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## TOWARD THE VIABILITY OF STATE-BASED LEGISLATION TO ADDRESS WORKPLACE CAPTIVE AUDIENCE MEETINGS IN THE UNITED STATES

Paul M. Secunda†

### INTRODUCTION

Private-sector employers in the United States routinely hold mandatory workplace meetings during union organization campaigns to express anti-union views to their employees.<sup>1</sup> Employees must attend these meetings at pain of discharge and may not be able to leave these meetings, ask questions, or espouse pro-union views.<sup>2</sup> Indeed, these captive audience meetings are so effective that American employers are increasingly using this technique to also inform their employees about their political and religious views.<sup>3</sup>

Because unions are generally not guaranteed access to employer property to share their pro-union message with employees,<sup>4</sup> organized labor rightly believes such meetings give employers the ability to effectively intimidate and harass employees during union

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† Assistant Professor of Law, University of Mississippi School of Law. I would like to thank Matt Finkin, Dennis Nolan, Cindy Estlund, Seth Harris, Craig Becker, Jeff Hirsch, and Brent Hunsberger, for their helpful comments and insights on the ideas contained in this essay. All errors or omissions, however, are mine alone. I would also like to extend my appreciation to the Lamar Order of the University of Mississippi School of Law for providing funds to support the research and writing of this essay.

1. One recent study found that 92% of four hundred-studied union campaigns included workplace captive audience meetings. Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, U.S. TRADE DEFICIT REVIEW COMMISSION 81 (2000), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports> (last visited June 9, 2007).

2. See discussion *infra* notes 30-32 and accompanying text.

3. See Lewis Maltby, *Office Politics: Civic Speech Shouldn't Get Employees Fired*, LEGAL TIMES, Aug. 29, 2005 (documenting increased use of political captive audience workplace meetings); see also discussion *infra* Part I.B.

4. See *Lechmere Inc. v. N.L.R.B.*, 502 U.S. 527, 538 (1992); *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

organizational campaigns.<sup>5</sup> And even beyond the issue of relative economic power in organizational campaigns, forcing employees to attend meetings during work to hear their employer's views is simply wrong.<sup>6</sup> It represents the worst type of misuse of employer economic power and interferes with employees' dignitary interests.<sup>7</sup> It is therefore not surprising at all that unions would very much like to see such captive audience meetings prohibited.

So what is being done to address this inequitable state of affairs? Although federal labor law in the United States does not address the ability of employers to express their views to workers on political and religious issues,<sup>8</sup> the U.S. Supreme Court has long interpreted the National Labor Relations Act (NLRA)<sup>9</sup> as permitting employers to hold these captive audience meetings with their employees on labor-oriented issues.<sup>10</sup> Although this has been the state of affairs in the captive audience meeting context for some time,<sup>11</sup> there has been a

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5. See William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 570-71 (1983) (concluding that employers' captive audience speeches have statistically significant effects on voting in union certification elections).

6. As Professor Balkin has observed, "[f]ew audiences are more captive than the average worker." J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (1990).

7. Cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) ("While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it."). See also Maltby, *supra* note 3 ("But when [employers] use their economic power over people's livelihoods to control the political behavior of U.S. citizens, it threatens American democracy.").

8. There are important First Amendment considerations concerning whether such limitations on political and religious speech qualify as reasonable time, place, and manner restrictions, see, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (restrictions on the time, place, or manner of speech must be narrowly tailored to a "significant government interest, and leave open ample alternative channels of communication."); whether employers should have less constitutional protections in the workplace captive audience context, see, e.g., *Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon showing that substantial privacy interests are being invaded in an essentially intolerable manner."); *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 737 (1970) ("In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail."); and whether such laws are content-discriminatory, see, e.g., *Walmart Foods v. N.L.R.B.*, 354 F.3d 870, 875 (D.C. Cir. 2004) (finding California union access law content-discriminatory); but all of these topics are beyond the scope of this essay. The focus here will be on labor-oriented captive audience meetings and whether state law prohibiting such meetings is preempted by federal labor law.

9. 29 U.S.C. §§ 151-169.

10. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L.REV. 1527, 1536-37 (2002) ("The [NLRA] not only protects employers' right to express their opposition to unionization; it also recognizes their right to compel employees to listen to them in 'captive audience' meetings, while excluding union representatives from the workplace altogether."); see also discussion *infra* Part I.A.

11. As discussed in more detail below, employer captive audience meetings were found lawful by the National Labor Relations Board in *Babcock & Wilcox*, 77 N.L.R.B. 577, 578

recent push by organized labor in the United States to prohibit employers from holding captive audience meetings concerning labor-related, political, or religious speech.<sup>12</sup>

Under Worker Freedom Act (WFA) legislation percolating presently in a number of state legislatures,<sup>13</sup> employers would not only be prohibited from holding mandatory sessions during work to express opinions on labor-related, political, and religious issues,<sup>14</sup> but would be liable for retaliating against workers who reported the holding of such sessions.<sup>15</sup> Although a couple of states are close to passing WFA legislation,<sup>16</sup> only modified-legislation in New Jersey, not addressing labor-oriented captive audience meetings, has actually been enacted.<sup>17</sup> And although New Jersey's prohibition on captive audience meetings involving political and religious topics might pose constitutional problems,<sup>18</sup> the focus on this essay is whether an unmodified version of Worker Freedom Act legislation would be preempted by federal labor law.<sup>19</sup>

This essay answers this question in two ways. First, under current labor preemption doctrine and Supreme Court precedent interpreting rights of states to continue to regulate property and contract rights in the labor relations context, courts should find that such state laws are not preempted by the NLRA. Nevertheless, opponents will likely argue that such state captive audience meeting legislation should be

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(1948), and the Supreme Court approved this holding in *N.L.R.B. v. Steelworkers (NuTone & Avondale)*, 357 U.S. 357 (1958). See discussion *infra* Part I.A.

12. AFL-CIO, *Fighting for Workers' Rights*, <http://aflcio.org/issues/legislativealert/stateissues/workersrights.cfm> (last visited June 4, 2007) (“The Worker Freedom Act will give employees the freedom to walk away from these indoctrination meetings—and would bar employers from firing or disciplining workers who choose not to attend or who report unlawful, forced meetings.”).

13. For a discussion of specific state legislation, see discussion *infra* Part II.

14. WFA legislation does not speak specifically about union-oriented speech, but instead defines “political matters” to include discussions on whether or not to join a labor organization. See *infra* note 102 and accompanying text.

15. See, e.g., Connecticut Substitute House Bill No. 7326, § 1(b) (Jan. Session 2007), available at <http://www.cga.ct.gov/2007/FC/2007HB-07326-R000540-FC.htm> (Apr. 19, 2007); Oregon House Bill 2893, <http://www.leg.state.or.us/07reg/measures/hb2800.dir/hb2893.intro.html> (last visited May 15, 2007).

16. As of June 2007, Connecticut and Oregon are closest to passing such legislation. See *infra* notes 99-104 and accompanying text.

17. New Jersey enacted the New Jersey Worker Freedom from Employer Intimidation Act in 2006, N.J.S.A. §§ 34:19-9-34:19-14.

18. See *supra* note 8.

19. This is a crucial question given the vast scope of implied federal preemption under the NLRA. See Estlund, *supra* note 10, at 1530-31 (“The broad implied federal preemption of state and local laws affecting collective labor relations blocks democratically inspired reforms or variations at the state and local level, as well as state common law innovation.”).

found preempted under the *Machinists* line of cases.<sup>20</sup> Under this labor preemption doctrine, federal labor law preempts any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress “to be controlled by the free play of economic forces” in a “zone free from all regulations, whether state or federal.”<sup>21</sup> Opponents of WFA legislation would argue that these laws interfere too greatly with the free play of economic forces left unregulated by the NLRA by placing the state’s thumb on the union’s side of the scale. This would upset the delicate balance of economic weapons that the labor law currently permits during union organizing campaigns.<sup>22</sup>

There are, however, a number of well-known exceptions to the *Machinists* doctrine in the area of state police powers and the regulation of property rights. Under this line of cases, traditional areas of state concern are within the states’ power to regulate and, therefore, not within the scope of NLRA preemption.<sup>23</sup> Either the state can provide for minimum conditions in the workplace under its police powers or place property restrictions on the bundle of property rights that the state grants to its property owners—that is, the bundle of property rights that private property owners possess would not include the use of their property for labor, political, or religious purposes. Under this conception, and consistent with Section 8(c) of the NLRA,<sup>24</sup> management can still inform employees of their views of unionization, but may not force employees into mandatory meetings to hear those views. In this manner, a court deciding a preemption challenge to the Worker Freedom Act should find that the states have the inherent power to pass such laws under principles of federalism.<sup>25</sup>

Nevertheless, given the current conservative political bent and judicial philosophy of the federal judiciary, there is reason to believe that Worker Freedom Act legislation may be found preempted

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20. *Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). *Machinist* preemption and labor preemption doctrine generally is discussed in more detail *infra* Part III.

21. *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076, 1085 (9th Cir. 2006) (en banc).

22. *See, e.g., Waremart Foods*, 337 N.L.R.B. 289, 289 (2001) (“The Respondent asserts that the ability to exclude non-union representatives from its property is the kind of economic weapon that Congress intended to be available to employers and thus is not subject to regulation by the States.”), *vacated on other grounds*, 354 F.3d 870 (D.C. Cir. 2004).

23. *See, e.g., N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939) (finding that under NLRA employer has “legal rights to the possession and protection of its property”).

24. 29 U.S.C. § 158(c). Part I.A examines in detail the free speech protections of Section 8(c) of the NLRA.

25. Indeed, “the strength and breadth of implied labor law preemption seems out of step with the powerful tide of recent federalism decisions.” *Estlund, supra* note 10, at 1574 n.211.

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because of a too-aggressive application of *Machinist* preemption and/or a general unfamiliarity with labor law. Consequently, it is also necessary to answer the initial question of whether WFA legislation would be preempted by going back to first principles and asking whether current labor preemption doctrine should be modified.

Following the pioneering work of Professor Michael Gottesman in this area,<sup>26</sup> this essay renews the call for a reconceptualization of labor preemption doctrine by the Supreme Court. Professor Gottesman has cogently argued that rights protected by federal labor laws come in two varieties—those where the entire field is occupied by federal law (“conduct on a continuum”) and those areas where the federal law just provides some restrictions (“conduct not on a continuum”).<sup>27</sup> Like access to property cases, workplace captive audience meeting cases should fall into the latter category once the minimum conditions of free speech under Section 8(c) are satisfied. That is, once federal labor law is satisfied by permitting the free exchange of ideas on unionization between employers and their employees, the state should then be able to go beyond that floor and provide additional protections to employees to be free from mandatory indoctrination sessions by their employers. And this conception should apply not only to labor-oriented speech, but to the growing use of political and religious captive audience speech by employers as well.

Such a fundamental reconceptualization of labor preemption law, of course, will not happen overnight, and would require the Supreme Court to reconsider the foundations of its labor preemption jurisprudence. Although the Court as currently constituted is unlikely to undertake this process, this essay seeks to plant the seeds for a future time when this type of American labor law reform has a more receptive audience on the Court.

This essay is divided into four sections. Section I examines the current state of federal labor law in the labor-oriented captive audience meeting context and finds there is virtually no constraint on an employer’s ability to use this highly-effective and harassing campaign tactic during union organizational campaigns. Section II explores current state legislative responses sponsored by organized labor and notes the increasing success of these state legislative initiatives. Section III applies traditional labor preemption doctrine

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26. Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

27. *Id.* at 357-59.

and concludes that courts should find such state-based responses to worker captive audience meetings not preempted by the NLRA. Recognizing that WFA legislation could still be found preempted, Section IV renews Professor Gottesman's call for a modified approach to labor preemption doctrine in order to place WFA legislation on a more solid doctrinal foundation.

