

# Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values

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The liberal-legalist order . . . will be founded on self-interested, rights bearing, adversarial individuals and this will not be sustainable. This type of social order is likely to aggravate precisely those points of tension in society which any vibrant political process should aim at alleviating. The ultimate danger is that liberal-legalism, may, paradoxically, bring about the precise end—despotism—which, it is designed to avoid.<sup>1</sup>

## I. INTRODUCTION

For more than two hundred years, American lawyers, judges, and legal academics have been looking for a fully persuasive theory that would justify the judicial invalidation of statutes on grounds that they fail to satisfy the judiciary's understanding of what the Constitution requires.<sup>2</sup> Nowhere is this clearer than within the domain instantiated by the intersection of fundamental freedoms, such as the freedom of speech and the doctrine of preemption,<sup>3</sup> and burgeoning efforts by states to regulate labor organizing and collective bargaining.<sup>4</sup>

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<sup>1</sup> MARTIN LOUGHLIN, *SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS* 5 (2000).

<sup>2</sup> JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 50 (1997).

<sup>3</sup> See, e.g., *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2413–14 (2008).

<sup>4</sup> Many of these efforts are sparked by academic and labor-union commentary that reflects disappointment with rates of unionization in the private sector. These trends reveal a continuing and persistent decline in unionization over the last several decades. In response, academic conferences have emerged to stem the decline. See, e.g., Symposium, *Next Wave Organizing*, 50 N.Y.L. SCH. L. REV. 303 (2005). Various methods have been proposed including new approaches to organizing that empha-

In *Chamber of Commerce of the United States v. Brown*, the United States Supreme Court offered one theory of judicial invalidation that protects employers' freedom of speech claims and reinvestigates federal preemption doctrine within the meaning of the National Labor Relations Act (NLRA).<sup>5</sup> Prescinding from an architectonic conception of freedom of speech that is supported forcefully and explicitly by the First Amendment, the Court relied on preemption doctrine to invalidate two provisions of a California statute<sup>6</sup> because the enactment constitutes regulation, which intrudes into a zone that is "protected and reserved for market freedom."<sup>7</sup> The Court properly upheld its previous stance permitting employers to speak directly to their employees about unionization,<sup>8</sup> but supporters of this decision might do well to withhold their applause.

While a continuing debate erupts with regard to whether justices since Oliver Wendell Holmes, Jr., have been looking to the judiciary as a means of subverting or fortifying the Constitution,<sup>9</sup> it is clear from the Supreme Court's 1941 decision in *NLRB v. Virginia Electric & Power Co.* that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems,"<sup>10</sup> unless the employer's speech is coercive within the meaning of the Act.<sup>11</sup> *Virginia*

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ize smarter organizing, bargaining to organize, reducing employer opposition, building public support for unions and the enactment of state and local laws designed to change the organizing environment. See Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approach to Union Growth*, 50 N.Y.L. SCH. L. REV. 337, 337-53 (2005).

<sup>5</sup> *Chamber of Commerce*, 128 S. Ct. at 2412-18.

<sup>6</sup> The California state statute is known as "Assembly Bill 1889" (AB 1889) and prohibits several classes of employers that receive state funds "from using the funds 'to assist, promote, or deter union organizing.'" CAL. GOV'T CODE § 16645.1(a) (Deering 2009). Two provisions of the statute were in issue: sections 16645.2 and 16645.7. *Chamber of Commerce*, 128 S. Ct. at 2412.

<sup>7</sup> *Chamber of Commerce*, 128 S. Ct. at 2412.

<sup>8</sup> *Id.* at 2413-14 (citing *Thomas v. Collins*, 323 U.S. 516, 537-39 (1945)).

<sup>9</sup> Harry V. Jaffa, *Original Intent and the American Soul*, 6 CLAREMONT REV. BOOKS 36, 36 (2005).

<sup>10</sup> *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941).

<sup>11</sup> See, e.g., *Thomas*, 323 U.S. at 537-38 (1945) (characterizing *Virginia Electric & Power* as a case that recognizes the First Amendment right of employers to engage in non-coercive speech about unionization); see also Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 7-11 (2008) (discussing difficulties in assessing whether employer coercion has taken place and pointing out that though NLRA section 8(a)(1) disallows employer conduct that interferes with, restrains, or coerces employees who were exercising rights protected under section 7). Difficulties arise when an employer engages in campaign activities that might intimidate or coerce yet not violate section 8(a)(1). *Id.* at 7. This line becomes fuzzy "when an employer is trying to convince employees of the negative consequence of

*Electric & Power* supports the proposition that employers have a First Amendment right to engage in non-coercive speech about unionization.<sup>12</sup> Labor sanctions, if imposed, are not for the punishment of employers but rather for the protection of employees; thus, employers are free to take any side and express any view on labor policies or problems in the absence of adducible evidence bearing upon the issue of coercion.<sup>13</sup>

Claims that employers possess free speech rights have spawned thorny debates about whether (1) employer speech rests on a wobbly foundation, (2) states can somehow limit the employer's free speech right,<sup>14</sup> and (3) the proposition tied to *Virginia Electric & Power* states a rule that can be defended sufficiently as a component of federal supremacy. Freedom-of-expression disputes frequently prompt uncertainty about whether employer and union expression tied to the merits of an ongoing labor controversy warrant full First Amendment protection,<sup>15</sup> or whether such expression, like commercial advertising, holds only a "subordinate position" on the scale of First Amendment values<sup>16</sup> and thus justifies a lower level of judicial scrutiny. In deciding freedom-of-expression disputes regarding the chargeability of union dues to union dissenters, the Supreme Court, in an early union dues case, found that such disputes can force First Amendment issues,<sup>17</sup> such as those initially raised but reserved in *Railway Employees'*

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union representation." *Id.* at 9. "Ultimately there is no clear line between impermissible threats and permissible campaign rhetoric." *Id.* at 11.

<sup>12</sup> *Chamber of Commerce*, 128 S. Ct. at 2413.

<sup>13</sup> *Va. Elec. & Power*, 314 U.S. at 477. Where a party to an organizing campaign engages in non-coercive speech, the employer or union may still be subject to a NLRB order, setting aside a representation election even though such a remedy impinges on the party's freedom-of-expression rights to some extent. ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 177 & n.9 (2004) (discussing *Bausch & Lomb Inc. v. NLRB*, 451 F.2d 873 (2d Cir. 1971)).

<sup>14</sup> See, e.g., Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 210-16 [hereinafter Secunda, *Toward the Viability of State-Based Legislation*] (supporting state efforts to limit employers' ability to speak to workers in their facilities); Paul M. Secunda, Debate, *The Ironic Necessity for State Protection of Workers*, 157 U. PA. L. REV. PENNUMBRA 20, 20-26 (2008), [www.pennumbra.com/debates/pdfs/Workplace Federalism.pfd](http://www.pennumbra.com/debates/pdfs/Workplace Federalism.pfd) (same).

<sup>15</sup> *Thomas v. Collins*, 323 U.S. 516, 531 (stating that the First Amendment safeguards are applicable to business or economic activity).

<sup>16</sup> LOUIS M. SEIDMAN ET AL., THE FIRST AMENDMENT, 195 (2003); see also Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 473 n.16 (1997) (distinguishing between union forced-dues cases and generic advertising program, with the latter being less likely to pose a First Amendment burden).

<sup>17</sup> *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970) (citing *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 763-64 (1961)).

*Department v. Hanson*<sup>18</sup> to the surface.<sup>19</sup> This provokes two corresponding queries: First, should First Amendment issues be reserved and if so why? And second, should disputes concerning the chargeability of union dues provide persuasive or analogical guidance to courts regarding disputes about employer free speech rights, particularly because the Supreme Court insists that “a significant impairment of First Amendment rights must survive exacting scrutiny”?<sup>20</sup> This Article will not attempt to answer both questions but will focus on the issue of whether NLRA preemption doctrine is strong enough to withstand an onrushing tide of disapproval coming from labor unions and their allies. This tidal wave of opinion, however under-theorized, appears calculated to stem the precipitous decline in private sector unionization, to prevent collective action from becoming an anachronism, and to eliminate presumed employer coercion—which some observers maintain is an impregnable barrier to employees’ rights to favor unionization.<sup>21</sup>

Presumably, freedom-of-expression contentions are fraught with challenges that exceed the competence of the National Labor Relations Board (NLRB or Board). Authority exists for the proposition that freedom-of-expression claims within a union dues context and the policy behind the preemption doctrine are not served by deferring to the Board when a constitutional question is validly presented.<sup>22</sup> This is so because constitutional adjudication trumps the Board’s interpretative expertise. Court adjudication, however, may be only marginally better since prevailing canons of interpretation require that the dispute be settled on grounds of statutory construction that ensure the statute is interpreted consistently with the Con-

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<sup>18</sup> *Ry. Employees’ Dep’t v. Hanson*, 351 U.S. 225, 238 (1956).

<sup>19</sup> The United States Supreme Court recently decided a controversy involving the first amendment in the labor context. See *Locke v. Karass*, 129 S. Ct. 798, 802 (2009). The Supreme Court was called upon to answer this question: “May a State . . . consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent’s affiliates’ litigation outside of a nonunion employee’s bargaining unit?”). Similar issues have arisen with respect to private sector labor unions as well. See, e.g., *Comm’n Workers v. Beck*, 487 U.S. 735, 745 (1988); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 453 (1984).

<sup>20</sup> *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 (1977) (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976)).

<sup>21</sup> See James J. Brudney, *Neutrality Agreement and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 819 (2005) (asserting that the NLRB election process is no longer normatively justified because the election paradigm regularly tolerates, encourages and promotes coercive conditions that preclude the attainment of employee choice).

<sup>22</sup> *Seay*, 427 F.2d at 1002.

stitution without reaching the constitutional claim itself.<sup>23</sup> Hence, freedom-of-expression rights often rest on constitutional principles without being fully defended by the language of such principles.

An additional layer of complexity emerges because liberal democratic countries, such as the United States, have been drawn increasingly to moral pluralism as an outgrowth of the pursuit of postmodernism. Coherent with this deduction, Professor Alasdair MacIntyre intuits that

[i]t is not just that we live too much by a variety and multiplicity of fragmented concepts; it is that these are used at one and the same time to express rival and incompatible social ideals and policies *and* to furnish us with a pluralist political rhetoric whose function is to conceal the depth of our conflicts.<sup>24</sup>

Moral pluralism provides a platform for elastic adjudication<sup>25</sup> and litigation. This interpretive tactic is contestable because statutory construction, just like constitutional interpretation and correlative political conflict, may not reveal the truth. Instead, a conscientious examination of prevailing interpretative techniques applied to the Constitution, legislative enactments, and the interstices of legislative intent may disclose a flight from a pre-commitment to truthfulness, as well as an isomorphic shift towards hypocrisy by the nation's elected and appointed ethnarchs.<sup>26</sup> Evidence may be available suggesting that such officials are predisposed to favor one side or another in the contest for political power and then mask their partisanship by deploying the elastic rhetoric of neutrality.

Whatever the value may be of elastic statutory construction as a substitute for principled constitutional interpretation, speech—particularly employer speech tied to an incipient labor dispute—can be barred by the NLRB if it is found to be coercive. That observation must be balanced by noticing Professors Gorman and Finkin's penetrating caveat:

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<sup>23</sup> *Id.* at 1003–04 (citing *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 763–64 (1961)).

<sup>24</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE* 253 (1984) (emphasis added).

<sup>25</sup> Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. PA. J. BUS. & EMPL. L. 663, 680 (2008) (“Unquestionably, postmodern implications, and even postmodernism itself, ought to be embraced with caution rather than enthusiasm because the deficiencies in postmodern implications may impair postmodernism’s ability to reclaim liberty and First Amendment values. In fact, it may be difficult to define First Amendment values through postmodern discourse.”).

<sup>26</sup> *See, e.g.*, DAVID RUNCIMAN, *POLITICAL HYPOCRISY: THE MASK OF POWER, FROM HOBBS TO ORWELL AND BEYOND* 2–6 (2008).

[I]t is fair to say that many courts have in close cases tended to give little deference to the Board's conclusions, . . . [instead] they have tended to examine the issue of coercion rather independently and . . . have far more frequently substituted their own finding of non-coercion for Board findings of coercion rather than the reverse.<sup>27</sup>

This conclusion is “explainable by the fact that federal regulation of the flow of information in labor-election campaigns may trench upon First Amendment protections, a setting naturally characterized by an ‘uninhibited, robust and wide-open’ exchange between labor and management.”<sup>28</sup> State initiatives that attempt to constrain employer speech face similar impediments tied to the force of constitutional values and the notion that the federal government has an interest in maintaining a province that is characterized by a robust exchange of ideas by labor and management. If the creation of a zone exemplified by robust exchange of views is an important objective, it can be sustained through the doctrine of federal preemption. But preemption that relies on varying, if not inconsistent, statutory interpretation may not always be enough to enforce employers’ speech rights. Since constitutional shelter for freedom of speech does not hinge on the individual or corporate identity of the speaker,<sup>29</sup> it follows that if the process of statutory interpretation tied to the doctrine of preemption proves inadequate to protect employers’ interests, this lacuna implies the necessity of reclaiming the Constitution itself as a source of freedom for employers.

Despite the declaration that recent Supreme Court opinions have accomplished a “Federalism Revolution” through decisions strengthening state autonomy and authority,<sup>30</sup> the Court’s *Chamber of Commerce of the United States v. Brown* opinion relies heavily on the doctrine set forth in *Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Commission*.<sup>31</sup> This reliance on the *Machinists*

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<sup>27</sup> GORMAN & FINKIN, *supra* note 13, at 187.

<sup>28</sup> *Id.* at 188.

<sup>29</sup> Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1748 (2008) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777–80 (1978)).

<sup>30</sup> Patrick M. Garry, *Federalism’s Battle with History: The Inaccurate Associations with Unpopular Politics*, 74 UMKC L. REV. 365, 365 (2005) (“After almost sixty years of dormancy, federalism made a constitutional comeback in the 1990s.”).

<sup>31</sup> See, e.g., Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1, 18 (1994) (“In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Committee*, [427 U.S. 132 (1976)], the United States Supreme Court dep-

doctrine emphasizes that both the NLRB and the states are without power “to regulate conduct that Congress intended” to be unregulated but remain “controlled by the free play of economic forces.”<sup>32</sup> According to the Court, “*Machinist* pre-emption is based on the premise that ‘Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.’”<sup>33</sup> Presumably, state enactments, which upset this balance, must give way to the federal interest.

On the other hand, a careful reading of the *Chamber of Commerce v. Lockyer* opinion by the United States Court of Appeals for the Ninth Circuit shows that the court is skeptical that the *Machinists* case established a constitutionally sufficient theory for invalidating the statute at issue.<sup>34</sup> Instead, the Ninth Circuit, unswerving from its irrepressible conception of the range of pro-union devices that can be deployed permissibly to strengthen unions and restrict freedom-of-expression claims,<sup>35</sup> reversed the district court and dismissed the plaintiffs’ claims.<sup>36</sup> The Ninth Circuit’s analysis is tied crucially to the proposition that there is a principled difference between an organizing context and a collective bargaining one for purposes of judging whether state regulation encroaches impermissibly on the federal scheme.<sup>37</sup> The court held that employer freedom-of-expression rights are not constrained when the State of California exerts its sovereign

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loyed a preemption doctrine that requires respect for economic weapons as part of the free play of economic forces envisioned by the NLRA.”).

<sup>32</sup> *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2412 (2008).

<sup>33</sup> *Id.* (quoting *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Comm.*, 427 U.S. 132, 140 n.4 (1976)). On the other hand, Professor Paul Secunda argues that in the absence of relatively equal economic power in the organizational setting, the *Machinists* doctrine makes less sense than it does in the collective bargaining or protected concerted activity realm. E-mail from Paul Secunda, Associate Professor of Law, Marquette University Law School, to Harry G. Hutchison (Oct. 17, 2008, 18:28 EST) (on file with author).

<sup>34</sup> *Chamber of Commerce of the U.S. v. Lockyer*, 463 F.3d 1076, 1085–90 (9th Cir. 2006), *rev’d sub nom.*, *Chamber of Commerce of the U.S. v. Brown* 128 S. Ct. 2408 (2008); *see also* Cynthia L. Estlund, *Labor, Property and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 341–42 (1994) (criticizing *Machinists*).

<sup>35</sup> *See Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 685 F.2d 1065, 1072–75 (9th Cir. 1982) (dismissing a freedom-of-expression challenge by union dissenters), *rev’d*, 466 U.S. 435 (1984); *United Food & Comm’l Workers Union, Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002) (holding that extra-bargaining unit organizing expenditures are germane to collective bargaining and chargeable to nonmembers’ dues despite their freedom-of-expression objections).

<sup>36</sup> *Chamber of Commerce*, 463 F.3d at 1082.

<sup>37</sup> *Id.* at 1086–87.

rights with respect to its spending power.<sup>38</sup> Hence, the Ninth Circuit upheld the contested provisions.<sup>39</sup>

On the basis of its interpretation of the California statute and its view of the doctrine of preemption, the Ninth Circuit decided that the State of California was free to prevent certain employers from using state funds to assist, promote, or deter union organizing, against the contrary claim that NLRA section 8(c) protects employers' speech rights.<sup>40</sup> Consequently, the employers' Commerce Clause and freedom-of-expression claims<sup>41</sup> were unavailing. Convinced that the state had a neutral purpose in enacting the contested legislation—to avoid interfering with an employee's choice about whether to join or to be represented by a labor union<sup>42</sup>—the Ninth Circuit concluded that the NLRA does not preempt the California statute and determined that the challenged restrictions did not violate the First Amendment.<sup>43</sup>

First Amendment jurisprudence is not noted for its perspicuity, and few areas of labor law seem quite as confusing as the scope of federal preemption.<sup>44</sup> It has been forcefully argued that “the First Amendment is a charter for government,” and “‘free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”<sup>45</sup> Accordingly, on freedom-of-expression grounds, the Supreme Court has barred state laws that constrain one party's ability to speak in favor of union organizing.<sup>46</sup> The Court has, however, been reluctant to recapture complete First Amendment protection for all activities that implicate the full range of the labor arena. Still, if labor-organizing activities are properly understood as lawful exercises of the First Amendment,<sup>47</sup> it would be anomalous if the First Amendment did not extend to activities opposing organizing.

However symmetrical and logical this contention may be, the asserted right of employer-recipients to use state funds to oppose orga-

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<sup>38</sup> *Id.* at 1080.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1100.

<sup>41</sup> *Id.* at 1080–82.

<sup>42</sup> *Chamber of Commerce*, 463 F.3d at 1080 (citing the preamble to CAL. GOV'T CODE §§ 16645–49 (Deering 2009)).

<sup>43</sup> *Id.*

<sup>44</sup> GORMAN & FINKIN, *supra* note 13, at 1078.

