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"Captive Audience" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?

ELIZABETH J. MASSON*

INTRODUCTION

The National Labor Relations Act (NLRA) protects the collective bargaining rights of most private sector workers in the United States. Under the NLRA, employees have the right to form, join, and assist unions, and to bargain collectively with their employers, through representatives of their own choosing. The NLRA also prohibits employers from interfering with, restraining, or coercing employees in their exercise of these rights. Protecting employees' rights, and thereby encouraging the practice of collective bargaining between employers and employees, is declared by the NLRA to be the policy of the United States.

Today, less than ten percent of private sector employees in the United States are represented by a union. Low union density is

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* J.D. Candidate, University of California, Hastings College of the Law, 2005. I would like to thank Professor Reuel Schiller for sharing his knowledge and passion for labor law. I would also like to thank Judge William L. Schmidt for his wisdom, encouragement, and friendship.

3. Section 152(3) of the NLRA defines the "employees" who are covered under the Act. 29 U.S.C. § 152(3). This definition excludes agricultural laborers, private domestic workers, independent contractors, statutorily-defined supervisors, workers covered by the Railway Labor Act, and governmental workers. Id. §§ 151-169.
4. Id. § 157.
5. Id. § 158(a)(1).
6. Id. § 151.

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attributable to several factors, including the intensity of employer resistance encountered by employees attempting to unionize a non-union workplace. A common and legal tactic used by employers in their efforts to fight unionization is the “captive audience” meeting. Employers assemble employees, usually during work time, and present them with anti-union speeches and videos. Employers can fire employees for not attending a captive audience meeting, or for asking a question during the meeting.

Although captive audience meetings were unlawful during the twelve years following the enactment of the NLRA, they are now legal and highly effective weapons used by employers to dissuade employees from electing a union. This Note will argue that captive audience meetings should be prohibited under the NLRA because they constitute employer interference in employees’ free choice in union elections.

Part I will examine the current state of the law and its effect on union organizing campaigns. Part II will trace the changes in the law and national labor policy that led to the legalization of captive audience meetings. Part III will analyze the conflict between the legal doctrine used to sanction captive audience meetings and both the statutory goal of protecting employee rights, and the basic policy assumptions underlying the NLRA. Part III will also examine the flawed presumptions underlying the concept that employer participation in union organizing campaigns is necessary.

Part IV will argue for a change in current law governing union representation elections, to ban the use of captive audience meetings throughout the pre-election time period. Part IV will discuss four bases of support for this proposal: 1) banning captive audience meetings requires merely an extension of current law, which prohibits captive

9. BRONFENBRENNER, supra note 8, at 73 tbl.8.
10. AFL-CIO ISSUE BRIEF, supra note 8, at 4-5.
11. NLRB v. Prescott Indus. Prod. Co., 500 F.2d 6, 11 (8th Cir. 1974) (upholding employer’s discharge of employee who attempted to ask questions during an anti-union captive audience meeting); Litton Systems, Inc., 173 N.L.R.B. 1024, 1030 (1968) (holding employees have no statutorily-protected right to leave meetings which they are required by management to attend on company time and property in order to hear anti-union speeches designed to influence the outcome of union election); HUMAN RIGHTS WATCH, supra note 8, at 57.
12. In re Clark Bros. Co., Inc., 70 N.L.R.B. 802, 805 (1946), enforced, 163 F.2d 373, 376 (2d Cir. 1947) (finding employer’s exercise of superior economic power in coercing its employees to listen to speeches related to their organizational activities to be an independent violation of Section 8(1) of the NLRA).
audience meetings during the twenty-four hours prior to a representation election; 2) banning captive audience meetings would not require employers to grant unions equal access to employees, which courts and employers have resisted for sixty years; 3) banning captive audience meetings would regulate employer speech in accordance with the First Amendment "captive-audience" doctrine; and 4) most industrialized democracies, and several individual states, have recognized captive audience meetings as inherently coercive and banned their use in representation elections.

I. THE CURRENT STATE OF THE LAW

Although 77 percent of workers in the United States have collective bargaining rights under the NLRA, union density in the private sector is at an all time low. Union membership as a percentage of the workforce has declined in the United States since the mid-1950s, when it peaked at more than 30 percent, to 9 percent in 2003. Yet 44 percent of unorganized private-sector employees report they would like to be represented by a union. This figure represents as many as 42 million U.S. workers who have not benefited from the statutory right to join a labor organization.

In 1997, employees successfully elected unions in only 48 percent of certification elections held by the National Labor Relations Board (Board). Many scholars and researchers attribute the disparity between workers who want unions, and workers who successfully elect unions to intense employer opposition to union organizing.

A. CAPTIVE AUDIENCE MEETINGS AS EMPLOYER RESISTANCE TACTIC

One of the most common anti-union tactics used by employers is the holding of "captive audience" meetings. A captive audience meeting is an anti-union meeting held on company time, at which worker attendance is mandatory, and which workers can be fired for refusing to attend. Workers can also be prohibited from asking questions or speaking during the meeting, upon pain of discipline, including

13. BUREAU OF LABOR STATISTICS REPORT, supra note 7, at tbl.3.
14. HUMAN RIGHTS WATCH, supra note 8, at 7 n.117 (2000).
15. BUREAU OF LABOR STATISTICS REPORT, supra note 7, at tbl.37.
20. BRONFENBRENNER, supra note 8, at 73 tbl.8.
21. See sources cited supra note 11.
discharge.\textsuperscript{22}

