Comments

Municipal Economic Boycotts as a Form of Political Opposition: Why Boycotts of Arizona Companies in Response to Arizona SB 1070 Run Afoul of the Dormant Commerce Clause of the U.S. Constitution

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I. INTRODUCTION

In April 2010, the governor of Arizona, Jan Brewer, signed Senate Bill 1070, Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), which the press immediately labeled as “the nation’s toughest law on illegal immigration.” The motivation of the law was to discourage illegal immigrants from coming to or remaining in Arizona.

SB 1070 generated a great deal of criticism and debate both domestically and across the border. Opponents widely criticized the law as supporting racial profiling and harassment of the Latino population, disregarding the presumption of innocence, and violating the Supremacy Clause of the U.S. Constitution.

President Obama criticized the Arizona law as “undermin[ing] basic notions of fairness.” Roger Mahony, the archbishop of Los Angeles, called SB 1070 “the country’s most retrogressive, mean-spirited and useless anti-immigration law” and compared the techniques used by the Arizona government to those of the

5. See, e.g., Arizona Immigration Law (SB 1070), supra note 2, at A1 (“[SB 1070] would lead to harassment of Hispanics and turn the presumption of innocence upside down.”); Michaud, supra note 4, at 1117 (noting that opponents of SB 1070 challenge it on two principal grounds: (1) racial profiling, and (2) preemption).
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German Nazis and Soviet Communists.7 Local governments, non-profit groups, businesses, and private citizens across the country were quick to denounce Arizona’s immigration policies.8 While most state and local governments participating in the public outcry over Arizona’s immigration law limited their involvement to ideological condemnation of SB 1070, a few went further and announced economic boycotts of Arizona businesses.9 Under the terms of these boycotts, local governments resolved to refrain from entering into contracts with companies headquartered in Arizona, and to terminate existing contracts with Arizona companies.10 By treating companies headquartered in Arizona differently from businesses located in the rest of the country, the boycotting municipalities intruded upon the territory governed by the Dormant Commerce Clause of the U.S. Constitution.11 This comment seeks to answer whether these municipal economic boycotts, the sole purpose of which is to express political opposition to the policies of the Arizona government, withstand the scrutiny under the Dormant Commerce Clause of the U.S. Constitution.

Part II of this comment provides a brief description of SB 1070, its purposes, and implications. Part III starts with a brief overview of the Dormant Commerce Clause and standards of judicial review adopted by the Supreme Court in the Dormant Commerce Clause context. Part III then concludes with an analysis of the constitutionality of the resolutions to boycott Arizona companies under the Dormant Commerce Clause. Finally, Part IV considers the market participant exception to the Dormant Commerce Clause and examines its applicability to the municipal resolutions at issue. This comment concludes that municipal resolutions declaring economic boycotts on companies headquartered in Arizona do not fall within the market participant exception, and thus, are unconstitutional under the Dormant Commerce Clause.

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9. L.A., Cal., Res. 10-0002-S36 (May 12, 2010); Seattle, Wash., Res. 31214 (May 17, 2010); Berkley, Cal., Res. 64,887 (May 18, 2010).
10. Id.
11. The Dormant Commerce Clause restricts the power of subnational governments to regulate interstate commerce even when Congress has not acted. See, e.g., Or. Waste Sys. v. Dep’t of Envtl. Quality, 511 U.S. 93, 98 (1994) (“Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”); Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (“It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce.”).
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II. ARIZONA SENATE BILL 1070 AND ITS AFTERMATH

A. Arizona Senate Bill 1070

On April 23, 2010, the Arizona legislature adopted Support Our Law Enforcement and Safe Neighborhood Act, popularly known as Arizona SB 1070, which was scheduled to become effective on July 29, 2010.12 By enacting SB 1070, the Arizona legislature proclaimed its “compelling interest in the cooperative enforcement of federal immigration laws” in Arizona and declared its intent to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”13 SB 1070 contains the following key provisions:

1. Requiring police officers to check a person’s immigration status if officers have a “reasonable suspicion” that the person is an illegal alien;14

2. Making the failure to carry immigration documents a state misdemeanor, in addition to a federal civil violation;15

3. Instituting a state misdemeanor offense for the knowing or reckless “transporting, moving, concealing, harboring or shielding of unlawful aliens.”16

When the legislature passed SB 1070, it caused an uproar of criticism and protests, across the country and abroad.17 Politicians and celebrities, minority groups and local governments, school boards and business associations voiced their opposition to Arizona’s immigration policies.18 Opponents criticized SB

13. Id. § 1.
15. Id. § 13-1509.
16. Id. § 13-2929.
17. See, e.g., Archibold, Arizona Enacts Stringent Law on Immigration, supra note 6, at A1 (“[SB 1070] unleashed immediate protests and reignited the divisive battle over immigration reform nationally.”).
18. See, e.g., AZCENTRAL, supra note 8 (listing local governments, non-profit organizations, and private citizens expressing some form of condemnation of SB 1070 and urging Arizona to repeal it, including thirty municipalities, more than twenty non-profit organizations, and several sport teams and musicians); Larry Rohter, Performers to Stay Away From Arizona in Protest of Law, N.Y. TIMES, May 28, 2010, at A11, available at http://www.nytimes.com/2010/05/28/us/28boycott.html (on file with the McGeorge Law Review) (“A coalition of music groups has announced that its members will boycott all performances in Arizona to protest the tough new anti-immigration law there.”); Archibold, Arizona Enacts Stringent Law on Immigration, supra note 6, at A1 (“Hispanics, in particular . . . railed against the law.”); Actions vs. State Have Slowed, ARIZONA REPUBLIC, July 11, 2010, at D2 (on file with the McGeorge Law Review) (by July 11, 2010, twenty-three municipalities and “six colleges and school districts announced travel and business boycotts to Arizona, and fourteen other municipalities condemned the law.”).
1070 for creating “a climate of hostility” against Latinos in Arizona,19 for generating “an open invitation for harassment and discrimination against Hispanics regardless of their citizenship status,”20 and for promoting racial profiling.21

On July 6, 2010, the U.S. Department of Justice filed a lawsuit challenging SB 1070 in the federal district court for the District of Arizona.22 The Department of Justice argued that federal laws preempt SB 1070 because the federal government holds the exclusive power to regulate immigration.23 One day before the law was scheduled to take effect, the federal government obtained a preliminary injunction barring enforcement of the most controversial provisions of the law.24 District Judge Bolton concluded that granting the injunction was “less harmful than allowing state laws that are likely preempted by federal law to be enforced.”25 In particular, Judge Bolton found that “[b]y enforcing [SB 1070], Arizona would impose a ‘distinct, unusual and extraordinary’ burden on legal resident aliens that only the federal government has the authority to impose.”26

On February 10, 2011, Arizona Governor Jan Brewer countersued the federal government for failing to enforce immigration laws in Arizona.27 The lawsuit asserted that the U.S. government had failed to control the United States–Arizona border, which led Arizona to spend large amounts of its taxpayers’ money to deal with the problem of illegal immigration in the state.28

B. Municipal Economic Boycotts of Arizona Companies

On May 12, 2010, in response to SB 1070, Los Angeles, California, became one of the first municipalities to adopt a resolution to announce an economic

