Chamber of Commerce v. Brown: Protecting Free Debate on Unionization

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Introduction

Congress enacted the National Labor Relations Act in 1935 to provide uniform federal regulation of the relationship between labor unions and management.[1] As originally enacted, the NLRA strictly regulated employer conduct, but did not impose the same level of regulation (or similar prohibitions) on unions themselves. Just over a decade later, Congress amended the NLRA to respond to the growing imbalance of power that favored unions by setting limits on certain union conduct. The Taft-Hartley Act amendments to the NLRA also sought to level the field by expressly guaranteeing the rights of employers to engage in non-coercive speech regarding unionization. Section 8(c) of the NLRA embodies this protection, providing that

> [t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[2]

Quite simply, section 8(c) gets it right.

This term, the Supreme Court found that the NLRA's protection of free debate in the context of union organization, articulated in

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[1] 29 U.S.C. §§ 151–69.

[2] 29 U.S.C. § 158(c).

part by section 8(c), preempts state regulation that purports to prohibit the expenditure of state funds by certain employers on speech ''to assist, promote, or deter union organizing.''[3] The Court struck down California's Assembly Bill (AB) 1889, which restricted the speech of recipients of state funds, because the NLRA preempts state regulation that interferes with Congress's intention that certain activities be left unregulated and instead controlled by the free play of economic forces. The decision reinforces the NLRA's preemptive power over state regulation of employer speech and highlights Congress's aim in protecting free debate on the issue of unionization.

Legislation like AB 1889 has been gaining popularity in recent years, as unions have increased their efforts to curtail employer speech and its effects on employees' decisions to unionize, particularly on the state and local levels. Such legislation, however, is now likely foreclosed by the Supreme Court's decision in *Chamber of Commerce v. Brown*, and unions may turn their attention to alternate means of easing the path to unionization. Ultimately, though, despite union outcry over declining rates of unionization, the balance struck by the NLRA is the right one—protecting the freedom of both unions and employers to speak will provide employees with more, and competing, information regarding the consequences of unionization (both positive and negative). This free debate ought to remain an integral part of any federal framework regulating employer/union relations.

I. California Assembly Bill 1889 Litigation

A. Assembly Bill 1889

On September 28, 2000, California Governor Gray Davis signed AB 1889, which prohibits certain employers from using funds received from the state ''to assist, promote, or deter union organizing.''[4] This provision was passed over the hard-fought opposition of employer groups and with the strong support of unions. Unions asserted that employer suppression of organizing campaigns had grown into a multi-million dollar business and that the law would ensure that state resources would no longer be used by employers

[3] Chamber of Commerce v. Brown, 522 U.S. ____ , 128 S. Ct. 2408 (2008) (''Chamber v. Brown'').

[4] See Cal. Gov't. Code Ann. §§ 16645–16649.

for such a purpose.[5] Although the bill was anticipated to impact employers in a wide range of industries, the main target of AB 1889 was the healthcare sector, in which many employers received state funds through the state's MediCal program.[6] Employers vocally opposed the measure as, among other things, infringing upon their constitutional right to free speech, specifically protected by section 8(c) of the NLRA, by intending to eliminate employer opposition during union organizing drives.[7] Some employer groups predicted that AB 1889 would have a negative impact on business performance, particularly because of the bill's recordkeeping requirements.[8] The bill passed the California General Assembly in September 2000 on a strict party line vote.

AB 1889's preamble clearly lays out that the bill is intended to further California's general policy objectives:

> 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 on a state contract.[9]

To achieve those policy objectives, AB 1889 prohibits several classes of employers that receive state funds from using the funds ''to assist, promote, or deter union organizing.''[10] The statute defines the prohibition on the use of funds in neutral terms: ''Assist, promote, or deter union organizing'' means ''any attempt by an employer to influence the decision of its employees in this state or

[5] See John Logan, Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California, University of California Institute for Labor and Employment, The State of California Labor 2003, 159–162 (2003).

[6] *Id.* at 160.

[7] *Id.* at 162–166.

[8] *Id.* at 164.

[9] 2000 Cal. Stats. ch. 872, § 1.

[10] See Cal. Gov't. Code Ann. §§ 16645–16649.

those of its subcontractors regarding . . . [w]hether to support or oppose a labor organization that represents or seeks to represent those employees [or] [w]hether to become a member of any labor organization.''[11] But it is clear that the bill's effect was intended to limit anti-union speech. In particular, AB 1889 expressly exempts from its funding restrictions ''activit[ies] performed'' or ''expense[s] incurred'' in connection with ''[a]llowing a labor organization or its representatives access to the employer's facilities or property,'' and ''[n]egotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.''[12]

AB 1889 enacted numerous recordkeeping-type provisions to ensure that covered employers did not use state funds in a manner prohibited by statute. Covered employers must certify that no state funds will be used for prohibited expenditures and must also maintain and provide upon request ''records sufficient to show that no state funds were used for those expenditures.''[13] Although records are not required to be maintained in any particular form, the statute provides that if state funds are commingled with other funds, ''any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis.''[14] In other words, if an employer commingles funds and makes any prohibited expenditure, that employer could be found to have violated the statute.

The law also provides for dual enforcement, allowing a civil action either by the state attorney general or by any private taxpayer.[15] Penalties for violations are harsh: An out-of-compliance employer is liable to the state for the funds expended in violation of the statute plus a civil penalty equal to twice the amount of those funds, and prevailing plaintiffs are entitled to reasonable attorney's fees and costs.[16]

Shortly after AB 1889 became effective in January 2001, labor unions began to add allegations to their organizing drives that

[11] *Id.* at § 16645(a).

[12] *Id.* at §§ 16647(b), (d).

[13] *Id.* at §§ 16645.2(c), 16645.7(b)–(c).

[14] *Id.* at § 16646(b).

[15] *Id.* at § 16645.8(a).

