Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings

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Workplace captive audience meetings are assemblies of employees during paid work time in which employers compel employees to listen to anti-union and other types of proselytizing. Employers enforce attendance at workplace captive audience meetings by threats of discharge. Typically, employers deny employees the right to ask questions or express disagreement with the anti-union views presented during these mandatory meetings. Soon after the enactment of the National Labor Relations Act (NLRA), the National Labor Relations Board (NLRB) concluded that workplace captive audience meetings discussing unionization are per se unlawful. However, the NLRB reversed course following the enactment of the 1947 Taft-Hartley Amendments to the NLRA, concluding that employer free speech rights immunize captive audience meetings from regulation. This remains the NLRB's view.

In this Article, I demonstrate that employers' First Amendment free speech rights do not preclude a ban on captive audience meetings. Instead, employees are a "captive audience" whom the Constitution protects from being force-fed the employer's religious and political ideology at the workplace. Employers, accordingly, have no free speech right to coerce workplace ideological listening.

The scope of employers' constitutional right to free speech as juxtaposed against employees' freedom not to listen is a timely issue. Several state legislatures are considering—and two have enacted versions of—the Worker Freedom Act, which bans workplace captive audience meetings discussing either religious or political matters. Opponents of the Worker Freedom Act have initiated legal challenges that are in the early stages of litigation, and many more such challenges are anticipated as more states adopt the Worker Free-

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dom Act. The employer's alleged free speech rights, as embodied in these meetings, and preemption of state law by the NLRA will be two key issues in this litigation. This Article demonstrates that the resolution of each of those issues will depend on whether the reviewing court acknowledges that employees have a constitutionally-recognized freedom not to listen.

"[U]nreplying attention to the words of another is known immemorially as an individual badge of servility."[1]

I.
INTRODUCTION

During the weeks preceding a union representation election, when communicating with bargaining unit employees is most critical, the workplace captive audience meeting is the employer's forum of choice.[2] The reason is simple: the captive audience meeting furnishes employers a "decided advantage over the union."[3] The employer gains "virtually complete access to the minds of [the employees] during work hours"[4] while the union normally is not entitled to a similar opportunity.[5] Employers stoutly defend their legal prerogative to conduct these meetings because they are so highly correlated with a favorable election day outcome.[6]

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[1] Charles L. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960, 966-67 (1953).

[2] *See* Labor Relations Institute, Inc., *Anti Union Campaign Tips—How Many Meetings*, http://lrionline.com/anti-union-campaign-tips-how-many (last visited Apr. 21, 2010) [hereinafter *Anti Union Campaign Tips*] (stating that "[t]he captive audience meeting is management's most important weapon in a[n] [anti-union] campaign"); *see also* Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, Ithaca, NY 81 (Table 8) (2000), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports/ (last visited June 29, 2009) [hereinafter *Uneasy Terrain*] (finding that employers held captive audience meetings in 92% of 400 NLRB-conducted union representation elections conducted between January 1, 1998 and December 31, 1999); JULIUS G. GETMAN, ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 90-92 (1976) (reporting that in twenty-eight of thirty-one union representation elections conducted by the NLRB in 1972-73, the captive audience meeting was a fixture of the employer's anti-union strategy and employees far more likely to attend such meetings than union meetings held off the property).

[3] *See* ALFRED DEMARIA, HOW MANAGEMENT WINS UNION ORGANIZING CAMPAIGNS xvii (1980) (viewpoint from the perspective of an employers' labor consultant); *see also* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting) ("When we force people to listen to another's ideas, we give the propagandist a powerful weapon."); *Anti Union Campaign Tips, supra* note 2 (concluding that "[i]f you hope to win your NLRB election, you must conduct a minimum of 5 captive audience meetings [and concluding that] the odds of a company victory increase with each captive audience meeting held . . . ."; *Uneasy Terrain, supra* note 2, at 73 tbl.8 (concluding that of the 400 union representation elections studied, the overall union win rate was 63% but in those where employers held captive audience meetings the union win rate was 43%).

[4] *See* DEMARIA, *supra* note 3, at xvii.

[5] *See* Livingston Shirt Corp., 107 N.L.R.B. 400, 406 (1953); discussion *infra* notes 58-61 and accompanying text.

[6] *See* DEMARIA, *supra* note 3, at xvii; *see also id.* at 9-10 (advising employer clients to schedule captive audience meeting soon after discovering union organizing effort); Kate L. Bronfenbrenner, *Employer Behavior in Certification and First-Contract Campaigns: Implications for Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 75 (Sheldon Friedman et al. eds., 1987) (reporting that a study of 261 union representation elections showed a correlation between number of captive audience meetings conducted and employer likelihood of defeating employees' effort to unionize); William

But for the federal government's acquiescence, employers would not enjoy this unilateral captive-audience-meeting advantage. Ever since the NLRB withdrew its objection to the captive audience meeting in 1948, employers have been legally permitted to compel employees to listen to anti-union proselytizing—under threat of discharge—in mandatory assemblies during paid work time.[7] The employer is entitled to discipline employees who leave the captive audience meeting[8] or who insist on participating by asking questions or manifesting disagreement with the views being force-fed to them.[9] Further, the employer may prevent pro-union employees from attending such meetings, deliberately isolating employees from co-workers who might be able to rebut the employer's claims.[10] It is not unprecedented for an employer to lock all the exits at the workplace during a captive audience meeting and physically restrain those attempting to leave.[11] The above demonstrates that the NLRB and the courts have found nothing incongruous between such forced anti-union indoctrination at the workplace and our national labor policy's commitment to employee free choice regarding union representation.[12]

T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 570-71 (1983) (showing correlation between conducting captive audience meetings and anti-union outcome in representation elections).

[7] *See* discussion *infra* notes 51-61 and accompanying text.

[8] *See, e.g.*, Litton Sys., Inc., 173 N.L.R.B. 1024, 1030 (1968) (holding employer may discipline employee who leaves captive audience meeting).

[9] NLRB v. Prescott Indus. Prod. Co., 500 F.2d 6, 11 (8th Cir. 1974) (holding employer may discipline employee attempting to interject question during captive audience meeting); J.P. Stevens & Co., Inc., 219 N.L.R.B. 850 (1975), *aff'd in part*, J.P. Stevens & Co. v. Textile Workers Union, 547 F.2d 792 (4th Cir. 1976) (upholding discharge of employees who asked or sought to ask questions during a captive audience speech or stood silently during anti-union speech). The Board's view is that the employer may refuse to permit employee questions. Whether the employer may discipline employees who do ask questions depends on an application of the principle that there

> is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.

Prescott Indus. Prod. Co., 205 N.L.R.B. 51, 52 (1973). *Compare* Howell Metal Co., 243 N.L.R.B. 1136, 1137 (1979) (stating that "the Board has held consistently that discipline for having the 'temerity to ask questions' during such meetings violates the Act, except when there is a scheme or plan to disrupt the meeting") *with* Hicks Ponder Co., 168 N.L.R.B. 806, 814 (1967) (discipline lawful when employees in concert engage in a course of conduct designed to disrupt captive audience meeting).

[10] *See* F.W. Woolworth Co., 251 N.L.R.B. 1111, 1113 (1980).

[11] *See* Bonwit Teller, Inc. 96 N.L.R.B. 608, 622 (1951) (employer locked exits and physically restrained some employees attempting to leave the premises).

[12] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (2004). Known widely as employees' "section 7 rights," this guarantee is found in section 7 of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2004) [hereinafter the NLRA or the Act].

An alluring question is why the courts should permit employers to assert their superior economic dominance over workers in such an overtly coercive manner in order to thwart unionization efforts.[13] During the 1960s, "industrial pluralists,"[14] such as Derrick Bok,[15] found nothing particularly problematic in the captive audience meeting, for, as he observed, employer speech serves a salutary function because, like political elections, union elections depend on a well-functioning marketplace of ideas. Thus, according to Bok, employer speech is instrumental in providing employees information they need—but are not likely to obtain on their own—for informed decision making regarding unionization.[16]

Bok's defense of the captive audience meeting acknowledged no countervailing employee interest in not being coerced into receiving an unwanted ideological indoctrination while captive at the workplace.[17] Bok perceived nothing "coercive" in these meetings, which he viewed as an aspect of "the right of management to run its business efficiently or to manage its property as it sees fit."[18] The critical consideration was simply whether the employer's choice of tactic "contribute[s] to the exchange of views."[19] This critique contains all of the core ingredients that have combined for over fifty years to trump challenges to the legality of the workplace captive audience meeting.

In this Article, I challenge the cornerstone of this defense of a right to a captive audience forum—the assertion that employers possess a constitutionally protected free speech right that immunizes captive audience meetings from statutory proscription. Linking First Amendment freedoms with the employer's coercive act of compelling employees to listen to anti-union propaganda on pain of discharge fundamentally misconceives the nature of

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[13] As early as 1953, Board member Murdoch sounded the alarm when, dissenting in *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 411 (1953) (Murdoch, dissenting) he stated that the captive audience meeting is "one of the most potent and effective methods by which self-organization [can] be stifled." Former Board member William Gould echoed Murdoch's concerns over fifty years later, stating that "the captive audience technique . . . has proved to be an extremely devastating technique in organizational campaigns." William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 484 (2007).

[14] *See* Alan Story, *Employer Speech, Union Representation, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 363 (1995). Story defines industrial pluralism as a view that both labor and management acknowledge that terms and conditions of employment will be established through a process of joint determination that both is a non-adversarial process and recognizes the needs and equal power of both sides. *Id.* at 445, 445 n.478.

[15] *See* Derek Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

[16] *Id.* at 49-51.

[17] Indeed, Bok recommended subjecting employees to more, not less, coercion through captive audience meetings by suggesting a rule that "the employer could not deliver a speech to his employees during working hours within the last seven days of the campaign unless he permitted the union to do likewise . . ." *Id.* at 102.

[18] *Id.* at 57.

[19] *Id.* at 68.

free speech. I argue that the First Amendment simply does not protect coercing another into forced ideological listening. If, as this Article shows, employees enjoy a constitutionally-based freedom not to be coerced into ideological listening while they are captive at the workplace, then by extension the employer free speech right cannot include the right to coerce such listening.

Previous assessments of captive audience meetings have not systematically evaluated the employer's free speech claim from the perspective of the employee's constitutionally-protected freedom not to listen. Some recent critiques of post-World War II labor relations policy have illuminated the role of employer free speech in limiting employee rights under the National Labor Relations Act.[20] This scholarship argues that employer workplace speech is inherently coercive and for that reason urges curtailment of its First Amendment protection.[21]

This Article, however, does not proceed from the premise that employer speech is inherently coercive and ought to be suppressed. I instead emphasize the employee's competing constitutional right—the freedom not to be coerced into listening. I assume for purposes of this Article that em-

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[20] *See, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Story, *supra* note 14.

[21] One approach rests on the argument that employer workplace speech is inherently coercive due to the unequal power relationship of employers and employees at the workplace and the dependency of employees on the continuing good will of their employers. *See, e.g.*, Story, *supra* note 14, at 361 (interpreting the preeminence that labor law has accorded to employer speech over employee interests as a thinly disguised "attempt to reestablish stricter employer control of the workplace, to reassert traditional employer/employee hierarchies, and to dampen union advances"). Under this critique, the increased protection of employer free speech is seen as an "essential adjudicative baseline[] . . . upholding . . . employer private property rights and maintaining workplace discipline." *Id.* at 356. "Within the employment context, the abstract 'right' of free speech becomes the right to control and discipline and provides scant utility to its supposed beneficiaries, voting employees." *Id.* at 357. The remedy, it is argued, is to truncate the level of protection law grants employer speech. *Id.*

Another attack, also emphasizing the inherently coercive nature of employer speech, focuses on the "silencing" effect on employee free speech resulting from employer speech. *See* Kate E. Andrias, Note, *A Robust Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2433-53 (2003) (arguing that the doctrine allowing employers to hold captive audience meetings as a legal prerogative is based on this notion of employee servility, inherent in the at-will employment relationship). The reasoning here is that the loss of union representation elections caused by the inherently coercive nature of employer speech causes employees to lose their voice at the work place. *Id.* Concomitantly, under-represented workers as a class are silenced in the broader political life of the country as a weakened trade union movement becomes less able to make workers' voice heard in the national political arena. *Id.*

Another related approach has argued that permitting the captive audience meeting constitutes an endorsement of the view of the employment relationship as one of master and servant, in which employees are servile to the transcending power and authority of their employers. *See* Elizabeth J. Masson, Note, *"Captive Audience" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?*, 56 HASTINGS L.J. 169, 181 (2004) (stating that "[i]t is ironic that employers can fire at-will employees for refusing to attend a captive audience meeting, the purpose of which is to persuade employees to remain at-will employees, who are subject to discharge at the whim of the employer."). The proposed remedy is adoption of union representation election rules that limit the scope of protected employer speech. *Id.* at 184-92.

ployer speech and employee speech are both legitimate, that employers have as much of a right to express their viewpoint about unionization as do employees and unions. Yet, I contend that employer claims to free speech and employee claims not to be forced to listen represent competing interests that the law needs to accommodate.[22] My core argument is that government proscription of captive audience meetings poses no risk of trammeling employer free speech rights—not because employer speech is entitled to less constitutional protection than is afforded free speech in general—but because the Constitution's free speech guarantees simply do not provide *any person* the freedom to coerce listening.

In Part I, this Article demonstrates that the NLRB initially viewed the captive audience meeting as per se unlawful. This view is consistent with other NLRB prohibitions of employer anti-union tactics that depend on the employer exercising its superior economic position over employees. I show that, but for a supposed employer free speech right to conduct these meetings, which caused a change in NLRB policy, the captive audience meeting likely would still be unlawful today.

Next, I show that employers have no legitimate free speech claim to hold captive audience meetings at the workplace because captive audience meetings unlawfully interfere with employees' constitutionally-based freedom not to be coerced into ideological listening.[23] When analysis of captive audience meetings focuses on the employees' freedom not to listen, the instability of the employer free speech claim justifying the captive audience meeting's immunity from regulation reveals itself readily.

I conclude by showing that, in the absence of a valid employer free speech claim justifying captive audience meetings, the government is free to regulate these meetings in a manner that better balances employer and employee rights and interests.[24] Congress may reform labor laws to pro-

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[22] *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 538 (1945) (holding that employer speech is "entitled to the same protection [as the] espousal of any other lawful cause."); *see also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 900 (2010) ("The Court has . . . rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"); Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2414 (2008) (holding that in the Taft-Hartley Act, "Congress renounced" the "judgment that partisan employer speech necessarily 'interferes with an employee's choice about whether to join or to be represented by a labor union'") (quoting 2000 Cal. Stat. ch. 872, § 1); First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) ("We find no support in the First or Fourteenth Amendments, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses protection simply because its source is a corporation . . . .").

[23] *See* discussion *infra* notes 62-195 and accompanying text.

[24] Since the Constitution's protections of individual liberties apply only to government, not to private entities or actors, clarifying employees' freedom not to be forced to listen to employers' ideological proselytizing is not designed to establish a constitutionally-based private right of action against private employers that invade this freedom by coercing listening among their employees. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883) (holding that the Fourteenth Amendment is prohibitory on the states, not "[i]ndividual invasion of individual rights").

hibit employer-sponsored coerced listening in the workplace.[25] Furthermore, an emphasis on the employees' freedom not to listen permits the NLRB to return to its previous, internally consistent position that these meetings necessarily violate employees' section 7 rights as guaranteed by the NLRA, or at least violate the less-exacting "laboratory conditions" standard for determining whether a union representation election needs to be rerun because employee free choice has been denied.[26]

Finally, an emphasis on employees' constitutional right not to listen is important when evaluating preemption challenges to state legislation banning workplace captive audience meetings that promote the employer's religious or political views, legislation that many states either have enacted or are considering.[27] Since freedom from the indignity and assault on conscience arising from coerced listening has constitutional dimensions, regardless of the content of the ideology being force-fed, state laws prohibiting coerced ideological listening at the workplace should not be preempted.

II.
THE DOMINANCE OF EMPLOYER FREE SPEECH CLAIMS IN CONTEMPORARY CAPTIVE AUDIENCE MEETING RULES

A. The Lawfulness of Captive Audience Meetings in the Absence of Employer Free Speech Claims

When one eliminates employer free speech claims from consideration, the argument that the workplace captive audience speech violates the NLRA is straightforward and easily understood. Section 8(a)(1) of the NLRA prohibits employer acts that "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7" of the Act.[28] Section 7, which implements that portion of national labor policy assuring employees the "full freedom of association,"[29] guarantees "[e]mployees . . . the right to self-organization[] [and] to form, join, or assist labor organizations."[30] Section 7 also assures employees "the right to refrain from any or all of such activities."[31] Thus, employees have the right to oppose self-organization or choose to remain uninvolved in election contests. The legal test of whether employer behavior interferes with employees' protected sec-

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[25] *See* discussion *infra* notes 196-202 and accompanying text.

[26] *See* discussion *infra* notes 205-238 and accompanying text.

[27] *See* discussion *infra* notes 277-344 and accompanying text.

[28] National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (2006).

[29] "It is hereby declared to be the policy of the United States . . . [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

[30] *Id.* § 157.

[31] *Id.*

tion 7 rights is an objective one: the Board asks whether "it may reasonably be said [that an employer's action] tends to interfere with the free exercise of employee rights under the Act."[32]

Absent considerations of employer free speech, therefore, the legal issue determining the lawfulness of a captive audience meeting is whether an employer's coercing employees into forced listening of an anti-union ideology, on pain of discharge, reasonably "tends to interfere with the free exercise of employee rights under the Act" including rights such as free association and free choice to choose non-association.

One need not speculate what the NLRB would conclude. In 1946, during a period when the NLRB did not acknowledge that employer free speech considerations limited regulation of captive audience meetings,[33] the Board in *Clark Brothers* concluded that captive audience speeches and meetings constitute unlawful employer interference with freedom of association and employee free choice.[34] That conclusion rested on two alternative rationales. The first is that the captive audience meeting interferes with employee free choice regarding which advice to seek in deciding how to exercise the freedom of association. In this regard the Board reasoned as follows:[35]

> The Board has long recognized that "the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning [the right to self-organization]." . . . Such freedom is meaningless, however, unless the employees are also free to determine whether or not to receive such aid, advice, and information. To force employees to receive such aid, advice, and information impairs that freedom; it is calculated to, and does, interfere with the selection of a representative of the employees' choice. And this is wholly apart from the fact that the [content of the] speech itself may be privileged under the Constitution.[36]

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[32] Am. Freightways Co., 124 N.L.R.B. 146, 147 (1959).