#### I. FEDERAL LABOR LAW AND WORKPLACE CAPTIVE AUDIENCE MEETINGS

The lack of state action in private-sector workplace captive audience meetings means that workers generally do not have federal constitutional rights to free speech in the workplace.<sup>28</sup> Instead, much of the legal analysis concerning private-sector workplace captive audience meetings in the United States takes place under federal and state statutory law. Even in the public sector, where First Amendment rights sometimes do exist, there has never been any right found to be free from captive audience speech by employers in the workplace.<sup>29</sup> Consequently, workers have historically looked to the federal labor laws when seeking protection from forced attendance at anti-union employer speeches.

##### A. *The Use of Workplace Captive Audience Meetings in Union Campaigns*

Under these federal labor laws, however, workers in the United States remain remarkably unprotected from workplace captive audience speech by their employers. Such captive audience speech occurs when employers require either supervisors to discuss anti-union opinions with their subordinates or when employers require employees to listen to the employer's anti-union message at

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28. See Otis B. Grant, *Law and Perceptions: Internal Investigations and Employee Privacy Interest in Public Sector Employment*, 71 UMKC L.REV. 1, 5 (2002). Somewhat related, some commentators have argued that sexually harassed employees should be considered captive audiences in the workplace and harassers should receive no First Amendment protection for their speech. See, e.g., Balkin, *supra* note 6, at 424 (“[W]e might do well to shift the paradigmatic case of the captive audience from the passengers on the public bus or the child running through stations on the radio dial to the employee working for low wages in a tight job market who is sexually harassed by her employer or co-worker.”). This theory, however, has not been adopted by many courts and the Supreme Court has never extended the constitutional captive audience speech doctrine into the workplace.

29. *But see* Hamilton County Welfare Dept., 3 Ohio Pub. Employee Rep. ¶ 3036, n.5 (May 12, 1986) (“There are conceivable constitutional arguments against public sector captive audiences which do not apply to private sector employers. At 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.”).

mandatory meetings during work time. Although in a formal sense employees are free to walk away from such speech or not attend such meetings, in reality, employees risk being fired if they are considered to be insubordinate to their supervisors by failing to listen them or by not attending anti-union assemblies.<sup>30</sup> Indeed, employees can be lawfully terminated for merely asking questions of their employers during such a meeting<sup>31</sup> or for leaving such meetings without permission.<sup>32</sup> One former member of the NLRB characterized this power of employers to monopolize its workplace for anti-union speeches as “one of the most potent and effective methods by which self-organization of employees [can] be stifled.”<sup>33</sup>

It is therefore hardly surprising that the vast majority of employers faced with a union organizing campaign make anti-union presentations to their workers during mandatory meetings. For instance, a federal government report studied four hundred union elections and found that 92% of these union campaigns involved employers forcing employees to attend captive audience meetings.<sup>34</sup>

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30. The complete power that employers exercise over employees in the workplace and subsequent impact that captive audience speech has on employees is well captured in the THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 125 (1938):

In considering the effect of the employer's conduct upon the self-organization of employees, there must be borne in mind the control wielded by the employer over his employees—a control which results from the employees' complete dependence upon their jobs, generally their only means of livelihood and economic existence. As the natural result of the employer's economic power, employees are alertly responsive to the slightest suggestion of the employer. Activities, innocuous and without significance, as between two individuals economically independent of each other or of equal economic strength, assume enormous significance and heighten to proportions of coercion when engaged in by the employer in his relationships with his employees . . . .

The Supreme Court has also recognized the practical realities of the workplace environment for workers: “Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely . . . [a]nd any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

31. *N.L.R.B. v. Prescott Indus. Prod. Co.*, 500 F.2d 6, 11 (8th Cir. 1974); *see also* *Hicks Ponder Co.*, 168 N.L.R.B. 806, 814 (1967) (upholding employer right to eject vocal pro-union workers who speak out once captive audience meetings has begun).

32. *Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030 (1968); *see also* *F.W. Woolworth Co.*, 251 N.L.R.B. 1111, 1113 (1980) (permitting employer to exclude pro-union employees from captive audience meetings).

33. *Livingston Shirt Co.*, 107 N.L.R.B. 400, 411 (1953) (Member Murdoch, dissenting). More recently, another Board Member, former Chairman Gould, has stated: “[T]he 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).

34. Bronfenbrenner, *supra* note 1, at 81.



The average union campaign had eleven captive audience meetings.<sup>35</sup> Additionally, 78% of the employers studied instructed supervisors to give anti-union messages to their subordinates.<sup>36</sup>

*B. The Legal Status of Workplace Captive Audience Meetings Under Federal Law*

Although American labor law has remained largely fixed in the captive audience area for some fifty years now, there was a previous period of time when workers could seek varying degrees of protection from such workplace speech under the National Labor Relations Act (NLRA or Act).<sup>37</sup> When enacted in 1935 as the Wagner Act,<sup>38</sup> the NLRA had no provisions specifically addressing the intersection between employee organizational rights and employer speech rights.<sup>39</sup> Section 7 of the Wagner Act provided that workers had the right to organize, to collectively bargain, and to engage in concerted activity for mutual aid and protection.<sup>40</sup> Employers were liable under Section 8(1) of the Act if they interfered, coerced, or restrained employees in the exercise of any of these Section 7 rights.<sup>41</sup>

Given this language, the general thought was that employers were supposed to remain neutral during union organizational campaigns.<sup>42</sup> When employers instead forced workers to attend mandatory sessions to hear the employer's anti-union views, the National Labor Relations Board's (NLRB or Board) initial reaction was to say that this was employer activity that interfered with

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35. *Id.*

36. *Id.*

37. 29 U.S.C. §§ 151-169.

38. The National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935).

39. Nevertheless, as early as 1939, the Supreme Court had made clear that employers retained significant property rights even in the face of protected Section 7 activity by employees. See *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939) (finding that under NLRA employer has "legal rights to the possession and protection of its property.").

40. 29 U.S.C. § 157 ("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 concerted activities for the purposes of collective bargaining or other mutual aid or protection.").

41. 29 U.S.C. 158(a)(1). Although under the Wagner Act the interference provisions were initially codified as Section 8(1) and the discrimination provisions as Section 8(3), the Taft-Hartley Amendments in 1947 recodified these employer unfair labor practice sections as Sections 8(a)(1) and 8(a)(3), and added union unfair labor practices under Section 8(b).

42. See Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 366 (1995) ("[T]he N.L.R.B. took the position in its early years—in fact, in its very first case—that the employer should remain neutral during union organizing drives because of its economic power and control over the workplace."). For a view that employers should still have no role in representational campaigns, see generally Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L.REV. 495, 500 (1993).

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employees' rights to organize under Section 7. More formally, the Board established a *per se* rule against all workplace captive audience meetings in *Clark Brothers Co., Inc.*<sup>43</sup> In support of this rule, the Board observed that:

[It] 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 those rights and their enjoyment." 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 so, wholly apart from the fact that the speech itself may be privileged under the Constitution.<sup>44</sup>

With regard to the potential constitutional issues caused by the rule's restraint on employer speech in the workplace, the Board commented: "[The captive audience] was not an inseparable part of the speech, any more than might be the act of a speaker in holding physically the person whom he addresses in order to assure his attention. The law may and does prevent such a use of force without denying the right to speak."<sup>45</sup> In other words, the Board felt it was only regulating employer conduct, not employer speech. The Board also pointed out that the employer had other alternative means for conveying its message about the union to its employees, short of threatening to terminate their employment if they did not attend the mandated meeting.<sup>46</sup>

Any future debate over the merits of the *Clark Brothers* doctrine, however, was superseded by the passage a year later of the Taft-Hartley Amendments of 1947.<sup>47</sup> Taft-Hartley completely changed the dynamics of the workplace captive audience debate in American labor law.<sup>48</sup> Significantly, Congress felt that the Wagner Act was tilted too far in favor of union interests in that it only addressed employees' right to organize and join a union, only set forth employer unfair labor practices, and did not protect employers' speech rights in opposition

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43. 70 N.L.R.B. 802 (1946).

44. *Id.* at 805 (emphasis in original and internal citations omitted).

45. *Id.*

46. *Id.*

47. 29 U.S.C. §§ 141-144, 167, 172-187. The Taft-Hartley Amendments were enacted over the veto of President Truman.

48. Becker, *supra* note 42, at 558 ("Since the Taft-Hartley Act, . . . the Board has refused to separate the compulsion to listen from the freedom to speak.").

to a union campaign.<sup>49</sup> Not only did Taft-Hartley amend the NLRA to emphasize that employees may refrain from any Section 7 activities and to insert union unfair labor practices,<sup>50</sup> but just as importantly it added significant employer speech protections under a new provision, Section 8(c).

Section 8(c) of the Act states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.<sup>51</sup>

As a result of this new provision, employers were now permitted broad free speech and expression rights in the workplace, as long they did not coerce their employees through threats or promises.<sup>52</sup> Not surprisingly, given this robust language, the Board quickly abandoned the *per se* rule against captive audience speech as inconsistent with the new rights granted to employers under Section 8(c).<sup>53</sup>

The Truman Board, however, still sought to regulate the use of captive audience speech in the workplace. Although the Board did not seek to limit the employer's non-coercive speech during captive audience meetings, it did seek to level the playing field by permitting unions on the employer's premise to give presentations on the advantages of unionization. Under the *Bonwit-Teller* doctrine,<sup>54</sup> the Board began in 1951 to require that employers who gave captive audience speeches to provide "equal opportunity" for unions to

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49. See Paul Alan Levy, *The Unidimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L. J. 269, 274 (1985) ("[T]he claim of one-sidedness on the part of the Board prompted Congress in 1947 to enact a law designed to equalize the relationship between corporations and union, the Taft-Hartley Act.").

50. 29 U.S.C. §§ 157, 158(b).

51. *Id.* § 158(c). The Supreme Court has subsequently commented that section 8(c) "merely implements the First Amendment." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

52. Whether employer speech is considered coercive is a somewhat involved issue and is discussed in more detail in *Gissel*, 395 U.S. 575 (threats) and *N.L.R.B. v. Exchange Parts, Inc.*, 375 U.S. 405 (1964) (promises). Because this article assumes that the captive audience speech by employers does not contain unlawful threats or promises, this line of cases is not discussed further.

53. *Babcock & Wilcox*, 77 N.L.R.B. 577, 578 (1948) ("[T]he language of Section 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 in circumstances such as this record discloses."). Indeed, "the legislative history of Section 8(c) contains adverse comment upon the Board's decision in *Clark Bros.*, that a captive audience is *per se* unlawful." *Bonwit-Teller, Inc.*, 96 N.L.R.B. 608, 614 n.12 (1951). Because the literal language of Section 8(c) applies only to unfair labor practice cases and not election cases, instances of employer captive audiences meetings could still have been found to warrant a new election, but the Board never adopted this view of Section 8(c).

54. *Bonwit-Teller, Inc.*, 96 N.L.R.B. 608 (1951), *modified*, 104 N.L.R.B. 497 (1953).

present their side of the story to workers at the employer's facility.<sup>55</sup> The Board reasoned that an employer captive audience speech coupled with a valid no-solicitation rule was tantamount to a discriminatory application of the no-solicitation rule and an unfair labor practice under Sections 8(a)(1).<sup>56</sup> Even apart from this reasoning, the Board felt that unequal union access to employees in the workplace interfered with the employees' "right to hear both sides of the story under circumstances which reasonably approximate equality."<sup>57</sup> Finally, the doctrine was seen as compatible with the free speech provisions of Section 8(c) because the rule did not limit what the employer could say, but only required certain employer conduct in permitting similar access to unions to the employer's facility to make its own pro-union speeches.

Nevertheless, when the composition of the Board became majority Republican two years later,<sup>58</sup> the new Eisenhower Board in *Livingston Shirt Corp.*<sup>59</sup> abandoned the *Bonwit-Teller* equal opportunity doctrine. There, the Board concluded:

[I]n the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but unlawful because of the character of the business), an employer does not commit an unfair labor practice if he makes a preelection

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55. *Id.* at 612 ("[A]n employer who chooses to use his premises to assemble his employees and speak against a union may not deny that union's reasonable request for the same opportunity to present its case, where the circumstances are such that only by granting such request will the employees have a reasonable opportunity to hear both sides.").