[16] *Id.* at §§ 16645.2(d), 16645.7(d), 16645.8(a), 16645.8(d).

employers were using public funds to oppose organization. Unions both filed complaints with the California attorney general—including 24 requests for investigation through December 2002—and initiated private civil litigation.[17] The complaints alleged violations for a variety of prohibited activities, including: hiring consultants and law firms to direct anti-union campaigns; running anti-union orientation and training sessions for supervisors; paying supervisors and managers to conduct group and individual captive meetings; paying employees to attend anti-union meetings; creating and distributing anti-union literature; and mounting elaborate public campaigns against unionization.[18]

Employers' active opposition to AB 1889 was based in large part on the potential for unions to use the legislation as leverage in conducting organizing drives. Unions' active attempts to enforce the law once it was enacted only confirmed the business community's predictions. It was no surprise, then, that AB 1889 soon became the subject of litigation.[19]

B. Lower Court Litigation

1. District Court Litigation

In April 2002, several organizations composed of members that do business with the state of California and several health care industry employers brought an action in the U.S. District Court for the Central District of California against the California Department of Health Services and several state officials, including Attorney General Bill Lockyer, to enjoin the enforcement of AB 1889. The American Federation of Labor and Congress of Industrial Organizations and California Labor Federation intervened to defend the statute's validity.

[17] See Logan, *supra* note 5, at 171 (2003) (collecting complaints); see also Chamber of Commerce v. Lockyer, 422 F.3d 973, 980–82 (9th Cir. 2003), vacated by 463 F.3d 1076 (9th Cir. 2006) (en banc).

[18] See Logan, *supra* note 5, at 171 (collecting and describing complaints).

[19] In fact, AB 1889 was the subject of litigation prior to its implementation. In late 2000, several business organizations (including the California Healthcare Association) filed a declaratory and injunctive relief action in federal district court challenging AB 1889's constitutionality. *California Chamber of Commerce v. California*, No. 8:00-cv-01190-GLT-AN (C.D. Cal. 2000). The district court denied plaintiffs' motion for a preliminary injunction, and plaintiffs subsequently voluntarily dismissed their suit.

Plaintiffs sought declaratory and injunctive relief, and filed a motion for summary judgment on the grounds that AB 1889 is unconstitutional under the federal and California Constitutions, and preempted by the NLRA, the Labor Management Reporting and Disclosure Act, and the Medicare Act.[20] The defendants and intervenors contended that the plaintiffs lacked standing to sue, and that their claims were barred by the Eleventh Amendment and abstention doctrines.

The district court found that at least one plaintiff—the U.S. Chamber of Commerce—had standing to challenge certain provisions of AB 1889, and allowed all properly named plaintiffs to challenge the provisions that governed the recipients of state funds grants, employers conducting business on state property, and private employers receiving state funds in excess of $10,000.[21] The court rejected the defendants' Eleventh Amendment and abstention doctrine defenses.

The court did not reach plaintiffs' federal and state constitutional arguments or their arguments with respect to preemption by the Labor Management Reporting and Disclosure Act and the Medicare Act because it found that ''AB 1889 is preempted by the National Labor Relations Act.''[22] It accordingly granted plaintiffs' summary judgment motion as to the provisions for which they demonstrated standing, sections 16645.2 and 16645.7, which bar private employers who are recipients of state grants and state program funds in excess of $10,000, respectively, from using the funds to ''assist, promote, or deter union organizing.''

In short, the district court found that AB 1889 was not enacted in the state's capacity as a market participant, but rather as a traditional exercise of regulatory power. Thus it is preempted because it ''regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate'' under section 8(c) of the NLRA.[23]

[20] See Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199, 1201 (C.D. Cal. 2002) (''Chamber I'').

[21] *Id.* at 1203.

[22] *Id.* at 1204.

[23] *Id.* at 1205.

2. Ninth Circuit Litigation—Initial Panel

Defendants appealed the district court's grant of summary judgment to the Ninth Circuit, and on April 20, 2004 a unanimous panel of the Ninth Circuit affirmed the district court.[24] The panel found that ''California—acting as a regulator, not a proprietor in imposing these restrictions—has acted in such a way as to undermine federal labor policy by altering Congress' design for the collective bargaining process.''[25] The panel's decision rested on the preemption doctrine established by the *Machinists* case.[26] A state statute is preempted by the NLRA under the *Machinists* doctrine when Congress intended to leave an area ''to be controlled by the free play of economic forces.''[27]

The two provisions at issue barring private employers who receive state grants and private employers who receive state funds in excess of $10,000 from using state funds to ''assist, promote, or deter union organizing,'' the panel concluded, were not passed in the state's proprietary capacity—''the statute on its face does not purport to reflect California's interest in the efficient procurement of goods and services'' and ''there is no question but that sections 16645.2 and 16645.7 are designed to have a broad social impact, by altering the ability of a wide range of recipients of state money to advocate about union issues.''[28]

The panel found AB 1889 preempted under the *Machinists* doctrine because ''the California statute, 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, it interferes with an area Congress intended to leave free of state regulation.''[29] The panel concluded that the statute ''has both the explicit purpose and the substantive effect of interfering with the NLRA system for organizing labor unions'' and ''will alter the NLRA process of collective bargaining and union organization, because an

[24] Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) (''Chamber II'').

[25] *Id.* at 1159.

[26] Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

[27] *Id.* at 140.

[28] Chamber II, 364 F.3d at 1163.

[29] *Id.* at 1165.

employer who decides against neutrality will incur both compliance costs and litigation risk.''[30]

The panel explained that First Amendment jurisprudence, which allows the government in some circumstances to limit the use of governmental funds to subsidize speech or conduct, is not properly applied when analyzing whether a state statute is preempted by the NLRA: ''First Amendment concepts cannot be imported wholesale in construing the NLRA for the purpose of preemption analysis—especially when to apply constitutional analysis mechanically would substantially alter the balance of forces established by Congress under the statute.''[31] ''[T]he balance between employer and employee expression established by the NLRA differs substantially from the standard First Amendment balancing of speech interests,'' the panel found, and in any event, ''state regulation is not automatically immune from First Amendment concern simply because that regulation comes in the form of a subsidy rather than a prohibition.''[32]

3. Ninth Circuit Litigation—Panel Rehearing

The panel granted defendants' petition for rehearing and again affirmed the district court's grant of summary judgment to the plaintiffs.[33] Over Judge Raymond Fisher's dissent, the panel majority's decision on rehearing rested on slightly different grounds than its vacated opinion, concluding that ''the California statute chills employers from exercising their free speech rights that are explicitly protected by Congress under the National Labor Relations Act,'' and ''the California statute interferes with the National Labor Relations Act's extension of exclusive jurisdiction to the National Labor Relations Board for the adoption and enforcement of representation election rules.''[34]

The majority elaborated on the effects of the statute, describing AB 1889 as requiring ''burdensome and detailed record-keeping'' and carrying ''a false air of evenhandedness.''[35] It also articulated how the statute reaches beyond the state funds it purports to restrict

[30] *Id.* at 1168.