[33] In the first decade following the 1935 enactment of the Act, the Board held that employers must maintain strict impartiality during union organizing campaigns on the theory that employer participation in matters of employee self-organization is inherently coercive. *See, e.g.*, Schult Trailers, 28 N.L.R.B. 975 (1941); Ford Motor Co., 23 N.L.R.B. 548 (1940). The most persuasive rendition of this theory was written by Judge Learned Hand. *See* NLRB v. Federbush, Co., 121 F.2d 954 (2d Cir. 1941). That view was short lived, for in 1941 the Court held in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941) that employers have a free speech right to express non-coercive views regarding unionization. The NLRB responded by finding that some anti-union statements do not constitute violations of § 8(a)(1). *See* Clark Bros. Co., 70 N.L.R.B. 802, 806 n.12 (1946) (citing cases finding employer expression of anti-union opinion lawful).

[34] Clark Bros. Co., 70 N.L.R.B. 802, *enforced as modified*, NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947). The captive audience meeting in that case occurred shortly before the scheduled election, but the Board's reasoning did not turn on that fact. *Id.* 804-06.

[35] *Id.* at 805.

[36] *Id.* at 805, 805 n.4 (citing Matter of Harlan Fuel Co., 8 N.L.R.B. 25, 32 (1938)). To this, the Board added that the employer free speech claims were no impediment to proscribing captive audience speeches because the employer has reasonable alternative avenues to convey its views to employees and the

Alternatively, the *Clark Brothers* Board found the captive audience meeting unlawful based on the intimidating effect of the employer's deployment of its superior economic power to force ideological listening. The Board stated, "we must perform our function of protecting employees against the use of the employer's economic power which is inherent in his ability to control [employees'] actions during working hours."[37] The Board concluded that the employer "exercised its superior economic power in coercing its employees to listen to speeches relating to their organizational activities, and thereby independently violated Section 8[(a)](1) of the Act."[38]

In sum, when employer free speech claims are eliminated as a dominating factor, finding that the captive audience tactic violates section 8(a)(1) is elementary, either by focusing on interference with employee freedom to choose which advice and information will inform the decision whether to choose unionization or by focusing on the employer's use of superior economic power over employees to manipulate the unionization decision. In this latter regard, one commentator has summarized the intimidating effect of such employer use of superior economic power to influence the election outcome as follows:

> The CAM [captive audience meeting] is a display of employer power, demonstrating at once the employer's position of dominance at work and the employees' vulnerability. It is difficult to think of other examples workers would experience in their lives in which they could be forced to sit and listen to opinions with which they may strongly disagree. Due to the very uniqueness of the experience, the CAM transmits an extremely potent signal to employees that is quite distinct from the content of the speech. It is a message about where power in the employment relationship rests, about the limits of a union's power . . ., and about the state's opinion of this imbalance of power and communicative access in the workplace.[39]

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coerced listening "was not an inseparable part of the speech, any more than might be the act of a speaker holding physically the person whom he addresses in order to assure his attention." *Id.*

[37] *Id.* In *Thomas v. Collins*, 323 U.S. 516, 543 (Douglas, J., concurring), Justice Douglas, in a concurring opinion joined by Justices Black and Murphy, argued that "no one may be required to obtain a license to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment."

[38] *Clark Bros. Co.*, 70 N.L.R.B. at 805. By adopting this reasoning to find a violation, the Board did not need to rest on or adopt the reasoning of the portion of the Trial Examiner's (Administrative Law Judge's) Intermediate Report in *Clark Bros.* referring to a "constitutional right of non-assembly." *Id.* at 805 n.7. The Second Circuit enforced the Board's order in *Clark Bros. See Clark Bros. Co.*, 163 F.2d at 376 (2d Cir. 1947). Declining to hold that employers may never hold captive audience meetings, the Court agreed with the Board on these facts because the employer had refused union representatives a comparable opportunity to address employees.

[39] *See* David J. Doorey, *The Medium and the "Anti-Union" Message: "Forced Listening" and Captive Audience Meetings in Canadian Labor Law*, 29 COMP. LAB. L. & POL'Y J. 79, 80 (2008) (discussing how the Canadian Labor Relations Board bans the use of captive audience meetings today on the theory that employer exploitation of its economic power over employees to force listening interferes with legislatively guaranteed employee freedom of association and free choice whether to support unionization).

In other contexts, the Board has no difficulty banning employer anti-union tactics that depend on exploitation of the employer's superior economic power to influence election outcomes. Promising or granting employees a benefit to influence the representation election outcome is a prime example. In *Medo Photo Supply Corp. v. NLRB*, the Court observed that "[t]he action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination."[40] Similarly, in *NLRB v Crown Can Co.*, the court held that "[i]nterference is no less interference because it is accomplished through allurements rather than coercion."[41] In *NLRB v. Exchange Parts*, the Supreme Court concluded:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.[42]

Clark Brothers, *Medo Photo Supply*, and *Exchange Parts* thus all rest on the unitary principle that the Act outlaws employer efforts to resist unionization when the persuasive efficacy of the tactic chosen depends on successful exploitation of the employer's superior economic power over employees. Coercive tactics based on the employer's superior economic power over its employees are not synonymous with attempts to inform through advocacy in a free marketplace of ideas, which is what the First Amendment protects. Accordingly, the cases cited above show that embedded in our national labor policy is recognition of the right of an employer to attempt to influence election outcomes by exploiting the superiority of an idea, not protecting coercive anti-union tactics based on the employer's superior economic power.

The rules regarding systematic polling of employees are another example of the NLRB's deeply-held conviction that employers may not deploy economic control over employees in an effort to influence election outcomes. To be lawful, such polls must be for the purpose of verifying a union's claim of majority support; this purpose must be communicated to employees; assurances against reprisal must be given; and the polling must be by secret ballot.[43] The NLRB deems these extraordinary protections necessary to protect against infringement on free choice regarding unionization. "[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the

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[40] 321 U.S. 678, 686 (1944).

[41] NLRB v. Crown Can Co., 138 F.2d 263, 267 (8th Cir. 1943), *cert. denied*, 321 U.S. 769 (1944) (quoting Western Cartridge Co. v. NLRB, 134 F.2d 240, 244 (7th Cir. 1943), *cert. denied*, 320 U.S. 746 (1943)). These cases show that Congress has recognized the stifling effect of the grant of benefit (or its promise) by exempting the promise of benefit from the scope of employer protected speech.

[42] 375 U.S. 405, 409 (1964).

[43] Struknes Constr. Co., 165 N.L.R.B. 1062, 1063 (1967).

mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights."[44] The fear of reprisal inherent in an employer's inquisition arises solely from the employer's superior economic position enabling the employer to force employees to submit to such questioning at the workplace and to retaliate when displeased with the employees' response.[45]

To be sure, the systematic poll is different from the captive audience meeting since the non-secret ballot poll forces the employee to express an observable choice in the presence of employer representatives. In this sense, the systematic poll is akin to cases banning supervisors from offering employees "Vote No" buttons[46] or videotaping employees at work for use in an anti-union video and then asking those videotaped to request in writing if they wish not to be included in the video.[47] Yet, underlying all of these limitations on employer anti-union tactics is the common denominator that each depends on successful exploitation of the employer's economic power over his employees and thereby the employer's ability to control employee behavior at the workplace.

Sony Corp. of America[48] explains this exquisitely. There, the Board held it was unlawful for an employer to take pictures of employees and use the images in anti-union videos without the employees' permission. The reason this violates the Act is that the

> showing of a photograph [in an anti-union video] to contradict the known views of the union supporters whose pictures were used would tend to show them and all the other employees that they were powerless to express their beliefs in the face of the Company's wishes; the ability of the Company to use their pictures would reinforce the feeling of futility in speaking out.[49]

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[44] *Id.* at 1062.

[45] In *Struknes* the Board explained that "'[a]n employer cannot discriminate against union adherents without first determining who they are.' That such employee fear is not without foundation is demonstrated by the innumerable cases in which the prelude to discrimination was the employer's inquiries as to the union sympathies of his employees." *Id.* (citing Cannon Elec. Co., 151 N.L.R.B. 1465, 1468 (1965)) (footnote omitted).

[46] *See, e.g.*, Kurz-Kasch, Inc., 239 N.L.R.B. 1044 (1978) (unlawful for supervisor to offer "Vote No" buttons to employees as acceptance or refusal forces disclosure of sympathy for union during organizing drive).

[47] *See* Allegheny Ludlum Corp., 320 N.L.R.B. 484, 490 (1995), *enforcement denied in part,* 104 F.3d 1354 (D.C. Cir. 1997), *clarified on remand*, 333 N.L.R.B. 734 (2001), *enforced*, 301 F.3d 167 (3d Cir. 2002) (requiring written request not to be included in anti-union video akin to interrogation regarding degree of support for union).

[48] 313 N.L.R.B. 420 (1993), *overruled in part*, Allegheny Ludlum Corp., 333 N.L.R.B. 734.

[49] *Id.* at 428. *Accord* Valerie Manor Inc., 351 N.L.R.B. No. 94, 351 N.L.R.B. 1306, 1322-23 (2007) (unlawful for employer to use signatures of pro-union employee on anti-union literature without permission, citing *Sony Corp. of America* and its reasoning). The best clarification of the Board's position on this issue is found in *Allegheny Ludlum Corporation.*, 333 N.L.R.B. 734, 745 (2001) (stating that "an employer may not lawfully include the images of an employee in a campaign videotape, in circumstances where the videotape reasonably tends to indicate the employee's position on union representation, unless the employee volunteers to participate in the videotape under . . . noncoercive circumstances

In sum, when employer free speech considerations did not dominate the analysis of whether workplace captive audience speeches are lawful, the Board consistently found that captive audience meetings violated section 8(a)(1) of the Act. These meetings, which coerce listening, interfere with the section 7 right to exercise free choice to receive (or not receive) aid, advice, and information regarding the decision whether or not to support unionization and the section 7 right to choose the sources from which to receive such aid, advice, and information. Further, the Board found that an employer's exploitation of superior economic power to force ideology on employees interferes with employee free choice in choosing or rejecting unionization by implying a risk of retaliation if the employer's will "is not obliged."[50]

B. The Emergence of Employer Free Speech Considerations in Shaping Captive Audience Doctrine

Passage of the 1947 Taft-Hartley amendments[51] marked the beginning of a turnaround in the NLRB's and the courts' view of the lawfulness of captive audience meetings. Particularly relevant was Taft-Hartley's addition of the free speech proviso to section 8(c), which states:

> The expressing of any views, arguments or opinion, or the dissemination thereof, whether in written, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[52]

The influence of section 8(c) on the development of captive audience doctrine transcends its literal language. Although the legislative history of section 8(c) in the report of the Senate Labor Committee manifests an intention to overrule *Clark Brothers*,[53] there is no indication that this Senate Report reflected the views of a majority in Congress when it enacted section 8(c).[54] Nevertheless, within one year following the addition of section 8(c) to the Act, the NLRB reversed *Clark Brothers* in *Babcock & Wilcox Co.*,[55]

[and a]n employer may lawfully film employees, and present a campaign videotape including their images, without previously soliciting their consent to be filmed, only if the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation and the employer complies with [certain] requirements [assuring that employees whose images are used are not unknowingly associated with the views in the video].")

[50] NLRB v. Exchange Parts, 375 U.S. 405, 409 (1964).

[51] Pub. L. No. 80-101, § 104, 61 Stat. 136, 152 (1947) (codified as amended in scattered sections of 29 U.S.C. §§ 151-169).

[52] National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (2006).

[53] *See* S. REP. NO. 105, at 23-24 (1947) (Senate Report), reprinted in NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 429-30 (1948); H.R. REP. NO. 510, at 45 (1947) (Conference Report).

[54] *See* discussion *infra* notes 219-231 and accompanying text.

[55] 77 N.L.R.B. 577, 578 (1948).

concluding in a one line statement that "the language of 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices [based on conducting captive audience meetings]."[56]

Babcock left unresolved the issue of whether the employer violates section 8(a)(1) by conducting a captive audience meeting and then refusing the union a similar opportunity to address employees. After oscillating on this issue for several years,[57] the Board in *Livingston Shirt Corp.*[58] firmly established that—in the absence of either an unlawful no-solicitation/no-distribution rule, or a "broad but privileged" no-solicitation rule[59]—the employer's conducting of a captive audience meeting creates no concomitant duty to provide the union an opportunity to address employees on the employer's premises.[60] *Livingston Shirt*, decided in 1953, still stands as the controlling rule.[61]

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[56] *Id.*

[57] Initially, the Board held that the employer owes the union no such "equal opportunity" duty. *See* S. & S. Corrugated Paper Mach. Co., 89 N.L.R.B. 1363, 1364 (1950). That view soon gave way in *Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 612 (1951), and *Biltmore Mfg. Co.*, 97 N.L.R.B. 905, 907 (1952), that, together, established the rule that the employer cannot campaign against the union by holding a captive audience meeting and then deny a union's request to address employees under similar circumstances. In *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953) the Board returned to the no-equal-opportunity rule in most cases. *See* discussion *infra* notes 58-61 and accompanying text.

[58] 107 N.L.R.B. 400 (1953).

[59] The general rule is that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956). As applied, the NLRB normally permits employers to ban solicitation only during working time. *See, e.g.*, Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943). In unusual cases, an employer may choose to avail itself of the privilege of promulgating and enforcing what is referred to as a "broad but privileged" no-solicitation rule. *See* May Dep't Stores, 136 N.L.R.B. 797, 800 (1962) (referring to "broad but privileged" no-solicitation rules). These are permitted upon the employer's demonstration of special circumstances necessitating promulgation and enforcement of a no-solicitation rule that bans solicitation, even during non-work time, in certain work areas of the employer's premises, such as selling areas of the store, in order to avoid customer confusion. *See, e.g.*, Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1952); May Dep't Stores, Co., 59 N.L.R.B. 976 (1944), *enforced*, 154 F.2d 533 (8th Cir. 1946).

[60] *Livingston Shirt Corp.*, 107 N.L.R.B. at 406-07.

[61] In 1958 the Supreme Court decided two consolidated cases collectively known as the *Nutone* case—*NLRB v. Steelworkers (Nutone, Inc.) & NLRB v. Avondale Mills*. 357 U.S. 357 (1958). Neither raised the issue of the free-speech-protected nature of the captive audience meeting *per se*, but both did address the question of whether an employer may ban pro-union speech at the workplace while itself engaging in workplace anti-union speech. *Id.* The Court held that the employer's exercise of free speech to express an anti-union viewpoint creates no duty to provide employees or the union an equal workplace opportunity to express pro-union views unless the confluence of the employer's speech and the denial of an equal opportunity to express a contrary viewpoint "create[s] an imbalance in the opportunities for organizational communication." *Id.* at 362. Following *Nutone*, the Board reaffirmed its *Livingston Shirt* doctrine as striking a balance that is consistent with the rule in *Nutone*. *See* May Dep't Stores Co., 136 N.L.R.B. 797 (1962) (violation for employer to enforce a broad but privileged no-solicitation rule, conduct a captive audience meeting, and deny the union a similar opportunity to reply), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963); *accord* Montgomery Ward & Co., 145 N.L.R.B. 846 (1964), *enforced as modified*, 339 F.2d 889 (6th Cir. 1989). The Board subsequently has been asked, but has refused, to abandon the *Livingston Shirt* doctrine in favor of a rule requiring the employer to provide equal time to

III.
THE EMPLOYEE'S FREEDOM NOT TO LISTEN AS A LIMITATION ON THE EMPLOYER'S FREE SPEECH RIGHTS

It bears repeating at this point that although a private sector employer's deployment of its superior economic power to force anti-union indoctrination on an unwilling employee does not constitute governmental action, that ought not diminish the importance of acknowledging an employee's constitutional freedom not to listen in the context of private labor-management relations. When Congress or the Board considers banning the captive audience meeting, it must overcome the employer's claim that the proscription violates its First Amendment protected right to hold these meetings. The employer's constitutional defense fails because, as I show, the captive audience meeting infringes on the captive employees' liberty interest in being free from coerced listening.[62] Consequently, legislatures and the NLRB are free—if they choose—to ban the captive audience meeting.

A. The Origins of the Freedom Not to Listen

1. The Freedom of Thought

The freedom not to listen arises from the freedom of thought. The relationship between the two is quite linear. From the freedom of thought comes the constitutional right to acquire the knowledge one requires to form thoughts and beliefs.[63] The freedom to acquire knowledge, in turn, necessarily entails the autonomy to decide for oneself how one will acquire knowledge and what knowledge one will choose and *not* choose to acquire, for example, what ideas, arguments, and convictions one will choose to enter the mind and influence the conscience. These related freedoms are all well established in our constitutional traditions.[64]

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the union whenever it conducts a captive audience meeting. *See, e.g.*, Gen. Elec. Co., 156 N.L.R.B. 1247 (1966) (concluding that it would be preferable to delay reassessment until the Board had a better opportunity to evaluate the rule of *Excelsior Underwear*, 156 N.L.R.B. 1236, 1240-41 (1966), decided that same term, which requires the employer to provide the union with names and addresses of employees eligible to vote in the upcoming union representation election).

[62] *See* In re Rothenberg, 676 N.W.2d 283, 290 n.9 (Minn. 2004) ("[W]e have found no case where the Supreme Court has applied the captive audience doctrine in the 'negative' sense, that is, where the government requires an individual to be 'captive' as opposed to protecting the individual from being captive").

[63] *See* discussion *infra* notes 65-78 and accompanying text.

[64] Charles Black spoke eloquently of the pedigree of the citizen's claim of a liberty right not to listen over a half century ago. He said:

> The objecting captive . . . . is fighting, after all, for a very old freedom, a freedom to which, in some sense, all the others are dedicated handmaidens—the freedom of the mind. . . . Forced listening attacks the mind's integrity with a new directness. Previous assaults have tended to the slow starvation of the mind through reducing the vitamin content in its fare, or to its frustration and atrophy through forbidding its exercise in expression. [With forced listening, a]

Decided eighty-five years ago, *Meyer v. Nebraska*[65] is the wellspring of the freedom not to listen. Immediately following World War I, some states banned the teaching of a foreign language. The ban on teaching German adversely impacted schools that taught German extensively, such as Lutheran parochial schools.[66] Such a law, enacted by the State of Nebraska, came before the Court in *Meyer*. Declaring the ban on teaching the German language unconstitutional, the Court laid the foundation for a rich body of freedom-of-conscience-based decisions that now permeate our First Amendment heritage. Although the Court acknowledged the concomitant rights of teachers to teach and parents to engage teachers to teach, the case fundamentally turned on how the ban on learning German ravished "the opportunities of pupils to acquire knowledge."[67] Only an authoritarian state, the Court reasoned, seeks to control thought formation by impeding access to knowledge, but under our system of freedom "[s]uch restrictions upon the people of a state [do] violence to both letter and spirit of the Constitution."[68]

Two years later in *Pierce v. Society of Sisters*[69] the Court again reflected on the liberty of knowledge acquisition when considering the constitutionality of Oregon's partial ban on non-public education. *Pierce* had consolidated challenges that had been brought in two cases: one by a parochial school and the other by a military academy. Often thought of as a foundation case establishing parents' right to control upbringing of their children, which it is, *Pierce* is more importantly a freedom of conscience case. The Court unanimously found the Oregon statute unconstitutional, reasoning that the Constitution does not permit making a child "the mere creature of the state."[70] As the Court explained, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[71] The Court implicitly proclaimed that none of us is a "creature of the state" and the state may not "standardize" any of its people because each has a fundamental right to

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man can no longer fall back to the last wall of keeping his mouth shut and calling his mind his own.

