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

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The liberal-legalist order . . . will be founded on self-interested, rights bearing, adversarial individuals and this will not be sustainable. This type of social order is likely to aggravate precisely those points of tension in society which any vibrant political process should aim at alleviating. The ultimate danger is that liberal-legalism, may, paradoxically, bring about the precise end—despotism—which, it is designed to avoid.\footnote{\textsc{Martin Laughlin, Sword & Scales: An Examination of the Relationship Between Law & Politics} 5 (2000).}

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Introduction

For more than two hundred years American lawyers, judges, and legal academics have been looking for a fully persuasive theory that would justify the judicial invalidation of statutes on grounds they fail to satisfy the judiciary’s understanding of what the Constitution requires.\(^2\) Nowhere is this clearer than within the domain instantiated by the intersection of fundamental freedoms such as the freedom of speech, the doctrine of preemption\(^3\) and burgeoning efforts by states to regulate labor organizing and collective bargaining.\(^4\) In *Chamber of Commerce et al v. Edmund G. Brown*,\(^5\) the Supreme Court offers one theory of judicial invalidation that protects employers’ freedom of speech claims and reinvigorates federal preemption doctrine within the meaning of the National Labor Relations Act (NLRA or Act). Prescinding from an architectonic conception of freedom of speech that is supported forcefully and explicitly by the First Amendment, the Court relies on preemption doctrine to invalidate two

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\(^2\) JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 50 (1997).


\(^4\) Many of these efforts are sparked by academic and labor union commentary that reflects disappointment with rates of unionization in the private sector. These trends reveal a continuing and persistent decline in unionization over the last several decades. In response, academic conferences have emerged to stem the decline. See e.g., *New Wave Organizing Symposium*, 50 NEW YORK L. SCH. L. REV. 303-614 (2005, 2006). Various methods have been proposed including new approaches to organizing that emphasize smarter organizing, bargaining to organize, reducing employer opposition, building public support for unions and the enactment of state and local laws designed to change the organizing environment. See generally, Fred Feinstein, *Renewing and Maintaining Union Vitality: New Approach to Union Growth*, 50 NEW Y. L. SCH. L. REV. 337-353 (2005).

\(^5\) *Chamber of Commerce*, 554 U.S. ___slip op. at 1-16.
provisions of a California statute\(^6\) because the enactment constitutes regulation, which intrudes into a zone that is protected and reserved for market freedom.\(^7\) The Court properly upholds its previous stance permitting employers to speak directly to their employees about unionization,\(^8\) but supporters of this decision might do well to withhold their applause.

While a continuing debate erupts with regard to whether or not Justices since Oliver Wendell Holmes, Jr. have been looking to the judiciary as a means of subverting or fortifying the Constitution,\(^9\) it is clear since the Supreme Court’s 1941 decision in *NLRB v. Virginia Elec. & Power Co.* that nothing in the NLRA prohibits an employer “from expressing its view on labor policies or problems”\(^10\) unless the employer’s speech is coercive within the meaning of the Act.\(^11\) *Virginia Elec. & Power* supports the proposition that employers have a First Amendment

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\(^6\) A California state statute known as “Assembly Bill 1889” (AB 1889) prohibits several classes of employers that receive state funds from using the funds ‘to assist, promote, or deter union organizing.” Two provisions of the statute were in issue: sections 16645.2 and 16645.7. *Chamber of Commerce*, 554 U.S. ___ slip op. at 1.

\(^7\) *Chamber of Commerce*, 554 U.S. ___ slip op. at 5.

\(^8\) *Id.* at 6 (citing Thomas v. Collins, 323 U.S. 516, 537-539 (1945)).


\(^11\) See e.g., Thomas v. Collins, 323 U.S. 516, 537-538 (1945) (characterizing *Virginia Electric* as a case that recognizes the First Amendment right of employers to engage in noncoercive speech about unionization). *See also*, Matthew T. Bodie, *Information and the Market for Union Representation*, 94 Va. L. Rev. 1, 7-11 (Discussing difficulties in assessing whether employer coercion has taken place and pointing out that though NLRA Section 8(a)(1) disallows employer conduct that interferes with, restrains or coerces employees who were exercising rights protected under Section 7. Difficulties arise when an employer engages in campaign activities might intimidate or coerce but yet not violate Section 8 (a) (1). This line becomes fuzzy when an employer is trying to convince employees of the negative consequence of union representation. Ultimately there is no clear line between impermissible threats and permissible campaign rhetoric.).
right to engage in noncoercive speech about unionization. Labor sanctions, if imposed, are not for the punishment of employers but the protection of employees; thus, employers are free to take any side and express any view on labor policies or problems in the absence of adducible evidence bearing on the issue of coercion. Claims that employers possess free speech rights have spawned thorny debates about whether or not: (1) employer speech rests on a wobbly foundation, (2) states can somehow limit the employer’s free speech right and (3) the proposition tied to Virginia Electric states a rule that can be defended sufficiently as a component of federal supremacy. Freedom of expression disputes frequently prompt uncertainty about whether or not employer and union expression tied to the merits of an ongoing labor controversy warrant full First Amendment protection or whether such expression, like commercial advertising, holds only

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12 Chamber of Commerce, 554 U.S. ___ slip op. at 6.
13 Virginia Elec. & Power, 314 U.S. at 477. Where a party to an organizing campaign engages in noncoercive speech, the employer or union may still be subject to a NLRB order, setting aside a representation election even though such a remedy impinges on the party’s freedom of expression rights to some extent. Robert A. Gorman and Matthew W. Pfinkin, Basic Text on Labor Law: Unionization and Collective Bargaining 177, and n. 9 and accompanying text (2004) (discussing Bausch & Lomb Inc. v. NLRB, 451 F.2d 873 (2d Cir. 1971).
15 Thomas 323 U.S. at 531 (stating that the First Amendment safeguards are applicable to business or economic activity).
a “subordinate position” on the scale of First Amendment values and accordingly, justifies a lower level of judicial scrutiny. In deciding freedom of expression disputes regarding the chargeability of union dues to union dissenters, for instance, the Supreme Court has found that such disputes can force First Amendment issues, such as those initially raised but reserved in Hanson, to the surface. This provokes two corresponding queries: (1) should First Amendment issues be reserved and if so why?, and (2) should disputes concerning the chargeability of union dues provide persuasive or analogical guidance to courts regarding disputes about employer free speech rights particularly because the Supreme Court insists that “a significant impairment of First Amendment rights must survive exacting scrutiny”? This article will not attempt to answer all such questions but will focus on the issue of whether NLRA preemption doctrine is strong enough to withstand an onrushing tide of disapproval coming from labor unions and their allies. This tidal wave of

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17 Seay, 427 F. 2d at 1004 (citing International Association of Machinists v. Street 367 U.S. 740, 763-64 (1961). See also, Railway Employes’ Dept. v. Hanson, 351 U.S. 225 (1956)).

18 A current controversy involving First Amendment issues is currently being litigated before the United States Supreme Court. See Locke v. Karass, 497 F. 3d 49 (2007) 2008 U.S. Lexis 1373 (2008) (Cert granted) (The Supreme Court is called upon to answer this question: “May a State . . . consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of agency fees for purposes of financing a monopoly bargaining agent’s affiliates’ litigation outside of a nonunion employee’s bargaining unit?”). Similar issues have arisen with respect to private sector labor unions as well. See e.g., Ellis v. Railway Clerks, 466 U.S. 435 (1984); Communication Workers v. Beck 487 U.S. 735 (1988).

opinion, however under-theorized, appears calculated to stem the precipitous
decline in private sector unionization, to prevent collective action from becoming
an anachronism and to eliminate presumed employer coercion, which some
observers maintain is an impregnable barrier to the employees’ right to favor
unionization.\footnote{James J. Brudney, Neutrality Agreement and Card Check Recognition: Prospects for Changing Paradigms, 90 IOWA L. REV. 819, 820 (2005) (abstract) (asserting that the NLRB election process is no longer normatively justified because the election paradigm regularly tolerates, encourages and promotes coercive conditions that preclude the attainment of employee choice).}

Presumably, freedom of expression contentions are riven with challenges
that exceed the competence of the National Labor Relations Board (NLRB).
Authority exists for the proposition that freedom of expression claims within a
union dues context and the policy behind the preemption doctrine are not served
by deferring to the Board when a constitutional question is validly presented.\footnote{Seay, 427 F. 2d at 1002.}
This is so because constitutional adjudication trumps the Board’s interpretative
expertise. Court adjudication, however, may be only a little better since
prevailing canons of interpretation require that the dispute be settled on grounds
of statutory construction that ensure the statute is interpreted consistently with
the Constitution without reaching the constitutional claim itself.\footnote{Seay, 427 F. 2d at 1003-1004 (citing International Association of Machinists v. Street 367 U.S. 740, at 763-64).} Hence,
freedom of expression rights often rest on constitutional principles without being
fully defended by the language of such principles.
An additional layer of complexity emerges because liberal democratic states, such as the United States have been drawn increasingly to moral pluralism as an outgrowth of the pursuit of postmodernism. Coherent with this deduction, Professor Alasdair MacIntyre intuits that “[i]t is not just that we live too much by a variety and multiplicity of fragmented concepts; it is that these are used at one and the same time to express rival and incompatible social ideals and policies and to furnish us with a pluralist political rhetoric whose function is to conceal the depth of our conflicts.”

Moral pluralism provides a platform for elastic adjudication and litigation. This interpretive tactic is contestable because statutory construction, just like constitutional interpretation and correlative political conflict, may not reveal the truth. Instead, a conscientious examination of prevailing interpretative techniques applied to the Constitution, legislative enactments and the interstices of legislative intent may disclose a flight from a precommitment to truthfulness, as well as an isomorphic shift towards hypocrisy by the nation’s elected and appointed ethnarchs. Evidence may be available suggesting that such officials may be predisposed to favor one side or another in the contest for political

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24 Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. of Pa. J. of Bus. and Emp. L. 663, 680 (2008) (“Unquestionably, postmodern implications, and even postmodernism itself, ought to be embraced with caution rather than enthusiasm because the deficiencies in postmodern implications may impair postmodernism’s ability to reclaim liberty and First Amendment values. In fact, it may be difficult to define First Amendment values through postmodern discourse.”).
power and then mask their partisanship by deploying the elastic rhetoric of neutrality.

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

\[ \ldots \text{it is fair to say that many courts have in close cases tended to give little deference to Board’s conclusions, \ldots [instead] they have tended to examine the issue of coercion rather independently and \ldots have far more frequently substituted their own finding of noncoercion for Board findings of coercion rather than the reverse.}^{26} \]

This conclusion is “explainable by the fact that federal regulation of the flow of information in labor-election campaigns may trench upon First Amendment protections, a setting naturally characterized by an ‘uninhibited, robust and wide-open’ exchange between labor and management.”^{27} State initiatives that attempt to constrain employer speech face similar impediments tied to the force of constitutional values and the notion that the federal government has an

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^{26} Gorman and Finkin, supra note ___ at 187.

^{27} Id. at 188.
interest in maintaining a province that is characterized by a robust exchange of ideas by labor and management. If the creation of a zone exemplified by robust exchange of views is an important objective, it can be sustained through the doctrine of federal preemption. But, preemption that relies on varying, if not inconsistent, statutory interpretation may not always be enough to enforce employers’ speech rights. Since constitutional shelter for freedom of speech does not hinge on the individual or corporate identity of its speaker, 28 it follows that if the process of statutory interpretation tied to the doctrine of preemption proves inadequate to protect employers’ interests, this lacuna implies the necessity of reclaiming the Constitution itself as a source of freedom for employers.

Despite the declaration that recent Supreme Court opinions have accomplished a “Federalism Revolution” through decisions strengthening state autonomy and authority, 29 the Court’s Chamber of Commerce opinion relies heavily on the Machinist doctrine. 30 This reliance emphasizes that both the NLRB and the states are without power to regulate conduct that Congress intended to

29 Patrick M. Garry, Federalism’s Battle with History: The Inaccurate Associations with Unpopular Politics, 74 UMKC L. REV. 365, 365 (2005) (suggesting that after almost sixty years of dormancy, federalism made a constitutional comeback in the 1990s).
30 See e.g., Harry G. Hutchison, Through the Pruneyard Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims, 78 MARQUETTE LAW REV. 1, 18 (1994) [hereinafter, Hutchison, Through the Pruneyard Coherently] (In Machinists v. Wisconsin, the United States Supreme Court deployed a preemption doctrine that requires respect for economic weapons as part of the free play of economic forces envisioned by the NLRA).
remain unregulated but controlled by the free play of economic forces.\footnote{Chamber of Commerce, 554 U.S. \_\_\_slip op. at 4.}

“\textit{Machinist} pre-emption is based on the premise that ‘Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.’”\footnote{Chamber of Commerce, 554 U.S. \_\_\_slip op. at 4 (quoting Machinist v. Wisconsin Employment Relations Comm’n 427 U.S. 132, 149 (1976)). On the other hand, Professor Paul Secunda argues that in the absence of relatively equal economic power in the organizational setting, \textit{Machinist} doctrine makes less sense than it does in the collective bargaining or protected concerted activity realm. (October 17, 2008 Email on file with the author).} Presumably, state enactments, which upset this balance, must give way to the federal interest.

On the other hand, a careful reading of the Ninth Circuit Court of Appeals’ \textit{Chamber of Commerce} opinion shows it is skeptical that the \textit{Virginia Electric} and \textit{Machinists} cases establish a constitutionally sufficient theory for invalidating the statute at issue.\footnote{Chamber of Commerce of the United States v. Lockyer 463 F.3d 1076 (2006). See also, Cynthia L. Estlund, \textit{Labor, Property and Sovereignty After \textit{Lechmere}}, 46 STAN L. REV. 305, 341-42 (1994) (criticizing \textit{Machinists}).} Instead, the Ninth Circuit, unswerving from its irrepressible conception of the range of pro-union devices that can be deployed permissibly to strengthen unions and restrict freedom of expression claims,\footnote{See generally, Bhd. Of Ry., Airline & S.S. Clerks, 685 F. 2d 1065 (1982) (dismissing a freedom of expression challenge by union dissenters) (cert. granted, and reversed by Ellis v. Bhd. Of Ry., Airline & S.S. Clerks, 466 U.S. 435, 452-457 (1984); United Food & Comm’l Workers, Union, Local 1036 v. NLRB, 307 F.3d 760 (9th Cir. 2002) (en banc) (cert. denied) (holding that extra-bargaining unit organizing expenditures are germane to collective bargaining and chargeable to nonmembers’ dues despite their freedom of expression objections).} reversed the lower court and dismissed the plaintiffs’ claims. The Ninth Circuit analysis is tied crucially to the proposition that there is a principled difference between an organizing context and a collective-bargaining one for purposes of judging
whether state regulation encroaches impermissibly on the federal scheme. The
court held that employer freedom expression rights are not constrained when the
state of California exerts its sovereign rights with respect to its spending power.
Hence, the Ninth Circuit upheld the contested provisions.\footnote{Chamber of Commerce et al., 463 F. 3d at 1080.}

On the basis of its interpretation of the statute and its elastic view of the
doctrine of preemption, the Court of Appeals decided that the state of California
was free to prevent certain employers from using state funds to assist, promote
or deter union organizing, against the contrary claim that NLRA statutory
section 8 (c) protects employers’ speech rights.\footnote{Chamber of Commerce et al., 463 F. 3d at 1100.} Consequently, the employers’
Commerce Clause and freedom of expression claims\footnote{Chamber of Commerce et al., 463 F. 3d at 1080-1082.} were unavailing.
Convinced that the state had a neutral purpose in enacting the contested
legislation—to avoid interfering with an employee’s choice about whether to join
or to be represented by a labor union\footnote{Id at 1080 (citing the preamble to California Government Code §§16645-16649).}—the Ninth Circuit concluded that the
NLRA does not preempt the California statute and determined that the
challenged restrictions do not violate the First Amendment.\footnote{Id. at 1080.}

First Amendment jurisprudence is not noted for its perspicuity and few
areas of labor law seem quite as confusing as the scope of federal preemption.\footnote{GORMAN AND FINKIN, supra note __ at 1078.}
has been forcefully argued that the First Amendment is a charter for government, and free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts. Accordingly on freedom of expression grounds, the Supreme Court has barred state laws, which constrain one party’s ability to speak in favor of union organizing even if the Court has been reluctant to recapture full First Amendment protection for all activities that implicate the full range of the labor arena. Still, if labor organizing activities are properly understood as lawful exercises of the First Amendment, it would be anomalous if the First Amendment did not extend to activities opposing organizing.