[31] *Id.* at 1170.

[32] *Id.* at 1170, 1171 n.8.

[33] Chamber of Commerce v. Lockyer, 422 F.3d 973 (9th Cir. 2005) (''Chamber III'').

[34] *Id.* at 976.

[35] *Id.* at 978.

to an employer's private resources. Central to that analysis is the characterization of some funds paid to state contractors as ''profits,'' which belong to the employer. AB 1889, the panel majority explained, ''commandeers employers' *own* money'' by prohibiting the use of profits from state contracts ''to discuss the advantages and disadvantages of union organizing efforts with employees.''[36] And it pointed to union actions taken under the statute ''to gain a special advantage in labor disputes, and thereby alter the balance of power between unions and employers.''[37]

On rehearing, the panel majority concluded, as it had before, that the California statute was preempted under the *Machinists* doctrine, but it also concluded that AB 1889 was preempted under the related doctrine set forth in *San Diego Building Trades Council v. Garmon*.[38] *Garmon* preemption functions to prevent state laws from interfering with the National Labor Relations Board's ''administration of the labor policy.''[39] Because ''[t]he California statute stifles employers' speech rights which are granted by federal law,'' the panel majority stated, it ''impedes the ability of the National Labor Relations Board to uphold its election speech rules and administer free and fair elections.''[40] Central to this analysis, the panel majority concluded that ''the same partisan employer speech'' regulated by AB 1889 was ''committed to the jurisdiction of the National Labor Relations Board'' by Congress.[41] AB 1889 was therefore preempted because it ''discourages employer speech, which works at cross-purposes with the relaxed election speech rules as established by the NLRB.''[42]

Judge Fisher disagreed. In his view, because AB 1889 allowed ''employers to spend their *own* funds, in whatever manner they please, to advocate for or against unionization,'' ''California is not actually regulating the speech at issue.''[43] Accordingly, neither *Garmon* nor *Machinists* preemption applies.

[36] *Id.* at 980.

[37] *Id.* at 982.

[38] 359 U.S. 236 (1959).

[39] Garmon, 359 U.S. at 242.

[40] Chamber III, 422 F.3d at 985.

[41] *Id.* at 987.

[42] *Id.*

[43] *Id.* at 995.

4. Ninth Circuit Litigation—En Banc

Citing Judge Fisher's position, defendants sought and were granted rehearing en banc by the Ninth Circuit. The en banc court reversed the district court's grant of summary judgment and held that AB 1889 was not preempted under either *Machinists* or *Garmon* and does not impinge on an employer's First Amendment right to express views on union organization.[44]

Judge Fisher, now writing for a 12-member majority, framed the question as ''whether a state's exercise of its sovereign power to control the use of its funds conflicts with national labor policy as expressed in the National Labor Relations Act.''[45] Although the en banc majority agreed with the district court and both panel opinions that ''California has acted as a regulator in enacting sections 16645.2 and 16645.7 and that the market participant exception does not apply,'' it found that these provisions were not preempted by *Machinists* or *Garmon*.[46]

The en banc majority concluded that ''AB 1889's restrictions on the use of grant and program funds do not interfere with an employer's ability to engage in 'self-help' in the sense protected by *Machinists*'' and ''[i]n restricting the *use* of state funds, California has not made employer neutrality or the substantive terms of employment between employer and employee a condition for the *receipt* of state funds.''[47]

The en banc majority also concluded that section 8(c) does not grant any speech rights to employers.[48] *Garmon* preemption was thus inapplicable because ''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.''[49]

Interestingly, the en banc majority discussed, for the first time in the litigation, arguments that AB 1889 violates the First Amendment. Although the panel decisions had addressed the parties' arguments

[44] Chamber of Commerce v. Lockyer, 463 F.3d 1076, 1080 (9th Cir. 2006) (en banc) (''Chamber IV'').

[45] *Id.*

[46] *Id.* at 1082, 1085.

[47] *Id.* at 1087–88.

[48] *Id.* at 1091.

[49] *Id.* at 1092.

analogizing the NLRA's protections to the First Amendment, the en banc majority made it a point to reach the First Amendment argument and specifically held that AB 1889 did not run afoul of the First Amendment: ''Because an employer retains the freedom to raise and spend its own funds however it wishes—so long as it does not *use* state grant and program funds on union-related advocacy—AB 1889 does not infringe employers' First Amendment right to express whatever view they wish on organizing.''[50]

Judge Robert Beezer, joined by Judges Andrew Kleinfeld and Consuelo Callahan, dissented, finding that AB 1889 both is preempted by the NLRA and violates the First Amendment.[51] The dissent began by addressing the First Amendment, explaining that ''[a] statutory blanket prohibition on employers advocating for or against unions would blatantly violate the First Amendment as the state has no legitimate interest in prohibiting employers from speaking on union issues.''[52] The state's legitimate interest ''in the funds it pays for the contracted goods and services is at an end'' once the state has chosen to award the contract.[53]

The dissenters instead found AB 1889 preempted under the *Machinists* doctrine because it ''directly regulates the union organizing process itself,'' ''imposes substantial compliance costs and litigation risks on employers who participate in that process using the statutorily protected self-help mechanisms,'' and accordingly, ''interferes with an area Congress intended to leave free of state regulation.''[54] The dissent would have also held the statute to be preempted under *Garmon* because AB 1889 displaced section 8(c)'s speech protections and consequently usurps the ability of the NLRB to administer elections that ''foster fair and free employee choice.''[55]

C. Supreme Court Decision

In the fall of 2007, the Supreme Court granted certiorari on the question of whether federal labor law preempts AB 1889. The Court heard oral argument in March 2008 and released its opinion on June

[50] *Id.* at 1096.

