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"Speak, Go Ahead, Speak, Speak": Chamber of Commerce v. Brown's Effect on Employment Speech Regarding Unionization

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"Speak, Go Ahead, Speak, Speak"[1]: *Chamber Of Commerce v. Brown's* Effect on Employer Speech Regarding Unionization

By Lauren Kadish*

I. INTRODUCTION

Unionization rates have drastically fallen in the public sector, from 33% of American workers in 1955, to less than 8% today.[2] For years, labor law has provided businesses with statutory support of employers' free speech regarding unionization efforts. Union advocates blame the difficulties of expanding union membership on businesses' improved skills in deterring workers from unionization and the sheer intimidation of their position as the employer. Thus, unions have turned their focus toward implementing procedures making union organization easier in order to increase membership and ultimately protect workers' freedom to freely choose representation. Recent case law promotes employer rights to speak freely and deter unionization; however, the question remains as to how this will ultimately affect employees' free choice in regard to unionization.

The National Labor Relations Act (NLRA) was enacted in 1935 to establish federal guidelines regarding the relationship between labor unions and management and to provide uniform federal regulations of employer conduct.[3] The Act only imposed strict

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1. Transcript of Oral Argument at 6, Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008) (No. 06-939).

2. *See* Press Release, Bureau of Labor Statistics, Union Members in 2008 (Jan. 28, 2009), http://www.bls.gov/news.release/union2.nr0.htm.

3 29 U.S.C. § 151 (2000).

regulations on employers and their ability to speak on unionization, but contained no provisions forbidding unfair labor practices of unions.[4] Thus, Congress passed the Labor Management Relations Act (LMRA) in 1947 as a reaction to the growing imbalance of power.[5] The amended NLRA implemented the congressional intent to encourage free debate on issues regarding organized labor and management.[6] Furthermore, section 8(c) of the NLRA expressly guaranteed the employer the right to speak freely in discouraging union representation, as long as the speech was noncoercive.[7]

In recent years, legislation regulating an employer's use of state funds to assist or deter union organization at the state and local level has become very popular with unions attempting to curtail employer speech in opposition to unionization. Responding to a decline in union membership, lack of enforcement of NLRA provisions by the National Labor Relations Board, and apparent inefficiency of the NLRA to protect workers' basic rights, organized labor has focused its efforts on enacting state and local legislation to supplement regulation where federal law is silent. As a result, the question has been raised in the courts as to whether or not this legislation is preempted by the NLRA.

The Supreme Court of the United States granted certiorari on the issue of whether a California statute (AB 1889) restricting the speech of employers receiving state funds was preempted by the NLRA.[8] The NLRA preempts state regulation interfering with Congress' intention that certain activities be left to the free play of economic forces. The Supreme Court's ultimate decision, analyzed further in Part IV, reinforces the NLRA's preemptive power over state regulation of employer speech. The Court's decision will also have a profound impact on organized labor's recent efforts to ease the path to unionization.

This case note examines the analysis of the Supreme Court's holding in *Chamber of Commerce. v. Brown* and the effect the decision will have on the rights of employers to engage in

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4. *Id.*

5. 29 U.S.C. § 141.

6. S. REP. NO. 74-573, at 2312 (1935).

7. 29 U.S.C. § 158(c) (2000); NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941).

8. *Chamber of Commerce*, 128 S. Ct. at 2408.

noncoercive speech regarding unionization. Part II discusses the historical lineage of employer free speech guaranteed under the NLRA. Part III denotes the relevant facts and procedural history of the case and issues presented to the Supreme Court. Part IV analyzes both the majority and dissenting opinions regarding NLRA preemption over state regulations prohibiting the expenditure of state funds by employers to deter union organization. Finally, Part V considers the effect this Court's decision will have on unions' legislative initiatives to curtail employer speech and the practical implications of allowing or limiting employer speech regarding representation elections and organization.

II. HISTORICAL BACKGROUND

The NLRA was enacted in 1935 to alleviate obstructions to the free flow of commerce "by encouraging the practice . . . of collective bargaining and by protecting the exercise . . . of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[9] The NLRA, also known as "The Wagner Act," created a federal agency, the National Labor Relations Board (NLRB), to have exclusive jurisdiction over controversies that are within the provisions of the NLRA and related to protecting concerted activities and preventing unfair labor practices.[10] Sections 7 and 8 of the NLRA provide uniform federal regulation of the relationship between labor unions and management.[11]

Sections 7 and 8 of the NLRA are "designed to protect and establish the basic rights incidental to collective bargaining."[12]

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9. 29 U.S.C. § 151 (2000).

10. 29 U.S.C. § 153 (2000). The NLRB was created to carry out the purposes Congress declared in sections 7 and 8 of the NLRA, eliminating obstructions to the free flow of commerce by encouraging collective bargaining and protecting employee's rights to negotiate terms of their employment by associating and organizing with other employees. NLRB v. Wash., Va. & Md. Coach Co., 85 F.2d 990 (4th Cir. 1936), *aff'd* 301 U.S. 142 (1937). *See also* Balt. Sun Co. v. NLRB, 257 F.3d 419 (4th Cir. 2001) (holding that the NLRB has the power to define the representative appropriate to the unit for collective bargaining).

11. 29 U.S.C. § 151.

12. S. REP. NO. 74-578, at 2308 (1935).

Section 7 provides that workers have the right to join or form unions, bargain collectively with employers about terms and conditions of employment, and work in concert with other employees in order to achieve employment-related goals.[13] Section 8 makes it an "unfair labor practice" for employers to "interfere with, restrain, or coerce employees" who are exercising their rights guaranteed by section 7.[14] To determine whether conduct of an employer constitutes an unfair labor practice, the NLRB looks to the relevant facts and circumstances of the particular case.[15] Generally, to establish a violation of section 7 rights, the NLRB must find the employer's actions intimidating to a reasonable employee.[16]

The NLRB, created under the NLRA to strictly regulate employers, decided that employer speech about unionization amounted to a form of coercion precluded by section 8 of the NLRA.[17] Even though the Supreme Court decided in *NLRB v. Virginia Electric & Power Co.* that an employer was not prohibited

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13. 29 U.S.C. § 157 (2000).

14. 29 U.S.C. § 158(a)(1).

15. *See* NLRB v. Link-Belt Co., 311 U.S. 584, 599-600 (1941) (finding that the free choice of the employee was obstructed by the employer's failure to announce impartiality, delay in advising supervisors to remain neutral until the union obtained majority, past union policy, and favorable treatment of the union, thus amounting to interference with fair union organization); NLRB v. Ill. Tool Works, 153 F.2d 811 (7th Cir. 1946) (holding that an employer whose assistant factory manager questioned employees about union membership, whose assistant foreman told employees to stop talking to the union, and whose factory manager was only discussing complaints with individuals not involved in a union engaged in unfair labor practices in violation of the NLRA); NLRB v. Am. Furnace Co., 158 F.2d 376, 379 (7th Cir. 1946) (employer's approval of mayor's speech on employer's premises during work hours discouraging union organization violated the NLRA as an unfair labor practice).

16. *See Ill. Tool Works*, 153 F.2d at 814-16 (holding that the test of employer's interference, restraint, and coercion of employees engaging in union activities is not the motive, success, or failure of the action, but whether the employer engaged in conduct that a reasonable employee would find to interfere with their rights to engage in union activities); NLRB v. William Davies Co., 135 F.2d 179, 181 (7th Cir. 1943) ("[t]he slightest interference, intimidation or coercion by the employer of the employees in the rights guaranteed to the employees by the statute constitutes an unfair labor practice in violation of Section 8(1) of the Act.").

17. *See William Davies Co.*, 135 F.2d at 181.

from expressing noncoercive views on labor issues,[18] there were no provisions recognizing abuse on the part of unions or forbidding unfair labor practices of unions.[19] In other words, the NLRA provided protection to the employee against unfair actions by his employer, but there were no protections against similar actions by a labor organization, making the Act biased toward organized labor. As a result, Congress amended the NLRA by enacting the Labor Management Relations Act (LMRA) in 1947 to set forth additional policies affording protections to employers and additional protections to employees.[20]

In the context of unfair labor practices, the LMRA amended sections 7 and 8 of the NLRA to protect the rights of workers to join or not to join a union, outlined additional restrictions on unions, and guaranteed employers and employees the right to engage in noncoercive speech about unionization.[21] Specifically, section 158(c) of the LMRA provides that:

> [t]he express[ion] of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such

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18. *Va. Elec. & Power Co.*, 314 U.S. at 477. The NLRA does not enjoin "the employer from expressing its views on labor policies or problems," provided the speech does not amount to coercion within the meaning of the NLRA. *Id.* This holding recognizes the employer's First Amendment rights to noncoercive speech in regard to unionization. *Id.*

19. *See* NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945) (finding that contrary to a general misconception, the NLRA was originally intended to grant "rights to the employee rather than . . . grant[ing] . . . power to the union.").

20. 29 U.S.C. § 141 (2000). The LMRA amended the NLRA to (1) exclude supervisors from the definition of "employee;" (2) separate prosecutorial and adjudicatory powers of the NLRB by appointing an independent General Counsel; (3) guaranteeing employees the right to refrain from union activities; (4) proscribing certain activities of unions as unfair labor practices; and (5) guaranteeing employers rights of free speech. *See* 29 U.S.C. §§ 152(3), 153(d), 157, 158(b), and 158(c).

21. 29 U.S.C. § 158(a)-(c).

> expression contains no threat of reprisal or force or promise of benefit.[22]

To some extent, the LMRA may be viewed in part as a codification of the Court's holding in *Virginia Electric*, where the Supreme Court held that the NLRA allows an employer to exercise its right of free speech under the First Amendment of the United States Constitution, provided the speech is noncoercive and does not amount to intimidation.[23] This section "merely implements the First Amendment" by requiring that statements cannot be used as evidence of an unfair labor practice if they do not interfere, restrain, or coerce employees in their determination of self-organization.[24]

Additionally, the amendment to section 8 of the NLRA implemented a congressional intent to encourage free debate on issues regarding labor and management.[25] Even those opposed to the provision did not take issue with the basic idea of free speech rights,[26] opposing only the fact that there is no other field of law that

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22. 29 U.S.C. § 158(c). Under the ruling in *Virginia Electric*, the Supreme Court made it clear that the NLRB has the right to look at both what an employer has said and done to determine whether it interfered with the employee's selection of representation. *Va. Elec. & Power Co.*, 314 U.S. at 477-78. The wording in the amendment to 29 U.S.C. § 158 indicates that this section is not designed to serve the interest of free debate by immunizing *all* statements made during negotiations or labor debates. 29 U.S.C. § 158(c). Instead, section 8(c) provides that the expression of views will not be evidence of unfair labor practices if it does not contain a threat of "reprisal or force or promise of benefit." *Id.* This wording makes it more likely that Congress adopted the section for a more narrow purpose like preventing the NLRB from attributing an anti-union motive to an employer because of previous or past statements made without threat of retaliation. *See* H.R. REP. NO. 80-510, at 1135 (1947).

23. *Va. Elec. & Power Co.*, 314 U.S. at 477.

24. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969).

25. S. REP. NO. 74-573, at 2312 (1935). "It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." *Id.*

26. H.R. REP. NO. 80-245, at 114 (1947) (Suppl. Minority Rep. by Hon. John F. Kennedy). Opponent Representative John F. Kennedy, declared that "there should be a readjustment of the collective-bargaining processes so that collective bargaining will be really free and equal and in good faith on both sides." *Id.*

excludes statements "as evidence of an illegal intention."[27] By choosing to amend the NLRA, rather than leave the issue open to the courts to decide on a case-by-case basis, Congress indicated the importance of leaving labor and management dispute issues open to free debate.[28]

In 2000, the California legislature enacted AB 1889 to curb the growing problem of aggressive anti-union campaigns being financed with taxpayer money throughout the state.[29] The bill fundamentally prohibited employers receiving a certain amount of state funding from using the state money to "assist, promote, or deter union organizing."[30] Essentially, the statutory language, "assist, promote, or deter" was defined as "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding . . . (1) [w]hether to support or oppose a labor organization that represents or seeks to represent those employees . . . [or] (2) [w]hether to become a member of any labor organization."[31] This regulation applied to private employers receiving over ten thousand dollars in state funds in any given year, any employer receiving a state contract for over fifty thousand dollars, and any private employers who are recipients of state grants.[32] Additionally, all employers were prohibited from using businesses located on state property to hold meetings addressing unionization, and state contractors cannot assist, deter, or promote union organization by employees who are performing work on state contracts.[33] Litigation opportunities were increased by providing for

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27. *Id.* at 84-85.