Black, *supra* note 1, at 966-67.

[65] 262 U.S. 390 (1923).

[66] *See* MILTON R. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE 83 (rev. ed. 2003) (1957).

[67] *Meyer*, 262 U.S. at 401.

[68] *Id.* at 400-01.

[69] Pierce v. Society of the Sisters of the Holy Names, & Pierce v. Hill Military Academy, 268 U.S. 510 (1925). Children between the ages of eight and sixteen were required to attend public school until they completed the eighth grade. *Id.* at 530-31.

[70] *Id.* at 535.

[71] *Id.*

form his or her own thoughts and beliefs and choose the sources of knowledge from which these formations develop.[72]

Because the Constitution contains a textual commitment to both the free exercise of religion and the ban on the establishment of religion, it is easy to mistake the freedoms of thought and conscience that animate both *Meyer* and *Pierce* solely as protections of the freedom to worship God in one's own way. But, as shown, *Meyer* paints on a broader canvas than freedom of religion and one of the two cases decided in *Pierce* was a military academy. As Milton Konvitz explained over half a century ago, "[p]olitical and religious totalitarianism are two sides of the same coin; neither can be accomplished without the other."[73] Conversely, "[i]f religion is to be free, politics must also be free: the free conscience needs freedom to think, freedom to teach, freedom to preach—freedom of speech and press."[74] In short, the heart of the Constitution is recognition of the irrepressible need to form one's own beliefs through the process of acquiring knowledge from sources of one's own choosing, whether those beliefs relate to religion, politics, economics, or trade unionism. "[R]ooted in American thought" is the conviction that "[m]atters of conscience were so important that it was considered intolerable to delegate to others the power to dictate with respect to them."[75]

The reserved liberty of the people to use their faculties, their conscious mind, to develop beliefs and acquire knowledge to do so is part of our constitutional culture. *Meyer* made clear that the term liberty "denotes not merely freedom from bodily restraint but also the right . . . to enjoy those privileges . . . essential to the orderly pursuit of happiness by free men."[76] In *Palko v. Connecticut*, the Court recognized that freedom of thought and speech was an "indispensable condition, of nearly every other form of freedom. . . . [and that] the domain of liberty . . . include[s] liberty of the mind

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[72] The freedom of the mind, of which the freedom of thought is an integral part, is a transcendent human value. Seven hundred years ago, the Knights Templar, the most powerful military order of the Crusades, was systematically disbanded, and its members persecuted. *See* Piers Paul Read, THE TEMPLARS 259-82 (1999). In the spring of 1310, following the systematic torture of Templar knights to exact confessions, a Templar priest, Peter of Bologna, was deputized to defend the Order before a papal commission. His timeless defense of the human spirit echoes in the Supreme Court's freedom of conscience cases today. The torture the Templars had been subjected to, Peter of Bologna argued, "removed any 'freedom of mind, which is what every good man ought to have.'" *Id.* at 279.

Charles Black reports:

> Classical antiquity affords one non-mythological parallel [to the contemporaneous insistence on a right not to listen]. Of Nero, we learn that "when he appeared [as a musician] publicly, his soldiers prevented the audience from leaving, though some jumped from windows and others feigned death in order to be carried out."

Black, *supra* note 1, at 966 n.16 (1953) (internal citation omitted).

[73] KONVITZ, *supra* note 66, at 5.

[74] *Id.*

[75] *Id.* at 6.

[76] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

as well as liberty of action."[77] Mr. Justice Brandeis, in his dissenting opinion in *Olmstead v. United States*, eloquently explained that:

> The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.[78]

The above examples demonstrate that deeply rooted in our concept of freedom is an immunity from totalitarian oppression that arises when authority figures attempt to arrogate to themselves the power to indoctrinate and interfere with the freedom of thought enshrined in our constitutional heritage. Our legal philosophy of freedom of speech is freedom of communication, of which freedom to read and acquire knowledge of one's own choosing are integral.

2. *The Constitution's Captive Audience Doctrine*

Recognition of the freedom of thought and the associated freedoms to read and to acquire knowledge inexorably leads to recognition of freedom of choice in listening, reading, and other means of acquiring knowledge. These freedoms are an indispensable condition for the vitality of the freedoms of thought and knowledge acquisition. It was from these roots that the constitutional captive audience doctrine developed—the right of a captive not to be forced to listen, *i.e.*, to choose what knowledge to acquire. The Court has acknowledged many times the unwilling listener's stake in the free speech matrix.

One of the earliest cases was *Martin v. Struthers*.[79] There, the Court recognized "the full right to *decide whether [to] receive* information" brought to the home by door-to-door distributors of advertisements, even as the Court rejected a blanket ban on all door-to-door solicitations.[80] For as the Court later explained in *Kovacs v. Cooper*, a case upholding restrictions on use of a sound truck, the *Struthers* decision "never intimated that the visitor could insert a foot in the door and insist upon a hearing."[81]

Breard v. City of Alexandria[82] even more forcefully anchored in the Constitution a right to not be forced to listen. There the Court sustained an ordinance prohibiting door-to-door canvassing by salesmen soliciting mag-

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[77] 302 U.S. 319, 327 (1937).

[78] 277 U.S. 438, 478 (1928) (quoted in part in the unanimous opinion of the Court in *United States v. Morton Salt Co.*, 338 U.S. 632, 651 (1950)).

[79] 319 U.S. 141 (1943).

[80] *Id.* at 147 (emphasis added).

[81] 336 U.S. 77, 86 (1949).

[82] 341 U.S. 622 (1951).

azine subscriptions. The Court said that "[f]reedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. *Rights other than those of the advocates are involved.*"[83]

The decisions in *Struthers* and *Breard* involved those who are a captive audience in their own home. *Kovacs* extended the captive audience principle for the first time beyond the home. The ordinance applied to sound trucks anywhere on any city street.[84] The principle of *Struthers*, and the holdings in *Breard* and *Kovacs* suggest protection for the captive "unwilling listener" wherever he or she is located.[85]

These early cases are grounded on the principle that the essence of *free* speech is the corresponding personal liberty interest in being free not to listen. The two are inextricably intertwined. Just as a free market connotes not only a willing seller but also a willing buyer who is free to choose to consume or not, so also the freedom of speech similarly connotes freedom on both sides of the communication. The freedom to speak carries with it only the opportunity to invite an audience from those who are free not to listen. The essential nature of free speech is that it is not just the speaker whose interest is protected—the listener also has a paramount constitutionally-recognized interest that must be accommodated.

3. Freedom Not to Speak Cases: Precedent for Demonstrating a Constitutional Right Not to Listen

At first blush, the freedom-not-to-speak cases of *West Virginia Board of Education v. Barnette*[86] and *Wooley v. Maynard*[87] might seem off the mark as precedent for demonstrating a constitutional right not to listen. After all, these cases involved attempts to compel persons to make public expressions of fidelity to an idea with which they disagreed.[88] Forced confes-

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[83] *Id.* at 642 (emphasis added).

[84] 336 U.S. at 78. Justice Jackson spoke of the right to "quiet enjoyment of home or park." *Id.* at 96 (Jackson, J., concurring). Subsequently, the *Kovacs* principle of quiet enjoyment from the unwanted blare of a sound truck has been applied to contexts beyond the home. *See* Commonwealth v. Geuss, 168 Pa. Super. 22, 76 A.2d 500 (1950), *aff'd per curiam*, 368 Pa. 290 (1951), *appeal dismissed*, 342 U.S. 912 (1952) (citing *Kovacs*, 336 U.S. 77).

[85] "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home *or on the street* he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality." *Kovacs*, 336 U.S. at 86-87 (emphasis added); *see also Kovacs v. Cooper*, 50 A.2d 451, 453 (N.J. 1946) ("The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen.").

[86] 319 U.S. 624 (1943).

[87] 430 U.S. 705 (1977).

[88] In *Barnette* the compulsion was a flag salute imposed on a child who engaged in "reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience." People ex rel. Fish v. Sandstrom, 18 N.E.2d 840, 847 (N.Y. 1939) (Lehman, J., concurring). In *Wooley* it was state compulsion forcing a driver to carry the state motto "Live Free or Die" on a license plate,

sion of belief may be seen as inflicting greater violence to the conscience than forced listening, which does not require that the individual express public acceptance of an unacceptable viewpoint.[89]

Yet, these right-not-to-speak cases are apposite because they clarify and reinforce the principle that the core of the guarantee of the freedom to speak is the freedom of thought, the freedom of the mind, and the associated freedom of knowledge acquisition. As the Court said in *Wooley*, the right not to speak derives from "the right of freedom of thought protected by the First Amendment."[90] Indeed, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[91] The evil in forced talking, like the evil of forced listening, is that it "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'"[92] The Court in *Turner Broadcasting System, Inc. v. FCC* stated: "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, *consideration*, and adherence."[93]

Professor Emerson summarizes the relationship between the right not to speak and the right not to listen as follows:

> Compulsory listening is the counterpart of compulsory expression of belief. The requirement that any person entertain a belief, opinion, or idea, or be forced to listen to [another's] version of events, is an affront to dignity and an invasion of autonomy . . . . Indeed, compulsion to listen is the hallmark of a totalitarian society.[94]

4. *Accommodating the Right of Free Speech and the Right Not to Listen*

The legal debate in modern cases has shifted to determining when government may protect the freedom not to listen, recognizing that when government protects the listener's freedom not to listen it does so most often by limiting the speech rights of others. Courts must decide when circum-

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which the Court described as compulsory "use [of] private property as a 'mobile billboard' for the State's ideological message." *Wooley*, 430 U.S. at 715.

[89] Milton Konvitz argues, however, that "compulsory listening to speeches which shock the conscience may be almost as unsettling, psychologically and spiritually, as forced confession of beliefs in politics or religion that are contrary to one's convictions." KONVITZ, *supra* note 66, at 119.

[90] *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 633-34).

[91] *Id.* (citing *Barnette*, 319 U.S. at 637).

[92] *Id.* at 715 (citing *Barnette*, 319 U.S. at 642).

[93] 512 U.S. 622, 641 (1994) (emphasis added), *aff'd on reh'g*, 520 U.S. 180 (1997).

[94] Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 833 (1981). *Barnette* and *Wooley* remind us of the totalitarian implications associated with all forms of coerced interference with the freedom of thought. In *Barnette*, Justice Jackson, writing for the Court, observed that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . Authority here is to be controlled by public opinion, not public opinion by authority." *Barnette*, 319 U.S. at 641.

stances warrant concluding that the listener's interest in not being forced to listen is sufficiently strong to trump the free speech rights of the speaker, i.e., when is the reluctant listener truly a "captive audience?"

Frisby v. Schultz[95] is a paradigmatic example of the Court concluding that the unwilling listener's interest surmounts the speaker's free speech claims. There the Court sustained an ordinance banning targeted residential picketing.[96] The outcome largely turned on whether the state had a sufficiently compelling interest in promulgating the ban. The ordinance recited the primary purpose as "'the protection and preservation of the home' through assurance 'that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy.'"[97] The Court found this interest was sufficient to limit the free speech rights of the picketers because the occupants of the homes being picketed were truly a captive audience, explaining that "'[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.'"[98] Indeed, "[o]ne important aspect of residential privacy is protection of the unwilling listener."[99] Typically, the Court reasoned "we expect individuals simply to avoid speech they do not want to hear, [but] the home is different," because there the occupants are truly a captive audience.[100]

If the captive audience rationale for acknowledging a freedom not to be forced to listen were limited to protecting the sanctity of the home, there would be no credible basis for arguing that employees at work also are a captive audience whose freedom not to listen to forced ideology warrants

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[95] 487 U.S. 474 (1988).

[96] The ordinance prohibited picketing "before or about the residence or dwelling of any individual." *Id.* at 477.

[97] *Id.* The Court also found that "[t]he Town Board believed that a ban was necessary because it determined that 'the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants.'" *Id.*

[98] *Id.* at 484 (citing Carey v. Brown, 447 U.S. 455, 471 (1980)). The Court also stated that "[o]ur prior decisions have often remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick,' and have recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.'" *Id.* (internal citations omitted).

[99] *Id.* The Court cited *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere."). Citing many previous examples of judicial recognition that "individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom," the Court concluded that "[i]n all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes." *Frisby,* 487 U.S. at 484. The Court concluded that "[t]here simply is no right to force speech into the home of an unwilling listener." *Id.*

[100] *Id.* The Court cited *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (drive-in theaters along a highway) and *Cohen v. California,* 403 U.S. 15, 21-22 (1971) (public street near the city court house).

government protection. But the captive audience principle is not so cabined.

As noted above, the government's right to ban sound trucks has been extended to contexts other than invasion of the sanctity of the home.[101] Moreover, early on, in *Schneider v. State of New Jersey*[102] the Court stated that the right to distribute literature on the streets extends only "to one willing to receive it."[103] In *Fritz* itself, the animating principle was not protection of the home but protection of those in the home who are captive by virtue of being there.[104] The First Amendment principle is that government may "prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[105]

The Court's decision in *Consolidated Edison Co. v. Public Service Commission of New York*[106] is particularly instructive in assessing the reach of the captive audience concept beyond the home. There, customers objected to certain inserts that were placed in monthly utility bills, asserting that they were a captive audience. The Court disagreed, concluding that

> the ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.' [(citing *Cohen v. California*, 403 U.S. 15, 21 (1971).)] A less stringent analysis would permit a government to slight the First Amendment's role in 'affording the public access to discussion, debate, and the dissemination of information and ideas' . . . . Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid [objectionable] speech.[107]

In *Consolidated Edison Co.*, the Court reiterated that this inability to "avoid" speech of others that one finds objectionable extends beyond the home and had been found among "[p]assengers on public transportation . . . [and] residents of a neighborhood disturbed by the raucous broadcasts from a passing sound truck, . . . [who] may well be unable to escape an unwanted message."[108] The final determination depends, in part, on the reasonableness of any self-help alternatives to avoid the unwanted communication.[109] Accordingly, "customers who encounter an objectionable billing insert may

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[101] *See* discussion *supra* note 84 and accompanying text.

[102] 308 U.S. 147 (1939).

[103] *Id.* at 162.

[104] The home is one place a person is captive because "[t]he resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech." *Frisby*, 487 U.S. at 487.

[105] *Id.* (citing Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 542 (1980)).

[106] 447 U.S. 530, 542 (1980).

[107] *Id.* at 541-42.

[108] *Id.* at 542 (citing Lehman v. Shaker Heights, 418 U.S. 298, 307-08 (1974) (Douglas, J., concurring in the judgment); Kovacs v. Cooper, 336 U.S. 77 (1949)).

[109] *Id.* at 535

'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"[110]

The public transportation cases, of which there are three,[111] are particularly illuminating. In *Lehman v. Shaker Heights*, the Court upheld the constitutionality of the City's complete prohibition on political advertising in its rapid transit cars, relying on the unique captive audience problems that public transportation presents.[112] Previously, the Court in *Packer Corp. v. Utah*[113] had sustained a ban on cigarette advertising on a billboard.[114] The Court in *Lehman* explained that the *Packer* decision

> reasoned that viewers of billboards and streetcar signs had no choice or volition to observe such advertising and had the message thrust upon them by all the arts and devices that skill can produce. . . . The radio can be turned off, but not so the . . . streetcar placard. The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice. In such situations, [t]he legislature may recognize degrees of evil and adapt its legislation accordingly.[115]

The more ideological the coerced message is, the greater the captive audience's claim on government protection from coerced listening. Justice Black explained this principle in his concurring opinion in *Public Utilities Commission v. Pollack*:

> Capital Transit's musical programs (which also include news and commercial messages) have not violated the First Amendment. I am of the opinion, however, that subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or *propaganda of any kind and by any means* would violate the First Amendment.[116]

The decision in *Lehman* addresses, and concurs with, the distinction Justice Black drew in his *Pollack* concurrence: that forced political indoctrination is a particularly virulent form of forced listening (viewing) justifying governmental intervention.[117]

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[110] *Id.* (citing *Cohen*, 403 U.S. at 21). The Court concluded that "[t]he customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket." *Id.*

[111] *See* Pub. Utils. Comm'n v. Pollack, 343 U.S. 451 (1952).

[112] 418 U.S. at 302-04.

[113] 285 U.S. 105 (1932).

[114] The ordinance at issue made it a misdemeanor to advertise cigarettes on "any bill board, street car sign, street car, . . . [or] placard," but exempted dealers' signs on their places of business and cigarette advertising "in any newspaper, magazine, or periodical." *Id.* at 107

[115] *Lehman*, 418 U.S. at 302 (internal quotation marks and citations omitted) (citing *Public Utilities Comm'n*, 343 U.S. at 468 (Douglas, J., dissenting); *Packer Corp.*, 285 U.S. at 110).

[116] *Pub. Utils. Comm'n*, 343 U.S. at 466 (Black, J., concurring) (emphasis added).

[117] As the Court held in *Lehman*, "[t]he city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity." 418 U.S. at 304.

In *Lee v. Weisman*,[118] the Court concluded that even a school graduation, which nominally is voluntary, is viewed at law as creating a captive audience among those attending because, as a practical matter, attendance is obligatory.

The sequel to *Lee* was *Santa Fe School Dist. v. Doe*,[119] an even more striking example of the Court's willingness to eschew legal formalism and evaluate captive audience status by probing the reality of one's ability to avoid objectionable speech. At issue in *Doe* was the constitutionality of student-led prayers prior to home football games.[120] The school district argued that football games are purely voluntary activities and any student desiring to avoid an unwelcome pre-game prayer simply can choose not to attend.[121] The Court disagreed.[122] Not only are there students such as cheerleaders, members of the band, and team members themselves—all for whom attendance is mandatory—but

> [t]he district also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee*, "[l]aw reaches past formalism." . . . To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." . . . We stressed in *Lee* the obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." . . . High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution . . . demands that the school may not force this difficult choice upon these students . . . .[123]

In *Bethel School Dist. No. 403 v. Fraser* the Court concluded that students attending a mandatory high school assembly constituted a "captive audience."[124] The Court sustained discipline imposed on a student whose speech to the assembled group contained sexual innuendos, concluding that school authorities "[should] protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."[125]

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[118] 505 U.S. 577 (1992).
[119] 530 U.S. 290 (2000).
[120] *Id.* at 294, 297-98.
[121] *Id.* at 311.
[122] *Id.*
[123] *Id.* at 311-312.
[124] 478 U.S. 675, 684 (1986).
[125] *Id.*

Perhaps the most powerful evidence of the flexible nature of the captive audience concept and its applicability beyond the home is the Court's decision in *Madsen v. Women's Health Center.*[126] The Court there sustained an injunction restricting speech in a thirty-six foot buffer zone around a women's health clinic following prior unlawful conduct by demonstrators interfering with patients' and staff's access to the facility.[127] As in the previous cases, a central issue was the governmental interest justifying the challenged regulation, for it may burden no more speech than necessary to serve a significant governmental interest.[128] The Florida Supreme Court concluded that the state had such a compelling interest, citing numerous significant government interests the injunction protects, among them

> the State's strong interest in residential privacy, acknowledged in *Frisby v. Schultz*, 487 U.S. 474 (1988), applied by analogy to medical privacy. The [Florida Supreme Court] observed that while targeted picketing of the home threatens the psychological well-being of the "captive" resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held "captive" by medical circumstance. We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them.[129]

5. *Conclusion*

The past several decades have clarified much regarding the freedom not to listen. It derives from the freedom of thought, which assures every person the associated freedom to acquire knowledge, including the freedom to decide what knowledge to acquire—which viewpoints to entertain and which to avoid.[130] The marketplace of ideas permits no forced orthodoxy. This freedom to filter intellectual input into one's consciousness supports a constitutionally recognized liberty interest in not being coerced into listening.[131] This freedom not to listen trumps the speaker's right to speak, however, only when the listener cannot avoid the objectionable speech through

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[126] 512 U.S. 753 (1994).