21. Michaud, supra note 4, at 1117; see also L.A., Cal., Res. 10-0002-S36 (May 12, 2010) (“S.B. 1070 encourages racial profiling and violates Fourteenth Amendment guarantees of due process and equal protection for U.S. citizens, legal residents and visitors who are detained for suspicion of being in the Country unlawfully.”).
24. Provisions blocked by Judge Bolton’s injunction include: (1) the provision requiring police officers to determine the immigration status of every person stopped, detained, or arrested; (2) the provision imposing penalties on legal immigrants for failure to carry their immigration papers; and (3) the provision imposing criminal penalties on immigrants who solicit work without lawful authorization. Id. at 1008.
25. Id.
26. Id. at 1006. Arizona appealed the district judge’s ruling, but the Ninth Circuit concluded that the injunction was appropriate. United States v. Arizona, 641 F.3d 339, 369 (9th Cir. 2011). The U.S. Supreme Court has granted Arizona’s petition for writ of certiorari. Arizona v. United States, 132 S.Ct. 845 (2011).
28. Id.
boycott on companies headquartered in Arizona.\textsuperscript{29} The Los Angeles City Council expressed its strong disagreement with the immigration policies of Arizona and declared that the city would not use its funds to support “immigration programs that promote racial profiling and discrimination based on race, ethnicity or national origin or any other form of discrimination.”\textsuperscript{30} Los Angeles resolved to terminate all existing and potential contracts with Arizona-based companies unless Arizona repealed SB 1070.\textsuperscript{31}

Other cities and counties across the country followed. On May 17, 2010, Seattle, Washington adopted a resolution declaring that the city would refrain “from entering into new or amended contracts to purchase any goods or services from any company that is headquartered in Arizona.”\textsuperscript{32} On May 18, 2010, the City of Berkeley, California adopted a resolution calling for a boycott of Arizona-based businesses.\textsuperscript{33} By the end of August 2010, more than a dozen municipalities had announced economic boycotts of companies headquartered in Arizona.\textsuperscript{34}

There is no reliable data on how many existing or potential contracts the municipal boycotts of Arizona companies actually affected.\textsuperscript{35} However, even if that number is insignificant, the local governments that adopted the resolutions at issue set a dangerous precedent of boycotting businesses from a sister-state as a form of political opposition to disfavored legislation. There is no guarantee that the situation will not repeat itself the next time another state adopts a


\textsuperscript{30} L.A., Cal., Res. 10-0002-S36 (May 12, 2010).

\textsuperscript{31} Id.

\textsuperscript{32} Seattle, Wash., Res. 31214 (May 17, 2010).

\textsuperscript{33} Berkeley, Cal., Res. 64,887 (May 18, 2010).

\textsuperscript{34} See AZCENTRAL, supra note 8 (listing local governments boycotting Arizona over SB 1070).

controversial bill unpopular in other states and localities, or that another outbreak of boycotts will not follow if Arizona adopts another unpopular immigration measure. As the Ninth Circuit stated, SB 1070 presented “a chilling foretaste of what other states might attempt” to curb in-state illegal immigration. The danger of a potential epidemic of municipal boycotts of out-of-state companies necessitates the analysis of the constitutionality of such boycotts under the Dorman Commerce Clause of the U.S. Constitution.

III. ECONOMIC BOYCOTTS AND THE DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION

A. Brief Overview of the Dorman Commerce Clause

The Commerce Clause provides that “[t]he Congress shall have Power . . . to regulate Commerce . . . . among the several States . . . .” Although the language of the Commerce Clause does not explicitly prohibit the states from regulating interstate commerce, the Supreme Court “has fashioned a self-executing Commerce Clause, which, when applicable, prohibits state regulatory action even when Congress has not acted.” This prohibitory principle is known as the “dormant” or “negative” Commerce Clause, which denies the states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce. Both state and local regulations are subject to the Dorman Commerce Clause principles.

In determining the constitutionality of state regulations in the area of interstate commerce, courts distinguish between regulations “that burden...
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interstate commerce only incidentally, and those that affirmatively discriminate against such transactions. If a restriction on commerce is patently discriminatory, it is subject to the strict scrutiny test and is virtually per se invalid except where the local government can demonstrate that the restriction advances a legitimate local purpose that reasonable nondiscriminatory alternatives cannot adequately address. As Professor Chemerinsky has observed, “judicial review of discriminatory laws involves scrutiny of both the ends served by the law and the means used.” If a regulation is not discriminatory and has only an “incidental effect” on interstate commerce, courts will likely uphold it “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”

B. Are Resolutions Boycotting Arizona Companies Discriminatory?

In analyzing any law subject to judicial scrutiny under the Dormant Commerce Clause, courts first have to determine whether the law “regulates evenhandedly with only ‘incidental’ effects on interstate commerce, or discriminates against interstate commerce . . . .” The U.S. Supreme Court generally defines “discrimination” as “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” The Supreme Court has stated that a regulation treating interstate commerce differently on the basis of “geographic distinctions” is “patently discriminatory.” There is no doubt that the resolutions to boycott Arizona companies are patently discriminatory because their plain language provides for a disparity in treatment between companies headquartered in Arizona and companies from any other state. Such a distinctive treatment of Arizona

44. CHEMERINSKY, supra note 40, at 444.
46. Hughes, 441 U.S. at 336.
49. See, e.g., L.A., Cal., Res. 10-0002-S36 (May 12, 2010) (calling for “terminating all current and future contracts with Arizona-based companies, unless S.B. 1070 is repealed”); Seattle, Wash., Res. 31214 (May 17, 2010) (demanding for refraining “from entering into new or amended contracts to purchase goods or services from any company that is headquartered in Arizona”); Berkley, Cal., Res. 64,887 (May 18, 2010) (calling for refraining “from entering into any new or amended contracts to purchase any goods or services from any company that is headquartered in Arizona” and for reviewing existing contracts with Arizona companies to explore possibilities of terminating those contracts).
companies amounts to “facial discrimination” because geographic distinctions are the sole basis of the disparity in treatment.\textsuperscript{50}

The absence of benefits to local businesses or local constituents does not cure the discriminatory nature of the resolutions or exempt the discrimination from the dormant Commerce Clause prohibitions.\textsuperscript{51} “A law need not be designed to further local economic interests in order to run afoul of the Commerce Clause.”\textsuperscript{52} Moreover, “[i]n determining whether a state statute is facially discriminatory, the following matters are irrelevant: the justification that the state offers for the discrimination, the legitimacy of the state interests that the statute is designed to protect, the degree and scope of the discrimination, and the volume of commerce affected.”\textsuperscript{53} Because the resolutions treat the federally protected class of commerce less favorably than other classes of commerce, they are “virtually per se invalid” unless the adopting municipalities can demonstrate that the resolutions advance a “legitimate local purpose” that reasonable nondiscriminatory alternatives cannot adequately serve.\textsuperscript{54}

\section*{C. Can Arizona Resolutions Withstand the Strict Scrutiny Test for Discriminatory Local Regulations?}

\subsection*{1. Legitimate Local Interest}

The first inquiry to determine whether a regulation is patently discriminatory is whether there exists a “legitimate local purpose” justifying adoption of the resolutions.\textsuperscript{55} The U.S. Supreme Court has identified numerous areas of traditional local concern, including: protection of natural resources and the environment, business regulation, waste disposal, consumer protection, as well as the health, safety, and welfare of citizens.\textsuperscript{56} However, the resolutions at issue do

\begin{thebibliography}{99}
\bibitem{50} Or. Waste Sys., 511 U.S. at 100.
\bibitem{51} See New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 276 (1988) (“[W]here discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown.”); Kraft Gen. Foods v. Iowa Dep’t of Revenue & Fin., 505 U.S. 71, 79 (1992) (Noting that the Court was “not persuaded . . . that [local] favoritism is an essential element of a violation” of the Commerce Clause).
\bibitem{52} Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 67 (1st Cir. 1999).
\bibitem{54} Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Or. Waste Sys., 511 U.S. at 99, 101; New Energy Co. of Ind., 486 U.S. at 274, 278.
\bibitem{55} Hughes, 441 U.S. at 336; Or. Waste Sys., 511 U.S. at 100–01; New Energy Co. of Ind., 486 U.S. at 278.
\end{thebibliography}
not invoke any of those traditional areas of local concern. Rather, the municipalities designed the resolutions to avoid using local funds to support allegedly discriminatory policies of the state of Arizona. Courts disagree on whether such “moral outrage”58 over the policies and laws of another jurisdiction fits within the scope of legitimate local interests.59

