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THE CODDLING OF THE AMERICAN WORKER'S MIND: THE ANTI-FREE SPEECH NATURE OF POPULAR LABOR LAW REFORMS

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INTRODUCTION

In *The Coddling of the American Mind*, authors Greg Lukianoff and Jonathan Haidt argue that a culture of intolerance for opposing viewpoints on college campuses actually serves to hurt the very individuals that the movement seeks to protect.[1] Lukianoff and Haidt argue that, among other things, restricting freedom of speech and suppressing opposing and, arguably, troubling viewpoints actually makes students more fragile, rather than protected and secure.[2] Additionally, the authors posit that one of the great psychological untruths surrounding such campus debate is that all of life is merely a battle between the good and evil of differing viewpoints.[3] In arguing against the suppression of speech and opposing viewpoints on college campuses, Lukianoff and Haidt further assert that students would be better off—and less fragile—if exposed to contrasting viewpoints on issues of immense concern to both themselves and society as a whole.[4] Or, stated another way, "[d]isputes over 'the truth' are resolved by facts, not feelings; by science, not superstition; by debate, not dogma; by discussion, not denunciation; by heterodoxy, not orthodoxy."[5]

The problems inherent in the creation of safe spaces, the suppression of speech, and the sheltering of students from diverse viewpoints laid out by Lukianoff and Haidt are not unique to college campuses.[6] Over time, the suppression of speech,

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[1] GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE 10 (2018).

[2] *Id.* at 32.

[3] *Id.* at 53–77.

[4] *Id.* at 19–32.

[5] William E. Thro, *Follow the Truth Wherever It May Lead: The Supreme Court's Truths and Myths of Academic Freedom*, 45 U. DAYTON L. REV. 261, 262 (2020). For a legal argument in support of free speech on campuses and elsewhere, see Mark Martin, *Introductory Remarks at Free Speech Symposium*, 32 REGENT U. L. REV. 219 (2019). For an argument supportive of protests to prevent speakers from appearing on college campuses, see Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551 (2019).

[6] For a discussion of the history and context of recent campus free speech controversies,

opposing ideas, and perspectives has pervaded an area of the law that, for the most part, preserves the ability of individuals and organizations to engage in freedom of expression.[7] More specifically, many commentators and a number of recent labor law reform proposals and initiatives seek to undermine an axiomatic principle of traditional labor law—absent threat or coercion, all parties have the right to express their views on unionization during a union representation campaign.[8] This principle is statutorily codified in the Free Speech Proviso of the National Labor Relations Act (NLRA or the Act).[9] That statutory provision specifically protects "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form" and further states that such expression "shall not constitute or be evidence of an unfair labor practice under any of the provisions of [the NLRA], if such expression contains no threat of reprisal or force or promise of benefit."[10] The idea behind this proviso is that free expression by either employers, employees, or unions concerning matters of the workplace cannot be restricted or used as evidence of illegality if the expression is free from threat or promise of benefit to employees.[11] In addition to allowing the NLRA to pass muster under the First Amendment, the intent of this provision is obvious: all entities involved in unionization have the right to express their views on the issue without fear of censorship through unfair labor practice litigation under the NLRA.[12]

Much like voters in political elections, then, the Free Speech Proviso allows employees to make their own decisions about unionization after hearing from both sides of the debate. The importance of employee free choice in union elections has been long recognized. As the U.S. Supreme Court stated, "[a]ny procedure requiring

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see Jason M. Shepard & Kathleen B. Culver, *Culture Wars on Campus: Academic Freedom, the First Amendment, and Partisan Outrage in Polarized Times*, 55 SAN DIEGO L. REV. 87, 110–20 (2018).

[7] For example, see Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995), for a discussion of the development of a free speech doctrine in the workplace and an argument against it. Despite this constitutional principle, the author ultimately argues that "the First Amendment need not protect employer speech as a direct intervention in the exercise of employees' federally-protected electoral rights of self-organization." *Id.* at 456.

[8] *See Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 755–62 (1979).

[9] 29 U.S.C. § 158(c) (2000) [hereinafter Free Speech Proviso]. For a discussion of the history of the legal regulation of employer free speech in this area, see Robert F. Koretz, *Employer Free Speech under the Taft-Hartley Act*, 6 SYRACUSE L. REV. 82 (1954).

[10] Free Speech Proviso, 29 U.S.C. § 158(c) (2000).

[11] *See* Koretz, *supra* note 9, at 83.

[12] The NLRA designated certain employer and union actions as unfair labor practices, and thus illegal under the law. 29 U.S.C. §§ 158(a)–(b) (2000). For an interesting discussion of NLRA unfair labor practices in the context of social media platforms, see Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957 (2012).

a 'fair' election must honor the right of those who oppose a union as well as those who favor it."[13] The NLRA explicitly codifies the right of employees to make this decision for themselves:

> 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* . . . .[14]

Put another way, the law does not and should not dictate the choice of unionization for employees—rather, it is up to each employee to make that decision for themselves with the majority of votes deciding the issue for each particular workplace.

Despite the statutory protection of free choice and free speech in labor law, much of the concentration of scholarship and recent proposed labor law reforms have focused on efforts to interfere with an employer's ability to speak to employees about unionization. Underlying much of this scholarship is a fundamental disagreement about the employer's role in the process for employees to choose or decline unionization. As one commentator has stated, "[t]he core defect in union election law . . . is the employer's status as a party to labor representation proceedings."[15] Perhaps approaching the law from that perspective, many proposed labor law reforms have sought to limit an employer's ability to speak to employees during representation campaigns.[16] From proposed prohibitions on employer captive audience meetings,[17] to shortening the time period before union elections are held,[18] to outright advocacy for muzzling employer viewpoints completely,[19] many labor law reform proposals trend in the direction of prohibiting free expression by employers during union representation campaigns.

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[13] NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973).

[14] 29 U.S.C. § 157 (2000) (emphasis added). For a discussion of the tension between the NLRB's remedial powers with respect to employer unfair labor practices and the NLRA's bedrock principle of employee freedom of choice, see Diana Dietrich, *Labor Law—Remedial Non-Majority Bargaining Orders*—Conair Corp. v. NLRB, 33 U. KAN. L. REV. 345 (1985).

[15] Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 498 (1993).

[16] *See id.* at 585–94. *See also* Allie Robbins, *Captive Audience Meetings: Employer Speech vs. Employee Choice*, 36 OHIO N.U. L. REV. 591 (2010); Charles J. Morris, *Freeing the Captives: How Captive-Audience Meetings Under the NLRB Can Be Controlled*, 69 ADMIN. L. REV. 869 (2017); Michael M. Oswalt, *The Content of Coercion*, 52 U.C. DAVIS L. REV. 1585 (2019).