28. *See* Linn v. United Plant Guard Workers, 383 U.S. 53, 62-63 (1966) ("the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth."). Debate on public issues should remain uninhibited and wide-open. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

29. *See* Cal. Bill Analysis, Senate Floor, 1999-2000 Regular Session, Assembly Bill 1889 (Aug. 25, 2000).

30. CAL. GOV'T CODE § 16645.1(a) (2009).

31. CAL. GOV'T CODE § 16645(a).

32. CAL. GOV'T CODE § 16645.7(a).

33. CAL. GOV'T CODE §§ 16645.3, 16645.5. Employers have to certify that no state funds are used for prohibited expenditures and provide on request sufficient records detailing their expenditures. *Id.* If any state funds are commingled with other funds, then "any expenditures to assist, promote, or deter union organizing

dual enforcement, allowing both a civil action by the attorney general or by an individual taxpayer.[34] In addition, penalties for noncompliance by the employer were also increased.[35]

Supporters viewed the bill as providing state neutrality in the area of union organization.[36] Realizing that a neutrality bill would not completely dissolve anti-union campaigns, the supporters of the legislation were at least assured that the bill would keep campaigns from being funded with state funds.[37] The bill did not require employers to remain entirely neutral during organizational campaigns; it just required them to use personal funds in the opposition or promotion of unions.[38] If the state allowed employers to use state money to oppose union organization, then the state would be viewed as choosing sides in private labor disputes; therefore, supporters viewed this bill as providing state neutrality, rather than employer neutrality.[39]

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shall be allocated between state funds and other funds on a pro rata basis." CAL. GOV'T CODE § 16646(b).

34. CAL. GOV'T CODE § 16645.8(a).

35. CAL. GOV'T CODE § 16645.2(d). Penalties for violations are harsh, and a non-complying employer is liable to the state for the funds spent in violation of the statute and a civil penalty equal to twice the amount of the funds used in violation. *Id.* Additionally, prevailing plaintiffs are entitled to attorney's fees and costs in order to encourage complaints to surface without fear of costly legal fees. CAL. GOV'T CODE § 16645.8(d).

36. *See* JOHN LOGAN, INNOVATIONS IN STATE AND LOCAL LABOR LEGISLATION: NEUTRALITY LAWS AND LABOR PEACE AGREEMENTS IN CALIFORNIA 160 (2003).

37. *Id.*

38. *Id.* at 162. Employers receiving state funds and incurring costs associated with possible prohibited activity are required to maintain sufficient financial records showing the costs were not paid by or reimbursed by state funds. CAL. GOV'T CODE § 16645.1(b) (2009). Fund recipients must "account for all monies received, and certify that no prohibited activity occurred; if involved in such activity, fund recipient must account separately for those expenditures." Cal. Bill Analysis, Senate Floor, 1999-2000 Regular Session, Assembly Bill 1889 (Aug. 25, 2000).

39. Logan, *supra* note 36, at 160. AB 1889 was not promoted as "neutrality" legislation requiring that employers remain entirely neutral during organizational campaigns. *Id.* at 162. Supporters of the bill note that because employers are still allowed to use private funds to launch anti-union campaigns, the statute enables the state of California, not employers, to remain neutral in regard to labor-management disputes. *Id.* By preventing the state from funding employers' opposition of

Those in opposition to the bill, primarily employers, viewed the regulation as an infringement on the employer's constitutional right of free speech that is protected by the amended section 8(c) of the NLRA.[40] Employers were required to maintain sufficient records to prove that state funds were used properly, and opponents argued that this would create a complex accounting system forcing employers into remaining neutral in order to comply with AB 1889.[41] Regardless of the outlined opposition, however, the California legislature enacted AB 1889 in September of 2000.[42]

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unions, this bill kept the state neutral in private labor disputes. *Id.* In 1999, California attempted to enact a state neutrality law, similar to AB 1889, but the governor vetoed it because the requirements for record keeping potentially "impose[d] an unreasonable burden" on corporations and increased employer litigation costs by increasing the opportunities for employees to file civil actions. Gray Davis, "AB 442: Veto Message" (1999). In response to the veto, supporters of the bill removed some of the record keeping requirements, limited the application of the bill, provided limitations on civil actions brought by potential plaintiffs, and added language that state funds could not be used to "promote or deter unionization." Logan, *supra* note 36, at 161. The employers in opposition to AB 1889 claimed that it was virtually the same as the previous bill vetoed by the governor and most importantly criticized the supposed neutrality of AB 1889 because of the additional limitations on employer speech in regard to unionization. *Id.* Primarily, opponents saw the bill as being focused on curbing opposition to unionization rather than the employer's support for unions. *Id.* AB 1889 was proposed as a revised version of the attempted state neutrality law of 1999. *Id.*

40. Logan, *supra* note 36, at 163. Opponents argued that the real intention of the bill was to eliminate employer opposition of union organization, which involves a clear violation of the NLRA and a constitutional violation of the employer's First Amendment rights of free speech. *Id.* Additionally, they argued that the true intent was to mandate employer neutrality in order to increase unionization among employees. *Id.* at 165.

41. *Id.* at 164. Employers argued that these additional requirements would have an impact on business performance and a devastating impact on those industries that are heavily reliant on the use of state funds. *Id.* Small businesses that could not afford to keep up with the record keeping accounting requirements would either go out of business or move out of the state to avoid these requirements. *Id.*

42. *Id.* at 171. In the twenty months that AB 1889 was effective, there were only twenty-four complaints filed by unions against employers alleging misappropriation of state funds for prohibited activities, which greatly undermined employers' opposition and claims that the bill would have a devastating effect on California businesses. *Id.* Among the activities that these employers were accused of engaging in was the hiring of consultants and law firms to direct anti-union campaigns, paying supervisors to conduct mandatory anti-union meetings at the

After the enactment of AB 1889, the question arose in the courts as to whether or not this state legislation is preempted by federal statute. The NLRA derives its general preemptive power from the Supremacy Clause of the United States Constitution, providing that all laws made in pursuance of the Constitution are the supreme law of the land and judges in state courts will be bound by these federal laws when faced with contrary state laws.[43] A prerequisite to preemption is a "finding that the state or local action in question constitutes regulation of labor relations between employers and employees" because the NLRA does not preempt statutes where the state is acting as a mere proprietor or market participant.[44] Provided the court finds that the state is acting in a regulatory capacity and the exercise of state power over a particular area or activity interferes with or contrasts with the policies embodied in the NLRA, the United States Constitution may preclude the respective state law. Sometimes the congressional intent of federal preemption is stated within in the statutory language of the federal law; however, the NLRA does not explicitly contain a preemption provision. Thus, the Supreme Court has interpreted the NLRA and its corresponding congressional intent to give rise to two preemption principles,

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workplace, and creating and distributing anti-union literature. *Id.* The complaints alleged that the employer was a recipient of state funds, had engaged in the prohibited activities, and did not maintain sufficient accounts to demonstrate they were in fact complying with AB 1889. *Id.* However, very few of these complaints were actually investigated by the attorney general. *Id.* at 176.

43. U.S. CONST. art. VI, cl. 2.

44. *See* Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1413 (9th Cir. 1996); Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 227 (1993). While there is not a formal rule for applying the market participant exception, two Supreme Court cases have helped to define the scope of the exception. *See* Wisc. Dep't. of Indus. Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986) (a Wisconsin statute regulated spending powers by providing additional remedies for violations of the NLRA and the state was held to be acting in a regulatory capacity and not privy to the market participant exception); *Boston Harbor*, 507 U.S. at 227 (state agency acted as a market participant when requiring contractors to agree to specific terms of a project labor agreement because the government was motivated purely by proprietary interests). When a state uses its spending power to shape the overall labor market in a regulatory manner, the market participation exception will not apply and the state action may be subject to NLRA preemption. Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) *reh'g granted and withdrawn*, 408 F.3d 590 (9th Cir. 2005).

Garmon preemption doctrine[45] and *Machinists* preemption doctrine.[46]

In *Garmon*, the court reasoned that by enacting the amendments of the LMRA, Congress did not exhaust the full sweep of legislative power over industrial relations; instead, it created a code outlawing some aspects of labor activities and leaving others "free for the operation of economic forces."[47] The *Machinists* doctrine precludes state and municipal regulation in regard to these areas that Congress intended to be left unregulated.[48] Under this ruling, the Supreme

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45. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). This decision precludes state and municipalities from regulating activity that is already protected or prohibited by the NLRA. *Id.* at 235. The aim of the *Garmon* test of preemption is to provide a uniform federal law governing labor relation issues under the regulation of a single agency, the NLRB. *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613 (1986) (holding that "[t]he *Garmon* rule is intended to preclude state interference with the [NLRB]'s interpretation and active enforcement . [of] the NLRA."). This broad test excludes state laws even where the terms of the state laws are consistent with that of the NLRA. *See Gould*, 475 U.S. at 282 (state law barring individuals or businesses found to violate the NLRA on three or more occasions in the preceding five years from doing business with the state was preempted by federal law). More importantly, preemption will result if state regulation significantly affects NLRA rights or procedures, bans conduct permitted by the NLRA, or interferes with the NLRB's jurisdiction. *See* Youngdahl v. Rainfair Inc., 355 U.S. 131 (1957) (holding that a state court may enjoin violence on a picket line, but it is preempted from enjoining peaceful picketing that is protected under the provisions of the NLRA); Sears, Roebuck, & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (holding that a state court trespass action to enjoin picketing on private property may be preempted where the NLRB has jurisdiction to decide whether the content of the picketing is protected by the NLRA and is thus an unfair labor practice).

46. Int'l Assoc. of Machinists & Aerospace Workers v. Wis. Employment Relations Comm. (*Machinists*), 427 U.S. 132, 134 (1976).

47. *Garmon*, 359 U.S. at 240. Under *Garmon*, the federal statute does not preempt state regulation of activity that does not go to the heart of the regulations or purposes served by the NLRA. *Id.* at 243-44.

48. *Machinists*, 427 U.S. at 134. In this case, an employer filed a charge with the NLRB claiming that union members' refusal to work overtime during negotiations for the renewal of their collective bargaining agreements constitutes an unfair labor practice. *Id.* at 135. Because the claim was dismissed on the ground that it did not violate the NLRA and was not enforceable by the NLRB, the employer filed a complaint with the Wisconsin Employment Relations Commission that issued an order against the union to cease their concerted refusal to work overtime. *Id.* at 135-36. The Supreme Court held that the union's activity was peaceful conduct that must be free of state regulation because it conflicts with the

Court held that a state cannot regulate conduct, as long as it is within the zone of activity that Congress intended to leave open to the free market.[49] The *Machinists* preemption doctrine is limited and does not preempt state action when it is in the nature of "market participation."[50] The primary application of this preemption principle arises when the state issues a regulation of economic weapons used by the parties involved in a labor dispute.[51] Allowing

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congressional intent that self-help economic activities, of either the employer or the employee, are not to be regulated by the NLRB or the states. *Id.* at 155. Neither the states nor the NLRA have the authority to attempt to introduce a balanced standard of bargaining power or define the economic functions permitted in negotiating for or against collective bargaining. *Id.* at 132. *See also* NLRB v. Insurance Agents, 361 U.S. 477, 498-500 (1960).

49. *Machinists*, 427 U.S. at 155. *See also Insurance Agents*, 361 U.S. at 488-89 (holding that a particular activity might be protected by federal law when it falls under section 7 and when it is an activity Congress intended to be "unrestricted by any governmental power to regulate."); Hanna Mining Co. v. Marine Eng'rs, 382 U.S. 181, 187 (1965) ("[T]he legislative purpose may dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation . .").

50. *See Boston Harbor*, 507 U.S. at 227. A state does not only regulate within the areas protected by the NLRA, and when a state owns and manages property, they must interact with private participants in the marketplace. *Id.* In *Gould*, the court was faced with a state agency's attempt to compel conformity with the NLRA by not allowing individuals who had violated provisions of the NLRA within the past five years from doing business with the state. *Gould*, 475 U.S. at 289-90. The court held that the state was not functioning as a private purchaser of services or goods, and thus its actions amounted to regulation and preempted by the NLRA. *Id.* at 290. The Supreme Court ruled that a state may take action without offending the preemption principles of the NLRA if it is acting as a proprietor and the conduct does not amount to regulation or policy making. *Boston Harbor,* 507 U.S. at 229-30.