However symmetrical and logical this contention may be, the asserted right of employer-recipients to use state funds to oppose organizing was not viewed sympathetically by the Ninth Circuit. Though NLRA preemption is vital to the Ninth Circuit’s analysis in Chamber of Commerce and the Supreme Court’s subsequent reversal, perplexing questions are aroused by the Court of Appeals’ dismissal of the plaintiffs’ freedom of expression claims. This is so because the Ninth Circuit determined that the contested provisions of the statute, which were directed toward employers, do not infringe the employers’ right to express

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42 Id. at 518 (finding a state law that appears to be inconsistent with provisions of the NLRA to be invalid because, as applied, it imposed a prior restraint on paid organizers who solicit union membership in Texas).
44 Chamber of Commerce, 463 F.3d at 1096-1097.
whatever view they wish on organizing because the provisions are deemed neutral and nonpartisan.45 This conclusion materializes as a contestable one because neutrality may be impossible in theory and particularly as applied by the Ninth Circuit. Coextensively, while the Supreme Court has often suggested complainants’ First Amendment rights warrant some protection, it has been reluctant to substantiate such rights energetically. The Chamber of Commerce Court breathes life into this unfortunate pattern.

In addition to examining labor law preemption principles, I inspect the often-contestable conception of neutrality in light of the existence of scholarship advocating an expansion in state labor law innovation aimed at reducing employer rights.46 The penultimate purpose of such innovation seems clear enough: to increase the level of unionization in the United States and to restore collective action to its previously ascendant status.47 It is doubtful that this objective can be seen as a “neutral” one. Instead, this goal is delineated by the declining importance of labor unions in the United States48 and the mounting appeal of paternalistic intrusions into the market.49 In light of this goal,

45 Id. at 1096.
46 See infra Part I. B.
47 For a discussion of collective action, see JOHN R. COMMONS, THE ECONOMICS OF COLLECTIVE ACTION 23-35 (1950, 1970) (examining collective bargaining during the period from 1883-1945). To his credit, Professor Secunda’s innovative efforts are motivated by the desire to ensure that workers have a fair opportunity to express their views about unionization. (October, 17, 2008, Email on file with the author).
employers when confronted with either legislative or judicial assertions of neutrality should be forgiven for suffering from a prevenient sense of doom. This impression is often made tangible via partisan enactments and adjudication. With the advent of postmodern discourse and the possibility that courts have become captive to progressive rhetoric that is not found within the Constitution, I argue that the Supreme Court should reconsider its reliance on the NLRA as the primary vehicle to vindicate employers’ rights and should instead return to the Constitution itself as a basis for its defense of what has become increasingly difficult to defend: the free speech rights of employers and employees within a labor-management context. This approach is exemplified by recapturing the Supreme Court’s understanding of *Virginia Electric* as an independent ground for relief. This case, decided before the Wagner Act was amended adding explicit protection of employers’ speech, stands for the proposition that employer and labor union “attempts to persuade to action with respect to joining or not joining unions are within the First Amendment’s guaranty.”

And, yet, Stanley Fish vitiates such sentiments by arguing that for modern democratic societies like the United States, “there is no such thing as free speech.” If Fish is correct, protection for any speech, including employer speech, may be impermanent and the surging conflict initiated by labor

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50 *Thomas v. Collins*, 323 U.S. at 537-538 (citing *Virginia Electric*).
advocates who seek to restrict employer authority and speech may be beyond resolution. At the end of the day, it is doubtful that placing employer speech rights on a constitutional plinth should be a basis for lasting celebration for employers because clarity in this arena, however desirable and however necessary, is likely to remain evanescent unless society regains a consensus on the meaning of liberty. Adjudication accompanied by imaginative interpretation may mean that freedom of expression cannot rest on a reliable foundation and that employer free speech rights face an uncertain future.

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

I. Finding the Law of Preemption

A. *Garmon* and *Machinists* Preemption.

When regulating conduct and actions that are linked to organizational activities, the NLRB’s “primary concern is to protect the statutory rights of employees, but in doing so it must balance those rights against the rights of the employer and, to a lesser extent, those of the union.”§2 Section 8(c) defends employers’ freedom of expression rights but the protections afforded to speech

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by this section of the NLRA are not absolute.\textsuperscript{53} Circumstances arise under which the employer’s free speech right can be circumscribed by the NLRA’s chief interpreter, the NLRB, because it must engage in a continuing effort to balance free speech and statutory requirements against interference, restraint or coercion of employees in the exercise of their Section 7 rights.\textsuperscript{54} The Board maintains a regulatory role in this arena\textsuperscript{55} despite precedent suggesting the First Amendment provides an independent ground to protect the right of workers, unions and employers to persuade employees to join or refrain from joining a union.\textsuperscript{56}

At issue here is whether states also have a role in balancing or alternatively expanding the rights of employees and diminishing the right of employers. State regulatory efforts raise the specter of federalism as well as the possibility of preemption. Professors McGinnis and Somin show that federalism is the cornerstone of the Constitution, and the constitutional system of federalism assigns powers to state and federal government officials not for their own benefit, but for that of the people.\textsuperscript{57} These benefits are many, including the diverse preferences and competition both among the states themselves and between the states and federal government.\textsuperscript{58} At times, federalism can be

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\textsuperscript{53} \textit{The Developing Labor Law}, \textit{supra} note ___ at 95.
\textsuperscript{54} \textit{Id}.
\textsuperscript{55} \textit{Id.} 121.
\textsuperscript{56} \textit{See e.g., Thomas}, 323 U.S. at 537-538.
\textsuperscript{58} \textit{Id}.
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defended by only restricting the power of state government rather than by expanding it.  

The dispute that gave rise to the District Court and several court of appeals decisions culminating in the Supreme Court’s opinion in *Chamber of Commerce v. Brown* evolved largely during an epoch presided over by the Rehnquist Court. This Court ostensibly restructured and rebalanced power between the national government and the states, reinvigorated the doctrine of federalism and restored power to the states. Still, the Supreme Court has recently published opinions that call into question allegations that a federalism revolution is afoot.

Whether the modern Court’s federalism decisions represent an inclination to favor symbolism rather than substance, whether federalism is a radical idea or not, or whether the critics of the modern Court’s new federalism only disapprove of the putative shift toward federalism when the Court offends their preferences, it is clear that New Deal reformers such as President Roosevelt

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59 *Id.*

60 “The Court of Appeals for the Ninth Circuit, after twice affirming the District Court’s judgment granted rehearing en banc and reversed.” *See Chamber of Commerce, 554 U.S. ___* slip op. at 3-4.


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


65 Garry, *supra* note ___ at 366 (stating that the notion of federalism is hardly a radical idea).

66 *Id.* at 367 (showing that the same political forces that condemn the constitutional revival of the federalism doctrine are simultaneously, in separate venues pertaining to separate issues, enthusiastically embracing the principles of federalism).
quickly scrapped their earlier states’ right views.\textsuperscript{67} This shift, by and large, favored federal regulation of the labor market. Consistent with this move, the organizing premises attached to the New Deal and the newly-ascendant \textit{zeitgeist},\textsuperscript{68} the national government came out as the more authoritative partner in the newly transformed federal-state system.\textsuperscript{69}

As enacted in 1935, the NLRA did not contain any provision that specifically addressed the collision between employee organizational rights and employer speech rights.\textsuperscript{70} Instead, cabined by the restructured boundaries of America’s liberal-legalist order, it was left to a federal regulatory agency, the National Labor Relations Board (NLRB), subject to review in federal court to reconcile these often conflicting interests in its construction of §§ 7 and 8 of the NLRA.\textsuperscript{71} While, an “employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board,”\textsuperscript{72} this teaching does not resolve the question of whether a state can infringe when neither the union nor the Board cannot. Turning directly to the federalism issue, it is remarkable that the NLRA unlike other federal laws that expressly confront their relationships to overlapping or potentially conflicting

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\textsuperscript{67} \textit{Id.} at 371.  \\
\textsuperscript{68} For a description of the prevailing religious, philosophical and political mood of the country, see Harry G. Hutchison, \textit{Work, the Social Question, Progress and the Common Good?} 48 J. of Cath. Legal Studies (forthcoming) [hereinafter, Hutchison, \textit{Work, the Social Question}].  \\
\textsuperscript{69} Garry, \textit{supra} note ___ at 371.  \\
\textsuperscript{70} \textit{Chamber of Commerce}, 554 U.S.____ slip op. at 5.  \\
\textsuperscript{71} \textit{Id.}  \\
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state law, generally speaking, fails to contain a statement articulating Congress’ intent on this issue in the text of the Act.\textsuperscript{73} As more fully developed below, an exception to this general rule arguably surfaces with respect to the text of section 8 (c) of the NLRA and employer free speech rights.\textsuperscript{74}

Despite this exception, the law of preemption is largely judge-made and may be subject to shifts in judicial application over time.\textsuperscript{75} The NLRA carries implications of exclusive federal authority and reflects Congress’ withdrawal from the states of much that had previously rested with them.\textsuperscript{76} What has been taken from the states and what has been left to them are to be concretized by the Board under the supervision of the courts.\textsuperscript{77} Initially, federal court intervention in disputes between states and the federal government regarding state attempts to regulate labor relations were characterized by reluctance.\textsuperscript{78}

Arguing for a return to reluctant adjudication that permits states to engage in legislative innovation promoting collective action in the workplace,\textsuperscript{79} Professor Gottesman concedes that judicial opinions preempting state laws, which collide

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\textsuperscript{73} GORMAN AND FINKIN, supra note ___ at 1079. See also, Garner v. Teamster Union, 346 U.S. 485, 488 (1953) (“The . . . [NLRA] leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.”).

\textsuperscript{74} See Infra Part III.

\textsuperscript{75} Id., supra note ___ at 1079.

\textsuperscript{76} Int’l Ass’n of Machinists v. Gonzalez, 356 U.S. 617, 619 (1958).


\textsuperscript{78} For an introduction to recent scholarship favoring this idea, see, What Workers Want by Richard B. Freeman & Joel Rogers, (2006); and Ellen Dannah, At 70, Should the National Labor Relations Act be Retired?; NLRA Values, Labor Values, American Values, 26 BERKLEY J. OF EMP. AND LAB. L. 223 (2005). But see, Hutchison, What Workers Want?, supra note ___ at 799-819 (questioning the wisdom of this idea).
with the collective bargaining regime created by the NLRA, were properly struck down. However, the courts did so through the adoption of preemption rules that were overbroad.\(^80\) Gottesman admits the rule adopted in \textit{Garmon,} an early preemption case, made good sense with respect to the type of conduct challenged case—picketing, an economic weapon to gain recognition—because this activity lies on a continuum in which Congress has regulated the field in its entirety.\(^81\) Conversely, he reasons that \textit{Garmon's} preemptive reach should not be deployed—leaving space for state regulation—when Congress has chosen to regulate categories of conduct in only a limited way.\(^82\) Joined in this view by Professor Secunda, who champions a fundamental reconceptualization of preemption analysis to diminish a “too-aggressive application of \textit{Machinists,}”\(^83\) Gottesman insists that overbroad preemption rulemaking persuades federal courts to preclude state regulatory efforts that are consistent with the political

\(^{80}\) Gottesman, \textit{supra} note ___ at 355-56.

\(^{81}\) \textit{Id.} at 357.

\(^{82}\) \textit{Id.} at 358. Secunda characterizes this area as a place where the federal law just provides some restriction but where the conduct at issue is not on a continuum. Secunda, \textit{Toward the Viability of State-based Legislation, supra} note ___ at 213. Gottesman illustrates what he means by arena wherein NLRA operates in a limited way by referring to the intersection of employer property rights and union demands for access to employer property for purposes of organizing. Under limited circumstances an employer who denies access commits an unfair labor practice but in most cases, because off-premises communication is available to unions, the NLRA does not entitle unions to enter employer premises and therefore, an employer does not violate the NLRA by refusing access. Gottesman, \textit{supra} note ___ at 358. Though, Gottesman does not see that the alteration of labor union access rules by state access enactments instantiates a change in the labor-management balance of power, it seems clear that if a state attempts to alter the labor-management balance of power, \textit{Machinists} preemption is clearly implicated. For a discussion of this issue, see DOUGLAS L. LESLIE, \textit{LABOR LAW,} 321-323 (2008, 5th ed.). \textit{supra} note ___ at 321-323.

\(^{83}\) Secunda, \textit{Toward the Viability of State-based Legislation, supra} note ___ at 213.
impulses that gave rise to the NLRA.\textsuperscript{84} Despite vast and depressing evidence demonstrating that unions, like most cartels,\textsuperscript{85} “raise wages in ways that misallocate labor and reduce social output,”\textsuperscript{86} advocates of increased state power as a vehicle for expanding union power, implore courts to re-interpret the preemption doctrine in a manner that permits states to encourage unionization and prevent certain kinds of employer speech.\textsuperscript{87}

Perhaps influenced by the desire to accelerate “social progress” created by building a transformative “social movement,”\textsuperscript{88} but refusing to rely solely on workers’ ability to freely choose or reject voluntary forms of human solidarity that may or may not include unions, some labor experts appear to be drawn to government power as a vehicle to ensure organizing. This move is evidently grounded the contestable presumption that their opinion favoring unionization or some other kinds of labor organization represents the actual desires of workers.\textsuperscript{89} Though it is doubtful that this viewpoint reflects the perspective of

\textsuperscript{84} Gottesman, \textit{supra} note ___ at 356.

\textsuperscript{85} See \textit{e.g.}, RICHARD A. POSNER, \textsc{Economic Analysis of Law} 343 (7\textsuperscript{th} ed. 2007) (the NLRA is a kind of reverse Sherman Act designed to encourage cartelization of labor markets); Lloyd Cohen, \textit{Comments on the Legal Education Cartel}, 17 J. \textsc{of Cont. L. Issues} 25 (2008) (all cartels raise price and reduce quantity as compared to what would prevail in a competitive market); and Hutchison, \textit{What Workers Want?} \textit{supra} note ___ at 813 (the effectiveness of the labor cartel is now in doubt).

\textsuperscript{86} Richard Freeman, \textit{Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?}, \textsc{in Unions and Economic Competitiveness} 143, 144 (Lawrence Mishel & Paula B. Voos eds., 1992).

\textsuperscript{87} Secunda, \textit{Toward the Viability of State-based Legislation}, \textit{supra} note ___ at 213 (citing Gottesman).

\textsuperscript{88} See \textit{e.g.}, Jim Pope, \textit{Next Wave Organizing and the Shift to a New Paradigm of Labor Law}, 515, 530-534, 50 \textsc{New York L. Sch. L. Rev.} (2005, 2006).