[17] *See* Becker, *supra* note 15, at 585–94.

[18] *See id.* at 546.

[19] *See id.* at 585–94.

As the nation enters an era in which a new presidential administration will likely push such labor law reforms, it is worth considering whether transparently anti-free speech reform measures make sense for the future of labor policy and law.[20] This Article argues that they do not. Because employee free choice is furthered, not diminished, by hearing both sides of an issue, American workers should have the opportunity to hear and evaluate employer speech in the course of union campaigns. Only then can employees make an informed decision about their workplace future. In the end, freedom of speech furthers employee freedom of choice—the NLRA's statutory goal in union elections. For these reasons, many labor law reform proposals should be rejected and seen for what they are: an attempt to suppress a particular viewpoint in furtherance of unionization, without regard for employee freedom of choice or a free and fair debate.

I. THE NLRB'S ELECTION PROCESS AND FREE SPEECH

A. The NLRB Election Process

The process by which employees choose or decline union representation is well established.[21] Generally, a union will collect authorization cards from the group of employees it seeks to represent.[22] If the union collects signed authorization cards from more than thirty percent of the unit it seeks to represent, it then has the right to petition the National Labor Relations Board (NLRB or the Board) to hold an election to determine if the employees want to be unionized.[23] Absent agreement between the

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[20] President Biden's plan on labor issues makes clear his priorities on labor issues, including incentivizing unionization. *See The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, JOEBIDEN.COM [hereinafter *Biden Plan on Labor*], https://joebiden.com/empowerworkers/#.

[21] As noted above, the law explicitly recognizes an employee's right to "refrain" from unionization, in addition to his or her right to unionize. 29 U.S.C. § 157 (2000).

[22] *See* William B. Sullivan, *New Developments in Union Authorization Cards and the NLRB Order to Bargain*, 5 SUFFOLK U. L. REV. 99, 105 n. 21 (1970). One author has described a union authorization card as follows:

> The union authorization card is basically a piece of paper used by union organizers and adherents whereby an employee by signing his name expresses his approval to some form of organizational activity. Authorization cards are generally classified as being either dual purpose or single purpose. The dual purpose card is one which both authorizes a specific union as the employee's bargaining representative and demands an N.L.R.B. election. The single purpose card on the other hand[ ] is one which generally only designates a collective bargaining agent.

Timothy J. Foran, NLRB v. Linden Lumber Co*.: Apparent Demise of the Union Authorization Card*, 5 CAP. U. L. REV. 339, 343 (1976); *see also Union Authorization Cards*, 75 YALE L.J. 805 (1966) (generally discussing the use of authorization cards in the union representation process).

[23] NLRB, CASE HANDLING MANUAL, PART II, REPRESENTATION PROCEEDINGS

parties, the NLRB generally will hold a hearing on the appropriateness of conducting an election.[24] Common issues that are litigated at such hearings include the inclusion or exclusion of particular job classifications or groups of employees from a separate employer location for voting purposes, as well as supervisory issues.[25]

After any such issues are decided, the NLRB conducts an election.[26] During that election, employees have the right to cast a secret ballot to make their decision.[27] More specifically, employees generally are provided a paper ballot to cast their vote; when completed, the ballot is then placed in a box with all of the other employee ballots, and the ballots are counted without registering or identifying the specific vote made by any particular employee.[28] The question of unionization is determined by majority.[29]

Between the time of the filing of a petition and the date an election is held, unions and employers often conduct campaigns to attempt to convince employees why unionization is, or is not, in their interest.[30] Thus, under current law, in a union representation election, employees have the right to cast their vote without any other party, union, or employer knowing their position on the issue.[31] If more than fifty percent of the employees cast their ballot in favor of unionization, the union will be

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§§ 11002.1(a), 11023.1, https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019published-9-17-20.pdf [https://perma.cc/9QJZ-FJ4N]. Although thirty percent is the minimum showing of interest to support the filing of a representation petition, many unions will not file unless they have authorization cards in excess of fifty percent of the proposed unit of employees.

[24] *Id.* §§ 11180–11248.

[25] *Id.* The test utilized by the NLRB in determining which employees shall be included a bargaining unit is termed the "community of interest" standard. *See, e.g.*, Tanja L. Thompson & Brenda N. Canale, *Has* Specialty Healthcare *Changed the Landscape in Organizing and Representation Proceedings?*, 29 A.B.A. J. LAB. & EMP. L. 447, 447–49 (2014) (discussing history of the application of the "community of interest" standard in non-acute health care facilities). For a discussion of the application of the "community of interest" standard in the higher education context, see Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions and* Brown University, 20 LAB. LAW. 243, 248–49 (2004). For a discussion of supervisory issues under the NLRA, see *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 HARV. L. REV. 1713, 1718–26 (1981). For a perspective on determinations of supervisory status from a recent member of the NLRB, see Philip A. Miscrimarra, *The NLRB and Supervisor Status: A Board Member's Perspective on the Self-Driving Workplace*, 31 A.B.A. J. LAB. & EMP. L. 411 (2016).

[26] CASE HANDLING MANUAL, PART II, *supra* note 23, §§ 11300–11350.

[27] *Id.* §§ 11322.1–11322.4.

[28] *Id.* §§ 11340.1–11340.11.

[29] *Id.* § 11340.8. For a discussion of the factors influencing employee turnout in union elections, see Henry Farber, *Union Organizing Decisions in a Deteriorating Environment: The Composition of Representation Elections and the Decline in Turnout*, 68 ILR REV. J. WORK & POL'Y 1126 (2015).

[30] Julius G. Getman et al., *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1465–68 (1975).

[31] CASE HANDLING MANUAL, PART II, *supra* note 23, §§ 11322.4, 11340.4.

certified as the bargaining representative of the unit.[32] The certification triggers a duty on the employer to bargain in a good faith attempt to reach an initial collective bargaining agreement with the union.[33]

B. Free Speech Under the NLRA

The regulation of employer speech during union representation campaigns has evolved over time.[34] In the early days after the NLRA became law, the NLRB required strict employer neutrality toward the issue of union representation during campaigns.[35] The principles underlying this regulation were twofold: (1) that in the context of union representation discussion, employer speech constituted *de facto* coercion and; (2) the employer, including its managers and supervisors, should have no interest in their employees' decisions concerning unionization.[36] These principles ultimately ran into opposition in the Supreme Court. In *Thornhill v. Alabama*, the Court held that the First Amendment applied to speech in the context of labor disputes.[37] The following year, in 1941, the Supreme Court went a step further and expressly recognized the right of employers to engage in free speech during union representation campaigns.[38] In so holding, the Court attempted to draw a distinction between protected free expression by employers and speech that restrained or coerced employees in their choices concerning unionization.[39] In 1947, Congress codified the Court's holdings in amending the NLRA to include the Free Speech Proviso.[40] As noted above, that statutory provision protects free expression, including employer speech, in the context of organizing campaigns so long as it does not contain "threat

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[32] *Id.* § 11470. For a general discussion of the NLRB objection process and common objections to election results, see Bruce D. Desfor, Note, *National Labor Relations Act Elections: Post-Election Objections*, 38 TEMP. L.Q. 288 (1965).

