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The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA

Paul M. Secunda[*]

I. INTRODUCTION

One of the more effective anti-union techniques used by employers during labor organizational campaigns is the holding during work time of employee captive audience meetings.[1] Employees, in the midst of deciding whether to join a union, are compelled to attend an assembly where management has a one-way conversation with them about the evils of unionism.[2] These meetings occur during working hours because the employer is then best able to exert its economic authority over employees and to play on fears of job loss if employees vote for the union.[3]

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[*] Paul M. Secunda is an Associate Professor of Law at Marquette University Law School. The title of this paper borrows from the famous phrase of Justice Harlan in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."). This contribution to the Florida International University College of Law 2010 Law Review Symposium: *Whither the Board? The National Labor Relations Board at 75*, would not have been possible without the exceptional research assistance of Michael Moeschberger, Marquette University Law School Class of 2010. The author claims responsibility for all errors or omissions.

1 *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) (finding that employers' captive audience meetings have statistically significant effects on voting in union certification elections).

2 I think it is purely semantics to say that employees are only compelled to attend these meetings, not compelled to listen. I also believe that the vast majority of these speeches by employers discuss the negative consequences of unionism (hence the cottage industry of "union avoidance" consultants), as opposed to supplying an even-handed analysis of the advantages and disadvantages of unions.

3 The U.S. Supreme Court has long recognized this workplace imbalance of power between employer and employee. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) ("Any balancing of [Section 8(a)(1) and 8(c)] 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."); *see also* NLRB v. United Steelworkers of Am., 357 U.S. 357, 368 (1958) (Warren, C.J., dissenting in part and concurring in part) ("Employees during working hours are the classic captive audience."); Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (1990) ("Few audiences are more captive than the average worker.").

While employees are free to leave these meetings in the formal sense, they may only do so at the peril of losing their jobs.[4] Employees may be terminated for refusing to attend anti-union assemblies. Indeed, employees can be lawfully terminated for merely asking questions of their employers during such a meeting, or for leaving such meetings without permission.[5] One former chairman of the National Labor Relations Board characterized this power of an employer to monopolize its workplace for anti-union speeches as "an extremely devastating technique in organizational campaigns."[6] It is perhaps no surprise, then, that a recent study indicated that employees were subject to nearly *eleven* captive audience meetings during an average union campaign.[7] When one also considers that unions generally lack access to employer property to disseminate pro-union messages,[8] one begins to understand the imbalance of this workplace dynamic. What is most amazing to those who hear about the captive audience meeting tactics for the first time is that such actions by employers are not only tolerated in the United States, but have been permitted under the National Labor Relations Act (NLRA or Act)[9] for over sixty years.[10]

Now ask yourself this: does free speech, whether by an individual or corporation, entail the act of compelling someone to listen?[11] Is it the same

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4 *See* Litton Sys., Inc., 173 N.L.R.B. 1024, 1030 (1968) (indicating that employee has no statutorily protected right to leave a mandatory antiunion captive audience member).

5 *See* NLRB v. Prescott Indus. Prods. Co., 500 F.2d 6, 10-11 (8th Cir. 1974) (refusing to enforce an NLRB decision holding that disallowing employee questioning during a captive audience meeting constituted an unfair labor practice); Hicks Ponder Co., 168 N.L.R.B. 806, 815 (1967) (upholding an employer's right to eject vocal pro-union workers who speak out once captive audience meetings have begun).

6 *See* 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).

7 *See* KATE BRONFENBRENNER, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING 73 (2000), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports.

8 *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (employer may prohibit non-employee union solicitation on its property unless the location of the plant is so remote that the union is unable to communicate with employees through its own reasonable efforts); *see also* Lechmere Inc. v. NLRB, 502 U.S. 527, 539 (1992) (holding that the *Babcock* inaccessibility exception is narrow and generally only applies to remote locations such as logging camps, mining camps, and mountain resort hotels).

9 29 U.S.C. §§ 151-169 (2006).

10 *See* Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948). To be clear, the statute does not expressly authorize captive audience meetings, but Congress decided not to make a legislative statement one way or the other on the permissibility of captive audience speech. That inaction leaves it for the Board to decide, based on its experience with the complexities surrounding industrial relations, the proper path to take. *See infra* Part III.

11 The Supreme Court has held clearly not. *See* Hill v. Colorado, 530 U.S. 703 (2000); Rowan v. U.S. Post Office Dep't., 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); Thomas v. Collins, 323 U.S. 516, 537-38 (1945) (finding that employers may

when somebody tries to persuade you of their position through speech alone as opposed to doing so with an "economic gun" to your head? Not at all. Yet, American labor law treats the employer's captive audience behavior as if its tactics are just a matter of free speech, rather than a form of highly effective employer coercive conduct.[12]

In a previous article, I advocated for states to fill the void by passing minimum work standards legislation to prevent employers from firing employees for failing to attend such meetings.[13] Although at least one state, Oregon, has recently enacted this approach,[14] such state legislative enactments are inevitably ensnared in questions concerning NLRA preemption.[15] Rather than negotiate the byzantine maze that is the NLRA preemption doctrine, this Article maintains that the same outcome – the outlawing of employer captive audience meetings – can be achieved without amendment to the current NLRA. By focusing on the speech/conduct continuum recognized in the picketing areas of labor law, and by reemphasizing the animating purposes behind the Taft-Hartley Amendments of 1947 (i.e., employee free choice in deciding whether or not to join a union), this type of employer tactic can be finally relegated to the dustbin of labor history.

To those who say that we should heed past National Labor Relations Board (NLRB or Board) precedent, I argue that past precedent is only valid to the extent that the original Board decision comports with minimum standards of reasoned elaboration. The Board decision in *Babcock & Wilcox*,[16] which established the legality of employer captive audience meetings in 1948, fails to meet this bare standard. Consequently, the time is well past nigh for its overruling by the present Board.

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have right to persuade their employees, but "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer's First Amendment] right has been passed").

12 The argument here is not that captive audience meetings are unlawful because they are ubiquitous and highly effective, but rather that they are properly subject to regulation under the current language of the NLRA as conduct rather than speech.

13 *See* Paul M. Secunda, *Towards the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008). With a group of other law professors, I also advocated this view in the recent federal case of *Associated Oregon Industries v. Avakian*. *See* Amicus Brief of Law Professors in Support of Defendants' Opposition to Summary Judgment, No. 09CV09-1494 (D. Or. Dec. 12, 2009) (filed Mar. 22, 2010). The case was eventually dismissed in favor of defendants on standing grounds, *see Associated Oregon Industries v. Avakian*, No. 09CV09-1494, 2010 WL 1838661 (D. Or. May 6, 2010), but another substantive challenge to this law appears inevitable.

14 This captive audience meeting legislation, Senate Bill 519, is codified at Oregon Revised Statutes §§ 659.780, 659.785 (2010).

15 *See generally* Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83 (2010).

16 77 N.L.R.B. 577 (1948).

To those who say that employees, once hired, must listen to any speech their employer wants them to hear since they are being paid for their time, I argue that employees are paid to do certain work, not be compelled to listen to ideological speeches by their employers. Employees, outside of their work duties/job descriptions, should be free from being forced to hear or do anything that is against their morals, principles, and dignity – this is called "human rights." Employees should be unmolested by their employers in matters of personal conscience and belief, because such concerns involve highly charged and complex issues of personal preference and trust. Instead of permitting this state of workplace affairs to continue, this article maintains that the Board should conclude that such captive audience meetings are inherently coercive and interfere with employees' Section 7 rights to organize, in violation of Section 8(a)(1) of the Act.