<sup>45</sup> *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

<sup>46</sup> *Id.* at 518 (finding a state law that appears to be inconsistent with provisions of the NLRA to be invalid because, as applied, it imposed a prior restraint on paid organizers who solicit union membership in Texas).

<sup>47</sup> See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.54 (7th ed. 2004).



nizing was not viewed sympathetically by the Ninth Circuit. Though NLRA preemption is vital to the Ninth Circuit's analysis in *Chamber of Commerce* and the Supreme Court's subsequent reversal,<sup>48</sup> perplexing questions are aroused by the Court of Appeals's dismissal of the plaintiffs' freedom-of-expression claims. This is so because the Ninth Circuit determined that the contested provisions of the statute, which were directed toward employers, do not infringe the employers' "right[s] to express whatever view they wish on organizing" because the provisions are deemed neutral and nonpartisan.<sup>49</sup> This conclusion materializes as a contestable one because neutrality may be impossible in theory and particularly as applied by the Ninth Circuit. Coextensively, while the Supreme Court has often suggested complainants' First Amendment rights warrant some protection, it has been reluctant to substantiate such rights energetically.<sup>50</sup> The *Chamber of Commerce* opinion breathes life into this unfortunate pattern.

In addition to examining labor law preemption principles, this Article will inspect the often contestable conception of neutrality in light of the existence of scholarship advocating an expansion in state labor law innovation aimed at reducing employer rights.<sup>51</sup> The ultimate purpose of such innovation seems clear enough: to increase the level of unionization in the United States and to restore collective action to its previously ascendant status.<sup>52</sup> It is doubtful that this objective can be seen as a "neutral" one. Instead, this goal is delineated by the declining importance of labor unions in the United States<sup>53</sup> and the mounting appeal of paternalistic intrusions into the market.<sup>54</sup> In light of this goal, employers confronted with either legislative or judicial assertions of neutrality should be forgiven for suffering from a preeminent sense of doom. This impression is often made tangible via partisan enactments and adjudication. With the advent of post-

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<sup>48</sup> *Chamber of Commerce of the U.S. v. Lockyer*, 463 F.3d 1076, 1096–97 (9th Cir. 2006), *rev'd sub nom.*, *Chamber of Commerce of the U.S. v. Brown* 128 S. Ct. 2408 (2008).

<sup>49</sup> *Id.* at 1096.

<sup>50</sup> Hutchison, *supra* note 25, at 707–16 (describing this development).

<sup>51</sup> See *infra* Part II.B.

<sup>52</sup> See JOHN R. COMMONS, *THE ECONOMICS OF COLLECTIVE ACTION* 23–35 (1950) (discussing collective action generally and examining collective bargaining during the period from 1883 to 1945). To his credit, Professor Secunda's innovative efforts are motivated by the desire to ensure that workers have a fair opportunity to express their views about unionization. E-mail from Secunda, *supra* note 33.

<sup>53</sup> See, e.g., J. Hoult Verkerke, *Employment Contract Law*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW*, 47, 47 (Peter Newman ed., 1998).

<sup>54</sup> See generally Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC L. REV. 799 (2008).

modern discourse and the possibility that courts have become captive to progressive rhetoric that is not found within the Constitution, this Article contends that the Supreme Court should reconsider its reliance on the NLRA as the primary vehicle to vindicate employers' rights and instead should return to the Constitution itself as a basis for its defense of what has become increasingly difficult to defend: the free speech rights of employers and employees within a labor-management context. This approach is exemplified by recapturing the Supreme Court's understanding of *Virginia Electric & Power* as a basis for relief.<sup>55</sup> This case, decided before the NLRA was amended, added explicit protection of employers' speech. *Virginia Electric & Power* stands for the proposition that employer and labor union "attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty."<sup>56</sup>

And, yet, Stanley Fish vitiates such sentiments by arguing that for modern democratic societies like the United States, "there is no such thing as free speech."<sup>57</sup> If Fish is correct, protection for any speech, including employer speech, may be impermanent, and the surging conflict initiated by labor advocates who seek to restrict employer authority and speech may be beyond resolution. At the end of the day, it is doubtful that placing employer speech rights on a constitutional plinth should be a basis for lasting celebration for employers because clarity in this arena, however desirable and however necessary, is likely to remain evanescent unless society regains a consensus on the meaning of liberty. Adjudication accompanied by imaginative interpretation may mean that freedom-of-expression cannot rest on a reliable foundation and that employer free speech rights face an uncertain future.

Part II of this Article examines preemption doctrine. Part III considers the Ninth Circuit's opinion in *Chamber of Commerce*. Part IV inspects the Supreme Court's opinion reversing the Ninth Circuit. Part V supplies analysis that is fortified by a re-examination of the *Virginia Electric & Power* case.

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<sup>55</sup> NLRB v. Va. Elec. & Power Co., 314 U.S. 469 (1941).

<sup>56</sup> Thomas v. Collins, 323 U.S. 516, 537-38 (citing NLRB v. Va. Elec. & Power Co., 314 U.S. 469 (1941)).

<sup>57</sup> See STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 114 (1994).

## II. FINDING THE LAW OF PREEMPTION

## A. Garmon and Machinists Preemption

When regulating conduct and actions that are linked to organizational activities, the NLRB's "primary concern is to protect the statutory rights of employees, but in doing so it must balance those rights against the rights of the employer and, to a lesser extent, those of the union."<sup>58</sup> Section 8(c) of the NLRA defends employers' freedom-of-expression rights but "the protections afforded to speech by [this section] of the NLRA are not absolute."<sup>59</sup> Circumstances arise under which the NLRA's chief interpreter, the NLRB, can circumscribe the employer's free speech right because the NLRB must engage "in a continuing effort to the right of free speech and [statutory requirements against] interference, restraint, or coercion of employees in the exercise of their section 7 rights."<sup>60</sup> The Board maintains a regulatory role in this arena<sup>61</sup> despite precedent suggesting that the First Amendment provides an independent ground to protect the right of workers, unions, and employers to persuade employees to join or refrain from joining a union.<sup>62</sup>

At issue here is whether states also have a role in balancing or alternatively expanding the rights of employees and diminishing the right of employers. State regulatory efforts raise the specter of federalism conflicts as well as the possibility of preemption. Professors McGinnis and Somin show that

federalism is the cornerstone of the Constitution. . . . The constitutional system of federalism assigns powers to state and federal government officials not for their own benefit, but for that of the people. These benefits are many, including the satisfaction of diverse preferences and competition both among the states themselves and between the states and federal government. . . . Sometimes federalism can be protected by only restricting the power of state governments, rather than strengthening it.<sup>63</sup>

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<sup>58</sup> 1 JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 81* (John E. Higgins, Jr. et al., eds., 5th ed. 2006) (citation omitted); see also Baworowsky, *supra* note 29, at 1753–59.

<sup>59</sup> 1 HIGGINS, *supra* note 58, at 95 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)).

<sup>60</sup> *Id.* (citation omitted).

<sup>61</sup> *Id.* at 121.

<sup>62</sup> See, e.g., *Thomas v. Collins*, 323 U.S. 516, at 537–38 (1945).

<sup>63</sup> John O. McGinnis & Ilya Somin, *Federalism vs. States Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 89 (2004).

The dispute that gave rise to a district court and several court of appeals decisions culminating in the Supreme Court's opinion in *Chamber of Commerce of the United States v. Brown*<sup>64</sup> evolved largely during an epoch presided over by the Rehnquist Court. This Court ostensibly "redefin[ed] the balance of power between the national government and the states,"<sup>65</sup> and thus "reinvigorated the doctrine of federalism and restored power to the states."<sup>66</sup> Still, the Supreme Court has recently published opinions that call into question allegations that a federalism revolution is afoot.<sup>67</sup>

Whether the modern Court's federalism decisions represent an inclination to favor symbolism rather than substance,<sup>68</sup> whether federalism is a radical idea or not,<sup>69</sup> or whether the critics of the modern Court's new federalism only disapprove of the putative shift toward federalism when the Court offends their preferences,<sup>70</sup> "it is clear that New Deal reformers such as President Roosevelt quickly scrapped [their] earlier states' right views."<sup>71</sup> This shift, by and large, favored federal regulation of the labor market. Consistent with this move, the organizing premises attached to the New Deal and the newly-ascendant zeitgeist,<sup>72</sup> "the national government 'came out as the

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<sup>64</sup> See *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2412 (2008) ("The Court of Appeals for the Ninth Circuit, after twice affirming the District Court's judgment granted rehearing en banc and reversed.").

<sup>65</sup> Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 844 (2000).

<sup>66</sup> Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 659 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

<sup>67</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding the power of Congress to ban the use of marijuana for medical purposes, even in states that permit it).

<sup>68</sup> See David Fontana, *The Current Generations of Constitutional Law*, 93 GEO. L.J. 1061, 1068-69 (2005) (reviewing MARK TUSHNET, *REVIEW OF THE NEW CONSTITUTIONAL ORDER* (2003)).

<sup>69</sup> See Garry, *supra* note 30, at 366 (stating that "[t]he notion of federalism is hardly a radical one").

<sup>70</sup> *Id.* at 367 ("[T]he same political forces that condemn the constitutional revival of the federalism doctrine are simultaneously, in separate venues pertaining to separate issues, enthusiastically embracing the principles of federalism.").

<sup>71</sup> DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* 94 (1995).

<sup>72</sup> For a description of the prevailing religious, philosophical, and political mood of the country, see Harry G. Hutchison, *Work, the Social Question, Progress and the Common Good?* 48 J. CATH. LEGAL STUD. 59 (2009) (reviewing *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007)).

more authoritative partner in the [newly transformed] federal-state system.”<sup>73</sup>

The Supreme Court stated, “As enacted in 1935, the NLRA . . . did not include any provision that specifically addressed the intersection between employee organizational rights and employer speech rights.”<sup>74</sup> Instead, cabined by the restructured boundaries of America’s liberal-legalist order, it was left to a federal regulatory agency, “the NLRB, subject to review in federal court to reconcile these [often conflicting] interests in its construction of §§ 7 and 8” of the NLRA.<sup>75</sup> While an “employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board,”<sup>76</sup> this teaching does not resolve the question of whether a state can infringe when both the union and the Board cannot. Turning directly to the federalism issue, it is remarkable that the NLRA, “unlike other federal laws that expressly confront their relationships to overlapping or potentially conflicting state law,” generally speaking, fails to contain a statement articulating Congress’s intent on this issue in the text of the Act.<sup>77</sup> As more fully developed below, an exception to this general rule arguably surfaces with respect to the text of section 8(c) of the NLRA and employer free speech rights.<sup>78</sup>

Despite this exception, “the law of preemption is entirely judge-made and so is subject to shifts in judicial application over time.”<sup>79</sup> The NLRA carries implications of exclusive federal authority and reflects Congress’s withdrawal from the states of much that had previously rested with them.<sup>80</sup> What has been taken from the states and what has been left to them are to be concretized by the Board under the supervision of the courts.<sup>81</sup> Initially, federal court intervention in disputes between states and the federal government regarding state

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<sup>73</sup> Garry, *supra* note 30, at 371 (quoting WALKER, *supra* note 71, at 97).

<sup>74</sup> Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408, 2413 (2008).

<sup>75</sup> *Id.*

<sup>76</sup> NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

<sup>77</sup> GORMAN & FINKIN, *supra* note 13, at 1079; *see also* Garner v. Teamsters Union, 346 U.S. 485, 488 (1953) (“The [NLRA] . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.”).

<sup>78</sup> *See infra* Part III.

<sup>79</sup> GORMAN & FINKIN, *supra* note 13, at 1079.

<sup>80</sup> *Id.* at 1079, 1080–81 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

<sup>81</sup> Int’l Ass’n of Machinists v. Gonzalez, 356 U.S. 617, 619 (1958).

attempts to regulate labor relations were characterized by reluctance.<sup>82</sup>

Arguing for a return to reluctant adjudication that permits states to engage in legislative innovation promoting collective action in the workplace,<sup>83</sup> Professor Gottesman concedes that judicial opinions preempting state laws that collide with the collective bargaining regime created by the NLRA, were properly struck down.<sup>84</sup> However, the courts “did so through the adoption of preemption rules that . . . were overbroad.”<sup>85</sup> Gottesman admits the rule adopted in *San Diego Building Trades Council v. Garmon*, an early preemption case, “made good sense with respect to the type of conduct challenged in that case”—picketing, an economic weapon to gain recognition—because this activity “lies on a continuum which Congress has regulated in its entirety.”<sup>86</sup> Conversely, he reasons that *Garmon*’s preemptive reach should not be deployed—leaving space for state regulation—when Congress has chosen to regulate categories of conduct in only a limited way.<sup>87</sup> Joined in this view by Professor Secunda, who champions a fundamental re-conceptualization of preemption analysis to diminish a “too-aggressive application of *Machinists*,”<sup>88</sup> Gottesman in-

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<sup>82</sup> Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 386 (1990).

<sup>83</sup> See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (2006) (introducing recent scholarship that favors collective action in the workplace); see also Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKLEY J. EMP. & LAB. L. 223 (2005) (same). But see Hutchison, *supra* note 54, at 799–819 (questioning the wisdom of this idea).

<sup>84</sup> Gottesman, *supra* note 82, at 355–56.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 357 (discussing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1956)).

<sup>87</sup> *Id.* at 358. When referring to Professor Gottesman’s proposition, Professor Secunda characterizes this area as a place where the federal law provides some restriction but where the conduct at issue is not on a continuum. Secunda, *Toward the Viability of State-Based Legislation*, *supra* note 14, at 213. Professor Gottesman illustrates what he means by arena wherein NLRA operates in a limited way by referring to the intersection of employer property rights and union demands for access to employer property for purposes of organizing. Gottesman, *supra* note 82, at 358. “In those limited circumstances, an employer who denies access commits an unfair labor practice. However, in most cases, because off-premises communication is available, the NLRA does not entitle unions to enter employer premises and therefore, an employer does not violate the NLRA by refusing access.” *Id.* (citations omitted). Though Professor Gottesman does not see that the alteration of labor union access rules by state access enactments instantiates a change in the labor-management balance of power, it seems clear that *Machinists* preemption is clearly implicated. For a discussion of this issue, see DOUGLAS L. LESLIE, LABOR LAW: IN A NUTSHELL, 321–23 (5th ed. 2008).

<sup>88</sup> Secunda, *Toward the Viability of State-Based Legislation*, *supra* note 14, at 213.

sists that overbroad preemption rulemaking persuades federal courts to preclude state regulatory efforts that are consistent with the political impulses that gave rise to the NLRA.<sup>89</sup> Despite vast and depressing evidence demonstrating that unions—like most cartels<sup>90</sup>—“raise wages in ways that misallocate labor and reduce social output,”<sup>91</sup> advocates of increased state power as a vehicle for expanding union power implore courts to reinterpret the preemption doctrine in a manner that permits states to encourage unionization and prohibit certain kinds of employer speech.<sup>92</sup>

Perhaps influenced by the desire to accelerate “social progress” created by building a transformative “social movement,”<sup>93</sup> but refusing to rely solely on workers’ ability to freely choose or reject voluntary forms of human solidarity that may or may not include unions, some labor experts appear drawn to government power as a vehicle to ensure organizing. This move is evidently grounded in the contestable presumption that their opinion favoring unionization or some other kind of labor organization represents the actual desires of workers.<sup>94</sup> Though it is doubtful that this viewpoint reflects the perspective of most Americans or most workers,<sup>95</sup> taken as a whole this perspective coincides with the conclusion that workers and employers’ constitutional rights to free speech, including freedom for employer speech, depend less on the Constitution and more on state ac-

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<sup>89</sup> Gottesman, *supra* note 82, at 356.

<sup>90</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 343 (7th ed. 2007) (arguing that the NLRA is a kind of reverse Sherman Act designed to encourage cartelization of labor markets); Lloyd Cohen, *Comments on the Legal Education Cartel*, 17 J. OF CONT. L. ISSUES 25, 28 (2008) (“[A]ll cartels raise price and reduce quantity as compared to what would prevail in a competitive market.”); Hutchison, *supra* note 54, at 813 (arguing that the effectiveness of the labor cartel is now in doubt).

<sup>91</sup> Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, in *UNIONS AND ECONOMIC COMPETITIVENESS* 143, 144 (Lawrence Mishel & Paula B. Voos eds., 1992).

<sup>92</sup> Secunda, *Toward the Viability of State-Based Legislation*, *supra* note 14, at 213 (citing Gottesman, *supra* note 82).

<sup>93</sup> See, e.g., Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 530–34 (2006).

<sup>94</sup> See generally FREEMAN & ROGERS, *supra* note 83, at 184 (“That so many workers do not have the voice at the workplace that they want bespeaks a remarkable institutional failure in the country’s labor laws and labor relations system.”).

<sup>95</sup> See, e.g., Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor’s Decline in Employee Representation*, in *THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING* 41–49 (Samuel Estreicher ed., 1998) (showing that American workers have been increasingly attracted to expressive individualism, which concentrates on subjective self-realization and are less likely to find attractive any collective action that requires individual interest to yield to group interest and solidarity).

tion aimed at diminishing employers' property rights and expanding union rights.<sup>96</sup> Such efforts may ultimately prove to be short-sighted because if states have power to police this domain without fear of preemption or the First Amendment, it is not clear that they will deploy their power to favor the preferences of labor advocates. On the contrary, states that are unshackled from the reach of preemption might choose to enact legislation that contracts rather than inflates the freedom of labor union organizers and that expands rather than restricts the discretion of employers.<sup>97</sup>

Preemption doctrine has given rise to three distinct grounds for preemption of state regulation.<sup>98</sup> Two grounds are of interest here.<sup>99</sup> The first is often referred to as *Garmon* preemption. It provides a "substantive rights" or "primary jurisdiction" basis for precluding any state law that has the potential of upsetting the uniform scheme of national labor policy.<sup>100</sup> As discussed more fully below, *Garmon*-type preemption can be subdivided into two component parts.<sup>101</sup>

The second ground for preemption is often referred to as *Machinist*-type preemption, under which the NLRA is understood to create an insulated zone for collective action and collective bargaining that precludes any regulation that would "upset what Congress intended to be the unregulated play of economic force."<sup>102</sup> Broadly speaking, the doctrine of preemption owes much of its force to *Garmon* and its progeny, and *Machinists* can be seen to rest on distinctly different or related doctrinal grounds. This second ground, directed

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<sup>96</sup> Secunda, *Toward the Viability of State-Based Legislation*, *supra* note 14, at 214. *But see* Baworowsky, *supra* note 29, at 1713–68 (arguing that the First and Fourteenth Amendments should protect corporate, religious speech from statutory regulation).

