Board’s project would “needlessly increase the cost of construction by limiting the number of bidders on the project, restricting bidding to union firms or those few open-shop companies willing to sign a project agreement. Reduced bidding competition means taxpayers will pay more than they need to for a regional transit system – a lot more.” However, BCTC countered that one-third of the registered contractors on the project were non-union and the additional costs were due to last-minute changes by owners and design mistakes. See Lund & Oswald, *supra* note 100, 100 at 10-11 (citing Kathleen B. Garrity, *Labor pact will make RTA costs jump*, SEATTLE TIMES, May 20, 1999, at p. B5 (emphasis in original) and Rick S. Bender & Allan B. Darr, *Transit Job Too Important Not to Include Labor Pact*, SEATTLE TIMES, May 26, 1999, at B5).

127. The Truth About PLAs, *supra* note 125; Lund & Oswald, *supra* note 100, at 12. However, this claim fails to consider Davis Bacon wages, which are required on all major federally-funded projects. Moran, *supra* note 104. Davis Bacon requires all employees be paid the “prevailing wage” determined by particular geographic areas determined by the Secretary of Labor on all federal public construction projects in excess of \$2,000. Davis Bacon Act, Rate of Wages for Laborers and Mechanics, 40 U.S.C. §3142(a) (2002). Contract Provisions and Related Matters, 29 C.F.R. §5.5 (1983).

128. The Truth About PLAs, *supra* note 125. However, nearly every state has either indicated no violation or criteria to review PLAs on a case-by-case basis. Lund & Oswald, *supra* note 100, at 12.

129. *Lowest Responsible Bidder*, BUS. DICTIONARY, www.businessdictionary.com/definition/lowest-responsible-bidder.html (last visited Mar. 22, 2019).

be qualified – those who use union labor – and does not award the project to the bidder with the actual lowest bid.¹³⁰

3. PLAs fail to deliver on their promised labor peace.¹³¹ While PLAs are believed to prevent labor disagreements and disruption, that is not always the case.¹³²

4. PLAs prevent non-union firms and workers from bidding or working on certain publicly owned projects and discriminate against non-union workers.¹³³

5. PLAs don't improve safety on projects.¹³⁴

6. PLAs discourage competitive bidding and interfere with the competitive nature of the market.¹³⁵

Many opponents believe that a PLA “effectively unionizes an entire construction project because all union and non-union contractors must comply with certain union protocol and procedure.”¹³⁶ Opponents also argue that PLAs discriminate against the majority of the workforce, since only 14% of the American construction workforce is unionized.¹³⁷ ABC successfully led campaigns in Indiana and Kentucky and repealed the state prevailing wage law prohibiting state agencies from establishing or mandating a wage schedule for state public works contracts.¹³⁸

130. The Truth About PLAs, *supra* note 125.

131. The Truth About PLAs, *supra* note 125. Although ABC pointed to a carpenter's strike, most carpenters were back to work the next day and resolved the strike shortly thereafter. *Id.* (citing *Strike Sets Stage for Court Case*, ENGR NEWS-RECORD, vol. 242, no. 21, p. 18 (1999)).

132. The Truth About PLAs, *supra* note 125.

133. *Id.*; Lund & Oswald, *supra* note 100, at 14-16.

134. The Truth About PLAs, *supra* note 125; *see* Moran, *supra* note 104 (explaining that research provided by both sides does not show that PLA construction projects are always safer, timely, and efficient than non-PLA projects).

135. The Truth About PLAs, *supra* note 125; *see also* Joe Woodard, *Union-Only Project Agreements Restrict Open Competition*, ENGR NEWS-REC., at 66 (July 18, 1994) (stating “[p]ublic contracting agencies are requiring that all contractors on their projects become signatory to union-only project labor agreements. ... The practice flies in the face of state competitive bidding and it is out of control).

136. Cent. Iowa BCTC, *AFL-CIO v. Branstad*, 2011 U.S. Dist. LEXIS 104871, at *3 (S.D. Iowa, Sept. 7, 2011).

137. Langworthy, *supra* note 13, at 1105; George Leef, *Here's An Easy Way For Trump to Cut the Cost of Government*, FORBES (May 6, 2017) www.forbes.com/sites/georgeleef/2017/05/06/heres-an-easy-way-for-trump-to-cut-the-cost-of-government/.

138. In 2015, ABC of Indiana/Kentucky mounted campaigns to eliminate or effectively lower the prevailing wage around Indiana. In doing so, the prevailing

However, this repeal did not affect any work performed on federally-funded projects covered by Davis Bacon.¹³⁹

3. Comparing PLA and Non-PLA Projects: Which is Better?

Projects with and without PLAs are difficult to compare because each project is unique, but the *Boston Globe* analyzed two similar projects – one with a PLA and one without.¹⁴⁰ The project without the PLA ended up initially bidding lower, but incurred \$2 million overrun and an additional \$1.5 million for overtime to complete the project on time when compared to a similar project with a PLA.¹⁴¹

The University of California Berkley Labor Center conducted a two-part study analyzing the effects of using PLAs in the construction of community colleges in California.¹⁴² The first part involved seven projects: three with PLAs and four without.¹⁴³ The PLA projects attracted a similar number of bidders, bid at a slightly lower price point, had similar or fewer construction problems, and trained more young, local workers.¹⁴⁴ The second part involved a statistical study of 263 community colleges, showing PLA projects with slightly more bidders and slightly lower bids than non-PLA projects.¹⁴⁵ The study concluded that PLAs do not reduce the number of bidders, raise costs on these projects, or increase the time to complete projects.¹⁴⁶

wage dropped below the common union wage and made union employment less attractive. *Common Construction Wage Home*, IND. DEPT OF LAB., www.in.gov/dol/2723.htm (last visited Mar. 24, 2019). In early 2017, ABC successfully lobbied Right to Work laws and repeal the prevailing wage in Kentucky. Catrona Lanctot, *Victory in Frankfort: Right to Work and Prevailing Wage*, A.B.C. OF IND./KY. (Jan. 12, 2017), www.abcindianakentucky.org/victory-in-frankfort-right-to-work-and-prevailing-wage/; *Davis Bacon Act*, ABC OF IND./KY., www.abc.org/Politics-Policy/Issues/Davis-Bacon-Act (last visited Mar. 24, 2019).

139. *Id.*

140. See Lund & Oswald, *supra* note 100, at 10-11 (citing Robert A. Jordan, *PLAs as a Benefit to Contractors*, BOSTON GLOBE (Apr. 6, 1999)).

141. *Id.*

142. Emma Waitzman & Peter Philips, *Project Labor Agreements and Bidding Outcomes: The Case of Community College Construction in California*, U.C. BERKLEY LAB. CTR. (Jan. 9, 2017), laborcenter.berkeley.edu/project-labor-agreements-and-bidding-outcomes/.

143. See *id.* (providing that in 2004, Marin County passed a bond measure allowing for nearly \$250 million to upgrade the College of Marin). It included construction of seven buildings, three with PLAs and four without between 2008 and 2015. *Id.*

144. *Id.* (explaining that all seven buildings were completed on time). Although each project was initially completed under budget, two of the four non-PLA projects involved cost overruns which exceeded their original budgets. *Id.* These costs were determined to relate to architectural errors rather than faulty construction. *Id.*

145. *Id.*

146. *Id.* (finding that the second study's PLA projects had slightly more

While the states disagree on whether to allow PLAs, both sides make a number of viable arguments. One study done in California, a pro-PLA state, concluded that using union labor did not confirm the arguments against PLAs. However, with only one study, it is difficult to ascertain whether this study is conclusive in other jurisdictions.

D. Does the NLRA Preempt the States?

Congress retains the power to preempt state law via the Constitution's Supremacy Clause.¹⁴⁷ In preemption cases, the court must assume that state police powers remain unless Congress expressed preemption.¹⁴⁸ Without express preemption by Congress, state action can also fall under implied preemption: field preemption or frustration of purpose.¹⁴⁹ Field preemption exists when the federal regulatory scheme is so pervasive, it occupies the entire field.¹⁵⁰ A state law frustrates the purpose of a federal law when it obstructs Congress's purpose and objective.¹⁵¹

States would argue that under their dormant commerce clause power, they have the authority to decide whether to enter into a PLA because doing so affects the rights and welfare of its citizens and furthers a legitimate state interest.¹⁵² Even if the state regulation is preempted, a state would argue that, when engaging in the buying of goods and services, it can enter into PLAs similar to private parties and fall under the market participant exception.¹⁵³ The NLRA does not contain an express statutory preemption provision nor indicate congressional intent to supplant the entire field of labor law.¹⁵⁴ Therefore, only state action that

bidders compared to non-PLA projects, but that the difference was not significant; the same analysis followed for the lower price point).

147. U.S. Const. art. VI, cl. 2.

148. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (finding that in all preemption cases, the court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

149. *Id.* at 625.

150. *Id.* at 569; *see also* *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 577 (7th Cir. 2012) (stating "[s]ome federal statutes do receive such wide berths as to displace virtually all state laws in the neighborhood. (The National Labor Relations Act and ERISA are the best examples)").

151. *Wyeth*, 555 U.S. at 602; *see also* *Gregory v. Burlington Northern R. Co.*, 638 F. Supp. 538, 547 (D. Minn. 1986) (reasoning that while the Railway Labor Act doesn't explicitly state railroad employees cannot initiate discharge disputes with federal courts, doing so would bypass arbitration procedures.) Doing so would frustrate the congressional purpose of the RLA – promoting stability in labor-management relations and minimizing interruptions in the nation's transportation service. *Id.*

152. *Tarrant Regional Water District v. Herrmann*, 656 F.3d 1222, 1231 (10th Cir. 2011).

153. *Jindal*, 107 F. Supp. 3d at 592.