56. After the Supreme Court's decision in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945), employers could prohibit union solicitation and distribution by employees during working time, but not during non-working times in non-working areas of the facility without violating Section 8(a)(1). *Id.* at 803. The *Bonwit-Teller* Board felt it a discriminatory application of the no-solicitation rule to permit employers to give speeches to it employees in violation of its lawful no-solicitation rule, but not to give the same right to the union. *Bonwit-Teller, Inc.*, 96 N.L.R.B. at 611.

57. 96 N.L.R.B. at 612.

58. Interestingly, this narrative of the history of the captive audience speech doctrine under federal labor law suggests that the political affiliation of the Board Members played a large role in how Board law developed in this area. Elsewhere, through empirical studies of other Board standards, I have argued that the Board may be less political than most commentators believe. See Paul M. Secunda, *Politics Not As Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 53-54 (2004). Nevertheless, it does appear that in particular divisive areas of labor law, such as the captive speech area, political affiliation of Board Members still plays a predictive role in how the Board decides cases. See Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 711 (2006) ("The only claim made in this Article is that ideology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues.").

59. 107 N.L.R.B. 400 (1953).

speech on company time and premises to his employees and denies the union's request for an opportunity to reply.<sup>60</sup>

In coming to this new conclusion, the Board refused to condition the free speech guarantees of Section 8(c) on giving a union a right to reply on the company's premises.<sup>61</sup> The Board also appeared to place additional emphasis on the employer's property interests to exclude unwanted visitors from its facilities,<sup>62</sup> finding that unions had equal opportunity to engage in comparable captive audience speech at their own union halls,<sup>63</sup> and that, "one party [need not] be so strangely openhearted as to underwrite the campaign of the other."<sup>64</sup> All of this was the start of a trend of denying union access to employer property, as by the U.S. Supreme Court's 1956 opinion in *N.L.R.B. v. Babcock & Wilcox*,<sup>65</sup> union organizers were not only being denied the opportunity to respond to employer captive audience speech in the workplace, but more generally from coming on to the employer's property to distribute union literature and solicit membership.<sup>66</sup>

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60. *Id.* at 409.

61. *Id.* at 406 ("If the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation.").

62. *Id.* ("We do not believe that unions will be unduly hindered in their right to carry on organizational activities by our refusal to open up to them the employer's premises for group meetings, particularly since this is an area from which they have traditionally been excluded, and there remains open to them all the customary means for communicating with employees."); *see also id.* ("The majority in *Bonwit Teller* did not cite, nor have we been able to find, any support in the statutory language or legislative history for holding that the employer who exercises his own admitted rights under the statute thereby incurs an affirmative obligation to donate his premises and working time to the union for the purpose of propagandizing the employees.").

63. *But see id.* at 418 (Member Murdock, dissenting) ("[T]he natural prominence of the plant premises as an extremely effective forum for dissemination of employer antiunion views had, long before the advent of *Bonwit Teller*, been recognized as a fact of industrial life. To be short, this is true not because of any decision of this Board but simply because that is where the employees work."); *id.* at 423 ("In contrast to the means open to the organizing employees, the employer speech on company time and property has the tremendous advantage of securing the undivided attention of all employees—interested, passive, and antagonistic. A carefully planned, extensive, and well-organized speech, under these circumstances, is hardly on a par with the limited time, argument, and opportunity open to the union.").

64. *Id.* ("[A]n employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees."). *But see id.* at 410-11 (Member Murdock, dissenting) ("I cannot believe that the majority's action in holding that an employer may lawfully monopolize the most effective forum for persuading employees is consistent with the declared congressional policy which is not that of neutrality but of 'encouraging the practice and procedure of collective bargaining.'").

65. 351 U.S. 105 (1956).

66. *Id.* at 113. The Court did allow nonemployee access to employer property to distribute union literature and solicit employee where the union was unable to reach workers through other available channels of communication, *id.* at 112, but this exception has been largely limited to such unusual settings as remote lumber camps. *See Lake Superior Lumber Corp.*, 70 N.L.R.B. 178 (1946), *enforced*, 167 F.2d 147 (6th Cir. 1948). And although the Board's union access rules have been liberalized at times over the years, *see, e.g.*, *Jean Country*, 291 N.L.R.B. 11 (1988), *Babcock & Wilcox's* more stringent limitation on nonemployee union solicitation and distribution on employer property was most recently expanded upon by the Supreme Court in

The Supreme Court signaled its approval of the *Livingston Shirt* decision in *N.L.R.B. v. Steelworkers (NuTone & Avondale)*.<sup>67</sup> In *NuTone & Avondale*, the Court agreed that the employer, in most cases, had no obligation to provide access to its property to the union for speeches to employees.<sup>68</sup> There, the Court stated that, “the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it.”<sup>69</sup>

Nonetheless, and somewhat consistent with *Babcock & Wilcox*,<sup>70</sup> the Court did hold open the prospect that unions may gain access to an employer’s premises to convey a pro-union message if there is a showing by the union that they are “truly diminished” in their ability to communicate with employees. The Court did not provide a hard and fast rule for when such circumstances might exist, but instead left such determinations to the industrial expertise of the Board in individual cases.<sup>71</sup> Not surprisingly, however, there have been few cases over the years that have qualified for this limited exception.<sup>72</sup> As a result, while employers may exempt themselves from their own no-solicitation rules<sup>73</sup> and regularly use captive audience speeches as part of their anti-union campaign arsenal, unions and their supporters remain largely without the opportunity to respond to such speeches under similar circumstances and conditions.

Exceptions to this broad rule permitting employer captive audience speech without the ability for union response comes today in only three narrow situations: (1) where the employer or union wants

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*Lechmere, Inc. v. N.L.R.B.*, which eliminated the necessity to balance employers’ property interests against unions’/employees’ organizational rights. 502 U.S. 527, 535 (1992).

67. 357 U.S. 357 (1958).

68. *Id.* at 363 (“Certainly the employer is not obliged voluntarily and without any request to offer the use of his facilities and the time of his employees for pro-union solicitation.”). The Court further observed that by allowing such union solicitation on its premises it may be accused on dominating or assisting a labor organization in violation of Section 8(a)(2). *Id.* (citing 29 U.S.C. § 158(a)(2)).

69. *Id.* at 364.

70. Unlike *Babcock & Wilcox*, the Court in *NuTone & Avondale* does not appear to draw a distinction between nonemployee and employee speech, a distinction which is fundamental in the union solicitation and distribution context. See DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 84 (2d ed. 2005).

71. *Id.* at 363-64.

72. See, e.g., *S&H Grossinger’s*, 156 N.L.R.B. 233 (1965), *enforced in part*, 372 F.2d 26 (2d Cir. 1967) (finding *NuTone and Avondale* equal opportunity exception applied where many employees were isolated in resort community).

73. See *James Hotel Co.*, 142 N.L.R.B. 761 (1963) (holding that employer may disregard own non-solicitation rule).

to hold a captive audience speech within twenty-four hours of a union election,<sup>74</sup> (2) where the employer has combined coercive workplace captive audience speech with an unlawful no-solicitation rule,<sup>75</sup> and (3) where “access” remedies for the union are appropriate in extraordinary cases involving particularly egregious unfair labor practices<sup>76</sup> and “access is needed to offset harmful effects that have been produced by that conduct.”<sup>77</sup> Subsequent attempts to argue for union access to employer’s premises to counter anti-union captive audience speeches beyond these limited circumstances have fallen on deaf ears at the Board over the years.<sup>78</sup>

Short of fuller-access rights to counteract captive audience speech, the Board has thrown unions a bone in the form of so-called *Excelsior Underwear* lists.<sup>79</sup> These employer-provided lists furnish

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74. *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953); *see also* *Bro-Tech Corp.*, 330 N.L.R.B. 37 (1999) (applying *Peerless Plywood* rule to use of sound trucks). The purpose of this rule was to preserve the “laboratory conditions” of the election so that employees could exercise their free choice in deciding whether to be presented by a union. *See General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948) (“An election can serve its true purpose only if the surrounding circumstances enable employees to register [a free and untrammled] choice for or against a bargaining representative.”).

75. *Montgomery Ward & Co.*, 145 N.L.R.B. 846 (1964), *enforced as modified*, 339 F.2d 889 (6th Cir. 1965) (finding Section 8(a)(1) violation where employer combined a coercive captive audience speech during work time with an *unlawful* non-solicitation rule that did not permit union solicitation during employee non-working hours in non-working areas). *But see* *May Department Stores Co.*, 136 N.L.R.B. 797 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963) (refusing to enforce unfair labor practice finding where an employer gave a captive audience speech *and* maintained a *lawful* no-solicitation policy because Board did not consider other alternative methods the union had for communicating with employees).

76. *See, e.g., N.L.R.B. v. H.W. Elson Bottling Co.*, 379 F.2d 223, 227 (6th Cir. 1967) (permitting as a remedy union being able to address employees on company premises in response to employer captive audience speech). *But see* *N.L.R.B. v. S & H Grossinger’s*, 372 F.2d 26, 30-31 (2d Cir. 1967) (denying union equal time on company premises to address employees during working time). Overall, a remedy which requires the company to pay employees to listen to a union speech is considered “strong medicine” for flagrant employer violations and is consequently rare. *See N.L.R.B. v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).

77. *United Steelworkers of America v. N.L.R.B.*, 646 F.2d 616, 638 (D.C. Cir. 1981). In such cases, “[i]f union access is needed to dissipate those effects, access may be granted even though the union has alternative means of communicating with employees.” *Id.*

78. *See* *Litton Systems, Inc.*, 173 N.L.R.B. 1024, 1030 (1968) (finding employees have no rights under NLRA to leave meetings which they are required by management to attend on company time and property); *General Electric Co.*, 156 N.L.R.B. 1247 (1966) (refusing to return to *Bonwit-Teller* doctrine and set aside a union election where employer made anti-union speeches to employees at non-mandatory meetings and union was denied access to facility to address employees). In *General Electric*, the Board indicated that it wished to see if the use of *Excelsior Underwear* list, *see infra* notes 79-80 and accompanying text, would alleviate some of the union’s organizational concerns. Forty years later, the Board has not revisited whether it makes sense to return to the *Bonwit-Teller* rule in light of the continuing hurdles unions face in being able to organize employees even with the use of *Excelsior Underwear* lists. Former Board Chairman Gould recently pointed out that the rationale of *Livingston Shirt* was left untouched by the Clinton Board. Gould, *supra* note 33, at 484 n.111 (citing *Beverly Enterprises-Hawaii, Inc.*, 326 N.L.R.B. 335, 361 (1998) (Gould, Chairman, dissenting)).

79. 156 N.L.R.B. 1236 (1966).

unions that have filed a petition for a representation election the names and addresses of all employees who are eligible to vote in that election.<sup>80</sup> Of course, it is hardly surprising that union organizers do not find this method of counteracting captive audience speech nearly as effective as being able to address employees directly on the employer's premises.<sup>81</sup>

More recently, however, unions have employed other techniques to gain access to employees at targeted employers. For instance, unions have been using email, blogs, and the internet to communicate with workers. The efficacy of these methods of communicating with workers is yet to be determined and there are still issues over whether the employer must permit the union the use of its electronic communications.<sup>82</sup> Unions have also sought additional communication between their organizers and employees by having their organizers apply for jobs with the company they are seeking to organize. Such "salting" practices have been upheld by the Supreme Court, but again do not seem to effectively counteract the power of the employer captive audience meeting.<sup>83</sup>

Indeed, empirical studies indicate that even alternative methods for unions to communicate with workers are not nearly effective as employer captive audience meeting.<sup>84</sup> In short, unions are playing a

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80. *Id.* at 1239-40 ("[W]ithin 7 days after the Regional Director has approved a consent-election agreement . . . or after the Regional Director or the Board has directed an election . . . , the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case."). The *Excelsior Underwear* list is seen as helping employees vindicate their organizational rights without raising the same property right issues in cases like *NuTone & Avondale* and *Lechmere*.