This Article proceeds in three parts. In the first part, the Article briefly provides an overview of the changing status of captive audience meetings since the inception of the NLRA. The second part re-examines the Congressional policy that motivated the enactment of the Taft-Hartley Amendments in 1947 – employee free choice. Finally, the third part proposes that the Board overrule past Board precedent and hold that employer captive audience conduct is incompatible with employee free choice, may be properly regulated under the NLRA as coercive conduct, and should be *per se* banned as an impermissible interference with employee Section 7 rights.

II. A BRIEF OVERVIEW OF THE CHANGING STATUS OF CAPTIVE AUDIENCE MEETINGS

A. Pre-Taft Hartley Act Practice

Today, captive audience meetings remain a ubiquitous fixture of private employer anti-organization campaigns,[17] but this was not always the case. When initially adopted as the Wagner Act of 1935,[18] the NLRA failed to provide any affirmative protections for employer free speech. 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.[19] Employers who interfered, coerced, or restrained employees in

17 A recent study revealed that ninety-two percent of the sample's 400 anti-union campaigns included captive audience meetings in the workplace. BRONFENBRENNER, *supra* note 7, at 81.

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

19 29 U.S.C. § 157 (2006).

the exercise of their Section 7 rights were liable for unfair labor practices under Section 8(1) of the Act.[20]

Because the Act remained silent on employer free speech rights, the NLRB initially adopted the position that employers were to remain neutral during employee organization campaigns.[21] For instance, in one of the first Board cases, *Pennsylvania Greyhound Lines*,[22] the employer imposed an employee association upon its employees in violation of Section 8(2).[23] When employees subsequently attempted to form an independent union, the employer responded by adamantly urging its employees not to join.[24] Various supervisors repeatedly questioned employees about union activity, threatening termination for any union involvement, and were otherwise very outspoken about their hostility toward unions.[25] Finding a Section 8(1) violation for the employer's repeated attempts to discourage union involvement, the Board ordered the employer to cease and desist from discouraging union membership.[26] The Board was particularly mindful of employees' susceptibility to coercion through employer suggestions, stating:

> Such "advice" is not the advice of a person on an equal plane and having an unprejudiced mind. It is the "advice" of an employer who has the right to discharge the employee to whom the "advice" is given – to control to a large extent his economic position and thus his welfare.[27]

While *Pennsylvania Greyhound Lines* did not directly involve captive audience meetings, the Board specifically addressed the legality of such

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20 *Id.* § 158(a)(1). The employer interference provisions were initially codified as section 8(1); the Taft-Hartley amendments of 1947 recodified these provisions at 8(a)(1), and added the union unfair labor practice provisions under Section 8(b).

21 *See* JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 94 (5th ed. 2006) (explaining that Board under the Wagner Act took the position that any partisan employer involvement would inevitably interfere with the Section 7 rights of employees).

22 *See* Pa. Greyhound Lines, Inc., 1 N.L.R.B. 1, 48 (1935). Company unions such as the employee association in *Pennsylvania Greyhound* were a major impediment to the formation of independent labor organizations prior to the enactment of the NLRA. *See* Matthew W. Finkin, *Representation of Employees Within the Firm*, 54 AM. J. COMP. L. 395, 403 (Supp. 2006) ("The historical intent of [Section 8(2)] was to legislate against the creation of sham (or 'company') unions that flourished in the mid-1930s."). As a result, Section 8(2), recodified as Section 8(a)(2) today, made it an unfair labor practice for employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2).

23 *See Pa. Greyhound*, 1 N.L.R.B. at 48.

24 *Id.* at 2.

25 *Id.* at 18-19.

26 *Id.* at 48, 51.

27 *Id.* at 23.

meetings in *Clark Bros. Co., Inc.*[28] Upon learning of a run-off election between the Congress of Industrial Organizations (CIO) union and Employee Association, Inc. of Clark Bros. Co. (EAI), the employer sought to insure selection of EAI by engaging in an anti-CIO campaign.[29] Following a five day period that included anti-CIO mailings to employees and anti-CIO advertisements in the local newspaper, the employer directed two captive audience meetings for all plant employees, the latter only an hour before the election.[30]

During the second speech, made at the plant during working hours, all employees were directed by an announcement over the public address system, and others were instructed by their foremen, to convene on the shipping floor with the specific purpose of listening to a speech by the Vice President of the company.[31] While the Vice-President gave this speech, all manufacturing operations were shut down, and the speeches were broadcast over the public address system throughout the entire plant.[32] Adopting the Trial Examiner's[33] conclusion that the employer played on the employees' fear of job insecurity by making it clear that support of the CIO was not in the company's interests,[34] the Board found that the speech interfered, restrained and coerced employees in violation of Section 8(1).[35] The Board further adopted a rule that employer captive audience meetings during work time amounted to a *per se* violation of employee Section 7 rights.[36] Elaborating on its rule, the Board explained:

> The Board has long recognized that "the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning 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.

28 70 N.L.R.B. 802 (1946).

29 *Id.* at 803.

30 *Id.* at 803-04.

31 *Id.* at 820.

32 *Id.*

33 The Trial Examiner, today known as an Administrative Law Judge (ALJ), is the first person to hear evidence after a complaint is issued in an unfair labor practice case. The trial examiner makes findings of fact and issues a decision and a recommended order. Such decisions are appealed to the NLRB.

34 *Clark Bros.*, 70 N.L.R.B. at 820-21.

35 *Id.* at 804.

36 *Id.* at 804-05.

> And this is so, wholly apart from the fact that the speech itself may be privileged under the Constitution.[37]

Even at this early point of its history, the Board appeared cognizant of the inherent power imbalance between the employer and its employees and felt that such a rule against captive audience meetings was necessary to insulate employees from employers' greater economic power.[38]

Addressing possible constitutional issues that may have been implicated by its rule, the Board noted that alternative channels of communication existed for the employer to impart its anti-union message to employees, specifically in the form of non-mandatory meetings.[39] The Board thus identified for the first time the inherent duality of captive audience meetings, separating the speech facet from the conduct of compelling attendance at these meetings. Because the Board found that mandatory attendance policy was not necessarily related to the employer's ability to speak, it felt it could freely regulate the coercive aspect of the employer's conduct.[40]

B. Captive Audience Meetings Post-Taft Hartley

Roughly one year after the Board's *Clark Bros.* decision, Congress passed the Taft-Hartley Act of 1947.[41] Believing that the Wagner Act unfairly advantaged union interests because it only addressed employee rights to organize, only provided for employer unfair labor practices, and did not grant employers free speech rights when opposing organizing campaigns, Congress amended the NLRA.[42] While leaving the text of the original Wagner Act unchanged, the Taft-Hartley amendments provided three pertinent additions to the Act: (1) employees now had the affirmative right to refrain from Section 7 activities;[43] (2) unions could now be sanctioned for

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37 *Id.* at 805 (emphasis in original and internal citations omitted). Interestingly, even before the introduction of the free speech provisions in Section 8(c) of the Taft-Hartley Amendments, the Board considered, and rejected, any possible First Amendment problems with its captive audience meeting prohibition.

