

# When One Is Not Enough, But Two Is a Company Union: A First Amendment Analysis of the National Labor Relations Board's Restrictions on Employee Involvement at the Nonunion Workplace

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## Introduction

Sections 8(a)(2) and 2(5) of the 1935 National Labor Relations Act (commonly referred to as the “Wagner Act” in recognition of its principal congressional sponsor, Senator Robert F. Wagner (D-NY)), have played a central role in American labor relations since they first entered into law.<sup>1</sup> Drafted with the aim of eliminating employer-

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1. Section 8(a)(2), 29 U.S.C. § 158(a)(2) (2006), provides that it is an unfair labor practice for an employer

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board . . . , an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . . .

This section appeared as Section 8(2) in the Wagner Act. *See* Wagner Act, ch. 372, § 8(2), 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 158(a)(2) (2006)). The Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (the “Taft-Hartley Act”) (codified as amended at 29 U.S.C. §§ 141-197 (2006)), changed the section number of this provision to Section 8(a)(2), but left its substance unaltered. For simplicity’s sake, I refer to this section as Section 8(a)(2) even when discussing its historical appearance within the 1935 law. Section 2(5), 29 U.S.C. § 152(5) (2006), defines a “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the

sponsored employee representation committees (so-called “company unions”), which had begun to challenge trade unions<sup>2</sup> for hegemony in the field of employee representation in the years prior to the Wagner Act, these sections removed what was thought to be a major impediment to trade union organization and industrial peace.<sup>3</sup> However, developments in the theory of human resource management and the concomitant proliferation of nonunion employee involvement programs during the past thirty-five years has led to much commentary on the wisdom of a statutory scheme that often acts as an obstacle to employers’ efforts to improve productivity, enrich employees’ working experience, and provide employees a greater role in workplace decision-making.<sup>4</sup>

For a long time, missing from this commentary was any serious consideration as to whether Section 8(a)(2), in tandem with Section 2(5), violates the First Amendment. The lack of attention to this issue was perhaps understandable given that the Supreme Court rejected a First Amendment challenge to Section 8(a)(2) in its 1959 decision in *NLRB v. Cabot Carbon Co.*<sup>5</sup> However, subsequent developments in the Court’s First Amendment jurisprudence call the Court’s ruling in that case into question.

*Electromation, Inc.*,<sup>6</sup> the most renowned decision by the National Labor Relations Board (“Board”) on the subject of nonunion employee involvement, illustrates how Section 8(a)(2) restricts labor-management communication at the workplace. In that case, a financially strapped electrical components manufacturer endeavored to cut its expenses by distributing year-end lump-sum payments to

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purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

2. The term “trade union” is used in this article to refer to the same thing that the word “union” ordinarily refers to in the labor relations context, that is, to an organization that is not sponsored by an employer and that engages in collective bargaining with one or more employers on behalf of employees. The term “trade union” is used to differentiate the organizations so named from company unions. On the other hand, the term “nonunion,” rather than “non-trade-unionized,” is used to describe those employees or workplaces that are not organized by a trade union.

3. See, e.g., Senator Robert F. Wagner, *Company Unions: A Vast Industrial Issue*, N.Y. TIMES, March 11, 1934, § 9, at 1, reprinted in 78 CONG. REC. 4230 (1935) and in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 23–25 (1949) [hereinafter NLRA LEG. HIST.].

4. For a sample of this extensive commentary, see Kenneth T. Lopatka, *A Contemporary First Amendment Analysis of the NLRA Section 8(a)(2)-2(5) Anachronism*, 2 CHARLESTON L. REV. 1, 3 n.2 (2007).

5. 360 U.S. 203 (1959).

6. 309 N.L.R.B. 990 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994).

employees, in lieu of giving them a wage increase, and altering its employee attendance bonus policy.<sup>7</sup> In an effort to respond to its employees' dissatisfaction with these changes, the company's management conceived the idea of establishing "Action Committees" as a way of involving employees in the effort to devise proposals that would address employees' concerns while respecting the company's budgetary constraints.<sup>8</sup> After the company's president sounded the idea out on a selected group of eight employees, the company posted a memorandum addressed to all employees announcing the formation of the Action Committees.<sup>9</sup> This memorandum identified the general topic that each committee was to address; explained that each committee would consist of six employees, the company's Employees Benefits Manager and one or two other members of management; and instructed interested employees to sign up on posted sign-up sheets that described the responsibilities and goals of each committee in more detail.<sup>10</sup>

The evidence indicated that employees' participation on the ultimately short-lived committees was entirely voluntary. And the committee meetings themselves appear to have been conducted in an atmosphere that was conducive to uninhibited discussion by the committees' employee members.<sup>11</sup> Thus, the committees appear to have been an example of willing speakers engaged in discussions regarding subjects of mutual interest. Nevertheless, the Board found that the committees fell within the broad parameters of Section 2(5)'s definition of a labor organization and that by establishing the committees; determining and limiting the subject matter each committee was to address; determining how each committee was to be composed; and appointing management representatives to the committees, the company dominated the formation and administration of this labor organization in violation of Section 8(a)(2).<sup>12</sup> It also found that the company unlawfully furthered its domination of the committees by furnishing them with writing materials, a calculator, and meeting space and permitting committee members to carry out committee activities on paid time.<sup>13</sup> Following

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7. *Id.* at 990.

8. *Id.* at 991.

9. *Id.*

10. *Id.* at 991, 1017.

11. *Id.* at 1017.

12. *Id.* at 997-98.

13. *Id.* at 998 & n.31, 1017.

its usual practice in such cases, the Board ordered the company to disestablish the committees.<sup>14</sup>

This result was unsurprising given the Board's extensive prior case law on Section 8(a)(2). Nevertheless, it is striking when considered against the backdrop of the First Amendment's protections of free speech. For the Supreme Court has long recognized that employers and employees have a First Amendment right to engage in noncoercive communications regarding workplace issues.<sup>15</sup> True, the Board did not specifically rule that the committees' discussions were unlawful, but only that the employer's involvement in the formation and administration of the committees and the employer's financial and material support of them were; yet it is well established that a statute that suppresses speech does not circumvent First Amendment scrutiny merely because it is targeted at ancillary conduct, such as the "hiring [of] a hall" or the "expenditure of money" for "printing, paper, and circulation costs," designed to facilitate the making or dissemination of speech, and not the speech itself.<sup>16</sup> How, then, could it be supposed that such an order would fail to raise serious First Amendment concerns?

The prolonged quiescence on this subject in the law journals was brought to an end by Kenneth Lopatka. In his article, *A Contemporary First Amendment Analysis of the NLRA Section 8(a)(2)-2(5) Anachronism*,<sup>17</sup> Lopatka argues that Section 8(a)(2), in combination with Section 2(5), constitutes a constitutionally invalid content-based regulation of speech. As he explains, owing to the fact that Section 2(5) limits the application of the term "labor organization" to those employee committees that exist for the purpose, in whole or in part, of dealing with employers concerning the subjects enumerated in Section 2(5),

the legality of an employer's conduct vis-à-vis an employee committee turns on the subjects the employer and the group of employees discuss. An employer may establish and/or support any committee or group of employees it likes, and the employer and these employees may make and respond to each

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14. *Id.* at 998.

15. *See, e.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–19 (1969); *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102–04 (1940).

16. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

17. 2 *Charleston L. Rev.* 1 (2007).

other's proposals on subjects such as enhancing product quality through research and development initiatives, improving morale by increasing social interaction, strengthening customer relations, or developing marketing ideas, without violating Section 8(a)(2) . . . . But if their bilateral exchange turns to any of those subjects mentioned in Section 2(5)—"grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work,"—the employer violates the law. Thus, if the topic of discussion is product safety or the safety of employees en-route to and from work, there is no violation, but if the topic is workplace safety, a violation occurs. Similarly, although no liability attaches to a discussion about improving productivity through new production processes or equipment, a discussion about improving productivity through new attendance rules or reduced staffing begets liability.<sup>18</sup>

Lopatka argues that such distinctions run afoul of the general rule against content-based regulations of speech, that is, against regulations that differentiate identical modes of speech or conduct based on the content of the speech associated with it.<sup>19</sup> He further argues that because Section 8(a)(2), in conjunction with Section 2(5), is a content-based regulation of speech, it cannot be justified either as a regulation of the time, place, or manner of speech or as a regulation of conduct.<sup>20</sup> Lopatka concludes that there is "a strong case for the proposition that the Board's historical construction of Sections 8(a)(2) and 2(5) violates the First Amendment" and, assuming this defect to exist, it "cannot be corrected unless the Board abandons its broad, literal application of the Section 8(a)(2)-2(5) scheme and requires proof that an employer has coerced employees before finding an employer's sponsorship or support of a dialogue about [the subjects listed in Section 2(5)] is unlawful."<sup>21</sup>

Although, as I argue below, Lopatka's conclusion appears sound, it is not clear that his argument supports it. Not all regulations that discriminate on the basis of the subject matter of speech violate the

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18. Lopatka, *supra* note 4, at 6–7 (quoting 29 U.S.C. § 152(5) (2006)).

19. *Id.* at 9–12.

20. *Id.* at 27–28, 32–35.

21. *Id.* at 5.

First Amendment. As Justice Stevens pointed out in his concurring opinion in *R.A.V. v. City of St. Paul*,<sup>22</sup> the Supreme Court has “upheld a city law that permitted commercial advertising, but prohibited political advertising, on city buses” and “a state law that restricted the speech of state employees, but only as concerned partisan political matters.”<sup>23</sup> Presumably, as he further pointed out, “the Government [also] may choose to limit advertisements for cigarettes, but not for cigars; choose to regulate airline advertising, but not bus advertising; or choose to monitor solicitation by lawyers, but not by doctors.”<sup>24</sup> Indeed, were a regulation that distinguished between an employee committee that deals with management regarding “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work” (“terms and conditions of employment”) and one that deals with management regarding other subjects always invalid under the First Amendment, then Lopatka’s proposed solution—that the Board require proof that an employer has coerced employees before finding that the employer’s sponsorship or support of a dialogue about terms and conditions of employment is unlawful—would not remedy Section 8(a)(2)’s constitutional defect, as the Board would continue to inspect the subjects discussed by employees and management to determine if the employer’s conduct violated Section 8(a)(2).

And there are, in fact, good reasons for believing that the distinction that the Wagner Act Congress drew between employee committees that deal with an employer concerning terms and conditions of employment and employee committees that deal with an employer concerning other subjects is a permissible one under the Supreme Court’s current case law. In *R.A.V.*, the Supreme Court struck down a St. Paul ordinance that made it a misdemeanor to “place[] on public or private property a symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color creed, religion or gender,”<sup>25</sup> but that, as the Court observed, did not cover words or symbols intended to “express hostility” on some other ground, “for example, on the basis of political affiliation, union membership, or homosexuality.”<sup>26</sup>

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22. 505 U.S. 377 (1992).

23. *Id.* at 421 (Stevens, J., concurring).

24. *Id.* at 422 (citations omitted).

25. *Id.* at 380 (majority opinion) (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

26. *Id.* at 391.

Although noting that the Minnesota Supreme Court had “limited the reach of the ordinance to conduct that amount[ed] to fighting words,”<sup>27</sup> a category of speech that is not protected by the First Amendment, the Court found that “the ordinance [wa]s facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses.”<sup>28</sup> The Court found it particularly objectionable that the ordinance was not neutral with respect to the viewpoints expressed, in that the ordinance permitted a speaker to “hold up a sign saying, for example, that all ‘anti-catholic bigots’ are misbegotten; but not that all ‘papists’ are.”<sup>29</sup> The Court opined, however, that “the prohibition against content discrimination . . . is not absolute”<sup>30</sup> and suggested that a content-based regulation of speech might be justified under the First Amendment if a “neutral” reason could be adduced for it.<sup>31</sup>

Such a reason can be advanced on behalf of Section 8(a)(2). In passing the Wagner Act, Congress sought to restore equality of bargaining power between employers and workers and, thereby, increase worker wage rates and purchasing power.<sup>32</sup> Senator Wagner and other congressional proponents of the Act were of the opinion that company unions were ill-suited to rectify the imbalance of bargaining power between employers and workers because they subscribed to the not unreasonable view that a committee that is created and financially supported by an employer and that is composed of persons employed by that employer generally will be subservient to the employer’s wishes.<sup>33</sup>

Congress’ differentiation of committees that deal with an employer regarding terms and conditions of employment from committees that deal with an employer regarding other matters—including principally “so-called ‘managerial’ matters such as product

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27. *Id.* at 380.

28. *Id.* at 381.

29. *Id.* at 391–92.

30. *Id.* at 387.

31. *Id.* at 388.

32. See Wagner Act, ch. 372, § 1, 49 Stat. 449, 449 (1935) (current version at 29 U.S.C. § 151 (2006)).

33. See H.R. REP. NO. 74-1147, at 18 (1935), *reprinted in* 2 NLRA LEG. HIST., *supra* note 3, at 3067; 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner), *reprinted in* 2 NLRA LEG. HIST., *supra* note 3, at 2333–2334; Wagner, *supra* note 3, *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 24.

quality or sales”<sup>34</sup> or “improving productivity through new production processes or equipment”<sup>35</sup>—is understandable when considered in the context of Congress’ overarching purpose of increasing employees’ bargaining power. Whether an employee committee increases the bargaining power of the employees that the committee represents is generally only a matter of concern when the committee deals with an employer concerning matters about which the employer and the employees have conflicting interests or about which one or both of the parties perceive the employer and the employees to have conflicting interests. By that measure, employee committees that deal with an employer regarding terms and conditions of employment differ in degree from employee committees that deal with an employer regarding product quality, sales or other managerial issues, as the latter committees are more apt to be exclusively concerned with ways of increasing an employer’s revenues or reducing an employer’s non-labor-related operating costs, areas in which employees’ and their employer’s interests generally coincide, and less apt to be concerned with how to distribute whatever is left over when one subtracts these costs from an employer’s revenues between employees and their employer, an area in which their perceived self-interests are more apt to conflict. The greater propensity of employee committees that discuss terms and conditions of employment with management to implicate the concern of employees’ bargaining power vis-à-vis employers supports the view that the distinction that Congress drew between these committees and committees that discuss other subjects was a constitutionally permissible one.<sup>36</sup>

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34. William B. Gould IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 CREIGHTON L. REV. 3, 10 (1996).

35. Lopatka, *supra* note 4, at 7.

36. See *Hill v. Colorado*, 530 U.S. 703, 707, 723–24 (2000) (upholding Colorado statute, which forbade any person within 100 feet of a health care facility’s entrance to “‘knowingly approach’ within eight feet of another person, without that person’s consent, ‘for the purpose of . . . engaging in oral protest, education, or counseling with such other person,’” and distinguishing it from the content-based ordinance struck down in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92-93 (1972), which forbade picketing within 150 feet of any primary or secondary school other than peaceful picketing relating to a labor-management dispute involving the school, on the grounds that the speech activities that the Colorado statute restricted—“oral protest, education, or counseling”—were those most likely to be associated with the evils that the statute sought to avert, i.e., “the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching” of patients entering a health care facility, whereas the ordinance in *Mosley* distinguished instances of speech that were similarly likely to

The legislative history of the Wagner Act does not suggest that Congress exempted committees that deal with an employer regarding product quality, sales, and other managerial issues from Section 8(a)(2)'s proscriptions because it had a preference for such speech. To the contrary, one of the Wagner Act's principal purposes was to promote collective bargaining between employers and employees regarding terms and conditions of employment.<sup>37</sup> Nor does the legislative history suggest that Congress singled out committees that deal with an employer regarding terms and conditions of employment for regulation because it wished to suppress the expression of any particular point of view. Although employers often used company unions as vehicles for proselytizing their view of business economics—specifically, that “the interests of management and labor are identical”<sup>38</sup>—the Wagner Act left employers free to convey this message to employees and their bargaining representatives. Senator Wagner hoped to promote cooperation between labor and management, but believed that genuine cooperation between them was possible only when they bargained with each other as equals.<sup>39</sup>

However, to say that Congress' discrimination between committees that deal with an employer regarding terms and conditions of employment and committees that deal with an employer regarding other subjects was in itself unobjectionable is not to say that Section 8(a)(2) is free from constitutional fault. Seemingly the more fundamental reason why Section 8(a)(2), as applied by the Board, violates the First Amendment is that it largely eliminates the most effective means by which private-sector employers can communicate regarding terms and conditions of employment with nonunion employees: group discussion.

In this article, I expand on this First Amendment objection to the Board's historical application of Section 8(a)(2). I first examine the restrictions that the Board imposes pursuant to Section 8(a)(2) on the

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raise the concerns to which the ordinance responded (quoting COLO. REV. STAT. § 18-9-122 (3) (1999)).

37. See Wagner Act, § 1, 49 Stat. at 449–50.

38. *To Create a National Labor Board: Hearings on S. 2926 Before the S. Comm. on Educ. and Labor*, 73rd Cong. 680 (1934) (statement of Leslie Vickers, Economist, Am. Transit Ass'n), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 718; see also NAT'L INDUS. CONFERENCE BD., EXPERIENCE WITH WORKS COUNCILS IN THE UNITED STATES, RESEARCH REPORT NO. 50, at 6, 170 (1922).

39. See *Hearings on S. 2926*, *supra* note 38, at 9, 11 (statement of Sen. Wagner), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 39, 41; 78 CONG. REC. 3444 (1934) (statement of Sen. Wagner), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 17.

freedom of employers to initiate, administer and support nonunion employee involvement committees. I argue that these restrictions constitute restrictions on protected speech and that the Supreme Court's apparent finding to the contrary in *Cabot Carbon Co.* is at odds with the Court's subsequent First Amendment case law.

Having concluded that Section 8(a)(2), as applied by the Board, restricts freedoms protected by the First Amendment, I then turn to a consideration of the two principal rationales for Section 8(a)(2): (1) that company unions, which Section 8(a)(2) was designed to eradicate, and the conduct engaged in by employers in promoting them coerce employees and (2) that company unions provide the appearance, but not the substance, of collective bargaining, thus leading employees to forego representation by a bona fide union, contrary to their best interests. Although Supreme Court precedent would suggest that restrictions on the freedom of employers and employees to discuss terms and conditions of employment are subject to strict scrutiny, for the sake of making all possible allowances for Section 8(a)(2), I will assume that the intermediate level of scrutiny that the Supreme Court applies to restrictions on commercial speech is the appropriate one and that, as a consequence, the restrictions on speech that the Board imposes pursuant to its interpretation of Section 8(a)(2) can be justified if they "directly advance" a "substantial" governmental interest and are "narrowly drawn."<sup>40</sup> I argue, however, that these rationales are inadequate even under this more forgiving standard of review.

Concurring with Lopatka, I conclude that Section 8(a)(2) can be saved from First Amendment infirmity if the Board requires proof that an employer's initiation, administration or support of any committee or other vehicle through which management and employees discuss workplace issues has coerced employees before finding that conduct to be unlawful under Section 8(a)(2). Like Lopatka, I argue that Section 8(c) of the Taft-Hartley Act,<sup>41</sup> which amended the Wagner Act, provides a statutory sanction for demanding such proof, albeit for different reasons than he suggests.