\textsuperscript{89} See generally, FREEMAN & ROGERS, \textit{supra} note ___ at 184 (“That so many workers do not have the voice at the workplace that they want bespeaks a remarkable institutional failure in the country’s labor laws and labor relations system.”).
most Americans or most workers,\textsuperscript{90} taken as a whole, this perspective coincides with the conclusion that workers and employers’ constitutional rights to free speech, including freedom for employer speech, depend less on the Constitution, and more on state action aimed at diminishing employers’ property rights and expanding union rights.\textsuperscript{91} Such efforts may ultimately prove to be short-sighted because if states have power to police this domain without fear of preemption or the First Amendment, it is not clear that they will deploy their power to favor the preferences of labor advocates. On the contrary, states that are unshackled from the reach of preemption might choose to enact legislation that contracts rather than inflates the freedom of labor union organizers and that expands rather than restricts the discretion of employers.\textsuperscript{92}

Preemption doctrine has given rise to three distinct grounds for preemption of state regulation.\textsuperscript{93} Two grounds are of interest here.\textsuperscript{94} The first ground is often

\begin{itemize}
\item \textsuperscript{90} See e.g., Sharon Rabin Margalioth, \textit{The Significance of Worker Attitudes: Individualism as a Cause for Labor’s Decline}, in \textit{Employee representation in THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING} 41-49 (1998, ed. Samuel Estreicher) (showing American workers have been increasingly attracted to expressive individualism, which concentrates on subjective self-realization and are less likely to find attractive any collective action that requires individual interest to yield to group interest and solidarity).
\item \textsuperscript{91} Secunda, \textit{Toward the Viability of State-based Legislation}, supra note ___ at 214. But see Baworowsky, \textit{supra} note ___ at 713-1768 (arguing that the First and Fourteenth Amendments should protect corporate religious speech from statutory regulation).
\item \textsuperscript{92} See e.g., \textit{Thomas v. Collins, Sheriff} 323 U.S. at 548-557 (Roberts, J. dissenting) (arguing that a Texas state statute restricting paid union organizers’ liberty in the exercise of the state’s police power, upheld by the Texas Supreme Court, should be upheld by the United States Supreme Court). \textit{See also}, Nathan Newman, \textit{The Conflict of the Courts: RICO, Labor, and Legal Preemption in Union Comprehensive Campaigns}, 51 DRAKE L. REV. 307, 311 (2003) (discussing a labor union attempt to use NLRA preemption doctrine to block the application of a Louisiana law by an employer).
\item \textsuperscript{93} GORMAN AND FINKIN, \textit{supra} note ___ 1079.
\item \textsuperscript{94} \textit{Id.} (the third preemption ground consists of the judge-made policy under section 301 of the NLRA that favors the resolution of disputes arising under collective-bargaining agreements by the contractual
referred to as Garmon preemption. It provides a “substantive rights”—or “primary jurisdiction”—basis for precluding any state law that has the potential of upsetting the uniform scheme of national labor policy.\(^{95}\) As discussed more fully below, Garmon-type preemption can be subdivided into two component parts.\(^{96}\)

The second ground is often referred to as Machinist-type preemption under which the NLRA is understood to create an insulated zone for collective action and collective bargaining that precludes any regulation that would “upset what Congress intended to be the unregulated play of economic force.”\(^{97}\) Broadly speaking, the doctrine of preemption owes much its force to Garmon and its progeny, and Machinists can either be seen to rest on distinctly different or related doctrinal grounds. This second ground, directed toward maintaining the labor-management balance of power,\(^ {98}\) is the most important for purposes of this article. Within this domain, the NLRB declines to take an active role and states are barred from doing otherwise. It is possible to violate both prongs of the preemption doctrine.\(^ {99}\)

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95 Id.
96 See infra.
97 GORMAN AND FINKIN, supra note ___ 1079.
98 LESLIE, supra note ___ at 322.
99 See e.g., Employers Association, Inc. v. United Steelworkers of America, 32 F.3d 1297 (1994) (invalidating Minnesota’s Striker Replacement Law declaring it an unfair labor practice for employers to hire permanent replacement employees during a strike or lockout because it deprived employers of the economic weapon of hiring permanent-replacement workers during an economic strike. This is allowable,
Before deploying either preemption prong, courts are often called upon to consider a crucial question concerning whether a state program that imposes conditions on employment is regulatory and therefore likely preempted under either *Machinists* or *Garmon*, or whether the state is acting narrowly to serve its own needs in a proprietary capacity as a market participant. A state statute becomes regulatory only when it addresses employer conduct unrelated to the employer’s performance of contractual obligations to the government entity.

Returning to the first ground, *Garmon*—substantive rights or “primary jurisdiction” preemption—advances a doctrine where, crucial to the administration of the NLRA, the courts insist that the determination of what is actually protected by section 7 or prohibited by section 8, should be left to the NLRB. Limited preemption, which has been the norm in other areas of federal law, merely suspends state action in order to give the agency time to take action. The *Garmon* doctrine, when applicable, means that in the vast majority of cases triggering federal labor preemption, the state is deprived of any power and therefore arguably protected by the NLRA (*Garmon*). Thus, the state statute regulates a zone designed to be controlled by the free place of economics forces (*Machinists*).

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100 *The Developing Labor Law*, supra note ___ at 2344.
101 *Id.* at 2342-44.
102 *Id.* at 2344.
103 *See e.g.*, GORMAN & FINKIN, supra note ___ at 1095 (When a states acts as a regulator of labor activity the action is subject to preemption analysis; but when the state acts as market participant it is far less likely to be subject to preemption constraints.). *See also*, Wisconsin v. Gould, 475 U.S. 282. But see Chamber of Commerce, 554 U.S. ___ slip op. at 4-5 (Breyer, J. dissenting) (contending that the regulator/market-participant distinction often offered in such cases is a false dichotomy because the converse of a market-participant is not necessarily “regulator”).
105 GORMAN AND FINKIN, supra note ___1084.
106 *Id.*
to act at all.\textsuperscript{107} In \textit{San Diego Building Trades Council v. Garmon}, federal labor preemption found its fullest expression\textsuperscript{108} in a Supreme Court rule that prevails today.\textsuperscript{109}

In \textit{Garmon}, the issue was whether a state court interpreting state law could award damages to an employer who suffered business losses from a union’s peaceful picketing.\textsuperscript{110} Finding that the state could not provide this remedy, \textit{Garmon} preemption evolved into two constituent parts.\textsuperscript{111} The first part of \textit{Garmon’s} guidelines safeguards the substantive rights of workers who are covered by the NLRA. This means that a “state cannot prohibit (or award damages) for conduct that the federal law protects. The conflict is obvious and the latter controls as a matter of federal supremacy.”\textsuperscript{112} Because of the ever-present danger of conflict, the Supreme Court maintains that state law is preempted if it regulates conduct that is protected by section 7.\textsuperscript{113} The NLRB retains primary

\begin{flushleft}
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 1079 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
\textsuperscript{109} Gottesman, \textit{supra} note ___ at 356.
\textsuperscript{110} \textbf{GORMAN AND FINKIN, supra} note ___ at 1081-82.
\textsuperscript{111} Id. at 1081.
\textsuperscript{112} Id. Thus the state cannot regulate the character of those who function as business agents for labor unions because the declared purpose of the Wagner Act is to encourage collective bargaining and to protect the full freedom of workers in the selection of bargaining representatives of their own choice. \textit{Id.} at 1081-82 (citing \textit{Hill v. Florida}, 325 U.S. 538). Substantive rights arise largely out of Section 7 of the NLRA, which provides: “Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain, collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .” NLRA, 29 U.S.C. \S\ 157.
\textsuperscript{113} Amalgamated Ass’n v. Wisconsin Empl. Rel. Bd., 340 U.S. 383, 398-99 (1951) (It would be sufficient to state that the Wisconsin act, in forbidding peaceful strikes for higher wages by workers covered by the NLRA, has forbidden the exercise of rights protected by section 7 of the NLRA.).
\end{flushleft}
jurisdiction to monitor protected activity. As a general rule, judicial application of the first component of the Garmon doctrine has not proved controversial.\textsuperscript{114}

Less obvious is the second and more controversial proposition: that a state cannot prohibit (or add remedies for) conduct that the federal law \textit{prohibits}.\textsuperscript{115} The NLRB retains primary jurisdiction to monitor prohibited activity, and the states cannot deter what the NLRA prohibits despite a persistent “strain in Supreme Court opinions, almost uniformly in concurring or dissenting opinions that argue for a more limited form of preemption, one that only bars states from inhibiting conduct that the federal Act actually protects.”\textsuperscript{116} Rejecting this constrained view Garmon prevents states from adding penalties to or otherwise regulating unfair labor practices within the meaning of the NLRA.\textsuperscript{117} Evidently, preemption is required to defend the primacy and uniformity of NLRB adjudication from erosion. Parties that violate the NLRA remain under the primary jurisdiction (administration) of the Board based on the judgment that \textit{administration} is more than a means of regulation; it is regulation.\textsuperscript{118} To be sure, administration is unlikely to resemble something noble or beautiful in an Aristotelian sense\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{114} Gottesman, \textit{supra} note ___ at 377.
\item \textsuperscript{115} \textit{Gorman and Finkin, supra} note ___ at 1081.
\item \textsuperscript{116} \textit{Id}.
\item \textsuperscript{117} \textit{Id}.
\item \textsuperscript{118} \textit{Id.} at 1084 (citing Justice Frankfurter).
\item \textsuperscript{119} See e.g., Joe Sachs, \textit{Introduction, in Aristotle, Nicomachean Ethics} xi, xxi (2002) (describing Aristotle’s conception of beautiful and illustrating his conception via two metaphors: Aristotle might say that an action is right in the same way that a painting might get everything right or alternatively, he might refer to Antigone who contemplates in her imagination the act of burying her brother and says “it would be a beautiful thing to die doing this.”).
\end{itemize}
because the NLRA, through its enforcement mechanism, relies on highly technical arguments\textsuperscript{120} that reaffirm Justice Frankfurter’s observation that administration devolves into a hyper-specialized “process of litigating elucidation.”\textsuperscript{121}

A second basis for preemption, in which the NLRA is understood to create an \textit{insulated zone} for collective action and collective bargaining, precludes regulation that would upset what Congress intended to be left unregulated except by the parties’ economic weapons and has been labeled \textit{Machinists} preemption. “An economic weapon that is neither arguably protected nor arguably prohibited nonetheless may be immune from state regulation.”\textsuperscript{122}


\textsuperscript{121} Int’l Ass’n of Machinists v. Gonzalez, 356 U.S. 617, 619 (1957). See also, GORMAN \& FINKIN, supra note ___ at 1081-82 (Providing additional evidence of elucidation). The Supreme Court has considered a plethora of cases that give evidence of elucidation regarding preemption. See e.g., RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 275 (4th ed., 2007) [hereinafter ROTUNDA AND NOWAK, SUBSTANCE AND PROCEDURE] (finding more than thirty such cases). \textit{Garmon} preemption has produced an impressive range of cases. See e.g., Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (rejecting preemption and allowing the state to set forth minimum health standards for covered residents of the state); Wisconsin v. Gould, Inc., 475 U.S. 282 (1986) (preempting the state’s use of its spending power to debar certain repeat violators from doing business with the state).

\textsuperscript{122} LESLIE, supra note ___ at 320. The \textit{Morton} case bridges the gap between the \textit{Garmon} and \textit{Machinists} prongs of preemption analysis. In \textit{Morton}, the Supreme Court held the issue was whether Congress had so completely occupied this field as to close it to regulation by the states. Concluding that peaceful appeals to secondary employers constitute an economic weapon intended to be left to the marketplace, and that such appeals were permitted but not protected by federal law, the state could not outlaw this self-help weapon because this would alter the intended balance of power between labor and management. Teamsters Local 20 v. Morton, 377 U.S. 252, 258-261. (1964) (“But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting § 303, ‘Congress occupied this field and closed it to state regulation.’” \textit{Automobile Workers v. O’Brien}, 339 U.S. 454, 457. The basic question is whether “in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.” \textit{Teamsters Local 174 v. Lucas Flour Co.}, 369 U.S. 95, 102. The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation.”).
Evidently, Congress envisioned that employer and union conduct in some situations would be entirely free from legal regulation. Conduct that falls within this domain is sheltered by Machinist preemption. Since state and Board regulation might alter the federally-approved labor-management balance of weapons within this insulated sphere of activity, the Machinists’ doctrine teaches that the NLRB and the states are without power to regulate or otherwise protect activity within this arena.

In Lodge 76 Int’l Ass’n of Machinists v. Wisconsin Employment Relations Comm’n (Machinists), a state labor relations board ordered the cessation of a concerted refusal to work overtime as a means of putting bargaining pressure on an employer. Since the union’s action was not protected by the NLRA, the employer could discharge the employees for using the contested tactic. Neither the NLRB nor the state could have intervened to deny the union the use of the disputed device because Congress “meant to leave some activities altogether unregulated by federal or state law—to be controlled by the free play of

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123 LESLIE, supra note ___ at 322.
124 Id.
125 Activity within this insulated zone has not always been free from state regulation. See e.g., GORMAN AND FINKIN, supra note ___ at 1103. (In Briggs-Stratton, a union called for a series of intermittent work stoppages to put bargaining pressure on the employer, and in response, the employer secured an order against activity from a state board under state law. In this specific case the union’s conduct was neither prohibited nor protected by the NLRA. Since the Court found no basis to deny the state power to regulate a course of conduct that is neither made a right under federal law nor operates as a violation of it, the state’s action was permissible.).
126 GORMAN AND FINKIN, supra note ___ at 1104 (citing Machinists).
127 Id. at 1104.
128 Id.
economic forces.” According to the two Justices of the Machinists Court, necessary to make up a majority, “[s]tate laws would not be regarded as neutral ‘if they reflect an accommodation of the special interest of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining.” In other words, within the zone insulated from regulation, states can not take sides and seek to implement their own view of the permissible use of economic weapons. The Machinists’ theory of preemption has been applied to challenge legislation concerning the recruitment of replacements for strikers as well as legislation bearing upon the obligations of successor employers toward workers of predecessor firms. In general, where state law sets a floor, providing employment rights for all, it is not preempted, but where the state adopts legislation directed toward collective-bargaining or creates a distinction between unionized and non-unionized employees in enforcing the state law, it is preempted.

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

Recently the Machinists doctrine has come under sustained attack by proponents of employer neutrality. One proposal would diminish Machinists’

129 Id.
130 LESLIE, supra note __ at 322 (citing Machinists).
131 GORMAN AND FINKIN, supra note __ at 1104.
132 Id. at 1105-1108.
133 Id. at 108-1109 (citing Livadas v. Bradshaw, 512 U.S. 107 (1994), which helps explain the preemptive effect of Section 301 of the NLRA).
preclusive effect by encouraging states to “provide for minimum conditions in
the workplace under its police power or place property restrictions on the bundle
of property rights that it grants to its property owners—that is, the bundle of
property rights that private property owners possess would not include the use
of their property for labor [and other] . . . purposes.” This forcefully-argued
effort to restrict employer speech, grounded in an expansive conception of
“neutrality,” correlates with a thesis—employer coercion as an obstacle to
representation—that undergirds the enactment of the disputed statute, AB 1889,
that gave rise to the Chamber of Commerce decision. Consistent with this thesis but
inconsistently with the statute’s asserted defense ensuring state neutrality, AB
1889 exempts from the statute’s restrictions, employer-recipient expenditures
connected: (1) to giving a union access to the employer’s property (workplace)
and (2) to voluntarily recognize a union as the bargaining representative of
employees.

While the statute can be exposed as an under-theorized enactment, it
operates as a prototype and forecasts future efforts within the labor-management
arena. Academic commentators have offered analogous proposals designed to

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134 Secunda, Toward the Viability of State-based Legislation supra note ___ 212 (advocating ways to
weaken the preclusive effect of Machinists).
135 Chamber of Commerce, 554 U.S. ____slip op. at 10.
contract property’s scope,\(^{136}\) and such proposals often attempt to limit the free speech rights of employers,\(^{137}\) increase the access rights of labor unions enabling them to expand the level of worker self-organization\(^{138}\) and transform labor’s moribund state through increased grass roots organizing and through the use of internet.\(^{139}\) Properly appreciated, many of these proposals are designed to neutralize employer opposition to social transformation made concrete through increased employee participation in workplace decision making and increased dues revenue collection used to pursue social transformation through politics.\(^{140}\)

In order to facilitate these objectives, states are urged to adopt their own labor policy and to vitiate employer’s property interests based on the conclusion that property, whatever it is, consists of a contestable bundle of rights. Hence, withdrawing a stick—the employer’s exclusive possessory interest in its

\(^{136}\) For an excellent critique of this move, see Eric R. Claeys, Property 101: Is Property a Thing or a Bundle? (paper on file with the author) (arguing that property is more than the right to exclude, it is a right to exclusively determine the use of something).