<sup>97</sup> *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 548–57 (1945) (Roberts, J., dissenting) (arguing that a Texas state statute restricting paid union organizers' liberty in the exercise of the state's police power—upheld by the Texas Supreme Court—should be upheld by the United States Supreme Court); *see also* Nathan Newman, *The Conflict of the Courts: RICO, Labor, and Legal Preemption in Union Comprehensive Campaigns*, 51 *DRAKE L. REV.* 307, 311 (2003) (discussing a labor union attempt to use NLRA preemption doctrine to block the application of a Louisiana law by an employer).

<sup>98</sup> GORMAN & FINKIN, *supra* note 13, at 1079.

<sup>99</sup> *Id.* (noting that the third preemption ground consists of "the judge-made policy under section 301 of the [NLRA] that favors the resolution of disputes arising under collective bargaining agreements by the contractual machinery established for that purpose . . . and precludes state administrative agencies and state courts from supplanting those contractual (and judicially favored) processes").

<sup>100</sup> *Id.*

<sup>101</sup> *See infra* notes 112–28.

<sup>102</sup> GORMAN & FINKIN, *supra* note 13, at 1079.



toward maintaining the labor-management balance of power,<sup>103</sup> is the most important for purposes of this Article. Within this domain, the NLRB declines to take an active role, and states are barred from doing otherwise. Furthermore, it is possible to violate both *Machinist* and *Garmon* preemption doctrines.<sup>104</sup>

Before deploying either preemption prong, courts are often called upon to consider a crucial question concerning whether a state program imposing conditions on employment is regulatory and therefore likely preempted under either *Machinists*<sup>105</sup> or *Garmon*,<sup>106</sup> or whether the state is acting narrowly to serve its own needs<sup>107</sup> in a proprietary capacity as a market participant.<sup>108</sup> A state statute becomes regulatory only when it “addresses employer conduct unrelated to the employer’s performance of contractual obligations to the government” entity.<sup>109</sup>

Returning to the first ground, *Garmon* substantive rights or “primary jurisdiction” preemption advances a doctrine where, crucial to the administration of the NLRA, the courts insist that the determination of what is actually protected by section 7 or prohibited by section 8 should be left to the NLRB.<sup>110</sup> Limited preemption, which has been the norm in other areas of federal law, merely suspends state action in order to give the agency time to take action.<sup>111</sup> The *Garmon* doctrine, when applicable, means that “in the vast majority of cases where federal labor preemption is triggered . . . the state is deprived of any

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<sup>103</sup> LESLIE, *supra* note 87, at 322.

<sup>104</sup> See, e.g., *Employers Ass’n v. United Steelworkers*, 32 F.3d 1297 (8th Cir. 1994). Minnesota’s Striker Replacement Law declares it to be an unfair labor practice for employers to hire permanent replacement employees during a strike. *Id.* at 1298. The Court of Appeals for the Eighth Circuit held that this deprives employers of the economic weapon of hiring permanent-replacement workers during an economic strike. *Id.* at 1300. The appellate court went on to hold that the state law was preempted under both the *Garmon* and *Machinists* tests. *Id.* at 1300–01.

<sup>105</sup> 2 HIGGINS, *supra* note 58, at 2344.

<sup>106</sup> *Id.* at 2342–44.

<sup>107</sup> *Id.* at 2344.

<sup>108</sup> See, e.g., *Wis. Dep’t of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986); GORMAN & FINKIN, *supra* note 13, at 1095 (“[W]hen a states acts as a *regulator* of labor activity the action is subject to preemption analysis; but when the state acts as [a market participant] . . . it is far less likely to be subject to preemption constraints.”). *But see* *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2419–22 (2008) (Breyer, J., dissenting) (contending that the regulator/market-participant distinction often offered in such cases is a false dichotomy because the converse of a market-participant is not necessarily “regulator”).

<sup>109</sup> *Bldg. & Constr. Trades Dep’t v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002).

<sup>110</sup> GORMAN & FINKIN, *supra* note 13, at 1084.

<sup>111</sup> *Id.*

power to act at all.”<sup>112</sup> In *Garmon* federal labor preemption found its fullest expression<sup>113</sup> in a Supreme Court rule that prevails today.<sup>114</sup>

In *Garmon*, the issue was whether a state court interpreting state law could award damages to an employer who suffered business losses from a union’s peaceful picketing.<sup>115</sup> Finding that the state could not provide this remedy, *Garmon* preemption evolved into two constituent parts.<sup>116</sup> The first part safeguards the substantive rights of workers who are covered by the NLRA. This means that “[a] state cannot prohibit (or award damages) for conduct that the federal law *protects*. The conflict is obvious and the latter controls as a matter of federal supremacy.”<sup>117</sup> Because of the ever-present danger of conflict, the Supreme Court maintains that state law is preempted if it regulates conduct that is protected by section 7.<sup>118</sup> The NLRB retains primary jurisdiction to monitor protected activity. As a general rule, judicial application of the first component of the *Garmon* doctrine has not proved controversial.<sup>119</sup>

Less obvious is the second and more controversial proposition: “that a state cannot also prohibit (or add remedies for) conduct that the federal law *prohibits*.”<sup>120</sup> The NLRB retains primary jurisdiction to monitor prohibited activity, and the states cannot deter from what the NLRA prohibits despite a persistent “strain in Supreme Court

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1079 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

<sup>114</sup> Gottesman, *supra* note 82, at 356.

<sup>115</sup> GORMAN & FINKIN, *supra* note 13, at 1081–82.

<sup>116</sup> *See id.* at 1081.

<sup>117</sup> *Id.* Therefore, the state cannot regulate the character of those who function as business agents for labor unions because the declared purpose of the Wagner Act is to encourage collective bargaining and to protect the full freedom of workers in the selection of bargaining representatives of their own choice. *Id.* at 1082 (citing *Hill v. Florida*, 325 U.S. 538 (1945)). Substantive rights arise largely out of section 7 of the NLRA, which provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

National Labor Relations Act (NLRA), 29 U.S.C. § 157 (2007).

<sup>118</sup> *Amalgamated Ass’n v. Wis. Employment Relations Bd.*, 340 U.S. 383, 398–99 (1951) (“It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages [by workers covered by the NLRA], has forbidden the exercise of rights protected by section 7 of the [NLRA].”).

<sup>119</sup> Gottesman, *supra* note 82, at 377.

<sup>120</sup> GORMAN & FINKIN, *supra* note 13, at 1081.

opinions, almost uniformly in concurring or dissenting opinions, that argues for a more limited form of preemption, one that only bars states from inhibiting conduct that the federal Act actually protects.”<sup>121</sup> Rejecting this constrained view, *Garmon* prevents states from adding penalties to or otherwise regulating unfair labor practices within the meaning of the NLRA.<sup>122</sup> Evidently, preemption is required to defend the primacy and uniformity of NLRB adjudication from erosion. Parties that violate the NLRA remain under the primary jurisdiction (administration) of the Board based on the judgment that administration is more than a means of regulation; it is regulation.<sup>123</sup> To be sure, administration is unlikely to resemble something noble or beautiful in an Aristotelian sense<sup>124</sup> because the NLRA, through its enforcement mechanism, relies on highly technical arguments<sup>125</sup> that reaffirm Justice Frankfurter’s observation that administration devolves into a hyper-specialized “process of litigating elucidation.”<sup>126</sup>

A second basis for preemption, in which the NLRA is understood to create an insulated zone for collective action and collective bargaining, precludes regulation that would upset an arena that Congress intended to be left unregulated (other than by the parties’ economic weapons) and has been labeled *Machinists* preemption. Thus understood, *Machinists* preemption means that “[a]n economic weapon that is neither arguably protected nor arguably prohibited

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1084 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

<sup>124</sup> See, e.g., Joe Sachs, *Introduction to ARISTOTLE, NICOMACHEAN ETHICS* xi, xxi (2002) (describing Aristotle’s conception of “beautiful” and illustrating his conception via two metaphors: Aristotle might say that “an action is right in the same way that a painting might get everything right,” or alternatively, he might refer to Antigone who contemplates in her imagination the act of burying her brother and says “it would be a beautiful thing to die doing this”) (internal citation omitted).

<sup>125</sup> Harry G. Hutchison, *Toward a Robust Conception of “Independent Judgment”: Back to the Future?*, 36 U.S.F. L. REV. 335, 339 (2002).

<sup>126</sup> *Int’l Ass’n of Machinists v. Gonzalez*, 356 U.S. 617, 619 (1957). The Supreme Court has considered a plethora of preemption cases. See, e.g., RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 275–79 (4th ed. 2007) (finding more than thirty such cases). *Garmon* preemption has produced an impressive range of cases. See, e.g., *Wis. Dep’t of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282 (1986) (preempting the state’s use of its spending power to debar certain repeat violators from doing business with the state); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (rejecting preemption and allowing the state to set forth minimum health standards for covered residents of the state).

nonetheless may be immune from state regulation.”<sup>127</sup> Evidently, Congress envisioned that employer and union conduct in some situations would be entirely free from legal regulation.<sup>128</sup> Conduct that falls within this domain is sheltered by *Machinists* preemption. Because state and Board regulation might alter the federally approved labor-management balance of weapons within this insulated sphere of activity,<sup>129</sup> the *Machinists*’ doctrine teaches us that the NLRB and the states are without power to regulate or otherwise protect activity within this arena.<sup>130</sup>

In *Machinists*, a state labor relations board ordered the cessation of a concerted refusal to work overtime as a means of putting bargaining pressure on an employer.<sup>131</sup> Because the union’s action was not protected by the NLRA, the employer could discharge the em-

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<sup>127</sup> LESLIE, *supra* note 87, at 320. The *Morton* case bridges the gap between the *Garmon* and *Machinists* prongs of preemption analysis. In *Morton*, the Supreme Court held that the issue was whether Congress had so completely occupied this field as to close it to regulation by the states. *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964). Concluding that peaceful appeals to secondary employers constitute an economic weapon intended to be left to the marketplace, and that such appeals were permitted but not protected by federal law, the Court held that the state could not outlaw this self-help weapon because this would alter the intended balance of power between labor and management. *Id.* at 259–60. The Court stated, “[b]ut even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting § 303, ‘Congress occupied this field and closed it to state regulation.’” *Id.* at 258 (citing *Int’l Union of United Auto. Workers v. O’Brien*, 339 U.S. 454, 457 (1950)). The Court further explained that “[t]he basic question is whether ‘in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.’” *Id.* (citing *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962)). Finally, the Court stated that “[t]he answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation.” *Id.* (citing *Colo. Anti-Discrimination Comm’n v. Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963)).

<sup>128</sup> LESLIE, *supra* note 87, at 322.

<sup>129</sup> *Id.*

<sup>130</sup> Activity within this insulated zone has not been always free from state regulation. See, e.g., *GORMAN & FINKIN*, *supra* note 13, at 1103 (citing *Auto. Workers v. Wis. Employment Relations Bd.*, 336 U.S. 245 (1949)):

In *Briggs-Stratton*, the union had called for a series of intermittent work stoppages to put bargaining pressure on the employer, and the employer secured an order against that activity from a state board under state law. . . . [In this specific case,] [t]he union’s conduct was neither prohibited nor protected by the NLRA. The Court saw “no basis” to deny the state power “to regulate a course of conduct that is neither made a right under federal law nor a violation of it.”

*Id.*

<sup>131</sup> *GORMAN & FINKIN*, *supra* note 13, at 1104 (citing *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 135 (1976)).

ployees for using the contested tactic.<sup>132</sup> Neither the NLRB nor the state could have intervened to deny the union the use of the disputed device<sup>133</sup> because Congress “meant to leave some activities altogether unregulated—and to be controlled by the free play of economic forces.”<sup>134</sup> According to the two Justices of the *Machinists* Court necessary to make up a majority, “[s]tate laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining.”<sup>135</sup> In other words, within the zone insulated from regulation, states cannot take sides and seek to implement their own view of the permissible use of economic weapons. The *Machinists*’ theory of preemption has been applied to challenge legislation concerning the recruitment of replacements for strikers as well as legislation bearing upon the obligations of successor employers toward workers of predecessor firms.<sup>136</sup> In general, where state law sets a floor providing employment rights for all, it is not preempted. However, where the state adopts legislation directed toward collective bargaining<sup>137</sup> or creates a distinction between unionized and non-unionized employees in enforcing the state law,<sup>138</sup> it is preempted.

#### B. *Diminishing Machinists: Neutrality as a Property Rights Gambit?*

Recently, the *Machinists* doctrine has come under sustained attack by proponents of employer neutrality. One proposal would diminish *Machinists*’ preclusive effect by encouraging the following:

[states should] provide for minimum conditions in the workplace under its police power or place property restrictions on the bundle of property rights that the state grants to its property owners—that is, the bundle of property rights that private property owners possess would not include the use of their property for labor [and other] . . . purposes.<sup>139</sup>

This forcefully argued effort to restrict employer speech, grounded in an expansive conception of “neutrality,” correlates with a thesis—

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (citing *Machinists*, 427 U.S. at 143).

<sup>134</sup> *Id.* (citing *Machinists*, 427 U.S. at 144).

<sup>135</sup> LESLIE, *supra* note 87, at 322 (quoting *Machinists*, 427 U.S. at 156 n.\*).

<sup>136</sup> GORMAN & FINKIN, *supra* note 13, at 1104.

<sup>137</sup> *Id.* at 1105–08.

<sup>138</sup> *Id.* at 1108–09 (citing *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (explaining the preemptive effect of section 301 of the NLRA)).

<sup>139</sup> Secunda, *Toward the Viability of State-Based Legislation*, *supra* note 14, at 212 (advocating ways to weaken the preclusive effect of *Machinists*).

employer coercion as an obstacle to representation—that undergirds the enactment of the disputed statute, AB 1889, that gave rise to the *Chamber of Commerce of U.S. v. Brown* decision. Consistent with this thesis but inconsistent with the statute's asserted defense ensuring state neutrality, AB 1889 exempts from the statute's restrictions employer-recipient expenditures connected (1) to giving a union access to the employer's property (workplace), and (2) to voluntarily recognizing a union as the bargaining representative of employees.<sup>140</sup>

While the statute can be exposed as an under-theorized enactment, it operates as a prototype and forecasts future efforts within the labor-management arena. Academic commentators have offered analogous proposals designed to contract property's scope,<sup>141</sup> and such proposals often attempt to limit the free speech rights of employers,<sup>142</sup> increase the access rights of labor unions enabling them to expand the level of worker self-organization,<sup>143</sup> and transform labor's moribund state through increased grass roots organizing and through the use of the Internet.<sup>144</sup> Properly appreciated, many of these proposals are designed to neutralize employer opposition to social transformation made concrete through increased employee participation in workplace decision making and increased dues revenue collection used to pursue social transformation through politics.<sup>145</sup>

In order to facilitate these objectives, states are urged to adopt their own labor policy and to vitiate employer's property interests

<sup>140</sup> *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2411 (2008); see CAL GOV'T CODE § 16647 (Deering 2009).

<sup>141</sup> For an excellent critique of this move, see Eric Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 647 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2007) (arguing that property is more than the right to exclude, it is a right to exclusively determine the use of something)).

<sup>142</sup> An example of such proposals is the New Jersey Workers Freedom from Employer Intimidation Act, N.J. STAT. ANN. §§ 34:19-9 to -14 (West 2007).

<sup>143</sup> See, e.g., Feinstein, *supra* note 4, at 346–49 (discussing in general terms how unions have become more active in promoting innovative changes in state, county, and municipal laws that encourage union growth, but conceding that the doctrine of preemption may limit such efforts).

<sup>144</sup> Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 69, 87–97 (2005).

<sup>145</sup> See, e.g., Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WM. & MARY BILL RTS. J. 1309, 1380–81 (2006) (arguing that organizing, particularly extra-bargaining unit organizing, is not necessarily aimed at expanding economic benefits for workers but rather aimed at social transformation.). This effort is supported by “evidence indicating that unions tend to consume up to 80 percent of union dues on . . . political, ideological, and other challengeable expenditures that are unlikely to have a representational objective.” *Id.* at 1381.

based on the conclusion that property, whatever it is, consists of a contestable bundle of rights. Hence, withdrawing a stick—the employer’s exclusive possessory interest in its property—is legitimized by lionizing an iatrogenic goal.<sup>146</sup> This “disintegrated” conception of property implies that property is not a thing but a highly-contingent arrangement of distinct elements serving socio-political goals<sup>147</sup> that purportedly fulfill human values.<sup>148</sup> Hence, on one account, employer’s “property rights materialize as a supernatural entity or as a form of transcendental nonsense.”<sup>149</sup> On this view, property owners must expect to find the absoluteness of their property rights curtailed by the organs of society for the promotion of the best interests of others<sup>150</sup> who have little or no permanent stake in the preservation of the economic value of the property in question. As such, the right to exclude can be diminished unless property owners can demonstrate

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<sup>146</sup> The iatrogenic possibility emerges out of the modern process of incessant diagnosis and treatment that problematizes human life. See, e.g., CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT 199–201 (2006). Ignoring rent-seeking efforts (the competition for government favors) by unions and union hierarchs for themselves and their political allies, whimsy can be found when commentators, legislators, and judges insist on the value of compulsory unionization when the survey evidence and the actual behavior of workers shows that it is improbable that even a significant minority of private-sector workers share the conviction that conventional unions are the best vehicles for the advancement of the full gamut of their interest. Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW 117, 118 n.2 (1996); see also Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLR?*, 34 FLA. ST. U. L. REV. 1133, 1139–40 (2007) (“Absent a sharp and unlikely shift by workers and voters from individualistic to collectivist attitudes or a more broad shift in U.S. economic policy from a competitive to a corporatist orientation, a resurgence in traditional private sector unionism is unlikely.”). Compulsory unionization, of course, means involuntary unionization. “[C]ollective bargaining imposed by statute appears to be consistent with the notion that legislation tends to favor a centralized decision-making process, [meaning that] interest groups (and/or interest group leaders) try[] to impose their will at the expense of more diffuse (and more diverse groups) and subgroups.” Hutchison, *supra* note 145, at 1377 (quotations omitted). If interest uniformity does not arise naturally, it remains highly doubtful that collective bargaining decisions initiated by union hierarchs will produce a collectively-rational outcome that represents, let alone benefits, the majority or even a minority of workers. See generally *id.* at 1376–77.

<sup>147</sup> Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 373–77 (rejecting the disintegrated theory of property and offering instead an integrated theory of property that maintains that the right to exclude, while fundamental to a principled conception of property rights, is insufficient and must include an understanding and defense of other elements such as exclusive acquisition, use, and disposal).

<sup>148</sup> *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) (citing 5 RICHARD POWELL, REAL PROPERTY § 746 (1970)).

<sup>149</sup> But see Mossoff, *supra* note 147, at 373.