[127] *Id.* at 757.

[128] *Id.* at 754.

[129] *Id.* at 767-68. The Court also recognized the need to protect the clinic staff, who as much as the patients were a captive audience with little practical choice but to go to work each day and confront the picketers. As the Court stated, "[t]he 'physically approaching' prohibition entered by the trial court is no broader than the protection necessary to provide relief for the violations it found. The trial judge entered this portion of the injunction only after concluding that the injunction was necessary to protect the clinic's patients and staff from 'uninvited contacts, shadowing and stalking' by petitioners." *Id.* at 781.

[130] *See* discussion *supra* notes 63-85 and accompanying text; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (stating that the "heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

[131] *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[T]he right of free speech includes a right to communicate a person's views to any willing listener . . . .").

reasonable efforts.[132] That is, the listener must truly be a captive audience. Captive audience status turns not on legal formalism bur rather on the realities of one's ability, as a practical matter, to avoid the objectionable speech.[133]

B. Extending the Right Not to Listen to the Employment Context

Except for *Madsen*,[134] the Supreme Court has had no occasion to consider whether employees' degree of captivity at work justifies government restraint on unwanted speech.[135] When an employer compels the employee to listen to anti-union proselytizing on pain of discharge, the legal issue is whether, as a practical matter, the employee's "degree of captivity makes it impractical for the unwilling [employees] to avoid exposure" to the unwanted speech.[136] Companies might contend that since the employment relation is purely voluntary, employees can avoid exposure to the unwanted speech by quitting their employment. The Court, however, has rejected wooden logic or legal formalism: the practicality of one's ability to avoid the unwanted speech defines the inquiry.[137] Should an employee be denied the government's protection from forced workplace listening because the employee is literally free to "choose" discharge as an alternative to forced listening? The reality is that employees offended by anti-union propaganda in a captive audience meeting listen because that is their only real option. "For many, if not most, employment is a practical necessity, and the economic and other costs of changing jobs would often be prohibitive."[138] The

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[132] *See* discussion *supra* notes 100, 110-129 and accompanying text.

[133] The offended listener has an obligation to avoid the unwanted speech if feasible. *See* Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 542 (1980) (inserts into utility bills mailed to residences); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (offensive images projected onto a screen at a drive-in theater located along a highway); Cohen v. California, 403 U.S. 15 (1971) (offensive language written on clothing by one walking on a public street near the city court house).

[134] *Madsen* upheld the thirty-six foot buffer limiting picketing at the women's health clinic both because the patients and the staff were a captive audience, the staff apparently because of their need to pass the picketers they encountered as they entered and left the clinic as part of their daily work routine. *See* discussion *supra* notes 126-129.

[135] *Cf.* NLRB v. Steelworkers (Nutone, Inc.) & NLRB v. Avondale Mills, 357 U.S. 357, 368-69 (1958) (Warren, C.J., dissenting in part and concurring in part) (concluding that "[e]mployees during working hours are the classic captive audience").

[136] *Erznoznik*, 422 U.S. at 209.

[137] *See* discussion *supra* notes 110-129 and accompanying text.

[138] Richard Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 43. Fallon explains that:

> In addition to the direct costs of finding a new job, leaving an established position often involves forfeiting important benefits such as longer vacations, larger pension contributions, and greater security against layoffs. Various studies have also noted the psychic costs of a job change, such as disruption of familiar routines and the necessity of forming new social relationships.

Id. at 43 n.213 (internal citations omitted).

"choice" to sacrifice one's livelihood in order to enjoy liberty is no choice at all.

The view that the Constitution does not require employees to sacrifice their present employment in order to avoid coerced ideological listening is consistent with judicial precedent. Keeping one's current job is no less a practical necessity than, for example, riding mass transit in *Lehman*: in each there usually is no realistic alternative.[139] The imperatives to continue in one's present employment, and maintain important employment benefits such as employer provided medical benefits, longer vacations, larger pension contributions, and greater security against layoffs far exceed the imperatives to attend the high school graduation in *Lee* or the football game in *Santa Fe School District*, or to avoid study hall as a detention for failure to attend the school assembly in *Bethel School*. These cases demonstrate that

> [p]eople need not engage in heroic efforts before we will conclude [that] they have sufficiently averted their eyes and plugged their ears [that is, that they are a captive audience]. People need to work; expecting them to walk past someone handing out leaflets on the sidewalk without accepting and reading the flyer is not the same as requiring them to walk off their job to avoid unwanted speech.[140]

The test whether one is a captive audience is whether avoiding unwelcome speech is "impractical"—not impossible.[141] In many instances it will not be practical to quit one's present employment.[142] Therefore, employees fall well within the scope of the captive audience doctrine as the Court has defined it.[143]

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[139] Lewis Maltby points out that Americans often are forced to sacrifice many things in order to keep their jobs, sometimes including their civil rights:

> The violation of individual rights is especially pernicious in light of most Americans' economic dependence on their employers. For mediocre wages, people will tunnel deep underground in dangerous coal mines; inhale dangerous fumes in manufacturing jobs; hang outside skyscrapers as window washers; or endure verbal, emotional, and even sexual abuse. People need their jobs, and many will sacrifice their rights as citizens to continue to provide for themselves and their families. Consequently, an employer that tries to use its financial muscle to control employees' political behavior will often succeed.

Lewis Maltby, *Office Politics: Civic Speech Shouldn't Get Employees Fired*, LEGAL TIMES, August 29, 2005.

[140] Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846, 872 (Cal. 1999) (Werdegar, J., concurring)

[141] *See Erznoznik*, 422 U.S. at 209.

[142] *See* Fallon, *supra* note 138, at 43 (stating "the case for extending the [captive audience] designation to the workplace is strong. '[It] is . . . typically infeasible to flee the workplace . . . ; most working people spend more hours per week on the job site than anywhere else except their homes—the place to which the "captive audience" label has most regularly been applied.'") (internal citation omitted).

[143] This conclusion is consistent with the consensus in the academic community. *See, e.g.*, Andrias, *supra* note 21, at 2440; J.R. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 ("Few audiences are more captive than the average worker."); Fallon, *supra* note 138, at 43 ("[T]he case for extending the [captive audience] designation to the workplace is strong."); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 210 (2008) ("[F]orcing employees to attend meetings during work to hear their employer's views . . . repre-

Moreover, at some point, law has to make sense. It makes no sense to conclude that centuries of struggle to secure the freedom of the mind from coercion should come to nothing more than the right to make a choice between subjecting oneself to forced indoctrination of what may well be a reviled point of view or quitting one's employment and sacrificing years of investment in a job. Charles Black has put it this way:

> The more I have thought about this captive audience business, the more it has seemed to me that the case against it can be summed up in a single sentence: It doesn't fit in. . . . It would be an awkward, stumbling job to try to explain to a well-disposed foreign visitor that audience captivity is not just "perfectly legal" but fully consonant with those of our aspirations and practices of which we are proudest before the world.[144]

Lower courts that have considered the question have concluded that workers at the workplace are a captive audience. Construction workers, for example, have been viewed as a captive audience protected from derisive speech and noise from a sound amplification system.[145] The issue has arisen in the racially and sexually hostile work environment cases where speech and other expressive conduct are central to proving the hostile workplace claim.[146] Here, the First Amendment does not bar proscribing

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sents the worst type of misuse of employer economic power and interferes with employees' dignity interests."); Story, *supra* note 14, at 414-18, 415-16 nn.309-19, 417-18 nn.325-34; *id.* at 417 ("Employees during working hours are the classic captive audience."); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 5 (1990) ("Employees at work constitute a captive audience, and the state has an interest in protecting these individuals from unwanted and unavoidable exposure to noxious ideas."); Benson A. Wolman, Note, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U.L. REV. 245, 268 (1988) ("[I]f the First Amendment does not prohibit a state from banning a benign political message to a captive audience on a bus, it is difficult to conceive how it could preclude a state from attempting to control hostile and injurious messages to a captive audience in the workplace"); *cf.* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment and the First Amendment*, 52 OHIO ST. L.J. 481, 516-20 (1991) ("None of the captive-audience cases supports suppression of speech that is deemed 'harassing' under Title VII because none of these cases involves suppression of speech because of the government's disagreement with the idea expressed or the government's belief that the message was inherently harmful."). *But see* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1833 (1992) ("The Court has . . . never found that employees in the workplace are 'captive,' and there are good reasons for it not to do so.").

[144] Black, *supra* note 1, at 969.

[145] *See, e.g.*, Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (E.D. Pa. 1980) (holding that construction workers "are a captive audience, who must remain on the jobsite during the workday . . . . [These] workers . . . are powerless to avoid bombardment by derisive speech and noise from the . . . defendants' amplification system short of giving up their jobs [which they would do] except that there was no other work available to them.").

[146] *See, e.g.*, Snell v. Suffolk County, 611 F. Supp. 521, 525-26 (E.D.N.Y. 1985) (inter alia, posting a derogatory article about African Americans on workplace bulletin board); EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384-85 (D. Minn. 1980) (recurring uses of word "nigger" and other demeaning racially-charged language when referring to two African American employees); Aguilar v. Avis Rent A Car System, Inc., 980 P.2d 846 (Cal. 1999) (Werdegar, J., concurring) (derogatory language referring to Latino workers in claim arising under state fair employment practices legislation).

racist speech, in part because workers are viewed as a captive audience.[147] Moreover, since the mid-1970s, courts have come to recognize hostile work environment sexual harassment as actionable under Title VII.[148] These hostile environment cases often involve speech that is not overtly coercive or threatening and in other contexts is constitutionally protected. For example, in *Robinson v. Jacksonville Shipyards, Inc.*, "the shipyard was filled with pornographic images of women, in part because workers received calendars full of such pictures from suppliers and were allowed to display them."[149] The court issued a broad injunction against workplace displays of pornography and harassing speech.[150] It rejected a free-speech defense because, *inter alia*, workers at the shipyard constitute a captive audience in relation to the speech that comprises the hostile work environment.[151]

Of course there is considerable forced listening that is incidental and necessary to everyday work life. These employer communications do not proselytize ideological views but rather have a reasonable nexus to maintenance of workplace production, safety, and discipline.[152] Such forced listening is clearly distinct from mandatory anti-union propaganda lectures because the coerced anti-union indoctrination is not "inescapably incidental [to the employer's business] but rather [is] itself a contrivance precisely aimed at the coercion of listening [to ideology]."[153]

Fashioning criteria to distinguish between forced listening that has a direct and substantial relationship to legitimate business interests and forced ideological indoctrination is something law easily can accomplish. For years the courts have successfully drawn a related line in forced association cases. The right not to speak includes the right not to be forced to subsidize ideology financially.[154] Accordingly, there are limits, for example, on forcing lawyers to pay bar dues for ideological activities.[155] Lawyers may only be required to pay compulsory bar dues that are "reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State."[156] Law has needed to de-

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[147] *See, e.g.*, *Aguilar*, 980 P.2d at 871 (Werdegar, J. concurring).

[148] Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 827-31 (1996).

[149] 760 F. Supp. 1486, 1493-94 (M.D. Fla. 1991); *see also* Becker, *supra* note 148, at 828.

[150] Robinson, 760 F. Supp. at 1539-41.

[151] *Id.* at 1535-36 (stating that "female workers at JSI are a captive audience in relation to the speech that comprises the hostile work environment. Few audiences are more captive than the average worker.").

[152] Examples would include compulsory production meetings where workers are instructed regarding safety, a new production process, shift assignments, the procedures for clocking out each day, legal requirements to protect against racial or sexual harassment, employer attendance policies, or a host of other communications that have a reasonable nexus to the maintenance of workplace production, safety, and discipline.

[153] *See* Black, *supra* note 1, at 970.

[154] *See* discussion *infra* notes 155-157.

[155] *See* Keller v. State Bar of Cal., 496 U.S. 1 (1990).

[156] *Id.* at 14.

velop standards to make the fine distinctions of which bar expenses satisfy that test.[157]

Similarly, in *Abood v. Detroit Board of Education* the Court held that collectively bargained compulsory union dues provisions covering public employees may only be enforced with respect to that portion of union dues used to finance activities germane to the collective bargaining process.[158] It violates the Constitution for a public employer to require dues objectors to pay that portion of union dues used for ideological activities with which they disagree.[159] Since *Abood*, the Courts have fashioned methods for making fine distinctions between union activities that are ideological and those that are germane to collective bargaining.[160] Distinguishing between forced listening that has a reasonable nexus to maintaining production, safety and discipline at the workplace and that which does not is far less complex than administering the holdings in *Keller* and *Abood*.[161]

A more doctrinally intricate First Amendment question with respect to government placing limits on workplace captive audience meetings involves the normal First Amendment requirement that the regulation be content neutral. It would be unconstitutional, for example, for the NLRB to ban employer anti-union workplace captive audience meetings but order the employer to permit the union onto the work premises to present a mandatory pro-union speech.[162] The government may not take sides by burdening one point of view or benefitting another.[163] But, viewpoint and speaker

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[157] *Id.*

[158] 431 U.S. 209, 235-236 (1977).

[159] *Id.*

[160] *See, e.g.*, Lenhert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Ellis v. Bhd. of Ry., 466 U.S. 435 (1984).

[161] There always will be employer workplace speech that is on the margins with respect to whether it constitutes a "captive audience meeting" used for ideological indoctrination. For example, at what point is a supervisor's passing reference to some employer anti-union viewpoint in a casual conversation with a group of employees so incidental to the discussion that it would be nonsensical to call this a "captive audience meeting?" Law has had to fashion an answer to similar questions when, for example, an isolated question by a supervisor has been alleged to constitute unlawful employer interrogation or a minor act of misconduct has been alleged to be the basis for ordering a new election because it allegedly upset the "laboratory conditions" required for employees to exercise free choice, and law no doubt can do so again in the context of describing when a meeting constitutes a "captive audience" meeting force-feeding ideology. *See, e.g.*, Temp Masters, Inc., 344 N.L.R.B. 1188 (2005) (isolated inquiry not coercive interrogation when in all the circumstances it did not appear to be seeking information upon which to take action against individual employee); Bon Appetit Mgmt., 334 N.L.R.B. 1042 (2001) (describing the test for determining when a new representation election will not be ordered because misconduct is so *de minimis* that it could not have affected the previous election outcome); *see also* Rossmore House, 269 N.L.R.B. 1176 (1984), *aff'd. sub nom.* Hotel & Rest. Employees Union, Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985) (avowed support for union diminishes the coercive effect of interrogation and permits employer more of a privilege to interrogate open union supporter).

[162] *See, e.g.*, Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (stating, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its *subject matter* or its content") (emphasis added).

[163] *Id.*

neutrality are easily achieved when regulating workplace captive audience meetings by simply banning all captive audience meetings at which employees are required to listen to either pro-union or anti-union ideology.

A limited ban on workplace captive audience meetings that prohibits all mandatory discussion of unionization while excluding from regulation all other captive audience meetings, such as those proselytizing political or religious ideology, is somewhat more knotty. Such a ban, while viewpoint and speaker neutral, is not subject matter neutral. The general rule describing when government may lawfully regulate speech requires that government regulations of the time, place and manner of speech must not only be viewpoint and speaker neutral but must also be subject neutral.[164] Accordingly, the legal issue posed by a ban on all mandatory workplace captive audience meetings that discuss the merits of unionization (but does not ban other ideology) is whether such under-inclusiveness would render the ban unconstitutional. As I show next, such under-inclusiveness is permissible.

First of all, the reason lack of subject neutrality creates grave constitutional concerns[165] is because "[l]aws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion."[166] In other words, under-inclusive regulation of the subject matter of speech can be a marker for pretext. I argue that such under-inclusiveness is permissible when banning anti-union (but not other ideological) captive audience meetings.

The NLRB's banning of workplace captive audience meetings involving discussion of union representation poses not the slightest risk that such under-inclusiveness evidences a pretext for suppression of ideas or information. Instead, such a ban advances the legitimate regulatory goal of protecting workers from coerced listening. The NLRB is assigned the relatively narrow regulatory authority to redress interference with the rights of employees that are guaranteed by section 7 of the Act—the right to engage (or refrain from engaging) in concerted activities for mutual aid and protection.[167] It is perfectly consistent with the NLRB's traditional role for Congress to authorize the Board to regulate only those captive audience meetings that have a nexus to employee decisions concerning union representation. Thus, the under-inclusiveness here of not assigning the NLRB responsibility for regulating other types of captive audience speech-

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[164] *See* discussion *supra*, notes 162-163.

[165] *Id.*; *see also* Carey v. Brown, 447 U.S. 455 (1980) (ban on all picketing in residential neighborhoods except labor picketing related to a place of employment unconstitutional because ban not subject neutral).

[166] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994), *aff'd on reh'g*, 520 U.S. 180 (1997); *see also* Consol. Edison Co. of N.Y. Inc. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980) (holding that lack of subject neutrality creates the risk of government manipulating the "search for truth").