[33] For a discussion of first contract bargaining between unions and employers and potential reform to that process, see William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 324–28 (2008).

[34] *See, e.g.*, Michael J. Bennett, *Excessive Restriction on Employers' Restrictions During Union Representation Campaigns*, 66 MARQ. L. REV. 785, 786–94 (1983). For an interesting discussion of racial appeals during union representation campaigns, see *Appeals to Race in Union Representation Campaigns*, 1 U. TOL. L. REV. 224 (1969).

[35] Bennett, *supra* note 34, at 786.

[36] *Id.* at 786–87.

[37] Thornhill v. Alabama, 310 U.S. 88, 89 (1940) ("The dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

[38] NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477–80 (1941).

[39] *Id.*

[40] Bennett, *supra* note 34, at 788–89 (noting that under the Free Speech Proviso, "an employer's right to express its views was firmly established and its speech would fall outside of constitutional protection only if the speech or the employer's related conduct clearly coerced employees").

of reprisal or force or promise of benefit."[41] In balancing those interests, the NLRB has inconsistently enforced where it draws the line as to when employer speech is viewed as coercive and therefore illegal and when employer speech constitutes acceptable free expression.[42]

In the initial aftermath of the passage of the Free Speech Proviso, the Board adopted the so-called "laboratory conditions" standard *In re General Shoe* for the purpose of assessing when speech in the context of a union campaign constitutes an unfair labor practice.[43] That standard in essence developed from this statement in *General Shoe*: "[i]n 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."[44] The decision allowed the Board to regulate some employer speech in the campaign context, despite the existence of the Free Speech Proviso.[45] Practically, and despite the clear statutory intent to protect freedom of speech in this context, the *General Shoe* doctrine allows regulation of speech in union election campaigns even if the speech does not rise to the level of constituting an unfair labor practice under the NLRA.[46] Despite what appear to be obvious statutory and constitutional issues with the Board's adoption of the "laboratory conditions" standard, that doctrine has not been subject to exacting scrutiny in the courts.[47] Eventually, the Supreme Court accepted the laboratory conditions standard in *NLRB v. Gissel Packing*.[48] As some commentators have noted, the laboratory conditions standard has the potential to make speech illegal solely because it is convincing, rather than coercive.[49]

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[41] Free Speech Proviso, 29 U.S.C. § 158(c) (2000).

[42] Bennett, *supra* note 34, at 791–808.

[43] *In re* General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

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

[45] For a discussion of the NLRB's "laboratory conditions" standard, see Shawn J. Larsen-Bright, Note, *Free Speech and the NLRB's Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204 (2002).

[46] *Id.* at 215–17.

[47] *Id.* at 217–22. *See also* Bausch & Lomb, Inc. v. NLRB, 451 F.2d 873, 877 (2d Cir. 1971) ("We agree with the Third and Ninth Circuits that Section 8(c) does not limit the Board's discretion in determining whether an election was conducted under 'laboratory' conditions.").

[48] 395 U.S. 575, 612 (1969). The "laboratory conditions" doctrine gives the Board the regulatory power to "substantively regulate union and employer campaign conduct. If the Board finds . . . that the employees' preferences for a bargaining representative may have been tainted, the doctrine enables it to set aside the otherwise valid election and direct a new one," regardless of whether said taint was caused by speech or conduct that was statutorily or constitutionally permissible. Larsen-Bright, *supra* note 45, at 207. For a discussion of "how conduct became speech and speech became conduct" in the development of labor law, see Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, 8 U. PA. J. CONST. L. 255, 288–95 (2006).

[49] Larsen-Bright, *supra* note 45, at 242–43 ("When applied in pure speech cases, the [laboratory conditions] doctrine violates constitutional rights."); *see also* Peerless Plywood

In sum, although free speech is generally protected in the context of union organizing campaigns and elections, the NLRB still scrutinizes speech in this area and may overturn the results of an election if it believes that the speech somehow tainted the atmosphere of the election. The NLRB can make this determination even in the absence of employer conduct that otherwise constitutes an unfair labor practice. As discussed below, the thrust of many proposed labor law reforms would further dilute the protection of free speech under the NLRA and, in some instances, would outlaw completely employer expression in the context of union representation campaigns.

II. THE ANTI-FREE SPEECH IMPLICATIONS OF LABOR LAW REFORMS

With the laboratory conditions standard in place, and the concomitant potential for NLRB review of employer speech in union organizing campaigns, it would seem that the suppression of employer speech would not be an important focus of labor law reform. However, a cursory review of many of the reforms proposed by labor unions and commentators supportive of labor interests cut directly in the other direction.[50] That is, it is clear that one of the underlying goals of union-side labor law reform is to suppress all employer speech to employees—not just coercive or illegal speech—concerning the issue of unionization to effectively limit the debate to one pro-union viewpoint. Consider the following oft-proposed labor law reforms as examples.

A. Banning Employer Captive Audience Speeches

Employer captive audience speech, which is best characterized as required employee meetings in which the employer speaks to employees on unionization, has been legal since at least 1948.[51] In the aftermath of the passage of the Free Speech Proviso, the NLRB reversed its position that captive audience meetings were per se coercive and unlawful.[52] In so finding, the Board held that, regardless of whether employee attendance at the meetings was compulsory, the employer's right to express its views on unions was protected.[53] It stated, "[a]lthough expressive of the [employer's] antipathy toward the [u]nion, the conduct herein does not contain any threat of reprisal or force or promise of benefit and is therefore protected by the guaranty of the [F]ree [S]peech [Proviso]."[54] Although various decisions of the NLRB have chipped away at the scope of an employers' right to hold captive audience meetings

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Co., 107 N.L.R.B. 427, 429 (1953) (banning employer captive audience speeches within twenty-four hours of election).

[50] *See, e.g.*, Story, *supra* note 7; Becker, *supra* note 15; Gould, *supra* note 33.

[51] *In re* Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948).

[52] *See, e.g.*, Clark Bros. Co., 70 N.L.R.B. 802, 805, *enforced as modified*, NLRB v. Clark Bros. Co., 163 F.2d 373, 376 (2d Cir. 1947) (employees must be free to choose what information they receive).

