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## No Runs, No Hits, Two Errors: How Maryland Erred in Prohibiting Replacement Players from Camden Yards during the 1994-95 Major League Baseball Strike

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# NOTES & COMMENTS

## COMMENT

### **NO RUNS, NO HITS, TWO ERRORS: HOW MARYLAND ERRED IN PROHIBITING REPLACEMENT PLAYERS FROM CAMDEN YARDS DURING THE 1994–95 MAJOR LEAGUE BASEBALL STRIKE**

#### I. INTRODUCTION

In August 1994, major league baseball experienced its eighth work stoppage in twenty-two years when the Major League Players Association (“Players Association” or “union”) went on strike. As in previous work stoppages, economics were a primary factor. Owners felt they were in financial distress and wanted to cap player salaries in order to ensure profitability. Players, whose yearly salaries averaged more than \$1 million, did not want to cede past negotiating gains and did not feel it was their responsibility to make sure the owners made money.

This work stoppage was different from the previous strikes and lockouts in several important respects:

- It caused the first cancellation of the World Series since 1903;
- It occurred at a time when baseball was without a commissioner. (Previous commissioners had taken partial responsibility for mediating labor disputes);
- It moved both Congress and the President to intervene; and
- It marked the first time that owners used replacement players during a labor dispute.

Fans reacted strongly to the use of replacement players. On one side were those who felt the owners might finally succeed in ruining the game by passing off scabs and scrubs as major leaguers. On the other side were those who could not muster sympathy for men who were paid millions of

dollars to play a game. The Maryland General Assembly (“the Assembly”) counted itself among the former group.

In March 1995, the Assembly stepped up to the plate and drove home legislation designed to prevent replacement players from playing baseball in Oriole Park at Camden Yards (“Camden Yards”). The Assembly rallied behind a statute that prohibited teams from playing in Camden Yards if fewer than seventy-five percent of their players had been on major league rosters in 1994.<sup>1</sup> The Assembly, however, may have been thrown out at home in its zeal to score a victory for taxpayers and fans. It committed two errors in judgment by testing the strong arms of the federal labor law and the Contract Clause of the Constitution.<sup>2</sup>

This Comment analyzes why and how Financial Institution section 13-723 (“Section 13-723” or “the Statute”) of the Annotated Code of Maryland is unconstitutional because it is preempted by federal labor law and violates the Contract Clause of the Constitution. Part II summarizes the 1994–95 baseball strike, providing a context for the resulting legislation. Part III discusses Section 13-723 and the dynamics involved in its passage. Part IV describes the National Labor Relations Act (“NLRA” or “the Act”) and its two main preemption doctrines. Part IV also describes cases that have applied these doctrines and analyzes Section 13-723, concluding that it runs afoul of the NLRA. Part V discusses the Contract Clause and the pertinent cases interpreting it. Part V also examines the Statute in light of these cases, concluding that the Statute is off-base under the Contract Clause. Part VI concludes that it is the job of major league baseball, not the states, to remedy its labor woes.

## II. BACKGROUND OF THE 1994–95 BASEBALL STRIKE

In December 1992, major league baseball owners voted to reopen negotiations on their collective bargaining agreement with the Major League Players Association.<sup>3</sup> The agreement, which was to expire at the end of the 1994 season, allowed either side to reopen negotiations one year early to discuss only two issues: free agency and salaries.<sup>4</sup> Owners reopened negotiations because they wanted a “new economic system”<sup>5</sup> that

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1. See *infra* notes 132–36 and accompanying text, arguing that this legislation was, in effect, a total ban on replacements.

2. U.S. CONST. art. I, § 10.

3. Ross Newhan, *Baseball Owners Open Door to Talks*, L.A. TIMES, Dec. 8, 1992, at C1.

4. *Id.* at C5.

5. Ross Newhan, *Owners Push for Salary Cap*, L.A. TIMES, Feb. 18, 1993, at C8.

tied a cap on player salaries to a new revenue-sharing plan between the large and small-market teams.<sup>6</sup>

At the time they reopened negotiations, the twenty-eight major league clubs shared all revenues from national broadcast coverage and other revenues from local broadcast coverage. Additionally, home teams shared a percentage of their gate receipts with visiting clubs.<sup>7</sup> The teams shared these funds because of the huge disparity in local broadcast revenues. For example, the New York Yankees had a twelve-year, \$486 million contract with the Madison Square Garden Network, while the Minnesota Twins collected only about \$4 million per year in local television revenues.<sup>8</sup> Theoretically, this income disparity made the small-market clubs less competitive because they could not simultaneously sign high-priced talent and remain profitable.<sup>9</sup>

The new revenue-sharing plan proposed by club owners provided each club with approximately \$18 million. This money came from national and local broadcast income, shares of ticket sales, licensing, and indemnification from the cable TV superstations.<sup>10</sup> Owners linked revenue-sharing to a salary cap because salaries had skyrocketed over the last twenty years,<sup>11</sup> consuming a greater percentage of gross revenues than they had previously.<sup>12</sup> The Players Association agreed that the clubs should review their revenue-sharing plan but argued that the owners should implement the new system and measure its progress before insisting that the players restrict their salaries to help ensure the plan's success.<sup>13</sup>

From the time the owners voted to reopen negotiations, they took six months to agree to consider some sort of revenue-sharing,<sup>14</sup> thirteen months to approve a revenue plan,<sup>15</sup> and eighteen months to present a proposal for a new collective bargaining agreement to the players.<sup>16</sup>

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6. *Id.*

7. *Id.*

8. *Owners Vow Not to Lock Out Players*, ARIZ. REPUBLIC, Aug. 13, 1993, at C1.

9. Ross Newhan, *Share and Share Alike?*, L.A. TIMES, Aug. 5, 1993, at C1.

10. *Id.* at C5.

11. The average player's salary rose from \$34,092 in 1972 to \$1.12 million in 1993. Richard Justice, *Baseball Faces Strike, Again*, WASH. POST, June 12, 1994, at A1.

12. Salaries comprised 58% of gross revenues in 1993 compared to 41% in 1989. Newhan, *supra* note 9, at C5.

13. *Id.*

14. Hal Bodley, *Labor Strife Places Races in Jeopardy*, USA TODAY, July 27, 1993, at 1C.

15. *Baseball Owners OK Revenue Sharing Plan*, S.F. CHRON., Jan. 19, 1994, at D1.

16. Richard Justice, *Baseball Proposes Salary Cap*, WASH. POST, June 15, 1994, at D1. The Players Association complained about the delay in receiving the proposal. "[I]f it takes [the

Waiting for a proposal, the Players Association threatened strikes in consecutive seasons. In 1993, a strike was avoided when owners pledged not to lock out players nor to change the free agency and salary arbitration systems before the 1994 season.<sup>17</sup> The union struck in August 1994 after it could not convince owners to drop the idea of a salary cap.<sup>18</sup> The Players Association did not persuade the owners to acknowledge that the game was more prosperous than the owners had claimed, even though revenue had increased from \$185 million in 1976 to \$1.8 billion in 1993.<sup>19</sup>

Unfortunately, the strike occurred during a remarkable season in which teams long mired in the cellar seemed destined to rise and decades-old records seemed ready to fall. The first-place New York Yankees had a chance to end that franchise's longest post-season drought of thirteen years. The Cleveland Indians were having their best season since winning the pennant in 1954. Tony Gwynn of the San Diego Padres had a chance to become the first .400 hitter since Ted Williams hit .406 fifty-three years earlier. Matt Williams, Ken Griffey, Jr., and Frank Thomas each had a chance to break Roger Maris' single-season home run record of sixty-one, which had stood for thirty-four years.<sup>20</sup>

Frustration and concern with the situation eventually reached the federal government. In June 1994, Ohio Senator Howard Metzenbaum introduced a bill that would have removed baseball's antitrust exemption on labor issues.<sup>21</sup> During the strike, Secretary of Labor Robert Reich met with the owner's negotiator, Richard Ravitch; union head Donald Fehr met with the Federal Mediation and Conciliation Service.<sup>22</sup> No degree of prodding helped. Negotiations went nowhere, time ran out, and the remainder of the season, including the World Series, was cancelled.<sup>23</sup>

In late September, Baltimore Oriole majority owner Peter Angelos met with Mr. Fehr informally to discuss possible options to end the

owners] eight months or more to make a proposal, how do they expect us to study it, respond to it and negotiate it in only a couple months?" Newhan, *supra* note 9, at C5.

17. *Owners Vow Not to Lock out Players*, *supra* note 8, at C1.

18. Ross Newhan, *Owners Gripe as Baseball Strike Begins*, L.A. TIMES, Aug. 12, 1994, at A1.

19. Richard Justice, *Strike All But Certain*, WASH. POST, July 19, 1994, at E1.

20. *And That's the Ballgame*, STAR TRIB. (Minneapolis-St. Paul), Sept. 15, 1994, at 1C.

21. Tom Diemer, *Congressional Action Unlikely if Baseball Players Strike*, THE PLAIN DEALER (Cleveland), July 14, 1994, at 3D. Senator Metzenbaum hoped that removing the antitrust exemption would give the players additional leverage by enabling them to take the owners to court if negotiations reached an impasse. *Id.*

22. *Players Walk, Negotiators Talk, Fans Sulk*, STAR TRIB. (Minneapolis-St. Paul), Aug. 13, 1994, at 1C.