In National Foreign Trade Council v. Natsios, the First Circuit Court of Appeals considered whether Massachusetts’ selective purchasing law violated the Commerce Clause.60 The Massachusetts law prohibited, except in very limited circumstances, state agencies and authorities from procuring goods or services from any company on the restricted purchase list maintained by the Secretary of Administration and Finance.61 That list included companies conducting business with Burma, and the law served as Massachusetts’ response to human rights violations in Burma.62 The First Circuit stated that there was no judicial support for the argument that a state’s moral outrage over the laws of another jurisdiction could provide a valid ground for a discriminatory regulation.63

However, the First Circuit’s conclusion in Natsios is not entirely accurate. In Board of Trustees of Employees’ Retirement Systems v. Mayor of Baltimore, for example, the Maryland Supreme Court upheld the City of Baltimore’s ordinance.64 Baltimore had adopted the ordinance in response to civil rights violations in South Africa, and required the pension systems to divest their

(1995) (“The Court generally has accepted health, safety, and welfare concerns as legitimate state ends . . . .”) (citing Maine v. Taylor, 477 U.S. 131 (1986); Mintz v. Baldwin, 289 U.S. 346 (1933)).

57. See, e.g., L.A., Cal., Res. 10-0002-S36 (May 12, 2010) (expressing local opposition to any legislation or administrative action providing funds that support the implementation of Arizona SB 1070, “which promote racial profiling, discrimination and harassment”); Seattle, Wash., Res. 31214 (May 17, 2010) (denouncing Arizona SB 1070 “as a step in the wrong direction”).


59. Compare, e.g., id. (concluding that “moral outrage” over the laws of another jurisdiction is not a matter of legitimate local concern), with Bd. of Trustees of Employees’ Retirement Sys. v. Mayor of Baltimore, 562 A.2d 720 (Md. 1989) (holding that a municipality has a legitimate local interest in expressing moral disapproval to discriminatory policies of a foreign jurisdiction).

60. Natsios, 181 F.3d at 38. In Natsios, the district court and the Court of Appeals for the First Circuit relied on the Commerce Clause and preemption doctrine in reaching their decisions that the Massachusetts law was unconstitutional. The U.S. Supreme Court granted certiorari, but found no need to address the issue of the Commerce Clause violation upholding invalidation of the Massachusetts law on the Supremacy Clause grounds. Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000). However, the decision of the U.S. Court of Appeals for the First Circuit offers useful insight into judicial interpretation of what might constitute a legitimate local interest for the purposes of the Commerce Clause. Although the case concerned the Foreign Commerce Clause application, the court noted that the principles governing the Foreign Commerce Clause and the Interstate Commerce Clause are similar and used case law concerning interstate commerce to reach its conclusions. Natsios, 181 F.3d at 61–72.

61. Id. at 45.

62. Id.

63. Id. at 70–71. Although the court made this statement in the context of the Foreign Commerce Clause, the statement is also relevant to the domestic Commerce Clause analysis as the First Circuit court derived its reasoning and conclusions from the domestic Commerce Clause jurisprudence.

64. Bd. of Trustees of Employees’ Retirement Sys., 562 A.2d at 755.
holdings in companies that did business with South Africa. The Maryland court explicitly stated that “it is indisputable that the Ordinances effectuated legitimate, local public interests . . . [by] permitting the City and its citizens to distance themselves from the moral taint of coventuring in firms that . . . help to maintain South Africa’s system of racial discrimination.” The Maryland high court emphasized that investing local funds in a “socially responsible manner” is a legitimate local interest.

A decade later, in 1998, Secretary of State, Madeleine Albright, confirmed this view when she stated that she and “President Clinton recognize the authority of state and local officials to determine their own investment and procurement policies, and the right—indeed their responsibility—to take moral considerations into account as they do so.” Some commentators also agree that local governments “are empowered to advance the moral interests of their citizens as ‘guardians and trustees of their people.’”

The District Court for the Northern District of California considered a different type of local ordinance designed “to combat a societal evil” in *Air Transport Association of America v. City & County of San Francisco*. In 1972, San Francisco adopted an ordinance in which it refused to enter into contracts with companies discriminating against same-sex domestic partnerships. San Francisco argued that it had a legitimate local interest in banning discrimination based on sexual orientation. The district court, while invalidating the ordinance in part, agreed with San Francisco on the local concern argument, stating that San Francisco “had acted to effectuate a legitimate local public interest . . . in not indirectly supporting discriminatory business practices.”

In coming to this conclusion, the district court quoted the Supreme Court’s plurality opinion from *City of Richmond v. J.A. Croson Co.*, which stated, in the context of the Equal Protection Clause, that a local government has “a

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65. *Id.*

66. *Id.*

67. *Id.*


71. 992 F. Supp. 1149 (N.D. Cal. 1998).

72. *Id.* at 1156–57.

73. *Id.* at 1164.

74. *Id.*

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compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice,” and that a municipality can “take measures to ensure that its citizens’ money is not used to further discrimination.” However, it is not at all clear whether the plurality opinion in City of Richmond applies in the Dormant Commerce Clause context. In Metropolitan Life Insurance Co. v. Ward, the Supreme Court stated:

The Commerce Clause, unlike the Equal Protection Clause, is integrally concerned with whether a state purpose implicates local or national interests. The Equal Protection Clause, in contrast, is concerned with whether a state purpose is impermissibly discriminatory; whether the discrimination involves local or other interests is not central to the inquiry to be made. Thus, the fact that promotion of local industry is a legitimate state interest in the Commerce Clause context says nothing about its validity under equal protection analysis.

Thus, it is uncertain whether the plurality’s statement in City of Richmond regarding a legitimate interest in not investing money in businesses with discriminatory practices translates into a similar conclusion in the context of the Dormant Commerce Clause.

Additionally, as Professor Chemerinsky has noted, the Supreme Court’s jurisprudence in the area of the Dormant Commerce Clause shows that “the Court requires more than just a legitimate purpose; a discriminatory state or local law must serve an important purpose in order to be upheld.” The Supreme Court’s statement in Edgar v. MITE Corp., that states have “no legitimate interest in protecting non-resident[s]” casts additional doubt on whether the Supreme Court would find that local governments have a legitimate “moral interest” in cutting economic ties with Arizona companies with the goal of protecting the interests of local residents from the allegedly discriminatory policies of the state government. Such “moral interest” is likely inadequate to validate local resolutions that attempt to regulate conduct and affect constituents outside of the local jurisdiction.