[53] *In re Babcock*, 77 N.L.R.B. at 578.

[54] *Id.*

during union campaigns, the basic right to hold such meetings has continued through the present time.[55] Fundamentally, employer captive audience speeches have been sanctioned as an appropriate exercise of employer free speech in the context of union representation campaigns.[56]

Despite the long-standing acceptance of captive audience speeches as protected by the Free Speech Proviso, labor law reformers continually argue that employer speech in this context should be suppressed.[57] The Protecting the Right to Organize Act (the PRO Act), which was passed by the U.S. House of Representatives on February 6, 2020, explicitly bans employer captive audience speeches in the context of union organizing campaigns.[58] The PRO Act bill specifically provides "[t]hat it shall be an unfair labor practice under the [NLRA] for any employer to require or coerce an employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties."[59] As the Biden Plan on Labor explicitly

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[55] For example, as noted above, the NLRB has limited captive audience meetings in the twenty-four-hour period immediately before employees vote in a union election. Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953) . More recently, the NLRB clarified this doctrine in the context of an election conducted by mail ballot rather than an in-person manual ballot vote. *In re* Guardsmark, L.L.C., 363 N.L.R.B. No. 103 (2016). There, the Board held that, in a mail ballot election, captive audience meetings are banned beginning twenty-four hours before the ballots are scheduled to be mailed to employees. *Id.* at 3.

[56] For an early history of employer captive audience speeches and regulation by the NLRB, see John M. Schobel, *The Captive Audience Doctrine: Its History with the Labor Board*, 2 ST. LOUIS U. L.J. 360 (1953). For a brief discussion of captive audience meetings beyond just the United States, see *The Captive Audience*, 29 COMPAR. LAB. L. & POL'Y J. 67 (2008).

[57] *See, e.g.*, Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123 (2012) (analyzing the likelihood and legal arguments that the NLRB might use to ban captive audience speeches); Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FIU L. REV. 385 (2010) [hereinafter Secunda, *The Contemporary "Fist Inside the Velvet Glove"*] (advancing argument that captive audience meetings are incompatible with employee freedom of choice); Charles J. Morris*, Freeing the Captives: How Captive-Audience Meetings Under the NLRB Can Be Controlled*, 69 ADMIN. L. REV. 869, 882–83 (2017) (proposing a rule-making to ban captive audience meetings); Allie Robbins, *Captive Audience Meetings: Employer Speech vs. Employee Choice*, 36 OHIO N.U. L. REV. 591 (2010) (discussing potential state worker freedom acts that ban captive audience meetings); Elizabeth J. Masson, "*Captive Audience" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?*, 56 HASTINGS L.J. 169 (2004) (arguing for a ban on captive audience meetings); Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65 (2010) (same); David J. Doorey, *The Medium and the "Anti-Union" Message: "Forced Listening" and Captive Audience Meetings in Canadian Labor Law*, 29 COMPAR. LAB. L. & POL'Y J. 79 (2008) (discussing changes to captive audience meetings under Canadian law); Paul M. Secunda*, Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMPAR. LAB. L. & POL'Y J. 209 (2008) (arguing that state legislation to ban captive audience meetings should not be preempted by federal labor law).

[58] Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2019–20).

[59] *Id.* § 2(d)(3).

endorses the PRO Act, it is very likely that future discussions of labor law reform will place employer free speech in the context of captive audience speeches at risk of legal elimination.[60] At least one Senate summary of the PRO Act is explicit in characterizing the legislation as an attempt to curtail employer speech: "The bill prohibits employers from requiring workers to attend meetings designed to persuade them against voting in favor of a union."[61] So, it is clear that the PRO Act targets more than just coercive employer speech, and sweeps in employer speech that merely seeks to convince employees to vote against unionization—arguably a frontal assault on employer freedom of speech in the workplace.[62]

Although the PRO Act is a relatively recent proposed labor law reform, similar arguments in favor of banning captive audience meetings as they pertain to union campaigns have been proposed in the past. As noted above, arguments against captive audience meetings have varied from the unfairness of the balance of power between employees and their employers in the workplace to a constitutional right not to listen to speech.[63] Some scholarship even cites the effectiveness of captive audience meetings in convincing employees to vote against unionization as evidence of why they should be banned.[64] At a base level, it is not hard to conclude that the proposed reforms do not reflect an interest in employee freedom of choice on these issues, but suppressing a specific viewpoint to achieve a desired result—unionization.[65]

In sum, the labor law reform of banning captive audience speeches has a direct impact on an employer's ability to speak to its employees about unionization. It also potentially deprives employees of the benefit of hearing those views while they make their decision on the unionization question. Such a reform clearly reflects an anti-employer viewpoint, which violates the core free speech principle of content-neutrality.[66]

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[60] *See Biden Plan on Labor*, *supra* note 20.

[61] *See* S. COMM. ON HEALTH, EDUC. LAB. & PENSIONS, 116TH CONG., PROTECTING THE RIGHT TO ORGANIZE ACT (2019) (summary by Sen. Patty Murray & Chairman Bobby Scott). It is worth noting that this summary is also explicit in suggesting that the act of persuading employees—arguably the very purpose of speech in nearly all instances—is why captive audience meetings should be banned.

[62] The distinction between coercion and persuasion in labor law is not unique to the captive audience context. For a discussion of the issue in the secondary boycott context, see Barbara J. Anderson, Comment, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811 (1984).

[63] *See* Doorey, *supra* note 57; Secunda, *The Contemporary "Fist Inside the Velvet Glove," supra* note 57; Hartley, *supra* note 57.

[64] Masson, *supra* note 57, at 190 ("Captive audience meetings are pervasive because they are effective, and because they are legal."). One article goes so far as to describe employer meetings with employees—assumedly a regular occurrence—as "plain coercion." Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton NLRB*, 16 LAB. LAW. 103, 115 (2000).

[65] *See, e.g.*, Robbins, *supra* note 57, at 594 ("Captive audience meetings and the discrimination and dismissal to which they often lead should be cause for concern, *not only for those who support the formation of workplace unions. . . .*") (emphasis added).