\(^{137}\) An example of such proposals is the New Jersey Workers’ Freedom and Employer Intimidation Act. N.J. STAT. ANN. §§ 34:19-9 to-14 (West Supp. 2007).

\(^{138}\) See e.g., Feinstein, supra note ___ at 346-349 (discussing in general terms how unions have become more active in promoting innovative changes in state, county and municipal laws that encourage union growth but conceding that the doctrine of preemption may limit such efforts).


\(^{140}\) See e.g., Harry G. Hutchison, A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values, 14 WILLIAM & MARY, BILL OF RIGHTS J. 1309, 1380-1381(2006) [hereinafter, Hutchison, A Clearing in the Forest] (arguing that organizing, particularly extra-bargaining unit organizing is not necessarily aimed at expanding economic benefits for workers but rather aimed at social transformation. This effort is supported by evidence indicating that unions tend to consume up to 80 percent of union dues on ideological, political and other challengeable purposes that are unlikely to have a representational objective).
property—is legitimated by lionizing an iatrogenic goal.\textsuperscript{141} This “disintegrated” conception of property implies that property is not a thing but a highly-contingent arrangement of distinct elements that serves socio-political goals.\textsuperscript{142} Hence, on one account, employer’s property rights materialize as a supernatural entity or as a form of transcendental nonsense.\textsuperscript{143} As such, the right to exclude can be diminished unless property owners can demonstrate good reasons for preventing access by union organizers\textsuperscript{144} or a constitutionally-adequate ground for legitimating and protecting employer speech rights can be found. Based on this view, employers’ claims to possession and exclusive use of their facilities,

\textsuperscript{141}The iatrogenic possibility emerges out of the modern process of incessant diagnosis and treatment that problematizes human life. See e.g., CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT 199-201 (2006) Ignoring rent-seeking efforts (the competition for government favors) by unions and union hierarchs for themselves and their political allies, whimsy can be found when commentators, legislators, and judges insist on the value of compulsory unionization when the survey evidence and the actual behavior of workers shows that is improbable that even a significant minority of private-sector workers share the conviction that conventional unions are the best vehicles for the advancement of the full gamut of their interest. Samuel Estreicher, The Dunlop Report and the Future of Labor Law Reform, 12 LAB. LAW 117, 118n.2 (1996). See also, Jeffrey M. Hirsch and Barry T. Hirsch, The Rise and Fall of Private Sector Unionism: what Next for the NLRA, 34 FLA. ST. U. L. REV. 1133, 1139-40 (2007) (“Absent a sharp and unlikely shift by workers and voters from individualistic to collectivist attitudes or a more broad shift in U.S. economic policy from a competitive to a corporatist orientation, a resurgence in traditional private sector unionism is unlikely.”). Compulsory unionization, of course, means involuntary unionization. Collective bargaining imposed by statute appears to be consistent with the conclusion that such legislation tends to favor centralized decision-making, meaning that interest groups and interest group leaders try to impose their will at the expense of more diffuse and more diverse groups and subgroups. If interest uniformity does not arise naturally, it remains highly doubtful that collective bargaining decisions initiated by union hierarchs will produce a collectively-rational outcome that represents, let alone benefits, the majority, or even a minority of workers. See generally, Hutchison, A Clearing in the Forest, supra note ___ at 1376-77.

\textsuperscript{142} Adam Mossoff, What is Property? Putting the Pieces Back Together, 45 ARIZONA L. REV. 371, 373-777 (rejecting the disintegrated theory of property and offering instead an integrated theory of property that maintains that the right to exclude, while fundamental to a principled conception of property rights, is insufficient and must include an understanding and defense of other elements such as exclusive acquisition, use, and disposal).

\textsuperscript{143} Id. at 373 (disagreeing with this perspective).

\textsuperscript{144} See e.g., Estlund, supra note ___ at 309 (arguing that employers’ property rights ought to be restricted sharply in the context of an organizing campaign in order to improve access by non-employee union organizers to the employer’s plant or land).
including the right to exclude and the right to engage in non-coercive speech regarding union organizing campaigns, face a premature and unwarranted demise.¹⁴⁵ Labor advocates and labor hierarchs, who appear to have embraced a conception of property that has succumbed to the acid wash of nominalism first popularized in the law by the legal realists,¹⁴⁶ champion this development. If extended to weaken Machinists and other preemption doctrines, and if reified by the Supreme Court, this approach might preclude future efforts by the federal judiciary to invalidate innovative state labor regulation that has been offered under the sheltering umbrella provided by allegations of neutrality. Placing political liberty at risk,¹⁴⁷ this constrained notion of property concludes that it contains nothing, which is essential for the state to protect, and accordingly, preemption doctrine as a device to constitutionalize the protection of employer speech, can be eviscerated by inventing a few phrases. Though such developments cannot be seen as neutral, they may be facilitated by the adoption of postmodern discourse, which can deprive courts of the language necessary to reclaim rights and freedom within any contestable context¹⁴⁸ and return us to

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¹⁴⁵ Mossoff, supra note ___ at 375.
¹⁴⁶ Id. at 371-372.
¹⁴⁷ Id. at 374.
¹⁴⁸ Hutchison, Reclaiming the First Amendment, supra note ___ at 706.
Alasdair McIntyre’s perplexing dilemma wherein human history provides no sound basis for rights.\textsuperscript{149}

Taken together, this development may suggests that employer speech rights are little more than an empty suit, and it underscores Isaiah Berlin’s claim that the pursuit of “positive” liberty on behalf of other people is necessarily incompatible with the commitment to permit people to live their own lives free from interference from others, particularly interference from political authorities.\textsuperscript{150} This effort to discount employer property rights elevates doubts concerning whether preemption doctrine is adequate to the task of defending employers’ freedom of expression claims. Still, it remains possible that a robust conception of the First Amendment, energetically enforced, may hinder state efforts to abrade employers’ free speech rights.\textsuperscript{151}

\section*{II. The Ninth Circuit Takes a Stand.}
\subsection*{A. Prolegomena}

\begin{footnotesize}
\textsuperscript{149} Id.
\textsuperscript{151} For a discussion of this possibility, see Hutchison, \textit{Reclaiming the First Amendment supra note ___ at 716. See also, Bawarowsky, supra note ___ at 1753-1759 (energetically favoring First Amendment protection for corporate employers). But see, Archibald Cox, \textit{Foreword: Freedom of Expression in the Burger Court, 94 HARV. L. REV. 1, 36-37 (1980) (commenting on the failure of the First Amendment to rescue a union’s effort to engage in secondary picketing from the preclusive reach of the NLRB); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (Employer’s First Amendment claims were not sufficient to overturn NLRB finding of an unfair labor practice where an employer made statements that could be deemed a threat of retaliation).}
\end{footnotesize}
The Ninth Circuit’s opinion responded to the District Court’s decision upholding the plaintiffs’ motion for summary judgment. Plaintiffs filed various claims for declaratory and injunctive relief regarding the enforcement of California Assembly Bill 1889, which added California Government code §16645 and following. Briefly stated, AB 1889 “prohibits the use of state funds or property to assist, promote, or deter union organizing; allows remedies for such violations; and requires state funds recipients to maintain sufficient records to show state funds were not improperly used under AB 1889.” The plaintiffs filed “a Motion for Summary Judgment arguing AB 1889 is unconstitutional under the federal and California Constitutions and preempted by the National Labor Relations Act (NLRA), Labor management Reporting and Disclosure Act (LMRDA) and the Medicare Act.” Finding that a series of preliminary issues did not bar relief, the District Court decided the preemption issue.

Emphasizing that NLRA §8 (c) dictates that the statement “of any views, argument, or opinion . . . shall not constitute or be evidence, of an unfair labor practice . . . if such expression contains no threat of reprisal or force or

153 Id. at 1201.
154 Id.
155 Id.
156 Id. at 1201-1204 (discussing the 11th Amendment, Standing, Abstention and finding that such contentions do not bar relief under the preemption doctrine implicated by the application of the NLRA at issue).
promise of benefit,” the District Court found that this provision manifests congressional intent to encourage free debate on issues dividing labor and management. By contrast, the California statute prohibits attempts by the employer to influence employee decisions through speech while the employer is being compensated with state funds or while on state property. Thus, the statute restricts employer speech about union organizing under specified circumstance even though Congress intended to encourage unregulated debate. On one account, AB 1889 is a “state labor regulation that has only one purpose and effect: to halt the free flow of non-coercive information from employer to their employees, so that unions may take advantage of the enforced silence and corral uninformed employees into unionization.” As such, employees are arguably the real victims of this effort to undo federal labor policy. The District Court found that AB 1889, if allowed to stand, would prevent free debate and dismissed the defendants and intervenors’ contention that Machinists is inapplicable because the state is merely controlling the use of state funds and is acting in its proprietary

157 Id. at 1204.
158 Id.
159 Id. at 1204-1205.
160 Id. at 1205.
162 Id.
163 Chamber of Commerce v. Lockyer, 225 F. Supp. 2d at 1205.
capacity.\textsuperscript{164} Finding that the California statute is regulatory and that the 
challenged restrictions prevent what Congress intended, the District Court, 
subject to a few exceptions, granted plaintiffs’ motion for summary 
judgment.\textsuperscript{165} The validity of this decision proved to be short-lived.


Over the past twenty-five years, labor hierarchs, labor organizations and 
their ideological allies appear to have obtained a sympathetic hearing before the 
Ninth Circuit Court of Appeals.\textsuperscript{166} Nowhere is this sympathy clearer than in the 
court’s decision upholding provisions of AB 1889 that restrict employers, who 
receive state grants or funds from using those funds to assist, promote or deter 
union organizing.\textsuperscript{167} Deciding that California’s grant and program fund 
restrictions do not undermine federal labor policy, are not preempted by the

organizing expenditures were chargeable to union dissenters); United Food & Comm’l Workers, v. NLRB, 
307 F.3d 760 (9\textsuperscript{th} Cir. 2002) (en banc) (cert. denied) (holding that extra-bargaining unit organizing 
expenditures are germane to collective bargaining and chargeable to nonmembers’ dues over their 
objections despite the Supreme Court holding in Commercial workers of Am. v. Beck, 487 U.S. 735, 762-
cannot charge organizing expenditures to dues objectors because such expenditures are spent to benefit 
those outside the already-organized unit). But see, Seay v. McDonnell Douglas, 427 F.2d 996 (9\textsuperscript{th} Cir. 
1970), further proceedings, 533 F. 2d 996, 1002 (9\textsuperscript{th} Cir. 1976) (contrary to the assertions of the labor 
union, the court finds that union dissidents’ claim arising out of an alleged misuse of agency fees 
constitutes a cognizable cause of action arising at least in part under the United States Constitution that is 
not preempted by the NLRA).

\textsuperscript{165} \textit{Chamber of Commerce}, 463 F. 3d 1076. \textit{See also}, United Food & Comm’l Workers v. NLRB 307 F. 3d 
at 771 (finding union organizing expenditures germane and therefore chargeable to union dues objectors 
because union organizing conducted for the general purpose of strengthening the union, while not germane 
under the Railway Labor Act, is not explicitly precluded by either the language of the NLRA or the 
Supreme Court in Beck). But see Hutchison, A Clearing in the Forest, supra note \textit{\_\_\_} at 1364-1394 
(disagreeing with the Ninth Circuit’s assessment).
NLRA and do not violate the First Amendment, the Ninth Circuit reversed the District Court after twice declining to do so.

“California enacted Assembly Bill No. 1889, Cal Gov’t Code §§ 16645-16649 (collectively, ‘AB 1889’),” contained the following statement in its preamble:

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

Two provisions of the California statute, sections 16645.2 and 16645.7, are at issue on appeal. Section 16645.2(a) bars private employers who receive a grant of state funds from using such funds to “assist, promote, or deter union

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168 Chamber of Commerce, 463 F. 3d at 1076.
169 Chamber of Commerce v. Lockyer, 364 F.3d 1154, 1163-1165 (2004) (resubmitted) (holding AB 1889 as written, preempted by the NLRA) and Chamber of Commerce v. Lockyer, 422 F.3d 973 (Vacated by Chamber of Commerce v. Lockyer, 435 F.3d 999, (9th Cir., 2006)).
170 Section 16645, Historical and Statutory Notes, Section 1 of Stats. 2000, c. 872.
171 Chamber of Commerce, 463 F. 3d at 1080.
organizing.” Section 16645.7(a) bars any private employer that receives state funds in excess of $10,000 per annum from its participation in a state program from using any program funds to “assist, promote, or deter union organizing.” The two provisions purport to preclude an employer-recipient from influencing the decisions of its employees regarding whether to support or oppose a labor organization that seeks to represent those employees. Though the statute is defended on grounds of neutrality, this neutrality is placed in doubt by virtue of the fact that employer activities are exempted from the reach of the statute when and if the employer voluntarily recognizes a union as the representative of its employees. In addition to this exemption, the statute places affirmative compliance burdens on employers because the pertinent provisions of AB 1889 require employers to certify that no state funds will be used to assist, promote or deter union organizing. An employer who in fact expends funds to assist, promote or deter union organizing must maintain and provide upon request “records sufficient to show that state funds have not be used for those expenditures.” The statute presumes that if the employer commingles state and

172 Id.
173 Id.
174 Id.
175 Id.
176 Id. at 1080-81.
other funds, that any expenditures to assist, promote or deter union organizing 
derive in part from state funds.\textsuperscript{177}

Consistent with the judgment that the statute’s overall scheme is calibrated 
to induce recipients of state funds to forego active opposition to a union 
organizing campaign, the statute imposes severe penalties. “Employers who 
violate sections 16645.2 or 16645.7 are subject to fines and penalties, which 
include the disgorgement of the state funds used for the prohibited purposes and 
a civil penalty paid to the state that is equal to twice the amount of those 
funds.”\textsuperscript{178} The statute’s objective seems clear enough. It signifies a legislative 
response to the hypothesis that has been transformed into an \textit{idée fixe}: employer 
coercion is the primary factor preventing workers from exercising their 
undisclosed choice to join a union.\textsuperscript{179}

Analytically, the Ninth Circuit correctly insists that by enacting the 
challenged legislation, the state of California is not acting as a market participant.

\textsuperscript{177} \textit{Id.} at 1081.
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} The literature predicated on the employer coercion thesis as the prime impediment to unionization is 
vast. For an excellent introduction to this literature, see Bodie, \textit{supra} note ___ at 31-34 (suggesting that 
weak remedies for employer unfair labor practices combined with lengthy delays in the representation and 
remediation process encouraged an atmosphere of employer coercion and law breaking). \textit{See also,} 
Brudney, \textit{supra} note ___ (abstract) (asserting that the NLRB election process is no longer justified as a 
normative process because it regularly tolerates, encourages and promotes coercive conditions that preclude 
the attainment of employee choice). For an excellent refutation of the employer coercion thesis, see Keith 
(showing that rational employers only invest in anti-union activities as long as having one puts them at a 
competitive advantage with nonunion employers and also showing that union win-rates in the private sector 
have remained consistent at the 50% level for a number of decades); \textit{see also,} Kenneth McLennan, \textit{A Management Perspective on What do Unions Do? in What Do Unions Do? The Evidence Twenty 
Year Later} (2005) (rejecting the claim that anti-union activities directed by highly-paid consultants hired 
by employers are the primary explanation for the decline in unionism).
In other words, the statute addresses employer conduct unrelated to the safe-
harbor directed towards preventing preemption that is instantiated when the
legislature addresses private employers’ performance of contractual obligations
to the government entity.\textsuperscript{180} The Court properly insists that the “cases teach that
when a state uses its spending power in a manner that is essentially not
proprietary, the market exception will not apply and the state action may be
subject to NLRA preemption.”\textsuperscript{181} Since the contested provisions of AB 1889 do
not have a narrow scope unrelated to broader regulation, the provisions are
regulatory and must comply with federal preemption doctrine.\textsuperscript{182} That the
challenged provisions are regulatory, however, does not necessarily mean they
are preempted by the NLRA.\textsuperscript{183}

The Ninth Circuit’s preemption analysis “begins with the ‘basic assumption
that Congress did not intend to displace state law.’”\textsuperscript{184} Accepting the proposition
that preemption is a “question of congressional intent and the ‘purpose of
Congress is the ultimate touchstone’ of preemption analysis,”\textsuperscript{185} the court
concedes that the Supreme Court has articulated two distinct preemption prongs:
\textit{Machinists} and \textit{Garmon}.\textsuperscript{186} Considering \textit{Machinists} first, the court admits that this

\textsuperscript{180} See supra Part I (discussing \textit{Garmon}-type of preemption).
\textsuperscript{181} \textit{Chamber of Commerce}, 463 F. 3d at 1084.
\textsuperscript{182} \textit{Id}. at 1084-85.
\textsuperscript{183} \textit{Id} at 1085. \textit{See infra}, Part III, D (discussing Justice Breyer’s agreement with this view).
\textsuperscript{184} \textit{Id}.
\textsuperscript{185} \textit{Id}.
\textsuperscript{186} \textit{Id}.
prong preempts state regulation of activities that although not directly regulated by the NLRA were intended by Congress “to be controlled by the free play of economic forces.”