[167] *See* discussion *supra* notes 29-50.

es such as forced indoctrination of political or religious ideology, is not a marker for pretext.[168]

The leading case evaluating the constitutionality of under-inclusive regulations is *R.A.V. v. City of St. Paul.*[169] There, Minnesota regulated fighting words, speech unprotected by the First Amendment.[170] The regulation was fatally under-inclusive, however, because the challenged statute contained the content-based distinction of regulating only fighting words arousing others to anger on the basis of race, color, creed, religion or gender.[171] Fighting words arousing people to anger for any other reason were not proscribed. Since the content-based distinction was "unrelated to [the] distinctively proscribable content"[172] of the speech (its fighting-words character), the under-inclusiveness manifested "hostility . . . towards the underlying message expressed,"[173] thus violating the principle that government may never regulate based on a hostility to a particular viewpoint.[174]

There are, however, exceptions to the *R.A.V.* equality principle. In *R.A.V.*, the Court acknowledged that some content discrimination among various subcategories within a class of proscribable speech is permissible because the content-based discrimination does not raise the specter of government effectively driving certain ideas or viewpoints from the marketplace.[175] As an example, the Court posited that the federal government lawfully could prohibit threats directed against the President—but not other threats—"since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President."[176]

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[168] The Equal Employment Opportunity Commission (EEOC) is assigned the responsibility for redressing employment discrimination based on race, religion, sex, national origin, and color. *See* Civil Rights Act of 1964, tit. VII, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006)). The courts have not found pretext for unlawful regulation in Congress's authorization of the EEOC to regulate speech related to certain forms of discrimination but not others, such as discrimination related to how one chooses to vote in national elections.

[169] 505 U.S. 377 (1992).

[170] *Id.* at 381.

[171] *Id.* at 380.

[172] *Id.* at 384.

[173] *Id.* at 386.

[174] *See* Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (stating, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content").

[175] *R.A.V.*, 505 U.S. at 387-88.

[176] *Id.* at 388. "But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities." *Id.* A related example of under-inclusiveness that poses no risk of being a marker for pretext for viewpoint discrimination is "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable . . . ." *Id.* Justice Scalia gave as an example government choosing to regulate obscenity but choosing to regulate only the most virulent forms, such as obscenity which is most appealing to the prurient interest in sex or the most patently offensive. *Id.*

The Court returned to exceptions to the *R.A.V.* equality principle in *Virginia v. Black.*[177] At issue in *Black* was Virginia's ban on cross burning with an intent to intimidate while not prohibiting or banning other acts intended to intimidate.[178] The Court excused Virginia's content-based distinction.[179] Cross burning is a symbol of hate, the Court reasoned. The state may selectively proscribe it because its historical use as a tool of intimidation has established it as "a particularly virulent form of intimidation."[180] Regulating the most virulent subcategories of unprotected speech protects society from the worst of the harm that renders the speech constitutionally unprotected in the first place. Such a content-based distinction is not a pretext for viewpoint discrimination.[181]

Choosing to regulate workplace captive audience meetings whose topic is union representation but not other workplace captive audience meetings similarly is constitutionally permitted because such a content-based distinction falls squarely within the exceptions to the *R.A.V.* equality doctrine. Government may thus single out for selective proscription captive audience meetings whose subject is union representation because it is "a particularly virulent form" of workplace coerced listening. This conclusion is justified by the well-documented historical use of captive audience meetings to coerce employee listening at the workplace[182] for the purpose of interfering with employee free choice and employees' section 7 rights. Therefore, selective proscription here does not raise the specter that regulation is a pretext for viewpoint discrimination.

The most textually demonstrable evidence that content-based distinctions are permissible when government legislates to protect the listener from forced listening to an anti-union message is found in *Erznoznik v. City of Jacksonville.*[183] There, the Court cited *Lehman v. City of Shaker Heights* for the proposition that:

> A State or municipality may protect individual privacy [freedom not to listen] by enacting reasonable time, place, and manner regulations applicable

[177] 538 U.S. 343 (2003).

[178] *Id.* at 347.

[179] *Id.* at 359-63.

[180] *Id.* at 363. The Court explained, by example, that a threat against the President is a particularly virulent form of threat and the most patently offensive obscenity is the most virulent form of obscenity. *Id.*

[181] *Id.*

[182] Since at least the years immediately following the enactment of the NLRA in 1935, employers have used the captive audience meeting to indoctrinate employees to its views regarding trade unionism. *See* discussion *supra* notes 33-38 and accompanying text. Its use continued and grew following the 1947 Taft-Hartley Amendments, (*see* discussion *supra* notes 54-61 and accompanying text) and continues as a forum of preference for the employer to express its anti-union views (*see* discussion *supra* notes 2-6 and accompanying text). There is evidence that employers recently have begun to use their superior economic power over employees to impose other ideologies, such as religious ideology. *See* discussion *infra* notes 261-267 and accompanying text. But only the union representation-related workplace captive audience meeting carries the historical record as a tool of employer oppression and coercion.

[183] 422 U.S. 205 (1975).

> to all speech irrespective of content. . . . But . . . selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, . . . *or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.*[184]

The *Erznoznik* Court's reliance on *Lehman* in the above statement of "general principles" is important because *Lehman* found constitutional an under-inclusive, content-based regulation that banned only political advertisements from public transit placards.[185] In *Erznoznik*, the Court states, as a blanket principle, that if the limitation on the freedom of speech is justified by the need to protect a captive audience from forced listening, government need not regulate all speech that invades the freedom not to listen. It may regulate subsets of such speech based on subject matter, as in *Lehman*.[186] Taken literally, the *Erznoznik* principle would give government *carte blanche* to engage in content-based distinctions based on subject matter whenever the justification for limiting speech is protection of a captive audience.

A more cautious understanding of the *Erznoznik* principle would be to merge it and *Lehman* within the exception to the *R.A.V.* equality principle. The political indoctrination banned in *Lehman* is the archetype of the coerced indoctrination the Constitution finds offensive. All forced indoctrination of transit passengers is evil but the Court might well have concluded in *Lehman* that forced *political* indoctrination of transit passengers is a particularly virulent form of that evil. So understood, permitting regulation of the political placard in *Lehman* is persuasive precedent that government may choose to regulate the anti-union workplace captive audience meeting, but not other workplace forced listening.

Imposing views on workers related to union representation, more than other types of workplace ideological proselytizing, is the archetype of what makes the workplace captive audience meeting proscribable. More than religious indoctrination and more than other attempted political indoctrination, forced-feeding of anti-union viewpoints via a mandatory captive audience meeting creates a particularly grave risk of interfering with employee free choice. The show of force and control over employees inherent in mandating their attendance at a captive audience meeting is particularly chilling when the decision the employer is attempting to manipulate through the forced listening is the employees' decision of whether it is safe to choose unionization; because the employer's show of power to force meeting attendance carries unique negative implications when unionization

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[184] *Id.* at 209-10 (emphasis added).

[185] *See* discussion *supra* note 112 and accompanying text.

[186] Nothing in *Erznoznik* suggests that the captive audience status of the listener would justify content-based distinctions based on either viewpoint or speaker identity.

is the subject of discussion,[187] the risk of invasion of the freedom of the mind is accordingly greater. Therefore, like the political placard in *Lehman*, and the burning cross in *Black*, government may reasonably conclude that the anti-union captive audience meeting is a particularly virulent form of unprotected speech and, for that reason, single it out for regulation.[188]

It also is worth emphasizing that employer efforts to force anti-union views on employees is a particularly virulent form of forced workplace listening because interference with the freedom of thought regarding whether to choose unionization has uniquely negative consequences to the public interest. The public has a large stake in assuring optimum conditions for employees to exercise free choice regarding unionization because of unions' important societal role as "a necessary countervailing force to perform both democratic and economic functions."[189]

The union's democratic functions operate at the workplace through collective bargaining and within the larger society through union participation in the political process. With respect to collective bargaining, it is well understood that this process is more than a device to secure more favorable wages and conditions of employment. The Commission on Industrial Relations of 1913-1915 summarized the principle that remains the foundation of our national labor policy. Relying extensively on the testimony of Louis B. Brandeis, the Commission urged that physical and material improvement of the individual is a necessary, though not adequate, condition for a democracy:

> It is the development of manhood to which any industrial and social system must be directed. . . . [T]here must be a division not only of the profits, but

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[187] In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969), the Court acknowledged that employees' economic dependency on their employer will impede their ability to listen objectively to their employer's attempts to indoctrinate with respect to unionization. As the Court stated, "what is basically at stake" during pre-election discussions about the merits of union representation "is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent, not an election . . . where the independent voter may be freer to listen more objectively . . . ." *Id.* For these reasons, "[a]ny assessment of the precise scope of employer expression . . . must be made in the context of [this] labor relations setting." *Id.* at 617.

[188] Plus, at the workplace the employees' strongest need for protection of their freedom of thought is with respect to attempted ideological indoctrination having a direct connection to workplace issues such as whether or not to choose union representation. This is because "the plant premises and working time are decisive factors during a labor dispute." NLRB v. Steelworkers (Nutone, Inc.) & NLRB v. Avondale Mills, 357 U.S. 357, 368-69 (1958) (Warren, J., dissenting in part and concurring in part). Justice Warren may have concluded that "plant premises and working time are decisive" because it is there that workers' thoughts are focused on work issues; that the buzz of discussion about union representation that abounds at the plant during an organizing drive feeds thought formation about the merits of union representation; that when the work shift ends, work issues fade in importance, as they necessarily need to compete with the other aspects of one's life—family, friends, errands, etc.; and in short, workers have a greater need for unobstructed thought formation at work with respect to the merits of union representation than matters related to other ideological subjects.

[189] Roger C. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U. L. REV. 13, 40 (1982).

> a division of responsibilities; and the men must have the opportunity of deciding, in part, what shall be their condition and how the business shall be run.[190]

This concept—referred to as "industrial democracy"[191]—argues that "[t]he struggle of labor for organization is not merely an attempt to secure an increased measure of the material comforts of life, but is a part of the age-long struggle for liberty. . . . Even if men were well fed they would still struggle to be free."[192] The NLRA is rooted in such aspirations for American workers.[193]

Unions' democratic function also extends beyond the workplace and into the larger society. First, unions promote both industrial and political stability.[194] In addition, contemporary unions serve what may broadly be termed a political representation function, seeking to stabilize workers' political power by acting as a counter-lobby to that of business and as a countervailing force to protect workers from the "tremendous state power inherent in a collectivist society."[195]

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[190] BASIL M. MANLY, FINAL REPORT OF THE UNITED STATES COMM'N ON INDUS. RELATIONS, S. DOC. NO. 64-415, at 63-64 (1916).

[191] *Id.* at 28-29, 40-49.

[192] *Id.* at 62. *See generally* JOHN R. COMMONS ET AL., HISTORY OF LABOUR IN THE UNITED STATES 520 (1918). For a discussion of Commons's view of the democratic function of collective bargaining and an excellent history of the development of industrial democracy during the early twentieth century, see Milton Derber, *The Idea of Industrial Democracy in America: 1898-1915*, 7 LAB. HIST. 259 (1966). *See generally* Hartley, *supra* note 189, at 39-44.

[193] Senator Wagner, echoing Brandeis's 1915 testimony before the Commission on Industrial Relations, stated:

> We can raise a race of men who are economically as well as politically free. . . . To me the organization of labor holds forth far greater possibilities than shorter hours and better wages. Organization plants in the heart of every worker a sense of power and individuality, a feeling of freedom and security, which are the characteristics of the kind of men Divine Providence intended us to be.

75 CONG. REC. 4918 (1932).

[194] The Wagner Act's Statement of Findings and Policies states that the denial of the right of employees to organize and the refusal by employers to accept the practice and procedure of collective bargaining are leading causes of strikes and other forms of industrial strife or unrest. National Labor Relations Act § 1, 29 U.S.C. § 151 (2006). Accepting this view, the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.* took judicial notice that the refusal to negotiate "has been one of the most prolific causes of strife" and, therefore, the right to self-organization is an "essential condition of industrial peace." 301 U.S. 1, 42 (1937). Moreover, testimony before the Senate Labor Committee advanced the view that unions promote political stability because "organized labor in this country [is] our chief bulwark against Communism and other revolutionary movements." IRVING BERNSTEIN, TURBULENT YEARS 332 (1970); *id.* ("When workers can express and redress their grievances, they have no inducement to overthrow the social order."); *see also* Hartley, *supra* note 189, at 44.

[195] SEYMOUR MARTIN LIPSET ET AL., UNION DEMOCRACY 411-12 (1956). The strategies include participation in community and local governmental affairs by designating nominees to sit on government boards and administrative agencies, directly and indirectly influencing the election of state and local political candidates, lobbying to influence legislation, endorsing candidates, and contributing large amounts of time and money to influence national elections. *See* Hartley, *supra* note 189, at 58-61 (collecting sources).

Workers' claims upon the government to redress the affront to dignity occasioned by the workplace captive audience meeting, therefore, are not simply a request to protect some vague notion of individual self-determination, as authentic as that request might be. Rather, workers' petition for acknowledgment of their right not to be coerced into listening to anti-union propaganda is a request for freedom of thought to form opinions about union representation, opinions that have a direct and significant bearing on each worker's belief regarding how most appropriately to participate in democratic self-government in the workplace. For this additional reason, coerced listening to anti-union ideology is a particularly virulent form of assault on the freedom of thought.

IV.
POLICY IMPLICATIONS ARISING FROM CLARIFICATION THAT THERE IS NO FREE SPEECH RIGHT TO HOLD A CAPTIVE AUDIENCE MEETING

A. Implications for Congressional Labor Law Reform Legislation

It is beyond the scope of this Article to address the normative question of whether, as part of labor law reform, Congress should ban workplace captive audience meetings. The above demonstration has the more modest goal of unburdening the debate over labor law reform from employer claims that such a ban violates employer free speech rights. The debate can then focus on whether banning workplace captive audience meetings discussing unionization is instrumental in advancing our national labor policy's freedom of choice goals.

If Congress bans pre-election workplace captive audience meetings, should that ban apply to all representation election speeches to massed assemblies of employees on company time—including those where attendance nominally is "voluntary?" Since its 1953 decision in *Peerless Plywood Co.*, the NLRB has invoked an absolute ban on all representation election speeches to massed assemblies of employees during the twenty-four hour period before an NLRB-conducted representation election.[196] While violation of this twenty-four hour rule is not an unfair labor practice, it constitutes grounds for ordering a new election.[197] The policy question is whether to make the *Peerless Plywood* twenty-four hour rule applicable at

[196] *See* Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[197] *Id.* at 429. By enforcing the *Peerless Plywood* rule through an order for a new election, rather than through the Board's unfair labor practice procedures, the Board in 1953 was able to avoid confronting the question whether such a ban conflicts with the literal language of section 8(c), which provides that employer non-coercive speech may not "constitute or be evidence of an unfair labor practice." National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (2006); *cf.* Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 (1962) (stating that in promulgating rules that provide for setting aside the results of a representation election, "the strictures of the first amendment, to be sure, must be considered in all cases").

all times, for example, prior to the twenty-four hours preceding a union representation election.[198]

If Congress were to ban all mandatory workplace captive audience meetings discussing unionization, Congress ought to also expand the *Peerless Plywood* rule to ban all "voluntary" representation election speeches to massed assemblies of employees on company time because the employee's choice whether to attend an anti-union speech to massed assemblies of employees on company time cannot realistically be voluntary. The threat of coercion remains when employees know that supervisors know, and are able to keep track of, those who choose not to attend. For a parallel example, consider that labor law already bans supervisors from offering employees "Vote No" buttons because putting employees to the choice of acceptance or refusal discloses a worker's union sympathy during the union organizing drive.[199] Although an employer's offer of a "Vote No" button surely is a communicative activity, NLRB regulation is not constitutionally problematic because offering the button interferes with employee free choice.[200] By similar reasoning, employers may not use the images of an employee in a campaign videotape in circumstances where the videotape reasonably tends to indicate the employee's position on union representation unless the employee volunteers to participate in the videotape under noncoercive circumstances.[201] The rationale, again, is that it is unlawful for an employer to use its superior economic control over employees to force them to communicate their pro-union (or anti-union) views.[202] Forcing employees to make a public choice of attending or not attending a work-time anti-union speech to massed assemblies of employees similarly forces employees to reveal publicly their stance on unionization. In sum, banning all campaign speeches to massed assemblies of employees on company time is necessary to effectuate a ban on mandatory workplace captive audience meetings and consistent with the mainstream of regulation under the NLRA.

Would expanding *Peerless Plywood* to make it applicable at all times violate employer free speech? This cannot be answered simply by arguing employees' constitutional freedom not to listen because attendance at the

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[198] As is currently true under the *Peerless Plywood* rule, expanding it would not interfere with the rights of unions or employers to circulate campaign literature on or off the work premises at any time prior to an election. *See, e.g.*, Gen. Elec. Co., 161 N.L.R.B. 618 (1966). Nor would it bar the use of any other legitimate campaign propaganda or media. *See* Pearson Educ., Inc., 336 N.L.R.B. 979 (2001) (stating that "the *Peerless Plywood* rule . . . does not apply to posters or other campaign literature"). In addition, current law does not prohibit employers or unions from making campaign speeches on or off company premises if employee attendance is voluntary and on the employees' own time. *Peerless Plywood Co.*, 107 N.L.R.B. at 430.

[199] *See, e.g.*, Kurz-Kasch, Inc., 239 N.L.R.B. 1044 (1978).

[200] *See* discussion *supra* notes 46-49 and accompanying text.

[201] *See* discussion *supra* notes 40-41 and accompanying text.

[202] *Id.*

meetings is nominally "voluntary" and employers may argue that one is a captive audience only if forced to listen. But there are several adequate responses to such potential free speech challenges. For over sixty years, the *Peerless Plywood* rule has been applied without constitutional infirmity since it is enforced merely by ordering a new representation election when the rule is violated.[203] There is no reason to believe that similarly enforcing an expanded *Peerless Plywood* rule should raise any credible First Amendment concerns. In any event, if employees continue to be coerced into attending nominally voluntary anti-union meetings conducted during work time, then a forced listening problem exists and the employee is a captive audience. If the enjoyment of the freedom not to listen depends on banning all speeches discussing unionization to massed assemblies of employees during company time, then such a ban is a constitutional means of protecting the captive employee's freedom not to listen.[204]

B. Implications for NLRB Action Without Legislative Amendment

Clarifying that the employer has no free speech right to hold workplace captive audience meetings raises the question of whether the NLRB possesses authority, on its own, to return captive audience doctrine to the rule of *Clark Brothers*.[205] This question cannot be resolved merely by showing that such administrative reform is not constitutionally problematic, for the question remains whether section 8(c) of the Act bars a return to *Clark Brothers* even if the First Amendment does not. It will be recalled that in *Babcock & Wilcox Co.* the Board reversed *Clark Brothers*, concluding in a one-line statement that "the language of 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Brothers* case no longer exists as a basis for finding unfair labor practices [based on conducting captive audience meetings]."[206] Subsequently, however, the NLRB softened its characterization of the preclusive effects of the legislative history of section 8(c) with respect to maintaining the *Clark Brothers* rule, concluding that the legislative history of 8(c) "contains adverse comment

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[203] *See* Peerless Plywood Co., 107 N.L.R.B. 427, 427, 431 (1953).

[204] One may fairly assume that not all First Amendment concerns are addressed simply because the remedy for a violation of a Board rule is a rerun of a representation election rather than a finding of unfair labor practice conduct. *See* Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 (1962) (stating that in promulgating rules that provide for setting aside the results of a representation election, "the strictures of the first amendment, to be sure, must be considered in all cases."). Thus, if ordering a new election creates a mild residual First Amendment concern, it would need to be balanced against the need, in fact, to protect the captive employee from coerced listening by banning workplace captive audience meetings that nominally are voluntary.