[66] *See* Lackland H. Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20, 21 (2019) ("As the Court has explained, viewpoint discrimination is a subset

B. Adopting Quickie Election Rules

Although not as obvious as the captive audience prohibition, recent labor law reforms to shorten the time period between when a union files a petition for an election and when the NLRB conducts that election, are also designed to limit and curtail employer speech in the context of union campaigns. More specifically, on December 15, 2014, the NLRB finalized a rule that sought to shorten the time period from the time a union representation petition is filed to the time that a vote is held.[67] Deemed the "quickie election" or "ambush election" rule, the NLRB's reform was quickly recognized as an attempt to limit the time that employers have to speak to employees about a question of union representation before an election:

> [T]he reality of the Rule and other changes to Board policies is that the union organizing and elections processes have been tilted heavily in favor of unions. Nearly every timeline for election procedures has been accelerated. This acceleration helps unions' organizing drives because it shortens the time that an employer has to exercise its free speech rights and conduct an educational campaign.[68]

Without specifying an exact time period for when elections should be held, the rule enacts various changes that allow votes to be held more quickly after the petitions are filed.[69] For example, the new rule limits the type of pre-election challenges an employer can make to a petition and even limits the filing of briefs after a hearing which might delay the scheduling and conducting of an election.[70] Additionally, the rule limits employers' ability to postpone and delay pre-election hearings.[71] Finally, the rule removes some of the obstacles that delay elections, such as the rule on how long unions must have the list of employees in the bargaining unit before a vote is held.[72] Although some of these processes were changed by the NLRB after President

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of content discrimination. As a matter of free speech law, content discrimination is very troublesome, generally giving rise to strict scrutiny. Viewpoint discrimination is significantly worse, often leading to per se invalidation.").

[67] National Labor Relations Board, Representation—Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) [hereinafter NLRB].

[68] Michael Lotito et al., *Recent Developments in Employment Law and Litigation*, 51 TORT TRIAL & INS. PRAC. L.J. 375, 377–78 (2016).

[69] *See* NLRB, *supra* note 67. *See also* Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 EMORY L.J. 1647, 1650 (2015) ("We should see quicker elections, but not to the degree that they can be characterized as 'ambush.'").

[70] Hirsch, *supra* note 69, at 1657–60.

[71] *Id.* at 1658.

[72] *Id.* at 1654–57.

Trump came to office, President Biden has taken the position that the Board should go back to the full quickie election rule processes.[73]

Although it does not do so directly, as noted above, the intent behind a rule that shortens the time for campaigns before union representation elections clearly aims to limit the time that employers have to speak to their employees about unionization.[74] As one commentator put it, "[the lapse in time between petition and vote] is considered problematic because employee interest in collective representation can wane and dissipate simply by the passage of time. The gap in time before the election takes place also enables employers to reduce support for the union by running anti-union campaigns."[75] As a union may have been conducting a campaign without employer knowledge for many months before the filing of a representation petition, limiting the time between the petition and election greatly restricts the employer's ability to mount a robust countercampaign to contrast the union's ongoing efforts. Put another way, pursuant to the quickie election rules, "many employees are left with 'an unrebutted story, a one-sided story, not necessarily an accurate one.'"[76] At some level, the question needs to be asked whether employer speech is bad solely because it is effective in convincing employees to vote against a union in a representation campaign.[77]

C. Eliminating Secret Ballot Elections

Yet another potential labor law reform that has often been proposed is the elimination of the secret ballot election in favor of deciding unionization based solely on authorization card signing.[78] Rather than using union authorization cards to obtain a secret-ballot election to determine representation, this process instead involves a union submitting such cards to the NLRB for determination as to whether

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[73] *See Biden Plan on Labor*, *supra* note 20 (stating that the intent of the Biden Administration is to "codify into law the Obama-Biden era's NLRB rules allowing for shortened timelines of union election campaigns").

[74] *See* Lotito et al., *supra* note 68, at 378.

[75] Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB & EMP. L. 1, 4–5 (2009). It is worth noting that an erosion of support for the union is presented as a substantive evil based on much of the scholarship in this area. *Id.*

[76] Amanda McHenry, *The NLRB Wields Its Rulemaking Authority: The New Face of Representation Elections*, 62 CASE W. RSRV. L. REV. 589, 600 (2011) (citation and quotation omitted).

[77] For just such an argument, see Joseph P. Mastrosimone, *Limiting Information in the Information Age: The NLRB's Misguided Attempt to Squelch Employer Speech*, 52 WASHBURN L.J. 473, 515 (2013).

[78] *See, e.g.*, James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 823 (2005) (arguing for neutrality agreements and card check recognition to combat "a regulatory regime that allows, if not encourages, employers to exert inordinate pressure on employee choice in the electoral process").

a majority of the employees in the proposed unit have indicated a desire to join a union based on the cards alone.[79] If the union has obtained signed authorization cards from a majority of the unit, then the unit becomes unionized without a secret ballot election.[80] The issues surrounding the elimination of NLRB secret-ballot elections and the adoption of unionization based solely on the signing of authorization cards have been described as follows:

> A significant policy debate has been occurring regarding union organizing methods in the United States. This debate focuses on the appropriateness of granting union recognition based on majority support as demonstrated by union authorization card signatures, also known as "card checking." Critics describe the practice as anathema to basic democratic principles and accuse unions of wanting to deal from the bottom of the deck to secure undeserved representation of employees. Proponents of card check recognition argue that reliance on [the NLRB's] organizing procedures fails to protect employees' rights to organize, and forces unions to compete against a stacked deck that unfairly favors employers.[81]

Card check recognition was a primary aim of the Employee Free Choice Act (EFCA), a failed legislative attempt to reform the NLRA during the Obama Administration.[82] EFCA would have eliminated the need for the NLRB to conduct a Board-supervised secret ballot election for the determination of whether a union will represent a group of employees.[83]

Setting aside the many problematic aspects of deciding union representation based solely on employee card signing—that is, the complete lack of oversight over the circumstances upon which an employee is asked, or demanded, to sign the card—it

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[79] See *supra* note 23 and accompanying text for a description of how authorization cards are used under the current representation process.

[80] Rather than the NLRB conducting an election and employees voting under the "laboratory conditions" standard described above, with respect to this process, employees may be asked to make the decision to sign a card with a union organizer in front of them asking for their support with no oversight from the NLRB. For a discussion of the "laboratory conditions" standard, see *supra* notes 43–49 and accompanying text.

[81] Rafael Gely & Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing?*, 35 FORDHAM URB. L.J. 247, 247 (2008).

[82] The Employee Free Choice Act, H.R. 1696, 109th Cong. (2005) [hereinafter EFCA]. For arguments for and against EFCA, see Juliet Martinez Ortega, *Why We Should Support the Employee Free Choice Act*, 31 LAB. STUD. J. 23 (2007) and Roy Adams, *The Employee Free Choice Act: A Skeptical View and Alternative*, 31 LAB. STUD. J. 1 (2007). For a discussion of EFCA's card check recognition processes, see Daniel V. Johns, *Playing with Cards: The Incompatibility of the Employee Free Choice Act and the National Labor Relations Board's Current Doctrines and Practices Governing Union Authorization Cards*, 60 LAB. L.J. 16 (2009).