23. *And That's the Ballgame*, *supra* note 20, at 1C.

strike.<sup>24</sup> The owners formally modified their salary cap proposal in mid-November, adding a taxation proposal that would have transferred revenue from large-market to small-market teams.<sup>25</sup> In early December, players offered a counterproposal calling for a payroll tax that would raise \$35 million for redistribution to small-market clubs.<sup>26</sup> On December 23, 1994, the owners rejected all union proposals, declared an impasse in negotiations, and unilaterally imposed a salary cap.<sup>27</sup> Within days, both sides filed unfair labor practice charges with the National Labor Relations Board ("NLRB").<sup>28</sup>

In January 1995, owners, who had earlier threatened to use replacement players in place of striking players,<sup>29</sup> developed and approved a plan for using replacement players. Each team would have a thirty-two-man roster; clubs would honor the contracts of those major league players who broke union rank to join in replacement games.<sup>30</sup>

In February 1995, under pressure from the NLRB, the owners voluntarily withdrew the salary cap. In return, the NLRB promised not to issue any complaints.<sup>31</sup> The union then lifted the ban on player signings it had imposed in response to the salary cap.<sup>32</sup> The owners, however, imposed their own ban on negotiating with and signing players,<sup>33</sup> prompting the Players Association once again to file an unfair labor practice charge with the NLRB.<sup>34</sup>

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24. Ross Newhan, *Owners Request More Time*, L.A. TIMES, Oct. 5, 1994, at C3.

25. Mark Maske, *Baseball Impasse Jeopardizes Start of '95 Season*, WASH. POST, Nov. 29, 1994, at E1. Owners hoped the proposal would help bring ensure profitability, reduce the share of club revenues going to players, and remedy payroll disparity between clubs. *Owners Respond Coolly to Union Offer*, ROCKY MTN. NEWS, Dec. 11, 1994, at 30B.

26. *Owners Respond Coolly to Union Offer*, *supra* note 25, at 30B.

27. *Owners Impose Salary Cap*, S.F. CHRON., Dec. 23, 1994, at G1.

28. Mark Maske, *Both Sides File Charges with NLRB*, WASH. POST, Dec. 28, 1994, at C1.

29. *Players to Fans—Focus on the Issues*, S.F. CHRON., Sept. 22, 1994, at B5.

30. Mark Maske, *Replacement Rules Approved*, WASH. POST, Jan. 14, 1995, at H10 [hereinafter Maske, *Replacement Rules*]. There were rumors on the owners' side that up to 20% of the players would cross the picket line within a few weeks of Opening Day. *Id.* Indeed, a week before spring training was to start, several players began to question the union's bargaining approach publicly. Mark Maske, *Baseball's Waiting Game: Now Both Sides Cool Off*, WASH. POST, Feb. 12, 1995, at D1 [hereinafter Maske, *Baseball's Waiting Game*].

31. Maske, *Baseball's Waiting Game*, *supra* note 30, at D7.

32. *Id.* The union had explained an earlier signings ban as a way to avoid creating "two different classes of players who signed under two different economic systems." Newhan, *supra* note 24, at C3.

33. Maske, *Baseball's Waiting Game*, *supra* note 30, at D7.

34. *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 250 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). It was upon this charge that the district court issued an injunction against the owners, a move that triggered the end of the strike.

With spring training fast approaching, President Clinton attempted to provide relief by calling both sides to the White House.<sup>35</sup> After those talks broke down, the President pitched legislation to Congress designed to settle the strike, but Congress was reluctant to take a swing.<sup>36</sup>

When spring training camps opened with replacements,<sup>37</sup> chaos and confusion were the order of the day. Union unrest was apparent, though players professed their solidarity was intact.<sup>38</sup> Ownership also had its problems. Detroit Tiger manager Sparky Anderson was put on leave of absence for refusing to manage replacement players, forfeiting a reported \$1 million salary.<sup>39</sup> The Toronto Blue Jays, defending World Series champions, were a team without a province because of an Ontario law that prohibited workers from crossing picket lines.<sup>40</sup>

Nothing, however, matched what was occurring in Baltimore, where the Orioles simply refused to field a team of replacement players.<sup>41</sup> Orioles owner Peter Angelos, a labor lawyer, called the decision to use replacements "ill-conceived, ill-advised, bizarre, ludicrous, [and] unconscionable."<sup>42</sup> As if to echo the sentiment, the Baltimore City Council passed an ordinance in early March prohibiting replacement players from playing at Camden Yards and imposing a \$1000 fine for each day the ordinance was violated.<sup>43</sup>

Against this backdrop, the State of Maryland decided to act.<sup>44</sup>

35. Mark Maske, *Clinton Seeks Intervention on Strike*, WASH. POST, Feb. 8, 1995, at A1.

36. Helen Dewar, *Hill Balks at Clinton Baseball Bill; Measure Would Create Panel of 3 Arbitrators*, WASH. POST, Feb. 9, 1995, at A1.

37. Bill McAllister, *Reluctantly, Congress Takes a Swing at Strike*, WASH. POST, Feb. 16, 1995, at B1.

38. Mark Maske, *Dykstra Says He Won't Cross Line*, WASH. POST, Feb. 17, 1995, at C1.

39. *Sparky Won't Coach Replacements*, S.F. CHRON., Feb. 18, 1995, at B2. Anderson, considered one of baseball's all-time great managers, was fourth on the career victory list for managers and the only manager to have won World Series titles and 100 games or more in a season in both leagues.

40. Tony DeMarco, *Strike May Leave Jays Without a Country*, DENVER POST, Feb. 5, 1995, at 1B.

41. *Id.* at 7B.

42. Pat Jordan, *Whaddya Mean No Man Is an Island?*, L.A. TIMES, Feb. 26, 1995 (Magazine), at 12.

43. BALTIMORE, MD., CITY CODE art. 21, § 12 (1983 Replacement Volume, as amended).

44. Shortly after Maryland passed its statute, District Judge Sonia Sotomayor found reasonable cause to believe the owners had committed an unfair labor practice and issued an injunction restoring the status quo terms of the expired agreement. *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 250 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). The Players Association then offered to end the strike. Mark Maske, *Baseball Players Offer to End Strike*, WASH. POST, Apr. 1, 1995, at A1. The owners, unable to garner enough votes for a lock-out, accepted the offer, and the longest and most costly strike in sports history was over. Ross Newhan, *It's Now Official: Baseball to Return*, L.A. TIMES, Apr. 3,

## III. LEGISLATION

The Maryland General Assembly prohibited replacement players from playing in Camden Yards for the 1995 season:

Notwithstanding any other provision of this subtitle, the [Maryland Stadium] Authority shall prohibit a major league professional baseball team from playing baseball in a stadium in Camden Yards if fewer than [seventy-five percent] of the players on the team's current [forty]-player major league roster were on the [forty]-player major league roster of a professional team in major league baseball at any time in the preceding calendar year.<sup>45</sup>

This legislation was "an emergency measure . . . necessary for the immediate preservation of the public health and safety."<sup>46</sup> It contained a provision that abrogated the statute on March 31, 1996, with no further action required of the legislature.<sup>47</sup>

In the preamble to Section 13-723, the Assembly set out its official reasons for enacting the legislation. It stated that Camden Yards involved a significant expenditure of State funds, that a significant debt arising from construction costs remained, and that reducing the debt depended on public use of the stadium.<sup>48</sup> The Assembly cited a poll stating that an overwhelming majority of Oriole season ticket holders would not be interested in attending games using replacement players.<sup>49</sup> Finally, the Assembly asserted that the State had a compelling interest in protecting its substantial investment in the stadium.<sup>50</sup>

There were also unofficial reasons for enacting the legislation. Baltimore Mayor Kurt Schmoke felt the City had a "substantial interest in major-league baseball being played . . . and replacement games are not

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1995, at A1.

45. MD. CODE ANN., FIN. INST. § 13-723(b) (1992 & Supp. 1995) (abrogated Mar. 31, 1996).

46. S. 719, Regular Sess., 1995 Md. Laws 6.

47. *Id.* Though the statute is no longer in effect, nothing prevents Maryland or other states from enacting similar statutes in the future. At the time this Comment went to press, owners and players had yet to reach a new collective bargaining agreement. Moreover, the issue of state regulation of industrial relations continues to be a live topic, not restricted to the friendly confines of baseball. To borrow a phrase from the mootness doctrine, the situation is "capable of repetition, yet evading review." *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974) (citations omitted).

48. S. 719, Regular Sess., 1995 Md. Laws 6.

49. *Id.*

50. *Id.*



major league baseball.”<sup>51</sup> The City also felt that the “future economic benefits of major league baseball require[d] protection of the fans’ interests and loyalty.”<sup>52</sup> Governor Parris Glendening said the bill was “extremely important to doing what we can to have real baseball in Maryland.”<sup>53</sup> Other proponents hoped the bill would provide cover for Oriole owner Peter Angelos, whose refusal to field replacement players irked the other owners.<sup>54</sup> Still others argued it would help preserve Cal Ripken’s streak of consecutive games played.<sup>55</sup>

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51. Peter Schmuck et al., *Mayor, Council May Try to Ban Replacements*, BALT. SUN, Jan. 28, 1995, at 1C. The idea of banning replacement players originated in Mayor Schموke’s office. Charles Babington, *A Conflict over Interests*, WASH. POST, Mar. 22, 1995, at A1. Unable to sponsor the bill himself, Mayor Schموke asked the chairman of the Baltimore delegation to the Assembly, State Senator John A. Pica, Jr., to sponsor it. Peter Brush, *4 Who Got Angelos Campaign Donations Pushed Legislation That May Help Him*, BALT. SUN, Apr. 1, 1995, at 4B. Senator Pica worked for Peter Angelos’ law firm at the time. Babington, *supra*. The possible conflict of interest prompted Delegate Robert Flanagan to delay temporarily passage of the measure so that the ethics panel could review it. That move so enraged Senator Pica that he attempted to confront Delegate Flanagan on the House floor; unfortunately, he mistakenly accosted another delegate, who then claimed to have been “physically threatened.” Senator Pica later said he would “knock [Flanagan’s] lights out when I see him.” *Id.*

Mayor Schموke also threw out the first pitch on a City ordinance banning replacement players from Camden Yards. Schmuck, *supra*. Interestingly, this ordinance was similar to City Council Bill No. 1077, which would have authorized the City “to prohibit the use of replacement workers for professional athletes . . .” Letter from Neal M. Janey, City Solicitor, City of Baltimore, to Honorable President and Members of the City Council of Baltimore 1 (Feb. 22, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*). The City Solicitor concluded that Council Bill No. 1077 would be preempted by federal law, *id.* at 5, and would subject the City to damages and attorneys fees in favor of the major league owners if they successfully challenged the bill in court. *Id.* at 5 n.3.