Finally, this article is primarily concerned with Section 8(a)(2)'s application to the nonunion workplace. Although much of the First Amendment analysis here is equally germane to the trade-unionized workplace, the trade-unionized workplace introduces certain

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40. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564–65 (1980) (quoting *In re Primus*, 436 U.S. 412, 438 (1978)).

41. 29 U.S.C. § 158(c) (2006).

complicating factors to the analysis—including, most importantly, the implication of the government’s interest in protecting a trade union’s bargaining relationship with an employer from being undermined by the employer’s dealings with other employee groups within the bargaining unit—that are beyond the scope of the argument here. Given that approximately ninety-two percent of non-agricultural workers in the American private sector—the workers to whom, with some exceptions, the Wagner Act, as amended, applies<sup>42</sup>—are not represented by a trade union,<sup>43</sup> this focus seems justified.

## I. The Company Union Ban

### A. Company Unionism Prior to the Wagner Act

The legislative history of the Wagner Act<sup>44</sup> leaves no doubt that Congress’ immediate objective in passing Section 8(a)(2) was to eliminate the company union.<sup>45</sup> The term “company union” referred

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42. Section 2(3) of the Wagner Act, as amended, 29 U.S.C. § 152(3) (2006), provides that, when used in the Act,

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . .

43. See Barry Hirsch & David Macpherson, *Union Membership, Coverage, Density, and Employment Among Private Sector Nonagricultural Workers, 1973-2012*, UNIONSTATS.COM, <http://www.unionstats.com> (follow “html” hyperlink below “I. U.S. Historical Tables: Union Membership, Coverage, Density and Employment, 1973-2012, Private Nonagricultural”) (last visited Feb. 17, 2013).

44. The legislative history referred to in this article includes not only the congressional hearings and debates on the National Labor Relations Bill that Senator Wagner introduced in the Senate on February 21, 1935, see 79 CONG. REC. 2368 (1935), reprinted in 1 LEG. HIST. OF NLRA, *supra* note 3, at 1311, and that, with some modification, was enacted into law, but also the congressional hearings and debates on the Labor Disputes Bill that Senator Wagner introduced the previous year. See S. 2926, 73rd Cong. (1934) (as introduced by Senator Wagner, March 1, 1934), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 1–14. This predecessor bill also contained provisions aimed at the eradication of the company union, albeit ones less finely tuned than the ones contained in the 1935 bill that became law. See *id.* §§ 3(5), 5(3)–(4), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 2–3. This legislative history is compiled in a two-volume publication by the Board. See NLRA LEG. HIST., *supra* note 3.

45. See, e.g., H.R. REP. NO. 74-1147, at 17 (1935), reprinted in 2 NLRA LEG. HIST., *supra* note 3, at 3066–67; S. REP. NO. 74-573, at 9–11 (1935), reprinted in 2 NLRA LEG.

to a variety of committees or networks of committees that employers established in order to deal with their employees regarding workplace issues on a collective basis. The designation of these committees as “company unions” reflected the recognition of the fact that the plans from which these committees emerged generally “confin[ed] both the jurisdiction of the employees’ representative[s] and the parties eligible to be selected as such to workers employed at an individual plant.”<sup>46</sup> Growing from something of a novelty on the American industrial scene prior to America’s entry into World War I,<sup>47</sup> company unions came to represent an estimated 2,500,000 workers at the time of the passage of the Wagner Act, or approximately three-fifths the number of American workers represented by trade unions at that time.<sup>48</sup>

### B. The Legislative Effort to Eliminate Company Unions

The company unions that emerged prior to the Wagner Act exhibited a broad range of structural, procedural, and jurisdictional differences. A task of legislative draftsmanship that presented itself to the Wagner Act’s framers, therefore, was to devise a prohibition broad enough to encompass these various entities, yet precise enough not to interfere with practices inhering in collective bargaining relationships between employers and trade unions. The Wagner Act’s framers performed this task by dividing it into two parts. First, they defined the term “labor organization” in Section 2(5) in a way broad enough to subsume most employee groups that discuss terms and conditions of employment with an employer. Second, through Section 8(a)(2), they prohibited those forms of employer conduct that were endemic to employers’ relationships with company unions, but not to employers’ relationships with trade unions. As discussed

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HIST., *supra* note 3, at 2309–10; 79 CONG. REC. 2371–72 (1935) (statement of Sen. Wagner), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 1312–13.

46. Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 520 (1986); *see also* BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CHARACTERISTICS OF COMPANY UNIONS 1935, BULLETIN NO. 634, JUNE 1937, at 108, 120–21 (1938).

47. *See* Bruce E. Kaufman, *Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Years: A Reassessment*, in NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 21, 23 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000) (“At the start of American involvement in the war in 1917, . . . nonunion representation plans covered a few thousand workers in a dozen or so plants . . .”).

48. *See* TWENTIETH CENTURY FUND, INC., LABOR AND THE GOVERNMENT 79–80 (1935).

below, the statutory scheme the Wagner Act's framers selected significantly impairs the ability of employers and nonunion employees to address their mutual affairs through the generally preferred means of group discussion.

1. *Section 2(5)'s Definitional Criteria*

Section 2(5)'s text<sup>49</sup> points to four criteria that an employee group must satisfy to be a labor organization under the Wagner Act. First, the group must be "an organization of any kind, an agency, employee representation committee or plan." Intended by Congress to apply to a wide array of entities, this already broad definitional language has been interpreted expansively by the Board. Thus, the Board has ruled that "[a]ny group . . . may meet the statutory definition of 'labor organization' even if it lacks a formal structure, has no elected officers, constitution or by-laws, does not meet regularly, and does not require the payment of initiation fees or dues."<sup>50</sup> And the Board has indicated that this group need not be any determinate group of employees within a workforce. For instance, in *Grouse Mountain Associates II*,<sup>51</sup> the Board found that a program of monthly meetings in which all employees were free to participate constituted a labor organization despite the fact that the number of employees in attendance at any one meeting ranged between four and twenty; "that few, if any, employees attend[ed] every such meeting"; and that those who attended were free to make suggestions or to respond to suggestions or comments by others as they so chose.<sup>52</sup>

The Board has found that an employee group cannot be a labor organization if it consists of the entire employee complement.<sup>53</sup> This exception aside, virtually any employee group that engages in face-to-face discussions with management will satisfy this criterion.

Second, "employees," as defined by Section 2(3) of the Wagner Act,<sup>54</sup> must participate in the group. A rare point of contention with respect to this element of the definition of "labor organization" concerns whether a single individual can constitute a labor organization, with the Board finding that an individual can be one if

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49. See *supra* note 1.

50. *Electromation, Inc.*, 309 N.L.R.B. 990, 994 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

51. 333 N.L.R.B. 1322 (2001), *enforced*, 56 F. App'x 811 (9th Cir. 2003).

52. *Id.* at 1335.

53. See *Gen. Foods Corp.*, 231 N.L.R.B. 1232, 1232, 1234 (1977).

54. See *supra* note 42.

other employees authorize that individual to represent them in negotiations with management<sup>55</sup> and the D.C. and Second Circuit Courts of Appeals expressing a contrary view.<sup>56</sup> There is little reason to suppose, however, that an employee involvement committee that contains two or more actively participating statutory employees would fail to satisfy this criterion.

Third, the employees must “deal[] with” an employer. As the Board has explained, “‘dealing with’ contemplates ‘a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management.’”<sup>57</sup> The “dealing with” component of the definition of a labor organization is satisfied if there exists “a pattern or practice in which a group of employees, over time, makes proposals to management [and] management responds to these proposals by acceptance or rejection by word or deed” or if “the group exists for a purpose of following such a pattern or practice.”<sup>58</sup>

The requirement that management respond in some way to an employee group’s proposals would seem to exempt few employee involvement committees from Section 8(a)(2)’s prohibitions. It is the rare case in which an employee group meets with management on a recurring basis, makes proposals to management, and does not receive some verbal response from management indicating acceptance or rejection of one or more of these proposals over the course of time. Besides which, as the requisite “deed” that may serve in lieu of a verbal response to a proposal under this requirement may be the implementation of an employee group’s proposal, then any employee group that “over time, makes proposals” will “deal[] with” management if management implements any of them.<sup>59</sup> Not

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55. *Grand Union Co.*, 123 N.L.R.B. 1665, 1666 (1959), *remanded sub nom.* *Schultz v. NLRB*, 284 F.2d 254 (D.C. Cir. 1960).

56. *See Schultz v. NLRB*, 284 F.2d 254, 256–59 (D.C. Cir. 1960) (finding that an individual is not comprehended by the term “labor organization” either as this term is defined in Section 2(5) or as it is used in proviso in Section 8(a)(3) authorizing certain union security agreements), *remanding* *Grand Union Co.*, 123 N.L.R.B. 1665 (1959); *United States v. Ryan*, 225 F.2d 417, 422 (2nd Cir. 1955) (“It involves a straining of the language of Section 2(5) to have the term ‘labor organization,’ which normally imports a collective body or group, cover an individual.”), *rev’d on other grounds*, 350 U.S. 299 (1956).

57. *Polaroid Corp.*, 329 N.L.R.B. 424, 424–25 (1999) (quoting *Electromation, Inc.*, 309 N.L.R.B. 990, 995 n.21 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994)).

58. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993).

59. *See Miller Indus. Towing Equip., Inc.*, 342 N.L.R.B. 1074, 1074, 1089 (2004).

surprisingly, then, litigation over whether an employee involvement group has dealt with an employer has tended to focus on whether the employees have made the requisite “proposals” to management and not on whether management has responded to them.<sup>60</sup>

One barrier to an employer’s efforts to discuss workplace issues with an employee group yet avoid dealing with it in the manner described by the Board is the ill-defined line between the expression of views and opinions, on the one hand, and proposals, on the other. In *Thompson Ramo Wooldridge, Inc.*,<sup>61</sup> the Board ruled that “the presentation to management of employee ‘views,’ without specific recommendations as to what action is needed to accommodate those views, constitutes ‘dealing’ with management under Section 2(5).”<sup>62</sup> However, in *E. I. du Pont de Nemours & Co.*,<sup>63</sup> the Board appeared to retrench from this position when it indicated that it would not find that an employee committee “deal[s] with” an employer when no “proposals” are made.<sup>64</sup> The Board offered the example of a “‘brainstorming’ group” whose “purpose . . . is simply to develop a whole host of ideas” as an example of an employee group that makes no proposals and, hence, does not deal with management.<sup>65</sup>

But, upon closer inspection, the freedom to engage in brainstorming proves to be a largely illusory one in the context of a discussion regarding terms and conditions of employment. Such matters as wages, hours, conditions of work, and the like are rarely so complex that employees are unable to discern on which side of an issue their interests lie. And if the relationship between the implementation of an idea and employees’ interests is clear, the distinction between presenting an idea and advancing a proposal all but disappears. An employee’s observation that a certain air conditioner is providing inadequate cooling for employees can just as easily be characterized as a proposal to do something about the air conditioning than as a mere observation on the functioning or capacity of a piece of equipment.

The further requirement suggested by the Board in *E. I. du Pont de Nemours & Co.* that the proposals presented by an employee

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60. See, e.g., *Syracuse Univ.*, 350 N.L.R.B. 755, 758 (2007); *Dillon Stores*, 319 N.L.R.B. 1245, 1251–52 (1995).

61. 132 N.L.R.B. 993 (1961), *enforced as modified*, 305 F.2d 807 (7th Cir. 1962).

62. *Id.* at 995.

63. 311 N.L.R.B. 893 (1993).

64. *Id.* at 894.

65. *Id.*

group to management be “group” ones<sup>66</sup> would seem to afford an employer no additional freedom to obtain an employee group’s input regarding terms and conditions of employment. In *Polaroid Corp.*,<sup>67</sup> the Board found that Polaroid’s Employee-Owners’ Influence Council (“EOIC”) advanced group proposals to management on the basis of evidence that at a number of the committee’s meetings Polaroid’s management had attempted to ascertain the majority view of the committee’s members, either by polling committee members or, as at one meeting, encouraging them to pare down the number of suggestions they generated to a handful with which they generally could agree.<sup>68</sup> The Board found that “polling individual viewpoints, or otherwise ascertaining the majority view, inherently . . . gauges group opinion.”<sup>69</sup> And, apparently, in the Board’s estimation, gauging an employee’s opinion is tantamount to eliciting a proposal from that employee when the opinion concerns the employee’s approval or disapproval of a proposal, whether that proposal has been advanced by another employee or by management.<sup>70</sup>

The notion that an employer solicits a group proposal from an employee group by attempting to ascertain the majority view of its members regarding a proposal creates a number of uncertainties for employers endeavoring to operate lawful employee involvement programs. *Polaroid Corp.* makes clear that no particular method of ascertaining the majority view, such as a show of hands or ballot, is required to transform the solicitation of individual views into polling. In one of the instances of polling relied upon by the Board, the polling consisted of nothing more than a management representative suggesting that they “*get a sense of where people are on this* [the issue of whether sexual harassment should be included in the company’s termination policy]” by “go[ing] around [the room and] say[ing] it’s OK, or pass, or mak[ing] a comment” and employees responding to this suggestion either by making a comment or by indicating their agreement with what was said before by saying “ditto’ or “nodd[ing] their heads.”<sup>71</sup> But if polling can arise through such informal means, at what point must the solicitation of individual views stop before it becomes an impermissible form of polling? Would polling occur if,

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66. *Id.*

67. 329 N.L.R.B. 424 (1999).

68. *See id.* at 427–31.

69. *Id.* at 431.

70. *Id.*

71. *Id.* at 427.

after an employer solicited the views of a minority of the employees on an employee committee, other committee members volunteered their opinions unsolicited, thus enabling the employer to ascertain the majority view of the committee's members? Might not an employer get a sense of an employee group's general leanings regarding a proposal merely by being attentive to the group members' verbal and non-verbal responses to it?

Moreover, as the Board has found that the "dealing with" component of the definition of a labor organization is satisfied if an employee "group exists for a purpose of [dealing with an employer],"<sup>72</sup> the Board may find that an employee group deals with an employer even if the employer does not solicit the views of a majority of the group's members about any proposals on the theory that the employer solicited the views of individual members of the group for the purpose of divining the group's majority view. The ease with which the solicitation of individual views can slide into the elicitation of a majority opinion or be construed by the Board as attempting to ascertain a group's majority opinion would seem to deter any legally circumspect employer from relying on any supposed non-group-proposal-making-committee exception to Section 8(a)(2)'s proscriptions.

A greater degree of legal certainty is permitted to those employers prepared to delegate an employee group actual authority with respect to matters it discusses with management. In *General Foods Corp.*,<sup>73</sup> the Board affirmed the Administrative Law Judge's ("ALJ's") finding that a job enrichment program the employer had established at one of its plants was not a labor organization.<sup>74</sup> Under this program, the plant's workforce was divided into four teams.<sup>75</sup> Acting by consensus, each team made job assignments to individual team members, assigned job rotations, and scheduled overtime.<sup>76</sup> Individual members of different teams also served together on committees that interviewed job applicants and made safety inspections of the plant.<sup>77</sup> The ALJ found that the job enrichment program involved the "delegat[ion]" of "managerial functions" to

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72. E. I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993).

73. 231 N.L.R.B. 1232 (1977).

74. *Id.* at 1232, 1235.

75. *Id.* at 1233.

76. *Id.*

77. *Id.* at 1235.

employees, not dealing between employees and management.<sup>78</sup> As the ALJ explained, the additional functions performed by employees under the program “were just other assignments of job duties, albeit duties not normally granted to rank-and-file personnel.”<sup>79</sup>

The Board has observed that an employee group deals with management if the group presents proposals to management and management has the power to reject them.<sup>80</sup> It also has found that in exercising this power to reject employees’ proposals, “it makes no real difference whether [management representatives] do so from inside or outside the committee [that formulates them].”<sup>81</sup> However, the Board has indicated that no dealing would occur “if the committee were governed by majority decision-making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management.”<sup>82</sup>

The fourth definitional element of a labor organization that must be satisfied is that these dealings must concern “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” The Board has found that a committee may satisfy this condition even if the committee spends most of its time discussing other subjects,<sup>83</sup> although the Board has found that an isolated discussion of terms and conditions of employment will not necessarily transform a committee into a statutory labor organization.<sup>84</sup> It also is not necessary for an employer to be the party that initiates a committee’s discussion concerning a Section 2(5) subject for the Board to conclude that one of the committee’s purposes is to deal with the employer regarding that subject—management’s mere response to proposals suggested by employees being sufficient to establish such a purpose.<sup>85</sup> The Board thus places an affirmative

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78. *Id.*

79. *Id.*

80. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 895 (1993).

81. *Id.*

82. *Id.*

83. *See Reno Hilton*, 319 N.L.R.B. 1154, 1157 (1995).

84. *Stoody Co.*, 320 N.L.R.B. 18, 20 (1995); *see also Vons Grocery Co.*, 320 N.L.R.B. 53, 54 (1995).

85. *See Vic Koenig Chevrolet*, 321 N.L.R.B. 1255, 1255, 1284 (1996), *enforced in part, enforcement denied in part on other grounds*, 126 F.3d 947 (7th Cir. 1997); *Aero Detroit, Inc.*, 321 N.L.R.B. 1101, 1101, 1113–14 (1996), *aff’d in part, rev’d in part and remanded on other grounds sub nom. APX Int’l v. NLRB*, 144 F.3d 995 (6th Cir. 1998).

obligation on an employer to police discussions with employees to ensure that they do not tread into impermissible areas.<sup>86</sup>

Finally, the Board has not determined whether an employee group can be a labor organization if it doesn't represent other employees in its dealings with management. The Board expressly declined to decide this issue in *Electromation, Inc.*<sup>87</sup> and has avoided a definitive resolution of the question since then. Even assuming, however, that an employee group cannot be a labor organization unless it represents other employees in some way, the Board has not been demanding as to either the kind or the quantity of evidence that is needed to satisfy this possible requirement. For instance, in *Grouse Mountain Associates II*,<sup>88</sup> the Board adopted the ALJ's finding that the employer violated Section 8(a)(2) and, thus, implicitly, his finding that a Quality Assurance program had the purpose of representing employees.<sup>89</sup> Yet, in support of this finding, the ALJ cited only the program's use by the employer "for the development of the process for determining the holidays, for which employees would be paid time and one half, and for determining the types of lunches, which would be provided to employees," and comments by the manager who chaired the program's monthly meetings suggesting that the employer viewed the program as "some sort of employee representative entity."<sup>90</sup>

Although, in *Polaroid Corp.*,<sup>91</sup> the Board reserved judgment on the ALJ's finding that Polaroid's "operation of the EOIC to 'reflect' the views of the employee population was tantamount to the EOIC acting in a representational capacity vis-à-vis the employee population," the Board has routinely considered evidence that an employer has selected a committee's members to reflect some departmental or other cross-section of the workforce as evidence that a committee acts in that capacity.<sup>92</sup> And the Board considers virtually any evidence that a committee member has relayed or was asked to relay a suggestion by an employee who is not a member of the committee as sufficient to establish that the committee acts in a

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86. See *Aero Detroit, Inc.*, 321 N.L.R.B. at 1114; *Stoody Co.*, 320 N.L.R.B. at 19–21.