154. *Id.*; *Metro Life Ins. Co. v. Mass.*, 471 U.S. 724, 747 (1985); *Brown v.*

frustrates the purpose of the NLRA would be preempted.¹⁵⁵

1. *The Fifth Circuit Distills the Market Participant Exception*

The Fifth Circuit Court of Appeals used *Cardinal Towing*¹⁵⁶ to distill *Boston Harbor* into a two-part test, which many circuit courts have relied on.¹⁵⁷ In determining the proprietary nature of the government's actions, the Fifth Circuit asked two questions:

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 primary goal was to encourage a general policy rather than address a specific proprietary problem?¹⁵⁸

These questions isolate and compare government action in the market with the actions of private parties to rule out regulatory behavior.¹⁵⁹

If the government's goal advances societal goals – such as punishing labor practices by disfavoring or withholding contract work – rather than narrowly focusing on spending power in contracting, the labor practice would be preempted.¹⁶⁰ The

Hotel & Rest. Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 501-02 (1984).

155. *Jindal*, 107 F. Supp. 3d at 592; *Metro Life Ins. Co.*, 471 U.S. at 747; *Brown*, 468 U.S. at 501-02.

156. *Cardinal Towing & Auto Repair, Inc., v. City of Bedford, Tex.*, 180 F.3d 686, 693 (5th Cir. 1999) ("*Cardinal Towing*") (describing that before November 1995, the City of Bedford, Texas ("City") permitted towing services to individually tow vehicles, store the vehicles at their respective lots, and then owner would ultimately pay for the service). In November, the City instead contracted with one company to tow all requests by City officials, not by private parties. *Id.* The City's bid contained certain requirements, including short response times and access to a wrecker. *Id.* Three companies submitted bids and the contract was awarded. *Id.* A non-winning bidder who didn't meet the requirements complained as the City re-bid the contract. *Id.* The bidder didn't win again because it still hadn't met the requirements and filed a discrimination suit. *Id.*

157. *Id.*; see also *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 89 (2d Cir. 2006) (showing the Second Circuit adopted *Cardinal Towing's* test); see also *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 207 (3d Cir. 2004) (showing the Third Circuit adopted a test similar to *Cardinal Towing*); see also *N. Ill. Chapter of ABC, Inc. v. Lavin*, 431 F.3d 1004 (7th Cir. 2005) ("*Lavin*") (showing the Seventh Circuit adopted a test similar to *Cardinal Towing*); *Rancho Santiago*, 623 F.3d at 1016 (showing the Ninth Circuit adopted *Cardinal Towing's* test).

158. *Cardinal Towing*, 180 F.3d at 693.

159. *Id.*

160. *Id.* at 692; see *Reich*, 74 F.3d at 1339 (describing the NLRA preempted the executive order barring the federal government from contracting with companies that permanently replaced striking workers); see also *Air Transport*

municipal government in *Cardinal Towing* acted as a typical private party when it selected a towing service to remove abandoned and disabled vehicles on public streets.¹⁶¹ The ordinance and contract specifications both promoted “efficient procurement” and were “narrow.”¹⁶² The municipality chose a single company to handle all of its towing needs which minimized confusion, clarified responsibility, and provided a unitary standard for all towing.¹⁶³ The contract specifications related to towing, a core interest to the government’s efficient running, and limited the towing to only non-consensual tows requested by local police.¹⁶⁴

2. *Market Participant Exception: Efficient Procurement – Best Value Does Not Always Mean Cheapest*

Many courts have discussed the first prong of the *Cardinal Towing* test: efficient procurement.¹⁶⁵ The Ninth Circuit determined in *Rancho Santiago*¹⁶⁶ that “efficient procurement” does not simply mean “cheap,” but instead means that the procurement must “serve the state’s purpose.”¹⁶⁷ Legitimate purposes are not

Assoc. of Am. v. City and County of San Fran., 992 F.Supp. 1149, 1179 (N.D.Ca.1998) (analyzing an ERISA preemption of a city ordinance barring contracts with employers that failed to offer domestic partner benefits to its workforce, where combating discrimination was ordinance’s primary goal and its terms were overbroad).

161. *Cardinal Towing*, 180 F.3d at 693.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*; *Rancho Santiago*, 623 F.3d at 1016; Bldg. Indus. Elec. Contractors Ass’n v. City of N.Y., 678 F.3d 184, 186 (2d Cir. 2012) (“*City of N.Y.*”); Elec. Contractors, Inc. v. Dep’t of Educ., 35 A.3d 188, 208 (Conn. 2012); Minn. Chapter of ABC, Inc. v. Cty. of St. Louis, 825 F. Supp. 238, 244 (D. Minn. 1993).

166. *Rancho Santiago*, 623 F.3d at 1016 (explaining that the Ninth Circuit Court of Appeals held in that the PLA in *Rancho Santiago* constituted government market participation not subject to preemption by the NLRA). The Rancho Santiago Community College District (“District”) contracted with the Los Angeles and Orange Counties BCTC and required a PLA as a contract condition. *Id.* The PLA required all contractors and subcontractors to contribute to union benefit programs, required workers to pay dues, prohibited labor disruptions, required an apprenticeship program for District residents, and maximized opportunities for minority-owned and women-owned businesses. *Id.* In response, non-union members sued in March 2004. *Id.* The District Court held that government was acting as a market participant and the PLA was exempt from preemption. *Id.* To determine whether the action is “tantamount to regulation,” the Ninth Circuit looked to the Fifth Circuit’s two-prong test: does the action reflect the entity’s own interest in the efficient procurement of needed goods and services; or does the action’s narrow scope address a specific proprietary problem or merely encourage a general policy? *Id.* The Ninth Circuit held this test offers two ways a state can prove its actions fall under the exception: by affirmatively showing its interest in efficient procurement; or pointing to the narrow scope of the action to prove it is not regulatory. *Id.*

167. *City of N.Y.*, 678 F.3d at 191-92; see *Rancho Santiago*, 623 F.3d at 1025 (quoting Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031,

limited to economic goals, like timely completion and costs; they extend to other goals including health, safety, and environment.¹⁶⁸ The court failed to be persuaded by the argument that the primary purpose of PLAs was to preference unions.¹⁶⁹ Instead, the court found the government used PLAs to serve legitimate proprietary goals: containing costs, optimizing productivity, and boosting economy.¹⁷⁰ The argument that no private party would enter into a PLA with so few benefits also failed to persuade the court; rather, the court reasoned that Congress would never intend for the market participant exception to apply only when the state gets a “good deal.”¹⁷¹ The court held that a “good deal” does not determine the proprietary nature of a PLA.¹⁷²

The Second Circuit followed a similar analysis: that legitimate state purposes for efficient procurement are not limited to economic goals.¹⁷³ A contractor argued that the practice of conditioning a bid on a PLA was anti-competitive and prevented him from bidding on the project because doing so violated his prior agreements with other unions.¹⁷⁴ The court found that this problem was “entirely self-inflicted,” and that the contractor was free to work on non-PLA projects or renegotiate its prior agreements.¹⁷⁵ The court noted that the difference between non-union or contractors in agreements with other unions did not alter the basic market participant analysis.¹⁷⁶ Similar to the reasoning of the Ninth Circuit, the Second Circuit also rejected the arguments that PLAs were anti-competitive and

1046 (9th Cir.2007) (efficient procurement does not mean “cheap” procurement – it means “procurement that serves the state’s purpose”).

168. Federal preemption of state action is a question of congressional intent. *Rancho Santiago*, 623 F.3d at 1022; see *Engine Mfrs. Ass’n*, 498 F.3d at 1039–40; see also *Gould*, 475 U.S. at 289 (demonstrating that in field preemption, federal laws always preempt state laws). Implied preemption prevents states from acting as regulators. *Id.* The market participant exception overcomes any state action that may frustrate congressional purpose. *Id.* A state action falls under the market participant exception when it directly participates in the market by purchasing goods or services and its actions are not “tantamount to regulation.” *Id.*

169. *Rancho Santiago*, 623 F.3d at 1026.

170. *Id.*

171. *Id.* at 1026-27.

172. *Id.* at 1027.

173. *City of N.Y.*, 678 F.3d at 187.

174. *Id.* (holding that the Second Circuit Court of Appeals, persuaded by both *Cardinal Towing* and *Rancho Santiago*, upheld PLAs in public contracts under the market participant exception). In 2009, the City of New York (“City”) entered into a PLA estimated to cover about half of the construction projects over the next five years with BCTC of Greater New York and Vicinity (“NY BCTC”). *Id.* The PLA required all signatory contractors to hire a minimum of 88% workers through NY BCTC. *Id.* One contractor entered into an agreement with a non-NY BCTC affiliated union, making it difficult for them to comply with the City’s PLA. *Id.*

175. *Id.*

176. *Id.* at 189.

costly.¹⁷⁷

The government exercises discretion in determining the lowest responsible bidder and that valuation is not solely determined by price.¹⁷⁸ As a purchaser, the government may enter into PLAs at its discretion.¹⁷⁹ Government discretion in awarding a contract is based on the best bid and not limited to the lowest dollar bid.¹⁸⁰ Cost considerations should not be leveraged above all other considerations or be the determinative factor.¹⁸¹ Certain factors include ensuring predictable costs and steady labor should not be limited to private entities.¹⁸² Increased costs by contracting with unions can eventually lead to overall savings when the result is avoiding labor disruptions and maintaining quality laborers.¹⁸³ PLAs can be extremely beneficial when a project increases in size or complexity.¹⁸⁴

3. *Market Participant Exception: Narrow Scope or Tantamount to Regulation?*

While noting efficient procurement as the first prong of the market participant exception, the Ninth Circuit in *Rancho Santiago* explored the second prong of the *Cardinal Towing* test which requires a narrow scope.¹⁸⁵ When a proprietary interest becomes “tantamount to regulation,” the goal is no longer narrow and is subject to preemption.¹⁸⁶ The PLA in *Rancho Santiago* was limited by a three-year term and only to construction projects costing over \$200,000, which were paid for by a fund approved by voters.¹⁸⁷ The

177. *See id.* at 190-91 (describing “acting like a proprietor” does not limit state action to the narrow goal of minimizing costs regardless of consequences.) As private owners may work with familiar or larger entities, government proprietors are afforded similar discretion. *Id.* This reflects continued economic rationality. *Id.* The court disagreed that the government must choose the lowest dollar amount. *Id.*

178. *Elec. Contractors, Inc. v. Dep’t of Educ.*, 35 A.3d 188, 208 (Conn. 2012); *see also* *Minn. Chapter of ABC, Inc. v. Cty. of St. Louis*, 825 F. Supp. 238, 244 (D. Minn. 1993) (quoting *Otter Tail Power Co. v. Village of Elbow Lake*, 49 N.W.2d 197, 201 (1951)).