[205] Clark Bros. Co., 70 N.L.R.B. 802 (1946) (holding that mandatory captive audience meetings are *per se* unlawful); *see* discussion *supra* notes 34-38 and accompanying text.

[206] 77 N.L.R.B. 577, 578 (1948).

upon the Board's decision in *Clark Bros.* that a captive audience is *per se* unlawful."[207]

The question presented is, does the current text of section 8(c) or its legislative history mandate reversal of *Clark Brothers*? With respect to the language of section 8(c), the Board's assertion in *Babcock* that section 8(c) self-evidently mandates reversal of *Clark Brothers* cannot withstand scrutiny. On its face, 8(c) protects from governmental restraint only the *content* of speech that is expressed or disseminated,[208] not the mode of its expression.[209] The fatal flaw in the *Babcock* reasoning is that it conflates protection of speech content and protection of the manner of expression of that content. The Board's implicit assumption about 8(c)—a view not supported by the language of 8(c)—is that if the content of speech is not coercive, the means of dissemination is irrelevant. But this cannot be so. Otherwise one would need to conclude that Congress intended to protect from NLRB regulation even extreme modes of communication such as an employer's prerogative to hold a loaded gun to an employee's head to force an anti-union message on the employee as long as the content of the message "disseminated" contains "no threat of reprisal or force or promise of benefit."[210] The threat of temporal or physical harm is an independent, separable consideration from the content of the message. The act that coerces the listening is conduct, not protected speech. In passing 8(c) Congress did not intend to immunize from NLRB regulation all conduct constituting the act of dissemination as long as the content of the message is not coercive.

A more plausible understanding of the Board's reasoning in *Babcock* is that the Board's intent was to state that, even if the language of section 8(c) does not require reversal of *Clark Bros.*, section 8(c) incorporates the First Amendment, which protects the employer's right to hold captive audience meetings.[211] The Court's decision in *NLRB v. Gissel Packing Company*[212]

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[207] Bonwit Teller, Inc., 96 N.L.R.B. 608, 612 (1951) (The Board did not cite the legislative history of § 8(c) to which it was referring.).

[208] Section 8(c) provides that the expression or dissemination of "*view[s], argument[s], or opinion*" shall not constitute an unfair labor practice unless such views, etc. are coercive. 29 U.S.C. § 158(c) (emphasis added).

[209] This is true at least when the mode of expression is not an inseparable part of non-coercive speech. As the Board concluded in *Clark Brothers,* the captive audience speech is "not an inseparable part of the speech any more than might be the act of a speaker holding physically the person whom he addresses in order to assure his attention." 70 N.L.R.B. 802, 805 (1946).

[210] National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (2004).

[211] *See* Andrias, *supra* note 21, at 2439-41 (collecting cases demonstrating that the NLRB and the courts sanction employer captive audience meetings based on the conclusion that such meetings are an exercise of protected employer free speech); *see, e.g.*, N.L.R.B. v. Montgomery Ward & Co., 157 F.2d 486, 498-99 (8th Cir. 1946) (refusal to enforce NLRB order finding employer violated Act by conducting a mandatory work time captive audience meeting concluding employer has a free speech right to hold such meetings); *cf.* Livingston Shirt Corp., 107 N.L.R.B. 400, 406 (1953) (suggesting that employer autonomy to choose how to "use . . . his own premises" supports the prerogative to hold captive audience meetings).

[212] 395 U.S. 575, 617 (1969).

supports the major premise of that reasoning—that 8(c) implements the First Amendment. In *Gissel*, the Court stated that "8(c) *merely* implements the First Amendment . . . ."[213] But, as shown above, the First Amendment creates no right to coerce captive audience listening. It is, therefore, likely that *Babcock* reversed *Clark Brothers* on the mistaken belief that the First Amendment required reversal, which was not an irrational view given some judicial precedent that existed in 1948. Indeed, the Eighth Circuit two years previously, in *NLRB v. Montgomery Ward & Co.*, had articulated a startling rendition of the freedom of speech, reasoning that the First Amendment concerns itself with the speaker's or writer's freedom of thought and expression "not with the conditions under which the auditor or listener receives the message" and, accordingly, "a legitimate consequence of free speech and presumably one of its purposes [is to permit employers to] influenc[e] [employees] against their will."[214]

Montgomery Ward offers a window into the state of First Amendment doctrine, in the minds of some, immediately following World War II when the rights of a captive audience were just beginning to be understood more clearly.[215] The *Montgomery Ward* case reinforces the conclusion that the Board's abandonment of the precedent in *Clark Brothers* was the result of a misguided understanding of the freedom not to listen. Based on an invalid constitutional premise, *Babcock* therefore holds no claim as binding precedent. There is nothing in the language of 8(c) or NLRB precedent that precludes the NLRB from choosing to return to the rule of *Clark Brothers*.[216]

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[213] *Id.* (emphasis added).

[214] Montgomery Ward & Co., 157 F.2d 486, 498-99 (1946). In *Montgomery Ward & Co.* the court stated:

> One need not, as a condition precedent to his right of free speech under the First Amendment, secure permission of his auditor. The First Amendment does not purport to protect the right of privacy, nor does it require that the audience shall have volunteered to listen. . . . Speech is very frequently invoked as a means to persuade those who do not agree with the speaker and may not even wish to hear him. . . . The employees were paid for attending and were not inconvenienced in the least. *If they were influenced against their will by the arguments presented, this was a legitimate consequence of free speech and presumably one of its purposes.*

Id. at 498-99 (emphasis added).

[215] *See* discussion *supra* notes 79-85 and accompanying text. One might have imagined that the World War II generation, which had just defeated three totalitarian regimes, and had sacrificed so much in the effort, readily would have understood the totalitarian implications of a constitutional view permitting coerced listening as a vehicle to instill ideological conformity. *See* Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 833 (1981) ("[C]ompulsion to listen is the hallmark of a totalitarian society.").

[216] One caveat, of course, is that return to the rule of *Clark Brothers* requires that there be a case properly before the NLRB raising the captive audience issue. That, in turn, requires cooperation from the NLRB General Counsel who controls the decision of which cases should be put before the Board for adjudication. *See* National Labor Relations Act § 3(d), 29 U.S.C. § 153(d) (2004) (stating that the NLRB general counsel "shall have final authority . . . in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board."). This Board authority is not judicially reviewable. *See also* United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966) (affirming the NLRB General Counsel's statutory authority to make independent prosecutorial decisions).

But what of *Babcock*'s statement that the "legislative history [of section 8(c)] make[s] it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices [based on conducting captive audience meetings]"?[217] Even if the language in 8(c) implements the First Amendment and the First Amendment does not protect the right to coerce listening, does the legislative history of 8(c) nevertheless "make it clear," as the Board stated in *Babcock*, that Congress intended to reverse *Clark Brothers* when enacting the 1947 Taft-Hartley amendments?[218] A close examination of the legislative history reveals no basis for such a conclusion.

Three documents comprise the relevant portions of the section 8(c) legislative history. The Taft-Hartley Amendments began with a bill in the House of Representatives. The House Committee on Education and Labor issued a Report containing a brief reference to what became section 8(c).[219] Following passage of the bill in the House of Representatives (H.R. 3020), the Senate took up its version, and the Senate Committee on Labor and Public Welfare issued a report that proposed substantial amendments to the House bill and contained a short discussion of what became section 8(c).[220] Following enactment by the Senate of its version, a conference committee considered the House and Senate versions and issued a report that mostly adopted the Senate version, with only scattered amendments from the original House version. One of the House version provisions the conference adopted ultimately became section 8(c).[221]

Congress's overriding concern in all of these reports was the Board's perceived misuse of its powers to rely on the *content* of speech, which was not itself coercive, as evidence of unfair labor practice conduct and to use past unfair labor practice conduct as evidence that employer speech is coercive.[222] There is no reference in the House Report to objections to the regulation of captive audience meetings in general or the rule of *Clark Brothers* specifically. The sole concern when enacting section 8(c) was protecting

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[217] 77 N.L.R.B. 577, 578 (1948).

[218] Though sparse, there is academic commentary agreeing that § 8(c) was intended to reverse *Clark Brothers*. *See* Bok, *supra* note 15, at 103 n.179 (concluding that "the intent of Congress [in enacting § 8(c)] was simply to restrain the Board from using the employer's speeches as evidence that unrelated acts were motivated by antiunion animus and to put a stop to Board rulings that 'captive audience' speeches by the employer were per se coercive."); *see also* H.R. REP. No. 80-510, at 45 (1947) (Conference Report); S. REP. NO. 80-105, at 23-24 (1947) (Senate Report).

[219] *See* H.R. REP. NO. 80-245, at 8 (1947) (reporting on H.R. 3020, 80th Cong. (1947)).

[220] *See* S. REP. NO. 80-105, at 23-24 (reporting on S. 1126, 80th Cong. (1947)).

[221] *See* H.R. REP. NO. 80-510, at 45.

[222] For example, the House Report states that "it is apparent from decisions of the Board itself that *what persons say* in the exercise of their right to free speech has been used against them. The bill provides that the new Board is prohibited from using as evidence against an employer . . . any statement that by its own terms does not threaten force or economic reprisal." H.R. REP. NO. 80-245, at 8 (emphasis added).

content of speech, "what persons say" and then only content that falls within "the exercise of their [constitutional] right of free speech."[223]

The Senate amendment of the House bill similarly focuses on objections to the Board's reliance on non-coercive content in employer speech as a basis for finding employer unfair labor practices. As the Senate Report states:

> The Supreme Court . . . held . . . that the Constitution guarantees freedom of speech on either side in labor controversies . . . . The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated . . . .[224]

It was here in the Senate Report that *Clark Brothers* is referred to. The Senate Report disapprovingly states that the Board holds

> speeches by employers to be coercive . . . if the speech was made in the plant on working time. (Clark Brothers, 70 N.L.R.B. 60). The committee believes [this] decision to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement.[225]

The Conference Committee's action is important for determining whether congressional enactment of section 8(c) was intended to reverse *Clark Brothers*. After reciting that "[b]oth the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech,"[226] the Conference Report then states that "the conference agreement *adopts the provisions of the House bill* . . . with one change from the Senate amendment."[227]

The Conference Report also explains:

> 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*

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[223] *Id.*

[224] S. REP. NO. 80-105, at 23.

[225] *Id.* at 23-24.

[226] H.R. REP. NO. 80-510, at 45.

[227] *Id.* (emphasis added). A comparison of the House bill and the Senate amendment shows that the "one change from the Senate amendment" was the scope of the § 8(c) protection. *See* Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act*, 53 OHIO ST. L.J. 1, 14 (1992).

> Both the House and Senate were in agreement on the need for language protecting employer 'free speech.' But there was disagreement on the scope of protection that should be provided. After extensive debate, the final version of section 8(c) contained language, originating in the House, that provided that noncoercive speech not only would not constitute but could not be evidence of an unfair labor practice.

Id.

free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination. [228]

There is no reference in the Conference Report to reversing the Board's then-current policy on captive audience speeches as set out in *Clark Brothers*. Instead, the clear intent is "to protect the right of free speech . . . ."[229] Thus, one readily can see why the Court in *Gissel* concluded that "8(c) *merely* implements the First Amendment . . . ."[230] Moreover, both the House and the Senate, and certainly the Conference, were focused on the First Amendment's protection of the *content* of speech—"*what persons say* in the exercise of their *right to free speech*."[231] One clause in one sentence of a Senate committee report that the conference committee rejected is a thin reed indeed upon which to conclude that the entire United States Congress in 1947 enacted section 8(c) with the intent to reverse *Clark Brothers*. A far more reasonable conclusion supported by the section 8(c) legislative history is that, contrary to what the Board in *Babcock* found,[232] section 8(c) does not preclude the NLRB from banning anti-union workplace captive audience meetings. Both the language and legislative history of 8(c) indicate that Congress merely wanted to provide statutory assurance that the NLRB would interpret the First Amendment in such a way to guarantee the employer's full free speech rights as those rights are defined and protected by the First Amendment.[233] And, as this Article has argued, the employer enjoys no First Amendment freedom to coerce its workers to listen to its ideological proselytizing.

The above notwithstanding, it is fair to question whether the courts would enforce an NLRB decision banning captive audience meetings. The Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[234] strongly suggests that they would defer to such a doctrinal change. *Chevron* requires that judicial review of agency action proceed in two steps. If the text or legislative history of the statute manifests a clear and unambiguous congressional intent regarding the issue before the court, the statutory text or legislative history is determinative of the issue and the

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[228] H.R. REP. NO. 80-510, at 45 (emphasis added).

[229] *Id.*

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

[231] *See* H.R. REP. NO. 80-245, at 8 (emphasis added).

[232] 77 N.L.R.B. 577, 578 (1948).

[233] The Board was on the defensive in 1948, the year it decided *Babcock*. For the first time in thirty years the 1946 congressional elections had placed Republican majorities in both houses of Congress; the Board was under attack by this 80th Congress; and the NLRB had just successfully fought off efforts in the House to abolish the NLRB and create a new board to hear cases and an agency to prosecute cases. *See* HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 363-84 (1950); Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 288-91 (1960). It may have been expedient for the Board to jettison *Clark Brothers* in an abundance of caution by over-reading the section 8(c) legislative history.

[234] 467 U.S. 837 (1984).

inquiry ends.[235] But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court becomes whether the agency's answer is based on a permissible construction of the statute."[236]

This Article has demonstrated that neither the text nor the legislative history of section 8(c) provides clear and unambiguous evidence that Congress intended to require reversal of *Clark Brothers* when it enacted 8(c). The Board, therefore, may provide a "permissible construction of the statute"—and banning captive audience meetings is such a permissible construction. It previously was the NLRB rule and there is no reason to believe that it would not have remained the Board rule over the past sixty years but for a misreading of the scope of employer free speech and Congress's intent in enacting section 8(c).[237] Under *Chevron*, the courts of appeals should uphold an NLRB decision returning captive audience doctrine to the rule in *Clark Brothers*.[238]

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[235] *Id.* at 842-43, 843 n.9.

[236] *Id.* at 843.

[237] *See* discussion *supra* notes 34-61 and accompanying text. Nor should the Court's decision in *NLRB v. Steelworkers (Nutone, Inc.) & NLRB v. Avondale Mills*, 357 U.S. 357 (1958), prevent the federal appellate courts from enforcing NLRB unfair labor practice orders predicated on employers conducting captive audience meetings. In *Nutone* the Court heard two consolidated cases, one of which involved Avondale Mills. In that case, during work time, "supervisory personnel interrogated employees concerning their organizational views and activities and solicited employees to withdraw their membership cards from the union." *Id.* at 360. Among other things, the Board held that enforcing a no-solicitation rule against employees in the context of the above activities by supervisory personnel constituted unlawful discrimination. *Id.* at 360-61. The Court disagreed, concluding that a violation of the Act depended on a finding that the confluence of the supervisor's work-time activities and enforcement of a rule barring employees from soliciting for the union during work time created an "imbalance in the opportunities for organizational communication." *Id.* at 362. The case did not litigate the permissibility of employer captive audience meetings. *Id.* at 358-63. Employees who were interrogated by the supervisors were a captive audience but that fact was incidental to the core dispute, which was the right of the employer to enforce rules barring work time solicitation that it did not hold itself to. *Id.* Chief Justice Warren, dissenting, argued that the Court should defer to the NLRB, which had found a violation in Avondale in part because the context of the employer's behavior had included making threats to a captive audience of employees. *Id.* at 368-69 (Warren, J., dissenting in part and concurring in part). Avondale thus is not a case where the Court considered, or rendered any decision regarding, the permissibility of the Board returning to the rule of Clark Brothers and holding that captive audience meetings are per se unlawful.

[238] The Ohio State Employment Relations Board has adopted the position that any captive audience activity will be deemed to fatally flaw the free and untrammeled conditions required for a valid election, and thus is a per se violation of the Ohio Public Employee Collective Bargaining Act and mandates a rerun election. *See* Ohio Civil Service Employees Association and Hamilton County Welfare Department, 3 Ohio Pub. Employee Rep. ¶ 3036 (1986) (stating that "[t]here are conceivable constitutional arguments against public sector captive audiences [and] [a]t least it is arguable that a public sector employer's compelled audience meets the state action element requisite to a claim of violation of the 14th Amendment" but deciding the case based on an interpretation of state law); *accord* Ohio Council 8, AFSCME and Noble County Engineer, 2 Ohio Pub. Employee Rep. ¶ 2632 (1985); Ohio Council 8, AFSCME and Belmont County Engineer 2 Ohio Pub. Employee Rep. ¶ 2652 (1985).

C. *Implications for State Legislative Action*

Protecting constitutionally recognized freedoms through state legislation is a traditional state function, deeply-rooted in local feeling and responsibility.[239] Freeing state legislative policy from the misconception that employer constitutional rights of free speech immunize it from regulation of workplace captive audience meetings that invade the freedom not to listen permits state legislatures to focus on the merits of such bans[240] and insulates such bans from successful attacks based on labor preemption.[241]

1. The Government's Dual Constitutional Roles

The Constitution imposes a dual role on government. First, government may not itself engage in "state action" infringing rights protected by the Constitution absent a showing that infringement is necessary to advance a compelling state interest.[242] But, in addition, government may have a constitutional obligation, and certainly has a traditional right, to take an active role in protecting its citizens from privately inflicted harms to constitutionally-recognized interests.[243]

The states' active role in protecting individual constitutional freedoms from infringement by private parties may take the form of legislation directly doing so. Massachusetts, for example, has enacted legislation creating a private right of action in state court for any individual whose enjoyment of rights guaranteed by the laws or Constitution of the United States or the state's own constitution have been interfered with, whether under color of state law or not.[244]

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[239] *See* discussion *infra* notes 242-260 and accompanying text.

[240] *See* discussion *infra* notes 261-284 and accompanying text.

[241] *See* discussion *infra* notes 288-344 and accompanying text.

[242] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 389-90 (1978) (interference with fundamental constitutional right to marry constitutional only when necessary to advance a compelling state interest and thus not lawful if state has adequate alternatives that are less harmful to constitutional rights).

[243] I do not intend here to enter the debate over whether the government's obligation to enable the Constitution's rights is of constitutional dimensions. *Compare* DeShaney v. Winnebago City Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (stating that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual" and thus the government has no constitutional duty to protect individuals from privately inflicted harms), *with* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 47 (1995) (concluding that "the First Amendment . . . is not entirely a negative right. It has positive dimensions as well [consisting] of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority over speech to private people"). I, more modestly, show that protecting free speech from infringements by private entities is a state interest that is deeply-rooted in local feeling and necessity.