87. 309 N.L.R.B. 990, 994 n.20 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

88. 333 N.L.R.B. 1322 (2001), *enforced*, 56 F. App'x 811 (9th Cir. 2003).

89. *Id.* at 1322, 1336.

90. *Id.* at 1336.

91. 329 N.L.R.B. 424, 434 n.29 (1999).

92. See, e.g., *Miller Indus. Towing Equip., Inc.*, 342 N.L.R.B. 1074, 1074, 1089 (2004); *Simmons Indus.*, 321 N.L.R.B. 228, 228, 253 (1996).

representational capacity.<sup>93</sup> Thus, the Board effectively requires that an employer ensure that committee members refrain from discussing committee matters with non-participating employees altogether if the employer wishes to take advantage of any hypothecated non-representational-committee safe harbor from Section 8(a)(2). But, even if it were feasible for an employer to stifle such communications, shrouding an employee involvement committee's proceedings in secrecy conflicts with some of the fundamental purposes of employee involvement.<sup>94</sup>

It would appear, then, the possible isolated exception aside, that the only way an employer can discuss terms and conditions of employment with an employee group, achieve some of the usual objectives of employee involvement through such discussions, and have some degree of confidence that the group with which the employer is having discussions is not a labor organization is by delegating decision-making authority to the group over the matters the employer discusses with it. Thus, whatever ways that a nonunion employer can facilitate such discussions in those cases where the employer chooses not to delegate such authority are by and large those left open by Section 8(a)(2). However, these are extremely limited.

## 2. Section 8(a)(2)

Section 8(a)(2)<sup>95</sup> was designed to erect a wall between employers and what the Wagner Act defined as labor organizations.<sup>96</sup> The basic

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93. See, e.g., *Miller Indus. Towing Equip., Inc.*, 342 N.L.R.B. at 1074, 1089; *Simmons Indus.*, 321 N.L.R.B. at 228, 253–54.

94. Among the historical objectives of employee involvement is to instill in employees greater feelings of personal efficacy and of control over their working lives, it being believed that these feelings have a salutary influence on employees' motivation, satisfaction and willingness to cooperate with management in achieving organizational goals. See JOHN L. COTTON, *EMPLOYEE INVOLVEMENT: METHODS FOR IMPROVING PERFORMANCE AND WORK ATTITUDES* 23, TABLE 2.1 (1993); EDWARD E. LAWLER III, *HIGH-INVOLVEMENT MANAGEMENT* 26, 28–35 (1986); Kohler, *supra* note 46, at 516–17. From the perspective of instilling these feelings in the broader workforce, however, an employee committee that is walled off from other employees and to whose deliberations non-members can neither contribute nor obtain information may be worse than useless. At least when management sets terms and conditions of employment on a unilateral basis management is free to consider the input of individual employees and to communicate with employees regarding the course of its deliberations before a decision is reached.

95. See *supra* note 1.

96. This wall was not intended to be wholly impenetrable, as Congress did not wish to prohibit practices that benefitted trade unions. Thus, Section 8(a)(2) allows an employer to “permit[] employees to confer with him during working hours without loss of

idea was that as employers and employees have an adversarial relationship when dealing with each other concerning employees' terms and conditions of employment, employers have an interest in making the employees' representatives for dealing with employers concerning these subjects as ineffective as possible.<sup>97</sup>

Section 8(a)(2) can be divided into two broad legal admonitions. First, it provides that it is an unfair labor practice for an "employer"—a term which encompasses "any person acting as an agent of an employer,"<sup>98</sup> such as a member of an employer's managerial or supervisory staff—"to dominate or interfere with the formation or administration of any labor organization." Although the Board has allowed the possibility that an employer might not violate Section 8(a)(2) "for merely suggesting to his employees that they organize a union or a committee" that the employer can lawfully recognize as their collective bargaining representative,<sup>99</sup> provided the

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time or pay." And Section 8(a)(3) of the Wagner Act, as amended, 29 U.S.C. § 158(a)(3) (2006), permits an employer and a trade union lawfully recognized by the employer as its employees' collective bargaining representative to enter into an agreement requiring as a condition of employment that the employees become dues-paying members of that trade union. An employer also may exert influence on a trade union through arms-length collective bargaining. However, an employer was not to be permitted to influence a labor organization "as an organic entity." *National Labor Relations Board: Hearings on S. 1958 Before the S. Comm. on Educ. and Labor*, 74th Cong. 41 (1935) (statement of Sen. Wagner), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 1417; 79 CONG. REC. 7570 (1935) (statement of Sen. Wagner), reprinted in 2 NLRA LEG. HIST., *supra* note 3, at 2334.

97. See, e.g., *Hearings on S. 1958*, *supra* note 96, at 40 (1935) (statement of Sen. Wagner) ("The company dominated union is frequently supported in part or in whole by the employer. I cannot comprehend how people can rise to the defense of a practice so contrary to American principles as one which permits the advocates of one party to be paid by the other."), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 1416; *Hearings on S. 2926*, *supra* note 38, at 209 (statement of Dr. Paul H. Douglas, Professor of Econ., Univ. of Chi., and member of the Consumers' Advisory Bd., Nat'l Recovery Admin.) ("[T]he law has long since recognized that a man should not serve adverse interests or represent both buyer and seller in the same transaction or both debtor and creditor. 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."), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 239. Senator Wagner often likened the situation faced by employees represented by a company union to that of litigant whose attorney is compensated by the opposing party. See, e.g., *Hearings on S. 1958*, *supra* note 96, at 395 (statement of Sen. Wagner), reprinted in 2 NLRA LEG. HIST., *supra* note 3, at 1781; 79 CONG. REC. 7570 (1935) (statement of Sen. Wagner), reprinted in 2 NLRA LEG. HIST., *supra* note 3, at 2334.

98. 29 U.S.C. § 2(2) (2006).

99. *Electromation, Inc.*, 309 N.L.R.B. 990, 993 (1992) (quoting MEMORANDUM COMPARING S. 1958, SEVENTY-FOURTH CONGRESS, FIRST SESSION, A BILL INTRODUCED BY SENATOR WAGNER ON FEBRUARY 21, 1935, TO CREATE A NATIONAL LABOR RELATIONS BOARD, AND FOR OTHER PURPOSES, WITH THE BILL REPORTED BY SENATOR WALSH ON MAY 26, 1934, AS A SUBSTITUTE FOR S. 2926, SEVENTY-THIRD CONGRESS, ALSO INTRODUCED BY SENATOR WAGNER 27 (S. Comm. Print 1935),

employer does not direct this suggestion to specific individuals or present it as an alternative to joining some other trade union,<sup>100</sup> the Board has found that an employer violates Section 8(a)(2) if the employer plays a more active role in bringing the organization into existence or in affecting its subsequent character. Thus, the Board has found that an employer violates Section 8(a)(2) if the employer conceives the idea of a committee that falls within Section 2(5)'s definition of a labor organization, announces the committee's establishment and invites volunteers from its workforce to participate on the committee<sup>101</sup> or, even if the idea for the committee comes from an employee, if an employer "adopt[s]" the idea "and t[akes] concrete steps to implement it by providing employees with the time and place to meet in order to establish the committee."<sup>102</sup> Likewise, the Board has found that an employer violates Section 8(a)(2) if the employer plays a role in devising the criteria by which the members of a committee that falls within the statutory definition of a labor organization are selected or in determining how it is composed;<sup>103</sup> selects the topics that such a committee discusses<sup>104</sup> or the manner in which they are discussed;<sup>105</sup> determines such a committee's purposes or functions;<sup>106</sup> participates in formulating such a committee's policies and procedures or in selecting its chairman or other officers;<sup>107</sup> or oversees the election of employees to such a committee.<sup>108</sup>

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reprinted in 1 LEG. HIST. OF NLRA, *supra* note 3, at 1352), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

100. See, e.g., *Magan Med. Clinic, Inc.*, 314 N.L.R.B. 1083, 1083 n.2 (1994); *Wheeler*, 260 N.L.R.B. 867, 867 (1982).

101. See, e.g., *EFCO Corp.* 327 N.L.R.B. 372, 372, 377 (1998), *enforced*, 2000 U.S. App. LEXIS 10909 (4th Cir. 2000); *Ryder Distribution Res., Inc.*, 311 N.L.R.B. 814, 818 (1993); *Electromation, Inc.*, 309 N.L.R.B. 990, 990–91, 997 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

102. *Addicts Rehab. Ctr. Fund, Inc.*, 330 N.L.R.B. 733, 742 (2000).

103. See, e.g., *Addicts Rehab. Ctr. Fund, Inc.*, 330 N.L.R.B. at 733, 742; *Webcor Packaging, Inc.*, 319 N.L.R.B. 1203, 1204 & n.8 (1995), *enforced in pertinent part*, 118 F.3d 1115 (6th Cir. 1997); *Electromation, Inc.*, 309 N.L.R.B. at 990–91, 997–98.

104. See, e.g., *Addicts Rehab. Ctr. Fund, Inc.*, 330 N.L.R.B. at 733, 742; *EFCO Corp.*, 327 N.L.R.B. at 377; *Electromation, Inc.*, 309 N.L.R.B. at 997–98.

105. See *Ryder Distribution Res., Inc.*, 311 N.L.R.B. at 818.

106. See, e.g., *Summa Health Sys., Inc.*, 330 N.L.R.B. 1379, 1379, 1382–83, 1385 (2000); *EFCO Corp.*, 327 N.L.R.B. at 377; *Webcor Packaging, Inc.*, 319 N.L.R.B. at 1204 & n.8.

107. See, e.g., *Magan Med. Clinic, Inc.*, 314 N.L.R.B. 1083, 1083 n.2, 1086 (1994); *Oregon State Emps. Ass'n*, 242 N.L.R.B. 976, 976, 993–94 (1979).

108. See, e.g., *Addicts Rehab. Ctr. Fund, Inc.*, 330 N.L.R.B. at 733, 742; *Magan Med. Clinic, Inc.*, 314 N.L.R.B. at 1083 n.2, 1086.

Second, Section 8(a)(2) provides that it is an unfair labor practice for an employer “to . . . contribute financial or other support” to a labor organization. In applying this injunction, the Board gives an employer less latitude in cooperating with a non-majority organization or committee, i.e., an organization or committee that has not obtained authorization from an uncoerced majority of employees to act as their collective bargaining agent, than with a lawfully recognized representative.<sup>109</sup> In the case of the former, the Board condemns as unlawful all but the most minimal levels of employer assistance.

In *Coamo Knitting Mills, Inc.*,<sup>110</sup> the Board observed “that the use of company time and property” by a nondominated, non-majority labor organization, such as a trade union engaged in organizing, “does not, *per se*, establish unlawful support and assistance.”<sup>111</sup> In that case, the Board concluded that the employer did not exceed the meager level of employer assistance to a non-majority labor organization tolerated by Section 8(a)(2) by permitting a trade union attempting to organize its employees to meet with employees on company premises because this occurred “at the end of the workday for all but five of the employees” and these five employees constituted a mere “3 percent of the total work force.”<sup>112</sup>

But the Board has found even such modest forms of employer assistance as furnishing meeting space or clerical supplies to a labor organization to be unlawful where the employer has dominated the organization’s formation.<sup>113</sup> In such a case, the Board views the employer’s assistance as furthering the employer’s unlawful domination of the labor organization.<sup>114</sup>

Finally, the Board may find that an employer has violated Section 8(a)(2) even if the employer does not play a role in the formation or administration of a labor organization or extend financial, material or logistical support to it. The Board has found

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109. Gen. Counsel Memorandum No. 93-4 from Jerry M. Hunter, NLRB Gen. Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers, Guideline Memorandum Concerning *Electromation, Inc.*, 309 NLRB No. 163, at 14–15 (Apr. 15, 1993), available at 1993 NLRB GCM LEXIS 27, at \*26–28.

110. 150 N.L.R.B. 579 (1964).

111. *Id.* at 582.

112. *Id.*

113. See, e.g., *Miller Indus. Towing Equip., Inc.*, 342 N.L.R.B. 1074, 1074, 1090 (2004); *Electromation*, 309 N.L.R.B. 990, 998 & n.31 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994).

114. *Electromation, Inc.*, 309 N.L.R.B. at 998 n.31.

that an employer unlawfully supports a labor organization if the employer “recognizes” a labor organization that has not been authorized by an uncoerced majority of employees in an appropriate unit to represent them for the purpose of collective bargaining.<sup>115</sup> The Board has found that an employer tacitly extends such recognition if the employer bargains with a committee concerning one or more of the subjects listed in Section 2(5).<sup>116</sup> The Board does not require any formal acknowledgment on the part of the employer that the labor organization is an employee representative or the consummation of a collective bargaining agreement.<sup>117</sup>

## II. Section 8(a)(2) as a Regulation of Speech

### A. First Amendment Protection for Employer-Employee Dialogue Regarding Terms and Conditions of Employment

The Supreme Court has not directly addressed whether the First Amendment protects the freedom of private employers and their employees to engage in a dialogue with each other concerning terms and conditions of employment. However, there seems little reason to doubt that it does. The Supreme Court has long recognized that the First Amendment protects the right of employees to communicate their dissatisfaction with their terms and conditions of employment to the public.<sup>118</sup> And, in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,<sup>119</sup> the Court found that, in the context of a School Board meeting at which the public was invited to attend, a public school teacher, who was a member of a bargaining unit that was represented by a union, but who was not a member of that union, had the same right under the First Amendment to criticize a union proposal that altered his terms and conditions of employment as any member of the public and that, consequently, the School Board could not be ordered to prohibit such commentary on the grounds that it “constituted negotiation” between the School Board and one of its employees in derogation of the

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115. See *Bernhard-Altman Texas Corp.*, 122 N.L.R.B. 1289, 1292 (1959), *enforced sub nom.* *ILGWU v. NLRB*, 280 F.2d 616 (DC Cir. 1960), *aff'd*, 366 U.S. 731 (1961).

116. See *Magan Med. Clinic, Inc.*, 314 N.L.R.B. 1083, 1083 n.2 (1994).

117. See *id.* at 1083 n.2, 1084–85.

118. See *Thornhill v. Alabama*, 310 U.S. 88, 102–03 (1940).

119. 429 U.S. 167 (1976).

School Board's obligation to bargain with the employee's bargaining representative.<sup>120</sup>

The Supreme Court also has recognized a reciprocal right of free speech on the part of employers. In *Thomas v. Collins*,<sup>121</sup> the Supreme Court affirmed that the First Amendment protects the right of both employers and employees to engage in noncoercive "attempts to persuade to action with respect to joining or not joining unions."<sup>122</sup> Later, in *NLRB v. Gissel Packing Co.*,<sup>123</sup> the Supreme Court appeared to eschew any subject matter limitation on an employer's right of free speech in finding that the First Amendment's protections extended to an employer's noncoercive communication of "*his views to his employees.*"<sup>124</sup> And, citing *Gissel Packing Co.*, federal circuit courts of appeals have found that an employer engaged in collective bargaining negotiations with a trade union has a First Amendment right to "speak freely to its employees about . . . the status of negotiations, outstanding offers, its position, [and] the reasons for its position"<sup>125</sup> and to criticize the trade union's position in these negotiations.<sup>126</sup> It would be strange indeed if the First Amendment protected an employer's freedom to communicate with employees regarding its negotiations with a trade union, but did not protect an employer's freedom to engage in those negotiations.

Outside the labor relations context, the Supreme Court has found that the First Amendment protects the right to solicit information or responses.<sup>127</sup> When this right is combined with the right of employers and employees to express their views regarding employees' terms and conditions of employment, it would seem to yield a right on the part of employers and employees to engage in a dialogue with each other regarding these subjects, if only because

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120. *Id.* at 174–75; *see also* *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 313 (1979) (noting "that the Constitution guarantees [private employees] the right individually or collectively to voice their views to their employers").

121. 323 U.S. 516 (1945).

122. *Id.* at 537.

123. 395 U.S. 575 (1969).

124. *Id.* at 617 (emphasis added).

125. *Americare Pine Lodge Nursing and Rehab. Ctr. v. NLRB*, 164 F. 3d 867, 875 (4th Cir. 1999).

126. *See NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121, 134 (2nd Cir. 1986).

127. *See Edenfield v. Fane*, 507 U.S. 761, 764–66 (1993); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

such a dialogue consists of a process in which both parties express their views and solicit information and responses from the other.<sup>128</sup>

Although Section 8(a)(2)'s proscriptions are targeted at employers, in their actual application they also burden employees' exercise of their rights of free speech. Under the Board's longstanding interpretation of Section 8(a)(2), an employer is prohibited from conditioning its willingness to enter into discussions with an employee group regarding terms and conditions of employment on the group's willingness to discuss certain topics or its willingness to include other employees in the discussions.<sup>129</sup> And, under the same interpretation of this section, an employer is prohibited from providing an employee group that falls within the statutory definition of a "labor organization," but that has not been authorized by an uncoerced majority of employees in an appropriate unit to act as their collective bargaining agent, any significant material or logistical support. But the former prohibition makes it more difficult for a group of employees to obtain their employer's agreement to enter into such discussions, an indispensable prerequisite to them in the absence of any legal compulsion on the employer to engage in them, while the latter deprives an employee group of the support ordinarily needed by its members to communicate with other interested employees. Such prohibitions impinge on employees' and not merely employers' freedom of speech.<sup>130</sup>

More importantly, Section 8(a)(2) deprives employees of the opportunity to participate in employee involvement programs initiated by employers. It is well established that the First Amendment protects not only the right to speak, but also the right to hear what a speaker has to say.<sup>131</sup> As the Supreme Court has explained: "Freedom of speech presupposes a willing speaker. But

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128. *Cf. Reno v. ACLU*, 521 U.S. 844, 874 (1996) (finding that the Communications Decency Act of 1996 violated First Amendment by "suppress[ing] a large amount of speech that adults have a constitutional right to receive and to address to one another").

129. *See* cases cited *supra* notes 103–04.

130. *See Buckley v. Valeo*, 424 U.S. 1, 21 (1976) ("[C]ontribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."); *cf. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 784 (1988) (finding that North Carolina law that prohibited professional fundraisers from charging a charity "an 'unreasonable' or 'excessive' fee" for their fundraising services violated charities' First Amendment rights (quoting N.C. GEN. STAT. § 131C-17.2 (1986))).

131. *See Va. State Bd. of Pharmacy*, 425 U.S. at 756–57 and cases cited; *Reno v. ACLU*, 521 U.S. at 874.

where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both.”<sup>132</sup> And just as restrictions on one person’s freedom to speak impinge on other persons’ freedom to hear what that person has to say, so too restrictions on the freedom of employers to initiate a dialogue regarding terms and conditions of employment impinge on the freedom of employees to participate in that dialogue.

The cumulative effect of the many ways that the Board’s application of Section 8(a)(2) restricts labor-management communication is not insubstantial: As a practical matter they preclude an employer and a nonunion employee group from discussing terms and conditions of employment with each other unless the employer delegates decision-making authority about the matters the employer discusses with the group to the group. In doing so, they largely eliminate as a vehicle for employer-nonunion employee communication regarding terms and conditions of employment what social psychologists, members of the business academy, employers and others have long regarded as the most effective way of communicating about a wide variety of workplace issues: group discussion.