38 *Id.*

39 *Id.*

40 *Id.*

41 29 U.S.C. §§ 141-144, 167, 172-187 (2006).

42 Congress enacted the Taft-Hartley Amendments over the veto of President Truman.

43 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)*.") (italicized portion added by Taft-Hartley).

committing unfair labor practices;[44] and (3) employers expressly enjoyed for the first time protection for their non-coercive speech. As to the last addition, new section 8(c) provides:

> 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 subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[45]

While Taft-Hartley granted employers free speech protections, these rights were not absolute. Section 8(c) expressly limits protected speech to communications that do not amount to a "threat of reprisal or force or promise of benefit."[46] So, for instance, in *NLRB v. Gissel Packing Co.*,[47] the Supreme Court held that inferences communicated by an employer that its plant would close upon unionization constituted a coercive threat and, therefore, were not protected speech under Section 8(c).[48] Similarly, the Court recognized employees' heightened vulnerability to coercion in the context of employer promises during organizing campaigns in *NLRB v. Exchange Parts*,[49] analogizing the promised remuneration to "a fist inside the velvet glove."[50] Such implicitly coercive promises were also found not to be protected by Section 8(c).

Although by no means required,[51] the Board also quickly adopted a new approach to captive audience meetings in a case decided shortly after Taft-Hartley's enactment. In *Babcock & Wilcox*,[52] the Board, in a conclusory manner, abandoned its *per se* rule from *Clark Bros.* against

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44 *Id.* § 158(b) ("It shall be an unfair labor practice for a labor organization or its agents . . . ").

45 *Id.* § 158(c). The U.S. Supreme Court later held that Section 8(c) "merely implements the First Amendment." NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

46 29 U.S.C. § 158(c).

47 395 U.S. 575 (1969).

48 *Id.* at 619-20.

49 375 U.S. 405 (1964).

50 *Id.* at 409.

51 As will be developed in Part III *infra*, this approach was not required since the aspect of the captive audience meetings sought to be regulated was conduct as opposed to speech. As also explained below, the Board did not discuss at all this essential speech/conduct distinction in its *Babcock & Wilcox* decision. Former NLRB Chairman William Gould suggests that the shift in doctrine was done "reluctantly." Yet, the Board has, as recently as 1998, refused to revisit the doctrine. Gould, *supra* note 6, at 484 n.11 (citing Beverly Enters.-Haw., Inc., 326 N.L.R.B. 335, 361 (1998)).

52 77 N.L.R.B. 577 (1948).

employer captive audience meetings.[53] In doing so, the Board focused on the language of Section 8(c) and some unspecified "legislative history."[54]

Yet, as far as the language of Section 8(c), it expressly applies only to employer *speech*, not employer *conduct*. In fact, a very instructive analogy can be made here between the way the U.S. Supreme Court handles labor picketing and how it deals with employer captive audience meetings. The Supreme Court has long recognized the dual nature of labor picketing.[55] Although the Court initially invalidated state laws that broadly banned all labor pickets by equating peaceful picketing with pure speech,[56] this analysis lasted less than two decades. The Court soon revised its free-speech approach to picketing in *Teamsters v. Vogt*.[57]

Addressing the validity of a state law that enjoined coercive or intimidating pickets, the *Vogt* Court recognized that, independent of its communicative component, picketing may also involve coercive conduct.[58] In this regard, Justice Frankfurter for the Court wrote: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[59] Where the picket was carried out to coerce the employer to put pressure on its employees to join the union, the Court held that such picketing "certainly involved little, if any, 'communication.'"[60] Finding therefore that the state statute against coercive picketing furthered a legitimate purpose of preventing intimidation, the Court upheld the statue in *Vogt*.[61]

Although *Vogt* deals with constitutional issues under the First Amendment, the case provides a robust analogy for assessing the dual aspects of captive audience meetings under the NLRA.[62] Just as the *Clark*

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53 *Id.* at 578 ("The 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.") (emphasis added).

54 *Id.*

55 *See* Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957).

56 *See* Thornhill v. Alabama, 310 U.S. 88, 105 (1940). In this sense, the Court's prior approach in *Thornhill* to picketing is similar to the Board's approach in *Babcock & Wilcox* of seeing captive audience meetings as being primarily about employer speech.

57 354 U.S. 284 (1957).

58 *Id.* at 289.

59 *Id.*

60 *Id.* at 290.

61 *Id.* at 294-95.

62 To say the analogy here to picketing is inapt because picketing sometimes involves violence largely misses the point: Captive audience meetings are just as effective in deterring employees from exercising their free will in an union election as violence on the picket line is in deterring employees from supporting the union more generally. To paraphrase Justice Frankfurter from *Vogt*: "the very

Bros. Board recognized the dual nature of captive audience meetings, the *Vogt* Court acknowledged that, wholly apart from informing the public about labor disputes, pickets may also serve to coerce employees, employers, or the general public.[63] Employer captive audience meetings similarly have two components – constitutionally and statutorily protected speech and unprotected coercive conduct. Because the element which the *Clark Bros*. Board sought to regulate with captive audience meeting is the compulsion associated with such meetings, the regulation goes only to conduct and does not, in any manner, implicate the free speech rights of employers.

So although Section 8(c) explicitly protects employer speech rights to disclose views on unionization in a non-coercive manner to its employees, the statute does not grant employers the affirmative right to force employees to attend meetings in order to hear those views. Section 8(c) is therefore simply inapplicable to the captive audience meeting context because employers are still free to espouse their anti-union views to employees who willfully choose to listen.[64] Yet, the Board tells us in *Babcock & Wilcox* that the language of Section 8(c) clearly permits employee captive audience conduct. No analysis; it just does.[65] And because the speech

presence of a [captive audience meeting] may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Id.* at 289.

63 *Id.* at 295.

64 Because employees are coerced into hearing the employer's speech, one could also argue that the exceptions to Section 8(c) for "threats of reprisal or force" come into play, serving as another basis to make Section 8(c) inapplicable to the captive audience meeting context. *See* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 405 (1995) ("[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."); *see also* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 559 (1993) ("Although the Board ratified captive audience speeches on account of the free speech proviso, such conduct involves an element of coercion easily distinguishable from expression. The captive audience speech is diametrically opposed to the 'free and open discussion' the Board professes to promote.").

65 This is especially surprising because in *Peerless Plywood*, a mere five years after *Babcock & Wilcox*, the Board specifically recognized that a restriction on captive audience meetings before an election is "a rule of conduct," not a rule concerning speech. *See* Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953); *see also* Livingston Shirt Corp., 107 N.L.R.B. 400, 408 (1953) ("The rule laid down in *Peerless Plywood* is a *rule of conduct* governing Board elections and, in our opinion, constitutes a narrow and reasonable limitation designed to facilitate the holding of free elections in the atmosphere of relative tranquility conducive to a sober choice of representative.") (emphasis added).

itself is not coercive (as far as containing an explicit threat or promise), the speech was deemed protected under Section 8(c).[66]

As far as the phantom "legislative history" to which *Babcock & Wilcox* refers in deciding that Taft-Hartley permits captive audience meetings, one can make the educated guess that the Board was obliquely referring to statements made in the Senate Report during the Congressional debates over Taft-Hartley. Apparently, some legislators believed that *Clark Bros.* inappropriately "restricted" or "limited" the Supreme Court's decision in *Thomas v. Collins*,[67] which held, among other things, that employers had the same speech rights as unions to talk about labor issues.[68] Additionally, although the Senate Report on the Taft-Hartley Act specifically disapproved of *Clark Bros.*, it only stated that the case stood for the proposition that employer speech was unlawful merely because it took place "in the plant on working time."[69] It appears, though, that the majority in *Clark Bros.* answered those same concerns when it responded to an argument by the dissenting Board Member in *Babcock & Wilcox*: "We simply do not share his view that there is anything in the reasoning or language of the recent Supreme Court and Circuit Court decisions he cites [including *Thomas v. Collins*] which requires the Board to treat this particular respondent as though it had done no more than make an appeal to the reasoning faculties

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66 *See* Babcock & Wilcox, 77 N.L.R.B. 577, 578 (1948).