[51] *Id.* at 1098.

[52] *Id.* at 1099.

[53] *Id.*

[54] *Id.* at 1105.

[55] *Id.* at 1108.

19, 2008—more than six years after the litigation began.[56] Justice John Paul Stevens wrote for the seven-justice majority, holding that AB 1889 is preempted by the NLRA under the *Machinists* doctrine. Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, dissented.

The Court held that sections ''16645.2 and 16645.7 are preempted under *Machinists* because they regulate within 'a zone protected and reserved for market freedom.'''[57] Although NLRA section 8(c), added by the Taft-Hartley amendments, ''forcefully buttresses the pre-emption analysis in this case,'' protection of free debate is not limited to section 8(c), the Court explained:

> In the case of noncoercive speech . . . the protection is both implicit and explicit. Sections 8(a) and 8(b) demonstrate that when Congress sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so. Moreover, the amendment to § 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization.[58]

The Court found that the ''policy judgment'' made by AB 1889—''that partisan employer speech necessarily 'interfere[s] with an employee's choice about whether to join or to be represented by a labor union'''—was renounced by Congress in the Taft-Hartley Act. Thus, ''[t]o the extent §§ 16645.2 and 16645.7 actually further the express goal of AB 1889, the provisions are unequivocally pre-empted.''[59]

The Court specifically declined to address the validity of AB 1889 under the First Amendment, explaining that the question ''is not whether AB 1889 violates the First Amendment, but whether it 'stands as an obstacle to the accomplishment and execution of the

[56] Chamber v. Brown, 128 S. Ct. 2408 (2008). Edmund (Jerry) Brown replaced Bill Lockyer as California's attorney general and was substituted as a defendant in the litigation.

[57] 128 S. Ct. at 2412 (quoting Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 227 (1993)).

[58] *Id.* at 2414.

[59] *Id.* at 2414.

full purposes and objectives' of the NLRA.''[60] Under the NLRA, California ''plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition [and] may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.''[61] Moreover, by coupling its ''use'' restriction with ''compliance costs and litigations risks that are calculated to make union-related advocacy prohibitively expensive for employers that receive state funds,'' ''AB 1889 effectively reaches beyond 'the use of funds over which California maintains a sovereign interest.'''[62] Justice Stevens also stated that ''Congress has clearly denied [the NLRB] the authority to regulate the broader category of noncoercive speech encompassed by AB 1889.'' And this protection extends to speech that goes beyond the ''narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA.''[63]

The Court distinguished the few federal statutes that restrict the use of federal funds for union-related speech: ''We are not persuaded that these few isolated restrictions, plucked from the multitude of federal spending programs, were either intended to alter or did in fact alter the 'wider contours of federal labor policy.'''[64] Importantly, ''the mere fact that Congress has imposed targeted federal restrictions on union-related advocacy in certain limited contexts does not invite the States to override federal labor policy in other settings.''[65] The Court recognized, however, that ''[h]ad Congress enacted a federal version of AB 1889 that applied analogous spending restrictions to *all* federal grants or expenditures, the preemption question would be closer.''[66]

Justice Breyer disagreed with the majority's holding that AB 1889 is preempted under the *Machinists* doctrine, explaining that ''a State's refusal to pay for labor-related speech does not *impermissibly* discourage that activity.''[67] In fact, the federal statutes imposing restrictions

[60] *Id.* at 2417 (quoting Livadas v. Bradshaw, 512 U.S. 107, 120 (1994)).

[61] *Id.* at 2415.

[62] *Id.* at 2416.

[63] *Id.* at 2417.

[64] *Id.* at 2418 (quoting Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985)).

[65] *Id.* at 2418.

[66] *Id.* (emphasis in original).

[67] *Id.* at 2420 (emphasis in original).

on the use of federal funds are evidence of Congress's intent to permit states to enact similar legislation:

> Could Congress have thought that the NLRA would prevent the States from enacting the very same kinds of laws that Congress itself has enacted? Far more likely, Congress thought that directing government funds away from labor-related activity was *consistent*, not *inconsistent*, with the policy of 'encourag[ing] free debate' embedded in its labor statutes.[68]

Justice Breyer did not foreclose, however, the possibility that the effects of AB 1889 would lead to the statute's preemption. Breyer recognized that ''should the compliance provisions, as a practical matter, unreasonably discourage expenditure of *nonstate* funds, the NLRA may well pre-empt California's statute,'' and would have remanded the case for further development of the record.[69]

II. Effect of Supreme Court's Decision on Efforts to Restrict Employer Speech

The Supreme Court's decision in *Chamber of Commerce v. Brown* stands as a significant obstacle to labor-backed state and local initiatives to curtail noncoercive employer speech. At the very least, Justice Stevens's opinion forecloses the ability of states and localities to regulate the use of government funds when such a restriction is coupled with ''compliance costs and litigation risks'' that make union-related advocacy prohibitively expensive for state-funded employers.[70] The Court's opinion arguably reaches farther, and could be read to prohibit all state regulation that ''indirectly regulate[s] [employer speech] by imposing spending restrictions on the use of state funds.''[71]

Because legislation similar to AB 1889 has been gaining popularity in recent years as a means of easing the path to unionization by stifling speech in opposition, the Supreme Court's decision will likely

[68] *Id.* at 2420 (emphasis in original).

[69] *Id.* at 2421. Ironically, had the case gone the other way—perhaps if the California law had been more narrowly drawn—it would have become part of the growing narrative about the Roberts Court's reticence to uphold facial challenges.

[70] *Id.* at 2416.

[71] *Id.* at 2415.

have a noticeable effect on the legislative strategies labor unions and their supporters follow in the near term. The remainder of this article examines the viability of legislation that aims to restrict noncoercive employer speech, and predicts alternate methods that union supporters might propose to either limit employer speech itself or to limit the effect of employer speech on employees' decisions to unionize.