Employers held anti-union captive audience meetings in 92 percent of more than 400 union elections held by the National Labor Relations Board between January 1998 and December 1999.\textsuperscript{23} On average, employers held eleven anti-union captive audience meetings in the time period prior to the Board election.\textsuperscript{24} Union win rates declined dramatically as the number of captive audience meetings increased, from more than 40 percent when no captive audience meetings were held, to 18 percent when the employer held twenty or more.\textsuperscript{25}

Employers hire anti-union labor consultants in 71 percent of Board elections.\textsuperscript{26} These consultants encourage employers to use their virtually unlimited opportunities to communicate aggressively with their employees during union campaigns.\textsuperscript{27} The Department of Labor (DOL) has documented the proliferation of anti-union consulting and legal firms.\textsuperscript{28} The DOL admits, however, that an accurate estimate of the amount of money employers spend on anti-union consultants and lawyers is not available under current law.\textsuperscript{29}

B. \textsc{Actual Employer Cost to Defeat Unionization Unknown}

In 1959, Congress passed the Labor-Management Reporting and Disclosure Act (LMRDA).\textsuperscript{30} Section 203 of the LMRDA requires that employers report the amount of money they spend on certain anti-union consultant activities to the government.\textsuperscript{31} In passing the LMRDA, Congress declared that tactics used by employers to defeat unionization should be exposed to public view, in order to protect the free exercise of employees' rights.\textsuperscript{32} The LMRDA, however, provides an exemption from the reporting requirements for payments covering services that constitute "advice," which the employer is free to accept or reject.\textsuperscript{33} As long as an anti-union consultant does not speak directly to an employer's workers, its services can be categorized as "advice."\textsuperscript{34} This exemption allows

\textsuperscript{22} See sources cited supra note 8.
\textsuperscript{23} BRONFENBRENNER, supra note 8, at 73 tbl.8.
\textsuperscript{24} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{29} Id.
\textsuperscript{31} 29 U.S.C. § 433(b).
\textsuperscript{33} 29 U.S.C. § 433(c).
\textsuperscript{34} Department of Labor Notice of Revised Statutory Interpretation, supra note 28.
employers and anti-union consultants to circumvent the reporting requirements of the LMRDA, and avoid the scrutiny of the Department of Labor, and the public. In January 2001, the Department of Labor revised its interpretation of the “advice” exemption in an attempt to remedy the underreporting of anti-union activities by employers and their consultants. In April 2001, the Bush administration rescinded the Department of Labor’s revised interpretation of the LMRDA’s “advice” exemption.

C. LEGISLATION INTRODUCED IN 2003 TO REFORM THE NLRA

Although the magnitude of the anti-union consulting industry supported by employer resistance to unionization is unknown, lawmakers have recognized its effects as problematic. In November 2003, Senator Edward Kennedy and Representative George Miller introduced legislation aimed at countering the negative effects of employer resistance to union organization. The bill, known as the Employee Free Choice Act, would amend the NLRA to allow a union to be certified as the employees’ representative when a majority of employees have signed union authorization cards. Currently, even if a majority of employees have signed union authorization cards, the employer can refuse to recognize the union as the employees’ representative, and insist on a Board-held election. Employers routinely require elections in order to engage in a campaign against the union. Witnesses testifying at a House subcommittee hearing on the Employee Free Choice Act cited pre-election captive audience meetings as the type of employer coercion that intimidates employees and has a chilling effect on the workers’ organizing campaign. While the bill is not currently scheduled for a vote, Representative Charles Norwood has introduced a bill in opposition to the Employee Free Choice Act, which would prohibit employers from recognizing unions through “card checks.”

35. Id.
36. Id. (reinterpreting “advice” exemption to exclude consultant-prepared materials, the object of which is to persuade employees to vote against union representation).
40. BNA Daily Labor Report, supra note 38.
41. Id.
The Employee Free Choice Act has 207 co-sponsors in the House of Representatives, and 32 in the Senate, which signifies a widespread concern for strengthening employees’ rights under the NLRA. Regardless of whether Congress passes the Employee Free Choice Act, banning captive audience meetings would limit employers’ ability to use the pre-election time period to infringe upon employees’ rights.

II. HISTORY OF CAPTIVE AUDIENCE MEETINGS

A. THE NLRA

The National Labor Relations Act, also known as the Wagner Act (for its leading proponent, Senator Robert Wagner) was passed in 1935 amidst “more sustained opposition than any other proposal made during the early years of the New Deal Administration.” The Wagner Act codified the democratic principles of worker self-organization and election of collective bargaining representatives without interference from management. Section 1 of the NLRA states that the denial by some employers of the right of employees to organize and engage in collective bargaining leads to industrial strife and the diminution of employment and wages. Section 1 further states that the inequality of bargaining power between at-will employees and employers substantially burdens and affects the flow of commerce. Congress found that this disparity in bargaining power also aggravates economic depression symptoms, depresses wages, and lowers purchasing power of wage earners. Section 1 declares the policy of the United States to be to encourage collective bargaining, and to protect the rights of workers to form and join unions, and to bargain collectively in negotiating their terms and conditions of employment.