67 323 U.S. 516 (1945). *See* Story, *supra* note 64, at 378 n.113 (citing 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 429 (1947)) ("By 1947, the drafters of the section 8(c) amendment were upset with only one important practical doctrinal point: the NLRB's view, as expressed in *Clark Bros.*, 70 N.L.R.B. 60 (1946), that employer captive audience speeches were inherently coercive. In the Senate Report on s 1126 (the original 'Taft' amendment), the Senate complained that the Board's decision in *Clark Bros.* had placed a 'limited' and 'too restrictive' construction on the Supreme Court's holding in *Thomas v. Collins*."). Yet, *Thomas v. Collins* itself makes clear that First Amendment rights do not also include the ability of the speaker to compel another person to listen, *Thomas*, 323 U.S. 516, 537-38 (1945), so it is unclear what the Senate report means when mentioning *Clark Bros.* and *Thomas v. Collins* in the same part of the legislative history. *See also* CLYDE SUMMERS & HARRY WELLINGTON, CASES ON LABOR LAW 265 (1968) ("The Senate Report, in half a sentence indicated an intent to overrule *Clark Bros.*, but gave no explanation.").

68 *Thomas*, 323 U.S. at 518. *Thomas*, a closely divided 5-4 decision, concerned the State of Texas' holding in contempt a labor organizer for soliciting for union membership in a public speech without first registering with the state and obtaining an "organizer's card." The Court struck down the organizer card statute on First Amendment grounds, holding that although, "the State has power to regulate labor unions with a view to protecting the public interest . . . Such regulation however, whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly." *Id.* at 532.

69 *See* S. REP. NO. 105, Legislative History of the Labor-Management Relations Act of 1947, at 23. Although one management-side witness called for "[e]xpress repudiation" of the captive audience doctrine, *see Labor Relations Program: Hearings on S. 55 Before the Comm. on Labor and Public Welfare*, 80th Cong., 1st Sess., pt. 4, 2139 (1947) (statement of Earl Carroll, Earl Carroll Theater-Restaurant), such express repudiation is clearly absent from Section 8(c) and any part of the Taft-Hartley Amendments.

of its employees."[70] In other words, the *Clark Bros.* majority was responding to the coercive aspects of the captive audience meetings, not its speech elements.

Additionally, and contrary to concerns expressed in the Senate Report to Taft-Hartley, the *Thomas* Court majority and concurrence could not have been clearer about the limits of employer free speech. Justice Rutledge for the majority stated with regard to the right to persuade by speech: "When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer's First Amendment] right has been passed."[71] Justice Douglas concurred, stating: "[O]nce [a person] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."[72]

Of course, it goes without saying that there is a complete absence in the text of Section 8(c) itself of any language that could be read to mandate that the Board post-Taft Hartley overturn *Clark Bros*.[73] Indeed, to the extent that the language of Section 8(c) is unambiguous in protecting employer speech in the labor context, canons of construction would suggest that it is inappropriate to look for further meaning from the statute in legislative pronouncements. In this regard, Justice Scalia has maintained: "We have repeatedly held that such reliance on [legislative history] is impermissible where, as here, the statutory language is unambiguous."[74] On the other hand, to the extent that the language of Section 8(c) could be deemed ambiguous, other contemporaneous legislative debates cast significant doubt on whether Section 8(c) was ever supposed to address the permissibility of captive audience meetings.[75] In short, conclusory assertions aside concerning inapplicable provisions and mysterious legislative history, the

70 Clark Bros., 70 N.L.R.B. 802, 806 (1946).

71 *Id*. at 537-38.

72 *Id*. at 543-44 (Douglas, J., concurring).

73 Some have argued that a combination of timing, text, and legislative history make clear that Taft-Hartley was meant to overturn the *Clark Bros*. doctrine. The text of Section 8(c) and the legislative history of Taft-Hartley do no such thing as explained above. As for the "timing," Taft-Hartley amended the NLRA in a multitude of ways, Section 8(c) being just one aspect. So the fact that *Babcock & Wilcox* comes one year after Taft-Hartley's enactment is in and of itself inconclusive at best.

74 Hamdan v. Rumsfeld, 548 U.S. 557, 665 (2006) (Scalia, J., dissenting).

75 *See* Story, *supra* note 64, at 379 ("[A]lthough the House and Senate debates over section 8(c) were heated, its supporters provided no further arguments regarding why employers should have free speech rights beyond those mentioned by the Supreme Court.").

Board appears to have remained free to uphold *Clark Bros.* even after the enactment of Section 8(c).[76]

Interestingly, though the Board missed the opportunity to discuss the speech/conduct distinction in captive audience meetings in its *Babcock & Wilcox* decision, the Trial Examiner did not. He recognized such a distinction when he held that the captive audience meetings did violate Section 8(1):

> Standing individually, [the employer's] statements in his speeches to the employees . . . , though openly anti-Union, contain no language that on the surface exceeds the bounds of free speech. If they constitute a violation of the Act, it is because coercion is to be imputed to them from the circumstances under which they were uttered and which affect their meaning.[77]

Although Section 8(c) had not yet been enacted at the time of the Trial Examiner's decision in *Babcock & Wilcox*,[78] he still found that the speech utilized by the employer during these meetings was lawful.[79] Rather, he based his decision of illegality on the coercive nature of the mandatory meeting, holding that the employer exploited its ability to control employees during working hours by stressing its superior economic position.[80] But as already discussed, instead of adopting these findings, the

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76 Alternatively, the Board could have also deemed captive audience meetings a *per se* violation of the necessary "laboratory conditions" as grounds to set the election aside under *General Shoe*. *See infra* notes 78-81 and accompanying text.

77 Babcock & Wilcox, 77 N.L.R.B. 577, 595 (1948).

78 The Trial Examiner's decision was issued on June 2, 1947; the Taft-Hartley Amendments were passed on June 23, 1947. Of course, the Trial Examiner may well have known of the pending legislation as the bill had been debated for months and already vetoed by President Truman.

79 *Babcock & Wilcox*, 77 N.L.R.B at 595.