The cognitive and psychological benefits of various forms of group discussion at the workplace have been attested to by numerous observers.<sup>133</sup> It has been noted that group discussion can have a stimulating effect on the formation of ideas by the group’s members, as ideas advanced by one member may stimulate the formation and presentation of ideas by other members of the group who might not have formulated them on their own.<sup>134</sup> And the exposure of the

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132. *Va. State Bd. of Pharmacy*, 425 U.S. at 756.

133. See, e.g., DAVID I. LEVINE, *REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN* 38–39, 43–46 (1995); ALEX F. OSBORN, *APPLIED IMAGINATION* 151–193 (1963); PETER M. SENGE, *THE FIFTH DISCIPLINE: THE ART & PRACTICE OF THE LEARNING ORGANIZATION* 238–49 (1990); Dean Tjosvold, *Participation: A Close Look at its Dynamics*, 13 J. MGMT. 739, 741 (1987) (“[C]omprehensive reviews indicate that several persons working in formal or informal groups often solve problems more efficiently than individuals working alone.”).

134. See, e.g., OSBORN, *supra* note 133, at 154; Vincent Brown, Michael Tumeo, Timothy S. Larey & Paul B. Paulus, *Modeling Cognitive Interactions During Group Brainstorming*, 29 SMALL GROUP RES. 495, 498 (1998); Simon Taggar, *Group Composition, Creative Synergy, and Group Performance*, 35 J. CREATIVE BEHAV. 261, 264–65 (2001). Research in the area of group brainstorming suggests that an employer can increase the creative potential of an idea-generating group by selecting as its members “people with diverse but overlapping knowledge domains and skills.” Paul B. Paulus, *Groups, Teams, and Creativity: The Creative Potential of Idea-generating Groups*, 49 APPLIED PSYCHOLOGY: AN INT’L REV. 237, 251 (2000). But such conduct would be

members of a group to conflicting views on an issue has been found to encourage the search for additional information on all sides of that issue, thereby expanding the pool of information upon which the group draws in rendering its judgment.<sup>135</sup> Likewise, it has been found that participating in an employee involvement group that has a meaningful role in organizational decision-making can increase employees' "feelings of accomplishment and self-worth,"<sup>136</sup> their "sense of power and dignity,"<sup>137</sup> and their willingness to cooperate with management in achieving organizational goals.<sup>138</sup> The process of employees and managers working together to address common problems also can build mutual trust between employees and management, with effects that permeate the employment relationship.<sup>139</sup>

Common sense would further suggest that a face-to-face discussion between managers and an employee group often is a more effective means for employers and employees to exchange information—historically, one of the most important functions of employee involvement<sup>140</sup>—than the avenues that the Board leaves open to employers and nonunion employees for communicating with each other regarding terms and conditions of employment, including principally managerial dealings with individual employees, suggestion boxes, and employee opinion surveys.<sup>141</sup> A face-to-face discussion allows both parties to ask follow-up questions, to provide clarification, to achieve consensus, and to identify areas of agreement

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unlawful under the prevailing interpretation of Section 8(a)(2) if the group fell within Section 2(5)'s diffuse definition of a "labor organization."

135. See Charlan Nemeth & Pamela Owens, *Making Work Groups More Effective: The Value of Minority Dissent*, in HANDBOOK OF WORK GROUP PSYCHOLOGY 125, 137 (Michael A. West ed., 1996).

136. LAWLER, *supra* note 94, at 26.

137. LEVINE, *supra* note 133, at 39.

138. See LAWLER, *supra* note 94, at 30; LEVINE, *supra* note 133, at 38–39.

139. See LEVINE, *supra* note 133, at 39; Bruce E. Kaufman & David I. Levine, *An Economic Analysis of Employee Representation*, in NONUNION EMPLOYEE REPRESENTATION, *supra* note 47, at 149, 156–157.

140. See ERNEST R. BURTON, EMPLOYEE REPRESENTATION 67–68 (1926) (noting that the most general function of company unions in the 1920s was to provide a forum for the bilateral "exchange of information, opinions, and desires" between employees and management); LAWLER, *supra* note 94, at 24–25; Gretchen Spreitzer, *Taking Stock: A Review of More Than Twenty Years of Research on Empowerment at Work*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 54, 56 (Julian Barling & Cary L. Cooper eds., 2008).

141. See *Polaroid Corp.*, 329 N.L.R.B. 424, 425 & n.6 (1999); *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993).

and disagreement with a subtlety that would be difficult to replicate through suggestion boxes, employee opinion surveys and other non-interactive modes of communication. And obviously an employer usually can exchange information with employees more efficiently if the employer is permitted to engage in face-to-face discussions with an employee group or multiple employee groups than if the employer is required to speak with each employee individually. The singular value of group discussion at the workplace would seem to preclude Section 8(a)(2) from being justified by loose analogy to constitutionally permissible restrictions on the time, place, or manner of speech, which must, *inter alia*, “leave open ample alternative channels for communication of the information,”<sup>142</sup> a requirement that the Supreme Court has found rules out restrictions on speech that require speakers to utilize more burdensome or less “effective” channels of communication<sup>143</sup> or that deprive speakers of a “unique and important” means of engaging in the desired communications.<sup>144</sup>

Section 8(a)(2) stands on no better footing as a putative regulation of the time, place, or manner of speech because nonunion employees can circumvent a number of the obstacles that it places in the way of their communicating with their employer by becoming unionized. Employees who wish to enter into discussions with management regarding terms and conditions of employment may be unable to persuade a majority of their co-workers of the merits of joining or forming a trade union. And these employees’ freedom to discuss these subjects with their employer cannot be thwarted merely because other employees choose not to exercise this freedom.<sup>145</sup> There is, of course, also no guarantee that the employees who wish to enter into a dialogue with management would be selected by other employees to serve on the labor organization’s bargaining committee.

It would appear, then, that Section 8(a)(2), as applied by the Board, imposes significant restrictions on the freedom of employers

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142. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

143. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

144. *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994).

145. *See Reno v. ACLU*, 521 U.S. 844, 859, 880 (1996) (finding that provisions in the Communications Decency Act of 1996 that criminalized the “knowing transmission of obscene or indecent messages to any recipient under 18 years of age” and the “knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age” violated the First Amendment because, among other reasons, they could enable an opponent of such speech to exercise a “heckler’s veto” by “simply log[ging] on [a website] and inform[ing] the would-be discourses that his 17-year old child . . . would be present”).

and nonunion employees to engage in speech that is protected by the First Amendment and that the constitutional import of these restrictions can't be minimized by reference to the remaining channels they leave open to employers and nonunion employees to communicate. Thus, some explanation is needed as to why Section 8(a)(2), as applied by the Board, does not violate the First Amendment. The Supreme Court's terse offering in its 1959 decision in *NLRB v. Cabot Carbon Co.*<sup>146</sup> represents its only attempt at one.

## **B. The *Cabot Carbon Co.* Decision and its Continued Salience in Contemporary First Amendment Jurisprudence**

### *1. The Cabot Carbon Co. Decision*

In *Cabot Carbon Co.*, the controlling case as to the validity of Section 8(a)(2) under the First Amendment, some affiliated employers set up employee committees at their plants.<sup>147</sup> Bylaws for these committees were prepared by the employers in collaboration with employee representatives from their several plants and approved by a majority of employees at each plant.<sup>148</sup> The bylaws provided that the committees' purpose was to furnish "a procedure for considering employees' ideas and problems of mutual interest to employees and management."<sup>149</sup>

In addition, a "Central Committee," consisting of the chairmen of the plant committees, met annually with the affiliates' Director of Industrial Relations.<sup>150</sup> This committee advanced a broad range of proposals concerning the employment relationship, some of which were approved by the Director.<sup>151</sup> However, neither the Central Committee nor the various plant committees ever endeavored to negotiate a collective bargaining agreement with any of the employers.<sup>152</sup>

The Board found that the employee committees were unlawfully dominated labor organizations and ordered the employers to disestablish them.<sup>153</sup> The Fifth Circuit Court of Appeals, however,

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146. 360 U.S. 203 (1959).

147. *Id.* at 205.

148. *Id.*

149. *Id.*

150. *Id.* at 208.

151. *Id.*

152. *Id.* at 209.

153. *Id.* at 209–210.

refused to enforce this order, finding that the committees did not fall within the Wagner Act's definition of a "labor organization" because they did not engage in what was commonly understood as "collective bargaining" and because, in its view, the Taft-Hartley Act's amendment to Section 9(a) of the Wagner Act indicated that Congress wanted to exclude such committees from this definition.<sup>154</sup>

The principal issue before the Supreme Court was whether the committees established by Cabot Carbon and its affiliates were labor organizations. As Lopatka points out, the First Amendment issue was given perfunctory treatment by the parties and the Court,<sup>155</sup> with a discussion of the issue occupying only two sentences of the Court's opinion.<sup>156</sup> At any rate, the Court exhibited no hesitancy in rejecting the employers' First Amendment challenge to the Board's application of Section 8(a)(2), finding that Section 8(a)(2) does not limit free speech but "merely precludes . . . employers from dominating, interfering with or supporting such employee committees which Congress has defined to be labor organizations."<sup>157</sup>

Although it would be hazardous to draw any firm conclusions about the Court's reasoning from this Delphic pronouncement, which does little more than restate Section 8(a)(2)'s prohibitions, what the Court appears to have in mind is that Section 8(a)(2) does not violate the First Amendment because it only regulates employers' conduct (i.e., acts of domination, interference or support of labor organizations) and, hence, is not subject to First Amendment scrutiny

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154. *Id.* at 210. The proviso to Section 9(a) of the Wagner Act read:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

Wagner Act, ch. 372, § 9(a), 49 Stat. 449, 453 (1935) (current version at 29 U.S.C. § 159(a) (2006)). The Taft-Hartley Act added the following language to Section 9(a):

and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Taft-Hartley Act, ch. 120, § 9(a), 61 Stat. 136, 143 (1947) (current version at 29 U.S.C. § 159(a) (2006)).

155. Lopatka, *supra* note 4, at 31.

156. *See Cabot Carbon Co.*, 360 U.S. at 218.

157. *Id.*

at all. This proposition, however, would not appear to survive the Court's subsequent case law.

## 2. *The Speech/Conduct Distinction*

The Supreme Court has not returned to the specific First Amendment question raised in *Cabot Carbon Co.*, that is, whether Section 8(a)(2), as applied by the Board, violates the First Amendment. It has, however, frequently revisited the issue of line drawing between protected speech and unprotected conduct, most instructively in cases in which the Court addressed First Amendment concerns relating to the regulation of expressive conduct or campaign finance.

In *United States v. O'Brien*,<sup>158</sup> the Court ruled that provisions in the Selective Service Act that made it unlawful for a draft registrant to destroy his draft card did not violate the registrant's First Amendment right to express his opposition to the Vietnam War and the draft. In so finding, the Court explained "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>159</sup> In the Court's view, this burden of justification was met if the regulation "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>160</sup>

In subsequent cases, the Supreme Court applied the *O'Brien* test to restrictions on a variety of admixtures of speech and conduct.<sup>161</sup> Notably, however, in *Buckley v. Valeo*,<sup>162</sup> the Court found its analysis in *O'Brien* to be inapplicable to restrictions on federal election campaign contributions and expenditures.

In *Buckley*, the Supreme Court considered whether campaign contribution and expenditure limits imposed by the Federal Election

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158. 391 U.S. 367 (1968).

159. *Id.* at 376.

160. *Id.* at 377.

161. *See, e.g.,* *United States v. Albertini*, 472 U.S. 675, 687–88 (1985) (entering a military base for the purpose of engaging in a peaceful demonstration); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984) (posting signs on public property); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (plurality opinion) (nude dancing).

162. 424 U.S. 1 (1976).

Campaign Act of 1971, as amended in 1974, violated the First Amendment. The act imposed, *inter alia*, (a) a \$1,000 limit on the amount that an individual could contribute to the campaign of any single candidate for federal elective office in any single election; (b) a \$1,000 limit on the amount that any individual could expend in an election “relative to a clearly identified candidate”; (c) restrictions on “a candidate’s use of personal and family resources in his campaign”; and (d) a limit on “the overall amount that c[ould] be spent by a candidate in campaigning for federal office.”<sup>163</sup> The D.C. Circuit Court of Appeals found and the government argued before the Supreme Court that the act regulated conduct; “that its effect on speech and association [wa]s incidental at most”; and that, therefore, the act’s campaign contribution and expenditure limitations were akin to those provisions in the Selective Service Act that the Supreme Court had upheld in *O’Brien*.<sup>164</sup>

The Supreme Court, however, rejected this analogy. The Court found that “[t]he expenditure of money simply cannot be equated with such conduct as destruction of a draft card.”<sup>165</sup> The Court observed that it had “never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element”<sup>166</sup> and noted that it had previously “contrasted picketing and parading,” which it had characterized as “conduct ‘intertwined with expression and association,’” with a “newspaper comment and a telegram,” which it had “described as a ‘pure form of expression’ involving ‘free speech alone’ rather than ‘expression mixed with particular conduct.’”<sup>167</sup> Yet, a newspaper comment and telegram will usually require the expenditure of money on some person’s part. As the Court explained:

[V]irtually every means of communicating ideas in today’s mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s increasing dependence on television, radio, and other mass media

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163. *Id.* at 13 (quoting 18 U.S.C. § 608(e) (Supp. IV 1970)).

164. *Id.* at 15–16.

165. *Id.* at 16.

166. *Id.*

167. *Id.* at 17 (quoting *Cox v. Louisiana*, 379 U.S. 559, 563–64 (1965)).

for news and information has made these expensive modes of communication indispensable instruments of effective political speech.<sup>168</sup>

The apparent import of the Court's discussion is that speech and the dissemination of speech is so dependent on and intertwined with certain types of conduct, such as expending money, printing and distributing handbills or leaflets, or hiring a hall, that restrictions on such ancillary conduct are tantamount to restrictions on the speech itself. Stated another way, if the rights of free speech guaranteed by the First Amendment are not to be rendered nugatory, then the First Amendment must protect a variety of conduct, other than the moving of lips and vocal chords, needed to effectuate communication between a speaker and his or her intended audience. A ban on the burning of draft cards is different in kind from a ban on the expenditure of money, even though both types of conduct may have as their purpose the promotion of a political message, since the former limits only one means, and not a principal means, of communicating opposition to a war or draft, whereas a ban on the expenditure of money swallows up virtually every avenue for disseminating the message that such conduct is intended to promote.

Since *Buckley*, the Supreme Court has repeatedly reaffirmed the view that restrictions on such conduct as the expenditure of money or the furnishing of "goods, materials, services, or facilities" are, when this conduct is designed to facilitate the political expression of the person, group or entity engaging in it, subject to strict scrutiny under the First Amendment.<sup>169</sup> The Court also has found that the First Amendment's protections extend to similar types of conduct when such conduct is engaged in to facilitate other kinds of speech. For instance, in *Secretary of State of Maryland v. Joseph H. Munson Co.*<sup>170</sup> and *Riley v. National Federation of the Blind of North Carolina, Inc.*,<sup>171</sup> the Court found that state laws that limited what a professional fundraiser could charge a charity for fundraising on the charity's behalf violated the First Amendment. In both cases the Court

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168. *Id.* at 19.

169. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990) (quoting MICH. COMP. LAWS § 169.254(1) (1979)), *overruled on other grounds* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *see also* *Citizens United v. FEC*, 130 S. Ct. at 898; *McConnell v. FEC*, 540 U.S. 93, 205 (2003); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978).

170. 467 U.S. 947 (1984).

171. 487 U.S. 781 (1988).

reasoned that “a direct restriction on the amount of money a charity can spend on fundraising activity” amounted to “a direct restriction on protected First Amendment activity.”<sup>172</sup>

Indeed, the Supreme Court has found that regulations governing the financing of commercial advertising implicate First Amendment freedoms. In *United States v. United Foods, Inc.*,<sup>173</sup> the Supreme Court ruled that government-mandated assessments used primarily to fund advertising promoting mushroom sales violated United Foods’ First Amendment right to refrain from subsidizing speech with which it disagreed. The Court likened the assessments to compelled subsidies of political speech that the Court had found unconstitutional in earlier cases.<sup>174</sup>

Like the campaign finance regulations that the Court has subjected to strict scrutiny under the First Amendment, Section 8(a)(2) restricts the freedom of those regulated to expend money or to furnish goods, materials, services, and facilities for the purpose of fostering speech. In this regard, the principal difference between Section 8(a)(2) and these campaign finance regulations is that Section 8(a)(2) leaves those regulated far less room to facilitate the underlying speech.

The other conduct that Section 8(a)(2) prohibits—“the dominat[ion] or interfere[nce] with the formation or administration of any labor organization”—would appear to be even more closely connected with pure speech than the provision of material, logistical or financial support. As noted above, if a committee falls within Section 2(5)’s broad definition of a labor organization, then, under the prevailing interpretation of the Wagner Act, as amended, an employer commits an unfair labor practice in violation of Section 8(a)(2) if the employer initiates the committee’s formation, plays a role in selecting its participants, or decides which topics that it discusses.<sup>175</sup> But one cannot have a dialogue without someone initiating it, engage in a dialogue regarding a particular topic without someone choosing to discuss that topic, or actively seek a dialogue with a specific group of individuals without interfering with the process by which that group is formed. To deprive employers of the

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172. *Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. at 788–89 (quoting *Joseph H. Munson Co.*, 467 U.S. at 967 & n.16).

173. 533 U.S. 405 (2001).

174. *Id.* at 410–11, 413.

175. See cases cited *supra* notes 101, 103–04.

right to engage in such conduct is to deprive employers and, indirectly, employees of a substantial part of the right of free speech.

Conduct that is protected by the First Amendment can always be described in a way that makes no reference to speech. For instance, the managing editor of a newspaper might be said to “dominate” the administration of the newspaper. And someone who conceives the idea of a book club, selects the books to be read by its members, places an advertisement in a newspaper inviting others to join, selects the time and locale of the club’s meetings, and serves as a moderator at those meetings might be said to “dominate” the formation and administration of the book club. But a statute designed to reduce or eliminate the influence that a class of persons has over newspapers or book clubs obviously would not escape First Amendment scrutiny merely by describing the conduct it proscribes in this fashion.<sup>176</sup> Similarly, Section 8(a)(2), which is designed to reduce the influence that employers have over labor organizations, does not escape such scrutiny by describing the conduct it prohibits in this way.

It would appear, then, that Section 8(a)(2) cannot escape First Amendment scrutiny on the theory that it regulates conduct and not speech. This, however, does not resolve the First Amendment issue. For even “a significant interference with [First Amendment freedoms] may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of [those] freedoms.”<sup>177</sup> Whether Section 8(a)(2), as applied by the Board, can be justified on this basis is addressed below.

### III. Justifying Section 8(a)(2)’s Burden on Speech

#### A. The Standard of Review

The Supreme Court applies “strict” or “heightened scrutiny” to restrictions on most types of speech when these restrictions cannot otherwise be justified as mere regulations of the time, place, or manner of speech.<sup>178</sup> Under this mode of review, a governmental

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176. Cf. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (noting that the First Amendment prohibits “[s]peech restrictions based on the identity of the speaker”).

177. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (internal quotation marks omitted).