76. Deutsch, supra note 70, at 489.
78. CHEMERINSKY, supra note 40, at 444.
80. See Dhooge, supra note 69, at 418–19 (expressing the view that moral concerns of the local government regarding civil rights violations in a different jurisdiction are outside the area of a legitimate local concern).
81. See id. at 420 (“Appealing though it may be to local constituencies, such an interest is also ‘unlikely to be sufficient justification for state action deemed offensive to federal constitutional priorities.’”) (quoting Howard N. Fenton, The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions, 13 NW. J. INT’L L. & BUS. 563, 574 (1993)).
2. Non-Discriminatory Alternatives

Even if municipalities have a legitimate local interest in refraining from using public money to support allegedly discriminatory policies of Arizona, the resolutions likely cannot withstand the second prong of the strict scrutiny test—“absence of non-discriminatory alternatives”—adequate to preserve local interests. In Natsios, the First Circuit concluded that, even if moral concerns about the legal situation in another jurisdiction are a legitimate local interest, the local regulation would still be invalid due to the availability of non-discriminatory alternatives. Instead of boycotting companies headquartered in Arizona, local governments could achieve their purpose of expressing their “moral outrage” by adopting resolutions limited to denouncing the policies of the Arizona government without boycotting private businesses headquartered in Arizona. Such an alternative is especially attractive given the lack of evidence supporting the effectiveness of economic boycotts of private companies on the conduct of the Arizona government.

Furthermore, there is evidence that such boycotts harm private companies located in Arizona. Although economic boycotts target the actions of the Arizona government, private businesses that lose contracts because of the state’s immigration policy primarily feel the effect, even though many of them may “share . . . disdain for SB 1070.” Paul Senseman, a spokesman for the Governor of Arizona, said that “[a]n economic boycott of Arizona just adds to the massive economic burden Arizonans have sustained for years due to the federal government’s failure to secure our borders.” Additionally, the victims of the boycotts include the very people such boycotts are supposed to protect—Latinos

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83. Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 70–71 (1st Cir. 1999) (The argument that such local purpose cannot be otherwise adequately served by alternative means is “very weak and does not suffice.”).
84. In fact, despite the boycotts, Arizona lawmakers proposed adopting an even more stringent law on illegal immigration including banning illegal immigrants from enrolling in schools, from driving in the state, and from receiving public benefits. Lacey, Arizona Seeks New Migrant Limits, supra note 36, at A5.
85. See, e.g., Builder Believes Loss of $40 Million Deal Tied to SB 1070 Boycott, ARIZONA REPUBLIC, June 26, 2010 (“A Chandler builder lost a contract worth nearly $40 million at Los Angeles International Airport, and he suspects it’s related to the boycott of Arizona begun in response to [SB 1070].”); Boycott Forces Company to Relocate, ARIZONA REPUBLIC, Aug. 2, 2010, at B5 (a medical company decided to move its headquarters from Chandler, Arizona, to Las Vegas, Nevada, because it faced losing clients as a result of boycotts of Arizona companies); Archibold, Phoenix Counts Big Boycott Costs, supra note 35, at A15 (“Boycotts . . . could cost the Phoenix metropolitan area $90 million in hotel and convention business over five years.”); Lacey, Arizona Law Said to Harm Convention Businesses, supra note 35, at A18 (estimating that because of fewer convention bookings, Arizona could potentially lose $750 million, and that losses “from conventions already canceled include 2,761 lost jobs, $86.5 million in lost earnings, $253 million in lost economic output and $9.4 million in lost tax revenues”).
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employed by Arizona-based companies. The City of Los Angeles itself recognized the resolution’s negative effect on private businesses located in Arizona and attempted to ease those concerns by offering incentives for Arizona companies to relocate to Los Angeles.

Another non-discriminatory alternative to economic boycotts of Arizona companies would be a non-binding resolution condemning businesses and other organizations supporting SB 1070. In terms of its constitutionality, such an alternative would undoubtedly be less questionable than the absolute bar on contracting with any companies headquartered in Arizona regardless of their position on SB 1070. As Professor Dorf has noted, there is a difference between choosing not to contract with a company because it engages in immoral business practices (like using child labor) and refusing to contract with companies based solely on their location in a state with objectionable laws.

IV. ECONOMIC BOYCOTTS IN LIGHT OF THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE

The strongest argument for upholding local resolutions announcing economic boycotts of Arizona companies would likely be that boycotting municipalities act not as market regulators, but as market participants, and thus the market participant exception shields the boycott resolutions from the strict scrutiny test.
A. Brief Overview of the Market Participant Exception

The market participant exception immunizes certain forms of government activity at the state and local level if the activity is not governmental in nature, but rather represents only the commercial participation of the state or municipality in the market as a buyer or seller. The market participant exception is based on “the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” Thus, if a state or local government is acting as a market participant, buying and selling goods or services in the market, as opposed to acting as a “regulator,” the Dormant Commerce Clause does not restrict its activities.

The Supreme Court first recognized the market participant exception in Hughes v. Alexandria Scrap Corp. In that case, the Court upheld a Maryland statute that favored in-state scrap-dealers by using a combination of fines and bounties to encourage the efficient processing of abandoned cars into scrap. The Court held that the statutory scheme was consistent with the Commerce Clause on the ground that Maryland was participating in the market rather than regulating it. Three years later, in Reeves, Inc. v. Stake, the Supreme Court decided that South Dakota could “favor its own citizens” by giving them preference over out-of-state citizens who sought to purchase cement from a plant owned and operated by the state. The Court affirmed the basic distinction drawn in Alexandria Scrap between states as market participants and states as market regulators, and concluded that South Dakota, as a seller of cement, “unquestionably fits” the market participant label.

In White v. Massachusetts Council of Construction Employers, Inc., the Supreme Court upheld an executive order from the mayor of Boston directing that only companies whose crews were composed of at least fifty percent Boston residents should perform the city’s construction projects. The Court asserted that the market participant exception did not necessarily stop “at the boundary of

94. See, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (“Nothing in the purpose animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”).
96. Id.; see also New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988) (noting that the market participant exception applies when a locality acts as a buyer or seller in a market rather than “acting in its distinctive governmental capacity.”).
97. 426 U.S. at 794.
98. Id. at 799–802.
99. Id. at 809–10.
100. 447 U.S. 429, 436 (1980).
101. Id. at 436, 440.
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formal privity of contract,” and once again confirmed that the single inquiry is “whether the challenged ‘program constitute[s] direct state participation in the market.”

Following White, the Supreme Court decided a series of cases in which it limited the application of the market participant exception. In South-Central Timber Development, Inc. v. Wunnike, the Court held unconstitutional an Alaska statute that required harvesters of state-owned timber to process the timber in the state. The Court found that Alaska imposed a “downstream” condition on the market that went beyond mere market participation because Alaska was trying to control the behavior of private companies outside of their immediate dealings with the state. The Court explained that the market participant doctrine, while allowing a state to impose conditions on the local market, “allows it to go no further. The [s]tate may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.”

In Camps Newfound/Owatonna, Inc. v. Harrison, the Supreme Court invalidated Maine’s statutory exemption from real estate and personal property taxes for charitable and benevolent institutions that excluded organizations operated principally for the benefit of nonresidents. The Court held that “avoiding this sort of ‘economic Balkanization,’ and the retaliatory acts of other [s]tates that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence . . . . By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the Dormant Commerce Clause was designed to prevent.”

B. Economic Boycotts in Light of Justifications for the Market Participant Exception

Professor Coenen has suggested several justifications for the market participant exception, including fairness, “need to avoid interference with state autonomy” based on the “values of federalism,” and a lesser degree of danger to the Commerce Clause values. The essence of the “fairness” justification is that it is generally fair to allow local governments to favor local citizens when selecting the recipients of local resources. “When a state government

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103. Id. at 211 n.7.
104. Id. at 208.
106. Id. at 95.
107. Id. at 97.
109. Id. at 577–78 (citation omitted).
110. Coenen, supra note 93, at 420.
111. Id.; see also Bair, supra note 56, at 2421 (“Moral and political theory suggests that states may legitimately prefer their own citizens in public contracting because they are spending state funds.”).
distributes state resources, it may—on behalf of all its citizens—pick and choose among the proper recipients.”