80 *Id.* at 578 ("With respect to the 'compulsory audience' aspect of the speeches, the Trial Examiner concluded from all the evidence that the notices of the meetings as well as the oral instructions given to the employees concerning these meetings removed the element of choice from the employees and, in effect, compelled them to attend in violation of the Act."). The Trial Examiner, unlike the Board, recognized that employers, unlike unions, have the ability to exercise immediate and direct economic control over their employees. *See* Story, *supra* note 64, at 380 ("To equate heavy-handed union tactics of pressuring an employee to sign a union card with the range of tactics available to employers (e.g. firing, suspension, failure to promote, favoritism in work assignments, and so on) or to equate the 'rough and tumble' of some union halls and a union shop contract with hierarchical workplace relationships is to operate from a truly impoverished understanding of employer coercion and a false assumption that unions and employer are equivalent."). Additionally, employers under the labor law have the advantage of direct contact with employees while they are at work. Unions, on the other hand, generally lack access to employees on the employer's property and are relegated to means of communication outside of work. *See* Lechmere Inc. v. NLRB, 502 U.S. 527, 538 (1992); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 111 (1956); *see also* Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 664 (2010) (observing that during the organiz-

Board, without reasoned elaboration, held the employer's actions within the protections of Section 8(c) and lawful under the Act.[81]

Today, employer captive audience meetings are still lawful based on this threadbare precedent. The Board has only revisited the legality of employer captive audience meetings on a few occasions, and on each of those occasions, the Board has either reiterated the conclusory *Babcock & Wilcox* reasoning[82] or further limited the actions of employees with regard to such meetings.[83] The only limit that actually exists, and it applies both to employers and unions, is that parties are prohibited from making captive meeting speeches to massed groups of employees within twenty-four hours before an election.[84] Violations are not deemed unfair labor practices, however, but rather violations of the Board's *General Shoe* laboratory condition standard.

Under *General Shoe Corp.*,[85] the Board set up a test for employer conduct that interfered with employees' ability to decide freely whether to join a union:

> 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. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that

ing phase, union efforts to communicate with employees primarily take place when employees are not at work through "house calls").

81 The Board's failure to provide meaningful analysis of its decision may be explained by intense pressure the Board may have felt from Congress and the corporate community to broadly interpret the recently enacted employer free speech provision of Section 8(c). *See* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 358 (1995) ("[B]y the middle 1940s, Congress faced strong pressures from America's corporate elite to enact statutory changes to the NLRA that would constrain further union growth and assist in the reassertion of managerial authority.").

82 For instance, twenty years later in *Litton Systems, Inc.*, 173 N.L.R.B. 1024, 1031 (1968), the Board merely reiterated the same conclusory language: "[T]he Board has held as long ago as 1948, that such a finding is barred by 'the language of Section 8(c) of the amended Act and its legislative history.'"

83 *See* F.W. Woolworth Co., 251 N.L.R.B. 1111, 1113 (1980) (permitting employer to exclude pro-union employees from captive audience meetings).

84 Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953); *see also* Livingston Shirt Corp., 107 N.L.R.B. 400, 408 (1953) ("The rule laid down in *Peerless Plywood* is a rule of conduct governing Board elections and, in our opinion, constitutes a narrow and reasonable limitation designed to facilitate the holding of free elections in the atmosphere of relative tranquility conducive to a sober choice of representative.").

85 77 N.L.R.B. 124 (1948).

> of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. That is the situation here.[86]

So although the Board found that the written and verbal communications during the organizing campaign in *General Shoe* did not constitute an unfair labor practice, nevertheless, it found the employer's conduct inconsistent with employees being able to freely choose whether to join a union and ordered that the election be rerun.[87]

Thus, seventy-five years after Congress enacted the NLRA, few limitations currently exist on the ability of employers to force their employees into captive audience meetings at pain of being terminated for not acquiescing. Although Section 8(c) clearly provides for employer free speech, an explanation has not been forthcoming from the Board as to how compelling employees to listen to their employers views on unionism is part of an employer's free speech rights.

In the next Section, this Article reexamines the policies that led to the enactment of the Taft-Hartley Amendments in 1947 and considers whether those policies can peacefully coexist with the idea of compelling employees to attend employer captive audience meetings and listen to anti-union speech.

III. EMPLOYEE FREE CHOICE: THE ANIMATING POLICY OF TAFT-HARTLEY

A. The Policy of the Wagner Act of 1935

Even prior to the enactment of Taft-Hartley in 1974, the concept of employee free choice was central to the labor relations scheme under the Wagner Act. As discussed in the previous section, Congress passed the NLRA in 1935 to grant workers the affirmative right to organize, to collectively bargain through a representative of their own choosing, and to engage in protected activities for mutual aid and protection.[88] Enacted in the wake of the Great Depression and increased labor unrest, the NLRA declared it the national policy of the United States to encourage the practice and procedure of collective bargaining by funneling destructive labor disputes into a constructive collective bargaining process.[89]

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86 *Id.* at 127.

87 *Id.*

88 29 U.S.C. § 157 (2006).

89 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not to compel.").

The Wagner Act recognized the inherent power imbalance between employees and their employers because of the former's economic reliance on the latter and sought to employ collective power to offset this imbalance.[90] Part of the solution to this workplace problem was to provide workers "industrial democracy;"[91] that is, to give workers some say, some input, about the terms and conditions of their employment.[92] The legislative history of the Act highlights this concept by likening industry with government, and labor organizations with political representation.[93]

Although the Wagner Act provided a detailed scheme that outlined the process of resolving industrial relation disputes, the Act made no reference to employer involvement in the selection process when employees determined whether they would select or designate a bargaining representative.[94] Rather, employer involvement was only addressed after employees had selected a bargaining representative of their own choosing; employers were to remain neutral while employees exercised their democratic rights.[95] The policy judgment to exclude employers from the employee selection of a bargaining representative was the consequence of various anti-union tactics used by employers prior to the 1930s, including the use of strikebreakers and Pinkerton agents, the utilization of threats to shut down plant operations if the employees unionized, and, of course, the use of workplace captive audience meetings.[96] As discussed in Part I, the early Board viewed such meetings as coercive and as inconsistent with employee free choice.

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90 *Id.* at 23 ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.").

91 During Senate Hearings debating the NLRA, Senator Wagner, the chief architect of the legislation, proclaimed "[t]hat is just the very purpose of this legislation, to provide industrial democracy." NATIONAL LABOR RELATIONS BOARD: HEARINGS ON S. 1958 BEFORE THE SENATE COMM. ON EDUCATION AND LABOR, 74th Cong., 1st Sess. 642 (1935).

92 *See* Cynthia Estlund, *Who Mops the Floors in the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 677 (2008) ("In 1935, the National Labor Relations Act gave workers the freedom to speak up, make common cause, and form organizations to bargain collectively with employers.").

93 "A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities." S. REP. NO. 1184, 73d Cong., 2d Sess. 4 (1934).

94 This omission was by no means incidental, as an employer free speech provision was rejected during House debates "as having no place in this bill." H.R. REP. NO. 1371, 74th Cong., 1st Sess. 6 (1935).

95 *See* Pa. Greyhound Lines, 1 N.L.R.B. 1, 51 (1935).

96 *See* Story, *supra* note 64, at 369-70 (discussing the LaFollette Senate Committee's "sensational revelations of employer violations of workers' civil liberties" during anti-organization campaigns).

The Wagner Act also sought to promote employee free choice through Section 8(2),[97] which prohibited employers from forming "company unions."[98] Prevalent throughout the first part of the 20th century,[99] employers often formed these types of union to deter employees from joining independent, outside labor organizations.[100] Prohibited by Section 8(a)(2), the Board came to observe that, "Congress brought within its definition of 'labor organization' a broad range of employee groups, and it sought to ensure that such groups were free to act independently of employers in representing employee interests."[101] In short, the existence of company unions was inconsistent with the promotion of employee free choice.