179. *ABC of R.I., Inc. v. Dep’t of Admin.*, 787 A.2d 1179, 1189 (R.I. 2002); *Callahan*, 713 N.E.2d at 961.

180. *Enertech Elec., Inc. v. Mahoning Cty. Com’rs*, 85 F.3d 257, 260 (6th Cir. 1996) (citing *Cedar Bay Constr., Inc. v. City of Fremont*, 552 N.E.2d 202, 205 (Ohio 1990)).

181. *Elec. Contractors, Inc.*, 35 A.3d at 205; *Connecticut ABC v. City of Hartford*, 740 A.2d 813, 825 (Conn. 1999) (“*City of Hartford*”).

182. *ABC of R.I., Inc.*, 787 A.2d at 1189.

183. *Elec. Contractors, Inc.*, 35 A.3d at 205; *City of Hartford*, 740 A.2d at 825.

184. *ABC of R.I.*, 787 A.2d at 1189.

185. *Cardinal Towing*, 180 F.3d at 693; *Rancho Santiago*, 623 F.3d at 1025 (citing *Gould*, 475 U.S. at 289).

186. *Rancho Santiago*, 623 F.3d at 1025 (citing *Gould*, 475 U.S. at 289).

187. *Rancho Santiago*, 623 F.3d at 1016 (detailing that the funds were

court compared the narrowness of this PLA to the substantially similar PLA in *Boston Harbor*, which involved a project limited in time and amount, albeit longer.¹⁸⁸ The Ninth Circuit concluded the government satisfied both prongs of the *Cardinal Towing* market participant test and its PLA was not preempted by the NLRA.¹⁸⁹ The court further found no indication of a regulatory purpose unrelated to the contractual obligations, such as rewards or sanctions for party conduct.¹⁹⁰

When a public contract's PLA is challenged, a court may require the government show the PLA furthers the purpose of the competitive bidding.¹⁹¹ A sufficiently narrow PLA will be upheld if "a project is of such size, duration, timing, and complexity that the goals of the competitive bidding statute cannot otherwise be achieved and the record demonstrates that the awarding authority undertook a careful, reasoned process to conclude that the adoption of a PLA furthered the statutory goals."¹⁹² In analyzing the "narrowness" prong of the *Cardinal Towing* test, more than a reasonable basis must be shown for inclusion of a PLA in public contracts.¹⁹³

It is strange, then, that the Louisiana District Court declined to follow the binding test of its Appellate Court and instead relied on persuasive material in the D.C. and Sixth Circuit Courts to uphold a blanket ban in *Jindal*.¹⁹⁴ In 2011, the Louisiana legislature passed Act 134, which prohibited bidding documents in construction contracts paid by government funds to require PLAs.¹⁹⁵ The union council AFL-CIO,¹⁹⁶ who regularly negotiated PLAs with the government, sued Governor Jindal alleging the Act

approved by voters in Ballot Measure E in 2002).

188. *Id.* at 1028 (citing *Boston Harbor* at 221-22); see also Brief for Petitioners at 7, *Boston Harbor*, 507 U.S. 218 (1993) (No. 91-261), 1992 WL 511837:

Like the District's PSA, the *Boston Harbor* agreement recognized one exclusive bargaining agent, specified dispute-resolution mechanisms, required all employees to become union members within seven days of their employment, required use of the union's hiring halls to supply the labor force, prohibited strikes for the term of the agreement, bound all contractors and subcontractors to the agreement, and prescribed the benefits that workers would receive for the duration of the project. *Id.*

189. *Rancho Santiago*, 623 F.3d at 1022.

190. *Id.* at 1026.

191. *John T. Callahan & Sons v. City of Malden*, 713 N.E.2d 955, 961 (1999).

192. *Id.*

193. *Associated General Contractors v. N.Y. State Thruway Authority*, 666 N.E.2d 185, 190 (1996); *ABC of R.I.*, 787 A.2d at 1186.

194. *Jindal*, 107 F. Supp. 3d at 587.

195. Act 134 was codified into LA. STAT. ANN. § 38:2225.5 (2014).

196. "Plaintiff, Southeast Louisiana Building and Construction Trades Council, AFL-CIO, is an unincorporated association comprised of member labor organizations or building and construction trade unions throughout Southeast Louisiana." *Jindal*, 107 F. Supp. 3d at 587.

was unconstitutional and unenforceable.¹⁹⁷ ABC intervened on their own behalf.¹⁹⁸ The union argued the NLRA preempted the Act's prohibition of PLAs on all public construction projects.¹⁹⁹

ABC and Governor Jindal argued that the Act was narrow and proprietary with the purpose of fostering competition in government projects.²⁰⁰ They also argued that the limited Act banned only public entities from entering into PLAs on construction projects and not contracts between the government and private entities.²⁰¹ Instead of relying on the binding market participant test laid out in *Cardinal Towing*, the court accepted ABC's argument and allowed a blanket ban of PLAs under both the efficient procurement and narrow scope prongs.²⁰² In a vague explanation determining a regulatory purpose, the court inexplicitly reasoned it should look primarily at the facial objective and not "search for an impermissible motive where a permissible purpose is apparent."²⁰³

In most court cases, the NLRA preempts state action when the action is regulatory in nature because it frustrates the purpose of the NLRA.²⁰⁴ Government proprietary actions fall under the market participant exception, which requires efficient procurement and a narrow scope.²⁰⁵

The Supreme Court test regarding PLAs rests on whether the government is acting as a regulator or proprietor. When acting as a regulator, the NLRA preempts state action. However, when the state acts as a market participant, the state is not preempted by the NLRA. Presidents have influenced the use of PLAs over several decades, with the tide of support changing dependent on the party in power. States have also influenced the use of PLAs, with many states rejecting PLAs, some states supporting PLAs, and the rest

197. *Id.*

198. *Id.* (referring to ABC as the Louisiana Chapter, the New Orleans-Bayou Chapter, and the Pelican Chapter of ABC, Inc.).

199. *Id.* at 592.

200. *Id.* at 595.

201. *Id.* at 594.

202. *Id.* (citing *Gould* 475 U.S. at 291).

203. "Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." *Jindal*, 107 F. Supp. 3d at 603 (citing *City of N.Y.*, 678 F.3d at 191 and quoting *Lavin*, 431 F.3d at 1007 (internal quotation marks omitted)).

204. *Jindal*, 107 F. Supp. 3d at 592; *Metro Life Ins. Co. v. Mass.*, 471 U.S. 724, 747 (1985); *Brown v. Hotel & Rest. Emps & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501-02 (1984).

205. *Cardinal Towing*, 180 F.3d at 693 (describing that before November 1995, the City of Bedford, Texas ("City") permitted towing services to individually tow vehicles, store the vehicles at their respective lots, and then owner would ultimately pay for the service). In November, the City opened towing services for bidding, requiring short response times and access to a wrecker. *Id.* Three bidders applied and the contract was awarded. *Id.* One bidder failed to meet the requirements and demanded the City re-bid the contract. *Id.* The bidder still failed to meet the requirements on re-bid and sued for discrimination. *Id.*

remaining silent on the issue. Hereafter, the analysis will discuss whether a blanket prohibition falls under regulation or the market participant exception.

III. ANALYSIS

This section lays out various issues including separation of powers and preemption. First, this section discusses whether the state legislation is within the purview of federal laws or if certain states are in conflict. Next, this section analyzes Supreme Court and lower court rulings regarding NLRA preemption. Finally, this section breaks down decisions from state and federal courts and analyzes the current political and economic issues.

A. *Do the Executive Orders Preempt the States?*

1. *Youngstown Analysis*

Under the *Youngstown* analysis, presidential executive orders regarding PLAs should fall within the second prong: where Congress has enacted legislation.²⁰⁶ Presidents have minimum authority when Congress addressed any specific issue.²⁰⁷ Unions that oppose executive orders argue that Congress specifically carved out an exception in the construction industry for PLAs; any executive order contrary to the NLRA lacks authority.²⁰⁸ The President would counter such union arguments by stating the executive branch retains the authority to narrow the scope of PLAs.²⁰⁹

Obama's current executive order encourages federal agencies to use project labor agreements on any construction project over \$25 million; however, it does not require PLA use on any project.²¹⁰ Because President Obama used the word "may" in his executive order, many states have issued statutes, constitutional amendments, or executive orders under their dormant commerce power.²¹¹ To date, none have been overturned based on conflict with the executive order.²¹² One state, Kentucky, passed a statute that

206. *Youngstown*, 343 U.S. at 635-38.

207. *Id.*

208. *Id.*

209. *Id.*

210. Exec. Order 13,502, 74 Fed. Reg. 4669 (2009).

211. *Id.* The states that have passed constitutional amendments, or executive orders after 2009 in alphabetical order include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin. *A Total of 24 States Restrict Government Mandated Project Labor Agreements*, *supra* note 119.