178. See David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 33, 37 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (noting that the “default category” of speech under the First Amendment “is high-value speech,” i.e., speech that receives the First Amendment’s “full protection”).

restriction on speech violates the First Amendment unless it “is necessary to serve a compelling [governmental] interest and . . . is narrowly drawn to achieve that end.”<sup>179</sup> The legislature must select the means “least restrictive” of speech to achieve its goal.<sup>180</sup>

However, the Supreme Court has formulated a somewhat more accommodating test for governmental restrictions on commercial speech. Under this “intermediate” level of scrutiny,<sup>181</sup> the Court first considers whether the speech at issue “concern[s] lawful activity and [is] not . . . misleading.”<sup>182</sup> If this condition is not met, the speech falls outside the protection of the First Amendment.<sup>183</sup> However, if this condition is satisfied, then the restriction on speech violates the First Amendment unless (a) “the asserted governmental interest is substantial,”<sup>184</sup> (b) “the regulation directly advances the governmental interest asserted,”<sup>185</sup> and (c) the regulation is “narrowly drawn.”<sup>186</sup> The Court has specified that the Government has the burden of showing that the challenged regulation directly advances its interest and that to meet this burden the government must show that its regulation will advance this interest “to a material degree.”<sup>187</sup> The Court also has stated “that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”<sup>188</sup>

The Supreme Court has “characteriz[ed] the proposal of a commercial transaction as ‘*the test* for identifying commercial speech.’”<sup>189</sup> The Court has explained that speech is not “commercial

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179. *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

180. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *accord Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

181. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (internal quotation marks omitted).

182. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 565 (quoting *In re Primus*, 436 U.S. 412, 438 (1978)).

187. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

188. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2001).

189. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989)); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (noting that “commercial speech” is “usually defined as speech that does no more than propose a commercial transaction”).

speech” merely because it concerns a “commercial subject.”<sup>190</sup> And “the fact that [a speaker] has an economic motivation for [speaking is] . . . clearly . . . insufficient by itself to turn the [speaker’s speech] into commercial speech.”<sup>191</sup>

The Supreme Court historically has given noncoercive speech relating to labor relations greater protection than commercial speech. As noted above, in 1940 the Supreme Court found that the First Amendment’s protections extended to “the dissemination of information concerning the facts of a labor dispute”<sup>192</sup> and in 1945 affirmed that these protections extended to noncoercive attempts by employers and employees “to persuade to action with respect to joining or not joining unions.”<sup>193</sup> By contrast, it was not until 1976 that the Supreme Court found that the First Amendment imposed constraints on the government’s freedom to restrict “a communication which does no more than propose a commercial transaction.”<sup>194</sup>

The Supreme Court provided its clearest indication of the relative value of labor speech versus commercial speech under the First Amendment in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.<sup>195</sup> There, the Court found that construing Section 8(b)(4)’s secondary boycott ban as prohibiting peaceful and orderly handbilling, as the Board had, would raise “serious constitutional issues.”<sup>196</sup> In so finding, the Court indicated that at least some labor speech was entitled to a greater degree of protection under the First Amendment than commercial speech:

We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection. The handbills involved here, however, do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits,

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190. *Discovery Network, Inc.*, 507 U.S. at 421 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)).

191. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983).

192. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

193. *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

194. *Va. State Bd. of Pharmacy*, 425 U.S. at 776 (Stewart, J., concurring).

195. 485 U.S. 568 (1988).

196. *Id.* at 576.

for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace.<sup>197</sup>

A similar point can be made about an employer's discussions with a labor organization, whether that labor organization is a trade union or a nonunion employee involvement committee. A discussion of wages can generate commentary regarding the value of employees' work, the economic conditions within industry, the relationship between employees' compensation and firm profitability, and distributive equity. And a discussion of a grievance relating to discipline or discharge can generate commentary regarding equality of treatment, due process, and the proportionality of a penalty to an offence. Such speech bears a greater resemblance to economic, political and legal commentary than it does to typical commercial speech.

Because commercial speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech,"<sup>198</sup> Section 8(a)(2)'s restrictions on speech would seem to be subject to strict scrutiny. Nevertheless, it will be assumed for the sake of argument that the intermediate level of scrutiny to which the Supreme Court subjects restrictions on commercial speech is the one that is applicable here. This path is chosen in the hope of reaching a more decisive conclusion with respect to the First Amendment issue, for there can be little doubt that a dialogue between an employer and an employee group regarding terms and conditions of employment merits at least as much protection under the First Amendment as the typical commercial advertisement. As it happens, the Board's Section 8(a)(2) restrictions cannot withstand even this lesser level of scrutiny.

## **B. The Rationales for Section 8(a)(2)**

### *1. The Puzzle of the Company Union Ban Revisited*

As noted above, the legislative history of the Wagner Act leaves no doubt that Congress' immediate objective in passing Section 8(a)(2) was to eliminate the company union. Why Congress deemed this necessary or desirable, however, is more difficult to divine. The

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197. *Id.*

198. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

Act's prohibition of company unions cannot be explained (or justified) merely by pointing to employers' and employees' supposed adversarial relationship concerning terms and conditions of employment and, hence, to the likelihood that any labor organization that is dominated by an employer will be a less effective representative of employees than one that is independently established by employees. Even Senator Wagner appears to have believed that employees were better off represented by a company union than having no representation at all.<sup>199</sup> If employees remain free to choose trade unionism over company unionism, just as they are free under the Act to choose trade unionism over nonunionism, what harm is there in permitting employers to install company unions?

Although several rationales for prohibiting company unions were offered during the congressional hearings and debates on the 1934 Labor Disputes Bill and the 1935 National Labor Relations Bill ("Wagner bills"), a number of these cannot withstand even the most cursory examination and, in any case, seem unlikely sources of inspiration for the effort to seek a legislative ban on company unions in the first place.<sup>200</sup> However, two arguments for eliminating company unions are not so easily dismissed. The first is that company unions and the conduct engaged in by employers in establishing them coerce employees. The second, the one favored by the early Board, is that company unions deceive employees by providing the appearance, but not the substance, of collective bargaining, thus leading employees to forego trade unionization, contrary to their best interests.<sup>201</sup> The

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199. See Wagner, *supra* note 3 ("The company union has improved personal relations, group-welfare activities, discipline, and the other matters which may be handled on a local basis."), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 23.

200. The legislative history reveals a number of *a priori* rationales for Section 8(a)(2) that postulate some supposed logical inconsistency in the notion of company unionism or inherent incompatibility between company unionism and employee rights. For descriptions of a number of these and why they afford inadequate defenses for Section 8(a)(2) under the First Amendment, see Lopatka, *supra* note 4, at 44–47. Perhaps the most superficially plausible rationale for Section 8(a)(2) of this general sort "posits that employees have a right not to be suppressed by the conflict of interest that exists when the employer sets up or props up the party on the other side of the table." *Id.* at 47. For an explanation as to why this justification for Section 8(a)(2) rises or falls on the strength of the structural and performative dissemblance rationale, considered below, see *id.* at 47–54.

201. See, e.g., H. E. Fletcher Co., 5 N.L.R.B. 729, 736 (1938), *enforced*, 108 F.2d 459 (1st Cir. 1939); Int'l Harvester Co., 2 N.L.R.B. 310, 348–51 (1936). In *Electromation, Inc.*, 309 N.L.R.B. 990, 997 n.27 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994), the Board appeared to endorse a combination of these two justifications for prohibiting company unions, finding that "[m]uch of the harm implicit in employer-dominated organizations is

underlying concern of both these not-mutually exclusive rationales for Section 8(a)(2) is the retarding influence that company unions had on the growth of trade union organization and arm's-length collective bargaining.

Although the second of these rationales for Section 8(a)(2) posits that company unions dupe employees into foregoing trade union representation, the claim obviously is not—and could not tenably be—that the individual communications that employers and employees make in the course of their mutual dealings through a company union are necessarily false or misleading. Thus, if restrictions on this speech are to withstand First Amendment scrutiny, then it must be shown, assuming that these communications are commercial speech, that these restrictions “directly advance[]” a “substantial” governmental interest and are “narrowly drawn” to advance that interest.

## 2. *The Coercion Rationale*

### a. Simple Coercion<sup>202</sup>

The Supreme Court has recognized that protecting employees' freedom of choice with respect to joining or not joining unions is a constitutionally sufficient reason for restricting coercive employer speech.<sup>203</sup> And Senator Wagner and other congressional proponents of the Wagner bills often justified these bills' restrictions on employers' freedom to promote their own forms of employee representation on the grounds of protecting employees' freedom of choice from employer interference, although much of the conduct they identified as interfering with employees' freedom of choice would appear to fall outside the domain of employer behavior that might be described as “coercive,” as this concept has been explicated by the Supreme Court.<sup>204</sup>

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that, when they are successful, they appear to employees to be the result of an exercise of statutory freedoms, when in fact they are coercive by their very nature.”

202. I employ Mark Barenberg's terminology in naming the two variants of the coercion rationale and the “structural and performative dissemblance” rationale discussed below. See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 777, 804 (1994).

203. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

204. For instance, in its report to the House of Representatives on the National Labor Relations Bill, the House Committee on Labor identified “financial support, participation in the formulation of the constitution or bylaws or in the internal management of the

Even so, there was no dearth of testimony about employer behavior that unambiguously falls within that domain upon which proponents of the Wagner bills might have relied in defending these bills' prohibitions of company unions. In testifying before the Senate Committee on Education and Labor during its hearings on the Wagner bills, labor leaders and others aligned with the American trade union movement recited a litany of coercive tactics that employers ostensibly brought to bear against employees in connection with the establishment and operation of company unions, including refusing to reinstate laid off employees who refused to sign a card indicating their intention to join a company union;<sup>205</sup> inducing employees to belong to a company union by limiting group insurance, death benefits and the right to file grievances to those who became

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company union" as among "[t]he most commonly recognized forms of interference" with employees' freedom of choice in connection with an employer's sponsorship of a company union. H.R. REP. NO. 74-1147, at 18 (1935), *reprinted in 2 NLRA LEG. HIST.*, *supra* note 3, at 3067. But why such conduct should interfere with employees' freedom to join a trade union or engage in any of the other conduct protected by the Wagner Act is not immediately obvious. The explanation for the Wagner Act proponents' seemingly capacious concept of employer interference with employee free choice would appear to lie in their view that nonunion employees were particularly susceptible to pressures exerted by their employer owing to their vulnerability to employer retaliation within the employment relationship. The reasoning appears to have been that by initiating, financially supporting, or participating in the internal affairs of a labor organization, an employer expressed its preference for that organization and that, because of employees' fear of transgressing their employer's wishes, such expressions of preference by the employer for the so-favored labor organization, by themselves, interfered with employees' freedom to join other labor organizations. *See id.* (noting that these forms of employer interference "are weighty precisely because of the existence of the employer-employee relationship"); *Hearings on S. 1958*, *supra* note 96, at 131 (statement of Lloyd K. Garrison, Dean, Univ. of Wis. Law Sch., and first chairman of the pre-Wagner Act Board) ("The company union cannot be set up in any form without it becoming perfectly apparent to all of the employees that the employer is for this sort of thing. He is for it and he is friendly to it, and it is perfectly apparent to the employees that they are expected to join it . . ."), *reprinted in 2 NLRA LEG. HIST.*, *supra* note 3, at 1511. This view is reflected in early decisions by the Board in which the Board found that an employer interferes with its employees' exercise of their rights under the Wagner Act by expressing its opposition to trade union organization. *See, e.g.*, *Schult Trailers*, 28 N.L.R.B. 975, 993-996 (1941); *Ford Motor Co.*, 23 N.L.R.B. 342, 350-52 (1940), *enforced as modified*, 122 F.2d 414 (8th Cir. 1941). However, the notion that an employer coerces its employees or otherwise interferes with their free choice merely by indicating to them its support of or opposition to trade unionism in general or any particular union has been rejected by the Supreme Court. *See Gissel Packing Co.*, 395 U.S. at 617; *Thomas*, 323 U.S. at 537.

205. *Hearings on S. 2926*, *supra* note 38, at 261 (statement of William Karlin, legal adviser for the Int'l Jewelry Workers Union), *reprinted in 1 NLRA LEG. HIST.*, *supra* note 3, at 291.

members of the company union;<sup>206</sup> informing employees with perceived leadership capabilities that the company expected them to help management form a company union;<sup>207</sup> instructing individual employees to vote in an election of representatives under a company union plan where the employee's participation in the election itself was construed as indicating the employee's approval of the company union plan;<sup>208</sup> and threatening employees who refused to join a company union.<sup>209</sup>

However, even without Section 8(a)(2)'s ban on company unions, Sections 8(a)(1) and 8(a)(3) protect employees against the kinds of coercive and discriminatory acts alleged by these witnesses.<sup>210</sup> And as these protections, coupled with the Wagner Act's secret-ballot-election machinery and other mechanisms, were thought adequate to protect employees' choice of trade unionization over nonunionization from employer coercion, they presumably are also

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206. See *id.* at 98 (statement of William Green, President, Am. Fed'n of Labor), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 128.

207. See *id.* at 144 (statement of John L. Lewis, President, United Mine Workers), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 174.

208. See *id.*

209. See *id.* at 135 (statement of Jacob Panken, trade union attorney), reprinted in 1 NLRA LEG. HIST., *supra* note 3, at 165.

210. Section 8(a)(1), 29 U.S.C. § 158(a)(1) (2006), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Wagner Act, as amended]." Section 7 of the Wagner Act provided:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Wagner Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (current version at 29 U.S.C. § 157 (2006)). The Taft-Hartley Act added the following language to Section 7:

and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Taft-Hartley Act, ch. 120, § 7, 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 157 (2006)). Section 8(a)(3), 29 U.S.C. § 158(a)(3) (2006), provides in pertinent part that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

adequate to protect employees' choice of trade unionization over company unionization from employer coercion.<sup>211</sup> Congress did not need to ban company unions in order to prevent employers from coercing employees into forming or joining them or to prevent employers from using these organizations as vehicles for interfering with employees' right to form, join, or assist labor organizations of their own choosing. Thus, protecting employees from such coercion did not require the extensive restrictions on speech that flow from the Board's historical application of Section 8(a)(2).

b. Structural Coercion

The "simple coercion" rationale for Section 8(a)(2) is inadequate because Congress could have protected employees from this type of coercion without prohibiting company unions. Mark Barenberg suggests, however, that elements of coercion may have inhered in the very structure of the company union. Specifically, Barenberg argues that the Wagner Act Congress might plausibly have viewed the "heightened status" and the "expanded opportunities for winning employer favor or for skimming patronage"<sup>212</sup> that service as an employee representative conferred on an employee at the company-unionized workplace as a coercive bribe to the employee to oppose trade union organizational efforts, as the employee's enjoyment of these benefits would continue only so long as these organizational efforts were unsuccessful.<sup>213</sup> Arguably, these incentives to oppose trade unionism could not have been eliminated without eliminating the underlying structure that gave rise to them.<sup>214</sup>

Before considering its underlying merits, some limitations of this rationale for Section 8(a)(2) should be noted. For one, these incentives would exist only where the employer-sponsored labor organization is organized in a way that gives the employee participants "heightened status or expanded opportunities for winning employer favor or for skimming patronage." This seemingly would exclude those labor organizations whose participants include a substantial fraction of the workforce, such as an organization that consists of a workforce organized along team lines that runs afoul of

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211. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Worker Cooperation*, 106 HARV. L. REV. 1379, 1444 (1993).

212. Barenberg, *supra* note 202, at 782.

213. See *id.* at 782–85.

214. See *id.* at 782–83.

Section 8(a)(2) because of an insufficient delegation of authority to team members.

Yet another limit to this rationale is that these incentives are felt only where there is a risk of organization by a trade union and there is an expectation on the part of the employee representative of the continued enjoyment of the benefits of his or her office if the organizational drive by the trade union is unsuccessful. Where no such expectation exists, either because the employer-sponsored labor organization is designed to operate only for a brief period of time or because the employee representatives are limited to single, short terms of office, these incentives disappear.

However, even if Section 8(a)(2) only prohibited employee involvement committees that were constructed along the lines of the prominent pre-Wagner Act company unions—in which committee members enjoy a certain level of status by virtue of their positions on the committee and the prospect of continued tenures of office following failed trade union organizing drives—this rationale for Section 8(a)(2) would seem open to a number of objections. The first concerns the notion that such incentives are coercive. Employees are not coerced merely because their decision to support or not support a trade union is influenced by conditions or expectations created by their employer. Although an employer may coerce employees by granting a wage or benefit increase during an organizing campaign for the purpose of influencing the outcome of that campaign,

[t]he Board has long held that the granting of benefits during an election campaign is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election. And the Board has further held that an employer can meet this burden by showing that the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the Union.<sup>215</sup>

Similarly, although an employer coerces employees if the employer makes “threats of economic reprisal to be taken solely on his own

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215. Am. Sunroof Corp., 248 N.L.R.B. 748, 748 (1980), *enforced as modified*, 667 F.2d 20 (6th Cir. 1981).

volition,”<sup>216</sup> the Supreme Court has found that it is not unlawful for an employer to communicate “what he reasonably believes will be the likely economic consequences of unionization that are outside his control,”<sup>217</sup> even though the making of such a prediction may deter employees from choosing trade union representation as effectively as the making of an unlawful threat.

What distinguishes the coercive grant of benefit from the noncoercive grant of benefit and the unlawful threat from the lawful prediction is the element of retaliatory animus. As the Supreme Court has explained, the reason why a grant of a benefit that is calculated to influence the outcome of a union representation election is coercive is “the suggestion of a fist inside the velvet glove.”<sup>218</sup> That is, employees will comprehend that an employer that grants benefits to deter trade union organization also may withdraw them if the outcome of the trade union organizing campaign is not as the employer desires.<sup>219</sup> By contrast, no retaliatory message is implied when an employer grants a wage or benefit increase that would have been awarded in the absence of organizing activity.

Nor is there any intimation of employer retaliation when employee representatives lose their emoluments of office at the successful conclusion of a trade union’s organizing drive. That is merely a function of the mechanics of federal labor law, which gives exclusive jurisdiction to the employees’ lawful bargaining representative, and conforms to the undoubted preferences of the trade union. Absent the intimation of possible employer retaliation, the incentives that a company union’s employee representatives have to campaign and vote against a trade union would seem to be no different in kind than the incentives that stewards or other local representatives of an incumbent trade union—persons who are usually employed by an employer with whom the trade union has a collective bargaining relationship<sup>220</sup>—have to campaign and vote for a trade union when the majority support of that trade union is challenged by a decertification petition. If, then, the latter incentives are not coercive, why are the comparable incentives coercive when experienced by representatives of a company union?

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216. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2nd Cir. 1967)).

217. *Id.* (quoting *River Togs, Inc.*, 382 F.2d at 202).

218. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

219. *Id.*

220. *See Lopatka, supra* note 4, at 64.