Ultimately, the balance struck by the NLRA section 8(c)—which protects free debate on unionization by both unions and employers—is the correct one. Despite concerns expressed about declining private sector unionization rates, by protecting the rights of all parties to speak, section 8(c) preserves the general principle that underlies both our democratic system and our economic markets: A free exchange of ideas is the best mechanism for decisionmaking. Limiting noncoercive employer speech deprives employees of valuable information about the consequences (both positive and negative) of unionization, and presuming that union speech alone will adequately inform the employee decisionmaker does not reflect the realities of the unionization process, as Congress recognized in enacting the Taft-Hartley Act.

A. The Importance of Employer Speech

The Taft-Hartley Act amendments were passed as a response to the NLRA's original focus on encouraging union organization.[72] They shifted the emphasis to a more balanced statutory scheme that protects the rights of workers to join or not join a union, and added restrictions on unions, while also guaranteeing certain freedoms of speech and conduct to employers and individual employees.[73]

Specifically, the Taft-Hartley amendments guaranteeing employer free speech were in response to several decisions by the NLRB, finding that the NLRA required ''complete neutrality'' on the part of employers.[74] These NLRB decisions continued despite admonishment from the courts of appeals applying the Supreme Court's jurisprudence in *Thomas v. Collins*[75] and *NLRB v. Virginia Elec. &*

[72] See 1 Developing Labor Law 41 (John E. Higgins, Jr. ed., 5th ed., 2006).

[73] *Id.*

[74] See Matter of Am. Tube Bending Co., Inc., 44 N.L.R.B. 121, 129 (1942) (finding that an employer committed an unfair labor practice on the basis of a finding that the employer acted with the purpose ''to influence the result of the election''); Matter of Clark Bros. Co., Inc., 70 N.L.R.B. 802, 803 (1946) (finding an unfair labor practice where the company ''injected itself into the then pending run-off election'').

[75] 323 U.S. 516, 537–38 (1945).

Power Co.[76], which made clear that employers' speech is protected under the First Amendment.

Accordingly, the Taft-Hartley Act was understood to ''guarantee[] to employees, to employers, and to their respective representatives, the full exercise of the right of free speech.''[77] Opponents took issue with the evidentiary rule laid out in section 8(c):

> [T]hese provisions go far beyond mere protection of an admitted constitutional right. By saying that statements are not to be considered as evidence, they insist that the Board and the courts close their eyes to the plain implications of speech and disregard clear and probative evidence. In no field of the law are a man's statements excluded as evidence of an illegal intention.[78]

Still, even those opposed to the general tenor of the Taft-Hartley Act did not take issue with its basic premise of free speech rights. For example, Representative John F. Kennedy, an opponent of many aspects of Taft-Hartley, explained that ''[t]here should be a readjustment of the collective-bargaining processes so that collective bargaining will be really free and equal and in good faith on both sides. To

[76] 314 U.S. 469, 477 (1941).

[77] H.R. Rep. No. 245, 80th Cong., 1st Sess., on H.R. 3020 at 6 (April 11, 1947). Reprinted in 1 Legislative History of the Labor Management Relations Act, 1947 (National Labor Relations Board, 1985). See also House Conference Report No. 510 on H.R. 3020 at 45:

> Both the House bill and the Senate amendment contained provisions designed to protect the right of both employees and labor organizations to free speech. The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, is not to constitute or be evidence of an unfair labor practice if such expression contains no threat of force or reprisal or promise of benefit. The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.

[78] House Minority Report No. 245 on H.R. 3020 at 84–85.

this end, employers must be guaranteed the same rights of freedom of expression now given to unions.''[79]

Organized labor was steadfastly opposed to the passage of the Taft-Hartley amendments and after its passage, publicized ''its opposition to what it called the 'slave labor law.'''[80] Although more than 60 years have passed since its enactment, and efforts of unions to repeal it have not been successful, many of the same objectives motivate organized labor today in seeking to rebalance the scale between management and labor.

B. State and Local Efforts to Curtail Employer Speech

Opponents of the federal labor law regime contend that to cope with the purportedly outdated and ossified NLRA, state and local governments have increasingly had to engage in labor regulation.[81] Whether to combat what they view as a frozen employer-friendly federal regime, or because local efforts allow unions to efficiently expend resources on legislative change, unions have focused their attention, to a great degree, on state and local government initiatives, rather than seeking legislative change on the national level.

Although the Supreme Court's decision in *Chamber of Commerce v. Brown* makes clear the strength of the NLRA's preemptive power, particularly under the *Machinists* doctrine, federal labor law does not preclude all state and local regulation. For example, state laws may set minimal employment standards that are not inconsistent with the general legislative goals of the NLRA (such as minimum wage laws).[82] Where state or local legislation does conflict with the goals of the NLRA, that regulation runs a high risk of preemption.

Although the target of AB 1889 appears to have been the health care industry, the statute was not narrowly tailored either to restrict the use of state funds to affect unionization in any particular economic sector or to prohibit a narrow class of actions undertaken on

[79] House Supplemental Minority Report No. 245, Supplemental Minority Report By Hon. John F. Kennedy at 114.

[80] 1 Developing Labor Law at 47.

[81] See, e.g., Benjamin I. Sachs, Labor Law Renewal, 1 Harv. L. & Pol'y Rev. 375, 394 (2007).

[82] See Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 757 (1985).

the employer's behalf.[83] Indeed, AB 1889 was limited only by the relatively loose definition of ''employers'' covered under the act, which amounted to essentially any employer who received a comparatively small amount of funding from the state in a given year.[84]

Although legislation of this general type has achieved some success in recent years, California's statute is among the most (if not *the* most) broad of these laws. Obviously, regulations styled after AB 1889 are unlikely to survive a preemption challenge under the plain holding of *Chamber of Commerce v. Brown*. State and local efforts to impose a similar restriction are also unlikely to survive a preemption challenge, but the form of the regulation at issue may play a role in structuring defenses to future challenges to such regulation.

At least one union representative has indicated support for a reading that such regulation can survive in substance if the enforcement provisions are less burdensome than those of AB 1889: Stephen Berzon, a lawyer for the AFL-CIO and its California affiliate and husband of Ninth Circuit Judge Marsha Berzon, has said that ''the ruling may leave room for a more limited law that restricts the use of state funds but omits some of the enforcement provisions in California's law.''[85] Mr. Berzon's understanding likely rests on Justice Breyer's dissent (and Judge Fisher's), in which a crucial factor to the rejection of preemption was the level of intrusiveness of the regulation on the employer's ability to use its own funds to speak on union issues.[86] Breyer's criticism that the majority acted with an inadequate record implies that, at the very least, he viewed the determination on burden to be a critical component of the Court's ultimate finding of preemption.