51. *Machinists*, 427 U.S. at 141. Certain activity that is neither protected nor prohibited under the NLRA may also be privileged against state regulation because it is a permissible "economic weapon in reserve, . . . actual exercise (of which) on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Id.* (quoting *Insurance Agents*, 361 U.S. at 488-89). Courts have invoked the *Machinists* preemption to strike down state regulation of work slowdowns, the hiring of replacement workers, and a party's refusal to agree to bargaining demands. *See* Employer's Ass'n v. United Steelworkers, 32 F.3d 1297 (8th Cir. 1994) (ruling that state law prohibiting the hiring of permanent replacements to fill positions left empty by strikers was preempted); Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (holding that a city council resolution requiring a taxi company franchise to

both the employer and employee to properly employ economic weapons is an integral part of the effort to achieve bargaining goals and part of the balance struck by Congress "between the uncontrolled power of management and labor to further their respective interests."[52] Thus, provided a state is acting in its capacity as a regulator and the proposed regulation concerns issues intended by Congress to be unregulated in the promotion of the free play of economics, the state regulation should be preempted by the NLRA under the *Machinists* theory.

III. FACTS AND PROCEDURAL POSTURE

In April 2002, several organizations involved in business with the State of California (collectively, Chamber of Commerce) brought suit in the United States District Court for the Central District of California against the California Department of Health Services and several state officials, including Attorney General Bill Lockyer, to prevent the enforcement of AB 1889.[53] Two labor unions, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and California Labor Federal, intervened to defend the validity of AB 1889.[54] Plaintiffs filed a motion for summary judgment arguing that AB 1889 was both unconstitutional under federal and state constitutions and preempted by the NLRA.[55] Based on the Supreme Court's holding in *Linn v. United Plant Guard Workers of America*[56] that the enactment of NLRA section 8(c) marked a "congressional intent to encourage free debate on issues dividing labor and management," the District Court found that AB

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end its strike and adopt a labor agreement in order to renew its franchise was preempted).

52. Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 258-59 (1964).

53. Chamber of Commerce v. Lockyer (*Lockyer I*), 225 F. Supp. 2d 1199, 1201 (C.D. Cal. 2002).

54. *Id.*

55. *Id.*

56. Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 62 (1966).

1889 was preempted by the NLRA because it would prevent free debate.[57] Plaintiff's motion for summary judgment was granted.[58]

Defendants appealed the District Court's grant of summary judgment to the Ninth Circuit in April of 2004.[59] The initial panel affirmed the District Court's ruling that AB 1889 was preempted under the *Machinists* doctrine because "California – acting as a regulator, not a proprietor in imposing these restrictions – has acted in such a way as to undermine federal labor policy by altering Congress' design for the collective bargaining process."[60] The language of the statute was found by this panel to regulate "the union organizing process itself and [impose] substantial compliance costs and litigation risk on employers who participate in that process," thus

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57. *Lockyer I*, 225 F. Supp. 2d at 1204-05. Parties did not dispute that the definition of "assist, promote or deter union organizing" included "attempts by the employer to influence employee decisions through speech" while the employer is being compensated by state funds or on state property. *Id.* The court held that AB 1889 is preempted because by definition it regulated employer speech about union organization, an area that Congress intended to leave open to free debate. *Id.*

58. *Id.* at 1201.

59. Chamber of Commerce v. Lockyer (*Lockyer II*), 364 F.3d 1154 (9th Cir. 2004) *reh'g granted and withdrawn*, 408 F.3d 590 (9th Cir. 2005).

60. *Id.* at 1159. The prerequisite for a preemption analysis is a finding that the statute constitutes regulation of labor relations between employers and employees, as opposed to state action in the capacity of a mere proprietor or market participant. *See supra* note 44 and accompanying text. This court used the Fifth Circuit's two-prong test to determine whether the market exception applied to the State of California in the enactment of AB 1889. *Lockyer II*, 364 F.3d at 1162 (citing Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999)). The first prong looks at the nature of the expenditure to determine whether the "action essentially reflect[s] the entity's own interest in the efficient procurement of needed goods and services." *Id.* Here, AB 1889 did not reflect California's interest in the procurement of goods and services, but rather prevented "the state from influencing employee choice about whether to join a union." *Id.* at 1163. The second prong looks at the scope of the expenditure, where a narrow scope will lean toward market participant and a broader social regulation will be regulatory. *Id.* Here, the court held that the statute "sweeps broadly to shape policy in the overall labor market" rather than addressing a specific proprietary problem. *Id.* Therefore, the Ninth Circuit held that AB 1889 is a regulatory measure that does not enjoy the protection of the market participant exception. *Id.*

interfering with an area that Congress intended to be left open to free debate and preempted under the *Machinists* doctrine.[61]

The Defendants' Petition for Panel Rehearing was granted by the Ninth Circuit, withdrawing its previous panel opinion.[62] Upon rehearing, the majority once more affirmed the District Court's holding that the NLRA preempts AB 1889, but the decision rested on slightly different grounds than the vacated panel decision.[63] The majority concluded that the California statute undermined employer speech rights by compelling employers to take a position of neutrality with respect to labor relations.[64] Requiring an employer to remain

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61. *Id.* at 1165. State regulation is preempted by the NLRA if it "directly targets and substantially affects open employer discussion about unionization, even if such regulation comes in the form of a restriction on the use of state funds." *Id.* at 1167. The Ninth Circuit determined that this California statute had the explicit purpose of interfering with the NLRA's established system for organizing labor unions. *Id.* at 1168. The ability of labor and management to openly advocate for or against union organization is an element of the collective bargaining process and explicitly outlined in section 8(c) of the NLRA. *Id.* at 1165. Thus, because AB 1889 interferes with the collective bargaining process outlined and protected by the NLRA, the California law is preempted under the *Machinist* doctrine. *Id.* at 1166.

62. *Lockyer II*, 364 F.3d 1154 (9th Cir. 2004), *reh'g granted and withdrawn*, 408 F.3d 590 (9th Cir. 2005). A petition for rehearing may be filed under the Federal Rules of Appellate Procedure Rule 40(a). FED. R. APP. P. 40(a) (2009). If a timely petition for rehearing is not filed in the court of appeals, then the party cannot re-raise matters previously decided at the district court level on subsequent appeal. *Id.*; *see also* United States v. Gargotto, 510 F.2d 409, 412 (6th Cir. 1975). The purpose of a petition for rehearing is to ensure that the panel properly considered all relevant information in rendering its decision. *See* Armster v. U.S. Dist. Court for Cent. Dist. of Cal., 806 F.2d 1347 (9th Cir. 1986).

63. Chamber of Commerce v. Lockyer (*Lockyer III*), 422 F.3d 973, 977 (9th Cir. 2005), *reh'g granted and withdrawn*, 437 F.3d 890 (9th Cir. 2006).

64 *Id.* at 978. This court held that "the California statute chills employers from exercising their free speech rights that are explicitly protected by Congress under the [NLRA]. . . [which] undermines the delicate balance established by Congress as between labor unions and employers." *Id.* at 976. This statute pushes employers to implement neutrality, and in turn facilitates union organization. *Id.* at 978. The majority notes that the statute's prohibition on spending state funds to "assist" or "promote" the organization of unions is meaningless because an employer will rarely spend funds encouraging its employees to join or create a union. *Id.* Therefore, the primary effect of the statute is to prevent the expenditure of money to "deter union organizing." *Id.* at 979. Creating compliance burdens, accounting requirements, threat of lawsuits, and heavy penalties for non-compliance, AB 1889 effectively halts employer campaigns to defeat labor organization. *Id.* This is most

neutral is in direct conflict with the NLRA, which explicitly grants employers the right to "articulate, in a non-coercive manner, their views regarding union organizing efforts" under section 8(c).[65] The basis of preemption under this ruling was not only based on the *Machinists* preemption doctrine,[66] but also the *Garmon* doctrine, which asserts that conflicting state regulations do not apply where the conduct is protected or prohibited by the NLRA.[67] *Garmon*

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obvious with employers receiving one hundred percent of their revenues from the state because under AB 1889, they have "no ability whatsoever to exercise their federal statutory rights to communicate their views about a union organizing effort." *Id.* at 980.

65. *Id.* at 982 (footnote omitted). This court held that section 8(c) of the NLRA "explicitly protects the right of employers to express their views about unions and union organizing efforts." *Id.* Clearly expressing that a particular activity is not punishable by the Act is essentially the equivalent of protecting the activity under the Act. *Id.* at 983. Thus, because section 8(c) of the NLRA declares noncoercive employer speech to be non-punishable, this type of employer speech is protected under the regulatory scheme of the Act. *Id.* The Supreme Court of the United States has held that section 8(c), along with the First Amendment, allows an employer to express "any of [their] general views about unionism or any of [their] specific views about a particular union" in a non-coercive fashion. *Id.* (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969)). Thus, the Ninth Circuit has adopted the Fifth Circuit's principle of free speech on union representation matters and that "it is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available." NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 760 (9th Cir. 1967) (quoting Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967)).

66. *Lockyer III*, 422 F.3d at 988. The *Machinists* preemption doctrine is based on the idea that neither the NLRB nor state regulation may determine which specific economic devices of labor management are or are not lawful because Congress intended to leave this area open to free debate. *Id.* Just as the initial Ninth Circuit panel concluded, AB 1889 is preempted by the NLRA under this doctrine because discouraging employers from exercising their protected speech rights operates to disrupt the intentional balance between management and labor. *Id.* at 989. "An essential structural component of the union organizing process as established by the [NLRA] is the ability of management to communicate its views on the merits of unionism, an attribute that AB 1889 disrupts." *Id.*

67. *Id.* at 985. The Supreme Court has held that there are three forms of *Garmon* preemption, depending on the conduct that the state is attempting to regulate: (1) conduct that is actually prohibited or protected by the NLRA; (2) conduct that is arguably prohibited; or (3) conduct that is arguably protected by the NLRA. *Id.*; *see generally Sears, Roebuck & Co.*, 436 U.S. 180. The strongest form of preemption is conduct that is actually prohibited or protected by the NLRA

preemption is intended to prevent state laws from interfering with the NLRB's enforcement of the NLRA.[68] The Ninth Circuit held that AB 1889 "stifle[d] employers' speech rights which are granted by federal law . . . imped[ing] the ability of the [NLRB] to uphold its election speech rules and administer free and fair elections."[69] Judge Fisher disagreed with the majority decision, and argued in dissent that neither the *Garmon* nor *Machinists* preemption applied because "California [was] not actually regulating the speech at issue . . . ."[70]

The Ninth Circuit's second panel opinion was then vacated and withdrawn from publication for reconsideration en banc.[71] The en banc panel reversed the District Court's grant of summary judgment for the plaintiffs, holding that AB 1889 was not preempted by the NLRA and did not interfere with an employer's First Amendment

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because "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [the NLRA,] due regard for the federal enactment requires that state jurisdiction must yield." *Lockyer III*, 422 F.3d 986 (quoting *Garmon*, 359 U.S. at 244).

68. *Lockyer III*, 422 F.3d at 987. "AB 1889 encumbers federally protected speech rights, and in doing so, interferes with the jurisdiction of the [NLRB]." *Id.* at 986.

69. *Lockyer III*, 422 F.3d at 985. Congress directed the NLRB to regulate employer speech and ensure compliance with section 8(c) of the NLRA. *Id.* at 987. AB 1889, however, regulated and discouraged the partisan employer speech that Congress explicitly placed within the jurisdiction of the NLRB. *Id.* This in turn "directly usurps the ability of the [NLRB] to administer elections that will foster fair and free employee choice." *Id.* This court held that Garmon preemption applies because AB 1889 creates a "frustration of national purposes" and regulates "conduct so plainly within the central aim of federal regulation." *Id.* at 988 (quoting *Garmon*, 359 U.S. at 244).

70. *Id.* at 995, *see generally id.* at 994-1006. Judge Fisher based his dissent on his belief that "when a state restricts merely the use of state funds for a given activity – without regulating an employer's ability to pursue that activity with its own funds – the state is not directly regulating that activity." *Id.* at 995. Because the dissent held that California is not actually regulating speech, Judge Fisher concluded that AB 1889 was not preempted by the NLRA under either the *Garmon* or *Machinists* doctrines. *Id.*

71. *See* Chamber of Commerce v. Lockyer, 437 F.3d 890 (9th Cir. 2006). Rule 35(a) of the Federal Rules of Appellate Procedure states that en banc hearing or rehearing "is not favored" and that it ordinarily will be ordered only when "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. PROC. 35(a) (2007).

right to express views on union organization.[72] This court agreed with the District Court and two previous panel opinions that California acted as a regulator and the market participant exception did not apply to preclude preemption.[73] However, the en banc panel did not agree with the previous courts' positions that AB 1889 was preempted by either the *Machinists* or *Garmon* doctrines.[74] The majority en banc opinion held that *Machinist* did not apply because (1) restriction on the *use* of state funds does not intrude on conduct meant to be left to the free play of economic forces, (2) Congress did not leave this zone of activity free from *all* regulation, and (3) it cannot be inferred that Congress intended the NLRA to deprive states of the ability to impose restrictions on employer speech because Congress itself passed similar federal laws.[75] The *Garmon* doctrine

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72. Chamber of Commerce v. Lockyer (*Lockyer IV*), 463 F.3d 1076, 1082 (9th Cir. 2006) (en banc).