<sup>150</sup> *Shack*, 277 A.2d at 373 (quoting 5 POWELL, *supra* note 148, at § 745).

good reasons for preventing access by union organizers<sup>151</sup> or a constitutionally-adequate ground for legitimizing and protecting employer speech rights. Based on this view, it is possible to infer that employer claims to possession and exclusive use of their facilities, including the right to exclude and the right to engage in non-coercive speech regarding union organizing campaigns, face a premature and unwarranted demise.<sup>152</sup> Labor advocates and labor hierarchs, who appear to have embraced a conception of property that has succumbed to the acid wash of nominalism first popularized in the law by the legal realists,<sup>153</sup> champion this development. If extended to weaken *Machinists* and other preemption doctrines, and if reified by the Supreme Court, this approach might preclude future efforts by the federal judiciary to invalidate innovative state labor regulation that has been offered under the sheltering umbrella provided by allegations of neutrality. Placing political liberty at risk,<sup>154</sup> this constrained notion of property concludes that it contains nothing essential for the state to protect and, accordingly, preemption doctrine as a device to constitutionalize the protection of employer speech can be eviscerated by inventing a few phrases. Though such developments cannot be seen as neutral, they may be facilitated by the adoption of post-modern discourse, which can deprive courts of the language necessary to reclaim rights and freedom within any contestable context<sup>155</sup> and “return us to Alasdair McIntyre’s perplexing dilemma wherein human history provides no sound basis for rights.”<sup>156</sup>

Taken together, this development may suggest that employer speech rights are little more than an empty suit, and it underscores Isaiah Berlin’s claim that the pursuit of “positive” liberty on behalf of other people is necessarily incompatible with the commitment to permit people to live their own lives free from interference from others, particularly interference from political authorities.<sup>157</sup> This effort to discount employer property rights elevates doubts concerning whether preemption doctrine is adequate to the task of defending

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<sup>151</sup> See, e.g., Estlund, *supra* note 34, at 309 (arguing that employers’ property rights ought to be restricted sharply in the context of an organizing campaign in order to improve access by non-employee union organizers to the employer’s plant or land).

<sup>152</sup> Mossoff, *supra* note 147, at 375.

<sup>153</sup> *Id.* at 371–72.

<sup>154</sup> *Id.* at 374.

<sup>155</sup> Hutchison, *supra* note 25, at 706.

<sup>156</sup> *Id.*

<sup>157</sup> Amy Gutmann, *How Limited is Liberal Government?*, in *LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR* 64, 69 (Bernard Yack ed., 1996) (disagreeing with Isaiah Berlin).



employers' freedom-of-expression claims. Still, it remains possible that a robust conception of the First Amendment, energetically enforced, may hinder state efforts to abrade employers' free speech rights.<sup>158</sup>

### III. THE NINTH CIRCUIT TAKES A STAND

#### A. *Prolegomena*

The Ninth Circuit's opinion in *Chamber of Commerce* responded to the district court's decision upholding the plaintiffs' motion for summary judgment.<sup>159</sup> Plaintiffs filed various claims for "declaratory and injunctive relief regarding [the] enforcement of California Assembly Bill 1889 (ABA 1889), [which added] California Government code § 16645 and following."<sup>160</sup> Briefly stated, AB 1889 "prohibits the use of state funds or property to assist, promote, or deter union organizing; allows remedies for such violations; and requires state fund recipients to maintain sufficient records to show state funds were not improperly used under AB 1889."<sup>161</sup> The plaintiffs filed "a Motion for Summary Judgment arguing AB 1889 is unconstitutional under the federal and California Constitutions and preempted by the National Labor Relations Act (NLRA), Labor Management Reporting and Disclosure Act (LMRDA), and the Medicare Act."<sup>162</sup> Finding that a series of preliminary issues did not bar relief, the district court decided the preemption issue.<sup>163</sup>

Emphasizing that NLRA section 8(c) dictates that the statement "of any views, argument, or opinion . . . shall not constitute or be evi-

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<sup>158</sup> See Hutchison, *supra* note 25, at 716 (discussing this possibility); see also Bawrowsky, *supra* note 29, at 1753–59 (energetically favoring First Amendment protection for corporate employers). But see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 615 (1969) (employer's First Amendment claims were not sufficient to overturn NLRB finding of an unfair labor practice where an employer made statements that could be deemed a threat of retaliation); Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 36–37 (1980) (commenting on the failure of the First Amendment to rescue a union's effort to engage in secondary picketing from the preclusive reach of the NLRB).

<sup>159</sup> *Chamber of Commerce of the U.S. v. Lockyer*, 225 F. Supp. 2d 1199, 1206 (C.D. Cal. 2002), *aff'd*, 364 F.3d 1154, *rev'd sub nom.*, *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408 (2008).

<sup>160</sup> *Id.* at 1201.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1201–04 (discussing the Eleventh Amendment, standing, and abstention, and finding that such contentions do not bar relief under the preemption doctrine implicated by the application of the NLRA).

dence, of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit,"<sup>164</sup> the district court found that this provision manifests "congressional intent to encourage free debate on issues dividing labor and management."<sup>165</sup> By contrast, the California statute prohibits "attempts by the employer to influence employee decisions through speech" while the "employer is being compensated with state funds or while . . . on state property."<sup>166</sup> Thus, the statute restricts employer speech about union organizing under a specified circumstance, even though Congress intended to encourage unregulated debate.<sup>167</sup> On one account, AB 1889 is a "state labor regulation that has only one purpose and effect: to halt the free flow of non-coercive information from employer to their employees, so that unions may take advantage of the enforced silence and corral uninformed employees into unionization."<sup>168</sup> As such, employees are arguably the real victims of this effort to undo federal labor policy.<sup>169</sup> The district court found that AB 1889, if allowed to stand, would prevent free debate<sup>170</sup> and dismissed the defendants' and interveners' contention that "*Machinist* [sic] is inapplicable . . . because the state is merely controlling the use of state funds and is acting in its proprietary capacity."<sup>171</sup> Finding that the California statute is regulatory and that the challenged restrictions prevent what Congress intended, the district court, subject to a few exceptions, granted plaintiffs' motion for summary judgment.<sup>172</sup> The validity of this decision proved to be short-lived.

### B. *The Ninth Circuit and Employer Free Speech Claims*

Over the past twenty-five years, labor hierarchs, labor organizations, and their ideological allies appear to have obtained a sympathetic hearing before the Ninth Circuit Court of Appeals.<sup>173</sup> Nowhere

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<sup>164</sup> *Id.* at 1204 (quoting NLRA, 29 U.S.C. § 158(c) (2000)).

<sup>165</sup> *Chamber of Commerce*, 225 F. Supp. 2d at 1204.

<sup>166</sup> *Id.* at 1204–05.

<sup>167</sup> *Id.* at 1205.

<sup>168</sup> Brief of the Nat'l Right to Work Legal Def. Found. et al. as Amici Curiae Supporting Petitioners, *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408 (2008) (No. 06-939).

<sup>169</sup> *Id.*

<sup>170</sup> *Chamber of Commerce*, 225 F. Supp. 2d at 1205.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1206 (excepting CAL. GOV. CODE §§ 16645.1, .3, .4, .6).

<sup>173</sup> See, e.g., *United Food & Commercial Workers Union v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc) (holding that extra-bargaining unit organizing expenditures are germane to collective bargaining and chargeable to nonmembers' dues over their objections, despite the Supreme Court holding in *Communication*

is this sympathy clearer than in the court's decision upholding provisions of AB 1889 that restrict employers who receive state grants or funds from using those funds to assist, promote, or deter union organizing.<sup>174</sup> Deciding that California's grant and program fund restrictions do not fall within the market participant exception,<sup>175</sup> are not preempted by the NLRA,<sup>176</sup> and do not violate the First Amendment,<sup>177</sup> the Ninth Circuit reversed the district court,<sup>178</sup> after twice declining to do so.<sup>179</sup>

California enacted ABA 1889 to add sections 16645 through 16649 to the California Government Code. ABA 1889 contained the following statement:

It is the policy of the state not to interfere with an employee's choice about whether to join or to be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization and to prohibit an employer from seeking to influence employees to

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*Workers v. Beck*, 487 U.S. 735, 762–63 (1988), that only those fees and dues that are necessary to the collective bargaining could be exacted); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 685 F.2d 1065, 1074–75 (9th Cir. 1982), (holding that union organizing expenditures were chargeable to union dissenters because each of the challenged expenditures were germane to the collective bargaining work of the union), *rev'd*, 466 U.S. 435, 451–53, 457 (1984). *But see* *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 999–1000, 1004 (9th Cir. 1970) (reversing the district court's decision that jurisdiction was preempted by the NLRA by concluding that section 301 of the Labor-Management Relations Act conferred jurisdiction upon the district court), *rev'd*, 553 F.2d 1126, 1132 (9th Cir. 1976) (finding against the labor union and holding that the lower court erred by not granting employees a full hearing on whether the intra-union remedy was fair and adequate).

<sup>174</sup> *Chamber of Commerce of the U.S. v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006), *rev'd sub nom.*, *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408; *see also* *United Food & Commercial Workers*, 307 F.3d at 776 (finding union organizing expenditures germane and therefore chargeable to union dues objectors because “union organizing conducted for the general purpose of strengthening the union, while not germane under the Railway Labor Act, is not explicitly precluded by either the language of the NLRA or the Supreme Court in *Beck*.”). *But see* *Hutchison*, *supra* note 145, at 1364–94 (disagreeing with the Ninth Circuit's assessment in *Chamber of Commerce* and *United Food & Commercial Workers*).

<sup>175</sup> *Chamber of Commerce*, 463 F.3d at 1084.

<sup>176</sup> *Id.* at 1090, 1096.

<sup>177</sup> *Id.* at 1096.

<sup>178</sup> *Id.* at 1098.

<sup>179</sup> *See* *Chamber of Commerce of the U.S. v. Lockyer*, 364 F.3d 1154, 1163–65 (9th Cir. 2004) (holding AB 1889, as written, is preempted by the NLRA), *aff'd*, 422 F.3d 973 (9th Cir. 2005), *vacated*, 435 F.3d 999 (9th Cir. 2006).

support or oppose unionization while those employees are performing work on a state contract.<sup>180</sup>

The Ninth Circuit described ABA 1889 in its *Chamber of Commerce* opinion as follows:

Two provisions of the California statute, sections 16645.2 and 16645.7, are at issue on appeal. Section 16645.2(a) bars private employers who are “recipient[s] of a grant of state funds” from “us[ing] the funds to “assist, promote, or deter union organizing.” Section 16645.7(a) bars “[a] private employer receiving state funds in excess of [\$10,000] in any calendar year on account of its participation in a state program” from using program funds to “assist, promote, or deter union organizing.”<sup>181</sup>

The two provisions purport to preclude an employer-recipient from “attempting . . . to influence the decisions of its employees . . . regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees.”<sup>182</sup> Though the statute is defended on grounds of neutrality,<sup>183</sup> this neutrality is placed in doubt by virtue of the fact that employer activities are exempted from the reach of the statute if and when the employer voluntarily recognizes a union as the representative of its employees.<sup>184</sup> In addition to this exemption, the statute places affirmative compliance burdens on employers because the pertinent provisions of AB 1889 require employers to certify “that none of the [state] funds will be used to assist, promote, or deter union organizing.”<sup>185</sup> An employer who in fact expends funds “to assist, promote, or deter union organizing shall maintain [and provide upon request] records sufficient to show that state funds have not been used for those expenditures.”<sup>186</sup> The statute presumes that “if an employer commingles state and other funds . . . any expenditures to assist, promote, or deter union organizing derive in part from state funds.”<sup>187</sup>

Consistent with the judgment that the statute’s overall scheme is calibrated to induce recipients of state funds to forego active opposition to a union organizing campaign, the statute imposes severe penalties. The statute states, “Employers who violate sections 16645.2 or

<sup>180</sup> Assemb. B. 1889, 1999–2000 Leg., 2000 Reg. Sess. (Cal. 2000).

<sup>181</sup> *Chamber of Commerce of the U.S. v. Lockyer*, 463 F.3d 1076, 1080 (9th Cir. 2006) *rev’d sub nom.*, *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* 1085, 1087.

<sup>184</sup> See CAL. GOV’T CODE § 16647(d) (Deering 2009).

<sup>185</sup> *Id.* § 16445.2(c); see also *id.* §16645.7(b).

<sup>186</sup> *Id.* § 16646(b).

<sup>187</sup> *Chamber of Commerce*, 463 F.3d at 1081 (citing CAL. GOV’T CODE § 16646(b)).

16645.7 are subject to fines and penalties, which include the disgorgement of the state funds used for the prohibited purposes and a civil penalty paid to the state that is equal to twice the amount of those funds.”<sup>188</sup> The statute’s objective seems clear enough. It signifies a legislative response to the hypothesis that has been transformed into an *idée fixe*: employer coercion is the primary factor preventing workers from exercising their undisclosed choice to join a union.<sup>189</sup>

Analytically, the Ninth Circuit correctly maintains that by enacting the challenged legislation, the State of California is not acting as a market participant. In other words, the statute addresses employer conduct unrelated to the safe-harbor, which is directed towards preventing preemption that is instantiated when the legislature addresses private employers’ performance of contractual obligations to the government entity.<sup>190</sup> The court properly insists that the “cases teach that when a state uses its spending power in a manner that is not essentially proprietary, the market participant exception will not apply and the state action may be subject to NLRA preemption.”<sup>191</sup> Because the contested provisions of AB 1889 do not “have a narrow scope or other element indicating that the statute is unrelated to broader regulation,”<sup>192</sup> the provisions are regulatory and thus may be preempted

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<sup>188</sup> *Id.* (citing CAL. GOV’T CODE §§ 16645.2(d), 16645.7(d)).

<sup>189</sup> The literature predicated on the employer coercion thesis as the prime impediment to unionization is vast. For an excellent introduction to this literature, see Bodie, *supra* note 11, at 31–34, which discusses two scholars’ views on increased employer coercion and notes that “weak remedies for unfair employer labor practices combined with lengthy delays in the representation and remediation process encouraged an atmosphere of employer coercion and law breaking.” *Id.* See Brudney, *supra* note 21, at 819 (asserting that the NLRB election process is no longer justified as a normative process because “it regularly tolerates, encourages, and effectively promotes coercive conditions that preclude the attainment of employee free choice”). For an excellent refutation of the employer coercion thesis, see Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 695–97 (2003), which shows that rational employers will only invest in anti-union activities when having a union would put these employers at a competitive disadvantage with nonunion employers and also showing that union win-rates in the private sector have remained consistent at the 50% level since the 1970s. *Id.* See Kenneth McLennan, *What Do Unions Do? A Management Perspective*, in WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 563, 580–82 (James T. Bennett & Bruce E. Kaufman eds., 2007) (questioning the claim that anti-union activities of employers are the primary explanation for the decline in unionism).

<sup>190</sup> See *supra* Part II.A (discussing *Garmon* preemption).

<sup>191</sup> Chamber of Commerce of the U.S. v. Lockyer, 463 F.3d 1076, 1084 (9th Cir. 2006), *rev’d sub nom.*, Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408 (2008).

<sup>192</sup> *Id.* at 1084.

by the NLRA.<sup>193</sup> That the challenged provisions are regulatory, however, does not necessarily mean they are preempted by the NLRA.<sup>194</sup>

The Ninth Circuit's preemption analysis "begins with the 'basic assumption that Congress did not intend to displace state law.'"<sup>195</sup> Accepting the proposition that preemption is a "question of congressional intent and the 'purpose of Congress is the ultimate touchstone' of preemption analysis,"<sup>196</sup> the court concedes that "the Supreme Court has articulated two distinct NLRA preemption doctrines: *Machinists* preemption and *Garmon* preemption."<sup>197</sup> Considering *Machinists* preemption first, the court admits that this doctrine preempts "any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress 'to be controlled by the free play of economic forces.'"<sup>198</sup> Insisting that context matters, the Ninth Circuit determines that the "[f]ederal courts of appeals have applied *Machinists* preemption in the context of *collective bargaining* between organized labor and employers, [but] not in the context of *organizing*."<sup>199</sup> Reasoning that collective bargaining constitutes an arena that the NLRA has affirmatively left unregulated,<sup>200</sup> the Ninth Circuit offers an additional predicate:

We need not resolve whether *Machinists* extends to pre-empting a state action that potentially affects organizing, because even if it did, AB 1889 would not be preempted under the *Machinists* doctrine. In enacting a restriction on the use of state grant and program funds with the purpose of remaining neutral in labor disputes, California has not intruded on conduct meant to be left to the free play of economic forces, an area free from all governmental regulation. Indeed, it is implausible that Congress intended the use of such funds to be an area unregulated because left to be controlled by the free play of economic forces, when the

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<sup>193</sup> *Id.* at 1085.

<sup>194</sup> *Id.*; see also *infra* Part IV.D (discussing Justice Breyer's agreement with this view).

<sup>195</sup> *Chamber of Commerce*, 463 F.3d at 1085 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

<sup>196</sup> *Id.* (quoting *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir. 1996)).

<sup>197</sup> *Id.* (citations omitted).

<sup>198</sup> *Id.* (quoting *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)).

<sup>199</sup> *Id.* at 1086 (emphasis added).

<sup>200</sup> *Id.* (reading the relevant precedents to suggest that *Machinists* doctrine concentrates solely on precluding state regulation of the "economic weapons" that Congress intended to give to parties to enable them to reach a collective bargaining agreement).

state's choices of how to spend its funds are by definition not controlled by the free play of economic forces.<sup>201</sup>

Because organizing already is regulated to some extent, removing this activity is not one that Congress left open to be decided by "the free play of economic forces."<sup>202</sup> Therefore, the court of appeals declined to find AB 1889 preempted.<sup>203</sup>

This move ignores *Machinists'* admonition that a statute cannot "be regarded as neutral 'if [it] reflect[s] an accommodation of the special interests of employers [or] unions.'"<sup>204</sup> The court of appeals determined that states have enacted a "neutral hands-off" policy preference, which is situated within an area that is already subject to state and federal regulation.<sup>205</sup> The statute is neutral because its "restrictions on the use of grant and program funds do not interfere with an employer's ability to engage in 'self-help' in the sense protected by *Machinists*," *Gould* or *Golden State*.<sup>206</sup> Despite the California statute's purported allegiance to neutrality, the Ninth Circuit fails to notice that AB 1889 expressly exempts from its restrictive reach any employer activities performed or expenses incurred in connection with undertakings that promote unionization,<sup>207</sup> while correspondingly imposing punitive penalties for employer-recipient error in the use of state funds.

Though the state's commitment to neutrality is dubious, the Ninth Circuit reasons that because AB 1889 applies to organizing, an activity positioned outside of a zone intended to be left free from regulation, federal courts will not find a statute like AB 1889

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<sup>201</sup> *Chamber of Commerce*, 463 F.3d at 1087 (quotations omitted).

<sup>202</sup> *Id.* at 1087, 1089. The court of appeals also cites the Supreme Court's *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110–11 (1997), decision for the proposition that *Machinists* indicated that Congress intended collective bargaining agreements to be controlled by economic forces—not governmental interference. *Chamber of Commerce*, 463 F.3d at 1086.