Justice Stevens's opinion, however, clearly endorses a broad reading of Taft-Hartley's speech protections and does not leave much

[83] Logan, *supra* note 5, at 160.

[84] See Cal. Gov't. Code Ann. §§ 16645.2, 16645.7.

[85] Bob Egelko, State Funds Can Be Used Against Unions, San Francisco Chronicle, B4 (June 20, 2008).

[86] See, e.g., Chamber v. Brown, 128 S. Ct. at 2421 (Breyer, J., dissenting); Chamber III, 422 F.3d 973, 1004 (''In certain respects, I share the majority's concerns. Some of the statute's enforcement provisions appear to have an impermissibly intrusive effect on the NLRA's balance of private actions between employer and employee, by exposing employers to the risk of significant litigation costs and punitive sanctions if they support or oppose unionization, even without using state funds.'').

room for this suggested balancing approach. Given the uncertainty as to whether legislation can be drafted to fit the contours between too burdensome and not burdensome—if there is any space to be found—it seems that support for California-style provisions will wane as unions and legislatures weigh the potential risks and expenses in defending these types of proposals against political and legal attack.

1. Limited By Activity Prohibited

One alternative to the AB 1889-type statute is legislation defining with more specificity the actions that an employer may not fund with state monies. New York, for example, proscribes the use of state money for three specific actions: (1) training managers, supervisors, or other administrative personnel on methods to encourage or discourage unionization; (2) hiring or paying attorneys, consultants, or other contractors to encourage or discourage unionization; and (3) hiring employees or paying the salary and other compensation of employees whose principal job duties are to encourage or discourage unionization.[87] Massachusetts has also passed a similarly limited regulation.[88]

Although this type of regulation is narrower than AB 1889, it is likely to be found to similarly limit the protection for an employer's exercise of speech. The New York law has already been found by one court to have been preempted by the NLRA under the *Machinists* doctrine.[89] Although the Second Circuit reversed the district court's grant of summary judgment, finding that material issues of fact regarding the effect of the regulation remained for the district court to resolve on remand, it did not preclude the district court's ultimate finding of either *Machinists* or *Garmon* preemption.

Moreover, nothing in the Court's decision in *Chamber of Commerce v. Brown* suggests that a relevant factor to consider in the preemption

[87] N.Y. Lab. Law. § 211-a. See also Debra Charish, Union Neutrality or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law Section 211-a, 14 J.L. & Pol'y 799–803 (2006) (describing legislative history and amendment of § 211-a and noting that the law in its original form was targeted solely at ''employers who actively discouraged unionization as a part of employee training'').

[88] See Mass. Gen. L. 7 § 56.

[89] See Healthcare Ass'n of New York State, Inc. v. Pataki, 388 F. Supp. 2d 6 (N.D.N.Y. May 17, 2005), rev'd by 471 F.3d 87 (2d Cir. 2006).

analysis is the specific type of speech activity regulated. Instead, the Court's inquiry focused only on whether the employer's speech was limited in contravention of the free debate protected by the act (and the extent to which states have control over state funds not connected to any programmatic message).

2. Limited By Employers Covered

Another alternative to an AB 1889-type regulation would be restrictions on state funds targeted specifically at certain industries or economic sectors, affecting only a limited number of employers. Florida, for example, passed such a law in May 2002, restricting the use of state funds to promote or deter unionization only in nursing homes.[90] Rhode Island has passed a law with a similar aim, preventing Medicaid reimbursement funds from being used to influence an employee's decision to join a union.[91]

Some laws with a similar limited scope have been upheld prior to the Supreme Court's decision in *Chamber of Commerce v. Brown*. For example, the Seventh Circuit found that an Illinois statute requiring that entities wishing to receive a subsidy for the construction of certain renewable fuel plans have a labor agreement establishing wages and benefits and including a no-strike clause.[92] Although the court found that the state was not acting in a proprietary capacity, it nevertheless found that the statute was not preempted by the NLRA because Illinois did not seek to affect labor relations generally through this targeted statute and thus was not engaging in regulation.[93]

Although supporters of this type of legislation may point to *Lavin* as blessing limitations targeted to a specific group of employers, such an argument may suffer from several weaknesses. First, the statute at issue in *Lavin* was exceptionally narrow. Neither the Florida nor the Rhode Island statutes affect such a narrow group of employers. Second, and more importantly, the Supreme Court explained in *Chamber of Commerce v. Brown*, that targeted statutes

[90] See Fla. Stat. 400.334.

[91] See R.I. Gen. Laws, § 40-8.2-23.

[92] Northern Illinois Chapter of Assoc. Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004 (7th Cir. 2005).

[93] *Id.* at 1006.

(much like the federal limitations in programs such as Head Start) may fall within the prerogative of Congress, but ''[u]nlike the States, Congress has the authority to create tailored exceptions to otherwise applicable federal policies, and (also unlike the States) it can do so in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent labor policies.''[94] Such a statement seems to foreclose the ability of states to implement restrictions on employer speech targeted to affect only certain groups of employers.

Such targeted restrictions are more likely to survive the NLRA's preemptive force if those restrictions can be drafted to fall within the market-participant exception to preemption.[95] One drawback to structuring laws in this manner is that certain industries simply may not be susceptible to influence exercised in this manner, particularly health care and other non-construction service industries where it is difficult to allocate state funds on a per-project basis.[96] The drawback to structuring laws in this manner, however, is that a state's participation in the market is by its very nature not meant to broadly regulate. Any restriction falling within the market-participant exception to preemption will likely have nothing more than a negligible effect on labor relations more generally.

3. Neutrality Agreements/Labor Peace Legislation

Some states and localities have taken greater strides towards limiting employer speech by requiring employers to enter into agreements with unions as a condition of receiving certain state funds or contracts.[97] Although certain of these regulations have been upheld

[94] Chamber v. Brown, 128 S. Ct. at 2418.