The Wagner Act created the National Labor Relations Board to enforce the provisions of the NLRA. The Board’s two main tasks are overseeing representational elections and remedying unfair labor practices. The unfair labor practices proscribed in Section 8(a)(1) through Section 8(a)(5) of the NLRA are designed to prevent employers from infringing upon employees’ rights. Section 8(a)(1) prohibits an

47. Id.
49. Id.
50. Id.
51. Id.
52. Id. § 153.
53. Id. §§ 153, 160.
54. RICHARD N. BLOCK ET AL., LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE: THE STATE OF THE WORKPLACE IN THE 1990S: HEARINGS OF THE COMMISSION ON THE FUTURE OF WORKER-
employer from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the NLRA.\textsuperscript{55}

As the early Board interpreted the Wagner Act, employers were not to be involved in employees' exercise of their Section 7 rights, based on the principle that the employer's participation in the process of unionization was inherently coercive, given the employees' economic dependence on the employer.\textsuperscript{56} The Board's goal of employer neutrality was further supported by a principle espoused by Dr. Paul H. Douglas, an economics professor at the University of Chicago, during the Senate Committee hearings preceding the passage of the NLRA. Dr. Douglas stated that, under the Wagner Act, employers should not directly or indirectly make or influence the choice of their workers.\textsuperscript{57}

It is to be the workers who will make the choice. This is only fair, since the law has long since recognized that a man should not serve adverse interests or represent both the buyer and the seller . . . . The employer, or the buyer of labor, can choose his own bargaining agency, but he is not to help the worker, or the seller of labor, to choose his.\textsuperscript{58}

1. 1935: Pennsylvania Greyhound Lines

The Board's first decision, \textit{In re Pennsylvania Greyhound Lines, Inc.}, involved an employer who warned his employees not to join a union, at the same time he created an internal employee association.\textsuperscript{59} The Board found that the "advice" the employer gave his employees not to join the "outside" union was motivated by a desire to keep the employees from joining a union of their own choosing.\textsuperscript{60} Such "advice," when offered by an employer who can fire the employee to whom the "advice" is given, interfered with, restrained, and coerced the employees from exercising their rights.\textsuperscript{61} The U.S. Supreme Court affirmed the Board's order to disestablish the employer-dominated association without commenting on the Board's finding that the employer's "advice" violated the NLRA.\textsuperscript{62}


Another early Board decision enforcing employer neutrality in the face of employees exercising their rights was reversed by the federal
appeals court. In *In re Virginia Electric & Power Co.*, the Board held that an employer's speeches and written bulletins, urging employees not to join a union, but instead to join an employer-dominated association, interfered with the employees' rights under the NLRA. The Fourth Circuit denied enforcement of the Board's order, and the U.S. Supreme Court affirmed. The Court held that the Board lacked a sufficient basis for finding that the employer's anti-union speeches and literature interfered with, coerced, or restrained employees in the exercise of their Section 7 rights. In reversing and remanding the case, the Court noted that nothing in the NLRA prohibited the employer from expressing his view on labor policies or problems, but that he was "as free now as ever to take any side [he] may choose on this controversial issue." Coming just six years after the NLRA's enactment, the Court's holding was in stark contradiction to Congress' declared national labor policy of encouraging the practice and procedure of collective bargaining as essential for a free and democratic society. Section 1 of the NLRA purportedly resolved any controversy on the issue soundly in favor of promoting employees' self-organization. *Virginia Electric Co.* marked a watershed in labor law under the NLRA, in signaling that employers need not remain neutral during the union election process.


The following year, in *In re American Tube Bending Co., Inc.*, the Board held that an employer violated the Act by interfering with the Board-held representation election. Prior to the election, the employer gave captive audience speeches and sent letters to its employees, in an effort to persuade employees not to vote for either union on the ballot. Somewhat reluctantly, the Second Circuit followed *Virginia Electric Co.* and denied enforcement of the Board's order. Judge Learned Hand stated that, prior to the Supreme Court's ruling in *Virginia Electric*, the court might have upheld the Board's order directing the employer not to interfere with or coerce its employees in the exercise of their Section 7 rights.

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63. Block et al., supra note 54, at 16.
64. 20 N.L.R.B. 911, 919–25 (1940).
65. 115 F.2d 414, 423 (4th Cir. 1940).
66. 314 U.S. 469, 480 (1941).
67. Id. at 479.
68. Id. at 477 (emphasis added).
69. 29 U.S.C. § 151 (2000) (declaring national labor policy of encouraging collective bargaining);
James A. Gross, *The Demise of the National Labor Policy: A Question of Social Justice*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW*, supra note 25, at 45, 46 (describing Wagner Act as based on the principle that the "rights of workers to participate in decisions affecting their workplace lives was considered an essential component of social justice").
70. Block et al., supra note 54, at 17.
71. 44 N.L.R.B. 121, 134 (1942).
72. Id. at 129–30.
73. 134 F.2d 993, 995 (2d Cir. 1943).
According to Judge Hand, the court could have interpreted earlier Board decisions to hold that any expression of such views by an employer directly to his employees could be construed as coercive, and possibly threatening to "those... whom he does not succeed in convincing." The court, however, found little to distinguish the anti-union conduct of the employer in American Tube Bending from that of the employer in Virginia Electric & Power Co., and declined to enforce the Board's order.


In 1946, the Board ruled in In re Clark Bros. that the employer's anti-union captive audience speeches were calculated to, and succeeded in interfering with the employees' selection of a representative of their choice. The Board stated that the freedoms guaranteed by Section 7 were meaningless unless employees were also free to choose whether or not to receive advice, aid, or assistance concerning their rights. The employer in Clark Bros. used its economic power to force its speech on unwilling listeners, rendering its speech unlawful. The Board compared captive audience speeches to the act of a person who physically restrains his listeners to assure their attention. The Board wrote: "The law may and does prevent such a use of force without denying the right to speak."