52. *Professional Baseball—Camden Yards: Hearing on S. 719 Before the Maryland Senate Fin. Comm., Gen. Assembly of 1995, Regular Sess.* (Md. 1995) (statement of Kevin O’Keefe, representing the Baltimore City Administration).

53. John A. Morris et al., *Bill on Duck Hunting Goes to Governor*, BALT. SUN, Mar. 28, 1995, at 3B.

54. Michael Abramowitz, *Maryland Senate Panel Considers Going to Bat for Orioles*, WASH. POST, Feb. 17, 1995, at D3.

The reasons behind Angelos’ refusal to hire replacements range from his dislike for acting commissioner Bud Selig to his admiration for the working man. Jordan, *supra* note 42, at 14, 16. Angelos characterized Selig’s methods for resolving baseball’s problems as “amateurish, ineffective, and doomed to failure. Watching him is like watching a person put his hand in a buzz saw. You want to shout, ‘You’re splattering blood all over the rest of us!’” Conversely, Angelos credits the labor movement “for everything good in America.” He believes it is every American’s responsibility “to buy American, even if it’s inferior to a foreign product. You have to support your fellow Americans.” Angelos literally practices what he preaches: his law firm has handled product-liability cases for employees and has represented steelworkers, shipyard workers, and other employees in a consolidated-action asbestos-poisoning suit, which so far has earned nearly \$1 billion for the workers. *Id.*

55. Abramowitz, *supra* note 54, at D3.

## IV. NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act<sup>56</sup> establishes the right of employees to self-organize, bargain collectively, and designate representatives to negotiate the terms and conditions of their employment.<sup>57</sup> In providing this comprehensive federal regulation of industrial relations, Congress did not simultaneously foreclose state power to regulate industrial relations.<sup>58</sup> In fact, Congress has left “much to the states, though [it] has refrained from telling us how much.”<sup>59</sup> Due to this ambiguity, the extent to which federal labor law preempts various state laws has been a matter of frequent concern.<sup>60</sup> Responding to this concern, the Supreme Court has set forth two distinct NLRA preemption doctrines, known as the *Garmon* and *Machinists* doctrines.<sup>61</sup>

A. *Garmon Preemption Doctrine*

The initial labor preemption doctrine was set forth in *San Diego Building Trades Council v. Garmon*.<sup>62</sup> The *Garmon* Court stated that when “the activities which a State purports to regulate are protected by [section 7 of the Act], or constitute an unfair labor practice under [section] 8, due regard for the federal enactment requires that state jurisdiction must yield.”<sup>63</sup> This doctrine was further developed to preempt state action if the

56. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (1994)).

57. National Labor Relations Act § 7, 29 U.S.C. § 157.

58. This was not an oversight. As one scholar has noted:

The 1935 Congress had enough worries about whether the NLRA’s core regulatory scheme would survive a challenge that it was unconstitutionally usurping state prerogatives, without needlessly enlarging that risk by ousting the states from parallel jurisdiction that did not in fact conflict with the federal scheme. Existing Supreme Court decisions in 1935, with which Congress was intimately familiar as it considered the Wagner Act, created serious doubt that the Commerce Clause empowered Congress to regulate the labor relations of employers (other than interstate carriers) at all.

Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 385 (1990) (footnotes omitted).

59. *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 488 (1953).

60. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241 (1959).

61. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498–99 (1983).

62. 359 U.S. 236 (1959). At issue in *Garmon* was whether California could award damages arising out of union activity that it could not enjoin. *Id.* at 239.

63. *Id.* at 244. Section 7 of the NLRA protects three employee rights: (1) the right to self-organization, (2) the right to bargain collectively, and (3) the right to engage in concerted activities for the purpose of bargaining collectively. National Labor Relations (Wagner) Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. §§ 151–169, § 157 (1994)). Section 8 defines five unfair labor practices of an employer: (1) interfering with

conduct “is actually or arguably either prohibited or protected by the Act.”<sup>64</sup> The *Garmon* Court noted two limited exceptions to preemption: where the regulated activity (1) was “a merely peripheral concern” of federal labor law or (2) “touched interests . . . deeply rooted in local feeling and responsibility.”<sup>65</sup>

### B. *Machinists Preemption Doctrine*

The second labor preemption doctrine was set forth in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*.<sup>66</sup> A state law may be preempted under *Machinists* if either of two conditions is met. First, a state law is preempted if “Congress intended that the conduct involved be unregulated because [it was] left ‘to be controlled by the free play of economic forces.’”<sup>67</sup> Second, a state law is preempted when “‘the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act’s processes.’”<sup>68</sup>

### C. *Applying the Preemption Doctrines to Section 13-723*

The Supreme Court has held that “the NLRA was intended to supplant labor *regulation*, not all legitimate state activity that affects labor.”<sup>69</sup> In practice, this means that labor law preemption doctrines apply only when a state or local government acts as a regulator, not when it acts as a proprietor or market participant.<sup>70</sup>

The Maryland Attorney General argued that Section 13-723 was not preempted because the State was acting in a proprietary capacity as owner

employees in the exercise of their § 7 rights, (2) interfering with the formation of a union, (3) discriminating with regard to hiring or tenure of employment, (4) retaliating against an employee for activities under the Act, and (5) refusing to bargain. National Labor Relations Act § 8(1)–(5), 29 U.S.C. § 158(a)(1)–(5).

64. *Belknap*, 463 U.S. at 498.

65. *Garmon*, 359 U.S. at 243–44.

66. 427 U.S. 132 (1976). The question in *Machinists* was “whether federal labor policy pre-empt[ed] the authority of a state labor relations board to . . . [enjoin] a union and its members from [refusing] to work overtime pursuant to a union policy to put economic pressure on the employer in negotiations for renewal of an expired collective-bargaining agreement.” *Id.* at 133.

67. *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

68. *Id.* at 147–48 (quoting *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

69. *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 227 (1993).

70. *Id.*; see discussion *infra* Parts IV.C.1–2 on the proprietor/regulator distinction.

of Camden Yards.<sup>71</sup> In a letter to several Maryland legislators, the Attorney General's office identified the *Garmon* and *Machinists* preemption doctrines and stated that if the legislation was viewed as regulatory "there is no doubt that [it] is preempted under the *Machinists* principle."<sup>72</sup> Nevertheless, the Attorney General concluded the legislation arguably would not be preempted because Maryland, as owner of Camden Yards, was acting in a proprietary capacity.<sup>73</sup> The first question, then, is: Was Maryland acting as a regulator or proprietor in enacting the Statute?

### 1. The Distinction Between Proprietor and Regulator

Three Supreme Court cases are instructive in delineating proprietary/regulatory conduct. *Golden State Transit Corp. v. City of Los Angeles*<sup>74</sup> and *Wisconsin Department of Industry v. Gould Inc.*<sup>75</sup> demonstrate what type of state action constitutes regulation; *Building & Construction Trades Council v. Associated Builders & Contractors, Inc.*<sup>76</sup> is an example of a state acting as a proprietor. Maryland's actions are closely analogous to the regulatory actions in *Golden State Transit* and *Gould* but dissimilar to the proprietary action in *Building & Construction Trades Council*.

*Golden State Transit* involved Los Angeles' refusal to renew a taxicab franchise because the company's drivers were on strike.<sup>77</sup> The Supreme Court rejected the contention that the City was simply making a decision concerning a taxicab franchise and not regulating it.<sup>78</sup> The Court held that the parties' use of economic pressure was "a legitimate part of

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71. Maryland legislators sought the opinion of the Maryland Attorney General because they were aware there may be legal objections to the bill. Letter from Richard E. Israel, Assistant Attorney General, State of Maryland, to Samuel I. Rosenberg, Delegate, and John A. Pica, Jr., Senator, Maryland General Assembly 5 (Feb. 21, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

72. *Id.* at 3. The Attorney General expressed no view whether the bill violated *Garmon*.

73. *Id.* at 5.

74. 475 U.S. 608 (1986).

75. 475 U.S. 282 (1986).

76. 507 U.S. 218 (1993).

77. *Golden State Transit*, 475 U.S. at 609. Drivers went on strike while the company was up for franchise renewal with the City. Initially, the City Council extended the contract several times while labor negotiations continued. *Id.* at 610. Later, Council members publicly accused the company of negotiating unreasonably and attempting to break the union. *Id.* at 611. The Council ultimately rejected a final contract extension and stated it would not reconsider unless the parties settled the dispute before the contract expired. *Id.* When the parties did not settle and the franchise expired, the company sued, alleging the City's action was preempted by the NLRA. *Id.*

78. *Id.* at 618.

their collective-bargaining process. . . . [T]he bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help.”<sup>79</sup> The situation might have been different if the City had purchased services from the company for use by City workers.<sup>80</sup> “In that situation, if the strike had produced serious interruptions in the services the city had purchased, the city would not necessarily have been pre-empted from advising Golden State that it would hire another company if the labor dispute were not resolved and services resumed by a specific deadline.”<sup>81</sup> Had Los Angeles acted as a market participant, protecting its interests as a consumer of services rather than regulating a company, its action might have survived a preemption challenge.

In *Gould*,<sup>82</sup> Wisconsin did not inject itself into a labor dispute but instead prohibited its procurement agents from doing business with any person who had violated the NLRA three times within five years.<sup>83</sup> The Supreme Court rejected the assertion that the statute was an exercise of the State’s spending, rather than its regulatory power.<sup>84</sup> The Court determined that the purposes of the statute were to deter labor law violations and enforce the NLRA.<sup>85</sup> “[A]s a supplemental sanction for violations of the NLRA, [the statute] conflicts with the [NLRB’s] comprehensive regulation of industrial relations . . . [,] diminishes the Board’s control over enforcement of the NLRA[,] and thus further detracts from the ‘integrated scheme of regulation’ created by Congress.”<sup>86</sup> The Court emphasized a limit to its holding:

We do not say that state purchasing decisions may never be influenced by labor considerations . . . . [However, we] are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the

79. *Id.* at 615 (citation omitted).