212. *Allbaugh*, 295 F.3d 28.

fits squarely within the executive order, but leaves discretion about any pre-hire agreements to its General Assembly.²¹³ This section of the statute only applies to construction projects over \$25 million and an area where the General Assembly might have an interest.

2. *Differences Between President William Clinton's and President George W. Bush's Executive Orders*

In contrast to Obama's executive order, Clinton's executive order conflicted with the NLRA and the D.C. Circuit Court declared his order unconstitutional. Clinton's executive order was ruled unconstitutional, not because it overreached into the states' authority, but because the requiring of PLAs on certain projects was contrary to the NLRA.²¹⁴ The Clinton executive order prohibited the government from contracting with businesses who hired permanent labor replacements when their workers went on strike.²¹⁵

After President George W. Bush was elected, he executed a facially neutral order that did not "require or prohibit" the government from entering into a PLA.²¹⁶ Although the language in the Bush executive order does not specifically undercut congressional policy regarding labor and management as exemplified in the NLRA, it still limited an area in which Congress was active and the provisions fell under the *Machinists* doctrine of preemption it sought to regulate – activity that Congress intended to remain unregulated and left to the free play of economic forces.²¹⁷ A number of courts have determined that the facially neutral language "neither prohibit nor require" is regulatory in effect.²¹⁸ Some courts still question the legality of Bush's executive order after its revocation, arguing that its ban of PLAs violates § 8(f) of the NLRA.²¹⁹

213. Public-private partnership delivery method of awarding state contracts for capital construction projects, KY. REV. STAT. ANN. § 45A.077 (8) and (10)(c).

214. *Reich*, 74 F.3d 1322.

215. *Reich*, 74 F.3d 1322.

216. *Allbaugh*, 295 F.3d at 32.

217. *Brown*, 554 U.S. at 77; *Machinists*, 427 U.S. at 140; *Gould*, 475 U.S. at 286 (stating "the NLRA preempts these provisions because they 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.'").

218. *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commissioners*, 781 N.E.2d 951 (Ohio 2002) ("*Ohio*").

219. *Id.* at 966 (quoting *Boston Harbor*):

It does not seem to us possible to deny that the President's Executive Order [in this case] seeks to set a broad [labor] policy. The President has, of course, acted to set procurement policy rather than labor policy. But the former is quite explicitly based--and would have to be based--on his views of the latter. Whatever one's views on the issue, it surely goes to the heart of United States labor relations policy. It cannot be equated to the *ad hoc* contracting decision made by MWRA in seeking to clean up Boston Harbor.

In considering whether an executive order exceeds the scope of the president's authority, courts look to the *Youngstown* analysis. Because a number of executive orders have focused on project labor agreements in the construction industry, it is important to know whether the President has exceeded the executive authority. While only Clinton's executive order has been revoked by a court, incoming presidents issue executive orders in line with their political parties. This back-and-forth pattern concerns many in the construction industry, especially those dealing with contracts that exceed a president's term or progress into the term of a politically-polar president.

B. Total Bans On PLAs Are Overly Broad and Should Be Preempted

Since the Supreme Court's rulings, states have sought various ways to affect PLAs.²²⁰ Legislative efforts in cases involving project labor agreements have generally been upheld.²²¹ Unfortunately, the point at which the primary goal of the governmental action encourages labor policy rather than a narrow proprietary goal is unclear.²²² When the facts of the case resemble *Boston Harbor*, courts have found contracts over projects of limited duration not to be preempted by the NLRA.²²³ When the facts of the case resemble *Gould*, courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through government spending and contracting power.²²⁴

In *Reich*, the D.C. Circuit Court struck President Clinton's executive order which barred the federal government from contracting with employers who hire permanent replacements during a lawful strike.²²⁵ The executive order overtly favored unions and attempted to set a broad pro-union policy affecting millions of American workers.²²⁶ Because the overbroad executive order waded into policymaking, the court ruled it unconstitutional.²²⁷ The D.C. Circuit Court opined that "[s]urely, the result would have been entirely different, given the [reasoning in *Boston Harbor*], if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all construction contractors doing

220. *City of N.Y.*, 678 F.3d at 191.

221. *Youssef v. Tishman Const. Corp.*, 744 F.3d 821 (2d Cir. 2014); *Balfour Beatty Constr. v. Md. Dep't of Gen. Servs.*, 220 Md. App. 334, 364 (2014).

222. *Jindal*, 107 F. Supp. 3d at 601.

223. *Id.* at 600.

224. *Id.*

225. *Reich*, 74 F.3d at 1339 (citing Exec. Order No. 12954, 60 Fed. Reg. 13023 (Mar. 10, 1995)).

226. *Id.* at 1337.

227. *Id.*

business with the state to enter into collective bargaining agreements . . . containing [PLAs].”²²⁸

1. *Allbaugh, Snyder, and Ohio Explored*

While some courts have found a “blanket prohibition” crosses the line between spending power and regulatory power,²²⁹ other courts disagree.²³⁰ In 2002, the D.C. Circuit Court declined to follow precedent in deciding *Allbaugh*.²³¹ The court looked to whether the executive order conflicted with the NLRA, which depended on whether the government acted as a regulator or a proprietor.²³² The court held that “because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order established no condition that can be characterized as ‘regulatory.’”²³³

The D.C. Circuit Court further found the government acted as a proprietor when it used its own funds to ensure the most efficient use of those funds and that the government, similar to a private owner, is motivated to maximize its benefits.²³⁴ The court held that the government’s action in issuing a blanket ban was consistent with private owners’ actions.²³⁵ The court further explained that the government crosses the line into regulation when it controls conduct that is unrelated to contractual obligations in construction projects.²³⁶ When the prohibition extends only to projects funded by the government and not to unrelated projects, the government has a proprietary interest and the executive order is lawful.²³⁷

Similarly in *Snyder*, the Sixth Circuit Court of Appeals upheld

228. *Id.*

229. *Idaho BCTC v. Wasden*, 836 F. Supp. 2d 1146, 1163 (D. Idaho 2011) rev’d by *Idaho BCTC v. Inland Pacific Chapter of ABC*, 616 F. App’x 319, 320 (9th Cir. 2015); *ABC of R.I., Inc. v. City of Providence*, 108 F. Supp. 2d 73, 81 (D.R.I. 2000); *Ohio*, 781 N.E.2d at 968.

230. *Allbaugh*, 295 F.3d at 29; *Snyder*, 729 F.3d at 574 (discussing the Governor’s executive order prohibiting state and political subdivisions from entering into PLAs on state-funded construction projects was proprietary and not preempted by the NLRA); *George Harms Constr. Co. v. N.J. Turnpike Auth.*, 137 N.J. 8 (N.J. 1994) (finding by the New Jersey Supreme Court that state was acting as proprietor or purchaser of labor in construction industry when prohibiting a project labor agreement specification in public contracts).

231. *Allbaugh*, 295 F.3d at 29.

232. *Id.* at 34.

233. *Id.* at 37.

234. *Id.* at 35.

235. *Id.*

236. *Id.* at 36 (citing *Boston Harbor*, 507 U.S. at 228-29: “A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor*, it ‘addresse[s] employer conduct unrelated to the employer’s performance of contractual obligations to the [Government]’”).

237. *Allbaugh*, 295 F.3d at 36.

a blanket ban on PLAs.²³⁸ In 2011, Michigan passed the Fair and Open Competition in Governmental Construction Act.²³⁹ Two AFL-CIO unions²⁴⁰ filed suit against Governor Snyder and the District Court found in favor of the unions.²⁴¹ While Governor Snyder appealed the District Court's decision,²⁴² the Michigan legislature amended the Act to replace the absolute bar of PLAs on projects that had government spending and add language allowing a voluntary PLA.²⁴³ The state's purpose was to "provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services by this state" as well as "providing for fair and open competition."²⁴⁴

The Sixth Circuit found the Act, as amended, to be proprietary and not regulatory: "[t]he law's effect is limited to forbidding governmental units from entering into PLAs and then forcing terms and conditions on bidders . . . Such a limited action is similar to those found to be proprietary by the Supreme Court, this court, and other circuits."²⁴⁵ The court looked at the Act's legislative history for intent – to improve efficiency in government projects, not to regulate: "the [A]ct specifically states it is intended to provide for more economical, nondiscriminatory, neutral and efficient procurement of construction related goods and services by this state."²⁴⁶

The court suggested that if the government wanted to encourage PLA use, it could just give all subcontracting power to one general contractor or allow contractors to voluntarily enter into a PLA when it is the most efficient way to proceed.²⁴⁷ The Act

238. *Snyder*, 729 F.3d at 576.

239. Michigan's Fair and Open Competition in Gov't Constr. Act, Mich. Comp. Laws § 423.14 (2011).

240. The two unions who sued were the Mich. BCTC, AFL-CIO and Genesee, Lapeer, Shiawassee BCTC, AFL-CIO.

241. *Snyder*, 846 F. Supp. 2d at 783 (Moore, J., dissenting) (explaining that the court rejected the Governor's argument that the state was acting as a proprietor and found that the law was regulatory in nature and preempted by §§ 7 & 8 of the NLRA). In order to act as a proprietor, the government would consider PLAs on a case-by-case basis and not issue a blanket prohibition. *Id.*

242. *Snyder*, 846 F. Supp. 2d at 770.

243. Contract for construction, repair, remodeling, or demolition of facility; prohibitions concerning bid specifications, project agreements, or other controlling documents, MICH. COMP. LAWS SERV. § 408.875 (2012) and Agreement with labor organization, MICH. COMP. LAWS SERV. § 408.878 (2012).

244. *Snyder*, 729 F.3d at 576.

245. *Id.* at 577.

246. *Id.* at 578.