Insisting that context matters, the Ninth Circuit determines that the federal courts of appeals have applied Machinists preemption in the context of collective bargaining between organized labor and the employers but not in the context of organizing. Reasoning that collective-bargaining, but not organizing, constitutes an arena where the NLRA has affirmatively de-regulated the field, the Ninth Circuit offers an additional predicate:

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

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187 Chamber of Commerce, 463 F. 3d at 1085.
188 Id. at 1086.
189 Id. (reading the relevant precedents to suggest that Machinists doctrine concentrates solely on precluding state regulation of economic weaponry by parties seeking to reach a collective bargaining agreement).
because] . . . the state’s choices of how to spend its funds are by
definition not controlled by the free play of economic forces.\textsuperscript{190}

Because organizing is already regulated to some extent, removing this activity
from the realm that Congress left free to be decided by economic forces,\textsuperscript{191} the
Court of Appeals declines to preempt AB 1889.\textsuperscript{192}

This move ignores \textit{Machinists’} admonition that a statute cannot be regarded
as neutral when it reflects an accommodation of the special interest of unions or
employer.\textsuperscript{193} The Court of Appeals determined that states have enacted a “neutral
hands-off” policy preference, which is situated \textit{within} an area that is already
subject to state and federal regulation.\textsuperscript{194} The statute is neutral because its
“restrictions on the use of grant and program funds do not interfere with an
employer’s ability to engage in ‘self-help’ in the sense protected by \textit{Machinists},”
\textit{Gould} or \textit{Golden State}.\textsuperscript{195} Despite the California statute’s purported allegiance to
neutrality, the Ninth Circuit fails to notice that AB 1889 expressly exempts from
its restrictive reach any employer activities performed or expenses incurred in

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1087.
\item Id. at 1088-89 (rejecting the NLRB contention that \textit{Machinists} preempts the California statute because
(1) the NLRB already regulates organizing activities and (2) \textit{Machinists} only preempts state regulation in a
zone left free of regulation). The Court of Appeals also cites the Supreme Court’s Golden State Transit
decision for the proposition that \textit{Machinists} is only concerned with the parties’ use of economic pressure
within a collective-bargaining context. \textit{Chamber of Commerce}, 463 F. 3d at 1086.
\item Id. at 1087.
\item LESLIE, supra note __ at 322 (citing \textit{Machinists’}).
\item Federal regulation within an organizing context takes many forms including: (1) barring employers and
unions alike from making election speeches on company time to massed assemblies of employees within 24
hours of an election; (2) the NLRB has power to regulate speech that is prejudicial to a fair election; (3)
elections can be set aside because of the manner of the representation. \textit{See, Chamber of Commerce}, 463 F.
3d at 1089-90.
\item \textit{Chamber of Commerce}, 463 F. 3d at 1087.
\end{enumerate}
\end{footnotesize}
connection with undertakings that promote unionization\textsuperscript{196} while correspondingly imposing punitive penalties for employer-recipient error in the use of state funds.

Though the state’s commitment to neutrality is dubious, the court reasons that since AB 1889 applies to organizing, an activity positioned outside of a zone intended to be left free from regulation, federal courts are without power to bar AB 1889.\textsuperscript{197} Thus scrutinized, the \textit{Machinists’} doctrine does not apply to the statute. “Under AB 1889, an employer has and retains the freedom to spend its own funds however it wishes; it simply may not spend state grant and program funds on its union-related advocacy.”\textsuperscript{198} Conceding that the state is not free to require employer neutrality as a condition of receiving state funds because that limits the firm’s ability to use its own funds, the court rejects the NLRB’s position claiming that the statute requires preemption because it works at cross purposes with NLRB policy.\textsuperscript{199} In summary, the court insists that since employers are free to raise and use non-state funds in order to convey their views about unionization, since it is well established that a legislature may attach “reasonable

\textsuperscript{196} Cal. Govt. Code Ann., AB 1889, §§16647 (b), (d) (2008) (exempting from funds restrictions employer undertakings that allow union representatives access to the employer’s property or expenses incurred in negotiating, entering into or carrying out a voluntary recognition agreement with a labor union).
\textsuperscript{197} \textit{Chamber of Commerce}, 463 F. 3d at 1086.
\textsuperscript{198} Id. at 1088.
\textsuperscript{199} \textit{Chamber of Commerce}, 463 F. 3d at 1088 (rejecting the NLRB contention that California’s statute should be invalidated because it limits the flow of information to employees by regulating employer speech in an area—an organizing election—that Congress did intend to be controlled by freely available economics forces).
and unambiguous” conditions to funds that a recipient is not obligated to accept, and since organizing is located outside of an area that is designed to remain completely free from regulation, employers’ First Amendment rights remain intact and unaffected by state labor innovation. The court’s grasp of liberty and neutrality are questionable but its approach is compatible with the conclusion that liberalism, as the customary governance theory in democratic societies, increasingly requires the government to take sides without necessarily admitting it.

The Ninth Circuit maintains that organizing is already subject to regulation and consequently the disputed statute cannot be barred by the Machinists prong of the preemption doctrine. This maneuver does not end preemption scrutiny; on the contrary, the possibilities associated with Garmon preemption are unleashed by the court’s analysis. “Garmon preemption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA.” Surrendering to the impression that organizing is already subject to regulation directly raises the possibility of conflict. However, the Ninth Circuit manages to circumvent this conflict by asserting Garmon “does not support an approach which sweeps away state-court jurisdiction over conduct traditionally

200 Id. at 1089 (citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006)).
201 Chamber of Commerce, 463 F. 3d at 1088.
202 Id. at 1090.
subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.”203 The court explains its position by stating:

California’s refusal to subsidize employer speech for or against unionization does not regulate an activity that is actually protected or actually prohibited by the NLRA. It does not interfere with, much less govern, “the same partisan employer speech that Congress committed to the jurisdiction of the NLRB. Nor does it infringe employers’ First Amendment rights, because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition of the receipt of state grant and program funds.204

This blueprint recalls Professor Gottesman’s analysis urging federal courts to become reluctant to preempt state law where Congress has chosen to regulate categories of conduct in a limited way.205 Following Gottesman, if employer speech is without protection at all, then despite the fact that certain kinds of speech are prohibited by the NLRA, states are free to regulate employer speech in this area because Congress does not protect this activity, but rather, it regulates this

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203 Id. (citing Sears Roebuck & Co. v San Diego County Dist Council, 436 U.S. 180,188 (1978)).
204 Chamber of Commerce, 463 F. 3d at 1092.
205 Gottesman, supra note ___ at 358.
activity in only a limited way.\textsuperscript{206} If this syllogism is accepted, then presumably by analogy, NLRB-enforced limitations on union access to employer premises during organizing campaigns\textsuperscript{207} ought to give way. This is so because state regulation fails to jeopardize a cognizable federal interest since it lies outside of what Gottesman describes as the protected-prohibited continuum, monitored by robust NLRB oversight.\textsuperscript{208} Accepting the implications of this paradigm, the Ninth Circuit argues that \textit{Garmon} only preempts state regulation that interferes with protected activities by employees under section 7 and activities of either employers or labor unions that are prohibited under section 8.\textsuperscript{209} It discounts the protective force of section 8(c) of the NLRA that prohibits sanctioning employers under the NLRA for engaging in an unfair labor practice when they exercise speech rights that are tied to the First Amendment. This is so because the court intuits that prohibition does not constitute a grant of employer speech rights.\textsuperscript{210} Instead of sheltering employers speech, section 8 (c) prohibits employers’ “noncoercive speech from being used as evidence of an unfair labor practice.”\textsuperscript{211} Section 8(c) does not describe activities that are protected by the NLRA, but activities that are protected from the NLRA.\textsuperscript{212}

\textsuperscript{206} \textit{Id.} (focusing on \textit{Garmon} preemption).
\textsuperscript{207} \textit{Id.} at 411-418 (supporting this approach to federal preemption within the meaning of the NLRA).
\textsuperscript{208} \textit{Id.} at 404.
\textsuperscript{209} \textit{Chamber of Commerce}, 463 F.3d at 1091.
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.}
Under the Ninth Circuit’s approach, neither *Machinists* nor *Garmon* bar AB 1889. Rejecting the dissent’s parade of horribles and relying on comparable federal statutes, which place restrictions on the use of funds, the court finds that the statute does not deny employers’ speech rights. Instead, it merely precludes state subsidization of such rights. Consequently, there is no legally cognizable impingement on plaintiffs’ First Amendment rights. The Ninth Circuit’s opinion reinstates the contested provisions of AB 1889 because speech is not protected. The NLRA regulates this arena albeit in a limited way, which permits state regulation of conduct that involves “‘interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,’” it is difficult to “infer that Congress ha[s] deprived the States of power to act.’” The court’s examination of AB 1889, aided by persevering abstractions about neutrality, establishes a firewall against preemption. Hence, the court vacates the judgment of the District Court.

C. A Dissenting View

Judge Beezer dissents from the Ninth Circuit’s cramped conception of the First Amendment and its guarded understanding of the doctrine of preemption. He asks this clarifying question: “May a state leverage its spending power to

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213 *Id.* at 1096-1097.
214 *Id.*
215 *Chamber of Commerce*, 463 F.3d at 1095.
216 *Id.*
induce an employer to adopt a neutral policy toward labor union organizing?" 217 Relying on the First Amendment, the NLRA and the well-established doctrine of preemption, he answers in the negative. 218 Concentrating on the Constitution first, Judge Beezer shows that California extends the definition of “state funds” to include any monies received by a private employer as a result of contracting with the state, and accordingly, strikes at the heart of the First Amendment. 219 AB 1889 prohibits not just the use of state money granted to an employer for and under a specific program but also co-opts the payment for goods, services and profit realized under a contract (undoubtedly not state funds). Hence the statute’s rules prevent any employer from spending its own funds in direct violation of the First Amendment. 220 Though this conclusion may be contestable because the majority opinion noted that the District Court made no finding on this issue, 221 he maintains correctly that AB 1889 interferes with the First Amendment rights of employers to speak out and discuss union organizing campaigns. 222 This can be seen most directly with respect to employers who receive all of their funds from the government. 223 “Employers who receive all of their revenue from the state have no other option but to cease all union-related

217 Chamber of Commerce, 463 F.3d at 1098 (Beezer, J. dissenting).
218 Id.
219 Id.
220 Id.
221 Id. at 1097.
222 Id. at 1098.
223 Id. at 1100.
speech.” Judge Beezer reasons that “[s]imply because a business or individual chooses to contract with the state does mean that the state may abrogate First Amendment Rights.” Though the Ninth Circuit majority dismissed his analysis, it is doubtful that its reasoning can contravene the full force of his First Amendment observations.

Turning next to preemption, Judge Beezer explains that the NLRA is a comprehensive scheme designed to balance the rights and interests of employers and employees, which include the free flow of information. The NLRA explicitly protects the rights of employers to express their views on union organizing efforts and AB 1889 impedes the flow information by regulating employer speech. While claiming to function neutrally, Judge Beezer observes that the statute prohibits expenditures related to labor union organizing but exempts from the statute’s restrictions certain pro-union activities and expenses, including expenditures incurred from voluntarily recognizing the union as the employees’ representative. Examined in its entirety, the statute carries a false air of evenhandedness because in addition to the ongoing disinclination of employers to favor unionization, it would be a rare set of circumstance where an employer would actually dedicate resources to encourage its employees to

224 *Id.*
225 *Id.*
226 *Id.*
227 *Id.* at 1102.
unionize. The true purpose of the statute becomes clear enough: to promote unionization, to strengthen the labor movement and to provide incentives for employers to embrace this development.

Judge Beezer exposes California’s less-than-neutral effort as a regulatory mechanism that ought to be preempted for reasons that implicate both prongs of the preemption doctrine. First, a “state law that both explicitly targets and directly regulates processes controlled by the NLRA is preempted under the Machinists doctrine.” Federal control is instantiated by a process of freeing a domain from regulations and authorizing the interplay of self-interested-weaponry by the parties. “Because AB 1889, on its face, directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process using the statutorily protected self-help mechanism,” it interferes with NLRA sanctioned self-help. Far from permitting self-help, the statute ties the hands of employer-recipients that oppose organizing while contrary to its purported neutrality rationale, allows pro-union groups and compliant employers free reign. By impeding the flow of information and substantive discussions of unionization, the statute, in addition to colliding with the First Amendment, interferes with Congress’

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228 Id. at 1102-1103.
229 Id. at 1105.
230 Id.
231 Id. at 1105.
intentional balance between the uncontrolled power of management and labor in furthering their respective interests. 232

Further, Judge Beezer concludes that AB 1889 is also preempted under the Garmon doctrine.233 Because the “California statute stifles employers’ speech rights which are granted by federal law, and in doing so, impedes the ability of the NLRB to uphold its election speech rules and administer free and fair elections,” the state is attempting to regulate what the NLRA protects. As such, the statute fails or at least, potentially fails to comply with the substantive rights/primary jurisdiction component of Garmon. Taken as a whole, the contested provisions of the statute silence employers. The state of California is preempted from doing so by application of both the NLRA and a principled interpretation of the Constitution itself. Judge Beezer’s views were vindicated, at least in part, by the Supreme Court.

III. The Supreme Court

The Supreme Court disagrees with the Ninth Circuit’s assessment of the law and the facts in the Chamber of Commerce case. Precedent supports the Supreme Court. Linn v. Plant Guard Workers234 stands for the proposition that Congress has unmistakably manifested its intent to encourage free debate on

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232 Id. at 1106. Additionally, Judge Beezer argues “[t]hat California purports to act through its spending power rather than its regulatory power is a ‘distinction without a difference’” Id.
233 Id.
issues dividing labor and management. If AB 1889 is a regulatory statute, this prompts preemption analysis, possibly on two levels. If employer speech is a protected activity, as Judge Beezer’s dissent suggests, this ought to trigger the Garmon prong. If the organizing domain constitutes a zone meant to be free of regulation as the District Court determined, this sparks Machinists scrutiny. Lacking sympathy for the thesis that its preemption analysis is “overbroad” or “too aggressive,” the Supreme Court does not rely on the First Amendment, nor does the Court rely on the Garmon doctrine. Instead, the Court insists that the challenged provisions are preempted under Machinists because they regulate within “a zone protected and reserved for market freedom.” The Court supplies background:

Among the frequently litigated issues under the Wagner Act were charges that an employer’s attempts to persuade employees not to join a union—or to join one favored by the employer rather than a rival—amounted to a form of coercion prohibited by § 8. The NLRB took the position that § 8 demanded complete employer neutrality during organizing.