73. *Id.* at 1082-85.

74. *Id.* at 1085.

75. *Id.* at 1087-90. First, the en banc panel concluded that enacting a statute that places spending restrictions only on the use of state funds does not impede on "conduct meant to be left to the free play of economic forces . . ." *Id.* at 1087. Because the state's choice of how to spend their money is by definition not controlled by economic forces, the court held that it cannot be Congress' intent to leave this area unregulated. *Id.* By enacting AB 1889, California did not engage in an attempt to use funds to alter employer-spending decisions. *Id.* Therefore, AB 1889's restrictions on the use of funds did not interfere with an employer's ability to engage in "weapon[s] of self-help" left unregulated by the NLRA, and "[e]mployers remain free to convey their views regarding unionization . . . provided only that they do not use state grant and program funds to do so." *Id.* at 1086, 1088. Second, the NLRB acknowledged that *Machinists* applies only to areas left free from complete regulation. *Id.* at 1089. Organization and employer speech within this context is not one of these areas, as indicated by the NLRB's own extensive regulation of this area. *Id.*; NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946) (giving the NLRB "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees"); *see also* Peoria Plastic Co., 117 N.L.R.B. 545, 547-48 (1957) (prohibiting interviews with employees immediately prior to an election); Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953) (barring employers and unions from conducting election speeches on company time to employees within 24 hours of election). Additionally, section 9 of the NLRA explicitly grants the NLRB the ability to regulate conduct by employers and unions, including speech, which is prejudicial to a fair election. 29 U.S.C. § 159 (2000). Finally, this court concluded that because Congress had previously passed federal laws similar to AB 1889, it cannot be inferred that Congress intended to deprive states of the

was also held inapplicable because the majority concluded that section 8(c) did not grant any speech rights to employers and therefore, "California's refusal to subsidize employer speech for or against unionization [did] not regulate an activity that [was] actually protected or actually prohibited by the NLRA."[76] Thus, the Ninth Circuit en banc panel concluded that AB 1889 was not preempted by the NLRA.[77] Three circuit judges dissented, finding that AB 1889 was preempted by the NLRA under the *Machinists* doctrine because "it interferes with an area Congress intended to leave free of state regulation" by "directly regulat[ing] the union organizing process itself and impos[ing] substantial compliance costs and litigation risk on employers who participate in that process using the statutorily protected self-help mechanisms."[78] Additionally, the dissent found AB 1889 was preempted under the *Garmon* doctrine as well because the California statute discouraged employer speech protected by

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ability to pass these laws as well. *Lockyer IV*, 463 F.3d at 1090. The court noted that the spending restrictions imposed by AB 1889 are modeled on those enacted by Congress to prohibit "the use of federal funds to assist, promote, or deter organizing." *Id.* at 1089.

76. *Id.* at 1092. This court held that section 8(c) of the NLRA carves out noncoercive speech from activity that is punishable under the federal regulation; however, this does not grant employers specific speech rights. *Id.* at 1091. Instead, the en banc panel concluded that the NLRA simply "prohibits [employers'] noncoercive speech from being used as evidence of an unfair labor practice." *Id.* Plaintiffs and the dissent argued that saying an activity is not punishable protects that activity in effect. *Id.* The majority, however, found that there is no explicit or affirmative grant of speech rights present in section 8(c); thus, California's restrictions of employer speech did not interfere with an activity that is either protected or prohibited by the NLRA. *Id.* at 1092.

77. *Id.* at 1098.

78. *Id.* at 1105 (Beezer, J., dissenting). Because the statute created a threat of expensive litigation and extensive compliance costs, the dissent reasoned that the California statute "ties the hands of management financially and allows pro-union groups free reign." *Id.* As an example, Judge Beezer noted that AB 1889 allows unions to bypass federal labor laws, providing that unions are only permitted to receive an employer's financial records for legitimate collective bargaining purposes after winning an election, because the unions can now file lawsuits in state court under a violation of AB 1889, rendering employer's financial records accessible. *Id.* at n.2. Once the unions have access to financial records, they have "additional leverage in advocating for a unionized workforce and [can] place additional pressure on an employer to simply recognize a given union." *Id.*

section 8(c) and "directly usurp[ed] the ability of the NLRB to administer elections that will foster fair and free employee choice."[79]

In 2007, the Supreme Court granted certiorari on the issue of whether the NLRA preempts AB 1889. On June 19, 2008, six years after the beginning of litigation, the Court released its opinion.[80] Justice Stevens wrote for the majority, holding that AB 1889 was preempted by the NLRA under the *Machinists* doctrine, reversing the Ninth Circuit's en banc opinion, and Justice Breyer, joined by Justice Ginsberg, issued a dissenting opinion.[81]

IV. ANALYSIS OF THE SUPREME COURT'S OPINION

A. Justice Stevens' Majority Opinion

The majority held that AB 1889 is preempted under the *Machinists* doctrine because it "regulate[s] within 'a zone protected and reserved for market freedom.'"[82] First, Justice Stevens discussed the statutory language of the NLRA, holding that the section 8(c) amendment indicates a policy judgment "favoring uninhibited, robust, and wide-open debate in labor disputes."[83] Under the

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79. *Id.* at 1107-08 (Beezer, J., dissenting). The majority opinion analyzed the *Garmon* preemption doctrine as applying only where the controversy in state court is identical to the controversy presented to the NLRB; however, Judge Beezer stated that this requirement of identical controversies is only applicable when the activity is arguably prohibited by the Act. *Id.* Here, the dissent reasoned that section 8(c) of the NLRA explicitly protected employer's speech rights, so there is not a requirement that the controversy be identical to that presented to the NLRB, and the majority's reliance upon the holding in *Sears* is misplaced. *Id.* at 1109 (citing *Sears, Roebuck & Co.*, 436 U.S. at 187). Therefore, because AB 1889 "interferes with [free speech rights of employers] and undermines the speech rules and election procedures of the NLRB," the dissent would have held that the California statute is preempted under the *Garmon* doctrine. *Id.*

80. *Chamber of Commerce*, 128 S. Ct. 2408 (2008). Note that Edmund G. Brown, Jr. was elected to replace Bill Lockyer as Attorney General of California in 2007.

81. *Id.*

82. *Id.* at 2412 (quoting *Boston Harbor*, 507 U.S. at 227). This court does not further discuss preemption under the *Garmon* doctrine as previous Ninth Circuit opinions.

83. *Brown*, 128 S. Ct. at 2414 (quoting Letter Carriers v. Austin, 418 U.S. 264, 272-73 (1974)). The NLRA did not include a specific provision addressing the

Machinists preemption doctrine, congressional intent to leave a zone of activity unregulated was generally found implicitly through the inference that the areas left unregulated remain as important as the imposed regulations. Therefore, because the majority found that the NLRA contains both implicit and explicit direction from Congress to leave noncoercive speech unregulated, the Supreme Court reasoned that a state statute regulating this speech is preempted by the federal Act.[84] The majority held that to the extent AB 1889 "interfere[d] with an employee's choice about whether to join or be represented by a labor union, . . . [AB 1889 is] unequivocally preempted."[85]

The majority opinion specifically declined to address AB 1889's validity under the First Amendment because it found that the question was "not whether AB 1889 violates the First Amendment,

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"intersection between employee organizational rights and employer speech rights," thus the NLRB was left to reconcile these interests. *Brown*, 128 S. Ct. at 2413. Initially, the NLRB took the strong position that section 8 requires total employer neutrality during organizational campaigns. *Id.* Under this approach, any partisan employer speech would interfere with the workers' rights to organize, bargain collectively, and engage in concerted activity for their own protection under section 7 of the NLRA. *Id.* The Supreme Court's holding in *Virginia Electric* limited the NLRB's aggressive interpretation by holding 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 [amounts] to coercion within the meaning of the Act.'" *Id.* (quoting *Va. Elec. & Power Co.*, 314 U.S. at 477). In response to the continuing restrictive regulation on employer speech, Congress passed the LMRA to amend sections 7 and 8 of the NLRA to protect speech by both unions and employers from regulation by the NLRB. *Brown*, 128 S. Ct. at 2413. Section 8(c) both implements the First Amendment by responding to particular constitutional rulings of the NLRB and shows a congressional intent to encourage free debate in this area. *Id.*

84. *Id.* at 2414. The area of noncoercive speech is both implicitly and explicitly protected under the NLRA. *Id.* The majority notes that "[s]ections 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." *Id.* Additionally, section 7 gives employees the right to refuse to join a union, which implies the right to receive information that opposes union organization. *Id.* Finally, section 8(c) "expressly precludes regulation of speech about unionization" as long as the communication is noncoercive. *Id.* The majority concludes that the mere fact that Congress took the effort to amend the NLRA, rather than continue to leave it to the courts and the NLRB to determine it on a case-by-case basis, shows intent to favor wide-open debate and leave noncoercive employer speech unregulated. *Id.*

85. *Id.*

but whether it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the NLRA."[86] Under the NLRA, California cannot regulate noncoercive employer speech about unionization either directly through an express prohibition[87] or indirectly through the imposition of spending restrictions.[88] By imposing spending restrictions on state funds for activities promoting or deterring union organization and directly restricting employer speech about unionization, AB 1889 became an

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86. *Id.* at 2417 (quoting Livadas v. Bradshaw, 512 U.S. 107, 120 (1994)). The en banc majority discussed the argument that AB 1889 violates the First Amendment because "[a] statutory blanket prohibition on employers advocating for or against unions would blatantly violate the First Amendment as the state has no legitimate interest in prohibiting employers from speaking on union issues." *Lockyer IV*, 463 F.3d at 1099. Once the state has chosen to award the contract, their interest in the funds used as payment for the contracted goods and services is gone. *Id.* The majority opinion here does not delve further into this analysis because it finds that the issue presented is whether the California statute stands in the way of the implementation of the NLRA's goals. *Brown*, 128 S. Ct. at 2417.

87. *Id.* at 2415. The Supreme Court has held that when a State is acting as a market participant, as opposed to a regulator, the regulations will not be preempted by the NLRA. *Id.*; *see Boston Harbor*, 507 U.S. at 218. In *Boston Harbor*, the NLRA did not preempt a state agency requiring contractors on a construction project to follow a labor agreement because the action was aimed at a specific contract in order to ensure the project would be completed at the lowest cost. *Boston Harbor*, 507 U.S. at 232. The majority, in concordance with prior opinions in the litigation, stated that California enacted AB 1889 in its regulatory capacity and did not act as a market participant. *Brown*, 128 S. Ct. at 2415. The state's purpose was to further a labor policy and "impose[] a targeted negative restriction on employer speech about unionization." *Id.*

88. *Id.* at 2415. In *Gould*, the Supreme Court held that Wisconsin's policy that the state would not purchase goods and services from three-time NLRA violators was preempted under the Garmon doctrine because it imposed a conflicting sanction that disrupted the NLRA's regulation scheme. *Id.* (citing *Gould*, 475 U.S. at 288-89 (1986)). Wisconsin argued that the statute intended to be an exercise of spending power rather than regulatory power, but the court held that these were essentially one and the same. *Brown*, 128 S. Ct. at 2415 (citing *Gould*, 475 U.S. at 287). "Wisconsin's choice to 'use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict' between the state and federal schemes[, so] the statute was pre-empted." *Brown*, 128 S. Ct. at 2415 (quoting *Gould*, 475 U.S. at 289). Under this ruling, the majority held that imposing a "use" restriction as opposed to a "receipt" restriction is "no more consequential than Wisconsin's reliance on its spending power rather than its police power in *Gould*." *Brown*, 128 S. Ct. at 2416.

obstruction to the execution of employer free speech under the NLRA.