Second, even assuming that employee representatives in a company union are coerced by the threatened loss of their emoluments of office, there are ways an employer can incentivize an employee subgroup into opposing trade unionism without creating a company union. For instance, an employer might use the resources it would otherwise have expended on a company union on a variety of so-called “[variable pay plans] such as profit sharing, employee stock ownership plans, knowledge pay, merit pay, etc.,”<sup>221</sup> likely to be viewed by their beneficiaries as being put in jeopardy by the organization of their plant by a national or international trade union, a type of collective bargaining agent that is popularly associated with an adversarial approach to collective bargaining and that is generally averse to compensation schemes that allow for variations in individual employees’ pay based on management’s assessments of their performance or that link employees’ compensation to firm profitability.<sup>222</sup> The Supreme Court has emphasized that the government cannot establish that a restriction on speech directly advances a substantial governmental interest on the basis of “speculation or conjecture.”<sup>223</sup> Yet, given the availability to the employer of these alternatives, it would seem to require nothing short of that to conclude that prohibiting company unions advances the government’s interest in reducing employer-created incentives for employees to oppose trade union organization to a “material degree.”

Finally, the cost to employee free choice of prohibiting employer-sponsored labor organizations seemingly has to be factored in to an assessment as to whether Section 8(a)(2)’s burden on speech is justified by the government’s interest in eliminating structural coercion. The government’s interest in protecting employees from coercion ultimately rests on its interest in protecting employees’ freedom of choice concerning workplace governance.<sup>224</sup> But this freedom of choice can be limited not only by employer coercion, but

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221. Anil Verma, *What Do Unions Do to the Workplace? Union Effects on Management and HRM Policies*, in *WHAT DO UNIONS DO?: A TWENTY-YEAR PERSPECTIVE* 275, 288 (James T. Bennett & Bruce E. Kaufman eds., 2007).

222. Ignace NG & Dennis Maki, *Trade Union Influence on Human Resource Management Practices*, 33 *INDUS. REL.: J. ECON. & SOCIETY* 121, 131–32 (1994); Verma, *supra* note 221, at 288–89.

223. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *accord Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999).

224. *See Garment Workers v. NLRB*, 366 U.S. 731, 738–39 (1961) (noting that the purpose of the Wagner Act’s and Taft-Hartley Act’s prohibitions against coercion was “to assure freedom of choice and majority rule in employee selection of representatives”).

also by government edict.<sup>225</sup> Given that the ostensibly coercive influences eliminated by prohibiting employer-sponsored labor organizations under this rationale bear on only a subgroup of employees, i.e., the employee representatives, and, even then, merely deter this subgroup from choosing to be represented by a trade union and do not foreclose the possibility altogether, while the Board's Section 8(a)(2) restrictions deprive all employees of the freedom to choose what is arguably the most popular form of workplace governance,<sup>226</sup> it seems unlikely that a salutary effect of these restrictions is a net expansion of employees' freedom of choice regarding workplace governance.

### 3. *The Structural and Performative Dissemblance Rationale*

#### a. The Company Union as an Instrument of Deception

In an early resolution condemning company unions the leadership of the American Federation of Labor alleged that company unions were “a delusion and a snare set up by the companies for the express purpose of deluding workers into the belief that they have some protection and thus have no need for trade union organization.”<sup>227</sup> This charge was restated in various ways during the

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225. See Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD; ESSAYS IN HONOR OF ERNEST NAGEL 440, 440 (Sidney Morgenbesser et al. eds., 1969) (offering the examples of being legally prohibited from doing something and being physically constrained from doing it as ways one can be unfree to do something and yet not be coerced into not doing it).

226. A 1994 national telephone survey of more than 2,400 American workers (“Wave 1” of the “Worker Representation and Participation Survey”) that was devised and directed by Professors Richard Freeman and Joel Rogers, RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 2–4, 17, 31, 157 (1999), and that figured prominently in the final report of the U.S. Commission on the Future of Worker-Management Relations, available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/2/](http://digitalcommons.ilr.cornell.edu/key_workplace/2/) (follow “The Dunlop Commission on the Future of Worker-Management Relations - Final Report” hyperlink), revealed that a majority of non-managerial employees “feel more comfortable raising workplace problems . . . [t]hrough an employee association” rather than “[a]s an individual.” FREEMAN & ROGERS, *supra* at 55, Exh. 3.7, 169. At the same time, non-managerial employees surveyed indicated by a 85%–10% margin that they preferred an organization “run jointly by employees and management” to one “run by employees alone” and by a 52%–34% margin that they preferred an organization “draw[ing] on company budget and staff” to one “rely[ing] on [its] own budget and staff.” *Id.* at 142, Exh. 7.1. Non-managerial employees surveyed who were not members of a union also indicated by a 55%–32% margin that they would vote against a union if an election were held at their company or organization. *Id.* at 69, Exh. 4.1.

227. Resolution No. 201, adopted by the convention as modified per the recommendation of the Committee on Organization, in REPORT OF PROCEEDINGS OF

congressional hearings and debates on the Wagner bills. In his testimony before the Senate Committee on Education and Labor, United Mine Workers President John L. Lewis alleged that company unions were “mere makeshifts and hollow mockeries deceptive in themselves and intended to divert the energies of the workers from their own self-protection to the protection of the corporation which employs them.”<sup>228</sup> For his part, Senator Wagner frequently alluded to company unions as “sham,” “dummy,” or “spurious unions.”<sup>229</sup> He also suggested that the reason company unions had “sprouted most prolifically” after the enactment of the National Industrial Recovery Act in 1933<sup>230</sup> was because employers wished to resist the trade union organizational efforts encouraged by that act.<sup>231</sup>

Unless it is to be supposed that Senator Wagner believed that employers created these entities to no purpose, the inescapable implication of his views was that employees were, in fact, sometimes deceived by these entities’ outward appearances. This notion, implicit in Senator Wagner’s remarks, was made explicit by a number of witnesses in the hearings conducted on the Wagner bills by the Senate Committee on Education and Labor. Lloyd Garrison, the pre-Wagner Act Board’s first chairman, contended that employees were “rather lulled to sleep by the false activity of the company union, which ha[d] an appearance of representing them and of acting for them, but which [wa]s in fact quite incompetent and quite powerless to do anything for them.”<sup>232</sup> One witness likened the effect that company unions sometimes had on workers to that of a puppet show on its audience:

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THE 39TH ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 303 (1919).

228. *Hearings on S. 2926, supra* note 38, at 143 (statement of John L. Lewis, President, United Mine Workers), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 173; *see also id.* at 456 (statement of Louis B. Ward, business counsel) (contending that company unions are “delusions and snares”—mere “camouflage[d]” shells of genuine unions), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 490.

229. *E.g., Labor Disputes Act: Hearings on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. 14 (1935) (statement of Sen. Wagner), *reprinted in* 2 NLRA LEG. HIST., *supra* note 3, at 2488; 79 CONG. REC. 2372 (1935) (statement of Sen. Wagner), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 1313.

230. Pub. L. No. 73-90, 48 Stat. 195 (1933).

231. *See, e.g., Hearings on S. 1958, supra* note 96, at 40 (statement of Sen. Wagner), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 1416.

232. *Id.* at 131 (statement of Lloyd K. Garrison, Dean, Univ. of Wis. Law Sch.), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 1511.

Now, these company unions are sometimes hard to recognize. They are cleverly disguised. They are like the puppet shows one sees in Italy, which so delight the children by their illusion. They go through all the motions, they swat one another over the head; but it is all done by an unseen person behind the screens who pulls the strings. It fools even some adults.<sup>233</sup>

As a consequence, according to this theory, employees remain contented with company unions and unreceptive to organizing efforts by trade unions even though trade union representation is in their best interest.

Among the ways that company-unionized employers have been alleged to have achieved this effect include draping company unions with the trappings of industrial democracy, thereby giving employees “the semblance,” but not “the substance, of collective activity”;<sup>234</sup> endowing company unions with elaborate, albeit ultimately ineffective grievance machineries;<sup>235</sup> creating a false appearance of activity by the company union by keeping its deliberations focused on matters of minor importance rather than the more substantive issues of wages and hours;<sup>236</sup> funneling predetermined wage and benefit increases through the company union apparatus, thus generating the false impression that these increases were obtained because of the company union;<sup>237</sup> eliminating the need for dues by covering the expenses of the company union, leading employees to believe they were getting the benefits of the company union for nothing “even though the not inconsiderable costs of running the company union in fact came out of labor and management’s joint surplus”;<sup>238</sup> and giving the company union an appearance of independence, while “subtly

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233. *Hearings on S. 2926, supra* note 38, at 133 (statement of Charlton Ogburn, general counsel, Amalgamated Ass’n of St. & Elec. Rys. Emps.), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 163.

234. *H. E. Fletcher Co.*, 5 N.L.R.B. 729, 736 (1938), *enforced*, 108 F.2d 459 (1st Cir. 1939).

235. *See Int’l Harvester Co.*, 2 N.L.R.B. 310, 348–49 (1936).

236. *See Hearings on S. 1958, supra* note 96, at 131 (statement of Lloyd K. Garrison, Dean, Univ. of Wis. Law Sch.), *reprinted in* 1 NLRA LEG. HIST., *supra* note 3, at 1511; Resolution No. 201, *supra* note 227.

237. *See Int’l Harvester Co.*, 2 N.L.R.B. at 331–33; *Hearings on H.R. 6288, supra* note 229, at 237 (statement of Edward Kephart, President, Buckeye Lodge, Amalgamated Ass’n of Iron, Steel, and Tin Workers, McDonald, Ohio), *reprinted in* 2 NLRA LEG. HIST., *supra* note 3, at 2711.

238. *Barenberg, supra* note 202, at 805.

orchestrat[ing] outcomes.”<sup>239</sup> These practices would have been difficult to eradicate without eliminating company unions altogether.

Explained in this fashion, Section 8(a)(2) is unabashedly paternalistic. This is problematic for Section 8(a)(2), for, as discussed below, paternalistic regulations of speech have generally not fared well under the First Amendment. However, like the structural coercion rationale for Section 8(a)(2), this rationale at least has the merit of explaining why the Wagner Act Congress might have left employees free to choose the nonunion, but not the company-union, form of workplace governance.

b. Permissible and Impermissible Paternalism Under the First Amendment

The Supreme Court has explicitly disapproved of paternalistic restrictions on fully protected speech, a paternalistic restriction on speech being defined here as a restriction on otherwise protected speech that the government justifies on the basis of one or more of the following reasons: (1) that engaging in that speech may not be in the best interest of the speaker; (2) that receiving the message directly or indirectly conveyed by that speech may not be in the best interests of those receiving it; or (3) that the transmission or receipt of the message conveyed by that speech by one or more members of an organization, association or group may not be in the best interest of the organization, association or group as a whole.<sup>240</sup> For example, in *First National Bank of Boston v. Bellotti*,<sup>241</sup> the Court invalidated a Massachusetts statute that prohibited business corporations from making contributions or expenditures to influence the outcome of voter referenda, other than those referenda affecting their property, business or assets. The Court found that Massachusetts’ asserted interest in preventing corporations from having an undue influence on such referenda was not a legitimate basis for restricting these contributions and expenditures. The Court explained:

[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative

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239. *Id.*; see also *J. Greenebaum Tanning Co.*, 11 N.L.R.B. 300, 311–13 (1939), *enforced as modified*, 110 F.2d 984 (7th Cir. 1940).

240. Compare Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 582–83 (2004) (defining a paternalistic restriction on speech as “a restriction on otherwise protected speech justified by the government’s belief that speaking or receiving the information in the speech is not in citizens’ own best interests”).

241. 435 U.S. 765 (1978).

merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.<sup>242</sup>

The Court further declared: “Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves. The First Amendment rejects the ‘highly paternalistic’ approach of statutes like [the Massachusetts one] which restrict what the people may hear.”<sup>243</sup>

In *Eu v. San Francisco County Democratic Central Committee*<sup>244</sup> and in *Riley v. National Federation of the Blind of North Carolina, Inc.*,<sup>245</sup> the Supreme Court invalidated state laws that had as one of their purposes the protection of speakers from harm. In *San Francisco County Democratic Central Committee*, the Court struck down a California election code law that, *inter alia*, “prohibit[ed] the official governing bodies of political parties from endorsing candidates in party primaries.”<sup>246</sup> One of the grounds on which California endeavored to justify its endorsement ban was that it advanced the State’s interest in “party stability” and, hence, its interest in “stable government” by removing a source of intra-party friction.<sup>247</sup> However, the Court rejected this argument, finding that “even if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party.”<sup>248</sup>

Likewise, in *National Federation of the Blind*, the Supreme Court found that North Carolina’s limitations on professional fundraiser fees were not justified by the State’s interest in protecting charities from unfair fees. The Court pointedly asserted, “The First Amendment mandates that we presume that speakers, not the

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242. *Id.* at 791–92 (footnotes omitted).

243. *Id.* at 791 n.31 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

244. 489 U.S. 214 (1989).

245. 487 U.S. 781 (1988).

246. 489 U.S. at 216.

247. *Id.* at 225–27.

248. *Id.* at 227–28.

government, know best both what they want to say and how to say it.”<sup>249</sup>

The Supreme Court has been no less explicit in its condemnation of paternalistic restrictions on commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>250</sup> the Court struck down a Virginia law that prohibited pharmacists from advertising prescription drug prices. The Court explained the rationale for the ban as follows:

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the “professional” pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.<sup>251</sup>

The Court rejected these justifications as incompatible with First Amendment principles. The Court observed that the alternative required by the First Amendment to the “highly paternalistic approach” of banning advertising by low-cost pharmacists was to allow the low-cost pharmacist to advertise her low prices and the “‘professional’ pharmacist [to] market[] his own assertedly superior product,” and to assume “that people will perceive their own best interests if only they are well enough informed.”<sup>252</sup>

Likewise, in *Linmark Associates, Inc. v. Township of Willingboro*,<sup>253</sup> the Supreme Court found that a “far more basic” constitutional defect with Willingboro’s ban on home “For Sale” signs than the fact that it had not been shown to directly advance the

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249. 487 U.S. at 790–91.

250. 425 U.S. 748 (1976).

251. *Id.* at 769–70.

252. *Id.* at 770.

253. 431 U.S. 85 (1977).

township's interest in deterring panic selling was the fact that it was designed by the Township Council "to restrict the free flow of [information regarding home sales activity] because it fear[ed] that otherwise homeowners w[ould] make decisions inimical to what the Council view[ed] as the homeowners' self-interest and the corporate interest of the township: they w[ould] choose to leave town."<sup>254</sup> The Court found that in attempting to protect its residents in this way Willingboro was guilty of the same "highly paternalistic approach" that it had decried in *Virginia State Board of Pharmacy*.<sup>255</sup>

Similarly, in *Bates v. State Bar of Arizona*,<sup>256</sup> the Supreme Court found that the suspension of two attorneys, who transgressed an Arizona State Supreme Court disciplinary rule by placing a newspaper advertisement offering "legal services at very reasonable fees" and listing their fees for certain routine services, violated the First Amendment. One of the arguments that the Arizona Bar raised on behalf of the rule's restrictions on attorney advertising was that the "advertising of legal services [is] inevitably . . . misleading . . . because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill."<sup>257</sup> However, the Court suspected that this argument rested on an underestimation of the public's ability to appreciate advertising's limitations.<sup>258</sup> "In any event," the Court observed, "we view as dubious any justification that is based on the benefits of public ignorance."<sup>259</sup>

Yet, despite the Supreme Court's condemnations of the paternalistic regulation of speech, the Court has not disapproved of all instances of governmental paternalism in this area. For instance, the Court has found that the government may prohibit false or misleading commercial advertising claims even though such prohibitions ordinarily are intended to protect consumers from the ill-influence these commercial messages have on them.<sup>260</sup> And, along these lines, the Court opined in *Bates* that "because the public lacks sophistication concerning legal services, misstatements that might be

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254. *Id.* at 96.

255. *Id.* at 97 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 770).

256. 433 U.S. 350 (1977).

257. *Id.* at 372.

258. *Id.* at 374-75.

259. *Id.* at 375.

260. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.”<sup>261</sup>

The Supreme Court also occasionally has sanctioned paternalistic rationales for restricting truthful commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court indicated that the State of New York could impose an advertising ban in order to discourage energy consumption, but found that the advertising ban at issue in that case impermissibly extended to advertising that might not increase consumption;<sup>262</sup> in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court found that a Puerto Rico ban on the advertising of casino gambling directed at Puerto Rico residents was justified by Puerto Rico’s interest in discouraging casino gambling by its residents;<sup>263</sup> in *United States v. Edge Broadcasting Co.*, the Court found that an FCC ban on the advertising of lottery tickets by broadcasters licensed to a state that did not allow lotteries was justified by the government’s interest in supporting a state’s anti-gambling policy;<sup>264</sup> and, in *Rubin v. Coors Brewing Co.*, the Court implicitly accepted the government’s right to prohibit the disclosure of alcohol content on beer labels in order to curb “strength wars” by beer brewers, who might seek to compete for customers on the basis of alcohol content, but found that the government’s regulatory scheme was too irrational to advance its asserted interest.<sup>265</sup>

Even political speech would not seem entirely immune to paternalistic regulation under the First Amendment. The Supreme

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261. *Bates*, 433 U.S. at 383.

262. *See* 447 U.S. 557, 568–70 (1980).

263. *See* 478 U.S. 328, 340–44 (1986). In *Posadas*, the Supreme Court found that it was “up to the legislature to decide whether or not [an anti-gambling educational campaign] would be as effective in reducing the demand for casino gambling as a restriction on advertising.” *Posadas*, 478 U.S. at 344. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), a plurality of the Court took issue with this “highly deferential approach” to a state legislature’s decision “to suppress truthful, nonmisleading information for paternalistic purposes,” finding it to be incompatible with the Court’s other prior cases on the subject. *Id.* at 510 (plurality opinion). However, unlike Justice Thomas, *see id.* at 518 (Thomas, J., concurring), the plurality in *44 Liquormart, Inc.* did not suggest that a paternalistic restriction of the sort at issue in *Posadas* was inherently illegitimate under the First Amendment, but only that the *Posadas* majority erred in not requiring the government to show that its advertising restriction reduced consumers’ demand for casino gambling “to a material degree,” *id.* at 505 (plurality opinion) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)), and was “no more extensive than necessary.” *Id.* at 507.

264. *See* 509 U.S. 418, 426–30 (1993).

265. *See* 514 U.S. 476, 485–90 (1994).

Court has indicated that “inciting . . . imminent lawless action” is not protected by the First Amendment even though the incitement may be accomplished through means of political speech.<sup>266</sup> Arguably, restrictions on such speech are not paternalistic because they can be justified solely by reference to the interests of innocent third parties. But it seems unlikely that the Supreme Court would find that the First Amendment requires the government to ignore the potential harm that inciting imminent lawless action might cause to those incited to engage in it.

All of which leads to the following question: Why are paternalistic restrictions on speech generally, but not always, invalid?<sup>267</sup> And why are paternalistic restrictions on speech more frequently tolerated when commercial speech is involved than when political speech is? Is it because a paternalistic restriction on speech more easily withstands intermediate than strict scrutiny under the First Amendment? The Supreme Court’s oft-invoked marketplace of ideas metaphor points to a different explanation.