80. *Building & Constr. Trades Council*, 507 U.S. at 227.

81. *Id.* at 227–28.

82. *Wisconsin Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282 (1986).

83. *Id.* at 283–84. Following judicial enforcement of four NLRB orders against various Gould divisions, Wisconsin informed the company that it would not enter new contracts with it for three years and would continue current contracts only as long as necessary to avoid penalties. *Id.* at 285.

84. *Id.* at 287.

85. *Id.*

86. *Id.* at 288–89.

requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the [NLRB].<sup>87</sup>

Conversely, *Building & Construction Trades Council*<sup>88</sup> involved an attempt by Massachusetts, as owner of a construction project, to enforce a pre-hire collective bargaining agreement negotiated by private parties.<sup>89</sup> The Supreme Court emphasized that Congress authorized certain kinds of labor agreements to accommodate conditions specific to the construction industry.<sup>90</sup> The Court stated:

[There was] no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same.<sup>91</sup>

Massachusetts' action was not preempted because it was not trying to regulate industrial relations; it was merely purchasing labor for a construction project it owned. As then-Circuit Judge Stephen Breyer had noted in dissent:

[W]hen the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.<sup>92</sup>

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87. *Id.* at 291.

88. *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218 (1993).

89. *Id.* at 220. The Massachusetts Water Resources Authority ("MWRA") was responsible for a clean-up project of Boston Harbor, providing the funds for construction of the treatment plant, awarding contracts, and supervising the effort. *Id.* at 221. The project management company sought and received approval from the MWRA to negotiate an agreement with the Building and Construction Trades Council ("BCTC"). The agreement recognized the BCTC as the exclusive bargaining agent for all craft employees, required that all employees become union members within seven days of employment, established the primary use of BCTC's hiring halls as suppliers of the craft labor force, and required all contractors and subcontractors to agree to be bound by the agreement. *Id.* at 221-22. Two contractors associations brought separate suits alleging the agreement violated the NLRA. *Id.* at 222-23.

90. *Id.* at 231.

91. *Id.*

92. *Associated Builders & Contractors, Inc. v. Massachusetts Water Resources Auth.*, 935

## 2. Maryland's Action Is Regulatory Rather Than Proprietary

The Maryland Attorney General's office opined that a state "has considerable latitude when pursuing its purely proprietary interest."<sup>93</sup> In addition, because Maryland owned and managed Camden Yards, "it is at least arguable that the State is acting in its proprietary capacity like any other property owner to protect a substantial investment which would likely be eroded if less experienced replacement players were used."<sup>94</sup> Analysis shows, however, that Maryland's action closely resembled the nonproprietary state actions in *Gould* and *Golden State Transit*.

Recall that in *Gould*, the statute punished companies for NLRA violations, not for breaches of its contractual obligations to the State.<sup>95</sup> Similarly, Maryland did not accuse the Orioles of breaching its lease with the Maryland Stadium Authority ("MSA"). There are no lease provisions requiring that players be of a certain caliber, that they achieve certain offensive or defensive milestones, or that the team attract a minimum number of fans to the park.<sup>96</sup> Maryland determined that the owners should be restricted in their use of replacement players; Maryland did not attempt to protect its substantial capital investment by taking any steps to ensure large attendance except with respect to the Orioles' labor policy. Thus it

F.2d 345, 361 (1st Cir. 1991) (Breyer, C.J., dissenting), *rev'd sub nom.*, *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218 (1993).

93. Letter from Richard E. Israel, Assistant Attorney General, State of Maryland, to Samuel I. Rosenberg, Delegate, and John A. Pica, Jr., Senator, Maryland General Assembly, *supra* note 71, at 4.

94. *Id.*

95. *Building & Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 228–29 (1993).

96. Agreement Regarding Oriole Park at Camden Yards Between the Maryland Stadium Authority and The Orioles, Inc., Sept. 2, 1992 [hereinafter Lease Agreement] (on file with the *Loyola of Los Angeles Entertainment Law Journal*). The Orioles' annual rent to the MSA is partially based on admission and concession revenues. *Id.* art. IV, §§ 4.03.2(a), (c). A decrease in attendance would probably cause a corresponding decrease in rent revenue to the State. As in any contract, however, the Orioles have an obligation to act in good faith. As long as the Orioles do not use replacement players in order to lower their rent payments, they will not have breached the lease. Moreover, the Lease Agreement states that:

[The MSA] shall have no right to approve or veto the ORIOLES' decisions regarding the business operations of the ORIOLES or the baseball operations of the Baltimore Orioles. The ORIOLES shall have the sole and exclusive right to make all such decisions in accordance with their own needs as the ORIOLES deem appropriate, without interference from MSA . . . .

*Id.* art. IV, § 4.10.

"Business operations" are defined to include "replacing members of and maintaining the Baltimore Orioles professional team . . . ." *Id.* art. V, § 5.01.3(c).

attempted to infringe upon the NLRA's "comprehensive regulation of industrial relations"<sup>97</sup> just as Wisconsin did in *Gould*.

Maryland's action is also similar to Los Angeles' attempt in *Golden State Transit* to use its legislative power to influence the outcome of a labor dispute. By prohibiting replacement players from using Camden Yards when Opening Day was only one month away, Maryland "in effect imposed a positive durational limit on the exercise of economic self-help."<sup>98</sup> The owners were intent on starting the season on time with either replacement or major league players. Maryland, in essence, declared that players would have to be major league players.<sup>99</sup> In order to start the season on time, the owners would have to settle with the Players Association before Opening Day.

The situation would have been different if Maryland had purchased baseball services from the Orioles for use by State employees. Using the language from the Court's reasoning in *Building & Construction Trades Council*:

[I]f the strike had produced serious interruptions in the [major league baseball] services the [State] had purchased, the [State] would not necessarily have been preempted from advising [the Orioles] that it would hire another [major league baseball team] if the labor dispute were not resolved and [major league baseball] services resumed by [the start of the season].<sup>100</sup>

Of course, Maryland does not have a baseball services contract with the Orioles or major league baseball. The State is not a consumer that has hired the Orioles to entertain State employees; the State is merely leasing its stadium to the Orioles.

The Maryland General Assembly emphasized that it was protecting its substantial investment as would any property owner.<sup>101</sup> This argument has some merit and judicial support. It may be too much to ask a state to stand by helplessly while a labor impasse wreaks havoc on its economy. Data suggested that the use of replacement players would threaten Maryland's investment in Camden Yards.<sup>102</sup> Additionally, several courts

97. Wisconsin Dep't of Indus. v. Gould, Inc., 475 U.S. 282, 288 (1986).

98. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 615 (1986).

99. See *infra* notes 132-36 and accompanying text.

100. *Building & Constr. Trades Council*, 507 U.S. at 227-28.

101. S. 719, Regular Sess., 1995 Md. Laws 6.

102. Memorandum from Peter D. Hart Research Associates, Inc., Survey of Baltimore Orioles Season Ticket Holders, to Peter Angelos 1-5 (Jan. 20, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*). This survey concludes that the Orioles would suffer serious damage to its fan base if it began the season with replacement players. Thirty percent of



have implied that the existence of local economic needs may have changed their finding of preemption.<sup>103</sup>

However, there is one fundamental problem with this argument. No court has held that the possibility of local economic harm transforms a state from a regulator to a proprietor. That argument is properly used only to show that the state regulation is excused under the *Garmon* “local feeling” exception.<sup>104</sup> Generally, state governments that attempt to regulate industrial relations do not try to escape preemption by portraying themselves as market participants. They attempt to bring their regulations within the *Garmon* exceptions.<sup>105</sup> Because Maryland is not purchasing baseball services, it is acting as a regulator and should be subject to the preemption doctrines. Arguments regarding harm to the local economy may properly be advanced only under the *Garmon* exceptions.

### 3. Preemption Overview

Since Maryland acted as a regulator and not a proprietor, the preemption doctrines apply to Section 13-723. The *Garmon* and *Machinists* preemption doctrines are different roads to the same destination. A particular state action need not violate both doctrines in order to be preempted by the NLRA. The Maryland Statute exemplifies this principle. On the one hand, Section 13-723 does not violate *Garmon* because it does not interfere with the NLRB’s interpretation or enforcement of the NLRA.<sup>106</sup> On the other hand, Section 13-723 does violate *Machinists* because it curtails self-help remedies.<sup>107</sup> Finally, the *Garmon* preemption exceptions do not save the Statute, as will be shown

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the respondents said that if replacements were used, thus ending Cal Ripken’s streak of consecutive games played, it would affect their long-term feelings toward the team. *Id.* at 1, 5.

103. The *Gould* Court said that the Wisconsin statute could not “plausibly be defended as a legitimate response . . . to local economic needs . . .” *Wisconsin Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282, 291 (1986). The court stated in *Alameda Newspapers, Inc. v. City of Oakland* that the city’s boycott of the newspaper “in no way helps the city. . . . Indeed, the city is hurt by its own action.” 860 F. Supp. 1428, 1433 (N.D. Cal. 1994) (holding that a city resolution cancelling the city’s newspaper advertising and subscriptions and endorsing a union boycott of a newspaper was preempted). It is plausible that the economic harm Maryland portended in its statute could have occurred. If the survey results were accurate and fans stayed away from Camden Yards, tax revenues from ticket, parking, and concessions sales would have been lower than expected. The statute might have helped both the state and local economies.

104. *See supra* Part IV.A.

105. *International Paper Co. v. Town of Jay*, 928 F.2d 480 (1st Cir. 1991); *NLRB v. Florida*, 868 F.2d 391, 394–95 (11th Cir. 1989).

106. *See infra* Part IV.C.3.a.