[83] Johns, *supra* note 82, at 16–18.

is clear that this proposed reform is premised on suppression of employer speech.[84] As one commentator has argued:

> From the perspective of labor unions, card checks have several advantages. By eliminating much of the campaigning that occurs between the union's request for recognition and the scheduled election, there is less opportunity for the employer to engage in anti-union campaigning. . . . In short, the card check process should make it easier for unions to communicate their message to employees and have the employees make a decision without undue pressure from the employer.[85]

Put another way, card check recognition as a labor policy is designed to influence employees to make a decision on unionization after hearing only from the union concerning the relevant workplace issues, while potentially denying an employer the same opportunity to make its case.[86] Viewed in this light, card check recognition sacrifices employer freedom of speech in favor of the purported substantive good of union representation.[87]

D. Incentivizing Employer Neutrality

Yet another oft-proposed labor law reform involves pressuring employers to stay neutral in union campaigns.[88] Such a proposal is often, but not always, joined with card check recognition.[89] Employer neutrality can be incentivized in various ways.[90]

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[84] As Richard Epstein has put it, "[a]s a matter of first principle, it hardly follows that the statutory limits on employer speech in the current setting should justify the total neutralization of employer speech in a secret card check campaign." Richard A. Epstein, *The Ominous Employee Free Choice Act*, 32 REGUL. 48, 53 (2009).

[85] Gely & Chandler, *supra* note 81, at 253–54. Or stated another way, card check recognition allows employees to make a decision on representation while only hearing from one side of the debate.

[86] *See* Epstein, *supra* note 84, at 52–54.

[87] "Predictably, mandated card-check recognition legislation benefits union organizing efforts." Rafael Gely & Timothy D. Chandler, *Organizing Principles: The Significance of Card-Check Laws*, ST. LOUIS U. PUB. L. REV. 475, 512 (2011).

[88] For a discussion of neutrality agreements and how they work, see George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAW. 215 (2000).

[89] *Id.* at 215 ("Usually, these provisions take the form of controlled access by the union to the employees to deliver its message, an employer statement that it does not object to its employees choosing union representation, and a voluntary recognition of the union by the employer upon a showing of an authorization card majority.").

[90] For example, the Biden Plan on Labor states that President Biden "will ensure federal contracts only go to employers who sign neutrality agreements committing not to run anti-union

Generally, neutrality agreements allow unions to campaign for employees to sign union authorization cards without challenge from the employer.[91] Neutrality agreements often explicitly prohibit employers from campaigning against the unionization effort.[92] Usually neutrality arrangements require an employer to do the following:

- agree to a "gag order" on communications to employees about the union;
- extend preferential hiring rights at unorganized facilities;
- meet promptly with the union to discuss such issues as appropriate unit, supervisory employees, and excluded employees, etc.;
- provide the union with an early list of the names and addresses of employees in the agreed-to unit;
- grant the union access to the facilities of the target employer to distribute union literature and meet with employees;
- recognize the union based on an authorization card majority or some higher percentage (i.e., without an NLRB election);
- agree to start contract negotiations for the newly organized unit within a short, specified time frame, and submit open issues to binding interest arbitration if no agreement is reached within sixty days;
- extend coverage of the neutrality agreement to affiliates of the signatory company, defined as companies in which the signatory has at least a fifty percent interest or exercises control; and
- agree not to create another entity in the same industry without ensuring that it adopts the neutrality agreement.[93]

Neutrality agreements are effective for unions in winning representation. As one commentator noted, "[t]he diminished levels of employer opposition presumably relate to unions' ability to recruit majority support in a shorter time span through authorization cards than under election arrangements and also to unions' ability to reach large numbers of workers before employers can begin to generate pressure against the organizing effort."[94] The anti-free speech aspect of employer neutrality agreements is obvious—keep employers neutral (silent) to allow the only voice employees hear during a unionization campaign to be from the union side. Indeed, many neutrality agreements go beyond mandating employer silence in the face of

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campaigns." *See Biden Plan on Labor*, *supra* note 20. So, employers that are reliant upon federal contracts for business may face the choice of giving up their voice in union campaigns or giving up that business.

[91] *See* Davies, *supra* note 88, at 215–16.

[92] *Id.*

[93] Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 LAB. LAW. 201, 203 (2000).

[94] James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 826 (2005).

a union representation campaign, but also require the employer to issue a statement to employees that it does not oppose the union's representation efforts.[95] Whether compelling silence or a statement of support, neutrality agreements seek to restrict employers from expressing any views that oppose or are considered in any way as negative towards a union organizing effort.[96]

III. PROTECTING FREEDOM OF SPEECH UNDER THE NATIONAL LABOR RELATIONS ACT

As noted above, *The Coddling of the American Mind* makes the case that the current anti-free speech climate at many universities should be criticized for a multitude of reasons, but perhaps most prominently for two: (1) a misguided attempt to protect fragile students from ideas that might "harm" them and; (2) a desire to categorize ideas in two stark buckets labeled "good" and "evil"—classifications which then easily allow the suppression of all speech contained within the "evil" bucket.[97] These two justifications can be applied to the anti-free speech labor law reforms set forth in the previous sections. For example, it might be argued that such proposals are justified because employees will be harmed by hearing an argument that runs contrary to unionization. Thus, it follows that, in the face of any employer speech, fragile employees are unable to think for themselves and make a decision that is in their best interest. These reforms also may be viewed through the binary lenses of "good" and "evil" where the employers' views are placed squarely in the evil bucket and thus rendered inappropriate for consumption by employees.[98] As set forth below and as argued in *The Coddling of the American Mind*, neither of these arguments justifies these reforms.

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[95] *See* Davies, *supra* note 88, at 215 (neutrality agreements may insist upon "an employer statement that it does not object to its employees choosing union representation"). *But see* Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 BERKELEY J. EMP. & LAB. L. 50 (1994) (arguing that unions should be able to negotiate substantive labor contract provisions in connection with neutrality and in advance of any employees even deciding that they want to be unionized).

[96] For a discussion as to whether the NLRB should enforce neutrality agreements, see Charles I. Cohen et al., *Resisting its Own Obsolescence—How the National Relations Board is Questioning the Existing Law of Neutrality Agreements*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521 (2006). For an analysis of whether employer neutrality agreements are legal under federal labor law, see Robert J. Mollohan Jr., *Employer-Union Organizing Assistance and Neutrality Agreements: Have We Overshot Congress's Landing and Upset a Fragile Balance?*, 30 GA. ST. U. L. REV. 885 (2014).