<sup>203</sup> *Chamber of Commerce*, 463 F.3d at 1090.

<sup>204</sup> LESLIE, *supra* note 87, at 322 (citing *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 156 n.\* (1976)).

<sup>205</sup> *Chamber of Commerce*, 463 F.3d at 1085, 1090. Federal regulation within an organizing context takes many forms including the following: (1) the NLRB's bar against "employers and unions alike from making election speeches on company time to massed assemblies of employees within [twenty-four] hours of an election"; (2) the NLRB's power to regulate speech "that is prejudicial to a fair election"; and (3) the NLRB's ability to set aside elections under certain circumstances. *Id.* at 1089.

<sup>206</sup> *Id.* at 1087.

<sup>207</sup> CAL. GOV'T CODE §§ 16647(b), (d) (Deering 2008) (exempting employer undertakings that allow union representatives access to the employer's property or expenses incurred in "[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization" from funds restrictions).

preempted.<sup>208</sup> Thus scrutinized, the *Machinists'* doctrine does not apply to the statute. "Under AB 1889, an employer has and retains the freedom to spend its own funds however it wishes; it simply may not spend state grant and program funds on its union-related advocacy."<sup>209</sup> Conceding that the state is not free to "require . . . employer neutrality as a condition of receiving state funds" because that limits the firm's ability to use its own money, the court rejects the NLRB's position claiming the statute is preempted because it "works at cross purposes with [NLRB] policy."<sup>210</sup> In summary, the court insists that because employers are free to raise and use non-state funds in order to convey their views about unionization, and because "[i]t is well established that a legislature may attach 'reasonable and unambiguous' conditions to funds that a recipient is not obligated to accept,"<sup>211</sup> employers are "thus free to exercise their First Amendment rights, provided . . . they do not use state . . . funds to [convey their unionizing views]."<sup>212</sup> The court's grasp of liberty and neutrality is questionable, but its approach is compatible with the conclusion that liberalism, as the customary governance theory in democratic societies, increasingly requires the government to take sides without necessarily admitting it.

The Ninth Circuit maintains that organizing is already subject to regulation and consequently the disputed statute cannot be barred by the *Machinists* prong of the preemption doctrine. This maneuver does not end the preemption inquiry. On the contrary, the possibilities associated with *Garmon* preemption are unleashed by the court's analysis: "*Garmon* preemption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA."<sup>213</sup> Surrendering to the impression that organizing is already subject to regulation directly raises the possibility of conflict.<sup>214</sup> However, the Ninth Circuit manages to circumvent this conflict by following the Supreme Court in asserting that *Garmon*

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<sup>208</sup> *Chamber of Commerce*, 463 F.3d at 1087, 1089.

<sup>209</sup> *Id.* at 1088.

<sup>210</sup> *Id.* (rejecting the NLRB's contention that California's statute should be invalidated "because it limits the flow of information to employees by regulating employer speech in an area—an organization election—that Congress did intend to be controlled by the free play of economics forces").

<sup>211</sup> *Id.* (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006)).

<sup>212</sup> *Id.* at 1088.

<sup>213</sup> *Id.* at 1090.

<sup>214</sup> See *Chamber of Commerce*, 463 F.3d at 1090.



preemption “does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.”<sup>215</sup> The court explains its position by stating:

California’s refusal to subsidize employer speech for or against unionization does not regulate an activity that is actually protected or actually prohibited by the NLRA. It does not interfere with, much less govern, “the same partisan employer speech that Congress committed to the jurisdiction of the NLRB. Nor does it infringe employers’ First Amendment rights, because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for the receipt of state grant and program funds.”<sup>216</sup>

This blueprint recalls Professor Gottesman’s analysis urging federal courts to become reluctant to preempt state law where Congress has chosen to regulate categories of conduct in a limited way.<sup>217</sup> Following Gottesman, if employer speech is *without protection at all*, then, despite the fact that certain kinds of speech are prohibited by the NLRA, states are free to regulate employer speech in this area.<sup>218</sup> This is because Congress has not fully occupied this area but, rather, regulates this activity in only a limited way.<sup>219</sup> If this syllogism is accepted, then presumably by analogy, NLRB-enforced limitations on union access to employer premises during organizing campaigns ought to give way to state regulation.<sup>220</sup> This is so because the state regulation fails to jeopardize a cognizable federal interest because union access to employer premises is an area that lies outside of what Gottesman describes as the “protected-prohibited continuum,” which would be monitored by robust NLRB oversight.<sup>221</sup> Accepting the implications of this paradigm, the Ninth Circuit argues that unless an exception applies *Garmon* preempts state regulation “of employee activities that are actually protected under section 7, or activities of either employers or labor unions that are actually prohibited under

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<sup>215</sup> *Id.* (quoting *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 188 (1978)).

<sup>216</sup> *Id.* at 1092 (citations omitted).

<sup>217</sup> Gottesman, *supra* note 82, at 358.

<sup>218</sup> *See id.* at 359–60, 411.

<sup>219</sup> *See id.* at 357–59, 411 (focusing on *Garmon* preemption).

<sup>220</sup> *See id.* at 411–12.

<sup>221</sup> *See id.* at 404, 411.

section 8.<sup>222</sup> It discounts the protective force of section 8(c) of the NLRA that “prohibits sanctioning employers under the NLRA for engaging in an unfair labor practice when they exercise speech rights that are guaranteed by the First Amendment.”<sup>223</sup> This is so because the court intuits that prohibition does not constitute a grant of employer speech rights.<sup>224</sup> Instead of sheltering employers’ speech rights, section 8(c) prohibits employers’ “noncoercive speech from being used as evidence of an unfair labor practice.”<sup>225</sup> Section 8(c) does not describe activities that are protected by the NLRA, but activities that are protected from the NLRA.<sup>226</sup>

Under the Ninth Circuit’s approach, neither *Machinists* nor *Garmon* bar AB 1889. Rejecting the dissent’s parade of horrors and relying on comparable federal statutes that place restrictions on the use of funds, the court finds that the statute does not deny employers’ speech rights. Instead, the statute merely precludes state subsidization of such rights.<sup>227</sup> Consequently, there is no legally cognizable impingement on plaintiffs’ First Amendment privileges.<sup>228</sup> The Ninth Circuit’s opinion reinstates the contested provisions of AB 1889 because speech is not protected. The NLRA regulates this arena, albeit in a limited way, which permits state regulation of conduct that involves “interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it is difficult to] infer that Congress ha[s] deprived the States of power to act.”<sup>229</sup> The court’s examination of AB 1889, aided by persevering abstractions about neutrality, establishes a firewall against preemption. Hence, the court vacates the judgment of the District Court.

### C. A Dissenting View

Judge Beezer dissented from the Ninth Circuit’s cramped conception of the First Amendment and guarded understanding of the

<sup>222</sup> Chamber of Commerce of the U.S. v. Lockyer, 463 F.3d 1076, 1091 (9th Cir. 2006) (citations omitted), *rev’d sub nom.*, Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408 (2008).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* (citations omitted).

<sup>226</sup> *Id.* (“Fitting a *Garmon* claim under the language of § 8(c) is awkward . . . . [T]he activities described in § 8(c) . . . are not ‘protected by the NLRA, except from the NLRA itself.’” (quoting UAW-Labor Employment & Training Corp. v. Chao, 325 F.3d 360, 364–65 (D.C. Cir. 2003))).

<sup>227</sup> *Id.* at 1096–97.

<sup>228</sup> *Chamber of Commerce*, 463 F.3d at 1096–97.

<sup>229</sup> *Id.* at 1095 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243–44 (1959)).

doctrine of preemption. He asked this clarifying question: "May a state leverage its spending power to induce an employer to adopt a neutral policy toward labor union organizing?"<sup>230</sup> Relying on the First Amendment, the NLRA, and the well-established doctrine of preemption, he answered in the negative.<sup>231</sup> Concentrating on the Constitution first, Judge Beezer showed that California extends "the definition of 'state funds' to include any monies received by a private employer as a result of contracting with the state [and accordingly] strikes at the heart of the First Amendment."<sup>232</sup> Judge Beezer went on to state that "AB 1889 prohibits not just the use of state money granted to an employer for and under a specific program but also co-opts the payment for goods and services and profit realized under a contract (undoubtedly not state funds)."<sup>233</sup> Hence the statute's rules "prevent any employer from spending its own funds in direct violation of the First Amendment."<sup>234</sup> Though this conclusion may be contestable because the majority opinion noted that the District Court made no finding on this issue,<sup>235</sup> Judge Beezer maintained correctly that AB 1889 interferes with "the First Amendment rights of employers to speak out and discuss union organizing campaigns."<sup>236</sup> This can be seen most directly with respect to employers who receive all of their funds from the government.<sup>237</sup> Judge Beezer stated, "Employers who receive all of their revenue from the state have no other option but to cease all union-related speech."<sup>238</sup> He reasoned that "[s]imply because a business or individual chooses to contract with the state does mean that the state may abrogate First Amendment rights."<sup>239</sup> Though the Ninth Circuit majority dismissed his analysis, it is doubtful that the majority's reasoning can contravene the full force of his First Amendment observations.

Turning next to preemption, Judge Beezer explained that "[t]he NLRA is a comprehensive scheme designed to balance the rights and interests of employers and employees,"<sup>240</sup> which includes the free flow of information. "[T]he NLRA explicitly protects the rights of em-

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<sup>230</sup> *Id.* at 1098 (Beezer, J., dissenting).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Chamber of Commerce*, 463 F.3d at 1098 (Beezer, J., dissenting).

<sup>235</sup> *Id.* at 1097.

<sup>236</sup> *Id.* at 1098 (Beezer, J., dissenting).

<sup>237</sup> *Id.* at 1100.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Chamber of Commerce*, 463 F.3d at 1100 (Beezer, J., dissenting).

ployers to express their views on union organizing efforts,” and AB 1889 impedes the flow of information by regulating employer speech.<sup>241</sup> While claiming to function neutrally, the statute, as Judge Beezer observed, prohibits expenditures related to labor union organizing but exempts from the statute’s restrictions certain pro-union activities and expenses, including expenditures incurred from voluntarily recognizing the union as the employees’ representative.<sup>242</sup> Examined in its entirety, “the statute carries a false air of evenhandedness” because, in addition to the ongoing disinclination of employers to favor unionization, it would be a rare set of circumstances “where an employer [would] actually dedicate resources to encourage its employees to unionize.”<sup>243</sup>

Judge Beezer exposed California’s less-than-neutral effort as a regulatory mechanism that ought to be preempted for reasons that implicate both prongs of the preemption doctrine. First, “a state law that both explicitly targets and directly regulates processes controlled by the NLRA is preempted under the *Machinists* doctrine.”<sup>244</sup> Federal control is instantiated by a process of freeing a domain from regulations and authorizing the interplay of self-interested weaponry by the parties. “Because AB 1889, on its face, directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process using the statutorily protected self-help mechanism, it interferes with” NLRA sanctioned self-help.<sup>245</sup> Far from permitting self-help, the statute ties the hands of employer-recipients that oppose organizing, while—contrary to its purported neutrality rationale—allowing pro-union groups and compliant employers free reign.<sup>246</sup> Judge Beezer asserted that “[b]y impeding the flow of information and substantive discussions of unionization, the statute, [in addition to colliding with the First Amendment, interferes with] ‘Congress’[s] intentional balance between the uncontrolled power of management and labor in furthering their respective interests.”<sup>247</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 1102.

<sup>243</sup> *Id.* at 1102–03.

<sup>244</sup> *Id.* at 1105.

<sup>245</sup> *Id.*

<sup>246</sup> *Chamber of Commerce*, 463 F.3d at 1105 (Beezer, J., dissenting).

<sup>247</sup> *Id.* at 1106 (Beezer, J., dissenting) (quoting *Bldg. and Constr. Trades Council v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 226 (1993)). Additionally, Judge Beezer states, “That California purports to act through its spending power rather than its regulatory power is a ‘distinction without a difference.’” *Id.* (quoting

Further, Judge Beezer concluded that AB 1889 is also preempted under the *Garmon* doctrine.<sup>248</sup> Because the “California statute stifles employers’ speech rights which are granted by federal law, and in doing so, impedes the ability of the NLRB to uphold its election speech rules and administer free and fair elections,”<sup>249</sup> the state is attempting to regulate what the NLRA protects. As such, the statute fails or at least potentially fails to comply with the substantive-rights/primary-jurisdiction component of *Garmon*. Taken as a whole, the contested provisions of the statute silence employers. The state of California is preempted from doing so by application of both the NLRA and a principled interpretation of the Constitution itself. Judge Beezer’s views were vindicated, at least in part, by the Supreme Court.

#### IV. THE SUPREME COURT

The Supreme Court disagreed with the Ninth Circuit’s assessment of the law and the facts in the *Chamber of Commerce* case. Precedent supports the Supreme Court. *Linn v. United Plant Guard Workers*<sup>250</sup> stands for the proposition that Congress has unmistakably manifested its intent to encourage free debate on issues dividing labor and management.<sup>251</sup> If AB 1889 is a regulatory statute, this prompts preemption analysis, possibly on two levels. If employer speech is a protected activity, as Judge Beezer’s dissent suggests, this ought to trigger the *Garmon* prong. If the organizing domain constitutes a zone meant to be free of regulation as the district court determined, this sparks *Machinists* scrutiny. Lacking sympathy for the thesis that its preemption analysis is “overbroad” or “too aggressive,” the Supreme Court did not rely on the First Amendment, nor does the Court rely on the *Garmon* doctrine. Instead, the Court insisted that the challenged provisions are preempted under *Machinists* because they regulate within “a zone protected and reserved for market freedom.”<sup>252</sup> The Court supplied background:

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Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 287 (1986)).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

<sup>251</sup> *Id.* at 62.

<sup>252</sup> *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408, 2412 (2008) (quoting *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors, Inc.*, 507 U.S. 218, 227 (1993)). *But see* Letter from Paul M. Secunda, Professor of Law, University of Mississippi School of Law, to Harry G. Hutchison, Professor of

Among the frequently litigated issues under the Wagner Act were charges that an employer's attempts to persuade employees not to join a union[—]or to join one favored by the employer rather than a rival[—]amounted to a form of coercion prohibited by § 8. The NLRB took the position that § 8 demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees.<sup>253</sup>

Rejecting the requirement that employers must remain neutral in an organizing context, in 1941 the Supreme Court "curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer 'from expressing its view on labor policies or problems' unless the employer's speech 'in connection with other circumstances [amount] to coercion within the meaning of the Act.'"<sup>254</sup> This analysis implies that state legislative efforts designed to induce employer neutrality ought to be barred because such efforts are not consistent with Supreme Court precedent.

Turning next to the Taft-Hartley Act, the Court found that Congress amended the Wagner Act for several reasons, including the goal of providing language that "protects speech by both unions and employers from regulation by the NLRB."<sup>255</sup> According to the Court, this amendment accomplishes several objectives. First, it incorporates and implements the First Amendment within the NLRA.<sup>256</sup> Second, it manifests a "congressional intent to encourage free debate on issues dividing labor and management."<sup>257</sup> Perhaps relying inordinately on the doctrine of preemption, and too little on the First Amendment, the Court stated, "It is indicative of how important Congress deemed such 'free debate' that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis."<sup>258</sup> Congress's policy judgment, which is suffused in the NLRA, favors "uninhibited, robust and wide-open debate in labor disputes."<sup>259</sup> Unlike the Ninth Circuit, which found neither express nor implied protection for employers'

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Law, George Mason University School of Law (October 17, 2008) (on file with the author) (arguing that this reasoning should not be dispositive).

<sup>253</sup> *Chamber of Commerce*, 128 S. Ct. at 2412 (2008).

<sup>254</sup> *Id.* (quoting *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941)).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

<sup>257</sup> *Id.* (quoting *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966)).

<sup>258</sup> *Id.* at 2413–14.

<sup>259</sup> *Chamber of Commerce*, 128 S. Ct. at 2414 (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974)).

speech, and distinct from typical preemption analysis where congressional intent can only be found implicitly, the Supreme Court determined that the NLRA expressly protects employers' non-coercive speech.<sup>260</sup> Discovering express protection may be helpful to employers and might potentially implicate *Garmon's* arguably protected prong as well as *Machinists'* insulated zone of conduct analyses. The Supreme Court explained:

California's policy judgment that partisan employer speech necessarily "interfere[s] with an employee's choice about whether to join or to be represented by a labor union" [the express goal of AB 1889], is the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act.<sup>261</sup>

Accordingly, "[t]o the extent §§ 16645.2 and 16645.7 actually further the express goal of AB 1889, the provisions are unequivocally preempted."<sup>262</sup>

While the Ninth Circuit reasoned that it was implausible that Congress intended California's restrictions on the use of state funds to be preempted by the *Machinists* doctrine because the state's choices of how to spend its funds, by definition, are not controlled by the free play of economic forces, the Supreme Court responded by finding the Ninth Circuit's analysis equally implausible. Moreover, the Supreme Court was not persuaded by the Ninth Circuit's hypothesis that there is a principled distinction between an organizing context and a collective bargaining one for the purposes of judging whether state regulation encroaches impermissibly on the federal scheme. Specifically, the Court of Appeals declared that *Machinists* does not "pre-empt §§ 16645.2 and 16645.7 for three reasons: (1) the spending restrictions apply only to the *use* of state funds, (2) Congress did not leave the zone of activity [organizing] free from *all* regulation, and (3) California modeled AB 1889 on federal statutes."<sup>263</sup> The Supreme Court maintained that none of these arguments are convincing.

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<sup>260</sup> *Id.* The Court asserted:

Section 8(a) and 8(b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. . . . Finally, the addition of § 8(c) expressly precludes regulation of speech about unionization "so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"

*Id.* (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

<sup>261</sup> *Id.* (quoting 2000 Cal. Stat. ch. 872, § 1) (internal citation omitted).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

A. *Neutrality and State Restrictions on the Use of State Funds*

Whether the use of state funds as a device to regulate labor is pre-empted depends “on the nature of the activities [that] States have sought to regulate, rather than on the method[s] of regulation adopted.”<sup>264</sup> Courts must assess “the actual content of the state’s policy and its real effect on federal rights.”<sup>265</sup> California cannot expressly and “directly regulate noncoercive speech about unionization;” equally clear, “California may not indirectly regulate such conduct through spending restrictions.”<sup>266</sup> Citing *Gould* with approval, the Court observed that a state’s choice to use its spending power rather than its police power does not significantly lessen the potential for conflict between state and federal schemes; therefore, such statutes are pre-empted.<sup>267</sup> In California, this conflict was made tangible by enacting AB 1889 to further the state’s labor policy,<sup>268</sup> and this conflict remains alive despite the state’s ostensible commitment to neutrality.