107. *See infra* Part IV.C.3.b.

through several cases in which courts have permitted a state to regulate labor under its police powers in the name of public safety.<sup>108</sup>

a. Applying *Garmon* to Section 13-723

*Garmon* prohibits state or local governments from regulating activities that the NLRA actually or arguably either protects or prohibits.<sup>109</sup> Section 13-723 does not violate *Garmon* because it does not regulate conduct that the NLRA protects under section 7 or prohibits under section 8. Two cases help clarify this concept.

In *Garmon*, a California court awarded damages to an employer for losses sustained due to union picketing.<sup>110</sup> The damage award was based on the California Supreme Court's holding that the union's conduct constituted an unfair labor practice.<sup>111</sup> However, the United States Supreme Court held that the NLRB had exclusive power to determine if an activity was an unfair labor practice, i.e., prohibited by section 8.<sup>112</sup> California's action was preempted because it sought to award damages for an activity over which the NLRB had sole jurisdiction.<sup>113</sup>

The second case, *Employers Ass'n v. United Steelworkers*,<sup>114</sup> involved Minnesota's Striker Replacement Law,<sup>115</sup> which made it an unfair labor practice for an employer to hire permanent replacement workers during a strike or lockout. The Employers Association argued that the law did not distinguish between hiring permanent replacements for an economic or unfair labor practice strike; therefore, the law simply restated well-settled federal labor law.<sup>116</sup> However, the district court noted that the law violated *Garmon* because only the NLRB may declare what constitutes an unfair labor practice.<sup>117</sup>

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108. See *infra* Part IV.C.3.d.

109. San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236, 244 (1959); see also *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983).

110. *Garmon*, 359 U.S. at 237-38.

111. *Id.* at 238. The NLRB had earlier declined to exercise its jurisdiction in the case. *Id.*

112. *Id.* at 245.

113. *Id.* at 246.

114. 803 F. Supp. 1558 (D. Minn. 1992), *vacated*, 19 F.3d 405 (8th Cir.), *vacated and superseded per curiam*, 23 F.3d 214 (8th Cir.), *aff'd*, 32 F.3d 1297 (8th Cir. 1994).

115. MINN. STAT. ANN. § 179.12 (West 1996). The statute states that it is an unfair labor practice "[t]o grant or offer to grant the status of permanent replacement employee to a person for performing bargaining unit work for an employer during a lockout of employees in a labor organization or during a strike of employees in a labor organization authorized by a representative of employees[.]" *Id.* § 179.12(9).

116. *Employers Ass'n*, 803 F. Supp. at 1566.

117. *Id.*

These cases demonstrate that the purpose of *Garmon* is to preserve the NLRB's unique role of interpreting and enforcing the NLRA.<sup>118</sup> The Maryland statute does not attempt to interpret or enforce the NLRA. Although Maryland may have thought that the owners' threat to use replacement players was "unfair" to the union, the fans, and the State, that conduct did not constitute an unfair labor practice under the NLRA. Thus, *Garmon* does not preempt the Statute because it does not regulate any activity that is protected or prohibited by the NLRA.

#### b. Applying *Machinists* to Section 13-723

*Machinists* does not allow a state to regulate conduct that Congress intended to be "controlled by the free play of economic forces."<sup>119</sup> Furthermore, *Machinists* prohibits state action that curtails self-help remedies if doing so frustrates implementation of the NLRA.<sup>120</sup> The Supreme Court has approved hiring replacement workers for strikers as a self-help remedy.<sup>121</sup> Courts have consistently held that statutes curtailing

118. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986).

119. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

120. *Id.* at 147-48 (quoting *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

121. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). Although this has been the law since 1938, it is still extremely controversial. As one scholar has written, "few rules of American labor law have been as heavily criticized as the legality of hiring permanent strike replacements." Paul Weiler, *Striking New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 393 (1984).

The argument against the *Mackay Radio* replacement rule covers three bases. First, the Court's pronouncement of this "rule" was contained in dicta. *Mackay Radio*, 304 U.S. at 345. The NLRB did not argue that Mackay could not replace its strikers; it merely claimed that the discriminatory manner in which it reinstated some of the strikers was an unfair labor practice. *Id.* at 346. Thus, the rule the Court announced was not based on any issue in controversy. Second, although the intent of the NLRA is to prevent employers from firing workers in reprisal for going on strike, *Mackay Radio* allows employers to replace strikers permanently. Weiler, *supra*, at 390. The possibility of a worker losing her job because of a strike is likely to chill her willingness to exercise her statutory right to strike. *Id.* Third, in passing the NLRA, Congress was silent on the issue of permanent replacements. In fact, during the past several years, Congress has attempted to overturn *Mackay Radio* by legislation, but filibusters have killed the efforts. 138 CONG. REC. S8237-03 (daily ed. June 16, 1992); 140 CONG. REC. S8844-03 (daily ed. July 13, 1994). President Clinton showed his displeasure with hiring permanent replacements by issuing an executive order banning federal government agencies from contracting with employers who permanently replace striking employees. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995). The Court of Appeals for the District of Columbia Circuit held that the NLRA preempted that order. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir.), *petition for reh'g denied*, 83 F.3d 439 (D.C. Cir. 1996). The administration subsequently decided not to pursue an appeal to the Supreme Court. *White House Won't Push for Striker*

self-help remedies are preempted by the NLRA.<sup>122</sup> The following two cases exemplify these holdings.

*Greater Boston Chamber of Commerce v. City of Boston*<sup>123</sup> evaluated a challenge to a Boston ordinance that prohibited the hiring of replacement workers in general and the recruitment or hiring of replacement workers specifically when there was a likely threat to public safety.<sup>124</sup> The district court found that hiring replacements was a legitimate economic weapon. As a result, the court held that an ordinance penalizing the use of this weapon was preempted under the *Machinists* doctrine.<sup>125</sup>

In *Alameda Newspapers, Inc. v. City of Oakland*,<sup>126</sup> the AFL-CIO was boycotting the Oakland Tribune. The City enacted a resolution endorsing the boycott and urging citizens to stop purchasing and advertising in the paper.<sup>127</sup> The City also cancelled its advertising in, and subscriptions to, the paper.<sup>128</sup> The paper sued, claiming the resolution was preempted by the NLRA.<sup>129</sup> The district court held that *Machinists* clearly preempted the resolution.<sup>130</sup> The court wrote:

The city's resolution attempts to coerce plaintiff through economic and public pressure, and that is legislative activity that is preempted by *Machinists*. By cancelling their subscriptions and advertisements, and by encouraging the citizens of Oakland to do the same, the city has changed the economic balance of the parties to the labor dispute, and has thereby restricted plaintiff's use of its economic rights *vis à vis*

*Replacement Ban*, L.A. TIMES, Sept. 10, 1996, at D2.

These arguments question the origin and legitimacy of *Mackay Radio*. It may very well be that Congress will one day ban replacement workers. Under that circumstance, Maryland will have been vindicated. Until that occurs, however, employers, including major league baseball owners, will be allowed to hire replacement workers, following the rule of *Mackay Radio* and its "unvarying progeny." *Employers Ass'n*, 803 F. Supp. at 1565 n.9.

122. See, e.g., *Employers Ass'n v. United Steelworkers*, 803 F. Supp. 1558 (D. Minn. 1992), *vacated*, 19 F.3d 405 (8th Cir.), *vacated and superseded per curiam*, 23 F.3d 214 (8th Cir.), *aff'd*, 32 F.3d 1297 (8th Cir. 1994); *Greater Boston Chamber of Commerce v. City of Boston*, 778 F. Supp. 95 (D. Mass. 1991); *Charlesgate Nursing Ctr. v. Rhode Island*, 723 F. Supp. 859 (D.R.I. 1989).

123. 778 F. Supp. 95 (D. Mass. 1991).

124. *Id.* at 96.

125. *Id.* at 97.

126. 860 F. Supp. 1428 (N.D. Cal. 1994).

127. *Id.* at 1430.

128. *Id.* at 1430-31.

129. *Id.* at 1431. The court first rejected the idea that the City was merely acting as a proprietor, finding the City was not a party to the collective bargaining agreement and had no proprietary interest in the terms of the agreement. *Id.* at 1432.

130. *Id.* at 1434.

the unions. The city has put its thumb on the balance scale between management and labor in a private industry, which a local government may not do.<sup>131</sup>

Section 13-723 does not prohibit hiring replacement players, but its practical effect is to prevent teams from using replacement players in place of striking players. The Statute prohibits teams from playing at Camden Yards "if fewer than [seventy-five percent] of the players on the team's current [forty]-player major league roster were on the [forty]-player major league roster . . . at any time in the preceding calendar year."<sup>132</sup> Therefore, at least thirty major league players per team would need to cross the picket line in order for a team to play with replacements at Camden Yards.

The numeric requirement poses two problems. First, the Statute does not contemplate rosters of any size other than forty players; however, the clubs approved replacement player rosters of thirty-two players.<sup>133</sup> If we were to ignore this reality and apply the Statute to forty-man rosters, Section 13-723 would require major league players to comprise thirty out of thirty-two players on the approved replacement roster (ninety-four percent). Assume, however, that a court would attempt to save the Statute and apply it to the approved replacement roster or any roster regardless of size. Seventy-five percent of a thirty-two man roster would permit only eight replacement players, and would require twenty-four major league players.

Second, the owners were predicting that, at most, twenty percent of major league players would cross the picket line.<sup>134</sup> To simplify matters, assume that we are only dealing with the replacement roster. Twenty percent of a thirty-two man roster equals approximately seven players. To complete their rosters, teams would have to hire twenty-five replacement players. Of course, if they did, they would clearly violate the Statute. Assume further that teams would not want to violate the Statute and that seven major league players on each team did cross the picket line. Each team would then be able to hire only two replacement players, the Statute thus limiting each club to nine-man rosters.<sup>135</sup>

Because each team has nine players in the game at any given time, there appears to be no problem with the statute. However, clubs cannot operate with nine-player rosters. It is unusual for modern pitchers to pitch

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131. *Id.*

132. MD. CODE ANN., FIN. INST. § 13-723(b) (1992 & Supp. 1995).

133. Maske, *Replacement Rules*, *supra* note 30, at H10.

134. *Id.*

135. Seven out of nine players is 78%; seven out of ten players is 70%, a ratio that violates the statute.

complete games and for position players to play in all 162 games in a season. No team has ever played an entire season with the same eight position players and the same four or five pitchers pitching every inning of every game. To compound matters, the Orioles are an American League team and use the designated hitter.<sup>136</sup> Section 13-723 would require both teams to use their entire rosters for every game at Camden Yards. Therefore, although Section 13-723 does not prohibit hiring replacements, it is unlikely that replacement players would ever work at Camden Yards.