[97] LUKIANOFF & HAIDT, *supra* note 1, at 263. In this regard, the authors posit two great untruths related to arguments against free expression: "What doesn't kill you makes you weaker," and "[l]ife is a battle between good people and evil people." *Id.*

[98] Even a cursory review of many of the articles arguing for these labor law reforms reveals that the authors would place unionization squarely into the good bucket.

A. The Myth of the Fragile Employee

Initially, the idea that employees are incapable of rationally evaluating their employer's viewpoint flies in the face of the legislative intent of the Free Speech Proviso and the cases that have interpreted it. As set forth above, at a base level, the Free Speech Proviso allows the NLRA to constitutionally pass muster by requiring evidence of coercion to make employer speech unlawful.[99] There is no question that the First Amendment protects against unlawful government restriction of speech, and preserves Americans' ability to express unpopular ideas and minority viewpoints.[100] This principle, of course, is not just for the benefit of the speaker. It is just as important, if not more important, for the listener, who will benefit in their thinking from hearing a diversity of viewpoints.[101] So, at some level, proposing that the law should be reformed so as to cut off one side of the debate cannot be squared with the intent of the Free Speech Proviso and First Amendment doctrine. The listener—in this case, the employee—loses the benefit of viewpoints opposing unionization in making his or her decision as to whether to be represented by a union. As one commentator has stated:

> Adequate information is the foundation of freedom to choose. Lacking full information, the employee cannot effectively evaluate the alternatives. Although employees may err in evaluating their information, they may also err in appraising their need for organization if the employer is prevented from raising wages and benefits to the level he plans to maintain.[102]

Nor is there any evidence that fragile employees need protection from employer speech. It is worth noting that these reforms cannot be viewed solely as attempts to protect employees from coercive employer behavior or speech. Such practices are already illegal under the NLRA.[103] Section 8(a)(1) of the Act specifically prohibits

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[99] *See supra* notes 3–12 and accompanying text. For a discussion of the regulation of coercion in the labor law context, see Michael M. Oswalt, *The Content of Coercion*, 52 U.C. DAVIS L. REV. 1585 (2019).

[100] "It is precisely here, however, that the protections of the [F]irst [A]mendment come into play, serving as a shield both for those who would express unpopular or unsound views and for those who, while profoundly disagreeing with those views, would protect the right to express them." Herbert T. Schwartz, *The Student, the University and the First Amendment*, 31 OHIO ST. L.J. 635, 647 (1970).

[101] *See* Skyline Distributors, Inc. v. NLRB, 99 F.3d 403 (D.C. Cir. 1996); *see also* Charles C. Jackson & Jeffrey S. Heller, Promises and Grants of Benefits under the National Labor Relations Act, 131 U. PA. L. REV. 1, 62 (1983) ("[E]mployee free choice is enhanced to the degree the full economic consequences of the vote for or against the union are disclosed.").

[102] David J. Hamilton, *NLRB Proscription on Granting of Benefits During Election Campaigns—A Detriment to Employees*, 1981 ARIZ. ST. L.J. 723, 732 (1981).

[103] 29 U.S.C. § 158(a) (2000). For a discussion of employer unfair labor practices during

employers from engaging in any actions that interfere with employees who engage in protected activity.[104] Such protected activity would include, of course, an employee attempting to organize or supporting a union.[105] Thus, it is not necessary to eliminate employer speech to remove coercion from the union representation process.

Going beyond coercion, in an effort to protect employees from undue influence, the Supreme Court has even gone so far as to prohibit employers from making any promises to employees in the context of a union representation campaign.[106] In prohibiting such promises, the Court relies upon a metaphor: "The danger inherent in well-timed increases in benefits is the suggestion of *a fist inside the velvet glove*."[107] Perhaps counterintuitively, the law does not prohibit promises by unions during representation campaigns.[108] The reasoning behind this distinction generally has been expressed as an assertion that employees have the ability to disregard union promises because they understand that unions cannot guarantee delivery.[109] On the other hand, employer promises are presumed to be pernicious because employers can deliver on their promises and thus have a greater ability to influence employee sentiment improperly.[110] Put another way, the law assumes that employees have the ability to distinguish between true and false promises made during representation campaigns. Viewed in this light, there is very little justification for reforming labor law to restrict or completely prevent employer speech when employees are able to filter good information from bad and to make decisions in their self-interest accordingly.[111]

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representation campaigns, see Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 961–69 (1991).

[104] 29 U.S.C. § 158(a)(1).

[105] *Id.*

[106] NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

[107] *Id.* at 409 (emphasis added). For a criticism of the Court's metaphoric reasoning in banning employer promises during campaigns, see Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits under the National Labor Relations Act*, 131 U. PA. L. REV. 1 (1982–83); *see also* Skyline Distributors, Inc. v. NLRB, 99 F.3d 403 (D.C. Cir. 1996) (describing the *Exchange Parts* reasoning as "counterintuitive").

[108] Daniel V. Johns, *Promises, Promises: Rethinking the NLRB's Distinction Between Employer and Union Promises During Representation Campaigns*, 10 U. PA. J. BUS. & EMP. L. 433, 437–39 (2008).

[109] *Id.*

[110] *Id.*

[111] Scholars recognized this point as far back as the 1970s, when a comprehensive study determined that employees generally were unmoved by information provided by employers during campaigns. Julius G. Getman & Stephen B. Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation Part II*, 28 STAN. L. REV. 263, 283 (1976); *see also* Kate Bronfenbrenner, *The Role of Union Strategies in NLRB Certification Elections*, 50 INDUS. & LAB. REL. REV. 195 (1997) (arguing that union tactics in representation campaigns play a greater role in determining election results than employer strategies); Epstein, *supra* note 84, at 53 ("The general view we have of political debates is that they work better with more, rather than less, information. I see no social

Moreover, as this author has argued in another context, employer speech should be viewed as even more valuable to employees than union speech during representation campaigns.[112] Employees generally have more experience with and a longer-term relationship with the representatives of their employer.[113] Contrast that relationship and knowledge with that of a union organizer who employees are much more likely to have no relationship with at all, let alone any personal history that would inform their decision making with respect to unionization.[114] Couple that lack of experience with the fact that many employees in the current workplace have little or no experience with unions given the overall decline of unionization in the American workplace.[115] In that context, banning employer speech, which employees are best able to filter and judge based upon their personal experience, cannot be justified from the standpoint of employee free choice. Employee freedom of choice in the unionization decision is furthered by the receipt of more information, not less.[116]

Employees are not fragile and should not be treated as incapable of hearing, assessing, and/or, where appropriate, disregarding employer speech. As in all elections, voters benefit from hearing all sides of an issue before making a decision. Any attempt to reform labor law should reflect this fundamental and axiomatic principle.