Coupling the restrictions on the use of state funds with compliance costs and litigation risks, AB 1889 reached beyond California's sovereign interest in the use of state funds.[89] Significant enforcement mechanisms put pressure on the employer to forgo its right to free speech or refuse the receipt of necessary state funds, which the majority found to silence one side of the intended debate under the NLRA.[90] A state is able to fund a program dedicated to advance permissible goals, but the state cannot "use its spending power to advance an interest that . . . frustrates the comprehensive federal scheme established by the Act."[91]

The Ninth Circuit Court of Appeals previously held that the *Machinist* doctrine was inapplicable to this statute because employer speech in regard to union organization is not a zone that Congress left free from all regulation.[92] The NLRB has policed a narrow zone of

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89. *Id.* AB 1889 required recipients of state funds to keep records showing that no state funds were used for prohibited activities or expenditures. *Id.* Additionally, the statute "presume[d] that any expenditure to assist, promote, or deter union organizing made from 'commingled' funds constitute[d] a violation of the statute." *Id.* (citing CAL. GOV'T CODE §16646(b) (2009)). The majority explained that this requirement is extremely difficult because a prohibited expenditure includes not only isolated expenses, such as legal fees, but also allocation of overhead for "time and resources spent on union-related advocacy." *Brown*, 128 S. Ct. at 2416 (citing CAL. GOV'T CODE §16646(a)). The statute also did not provide a safe harbor, unless the expense is incurred with activities favoring unions or required by law. *Brown*, 128 S. Ct. at 2416 (citing CAL. GOV'T CODE §16647). AB 1889 authorized both the Attorney General and a private taxpayer, which would include a union, to bring a civil action against violating employers for "injunctive relief, damages, civil penalties, and other appropriate equitable relief." *Brown*, 128 S. Ct. at 2416 (quoting CAL. GOV'T CODE §16645.8(a)). This means that essentially a somewhat trivial violation of the statute, perhaps commingling of state and private funds, may give rise to substantial liability. *Brown*, 128 S. Ct. at 2416. These enforcement mechanisms put pressure on the employer to forgo its speech rights or refuse state funds. *Id.*

90. *Id.* AB 1889 "chills one side of 'the robust debate which has been protected under the NLRA.'" *Id.* at 2417 (quoting *Letter Carriers*, 418 U.S. at 275).

91. *Brown*, 128 S. Ct. at 2417.

92. *Lockyer IV*, 463 F.3d at 1089. The Court of Appeals en banc panel held that the NLRB's regulation of organizing activities shows that employer speech was not intended to be an area left free of regulation. *Id. See, e.g.*, Peoria Plastic

speech under section 9 of the NLRA to protect and ensure free and fair elections.[93] In contrast to the Ninth Circuit en banc panel's opinion, the majority held that regardless of the NLRB's regulatory authority over elections, Congress did not grant it the "authority to regulate the broader category of noncoercive speech encompassed by AB 1889."[94] Furthermore, because Congress did not grant this regulatory authority to the NLRB, California also does not have the authority because "[s]tates have no more authority than the [NLRB] to upset the balance that Congress has struck between labor and management."[95]

The en banc panel had also argued that Congress did not intend to preempt AB 1889 because Congress itself has passed similar restrictions and provisions forbidding the use of grant and program funds to "assist, promote, or deter union organizing."[96] However, the majority was "not persuaded that these few isolated restrictions . . . intended to alter . . . federal labor policy."[97] Unlike the states,

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Co., 117 N.L.R.B. 545, 547-48 (1957) (NLRB barred interviews with employees immediately prior to an election); Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953) (NLRB prevented employers and unions from making election speeches within 24 hours of an election). *See also* NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.").

93. *Brown*, 128 S. Ct. at 2417. Section 9 of the NLRA grants the NLRB power to regulate employer and union conduct that is prejudicial to a fair election, including employer speech. 29 U.S.C. § 159. The Supreme Court held that the NLRB can set aside an election for a misrepresentation of a material fact within a campaign if it had an effect on the free choice of employees. *See* Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 60 (1966).

94. *Brown*, 128 S. Ct. at 2417.

95. *Id.* (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985)).

96. *Brown,* 128 S. Ct. at 2418; *see Lockyer IV*, 463 F.3d at 1090-91. The Ninth Circuit panel points to three main statutes. First, the Workforce Investment Act provides assurances that funds received under this Act will not be used to assist, promote, or deter union organizing. 29 U.S.C. § 2931(b)(7) (2009). Second, the Head Start Programs Act does not allow appropriated funds to be used for the promotion or deterrence of union organization. 42 U.S.C. § 9839(e). Third, the National Community Service Act does not allow the assistance provided under the act to be used by participants for these purposes either. 42 U.S.C. § 12634(b)(1).

97. *Brown*, 128 S. Ct. at 2418 (quoting *Metro. Life*, 471 U.S. at 753) (internal citation omitted).

Congress has the ability to "create tailored exceptions to otherwise applicable federal policies" because any adaptation to the statute applies nationwide, preserving uniformity.[98] Therefore, "the mere fact that Congress [enacted] federal restrictions on union-related advocacy in certain limited contexts does not invite the States to override federal labor policy in other settings."[99]

B. Justice Breyer's Dissenting Opinion

Justice Breyer, joined by Justice Ginsburg, disagreed with the majority's decision that AB 1889 is preempted under the *Machinists* doctrine because he did not feel that the spending limitations amounted to regulation that would be preempted by the NLRA.[100]

First, the dissent argued that AB 1889 does not try to compel or forbid labor related activity because employers are still able to engage in the assisting, promoting, or deterring of union organization, they are just prohibited from doing so with state funds.[101] Refusing to pay for a certain activity is not the same as compelling others to engage in the activity; therefore, AB 1889 neither compels labor related activity nor forbids it.[102] Second,

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98. *Brown*, 128 S. Ct. at 2418.

99. *Id.* The majority also noted that if Congress had enacted a federal regulation that was exactly the same as AB 1889 in regard to spending restrictions on all federal grants or funds, then the preemption argument would be closer. *Id.* However, none of the statutes cited by the Ninth Circuit were nationwide, contained comparable provisions, or contained pro-union exemptions. *Id.*

100. *Id.* at 2419 (Breyer, J., dissenting). Justice Breyer found that the relevant statute in *Gould* was radically different from AB 1889 because the Wisconsin statute "prohibited the State from doing business with firms that repeatedly violated the NLRA." *Id.* (Breyer, J., dissenting). The Supreme Court held that the Wisconsin statute's main purpose was to enforce the NLRA's requirements, which is a function reserved for the NLRB, thus explicitly conflicting with the goals and intent of Congress.

101. *Id.* at 2420 (Breyer J., dissenting). Employers receiving state funds were able to "assist, promote, or deter union organizing," just not on the state's dime. *Id.* (Breyer, J., dissenting). Therefore, because employers still had the ability to engage in this activity, California's "refusal to pay for labor-related speech does not impermissibly discourage that activity." *Id.* (Breyer, J., dissenting) (emphasis omitted).

102. *Id.* (Breyer, J., dissenting). Justice Breyer pointed out that just because the state of California has chosen to prohibit employers from using state funds for

federal statutes imposing restrictions on the use of federal funds demonstrate Congress' intent to permit the state to ratify similar legislature.[103] Rather than believing the idea that Congress intended the NLRA to prevent states from enacting similar legislation, Justice Breyer considers that Congress believed directing funds away from labor related activity was consistent with the intended policy of encouraging free debate.[104] Finally, state legislatures are generally given broad authority in determining how to spend state funds, and a state can allocate funds without participating or regulating the labor market.[105] The mere fact that California is not acting as a market participant does not necessarily mean that they are acting as an impermissible regulator which would subject the statute to preemption under the *Machinists* doctrine, as the majority opinion held.[106]

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labor-related speech, employers are not strictly prohibited from engaging in the activity. *Id.* (Breyer, J., dissenting). Failure to pay for an activity does not result in compelling the activity. *Id.* (Breyer, J., dissenting).

103. *Id.* (Breyer, J., dissenting). Justice Breyer referred to the three statutes noted in the Ninth Circuit's panel opinion. *See supra* note 96. The Workforce Investment Act, 29 U.S.C. § 2931(b)(7) (1998); The Head Start Programs Act, 42 U.S.C. § 9839(e) (2007), and The National Community Service Act, 42 U.S.C. § 12634(b)(1) (2000). *Brown*, 128 S. Ct. at 2420 (Breyer, J., dissenting).

104. *Id.* (Breyer, J., dissenting). The dissent concluded that because Congress enacted three statutes using identical language to that of AB 1889, California's statute does not weaken congressional policy. *Id.* (Breyer, J., dissenting).

105. *Id.* at 2420-21 (Breyer J., dissenting). The Supreme Court has ruled that the legislature has the right to choose not to fund activities even though those activities may be otherwise protected. *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 549 (1983) (holding that a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.").

106. *Id.* at 2421 (Breyer, J., dissenting). The dissent pointed out that the converse of "market participant" is not necessarily "regulator." *Id.* at 2421 (Breyer, J., dissenting). A state can freely allocate funds without participating *or* regulating the labor market, and the NLRA will only preempt a state's actions when they amount to *impermissible* regulation. *Id.* (Breyer, J., dissenting). Justice Breyer also did not find the fact that the statute imposes a restriction only applicable to labor to be a "fatal objection" because if a state can prohibit employers from using state funds for broad categories of expenses, like overhead, then it should be able to regulate the use of funds for smaller categories, like overhead expenses related to management's role in labor organization. *Id.* (Breyer, J., dissenting).

Additionally, the dissent notes that the majority appears to find the compliance provisions of AB 1889 too strict, and through neutral enforcement, they discourage the use of non-state funds to engage in free debate on labor issues.[107] However, Justice Breyer is not clear as to which provisions will actually deter a state fund recipient from using non-state funds to engage in unionization matters.[108] Therefore, the dissent concludes that the issue should be remanded to the District Court for more clarification and findings on the question of whether the specific compliance provisions of AB 1889 "constitute sufficient grounds for finding the statute pre-empted."[109]

V. EFFECT OF THE SUPREME COURT'S DECISION

A. Legal Impact of Decision on Efforts to Limit Noncoercive Employer Speech

Section 8(c) of the NLRA protects free debate on unionization by maintaining the free exchange of ideas from both unions and employers. Limiting or strictly regulating noncoercive speech inhibits an employer's ability to inform employees of information regarding the consequences of unionization, thus suppressing one side of the debate. Originally, the NLRA was focused on encouraging union organization, but the LMRA amendments shifted the emphasis to a "more balanced statutory scheme [protecting] rights of workers to join or not join a union, [adding] restrictions on unions, [and] guaranteeing certain freedom of speech and conduct to employers and individual employees."[110] By adding section 8(c) to

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107. *Id.* (Breyer, J., dissenting). While Justice Breyer agreed with the majority in that if the compliance provisions discourage the spending of non-state funds then AB 1889 should be preempted by the NLRA, he was not convinced that the statute would have that effect, based on the record before the Court. *Id.* (Breyer, J., dissenting). The dissent found the language and requirements of the statute very clear, but was not sure whether these provisions would actually deter a recipient of state funds from spending personal money to engage in unionization matters. *Id.* at 2421-22 (Breyer J., dissenting).

108. *Id.* at 2422 (Breyer, J., dissenting).

109. *Id.* (Breyer, J., dissenting).

110. William J. Kilberg & Jennifer J. Schulp, *Chamber of Commerce v. Brown: Protecting Free Debate on Unionization*, 2008 SUP. CT. REV. 189, 203 (2008).

the Act, the NLRA now guaranteed employers the right of free speech and finally designated the same freedom of expression rights enjoyed by unions to employers.[111]

In response to an employer-friendly federal labor regulation scheme, union supporters have increasingly enlisted state and local governments to launch efforts to curtail employer speech in opposition to unionization. The Supreme Court's recent decision in *Chamber of Commerce v. Brown* found that state regulation interfering with the employee's choice regarding unionization is within a zone reserved for market freedom, and is preempted by the NLRA under the *Machinists* doctrine.[112] As a result, recently popular state and local efforts to issue legislation curtailing employer noncoercive speech about unionization will be preempted by federal law.

1. State and Local Initiatives to Limit Employer Speech

The Supreme Court's holding in *Chamber of Commerce v. Brown* bars the ability of state and local legislatures to regulate employer speech indirectly by imposing spending restrictions on government funds.[113] Thus, state and local laws similar to AB 1889 will clearly be preempted under the *Machinists* doctrine and the Supreme Court's ruling. However, what will the effect of the Supreme Court's decision be on neutrality agreements constructed differently from AB 1889, but still limiting employer speech?

Due to a lack of enforcement by the NLRB and seemingly ineffective ability of the NLRA to protect basic rights of workers, many states and local governments have enacted legislation to supplement regulation where federal law is silent or absent.[114]

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111. H.R. REP. NO. 80-510, at 45 (1947) (Conf. Rep.). The amendments were enacted to "protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." *Id.*

112. *Brown*, 128 S. Ct. at 2414.