Though the Court of Appeals hung its persuasive powers on the contention that the disputed statute is calculated to ensure state neutrality in labor matters, the Supreme Court showed that, in contrast to a neutral affirmative requirement that funds be spent solely for the purposes of the relevant grant or program, “AB 1889 imposes a targeted negative restriction on employer speech about unionization.”<sup>269</sup> Moreover, the Supreme Court and Judge Beezer emphasized that the challengeable constraint is not applied uniformly.<sup>270</sup> The Supreme Court stated, “Instead of forbidding the use of state funds for *all* employer advocacy regarding unionization, AB 1889 permits use of state funds for select [preferred] employer advocacy activities that promote unions.”<sup>271</sup> Hence the statute exempts employer “expenses incurred in connection with . . . giving unions access to the workplace

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<sup>264</sup> *Id.* (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 n.5 (1986)).

<sup>265</sup> *Chamber of Commerce*, 128 S. Ct. at 2414 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994)).

<sup>266</sup> *Id.* at 2414–15.

<sup>267</sup> *Id.* at 2415 (“In *Gould*, we held that Wisconsin’s policy of refusing to purchase goods and services from three-time NLRA violators was pre-empted under *Garmon* because it imposed a supplemental sanction that conflicted with the NLRA’s ‘integrated scheme of regulation.’” (quoting *Wisconsin Dep’t of Indus., Labor, & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 288–89 (1986)).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*; *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1102–03 (9th Cir. 2006) (Beezer, J., dissenting).

<sup>271</sup> *Chamber of Commerce*, 128 S. Ct. at 2415.



and voluntarily recognizing unions without a secret ballot election.”<sup>272</sup> The Ninth Circuit purported to distinguish *Chamber of Commerce* from *Gould* “on the theory that AB 1889 does not make employer neutrality a condition for receiving funds, but instead restricts only the use of funds.”<sup>273</sup> Analytically, this constitutes a radical capitulation to neutrality rhetoric as a justifying rationale, but this surrender is unsustainable.

The Supreme Court found only a distinction without difference between restrictions on the use of funds and restrictions on the receipt of funds.<sup>274</sup> Indeed, California’s reliance on neutral “use” restrictions rather than on partisan “receipt” restrictions is “no more consequential than Wisconsin’s reliance on its spending power rather than its police power in *Gould*.”<sup>275</sup> The Supreme Court reached this conclusion for several reasons, including the fact that California “couples its ‘use’ restriction with compliance costs and litigation risks that are designed to make union-related advocacy prohibitively expensive for employers that receive state funds.”<sup>276</sup> Consistent with this examination, California makes it extremely “difficult for employers to demonstrate that they have not used state funds” for prohibited purposes and “impose[s] punitive sanctions for noncompliance.”<sup>277</sup> The Court was persuaded that California has transmuted neutrality rhetoric into partisanship, which is outlawed by the NLRA.

Partisanship can be shown by the fact that the only safe harbor the statute affords for recipients of state funds consists of activities “that either favor unionization or are required by federal or state law.”<sup>278</sup> The Court was unconvinced by Justice Breyer’s dissent claiming that neutrality can be found by simply accepting the contention that the challenged restrictions were only aimed at ensuring neutrality with regard to contested as opposed to uncontested organizing campaigns.<sup>279</sup> Rather, Justice’s Breyer’s contention unintentionally but forcefully underscores the Court’s principled understanding of partisanship by showing that it is beyond question that the State of California prefers one outcome rather than another when employer-recipients are engaged in an organizing campaign.<sup>280</sup>

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 2415–16.

<sup>275</sup> *Id.* at 2416.

<sup>276</sup> *Id.*

<sup>277</sup> *Chamber of Commerce*, 128 S. Ct. at 2416.

<sup>278</sup> *Id.*

<sup>279</sup> See *infra* Part IV.D.

<sup>280</sup> See *id.*

In light of the compliance burdens, non-trivial litigation risks, and other factors vitiating allegations of neutrality, the Supreme Court concluded that the statute's "enforcement mechanisms put considerable pressure on an employer either to forego his 'free speech right to communicate his views to his employees' . . . or else to refuse the receipt of any state funds."<sup>281</sup> This dilemma burdens employers' ability to use their own funds to advocate for or against unionization and underlines an inherent potential for conflict between AB 1889 and the NLRA,<sup>282</sup> and between the California statute and the First Amendment.<sup>283</sup> The statute impermissibly predicates benefits on forcing employers to "refrain[] from conduct protected by federal labor law" and chills robust debate, which is protected by both the NLRA and the doctrine of preemption.<sup>284</sup> The Court insisted that the issue is not chiefly whether the challenged provisions of AB 1889 violate the First Amendment, nor is it whether such provisions are analogous to existing federal legislation that is not preempted by the NLRA.<sup>285</sup> Instead, the Court found the issue to be whether the statutory scheme "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the NLRA."<sup>286</sup>

While a state may choose funding restrictions to advance acceptable goals, it is impermissible "for a State to use its spending power to advance an interest that—even if legitimate in the absence of the NLRA . . . frustrates the comprehensive federal scheme established by that Act."<sup>287</sup> This explication demonstrates that the First Amendment interest of employers can be sheltered from intrusions that are bounded by statutory analysis, but the Court declined to deploy the robust exacting scrutiny required when deciding a case on the basis of the First Amendment, preferring instead to hang its judgment on whether the California statute hinders the accomplishment of the full purposes of the NLRA.

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<sup>281</sup> *Chamber of Commerce*, 128 S. Ct. at 2416.

<sup>282</sup> *Id.* at 2416–17.

<sup>283</sup> Recall the Ninth Circuit's claim that AB 1889 does not "infringe employers' First Amendment rights because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds." *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076, 1092 (9th Cir. 2006). The statute's enforcement mechanism arguably negates the Ninth Circuit's claim.

<sup>284</sup> *Chamber of Commerce*, 128 S. Ct. at 2416–17.

<sup>285</sup> *Id.* at 2417.

<sup>286</sup> *Id.* (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994)).

<sup>287</sup> *Id.* (internal citations omitted).

B. *Does the NLRA Regulate Speech Concerning Organizing?*

Next, the Supreme Court tackled the *Machinists*<sup>288</sup> preemption issue directly by ascertaining whether organizing falls within a zone intended to remain free from state and federal regulations. The Court rejected the claim that *Machinists* is inapplicable because the NLRB has regulated election-eve employer speech, employer interviews with employees in their homes immediately prior to an election, and barred employers and unions alike from making speeches on company time to assemblies of employees within the twenty-four hours of an election.<sup>289</sup> The Court pondered the purpose of such regulation and concluded that the NLRB “has policed a narrow zone of speech to ensure free and fair elections under the aegis of [section] 9 of the NLRA” and noted that “Congress has clearly denied [the Board] the authority to regulate the broader category of noncoercive speech encompassed by AB 1889.”<sup>290</sup> Because, generally speaking, the NLRB is without authority within this insulated domain, it is equally clear “that the NLRA deprives California of this authority since ‘[t]he States have no more authority than the Board to upset the balance that Congress has struck between labor and management.’”<sup>291</sup> The Supreme Court next turned its attention to the Ninth Circuit’s dependence on analogies between the contested state legislation and federal statutes that similarly restrict the use of government funds, and finds such analogies unavailing.

C. *Preemption in the Mirror of Federal Statutes*

Conceding that it is clear beyond peradventure that “three federal statutes [relied upon by the court below] include provisions that forbid the use of particular grant and program funds ‘to assist, promote, or deter union organizing,’”<sup>292</sup> the Supreme Court was not convinced that “these few isolated restrictions, plucked from thousands [of] federal spending programs, were either intended to alter or did in fact alter the ‘wider contours of federal labor policy.’”<sup>293</sup> The Court observed that “[a] federal statute will contract the preemptive scope of the NLRA if it demonstrates that ‘Congress has decided to tolerate a substantial measure of diversity’ in the particular regulatory sphere” but that is not the case with respect to the fed-

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<sup>288</sup> *Int’l Ass’n of Machinists v. Gonzalez*, 356 U.S. 617 (1958).

<sup>289</sup> *Chamber of Commerce*, 128 S. Ct. at 2417.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751 (1985)).

<sup>292</sup> *Id.* at 2417–18.

<sup>293</sup> *Id.* at 2418 (quoting *Metro. Life Ins. Co.*, 471 U.S. at 753).

eral statutes placed at issue in this litigation.<sup>294</sup> None of the three federal statutes relied upon by the Court of Appeals either conflicts with the NLRA or otherwise establishes that “Congress ‘decided to tolerate a substantial measure of diversity’ in the regulation of employer speech.”<sup>295</sup> Moreover, none of the federal statutes cited “is Government-wide in scope, none contains comparable remedial provisions, and none contains express pro-union exemptions.”<sup>296</sup> For these and other reasons, the Supreme Court reversed the judgment of the Ninth Circuit and sustained employer speech rights. Nevertheless, the Ninth Circuit had a point. Once federal statutes are allowed to impede employer speech rights, it becomes doubtful that every state statute attempting a similar feat can be credibly denied enforcement. Thus understood, resting employer freedom-of-expression rights on statutory interpretation may be a risky proposition.

### C. *A Dissenting View*

Justice Breyer (joined by Justice Ginsburg) was convinced that California’s spending limitations do not amount to regulation that the NLRA preempts.<sup>297</sup> Conceding that Congress meant to encourage free debate, Justice Breyer did not “believe the operative provisions of the California statute amount to impermissible regulation that interferes with that policy as Congress intended it.”<sup>298</sup> Justice Breyer insisted that the only analogous case in the labor law pantheon is *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, where the Court considered a Wisconsin statute prohibiting “the state from doing business with firms that repeatedly violated the NLRA.”<sup>299</sup> He differentiated *Gould* and *Chamber of Commerce* by asserting that the “manifest purpose and inevitable effect” of the Wisconsin statute “was ‘to enforce’ the NLRA’s requirements, which [is the] role Congress reserved exclusively for the [NLRB],”<sup>300</sup> whereas the California statute, “does not seek to compel labor-related activity. And it does not forbid labor-related activity.”<sup>301</sup> This contention

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<sup>294</sup> *Id.* (quoting *New York Tel. Co. v. New York Dep’t of Labor*, 440 U.S. 519, 546 (1979) (plurality opinion)).

<sup>295</sup> *Chamber of Commerce*, 128 S. Ct. at 2418.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 2419 (Breyer, J., dissenting).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* (citing *Wisc. Dep’t of Indus., Labor & Human Rels. v. Gould Inc.*, 475 U.S. 282 (1986)).

<sup>300</sup> *Id.* (quoting *Gould*, 475 U.S. at 291).

<sup>301</sup> *Chamber of Commerce*, 128 S. Ct. at 2420 (Breyer, J., dissenting).

promises more than it delivers because Justice Breyer admitted that California did have a labor relations objective—ending conflict regarding organizing when workers or labor unions desire to unionize a given employer.<sup>302</sup> Thus, a reasonable interpretation of the California statute suggests its regulatory purpose: to induce, if not compel, agreement between labor and management as a device to favor unionization. However, there is more to Justice Breyer's claims.

Overlooking statutory exemptions that favor unionization and failing to notice the importance of the statute's compliance and litigation burdens, Justice Breyer asserted that AB 1889 permits all employers who receive state funds to assist, promote, or deter union organizing if they so choose, but he merely precluded such activities on the state's dime.<sup>303</sup> His analysis, if accepted, signifies that states wishing to pay for employer speech in a labor-organizing context are free to do so.<sup>304</sup> Additionally, he argued that the regulator/market-participant distinction suggests a "false dichotomy" because "[t]he converse of a 'market participant' is not necessarily 'regulator.'"<sup>305</sup> This is so because a state "may appropriate funds without either participating in or regulating the labor market" and "the NLRA preempts a State's 'actions when taken as an appropriator,' only if those actions amount to impermissible regulation."<sup>306</sup> Justice Breyer's inability to find a regulatory purpose is difficult to understand because the State of California "abandoned [its] principal argument . . . that AB 1889 serves a proprietary interest exempt from preemption."<sup>307</sup> Instead, California conceded, "AB 1889's spending restriction was not designed to achieve cost savings or programmatic efficiencies. Rather, California imposed a spending restriction on, or 'refus[ed] to subsidize,' employer speech about unionization solely because 'the legislature believed [that such speech] may interfere with an employee's choice about whether to join a union.'"<sup>308</sup> A statute premised on the respondents' reading of the case is regulatory even if Justice Breyer tried to evade the respondents' apparent concession that places the asserted neutrality of the statute in doubt.

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 2421.

<sup>306</sup> *Id.*

<sup>307</sup> Reply Brief of Petitioners-Appellants at 1, *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008) (No. 06-939), 2008 U.S. S. Ct. Briefs LEXIS 295.

<sup>308</sup> *Id.* at 1–2.

Justice Breyer continued by asserting that he is not convinced that the statute's failure to apply spending restrictions uniformly is fatal to the legislation. Instead, he offered a compliant syllogism: permitting the expenditure of state funds (when such funds are used to promote unionization) and precluding the use of said funds (when used to deter unionization) fortifies an inference that is opposite to the one reached by a majority of the Court.<sup>309</sup> Neutrality can be found within "California's basic purpose—maintaining a position of spending neutrality on contested labor matters."<sup>310</sup> Hence, "[w]here labor and management agree on unionization, there is no conflict," and there is no need for the state to impose funding restrictions.<sup>311</sup>

Another way of viewing Justice Breyer's claim is to accept (1) that the proper outcome of any organizing campaign ought to culminate in unionization despite the express language of the NLRA granting employees the right to refrain from joining a labor organization, (2) that neutrality can be understood as a postmodern idiom favoring unionization and disfavoring employers, and (3) that the language contained within the preamble to the California statute stating it is the intent of the legislature to prohibit an employer from using state funds to support or oppose unionization based on the state's policy to refrain from interfering with an employee's choice to join or not to join a union<sup>312</sup> only applies when there is a contest about the value of unionization. When such a contest takes place the neutrality objective is transmuted into a device favoring labor unions.

Turning to compliance issues, Justice Breyer conceded that such provisions may sink the statute on the shoals of preemption. He observed that on the record before the Court the evidence is insufficient to infer, let alone prove, that the compliance provisions, as a practical matter, might unreasonably discourage the expenditure of non-state funds by employers.<sup>313</sup> He would therefore decline to decide the compliance question until the lower courts have had an opportunity to consider and rule upon this issue.<sup>314</sup>

For a number of reasons, Justice Breyer could not find evidence that the contested spending limitation amounts to regulation that the NLRA preempts, which leads to several observations: (1) the State is

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<sup>309</sup> *Chamber of Commerce*, 128 S. Ct. at 2421 (Breyer, J., dissenting).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> 2000 Cal. Stat. ch. 872 § 1.

<sup>313</sup> *Chamber of Commerce of the U.S. v. Brown*, 128 S. Ct. 2408, 2421 (2008) (Breyer, J., dissenting).

<sup>314</sup> *Id.* at 2422.

free to refuse to pay for an activity it dislikes; (2) the congressional parameters for free debate and a robust exchange of ideas about the costs and benefits of unionization remain intact; (3) the State of California is neither participating in nor regulating the labor market in impermissible ways; (4) the statute is tolerably neutral on the record before the Court to enable a lower court to conclude that compliance burdens are not fatal; and (5) the First Amendment interest of employers is inadequate to warrant constitutional protection.

#### V. ANALYSIS: ORGANIZING, PRESUPPOSITIONS, AND FREEDOM OF SPEECH

Understanding the *Chamber of Commerce* case requires background that considers the central tendency of democratic societies. John Gray's contribution to the proper understanding of modern mass democracies intuits that modern "states tend overwhelmingly" to fail "to protect or promote the public interest."<sup>315</sup> He argued that "[c]ontrary to the classical theory of the state as the provider of public good—goods, that is to say, which in virtue of their indivisibility and non-excludability must be provided to all or none—modern states are above all suppliers of private goods."<sup>316</sup> Rather than provide the "pure public good of civil peace," mounting evidence signifies that the mission of the modern state is "to satisfy the private preferences of collusive interest groups,"<sup>317</sup> whether or not the pursuit of such aims is cloaked in language implying some pure public purpose or alternatively, infused with the language of market failure.<sup>318</sup> It is possible, therefore, to achieve private aims and objectives through government processes more efficiently than by relying on market processes.<sup>319</sup> Coherent with that possibility, "[m]odern democratic states have themselves becomes weapons in the war of all against all, as rival in-

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<sup>315</sup> JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 11 (1993).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 11–12; see also James M. Buchanan, *The Constitution of Economic Policy*, in *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* 103, 107–08 (James D. Gwartney & Richard E. Wagner eds., 1988).

<sup>318</sup> WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKET, WELFARE, AND THE FAILURE OF BUREAUCRACY* 1 (1994) (stating that "[t]he vision underlying the expansion of regulation and bureaucracy is that the government succeeds where markets fail"). It is possible that welfare economists have dethroned markets in western countries and administered the coronation of government premised on the claim of "undersupplied public goods, exorbitant and ubiquitous social costs of private action" and attached to the notion of "unfairly distributed wealth and income." *Id.* at 3.

<sup>319</sup> *Id.* at 108.

terest groups compete with each other to capture government and use it to seize and redistribute resources among themselves.”<sup>320</sup>

It is doubtful that union advocates and their ideological allies can be separated from this centripetal tendency that afflicts democratic societies.<sup>321</sup> One of the quintessential objectives of union advocates is to silence employer speech. In part, this goal is tilted towards a presumption that the employer is a third party to the transaction between a union that seeks to represent workers and workers themselves.<sup>322</sup> It is true that workers, whether they have a job or not, can choose a representative. But it is a mistake to emphasize the claim that employers are simply “third parties.”<sup>323</sup> On the contrary, they are central to any employment agreement that involves individual workers or workers represented by a union. Equally clear, if the mounting survey evidence showing dissatisfaction with traditional unions is accurate,<sup>324</sup> unions, union hierarchs, and their allies can be seen as unwanted third parties.<sup>325</sup> Nevertheless, academic commentary has become exercised by the possibility that employer hostility and coercion is the primary factor hindering the restoration of labor’s previously ascendant position.<sup>326</sup> Correspondingly, commentators have sought to contract the scope of employers’ property rights and to diminish the reach of the doctrine of preemption. Commentators pursue employer neutrality via state and local legislation or other innovation, and such efforts are then defended by the assertion that they have a neutral objective: the removal of employer opposition.<sup>327</sup>

<sup>320</sup> GRAY, *supra* note 315, at 4.

<sup>321</sup> For a discussion of these issues, see Hutchison, *supra* note 145, at 1339–48.

<sup>322</sup> Bodie, *supra* note 11, at 53.

<sup>323</sup> *Id.* at 53 (emphasizing the contention that employers are an unwanted third party).

<sup>324</sup> See, e.g., Margalioth, *supra* note 95, at 41–49 (demonstrating that workers are increasingly expressing dissatisfaction with collective solutions in the employment context).