[95] See Bldg. & Constr. Trades Counsel of the Metro. Dist. v. Associated Builders & Contractors of Mass/R.I., Inc., 507 U.S. 218, 229–30 (1993); see also Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 291 (1986) (explaining that a state may act as a market participant when the enactment is ''specifically tailored to one particular job'' or a ''legitimate response to state procurement constraints or to local economic needs'').

[96] See Brian R. Garrison & Joseph C. Pettygrove, Yes, No, and Maybe: The Implications of a Federal Circuit Court Split Over Union-Friendly State And Local Neutrality Laws, 23 *Labor Lawyer* 121, 150 (2007).

[97] See Benjamin I. Sachs, *supra* note 81, at 388.

in the past,[98] other regulations have been held to be preempted by the NLRA.[99] The Supreme Court's statement in *Chamber of Commerce v. Brown* that ''[a]lthough a State may choose to fund a program dedicated to advance certain permissible goals, it is not permissible for a State to use its spending power to advance an interest that—even if legitimate in the absence of the NLRA—frustrates the comprehensive federal scheme established by that Act''[100] seems to suggest that legislation requiring such labor peace agreements may be preempted by the NLRA. And even if regulations of this type are not found to be preempted by the NLRA, they may be subject to an independent claim that they violate the First Amendment by imposing impermissible speech-based restrictions on the provision of government benefits.[101]

C. Federal Legislation Restricting Employer Speech

If the Supreme Court's decision in *Chamber of Commerce v. Brown* increases the risk that state and local legislation will be found to be preempted by the NLRA, unions and their supporters may refocus their attention on Congress. The general substance of the federal law governing the labor-management relationship has remained largely unchanged for decades. Critics—primarily unions and their supporters—complain that employers have prevented reform at the expense of declining unionization. But these same critics fail to convincingly argue that restricting the free debate on unionization will necessarily lead to a better represented workforce.

Indeed, certain members of Congress have recognized a need to turn attention away from legislation that seeks to fundamentally alter the balance struck by the NLRA. For example, Senator Arlen

[98] See, e.g., Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., 390 F.3d 206 (3d Cir. 2004) (upholding Pittsburgh regulation on the grounds of market-participant exception).

[99] See, e.g., Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277 (7th Cir. 2005) (finding Milwaukee regulation to be preempted because the county's spending power could not be used as a pretext to regulate labor relations).

[100] Chamber v. Brown, 128 S. Ct. at 2417.

[101] See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) (the government ''may not deny a benefit to a person on a basis that infringes his constitutionally protected speech''); see also Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, Chamber of Commerce v. Brown, U.S. Supreme Court, No. 06-939, at 13.

Specter advocates instead that Congress focus on increasing the effectiveness of the NLRB: ''Congress must hold hearings on how to reduce the window of time during which both sides could cheat and how to increase remedies when cheating does occur. Second, it must pass legislation that focuses on securing employees' freedom of choice in the workplace, rather than on serving the interests of unions or employers.''[102] And, as Senator Specter recognizes, ''[l]egislating on the assumption that all organizers have pure motives would be a mistake.''[103] To be fair, the same caution applies to employers' motives, and for that very reason, legislation that seeks to change processes, rather than to limit the exchange of information, is a more prudent course.

Whether unions ultimately support proposals that strengthen the NLRB's enforcement powers, it is safe to assume that they will continue to press their long-term agenda to limit employer opportunities for speech against unionization. In the wake of *Chamber of Commerce v. Brown*, unions may consider two approaches to legislating speech restrictions nationally.

1. Limited Restrictions

Throughout the AB 1889 litigation, the parties argued over the meaning of several targeted federal statutes that prevented recipients of certain federal funds from using those funds to ''assist, promote, or deter union organizing.''[104] Nobody questioned the validity of these restrictions, and the Court determined that the federal government may enact targeted restrictions on the spending of federal dollars without affecting the preemptive power of NLRA.[105] Unions

[102] Arlen Specter & Eric S. Nguyen, Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act, 45 Harv. J. on Legis. 311, 319 (2008).

[103] *Id.* at 321.

[104] See 29 U.S.C. § 2931(b)(7) (''Each recipient of funds under [the Workforce Investment Act] shall provide to the Secretary assurance that none of such funds will be used to assist, promote, or deter union organizing''); 42 U.S.C. § 9839(e) (''Funds appropriated to carry out [the Head Start Programs Act] shall not be used to assist, promote, or deter union organizing''); 42 U.S.C. § 12634(b)(1) (''Assistance provided under [the National Community Service Act] shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing'').

[105] Chamber v. Brown, 128 S. Ct. at 2417–18.

may pursue the enactment of funding restrictions to limit employer speech on unionization in particular contexts. The effect of such restrictions would vary based on the funds targeted, but restrictions attached to, say, Medicare funding, could have a substantial impact on the health care industry as a whole, where unions have already concentrated their efforts.

A collateral effect of the passage of such targeted restrictions might be the weakening of the NLRA's preemptive effect. Such an effect may be extrapolated from the Court's observation that the ''three federal statutes relied on by the Court of Appeals neither conflict with the NLRA nor otherwise establish that Congress 'decided to tolerate a substantial measure of diversity' in the regulation of employer speech.''[106] If a ''patchwork'' of targeted restrictions is enacted, however, the effect over time may be exactly the tolerance of such diversity.

2. Broader Restrictions

A more ambitious undertaking would be to amend the NLRA itself, and faced with the Court's decision, unions might seek to directly undermine the protections of free debate provided by section 8(c) that the Court recognized as preempting AB 1889. Ignoring the political challenges inherent in passing such legislation, restricting employer speech in such a manner may raise First Amendment concerns. Although section 8(c) has been understood to ''merely implement[] the First Amendment,''[107] section 8(c) itself manifests a particular ''congressional intent to encourage free debate on issues dividing labor and management,''[108] and is therefore not simply an embodiment of First Amendment protections.

The Supreme Court has recognized employers' First Amendment right to engage in noncoercive speech about unionization that exists independent of section 8(c).[109] The contours of this speech right have not been fully developed, in large part because of the NLRA's separate guarantee of the right. But unlimited noncoercive advocacy

[106] *Id.* at 2418.