113. *Id.* at 2415-16.

114. Paul M. Secunda, *The Ironic Necessity for State Protection of Workers*, 157 U. PA. L. REV. 29, 29 (2008). Professor Paul Secunda of Marquette University Law School makes the argument that states are best equipped to protect worker's rights under the law. *Id.* NLRA proponents originally "saw its enactment as a way to overcome [the] anti-union state influences and to foster at the federal level the

Legislation similar to AB 1889 has been gaining popularity at the state and local level to increase union organization and curtail employer speech in opposition to organizational efforts. States have imposed neutrality agreements and legislation limiting the use of state funds that either (1) define the prohibited uses more specifically than AB 1889 or (2) target specific industries and employers.[115] Local governments have also enacted labor peace legislation requiring employers to enter into agreements with unions as a condition for receiving state funds.

a) More Specific State Neutrality Laws

One alternative to the broad statutory language of AB 1889 is more specific legislation defining for what purposes the employer can and cannot use state funds. In New York, the State Assembly passed a bill prohibiting employers from using state money to:

> (a) train managers, supervisors, and other administrative personnel on methods to encourage or discourage union organization, . . . (b) hire or pay attorneys, consultants or other contractors to encourage or discourage union organization, . . . or (c) hire employees or pay the salary and other compensation of employees whose principal job duties are to encourage or discourage union organization.[116]

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use of collective bargaining to promote the workplace rights of employees." *Id.* Over time, however, the federal government "has proven unwilling and unable to protect the basic rights of workers" through the NLRA and other federal acts governing labor law, such as the Employee Retirement Income Security Act (ERISA) and the Occupational Safety and Health Act (OSHA). *Id.* Professor Secunda argues that state laws should be encouraged in order to protect worker's rights because historically "[c]ourts, agencies, and employers have routinely operated together in order to stifle employee's rights to organize." *Id.* at 30.

115 *See* Logan, *supra* note 36, at 158. Several states have enacted legislation, or neutrality agreement laws, that "prohibit employers [receiving] state funds from using that money to promote or deter unionization." *Id.* AB 1889 was based upon more specific neutrality regulations and was expected to benefit unions while keeping the state neutral during union organization campaigns. *Id.*

116 N.Y. LAB. LAW § 211-a (McKinney 2009).

This New York bill allows employers to use state funds to finance "other nonspecified anti-union activities, such as captive-audience meetings, provid[ed] they are not conducted by someone whose principal job is to discourage unionization."[117] In contrast with AB 1889, the New York bill did not include effective enforcement provisions or civil penalties for violations of the regulation.[118] These types of statutes encourage employer neutrality in the area of union representation for employers receiving a significant portion of their income from the state, while limiting employer noncoercive speech protected under section 8(c) of the NLRA.[119]

While provisions with specific limitations on how an employer can use state funds, like the New York bill, are unlike California's blanket prohibition on the use of public money to deter unionization efforts, they still place limitations on an employer's protected exercise of free speech. In most instances, these statutes will be preempted, similarly to AB 1889, because "once a given employer is subject to such laws by virtue of the receipt of a certain amount of public funds for any of its operations, all of its operations are subject to their prohibitions, not just those operating by virtue of the grant . . . ."[120] The majority opinion in *Brown* concludes that a state cannot "use its spending power to advance an interest that . . . frustrates the comprehensive federal scheme established by [the NLRA]."[121] The opinion, however, did not find specific types of prohibited activities

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117 Logan, *supra* note 36, at 181.

118 *See id.* AB 1889 included compliance costs and litigation risks and the Supreme Court found it preempted because the enforcement mechanisms put pressure on the employer to either stay quiet and receive state funds or refuse the state funding and speak freely. *Brown*, 128 S. Ct. at 2416; *see also supra* note 89.

119. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 388 (2007). This New York statute has been found by a district court to be preempted under the *Machinists* doctrine, but the decision was reversed by the Second Circuit and remanded to the district court for further findings regarding the effect of the regulation but did not preclude the district court's finding of *Machinists* or *Garmon* preemption. *See* Healthcare Ass'n of New York State, Inc. v. Pataki, 388 F. Supp. 2d 6 (N.D.N.Y. 2005), *rev'd*, 471 F.3d 87 (2d Cir. 2006).

120. *See* Brian R. Garrison & Joseph C. Pettygrove, *"Yes, No, and Maybe": The Implications of a Federal Circuit Court Split over Union-Friendly State and Local "Neutrality" Laws*, 23 LAB. LAW. 121, 148 (2007).

121. *Brown*, 128 S. Ct. at 2417.

that have the effect of limiting employer speech to be a relevant factor in the preemption analysis. Rather, the Court focused on whether the free debate intended by Congress was hindered through limitations on employer's speech, not the specific means by which that speech was limited. As a result, it appears that in light of the Supreme Court's decision, even though these types of statutes specifically define actions regarding the use of state funds, they will be preempted by the NLRA provided the provisions continue to limit employer speech.

b) Legislation Targeting Specific Industries or Employers

Prior to the Supreme Court's holding in *Brown*, circuit courts have upheld state legislation placing restrictions on state funds that are targeted at specific industries or types of employers. In 2002, Florida passed limited neutrality legislation "restrict[ing] the use of state funds to promote or deter unionization *only* in nursing homes."[122] This bill was part of the Service Employees International Union's effort to pass "Healthcare Funds for Healthcare Only" bills in several states "to prevent the misappropriation of health care funds [and] to limit employer conduct."[123] Under the Florida statute, managers are prohibited from performing anti-union activities in the midst of employees caring for Medicare beneficiaries.[124] Rhode Island passed similar legislation preventing employers from using Medicaid reimbursement funds to influence an employee's decision of whether or not to join a union.[125]

The Seventh Circuit upheld an Illinois statute in 2005 requiring entities receiving subsidies for construction of renewable fuel plans to enter into a labor agreement "establish[ing] wages and benefits and . . . includ[ing] a no-strike clause."[126] The court found that Illinois was not acting in a proprietary capacity, but was still protected under the market participant exception because it did act as a regulator seeking to affect labor relations generally through a targeted

122. Logan, *supra* note 36, at 183.

123. *See id.*

124. FLA. STAT. § 400.334 (2009).

125. R.I. GEN. LAWS § 40-8.2-23 (2009).

126. N. Ill. Chapter of Assoc. Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1005 (7th Cir. 2005).

statute.[127] The court held that Illinois limited the conditions on spending to a specific project and did not engage in regulation resulting in preemption by federal law.[128]

For several reasons, targeted statutes will be found preempted by the NLRA as a result of the Supreme Court's recent decision in *Brown*. First, the Illinois statute was exceptionally narrow and applied only to a specific project and a narrow group of contracting parties; however, the Florida and Rhode Island statutes do not affect such a narrow group because of the numerous contracting parties in the health care industry. Second, the Supreme Court explains that targeted statutes may fall within the right of Congress, which has the "authority to create tailored exceptions to otherwise applicable federal policies . . . in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies."[129] This statement seems to eliminate the state's ability to "implement restrictions on employer speech targeted to affect only certain groups of employers."[130] Therefore, targeted restrictions will only survive preemption if they can be drafted to fall within the market participant exception to preemption.[131] By definition, legislation under the market participant exception cannot have the effect of broadly regulating labor relations, so while targeted restrictions may survive preemption through acting as a market

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127 *Id.* at 1006. Unlike *Boston Harbor*, where Boston hired the general contractors for the project, Illinois did not hire contractors, invest in the project through bonds, or have a proprietary interest in the project. *Id.*; *see Boston Harbor*, 507 U.S. at 227. Furthermore, Illinois does not seek to affect labor relations generally and "[b]oth labor and management are free to make independent decisions with respect to all activities other than those for which the state pays." *Lavin*, 431 F.3d at 1006. Conditions on spending are not considered "regulation" unless they "affect conduct other than the financed project." *Id.* (citing Wisconsin Dep't of Indus. v. Gould Inc., 475 U.S. 282 (1986)). Therefore, because Illinois "limited its condition to the project financed by the subsidy, it has not engaged in 'regulation' . . and its conditions are not preempted by federal law." *Lavin*, 431 F.3d at 1007.

128. *Id.*

129. *Brown*, 128 S. Ct. at 2418.

130. Kilberg & Schulp, *supra* note 110, at 209.

131. *Id.* Governments attempting to meet the market participant exception test encounter difficulties in areas outside of construction because it is often difficult to allocate money on a "per-project" basis. Garrison & Pettygrove, *supra* note 120, at 150.

participant, they will not achieve the broad regulatory effect intended by union supporters.

c) Labor Peace Agreements

Labor peace agreements have become popular at the city and county levels of government. Under these agreements, the governmental entity requires employers to sign an agreement with unions in return for government financial assistance.[132] The agreements generally require employers to provide "employee information . . . early in the organizing campaign, and refrain from making disparaging statements about the union," and the union must agree to "forego strikes, boycotts, or other disruptive organizing tactics" and consent to arbitrate future disputes.[133] The agreement does not require employer neutrality, but it does prohibit the employer from "expressing false or misleading information relevant to the question of unionization and . . . compelling employees to attend meetings on the question of unionization."[134]

The Third Circuit upheld a labor peace ordinance against a preemption challenge where the City of Pittsburgh conditioned grants of tax increment financing upon the recipient's acceptance of a labor neutrality agreement under local legislation.[135] The court held that by enacting an ordinance "specifically tailored to protect its proprietary interest in the value of the tax-revenue-generating property," the City of Pittsburgh was acting as a market participant and "reasonable investor in applying conditions to its multimillion

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132. Logan, *supra* note 36, at 184.

133. *Id.*

134. Sachs, *supra* note 119, at 388-89. In these situations, unlike AB 1889, the city or county does not have an opportunity to be "neutral," but rather is required to enter a labor-management agreement prohibiting employers from stating false or misleading information or compelling employees to attend meetings regarding unionization. *Id.* This essentially may be seen as restricting employer speech, and since the Supreme Court's ruling in *Brown*, may be deemed preempted under the NLRA.

135. Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., 390 F.3d 206, 208 (3d Cir. 2004). The agreement was to include a no picketing promise, a provision that union representation be determined by the card check process, and that all disputes under the agreement be settled through arbitration. *Id.* at 208-09.

dollar investment," an exception to preemption by the NLRA.[136] In contrast, the Seventh Circuit invalidated a labor peace agreement holding that it was preempted by the NLRA.[137] Under the Milwaukee County ordinance, firms with "contracts with the County for the provision of transportation and other services for elderly and disabled County residents" must negotiate "labor peace agreements" with unions;[138] however, the court found that these agreements

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136. *Id.* at 217. In *Boston Harbor*, the Massachusetts Water Resources Authority implemented a requirement that all contractors working on the harbor cleanup project must sign a collective bargaining agreement recognizing a specific union. *Boston Harbor*, 507 U.S. at 218. The Supreme Court held that this regulation was not preempted by the NLRA because Massachusetts Water Resources Authority was acting as a "market participant" with the purpose of ensuring that the project would be completed quickly and efficiently at a low cost, as opposed to an effort to regulate the conduct of others outside of the harbor cleanup project. *Id.* at 232. In contrast, the court in *Gould* held that a provision broadly disqualifying firms with multiple past labor law violations from doing business with the state was preempted because the statute was not related to a proprietary interest in ongoing projects, but more broad and regulatory in nature. *Gould*, 475 U.S. at 288. The Third Circuit held that the City of Pittsburgh enacted the ordinance requiring contractors to enter into a labor neutrality agreement as a market participant because the city "is a partner in the proprietary interests of the URA itself [and] the URA as issuer of the [tax increment financing] bonds has a proprietary financial interest in the . . . development project that is the same as that of any (nonprofit) private entity that finances a development by issuing bonds." *Hotel Employees & Rest. Employees Union, Local 57*, 390 F.3d at 216-17. Therefore, the agreement is "specifically tailored to protect its proprietary interest in the value of the tax-revenue-generating property," and the "[c]ity has an interest in ensuring that labor strife does not damage the development," which is similar to the Massachusetts Water Resources Authority's position in *Boston Harbor*. *Id.* at 217; *See Boston Harbor*, 507 U.S. at 221.

137. Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277 (7th Cir. 2005).