81. One need only consider a scenario in which the employer is located in a heavily-populated urban center and employees live spread out across the metropolitan area. The resources it takes to travel to each employee home or to otherwise contact them is a substantial hurdle to being effectively able to apprise them of arguments in favor of unionism. Nevertheless, the Board has refused to adopt a "big city" access rule. See *Monogram Models, Inc.*, 192 N.L.R.B. 705 (1971).

82. On March 27, 2007, the Board took the unusual step of hearing oral argument on this issue in the case of *The Guard Publishing Company, d/b/a The Register-Guard*. See Jeffrey M. Hirsch, *Register-Guard Oral Argument*, WORKPLACE PROF BLOG, Mar. 27, 2007, [http://lawprofessors.typepad.com/laborprof\\_blog/2007/03/registarguard\\_o.html](http://lawprofessors.typepad.com/laborprof_blog/2007/03/registarguard_o.html) (last visited June 11, 2007). See also generally Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEORGE WASHINGTON L. REV. (forthcoming 2008); Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000).

83. *N.L.R.B. v. Town & Country Elec. Co.*, 516 U.S. 85 (1995). The effectiveness of the salting strategy has been recently compromised by the Second Bush Board's holding that the burden of proof falls on the salt to show the damage caused by an employer's discriminatory failure to hire or discharge. See *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. No. 118 (2007).

84. See generally JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 90-92 (1976) (based on organizing campaigns study, finding that only about one-third of employees attended union-sponsored meetings held away from the employer's



constant game of catch-up. With this current state of affairs, the labor movement has considered state statutory alternatives for protecting employees from the impact of captive audience speech in the workplace.<sup>85</sup>

*C. Political and Religious Expansion of American Workplace  
Captive Audience Speech*

In addition to the classic use of captive audience speech by employers to defeat union campaigns, there is increasing evidence that employers are also engaging in political and religious captive audience speech in the workplace. During these sessions, employees are forced, at the pain of losing their jobs, to listen to their employer's perspective on the latest political and religious issues of the day.

For instance, during the last presidential election, the National Association of Manufacturers sought to have employers use their workplaces to have meetings with their employees to discuss partisan political issues.<sup>86</sup> Employees were urged to act in their employer's best interest by not voting for unacceptable candidates.<sup>87</sup> These meetings were not voluntary and employees could lose their jobs by not attending. As one commentator has observed, such political captive audience speeches are highly effective because "[p]eople 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."<sup>88</sup>

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workplace). *But see* discussion *supra* note 82-83 and accompanying text on newly-emerging techniques for unions to communicate with workers.

85. Presently pending federal legislation may also reinvigorate union organizational rights. On March 1, 2007, the House approved the Employee Free Choice Act (EFCA), H.R. 800, 110th Cong. (2007). *See* Michael Newman & Shane Crase, *The Future of Secret Ballot Elections Under the National Labor Relations Act*, 54 *FED. LAW.* 14, 14 (2007). The EFCA would, among other things, require unions to be recognized based on signed authorization cards. *Id.* By not having to go through the formal union election process, the EFCA might go a long way in undermining the importance of employer captive audience meetings. Similarly, neutrality agreements, under which employer agree to remain neutral in a union organization campaign, would effectively eliminate or modify the use of anti-union captive audience speech. *See* Cynthia Estlund, *Something Old, Something New: Governing the Workplace By Contract Again*, 28 *COMP. LAB. L. & POL'Y J.* 351, 357 (2007) ("A neutrality agreement aims to achieve by contract many of the reforms that unions have failed to secure by statute, such as organizer access to the workplace and restrictions on anti-union campaigns and 'captive audience' meetings."). Given the current political environment, it is unlikely, however, that the EFCA will be enacted any time soon. *Accord id.* at 352-53.

86. Center for Policy Alternatives, *Worker Freedom from Mandatory Meetings*, available at <http://www.stateaction.org/issues/issue.cfm/issue/WorkerFreedom.xml> (last visited June 9, 2007).

87. *Id.*

88. Maltby, *supra* note 3.

In addition to political speeches, there is increasing evidence that employers are also engaging in more religious proselytizing at work during captive audience meetings.<sup>89</sup> Evangelical Christian organizations are offering Christian ministry services for employers to provide to their employees during work hours.<sup>90</sup> Prayer breakfasts, faith-based training and education, and requests for information about employees' religious affiliations are becoming part of the American workplace.<sup>91</sup> One indication of the increasing prevalence of religion in the American workplace is the growth of Marketplace Ministries, Inc., which now has 1700 chaplains who make on-site visits to 300 companies in 38 states.<sup>92</sup> Although there are limits on the ability of employers to proselytize in the workplace under Title VII and parallel state anti-discrimination law,<sup>93</sup> the relative lack of cases in this area suggest that employees do not yet feel comfortable fighting back against these workplace practices.

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89. Center for Policy Alternatives, *supra* note 86.

90. *Id.*

91. *Id.*

92. Stephen Singer, *Conn. Considers Bill to Prevent Proselytism in the Workplace*, AP, Mar. 11, 2006, available at [http://www.christianpost.com/article/20060311/19361\\_Conn.\\_Considers\\_Bill\\_to\\_Prevent\\_Proselytism\\_in\\_the\\_Workplace.htm](http://www.christianpost.com/article/20060311/19361_Conn._Considers_Bill_to_Prevent_Proselytism_in_the_Workplace.htm) (last visited June 9, 2007). But the founder of the Marketplace Ministries group insists: "We're not there to proselytize . . . I don't take my faith to harass you or hurt you or make you feel inferior." *Id.*; see also Neela Banerjee, *At Bosses' Invitation, Chaplains Comes Into Workplace and Onto Payroll*, N.Y. TIMES, Dec. 4, 2006, at A16, available at <http://select.nytimes.com/gst/abstract.html?res=F30813FA345A0C778CDDAB0994DE404482> (last visited June 9, 2007) ("From car parts makers to fast food chains to financial service companies, corporations across the country are bringing chaplains into the workplace. At most companies, the chaplaincy resembles the military model, which calls for chaplains to serve the religiously diverse community before them, not to evangelize.").

93. Title VII prohibits religious discrimination in the workplace, see 42 U.S.C. § 2000e-2(a), and also requires employers to accommodate the religious practices of employees to the extent that it does not cause an undue burden to the employer. *Id.* at § 2000e(j); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). There is a good argument that employer-sponsored religious proselytizing could rise to the level of unlawful religious harassment if it otherwise satisfied the elements for a hostile work environment claim under Title VII. See Michael D. Moberly, *Bad News for Those Proclaiming the Good News: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1, 61 (2001) (applying NLRA-based approach to regulate workplace proselytizing); Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, 31 COLUM. J.L. & SOC. PROBS. 39, 55 (1997) ("If an employer or co-worker attempts to impose his religious beliefs on others and does so in a constant and pervasive manner sufficient to create hostility, those targeted should not be forced to endure the imposition without being able to take legal measures to end such activity."). But see *Meltebeke v. Bureau of Labor & Industries*, 903 P.2d 351, 363 (Or. 1995) (under Oregon anti-discrimination law, holding that employer must know that that religious proselytizing created an intimidating, hostile or offensive working environment). Indeed, the Equal Employment Opportunity Commission (EEOC) is of the long-held view that workplace proselytization can amount to unlawful harassment in appropriate circumstances. See EEOC Dec. No. 72-1114, 4 Fair Empl. Prac. Cas. (BNA) 842, 842 (Feb. 18, 1972).

Consequently, organized labor has sought not only to protect employees against labor-oriented captive audience meetings at work, but also against political and religious intimidation and pressure. The states are starting to respond to this need by considering Workplace Freedom Act legislation.

## II. THE RISING TIDE OF STATE WORKPLACE CAPTIVE AUDIENCE LEGISLATION

Although employer captive audience speech remains largely unregulated under the NLRA as discussed in the previous section, there has been significant legislative movement on the state level in the past few years to pass laws that would prohibit captive audience meetings involving political, religious, or labor-oriented speeches.<sup>94</sup> The same debates at the Board about employer ability to give such workplace speeches from fifty years ago continue today between business and labor lobbyists in this new battleground. Employers believe that such laws would amount to a constitutional infringement on their free speech rights to communicate with their workers and would be inconsistent with existing federal labor law. Unions respond that such legislation does not bar employers from holding such meetings, only from mandating employee attendance, and employees should not be forced to listen to speech they do not want to hear.<sup>95</sup>

Following the lead of the AFL-CIO,<sup>96</sup> a number of states have considered Worker Freedom Act (WFA) legislation.<sup>97</sup> This legislation

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94. One of the sponsors of one such captive audience bill introduced in Washington explained the impetus behind outlawing captive audience meetings in the workplace this way: "[Mandatory employment meetings are] one of the reasons we've seen such a decline in private-sector unionism. What we're trying to do is restore some balance." See Ralph Thomas, *Labor Lobbyists Push Union Bill; Quick Passage Sought - It Would Ban Companies from Requiring Attendance at Organization Meetings*, SEATTLE TIMES, Mar. 14, 2007, at B2.

95. For examples of the views of proponents and opponents of such state legislation, see the Nature and Sources of Support and Opposition in the Connecticut Judiciary Committee's Joint Favorable Report on HB-7326 (Apr. 3, 2007), available at <http://www.cga.ct.gov/2007/JFR/H/2007HB-07326-R00JUD-JFR.htm> (last visited June 4, 2007).

96. *Worker Freedom from Employer Intimidation Act Goes Into Effect Immediately*, JACKSON LEWIS LEGAL UPDATE, Aug. 16, 2006, <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=979> (last visited May 15, 2007) (stating that the newly enacted New Jersey Workplace Freedom law stems from the AFL-CIO's model Freedom from Employer Intimidation Act).

97. There are also so-called "State Financial Accountability Acts" which prohibit public or private employers from using state funds "to assist, deter, or promote" union organizing. See, e.g., Cal. Gov't Code §§ 16645-16649 (forbidding California employers who receive state grants or funds in excess of \$10,000 from using such funding to "assist, promote, or deter union organizing"). Such laws have been recently found not to be preempted by the NLRA by the en banc Ninth Circuit in *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006) (en banc), petition for cert. filed, 75 U.S.L.W. 3369 (U.S. Jan. 5, 2007) (No. 06-939), and the Second Circuit in *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006). Although such laws

would “give employees the freedom to walk away from political or religious indoctrination meetings—and would bar employers from firing or disciplining workers who choose not to attend or who report unlawful forced meetings.”<sup>98</sup> Generally, it is clear in most of these bills that speech on “political matters” includes speech on labor organizing.<sup>99</sup> None of these laws have yet to be enacted. States with current Worker Freedom Act legislation with the best chance of being enacted include Connecticut and Oregon.<sup>100</sup>

For instance, in Connecticut, the proposed captive audience bill, the Freedom in the Workplace Act, would prohibit an employer from requiring employees to attend an employer-sponsored meeting when the primary purpose is to communicate the employer’s opinion about religious or political matters.<sup>101</sup> “Political matters” are further defined to include the decision to join or not join a labor organization,<sup>102</sup> though the legislation does not seek to impair rights under a collective

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could also help in preventing employee captive audience meetings, their focus is both broader and narrower than captive audience bills; broader in applying to many more labor activities, but narrower in only applying to employers that receive state funds. They also concern legislation that potentially prevents speech as opposed to just prohibiting attendance at mandatory workplace meetings. Because these cases raise substantially different issues under preemption analysis, these cases are not further focuses on in this essay.

98. AFL-CIO, *2007 State Working Families Agenda*, <http://www.aflcio.org/issues/legislativealert/stateissues/upload/WFAGenda2007.pdf> (last visited May 15, 2007). The AFL-CIO states that, “[a]t least 9 states are expected to consider legislation to protect workers’ freedom in 2007.” AFL-CIO, *Fighting for Worker’s Rights*, <http://www.aflcio.org/issues/legislativealert/stateissues/workersrights.cfm> (last visited May 15, 2007).