B. Explicit Preference for Employee Free Choice Under Taft-Hartley

Whereas the concept of employee free choice was always consistent with the core principles of the Wagner Act, it became one of the central themes after Congress amended the NLRA through the Taft-Hartley Act in 1947.[102] Although the Taft-Hartley Act made important changes to the NLRA, it did so through addition, leaving the policy of the NLRA and most of its text unchanged.[103] The Amendments were the product of a Congressional policy in favor of employee free choice,[104] a sentiment that the Wagner Act unfairly favored union interests,[105] and the belief that employer

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97 "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (2006).

98 *See* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 776-77 (1994) (stating that proponents of the NLRA sought to promote employee free choice by eliminating company unions).

99 *See* Matthew W. Finkin, *Section III: Commercial Labor Law: Representation of Employees Within the Firm: The United States Report*, 54 AM. J. COMP. L. 395, 403 (Supp. 2006) (maintaining intent of Section 8(a)(2) was to eliminate company unions).

100 *See* Barenberg, *supra* note 98, at 772, 780 ("The company union was . . . an apparatus that tended to produce a cadre of workers opposed to outside unionism because especially beholden to, or intimidated by, management's preferred mode of governance.").

101 Electromation, Inc., 309 N.L.R.B. 990, 994 (1992).

102 Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947).

103 *See* Harry Mills & Emily Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 630 (1950) ("Much of the body of doctrine built up during the twelve years of the Wagner Act was left untouched by the [Taft-Hartley] amendments.").

104 *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1534 (2002) ("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.").

105 *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.").

speech should be protected during an organizational campaign. In this latter regard, the Senate report accompanying the Taft-Hartley Act states that "this amendment . . . would insure both to employers and labor organizations full freedom to express their views to employees on labor matters, refrain from threats of violence, intimidation of economic reprisal, or offers of benefit."[106]

Both the U.S. Supreme Court[107] and the Board[108] have repeatedly emphasized the NLRA's policy in favor of employee free choice in numerous contexts. Most recently, the Court examined the importance of employee free choice under the NLRA in *Chamber of Commerce v. Brown*.[109] In *Brown*, the Court addressed whether a California statute that prohibited employers who receive state funds from using those funds to promote or deter organization was preempted by the NLRA.[110] In the process of holding that the California law was preempted by the NLRA,[111] Justice Stevens, for the Court majority, reaffirmed that the Taft-Hartley Act demonstrated Congressional intent to permit representation elections where

106 S. REP. NO. 105, S. 1126 (1947).

107 *See, e.g.*, Auciello Iron Works v. NLRB, 517 U.S. 781, 790 (1996) (discussing the NLRA's "command to respect the free choice of employees" to select bargaining representatives); NLRB v. Gissel Packing Co., 395 U.S. 575, 608 (1969) (discussing the Board's obligation to ensure employee free choice in the use of authorization cards); NLRB v. Exch. Parts Co., 375 U.S. 405, 409 (1964) (holding that Section 8(a)(1) prohibits employer conduct that inhibits employees' freedom of choice); Garment Workers' v. NLRB, 366 U.S. 731, 737 (1961) ("[T]he Wagner Act guarantees employees' freedom of choice and majority rule."); Brooks v. NLRB, 348 U.S. 96, 99 (1954) (observing that by conducting secret ballot elections to determine union representation, Board ensures employee free choice).

108 *See, e.g.*, Dana Corp., 351 N.L.R.B. 434, 441 (2007) ("[Employee] free choice is, after all, the fundamental value protected by the Act."); Madison Square Garden Ct., LLC., 350 N.L.R.B. 117, 121 (2007) (setting aside the representation election because a supervisor's conduct coerced and interfered with employee free choice); Seattle Mariners, 335 N.L.R.B. 563, 565 (2001) ("[B]y dismissing the instant petition, we are both promoting voluntary recognition and effectuating the free choice of the majority of the unit employees."); Smith's Food & Drug Ctrs., 320 N.L.R.B. 844, 846 (1996) (holding that its rule requiring a challenging union to demonstrate a thirty percent showing of interest before a decertification petition will be granted effectuates employee free choice); Electromation, Inc., 309 N.L.R.B. 990, 993 (1992) (discussing the Wagner Act's ban on employer dominated labor organizations as furthering Congress' goal of promoting employee free choice when selecting a labor organization); Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982) (holding that deceptive statements that interferes with employee free choice will be grounds to set an election aside); RCA Del Caribe, 262 N.L.R.B. 963, 965 (1982) ("This new approach [to representation petitions filed by challenging unions] affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice); Peerless Plywood, 107 N.L.R.B. 427, 429 (1953) ("We institute this rule pursuant to our statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammeled choice.").

109 554 U.S. 60 (2008).

110 *Id.* at 62.

111 *Id.* at 65-66.

employees can exercise free choice in deciding whether to be represented by a union.[112]

The NLRA's policy in favor of employee free choice has also been lately demonstrated by the proposed Employee Free Choice Act (EFCA).[113] The bill, not coincidentally named after this preeminent policy of the Act, seeks to promote employee free choice, most notably by allowing unions to gain recognition via a "card check" majority. Although the bill has thus far failed to pass Congress, the delay is not the result of sentiment opposed to employee free choice; rather, the debate continues as to how best to ensure employee free choice.[114] While Democrats generally support EFCA's card check recognition provision, most Republicans oppose such a recognition procedure, instead demanding that the Board maintain its secret ballot election procedure, which they believe best furthers employee free choice when choosing for or against designating a bargaining representative.[115]

In short, little doubt exists that any interpretation of the NLRA should be consistent with one of its central animating principles: ensuring employee free choice concerning the decision of whether to join a labor union. The next Part contends that only a *per se* rule prohibiting employer captive audience meetings is consistent with conducting "elections in circumstances and under conditions which will ensure employees a free and untrammeled choice."[116]

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112 *Id*. at 74 ("The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA.").

113 Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-560 ("A bill to amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during the organizing efforts, and for other purposes.").

114 *See* Drummonds, *supra* note 15, at 97 ("Management-side lawyers often argue that the law works to allow employees to exercise their free choice rights," while union lawyers and most scholars disagree with this assessment).

115 *See* Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. LEGIS. 311, 318 (2008) ("Recent efforts to address the shortcomings in the NLRA have gone nowhere. On one side of the aisle, Democrats have supported legislation that would mandate union recognition based on authorization cards, or a 'card check' procedure. On the other side, Republicans have blocked consideration of that legislation and have instead supported legislation that mandates secret ballot elections in all circumstances.").

116 Peerless Plywood, 107 N.L.R.B. 427, 429 (1953).

IV. THE NLRA FRAMEWORK SUPPORTS A *PER SE* BAN ON CAPTIVE AUDIENCE MEETINGS AND CURRENT BOARD PRECEDENT IS NOT AN OBSTACLE

A. The Time Has Come to Reinstitute the *Clark Bros.* Doctrine

In light of the NLRA's explicit and fundamental policy of favoring employee free choice in the union organizational setting, the Board should adopt a *per se* ban on employer captive audience meetings. Such meetings significantly interfere with employees' rights to decide whether to join, or refrain from joining, a labor organization under Section 7 of the Act and are, therefore, an unfair labor practice in violation of Section 8(a)(1).