Section 13-723 increased the pressure on major league baseball to settle the strike. Because Section 13-723 was enacted about a month before the start of the regular season, the Assembly placed a time restriction on negotiations between owners and players.<sup>137</sup> If there was no agreement before Opening Day, baseball would not be played at Camden Yards. Thus, the statute infringed upon the owners' self-help remedy and violated the *Machinists* preemption doctrine.

### c. The *Garmon* Exceptions to Preemption

Although Section 13-723 violates *Machinists*, it may survive preemption if it falls within the two limited exceptions articulated in *Garmon*: that the regulated activity was (1) a peripheral concern of the NLRA, or (2) deeply rooted in local feeling and responsibility.<sup>138</sup> At least one court has applied the *Garmon* exceptions to determine if a statute preempted under *Machinists* was still valid. In *Charlesgate Nursing Center v. Rhode Island*,<sup>139</sup> a Rhode Island statute prohibited employers from using third parties to recruit or hire replacements for striking workers.<sup>140</sup> Following a strike by nursing home workers, the nursing home sued the State, challenging the statute's constitutionality.<sup>141</sup> The district court held that the State could not proscribe the nursing home from

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136. Long the bane of baseball traditionalists, the designated hitter (DH) rule allows American League teams to use a tenth player to bat in the pitcher's spot in the batting order. The DH rule has not been adopted in the National League, proving that some owners have moments of lucidity.

137. See *supra* notes 98–99 and accompanying text.

138. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243–44 (1959).

139. 723 F. Supp. 859 (D.R.I. 1989). Note that when confronted with a preemption question, the Supreme Court has found that state law either was preempted or fell within a *Garmon* exception. The Court has never definitively stated that a state law that was preempted could be saved by a *Garmon* exception. That is the analysis, however, that the district court in *Charlesgate* used. *Id.* at 866.

140. *Id.* at 860–61.

141. *Id.* at 861.

using a "peaceful form of self help that is not prohibited by the NLRA" unless the State could meet the *Garmon* exceptions.<sup>142</sup>

The court then found that the statute had more than a peripheral impact on federal labor law because it "directly and significantly limit[ed] the availability of one of an employer's principal economic weapons . . . [,] fundamentally alter[ing] the economic balance between labor and management envisaged by the NLRA."<sup>143</sup> The court also found that the statute did more than address local concerns, such as the prevention of violence.<sup>144</sup> It emphasized that the statute did not proscribe violence; it merely restricted an employer's right to hire replacements.<sup>145</sup> The court ruled that the State would have to achieve its goals through means less intrusive on federal rights.<sup>146</sup>

It is difficult to argue that the regulations on the use of replacement workers are merely a peripheral concern of the NLRA. The Supreme Court has long held that an employer has a right to replace striking workers.<sup>147</sup> Additionally, it is difficult to argue that the law merely concerns local interests. Baseball, the national pastime, has annual revenues of \$1.7 billion.<sup>148</sup> Fourteen American League teams, representing twelve states and two countries,<sup>149</sup> play ball at Camden Yards each season.

The strike generated so much interest on Capitol Hill that Congress members introduced bills and amendments and held hearings to remove baseball's antitrust exemption and to establish a mediation process to resolve the strike.<sup>150</sup> President Clinton also intervened several times. First, he appointed William J. Usery, a former Secretary of Labor, to mediate the dispute. Later, he personally met with owner and union

142. *Id.* at 866.

143. *Id.*

144. *Id.*

145. *Charlesgate*, 723 F. Supp. at 866.

146. *Id.*

147. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938). *But see supra* note 121.

148. Richard Justice, *Baseball Faces Strike, Again*, WASH. POST, June 12, 1994, at A1.

149. California (Angels, Athletics), Illinois (White Sox), Maryland (Orioles), Massachusetts (Red Sox), Michigan (Tigers), Minnesota (Twins), Missouri (Royals), New York (Yankees), Ohio (Indians), Texas (Rangers), Washington (Mariners), Wisconsin (Brewers), and Canada (Blue Jays).

150. Diemer, *supra* note 21, at 3D; Mark Maske, *Congress Ready for Turn at Bat; Baseball May Lose Antitrust Exemption*, WASH. POST, Jan. 4, 1995, at F1; Manny Topol, *Repeal of Exemption Gains Some Ground*, NEWSDAY, Sept. 23, 1994, at A98; Manny Topol, *Taking Swing at Exemption Subcommittee OKs Bill*, NEWSDAY, Sept. 29, 1994, at A83; *A Small Step by Reps Committee Votes to Curb Exemption*, NEWSDAY, Sept. 30, 1994, at A105.

representatives at the White House in an attempt to reach a consensus. Finally, he sent legislation to Congress that would create a panel of arbitrators to settle the strike.<sup>151</sup> That last action was unprecedented, as no President had ever previously sought legislation under the NLRA to end a strike.<sup>152</sup> The presidential and congressional response to the baseball labor dispute demonstrates that the strike and its effects were not isolated to the major league baseball cities. Although the use of replacement players at Camden Yards would uniquely affect the economies of Baltimore and Maryland, a prohibition on their use would ripple throughout baseball and have both national and international implications.

#### d. Police Powers

The Supreme Court has allowed states to regulate labor under their police powers in the name of public safety.<sup>153</sup> Not surprisingly, the Maryland General Assembly enacted the law as an emergency measure in the name of public health and safety.<sup>154</sup>

The following cases set the parameters within which courts seem willing to allow state regulation of labor under police powers. Generally, the cases demonstrate that the laws must: (1) promote public safety; (2) be unrelated to the collective bargaining process; and (3) involve an actual emergency.

In *Metropolitan Life Insurance Co. v. Massachusetts*,<sup>155</sup> the issue was whether a Massachusetts statute, requiring minimum mental health care benefits for insured residents, applied to insurance policies purchased pursuant to collective bargaining agreements regulated by the NLRA.<sup>156</sup> The Supreme Court held that the NLRA was not intended to disturb

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151. Mark Maske, *Usery's Deadline Extended; Baseball Mediator Will Present Plan to President This Afternoon*, WASH. POST, Feb. 7, 1995, at E1; Maske, *supra* note 35, at A1; Dewar, *supra* note 36, at A1.

152. Frank Swoboda, *President Treading New Ground; Congress Wonders if it Should Follow Suit*, WASH. POST, Feb. 9, 1995, at D2. During the Korean War, President Truman seized the nation's steel mills in response to a union notice of a nationwide strike. He believed that the threatened work stoppages would immediately jeopardize the national defense. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

153. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Again, it does not appear the Court is establishing "police powers" or "public safety" as new *Garmon*-like exceptions. Rather, it seems the Court groups these under the *Garmon* local responsibility exception. Unfortunately, the Court has never clearly stated its position.

154. S. 719, Regular Sess., 1995 Md. Laws 6.

155. 471 U.S. 724 (1985).

156. *Id.* at 727. "Insured residents" are those insured under a general policy, an accident or sickness policy, or an employee health-care plan that covered hospital and surgical expenses. *Id.*



existing state laws that set minimum labor standards and were unrelated to the processes of bargaining or self-organization.<sup>157</sup> Instead, the Court found that Congress “developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety.”<sup>158</sup> The Court continued: “‘States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples.’”<sup>159</sup>

*International Paper Co. v. Town of Jay*<sup>160</sup> involved a city ordinance passed during a labor strike requiring (1) companies to obtain a permit before discharging pollutants and (2) compliance with local environmental regulations before the permit would be issued.<sup>161</sup> International Paper claimed the ordinance unduly restricted its bargaining power with the union and therefore was preempted by the NLRA.<sup>162</sup> The First Circuit rejected this claim, stating that no direct effect on the company’s bargaining position existed.<sup>163</sup> The court added that “indirect intrusions into collective bargaining, such as ‘[c]lean air and water laws, selective cutting requirements in forest operations, industrial safety standards, [and] tax increases,’ are rarely preempted by labor statutes such as . . . the NLRA.”<sup>164</sup>

In *NLRB v. Florida*,<sup>165</sup> the Eleventh Circuit examined whether Florida could require jai alai players to give fifteen days notice to the State of Florida and the National Association of Jai Alai Frontons before striking.<sup>166</sup> Florida and the fronton owners contended that the State’s police powers had authorized the State to regulate the players’ conduct because the strike would likely endanger the public health and safety.<sup>167</sup> The circuit court noted that police powers allow a state to enjoin strike conduct only under existing emergency circumstances.<sup>168</sup> The court

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157. *Id.* at 756.

158. *Id.*

159. *Id.* (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)).

160. 928 F.2d 480 (1st Cir. 1991).

161. *Id.* at 482.

162. *Id.* at 483.

163. *Id.* at 484.

164. *Id.* (citation and emphasis omitted).

165. 868 F.2d 391 (11th Cir. 1989).

166. *Id.* at 392.

167. *Id.* at 394.

168. *Id.* at 396.

agreed with the NLRB that Florida and the owners had not established the requisite actual or imminent public danger:<sup>169</sup>

[C]ourts have strictly limited state regulation of strike conduct to emergency situations where a strike has caused violence or will inevitably harm the public welfare . . . .

. . . .

. . . Case law clearly prohibits states from exercising their police powers to regulate strike conduct prior to the existence of actual or imminent danger or injury to the public.<sup>170</sup>

These cases demonstrate that courts allow states to regulate labor under their police powers as long as there is an actual threat to public safety and the regulation does not impair the collective bargaining process. Section 13-723, although enacted in the name of public health and safety, clearly does not protect the public welfare in the manner envisioned by the courts.