247. *Id.* (citing 2012 Mich. Pub. Acts 238 § 2 (codified at MICH. COMP. LAWS SERV § 408.872 (2002)) Senator Moolenaar explained that the act is intended to "guarantee [] the equal opportunity and fiscal accountability that taxpayers expect from government" (S. Journal 48, 96th Leg., at 867 (Mich. 2012))). Senator Gleason, opposing the act, argued that the act constitutes a terrible decision to "go cheap on labor" because it would lead to the use of lesser-skilled workers and shabbily built projects. *Id.* He noted it would be better to have

limited its blanket ban of PLAs only on public projects, which would not be considered too broad if a private contractor issued the ban; therefore, the court considered it narrow enough to fall under the market participant exception.²⁴⁸ The court reasoned that this government action was more akin to *Boston Harbor*, because the legislative intent was efficient procurement.²⁴⁹ Unlike the statutes in *Gould* and *Brown*, the Michigan statute did not facially evidence regulatory intent.²⁵⁰

By contrast, in *Cuyahoga County*, the Ohio Supreme Court found a state statute preempted by the NLRA, using precedent that the *Allbaugh* and *Snyder* courts failed to follow.²⁵¹ The statute prohibited the government from conditioning public projects on PLAs, as it had commonly done so previously.²⁵² After enacting the statute, the government notified the union it would no longer be conditioning projects on PLAs.²⁵³ The union brought suit against the government regarding the constitutionality of the state statute.²⁵⁴ The trial court found the Supremacy Clause invalidated the statute and permanently enjoined its enforcement.²⁵⁵ The Court of Appeals reversed, holding the statute did not facially, or by application, prohibit a government agency to enter into a PLA, but instead only prohibited PLAs with objectionable terms.²⁵⁶ It also held the statute was not preempted by the NLRA.²⁵⁷ Two other courts have followed this logic.²⁵⁸ The Supreme Court of Ohio reversed, citing Ohio Governor Taft:

I am concerned that this legislation would not survive a constitutional challenge based on the supremacy clause of the U.S. Constitution. Our legal research shows the courts have, in the past, found that the regulation of project labor agreements is a federal

“high standards and high qualifications, not low cost.” *Id.* at 866-67.

248. *Snyder*, 729 F.3d at 578.

249. *Id.*

250. *Id.* at 579.

251. *Ohio*, 781 N.E.2d 951.

252. *Id.* at 953-54; Preamble to 1999 Am.H.B. No. 101.

253. *Ohio*, 781 N.E.2d at 954.

254. *Id.* at 953.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Jindal*, 107 F. Supp. 3d at 594; *see also* Cent. Iowa Bldg. & Const. Trades Council v. Branstad, 4:11-CV-00202-JAJ-CFB, 2011 WL 4004652, at *1 (S.D. Iowa Sept. 7, 2011). Two Iowa Trades Councils (collectively referred to as “BCTC”) sued Governor Branstad who signed Exec. Order 69 which prohibited Iowa state officials from entering into PLAs on state-funded construction projects. *Branstad*, 2011 U.S. Dist LEXIS 104871 at 1. The Southern District of Iowa held that, after reviewing *Boston Harbor’s* analysis, Governor Branstad’s executive order 69 was not preempted by the NLRA because prohibiting PLAs on state-funded projects is a valid proprietary decision. *Id.* at 29. Neither the *Garmon* nor *Machinists* preemptions apply here because the court found the State of Iowa was not regulating businesses through the issuance of the executive order. *Id.*

responsibility under the National Labor Relations Act and that the state is therefore preempted from legislating in this area.²⁵⁹

The NLRA preempts blanket prohibition against the enforcement of PLAs on public works.²⁶⁰

Although the Ohio Court of Appeals found the statute to be facially neutral, and the statute's restrictions did not effectively prohibit the government from entering into a PLA, the Ohio Supreme Court disagreed.²⁶¹ The court looked at the legislative history, including the statutes sponsor's testimony for the bill before the House Commerce and Labor Committee that "[t]his important legislation will prohibit so-called 'project labor agreements' in the State of Ohio."²⁶² The Supreme Court of Ohio found that the statute expressly prohibited "the very sort of labor agreement that Congress explicitly authorized and expected frequently to find."²⁶³ In essence, the facially neutral statute was discriminatory in purpose and effect, which frustrates congressional purpose.²⁶⁴

2. *Allbaugh and Snyder Misconstrue Supreme Court Decisions and Ignore the Cardinal Towing Test*

The *Allbaugh* and *Snyder* majority opinions fundamentally misconstrue critical aspects of the Supreme Court decisions in *Boston Harbor*, *Gould*, and *Brown*. In *Gould*, the Supreme Court stated, "[w]e agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services . . . for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.'"²⁶⁵ The breadth of an outright ban reaches too far outside the proprietary aspect of government ownership in a project.²⁶⁶ Prohibiting PLAs through neutral language means that the State is imposing a much harsher sanction than Congress intended.²⁶⁷ These Wisconsin laws not only advance a broad policy statement, they actually regulate conduct.²⁶⁸

However, both federal courts in *Allbaugh* and *Snyder* upheld the blanket ban of PLAs because the PLAs were only being prohibited on projects that used government funds, where the government was acting in a proprietary way and neither the

259. *Ohio*, 781 N.E.2d at 954 (citing Communications Release (June 30, 1999), Office of the Governor).

260. *Id.*

261. *Id.* at 958.

262. *Id.* (citing first Ron Young (R-Leroy) the sponsor of Am.H.B. No. 101).

263. *Id.*

264. *Id.*

265. *Gould*, 475 U.S. at 289 (citing *Gould, Inc. v. Wisconsin Department of Industry, Labor & Human Relations*, 750 F.2d 608, 614 (7th Cir. 1984)).

266. *Id.*

267. *Id.*

268. *Id.*

executive order nor the Michigan legislation established any regulatory conditions.²⁶⁹ The D.C. Circuit Court in *Allbaugh* stated that imposing a condition when awarding a contract or funding a project is regulatory only when it addresses conduct unrelated to government's contractual obligations.²⁷⁰ However, his language from *Boston Harbor* indicated other non-key factors.²⁷¹ The Supreme Court used this language to rebut respondent's argument that state action is preempted even when acting as a proprietor.²⁷² The two main factors the Supreme Court relied on were distilled in *Cardinal Towing*: efficient procurement and the narrow scope of the action.²⁷³

Allbaugh ignored the narrow prong of *Cardinal Towing's* *Boston Harbor* test: "[t]here simply is no logical justification for holding that if an executive order establishes a consistent practice regarding the use of PLAs, it is regulator even though the only decisions governed by the executive order are those that the federal government makes as a market participant."²⁷⁴ Rather, the overly broad presidential executive order applies to all public construction contracts.²⁷⁵ Secondly, the executive order removes the discretion of the individual governmental agency, even if the state might find "efficient procurement" in not choosing the lowest dollar bid.²⁷⁶ The Bush executive order should be held to the same standard of the Clinton executive order because, as courts have found, it has facially neutral language promoting a broad regulatory policy in an effectual and purposeful way.²⁷⁷

The Michigan Act in *Snyder* also fails under both prongs of the *Cardinal Towing* test.²⁷⁸ Instead of following binding precedent of the Supreme Court and followed by many circuits, the majority in *Snyder* followed the contradictory reasoning of a single panel of the D.C. Circuit Court.²⁷⁹ First, the court forgoes any analysis showing

269. *Gould*, 475 U.S. at 289.

270. *Allbaugh*, 295 F.3d 28; *Snyder*, 729 F.3d 572.

271. *Allbaugh*, 295 F.3d at 28.

272. *Snyder*, 729 F.3d at 587 (Moore, J., dissenting).

273. *Id.*

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

275. *Snyder*, 729 F.3d at 587 (Moore, J., dissenting).

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

277. *Reich*, 74 F.3d 1322.

278. *Snyder*, 729 F.3d at 576.

279. *Id.* at 584 (Moore, J., dissenting):

Instead of following this binding Supreme Court precedent—as well as the decisions of the Second, Third, Fifth, Seventh, and Ninth Circuits; two panels of the D.C. Circuit; and a decision of this Court in *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001), *abrogated on other grounds* by *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), 122 S. Ct. 2226, 153 L. Ed. 2d 430—the majority has chosen to adopt a standard set forth by a single panel of the D.C. Circuit that directly contradicts Supreme Court precedent.

that a blanket ban promotes and reflects each entity's own interest in efficient procurement.²⁸⁰ Second, an industry-wide ban of PLAs furthers a general policy to isolate unions from bidding in construction projects.²⁸¹ Contrary to the Supreme Court's rationale in *Boston Harbor*, the Sixth Circuit upheld an overly broad Act that sought to set a broad policy governing the behavior of numerous American workers.²⁸² Rather, the court focuses its analysis of the narrow prong on the actions between private parties, which the Act does not regulate.²⁸³ Not only does the court misstate the issue, but it is misguided in its reasoning.²⁸⁴ The issue is whether the government is precluded from entering into a PLA.²⁸⁵ "When the right at issue is wholly precluded by the action at issue, it is hard to understand how the action can be construed as narrow with respect to its effect on the right."²⁸⁶ If every court looked to what a law does not regulate, instead of what the law does, then every state action could be construed as narrow.²⁸⁷

3. *The Laws May Be Facially Neutral, But They Are Discriminatory in Effect*

The *Allbaugh* and *Snyder* courts decided that the facially neutral language of "neither prohibit nor require" is a central part of the legal analysis, showing neutrality in the law and not discrimination.²⁸⁸ *Snyder* cites *Lavin* "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment."²⁸⁹ However, neither the *Allbaugh* nor the *Snyder* courts cease the analysis after determining broad neutrality, instead of evaluating the legislators' efforts or the motive behind it.²⁹⁰

Although many states pass statutes, constitutional amendments, and executive orders with facially neutral language, such as "neither require nor prohibit," these laws are discriminatory in effect. Passed in Republican states with anti-union agendas, the effect further isolates unions in states that do not require employees to pay the union to receive its benefits ("Right to Work Doctrine").²⁹¹

280. *Snyder*, 729 F.3d at 576.