B. Union Speech Versus Employer Speech: Good Versus Evil?

If restrictions on employer speech cannot be justified based on the NLRA's statutory framework or the fragility of the American worker, then what motivates the attempts to reform labor law in this way? *The Coddling of the American Mind* suggests an answer to this question as well.[117] Unfortunately, many labor law reforms appear to reflect a basic assumption that unionization is a substantive good, regardless of employee choice, and the employer's views (which are presumably anti-union) therefore belong squarely in the bucket of evil to be treated as a malevolent attempt to influence employees to act against their self-interest.[118] Viewed in that

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justification whatsoever for a system that silences both the employer and dissident workers in order to facilitate union organization drives that could easily result in trapping workers who have not had the opportunity to express their preferences.").

[112] Johns, *supra* note 108.

[113] *Id.* at 449–50.

[114] *Id.*

[115] *Id.*

[116] Epstein, *supra* note 84, at 53.

[117] LUKIANOFF & HAIDT, *supra* note 1.

[118] This viewpoint is completely inconsistent with the intent and structure of the NLRA. "But *because labor law neither favors nor disfavors unionization*, instead allowing employees to decide which form of bargaining they prefer, the appropriateness of curtailing managerial intervention in union organizing efforts must be investigated as part of an overall analysis of employee choice." Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 658 (2010) (emphasis added).

light, these labor law reforms do not reflect a desire to protect employees in making a free and informed decision for themselves, but instead reflect an attempt to influence the process so that it is more likely that employees will unionize and thus reject the evil of their employer's views.[119] Under this thinking, employee choice might be viewed as irrelevant to the overall substantive good of unions winning as many elections as possible. Or, alternatively, this viewpoint might be supported by the thought that employees are not intelligent enough to know that unionization is in their self-interest so the law has to step in to make employees' decision for them.[120] In my view, these arguments are false.

The world is not so black and white that in all instances employee interests should be viewed as being served by unionization.[121] As the U.S. Court of Appeals for the District of Columbia Circuit has noted, sometimes the campaign process results in employees getting "exactly what they wanted" without unionization.[122] In such an instance, is it a substantive good to force employees to become unionized even if they do not believe it is in their self-interest?[123] If the employees in *Skyline Distributors, Inc. v. NLRB* got exactly what they wanted without paying union dues on an ongoing basis, it is counterintuitive to suggest that they are ignorant or out of touch with their own interests. Put simply, as implied by the *Skyline* decision, these reforms serve the interest of the union and not the employee. Unionization should not be viewed as a substantive good if it is contrary to the viewpoint of the affected employees. Or, as one commentator has stated:

> [W]e should strive to find ways to ensure employees are making choices that represent what they really want that are consistent with those traditions. Such a process would not only uphold

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[119] *See, e.g.*, Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016) ("[E]mployer speech on these topics can also inflict substantial harm. More specifically, employers' lies, misrepresentations, or nondisclosures about the terms and conditions of employment can distort and sometimes even coerce workers' important life decision.").

[120] For a discussion of what jobs mean to employees in the modern workplace, see Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71 (2015).

[121] The rejection of such dichotomous thinking is the precise reason why *The Coddling of the American Mind* includes the famous quote from Alexandr Solzhenitsyn as one of its epigraphs: "The line dividing good and evil cuts through the heart of every human being." LUKIANOFF & HAIDT, *supra* note 1, at 237.

[122] Skyline Distributors, Inc. v. NLRB, 99 F.3d 403, 407–09 (D.C. Cir. 1996).

[123] Perhaps one way to justify favoring the union over the employee's wishes in this context is the economic free-rider problem—that is, employees get the benefit of unionization (improvements to their terms and conditions of employment) while avoiding the cost (union dues) of those improvements. Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1004 (1984).

> basic American values and constitutional principles but would ensure that employees are given the information and time needed to exercise the right protected by the NLRA—the right to choose whether to be represented by a union.[124]

Setting up the union representation process in any other way appears to be nothing more than a political gift for unions.[125] It also ignores the fact that employees have many reasons to consider voting against unionization that are neither irrational nor illogical.[126] Unionization is not a substantive good if employees do not want it. The world of labor law is not a choice between good and evil—the truth is more nuanced than that and employees should be given the right to make that decision for themselves with the maximum amount of information to inform that decision.[127]

CONCLUSION

Many of the popular proposals that have been advanced to reform labor law have as their express or implied purpose the suppression of employer speech during union representation campaigns.[128] Not only are such proposals inconsistent with the Free Speech Proviso of the NLRA, but they are based upon a false and arguably offensive view of employees.[129] Employees are not fragile—they have the ability to listen to and to assess the value of employer speech during union campaigns without falling hopelessly into a coerced stupor which prevents them from making a reasoned and independent decision as to the appropriateness of unionization for their own circumstances.[130] As the NLRB recently stated, the election process should be

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[124] Mastrosimone, *supra* note 77, at 515.

[125] Johns, *supra* note 108, at 457 n.110. Labor law reforms "should be critically examined to determine whether it, in fact, furthers employee freedom of choice or whether, instead, it merely constitutes a political gift to unions." *Id.*

[126] *See, e.g.*, Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1 (2013) (discussing downsides of unions).

[127] "Because it is the employee's ultimate decision as to which position to support, the Court has decided that the employee should make an educated choice after sifting through the free flow of information." Stephen F. Befort & Bryan N. Smith, *At the Cutting Edge of Labor Law Preemption: A Critique of* Chamber of Commerce v. Lockyer, 20 LAB. LAW. 107, 126 (2004).

[128] *See supra* notes 50–96 and accompanying text.

[129] *See supra* notes 97–127 and accompanying text.

[130] It is worth again noting that if employees do not possess the ability to hear their employers' views on unionization without becoming hopelessly confused or coerced into voting a certain way, then how is that they are able to hear union speech without the same result? This asymmetrical view of labor law is often assumed to be the appropriate result by commentators. *See, e.g.*, Michael J. Hayes, *Let Unions Be Unions: Allowing Grants of Benefits During Representation Campaigns*, 5 U. PA. J. LAB. & EMP. L. 259, 293–95 (2003) (arguing for allowing union to grant benefits during representation campaigns while denying employers the same right).

"a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so."[131] Reforming labor law to cut off one side of the debate over unionization does not serve that statutory goal. To view labor law reform through the lens of *The Coddling of the American Mind* is to understand that many labor law reforms will not make the lives of American workers better or assist employees in making their statutorily guaranteed decision as to whether unionization is right for them. American workers do not need to be coddled—they need to hear from both sides of the debate to make the best decision for themselves about unionization.

[131] *In re* Aspirus Keweenaw, 370 N.L.R.B. No. 45 at 1 (Nov. 9, 2020).