Although courts refer to minimum labor standards, minimum wage laws, and occupational safety, Section 13-723 implicates none of these criteria. Instead, the Maryland General Assembly expresses concerns about its substantial investment and the use of replacement players, and it equates this concern to a threat to the public welfare. Few people would disagree with the Assembly that businesses would lose money if replacement players were used.<sup>171</sup> However, economic harm does not always rise to the level of a threat to public welfare. Most, if not all, strikes have some adverse economic impact on local and state economies; that fact alone does not give a state authority to regulate. If it did, states could theoretically prohibit union strikes of private companies whenever those strikes threatened economic harm.

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169. *Id.*

170. *Id.*; see also *Division 1287, Amalgamated Ass'n of St. Employees v. Missouri*, 374 U.S. 74 (1963); *Charlesgate Nursing Ctr. v. Rhode Island*, 723 F. Supp. 859, 866 (D.R.I. 1989). *Amalgamated* involved a Missouri law that defined certain public utilities as "life essentials" and empowered the State to regulate labor relations affecting those utilities as being necessary to the public interest. *Amalgamated Ass'n of St. Employees*, 374 U.S. at 78 n.4. The Court held a state law could not withstand a preemption challenge simply by being designated as emergency legislation. *Id.* at 81-82.

171. Even some of the owners during the strike said that spring training cities could expect games involving replacement players to generate 70% of their normal revenues. Maske, *supra* note 35, at A1. Approximately one year after the strike, data indicated that attendance at major league ballparks was down nearly 20% over 1994; 25 of 28 teams had lost more than 10% in attendance, and two teams, Minnesota and Pittsburgh, had lost over 30%. Cheryl Phillips, *Ballpark Figures Slide; Struggling Teams Look for Late-Season Financial Rally*, USA TODAY, Aug. 11, 1995, at 3C.

Maryland termed Section 13-723 an emergency measure, but the facts do not support that designation. There were no reports of players, fans, fired front-office workers, advertisers, or business employees threatening violence in Baltimore or in any other major league city if the strike continued or if replacement players were used. Aside from the potential for economic harm, there was no threat to the public health and safety. Section 13-723 was a direct attempt to influence the collective bargaining process. As such, it was preempted under the *Machinists* labor law preemption doctrine and was not saved by either of the *Garmon* exceptions.

## V. CONTRACT CLAUSE

The Constitution provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”<sup>172</sup> The Supreme Court has indicated that “[t]he context in which the Contracts Clause is found, the historical setting in which it was adopted, and our cases construing the Clause, indicate that its primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy.”<sup>173</sup> Originally, the Contract Clause was one of the few express limitations on state power.<sup>174</sup> However, over the past century, the Fourteenth Amendment has assumed a larger role in limiting state power.<sup>175</sup> As a result, only a handful of Contract Clause cases have reached the Supreme Court over the past several decades, and most of those cases have been decided in favor of the State.<sup>176</sup> Nevertheless, based upon the Supreme Court’s current Contract Clause analysis, it is possible to use the Contract Clause to strike down Section 13-723.

### A. *Current Supreme Court Analysis*

By its plain language, the Constitution precludes any law that impairs contractual obligations. Such a strict construction, however, would choke

172. U.S. CONST. art. I, § 10.

173. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 502–03 (1987) (footnote omitted).

174. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 14–15 (1977).

175. *Id.*

176. *See General Motors Corp. v. Romein*, 503 U.S. 181 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *City of El Paso v. Simmons*, 379 U.S. 497 (1965). *But see Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

off many state laws. In *Home Building & Loan Ass'n v. Blaisdell*,<sup>177</sup> the Supreme Court said that the Clause "is not to be read with literal exactness like a mathematical formula."<sup>178</sup> Since *Blaisdell*, the Court has developed a three-part analysis for Contract Clause violations: Has there been an impairment of contract?<sup>179</sup> Does the change in law substantially impair a contractual relationship?<sup>180</sup> Is the state impairing the obligations of its own contracts?<sup>181</sup>

### B. Maryland Has Impaired a Contract

Before there can be a contract impairment, there must be a contract. The Supreme Court has noted that this part of the analysis is normally not problematic,<sup>182</sup> and it is not problematic here. The MSA has a 30-year lease with the Orioles that requires Camden Yards be available to the team.<sup>183</sup>

Having established the contractual relationship, we must next ask whether the Statute impairs that contract. Section 13-723 prohibits a major league baseball team, including the Orioles, from playing baseball in Camden Yards if fewer than seventy-five percent of its players were on a major league team in the preceding year.<sup>184</sup> Section 13-723 impaired such express contractual obligations as the Orioles' day-to-day operations,<sup>185</sup>

177. 290 U.S. 398 (1934).

178. *Id.* at 428. The Court noted five relevant factors to determine a Contract Clause violation: (1) an emergency existed that furnished the proper occasion for the state to exercise its power to protect the vital interests of the community; (2) the legislation addressed a legitimate end in that it protected a basic societal interest, not particular individuals; (3) the relief afforded was appropriate to the emergency; (4) the conditions imposed were reasonable; and (5) the legislation was limited to the length of the emergency. *Id.* at 444-47. See also *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 n.11 (1983).

179. *United States Trust*, 431 U.S. at 17; see also *Romein*, 503 U.S. at 186.

180. *Allied Structural Steel*, 438 U.S. at 244; see also *Romein*, 503 U.S. at 186. The Fourth Circuit has noted the Supreme Court's occasional inquiry into whether the contract impairment disrupted the parties' legitimate expectations. *Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012, 1017 n.7 (4th Cir. 1993) (citing *United States Trust*, 431 U.S. at 20 n.17; *Allied Structural Steel*, 438 U.S. at 247). The circuit court was unsure whether this inquiry was different from the inquiry into whether the parties actually relied upon the contractual right impaired. The court concluded that the reference to legitimate expectations "was merely a shorthand for reliance." *Id.*

181. *Allied Structural Steel*, 438 U.S. at 244 n.15.

182. *Romein*, 503 U.S. at 186.

183. Lease Agreement, *supra* note 96, art. II, § 2.03.

184. MD. CODE ANN., FIN. INST. § 13-723(b) (1992 & Supp. 1995).

185. Lease Agreement, *supra* note 96, art. V, § 5.03.

their right to use Camden Yards for playing baseball games,<sup>186</sup> and the covenant of quiet enjoyment.<sup>187</sup>

The Assistant Attorney General argued that Section 13-723 did not impair the contract.

As existing law confers on the [MSA] express power to “regulate the use and operation of the stadium[,]” and the Orioles have agreed in the lease to “comply with all material laws,” it can be said the lease recognizes the reserve power of the State and that the enactment of the legislation would not be an impairment of contract.<sup>188</sup>

However, the Fourth Circuit recently rejected a similar argument advanced by Baltimore in a suit brought by its unionized police and teachers after the City reduced their salaries.<sup>189</sup> Baltimore argued that the contracts were “expressly subject to the Baltimore City Charter[,] which . . . permitted the reductions.”<sup>190</sup> The majority noted that the law only authorized reductions in appropriations.<sup>191</sup> The court further stated:

[If the law] were read to authorize any contravention of contractual terms . . . it is doubtful that there ever existed (or ever could exist) a contract between the City and its employees, because there would have been a failure of mutual obligation. More importantly, even assuming such a failure were not fatal to contract formation, the [law], so read, would almost certainly violate the Contract Clause itself.<sup>192</sup>

The Assistant Attorney General attempted a similar expansion of the MSA’s power to regulate the use and operation of Camden Yards. Although it does not cover every possibility, the Lease Agreement between the Orioles and the MSA encompasses much in terms of use and regulation.<sup>193</sup> It does, however, expressly provide:

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186. *Id.*

187. *Id.* art. XXII.

188. Letter from Richard E. Israel, Assistant Attorney General, State of Maryland, to Samuel I. Rosenberg, Delegate, and John A. Pica, Jr., Senator, Maryland General Assembly, *supra* note 71, at 5 (citation omitted).

189. *Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012 (4th Cir. 1993). Facing a budgetary deficit, the City reduced the salaries of its employees by one percent. The police and teachers challenged the action on the ground that it impermissibly impaired their contracts with the City. *Id.* at 1014.

190. *Id.* at 1015–16.

191. *Id.* at 1016.

192. *Id.* at 1016 n.5.

193. The lease addresses, in part, the following: permitted uses (by both the Orioles and the MSA) of the ballpark and the Camden Yards site; concession stands; parking; maintenance,

[The MSA] shall have no right to approve or veto the ORIOLES' decisions regarding the business operations of the ORIOLES or the baseball operations of the Baltimore Orioles. The ORIOLES shall have the sole and exclusive right to make all such decisions in accordance with their own needs as the ORIOLES deem appropriate, without interference from MSA . . . .<sup>194</sup>

Permitting the MSA to contravene such specific contractual obligations would, in the view of the Fourth Circuit, violate the Contract Clause.

### C. Maryland Has Substantially Impaired This Contract

The second question concerns whether the impairment of the contract is substantial. The Supreme Court has never specifically defined "substantial"<sup>195</sup> except to say that "substantial" is more than "minimal"<sup>196</sup> but less than "total."<sup>197</sup> The Fourth Circuit has interpreted "substantial" to mean that "the contract right or obligation impaired was one that induced the parties to enter into the contract and upon the continued existence of which they have especially relied . . . ."<sup>198</sup> Under the Fourth Circuit's view, Section 13-723 substantially impairs the Orioles' contract with the State.

The main reason the Orioles entered into the lease with the State was to play baseball at Camden Yards.<sup>199</sup> The MSA purchased the Camden Yards site and constructed and developed the ballpark in return for a commitment from the Orioles to play all their home games there.<sup>200</sup> The team and the American League relied on being able to play at Camden Yards when the season schedule, team travel arrangements, and promotional dates were set. Section 13-723 completely destroyed the

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repairs, improvements and operations; private suites; scoreboards, videoboard and related systems; advertising and announcements; ballpark security; insurance; indemnification; remedies for default; arbitration, force majeure, and eminent domain clauses; assignment, subletting successors; ballpark names and proprietary symbols; surrender of premises; administration of agreement; and interpretation and construction. Lease Agreement, *supra* note 96, at iii-xiv.