138. *Id.* at 277-78. Milwaukee's ordinance requires the labor peace agreement to (1) prohibit employers from engaging in coercive speech regarding selection of a bargaining representative, (2) require employers to furnish contact information of employees providing services to the County, and (3) forbid unions from engaging in economic action against the employer. *Id.* at 278. This ordinance is tilted in favor of unions primarily because there is no sanction for a union violating the ordinance, other than "excus[ing] the employer from further compliance with [the ordinance] in regard to that union." *Id.* The court notes that had the city been intervening in its labor relations with firms from which it buys services in order to reduce the cost or increase the quality of services, then the ordinance would escape

would further affect the contractors' labor relations with private hospitals and nursing homes.[139] The provision excluding employees under a County contract from required attendance at a meeting to influence the selection of union representation would not just apply to employees spending all their time on a County contract, but *all* employees of the party contracting with the County, even those who do not work on County contracts.[140] Thus, the court held that the "County [was] trying to substitute its own labor-management philosophy for that of the [NLRA]" by prohibiting *all* employees and employers contracting with the County from expressing any opposition to unionization.[141]

These two contrasting circuit decisions indicate ambiguity as to whether the NLRA preempts labor peace legislation that limits employer speech by requiring the employer to enter into neutrality agreements with unions. However, both the Third and Seventh Circuit holdings appear to align with the Supreme Court's recent decision. The court in *Brown* held that "[a]lthough a State may choose to fund a program dedicated to advance certain permissible goals, it is not permissible for a State to use its spending power to advance an interest that . . . frustrates the comprehensive federal scheme established by that Act."[142] This statement indicates that labor peace legislation placing conditions limiting employer noncoercive speech on the receipt of state funds would interfere with an area left open to free debate, an interest frustrating Congress' intended purpose. Requiring a company to choose between allowing their employers to exercise their right to free speech and forego state funding versus accepting state funds and agreeing to limit their speech in opposition to unionization suppresses one side of the free

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preemption under the market participant exception. *See Boston Harbor*, 507 U.S. at 232.

139. *Milwaukee*, 431 F.3d at 279. The obligation to negotiate a labor peace agreement would be triggered when a union sought to represent employees working on the employer's contracts with the County, but most of the agreement would also apply to the employer's other employees, who many never work on a County contract, but will still be subjected to the employer speech limitations. *Id.*

140. *Id.* at 278-79.

141. *Id.*

142. *Brown*, 128 S. Ct. at 2417 (internal quotations and citations omitted).

debate.[143] Furthermore, labor peace legislation will face the same dilemma as targeted legislation falling into the market participant exception of preemption. While legislation may escape preemption if the provisions are negotiated for a specific project and the city or county plays the role of a market participant, by definition, it will be a valid regulation, but cannot have the broad impact on labor relations that was the driving force behind the legislation in the first place.[144]

2. Federal Legislation Enacted to Limit Employer Speech

The statutory language of the NLRA and the labor-management relationship has remained unchanged for several decades. Since the LMRA amendments were passed in 1947, very little has been done in response to unions and employers taking advantage of the current law to influence labor relations.[145] Politics are partly to blame because for many decades both employers and organized labor have had enough support to block any significant legislation they oppose.[146]

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143. *Id.* The Supreme Court held that AB 1889 "chills one side of the robust debate which has been protected under the NLRA." *Id.* (internal quotations and citations omitted).

144. *See supra* note 44.

145. Senator Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 314-15 (2008). Congress enacted the Labor Management Reporting and Disclosure Act of 1959, or Landrum-Griffin Act, which gave union officials "fiduciary responsibility over members' funds, increased financial transparency, and required honest internal union elections." *Id.* Since the Landrum-Griffin Act, Congress has also passed important legislation affecting (1) pensions and employee benefits, Employee Retirement Income Security Act of 1974, and (2) worker safety, Occupational Safety and Health Act of 1970, but nothing in regard to union and employer actions during selection of representation. *Id.*

146. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1540 (2002). Neither side has had a majority, but each minority is well-organized and "committed enough to tie up a bill through the arcane supermajority requirements of the Senate . through filibuster . ." *Id.* For example, President Carter's Labor Law Reform Act of 1977, which was introduced to curtail an employer's overwhelming advantage during union campaigns and the NLRA's inadequate deterrence of employer misconduct, died after a five-week filibuster and six unsuccessful attempts to end the debate in the

Union supporters, however, continue to argue that the federal government's employer-friendly legislation comes at the expense of declining unionization.[147] Frustration over declining union membership rates and inevitable federal preemption of state and local initiatives to curb employer speech under the Supreme Court's decision in *Brown* may lead organized labor to seek enactment of federal legislation restricting funds to limit employer speech on unionization or amendments to the NLRA and NLRB.

a) Federal Legislation Restricting Funds to Limit Employer Speech

The en banc panel of the Ninth Circuit argued that Congress could not have intended to preempt statutes similar to AB 1889 because it had already passed similar restrictions on the use of state funds to "assist, promote, or deter union organizing."[148] The Supreme Court discussed this issue by clarifying that the statutes relied upon by the Ninth Circuit en banc panel "neither conflict with the NLRA nor otherwise establish that Congress 'decided to tolerate a substantial measure of diversity' in the regulation of employer speech."[149] Nothing in the majority opinion conclusively said that the federal statutes with funding restrictions are prohibited, and Congress has the "authority to create tailored exceptions to otherwise applicable federal policies . . . in a manner that preserves national uniformity."[150]

In order to limit employer speech, unions may fight for the enactment of funding restrictions on targeted federal legislation. Placing restrictions on the recipient's use of certain federal funds

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Senate. *Id.* This was the last time in decades the Congress has considered or debated reforming the NLRA. *See* Specter & Nguyen, *supra* note 145, at 315.

147. Specter & Nguyen, *supra* note 145, at 311. Scholars argue that union membership has decreased as a result of employer suppression and lack of remedies under the NLRB for employer hostilities. *Id.*

148. *Lockyer IV*, 463 F.3d at 1090-91. The Ninth Circuit panel points to three main statutes: (1) The Workforce Investment, 29 U.S.C. § 2931(b)(7), (2) The Head Start Programs Act, 42 U.S.C. § 9839(e), and (3) The National Community Service Act, 42 U.S.C. § 12634(b)(1).

149. *Brown*, 128 S. Ct. at 2418 (quoting N.Y. Tel. Co. v. N.Y. State Dep't. of Labor, 440 U.S. 519, 546 (1979)).

150. *Id.*

would have a substantial impact on the industry as a whole. A subsequent response to increased targeted restrictions on federal funding might be a weakened NLRA preemptive effect.[151] The Supreme Court acknowledged that a federal statute narrows the scope of NLRA preemption if it establishes tolerance of a "substantial measure of diversity."[152] If numerous federal states contain targeted funding restrictions, then "the effect over time may be exactly the tolerance of such diversity," and the scope and effect of NLRA preemption would be extensive and weakened.[153]

b) Increased Effectiveness of the NLRB's Enforcement

In order for both unions and employers to effectively promote, or deter union organization, there must be a functioning system of labor relations providing an "effective enforcement of remedies."[154] Because of the NLRB's inability to effectively enforce the provisions of the NLRA in regard to union election campaigns, both employers and organized labor regularly engage in coercive tactics to exert pressure on employees.[155] The NLRB experiences considerable delays in case processing, which results in a lack of enforcement of the agency's ruling in federal court.[156] Furthermore, standard

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151. Kilberg & Schulp, *supra* note 110, at 212.

152. *Brown*, 128 S. Ct. at 2418 (quoting *N.Y. Tel. Co.*, 440 U.S. at 546).

153. Kilberg & Schulp, *supra* note 110, at 212.

154. Specter & Nguyen, *supra* note 145, at 322.

155. *Id.* at 320. Neither side is more innocent in regard to abusing the current system. Unions regularly mislead employees into signing authorization cards, threaten workers to sign the cards, visit homes of employees who choose not to support the unions, and unlawfully promising advantages and benefits to members if the union was certified by secret ballot vote. *Id.* at 320-21. On the other side, employers have been found to unlawfully threaten employees, restrict their ability to solicit union support, and provide union organizers with incorrect contact information. *Id.* at 321.

156. *Id.* at 322-23. In some cases, the delay between filing a complaint with the NLRB and their decision can be more than a couple years long. *Id.* The Eighth Circuit reprimanded the NLRB for "inexcusable and unfortunate" delays. *See* NLRB v. Mountain Country Food Stores, Inc., 931 F.2d 21, 23 (8th Cir. 1991). This delay generally "render[s] a bargaining order unenforceable and a new election . grossly ineffectual." Specter & Nguyen, *supra* note 145, at 323. Furthermore, it is detrimental to employers because the costs of extensive litigation and potential back add up over time. *Id.* at 324.

remedies implemented by the Board "include reinstating unlawfully discharged workers and requiring employers to compensate those employees with back pay less income earned between the firing and the decision;" however, these remedies do nothing to deter violations or ensure that the employee has the right to choose.[157]

Republican Senator Arlen Specter of Pennsylvania illustrated two ways Congress can focus on increasing the effectiveness of the NLRB to ensure the employee's freedom of choice: (1) reduce the window of time during which both sides could cheat and increasing the remedies when deceit occurs, and (2) pass legislation focusing on securing employee freedom of choice.[158] Changing the law will not eliminate either employers' or organized labor's motives to pressure employees to vote one way or the other in a union representative election; however, creating a new system of enforcement that deters unfair labor practices and limits the employer's opportunity to engage in similarly bad conduct would correct some of these problems.

c) Enact Amendments to the NLRA

The text of the NLRA has remained virtually untouched for several decades; however, the labor force has changed dramatically during this time.[159] Remaining employer-friendly, the NLRA protects the employer's right to express opposition to unionization and recognizes their right to compel employees to listen to "captive audience" meetings and exclude union representatives from the workplace all together.[160] In opposition, unions might seek to

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157. *Id.* at 325. Unfortunately, the remedies awarded by the NLRB are so weak and the incentives for employers or unions to cross the line are too great that the traditional remedies are not effective deterrents. *Id.*

158. *Id.* at 319.

159. *See* Estlund, *supra* note 146, at 1535-36. Since 1959, women have entered the workforce in great numbers, racial and ethnic diversity has flourished, mass production and stable workplace hierarchies have changed to more customer centered production methods and team-based organizations, and laws regarding employment and granting individual employee rights increased. *Id.* at 1536. However, in light of all these transformations, the NLRA has remained the same, leaving the states to regulate what they can and creating a complicated system of labor law for employers and unions to follow.

160. *Id.* at 1536-37.

"directly undermine the protections of free debate provided by section 8(c)[, which] the court recognized as preempting AB 1889."[161] Restricting employer speech, however, will raise First Amendment concerns because the Supreme Court has acknowledged employers' First Amendment right to engage in noncoercive speech about unionization.[162] The scope of this right to free speech has not been fully developed in the context of labor relations,[163] but unlimited noncoercive speech would better inform the employee and is consistent with general First Amendment speech protections.

B. Practical Impact of the Supreme Court's Decision in Brown on Employer Speech Regarding Unionization

Over the last few decades, union membership has declined drastically.[164] Organized labor blames this partly on the employers'

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161. Kilberg & Schulp, *supra* note 110, at 212. As previously discussed, there would likely be strong political challenges inherent in passing legislation to undermine free debate over union organization. But this is briefly ignored in order to consider the effect of passing such legislation.

162. *See* Thomas v. Collins, 323 U.S. 516, 537-38 (1945) (citing *Va. Elec. & Power Co.*, 314 U.S. at 477) (holding that "'employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guarantee.").

163. *See* Alan Story, *Employer Speech, Union Representation Elections, and The First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 366 (1995). When the Supreme Court decided *Thomas* and *Virginia Electric*, certain First Amendment concepts, such as restrictions on "time, place and manner," distinction between political and commercial speech, concept of corporate speech, and different levels of constitutional protection, developed in primitive forms. *Id.* at n.42. The silence and confusion on these issues left by the Supreme Court's opinions may require a re-examination of the First Amendment rights of employers. *Id.*

164. Over the past fifty years, union membership has declined in the United States as a result of increased employer hostility and lack of remedies to deal with that hostility. Specter & Nguyen, *supra* note 145, at 312. A decrease in union membership greatly impacts society because unions "paved the way to the middle class for millions, pioneering benefits such as paid pensions and health care" Joseph Z. Fleming, *The "Employee Free Choice Act": The House of Lords and the House of Labor Have Something in Common: They Both are Seeking to Avoid Secret Ballot Elections*, ALI-ABA, Appendix B (Dec. 4-6, 2008). Unions influence wages for both members and non-members, so as membership slides, so does the union's ability to raise wages for their members. *Id.*

right to speak to employees prior to representation elections.[165] Unions are generally less effective in convincing employees to recognize a particular union when the employer becomes involved and provides information to the employee.[166] Organized labor has supported initiatives at the state and federal level in an effort to place limitations on the employers' speech rights. The Supreme Court's decision in *Brown*, however, concluded that employers have the right to noncoercive speech regarding unionization, and state legislation preventing employers from speech that promotes or deters union organization is preempted under the NLRA. Thus, as discussed in Part V. A, most of organized labor's initiatives to place limitations on the employers' speech rights through legislation will be preempted by the NLRA. As a result, unions have begun looking at procedures to diminish the importance of the employers' speech in an employee's decision.