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235 Linn, 383 U.S. at 62.
236 Chamber of Commerce, 554 U.S. ___ slip op. at 5. But see Secunda (October 17, 2008, Email on file with the author) (arguing that this reasoning should not be dispositive).
237 Chamber of Commerce, 554 U.S. ___ slip op. at 5.
campaigns, reasoning that any partisan employer speech about
unions would interfere with the § 7 rights of employees. . . . 238

Rejecting the requirement that employers must remain neutral in an organizing
context, in 1941, the Supreme Court “curtailed the NLRB’s aggressive
interpretation, clarifying that nothing in the NLRA prohibits an employer ‘from
expressing its view on labor policies or problems unless the employer’s speech
‘in connection with other circumstances [amount] to coercion within the meaning
of the Act.’” 239 This analysis implies that state legislative efforts designed to
induce employer neutrality ought to be barred because such efforts are not
consistent with Supreme Court precedent.

Turning next to the Taft-Hartley Act, the Court finds that Congress
amended the Wagner Act for several reasons including the goal of providing
language that protects speech by both unions and employers from regulation by
the NLRB. 240 This amendment accomplishes several objectives. First, it
incorporates and implements the First Amendment within the NLRA. 241 Second,
it manifests “a ‘congressional intent to encourage free debate on issues dividing
labor and management.’” 242 Perhaps relying inordinately on the doctrine of
preemption, and too little on the First Amendment, the Court states: “It is

238 Id.
239 Id.
240 Id. at 6.
241 Id. at 7.
242 Id. at 7.
indicative of how important Congress deemed such ‘free debate’ that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB’s decisions on a case-by-case basis.”243 Congress’ policy judgment, which is suffused in the NLRA, favors uninhibited, robust and wide-open debate in labor disputes.244 Unlike the Ninth Circuit, which found neither express nor implied protection for employers’ speech, and distinct from typical preemption analysis where congressional intent can only be found implicitly, the Supreme Court determined that the NLRA expressly protects employers’ noncoercive speech.245 Discovering express protection may be helpful to employers and might potentially implicate Garmon’s arguably-protected prong as well as Machinists’ insulated zone of conduct analyses. The Supreme Court explains “California’s policy judgment that partisan employer speech necessarily ‘interfere[s] with an employee’s choice about whether to join or to be represented by a labor union [the express goal of AB 1889] is the same policy judgment that the NLRB advanced under the Wagner Act and Congress renounced in the Taft-Hartley

243 Id.
244 Id.
245 Id. (Section 8(a) and 8 (b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set the mechanisms for doing so . . . Finally, the addition of § 8 (c) expressly precludes regulation of speech about unionization ‘so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’’’).
Accordingly, “[t]o the extent §§ 16645.2 and 16645.7 actually further the express goal of AB 1889, the provisions are unequivocally preempted.”

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

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

Whether or not the use of state funds as a device to regulate labor is pre-empted depends on the nature of the activities that States have sought to

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246 Id. at 7-8.
247 Id. at 8.
248 Id. at 8.
regulate, rather than on the methods of regulation adopted.\textsuperscript{249} Courts must assess the actual content of the state’s policy and its real effect on federal rights.\textsuperscript{250} California cannot expressly and directly regulate noncoercive speech about unionization; equally clear, California may not indirectly regulate such conduct through spending restrictions.\textsuperscript{251} Citing \textit{Gould} with approval, the Court observes that a state’s choice to use its spending power rather than its police power does not significantly lessen the potential for conflict between state and federal schemes; therefore, such statutes are pre-empted.\textsuperscript{252} In California this conflict is made tangible by enacting AB 1889 to further the state’s labor policy,\textsuperscript{253} and this conflict remains alive despite the state’s ostensible commitment to neutrality.

Though the Court of Appeals hangs its persuasive powers on the contention that the disputed statute is calculated to ensure state neutrality in labor matters, the Supreme Court shows that in contrast to a neutral affirmative requirement that funds be spent solely for the purposes of the relevant grant or program, AB 1889 imposes targeted negative restrictions on employer speech about unionization.\textsuperscript{254} Moreover, the Supreme Court and Judge Beezer emphasize that

\begin{footnotesize}
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\item \textsuperscript{249} \textit{Id.} at 8.
\item \textsuperscript{250} \textit{Id.} at 8.
\item \textsuperscript{251} \textit{Id.} at 8.
\item \textsuperscript{252} \textit{Id.} at 9 (In \textit{Gould}, Wisconsin’s policy of refusing to purchase goods and services from three-time NLRA violators was pre-empted under Garmon because it imposed a supplemental sanction that conflicted with the NLRA’s integrated scheme of regulation).
\item \textsuperscript{253} \textit{Id.} at 10.
\item \textsuperscript{254} \textit{Id.} at 10.
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the challengeable constraint is not applied uniformly.255 “Instead of forbidding
the use of state funds for all employer advocacy regarding unionization, AB 1889
permits use of state funds for select [preferred] employer advocacy activities that
promote unions.”256 Hence the statute exempts employer “expenses incurred in
connection with . . . giving unions access to the workplace and voluntarily
recognizing unions without a secret ballot election.”257 The Ninth Circuit
purports to distinguish Chamber of Commerce from Gould on the theory that AB
1889 does not make employer neutrality a condition for receiving funds, but
instead, without taking sides, restricts only the use of funds.258 Analytically, this
constitutes a radical capitulation to neutrality rhetoric as a justifying rationale,
but this surrender is unsustainable. The Supreme Court is unable to find more
than a distinction without difference between restrictions on the use of funds and
restrictions on the receipt of funds. Indeed, California’s reliance on “neutral use"
restrictions rather than on partisan “receipt” restrictions “is no more
consequential than Wisconsin’s reliance on its spending power rather than its
police power in Gould.”259 The Supreme Court reaches this conclusion for several
reasons, including the fact that California couples its “use” restrictions with
compliance costs and litigation risks that are designed to make union-related

255 Id. at 10.
256 Id. at 10.
257 Id. at 10.
258 Id. at 10.
259 Id. at 10.
advocacy prohibitively expensive for employers that receive state funds.\textsuperscript{260} Consistent with this examination, California makes it extremely difficult for employers to demonstrate that they have not used state funds for prohibited purposes and imposes punitive sanctions for noncompliance.\textsuperscript{261} The Court is persuaded that California has transmuted neutrality rhetoric into partisanship, which is outlawed by the NLRA. Partisanship can be shown by the fact that the only safe harbor afforded by the statute for recipients of state funds consists of activities that favor unionization or are required by federal or state law.\textsuperscript{262} Nor is the Court convinced by Justice Breyer’s dissent claiming that neutrality can be found by simply accepting the contention that the challenged restrictions were only aimed at ensuring neutrality with regard to contested as opposed to uncontested organizing campaigns.\textsuperscript{263} Rather, Justice’s Breyer’s contention, unintentionally but forcefully, underscores the Court’s principled understanding of partisanship by showing that it is beyond question that the state of California prefers one outcome rather than another when employer-recipients are engaged in an organizing campaign.

In light of the compliance burdens, non-trivial litigation risks and other factors vitiating allegations of neutrality, the Supreme Court concludes that the

\textsuperscript{260} Id. at 11.  
\textsuperscript{261} Id. at 11.  
\textsuperscript{262} Id. at 11.  
\textsuperscript{263} See infra, Part III, D.
“...statute’s enforcement mechanisms put considerable pressure on an employer either to forego his ‘free speech right to communicate his views to his employees . . . or else to refuse the receipt of any state funds.” 264 This dilemma burdens employers’ ability to use their own funds to advocate for or against unionization and underlines an inherent potential for conflict between AB 1889 and the NLRA,265 and the California statute and the First Amendment.266 The statute impermissibly predicates benefits on forcing employers to refrain from conduct protected by federal labor law and chills robust debate, which is protected by both the NLRA and the doctrine of preemption.267 The Court insists that the issue is not chiefly whether the challenged provisions of AB 1889 violate the First Amendment nor whether such provisions are analogous to existing federal legislation that is not preempted by the NLRA, but rather whether the statutory scheme “...stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the NLRA.”268 While a state may choose funding restrictions to advance acceptable goals, it is impermissible “for a State to use its spending power to advance an interest that—even if legitimate ‘in the absence of

264 Chamber of Commerce, 554 U.S. ___ slip op. at 12.
265 Id. at 12.
266 Recall, the Ninth Circuit’s claim that AB 1889 does not “infringe employers first Amendment rights because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition of the receipt of state grant or program funds.” Chamber of Commerce, 463 F. 3d at 1092. The statute’s enforcement mechanism arguably negates the Ninth Circuit’s claim.
267 Chamber of Commerce, 554 U.S. ___ slip op. at 12.
268 Id. at 13.
the NLRA, ‘... frustrates the comprehensive federal scheme established by that Act.’ This explication demonstrates that the First Amendment interest of employers can be sheltered from intrusions that are bounded by statutory analysis, but the Court declines to deploy robust exacting scrutiny required when deciding a case on the basis of the First Amendment, preferring instead to hang its judgment on whether the California statute hinders the accomplishment of the full purposes of the NLRA.

B. Does the NLRA Regulate Speech Concerning Organizing?

Next, the Supreme Court tackles the *Machinists* preemption issue directly by ascertaining whether organizing falls within a zone intended to remain free from state and federal regulations. The Court rejects the claim that *Machinists* is inapplicable because the NLRB has regulated election eve employer speech, employer interviews with employees in their homes immediately prior to an election and barred employers and unions alike from making speeches on company time to assemblies of employees within the 24 hours of an election. The Court ponders the purpose of such regulation and concludes that the NLRB has policed only a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA and notes that Congress has clearly denied the Board authority to regulate the broader category of noncercive speech

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269 Id. at 13.
270 Id.
encompassed by AB 1889. Since the NLRB, generally speaking, is without authority within this insulated domain, it is equally clear that the NLRA deprives California of authority since states have no more authority than the Board to upset the balance that Congress has struck between labor and management.

The Supreme Court next turns its attention to the Ninth Circuit’s dependence on analogies between the contested state legislation and federal statutes that similarly restrict the use of government funds and finds such analogies unavailing.

C. Preemption in the Mirror of Federal Statutes

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

271 Id.
272 Id. at 13-14.
273 Id. at 14.
274 Id. at 14.
respect to the federal statutes placed at issue by this litigation.\textsuperscript{275} None of the three federal statutes relied upon by the Court of Appeals either conflict with the NLRA or otherwise establish that “Congress ‘decided to tolerate a substantial measure of diversity’ in the regulation of employer speech.”\textsuperscript{276} Moreover, none of the federal statutes cited are government-wide in scope, none contain comparable remedial provisions and none contain express pro-union exemptions.\textsuperscript{277} For these and other reasons, the Supreme Court reverses the judgment of the Court of Appeals and sustains employer speech rights. Nevertheless, the Ninth Circuit has a point. Once federal statutes are allowed to impede employer speech rights, it becomes doubtful that every state statute attempting a similar feat can be credibly denied enforcement. Thus understood, resting employer freedom of expression rights on statutory interpretation may be a risky proposition.

\textbf{D. A Dissenting View}

Justice Breyer (joined by Justice Ginsburg) doubts that California’s spending limitations amount to regulation that the NLRA preempts.\textsuperscript{278} Conceding that Congress meant to encourage free debate, Breyer does not “believe that the operative provisions of the California statute amount to impermissible regulation

\textsuperscript{275} \textit{Id.}
\textsuperscript{276} \textit{Id.} at 15.
\textsuperscript{277} \textit{Id.} at 15.
\textsuperscript{278} \textit{Chamber of Commerce}, 554 U.S. ____slip op. at 1, 2 (Breyer, J. dissenting).
that interferes with that policy as Congress intended it.”

Justice Breyer insists that the only analogous case that can be extracted from the labor law pantheon is Wisconsin v. Gould where the Court considered a Wisconsin statute prohibiting the state from doing business with firms that repeatedly violated the NLRA. He differentiates Gould and Chamber of Commerce by asserting that the manifest purpose and effect of the Wisconsin statute “was ‘to enforce the NLRA’s requirements, which [is the] ‘role Congress reserved exclusively for the [National Labor Relations Board]’” whereas the California statute, “does not seek to compel labor-related activity. Nor does it seek to forbid labor-related activity.”

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

Overlooking statutory exemptions that favor unionization and failing to notice the importance of the statute’s compliance and litigation burdens, Justice Breyer asserts that AB 1889 permits all employers who receive state funds to

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279 Id. at 2.
280 Id.
281 Id.
282 Id. at 3.
assist, promote, or deter union organizing if they so choose but merely precludes such activities on the state’s dime. His analysis, if accepted, signifies that States that wish to pay for employer speech in a labor-organizing context are free to do so. Additionally, he argues that the regulator/market-participant distinction suggests a false dichotomy because the converse of a market participant is not necessarily “regulator.” This is so because a state may appropriate funds without either participating in or regulating the labor market and the NLRA pre-empts a state’s “actions when taken as an ‘appropriator,’ only if those actions amount to impermissible regulation.” Justice Breyer’s inability to find a regulatory purpose is difficult to understand because the state of California “abandoned their principal argument . . . [stating] that AB 1889 serves a proprietary interest exempt from preemption.” Instead, California concedes, “AB 1889’s spending restriction was not designed to achieve cost saving or programmatic efficiencies. Rather, California imposed a spending restriction on, or ‘refused to subsidize,’ employer speech about unionization solely because ‘the legislature believed [that such speech] may interfere with an employee’s choice about whether to join a union.’” It is possible that a statute premised on the

283 Id. at 3.
284 Id.
285 Id. at 4-5.
286 Id. at 5.
288 Id. at 1-2.
respondents reading of the case is regulatory even if Justice Breyer tries to evade the respondents’ apparent concession that places the asserted neutrality of the statute in doubt.

Justice Breyer continues by asserting that he is not convinced that statute’s failure to apply spending restrictions uniformly is fatal to the legislation. Instead he offers a compliant syllogism: permitting the expenditure of state funds when such funds are used to promote unionization and precluding the use of said funds when used to deter unionization fortifies an inference that is opposite to the one reached by a majority of the Court. Neutrality can be found within “California’s basic purpose—maintaining a position of spending neutrality on contested labor matters.”289 Hence, “[w]here labor and management agree on unionization, there is no conflict,”290 and there is no need for the state to impose funding restrictions.

Another way of viewing Justice Breyer’s claim is to accept that: (1) the proper outcome of any organizing campaign ought to culminate in unionization despite the express language of the NLRA granting employees the right to refrain from joining a labor organization, (2) neutrality can be understood as a postmodern idiom favoring unionization and disfavoring employers, and (3) the language contained within the preamble to the California statute stating it is the

289 Chamber of Commerce, 554 U.S. _____slip op. at 5 (Breyer, J. dissenting).
290 Id. at 5 (Italics added).
intent of the legislature to prohibit an employer from using state funds to support or oppose unionization based on the state’s policy to refrain from interfering with an employee’s choice to join or not to join a union only applies when there is a contest about the value of unionization. When such a contest takes place the neutrality objective is transmuted into a device favoring labor unions.

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

For a number of reasons, Justice Breyer cannot find evidence that the contested spending limitation amount to regulation that the NLRA preempts, which leads to several observations: (1) the State is free to refuse to pay for an activity it dislikes, (2) the congressional parameters for free debate and a robust exchange of ideas about the costs and benefits of unionization remain intact, (3) the State of California is neither participating in nor regulating the labor market.

291 Section 16645, Historical and Statutory Notes, Section 1 of Stats. 2000, c. 872.
292 Chamber of Commerce, 554 U.S. ____slip op. at 6 (Breyer, J. dissenting).
293 Id. at 7.
in impermissible ways, (4) the statute is tolerably neutral on the record before the
Court to enable a lower court to conclude that the compliance burdens are not
fatal, and (5) the First Amendment interest of employers is inadequate to warrant
constitutional protection.