[244] *See* Kolodziej v. Smith, 588 N.E.2d 634, 637 (Mass. 1992) (stating that "G.L. c. 12, § 11H (1990 ed.), authorizes the Attorney General to bring a civil action in the Superior Court '[w]henever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion . . . with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth . . . .'

In addition, states enact laws regulating defamation in an effort to protect a constitutionally-recognized liberty interest in the preservation of one's "good name, reputation, honor, or integrity."[245] This state interest in protecting the liberty interest in reputation from infringement is deeply rooted in local feeling and responsibility.[246]

The anti-discrimination laws enacted by many state and local jurisdictions are another example of state or local legislation protecting persons from privately inflicted harms to constitutionally-recognized interests. In *Roberts v. United States Jaycees* the Court upheld application of the Minnesota Human Rights Act prohibition of private discrimination based on race and gender.[247] The Court held that the state had a compelling state interest that is unrelated to the suppression of ideas, for example, elimination of discrimination based on race and gender, both constitutionally-recognized liberty interests. Through similar reasoning, the Court has upheld a California statute requiring the Rotary Club to admit women[248] and has upheld a New York City ordinance banning discrimination among certain private clubs.[249]

In addition to the above, states traditionally protect by statute private infringement of many other rights the Constitution protects from government infringement, including laws protecting the constitutional right of freedom of association from being infringed by private parties,[250] laws protecting the freedom from coercion in choosing how to vote in state and local

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Section 1 11 grants a private cause of action to any individual whose exercise or enjoyment of such rights has been interfered with . . . .").

[245] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[246] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 575 (1975) (requiring some procedural due process prior to suspension from school because discipline "could seriously damage the students' standing with their fellow pupils and their teachers . . . ."); *Constantineau*, 400 U.S. at 575. This constitutional right to due process attaches at least when the harm to reputation is accompanied by some tangible detriment, such as loss of employment. *See* Owen v. City of Independence, 445 U.S. 622, 661 (1980) (obligation to provide procedural due process to discharged public employee when government disseminates "a false or defamatory impression about the employee in connection with his termination"); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-61 (1985) (permissible for state to enforce defamation laws protecting reputation that include presumed or punitive damages when defamation is of a private person and does not entail a matter of public concern); Gertz v. Welsh, 418 U.S. 323, 347 (1974) (permissible for states to enforce defamation laws involving defamation of a public figure, or a private person where the defamation does entail a matter of public concern, "so long as [state defamation laws] do not impose liability without fault" or impose punitive damages without requiring a showing of malice); *cf.* Bishop v. Wood, 426 U.S. 341, 348-49 (1976) (no due process owed when public employer does not disseminate information harming the reputation of discharged public employee); Paul v. Davis, 424 U.S. 693, 712 (1976) (holding that interest in good name rises to a protected liberty interest only if accompanied by harm to some tangible interest).

[247] 468 U.S. 609, 623 (1984)

[248] Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537 (1987).

[249] N.Y. State Club Ass'n. v. City of N.Y., 487 U.S. 1 (1988).

[250] Commc'n Workers v. Beck, 487 U.S. 735 (1988).

elections,[251] and laws requiring that members of the press testify at grand jury proceedings and at criminal trials.[252] Moreover, states "play an active role . . . in enabling the free speech principle that the Constitution establishes" through enactment of legislation creating a statutory right of access to the private property for the purpose of engaging in speech-related activities ("access legislation").[253] All of the foregoing are examples of state law protecting constitutionally recognized interests from being harmed by private entities.

In addition, and as shown above, state and local governments may protect captive audiences in their homes from intrusions by door-to-door solicitors[254] and targeted picketing,[255] persons on the street from being forced to receive unwanted handbills,[256] transit passengers from being forced to view unwanted political propaganda posted to placards on transit vehicles,[257] school students attending a mandatory high school assembly from private speech containing sexual innuendos,[258] medical patients' right not to listen to unsolicited messages,[259] and, finally, the rights of workers not to be coerced into listening at their place of employment.[260]

The above makes no pretense of constituting a complete inventory of state and local legislation designed to protect rights guaranteed under the

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[251] *See* Maltby, *supra* note 139, at 44. Twenty-nine states have enacted some form of statute to protect political liberties from employer infringement. *Id.* Missouri, for example, has enacted legislation that prohibits an employer from "'threatening to inflict any loss against anyone in his employ in order to compel such employee to vote or refrain from voting for any particular candidate.'" *Id.* The most sweeping protection is legislation enacted by California and four other states, which provides that "no employer shall make, adopt, or enforce any rule, regulation, or policy controlling or directing, or tending to control or direct the political activities or affiliations of employees." *Id.*

[252] *See* discussion of this legislation in Branzburg v. Hayes, 408 U.S. 665 (1972).

[253] *See* Anna M. Tarushhio, Note, *The First Amendment, The Right Not to Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1013-19 (2000) (cataloguing federal and state legislation designed to expand free speech by requiring access to private property).

[254] *See* Breard v. Alexandria, 341 U.S. 622 (1951); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1952); discussion *supra* notes 82-83 and accompanying text.

[255] *See* Frisby v. Schultz, 487 U.S. 474, 476 (1988); discussion *supra* notes 95-101 and accompanying text.

[256] *See* Schneider v. State of New Jersey, 308 U.S. 147, 162 (1939) (concluding that the right to distribute literature on the streets extends only "to one willing to receive it"); discussion *supra* note 102 and accompanying text.

[257] *See* Lehman v. Shaker Heights, 418 U.S. 298 (1974); discussion *supra* notes 112-117 and accompanying text.

[258] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684-86 (1986); discussion *supra* notes 124-125 and accompanying text.

[259] *See, e.g.*,Madsen v. Women's Health Center, 512 U.S. 753 (1994).

[260] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (protecting captive audience female employees from a hostile work environment pursuant to state law); Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (E.D. Pa. 1980) (holding that construction workers "are a captive audience, who must remain on the jobsite during the workday . . . . [These] workers . . . are powerless to avoid bombardment by derisive speech and noise from the . . . defendants' amplification system short of giving up their jobs [which they would do] except that there was no other work available to them."); discussion *supra* notes 149-151 and accompanying text.

Constitution from infringement by private parties. It does demonstrate, however, that doing so is a state interest deeply-rooted in local feeling and responsibility and a traditional governmental function. Accordingly, when state legislatures protect the freedom not to listen by banning all workplace captive audience meetings in which the employer espouses its political or religious ideology, states are acting within a rich and deeply-rooted legislative tradition.

2. *Coerced Religious and Political Indoctrination at the Workplace*

The First Amendment foundations of the right not to be coerced into listening and the rich tradition of state legislative efforts to protect constitutional interests from private infringement merge when states enact legislation to ban all coerced ideological proselytizing at the workplace. The workplace captive audience meeting, once just the mainstay of a communications strategy to indoctrinate employees with the employer's anti-union views,[261] has begun to morph into a vehicle for religious and political indoctrination.[262] For example, during the 2008 presidential election the National Association of Manufacturers is reported to have urged members to assemble employees at the workplace to "discuss political issues" and "act in their employer's best interest by not voting for unacceptable candidates."[263] There are also reports that during the 2008 election "Wal-Mart forced workers to attend meetings in which managers told them [that] electing Democrats to the White House and Congress could threaten their jobs."[264]

Religious proselytizing in the workplace is also on the rise. One source is "[e]vangelical Christian organizations [that] are offering Christian ministry services for employers to provide to their employees during work hours."[265] These services include prayer breakfasts and faith-based training and education.[266] The National Workrights Institute reports that "many em-

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[261] *See* discussion *supra* notes 2-6 and accompanying text.

[262] *See* discussion *infra* notes 263-276 and accompanying text.

[263] Secunda, *supra* note 143, at 224.

[264] Mike Hall, *Oregon Bill Bans Mandatory Anti-Union Meetings*, AFL-CIO NOW BLOG, June 19, 2009, http://blog.aflcio.org/2009/06/09/oregon-bill-bans-mandatory-anti-union-meetings/#more-15048.

[265] Secunda, *supra* note 143, at 225; *see Corporate Chaplains: Praying for Gain*, ECONOMIST, Aug. 25, 2007, at 76, *available at* 2007 WLNR 16426531 (Westlaw) (concluding that Corporate chaplains are a booming business in America, that there are roughly 4,000 of them, that Marketplace Chaplains USA, based in Dallas, Texas, is America's biggest provider of corporate chaplains, employing 2,100 of them at 300 companies in forty-six states, and that "Corporate chaplains can perform the role of traditional village priests").

[266] *Id.* Baseball Chapel is an evangelical Christian organization whose web site states that "[o]ur purpose is to glorify Jesus Christ." http:/www.baseballchapel.org/ (last visited July 22, 2009). It supplies volunteer chaplains to major and minor league baseball teams to lead Sunday morning Christian prayer meetings among both the players and the umpires of all major league and minor league baseball teams soon before the beginning of a game. *See* Murray Chass, *Should a Clubhouse Be a Chapel?*, N.Y. TIMES, Feb. 2, 2008, at D1. The chaplains come to the umpires' locker room and, as one non-Christian umpire has reported, "they preach to you [and] [a]t the end they ask if there is anything you want me to

ployers feel it is their religious duty to convert workers and thus employ . . . corporate chaplains, many of whom have conversion as part of their official mission."[267]

Title VII and state anti-discrimination law do not provide a complete remedy for this coerced workplace religious indoctrination. For example, the Equal Employment Opportunity Commission (EEOC) ordered an employer to cease subjecting captive audience employees to daily broadcasts of prayers over the employer's public address system, concluding that such activity constitutes a hostile work environment.[268] However, the EEOC concluded that, "in order to establish a case of harassment that creates a hostile working environment, the harassment of which appellant complains generally must be *ongoing and continuous* . . . ."[269] In that case the prayer broadcasts had continued on a daily basis for a year, notwithstanding that plaintiff had asked that they be stopped.[270] That year-long pattern of broadcasted prayers, the EEOC concluded, constituted the required "ongoing and continuous" conduct.[271] A less consistent pattern of religious indoctrination might well have resulted in a different outcome.

In *Brown v. Polk County*, the court found that during mandatory departmental meetings a supervisor had permitted prayers, affirmed his Christian faith to the assembled employees, and referenced "Bible passages related to slothfulness and 'work ethics.'"[272] Yet, the court found no violation of Title VII because the prayers were voluntary and spontaneous and the activity occurred with sufficient irregularity to render it "inconsequential as a legal matter."[273]

Also, in *Kolodziej v. Smith*, the court found nothing unlawful under the United States Constitution, state constitution, or state law when an em-

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pray for." *Id.* It is reported that at a Washington Nationals prayer meeting the chaplain indicated his approval of the view that "Jews were doomed because they didn't believe in Christ." *Id.* While these prayer meetings nominally are voluntary, as a practical matter there is great compulsion not to vacate the room where they are held because there often is no other place to go. *Id.* Players may leave and mingle with the fans, though the more appropriate (and unpleasant) alternative is often to go outside, where the temperature may have reached 100 degrees, especially at minor league day games in the South. *Id.* Players also may feel compelled to stay in the prayer meetings because among baseball umpires the promotion system from minor leagues to major leagues is precarious and depends on the good will of the more senior umpires, some of whom are religious and welcome the prayer meetings; the perception is that choosing not to be part of the group could affect your chances. *Id.* One outside observer has concluded that "there probably is a perceived coercive element in this movement in that if you're not part of it you are somehow suspect . . . . There's this social obligation that very often is felt among a small group of cohorts, and in small quarters that makes it difficult." *Id.*

[267] *Worker Freedom Act Gains Momentum*, Workrights News, Spring-summer, 2006, http://www.workrights.org/newsletters/summer06newsletter.pdf.

[268] Hilsman v. Runyon, 1995 WL 217486 (E.E.O.C. Mar. 31, 1995).

[269] *Id.* at *3 (emphasis added).

[270] *Id.* at *3-4.

[271] *Id.* at *3.

[272] 61 F.3d 650, 652 (8th Cir. 1995).

[273] *Id.* at 656.

ployer threatened to discharge an employee who refused to complete a mandatory week-long seminar built around a core of Christian theology.[274] The court reasoned that:

> the seminar . . . was in no sense devotional . . . . There is no evidence . . . that the defendants have forced the plaintiff to alter her religious convictions or her profession of belief, or to give the appearance of supporting a particular tenet of religion [nor evidence that the employer] required [plaintiff] to miss any religious service or to compromise her faith [or] that Roman Catholic dogma forbade her attendance at the seminar.[275]

The employer plainly had denied plaintiff the enjoyment of her freedom not to listen by attempted inculcation of a particular brand of religious dogma, but existing state law provided no relief.[276]

3. *State Legislative Response: The Worker Freedom Act*

Because existing statutory law often fails to protect adequately against private infringement of the constitutional right not to listen, state legislatures throughout the United States are considering legislation to outlaw all workplace captive audience meetings that attempt political or religious proselytization. This legislation is called the Worker Freedom Act. These laws create an intentional tort enforced through a civil private right of action for damages.

Two states already have enacted such legislation. On July 6, 2009, the governor of Oregon signed Senate Bill 519, the "Worker Freedom Act." It prohibits employers from punishing workers for choosing not to attend work time meetings that discuss the employer's opinion on religious issues or political matters, such as ballot measures and union organization.[277] Oregon was the second state to enact such a bill.

New Jersey enacted a modified Worker Freedom Act in July 2006, entitled the "Worker Freedom from Employer Intimidation Act,"[278] which prohibits all forms of discipline for refusal to attend regulated captive audience meetings at the workplace. The statute provides for a civil remedy,

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[274] 588 N.E.2d 634, 636 (Mass. 1992).

[275] *Id.* at 638-39.

[276] The case was remanded to provide plaintiff an opportunity to file charges under Title VII. *Id.* at 639.

[277] *See Atty Says Ore. Labor Law Likely Preempted*, LAW 360: THE NEWSWIRE FOR BUSINESS LAWYERS, July 7, 2009, *available at* http://employment.law360.com/registrations/user_registration?article_id=109786&concurrency_check=false (last visited, July 8, 2009). The bill provides an exception for churches and political parties. *See* Peter Wong, *Bill That Was High Priority for Labor Unions Passes*, STATESMAN JOURNAL, June 20, 2009, at C3. The Oregon Worker Freedom Act has been challenged on a variety of grounds, including labor preemption. *See* Complaint, Assoc. Ore. Indus. v. Avakian, No. 09-CV-1494 (D. Ore. 2009). The court dismissed this request for pre-enforcement review, concluding that the action presented no case or controversy that was ripe for adjudication. *See* Assoc. Ore. Indus. v. Avakian, 2010 WL 1838661 (D. Or. May 6, 2010).

[278] N.J. STAT. ANN. §§ 34:19-9 to 32:19-14 (West 2009).

including reinstatement, lost wages, and attorney fees.[279] The New Jersey legislation is narrower than that passed by Oregon, however. While the New Jersey Act, like Oregon's, bars mandatory attendance at workplace captive audience meetings "the purpose of which is to communicate the employer's opinion about . . . political matters," the New Jersey statute excludes from the definition of "political matters" meetings to discuss the merits of union representation.[280]

Numerous other state legislatures are weighing enactment of variations of the intentional tort created by the model Worker Freedom Act. The Colorado legislature approved the act in 2006 but it was vetoed by the governor.[281] The West Virginia House of Delegates approved such an act in February 2008 but the legislature failed to enact it.[282] Meanwhile, legislative chambers in New Hampshire, Michigan, and Vermont also have approved bills modeled after the Worker Freedom Act.[283] In addition, similar legislation has been introduced in the Connecticut and Missouri legislatures.[284]

4. *Objections to the Worker Freedom Act*

Three categories of objection have been raised to these Worker Freedom Act bills. The first is non-legal. Employers have argued that the Worker Freedom Act violates the employer's managerial prerogative.[285]

Second, employer representatives have argued that the Worker Freedom Act infringes on the employer's free speech rights.[286] However, as shown above, a ban on captive audience meetings for the purposes of political and religious indoctrination does not violate employer rights because

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[279] *Id.*

[280] *See* Secunda, *supra* note 143, at 228-29.

[281] Progressive States Network, Protecting Worker Freedom from Mandatory Meetings (Mar. 6, 2008), http://www.progressivestates.org/node/789/.

[282] *Id.*

[283] *Id.*

[284] *See* Stephen Singer, *Conn. Considers Bill to Prevent Proselytism in the Workplace*, AP, Mar. 11, 2006, *available at* http://www.christianpost.com/article/20060311/conn-considers-bill-to-prevent-proselytism-in-the-workplace/index.html (last visited July 7, 2009) (discussing the Connecticut bill); H.R. 1371, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006), *available at* http://www.house.mo.gov/content.aspx?info=/bills061/biltxt/intro/HB1371I.htm.

[285] Opposed to the Oregon Worker Freedom Act, the Vice President of Associated Oregon Industries is reported to have questioned what is wrong with making employees attend meetings: "Employees work at the pleasure of the employer and the employer is entitled to make a request or demands on the employee's time if the employer pays for it." Janie Har, *Oregon House Sides with Labor on Workplace Communications*, THE OREGONIAN, June 19, 2009, *available at* http://www.oregonlive.com/politics/index.ssf/2009/06/oregon_house_sides_with_labor.html. This Article has demonstrated that "what's wrong with making workers attend meetings?" is that such coercion trammels fundamental liberties enshrined in the Constitution, liberties that states have the prerogative to protect legislatively from private infringement. *Id.*

[286] *See* Peter Wong, *Bill That Was High Priority for Labor Unions Passes*, STATESMAN JOURNAL, June 20, 2009, at C3 (stating that "[b]usiness groups argue[] that the bill violates their right to communicate with employees . . . .").

coerced listening itself violates a constitutionally recognized freedom. State legislatures are entitled to protect employees' constitutional rights by creating a statutory tort to protect against private infringement thereof. Simply put, the employer has no constitutional right to coerce listening among its employees.[287]

A final objection is that the Worker Freedom Act conflicts with, and therefore is preempted by, the NLRA to the extent that it bans workplace captive audience meetings discussing the merits of union representation.[288] A brief overview of labor preemption is offered here to provide a foundation for explaining why the Worker Freedom Act, adopted to protect workers' constitutional freedom not to listen, is not preempted by federal law.

Most labor preemption is either conflict or frustration (obstacle) preemption; thus, the Act normally does not preempt state law "unless it conflicts with federal law or would frustrate the federal scheme . . . ."[289] Except when state action expressly contravenes a federal right or prohibition, the Court is required to determine whether Congress, had it considered the matter, would have intended preemption because the state law frustrates federal labor policy.[290] *Garmon* preemption guards against such frustration created when state law undermines federally protected rights or the integrity of the NLRB's primary jurisdiction.[291] With certain exceptions, it preempts state and local law that regulates conduct actually or even arguably protected by section 7 of the Act or prohibited by section 8. *Machinists* pre-

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[287] *See* discussion *supra* notes 134-195 and accompanying text.