1. Current Opportunities for Employer Speech Regarding Union Organization

Under the current version of the NLRA, the NLRB is required to recognize a union as the employees' representative when it has been "designated or selected" by employees.[167] Once a union is contacted by employees who feel unfairly treated in their place of employment, the labor organizing campaign begins.[168] Throughout its campaign, the union distributes authorization cards where the employees can designate a particular union as their bargaining representative.[169] Once the union has received authorized cards from a majority of employees, it will request recognition from the employer as the representative union and begin a collective bargaining relationship with the employer.[170] The current practice is that employers will generally decline the union's request and demand a representation election. Once there is a question of representation or a suggestion

165. Specter & Nguyen, *supra* note 145, at 312.

166. *Id.* at 327.

167. 29 U.S.C. § 159(a).

168. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824 (2005).

169. *Id.*

170. *Id.*

that cards are an inaccurate indication of the employees' choice, the employer files a petition with the NLRB seeking an election by secret ballot to certify representation.[171] Courts have consistently upheld the secret ballot as the standard and preferred method of selection.[172]

Insisting on a secret ballot election provides employers a significant window of time to influence the employees' decision to join a union and campaign against union organization prior to the representative's designation. Thus, the primary criticisms or problems with the NLRA's current process are that delays between petitioning for and holding an election, unlimited employer free speech rights, and a lack of sufficient penalties for unfair labor practices allow employers to mount coercive anti-union campaigns that undermine employees' free choice. Legally, employers are free to hold "captive audience meetings" and communicate information about the consequences of union organizing.[173] The NLRA does limit the employer's ability to threaten employees, fire or discriminate against those choosing to join the union, or promise benefits to the employees in reward for rejecting the union. However, there is an abundance of evidence showing that employers regularly engage in both legal and illegal campaign tactics, which generally result in a union loss by the time the secret ballot vote arrives.[174]

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171. 29 U.S.C. § 159(c).

172. *See Gissel Packing Co.*, 395 U.S. at 604 (Supreme Court held that an employer is able to insist on a secret ballot election, unless the workplace environment has been undermined to the point that a fair election is no longer possible); Linden Lumber Div. v. NLRB, 419 U.S. 301, 310 (1974) (employers do not have to recognize a union based solely on card checks and they can insist on a secret ballot election without proving the cards do not correctly indicate the employees' choice).

173. Captive audience speeches provide a forum for employers to express their views on "union, political, and religious issues." Secunda, *supra* note 114, at 23. This interferes with worker's rights because employees generally cannot "speak, leave, or offer a rebuttal, without risking termination for insubordination." *Id.* This tactic is highly effective and widely used by employers. The government recently reported that ninety-two percent of union campaigns include captive audience meetings, and the average campaign has up to eleven captive audience meetings. *Id.*

174. *See* Specter & Nguyen, *supra* note 145, at 312.

2. Increased Support for Card Check Process

The use of card check procedures has been growing in the United States as union membership conversely declines.[175] The card check process consists of employers agreeing to recognize a union based on authorization cards signed by a majority of bargaining unit workers.[176] The union's ultimate goal is to obtain enough authorized cards for voluntary recognition from the employer without the necessity of a secret election. Generally, this process is agreed to by employers and unions in conjunction with neutrality agreements.

Proponents argue that the card check process is desirable because it diminishes the employer's opportunity to speak and launch anti-union campaigns.[177] Unions contend that the greater the amount of employer communication during a campaign, the less likely a union

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175. Raja Raghunath, *Stacking the Deck: Privileging "Employer Free Choice" Over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 335 (2008). Originally, card check organizing campaigns were conducted in the private sector pursuant to private agreements between unions and employers. *Id.* However, since 2001, more states have enacted card check laws for their employees through the use of neutrality agreements between unions and employers. *Id.* In ninety percent of cases where a card check agreement is in place, the labor union becomes the bargaining representative. *See* Joseph J. Fleming & Daniel B. Pasternak, *Mutuality Agreements: Innovative Approaches to the Use of Neutrality Agreements – A Unique Proposal for Compromise*, ALI-ABA. at 578 (Feb. 15-17, 2007).

176. *See generally* Sheila Murphy, Comment, *A Comparison of the Selection of Bargaining Representatives in the United States and Canada: Linden Lumber, Gissel, and the Right to Challenge Minority Status*, 10 COMP. LAB. L.J. 65, 81-96 (1988) (the Canadian model utilizes authorization cards to show majority support and as an alternative to the United State's system of selecting a bargaining representative).

177. Brudney, *supra* note 168, at 832. Neutrality and card check arrangements give unions the opportunity to avoid anti-union campaigns, speech, and conduct. *Id.* When an employee repeatedly hears that the employer does not approve of unionization, the employee is bound to consider that joining the union may adversely affect their work life, even if the employer's speech is noncoercive. *Id.* In Canada statutes were enacted to limit the time available for employers and unions to campaign prior to an election and implemented card check procedures in some provinces to ease the process of unionization. Specter & Nguyen, *supra* note 145, at 326-27.

is to prevail in the election.[178] By establishing a card check process, unions essentially make the employer agree to remain neutral and not communicate to employees any indications as to how they feel toward unionization. Additionally, because the process eliminates the secret ballot election, the costs and risks of an organizing campaign are decreased.[179]

Unions gain a clear advantage in card check procedures because (1) getting employees to sign authorization cards requires less effort than campaigning prior to a secret ballot election, and (2) unions are able to exert more influence over individual employees, as opposed to all company employees prior to an election.[180] Opponents argue that the card checks are conducted too quickly and eliminate the employer's opportunity to state their opinions as to unionization.[181] Furthermore, the process replaces the secret ballot system, where employees make their choice privately, with a process in which employees are required to openly express their preference before union organizers, coworkers, and even supervisors.[182]

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178. Brudney, *supra* note 168, at 832. The "aggressive and hierarchical nature of employer communication" suggests an adverse impact on an election. *Id.*

179. *Id.*

180. Kilberg & Schulp, *supra* note 110, at 213.

181. Raghunath, *supra* note 174, at 337-38. The NLRB ruled in September 2007 that there be a forty-five day window period after a union is recognized via the card check process during which employees can file a petition for a decertification election. *See* Dana Corp., 351 N.L.R.B. No. 28 (Sept. 2007), 2007 WL 2891099.

182. *See* Raghunath, *supra* note 174, at 337. While secret ballots are revered in a democracy, there must be a democratic context in order for the elections to be effective and meaningful. *Id.* Labor relations today involve intimidation during elections, which makes the election run more as a "dictatorship than a functioning democracy." *Id.* (quoting *Strengthening America's Middle Class Through Employee Free Choice Act: Hearing on H.R. 800 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 3-4 (2007)). Because the labor-management relationship is not generally a democracy, a secret ballot is not necessarily the best indicator of employees' choice.

3. Effect of Employee Free Choice Act on Employers' Speech Rights

The linchpin of the card check process initiative is federal legislation requiring the NLRB to replace the secret ballot election process with card checks when union representation is in question. In 2007, the Employee Free Choice Act (EFCA) was introduced as legislation amending the NLRA to require NLRB certification of a bargaining representative if a majority of the bargaining unit employees signed cards under a card check process.[183] Under this bill, a certified union can demand that an employer begin bargaining with them within ten days of certification.[184] The House of Representatives passed the EFCA in March of 2007, but it failed to pass in the Senate, and thus cannot be considered again in Congress until 2009.[185]

The EFCA became a major issue during the 2008 presidential campaign, and President Barack Obama and his current administration have long supported the measure.[186] Unions support the bill for the same reasons that they favor the card check procedure. Organized labor believes that the current election process is tilted in favor of employers because the "employer has all the power[,] . . . control[s] the information workers can receive[,] . . . force[s] workers to meet with supervisors [delivering] anti-union messages[,] . . . and . . . imply that business will close if the union wins."[187] The bill gives employees the opportunity to come together as a majority and know that their decision will be certified immediately, without having to endure coercive speech and brow beating by employers.

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183. H.R. 800, 110th Cong. (2007).

184. *Id.*

185. Raghunath, *supra* note 174, at 337.

186. *See* 2007 CONG. REC. 153, S8378-S8398, S8390 (2007) (statement of Sen. Obama of Illinois). Then Senator Obama supported this bill in 2007 because the current process for organizing a workplace denies workers the right to organize under a fair and free process. *Id.* While voluntary card check programs allow employers to choose whether to accept the decision of a majority of workers, this bill would leave that choice up to the workers and require the employer to implement their decision.

187. *See* 2007 CONG. REC. 153, E260 (2007) (statement of Rep. Miller of California).

Those employers in opposition to the bill argue that the NLRA was enacted to give American workers the right to cast a vote privately as to whether or not they choose to organize.[188] The card check process would allow unions to bypass the secret ballot system and eliminate the employees' democratic right to vote.[189] The opposition also contends that the additional and required use of card check procedures will lead to more coercion on the part of union organizers, further eliminating the employees' free choice.[190]

While the purpose of the federal legislation is to diminish the importance of employer speech to an employees' decision regarding representation, the EFCA could potentially inhibit employee free choice during the voting process in the same way that supporters argue that employers currently inhibit free choice by launching anti-union campaigns. History shows that the card check process increases union membership; however, it may not always be the best indicator of employees' desires because of inevitable motives on the part of unions to coerce, intimidate, and manipulate a majority of employees to authorize union certification.[191] Furthermore, while the EFCA has the potential to force employers to certify unions based on

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188. *See* Press Release, Committee on Education and Labor, Former Union Organizer Details Tactics of "Manipulating Workers Just to Get a Majority on 'the Cards'" (Feb. 8, 2007). Representative John Kline of Minnesota has stated that a system where everyone knows how the employee voted not the best way to ensure that the worker is free to choose. *Id.* A private ballot means no one will know how the employee voted, thus a proposal to take away an employee's democratic right to vote does not equal "employee free choice." *Id.*

189. *See* 2007 CONG. REC. 153, S8378-S8398, S8389 (2007) (statement of Sen. McCain of Arizona).

190. *See Gissel Packing Co.*, 395 U.S. at 602 (court held that cards do not "accurately reflect an employee's wishes . . . because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth . [and] cards are too often obtained through misrepresentation and coercion which compound the cards' inherent inferiority to the election process.").

191. *See* Meghan Brooke Phillips, Comment, *Using the Employee Free Choice Act as Duct Tape: How Both Active and Passive Deregulation of Labor Law Make the EFCA an Improper Mechanism for Remedying Working Class Americans' Problems*, 111 W. VA. L. REV. 219, 260 (2008). For example, in a small town, where there is one major employer, if an employee chose not to vote for unionization, the entire town would know because the process is no longer secret. *Id.* On the flip side, an employee may feel that if the employer knows that they specifically voted for a union they will be treated different at work. *Id.* at 261.

a majority of cards, the legislation will not remove their inherent motives to oppose unions. Employers could engage in more intense monitoring systems to detect union organization earlier and implement anti-union campaign tactics prior to the commencement of an organizational effort. Thus, the proposed EFCA will essentially act as a band-aid to solve the problems American workers are facing in regard to employee free choice and union attempts to exert more influence over employees and diminish the importance of employer speech.

VI. CONCLUSION

Section 8(c) of the NLRA defends the idea that a free exchange of ideas is the best mechanism for decision making, a principle underlying economic markets and the long respected democratic system. The Supreme Court's decision in *Chamber of Commerce v. Brown* highlighted the NLRA's protection of free debate between employers and organized labor on unionization. Recent union initiatives to enact legislation and card check procedures in order to silence employer speech during union campaigns show no signs of abating. However, due to the Court's recent decision, legislation restricting the use of state funds and prohibiting employer speech prior to elections is preempted and unenforceable. Limiting noncoercive employer speech deprives employees of valuable information regarding the consequences of unionization, chilling one side of the debate. The balance struck by the NLRA, and upheld in the Supreme Court's decision, promotes employee free choice. Protecting the freedom of both unions and employers to speak ultimately provides the employee with all available information to make an informed decision regarding unionization.