[107] NLRB v. Gissell Packing Co., 395 U.S. 575, 617 (1969).

[108] Linn v. Plant Guard Workers, 383 U.S. 53, 62 (1966).

[109] Thomas v. Collins, 323 U.S. 516, 537–38 (1945); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941).

serves to better inform the employee and is consistent with the general First Amendment speech protections.

D. Efforts to Diminish the Importance of Employer Speech

Given the difficulties that arise with regard to actually limiting employer speech, the more politically feasible (and perhaps more legally defensible) option available to unions and their supporters may be to attempt to diminish the importance of employer speech in an employee's decisionmaking process. Unions assert that employer speech has an inordinate effect on unionization, in large part because employers' speech is ''likely to reflect their perceptions about the speaker's basic power over their work lives rather than the persuasive content of the words themselves.''[110] In other words, unions are less effective in convincing employees when employers speak not because the employer provides useful or persuasive information when speaking, but simply because the employer speaks.

But the reality of declining rates of unionization is far more complicated. In addition to a shifting economy, declining union membership may be attributable to workers enjoying the fruits of union efforts without having to pay union dues. Union efforts to increase worker pay, benefits, and working conditions generally may themselves play a large role in declining unionization.[111] Moreover, in the modern economy, it simply may not be true—as some union supporters advocate—that ''[l]abor needs more power for the U.S. economy to prosper.''[112]

One method has already begun to gain momentum: Requiring employers to recognize unions based on card checks—employees signing authorization forms—instead of secret-ballot elections. The advantage to unions in card check procedures is two-fold. First, signing a union authorization card requires less effort, and is often done with less forethought, than participation in an election. Second, unions are able to exert more influence over individual employees

[110] James J. Brudney, Neutrality Agreements And Card Check Recognition: Prospects For Changing Paradigms, 90 Iowa L. Rev. 821, 832 (2005).

[111] See Eugene Scalia, Ending Our Anti-Union Federal Employment Policy, 24 Harv. J.L. & Pub. Pol'y 489, 491 (2001).

[112] Avrum D. Lank, Obama Adviser pushes for more labor power: He says aiding unions helps the economy, Milwaukee Journal Sentinel (June 26, 2008) (quoting Jared Bernstein, an economic adviser to Democratic presidential nominee Barack Obama).

in card signature drives than the union would be able to assert in an election.[113] Both of these factors make the employer more of a remote player in the unionization process, thus diminishing the importance of employer speech to an employee's decision.

Certain states, such as California, have already passed limited ''card check recognition'' laws for sectors not covered by the NLRA.[114] And unions have made inroads by negotiating permissible voluntary recognition agreements with employers, usually as part of negotiated neutrality agreements.[115]

But the cornerstone to the card check proposals is federal legislation requiring the NLRB to allow card checks instead of secret ballot elections when union representation is disputed. Legislation is currently pending in Congress that would accomplish this. The current incarnation of the Employer Free Choice Act has passed the House of Representatives, but failed to receive enough votes to invoke cloture in the Senate.[116]

Although union support for such a measure predates the *Chamber of Commerce v. Brown* decision, the Court's articulated limits on the ability of unions to seek state and local restrictions on employer speech may further rally support for federal card check legislation. For example, Stephen Berzon recently stated that *Brown* ''highlights the importance of labor-backed legislation—passed by the House, but stalled in the Senate—that would require an employer to recognize a union if a majority of employees signed affiliation cards.''[117]

Support for card check recognition is also a key issue in the 2008 presidential campaign.[118] AFL-CIO leaders have made the Employee

[113] For example, a local union organizer may be able to more easily pressure individual employees with threats or mislead employees about the purpose of signing an authorization card. See, e.g., Specter & Nguyen, *supra* note 102, at 320–21 (describing testimony from February 2007 House Subcommittee on Labor, Education and Pensions hearing ''Strengthening America's Middle Class through the Employee Free Choice Act'' regarding union abuses in connection with union organization drives and authorization cards).

[114] See Cal. AB 1281 (2001) (requiring employers to recognize unions for public employees when a majority of employees sign authorization cards).

[115] See Brudney, *supra* note 110, at 828–830.

[116] See H.R. 800 and S. 1014 (110th Cong. 2007).

[117] See Egelko, *supra* note 85.

[118] See, e.g, Ann Zimmerman & Kris Maher, Wal-Mart Warns of Democratic Win, Wall Street Journal, A1 (August 1, 2008).

Free Choice Act central to their platforms,[119] and advisors to Democratic nominee Barack Obama have championed his support for the measure.[120]

Conclusion

The Supreme Court's decision in *Chamber of Commerce v. Brown* has reinforced the NLRA's protection of free debate in the unionization context. As unions adjust their policy objectives in the wake of this decision, it is likely that limiting employer speech or its effects will remain a priority on their legislative agendas. Enacting legislation to further these policy objectives, however, would be a mistake: The NLRA's speech protections are not limited to employer speech, but extend to the other voices in the unionization debate. Allowing opinions to be aired is consistent with the First Amendment's protections and, moreover, is consistent with informed decisionmaking by all participants in the labor market.

[119] See AFL-CIO Secretary Treasurer Richard Trumka, Speech to United Steelworkers Annual Convention (July 2, 2008), reprinted in John Nichols, AFL's Trumka: Labor Must Battle Racism To Elect Obama, Capital Times (Madison, WI) (July 3, 2008) (''Union companies are no less competitive, the fact is they're more competitive. . . . Brothers and sisters, labor market flexibility is about one thing only: it isn't helping companies be more competitive, it's about making unions weaker. And, I'll tell you one other thing: that stops the day the Employee Free Choice Act is signed!'').

[120] Lank, *supra* note 112 (''Foremost among them is allowing unions to be certified without an election if a majority of workers want one, he said. The prospects for such legislation are not good with the current Congress, Bernstein said. However, he said Obama, a senator from Illinois, supports such a measure, as does organized labor. . . . However, the laws are now tilted too far in the direction of management, with companies using numerous legal tactics to delay an election after a majority of workers ask for one.'').