In *Konigsberg v. State Bar of California*,<sup>268</sup> Justice Harlan, writing for the Court in a 5-4 decision, noted that the notion that the First Amendment grants “an unlimited license to talk” could not “be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like.”<sup>269</sup> In his view, the many exceptions to such a license supported the notion that in divining whether speech is protected under the First Amendment a court is obliged to engage in “an appropriate weighing of the respective interests involved” in permitting that speech and in suppressing it.<sup>270</sup>

A problem that has been noted with this “balancing” approach, however, is that it is difficult to square with the facial command of the First Amendment, which provides that “Congress shall pass no

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266. *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969).

267. In *44 Liquormart, Inc.*, 517 U.S. at 520-521 (Thomas, J., concurring), Justice Thomas noted that the Supreme Court had not as of then explained how its seeming acceptance in *Central Hudson*, *Posadas*, and other cases of “the legitimacy of laws that suppress information in order to manipulate the choices of consumers” comports with the many cases following *Va. State Board of Pharmacy* in which the Supreme Court “stress[ed] . . . the antipaternalistic premises of the First Amendment.” The Court has not offered an explanation since.

268. 366 U.S. 36 (1961).

269. *Id.* at 49 n.10, 50.

270. *Id.* at 51.

law . . . abridging the freedom of speech.”<sup>271</sup> For how is it permissible for a court to balance free speech rights against other governmental interests when the text of the First Amendment indicates that the rights enumerated therein take precedence over any conflicting governmental priorities?

An alternative way that has been suggested by which one might attempt to account for the many exceptions to an unlimited license to talk, while giving force to the First Amendment’s absolutist language, is by supposing that “the freedom of speech” protected by the First Amendment encompasses something other than the freedom to engage in any and all expression free from governmental interference and then supposing that the First Amendment gives “absolute” protection to whatever this *other* might be.<sup>272</sup> Possible candidates that have been proposed include the freedom to engage in a particular kind of process,<sup>273</sup> with the freedom to engage in a “marketplace of ideas” being the best-known example of this kind of conception of the First Amendment.

The marketplace of ideas refers to a process by which competing ideas gain public acceptance. In his famous dissent in *Abrams v. United States*,<sup>274</sup> Justice Holmes likened the deliberative process contemplated by the First Amendment to an economic free market in which sellers of ideas compete with each other for the intellectual allegiance of the public, it being the premise of the First Amendment “that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the public’s] wishes safely can be carried out.”<sup>275</sup>

This notion, that the First Amendment leaves the task of identifying the truth to the marketplace of ideas rather than the

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271. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 17 (1948) (“The phrase, ‘Congress shall make no law . . . abridging the freedom of speech,’ is unqualified. It admits of no exceptions.”); Laurent B. Frantz, *The First Amendment in the Balance*, 71 *YALE L. J.* 1424, 1447–1448 (1962).

272. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245, 247–48 (1961).

273. See Frantz, *supra* note 271, at 1449 n.105 (defining “the freedom of speech” protected by the First Amendment “as the exclusion of governmental force from the process by which public opinion is formed on public issues”); Meiklejohn, *supra* note 272, at 255 (“The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’”).

274. 250 U.S. 616 (1919).

275. *Id.* at 630 (Holmes, J., dissenting).

public authority, has become a bedrock part of our First Amendment jurisprudence.<sup>276</sup> Indeed, the Supreme Court has gone so far as to state that “[i]t is *the purpose of the First Amendment* to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>277</sup>

Implicit in the view “that the best test of truth is the power of the thought to get itself accepted in the competition of the market” is the belief “that the people are not foolish but intelligent, and will separate the wheat from the chaff.”<sup>278</sup> It is for this reason that they can be counted on to “perceive their own best interests if only they are well enough informed.”<sup>279</sup> And it is for this reason as well that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>280</sup>

That the people are intelligent, that is, composed of individuals who are, by and large, both “rational and skeptical” and “capable, when left to their own devices, of sorting through masses of information to discover truth,”<sup>281</sup> is an assumption that the

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276. See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 825 (2008) (noting that Justice Holmes’ marketplace of ideas metaphor has “dominat[ed] the explanation and the justification for free speech in the United States”); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (“In Speech Clause jurisprudence . . . the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”); Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 HASTINGS CONST. L.Q. 131, 146 (2010) (“[T]he marketplace metaphor with its neoconservative economic connotations is now dominant in the Court’s First Amendment decisions.”). For partial lists of cases in which the Supreme Court has invoked the marketplace of ideas metaphor for the First Amendment, see Blocher, *supra* at 825 n.7; Menthe, *supra* at 144 n.62.

277. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added); *accord FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972).

278. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia J., dissenting), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

279. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

280. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandies, J., concurring)); *accord Texas v. Johnson*, 491 U.S. 397, 419 (1989); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

281. Lyrissa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 804 (2010).

marketplace of ideas model of the First Amendment shares with democratic theory. As one commentator has put it:

The liberal democratic ideal reflected in the U.S. Constitution imagines a rational citizenry, and the First Amendment is part of the machinery to create that citizenry. If citizens are incapable of exercising their rational faculties to participate in public discourse, then they are equally incapable of rational self-governance. To reject the possibility of a rational citizenry, therefore, is to reject the democratic ideal.<sup>282</sup>

From the perspective of our constitutional scheme, then, paternalistic restrictions on speech are most objectionable when they presuppose an incapacity on the part of the people to make the kinds of judgments necessary for democratic self-governance.

If there is any theater of speech for which the marketplace of ideas is an appropriate metaphor it would appear to be the arena of electoral politics. The self-interest of office seekers and the persons, factions and interests they represent; the controversial character of the issues around which electoral politics revolve; and the consequential nature of the outcomes of elections ensure that, absent the intervention of government, the voting public will be exposed to a wide range of conflicting views. It is the function of the citizenry under our democratic form of government to weigh the merits of these views. And it is considered a civic obligation of all citizens to educate themselves on the issues of the day so that they can make informed choices at the ballot box.

The majoritarian nature of our democratic processes of government provides the public with a further layer of protection from false or misleading speech by rendering harmless the gullibility or ignorance of the few. Thus, our constitutional scheme does not presuppose that people are universally wise or incapable of acting from impulse, but merely that over time the people are the best judge as to their best interests.

But not every paternalistic regulation of speech interferes with the citizenry's assumption of its constitutionally assigned role to sit in judgment of the truth of competing ideas. Some speech does not lend itself to timely rebuttal, and some speech may cause harm to its

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282. *Id.* at 839.

hearers for reasons unrelated to any supposed inability on their part to make reasoned judgments. The paternalistic regulations of speech for which the Supreme Court has indicated approval regulated speech of these sorts.

### **i. Restrictions on False or Misleading Commercial Speech**

In *Gertz v. Robert Welch, Inc.*,<sup>283</sup> the Supreme Court set forth a dichotomous analytical framework for evaluating common law restrictions on defamation that is equally applicable to the evaluation of statutory restrictions on false or misleading speech. According to the Court:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction . . . on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.<sup>284</sup>

However, the Court emphasized that false statements of fact were not wholly outside the protections of the First Amendment. As the Court explained, "the erroneous statement of fact is . . . inevitable in free debate" and lest the threat of "punishment of error . . . induc[e] a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press," it is necessary that "some falsehood" be protected by the First Amendment "in order to protect speech that matters."<sup>285</sup>

Even so, the Supreme Court has declined to extend First Amendment protection to false or misleading commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>286</sup> the Court offered two reasons for this:

First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are

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283. 418 U.S. 323 (1974).

284. *Id.* at 339–40 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (footnote omitted)).

285. *Id.* at 340–41.

286. 447 U.S. 557 (1980).

well situated to evaluate the accuracy of their messages . . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not “particularly susceptible to being crushed by overbroad regulation.”<sup>287</sup>

Under the *Gertz* framework, therefore, speech can never be suppressed because it conveys a false idea. A false statement of fact may be suppressed if the government’s interest in averting the harm it causes outweighs whatever contribution that permitting it makes to “advanc[ing] society’s interest in ‘uninhibited, robust, and wide-open debate on public issues,’” with the balance of interests weighing on the side of suppression when false or misleading commercial speech is involved.

But the inferior status of false or misleading commercial speech under the Constitution also can be explained by reference to the marketplace of ideas metaphor. Unlike a factual claim regarding “truth, science, morality and arts in general” or the “administration of government,”<sup>288</sup> for which there exists a widely accepted common body of knowledge against which such a claim can be compared, a claim that a product is sold at a particular price or performs a particular function generally concerns a matter that is within the “specific and unique knowledge” of the commercial speaker.<sup>289</sup> One consequence of this is that other speakers will be less able to challenge such a claim. Another consequence is that the individual consumer will be less able to draw upon his or her own experiences and knowledge to evaluate its truthfulness. It involves no denigration of the intellectual abilities of consumers to acknowledge that they will not always be in a position to know or to test out the truthfulness of all the various advertising claims that they may encounter.

Moreover, even where a commercial speaker’s competitors have knowledge of the falsity of a commercial advertising claim, there often will not be time to rebut the claim before harm is done. And the majoritarian protections that are built into our democratic

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287. *Id.* at 564 n.6 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)).

288. *Roth v. United States*, 354 U.S. 476, 484 (1957) (quoting letter from the Continental Congress to the inhabitants of Quebec (1774), reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774)) (internal quotation marks omitted). The Supreme Court has found such speech to be worthy of the First Amendment’s highest protections. See *Va. State Bd. of Pharmacy v. Va. Citizens Council, Inc.*, 425 U.S. 748, 762 (1976); *Roth*, 354 U.S. at 484.

289. *Va. State Bd. of Pharmacy*, 425 U.S. at 779 (Stewart, J., concurring).

processes are largely inapplicable in the commercial sphere, as the harm that the government has an interest in averting occurs if any single consumer relies on false or misleading commercial speech to his or her detriment. Thus, even though restricting false or misleading commercial speech is “paternalistic” in the broadest sense of the term, it does not presume a deficiency in knowledge or judgment on the part of the people that is inconsistent with the presumptions of our democratic form of government.

### ii. Restrictions on Truthful Commercial Speech

The paternalistic restrictions on truthful commercial speech that the Supreme Court indicated were permissible or would have been permissible but for the fact they were overbroad or failed to materially advance the interest asserted by the government were likewise not predicated on assumptions regarding the people at odds with the assumptions underlying the marketplace of ideas metaphor. There are only a few cases—and energy use, alcohol consumption, and gambling are among them—where the government might be thought to have a substantial interest in suppressing lawful economic activity. Because the evil that the government seeks to avert in these cases by restricting advertising is an increase in the public’s participation in the activity advertised, a marketplace of ideas represents a satisfactory alternative means for averting the evil only if it includes among its offerings speech aimed at discouraging the public’s participation in that activity. But such speech is unlikely to arise from the private commercial marketplace. The usual persons to provide corrective speech for commercial advertising—the economic competitors of the company whose product or service is being advertised—have little interest in “offer[ing] admonitory comments on the safety or health characteristics or other risks or functional costs of their competitor’s offerings—with which their own products, or offered services, often share so many characteristics.”<sup>290</sup> And

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290. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1167 (2012). Brudney argues that this is a reason for withholding First Amendment protection from commercial speech in most instances. *See id.* at 1154, 1217–19, 1223. However, even if commercial speech was, for this reason, a wholly proscribable class of speech under the First Amendment, this would not necessarily authorize the government to make content-based distinctions within this class of speech—e.g., permitting pharmacists to advertise the advantages of taking prescription drugs, but not the pharmacists’ prices for them—where it is reasonable to anticipate that the needed corrective information would be furnished by the commercial speaker’s competitors. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391–92 (1992) (ordinance that made content-based distinctions between different kinds of fighting words violated the First Amendment).

vendors in industries other than the one whose economic activity the government seeks to suppress ordinarily would have too weak an economic interest in discouraging consumers' participation in the disfavored activity to make the cost of engaging in such corrective speech worthwhile.

Moreover, the restrictions in *Central Hudson*, *Posadas*, *Edge Broadcasting* and *Coors Brewing Co.* were designed to suppress speech relating to the satisfaction of some want for which little intervening calculation on the part of the consumer was required. People tend not to increase their energy use, gamble, or drink higher proof beer because they are persuaded of the intellectual merits of doing so, but rather because such activities serve some immediate gratification. A person's proclivity to consume alcohol is not necessarily predictive of that person's views as to the merits (medical or otherwise) of consuming alcohol or views as to the societal interest in discouraging alcohol consumption. Thus, although these restrictions were designed to influence behavior, they did not do so through the medium of influencing public opinion and were not predicated on the assumption that the legislature had greater knowledge or powers of ratiocination than consumers.

This conclusion is buttressed by the fact that the legislative judgments underlying the restrictions were relatively uncontroversial. While there have been a number of public policy controversies concerning energy consumption, casino gambling, lotteries, and alcohol, there are not sizeable constituencies for the propositions that the public would be better off if there were an increased predilection on the part of consumers to consume energy (*Central Hudson*), engage in casino gambling (*Posadas*), participate in lotteries in those states that prohibit them (*Edge Broadcasting*), or drink higher proof beer (*Coors Brewing Co.*). Although, from one perspective, the degree of controversy surrounding a proposition is a highly unsatisfactory method of determining whether expression is protected by the First Amendment, as unpopular views are those most in need of constitutional protection, the relative absence of controversy on these issues supports the notion that in adopting these restrictions the legislature wasn't attempting to substitute its judgment for the reasoned judgments of consumers.

By contrast, there was considerable controversy in *Virginia State Board of Pharmacy* as to soundness of the principal underlying rationale for the advertising ban: that consumers would be better off avoiding low cost pharmaceutical services and products. Indicative of the controversial nature of this assumption was the fact that the

plaintiffs in the case included a consumer organization that had approximately 150,000 members and the Virginia State AFL-CIO.<sup>291</sup>

### iii. Section 8(a)(2)

The above considerations suggest that there is no simple bright line test to determine the validity of a paternalistic restriction on speech. However, if the degree to which a paternalistic restriction on speech interferes with the formation or operation of a marketplace of ideas is the decisive factor in determining whether such a restriction passes constitutional scrutiny, then the various paternalistic restrictions on speech that a legislature might enact can be placed on a continuum, bounded on one side by paternalistic restrictions on political advocacy, which are rarely permissible because they restrain speech in contexts in which the protections of the marketplace of ideas generally inhere, and on the other side by paternalistic restrictions on false or misleading commercial speech, which suppress speech in contexts in which all or most of the corrective features that inhere in the political marketplace are absent. As the restrictions on speech that the Board imposes pursuant to Section 8(a)(2) operate in a context that bears virtually all of the features that render political speech largely immune to paternalistic regulation, they would appear to fall on the far end of the impermissible side of this continuum. First, the divination of the truth or falsity of the message ostensibly conveyed by the communications suppressed by Section 8(a)(2)—that representation by an employer-sponsored labor organization is a satisfactory substitute for representation by a trade union—depends upon the divination of the truth or falsity of a series of psychological, economic, sociological and political inferences and assumptions. Whether or not this proposition is ultimately false, it is hardly reducible to a simple factual assertion whose falsity is subject to unambiguous ascertainment. Rather, if the message ostensibly conveyed by the communications suppressed by the Board's Section 8(a)(2) restrictions is objectionable, it is because it conveys a "false idea," for whose correction the First Amendment requires that "we depend . . . on the competition of other ideas."<sup>292</sup>

Second, the proposition that employees are better off represented by a trade union than by an employer-sponsored labor organization is a controversial one. The controversial nature of this

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291. *Va. State Bd. of Pharmacy*, 425 U.S. at 753 & n.10.

292. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

assertion among employees is illustrated by the Worker Representation and Participation Survey (“WRPS”), which, as noted above, revealed that large majorities of workers prefer joint employee-management committees to unions, prefer an organization “run jointly” by employees and management to one “run by employees alone,” and prefer “an organization drawing on company budget and staff” to one “rely[ing] on [its] own budget and staff” for dealing with their employer regarding workplace problems.<sup>293</sup> It also is indicated by the fact that, during the 30-year period from the Board’s fiscal year 1969 through the Board’s fiscal year 1998, trade unions lost a majority of the representation elections conducted by the Board,<sup>294</sup> even though the principal alternative that employees had for dealing with their employer regarding terms and conditions of employment during this time was to do so on an individual basis, a mode of dealing with management that the WRPS indicates is less favored among employees than the employer-assisted employee organization.<sup>295</sup>

Third, whether the message that is ostensibly conveyed by the communications suppressed by the Board’s Section 8(a)(2) restrictions is truthful is not something within the unique knowledge of the parties conveying it. Generally speaking, employees represented by an employer-sponsored labor organization will know as well as anyone whether their interests are being adequately served. If our constitutional scheme presupposes that employees, like other citizens, are capable of making informed choices about who should represent them in Congress, it is difficult to see why it would not also presuppose that employees are capable of making informed choices about who should represent them in labor-management dealings regarding their terms and conditions of employment—“subjects that lie at the core of an employee’s day-to-day concerns.”<sup>296</sup>

Fourth, information that might disabuse employees of any misapprehension they may have regarding the need for trade union representation as a result of an employer’s dealings with an employer-sponsored labor organization is typically available. Trade unions “have every incentive to apprise employees of the defects and disadvantages they perceive in employer-sponsored committees, for

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293. See *supra* note 226.

294. See 2 HISTORICAL STATISTICS OF THE UNITED STATES, PART B: WORK AND WELFARE 2–352 (Susan B. Carter et al. eds., 2006).

295. See *supra* note 226.

296. Lopatka, *supra* note 4, at 63–64.

they are in the business of convincing employees that there is no substitute for traditional unionism.”<sup>297</sup>

There also are no exigencies of time that prevent this corrective information from becoming available. The timing and duration of a trade union’s organizing campaign and the timing of the filing of a representation petition that sets the Board’s process for a Board-supervised representation election in motion are almost entirely controlled by the trade union. Thereafter, armed with employees’ home contact information, trade union organizers typically have an additional five to six weeks to communicate with employees regarding the advantages of being represented by a trade union.<sup>298</sup>

Finally, the Wagner Act, as amended, provides for majority rule in the selection of a bargaining representative.<sup>299</sup> Consequently, it provides the same majoritarian protections against the ignorance or gullibility of the few that our political processes provide in the realm of political speech.

Thus, the government’s interest in preventing employees from “erroneously” choosing employer-sponsored labor organizations over trade unions is not legitimate.<sup>300</sup> This kind of paternalism is at odds with the First Amendment’s underlying presumption that the people are intelligent and are capable of “perceiv[ing] their own best interests if only they are well enough informed.”<sup>301</sup>

In sum, none of the proffered rationales for Section 8(a)(2) justify the burden on speech that flows from the Board’s longstanding interpretation of it. If, then, this central provision of the Wagner Act is to be saved from First Amendment infirmity, the Board’s historical construction of it must be substantially revised.

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297. *Id.* at 64–65.

298. See Gen. Counsel Memorandum No. 11-03 from Lafe E. Solomon, Acting NLRB Gen. Counsel, to All Employees, Office of the Gen. Counsel, Summary of Operations (Fiscal Year 2010) 5 (Jan. 10, 2011), available at <http://www.nlr.gov/summary-operations> (follow “FY 2010 Summary” hyperlink) (noting that the median time to proceed to an election from the filing of a petition was 38 days in fiscal year 2010 and 37 days in fiscal year 2009).