In finding the captive audience speeches to be an unfair labor practice, the Board reasoned that:

[T]he words or conduct of an employer... must be judged not as an abstract proposition but realistically in the light of the economic relationship between the employer and his employees. It need hardly be stressed that their economic dependence renders employees unduly responsive to the suggestions of their employer, whose good will is so necessary, and gives to the employer's statements... an immediate and compelling effect that they would not possess if they were addressed to economic equals.

The Second Circuit upheld the Board's order. The court stated that the constitutional guarantee of free speech entitles an employer to express his views on labor relations, so long as his conduct as a whole is
not coercive. In Clark Bros., the employer’s holding of captive audience meetings was coercive and interfered with the employee’s rights, despite the generally unobjectionable content of the employer’s speech. The court held that, given the circumstances of the employer’s aggressive anti-union campaign, the Board was justified in finding the captive audience meetings violated the Act. However, the court rejected the Board’s argument that employees’ rights were infringed upon whenever an employer used its power to compel their attendance at anti-union meetings. The court declined to hold that employers may never hold captive audience meetings; such meetings would not violate the NLRA, provided union representatives were accorded a similar opportunity to address employees.

B. TAFT-HARTLEY ACT AMENDED NLRA

In 1947, Congress passed the Labor Management Relations Act (LMRA), better known as the Taft-Hartley Act, a substantial amendment to the NLRA. The LMRA added Section 8(c) to the NLRA, which provides that “[t]he expressing of any views, argument or opinion... shall not constitute or be evidence of an unfair labor practice... if such expression contains no threat of reprisal or force or promise of benefit.” Section 8(c) became known as the “employer free speech” provision. In passing the LMRA, the Senate declared its intention to overrule Board decisions such as Clark Bros., which the Senate Committee on Labor and Public Welfare considered to be “too restrictive” of employers’ rights.

The following year, the Board ruled in In re Babcock & Wilcox that Section 8(c) of the Taft-Hartley Act extinguished the “compulsory audience” doctrine espoused by the Board in Clark Bros. as a basis for finding an unfair labor practice.

Subsequently, the Board attempted to restrict rather than to prohibit employers’ use of captive audience speeches; however, the Second
Circuit overruled the Board’s decision. In *In re Bonwit Teller*, the employer enforced a broad no-solicitation rule, which prohibited employees from discussing unionization in working areas, and kept union organizers from accessing employees. Prior to a Board-held election, the employer locked all employees inside the store to compel their attendance at an anti-union meeting, and even physically restrained employees who attempted to leave the store. The employer also ignored the union’s request for permission to address the employees at the store. The Board held that, given the employer’s broad no-solicitation rule, denying the union’s request to address the employees had made a fair election impossible. The anti-union captive audience meetings, combined with the employer’s refusal to allow the union to access the employees during working hours, interfered with the employees’ rights in violation of the NLRA.

The Second Circuit refused to enforce the Board’s order that the employer either cease making captive audience speeches or allow the union an equal opportunity to address employees. The court found that such an order was too broad, and held instead that the employer must cease discriminatorily applying its no-solicitation rule, thereby affording the union some avenue of communication with employees.

C. CURRENT LAW: PEERLESS PLYWOOD RULE IS SOLE LIMITATION ON CAPTIVE AUDIENCE MEETINGS

In 1953, the Board issued a pair of companion cases, *In re Livingston Shirt Corp.* and *In re Peerless Plywood Co.*, that overruled *Bonwit Teller* and established a single limitation on captive audience meetings. In *Livingston Shirt* the Board found that "*Bonwit Teller* was the discredited Clark Bros. doctrine in scant disguise." The Board held that requiring an employer to allow the union equal opportunity to address employees at their workplace, on work time, impermissibly violated employers’ property rights.

*Peerless Plywood* established the rule that captive audience meetings may be held, by either the employer or the union, except within the last

96. 96 N.L.R.B. 608 (1951), enforced in part, 197 F.2d 640 (2d Cir. 1952).
97. 96 N.L.R.B. at 611.
98. Id. at 622.
99. Id. at 632.
100. Id. at 613.
101. Id. at 615.
102. 197 F.2d 640, 646 (2d Cir. 1952).
103. Id.
104. 107 N.L.R.B. 400 (1953).
106. 107 N.L.R.B. at 407.
107. Id. at 406-07.
twenty-four hours before the scheduled time for conducting an election. The Board found in Peerless Plywood that a captive audience speech given within the last twenty-four hours before an election tends to create a "mass psychology" that overrides arguments made through other campaign media, and gives an unfair advantage to the party having the "last word." In Livingston Shirt, the Board referred to this rule as an attempt to protect employees, "whose rights are after all paramount," from last-minute arguments they "may be compelled to hear."

Although the rule ostensibly applies to both employers and unions, Livingston Shirt made clear that only the employer has the right to compel employees to hear any speech, through economic coercion. Because employers are never required to allow unions to address employees on the employer's premises, unions do not hold "captive audience" meetings and the Peerless Plywood rule does not affect unions.

By the 1970s, employers had obtained the right to keep union organizers off their property and had almost total control over the organizing campaign in the workplace. By the end of the 1980s, the nature of labor relations in the U.S. had fundamentally shifted from any vestige of protecting the freedoms guaranteed to workers by the NLRA, to a new emphasis on preventing or eliminating collective bargaining.