However, the problem with the application of this rationale to the resolutions is that the essence of the resolutions is not to prefer local residents over outsiders, but to exclude one particular group of outsiders—those affiliated with Arizona.

Some commentators, however, have interpreted Professor Coenen’s “fairness” justification to mean that the market participant exception applies even if the local government does not prefer local citizens to outsiders. It is difficult to reconcile such an interpretation with the essence of the “fairness” justification as it is the citizens of the state that “may reap where they have sown,” not citizens of all but one state with policies that a particular local government does not agree. Professor Coenen himself finds support for the “fairness” justification in the words of Alexander Hamilton, who argued that it is fair to let “individual states . . . raise their own revenues for the supply of their own wants.” Additionally, Professor Coenen draws upon Professor Varat’s statement that “political communities . . . have a prima facie justification for limiting distribution of their public goods to those who combined to provide them.”

Thus, the “fairness” justification for the market participant exception simply does not apply in situations where the purpose of the local regulations is not to provide benefits to local residents over outsiders, but to exclude one particular group of outsiders from the benefits distribution process.

Another justification for the market participant exception is that the ideological values of federalism prevent federal interference with state autonomy when a state government acts as a purchaser or seller in the marketplace. Such values of federalism include, in particular, the values of “local experimentation and optimal responsiveness to local concerns.”

Meaningful local governance fosters experimentation and responsiveness to distinctive local conditions, facilitates choice by fostering diversity, and may increase both liberty and participatory democracy by keeping government near at hand. More subtly, the allowance of substantial local

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112. Coenen, supra note 93, at 422.
113. See Michelle C. Sarruf, Note, Applying the Market Participant Exception to Selective Purchasing Laws that Affect Foreign Commerce Relations: Reading Between the Lines of National Foreign Trade Council v. Natsios, 24 SEATTLE U. L. REV. 1151, 1152 (2001) (arguing that the “fairness” justification allowed Massachusetts to boycott companies doing business with Burma even though the Massachusetts Burma Law did not provide preferential treatment to Massachusetts residents).
114. Coenen, supra note 93, at 423.
115. Id. (quoting THE FEDERALIST NO. 32, at 199 (Alexander Hamilton) (J. Cooke ed., 1961)).
117. Id. at 441.
118. Id.
control may promote the healthiest brand of nationalism by fostering pursuit of different traditions in a spirit of shared toleration.\textsuperscript{119}

Ironically, Arizona’s in-state policies toward illegal immigration can serve as one example of the local experimentation that Professor Coenen talks about. However, contrary to his view on the nature of the market participant exception, the resolutions not only fail to “foster[] pursuit of different traditions in a spirit of shared toleration,”\textsuperscript{120} but also promote extreme intolerance toward the laws and policies of another state.

Another justification for the market participant exception is a lesser degree of danger to “commerce clause values of a free market and unified Nation” than discriminatory regulations normally present.\textsuperscript{121} Professor Coenen explains that when a state or local government prefers its own citizens in distributing local resources, the other states “are unlikely to pursue the retaliation and reprisals the dormant commerce clause was meant to neutralize.”\textsuperscript{122} Under such a traditional application of the market participant exception, there is no significant risk of retaliation because other localities likely have similar preferential legislation or at least recognize the validity of proprietary concerns of the local government that has adopted the preferential legislation.\textsuperscript{123} In this context, a minimal risk of retaliation serves as a “built-in-restraint,” reducing the impact on interstate commerce.\textsuperscript{124}

However, this “built-in-restraint” simply does not work if the basis for the exclusion of a certain group of out-of-statess is not the economic “sow-and-reap” rationale, but some moral or political consideration unconnected to local social or economic benefits. On the contrary, a state or locality that becomes a target of economic boycotts based on political or moral disagreements is much more likely to strike back against the boycotting municipality by adopting retaliatory, punitive measures. For example, in response to the economic boycott announced by Los Angeles, one Arizona official explicitly threatened to withhold energy sales by Arizona to Los Angeles.\textsuperscript{125} Considering that Los Angeles receives about

\begin{itemize}
\item \textsuperscript{119} Id. at 427 (footnotes omitted).
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. at 441.
\item \textsuperscript{122} Id. at 434.
\item \textsuperscript{123} Bair, supra note 56, at 2422; see also Coenen, supra note 93, at 434 (‘If it is ‘obvious’ that a state may prefer its own residents in distributing its resources, then few nonresidents will take umbrage when a state does so; and if few nonresidents take umbrage, then their home states are unlikely to pursue the retaliations and reprisals the dormant commerce clause was meant to neutralize.”).
\item \textsuperscript{124} Bair, supra note 56, at 2422.
\end{itemize}
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one-fourth of its electricity from Arizona, this might not be just an empty threat, but a real warning of potential retaliatory measures by Arizona.

This is the very type of “umbrage and complaint” and “animosity and discord” between states that the Framers of the U.S. Constitution attempted to prevent by drafting the Commerce Clause. It is therefore doubtful that the Supreme Court intended to increase the very danger that the Dormant Commerce Clause was designed to avoid when the Court created the market participant exception.

C. Market Participation Versus Market Regulation: Why Municipal Economic Boycotts Do Not Fall Within the Scope of Market Participation

As the Supreme Court emphasized in Wunnice, the market participant doctrine “is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.”

Simply because the local government engages in the sale or purchase of goods or services does not automatically place its activity within the market participant exception. Judges and scholars frequently disagree over when a municipality is acting as a market participant and when that municipality is camouflaging its regulatory activity by acting in the market.

Courts use several factors to determine whether a local government engages in a regulatory activity, including: (1) extraterritorial effect of the regulation, (2) coercive nature of the regulation, (3) controlling economic power of the local government, (4) motive and purpose of the regulation, (5) proprietary character of the regulation, (6) risk of retaliation from other states, (7) whether the regulation involves a “discrete activity focused on a single industry,” and (8) whether the regulation affects conduct unrelated to the transactions that it

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126. Id.

127. In evaluating potential retaliatory measures, it is also necessary to take into account that several states have considered adopting legislation similar to Arizona SB 1070, which can potentially lead to retaliatory measures not only by Arizona but by other state and local governments. See, e.g., Harder, supra note 36, at 36 (“Politicians in several states are calling for S.B. 1070-type legislation . . . . It is likely that S.B. 1070-type legislation will be introduced in the Texas Legislature.”); Krebs & Adams, supra note 4, at 28 (at least five other states, including South Carolina, Pennsylvania, Minnesota, Rhode Island, and Michigan, have pending legislation similar to SB 1070). In addition, numerous local governments expressed their support of S.B. 1070. AZCENTRAL, supra note 8 (listing several municipalities supporting SB 1070 including Costa Mesa, California; Orange, California; Hudspeth County, Texas; Lake Elsinore, California).


130. Coenen, supra note 93, at 404.

131. See, e.g., id. at 436 (“The term ‘regulate,’ of course, is not self-defining.”); J.T. Hutchens, Market-Participant Exception and The Dormant Foreign Commerce Clause, 5 Cardozo Pub. L. Pol’y & Ethics J. 445, 468 (2007) (“The line between participation and regulation is often narrow or obscure. . . .”).
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governs. As discussed below, an analysis of these factors demonstrates that municipal economic boycotts do not fall within the scope of the market participant doctrine.