<sup>325</sup> Harry G. Hutchison, Response, *The Market for Union Representation: An Information Deficit or Rational Behavior?*, VA. L. REV. IN BRIEF 15, 18 (2008), <http://www.virginialawreview.org/inbrief/2008/03/24/hutchison.pdf>.

<sup>326</sup> See, e.g., Richard B. Freeman, *What do Unions Do? The 2004 M-Brane Stringtwister Edition*, in WHAT DO UNIONS DO? A TWENTY YEAR PERSPECTIVE 607, 627 (James T. Bennett & Bruce E. Kaufmann eds., 2004) (offering employer hostility as a highly influential explanation for labor union decline); see also FREEMAN & ROGERS, *supra* note 83, at 185 (asserting that management has been given “near-veto power over whether workers can achieve union representation”).

<sup>327</sup> Debra Charish, Comment, *Union Neutrality Law or Employer Gag Law? Exploring NLR Preemption of NEW YORK LABOR LAW SECTION 211-A*, 14 J. L. & POL’Y 779, 787, 789 (2006).



By contrast, the two Justices (Powell and Burger) of the *Machinists* Court necessary to make up a majority asserted that “[s]tate laws should not be regarded as neutral if they reflect an accommodation of the special interest of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining.”<sup>328</sup> AB 1889 amounts to just such an accommodation of the special interest of unions and the ideological allies who are animated by the decline of labor over the last few decades.<sup>329</sup> Labor advocates have focused on the ways in which purported obstacles to union organizing can be eliminated.<sup>330</sup> In light of these developments, a correlative probability issues forth, suggesting that the Ninth Circuit has proved capable of finding neutrality lurking in non-neutral legislation as a basis for trumping the First Amendment interest of employers.

#### A. *Neutrality Reflected in Three Questions*

Given the Supreme Court debate and the Ninth Circuit wrangle, the *Chamber of Commerce* case prompts three questions: First, does AB 1889, inconsistently with its stated neutrality rationale, require or encourage employer-recipient silence by virtue of the statutory compliance costs, litigation risk, and penalties arising from employer-recipient error when using state funds? Second, are these enhanced transaction costs that accompany employer compliance error calculated to preclude employer-recipients from exercising their established right to engage in non-coercive, anti-organizing advocacy funded by non-state funds? Third, does the fact that California purports to act through its spending power rather than its regulatory power make a difference?

Preliminary analysis shows why the answers to such questions are important. The first question is significant because the statutory penalties, compliance costs, and litigation costs can exceed the amount of state funds that an employer-recipient receives. AB 1889, in addition to disgorgement, calls for a penalty of twice of the funds received from the state.

The second question is pertinent given the plausible inference that the costs imposed by AB 1889 are calculated to inhibit employer-recipients in exercise of their freedom-of-expression rights, even with

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<sup>328</sup> *Int'l Ass'n of Machinists & Aero. Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 156 n.\* (Powell, J. and Burger, J., concurring).

<sup>329</sup> See, e.g., Feinstein, *supra* note 4, at 337–53.

<sup>330</sup> Charles Heckscher, *Organizations, Movements, and Networks*, 50 N.Y.L. SCH. L. REV. 313, 313 (2006).

respect to non-state funds. This inference comes alive despite the possibility that employer-recipients can avoid such costs in three ways: by declining to contract with or to receive state funds, by refraining from all union advocacy designed to deter unionization, or by becoming an advocate for labor union organizing. In a word, the price of cost avoidance is employer neutralization. This move may have an adverse effect on employee rights to listen to a debate with regard to the advantages and disadvantages of organizing.

The third question arises because AB 1889 could be framed as an exercise of California's spending power, as opposed to its regulatory power, to defend against preemption and First Amendment invalidation, despite countervailing arguments by Judge Beezer.<sup>331</sup> Justice Breyer defended the Ninth Circuit's analysis by discounting the regulator/market-participant distinction and maintains that a "state may appropriate funds without either participating in or regulating the labor market so long as it appropriates without engaging in impermissible regulation."<sup>332</sup> That said, in order to more fully explain the deductions that can be drawn from statutory analysis, this Article will address the three questions below.

The Supreme Court majority supplied an affirmative answer to the first two questions and a negative answer to the third. First, AB 1889 offers a capacious conception of neutrality with respect to restrictions on the use of state funds. This is not the first time that California offered the now-familiar rhetoric of neutrality in defense of state regulation within the labor arena. To be fair, neutrality as a concept often has an in-the-eye-of-the-beholder quality. But just like a moral philosopher may not be a virtuous man and yet know everything about virtue,<sup>333</sup> it is possible that a legislative body or a court may know everything about neutrality conceptually, but cannot consistently apply the concept in practice or alternatively can only apply neutrality as a weapon.

*Golden State I* gives substance to the observation that such a possibility has begun to infect Ninth Circuit adjudication. The City of Los Angeles "conditioned renewal of a [taxicab] franchise on the settlement of [a] labor dispute" between the franchisee and the union

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<sup>331</sup> Chamber of Commerce of the U.S. v. Lockyer, 463 F.3d 1076, 1106 (9th Cir. 2006) (Beezer, J., dissenting) (arguing that the "State of California purports to act through its spending power rather than its regulator power is a distinction without a difference").

<sup>332</sup> Chamber of Commerce of U.S. v. Brown, 128 S. Ct. 2408, 2421 (2008) (Breyer, J., dissenting).

<sup>333</sup> JACQUES MARITAIN, NATURAL LAW: REFLECTIONS ON THEORY & PRACTICE 15 (William Sweet ed., 2001).

representing its employees, who were on strike. The Ninth Circuit affirmed a district court judgment that the city's action was not preempted under the NLRA.<sup>334</sup> Conversely, the Supreme Court held that such a condition "destroy[s] the balance of power designed by Congress and frustrate[s] Congress'[s] intention to leave open the use of economic weapons"<sup>335</sup>; "a city cannot condition a franchise renewal in a way that intrudes into the collective bargaining process."<sup>336</sup> Evidently a state or local entity's desire to encourage a settlement or to remain neutral during a labor dispute cannot control preemption.<sup>337</sup> Instead, the court must decide if a state's rule conflicts with or otherwise "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law.<sup>338</sup>

Other circuit courts have reached similar decisions dismissing euphonious claims of neutrality as a defense to preemption when proffered by state or local officials in an effort to legitimize a regulatory policy.<sup>339</sup> Still, evidence mounts that the Ninth Circuit has been drawn to the persistent appeal of neutrality rhetoric. In *Livadas*, an employee covered by a collective bargaining agreement within the meaning of the NLRA was deprived of benefits generally made available to non-union workers.<sup>340</sup> The Ninth Circuit, underscoring its difficulty with the concept of neutrality, accepted the state's contention that because the plaintiff was covered by a collective bargaining agreement, the state could not be required to enforce a provision of the California Labor Code protecting the plaintiff's right to prompt payment of wages. While this move depriving a unionized worker of generally-available benefits cannot be seen as union favorable, it represents an ever present possibility: states taking sides in an employment contest in order to accommodate one interest or another. The preemption doctrine is properly calibrated precisely to preclude this possibility. Hence, the Supreme Court unanimously reversed the Ninth Circuit and invalidated the California rule. The *Livadas* Court

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<sup>334</sup> *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985), *rev'd*, 475 U.S. 608 (1986).

<sup>335</sup> *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986).

<sup>336</sup> *Id.*

<sup>337</sup> *See generally id.*

<sup>338</sup> *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408, 2418 (2008)

<sup>339</sup> *See, e.g., Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148, 1154 (4th Cir. 1992) (invalidating a state neutrality statute and holding that states may not, consistently with the NLRA, withhold protections of state anti-trespass law from employers involved in labor disputes). The Supreme Court of the United States cited this case with approval in *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994).

<sup>340</sup> *GORMAN & FINKIN*, *supra* note 13, at 1108–09.

reached its decision because a “rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose,”<sup>341</sup> and threatens the Constitution’s supremacy clause insofar as it interferes with or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law.”<sup>342</sup>

Claims of state neutrality often coexist with evidence showing that the state has placed its thumb on the scale. This is a metaphor for the precise evil that the *Machinists* prong seeks to avoid—“the possibility that the state would alter the balance of power in a particular labor conflict and thereby, subvert congressional intent that the matter be left free of government intervention.”<sup>343</sup> The Supreme Court clarified, determining that “the NLRA forbids state policies that aid or assist either party to a labor dispute” despite claims of neutrality.<sup>344</sup> The Court defended federal power and the federal scheme by stating that California’s “hands off” policy poses a risk that the freedoms and “advantages conferred by federal law will be canceled out and its objectives undermined, and those dangers are not laid to rest by professions of the need for governmental neutrality in labor disputes.”<sup>345</sup>

Apparently, poignant appeals to neutrality rhetoric are no substitute for sound preemption analysis. Still, the Ninth Circuit defended its *Chamber of Commerce* judgment by insisting on a crabbed conception of “neutrality.” This maneuver brings to mind the Jacobins’ reliance on words to transform society during the aftermath of the French Revolution. French social critic Alain Finkielkraut showed that the Jacobins insisted on the substitution a single word—*associates*—for the nation’s history and its rich tradition of social and political relationships<sup>346</sup> as a vehicle to ensure social progress and to ignore the carnage. The end result of this transformative process was to catalyze accretions in state power and to diminish the liberty of putatively free people. Similarly, in *Chamber of Commerce*, the Ninth Circuit solicited the persuasive force of the word “neutrality” in order to defend AB 1889 and to enhance the power of the state by legitimizing California’s pro-union policies while eviscerating employers’ liberty interest in freedom of speech. Just like the Jacobins, the Ninth Cir-

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<sup>341</sup> *Livadas*, 512 U.S. at 116.

<sup>342</sup> *Id.* at 120.

<sup>343</sup> DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW, 376–77 (1999).

<sup>344</sup> *Livadas*, 512 U.S. at 130.

<sup>345</sup> *Id.* at 129 (citing *Brown v. Hotel Int’l Union Local 54*, 468 U.S. 491, 501 (1984)).

<sup>346</sup> ALAIN FINKIELKRAUT, THE DEFEAT OF THE MIND 10–11 (Judith Friedlander trans., 1995).

cuit's solicitation flounders in the face of a principled conception of words, such as neutrality.

In order to fully ascertain whether California enacted a policy that aids or assists labor unions and disadvantages employers, the Supreme Court emphasized that employers have a freedom-of-expression right that section 8(c) of the NLRA specifies. Contrary to the Ninth Circuit's *Chamber of Commerce* conjecture that section 8(c) supplies no protection to employer speech in the context of organizing but merely shelters non-coercive speech from supporting an unfair labor practice charge, the Supreme Court held that employers have a right worth protecting. Properly understood, AB 1889 is calculated to aid unions by depriving the organizing contest of the employer's voice and ensuring that employees cannot hear that voice. Claims of neutrality cannot shelter this maneuver and this is particularly true when pro-union advocacy escapes the preclusive reach of the statute.

Second, AB 1889 distributes enhanced transaction costs in the form of employer-recipient compliance expenses as well the penalty for employer error. These costs establish spillover effects that deter the exercise of employer-recipients' speech rights with respect to their use of non-state funds. Deterrence takes a tangible and punitive form that unreasonably discourages the expenditure of non-state funds by employer-recipients during organizing contests for fear of violating the statute. This is so because the provisions of AB 1889 regulating employer-recipient error in the use of funds are designed to capture several times the amount of state funds received. Taken together, a credible inference surfaces suggesting the statute, couched in language that purports to vindicate the state sovereign interests in neutral restrictions on the usage of funds, actually reflects a predisposition to neutralize employer-recipients' speech entirely. Consistent with this possibility, even Justice Breyer was willing to concede that compliance costs might sink the statute on the shoals of preemption.

In answering the third question, it is doubtful that a statute designed to interfere with the employer-recipients' speech rights by placing restrictions on the use of *state* funds, and that has the effect of inhibiting employer's speech with respect to their *own* funds constitutes a legitimate exercise of California's spending power. In order to deprive the statute of its regulatory purpose, observers must yield to imaginary claims of neutrality and ignore: (1) evidence showing that "AB 1889 permits the use of state funds for select employer ad-

vocacy activities that promote unions”<sup>347</sup> and (2) the fact that the state of California apparently concedes the statute’s regulatory purpose.<sup>348</sup> Given the non-neutral purpose and effect of the statute, and in light of California’s apparent concession, the appropriate outcome becomes observable: “a state may not leverage its spending power to induce employers to adopt a neutral policy toward union organizing.”<sup>349</sup> The fact that California purports to act through its spending power rather than its regulatory power makes no difference, because AB 1889 interferes with Congress’s intention to create a zone free from regulation.

The three questions discussed above rely largely on the intersection of neutrality and preemption doctrine for answers. It is doubtful that the answers, however definite they may be, constitute an adequate defense of employer speech rights. Evidence can be adduced showing that some judges and legislatures have capitulated to the surging commentary directed toward reversing the ongoing decline in unionization as intensified by the appeal of postmodern discourse.

Therefore, two additional inquiries emerge: First, given the possibility that the Ninth Circuit, and by extension the judiciary, have been captured by a predisposition to accept the legitimacy, if not the necessity, of state labor regulation favoring unions, does statutory analysis, standing alone, constitute an effective barrier to labor regulation and judicial language that shrinks employer speech rights? Second, can a return to the First Amendment itself offer stronger, if not permanent, protection for such rights?

### *B. Inclinations?*

It is possible to uncover evidence implying that Ninth Circuit adjudication exemplifies the possibilities associated with postmodern discourse. This development may arouse doubts about the long-term viability of the liberal-legalist project while sustaining the observation that the courts are susceptible to capture. Analogical data sustains the tentative inference that the Ninth Circuit panel, like other officials in liberal democratic societies, is predisposed to favor one side or another in the contest for political power. As such, the Supreme

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<sup>347</sup> Chamber of Commerce of U.S. v. Brown, 128 S. Ct. 2408, 2415 (2008).

<sup>348</sup> Reply Brief for Petitioner-Appellant at 1, Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408 (2008) (No. 06-939), 2008 U.S. S. Ct. Briefs LEXIS 295.

<sup>349</sup> Chamber of Commerce of U.S. v. Lockyer, 463 F.3d 1076, 1098 (9th Cir. 2006) (Beezer, J., dissenting).

Court has had occasion to correct the Ninth Circuit and vindicate the First Amendment rights of union dissenters.<sup>350</sup>

The vulnerability of the Ninth Circuit's analysis is highlighted by examining briefly two of the court's recent decisions emphasizing that organizing expenditures and activities can be justified against union dissenters' freedom-of-expression claims. This paradigm suppresses union dissenters' freedom-of-expression claims in exchange for the goal of strengthening labor unions. The Ninth Circuit's susceptibility to this objective takes on additional weight given the propensity of the court to favor neutrality rhetoric as a device that trumps the preemption doctrine.<sup>351</sup>

Within the tightly-contested category that is bound by the clash of freedom-of-expression claims and compulsory union dues, the Ninth Circuit's willingness to favor union organizing as a goal while disfavoring freedom of expression has drawn a sharp rebuke from the Supreme Court. In *Ellis*, the Court held that the union's rebate scheme was inadequate, and that the Ninth Circuit erred in finding that the Railway Labor Act authorizes a union to spend compelled dues for general litigation and organizing efforts<sup>352</sup> deemed necessary to ensure and improve union strength.<sup>353</sup> *Ellis* was extended to the *Beck* case wherein the Supreme Court confirmed that the principles adduced in *Ellis* apply in the context of the NLRA.<sup>354</sup>

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<sup>350</sup> *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991) (plurality opinion) (citing *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 453 (1984)). In *Lehnert*, a four-member plurality held that the "[First] Amendment proscribes such assessments in the public sector." *Id.* at 528.

<sup>351</sup> See *supra* Part V.A (discussing *Golden State I* and *Livadas*).

<sup>352</sup> *Ellis*, 466 U.S. at 441 (holding that the "union's rebate scheme was inadequate and that the Ninth Circuit Court of Appeals erred in finding that the Railway Labor Act authorizes a union to spend compelled dues for its general litigation and organizing efforts").

<sup>353</sup> *Id.* at 441. The Court stated:

Turning to the question of permissible expenditures, the Court of Appeals framed "the relevant inquiry [as] whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. . . . [That is, whether it] can be seen to promote, support or maintain the union as an effective collective bargaining agent." The court found that each of the challenged activities strengthened the union as a whole and helped it to run more smoothly, thus making it better able to . . . negotiate and administer agreements.

*Id.*

<sup>354</sup> *UFCW v. NLRB*, 249 F.3d 1115, 1117-20 (9th Cir. 2001), *withdrawn, and overruled by*, 307 F.3d 760 (9th Cir. 2002) (en banc) (concluding that the *Ellis* decision held organizing expenses to be outside of Congress's authorization in section 2, Eleventh of the RLA, followed by the *Beck* decision, which found statutory equivalence between the NLRA and the RLA, and the *Lehnert* case confirming that RLA cases in-

Nonetheless, contemporary evidence shows that the Ninth Circuit has legitimized union-organizing activities in particular, and unionization in general, on grounds that such efforts are mandated by the goal of strengthening and expanding unions,<sup>355</sup> despite the determination by an unanimous Court in *Ellis* “that it would be perverse to” compel dues objectors to finance the expansion of unionism to other bargaining units.<sup>356</sup> Disagreeing with the *Ellis* Court’s assessment of perversity, the Ninth Circuit stated in *United Food*, “Because the union can only become the collective bargaining representative if enough employees agree, the initial recruitment and incorporation of new members into a nascent bargaining unit through organizing is crucial.”<sup>357</sup> This opinion is underwritten by tolerating the contention that extra-bargaining unit organizing is necessary and, therefore, defensible despite the complainants’ free-speech claims and the existence of contrary precedent.<sup>358</sup>

The *United Food* Court reached the following conclusions, which coincide with its implicit agreement with the objectives associated with AB 1889:

(1) the organizing of competitor employees “eliminates the competition of employers and employees based on labor conditions regarded as substandard.” (2) nonunion employers will tend to “pay lower wages and provide lesser benefits,” and (3) “competition from non-unionized employers “significantly weakens the union’s ability to bargain with [already-organized] employer[s], and decreases the union’s prospects of achieving the economic objectives of the members of the bargaining unit.”<sup>359</sup>

These arguments are dubious<sup>360</sup> and raise the probability that the court has been captured by an inclination to expand unions, a conclusion that underscores its holding in *Chamber of Commerce*. Still, the

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cluding *Ellis*, serve to determine the scope of the chargeable activities under the NLRA, and therefore union organizing expenses cannot be authorized by the NLRA).

<sup>355</sup> See, e.g., *Ellis v. Bhd. Of Ry., Airline & S.S. Clerks*, 685 F.2d 1065, 1075 (9th Cir. 1982); *UFCW*, 307 F.3d at 771.