III. CAPTIVE AUDIENCE MEETINGS ARE INHARMONIOUS WITH AND UNNECESSARY FOR THE PROTECTION OF WORKERS' RIGHTS

A. CAPTIVE AUDIENCE MEETINGS CONFLICT WITH THE POLICY GOALS OF THE NLRA

The "free speech" doctrine that the Board and courts used to legalize captive audience meetings is in deep conflict with the goals of the NLRA. Section 1 of the NLRA expresses the statutory purpose of equalizing bargaining power between employer and employees. The NLRA was intended to enable workers to obtain power so that respect for their rights and interests was not dependent solely on the interests of their employers or the state.

108. 107 N.L.R.B. at 429.
109. Id.
110. 107 N.L.R.B. at 408 (emphasis added).
111. See id. at 405-06.
112. BLOCK ET AL., supra note 54, at 18.
113. Phil Comstock & Maier B. Fox, Employer Tactics and Labor Law Reform, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, supra note 25, at 90, 91.
By guaranteeing workers the freedom to engage in self-organization and collective bargaining, Congress created an exception to the at-will employment doctrine, which governs most employment relationships in this country. The doctrine allowing employers to hold captive audience meetings as a legal prerogative is based on this notion of employee servility, inherent in the at-will employment relationship. It is ironic that employers can fire at-will employees for refusing to attend a captive audience meeting, the purpose of which is to persuade employees to remain at-will employees, who are subject to discharge at the whim of the employer.

B. DEFENSES OF CAPTIVE AUDIENCE MEETINGS ARE FLAWED

The premise that employer speech is important is union organizing campaigns is based on several flawed concepts: that both sides have a legal right to express their views; that employees need to hear the employer’s point of view; and that, as a candidate in the election, the employer’s speech is protected as political speech.

1. Employee Speech Versus Employer Speech

Employers and courts have defended the legality of captive audience meetings as an attempt to encourage debate over the pros and cons of unionization. The captive audience doctrine, however, explicitly allows employers to ban discussion within meetings, and to restrict the speech of pro-union workers. Employers may legally fire employees for asking questions about information presented by the employer. The law gives pro-union employees no right to counterbalance employers’ anti-union speeches. As the Eighth Circuit held in NLRB v. Prescott Industrial Products Co., anti-union captive audience speeches are not forums in

116. Id.
117. CHARLES MANLEY SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT 69 (1862).
119. 1 LEX K. LARSON, UNJUST DISMISSAL, RELEASE NO. 36, § 1.01 (MATTHEW BENDER 2002).
120. Id. at 382; see also Kate E. Andrias, Note, A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections, 112 YALE L.J. 2415, 2427 (2003) (arguing legislative history and historical context of Section 8(c) show liberty at issue was employer’s freedom to campaign against unionization, not free speech for employers and employees).
121. Andrias, supra note 120, at 2440.
122. NLRB v. Prescott Indus. Prod. Co., 500 F.2d 6, 11 (8th Cir. 1974) (upholding discharge for insubordination of employee who attempted to ask a question of the employer following a captive audience meeting) Andrias, supra note 120, at 2440 (citing J.P. Stevens & Co., 219 N.L.R.B. 850, 850 (1975)). The NLRB found the employee had been fired for engaging in protected activity and that although exceeding the bounds of lawful conduct, he did not lose the protection of the Act. Prescott Indus. Prod. Co. 205 N.L.R.B. 51, 51-52 (1973). The 8th Circuit denied enforcement of the Board’s order reinstating the fired employee. 500 F.2d at 19.
which workers must be treated as equals in dealing with management.\textsuperscript{123}

Captive audience meetings are also defended on the grounds that employees have a right to hear both sides of the issue.\textsuperscript{124} Employer speech is endorsed as enhancing employees’ freedom of choice by contributing to the creation of a “marketplace of ideas.”\textsuperscript{125} However, employers have no obligation to allow union organizers access to employees\textsuperscript{126} and pro-union employees can be silenced and fired for not remaining silent.\textsuperscript{127} Judge Brandeis’ famous remedy of “more speech” is not applied to speech encouraging employees to exercise their rights.

2. Captive Audience Meetings Are Not Necessary for Employees to Receive Information

Research shows that workers already know how their employers feel about unions before campaigning begins.\textsuperscript{128} In a study of 360 union organizing campaigns, workers were asked how they felt their company would respond to the issue of union representation.\textsuperscript{129} Forty-two percent of workers thought their employer would “make an all-out effort to defeat the union”; another 21 percent thought their employer would “try to persuade workers to oppose union representation.”\textsuperscript{130} Only 24 percent of workers thought their employer would allow the employees to make the choice on their own.\textsuperscript{131}

A seminal study of thirty-one union elections during 1973 and 1974 found that employer campaigning combined with denial of union access created an improper imbalance in opportunities for communication with employees.\textsuperscript{132} The Getman study, while arguing that employees are not influenced by either the employer’s or the union’s campaign, admitted that a powerful correlation existed between “campaign familiarity” and attendance at meetings.\textsuperscript{133} The study found that employers had an inordinate advantage in organizing campaigns because they were “substantially more successful in getting employees to attend meetings than was the union.”\textsuperscript{134} The study reported that 83 percent of employees

\begin{itemize}
  \item 123. 500 F.2d 6, 11 (8th Cir. 1974) (citing NLRB v. Red Top, Inc., 455 F.2d 721, 728 (8th Cir. 1972)).
  \item 124. Story, supra note 118, at 383.
  \item 125. Id.
  \item 126. NLRB v. United Steelworkers of America, CIO (NuTone/Avondale), 357 U.S. 357, 363 (1958) (holding employer has no obligation to allow the use of facilities for pro-union solicitation although employer himself is violating no-solicitation rule in anti-union campaign).
  \item 127. Andrias, supra note 120, at 2440.
  \item 128. Comstock & Fox, supra note 113, at 99.
  \item 129. Id.
  \item 130. Id.
  \item 131. Id.
  \item 132. JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 143–57.
  \item 133. Id. at 156.
  \item 134. Id. at 92.
\end{itemize}
attended company meetings, while only 36 percent attended union meetings. This disparity created an imbalance that the authors recommended be redressed by requiring employers to allow the union to hold meetings on working time and premises, if the employer holds such meetings.