[288] Professor Paul Secunda and Kye D. Pawlenko have published conflicting views on this question. *Compare* Secunda, *supra* note 143, at 229-39 (arguing no pre-emption) *with* Kye D. Pawlenko, *The Non-Viability of State Regulation of Workplace Captive Audience Meetings: A Response to Professor Secunda*, 32 HAMLINE L. REV. 191 (2009) (arguing there is pre-emption). I need not address their debate in detail here because, as I show next, the Worker Freedom Act is protected from preemption for reasons not addressed in their exchange of views. The Secunda/Pawlenko exchange quite adequately outlines the basic rules of labor preemption. I previously have laid out those basics, *see* Roger C. Hartley, *Preemption's Market Participant Immunity—A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 U. PA. J. LAB. & EMP. L. 229, 230-32 (2003), as have many others, *see, e.g.*, Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, n.508 (1993); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990); Eileen Silverstein, *Against Labor Preemption*, 24 CONN. L. REV. 1, 2 n.8 (1991) (collecting authority); *id.* at 4-6.

[289] Met. Life Ins. Co. v. Mass., 471 U.S. 724, 747-48 (1985) (citations omitted). Rarely, "courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States" and preclude all state regulation in that area, but that is not implicated in the present discussion. *Id.* Section 301 preemption is an example of this. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220-21 (1985).

[290] *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 623 (1986) (Rehnquist, C.J., dissenting) (discussing how labor preemption developed from "a series of implications regarding congressional intent in the face of congressional silence").

[291] *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

emption[292] guards against a different type of frustration of national labor policy—that caused by state law interfering with the congressional judgment that certain conduct should be left unregulated by any governmental body.[293] It prohibits state and municipal regulation that the courts conclude "upset[s] the balance of power between labor and management expressed in our national labor policy."[294]

Banning workplace captive audience meetings that attempt to inculcate the employer's religious or political ideology through coerced listening is preempted neither by *Garmon* nor *Machinists*.

a. Garmon *Preemption*

Garmon does not bar states from banning workplace captive audience meetings because such legislation does not threaten the NLRB's primary jurisdiction, which is the bedrock concern of *Garmon* preemption.[295] In *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters* the Court explained that *Garmon* preemption requires proof of a "realistic risk of [state] interference with the Labor Board's primary jurisdiction."[296] There is no such "realistic risk" unless the controversy in the state court is "identical" to the controversy that would be before the NLRB if the matter had been brought to the NLRB.[297] In *Sears,* a trespass action was brought in state court arising out of conduct by a union that may or may not have violated section 8 of the Act, depending on the object of the picketing.[298] The Court ruled there was no *Garmon* preemption because the focus of the trespass action was the location of the picketing and the focus of litigation be-

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[292] Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140 (1976).

[293] *Id.* at 146

[294] *Id.*

[295] Met. Life Ins. Co. v. Mass., 471 U.S. 724, 748 (1985) ("The so called Garmon [preemption] protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA") (citations omitted). The Secunda/Pawlenko debate consumed much space disagreeing over whether the *Garmon* reference to preempting state regulation touching matters "protected by the NLRA" meant only activity protected by section 7 of the Act (a section which protects only employee rights but not employer rights) as asserted in the Secunda article, *see* Secunda, *supra* note 143, at 232-34, or whether it also means that state regulation may be preempted under *Garmon* if it regulates any conduct "subject to the Board's regulatory jurisdiction" as asserted in the Pawlenko article. *See* Pawlenko, *supra* note 288, at 195-98. For purposes of my analysis, I assume for sake of argument that Pawlenko is correct that *Garmon* is designed to protect NLRB primary jurisdiction to interpret all sections of the Act, not just sections 7 and 8.

[296] 436 U.S. 180, 198 (1978).

[297] *Id.* at 197 ("The critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.").

[298] *Id.* at 185.

fore the NLRB would have been the object of the picketing.[299] Given this differing focus, the controversies were not the same and, therefore, the state court adjudication of the trespass would not threaten the NLRB's primary jurisdiction.[300]

Subsequently, in *Belknap, Inc. v. Hale*,[301] the Court applied the same principle. There, striker replacements brought a breach of contract and misrepresentation claim against an employer based on the employer's promise of permanent employment status following the termination of a strike.[302] The employer's promise was arguably a violation of the Act, depending on whether the strikers were economic or unfair labor practice strikers.[303] The Court held there was no *Garmon* preemption of the state claims because the controversies in state court and those that might have been brought before the NLRB were different since they raised "discrete concerns."[304] The focus of the state and NLRB proceedings would be on the interests of *different groups of persons*.[305] In addition, each forum would focus on *different legal issues and remedies*.[306]

Farmer v. United Brotherhood of Carpenters and Joiners, Local 25[307] is an additional example of the same principle, that there is no *Garmon* preemption unless the controversies before the state court and the NLRB sufficiently overlap, for only then is the NLRB's primary jurisdiction jeopardized. In *Farmer*, the Court held that a state court action for intentional infliction of emotional distress arising out of a union's alleged discriminatory job referrals was not *Garmon* preempted even though the basis for the claim arose out of a labor relations controversy and "might form the basis for unfair labor practice charges before the Board."[308] The Court emphasized the importance of avoiding an "inflexible application of the [*Garmon*] doctrine especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."[309] The Court stressed

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[299] *Id.* at 198.

[300] *Id.* at 202-03.

[301] 463 U.S. 491 (1983).

[302] *Id.* at 493-95.

[303] *Id.* at 500-01, 503, 507-08; *see also id.* at 527-28 (Brennan, J., dissenting).

[304] *Id.* at 512 ("The interests of the Board and the NLRA, on the one hand, and the interest of the state in providing a remedy to its citizens for breach of contract, on the other, are "discrete" concerns . . . . We see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy of the federal labor laws.").

[305] At the state court the focus would be on the rights of the replacements, whereas before the NLRB, the focus of the section 8(a)(1) and 8(a)(3) litigation would be on the rights of the strikers. *Id.* at 510-11.

[306] At the state court, the question would be whether the company made misrepresentations and/or whether the contract was breached. *Id.* at 511. At the NLRB, the question would be whether the strike was an unfair labor practice strike. *Id.* at 511.

[307] 430 U.S. 290 (1977).

[308] *Id.* at 302.

[309] *Id.*

the importance of comparing the focus of the state litigation with the focus of the litigation that would be before the Board if a charge had been filed with the Board. In *Farmer* that focus was entirely different because litigation before the NLRB would concentrate on interference with rights protected by section 7 in the context of the employment relationship but "[w]hether the statements or conduct of the respondents also caused [the union member] severe emotional distress and physical injury would play no role in the Board disposition of the case, and the Board could not award [him] damages for pain, suffering, or medical expenses."[310]

The principle in all of these cases was concisely explained by the Court in *Belknap*. The key inquiry, the Court explained, when evaluating whether the Board's primary jurisdiction is jeopardized by state regulations is whether it appears that the state-court plaintiff is seeking to ignore the NLRB, that is, whether the plaintiff is attempting to use the state court as an "alternative forum" to avoid reliance on the NLRB for the relief sought.[311]

Enforcing the Worker Freedom Act in state court does not jeopardize the NLRB's primary jurisdiction because an employee does not bring an action in state court to protect his constitutional liberty not to listen *instead* of bringing an action before the NLRB. It is not the function of the NLRB to protect individual constitutional rights.[312] Indeed, under current law, if an individual on his own and for his own benefit sought protection against forced workplace listening, the NLRB could not provide a remedy because the NLRA only protects "concerted" activity for mutual aid or protection, not the rights of individual, *qua* individuals.[313] Moreover, the focus of a claim challenging a captive audience meeting before the NLRB would be an inquiry into whether employer conduct caused interference with employee free choice in choosing or rejecting union representation. Indeed, that was exactly the focus in *Clark Brothers*, the Board's last effort to ban workplace captive audience meetings.[314] By contrast, the focus of the Worker Freedom Act claim in state court is the mandatory nature of captive audience meetings—the invasion of the liberty interest in not being forced to listen. In short, the focus of litigation before the NLRB is interference with employee free choice regarding unionization, while in litigation under

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[310] *Id.* at 304.

[311] *Belknap*, 463 U.S. at 510 (holding that there is no threat to the Board's primary jurisdiction because "[t]he state courts in no way offer [plaintiffs] an alternative forum for obtaining relief that the Board can provide").

[312] "The NLRA does not provide, of course, a comprehensive scheme for the vindication of the plaintiffs' constitutional rights." Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 781 (9th Cir. 2001).

[313] *See, e.g.*, Meyers Indus., 281 N.L.R.B. 882, 885 (1986) (*Meyers II*) ("[I]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.") (quoting Meyers Indus., 268 N.L.R.B. 493, 497 (1984) (*Meyers I*)).

[314] *See* discussion *supra* notes 34-38 and accompanying text.

the Worker Freedom Act the effect of the captive audience meeting on freedom to choose or reject a union is immaterial.

Moreover, as in *Farmer*, there is no *Garmon* preemption of the Worker Freedom Act because "the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."[315] As has been demonstrated above, the state has a deeply-rooted interest in protecting constitutional rights from abridgement by private parties.[316] Moreover, state court actions enforcing a ban on all religious or political workplace captive audience meetings do not "threaten undue interference with the federal regulatory scheme" for the efficacy of the regulatory scheme administered by the NLRB does not depend on the continuing presence of employer captive audience meetings. Neither Congress nor the NLRB has ever made a determination that these meetings are integral to providing the freedom of choice upon which the statute is based. Indeed, for a time the Board held that workplace captive audience meetings were *per se* unlawful.[317] It is important to remember that the Board withdrew its proscription of workplace captive audience meetings in 1948 not because they were needed to provide employees free choice but rather based on a mistaken view that employer free speech rights precluded their proscription.[318] Moreover, neither Congress nor the NLRB has made a determination that captive audience meetings are essential (or even beneficial) to effectuation of the NLRA. The most one can say with any certainty is that for roughly half a century the NLRB has been agnostic regarding the contribution to free and open debate resulting from coerced listening imposed by employers. Therefore, regulation of captive audience meetings by the states does not interfere with the NLRB's primary jurisdiction. In *Livingston Shirt Corp.*[319] the Board reiterated that captive audience meetings are left unregulated by the NLRB due to an absence of evidence that Congress intended to ban them. Banning the captive audience meeting, the NLRB concluded, would require "administratively grafting new limbs on the statute" since the Board could "find nothing in the statute which even hints at any congressional intent *to restrict* an employer in the use of his own premises for the purpose of airing his views."[320] This view, of course, falsely equates the absence of an explicit congressional intent to proscribe to a congressional intent to preserve.[321]

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[315] *Farmer*, 430 U.S. at 302.

[316] *See* discussion *supra* notes 243-261 and accompanying text.

[317] *See* discussion *supra* notes 34-38 and accompanying text.

[318] *See* discussion *supra* notes 51-57 and accompanying text.

[319] Livingston Shirt Corp., 107 N.L.R.B. 400, 406 (1953).

[320] *Id.* at 406 (emphasis added).

[321] Nor does the legislative history of the Taft-Hartley Amendments require the conclusion that state bans of workplace captive audience meetings "threaten undue interference with the federal regulatory scheme." Farmer v. United Bhd. of Carpenters & Joiners, Local 25, 430 U.S. 290, 302 (1977). As

Moreover, *Garmon* does not preempt the Worker Freedom Act because it is well-established that states are empowered to regulate when "the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States" of regulatory authority.[322] Primarily, intentional torts—often involving civil unrest—fall into this "overriding local interest" exception.[323] But, the Court has acknowledged other intentional torts as qualifying, such as malicious defamation[324] and intentional infliction of emotional distress.[325]

This exception has been applied also to torts unrelated to civil unrest. For example, in *Radcliffe v. Rainbow Construction Co.*[326] a union representative who was exercising a right under state law to visit a construction site filed a claim against an employer for false arrest, false imprisonment, and malicious prosecution following his arrest for trespassing.[327] The court held that these claims were not preempted under *Garmon* even though the employer's actions in securing the arrest were arguably violative of the Act.[328] Applying the principles discussed above, the court held that there was a lack of identity between the state claims and any unfair labor practice litigation that might have been brought.[329] Moreover, the "[f]reedom of citizens from false arrest, false imprisonment, and malicious prosecution 'touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of power to act.'"[330]

As has been demonstrated above, the intentional tort created by the Worker Freedom Act also is deeply rooted in local feeling and responsibility[331] and for that additional reason is not preempted.

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shown above, at most there is a fragment of suggestion in one line of a Senate Report that the NLRB should not ban captive audience meetings but then only because of perceived employer free speech rights to hold them. *See* discussion *supra* notes 219-238 and accompanying text. That fragment is a far cry from a congressional mandate. In any event, the premise that employers have a constitutionally-protected free speech right to coerce listening has not survived the test of time. *See* discussion *supra* notes 62-195 and accompanying text.

[322] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

[323] *See, e.g.*, Int'l Union, United Auto. Workers v. Russell, 356 U.S. 634 (1958) (threats); Youngdal v. Rainfair, Inc., 355 U.S. 131 (1957) (obstruction of streets and threats); Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (violence).

[324] *See* Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 61 (1966).

[325] *See Farmer*, 430 U.S. 290.

[326] 254 F.3d 772 (9th Cir. 2001), *cert denied*, 534 U.S. 1020 (2001).

[327] *Id.* at 776-77.

[328] *Id.* at 784-87.

[329] *Id.* at 786-88.

[330] *Id.* at 785 (quoting *Garmon*, 359 U.S. at 243-44).

[331] *See* discussion *supra* notes 239-284 and accompanying text.

b. Machinists *Preemption*

Machinists preemption enforces the congressional judgment that certain conduct should remain unregulated and instead be "controlled by the free play of economic forces."[332] The Court's most recent articulation of the *Machinists* preemption doctrine is *Chamber of Commerce v. Brown*.[333] As the Court there explained, "*Machinists* 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."[334] In *Brown*, the Court found *Machinists* preempted a California statute that precluded the recipients of state funds from using those funds "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."[335] The Court found that California had made the judgment that "partisan employer speech necessarily interferes with an employee's choice about whether to join or to be represented by a labor union."[336] Since this was exactly the opposite judgment Congress made in section 8(c) of the Act—that non-coercive employer speech has a legitimate role in union representation decisions—the California statute was found "unequivocally pre-empted" as it conflicted with the "explicit direction from Congress to leave noncoercive speech unregulated."[337]

As interpreted in *Brown*, *Machinists* would not preempt the Worker Freedom Act. *Brown* protects the integrity of the congressional judgment that the content of employer speech shall remain unregulated as long as it remains non-coercive. The Worker Freedom Act, by contrast, is not based on any presupposition about the inherent coerciveness (or non-coerciveness) of the content of employer workplace speech. Its enactment and administration are wholly unconcerned with taking sides regarding that controversy. The sole focus of the Worker Freedom Act is the coercive *manner* of the presentation of workplace speech, not its *content*, for it bans employer speech only when it is coerced and forced upon employees at the workplace. In passing the Worker Freedom Act, the state legislature makes a judgment that coerced listening violates employee civil liberties guaranteed by the Constitution. Nothing in the legislative history of the NLRA precludes state action to protect such liberties, and thus the decision in

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[332] *See* Lodge 76, Int'l Ass'n Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140 (1976) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

[333] 128 S. Ct. 2408 (2008).

[334] *Id.* at 2412 (quoting *Machinists*, 427 U.S. at 140) (internal quotation marks omitted).

[335] *Id.* at 2411.

[336] *Id.* at 2414.

[337] *Id.*

Brown provides no basis for concluding that the Worker Freedom Act is *Machinist* preempted.

Once it is understood that state regulation of workplace captive audience meetings through the Worker Freedom Act is fully consistent with Congress's decision that the non-coercive content of employer workplace speech should remain unregulated, there is no basis for finding *Machinists* preemption. First, we do not expect Congress to enact legislation intended to deny the states their traditional role of protecting constitutional freedoms from private infringement or relegating the enjoyment of these freedoms to the "free play of economic forces."[338] Certainly one would not expect such an intent to be manifested through congressional silence.

Second, finding *Machinists* preemption of state efforts to ban coerced workplace listening is at odds with the Act's commitment to ensuring that unionization decisions should be a product of a "free debate on issues dividing labor and management."[339] When a state bans workplace captive audience meetings, it protects captive workers' freedom of the mind, which in turn promotes free choice, which is the goal of the Act. The Act leaves no room for any party to attempt to use superior economic power to manipulate the outcome of unionization decisions.[340]

Finally, there are no grounds to conclude that Congress intended that the captive audience meeting should remain immune from all governmental regulation and subject only to the "free play of economic forces" and the "balance of power between labor and management."[341] In *Belknap, Inc. v. Hale* the Court explained the conduct it was referring to in *Machinists* as "conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes."[342] But such "self-help," which arises in conflicts between an employer and its employees, is illusory prior to unionization. Prior to choosing union representation employees remain atomized because collective cohesion is still forming and the employer's superior economic power over them remains intact.[343] Nor is there any "free play" of economic power when individual employees attempt to contest employer authority in a labor relations system built upon the doctrine of employment at will. When "listen or leave" is the workplace rule and employees lack union representation, employees have no realistic alternative but to succumb

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[338] *See* Lodge 76, Int'l Ass'n Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140 (1976).

[339] *Brown*, 128 S. Ct. at 2413 (quoting Linn v. Plant Guard Workers, 383 U.S. 53, 62 (1966)) (internal quotation marks omitted).

[340] *See* discussion *supra* notes 33-50 and accompanying text.

[341] *Machinists*, 427 U.S. at 146.

[342] 463 U.S. 491, 499 (1983).

[343] *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (2006) (referring to the "[t]he inequality of bargaining power between employers and employees who do not possess the full freedom of association or actual liberty of contract [when dealing with] employers who are organized in the corporate . . . form[] of ownership").

to employer coercion and it is unrealistic to suppose that through the "self-help" *Machinists* anticipates employees could protect their freedom not to listen. Congress certainly was aware of the reality of the "inequality of bargaining power between employees who do not possess . . . actual freedom of contract and employers . . . ."[344] There is no evidence that Congress intended to deny states their traditional role of protecting employees' constitutional rights from private infringement—here the freedom not to listen.

V.
CONCLUSION

A colleague who is not a labor lawyer kindly reviewed this Article prior to publication. When he finished, he remarked, "How employers sold [the right to hold captive audience meetings] as a First Amendment right is a mystery to me . . . ." My colleague's comment suggests that labor law practitioners and academics can all too easily become acculturated to the rules with which we have come to feel comfortable, if for no better reason than their longevity. Interpreting the NLRA as permitting the mandatory workplace captive audience meeting is a good example. Perhaps the larger lesson here is the need for examination of other "established" rules and procedures that similarly have become embedded and accepted over the years. Such a review and "second look" (and revision) is no substitute for congressional labor law reform, but it may produce immediate modest reforms that will make the Act an even better vehicle for effectuating employee free choice and free association.

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344 *Id.*