99. See *infra* note 102 and accompanying text.

100. As of early June 2007, the Oregon Worker Freedom Act has passed the Oregon House and is awaiting action by the Senate. Oregon House Bill 2893, <http://www.leg.state.or.us/07reg/measures/hb2800.dir/hb2893.intro.html> (last visited May 15, 2007); see also Brent Hunsberger, *Unions Seek New Ally: The Law*, THE OREGONIAN, May 11, 2007, <http://www.oregonlive.com/business/oregonian/index.ssf?/base/business/11788900037310.xml&coll=7> (last visited May 15, 2007). Similarly, Connecticut Worker Freedom legislation is awaiting further action. Connecticut Substitute House Bill No. 7326 (Jan. Session 2007), available at <http://www.cga.ct.gov/2007/FC/2007HB-07326-R000540-FC.htm> (Apr. 19, 2007). Similar bills have recently failed in Colorado and Washington. See Colorado General Assembly, Summarized History for Bill Number HB06-1314, [http://www.leg.state.co.us/CLICS2006A/csl.nsf/fsbillcont3/9A96E6C3FF2C2B13872570E00064ABEB?Open&file=1314\\_enr.pdf](http://www.leg.state.co.us/CLICS2006A/csl.nsf/fsbillcont3/9A96E6C3FF2C2B13872570E00064ABEB?Open&file=1314_enr.pdf) (last visited May 10, 2007); WSLC Legislative Update—March 16, 2007, *Dead or Alive... Still Wanted*, <http://www.wslc.org/legis/07lu0316.htm> (last visited May 10, 2007).

101. Connecticut Substitute House Bill No. 7326, § 1(b) (Jan. Session 2007), available at <http://www.cga.ct.gov/2007/FC/2007HB-07326-R000540-FC.htm> (Apr. 19, 2007). Exceptions are made for religious or political matters which the employer by law must discuss with its employees, for political and religious employers, for higher education institutions engaged in regular coursework, and for casual conversations between employer and employees in the normal course of the employee’s duties. *Id.* § 1(b), (f).

102. *Id.* § 1(5).

bargaining agreement.<sup>103</sup> Moreover, employees who are disciplined for making a good-faith report about an unlawful workplace captive audience meeting are provided with a private whistle blower right of action under which they may be entitled to treble damages and attorney's fees.<sup>104</sup>

As of early June 2007, the bill has been approved by the Labor and Public Employees, Appropriations, and Judiciary Committees of the Connecticut General Assembly and is awaiting further legislative action.<sup>105</sup> If it is enacted, it is scheduled to be effective on October 1, 2007.<sup>106</sup> Nevertheless, the Connecticut Officer of Legislative Research (OLR) has expressed concern that if legislation seeks to eliminate labor-oriented captive audience meetings, such legislation might be preempted by the NLRA.<sup>107</sup> In this regard, the OLR concluded that, "it appears likely that, based on the history of the NLRA and court rulings, that the NLRA would preempt the bill's provisions as they relate to labor organizing."<sup>108</sup>

Likely responding to these same preemption concerns, New Jersey enacted a modified Worker Freedom Act in 2006, the New Jersey Worker Freedom from Employer Intimidation Act.<sup>109</sup> This law does not seek to regulate captive audience meetings related to labor organizing as the Connecticut bill does. Instead, the New Jersey legislation only makes it unlawful for any employer to force its employees to attend employer-sponsored meetings whose purpose is to discuss the employers' opinions on religious and political matters.<sup>110</sup>

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103. *Id.* § 1(e).

104. *Id.* § 1(d). Such an action must be brought within ninety days of the unlawful meeting.  
*Id.*

105. See Connecticut General Assembly, H.B. No. 7326 Bill History, [http://search.cga.state.ct.us/dtSearch\\_lpa.html](http://search.cga.state.ct.us/dtSearch_lpa.html) (last visited June 9, 2007) (must enter "bill status" and search for "7326").

106. Connecticut Substitute House Bill No. 7326, § 1 (Jan. Session 2007), available at <http://www.cga.ct.gov/2007/FC/2007HB-07326-R000540-FC.htm> (Apr. 19, 2007).

107. OLR Research Report, *Captive Audience Prohibitions and Federal Preemption*, <http://www.cga.ct.gov/2006/rpt/2006-R-0204.htm> (last visited May 15, 2007).

108. *Id.*

109. N.J.S.A. §§ 34:19-9-34:19-14.

110. *Id.* § 34:19-10 ("No employer or employer's agent, representative or designee may, except as provided in section 3 of this act, require its employees to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters.") (internal citation omitted). The New Jersey legislature went out of its way to make clear that it was not seeking to regulate speech, but only conduct. Under the law, employers can still converse with their employees in a voluntarily manner over such issues as long as the "employer notifies the employees that they may refuse to attend the meetings or accept the communications without penalty." *Id.* § 34:19-10. Similar exceptions discussed with regard to the Connecticut legislation also exist under the New Jersey law, see *id.* §§ 34:19-11(a), §

In the New Jersey bill, however, “political matters,” does not include meetings concerning the decision to join a labor organization.<sup>111</sup>

The absence of labor organizations from the New Jersey law was not an oversight. Indeed, before being enacted, the legislature amended the bill to remove the words “labor organization,” and a definition for that phrase, from the bill.<sup>112</sup> As a result, employers may continue to hold mandatory captive audience meetings to express their anti-union views during unionization drives.<sup>113</sup> And although it is still possible that the New Jersey law will be challenged on constitutional grounds as impermissibly interfering with employer speech,<sup>114</sup> without the labor language it does not raise labor preemption issues.

But what if Connecticut, Oregon, or another state passes a version of the Worker Freedom Act that does preclude employers from holding labor-oriented captive audience meetings? The next section considers whether such legislation would be preempted by the NLRA under current labor preemption doctrine.

### III. THE CURRENT STATE OF FEDERAL LABOR PREEMPTION DOCTRINE

When discussing current labor preemption doctrine in the United States, and the move to state-based legislative responses for what ails American labor relations law, one cannot avoid a sense of irony.<sup>115</sup> When Congress initially enacted the NLRA in 1935, state courts and legislatures were very pro-employer, and the labor movement sought

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34:19-11(b)(1)-(3), as well as similar remedial provisions for whistle blowers. *See id.* §§ 34:19-12-34:19-14.

111. *See id.* § 34:19-9.

112. *See* Worker Freedom from Employer Intimidation Act, As reported by the Senate Labor Committee on February 6, 2006, with amendments, <http://www.judiciary.state.nj.us/legis/2006c53.pdf> (last visited May 15, 2007).

113. “Significantly, while the Act stems from the AFL-CIO’s model Freedom from Employer Intimidation Act, drafters of the New Jersey law eliminated the phrase ‘labor organizations’ from the Act’s definition of ‘political matters.’ Consequently, employers may continue to hold mandatory captive-audience speeches to communicate with employees their position on unions without running afoul of the Act.” *Worker Freedom from Employer Intimidation Act Goes Into Effect Immediately*, JACKSON LEWIS LEGAL UPDATE, Aug. 16, 2006, <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=979> (last visited May 15, 2007).

114. The question of whether the New Jersey law’s prohibitions on employer captive audience meetings for political and religious speech are constitutionally valid will be left for another day as it is beyond the present scope of this essay. *See supra* note 8.

115. Gould, *supra* note 33, at 489 (“Ironically, the preemption doctrine was thought to implement the principles of the statute more effectively inasmuch as repressive state regimes were ousted from the jurisdiction over strikes, picketing and other forms of concerted activity.”).

broad protections from the new federal labor laws.<sup>116</sup> At the time, federal labor law sought to proactively encourage unionization and collective bargaining between employers and their employees.<sup>117</sup>

Starting with the enactment of the Taft-Hartley Amendments of 1947, however, the federal government's orientations toward unionization became decidedly neutral, with the emphasis of the new amendment being on the employees' ability to exercise free choice "in laboratory conditions"<sup>118</sup> to decide whether they wished to be represented by a union.<sup>119</sup> Even more recently, with the increased politicization of the National Labor Relations Board, especially by the second Bush administration,<sup>120</sup> federal labor law has been interpreted to favor employers of many issues considered essential to organized labor. The surprising upshot of all this labor history is that there has been an increasing push by the labor movement to decrease the scope of labor preemption to permit state legislation to provide union protections that federal labor law no longer does.<sup>121</sup>

#### A. *A Brief Primer on American Labor Preemption Law*

In its simplest form,<sup>122</sup> labor preemption doctrine deals with the conflicts that inevitably arise between federal labor law and state laws and regulations. Based on the Supremacy Clause of Article VI of the U.S. Constitution,<sup>123</sup> where federal and state labor laws collide, the state law in question must give way in favor of the federal scheme. In

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116. Gottesman, *supra* note 26, 378 n. 90 ("The [NLRA] was enacted out of dissatisfaction with state treatment of labor relations, and Section 7 stands as a declaration of 'rights' independently of the prohibitions on employer interference appearing in Section 8.").

117. Estlund, *supra* note 10, at 1533.

118. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.").

119. Estlund, *supra* note 10, at 1534 ("Taft-Hartley turned away from the forthright endorsement of collective bargaining and reframed the basic policy of the Act as favoring employee 'free choice' with respect to unionization and collective bargaining.").

120. For the view that the second Bush Board is one of the most politicized in Board's history, see Gould, *supra* note 33, at 470 ("The Bush II Board has pushed matters to one end of the continuum. The tilt on the seesaw has become the topsy-turvy process of an upside-down Ferris wheel.").

121. Not everyone is in favor of depending on states more for labor law protection. *Id.* at 490 ("'Red' states like Mississippi, North Carolina, South Carolina, Alabama, and the like are forgotten in this equation. Thus, state legislation could repress workers under this antipreemption scheme and consequently, these ideas are misguided.").

122. There is actually nothing "simple" about American labor law preemption. See ARCHIBALD COX ET AL., LABOR LAW: CASES & MATERIALS 939 (13th ed. 2001) ("Federal-state preemption issues are difficult to resolve in most substantive areas of the law, but they are particularly complicated in the area of labor-management relations.").

123. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall made in Pursuance thereof . . . shall be the supreme Law of the Land.").

addition, the Commerce Clause<sup>124</sup> has been interpreted to give Congress an almost limitless right to legislate in the labor relations area.<sup>125</sup> Thus, Congress could have chosen to occupy the field of labor relations law exclusively, but it has never exercised its full powers in this regard, leaving the states free to pass many state and local laws and regulations that apply to the workplace.<sup>126</sup> The difficult issue that remains, however, is: What is the preemptive intent of the NLRA with regard to potentially inconsistent, parallel state labor laws?<sup>127</sup> The fact that the NLRA does not have an express preemption provision only serves to complicate the answer to this question.<sup>128</sup>

To clarify where the preemption line may lie, it is helpful to understand that the Supreme Court has set forth two guiding principles or themes in its labor preemption decisions: (1) the need to avoid conflicts in substantive rights; and (2) the need to protect the primary jurisdiction of the NLRB.<sup>129</sup> With regard to guarding against conflict between state and federal labor law, state laws have been found preempted under at least four basic circumstances: (1) where state laws restrict or potentially restricts the exercise of rights under Section 7 of the NLRA, (2) where state laws permit or potentially permit conduct that is restricted by the unfair labor practice provisions of Section 8, (3) where state laws provide a different remedial scheme than federal labor law, and (4) where state laws seek to regulate activity that Congress purposefully chose to leave unregulated.

On the other hand, the complementary doctrine of primary jurisdiction brings to bear familiar administrative law concepts. Most importantly, that Congress has created the NLRB to administer and implement the NLRA and has granted primary jurisdiction to the

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124. *Id.* art. 1, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”).

125. *Brown v. Hotel & Restaurant Employees Int’l Union Local 54*, 468 U.S. 491, 501 (1984); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *see also Howell Chevrolet Co. v. N.L.R.B.*, 346 U.S. 482 (1953) (upholding application of NLRA to small local retailers of automobiles).

126. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1955) (“By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause.”).