281. *Id.*

282. *Id.* at 585-86 (Moore, J., dissenting).

283. *Id.* at 590 (Moore, J., dissenting).

284. *Id.*

285. *Id.*

286. *Snyder*, 729 F.3d at 590.

287. *Id.*

288. *Id.* at 592 (Moore, J., dissenting).

289. *Allbaugh*, 295 F.3d 28; *Snyder*, 729 F.3d 572.

290. *Id.*

291. Many of states that passed Right to Work legislation are also anti-PLA: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nevada, North Carolina, North Dakota,

Banning PLAs essentially ousts unions from construction projects.²⁹² Although union labor costs more,²⁹³ by either increasing the total costs of the project or cut into profits, union employees nonetheless receive greater benefits.²⁹⁴ The Bureau of Labor statistics reports that in construction, union members earned \$1099 per week in 2015 opposed to nonunion employees who made only \$743.²⁹⁵ In addition, unions provide better benefits which are also included in construction costs.²⁹⁶ Many federally-funded public projects, or projects with significant government subsidies, require union workers and Davis-Bacon prevailing wage, which eliminates the union problem of being undercut on price.²⁹⁷

Many unions require their members to be extensively trained, which leads to owners benefitting from the qualified, safer, and more productive workers.²⁹⁸ Contractors who want a large-scale job done quickly and safely rely on a skilled workforce.²⁹⁹ The New York Committee for Occupational Safety and Health reported that 79% of job site accidents where a worker fell and died were at nonunion sites.³⁰⁰ In addition, the report reveals that 90% of city construction companies in OSHA's Severe Violator Enforcement Program were non-union.³⁰¹ If a project isn't done correctly, liability issues arise.³⁰² Although a project may be the cheaper bid does not mean it will cost an owner the least money.³⁰³ These unforeseen ramifications are part of the decision-making process by the state and should be left to state discretion on a case-by-case basis.³⁰⁴

4. Government Bodies Are Not Private Actors for a Reason

The Supreme Court in *Gould* clearly stated that states must be

Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. Button, *supra* note 101.

292. Kim Slowly, *Construction unions: Headed for extinction or poised for a resurgence?*, CONSTR. DIVE (Mar. 31, 2016), www.constructiondive.com/news/construction-unions-headed-for-extinction-or-poised-for-a-resurgence/416545/.

293. See Shane Hedmond, *Average Hourly Wage of Union and Non-Union Construction Workers*, CONSTR.JUNKIE (Mar. 28, 2018), www.constructionjunkie.com/blog/2018/3/25/average-hourly-wage-of-union-and-non-union-construction-workers (providing data showing union workers with a higher hourly wage across the United States).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* (including two private construction projects – Apple Campus 2 “spaceship” in Cupertino, California and Tesla’s gigafactory in Reno, Nevada).

298. *Id.*

299. See Slowly, *supra* note 285 (citing the “two-day rule” where union crews pour concrete and complete a high-rise floor once every two days).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

held to a higher standard than private actors in areas governed by the NLRA.³⁰⁵ Asking what state action the Commerce Clause would permit without the NLRA is entirely different from asking what States may do while the NLRA is in place.³⁰⁶ States are treated differently by the NLRA because governments are fundamentally different from private actors.³⁰⁷ For example, private parties may regulate by banning a supplier or union from all future work and can act on an across-the-board basis without becoming regulators or their action becoming “tantamount to regulation.”³⁰⁸ Government action, on the other hand, absolutely can cross the line and become “tantamount to regulation.”³⁰⁹ The Supreme Court relies on this fundamental principle in *Boston Harbor, Gould, and Brown*.³¹⁰

A State may act identical to a private actor when it limits its action to only participating in the market.³¹¹ Otherwise, the State would be permitted to regulate within the NLRA’s protected zone because a private actor may do so. Both *Allbaugh* and *Snyder* fundamentally miss this distinction in reasoning that the government, similar to a private owner, has the authority and interest in issuing nationwide or statewide bans.³¹²

This flawed analysis has long-lasting implications. First, as evidenced by our two-party system, a national- or state-wide ban detrimentally effects one party to the advantage of the other. Each new presidential executive order shifts labor policy, leaving uncertainty and instability throughout all levels of government. In response, many states have enacted laws to circumvent shifting party politics. However, upholding any state bans in the face of the congressionally-preempted labor policy is contrary to the basic constitutional separation of powers principle.³¹³ Second, the ban

305. *Gould*, 475 U.S. at 282.

306. *Id.* at 290.

307. *Id.*

308. *Lavin*, 431 F.3d at 1007.

309. *Id.*

310. *Gould*, 475 U.S. at 290; *Boston Harbor*, 507 U.S. at 222; *Brown*, 554 U.S. at 63.

311. *Boston Harbor*, 507 U.S. at 222.

312. *Allbaugh*, 295 F.3d 28; *Snyder*, 729 F.3d 572.

313. Nat. Conf. of State Legis., *Separation of Powers -- An Overview*, NAT. CONF. OF STATE LEGIS., www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx (last visited Mar. 24, 2019):

The traditional characterizations of the powers of the branches of American government are:

* The legislative branch is responsible for enacting the laws of the state and appropriating the money necessary to operate the government.

* The executive branch is responsible for implementing and administering the public policy enacted and funded by the legislative branch.

* The judicial branch is responsible for interpreting the constitution and laws and applying their interpretations to controversies brought before it. *Id.*

does not take into consideration the areas where the governmental entity uses its discretion to determine a PLA is necessary and instead revokes the discretion and implements the ideology of the current party in power. The local agencies that work with the federal government on these federally-funded projects should continue to exert their authoritative discretion on a project-by-project basis.

C. “Grey Area” between Market Participant and Regulator

1. Seventh Circuit Clarifies the “Grey Area”

The Seventh Circuit Court of Appeals held in two cases that the government fell under the market participant exception.³¹⁴ The state toll highway authority in *Colfax* demanded that contractors must comply with a multi-project PLA in order to be approved to remove asbestos from public buildings.³¹⁵ Like a private entity, the government can demand a contractor to abide by a multi-project labor agreement in an attempt to keep labor peace.³¹⁶ Because it was aware of conflicts between a contractor and signatory unions, the government validly contracted with companies who were willing to sign the PLA.³¹⁷

The Seventh Circuit held in *Lavin*, that conditioning grants on PLAs to specific projects is permissible under the market participant doctrine.³¹⁸ Illinois subsidized ethanol plants and conditioned grants on a PLA and a non-union contractor filed suit and alleged that the conditional offer of a subsidy was a form of regulation.³¹⁹ Courts have generally held that conditions on national grants to states are not regulatory, because the national government cannot direct a state to pass or enforce a law and that the state decides whether to take the money and obligate itself to the conditions.³²⁰ Conditions on spending become regulation when they affect conduct other than the financed project.³²¹ “Illinois is concerned exclusively with subsidized renewable-fuels projects contract for labor; its condition is project specific” and has not engaged in regulation preempted by the NLRA.³²² *Lavin* is followed

314. *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631 (7th Cir. 1996) (“*Colfax*”) and *Lavin*, 431 F.3d 1004.

315. *Colfax*, 79 F.3d at 635.

316. *Id.*

317. *Id.*

318. *Lavin*, 431 F.3d at 1007.

319. *Id.*

320. *Id.* (citing *Printz v. United States*, 521 U.S. 898 (1997); *S. Dakota v. Dole*, 483 U.S. 203 (1987)).

321. *Lavin*, 431 F.3d at 1006 (citing *Gould*, 475 U.S. 282 (1986)).

322. *Id.*

by the District of Rhode Island.³²³

The Seventh Circuit Court of Appeals held in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, the NLRA preempted Chapter 31 of the General Ordinances of Milwaukee County, which required PLAs on contracts concerning transportation and services for the elderly and disabled.³²⁴ *Gould* illustrates the principle that spending power may not be used as a pretext for regulating labor relations.³²⁵ To comply with this PLA, contractors would have to extensively change the way they do business.³²⁶ For example, contractors would have to divide a workforce that performed identical work into those governed by a PLA and those that are not based on different customers.³²⁷ Therefore, the PLA is no longer limited to the scope of certain projects, but is having a spillover effect on private contracts.³²⁸ Similar to the analysis in *Gould*, a purchasing rule determining how contractors must manage labor relations in all aspects of their business is preempted by the NLRA.³²⁹

2. Line Between Proprietor and Regulator

The pivotal distinction between *Lavin* and *Milwaukee* is the narrow prong of the *Cardinal Towing* test.³³⁰ The grant in *Lavin* is narrowly tailored to projects in a specific area whereas the ordinance in *Milwaukee*, although narrow in language, spread to private contracts and effected private businesses.³³¹ The ordinance made it impracticable for business owners to have separate transportation fleets for private and public contracts.³³² The ordinance was overly broad even though the language was facially neutral because it infringed on public contracts and, therefore, the

323. In 2000, the United States District Court of Rhode Island determined that while tax benefits may subsidize a particular industry, a tax exemption does not fall within the market participant exception. The government acted as a regulator and not as a market participant when it required PLAs on private construction projects receiving favorable tax treatment and this action is preempted by the NLRA. *City of Providence*, 108 F. Supp. 2d at 82; *see also* *Hudson Cty. BCTC v. City of Jersey City*, 960 F.Supp. 823, 833 (D.N.J. 1996) (analyzing that a city which enacted an ordinance requiring businesses to make good faith efforts to hire a majority of residents was engaged in regulatory activity and the market participation doctrine did not apply to preclude NLRA preemption).

324. *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 431 F.3d 277, 277-78 (7th Cir. 2005) ("*Milwaukee Cty.*").