3. The Employer is Not a Candidate

Another flawed concept underlying the doctrine of "employer free speech" casts the employer as a "candidate" in the election. In *Thomas v. Collins*, the Supreme Court presupposed that employers and unions are rival candidates in representation elections, construing employer speech as political speech, entitled to protection. Upon closer examination, however, the differences between a political campaign and an organizational campaign are apparent. First, employees voting in a representation election choose whether to be represented for purposes of collective bargaining by a particular union—the employer is not on the ballot. Second, the First Amendment protection guaranteed to political speech is premised on a democratic and "robust" approach to debate, in which competing views are permitted "equal time." However, only the employer is guaranteed the right to speak, while also being permitted to exercise its economic power to prohibit employees from speaking in turn.

Finally, union campaigns are fundamentally different from political campaigns in their outcome. When employees choose a union, the employer is not ousted as a losing incumbent, but rather retains control of its workplace. The union does not gain authority to set terms of employment, but only a right to negotiate as the elected representative of the employees. By protecting employer speech as "political" speech, the courts have "cloaked a private corporate speaker with First Amendment protection which, in turn, has used that protection to abridge the First Amendment values and their exercise by employees." This result is particularly ironic because only the employees' interests are statutorily protected by the NLRA, which gives employers no positive right to influence employees' votes.

In draping employer anti-union speech in First Amendment finery, the Board and the courts ignore the principle that freedom of speech is not an absolute right, and cannot subjugate all other rights. First Amendment doctrine allows for time, place, and manner restrictions of
speech to further the aims of democracy. As the NLRA proclaims, protecting employees' rights and promoting industrial equality are democratic ideals. Regulating speech that threatens the realization of those ideals advances the goals of the First Amendment.  

C. PROTECTION OF EMPLOYERS' RIGHTS AT A COST TO EMPLOYEES' RIGHTS

Concerned that the nation's labor laws were not adequately protecting the rights of employees to organize, the Secretaries of Labor and Commerce established the Commission on the Future of Worker-Management Relations (The Dunlop Commission) in 1993 to investigate and recommend changes to existing labor law. The Commission reported that the law protects employers' rights to an extent that allows employers to campaign constantly against a union during an organizing drive. The Board and courts rigorously protect employers' speech, property and managerial rights, ensuring that only the employer's view is presented in the workplace. While the exercise of the employer's right to speak to its employees about unionization, to compel their attendance at anti-union meetings, and to prevent union organizers from accessing its property are all legal per se, taken together, they result in an imbalance in the favor of the employer that is inconsistent with the policy of the NLRA. The Commission further found that the exercise of these rights demonstrates the employer's power over the employee, making the choice of unionization seem that much more costly to employees than it might otherwise be perceived. Through legal tactics, employers can effectively defeat one of the main goals of the NLRA: to provide employees with a free and uncoerced choice regarding whether to be represented by a union.

IV. CAPTIVE AUDIENCE MEETINGS SHOULD BE BANNED

A. EXTENSION OF PEERLESS PLYWOOD RULE

This Note proposes one reform to current U.S. labor law: banning captive audience meetings by extending the existing rule of Peerless Plywood to the entire pre-election time period. The Board's stated rationale for limiting the Peerless Plywood prohibition of captive audience meetings to the last twenty-four hours before an election is

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142. Andrias, supra note 120, at 2458.
143. Block et al., supra note 54, at 5.
144. Id. at 1.
145. Id. at 77.
146. Id.
147. Id. at 92.
148. Id. at 100.
149. Id. at 92.
150. Id. at 91–92.
unclear. According to the Board, captive audience speeches are only harmful when made during the last twenty-four hours before an election:

[T]he real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether the employer or the union, who in this manner obtains the last most telling word. 151

The Board’s decision does not explain why this “mass psychology” is not engendered by a “voluntary” meeting held on company premises within the last twenty-four hours, or a captive audience meeting held at other times prior to an election.

In both Peerless Plywood and Livingston Shirt, the Board claimed to rely on its experience with conducting representation elections in deciding that captive audience speeches held within the last twenty-four hours before an election have an “unwholesome and unsettling effect”152 on employees. 153 For the eight years preceding the two cases, however, the Board allowed employers to hold captive audience meetings without distinguishing “last-minute” speeches from any other. No empirical evidence could have existed comparing the effects of captive audience meetings held prior to the last twenty-four hours before the election, from the effects of those held within the last twenty-four hours, as the Board had never delineated between them.