127. When deciding issues of preemption, the purpose of Congress in enacting the NLRA is the “ultimate touchstone.” *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

128. Even the Court has commented on the obtuseness of the statute: “[The NLRA] leaves much to the states, though Congress has refrained from telling us how much.” *Garner v. Teamsters Local No. 776*, 346 U.S. 485, 488 (1953). *See also Gottesman, supra* note 26, at 374 (“The Court has found nothing on the face of the statute, nor in the legislative history, that reflects an express decision by Congress one way or the other respecting the survival of state laws.”).

129. *COX ET AL., supra* note 122, at 940.



NLRB, as the court of first resort, to adjudicate disputes that arise under the statute.<sup>130</sup> This means that labor and management must first use the NLRB to resolve their labor relations disputes. This primary reliance on the NLRB is, in turn, premised on the NLRB's expertise and experience in resolving labor relations matters and on the importance of fashioning a coherent and uniform body of labor law by which parties can predicate their future conduct.<sup>131</sup>

Based on these two guiding principles, the Supreme Court has developed three preemption doctrines: (1) Section 301 preemption,<sup>132</sup> (2) *Garmon* preemption; and (3) *Machinists* preemption. Section 301 preemption concerns disputes arising under existing collective bargaining agreements so does not directly concern the argument being addressed in this essay, but the other two doctrines are potentially applicable.

### 1. *Garmon* Preemption Analysis

The Supreme Court held in *San Diego Trades Council v. Garmon*<sup>133</sup> that the NLRA preempts state laws that Section 7 protects or *arguably* protects or that Section 8 prohibits or *arguably* prohibits.<sup>134</sup> The use of the word "arguably" underscores the breadth of *Garmon* preemption.<sup>135</sup> Nevertheless, Workplace Freedom Act legislation would not appear to be subject to *Garmon* preemption.

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130. *Id.*

131. Jonathan D. Hacker, Note, *Are Trojan Horse Union Organizers "Employees"?: A New Look at Deference to the NLRB's Interpretation of NLRA Section 2(3)*, 93 MICH. L.REV. 772, 776 (1995) (observing that courts have consistently recognized the Board's experience and expertise with the complexities of industrial relations); Paula K. Knippa, Note, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L.REV. 1289, 1315 (2007) ("The inconsistent holdings emanating out of both federal and state courts would destroy the uniformity of the regulatory scheme that Congress hoped to achieve through the administrative and adjudicatory clearinghouse of the [NLRB].").

132. Section 301 of the Taft-Hartley Act permits parties to a labor dispute to enforce terms of a collective bargaining agreement in federal court. 29 U.S.C. § 185. "Although section 301 refers only to jurisdiction, it has been interpreted as authorizing federal courts to fashion a body of common law for the enforcement of collective bargaining agreements." *Antol v. Esposito*, 100 F.3d 1111 (3d Cir. 1996) (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957)).

133. 359 U.S. 236 (1959).

134. *Id.* at 245. "*Garmon* preemption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA." See Chamber of Commerce of U.S. v. Lockyer, 463 F.3d 1076, 1090 (9th Cir. 2006) (en banc).

135. Gottesman, *supra* note 26, at 378 ("*Garmon's* 'arguably protected' rule imposes greater restrictions on state courts with respect to labor disputes: so long as the assertion of NLRA protection is not frivolous, the state court is without authority to proceed, *even though ultimately the NLRB might determine that the challenged conduct is not federally protected.*") (emphasis in original).

This is because the state law neither regulates employee activities that are actually or potentially protected under Section 7, nor does it permit employer activity that is actually or potentially prohibited under Section 8. More specifically, Section 7 only provides rights to employees and says nothing about employer's rights in the workplace.<sup>136</sup> Section 7 is thus not even arguably implicated.<sup>137</sup>

Similarly, there is nothing in Section 8 that arguably prohibits the states from outlawing captive audience speech on labor organizing. The unfair labor practices discussed therein only apply to employer or union interference, restraint of or coercion of employee's Section 7 rights. Even if one were to accept the view of some courts that Section 8(c) protects "employer rights" under the First Amendment to express views on unionization in a non-coercive manner to its employees,<sup>138</sup> it does not speak to whether employers may mandatorily require employees to attend meetings to hear those views. Section 8(c) is just not applicable to the captive audience situation, since employers can still freely express their views to employees who chose to listen during workplace meetings without having to force their employees to be there.<sup>139</sup> In short, workplace

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136. *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 532 (1992) ("By its plain terms, . . . the NLRA confers rights only on *employees*." (emphasis in original); *see also* Gottesman, *supra* note 26, at 379 ("Section 7 protects only conduct of employees, not of employers. Indeed, the Act nowhere vests employers with protected rights; on its face, it forbids certain employer actions, but protects none."). *But see infra* note 137 and accompanying text.

137. The en banc Ninth Circuit recently rejected the argument that "to say an activity is not punishable by the NLRA is to protect that activity." *Lockyer*, 463 F.3d at 1091.

138. *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 100 (2d Cir. 2006) ("We therefore conclude that section 8(c) does protect employer speech in the unionization campaign context and can provide a basis for *Garmon* preemption."); *but see Lockyer*, 463 F.3d at 1091 ("Notwithstanding the dissent's mistaken insistence to the contrary, section 8(c) does not grant employers speech rights. Rather, it simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice.") (citing *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

139. Indeed, because the employees are coerced into hearing the employer speech, one could even argue that the exceptions to Section 8(c) for "threats of reprisal or force" come into play and also make the provision inapplicable to the captive audience meeting context. This appears to be the argument advanced by the Center for Policy Alternatives when it concludes: "The Worker Freedom Act addresses only the coercive expression of political and religious views, something that is entirely within states' rights to legislate." *See* Center for Policy Alternatives, *supra* note 86; *see also* Story, *supra* note 42, at 405 ("[T]he NLRB and the courts overlook and/or permit many election statements and interventions by employers which are, in fact, coercive and which have a tendency, as a result, to chill the exercise of employee rights of self-organization."). Story believes that captive audience speech is a paradigmatic example of such unrecognized coercive interventions. *Id.* at 422 ("[T]he very exercise of an employer's legally-sanctioned right to hold such captive audience meetings, to prevent the union from holding them, to forbid the asking of questions at such meetings, and to discharge employees who ask 'loaded questions' is a manifestation of coercive power and domination.") (internal citations omitted); *see also* Becker, *supra* note 42, at 559 ("Although the Board ratified captive audience speeches on account of the free speech proviso, such conduct involves an element of coercion easily distinguishable from

captive audience legislation is one of those “activities in labor relations [that] are neither protected nor prohibited by the NLRA and are therefore not preempted under *Garmon*.”<sup>140</sup>

## 2. *Machinists* Preemption Analysis

With *Garmon* preemption not likely to be an obstacle, this analysis of the preemption of Worker Freedom Act legislation leads to another line of preemption cases under *Machinists v. Wisconsin Employment Relations Commission*.<sup>141</sup> *Machinists* preemption does provide employers with protection from state law even though employers do not enjoy express rights under the NLRA.<sup>142</sup> In *Machinists*, the Court held that the scheme of the NLRA implicitly left open the availability of economic force to the parties as a way to resolve labor stalemates.<sup>143</sup> Because Congress meant to leave unregulated economic weapons not expressly protected by Section 7 or prohibited by Section 8,<sup>144</sup> state law is preempted when it interferes with lawful economic pressure applied by either party. Indeed, where state laws have attempted to give additional economic power to one side or the other during the collective bargaining process, as some states have sought to do in the past, such laws have been found to be preempted under *Machinists*.<sup>145</sup> In many respects, *Machinists* preemption has proven to be just as broad as *Garmon* preemption.<sup>146</sup>

It is therefore more than just conceivable that the argument would be advanced that WFA legislation is preempted because an

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expression. The captive audience speech is diametrically opposed to the ‘free and open discussion’ the Board professes to promote.”)

140. *Lockyer*, 463 F.3d at 1091.

141. 427 U.S. 132 (1976).

142. Gottesman, *supra* note 26, at 380 (“The *Machinists* doctrine depends upon a startling supposition for those familiar with the climate that spawned the Wagner Act: that Congress intended, in passing that Act, to ‘protect’ employers from state law disarmament.”).

143. *Machinists*, 427 U.S. at 140; *see also* N.L.R.B. v. Insurance Agents, 361 U.S. 477, 495 (1960) (“[T]he use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining.”).

144. *Machinists*, 427 U.S. at 144.

145. *See, e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618 (1986) (finding preempted city law that conditioned employer’s operations on the settlement of a labor dispute); *Employers Ass’n v. United Steelworkers*, 32 F.3d 1297, 1301 (8th Cir. 1994) (finding preempted under *Machinists* Minnesota law prohibiting permanent replacement of striking or locked out workers); *Greater Boston Chamber of Commerce v. City of Boston*, 778 F. Supp. 95, 98 (D. Mass. 1991) (finding preempted Boston ordinance banning permanent replacements that could pose threat to public safety).

146. Gottesman, *supra* note 26, at 381 (“The danger inherent in the *Machinists* doctrine is that it infers preemption based on rights that the Court discerns although they are nowhere expressed in the statute.”); Estlund, *supra* note 10, at 1576 (“*Machinists* preemption essentially transforms management’s economic power, and some of its rights under the state law of property and contract, into federal statutory rights.”).

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employer has the right, consistent with the “free play of economic forces” under the NLRA,<sup>147</sup> to hold workplace captive audience meetings during union organizational campaigns. Opponents of the WFA would suggest that allowing such meetings is a well-established, lawful form of economic pressure that an employer may use to defeat a union’s campaign.<sup>148</sup> Moreover, one might further argue that the *Peerless Plywood* rule, which disallows captive audience speeches by either side twenty-four hours before an election,<sup>149</sup> indicates that the Board has chosen to regulate this area only to that extent and has decided purposefully not to regulate in this area any further. State laws that would prohibit such labor-oriented captive audience meetings would therefore inappropriately place the state’s thumb on the union side of the scale and regulate an area of the law that the NLRA meant to keep unregulated. As such, the argument continues, such state laws should be preempted under *Machinists* preemption.<sup>150</sup>

There are, however, at least four potential counter-arguments, three of which lead to the conclusion that WFA legislation should not be found preempted under *Machinists*. Under the first, less persuasive of these, at least one court has concluded that *Machinists* preemption doctrine has only been applied in the context of collective bargaining and not in the context of organizing.<sup>151</sup> The argument is that the economic weaponry appropriate for the bargaining context is inapt for the election process where there is a lack of equality between unions and employers and not a true “marketplace of ideas.”<sup>152</sup>

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147. *Machinists*, 427 U.S. at 140 (citing *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

148. This exact argument was raised in the slightly different context of state financial accountability laws. See *Healthcare Ass’n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 108 (2d Cir. 2006) (“The associations also raise an additional *Machinists* argument; they contend that the NLRA allows employers free speech as a ‘weapon’ to respond to union organizing campaigns and to deprive employers of this ‘weapon’ would alter the balance of power created by Congress.”). Although not dispositive in this analysis, because different federal and state interests were at play, the Second Circuit in *Pataki* did not buy the employer’s argument. *Id.*

149. See *supra* notes 79-80 and accompanying text.

150. Professor Estlund appears to be of the view that, under current labor preemption law, this broad view of *Machinists* preemption would likely carry the day. Estlund, *supra* note 10, at 1579.

151. See *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076, 1087 (9th Cir. 2006) (en banc) (“*Machinists* doctrine is not likely to apply to organizing, a conclusion that the Chamber of Commerce conceded during oral argument when it acknowledged that interference with organizing is ‘typically’ analyzed under the *Garmon* doctrine.”); see also Estlund, *supra* note 10, at 1578 (arguing that the concept of free play of economic forces under *Machinists* is out of place in the unorganized workplace where there is not a fair contest or battle).