<sup>356</sup> *Ellis*, 466 U.S. at 452 n.13.

<sup>357</sup> *UFCW*, 307 F.3d at 768.

<sup>358</sup> In analyzing the *UFCW* case, the Ninth Circuit attempted to distinguish cases arising under the NLRA from cases like *Ellis* arising under the Railway Labor Act despite the Supreme Court’s claim in *Beck* that because section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA “are in all material respects identical,” RLA cases are “more than merely instructive, they are controlling” for purposes of understanding the free-rider approach taken by Congress. *Comm’n Workers v. Beck*, 487 U.S. 735, 745–47 (1988).

<sup>359</sup> *UFCW*, 307 F.3d at 768–69.

<sup>360</sup> See Hutchison, *supra* note 145, at 1357–1401.



*United Food* Court's opinion, which burdens freedom of expression,<sup>361</sup> is reinforced by observing that the Supreme Court, unsurprisingly, is not inclined to grant certiorari in all such cases. The Court has often deferred the determination of which labor union activities are defensible against freedom-of-speech claims brought by complainants to the appellate courts.<sup>362</sup> Bright-line guidance in such situations might be helpful.

If this potential quandary is extended to the employer speech rights domain, and if lower courts are free, in practice, to ignore precedent, it becomes likely that freedom-of-expression claims will be litigated and re-litigated, thus providing continuing opportunities for elucidation. This is so despite the Supreme Court's recurring admonition that a given state scheme must be evaluated on the basis of whether it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the NLRA. The accomplishment of such goals and objectives may depend on whether there is a uniform or elastic understanding of the NLRA's purposes. Comprehensive elucidation must admit that the Supreme Court has approved or, at the very least, has not overruled the validity of federal statutes that appear to have the same purpose as AB 1889.<sup>363</sup> That observation should give us pause, even if it does not negate the evidence suggesting that elucidation in the chambers of the Ninth Circuit or deliberation within the California legislature favors organizing activities and disfavors freedom-of-expression rights of employers and dissenting workers. Recall the Ninth Circuit's decision making in *Golden State I* and *Livadas*, which suggests a propensity to accept statutes sheltered from invalidation by neutrality rhetoric. The *Chamber of Commerce* case offers another occasion for the Supreme Court to rectify the Ninth Circuit's decision making. However, the relevant inquiry becomes whether the Supreme Court's focus on statutory interpretation is sufficient to defend the freedom-of-expression rights of employers and prevent states from placing their finger on the scale in order to favor one side in the absence of clear protection supplied by the First Amendment itself.

### C. *The First Amendment as a Source of Employer Rights?*

Any discussion of freedom-of-expression rights and the First Amendment must note that the doctrines, which plague this arena,

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<sup>361</sup> *Id.* at 1384–94.

<sup>362</sup> See, e.g., *UFCW v. NLRB*, 284 F.3d 1099 (9th Cir. 2001), *cert. denied*, 537 U.S. 1024 (2002).

<sup>363</sup> See *supra* Part IV.C.

are irreducibly complex, conducing to a process that is at once engaging and repelling. Centuries of equivocation, coupled with infection by cumbersome words and doctrines, signify that plain meaning of both the law of freedom of expression and the language of the First Amendment may not mean what they say. Properly appreciated, contemporary-rights talk presents its own set of problems, not least, the possibility that much of it is unworkable.<sup>364</sup> Still, consistent with the intuition of Professor Wolterstorff, it may be “a mistake to dismiss or resist inherent rights, as atomizing emanations from the Enlightenment, fourteenth-century nominalism, or the grandiose narcissism that pervades so many Supreme Court decisions.”<sup>365</sup> The necessity of deploying constitutional safeguards to prevent an impermissible impingement of employer’s speech rights takes on added urgency given the fact that the insulated sphere of labor activity presently supervised by the *Machinists* doctrine has not always been free of state regulation.<sup>366</sup> This implies that the present preemption epoch may be merely a prologue to the past.

Returning to the past requires a brief examination of the status of employer-speech rights before the Wagner Act was amended adding section 8(c), which provides explicit protection for employer speech within an organizing context. *Virginia Electric & Power*, as confirmed by the Supreme Court’s subsequent holding in *Thomas v. Collins*, situates employer and labor union efforts to persuade workers to join or refrain from joining a union within the First Amendment’s guaranty.<sup>367</sup> *Virginia Electric & Power* bears witness to the judgment that provably hostile conduct by an employer who suggested that its employees form an “independent” union to bargain on their behalf cannot bar First Amendment protection for employer speech.<sup>368</sup> As part of its campaign, the employer, Virginia Electric & Power Company, “gave impetus to, and assured the creation of, an ‘inside’ organization, and coerced its employees in the exercise of their rights guaranteed by § 7 of the Act.”<sup>369</sup> The NLRB found that company

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<sup>364</sup> Richard W. Garnett, *Righting Wrongs and Wronging Rights*, FIRST THINGS, Oct. 2008, at 48, 48 (reviewing NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS (2007)).

<sup>365</sup> *Id.*

<sup>366</sup> See, e.g., GORMAN & FINKIN, *supra* note 13, at 1103 (citing *Automobile Workers v. Wisconsin Employment Relations Board [Briggs-Stratton]* 336 U.S. 245 (1949) for the proposition that the Supreme Court has not always prevented states from regulating this insulated zone); see also *supra* Part II.

<sup>367</sup> *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945) (citing *Labor Bd. v. Va. Elec. & Power Co.*, 314 U.S. 469 (1941)).

<sup>368</sup> *Va. Elec. & Power*, 314 U.S. at 470–74, 477.

<sup>369</sup> *Id.* at 474.

speeches arranged on company property and on company time as well as a bulletin posted on company property<sup>370</sup> constituted conduct that interfered, restrained, and coerced the company's employees in violation of section 7 of the NLRA.<sup>371</sup> The NLRB "concluded that the Company had committed unfair labor practices within the meaning of § 8 (1), (2), and (3) of the Act."<sup>372</sup> The NLRB issued an order directing the company "to cease and desist from its unfair labor practices and from giving effect to its contract with Independent [inside union]."<sup>373</sup> The court of appeals denied enforcement of the Board's order and petition for writs of certiorari followed.<sup>374</sup>

In its appeal to the Supreme Court, Virginia Electric & Power Co. argued that the bulletin and the speeches on company property could not form the basis of the NLRB's order because such an order is repugnant to the First Amendment. The Supreme Court responded by holding:

Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterance which it has made. The sanctions of the Act are imposed . . . for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue.<sup>375</sup>

Ultimately, this case was sent back to the Board "for a re-determination of the issues."<sup>376</sup> Propositionally, *Virginia Electric & Power* imparts substance to the contention that fear of coercion and even rampant hostility cannot be seen as sufficient to deprive employers of their First Amendment rights, despite the NLRB's early history demanding employer neutrality during organizing campaigns.<sup>377</sup> Thus, contemporary state labor innovation (such as AB 1889), motivated by the employer-hostility thesis, and leading to a correlative endeavor to neutralize employers should have difficulty surviving in the face of this rather clear principle.

Correctly characterized, *Virginia Electric & Power* affirms the proposition that employers have a First Amendment right "to engage in non-coercive speech about unionization."<sup>378</sup> Given the Supreme

<sup>370</sup> *Id.* at 471–74.

<sup>371</sup> *Id.* at 476–77.

<sup>372</sup> *Id.* at 475.

<sup>373</sup> *Id.*

<sup>374</sup> *Va. Elec. & Power*, 314 U.S. at 476.

<sup>375</sup> *Id.* at 477.

<sup>376</sup> *Id.* at 479–80.

<sup>377</sup> See Chamber of Commerce of U.S. v. Brown, 128 S. Ct. 2408, 2413 (2008).

<sup>378</sup> *Id.*

Court's determination that section 8(c) amended the Wagner Act to make manifest Congress's "intent to encourage free debate on issues dividing labor and management,"<sup>379</sup> it is important to note that free debate, to be meaningful, cannot countenance a regime that permits the enactment and enforcement of statutes that deprive only one side of the right to speak.

Decision making energetically tied to the First Amendment stands on the conviction that, as a general rule, intrusions upon the domain protected by the First Amendment can only be supported "if grave and impending public danger requires this."<sup>380</sup> No evidence of a grave and impending danger was presented justifying the enactment of AB 1889, and hence this statute ought to be forcefully disallowed pursuant to First Amendment norms. The weight of First Amendment scrutiny is fortified by noting that corporations and other employers have full constitutional speech rights,<sup>381</sup> which protect them "from unlawful state deprivations of liberty."<sup>382</sup> This gives rise to the desirable inference that the First Amendment ought to act as a bulwark against state labor regulation that intrudes on this right and implies that statutory protection of employer speech rights can be seen, at least in part, as a gratuitous enactment.

Still, whether statutory protection is gratuitous or not, neutrality as a malleable concept overhangs this debate. This concept is difficult because there is an interminable character of much of what passes for Americans' contemporary moral and philosophical debates.<sup>383</sup> The ever-increasing scope of these debates and the profound depth of cultural division combine to reflect a "clash of orthodoxies" on a number of levels.<sup>384</sup> Thus, reaching agreement on something as essential as the meaning and shape of neutrality in societies proffering a continued allegiance to liberalism is apt to be challenging. The complexity of such a venture may succumb to ambiguity.

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<sup>379</sup> *Id.* (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966)).

<sup>380</sup> *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

<sup>381</sup> *McConnell v. FEC*, 540 U.S. 93, 256–59 (2003) (Scalia, J., concurring in part and dissenting in part) (stating that the true interpretation of *Bellotti* means that corporations have full constitutional speech rights).

<sup>382</sup> Baworowsky, *supra* note 29, at 1748.

<sup>383</sup> MACINTYRE, *supra* note 24, at 226.

<sup>384</sup> ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* (2001); see also Harry G. Hutchison, *Shaming Kindergarteners? Channeling Dred Scott? Freedom of Expression Rights in Public Schools* 56 CATH. U. L. REV. 361, 361–68 (2007).

Consider the Ninth Circuit's assertion that neutrality is made concrete by preventing employers from using state funds when employers "attempt to influence employee choice about whether to join a union."<sup>385</sup> Relying primarily on statutory analysis, the Ninth Circuit finds that both prongs of the preemption doctrine are inapplicable despite evidence demonstrating that the State of California has attempted to regulate labor, compounded by unmistakable evidence showing that the restrictions on the use of state funds are excused if and when the employer takes steps to voluntarily recognize the union. To be sure, the Supreme Court disagrees with the Ninth Circuit's assessment of neutrality, finding employer speech within the preemptive remit of the NLRA. Accordingly, assertions of state neutrality could not defend a statute that does not appear to be neutral on its face or as applied.

However, it is also true that this dispute regarding the permissible reach of AB 1889 provides further proof that when state policies are contested within boundaries furnished by liberal societies, the elastic language of neutrality<sup>386</sup> has its uses and in some quarters it may have many definitions. Given an unsettled world wherein modern states fail to protect the public interest, conflict regarding the provision of private preferences of collusive interest groups may be a null hypothesis. In such a world, state neutrality may be a difficult if not impossible proposition to sustain. Further support for this deduction can be found because of the existence of viable federal statutes. Like AB 1889, these statutes restrict the use of federal funds to assist, promote, or deter union organizing. Implicitly, the Supreme Court accepted the neutrality of such federal statutes, which arguably provided private benefits, by relying on the contestable contention that a few isolated restrictions fail to alter the wide contours of federal labor policy.<sup>387</sup> This development may expose the Supreme Court to the charge of hypocrisy.

Any kind of interpretation—statutory or constitutional—existing outside a boundary cabined by a shared understanding of truth, liberty, and justice unavoidably prepares liberal-legalist societies for a dead end: despotism<sup>388</sup> designed to support largely private beneficia-

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<sup>385</sup> Chamber of Commerce of U.S. v. Lockyer, 463 F.3d 1076, 1084 (9th Cir. 2006).

<sup>386</sup> For a less elastic conception of neutrality, see *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353 (4th Cir. 1991), which refuses to defer to a West Virginia law that exempted labor activity from state trespass law. See also Estlund, *supra* note 34, at 341 ("What West Virginia saw as neutrality, the Fourth Circuit viewed as state partisanship favoring labor.").

<sup>387</sup> See *supra* Part IV.C.

<sup>388</sup> LOUGHLIN, *supra* note 1, at 5.

ries. At the same time, Richard Pildes contends that the “most urgent problem in the design of democratic institutions today is how best to design such institutions in the midst of seemingly-profound internal heterogeneity, conflict and group difference.”<sup>389</sup> This comment, aimed at resolving differences over ethnic identity, has equally poignant implications for a wide array of issues that coincide with the postmodern conclusion that “our world has fallen apart” and that we live at the end of the neoclassical age as society struggles through feelings of confusion and helplessness that confirm “the ‘real’ world lacks reality.”<sup>390</sup> Coextensively, America faces a continuing struggle among combatants to transmute the existing design of democratic institutions and utilize the power of government, including the courts, to extract largely private benefits. Whether intertwined with statutory preemption analysis, incipient federalism, or constitutional interpretation, liberal democratic states have struggled to fashion and sustain fundamental freedoms, despite the possibility that liberal societies, including our own, are drawn to the conclusion that at least one fundamental freedom—freedom of speech—constitutes an absolute right.<sup>391</sup> While it is clear that employers and corporations have been and continue to be included within the protective envelope provided by the constitutional guarantee of free speech,<sup>392</sup> a struggle to maintain coherence regarding employer speech rights ensues. The contours of this struggle may come into view as an uncompromising surrender to paradox because the freedoms that are emblematic of liberalism—the freedoms of expression, religion, and association—all

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<sup>389</sup> Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 173, 173 (Sujit Choudry ed., 2008).

<sup>390</sup> Fredrick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197–98 (2006).

<sup>391</sup> Evidently, “Justices Black and Douglas championed an absolutist view of free speech,” but a majority of the United States Supreme Court has never adopted it. NOWAK & ROTUNDA, *supra* note 47, § 16.7(b).

<sup>392</sup> See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 767, 785 (1978) (reversing the lower court’s holding that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets and finding no support in the First or Fourteenth Amendments for the proposition that speech, which otherwise would be within the protection of the Constitution, is outside of constitutional protection, simply because its source is a corporation.) Justice Burger concurred in the opinion and judgment stating that “a disquieting aspect of Massachusetts’ position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form—as many do—to carry on the business of mass communications”; suggesting that it may be impossible to distinguish what qualifies and what does not qualify for protection under the state’s approach. *Id.* at 796 (Burger, J., concurring).

appear to require a governmental stance of evaluative neutrality.<sup>393</sup> Properly evaluated, freedom of expression for those with whom the government agrees is not freedom of expression.<sup>394</sup>

The implications of that observation provide constitutional ground to defend actual neutrality as a concept in practice rather than a cramped and largely rhetorical notion that shelters innovative state legislation and adjudication, whenever shelter is desired. Still, it is worth noting that neutrality may be a stance that is impossible to sustain in practice. Employer freedom-of-speech rights, which rest on the Constitution, ought to rest more securely than speech rights, which depend solely on statutory analysis. However, problems remain. Larry Alexander noticed that any philosophical account of political morality must take a stand on what is true, right, and valuable and what is not.<sup>395</sup> Despite the fact that free speech occupies a “preferred position” compared to the majority of rights in the U.S. Constitution,<sup>396</sup> and despite the frequent invocation of the claim that government officials when legislating or adjudicating are engaged in an ongoing effort to maintain neutrality, the state “will and must be ‘partisan’ in favor of its own conclusions. Thus, it must regard as error and possibly malign those ideas that it rejects.”<sup>397</sup> Without a shared understanding of truth, justice, and liberty, it is unlikely that a way can be found to resolve such disputes on terms that all will agree are just. It is not clear that the Constitution can be relied upon in a society where doubts flourish about the possibility of attaining philosophical liberalism<sup>398</sup> and where political liberalism may be “devoid of deep conviction.”<sup>399</sup>

These various developments may give rise to pessimism and provide a negative answer to Professors Scaperlanda and Collett’s haunting question: “[H]ow can ‘law’ . . . facilitate America’s ongoing experiment with representative self-governance” if society “[has] lost its shared moral foundations?”<sup>400</sup> Though *Chamber of Commerce*, in all of

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<sup>393</sup> LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION 148 (2005).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> NOWAK & ROTUNDA, *supra* note 47, § 16.7(a).

<sup>397</sup> ALEXANDER, *supra* note 393, at 148–49.

<sup>398</sup> Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. OF CONTEMP. LEGAL ISSUES, 625, 625 (2002) (citing Stanley Fish, *Mission Impossible: Setting the Just Bounds between Church and State*, 97 COLUM. L. REV. 2255 (1997)).

<sup>399</sup> *Id.*

<sup>400</sup> Michael A. Scaperlanda & Teresa Stanton Collett, *Introduction to RECOVERING SELF-EVIDENT TRUTHS* 1, 2 (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

its permutations but particularly the Ninth Circuit's opinion, illustrates the difficulty of settling disputes about statutory interpretation, the implications of this difficulty come alive with equal force with respect to constitutional analysis. It is unlikely that a liberal democratic state can sustain its ostensibly neutral stance on anything, including union organizing, unless it recaptures what is arguably missing in American society: a shared understanding of essentials, such as truth, because it is not possible to live in a democratic society that papers over deeply antagonistic world-views, except temporarily. This quandary implies that endless elucidation may be the looming destination of all debates, including the employer free speech wrangle.

## VI. CONCLUSION

"From the beginning or, to be more precise, from the time of Plato to that of Voltaire, human diversity was judged in the court of fixed values. Then came Herder, who turned things around. He had universal values condemned in the court of diversity."<sup>401</sup> As the nation embraces diversity, internal heterogeneity characterizes America's democracy. Diversity, specifically in its cosmopolitan form and particularly in all of its dimensions, suggests an obvious conclusion to the resolution of conflicts over fundamental rights and freedoms: the impossibility, if not the undesirability, of reaching a consensus that represents universal claims regarding justice, truth, and liberty. Americans now make up a culture that verifies philosopher Chantal Delsol's rich description of a postmodern "society that is waiting, but does not know what it is waiting for."<sup>402</sup> Though liberty may "promote individual and social progress"<sup>403</sup> coextensively with the boundary administered by eternal vigilance, it is improbable that preemption analysis tied to statutory interpretation of the NLRA or constitutional adjudication that concentrates on fundamental freedoms can offer hope for a permanent resolution of society's budding debates. As such, employer free speech rights, however justifiable and desirable, face an indeterminate future.

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<sup>401</sup> FINKIELKRAUT, *supra* note 346, at 9.

<sup>402</sup> CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD*, at xxvii (2003).

<sup>403</sup> Patrick Hayden, *Introduction* to JOHN STUART MILL, *ON LIBERTY*, at vii, xiii (2004).