IV. Analysis: Organizing, Presuppositions and Freedom of Speech

Understanding the *Chamber of Commerce* case requires background that
cconsiders the central tendency of democratic societies. John Gray’s contribution
to the proper understanding of modern mass democracies intuits that modern
states tend overwhelmingly to fail to protect or promote the public interest.294

"Contrary to the classical theory of the state as the provider of public good—
goods, that is to say, which in virtue of their indivisibility and non-excludability
must be provided to all or none—modern states are above all suppliers of private
goods."295 Rather than provide the pure public good of civil peace, mounting
evidence signifies that the mission of the modern state is to satisfy the private
preferences of collusive interest groups296 whether or not the pursuit of such aims
is cloaked in language implying some pure public purpose or alternatively
infused with the language of market failure.297 It is possible, therefore, to achieve

295 Gray, supra note ___ at 11.
296 Gray, supra note ___ at 11-12. See also James M. Buchanan, The Constitution of Economic Policy, in
Public Choice and Constitutional Economics, 103, 107-08 (James D. Gwartney & Richard E.
Wagner eds., 1988).
297 William C. Mitchell & Randy T. Simmons, Beyond Politics: Market, Welfare, and the
Failure of Bureaucracy, 1 (1994) (The vision underlying the expansion of regulation and bureaucracy
private aims and objectives through government processes more efficiently than by relying on market processes.\textsuperscript{298} Coherent with that possibility, “[m]odern democratic states have themselves becomes weapons in the war of all against all, as rival interest groups compete with each other to capture government and use it to seize and redistribute resources among themselves.”\textsuperscript{299}

It is doubtful that union advocates and their ideological allies can be separated from this centripetal tendency that afflicts democratic societies.\textsuperscript{300} One of the quintessential objectives of union advocates is to silence employer speech. In part this goal is tilted towards a presumption that the employer is an unwanted third party to the transaction between a union that seeks to represent workers and workers themselves.\textsuperscript{301} It is true that workers, whether they have a job or not, can choose a representative. But it is a mistake to emphasize the claim that employers who offer employment are simply “third parties.”\textsuperscript{302} On the contrary they are central to any employment agreement that involves individual workers or workers represented by a union. Equally clear, if the mounting

\textsuperscript{298} MITCHELL \& SIMMONS, supra note ___ at 108.
\textsuperscript{299} GRAY, supra note ___ at 4.
\textsuperscript{300} For a discussion of these issues, see Hutchison, A Clearing in the Forest, supra note ___ at 1339-48.
\textsuperscript{301} Bodie, supra note ___ at 53.
\textsuperscript{302} Id. at 53 (emphasisizing the contention that employers are an unwanted third party).
survey evidence showing dissatisfaction with traditional unions is accurate, unions, union hierarchs and their allies can be seen as unwanted third parties. Nevertheless, academic commentary has become exercised by the possibility that employer hostility and coercion is the primary factor hindering the restoration of labor’s previously ascendant position. Correspondingly, commentators have sought to contract the scope of employers’ property rights and to diminish the reach of the doctrine of preemption. Commentators pursue employer neutrality via state and local legislation or other innovation and such efforts are then defended by the assertion that they have a neutral goal or objective in view.

By contrast, the two Justices (Powell and Burger) of the Machinists Court, necessary to make up a majority, asserted “[s]tate laws would not be regarded as neutral ‘if they reflect an accommodation of the special interest of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining.’” AB 1889 amounts to just such an accommodation of the special interest of unions and the ideological allies who are animated by the decline of labor over the last few decades. Labor advocates have focused on the

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303 See e.g., Margalioth, supra note ___ at 41-49 (workers are increasing expressing dissatisfaction to collective solutions in an employment context).
305 See e.g., RICHARD B. FREEMAN WHAT DO UNIONS DO? THE 2004 EDITION, 34 (2004) (offering employer hostility as a highly influential explanation for labor union decline). See also, FREEMAN & ROGERS, supra note ___ at 185 (asserting that management has been given near-veto power over whether workers can achieve union representation).
306 LESLIE, supra note ___ at 322 (citing Machinists 427 U.S. 156 (Powell, J. and Burger, J. concurring).
307 See e.g., Feinstein, supra note ___ at 337-353.
ways in which purported obstacles to union organizing can be eliminated. In light of these developments, a correlative probability issues forth, suggesting that the Ninth Circuit Court has proved capable of finding neutrality lurking in non-neutral legislation as a basis for trumping the First Amendment interest of employers.

A. Neutrality Reflected in Three Questions

Given the Supreme Court debate and the Ninth Circuit wrangle, the Chamber of Commerce case prompts three questions: (1) Does AB 1889, inconsistently with its stated neutrality rationale, require or encourage employer-recipient silence by virtue of the statutory compliance costs, litigation risk and penalties arising from employer-recipient error when using state funds? (2) Are these enhanced transaction costs that accompany employer compliance error calculated to preclude employer-recipients from exercising their established right to engage in noncoercive, anti-organizing advocacy funded by nonstate funds? (3) Does the fact that California purports to act though its spending power rather than its regulatory power make a difference?

Preliminary analysis shows why the answers to such questions are important. The first question is significant because the statutory penalties, compliance costs and litigation costs can exceed the amount of state funds that an

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employer-recipient receives. AB 1889, in addition to disgorgement, calls for a penalty of twice of the funds received from the state.

The second question becomes pertinent given the plausible inference that the costs imposed by AB 1889 are calculated to inhibit employer-recipients in exercise of their freedom of expression rights even with respect to nonstate funds. This inference comes alive despite the possibility that employer-recipients can avoid such costs in three ways: by declining to contract with or to receive state funds, by refraining from all union advocacy designed to deter unionization, or by becoming an advocate for labor union organizing. In a word, the price of costs avoidance is employer neutralization. This move may have an adverse effect on employee rights to listen to a debate with regard to the advantages and disadvantages of organizing.

The third question arises because AB 1889 could be framed as an exercise of California’s spending power as opposed to its regulatory power to defend against preemption and First Amendment invalidation, despite countervailing arguments by Judge Beezer. Justice Breyer defends the Ninth Circuit’s analysis by discounting the regulator/market-participant distinction and maintains that a state may appropriate funds without either participating in or regulating the labor market so long as it appropriates without engaging in impermissible

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309 *Chamber of Commerce*, 463 F.3d at 1106 (Beezer, J. dissenting) (arguing that the state of California purports to act through its spending power rather than its regulator power is a distinction without a difference).
regulation.\textsuperscript{310} That said, in order to more fully explain the deductions that can be drawn from statutory analysis, I will address the three questions below.

The Supreme Court majority supplied an affirmative answer to the first two questions and a negative one to the third. First, AB 1889 offers a capacious conception of neutrality with respect to restrictions on the use of state funds. This is not the first time that California offered the now-familiar rhetoric of neutrality in defense of state regulation within the labor arena. To be fair, neutrality as a concept often has an in-the-eye-of-the-beholder quality. But just like a moral philosopher may not be a virtuous man and yet know everything about virtue,\textsuperscript{311} it is possible that a legislative body or a court may know everything about neutrality conceptually, but cannot consistently apply the concept in practice or alternatively can only apply neutrality as a weapon.

\textit{Golden State I} gives substance to the observation that such a possibility has begun to infect Ninth Circuit adjudication. The City of Los Angeles conditioned a renewal of a taxicab franchise on the settlement of a labor dispute between the franchisee and the union representing its employees, who were on strike. The Ninth Circuit affirmed a District Court judgment that the city’s action was not preempted under the NLRA.\textsuperscript{312} Conversely, the Supreme Court held that such a condition destroys the balance of power designed by Congress and frustrates

\begin{thebibliography}{99}
\item \textit{Chamber of Commerce}, 554 U.S. \____ slip op. at 5 (Breyer, J. dissenting).
\item 754 F.2d 830 (1985) (reversed and remanded).
\end{thebibliography}
Congress’ intention to leave open the use of economic weapons; a city cannot condition a franchise renewal in a way that intrudes into the collective bargaining process. In *Golden State I*, the Supreme Court held the city’s stated desire to remain neutral during a labor dispute does not control preemption. Instead the court must decide if a state’s rule conflicts with or otherwise “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of federal law.\(^ {313} \)

Other circuit courts have reached similar decisions dismissing euphonious claims of neutrality as a defense to preemption when proffered by state or local officials in an effort to legitimize a regulatory policy.\(^ {314} \) Still, evidence mounts that the Ninth Circuit has been drawn to the persistent appeal of neutrality rhetoric. In *Livadas*, an employee covered by a collective-bargaining agreement within the meaning of the NLRA was deprived of benefits generally made available to non-union workers.\(^ {315} \) The Ninth Circuit, underscoring its difficulty with the concept of neutrality, accepted the state’s contention that since the plaintiff was covered by a collective-bargaining agreement, the state could not be required to enforce a provision of the California Labor code protecting the

\(^{313}\) 475 U.S. 608 (1986).

\(^{314}\) See *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F. 2d 1148 (Invalidating a state neutrality statute and holding that states may not, consistently with the NLRA withhold protections of state anti-trespass law from employer involved in labor dispute) (cited with approval by the United States Supreme Court in *Livadas v. Bradshaw*).

\(^{315}\) GORMAN AND FINKIN, *supra* note __ at 108-1109.
plaintiff’s right to prompt payment of wages. While this move depriving a unionized worker of generally-available benefits can not be seen as union favorable, it represents an ever present possibility: states taking sides in an employment contest in order to accommodate one interest or another. The preemption doctrine is properly calibrated precisely to preclude this possibility. Hence, the Supreme Court unanimously reversed the Ninth Circuit and invalidated the California rule. The *Livadas* Court reached its decision because a rule “predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose,”\(^{316}\) and threatens the Constitution’s supremacy clause since it interferes with or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law.”\(^{317}\)

Claims of state neutrality often coexist with evidence showing that the state has placed its thumb on the scale. This is a metaphor for the precise evil that the *Machinists* prong seeks to avoid—the possibility that the state would alter the balance of power in a particular labor conflict—and thereby, subvert congressional intent that the matter be left free of government intervention.\(^{318}\)

The Supreme Court clarifies, determining that the NLRA forbids state policies

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\(^{317}\) *Id.* at 120.

that aid or assist either party to a labor dispute despite claims of neutrality. The Court defends federal power and the federal scheme by stating that California’s “hands off” policy label poses a risk that the freedoms and “advantages conferred by federal law will be canceled out and its objectives undermined, and those dangers are not laid to rest by professions of the need for governmental neutrality in labor disputes.”

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

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319 Livadas, 512 U.S. at 130.
320 Id. at 129.
freedom of speech. Just like the Jacobins, the Ninth Circuit’s solicitation founders in the face of a principled conception of words, such as neutrality.

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

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

In answering the third question, it is doubtful that a statute that is designed to interfere with the employer-recipients’ speech rights by placing restrictions on the use of state funds, and that has the effect of inhibiting employer’s speech with respect to their own funds constitutes a legitimate exercise of California’s spending power. In order to deprive the statute of its regulatory purpose, observers must yield to imaginary claims of neutrality and ignore: (1) evidence showing that AB 1889 permits the use of state funds for select employer advocacy activities that promote unions and (2) the fact that the state of California apparently concedes the statute’s regulatory purpose. Given the non-neutral purpose and effect of the statute, and in light of California’s apparent concession, the appropriate outcome becomes observable: a state may

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322 Chamber of Commerce, 554 U.S. ____ slip op. at 10.
not leverage its spending power to induce employers to adopt a neutral policy
toward union organizing. The fact that California purports to act through its
spending power rather than its regulatory power makes no difference because
AB 1889 interferes with Congress’s intention to create a zone free from
regulation.

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

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

324 Chamber of Commerce, 463 F. 3d at 1098 (Beezer, J. dissenting).
B. Inclinations?

It is possible to uncover evidence that implies Ninth Circuit adjudication exemplifies the possibilities associated with postmodern discourse. This development may arouse doubts about the long-term viability of the liberal-legalist project while sustaining the observation that the court and courts are susceptible to capture. Analogical data sustains the tentative inference that the Ninth Circuit panel like other officials in liberal democratic societies is predisposed to favor one side or another in the contest for political power. As such, the Supreme Court has had occasion to correct the Ninth Circuit and vindicate the First Amendment rights of union dissenters.325

The vulnerability of the Ninth Circuit’s analysis is highlighted by briefly examining two of the court’s recent decisions emphasizing that organizing expenditures and activities can be justified against union dissenters’ freedom of expression claims. This paradigm suppresses union dissenters’ freedom of expression claims in exchange for the goal of strengthening labor unions. The Ninth Circuit’s susceptibility to this objective takes on additional weight given the propensity of the court to favor neutrality rhetoric as a device that trumps the preemption doctrine.326

325 Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507, 528 (1991) (opinion of Blackmun, J., citing Ellis, 466 U. S. 434, 453 (1984)) (In Lehnert, a four-member plurality held that the First Amendment proscribes such assessments in the public sector).
326 See supra Part IV A. (discussing Golden State I and Livadas).
Within the tightly-contested category that is bounded by the clash of freedom of expression claims and compulsory union dues, the Ninth Circuit’s willingness to favor union organizing as a goal while disfavoring freedom of expression has drawn a sharp rebuke from the Supreme Court. In Ellis, the Court held that the union’s rebate scheme was inadequate and that the Ninth Circuit erred in finding that the Railway Labor Act authorizes a union to spend compelled dues for general litigation and organizing efforts\textsuperscript{327} deemed necessary to ensure and improve union strength.\textsuperscript{328} Ellis was extended to the Beck case wherein the Supreme Court confirmed that the principles adduced in Ellis apply in the context of the NLRA.\textsuperscript{329}

Nonetheless, contemporary evidence shows that the Ninth Circuit has legitimated union organizing activities in particular, and unionization in general, on grounds that such efforts are mandated by the goal of strengthening and

\textsuperscript{327} Ellis 466 U.S. at 443, 443 (holding that the union’s rebate scheme was inadequate and that the Ninth Circuit Court of Appeals erred in finding that the Railway Labor Act authorizes a union to spend compelled dues for its general litigation and organizing efforts).

\textsuperscript{328} Id. at 441 (“Turning to the question of permissible expenditures, the Court of Appeals framed "the relevant inquiry [as] whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. . . . [That is, whether it] can be seen to promote, support or maintain the union as an effective collective bargaining agent." . . . The court found that each of the challenged activities strengthened the union as a whole and helped it to run more smoothly, thus making it better able to . . . negotiate and administer agreements.”).

\textsuperscript{329} United Food & Comm’ Workers, 249 F.3d 1115, 1117-1120 (9th Cir. 2001) (withdrawn and overruled by United Food & Comm’ Workers, 307 F.3d 760 (9th Cir. 2002) (en banc) (concluding that the Ellis decision held organizing expenses to be outside of Congress’ authorization in section 2, Eleventh of the RLA followed by the Beck decision, which found statutory equivalence between the NLRA and the RLA and the Lehnert case confirming that RLA cases including Ellis serve to determine the scope of the chargeable activities under the NLRA, and therefore union organizing expenses cannot be authorized by the NLRA).
expanding unions despite the determination by an unanimous Court in *Ellis* “that it would be perverse to” compel dues objectors “to finance the expansion of unionism to other bargaining units.” Disagreeing with the *Ellis* Court’s assessment of perversity, in *United Food* the Ninth Circuit stated: “Because the union can only become the collective bargaining representative if enough employees agree, the initial recruitment and incorporation of new members into a nascent bargaining unit through organizing is crucial.” This opinion is underwritten by tolerating the contention that extra-bargaining unit organizing is necessary, and therefore, defensible, despite the complainants’ free speech claims and the existence of contrary precedent.