152. See Becker, *supra* note 42, at 497 (arguing that current conception of union elections “rests on a fiction of equality between unions and employers as candidates vying in the electoral arena.”); Story, *supra* note 42, at 388 (“[I]t becomes conceptually difficult to consider the workplace as ‘a marketplace.’ Instead, it is an all-but-monopolized private forum subject to strictly defined and limited incursions by nonowners, providing constitutionally-protected free

However, looking at the *Machinist* opinion itself, Justice Brennan, writing for the majority, cites to an article by Archibald Cox for the proposition that Congress intended some conduct to remain unregulated and left to the free play of economic forces.<sup>153</sup> In the cited article, Cox did not distinguish between collective bargaining and organizing, when he stated that, “Congress struck a balance of protection, prohibition, and laissez-faire in respect to *union organization*, collective bargaining, and labor disputes that would be upset if a state could enforce statutes or rules of decisions resting upon its views concerning accommodation of the same interests.”<sup>154</sup> This conclusion is further bolstered by language in *Metropolitan Edison Life Ins. Co. v. Massachusetts*: “[*Machinist* cases] rely on the understanding that in providing in the NLRA a framework for *self-organization* and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated.”<sup>155</sup> It thus seems implausible, at least as a doctrinal matter, that *Machinists* was just a case that was supposed to apply in the collective bargaining context.

Nevertheless, even if *Machinists* preemption were found to apply to the organizational context, there are at least three other persuasive arguments that help to explain why *Machinists* preemption would not preempt WFA legislation. First, responding to the argument that the *Peerless Plywood* rule lends support to the argument that the Board has already regulated captive audience meetings to the extent it thought necessary and purposely did not regulate any further, it is important to remember that, “*Machinists* applies *solely* to zones of activity left free from *all* regulation.”<sup>156</sup> The extensive regulation of organizing activities by the NLRB through its *General Shoe* laboratory conditions doctrine<sup>157</sup> demonstrates that “*organizing-and* employer speech in the context of organizing-is not such a zone.”<sup>158</sup> “A state law that both explicitly targets and directly regulates processes controlled by the NLRA’ might be preempted under

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speech to one side and not the other, and allowing speech to be delivered to an unwilling audience.”).

153. *Machinists*, 427 U.S. at 140 n.4.

154. Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L.REV. 1337, 1352 (1972).

155. 471 U.S. 724, 751 (1985) (emphasis added).

156. See Chamber of Commerce of U.S. v. Lockyer, 463 F.3d 1076, 1089 (9th Cir. 2006) (en banc) (emphasis in original) (citing Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 226 (1993) (“Boston Harbor “)).

157. See *supra* note 117 and accompanying text.

158. *Lockyer*, 463 F.3d at 1089 (emphasis in original) (citing *Peoria Plastic Co.*, 117 N.L.R.B. 545, 547-48 (1957); *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953)).

*Garmon* . . . , but is surely not preempted ‘under the *Machinists* doctrine.’”<sup>159</sup>

Second, the Supreme Court has recognized an exception to this form of preemption where the states “traditionally have had great latitude under their police powers to legislate as ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons.’”<sup>160</sup> In such circumstances, “[w]hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.”<sup>161</sup> Thus, mandated benefit laws, child labor laws, occupational safety and health laws, and minimum wage laws, have all survived NLRA preemption.<sup>162</sup>

Similarly, states should be able to protect workers from being harassed and intimidated by employers at work through captive audience meetings as a minimal working condition. Or put differently, states should be able to enact laws that prohibit employers from firing workers who refuse to attend captive audience meetings about the employer’s anti-union views.<sup>163</sup> Such a state law would satisfy the conditions of such “minimum condition” laws by not “prevent[ing] the accomplishment of the purposes of the federal act.”<sup>164</sup> Under such laws, employers would still be able to communicate their views about unionization with their employees as Section 8(c) contemplates, but just not be able to force them to listen to such speeches at pains of losing their jobs. Thus, there would be no general

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159. *Id.* at 1089 n.11 (internal citations omitted).

160. *Metropolitan Edison*, 471 U.S. at 756 (quoting *Slaughter-House Cases*, 16 Wall. 36, 62 (1873)).

161. *Id.* at 757; *see also* *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971) (“[The Court] cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationship between employees, employers, and unions; obviously, much of this is left to the States.”). The Court has used similar language in cases under the Railway Labor Act, 45 U.S.C. §§ 151-188: “We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State . . . from making the order in question.” *Terminal Ass’n v. Trainmen*, 318 U.S. 1, 7 (1943).

162. *Metropolitan Edison*, 471 U.S. at 756.

163. *Accord* *Gottesman*, *supra* note 26, at 396 (“The states are free to forbid discharges for any number of reasons, such as refusal of sexual advances, whistle-blowing, refusing to violate the law, and filing workers’ compensation claims.”); *see also* Matthew W. Finkin, *Bridging the “Representation Gap,”* 3 U. PA. J. LAB. & EMP. L. 391, 411 (2001) (“The states are free to impose ‘minimum terms of employment’ and extend these to unionized, as well as non-unionized, employees.”).

164. *Metropolitan Edison*, 471 U.S. at 756 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941); *Electrical Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749-751 (1942); *Malone v. White Motor Corp.*, 435 U.S. [497,] 504 [1978]).

legislative goal of the NLRA compromised by permitted WFA legislation to survive preemption.<sup>165</sup>

Finally, not only should WFA legislation be able to survive *Machinists* preemption under a minimum conditions theory, but also based on the powers of the state to regulate property interests. This exception to preemption law derives directly from the Court's holding in *Lechmere Inc. v. NLRB*.<sup>166</sup> More recently, the Court explained *Lechmere* and its holding on the relationship between federal labor law and state property regulation this way:

Without addressing the merits of petitioner's underlying claim, we note that petitioner appears to misconstrue *Lechmere Inc. v. N.L.R.B.*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992). The right of employers to exclude union organizers from their private property emanates from state common law, and *while this right is not superseded by the NLRA*, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union employees to obtain access to an employer's property under limited circumstances. See *id.*, at 537, 112 S.Ct., at 848; *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956).<sup>167</sup>

Two important points can be derived from this passage: (1) private property rights that emanate from state common law are not preempted by the NLRA; and (2) these same private property rights are also not protected by the NLRA. The second point makes clear that *Garmon* preemption is not implicated in these property rights situations or, put differently, situations where employers seek to use their property as they wish. But even more importantly, the first point makes clear that *no* form of labor preemption, *Garmon* or *Machinists*, comes into play when states decide to modify the common law of property through statute.<sup>168</sup>

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165. See Finkin, *supra* note 163, at 411 (“[T]he states are free to reach those substantive aspects of the employment relationship that are not reached, or reached only partially by the NLRA.”). There is a counter-argument that such a minimum-conditions law should be preempted because the Board has expressly concluded that employers are allowed to require employees to attend captive audience meetings. See *Babcock & Wilcox*, 77 N.L.R.B. 577, 578 (1948). Nevertheless, captive audience meetings generally are neither arguably protected nor prohibited by the Act, as discussed above, and the NLRA's policy of employee free choice runs counter to permitting employers to force employees to attend these meeting. See Story, *supra* note 42, at 422 (“[T]he very exercise of an employer's legally-sanctioned right to hold such captive audience meetings, to prevent the union from holding them, to forbid the asking of questions at such meetings, and to discharge employees who ask ‘loaded questions’ is a manifestation of coercive power and domination.”).

166. 502 U.S. 527 (1992).

167. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) (emphasis added).

168. *Accord* *Walmart Foods*, 337 N.L.R.B. 389 (2001) (“The Respondent asserts that the ability to exclude non-union representatives from its property is the kind of economic weapon that Congress intended to be available to employers and thus is not subject to regulation by the

The Court applied this very same principle to the advantage of employers in *Lechmere* where it found that non-employee union organizers generally had no right to access employer property to solicit for union membership.<sup>169</sup> The right to exclude these organizers did not derive from federal labor law, but rather the property rights of the employers.<sup>170</sup> And just as a state may permit employers to exclude non-employee organizers as part of the employer's property rights, just as surely states can seek to limit those same property rights and refuse to allow employers to harass or intimidate their employees during mandatory meetings discussing the employer's anti-union views.<sup>171</sup> It is just a matter of states, by statutes, modifying the bundle of property rights that employers enjoy under state law.<sup>172</sup> *Lechmere* and its progeny stand for nothing less than the proposition that the NLRA does not supersede the ability of states to regulate common law rights of property and therefore WFA legislation is within the state's power to undertake if they choose to do so.<sup>173</sup>

In short, both the minimum conditions and property rights exceptions to *Machinist* preemption would seem to permit state enactments of WFA legislation to avoid NLRA preemption.

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States. Accordingly, the Respondent contends that the State's attempt to deprive it of that right is preempted under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). We reject that contention."), *vacated on other grounds*, 354 F.3d 870 (D.C. Cir. 2004).

169. *Lechmere*, 502 U.S. at 537.

170. *See* Glendale Assocs., Ltd. v. N.L.R.B., 347 F.3d 1145, 1151 (9th Cir. 2003) ("[T]his Court, along with other Circuits and the Board, have found *Lechmere* to be inapplicable to cases where an employer excluded nonemployee union representatives in the absence of a state property right to do so."); *see also id.* at 1152 ("An employer's state property right controls where an employer may ban nonemployee union representatives because 'state property law is what creates the interest entitling employers to exclude organizers in the first instance. Where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1) [of the NLRA].") (citing *N.L.R.B. v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999)).

171. *See* *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) ("Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), when common-law rights were also found immune from revision by State or Federal Government.").

172. *See* *Gottesman*, *supra* note 26, at 412 ("While there is a zone of federal prohibition, there is no zone of federal protection of an employer's right to exclude. If states wish to go further in restricting the employer's property rights, no federal interest is implicated.").

173. For a thoughtful argument that unions' rights of access to employer property should not even depend on state property law, but on whether exclusion chills employees' Section 7 rights, *see* Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L.REV. 891, 892-93 (2006) ("[T]he Board no longer would consider state property rights. Instead, it would presume that an employer's peaceful request to stop organizing activity on what appears to be its property is lawful, and presume that any action going beyond such a request violates the NLRA.").



## IV. RECONCEPTUALIZING AMERICAN LABOR PREEMPTION LAW FOR A NEW MILLENNIUM

Although this essay argues that under current labor preemption doctrine, Worker Freedom Act legislation should survive labor law preemption, the answer is not nearly as clear cut as it should be. And in an environment where there exist an increasing number of judges with pro-employer, conservative judicial philosophies,<sup>174</sup> it would not be far-fetched to predict that a number of courts would still apply these same labor preemption principles under the *Machinists* line of cases to strike down WFA legislation. Indeed, this outcome may be more likely based solely on this generation of federal court judges' lack of familiarity with labor law cases because of their relative rarity in the federal courts these days.<sup>175</sup>

In any event, to protect employees from the evils of workplace captive audience meetings, this section seeks to provide a more sound doctrinal basis for finding WFA legislation not preempted by federal labor law. In making this argument, this essay relies heavily on the persuasive analysis put forth by Professor Michael Gottesman in his piece concerning how labor preemption doctrine should be re-interpreted consistent with the purposes of federal labor law and principles of federalism.

In the article, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*,<sup>176</sup> Gottesman argues that the current approach to labor law preemption under *Garmon* and *Machinist* preemption is overbroad.<sup>177</sup> Instead, he points to a significant distinction, overlooked by courts, between different types of labor-oriented conduct that states seek to regulate. Specifically, some conduct, like picketing, lies on a protected-prohibited continuum that Congress has chosen to regulate in its entirety.<sup>178</sup> “[C]onduct on a continuum is conduct that the NLRA protects up to a point and

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174. James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1715-19 (1999) (correlating union support in labor cases with a judges being appointed by a Democratic president); Michael J. Songer, Note, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 265 (2005) (“Due to the conservative appellate appointments by President George W. Bush, the federal judiciary is presumably more conservative today than in 2000.”).

175. See Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 426-27 (1995).

176. Gottesman, *supra* note 26.

177. *Id.* at 355 (“My thesis is that, contrary to prevailing wisdom, the National Labor Relations Act (NLRA) does not wholly preempt the states’ ability to adopt laws facilitating unionization and enhancing employee leverage in collective bargaining with employers.”).