325. *Milwaukee Cty.*, 431 F.3d at 279.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Gould*, 475 U.S. at 289.

330. *Cardinal Towing*, 180 F.3d at 693.

331. *Lavin*, 431 F.3d at 1006; *Milwaukee Cty.*, 431 F.3d at 279.

332. *Milwaukee Cty.*, 431 F.3d at 279.

government was no longer acting as a proprietor.³³³ Because the *Milwaukee* ordinance was overly broad, it was preempted by the NLRA.³³⁴ The Seventh Circuit more clearly defines areas in which the government action becomes “tantamount to regulation.”³³⁵

D. Congressional Action

Both the Senate and House bills recited the same language and were titled the “Fair and Open Competition Act” (FOCA).³³⁶ Prior to its failure, eighty-five members of the House endorsed FOCA.³³⁷

333. *Id.*

334. *Id.*

335. *Id.*

336. Fair and Open Competition Act, S. 622, 115th Cong. § 1, *et seq.* (2017). This Senate bill was introduced by Senator Jeff Flake (R-AZ) and supported by two cosponsors – Senator James E. Risch (R-ID) and David A. Perdue (R-GA). Fair and Open Competition Act, 115 S. 622, 2017 S. 622, 115 S. 622.

337. Fair and Open Competition Act, (FOCA Act), H.R. 1552, 115th Cong. § 1, *et seq.* (2017). The House bill was introduced by Rep. Dennis A. Ross (R-FL) on March 15, 2017 and also sponsored by Rep. Thomas Massie (R-KY), Rep. Mark Walker (R-NC), Rep. Jody B. Hice (R-GA), Rep. Ralph Lee Abraham (R-LA), Rep. Gregg Harper (R-MS), Rep. Trent Franks (R-AZ), Rep. Mo Brooks (R-AL), Rep. Glenn Grothman (R-WI), Rep. Ken Calvert (R-CA), Rep. Blake Farenthold (R-TX), Rep. Blake Chabot (R-OH), Rep. John R. Carter (R-TX), Rep. Dana Rohrabacher (R-CA), Rep. Jodey C. Arrington (R-TX), Rep. Trey Hollingsworth (R-IN), Rep. Rick W. Allen (R-GA), Rep. Paul A. Gosar (R-AZ), Rep. Trent Kelly (R-MS), Rep. Mimi Walters (R-CA), Rep. Darrell E. Issa (R-CA), Rep. Luke Messer (R-IN), Rep. Tom Cole (R-OK), Rep. Francis Rooney (R-FL), Rep. Ann Wagner (R-MO), Rep. Duncan D. Hunter (R-CA), Rep. Billy Long (R-MO), Rep. Jason Smith (R-MO), Rep. Blaine Luetkemeyer (R-MO), Rep. John R. Moolenaar (R-MI), Rep. Lloyd Smucker (R-PA), Rep. Vicky Hartzler (R-MO), Rep. David Rouzer (R-NC), Rep. Richard Hudson (R-NC), Rep. Edward R. Royce (R-CA), Rep. Joe Wilson (R-SC), Rep. Scott Perry (R-PA), Rep. Kevin Yoder (R-KS), Rep. Stephen Knight (R-CA), Rep. Paul Mitchell (R-MI), Rep. Jim Jordan (R-OH), Rep. Tom McClintock (R-CA), Rep. Jeb Hensarling (R-TX), Rep. Andy Barr (R-KY), Rep. Bradley Byrne (R-AL), Rep. Robert B. Aderholt (R-AL), Rep. Barbara Comstock (R-VA), Rep. Mike Bishop (R-MI), Rep. Roger W. Marshall (R-KS), Rep. John Abney Culberson (R-TX), Rep. Doug Lamborn (R-CO), Rep. Bill Flores (R-TX), Rep. Ted Poe (R-TX), Rep. John H. Rutherford (R-FL), Rep. Randy K. Weber (R-TX), Rep. Larry Bucshon (R-IN), Rep. Raul R. Labrador (R-ID), Rep. Todd Rokita (R-IN), Rep. Glenn Thompson (R-PA), Rep. John Ratcliffe (R-TX), Rep. Mia B. Love (R-UT), Rep. Pete Olson (R-TX), Rep. Lamar Smith (R-TX), Rep. Justin Amash (R-MI), Rep. Ron Estes (R-KS), Rep. Bruce Westerman (R-AR), Rep. Marsha Blackburn (R-TN), Rep. Kenny Marchant (R-TX), Rep. J. French Hill (R-AR), Rep. Pete Sessions (R-TX), Rep. Matt Gaetz (R-FL), Rep. Scott DesJarlais (R-TN), Rep. Bob Goodlatte (R-VA), Rep. Brad R. Wenstrup (R-OH), Rep. Ted Budd (R-NC), Rep. George Holding (R-NC), Rep. Andy Briggs (R-AZ), Rep. John J. Faso (R-NY), Rep. Steve Womack (R-AR), Rep. Andy Harris (R-MD), Rep. Tim Walberg (R-MI), Rep. Markwayne Mullin (R-OK), Rep. Doug LaMalfa (R-CA), Rep. David P. Roe (R-TN), Rep. Mark Sanford (R-SC), and Rep. Dave Brat (R-VA). Broken down by state: Texas (13), California (9), Michigan (5), Missouri (5), North Carolina (5), Indiana (4), Alabama (3), Arizona (3), Arkansas (3), Florida (3), Kansas (3), Ohio (3), Pennsylvania (3), Tennessee (3), Virginia (3), Georgia (2), Kentucky (2),

Neither bill left their respective subcommittees and neither passed in the 115th Congress.³³⁸ However, FOCA may be revisited by future congressional sessions.

While there is a strong chance Trump would sign FOCA into law, Trump and Flake, FOCA's main supporter, had extensive disagreements.³³⁹ Flake then announced he would not run for re-election³⁴⁰ and the senate seat was won by Democrat Kyrsten Sinema.³⁴¹

If Congress passed legislation that was facially neutral but actually banned PLAs, a number of long-term ramifications may occur. First, this ban would compete with the jurisdiction of the NLRA; and courts may have to reconcile which government actions fall under the NLRA and which fall under this new legislation. These disputes would increase potential litigation and create confusion nationwide.

Banning PLAs would deeply undermine the very nature of the bidding process in the construction industry. PLAs address unique circumstances in construction ranging from mass short-term employment of workers to timely completion of projects. A total ban would severely disable unions and speed up their current decline in power.³⁴² Although many opponents argue that unions are no longer necessary to assist the workforce, unions have a long history of supporting individual workers in obtaining a livable wage, securing safe working conditions, and holding companies responsible for their actions.³⁴³ ABC actively supports the lobbying of this legislation.³⁴⁴

Mississippi (2), Oklahoma (2), South Carolina (2), Colorado (1), Idaho (1), Louisiana (1), Maryland (1), New York (1), Utah (1), and Wisconsin (1).

338. 115 Legislative Outlook S. 622 LEXIS.

339. *Id.*

340. Eric Bradner, *Flake's speech burning Trump gets standing ovation from some Republicans*, CNN (Oct. 24, 2017), www.cnn.com/2017/10/24/politics/jeff-flake-retirement-arizona/index.html.

341. Tessa Stewart, *How Trump Accidentally Helped Democrat Kyrsten Sinema Flip Jeff Flake's Arizona Senate Seat*, ROLLING STONE (Nov. 13, 2018 at 1:07 PM), www.rollingstone.com/politics/politics-news/sinema-jeff-flake-seat-arizona-754785/.

342. Hannah Fingerhut, *More Americans view long-term decline in union membership negatively than positively*, PEW RES. CTR. (Jun. 5, 2018) www.pewresearch.org/fact-tank/2018/06/05/more-americans-view-long-term-decline-in-union-membership-negatively-than-positively/.

343. *Id.*

344. ABC's website "urges lawmakers to support the Fair and Open Competition Act (H.R. 1552/S. 622), which would prevent the government from mandating a PLAs on federal and federally assisted construction projects, optimize construction spend and taxpayer value and reward safe performance. H.R. 1552/S. 622 does noting [sic] to prevent a contractor from voluntarily entering into a PLA- it only prevents the government from mandating the use of a PLA as a condition of winning a contract." *ABC strongly opposes government-mandated Project labor agreements on public construction projects*, ABC, INC., www.abc.org/en-us/politicspolicy/issues/projectlaboragreements.

IV. PROPOSAL

Many owners choose PLAs to ensure timely completion of their construction projects even if, at bidding, the contract may cost more. First, as an owner on federally-funded public construction projects, the federal government is in the best situation to determine if it wants PLAs on these projects. If it does, the easiest solution is to condition federal funds on a PLA. Otherwise, Congress could always pass a bill narrowly tailored to PLAs. A less practical alternative would be for Congress to completely update the NLRA, including provisions pertaining to PLAs. Finally, the Supreme Court could resolve the circuit split on laws banning PLAs.

A. Condition Federal Funds on PLAs

If the federal government wanted PLAs on its projects, the easiest solution would be to conditionally require a PLA in order to receive federal funds. Currently, the federal government provides federal funding with many conditions. For example, federally-funded highway projects often mandate environmental impact statements, noise reports, and disadvantaged business enterprise (DBE) requirements.³⁴⁵ These conditions, along with many others, are all within the authority of the federal government under *South Dakota v. Dole*.³⁴⁶

Under the *Dole* test, the federal government would be using its spending power for the general welfare, with unambiguous conditions that allow the States a choice and clear consequences for non-compliance.³⁴⁷ The federal government's promotion of general welfare extends to environmental, economic, restorative, and other societal interests. In considering whether it is accepting federal funds, States have three options: (1) receive the money on condition of a PLA, (2) reject the money and fund the project themselves, or (3) reject the money and forgo the project.³⁴⁸ A PLA condition would relate to a federal economic and labor interest in nationwide

asp#LiveTabsContent5923412-lt (last visited Mar. 24, 2019).