Not only would such a legal conclusion be consistent with the policy of employee free choice, but such an approach would be entirely supported by both U.S. Supreme Court precedent in the labor picketing context under the *Vogt* line of cases,[117] and with the surrounding legislative history of the Wagner Act and the Taft-Hartley Amendments. The relevant case law recognizes the duality of labor speech activities and permits the government to regulate the conduct aspects of such activities. Although there is some language in the Senate report disapproving of the *Clark Bros.* doctrine,[118] these meager excerpts reflect at most Congressional concern in some quarters about the doctrine. By no means, however, do these statements provide a sufficient basis for concluding, in derogation of the statute's clear language, that Congress intended to permit captive audience meetings pursuant to Section 8(c).

Instead, the text of Section 8(c) is the clearest indication that Congress decided not to make a legislative statement one way or the other on the permissibility of captive audience speech. That inaction leaves it for the Board to decide, based on its experience with the complexities surrounding industrial relations, which path to take.[119] Because employer captive audience meetings are not about free speech, but conduct, the Board is free to

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[117] Recall that the *Vogt* analysis permits regulation of coercive union conduct on the picket line. I argue here that *Vogt* strongly suggests that the Board, consistent with the free speech provisions of Section 8(c), be able to regulate coercive employer captive audience conduct. In other words, the *Babcock & Wilcox* Board failed to appreciate that the coercive aspect of captive audience meetings often comes not from employer's explicit speech, but from the context in which the employer speech is delivered. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969); NLRB v. Exch. Parts Co., 375 U.S. 405, 409 (1964).

[118] *See supra* notes 67-76 and accompanying text.

[119] *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, 56 (2004) ("By placing the enforcement mechanism of the Act within the NLRB, Congress expected that experienced officials with an adequate appreciation of the complexities surrounding industrial relations would make the decisions that would shape national labor policy.").

take action in this area without impermissibly burdening any constitutional rights of employers. With its focus on conduct, a rule banning employers from compelling attendance at these meetings would qualify as a regulation of conduct rather than as an impermissible content-based regulation on speech.[120] Further, and significantly, the U.S. Supreme Court has long recognized that government may protect a listener's interest in avoiding unwanted communication.[121]

On the other hand, even if a court were to side with employers and their allies and construe captive audience meetings as involving employer speech rights, restrictions placed on such meetings by the Board would be permissible under the First Amendment and Section 8(c) as "time, place and manner" regulations,[122] would be appropriately content neutral,[123] and would be valid under the Supreme Court's captive audience doctrine as applied outside the parameters of the NLRA.[124] Further, any concerns that a *per se* ban on employer captive audience meetings would unduly restrict employer speech would be further quelled by the fact that employers would still be free to make the exact same speeches to employees.[125] A ban on captive audience speeches would not do anything to restrict employer speeches that are otherwise protected by Section 8(c); the only resulting difference is that such speeches can only be given to employees who, consistent with the

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120 Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (holding that a hate crimes statute did not violate free speech rights because "the statute . . . is aimed at conduct unprotected by the First Amendment").

121 Hill v. Colorado, 530 U.S. 703, 734 (2000); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); Thomas v. Collins, 323 U.S. 516, 537-38 (1945) (finding that employers may have right to persuade their employees, but "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer's First Amendment] right has been passed").

122 Clark v. C.C.N.V., 468 U.S. 288, 293 (1984).

123 Turner v. FCC, 512 U.S. 622, 649 (1994); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Such an interpretive approach does not single out meetings concerning unionization. It would cover all matters of personal conscience and belief: religion, political campaigns, and unionization. All of these concerns can involve highly charged and complex issues of personal preference and trust. The Board should be permitted to adopt this interpretation of current NLRA law to address the perception that it is unfair to require employees to listen to their employers' views about subjects laden with ideological content.

124 Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."); Lehman v. Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); *Rowan*, 397 U.S. at 737.

125 During the presentation of this paper at the Florida International Law Review Symposium, one detractor of this proposal suggested that employers would not have adequate means to address their employees about unions without the ability to hold captive audience meetings. One person in the audience responded to this concern aptly: Isn't it just as easy to get employees to come to voluntary meetings on unionism if you offer them food or some other benefit for attending? Indeed, the only employees who probably won't attend are those who are firmly in support of unionization.

policy of the Act, voluntarily choose to hear the speech.[126] The combination of voluntary exchanges between employer and employee, both inside and outside the workplace, will still lead to an informed electorate before the representation election occurs.

So, not only do such meetings interfere with the laboratory conditions needed for a fair and free representation election, but more fundamentally, such meetings bring the full economic power and intimidation of employers to bear on employees who are told in no uncertain terms that joining a union would be bad for them and the company. As such, employer captive audience meetings should be seen as employer conduct that interferes with the employee right to choose whether to join a union.

B. The Non-Immutable Nature of NLRB Precedent

Now, it may be argued by opponents that such a change in Board direction would overrule more than sixty years of Board precedent. That is correct. Such a ban of captive audience meetings would necessarily require the Board to overturn its 1948 *Babcock & Wilcox* decision. But Board precedent here should not be an obstacle to the NLRB.

Although I believe strongly in a substantial role for Board precedent (the Board's history of flip-flopping in various doctrinal areas notwithstanding),[127] I also strongly believe that old Board cases should only be given precedential effect to the extent that they deserve to be given such effect. Board precedent is not sacrosanct, especially where the initial Board decision is not supported by a modicum of reasoned elaboration. Recall that in *Babcock & Wilcox*, the Board failed to elaborate on its reasoning for its new rule,[128] simply stating that "the language of Section 8(c) of the

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[126] Indeed, one form of the captive audience meeting, supervisor speech to individual employees, has been found by the Board to be capable of leading to a *General Shoe* laboratory conditions test violation in the pro-union supervisor context. *See* Harborside Health Care, Inc., 343 N.L.R.B. 906 (2004). In *Harborside*, although the Board made clear that supervisor pro-union speech is not objectionable in and of itself, *id.* at 911, the 3-2 Republican majority reaffirmed "long-standing Board precedent" that pro-union supervisory conduct may be grounds for setting aside an election without there being an explicit threat of reprisal or promise of benefit. *Id.* at 909. More specifically, the Board adopted a rule that supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances. It would appear to make sense, then, to treat anti-union supervisor speech as coercive conduct as well when supervisors use their workplace authority to keep employees from either signing a union authorization card or voting against the union in an election. Moreover, it would seem evident that instances of supervisor pro-union intimidation in this context would pale in comparison to normal anti-union intimidation by supervisors.

[127] *See* Dana Corp., 351 N.L.R.B. 434, 441 (2007) ("Even in the context of administrative law, the principle of *stare decisis* is entitled to considerable weight.").

[128] Indeed, the *Babcock & Wilcox* Board dedicated only half a sentence to overturning its *Clark Bros.* doctrine while establishing that captive audience meetings are protected under Section 8(c).

amended Act [Taft-Hartley], and its legislative history, make it clear that the doctrine of the *Clark Bros*. case no longer exists as a basis for finding an unfair labor practices [based on captive audience meetings]."[129] However, the Board's rationale that its decision was based on the legislative history of the Taft-Hartley Act was illusory; and the Board failed to cite to any committee reports or Congressional debates discussing the Act. Nor did the decision acknowledge that the policy of the Taft-Hartley Act was to ensure employee free choice. By narrowly basing its decision on Section 8(c), the *Babcock & Wilcox* Board also failed to recognize the dual speech/conduct aspects of captive audience meetings. In short, the Board's 1948 decision in *Babcock & Wilcox* does not come close to the type of Board precedent that should be respected. In the absence of *any* reasoned elaboration as to why the promulgation of Section 8(c), an *employee free speech* provision, or legislative history, required the abandonment of the *Clark Bros.* doctrine outlawing captive audience meeting, the only thing to recommend this old case is its age and strange persistence. That alone, however, does not support continual adherence to it.