178. *Id.* at 357.

prohibits beyond that point.”<sup>179</sup> Either picketing is protected as concerted activity for mutual aid and protection under Section 7 (because it enhances bargaining power) or it is prohibited conduct under Section 8 (like secondary picketing<sup>180</sup> because of its impact on the business of neutral employers).<sup>181</sup> But all in all, Congress has chosen to completely occupy the field of employee picketing rights under federal labor law and it is for the NLRB, not the states, to decide where the line exists on this picketing continuum between protected and prohibited conduct.<sup>182</sup> It is important that the NLRB make this determination between protected and prohibited picketing in a consistent, uniform matter so future exercise of these rights will not be chilled.<sup>183</sup> So with picketing, the broad *Garmon* preemption doctrine, which seeks to avoid substantive conflicts in situations where conduct is even arguably protected or prohibited, makes much more sense.

On the other hand, there is conduct, like a union seeking an equal opportunity to address employees on employer property that does not lay on a continuum that Congress has chosen to regulate completely.<sup>184</sup> “Conduct not on a continuum is prohibited in some of its manifestations, but federal law does not protect it otherwise.”<sup>185</sup> In these situations, Gottesman argues that states should be free to regulate beyond the point that the federal labor law, and corresponding federal interest, no longer come into play.<sup>186</sup> In this vein, he states that, “[i]n choosing a standard, states may consciously attempt to affect the relative interests of employers, unions and employees regarding unionization and collective bargaining.”<sup>187</sup>

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179. *Id.* at 395.

180. Section 8(b)(4) prevents most forms of secondary picketing by unions because it causes neutral employers to become embroiled in labor disputes not of their own making. *See* 29 U.S.C. § 158(b)(4); Estlund, *supra* note 10, at 1607 (“[T]he [NLRA]’s ban on secondary boycotts constrains the means by which unions can put pressure on legally ‘neutral’ employers . . . .”); Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L.REV. 1018, 1032 (1998) (“[T]he secondary boycott provisions try to prevent unions from dragging neutral employers into the fray.”).

181. Gottesman, *supra* note 26, at 357.

182. *Id.* (“Congress had created an expert agency, the National Labor Relations Board (NLRB), to identify the fine line that distinguishes protected from prohibited conduct. To allow state regulation would create an intolerable risk to federal interests; state courts might err in locating the line and award damages for conduct the N.L.R.B. would deem protected by the NLRA.”).

183. *Id.*

184. *See id.* at 358.

185. *Id.* at 395.

186. *Id.* at 359.

187. *Id.* at 360.

For instance, Congress and the courts have interpreted the NLRA to permit union access to employer property to address employees during organizational campaigns only when the union is completely unable to communicate with employees through other alternative means or where the employer discriminatorily restricts access to property.<sup>188</sup> Beyond this extremely limited right to access employer property, federal labor law is silent on the ability of the employer to exclude union organizers from their property.<sup>189</sup> And indeed, *Lechmere*, decided after the Gottesman article, stands for the proposition that an employer's property interest almost always outweighs the competing derivative rights of non-employee, union organizers under Section 7 of the NLRA.<sup>190</sup> But it does not stand to reason, therefore, that the NLRA somehow "confer[s] upon employers a right they had not theretofore possessed: to be free of state dedication of private property for union organizing wherever federal law did not create a right of union access."<sup>191</sup>

Nor should the continuing validity of the *Machinists* preemption doctrine impact this modified labor preemption doctrine. As Gottesman argues, it is unlikely that, "Congress provided access only in exceptional circumstances because it thought that unions and employees ought not to communicate too freely or that employers should be protected against any broader intrusion on their premises."<sup>192</sup> It is much more likely that "Congress provided limited access merely because it did not think the federal interest in union-employee communication warranted any greater intrusion on the state's sovereign prerogative to define property interests."<sup>193</sup> In other words, because limited access rights to union organizers show respect for state regulation over property interests, states should be able to adjust those property interests as they see fit without running afoul of NLRA preemption.

Indeed, this conclusion is consistent with what the Supreme Court later stated in *Thunder Basin Coal Co.*: "The right of

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188. *Lechmere Inc. v. N.L.R.B.*, 502 U.S. 527, 538 (1992); *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). As discussed in Part I, this is an extremely narrow exception that is limited to such situations as lumber camps and remote resorts. See *supra* notes 66, 72 and accompanying text.

189. Another way of viewing this Congressional silence on the issue is that the federal interest to insure union access to employer property to foster organizational rights does not extend to those situations where unions have other viable means for contacting employees it seeks to organize. Gottesman, *supra* note 26, at 358.

190. *Lechmere*, 502 U.S. at 533.

191. Gottesman, *supra* note 26, at 358.

192. *Id.* at 416-17.

193. *Id.* at 417.

employers to exclude union organizers from their private property emanates from state common law, and while *this right is not superseded by the NLRA*, nothing in the NLRA expressly protects it.”<sup>194</sup> Unlike the picketing example, there is no other side of the continuum where access to employer property is prohibited under Section 8. This is simply not an area where Congress chose to completely preempt the field and the NLRA “did not otherwise intend to disturb the states’ existing authority to define property interests.”<sup>195</sup>

Similarly, workplace captive audience speech is also conduct of the non-continuum variety that states should be free to regulate as property interests beyond a certain point without fear of *Garmon* or *Machinists* preemption. Indeed, state regulation in the workplace captive audience meeting context could actually occur in one of two ways. First, state laws could require that unions be given equal access to employer property for pro-union captive audience speeches when employers give their own captive audience speeches. Like *Lechmere* and *Babcock, NuTone & Avondale* stands for the proposition that unions do not have the right to address employees on employer property unless it is shown that the union has completely no other alternative way to communicate with prospective union members.<sup>196</sup> Beyond that point, however, state property law takes over and generally permits employers to exclude unions from holding captive audience meetings. But again, the point is that unions are excluded as a matter of state property law, not federal labor law. Nothing in the NLRA protects employers in their ability to exclude the union from the workplace.<sup>197</sup> Consequently, a state law modifying property rights should not be preempted by the NLRA.<sup>198</sup>

The Worker Freedom Act legislation that out-and-out prohibits employer captive audience speech on labor-oriented topics would be just another way for states to modify existing property interests in a

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194. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) (emphasis added).

195. Gottesman, *supra* note 26, at 358. Gottesman aptly observes in this regard: “In [these non-continuum cases], the federal interest is in protecting employees’ rights of self-organization: there is no countervailing federal right for employers. Any such employer rights are derived from state law, and the choice whether to constrict them thus should lie with the states.” *Id.* at 411.

196. *N.L.R.B. v. Steelworkers (NuTone & Avondale)*, 357 U.S. 357, 363-64 (1958).

197. Gottesman, *supra* note 26, at 417 (“Congress did not confer upon employers a federal right to fence out organizers.”).

198. One Ninth Circuit case has actually cited Professor Gottesman’s article and upheld a state law permitting additional property rights for unions. See *N.L.R.B. v. Calkins*, 187 F.3d 1080, 1095 (9th Cir. 1999) (finding California law permitting labor picketing on private property not preempted by the NLRA).

way that facilitates unionization. In this context, Section 8(c) requires the minimum condition of allowing employers to share their views on unionization with their employees. To the extent that a state were to pass a law somehow interfering with all non-coercive speech to employees prior to twenty-four hours before a union election, that law would be rightly preempted under *Garmon* preemption as something that would be prohibited under Section 8. On the other hand, if the free speech rights of the employer are secured, and the only thing at issue is whether employers can force their employees to hear their views on unionization during work, a part of the continuum has been reached where federal labor law is silent and there is no longer any federal interests implicated. Rather, the realm of state property law has been reached, and consistent with notions of federalism,<sup>199</sup> states should given free reign to modify the bundle of property rights that employers currently hold and prohibit captive audience meetings during union organization campaigns.

Now, this way of seeing labor preemption is no doubt a double-edged sword for those who favor increased unionization in this country. Just as more progressive states may choose to modify property rights to permit unions equal access to property and to prohibit labor-oriented captive audience speech, other states could manipulate state law to favor employer interests.<sup>200</sup> Although state legislators have the ability to be creative in this manner, it is hard to imagine how the background norms animating state property, or contract law for that matter, could be made much more employer-friendly than they already are.<sup>201</sup> Employees in the United States exist in a world where employers have nearly absolute property rights to exclude unions and others from their workplaces and the employment-at-will doctrine gives employers maximum flexibility when it comes to hiring and terminating their employees.<sup>202</sup> In short, the benefits of permitting states to legislate in a way that favors the ability of unions to organize seems to greatly outweigh any

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199. Gottesman, *supra* note 26, at 361 (“[T]he Warren Court’s pro-preemption preference is inconsistent with constitutional federalism and separation-of-power norms.”).

200. Gould, *supra* note 33, at 490 (““Red” states like Mississippi, North Carolina, South Carolina, Alabama, and the like are forgotten in this equation. Thus, state legislation could repress workers under this antipreemption scheme and consequently, these ideas are misguided.”).

201. *Accord* Estlund, *supra* note 10, at 1574 (“Employers have the property that is . . . protected, while organized labor traditionally relies on the power of numbers and of more or less disruptive concerted activities such as picketing.”).

202. *Id.* at 1596 (“[Employers] own the workplace, and they effectively own the employees’ jobs under the prevailing American presumption of employment at will.”).

disadvantage that might come if legislatures seek to pass employer-friendly laws under the same preemption theory advanced above.<sup>203</sup>

And besides, there's really nothing to lose given the current state of American labor law, is there?<sup>204</sup>

#### CONCLUSION

Workplace captive audience meetings remain one of the most effective, and inequitable, tools that employers in the United States use during union organizational campaigns. Rather than there being any let up in the use of these meetings, employers are taking advantage of the unregulated nature of their workplaces to increasingly also subject their employees to their views on political and religious matters.

Commendably, and because there exists a federal void in this area of workplace law, states have taken the legislative initiative to ban such workplace captive audience meetings. Although this Workplace Freedom Act legislation has not passed any state legislature in its unmodified form as of the writing of this essay, recent successes in the legislative process suggest that there is reason to believe that such laws will soon be enacted.

With regard to labor-oriented captive audience meetings, this essay takes the view that WFA legislation should not be preempted by the NLRA under current labor preemption doctrine. Rather, states should remain free to regulate the minimum conditions of employment and the property rights of employers without running afoul of federal labor relations law.

Nevertheless, there is always the possibility that WFA legislation could be found preempted under a too-generous interpretation of *Machinists* preemption. Consequently, this essay renews the call for the adoption of a modified labor preemption doctrine in the United

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203. *Accord id.* at 1577 (“A narrower preemption doctrine would thus predictably afford more room for the regulation of employer conduct than for the regulation of employee and union conduct.”); Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Law?*, 58 LAB. & EMP. REL. ASS'N SERIES 125 (2006), available at <http://www.press.uillinois.edu/journals/irra/proceedings2006/freeman.html> (last visited June 8, 2007) (“Labor would fare better if the United States reduced federal preemption of private sector labor relations law and devolved the legal regulation and enforcement of freedom of association and collective bargaining to the states.”).

204. Freeman, *supra* note 203 (“While there are no guarantees, turning the law regulating private sector labor relations and/or its enforcement over to the states cannot be much worse than the U.S. labor law is now. Washington has failed. Why not see if Sacramento and Bismarck, Albany and Oklahoma City, Des Moines and Detroit, Salt Lake City and Madison can do better?”).

States by the U.S. Supreme Court.<sup>205</sup> Under this conception, championed first by Professor Gottesman, states would be free in non-continuum instances to pass state legislation that increases the chances for workers to form unions.

The Court is best able to undertake this needed modification because, in the absence of an express preemption provision in the NLRA, the Court has been the driving force in promulgating current labor preemption doctrine. And just as the Court was free to fashion the current doctrine, it should be equally free to reformulate labor preemption law to be more consistent with the purposes of NLRA and with the principles of federalism.

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205. Given the political impasse that has stymied labor law reform for the last fifty years, this essay takes the view that it is unrealistic to expect Congress to change preemption law through a federal amendment to the NLRA any time soon.