The *United Food* court reached the following conclusions, which coincide with its implicit agreement with the objectives associated with AB 1889: (1) the organizing of competitor employees eliminates competition among employers and employees based on labor conditions that are regarded as substandard; (2) nonunion employers will tend to pay lower wages and provide lesser benefits; and (3) competition from non-unionized employers weakens significantly the

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331 *Ellis*, 466 U. S. at 452.
332 *United Food v. NLRB* 307 F.3d at 768
333 In analyzing the *United Food* case, the Ninth Circuit attempted to distinguish cases arising under the NLRA and cases like *Ellis* arising under the Railway Labor Act despite the Supreme Court’s claim in *Communications Workers v. Beck* that since section 8(a) (3) of the NLRA and section 2, Eleventh of the RLA “are in all material respects identical,” RLA cases are “more than merely instructive, they are controlling” for purposes of understanding the free-rider approach taken by Congress. *Communications Workers of Am. v. Beck*, 4587 U.S. at 745-747.
union’s ability to bargain with already-organized employers, and diminishes the union’s prospects of achieving the economic objectives of the members of the bargaining unit.\textsuperscript{334} These arguments are dubious\textsuperscript{335} and raise the probability that the court has been captured by an inclination to expand unions, a conclusion that underscores its holding in \textit{Chamber of Commerce}. Still, the \textit{United Food} court’s opinion burdening freedom of expression\textsuperscript{336} is reinforced by observing that the Supreme Court, unsurprisingly, is not inclined to grant certiorari in all such cases. The Court has often deferred to the appellate courts the determination of which labor union activities are defendable against freedom of speech claims brought by complainants.\textsuperscript{337} Bright-line guidance in such situations might be helpful.

If this potential quandary is extended to the employer speech rights domain, and if lower courts are free, in practice, to ignore precedent, it becomes likely that freedom of expression claims will be litigated and re-litigated, thus providing continuing opportunities for elucidation. This is so despite the Supreme Court’s recurring admonition that a given state scheme must be evaluated on the basis of whether it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the NLRA. The

\textsuperscript{334} \textit{United Food v. NLRB} 307 F.3d at 768-69.
\textsuperscript{335} See generally, Hutchison, \textit{A Clearing in the Forest}, supra note ___ at 1357-1401.
\textsuperscript{336} \textit{Id.} at 1384-1394.
\textsuperscript{337} See e.g., Phillip Mulder Et. Al. v. NLRB 537 U.S. 1024 (2002) (certiorari denied) (disallowing appeal of the \textit{United Food} case).
accomplishment of such goals and objectives may depend on whether there is a uniform or elastic understanding of the NLRA’s purposes. Comprehensive elucidation must admit that the Supreme Court has approved or at the very least has not overruled the validity of federal statutes that appear to have the same purpose as AB 1889. That observation should give us pause even if it does not negate the evidence suggesting that elucidation in the chambers of the Ninth Circuit or deliberation within the California legislature favors organizing activities and disfavors freedom of expression rights of employers and dissenting workers. Recall the Ninth Circuit’s decision making in Golden State I and Livadas, which suggests a propensity to accept statutes sheltered from invalidation by neutrality rhetoric. The Chamber of Commerce case offers another occasion for the Supreme Court to rectify the Ninth Circuit’s decision making. However, the relevant inquiry becomes whether the Supreme Court’s focus on statutory interpretation is sufficient to defend the freedom of expression rights of employers and prevent states from placing their finger on the scale in order to favor one side in the absence of clear protection supplied by the First Amendment itself?

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

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

Returning to the past requires a brief examination of the status of employer speech rights before the Wager Act was amended adding section 8 (c), which

340 Id.
341 See e.g., GORMAN AND FINKIN, supra note __ at 1103 (citing Briggs-Stratton for the proposition that the Supreme Court has not always prevented states from regulating this insulated zone). See also, supra Part I.
provides explicit protection for employer speech within an organizing context.

*Virginia Electric* as confirmed by the Supreme Court’s subsequent holding in *Thomas v. Collins* situates employer and labor union efforts to persuade workers to join or refrain from joining a union within the First Amendment’s guaranty.\(^{342}\)

*Virginia Electric* bears witness to the judgment that provably hostile conduct by an employer who suggested that its employees form an “independent” union to bargain on their behalf\(^{343}\) cannot bar First Amendment protection for employer speech. As part of its campaign, the employer, Virginia Electric & Power Company, “gave impetus to and assured the creation of an ‘inside’ organization and coerced its employees in the exercise of right guaranteed by § 7 of the Act.”\(^{344}\)

The NLRB found that company speeches arranged on company property and on company time as well as a bulletin posted on company property\(^{345}\) constituted conduct that interfered, restrained and coerced the company’s employees in violation of section 7 of the NLRA.\(^{346}\) The NLRB “concluded that the Company had committed unfair labor practices within the meaning of § 8 (1), (2) and (3) of the Act.”\(^{347}\) The NLRB issued an order directing the company “to cease and desist from its unfair labor practices and giving effect to its contract with

\(^{342}\) *Thomas v. Collins*, 323 U.S. at 537-538 (citing *Virginia Electric*).

\(^{343}\) *Virginia Electric*, 314 U.S. at 470-474.

\(^{344}\) *Id.* at 474.

\(^{345}\) *Id.* at 474.

\(^{346}\) *Id.* at 476.

\(^{347}\) *Id.* at 475.
Independent [inside union] . . .”

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

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

Ultimately, this case was sent back to the Board for a redetermination of the issues. Propositionally, Virginia Electric imparts substance to the contention that fear of coercion and even rampant hostility cannot be seen as sufficient to deprive employers of their First Amendment rights despite the NLRB’s early history demanding employer neutrality during organizing campaigns. Thus, contemporary state labor innovation (such as AB 1889) motivated by the

348 Id.
349 Id. at 475.
350 Id. at 477.
351 Id. at 479-489.
352 Chamber of Commerce, 554 U.S. ____ slip op. at 5.
employer-hostility thesis leading to a correlative endeavor to neutralize employers should have difficulty surviving in the face of this rather clear principle.

Correctly characterized, *Virginia Electric* affirms the proposition that employers have a First Amendment right to engage in non-coercive speech about unionization. Given the Supreme Court’s determination that § 8(c ) amended the Wagner Act to make manifest Congress’ intent to encourage free debate on issues dividing labor and management, it is important to note that free debate, to be meaningful, cannot countenance a regime that permits the enactment and enforcement of statutes that deprive only one side of the right to speak.

Decision making energetically tied to the First Amendment stands on the conviction that as a general rule, intrusions upon the “domain protected by the First Amendment can only be supported if grave and impending public danger requires this.” No evidence of a grave and impending danger was presented justifying the enactment of AB 1889 and hence this statute ought to be forcefully disallowed pursuant to First Amendment norms. The weight of First Amendment scrutiny is fortified by noting that corporations and other

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353 Id. at 6.
354 Id. at 6.
355 *Thomas v. Collins*, 323 U.S. at 532.
employers have full constitutional speech rights,\textsuperscript{356} which protect them from unlawful state deprivations of liberty.\textsuperscript{357} This gives rise to the desirable inference that the First Amendment ought to act as a bulwark against state labor regulation that intrudes on this right, and implies that statutory protection of employer speech rights can be seen, at least in part, as a gratuitous enactment.

Still, whether statutory protection is gratuitous or not, neutrality as a malleable concept overhangs this debate. This concept is difficult because there is an interminable and unsettable character of much of what passes for American’s contemporary moral and philosophical debates.\textsuperscript{358} The ever-increasing scope of these debates and the profound depth of cultural division combine to reflect a clash of orthodoxies on a number of levels.\textsuperscript{359} Thus, reaching agreement on something as essential as the meaning and shape of neutrality in societies that proffer continuing allegiance to liberalism is apt to be challenging. The complexity of such a venture may succumb to ambiguity.

Consider the Ninth Circuit’s assertion that neutrality is made concrete by the withdrawal of state subsidization (use of state funds) when employers

\textsuperscript{356} McConnell v. FEC, 540 U.S. 93, 256-59 (2003) (Scalia, J., concurring in part and dissenting in part) stating that the true interpretation of Bellotti means that corporations have full constitutional speech rights).

\textsuperscript{357} Baworowsky, supra note ___ at 1748-49.

\textsuperscript{358} MacIntyre, supra note ___ at 226.

attempt to influence employee choice about whether to join a union.\textsuperscript{360} Relying primarily on statutory analysis, the Ninth Circuit finds that both prongs of the preemption doctrine are inapplicable despite evidence demonstrating that the state of California has attempted to regulate labor compounded by unmistakable evidence showing that the restrictions on the use of state funds are excused when and if the employer takes steps to voluntarily recognize the union. To be sure, the Supreme Court disagrees with Ninth Circuit assessment of neutrality, finding employer speech within the preemptive remit of the NLRA. Accordingly, assertions of state neutrality could not defend a statute that does not appear to be neutral on its face or as applied.

However, it is also true that this dispute regarding the permissible reach of AB 1889 provides further proof that when state policies are contested within boundaries furnished by liberal societies, the elastic language of neutrality\textsuperscript{361} has its uses and in some quarters it may have many definitions. Given an unsettled world wherein modern states tend to fail to protect the public interest, conflict regarding the provision of private preferences of collusive interest groups may be a null hypothesis. In such a world state neutrality may be difficult if not an impossible proposition to sustain. Further support for this deduction can be

\textsuperscript{360} \textit{Chamber of Commerce}, 463 F.3d at 1084.

\textsuperscript{361} For a less elastic conception of neutrality, see \textit{Rum Creek Coal Sales v. Caperton}, 926 F. 2d 353 (4th Cir. 1991) (the court refused to defer to a West Virginia law that exempted labor activity from state trespass law). \textit{See also}, Estlund, \textit{supra} note \_ at 341 (“What West Virginia saw as “neutrality,” the Fourth Circuit viewed as state partisanship favoring labor.”).
found because of the existence of viable federal statutes. Like AB 1889, these statutes restrict the use of federal fund to assist, promote or deter union organizing. Implicitly, the Supreme Court accepted the neutrality of such federal statutes, which arguably provided private benefits, by relying on the contestable contention that a few isolated restrictions fail to alter the wide contours of federal labor policy.\(^{362}\) This development may expose the Supreme Court to the charge of hypocrisy.

Any kind of interpretation—statutory or constitutional—existing outside a boundary cabined by a shared understanding of truth, liberty and justice, unavoidably prepares liberal-legalist societies for a dead end: despotism\(^{363}\) designed to support largely private beneficiaries. At the same time, Richard Pildes contends that the “most urgent problem in the design of democratic institutions today is how best to design such institutions in the midst of seemingly-profound internal heterogeneity, conflict and group difference.”\(^{364}\) This comment, aimed at resolving differences over ethnic identity, has equally poignant implications for a wide array of issues that coincide with the postmodern conclusion that our world has fallen apart, and that we live at the end of the neoclassical age as society struggles through feelings of confusion and

\(^{362}\) See supra Part III C.

\(^{363}\) LOUGHLIN, supra note ___ at 5.

helplessness that confirm the real world lacks reality.\textsuperscript{365} Coextensively, America faces a continuing struggle among combatants to transmute the existing design of democratic institutions and utilize the power of government, including the courts, to extract largely private benefits. Whether intertwined with statutory preemption analysis, incipient federalism or constitutional interpretation, liberal democratic states have struggled to fashion and sustain fundamental freedoms despite the possibility that liberal societies, including our own, are drawn to the conclusion that at least one fundamental freedoms—freedom of speech—constitutes an absolute right.\textsuperscript{366} While it is clear that employers and corporations have been and continue to be included within the protective envelope provided by the constitutional guarantee of free speech,\textsuperscript{367} a struggle to maintain coherence regarding employer speech rights ensues. The contours of this struggle may come into view as an uncompromising surrender to paradox because the freedoms that are emblematic of liberalism—the freedoms of expression, religion and association—all appear to require a governmental stance of evaluative


\textsuperscript{366} Evidently, Justices Black and Douglas championed an absolutist view of free speech, but a majority of the United States Supreme Court has never adopted it. NOWAK AND ROTUNDA, \textsc{Constitutional Law}, supra note \textsuperscript{321} at §16.7.

\textsuperscript{367} See e.g., First National Bank v.Bellotti, 435 U.S. 765, 767, 785, 796 (1977) (reversing the lower court’s holding that the First Amendment rights of a corporation are limited to issues that materially affect its business, property or assets and finding no support in the First or Fourteenth Amendment for the proposition that speech that otherwise would be within the protection of the Constitution, imply because its source is a corporation, that it is outside of constitutional protection. Justice Burger concurred in the opinion and judgment stating that a disquieting aspect of Massachusetts’ position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form—as many do—to carry on the business of mass communications, suggesting that it may be impossible to distinguish what qualifies and what does not qualify for protection under the state’s approach).
neutrality.\textsuperscript{368} Properly evaluated, freedom of expression for those with whom the government agrees is not freedom of expression.\textsuperscript{369}

The implications of that observation provide constitutional ground to defend actual neutrality as a concept and in practice rather than a cramped and largely rhetorical notion that shelters innovative state legislation and adjudication, whenever shelter is desired. Still, it is worth noting that neutrality may be a stance that is impossible to sustain in practice. Employer freedom of speech rights, which rest on the Constitution, ought to rests more securely than speech rights which depend solely on statutory analysis. However, problems remain. Larry Alexander notices that any philosophical account of political morality must take a stand on what is true, right and valuable and what is not.\textsuperscript{370} Despite the fact that free speech occupies a preferred position compared to the majority of rights in the United States’ Constitution,\textsuperscript{371} and despite the frequent invocation of the claim that government officials when legislating or adjudicating are engaged in an ongoing effort to maintain neutrality, the state “will and must be ‘partisan’ in favor of its own conclusions. Thus, it must regard as error and possibly malign those ideas that it rejects.”\textsuperscript{372} Without a shared understanding of

\textsuperscript{368} Larry Alexander, Is There a Right of Freedom of Expression, 148 (2005) [hereinafter, Alexander, Is There a Right of Freedom of Expression].
\textsuperscript{369} Id.
\textsuperscript{370} Id.
\textsuperscript{371} Nowak and Rotunda, Constitutional Law supra note ___ at § 16.7.
\textsuperscript{372} Alexander, Is There a Right of Freedom of Expression, supra note ___ at 148-49.
truth, justice and liberty, it is unlikely that a way can be found to resolve such disputes on terms that all will agree are just. It is not clear that the Constitution can be relied upon in a society where doubts flourish about the possibility of attaining philosophical liberalism and where political liberalism may be devoid of deep conviction.

These various developments may give rise to pessimism and provide a negative answer to Professors Scaperlanda and Collett’s haunting question: How can law facilitate America’s ongoing experiment with representative self-governance if society has lost its shared moral foundations? Though *Chamber of Commerce* in all of its permutations but particularly the Ninth Circuit’s opinion, illustrates the difficulty of settling disputes about statutory interpretation, the implications of this difficulty come alive with equal force with respect to constitutional analysis. It is unlikely that a liberal democratic state can sustain its ostensibly neutral stance on anything, including union organizing unless it recaptures what is arguably missing in American society: a shared understanding of essentials, such as truth, because it is not possible to live in a democratic society that papers over deeply antagonistic world-views, except temporarily. This quandary implies that endless elucidation may be the looming

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374 *Id.*
destination of all debates including the employer free speech wrangle.

**Conclusion**

“From the beginning or, to be more precise, from the time of Plato to that of Voltaire, human diversity was judged in the court of fixed values. Then came Herder, who turned things around. He had universal values condemned in the court of diversity.” As the nation embraces diversity, internal heterogeneity characterizes America’s democracy. Diversity, specifically in its cosmopolitan form and particularly in all of its dimensions suggests an obvious conclusion to the resolution of conflicts over fundamental rights and freedoms: the impossibility, if not the undesirability of reaching a consensus that represents universal claims regarding justice, truth and liberty. Americans now make up a society that verifies philosopher Chantal Delsol’s rich description of a postmodern society that is waiting, but does not know what it is waiting for.

Though liberty may promote individual and social progress, coextensively with the boundary administered by eternal vigilance, it is improbable that preemption analysis tied to statutory interpretation of the NLRA or constitutional adjudication that concentrates on fundamental freedoms can offer hope for a permanent resolution of society’s budding debates. As such, employer

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376 *FINKELKRAUT*, supra note ___ at 9.
free speech rights, however justifiable and desirable, face an indeterminate future.