1. Extraterritorial Effect

The first factor articulated by the U.S. Supreme Court to distinguish market participation from market regulation is whether a local regulation affects areas in which the locality is not a market participant.\(^{132}\) In *Healy v. Beer Institute*, the Supreme Court explained, “the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”\(^{133}\) Thus, in evaluating local legislation under the Dormant Commerce Clause, a court shall determine “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”\(^{134}\) If the local legislation attempts to regulate conduct “occurring wholly outside the boundaries,” it is “invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”\(^{135}\)

Applying the extraterritoriality factor in *Natsios*, the First Circuit concluded that the market participant exception did not shield Massachusetts when it adopted an economic boycott of companies doing business in Burma:

Massachusetts may not regulate conduct wholly beyond its borders. Yet the Massachusetts Burma Law—by conditioning state procurement decisions on conduct that occurs in Burma—does just that. . . . The “critical inquiry” here is “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State . . . .” Because we find that the Massachusetts Burma Law has such an effect, and is not otherwise shielded by the market participant exception, we find that the law violates the . . . Commerce Clause.\(^{136}\)

The *Natsios* court emphasized that local government may not use the market participant exception to shield otherwise impermissible regulatory behavior that goes beyond ordinary private market conduct.\(^{137}\)

\(^{132}\) See *Wunnicke*, 467 U.S. at 97 (“The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.”); *Deutsch*, supra note 70, at 485 (“One consideration should be whether the ordinance is dealing with business activity that is not occurring anywhere within that state.”).


\(^{134}\) Id. at 336.

\(^{135}\) Id.


\(^{137}\) Id. at 64.
The resolutions boycotting Arizona companies likely reach too far to be shielded by the market participant exception. The resolutions expressly provide that their main purpose is to express opposition to Arizona’s immigration laws and to compel Arizona to repeal SB 1070.\textsuperscript{138} The objective of the resolutions has no connection to the marketplaces of municipalities participating in boycotts. Furthermore, the event that motivated adoption of the resolutions (adoption of SB 1070) also has no connection to the local marketplaces. As discussed earlier, the boycotting municipalities have no legitimate local interest in the welfare of residents of Arizona to bring the resolutions within the scope of the relevant market. Thus, the purpose of the local governments participating in the boycotts is to impose conditions “that have a substantial regulatory effect” outside the relevant local markets.\textsuperscript{139} By boycotting Arizona companies, local governments attempt to impose restrictions not on their immediate business partners, but on the government of Arizona, which is not in any contractual relationships with the boycotting municipalities.

Local governments do not have a right to demand that Arizona act according to their sense of rightness or suffer economic loss if Arizona refuses to change its immigration policies. Even if SB 1070 is unconstitutional, as the federal government alleges in its lawsuit against Arizona, it is up to the judiciary, and not states and their political subdivisions, to apply sanctions against the government of Arizona.\textsuperscript{140}


Some commentators have suggested that the essential characteristic of market regulation as opposed to market participation is the controlling economic power of the local government in a certain market.\textsuperscript{141} These commentators note that the Supreme Court held that Alaska was a market regulator in \textit{Wunnicke} because Alaska “had controlling economic power [by being] in a position to

\textsuperscript{138} See L.A., Cal., Res. 10-0002-S36 (May 12, 2010) (deciding to suspend travel to Arizona and possibly terminate current and future contracts with Arizona businesses until SB 1070 is repealed), Seattle, Wash., Res. 31214 (May 17, 2010) (abstaining from entering into any sales contracts with Arizona companies), Berkeley, Cal., Res. 64,887 (May 18, 2010) (resolving to refrain from entering into contracts with companies headquartered in Arizona unless and until Arizona rescinds S.B. 1070).

\textsuperscript{139} S.-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).

\textsuperscript{140} See, e.g., Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 379–80 (1976) (concluding that a state’s remedy against another state’s discriminatory legislation is not in adopting retaliatory measures, but in suing the other state in court).

regulate a market different from the one in which the transaction took place through what appeared to be mere conditions placed on its trading partners.”

In *Alameda Newspapers, Inc. v. City of Oakland*, the Ninth Circuit considered what constitutes a “regulation” in the preemption context. The City of Oakland endorsed a boycott and terminated its business relationship with a newspaper that allegedly engaged “in a bitter and divisive labor dispute with its employees.” The newspaper argued that the National Labor Relations Act preempted Oakland’s regulation, thus the regulation was invalid. The court explained that “a prerequisite to preemption . . . is a finding that the state or local action in question constitutes regulation . . . . If a municipality’s action does not rise to the level of regulation, it is not preempted.” The Ninth Circuit concluded that the essence of a “regulation” is in its coercive nature. The court refused to invalidate Oakland’s boycott because the boycott did not constitute coercive power; rather, the City was merely proclaiming its views—an act without legal significance.

However, in *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, the Supreme Court reached a different conclusion in a similar factual situation involving preemption under the National Labor Relations Act. The Court held that Wisconsin was not acting as a market participant when it refused to purchase products from repeated violators of the National Labor Relations Act. The Court found that “Wisconsin’s debarment scheme [was] tantamount to regulation,” as the law could not “even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or [as] a law that pursues a task Congress intended to leave to the States.” In *Boston Harbor*, the Supreme Court stated that *Gould* makes clear that “[w]hen
the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role."  

Some commentators have concluded that announcing an economic boycott is an inherently coercive “characteristically governmental” activity. Others disagree, stating that it is usually “private purchasers [who boycott] goods and services” associated with certain geographic areas with the purpose of “influencing events unconnected with the purchasing decisions.” Whether one considers economic boycotts to be an inherently governmental or private action, it is undeniable that local economic boycotts of Arizona companies include elements of economic pressure. First, they seek to compel Arizona to repeal the law deemed unconstitutional by the boycotting local governments. Second, one of the intended (or unintended) effects of the resolutions is to coerce Arizona-based companies to relocate from Arizona.

As Justice Blackmun stated in his separate opinion in White v. Massachusetts Council of Construction Employers, “[t]he power to dictate to another . . . with whom [h]e may deal is viewed with suspicion and closely limited in the context of purely private economic relations. When exercised by government, such a power is the essence of regulation.” As the resolutions attempt to dictate a sovereign state’s laws and policies, and as they have direct injurious effects outside of the local government’s regulatory power, the resolutions are inherently coercive.

3. Motive and Purpose of the Regulation

Case law suggests that courts examine the local government’s motives in adopting a challenged regulation in order to determine whether it fits within the scope of the market participant exception. In Natsios, for example, the First Circuit Court explicitly emphasized that the sole purpose of the Massachusetts


155. See, e.g., Daniel M. Price & John P. Hannah, The Constitutionality of United States State and Local Sanctions, 39 HARV. INT’L L.J. 443, 490 (1998) (“The stated goal of the selective purchasing laws, as well as their principal effect—boycotting companies with commercial ties to Burma in order to influence events in Burma—demonstrate that these local governments are not simply functioning as private purchasers of goods and services.”).

156. Sommers, supra note 141, at 337; see also id. at 340 (arguing that Massachusetts’ economic boycott of companies doing business with Burma cannot be considered truly “coercive . . . .”).