194. *Id.* art. IV, § 4.10.

195. *Baltimore Teachers Union*, 6 F.3d at 1017.

196. "Minimal alteration of contractual obligations may end the inquiry at its first stage." *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 245 (1978) (footnote omitted).

197. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (citation omitted).

198. *Baltimore Teachers Union*, 6 F.3d at 1018.

199. *See generally* Lease Agreement, *supra* note 96.

200. *Id.* at 2, Recital M.

contractual rights that induced the Orioles to sign the lease and upon which it especially relied.<sup>201</sup> There was no realistic possibility of any team reaching the seventy-five percent threshold.<sup>202</sup>

The impairment is substantial for other reasons as well. First, aside from Memorial Stadium, the Orioles' former home, there may not be a facility in the immediate vicinity that is suitable for major league baseball.<sup>203</sup> Second, even if a facility were available, arranging its use on short notice for playing an eighty-one-game home schedule would be a monumental task. These arrangements would include leasing the facility, resolving conflicts with the facility's pre-existing schedule, establishing new delivery schedules with vendors, changing pre-existing advertising, and accommodating possible city or county concerns about the sudden influx of people in the neighborhood around the facility. Third, and most importantly, the Orioles agreed in the Lease Agreement neither to relocate the team from Baltimore nor to play any of its home games at any location other than Camden Yards.<sup>204</sup> Thus, the Orioles would have to break their lease and face a logistical nightmare in order to play with replacement players. For all these reasons, the impairment of the contract is substantial.

*D. Section 13-723 Is Neither Reasonable nor Necessary to  
Serve an Important State Interest*

The final issue is whether the State is impairing its own contractual obligations. Unquestionably, Maryland is a party to the lease of Camden Yards,<sup>205</sup> and Section 13-723 impairs the State's contractual obligations. However, this only begins the inquiry.

It is well-settled that a State cannot contract away its sovereign police power.<sup>206</sup> "This power . . . is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts

201. See *supra* notes 132-36 and accompanying text.

202. See *supra* notes 132-36 and accompanying text.

203. Memorial Stadium is used by a Canadian Football League team. Michael Farber, *But Don't Call Them the Colts*, *SPORTS ILLUSTRATED*, July 25, 1994, at 56. It is unclear what the lease arrangements were at the time of the strike and if the stadium could have accommodated the Orioles, in terms of parking, seating capacity, or field conditions.

204. Lease Agreement, *supra* note 96, art. XX.

205. The Maryland Stadium Authority, a party to the contract, is an instrumentality of the State. S. 719, Regular Sess., 1995 Md. Laws 6.

206. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 241 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977).

between individuals.”<sup>207</sup> Maryland made a substantial investment in Camden Yards, and, under particular circumstances, may be able to employ its police powers to protect that investment and the public welfare. However, the Contract Clause limits “the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.”<sup>208</sup> Thus, “an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.”<sup>209</sup> Under this analysis, Section 13-723 is neither reasonable nor necessary to further Maryland’s interest in Camden Yards.

### 1. Section 13-723 Is Not a Reasonable Exercise of Maryland’s Police Power

To determine “reasonableness” under the Contract Clause analysis, courts examine factors such as whether the legislation (1) addresses a broad, generalized economic or social problem;<sup>210</sup> (2) regulates an area never before subject to state regulation;<sup>211</sup> (3) narrowly targets a specific group;<sup>212</sup> and (4) is temporary or permanent.<sup>213</sup>

First, Section 13-723 may be viewed as addressing a broad, generalized economic problem, although part of that problem is self-induced. The State’s Department of Economic and Employment Development estimated that the elimination of the entire baseball season from Camden Yards would result in a \$225 million loss to the State.<sup>214</sup> All games would be eliminated because no team could meet the Section 13-723 limit of twenty-five percent replacement players.<sup>215</sup> However, if all games were played with replacement players, revenues could drop substantially and result in a net loss. The loss would not likely reach \$225 million because the games would probably generate some

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207. *Allied Structural Steel*, 438 U.S. at 241 (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)).

208. *Id.* at 242.

209. *United States Trust*, 431 U.S. at 25–26.

210. *Allied Structural Steel*, 438 U.S. at 250.

211. *Id.*

212. *Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012, 1021 (4th Cir. 1993).

213. *Id.*

214. S. 719, Regular Sess., 1995 Md. Laws 6 (Dep’t of Fiscal Servs. for Md. Gen. Assembly (1995)).

215. See *supra* notes 132–36 and accompanying text.



revenue.<sup>216</sup> Consequently, the Statute has the potential effect of worsening the economic problem.

Second, although a state may regulate labor relations to the extent not preempted by federal law, previous baseball work stoppages were free from state regulation. Therefore, neither the Orioles nor the American League would have expected state interference with the contract.

Third, the legislation targeted only baseball teams. In Contract Clause litigation, courts particularly disapprove of legislation narrowly aimed at specific targets.<sup>217</sup>

Fourth, the Statute's temporary nature belies the State's need for it. Given the eight work stoppages in baseball since 1972,<sup>218</sup> and that the lease for Camden Yards lasts for thirty years,<sup>219</sup> there is little likelihood that Section 13-723, effective only for one season, could reasonably protect Maryland's long-term investment.<sup>220</sup> For these reasons, Section 13-723 is not a reasonable exercise of Maryland's police powers.

## 2. Section 13-723 Is Not Necessary to Further Maryland's Specific Interest

To determine "necessity" under the Contract Clause analysis, courts require that (1) a less drastic modification would have worked or (2) the important state interest could have been achieved using alternative means.<sup>221</sup> Here, Maryland does not meet either requirement.

Compared to 1994 figures, attendance for major league ballparks dropped by twenty percent after the strike.<sup>222</sup> Even the Orioles, whose owner and organization arguably fought for the fans' interest more than any other club, lost more than 150,000 fans in attendance through its first

216. There is the possibility that operating Camden Yards with replacements would produce a greater loss than not operating it at all. If few fans attended, the initial costs of operation could exceed the revenue generated by more than \$225 million.

217. See *Baltimore Teachers Union*, 6 F.3d at 1021 (citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.13 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 248 (1978)).

218. Newhan, *supra* note 18, at A1.

219. Lease Agreement, *supra* note 96, art. II, § 2.03.

220. Had Maryland not included a sunset provision, § 13-723 would potentially affect future baseball strikes and potentially protect Maryland's long-term investment. In that case, however, the statute would not be narrowly tailored because it would not be temporary. This highlights that Maryland was in a no-win situation and would have been better off not enacting the statute.

221. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29-30 (1977).

222. Mark Maske, *With Spring in Its Step, Grand Old Game Starts Anew*, WASH. POST, Feb. 11, 1996, at D8.

nineteen home games.<sup>223</sup> Regardless of the good intentions of the State, baseball fans alienated by the strike were going to boycott games.<sup>224</sup> Eventually, though, the fans do return.<sup>225</sup> In 1982, baseball set an attendance record the year after a fifty-day strike.<sup>226</sup> During the off-season between 1995 and 1996, the Cleveland Indians sold out every home game on their schedule.<sup>227</sup> Strike history illustrates that the best course of action is to take no action at all.

## VI. CONCLUSION ("IT AIN'T OVER 'TIL IT'S OVER")

The Maryland Statute was not challenged in court for several reasons. First, Oriole majority owner Peter Angelos was in favor of the law.<sup>228</sup> Second, the Players Association ended the strike and reported back to work. Third, major league baseball may have had other options before challenging a state statute in court. However, as shown, Section 13-723 would probably not have survived judicial review.

Maryland may still have options if it wants to ban replacement players from Camden Yards in the future. The MSA and the Orioles may be able to amend their stadium lease agreement to ban the use of replacement players. They also may be able to modify the lease to incorporate provisions that would protect Maryland's substantial investment, i.e., revenues based on a minimum attendance figure. It is unclear if the American League, which had to approve the Lease Agreement,<sup>229</sup> would oppose such modifications. Fortunately for Maryland, it has an ally in Peter Angelos, who refused "to participate in the replacement player charade."<sup>230</sup> Any solution involving Mr. Angelos may have a great chance of avoiding a legal challenge.

These solutions will treat only the symptoms of major league baseball's labor disease; they will not take baseball off the disabled list.

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223. William Gildea, *Fans Taking Themselves out of the Ballgame*, WASH. POST, June 11, 1995, at A1.

224. *Id.*

225. Ross Newhan, *It May Be Now or Never for Baseball*, L.A. TIMES, Mar. 26, 1995, at C3.

226. Tom Verducci, *The Play's the Thing*, SPORTS ILLUSTRATED, July 10, 1995, at 16, 18.

227. Maske, *supra* note 222, at D8.

228. Letter from Peter G. Angelos to the Honorable Thomas Bromwell, Chairman, Maryland Senate Finance Committee 1 (Feb. 22, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

229. Lease Agreement, *supra* note 96, art. XXX, § 30.01.

230. Letter from Peter G. Angelos to the Honorable Thomas Bromwell, Chairman, Maryland Senate Finance Committee, *supra* note 228, at 1.

More than two years have passed since the strike, and owners and players have still not agreed on a new collective bargaining agreement. Reaching that agreement and preventing the work stoppages that have accompanied every labor negotiation since 1972 must be major league baseball's top priority.

The one constant through all the years . . . has been baseball. America has rolled by like an army of steamrollers. It's been erased like a blackboard, rebuilt, and erased again. But baseball has marked the time. This . . . game . . . is a part of our past . . . . It reminds us all that once was good and could be again.<sup>231</sup>

*Peter F. Giamporcaro\**

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231. *FIELD OF DREAMS*, at t:01:24:44 (Universal City Studios, Inc. 1989).

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