345. See Fed. Highway Admin., *Contract Provisions for Federal-aid Construction and Service Contracts Required by FHWA or Other Agencies*, US DEPT. OF TRANSP., www.fhwa.dot.gov/construction/contracts/provisions.cfm (last visited Mar. 24, 2019) (listing a number of contract provisions for federal-aid construction and service contracts required by Federal Highway Administration or other agencies including Disadvantaged Business Enterprise (DBE) program requirements (49 CFR 26), Davis-Bacon's prevailing wage requirements (23 U.S.C. 113 and 40 U.S.C. 3141), environmental requirements (2 CFR Part 200 Appendix II (G) and (H)), and procurement requirements (2 CFR Part 200 at Appendix II (K)).

346. *Dole*, 483 U.S. 203.

347. *Id.*

348. *Id.*

projects because the federal government is acting as a proprietor in providing these funds.³⁴⁹ As an owner, the federal government should have the discretion to require conditions or enter into agreements it sees fit. Finally, because the States could refuse to accept the federal funds, the condition of funding would be argued as state pressure and not one of compulsion.³⁵⁰

State governments may elect to use federal funds for projects, especially when the federal government is footing most of the bill. Then States will not have to spend as much of their own funds on necessary projects. In accepting the funding, the State must comport with any conditions set forth in the PLA. These conditions often include prevailing wage requirements, disadvantaged business enterprise requirements, and environmental impact studies.³⁵¹ Large federal projects require prevailing wage whether or not the union is employed.³⁵² Therefore, the concern for using a PLA because of wage requirements is moot.

States that reject the condition must decide the importance of the project. If important, the State must come up with its own funds to finance the project without a PLA. Although states may elect to use non-union labor on their own projects, many choose union labor because they must comply with Davis Bacon and therefore the cost are equal.³⁵³ The states that oppose PLAs will likely reject PLAs on smaller projects that are easier to fund and unlikely to reject larger projects where majority of costs are covered by federal funding. If not important, the State may completely forgo the construction project. Either way, the federal government may divert its funds to other projects that include PLAs.

B. Congressional Action

1. Pass a Law Specifically Addressing PLAs

Next, Congress could limit its focus only to PLAs in order to pass a bill. Current congressional bills titled Fair Open and Competition Acts specifically address PLAs.³⁵⁴ These facially neutral, yet discriminatory in effect, Acts result from extensive lobbying by the Association of Builders & Contractors to end PLAs.³⁵⁵ If Congress wanted to put an end to PLAs, it could reintroduce and pass the Fair and Open Competition Act. These

349. *Id.*

350. *Id.*

351. *Id.*

352. Fed. Highway Admin., *Davis-Bacon and Related Acts, Questions and Answers*, U.S. DEPT OF TRANS., www.fhwa.dot.gov/construction/contracts/dbra_qa.pdf (last visited Mar. 24, 2019).

353. *Id.*

354. FOCA, *supra* note 337.

355. Lund & Oswald, *supra* note 100, at 2.

current bills mirror state legislation in states that seek to use non-union labor.³⁵⁶ Because the Act closely resembles many of the states' anti-PLA legislation, passing this Act would strengthen anti-PLA states.³⁵⁷ Alternatively, if this bill is not reintroduced or passed, and the majorities in the House and Senate shift to the democratic stance, Congress may pass a bill promoting the use of PLAs.

2. Update the NLRA

The most powerful and effective, yet highly unlikely, solution would be for Congress to update the NLRA. Congress has already preempted this area of labor law in passing the NLRA,³⁵⁸ but labor law has substantially changed since 1935.³⁵⁹ There has been no congressional update of the NLRA since the Landrum-Griffin Act.³⁶⁰ Updating the NLRA would clear up confusion not just with PLAs, but also other uncertainties in labor law.³⁶¹ Unfortunately, our current Congress is unlikely to pass any amendments.³⁶² If our current conservative Senate could pass amendments, those laws would likely undercut unions and the authority of the NLRA. If the balance of power shifts to a more liberal Congress, I predict that revisions would likely promote labor relations.

C. Further Clarification from the Supreme Court

The Supreme Court could grant certiorari on another PLA case. Any further ruling on the circuit split issue may clarify the law and uphold precedent: striking overly broad laws that promote policy and upholding narrowly tailored laws that further a

356. FOCA, *supra* note 337.

357. Passing the congressional act as drafted would strengthen anti-PLA states because the neutral language of the act has been determined by various courts to be discriminatory in effect. Therefore, if Congress were to pass FOCA, states would theoretically be able to discriminate on both state-funded projects and federally-funded projects.

358. *Infra* Section Background (D).

359. NLRA, 29 U.S.C. §§ 151-169 (1947).

360. *Id.*; see also James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 *FORDHAM L. REV.* 497, 524 (2014) (stating “following longstanding legislative gridlock, engineered by labor and management as powerful interest groups, Congress has failed to update the NLRA since 1959. This remarkable period of congressional inaction has left the NLRB on a political island”).

361. See generally Michael H. Gottesman & Michael R. Seidl, *A Tale of Two Discourses: William Gould's Journey from the Academy to the World of Politics*, 47 *STAN. L. REV.* 749, 765-66 (1995) (arguing to update the NLRA regarding its statutory purpose of promoting collective bargaining relationships); James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 *N.C.L. REV.* 939, 1024 (1996).

362. See *Statistics and Historical Comparison*, GOVTRACK, www.govtrack.us/congress/bills/statistics (last visited Mar. 24, 2019) (showing that Congress has only enacted 3% of proposed legislation in the 115th Congress).

procurement interest.³⁶³ In following the precedent set in *Boston Harbor, Gould, and Brown*, the Supreme Court's holding may find current legislative and executive action by the states to be in violation of the Supremacy Clause and strike down all laws that ban PLAs.³⁶⁴

However, the current conservative majority on the court will likely enforce a ban on PLAs to encourage "competition."³⁶⁵ In 2018, the Supreme Court held that "fair share" policies violate the First Amendment by forcing employees to join unions, instead of allowing voluntary membership.³⁶⁶ Also in 2018, the Supreme Court upheld arbitration agreements that imposed individual proceedings for employees and "must be enforced as written."³⁶⁷ Therefore, considering the political stance of the Justices, both sides may consider lobbying Congress as a more efficient method.

D. What Won't Work

Executive Orders are not a permanent solution. Since the first presidential executive order in 1992,³⁶⁸ each executive order shifted the current labor policy.³⁶⁹ This fluctuating policy continues to leave uncertainty and instability throughout all levels of government.³⁷⁰ Future presidential executive orders regarding PLAs will only add to the confusion and seek to muddy the waters dependent on the political party in office, which changes quite often. Instead, it would be more prudent to leave the policy and law-making decisions to Congress.

363. Were the Supreme Court to grant certiorari on another PLA case, it may further reinforce and clarify the precedent set out in *Boston Harbor*.

364. If the Supreme Court were to find that the discriminatory nature of state legislative and executive action violated the supremacy clause, the state bans on PLAs would be unconstitutional and agencies would more readily be able to determine their need for PLAs on a case-by-case basis.

365. The current conservative court does not appear interested in supporting union activity. Instead, the Supreme Court granted certiorari on a number of cases that indicate a non-union stance and subsequently ruled against union activity.

366. *Janus v. AFSCME*, Council 31, 851 F.3d 746, 747 (7th Cir. 2017) (overruled by *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018) ("*Janus*")) (upholding the "fair share" policy which requires non-union employees who receive union benefits to contribute to union fees). The Supreme Court held that "fair share" policies violate the First Amendment. *Janus*, 138 S. Ct. at 2478.

367. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (deciding that labor employees can contractually waive their right to class actions and forcibly submit to arbitration).

368. Exec. Orders, *supra* note 86.

369. Exec Orders, *supra* note 78.

370. Although the federal government has discretion on whether or not to include PLAs on federally-funded projects, states have either prohibited or required the use of PLAs on their projects. When party politics in states shift, the construction industry must adapt to the changes, generally to its disadvantage.

While waiting on the next executive order will likely result in a continued pattern of confusion regarding PLAs in the construction industry, various avenues exist to fix the confusion. Federal governments can use their market-participant status to effectuate PLAs in exchange for funding. Alternatively, both sides may lobby Congress to either update the NLRA or pass a PLA-specific bill. Finally, the least practical alternative would be for the Supreme Court to rule on a PLA case.

V. CONCLUSION

Between the long-delayed need for infrastructure and response to recent natural disasters in the United States, the use of project labor agreements will likely rise as construction projects increase. Even though the chief complaints against PLAs are increased costs and decreased competition, these issues are moot on federally funded projects. Because large-scale federally funded projects must comply with Davis-Bacon's prevailing wage, the projects essentially cost the same with or without a PLA. Many owners take comfort in a PLA, which assures that project workers are sufficiently trained to efficiently complete the project in a timely and safe manner. Every construction project carries with it the risk of weather changes, additional costs, labor disputes, and delays. Certainly, many of these risks are not within the control of the owner or contractors. However, owners should seek to minimize any risks that are within their control and many of those include labor issues which can be laid out in a PLA. It should therefore be up to the individual governmental agencies to determine whether to use a PLA on any given project and not be debilitated by a contractual ban by the legislature.

However, since many state governments disfavor PLAs, the federal government must decide if using PLAs is in its best interest. If so, the federal government has a number of options to implement the usage of PLAs, including conditioning funding on PLAs, introducing a bill supporting or opposing PLAs, or amending the NLRA to reflect the current stance. This leaves the states opportunities on construction projects and autonomy to decide whether the funding is worth the contractual obligation of a PLA. Otherwise, disagreements between unions and non-union contractors will likely result in increased litigation and it may be years before the Supreme Court adjudicates the issue.