157. See L.A., Cal., Res. 10-0002-S36, Motion 13A of Councilmember Richard Alarcon (May 12, 2010) (resolving “to develop . . . a plan . . . that would offer a package of incentives to firms headquartered in Arizona that wish to relocate to Los Angeles); see also Boycott Forces Company to Relocate, supra note 83, at B5 (a medical company forced to relocate from Arizona to Nevada because of losing business as a result of boycotts of Arizona companies).


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law was to pressure the government of Burma to change its domestic laws and policies.\textsuperscript{160} Thus, the law “had more than an indirect or incidental effect.”\textsuperscript{161} Similarly, the only purpose of the economic boycotts at issue is to pressure Arizona into changing its in-state immigration policies. Some commentators have argued that the distinction between participation in the market and regulation of the market should not depend on the motives of the government.\textsuperscript{162} Their main argument is that ordinary market participants routinely base their purchasing decisions on factors not related to the economics of the proposed transaction and can refuse to enter into a contract with a morally tainted supplier.\textsuperscript{163} The simple counterargument here is that private parties, unlike state and municipal governments, are not within the scope of the Dormant Commerce Clause and, as such, can base their purchasing decisions on whatever factors they want, even if those decisions will have some regulatory effect on interstate commerce.\textsuperscript{164} In Boston Harbor, the Supreme Court touched upon the “conceptual distinction between regulator and purchaser” in the preemption context:

A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. The private actor under such circumstances would be attempting to “regulate” the suppliers and would not be acting as a typical proprietor. The fact that a private actor may “regulate” does not mean, of course, that the private actor may be “pre-empted” by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors

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\item \textsuperscript{160} 181 F.3d 38, 51 (1st Cir. 1999).
\item \textsuperscript{162} \textit{See, e.g.}, Sommers, \textit{supra} note 141, at 330 (“[T]he participation/regulation distinction should not turn on whether the governmental consumer narrowly considers just the good or service underlying the transaction or whether it considers larger issues.”); Sarruf, \textit{supra} note 113, at 1152 (“[W]hen acting in the role of a market participant, a government is allowed to choose its own business partners, regardless of whether its choice is based on moral or economic reason, and regardless of whether the business partners are foreign or domestic.”).
\item \textsuperscript{163} \textit{See, e.g.}, Sommers, \textit{supra} note 141, at 318.
\item Why does a state not have the right to choose its suppliers based on the moral qualities of their involvements abroad? Individual consumers routinely make purchasing choices based on more than raw economic analysis. The citizen who chooses to buy an automobile manufactured in her country, or the consumer who refuses to buy shoes manufactured using slave labor exemplify these choices. It seems wrong that states and their agencies should not have the same range of choices as consumers in this regard because their choices, like the choices of individual consumers, apply economic rather than political leverage.
\item \textit{Id.}
\item \textsuperscript{164} Antitrust laws and regulations, however, can place some restrictions on actions on private parties in the market. \textit{See, e.g.}, 15 U.S.C. § 1 (2006) (prohibiting certain business activities of private parties that “restraint trade or commerce among the several States”).
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therefore may “regulate” as they please, as long as their conduct does not violate the law. . . . [H]owever, States have a qualitatively different role to play from private parties. When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.\textsuperscript{165}

Similarly, even if private parties can attempt to “regulate” the market by announcing economic boycotts to businesses from a certain state with the purpose of setting particular policies, it does not necessarily mean that a governmental entity can engage in the same conduct and claim the protection of the market participant exception.\textsuperscript{166} The Dormant Commerce Clause, just like the Supremacy Clause, is not applicable to private parties and thus does not prohibit their “regulatory” behavior, while prohibiting similar actions if exercised by a state or local government.

Because the purpose of the resolutions is, in a sense, to force Arizona into changing its laws to conform to the boycotting municipalities’ views and policies, it is useful to analyze the Supreme Court’s jurisprudence on the constitutionality of reciprocal requirements adopted by sub-national governments. On several occasions, the Supreme Court gave unfavorable treatment to such demands of reciprocity when they burden interstate commerce.\textsuperscript{167} In \textit{Sporhase v. Nebraska}, for example, the Supreme Court invalidated a Nebraska law, which prohibited grants of permits for the use of Nebraska groundwater in an adjoining state unless such a state provided a similar

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\item \textsuperscript{165} 507 U.S. 218, 229 (1993).
\item \textsuperscript{166} See, e.g., Jonathan D. Varat, \textit{State “Citizenship” and Interstate Equality}, 48 U. Chi. L. Rev. 487, 506 (1981) (“Precisely because state proprietary activity is a blend of both private and public business, it is not sufficient to assume that the state should have the same freedom to choose business policy as private business.”); Hutchens, supra note 131, at 464 (“[T]here is always something distinctive about a state’s entry to a marketplace . . . . When an action bears the imprimatur of the state’s government it ceases to be private action, and must assume greater, or at least different, scrutiny.”); Air Transp. Ass’n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1178 (N.D. Cal. 1998) (“States and local governments, when they are directly participating in the marketplace, are not free to take any action that a private party could take in that role. When either a State or a private party refuses to enter into a contract based on a ‘policy concern rather than a profit motive,’ . . . that actor ‘would be attempting to “regulate” the suppliers and would not be acting as [a] typical proprietor.’”).
\item \textsuperscript{167} See, e.g., New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) (invalidating Ohio law that denied the tax credit to ethanol from states that did not grant a similar tax credit to Ohio ethanol); Sporhase v. Nebraska, 458 U.S. 941 (1982) (invalidating Nebraska law that refused to grant permits for the use of the Nebraska groundwater in a neighboring state if such a neighboring state did not provide reciprocal rights regarding withdrawal and transport of groundwater into Nebraska); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (invalidating Mississippi law that prohibited sales of milk and milk products from another state unless that state agreed to allow sales on Mississippi milk on a reciprocal basis).
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regime for the use of its groundwater in Nebraska. The Court concluded that such a reciprocity requirement “operate[d] as an explicit barrier to commerce between the two States” when the adjoining state did not allow transportation of its groundwater to Nebraska. Holding that the state did not narrowly tailor the reciprocity requirement to its interest in conserving and preserving local natural resources, the Court concluded that “[t]he reciprocity requirement [did] not survive the ‘strictest scrutiny’ reserved for facially discriminatory legislation.”

In *Great Atlantic & Pacific Tea Co. v. Cottrell*, the Supreme Court stated that a local government “may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement.” Even if the laws of the targeted state are unconstitutional, other states and municipalities cannot respond by creating barriers to interstate commerce with the purpose of forcing the targeted state into changing its laws. Their remedies lie not in boycotting companies from the state with an allegedly unconstitutional law, but in invalidating the law through federal legislation and judiciary.

The potential implications of allowing every sub-national government to base its purchasing decisions on factors unrelated to the economics of the proposed transactions would be disastrous the Dormant Commerce Clause principles. Justice Powell rightly noted in his dissent in *Reeves, Inc. v. Stake* that states often “respond to market conditions on the basis of political rather than economic concerns.” As one commentator has observed, “[a] multiplicity of conflicting traditions would result in a multiplicity of restrictions, sanctions and other encumbrances upon commerce.” Permitting local governments to base their purchasing decisions on moral and political rationales could potentially lead to severance or substantial deterioration of economic relationships between states and municipalities with conflicting viewpoints on controversial issues of political concern. Such an expansive interpretation of the market participant exception

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168. 458 U.S. at 957.
169. *Id.*
170. *Id.* at 958 (“Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska.”).
171. 424 U.S. at 379.
172. *See id.* at 379–380 (noting that if the targeted state itself “is unconstitutionally burdening the flow of milk in interstate commerce by erecting and enforcing economic trade barriers to protect its own producers from competition under the guise of health regulations, the Commerce Clause itself creates the necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging [another State’s] actions as violative of the [Constitution].”); *see also Sporhase*, 458 U.S. at 958 (“The reciprocity requirement cannot . . . be justified as a response to another State’s unreasonable burden on commerce.”).
175. Dhooge, *supra* note 69, at 422.
would effectively interfere with the operation of the Dormant Commerce Clause as it would allow local governments to mask their regulatory activities by fabricating moral and political reasons to support discriminatory measures against out-of-state companies. Thus, the market participant exception should not apply to situations in which a legislature does not connect its motive and purpose for the discriminatory measure to favoring local citizens or securing local benefits.