The reasoning of Livingston Shirt, Peerless’ companion case, is equally opaque as to the Peerless rule’s rationale. In Livingston Shirt, the Board referred not to “mass psychology,” but to protecting employees from: “last minute blandishments which [they] may feel compelled to hear and which may becloud [their] judgment and interfere with [their] thoughtful weighing of the issues involved.” 154 The Peerless rule, however, does not prohibit an employer from giving a captive audience speech to each employee, individually, while at his or her workstation, within the last twenty-four hours before an election. 155 If the Peerless rule is based on protecting employees from last minute arguments they may feel compelled to hear, allowing individual captive meetings with employees within the last twenty-four hours before an election defeats the purpose. Individual captive meetings allow employers to becloud

152. Id.
153. Id.; Livingston Shirt Corp., 107 N.L.R.B. 400, 408 (1953).
155. Associated Milk Producers, Inc., 237 N.L.R.B. 879, 880 (1978) (holding an employer did not violate the rule of Peerless Plywood when he, on the day of the union election, gave a short anti-union speech to every employee while each was at his or her workstation, and to assembled employees in an area where limited workspace precluded him from addressing them individually).
employees' judgments and interfere with their weighing of the issues at least as much as much as mass captive audience meetings, creating a distinction without a difference. As Board Member Murdock wrote in his dissent in *Peerless Plywood*:

The mass psychology which my colleagues agree is created by employer speeches of this type, is not solely dependent upon the last-minute character of the employer's speech but comes, in fact, as a result of the employer's *exclusive* use of a forum as highly charged with significance and pressure for employees as is the place where they work. This, the crux of the interference with a free election caused by such employer speeches, is not alleviated in any manner by the last-minute moratorium proposed by the majority. 156

B. BANNING CAPTIVE AUDIENCE MEETINGS DOES NOT REQUIRE UNION ACCESS TO EMPLOYER PREMISES

The proposal to ban captive audience meetings has been made in the past, usually in the context of arguing for "equal access" to employees for unions to present campaign speeches157 or for a major overhaul of the representation election process.158 Following the passage of the Taft-Hartley Act, the Board tried to require equal access to employees for unions, holding that employers who held captive audience meetings were required to allow union organizers an equal opportunity to communicate with employees.159 The courts consistently denied enforcement of these Board orders, and declared that employers' property rights trump the rights of employees' under the NLRA. 160

In 1956, the Supreme Court held in *NLRB v. Babcock & Wilcox* that employers may bar union organizers from their property unless unions have no other possible means to communicate with employees.161 This rule allows employers to deny unions access to employees, unless the

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156. 107 N.L.R.B. 427, 432 (1953) (Murdock, Bd. Member, dissenting).
157. Labor Law Reform Act of 1977, H.R. 8410, 95th Cong. (1977) (failed attempt to reform NLRA; bill passed the house and was voted down in the Senate after filibuster by Senator Hatch); Comment, Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections, 127 U. PA. L. REV. 755, 790-91 (1979) (proposing reform that requires employers to grant unions opportunity to respond to captive audience meetings on employers' time and premises).
158. Becker, *supra* note 139, at 585-94 (proposing changes to representation elections including denying employers the right to be heard in representation cases and unfair labor practice cases arising from election conduct, the right to raise questions concerning voter eligibility or unit determination, and the right to appeal election results).
159. See e.g. Bonwit Teller, 96 N.L.R.B. 608, 611 (1951) (finding employer's denial of union's request to address employees on premises had same effect as discriminatorily applying no-solicitation rule); *In re* Babcock & Wilcox, 109 N.L.R.B. 485, 494 (1954) (finding employer's refusal to allow non-employee union members to distribute literature in plant parking lot constituted an unreasonable impediment to self-organization).
160. See discussion *supra* Part II.
employees live at their workplace, such as in logging or mining camps. As the Court wrote in 1958: "the Taft-Hartley Act does not command that labor organizations ... 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."

Under the NLRA, employers cannot be required to allow union organizers to solicit or distribute literature on company property. Given the current state of the law, any labor law reform that would require employers to allow a union representative to use employer facilities to counteract employer anti-union captive audience meetings is unlikely to be enforced.

Furthermore, even if unions were afforded "equal access" to employees, on employer premises and time, the communicative impact of employer speech and union speech would never be equal. The employee is economically dependent on the employer, not on the union. The employer can make promises and threats (whether legal or not) that it has the power to make good on under any circumstances; the union can only keep its promises if the employees elect it as a representative. Whether the union wins or loses the election, the employer continues signing the employees' paychecks every month. The economic reality of at-will employment makes "equal access" an oxymoron when used to describe union-held "captive audience" speeches.

C. FIRST AMENDMENT CAPTIVE AUDIENCE DOCTRINE ALLOWS FOR REGULATION OF EMPLOYER SPEECH

As Chief Justice Warren wrote in his concurrence and dissent in NLRB v. United Steelworkers of America, CIO, "[e]mployees during working hours are the classic captive audience." First Amendment doctrine allows for regulation of speech directed at captive audiences, and should be invoked to prohibit employers' anti-union captive audience meetings. The captive audience doctrine is based on the belief that an individual, when captive, has a right not to hear speech that outweighs the speaker's right to free expression. The doctrine is premised in part on the right to choose what information one receives,

162. Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992) (holding Babcock allows a union equal access to employees "only where the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them").
163. NLRB v. United Steelworkers of America, CIO (NuTone/Avondale), 357 U.S. 357, 364 (1958).
164. Id. at 368 (Warren, C.J., dissenting).
and to make one's own choices based on that information. Forcing listening, by definition, removes decision-making authority from the individual. In balancing the right to free speech with the right to choose what one hears, courts consider the burden the listener should bear in avoiding the speech, such as walking away from a speaker or averting one's eyes to written speech. If an individual's choice not to hear speech cannot be freely made, that burden should be found to be unreasonable. The greatest justification for regulating expression based on the captive audience doctrine exists when the speech is highly intrusive upon the right to choose not to listen, and the burden of avoiding such speech is extreme.