The Board has recently shown its willingness to overturn decades-old Board precedent.[130] Indeed, the Board articulated standards for overturning its own precedent in two cases: *IBM Corp*.[131] and *Dana Corp*.[132] In *IBM Corp*., the Board continued its shifting position regarding non-unionized employees' rights to have a coworker present at a disciplinary investigatory interview, conventionally known as "*Weingarten* rights."[133] Overturning its *Epilepsy Foundation of Northeast Ohio*[134] decision, the Board stated that, "national labor relations policy will be best served by overruling existing

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129 *See* Babcock & Wilcox, 77 N.L.R.B. 577, 578 (1948).

130 During the presentation of this paper at the Symposium, Member Schaumber maintained that the Board's recent decision by a 3-2 partisan margin in *Dana Corp.*, 351 N.L.R.B. 434, did not represent a radical departure from precedent. I, and many others, disagree strongly with this sentiment. How can a case that overturns forty years of precedent with a new rule developed out of whole cloth not be considered anything but a radical departure from prior precedent?

131 341 N.L.R.B. 1288 (2004).

132 351 N.L.R.B. 434.

133 Employee rights to have a representative present during disciplinary investigatory interviews were first recognized by U.S. Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). There, the Court held that unionized employees have the right to have a union representative present at interviews with the employee if that interview might reasonably lead to disciplinary action. In *E.I. DuPont & Co.*, 289 N.L.R.B. 627, 628 (1988), the Board reaffirmed its position that Weingarten rights do not apply to nonunionized workers, but acknowledged that such an interpretation of the Act was "permissible" rather than "mandatory." *DuPont* was overturned twelve years later in *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676, 678 (2000), when the Board this time decided that the Act guaranteed all employees, whether unionized or not, the protections of *Weingarten*.

134 331 N.L.R.B. 676 (2000).

precedent and returning to the earlier precedent of *DuPont*."[135] The Board noted that when it is faced with two permissible interpretations of the Act (that of *DuPont* or *Epilepsy Foundation*), it is free to use its discretion to decide which rule best effectuates the Act's overarching goals.[136] Consistent with its duties to "adapt the Act to the changing patterns of industrial life"[137] and to further the policies of the Act, the Board felt compelled to overturn *Epilepsy Foundation* and adopt the new rule in *IBM*.[138]

Similarly, the Board should feel compelled to overturn *Babcock & Wilcox* and embrace a new rule consistent with the *Clark Bros.* doctrine. Such a switch in the context of captive audience meetings would both "best serve national labor relations policy," and "adapt the Act to the changing patterns of industrial life." Because we now know after sixty years of experience that captive audience meetings have become a ubiquitous and effective tactic in contemporary anti-organizing campaigns,[139] the *per se* ban would be consistent with the changing patterns of industrial life and also best serve the main national labor relations policy, which all agree is to promote employee free choice in deciding whether or not to be represented by a union.

The more recent case of *Dana Corp*.[140] stands even more strongly for the proposition that Board precedent should not stand in the way just because of its old date. In *Dana Corp.*, the Board overturned more than forty years of Board precedent by modifying its voluntary recognition-bar doctrine.[141] The longstanding rule had been that an employer's voluntary recognition of a union barred an election petition by employees and rival unions for a "reasonable period of time," usually around six months, to promote stability in the newly-formed collective bargaining relationship.[142]

The Board stressed that the overturning of past Board precedent was necessary "to provide greater protection for employee free choice."[143] By

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135 *IBM*, 341 N.L.R.B. at 1289.

136 *Id.* at 1289-90.

137 *Id.* at 1291 (citing *Weingarten*, 420 U.S. at 266).

138 *Id.* at 1294.

139 Indeed, even the Board, in the laboratory conditions context, has recognized the coercive effect of captive audience meetings on employee free choice and permitted the formulation of rules of conduct to deal with that coercive situation. *See* Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953); *see also* Livingston Shirt Corp., 107 N.L.R.B. 400, 408 (1953) (reading *Peerless Plywood* as providing a "rule of conduct" against last-minute captive audience meetings).

140 Dana Corp., 351 N.L.R.B. 434, 437 (2007) (acknowledging that the Board's previous recognition-bar doctrine was established in *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966)).

141 *Id.* at 434.

142 *Id.* at 437 (citing *Keller Plastics*, 157 N.L.R.B. at 587) ("[T]he parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining.").

143 *Id.* at 438.

allowing employees of the bargaining unit to file a decertification petition or a certification petition in favor of a rival union under its newly fashioned rule within forty-five days of the employer's voluntary recognition of the union, the Board believed it was furthering one of the Act's central policy goals.[144] Anticipating concerns stemming from overturning forty years of Board precedent in this area, the Board majority concluded that its rules are not "fixed and immutable," and have been changed in other situations to impose higher standards.[145] Further, the Board stated that its "precedent is not immune from reconsideration simply because it is of a certain vintage."[146]

Likewise, and consistent with the Board's reasoning concerning when to defer to precedent, the Board should readily overturn its *Babcock & Wilcox* decision and enact a ban on employer captive audience meetings. *Babcock & Wilcox* is simply irreconcilable with the Act's policy of employee free choice. It is absurd to think that employees, forced to attend anti-organizing meetings at the direction of their employer, where they are not free to ask questions or challenge the employer's indoctrination, could possibly exercise free choice during the subsequent certification election. This is the classic situation of the "fist inside the velvet glove."[147] Moreover, as the *Dana Corp.* Board itself observed, Board rules are not "fixed and immutable,"[148] but should be changed to protect NLRA values,[149] and are "not immune from reconsideration simply because [they are] of a certain vintage."[150] All of these factors inexorably lead to the conclusion that *Babcock & Wilcox* should be overturned and a new rule based on *Clark Bros.* adopted to insulate employees from coercive employer conduct.

V. CONCLUSION

Based on employee free choice, the conduct/speech distinction, and the threadbare nature of NLRB precedent in this area, the Board should return to its *Clark Bros.* doctrine and make employer captive audience

144 *Id.* at 434 ("In order to achieve a 'finer balance' of interests that better protects employees' free choice, we herein modify the Board's recognition-bar doctrine . . . .").

145 *Id.* at 441.

146 *Id.* at 441 n.32.

147 *See* NLRB v. Exch. Parts Co., 375 U.S. 405, 409 (1964). Just as employees are "well aware of the inference that well timed employer benefits" suggest, employees are equally aware of the meaning behind being compelled, at pain of discipline or termination, to hear their employer views of labor unions also strong: "[T]hat the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *Id.*

148 *See Dana Corp.*, 351 N.L.R.B. at 441.

149 *Id.* at 434.

150 *Id.* at 441 n.32.

meetings a *per se* violation of Section 8(a)(1) of the NLRA. No need exists for statutory amendment of the NLRA because the current language of the Act, even in light of the Section 8(c) employer free speech provisions, readily supports this alternative interpretation. Without being compelled to listen to their employer's anti-union screed, employees will better be able to exercise their free choice in deciding whether they wish to be represented by a labor organization.