4. Proprietary Character of the Regulation

In *Natsios*, the First Circuit emphasized that the market participant exception applies only when a local government’s actions qualify as proprietary and does not apply when the purpose of the regulation is unrelated to securing local benefits. Generally, governmental action qualifies as proprietary in either of two circumstances: (1) “if it essentially reflects the governmental entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,” or (2) “if the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.”

The Circuit Court for the District of Columbia hinted that, at least in the preemption context, governments act as market participants only when they make “economically rational” decisions. The District Court for the Northern District of California came to the same conclusion in *Air Transport Association*, when it conclusion in *Natsios* that the market participant exception does not apply to the Massachusetts Burma Law “invokes fears that permitting non-self-interested state purposes would grant states free rein to use the market participant exception to promote any policy whatsoever.”).

177. *See* Dhooge, *supra* note 69, at 422 (“The potential ramifications for commerce in the event that every state and locality was permitted to indulge their [sic] historical traditions . . . . may inspire ad hoc rationalizations and fabricated historical traditions in support of legislation clearly designed to discriminate against foreign businesses.”).


179. *Id.*

180. Engine Mfrs. Ass’n v. S. Coast Air Quality Maint. Dist., 498 F.3d 1031, 1041 (9th Cir. 2007) (alterations in original)(quoting Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas, 180 F.3d 686, 693 (5th Cir. 1999))(internal quotation marks omitted).


We would be surprised if private contractors were to care whether a struck supplier hired permanent or temporary replacements, so long as the goods or services contracted for were provided in a timely fashion and met quality standards. There may well be, however, some companies who, for political or philosophic reasons . . . would not wish to do business with a struck company that hired permanent replacements. But even if that behavior were a good deal more common than we suppose, we would still regard the Executive Order as regulatory in character.
considered the opposite results of the Supreme Court’s decisions in Gould and Boston Harbor:

In Gould . . . the State was acting as a regulator when it refused to enter into contracts with companies that repeatedly violated the NLRA, because conditioning contracts on this requirement was an “attempt to compel conformity with the NLRA . . . [and was] unrelated to the employer’s performance of contractual obligations to the State.” In Boston Harbor, on the other hand . . . the government agency acted as a “market participant” or proprietor when it attached conditions to contracts governing a specific, time-sensitive public works project that required subcontractors to sign a union contract so that there would be no labor-related work interruptions. The Court concluded that the agency had “no interest in setting policy” when it imposed these conditions.182

Some academic commentary also suggests that economically unsound decisions should be characterized as government regulation, as opposed to market participation.183 Because the resolutions at issue do not confer any economic benefits on local residents and do not serve any local economic or social purposes, they should not be considered proprietary within the meaning of the market participant exception.

5. Other Factors

Case law and academic commentary suggest some other factors that courts consider in deciding whether the governmental activity fits within the market participant exception. One of the factors used by the First Circuit in Natsios in invalidating Massachusetts’ Burma Law was that the case did not involve a “discrete activity focused on a single industry.”184 The Supreme Court’s jurisprudence on the market participant exception suggests that local measures validated by the Court indeed focused narrowly on a single industry, and did not involve sweepingly broad regulations like municipal resolutions to boycott Arizona companies.185

184. 181 F.3d at 63. In this respect, the court distinguished the case from Reeves, Inc. v. Stake, 477 U.S. 429 (1980), and Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), in which the Supreme Court held that the market participant exception applied. Natsios, 181 F.3d at 63.
185. See White v. Mass. Council of Constr. Emp’rs, 460 U.S. 204 (1983) (noting the order of the mayor of Boston was limited to the city’s construction projects); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (finding that South Dakota’s policy was limited to sale of cement from the state-owned plant); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (holding that the Maryland statute was limited to resolving the state’s problem of processing of abandoned cars into scrap).
Another factor that the Natsios court articulated is whether the local legislation affects conduct unrelated to the transactions it governs. The resolutions at issue purport to regulate conduct of the government of Arizona, which does not have any sensible relationship to potential contracts affected by the resolutions.

A final factor to consider is whether the government action creates a significant risk of retaliation from other states. The logic behind the Dormant Commerce Clause suggests that the market participant exception should not apply to those local regulations that “unnecessarily risk retaliation.” As discussed earlier, municipal economic boycotts of Arizona companies carry with them a substantial danger of retaliatory punitive measures not only from Arizona, but potentially from other states and localities that agree with Arizona’s immigration policies.

VI. CONCLUSION

More than a century ago, the U.S. Supreme Court stated that the purpose of the Commerce Clause was to eliminate “all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states.” Municipal resolutions boycotting Arizona companies in response to SB 1070 are one example of such an “evil” local regulation which the Dormant Commerce Clause was supposed to eradicate. The patently discriminatory resolutions cannot withstand the strict scrutiny test as the boycotting governments cannot demonstrate a compelling local interest. And even if they can, readily available alternative measures can achieve this interest. By using the “threat of economic isolation as a weapon” to pressure Arizona into changing its in-state immigration policies, the boycotting municipalities pave the road to “animosity and discord” between states of the union, the very consequence the Commerce Clause was designed to prevent.

The market participant exception to the Dormant Commerce Clause does not shield the resolutions from the strict scrutiny test. Neither the rationales for the

186. 181 F.3d at 63.
187. Coenen, supra note 93, at 442; see also Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564, 577–78 (1997) (“Avoiding . . . the retaliatory acts of other States that may follow . . . is one of the central purposes of our negative Commerce Clause jurisprudence.”).
188. Bair, supra note 56, at 2423.
192. THE FEDERALIST, supra note 128, at 137.
market participant exception nor judicially developed factors justify economic boycotts of Arizona companies by sub-national governments. The Supreme Court has never applied the market participant exception to local regulations the explicit purpose of which were to change the laws of another state. On the contrary, the Court’s Commerce Clause jurisprudence strongly suggests that local regulations purporting to regulate conduct outside of local borders or inviting retaliatory action by the target state are unconstitutional. A sub-national government simply “is not privileged under the Commerce Clause to force its own judgments . . . on [another state] at the pain of [a] . . . ban on the interstate flow of commerce . . . .” While local governments are free to participate in the political debate over immigration issues of national importance, they are not free to ignore the mandates of the Dormant Commerce Clause, which prohibits discrimination of out-of-state residents and businesses. The market participant exception does not give sub-national governments a free pass to boycott Arizona companies simply because such local governments are “morally outraged” by Arizona’s immigration laws and policies.

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193. S.-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984) (“The state may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.”); Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564, 577–78 (1997) (“Avoiding . . . the retaliatory acts of other States that may follow [the discriminatory regulation] . . . is one of the central purposes of our negative Commerce Clause jurisprudence.”).


195. See Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 70–71 (1st Cir. 1999) (concluding that the “moral outrage” over the laws of another jurisdiction is not a sufficient justification for discriminatory regulation).