Following this doctrine, the Supreme Court has held that radio listeners receiving broadcasts in their homes are captive audiences, and so the FCC can prohibit certain types of offensive speech. Yet workers, who can be fired for refusing to attend an employer's anti-union captive audience meeting, are not considered so greatly burdened as to warrant governmental restriction of employer speech. Some courts have recognized the "captive" nature of the employees' at the workplace in cases where employers, and even third parties, have targeted workers with objectionable speech. If speech directed at employees during working time can be regulated in some contexts, then employer speech may be restricted if that speech is intended to deter employees from exercising their statutorily protected rights.

D. OTHER INDUSTRIALIZED COUNTRIES AND SOME STATES ALREADY BAN CAPTIVE AUDIENCE MEETINGS

The United States is unique among industrialized democracies in not restricting employers' behavior in actively opposing their employees' decision to unionize. The United States has refused to ratify International Labor Organization Convention 87, which requires member states to "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize."

167. Id. at 108-09.
168. Id. at 109.
170. Strauss, supra note 166, at 110.
171. Id. at 120.
173. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (holding female employees were captive audience to speech creating hostile work environment); Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 402 (E.D. Penn. 1980) (holding employees at jobsite were captive audience as only measure they could take to avoid speech was to quit their jobs).
174. For example, the First Amendment might not protect an employer's captive audience speech that attempted to persuade employees not to vote in a presidential election.
175. Comstock & Fox, supra note 113, at 90.
176. Freedom of Association and Protection of the Right to Organise Convention, adopted July 9,
The U.S. government was urged by the U.S. Council for International Business not to sign the convention because it had been interpreted as foreclosing any employer interference with organizing rights, such as employer "free speech" under Section 8(c) of the NLRA.177

The Canadian courts cited the experience of U.S. employees who attempt to unionize and are defeated by intense employer resistance as support for restricting employer speech during union organizing campaigns.178 A 1996 decision noted the long-standing policy of Canadian Labour Boards that employers are not allowed to engage in anti-union political-style campaigns in an effort to prevent a union from being chosen by their employees.179 The B.C. Labour Board recognized that the economic dependence and vulnerability of employees underlies the need to protect employees’ rights, particularly during a union organizing campaign.180 According to the B.C. Labour Board, the Canadian government has made a statutory choice to restrict employer speech in favor of ensuring employees' freedom of association.181

In the United States, labor laws in individual states could provide more protection for employees’ rights.182 The NLRA, as federal law, may preempt states from recalibrating the “rules of engagement” established between employers and unions in the context of collective bargaining, including what types of picketing or strike activity are legal.183 However, the NLRA might not preempt states from providing employees greater protection from employers in organizing campaigns, particularly because the NLRA does not grant any affirmative rights to employers to use their economic power against employees.184 Federal labor law could be viewed as establishing minimum standards of workers' rights, to which states


179. Id. at 75 (citing Re Cardinal Transportation B.C. Inc., [1996] 34 C.L.R.B.R. (2d) 1).

180. Id.

181. Id. at 76.


183. Id. at 1577 n.227 (citing Michael Gottesman, Rethinking Labor Law Presumptions: State Law Facilitating Unionization, 7 Yale J. on Reg. 355, 357 (1990)).

184. Id. at 1578.
could add, making the NLRA a "floor" but not a "ceiling."

Under this scheme, individual states may determine that captive audience meetings have no place in private sector organizing campaigns. Some states have already banned employer anti-union captive audience meetings in the public sector. The Ohio State Employment Relations Board has found the holding of captive audience meetings to be a per se violation of the Ohio labor relations statute, depriving employees of a free and untrammelled election environment, and requiring the state labor board to set aside elections.

Other industrialized nations and individual states recognize that captive audience meetings are antithetical to the protection of employees' rights. Congress, however, has not acted upon the apparent conflict between protecting "employer free speech" and protecting workers' freedom of association, self-organization, and designation of representatives of their own choosing.

**CONCLUSION**

The concept of employer held captive audience meetings as a legitimate expression of employer "free speech" cannot be squared with the democratic ideals embodied in the National Labor Relations Act. Imagine you are a worker, forced by your employer to assemble with your co-workers and be told that you should not exercise your rights to obtain equal bargaining terms with management, or join a labor union; that you should not desire more input regarding your working conditions; or resist the notion of servility that pervades the at-will employment relationship; that you should not have more power in the workplace; should not bargain collectively to improve wages and terms of employment; should not vote for the union.

Employees receive this message and understand that voting for the union is dangerous if they want to keep their jobs. Captive audience meetings are pervasive because they are effective, and because they are legal. Banning captive audience meetings does not require a sea change in national labor policy or law. The *Peerless Plywood* rule, which recognizes the danger of captive audience meetings, could be extended to cover the entire pre-election time period. First Amendment captive audience doctrine provides for restriction of coercive speech when the listener has no chance to escape such speech. Workers being told, by those who wield economic power over them, not to enjoy a statutorily protected, universally recognized human right are a captive audience,

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185. *Id.* at 1578-79.
who require protection. For when could a listener have more of a burden in resisting such speech than a worker at work, whose only recourse is to quit the job? As most industrialized democracies, and some states, recognize, captive audience meetings constitute impermissible employer coercion in employees' exercise of their right of self-organization and should be banned in private sector union organizing campaigns.
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