299. See 29 U.S.C. § 159(a) (2006).

300. Consequently, it is not necessary to consider whether Section 8(a)(2), as applied by the Board, directly advances that interest or is narrowly drawn or whether, but for the defect of paternalism, the government’s interest in protecting employees from being misled by employer-sponsored labor organizations is substantial.

301. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

#### IV. The Coercion Standard

Because *Cabot Carbon Co.* placed much of the conduct proscribed by Section 8(a)(2) outside the protection of the First Amendment, neither the Board nor the courts have needed to articulate what a constitutionally sound construction of Section 8(a)(2) might look like in light of the Supreme Court's more recent First Amendment precedent. However, the Supreme Court's decision in *NLRB v. Gissel Packing Co.*<sup>302</sup> suggests what this might be. There, the Court identified the coerciveness of an employer's expression of "his general views about unionism or any of his specific views about a particular union"<sup>303</sup> as the yardstick for determining whether that commentary is protected by the First Amendment.<sup>304</sup> If protecting employees from employer coercion is a sufficient basis for restricting an employer's freedom to engage in such speech, then it would seem reasonable to assume that it is also a sufficient basis for restricting an employer's freedom to facilitate discussions with an employee group concerning terms and conditions of employment.

How Section 8(a)(2) might be applied under such a construction is open to debate. Lopatka contends that "[a]n employer-sponsored employee committee that deals with management concerning terms and conditions of employment only rarely will be coercive, if that term retains its traditional meaning as intimidating or impeding employees in exercising their free choice as to whether to be represented by an independent labor organization."<sup>305</sup> Even so, he concedes that a coercion finding might be justified if

an employer foists an employee participation program on employees in order to defeat a union organizing campaign; compels involuntary employee participation; . . . signs a collective bargaining agreement with an employer-sponsored committee and leads employees to believe that there is a contractual bar to a representation election or that they have contractually waived their right to strike; . . . uses threats or intimidation to compel their adherence to an employer-sponsored entity over competing

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302. 395 U.S. 575 (1969).

303. *Id.* at 618.

304. *See id.* at 617–18, 620.

305. Lopatka, *supra* note 4, at 87.

independent unions; . . . [or] takes control of or, without regard to the wishes of employees, interferes with the administration of an employee organization independently established by employees, even in the absence of overt threats or intimidation.<sup>306</sup>

This list would seem to cover the principal ways an employer might coerce employees in connection with an employee involvement program, provided it is understood that the ways that an employer might coerce employees into participating in such a program can be more subtle than the ways that an employer might coerce employees into voting against a trade union in a union representation election. In *Gissel Packing Co.*, the Supreme Court specified that any assessment of the effect that an employer's communications have on employees "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."<sup>307</sup> This concern would seem to be particularly acute in the case of an employer's appeal to employees to participate in an employee involvement program because of the overt nature of the conduct requested. Thus, in protecting employees' Section 7 right to refrain from joining a labor organization, the Board probably would be within the bounds prescribed by the First Amendment in imposing greater restrictions on the ways an employer might encourage employees to serve on an employee involvement committee that falls within the statutory definition of a labor organization than on the ways an employer might urge employees to vote against a trade union in a secret ballot election. Likewise, the Board probably would be warranted in requiring an employer, as a condition of forming such a committee, to issue some pro forma statement to employees that serving on the committee is voluntary and that the employer will not retaliate against an employee because he or she declines to do so and, subsequently, to require the employer to adhere to these avowals.

But it would go too far to say that an employee's participation in a nonunion employee involvement program is invariably coerced. And the First Amendment does not tolerate a "prophylactic" ban on commercial speech, let alone fully protected speech, where there

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306. *Id.* at 87–88 (punctuation altered).

307. *Gissel Packing Co.*, 395 U.S. at 617.

exists “the possibility of policing [such speech] on a case-by-case basis.”<sup>308</sup>

### V. Interpreting Section 8(a)(2) to Avoid Constitutional Difficulties

It is a well-recognized rule of statutory construction that statutes susceptible of more than one interpretation should be interpreted in a way that avoids serious constitutional questions.<sup>309</sup> In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*,<sup>310</sup> the Supreme Court explained:

[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress . . . . “[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”<sup>311</sup>

Congressional professions of interest in preventing employers from interfering with employees’ freedom of choice notwithstanding, there is ample evidence from the legislative history of the Wagner Act that Congress did not mean to leave room for employers to promote their own form of employee representation provided they refrained from threatening employees or engaging in other conduct that the Supreme Court has found to be coercive of employees. Were, then, the Wagner Act to represent Congress’ last word on the subject of employer-employee communications, it is doubtful that Section 8(a)(2) could reasonably be construed as prohibiting only coercive employer behavior.

However, the Wagner Act was followed twelve years later by the Taft-Hartley Act. This subsequent act “ushered in a period of marked change in the government’s attitude toward unionization.”<sup>312</sup> But more importantly for our purposes here, it manifested a change

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308. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985).

309. *See, e.g., NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961).

310. 485 U.S. 568 (1988).

311. *Id.* at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

312. ARCHIBALD COX, *DEREK CURTIS BOK & ROBERT R. GORMAN, CASES AND MATERIALS ON LABOR LAW* 86 (9th ed. 1981).

in congressional policy with regard to labor-management communication. This change was partly reflected in the amendment to Section 9(a) upon which the employers relied in *Cabot Carbon Co.* But it was primarily reflected in the adoption of a “free speech” provision in Section 8(c). Section 8(c) provides:

The expressing of any views, argument, or opinion, or any dissemination thereof, whether in written, printed, graphic, or visual form, 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.<sup>313</sup>

One need not strain the language of this Section to construe it as requiring the Board to find that an employer’s conduct has coerced employees before finding that conduct to be unlawful under Section 8(a)(2). First, by providing that “[t]he expressing of any views, argument, or opinion . . . shall not constitute . . . an unfair labor practice,”<sup>314</sup> Section 8(c) establishes an affirmative right to engage in the noncoercive expression of “views, argument, or opinion.” In doing so, it does not distinguish between the expression of views, argument, or opinion that occurs in a speech and the expression of views, argument, or opinion that occurs in a dialogue. And just as the Supreme Court has found that the right of free speech under the First Amendment implies a corresponding right to engage in conduct needed to effectuate it, e.g., the hiring of a hall or the expenditure of money for printing, paper, and circulation costs, so too the right of free speech under Section 8(c), which the Supreme Court has found “merely implements the First Amendment,”<sup>315</sup> implies a corresponding right to engage in conduct reasonably necessary to facilitate that right.

Moreover, by providing that “[t]he expressing of any views argument or opinion . . . shall not . . . be *evidence* of an unfair labor

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313. 29 U.S.C. § 158(c) (2006). The phrase “promise of benefit” here refers to promises that are unlawful under Section 8(a)(1). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). And a promise is unlawful under Section 8(a)(1) only if it is made for the purpose of “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in [Section 7 of the Wagner Act, as amended].” 29 U.S.C. § 158(a)(1) (2006).

314. 29 U.S.C. § 158(c) (2006).

315. *Gissel Packing Co.*, 395 U.S. at 617.

practice,”<sup>316</sup> Section 8(c) provides textual support for supposing that such ancillary conduct as is needed to effectuate the right to engage in noncoercive expression falls within its protections. If one assumes that evidentiary immunity to unfair labor practice liability under this section extends only to that expression that is willingly engaged in by the speakers—a reasonable assumption, as it is to protect a speaker’s right of free speech that this evidentiary immunity is granted—then Section 8(c) provides a statutory basis for the constitutionally permissible construction of the Wagner Act, as amended, proposed here.<sup>317</sup>

The biggest drawback to this interpretation of Section 8(c) is that it appears to effect a more significant change in the treatment of company unions than Congress contemplated when it passed the Taft-Hartley Act. In reaffirming the Board’s historical proscriptions of company unionism in *NLRB v. Cabot Carbon Co.*,<sup>318</sup> the Supreme Court pointed to the fact that the conference bill—the bill that emerged out of the House and Senate managers’ conference on the House and Senate bills and that was enacted into law after Congress overrode President Truman’s veto of it—omitted a provision in the House bill that would have permitted an employer to “[f]orm[] or maintain[] . . . a committee of employees and [to] discuss[] with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not

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316. 29 U.S.C. § 158(c) (2006) (emphasis added).

317. If an employer coerces employees in connection with a nonunion employee involvement committee that falls within the statutory definition of a labor organization, it is more likely because the employer has coerced the employees into serving on the committee than because of anything that the employer might say to them during committee meetings. To enable the Board to prohibit an employer from coercing employees into serving on such a committee in those cases where the employer’s communications with the committee do not contain a threat of reprisal or force or promise of benefit, it is necessary to limit evidentiary immunity under Section 8(c) to that exchange of views, argument, or opinion that is engaged in voluntarily by the participants. This involves no more a departure from the letter of Section 8(c) than some of the common sense exceptions that the Board already makes to Section 8(c)’s textual command. For example, the Board has not the slightest compunction about considering evidence that an *employee* expressed support for a union in determining whether his employer discharged him for engaging in protected activity. See, e.g., *Shearer’s Foods, Inc.*, 340 N.L.R.B. 1093, 1093 (2003); *La Gloria Oil and Gas Co.*, 337 N.L.R.B. 1120, 1120 (2002). Yet, read literally, Section 8(c) prohibits the Board from doing so unless the employee’s expression contained a threat of reprisal or force or promise of benefit. The rationale for departing from the letter of Section 8(c) in both cases is the same: in neither case does the Board’s use of such evidence chill the exercise of the right of free speech under the First Amendment.

318. 360 U.S. 203 (1959).

certified or the employer has not [lawfully] recognized a representative as their representative . . . .”<sup>319</sup> The Court also cited the fact that, in written remarks on this same conference bill, Senator Robert Taft, the Taft-Hartley Act’s principal sponsor in the Senate, observed that it did not “‘amend . . . the provisions in subsection 8(2) [of the Wagner Act] relating to company-dominated unions’ and had left its prohibitions ‘unchanged.’”<sup>320</sup> These indicia of congressional intent are difficult to reconcile with the supposition that the Taft-Hartley Act substantially altered federal labor law’s posture toward employer-sponsored labor organizations.

Lopatka argues that as the Supreme Court has found that “Section 8(c) ‘merely implements the First Amendment’ . . . Section 8(c) should capture the First Amendment’s protections as they evolve over time.”<sup>321</sup> So understood, Section 8(c) operates as something of a First Amendment savings clause. Thus, the argument would be that Senator Taft and other congressional proponents of the Taft-Hartley Act fully intended that Section 8(c) incorporate the First Amendment’s protections of speech as these might later be divined by the Supreme Court and that Senator Taft’s written comments on the conference bill merely reflect the fact that he did not anticipate what these might be.

The problem with this argument is that the House and Senate conferees who produced the final bill rejected the free speech provision in the Senate bill, which expressly incorporated the First Amendment’s protections, in favor of what was thought to be more speech-protective language from the House bill.<sup>322</sup> The reason for

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319. *Id.* at 215 (quoting H.R. 3020, 80 Cong. § 8(d)(3) (1947) (as passed by House, April 18, 1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 183 (1948) [hereinafter LMRA LEG. HIST.]).

320. *Id.* at 217 (quoting 93 CONG. REC. 6600 (1947) (statement of Sen. Taft), reprinted in 2 LMRA LEG. HIST., *supra* note 319, at 1539). On the other hand, in the same written submission, Senator Taft noted that the purpose of “the phrase ‘constitute or be evidence of an unfair labor practice’” in Section 8(c) was “to make it clear that the Board is not to use any utterances containing [neither] threats [n]or promises of benefit as either an unfair labor practice standing alone or as *making some act which would otherwise not be an unfair labor practice, an unfair labor practice.*” 93 CONG. REC. 6601 (1947) (statement of Sen. Taft) (emphasis added), reprinted in 2 LMRA LEG. HIST., *supra* note 319, at 1541. Of course, that is precisely what the Board does when it conditions the attachment of unfair labor practice liability to an employer’s acts of dominating, interfering with or supporting an employee involvement committee on the basis of the subject matter of the employer’s discussions with the committee.

321. Lopatka, *supra* note 4, at 84 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

322. Section 8(c) of the Senate bill provided:

this, according to Senator Taft, was to “freeze[]” the “rule” laid down by the Supreme Court—i.e., that noncoercive speech is protected by the First Amendment and, therefore, cannot be deemed to be an unfair labor practice—“into the law itself, rather than . . . leave employers dependent upon future decisions.”<sup>323</sup> Thus, if Section 8(a)(2) is to be saved from First Amendment infirmity in the manner that Lopatka suggests, the following seemingly ad hoc explanation of congressional intent would have to be given: that Congress intended that Section 8(c) capture the First Amendment’s evolving protections when they expand, but not when they contract, or at least not to the point that they leave noncoercive speech outside their umbrella.

An alternative argument is that the legislative history cited by the Supreme Court in *Cabot Carbon Co.* bears only on the House and Senate conferees’ predilections regarding substantive changes to Section 8(a)(2), not changes to evidentiary practices wrought by Section 8(c) that might affect Section 8(a)(2)’s enforcement. Unlike

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The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit: Provided, That no language or provision of this section [Section 8] is intended to nor shall it be construed or administered so as to abridge or interfere with the right of either employers or employees to freedom of speech as guaranteed by the first amendment to the Constitution of the United States.

H.R. 3020, 80th Cong. § 8(c) (as passed by Senate, May 13, 1947), *reprinted in* 1 LMRA LEG. HIST., *supra* note 319, at 242. Meanwhile, Section 8(d) of the House bill provided in pertinent part:

[8](d) Notwithstanding any other provision of this section [Section 8], the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act: (1) Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not by its own terms threaten force or economic reprisal.

H.R. 3020, 80th Cong. § 8(d) (as passed by House, April 18, 1947), *reprinted in* 1 LMRA LEG. HIST., *supra* note 319, at 183.

323. 93 CONG. REC. 3953 (1947) (statement of Sen. Taft), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1011. Although Senator Taft does not specify, he presumably refers here to the rule laid down by the Supreme Court in *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945). *See* S. REP. NO. 80-105, at 23 (1947) (noting that one of the purposes of Section 8(c) of the Senate bill was to correct what the committee deemed to be the Board’s overly restrictive construction of the Supreme Court’s decision in *Thomas*), *reprinted in* 1 LMRA LEG. HIST., *supra* note 319, at 429.

the Wagner Act, which was enacted into law largely as Senator Wagner had introduced it in February 1935, the Taft-Hartley Act was an amalgam of two distinct bills—the House bill, the more radical of the two, and the Senate bill—with distinct approaches to labor-management communication. Although in *Cabot Carbon Co.* the Supreme Court gave weight to the fact that the conference bill did not contain Section 8(d)(3) of the House bill or any similar language, the Court did not address the possible significance of the fact that the conferees adopted a free speech provision that more closely followed the version contained in Section 8(d)(1) of the House bill rather than the one in Section 8(c) of the Senate bill. Because the House free speech provision, or any close approximation thereto, did not appear without Section 8(d)(3)'s amendment to Section 8(a)(2) of the Wagner Act until late in the legislative process, Congress had little opportunity to consider what impact the House free speech language might have on an unamended Section 8(a)(2).

Section 8(c) of the conference bill was assailed during the congressional debates for going beyond the protection of the constitutional right of free speech and depriving the Board of the use of evidence that would ordinarily be deemed relevant by a court of law.<sup>324</sup> Of particular note here are Senator Morse's arguments with respect to Section 8(c)'s impact on the Board's ability to enforce some of the Wagner Act's central injunctions against company unionism:

One of the most objectionable and destructive provisions in the bill is the free-speech amendment made in conference. . . .

. . . [Under this provision, i]f an employee were discharged for union activities . . . the Board could not use as evidence of the employer's purpose, any expressions which were not in themselves coercive, no matter how revealing they might be of the employer's true reasons for the discharge. Under this provision, too, an employer could urge his employees to form a union, could suggest a constitution and bylaws, could

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324. See, e.g., 93 CONG. REC. 6673 (1947) (statement of Sen. Pepper), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1590–91; *id.* at 6656 (statement of Sen. Murray), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1567; *id.* at 6542 (statement of Cong. Madden), *reprinted in* 1 LMRA LEG. HIST., *supra* note 319, at 887.

recommend an attorney, and could propose who the leaders of the organization should be, and he, nevertheless, would be immune from charges of unfair labor practices for forming and instigating what clearly would be a company union in every sense. This is so because, by the clear language of section 8(c) of the bill, the employer's views or arguments shall not be evidence of an unfair labor practice.

I think we would be far more honest and candid with American labor, and fairer to it, too, if we repealed the act instead of adopting an amendment such as this.<sup>325</sup>

Senator Taft seemed to concede that Section 8(c) might impede the Board's enforcement of certain sections of the Wagner Act that Congress had no intention of repealing, but appeared to take the view that this was the price that had to be paid to ensure that an employer's right of free speech was protected under the Act. In an exchange with Senator Taft, Senator Pepper asked:

Under that provision [Section 8(c)], if an employer were to say on Monday, "I hate labor unions, and I think they are a menace to this country," and if he fired a man on Thursday and the question was whether that man was fired for cause or fired because he was agitating for a union in the plant, would the statement made on Monday, in which the man said, "I think labor unions are a menace to this country" be admissible in evidence as bearing on the question of the reason for the discharge?<sup>326</sup>

Conceding that "[u]nder the facts generally stated by the Senator" the statement would not be,<sup>327</sup> Senator Taft justified this result as follows:

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325. *Id.* at 6610 (statement of Sen. Morse), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1555.

326. *Id.* at 6603-04 (1947) (statement of Sen. Pepper), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1545.

327. *Id.* at 6604 (statement of Sen. Taft), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1545.

So long as the Board has a statement of that kind the employer's mouth is practically shut. In case he makes a speech later on and is charged with some unfair or unlawful labor practice, and that can be considered in evidence, it means that he cannot afford to speak at all. Without that provision there is not freedom of speech.<sup>328</sup>

Congress, of course, was aware of the objection that Section 8(c) would make it more difficult for the Board to enforce the unfair labor practice provisions of the Wagner Act. That argument was made repeatedly in the congressional debates<sup>329</sup> and was raised again by President Truman in his veto message.<sup>330</sup> Nevertheless, Congress chose to retain that provision without modification in the face of those objections. Thus, by refraining from amending Section 8(a)(2), Congress did not necessarily signal its position on how Section 8(c) should affect the Board's enforcement of Section 8(a)(2). Congress evinced no intent to repeal the Wagner Act's proscriptions of employer discrimination against employees for engaging in activity protected by Section 7; yet both proponents and opponents of Section 8(c), alike, seemed to agree that Section 8(c) would hamper the Board's ability to enforce those proscriptions.<sup>331</sup>

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328. *Id.* (statement of Sen. Taft), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1546.

329. *See, e.g., id.* at 6673-74 (statement of Sen. Pepper), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1590-91; *id.* at 6655 (statement of Sen. Murray), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1567; *id.* at 6542 (statement of Cong. Madden), *reprinted in* 1 LMRA LEG. HIST., *supra* note 319, at 887.

330. *See* PRESIDENT HARRY S. TRUMAN, LABOR-MANAGEMENT RELATIONS ACT, 1947—VETO MESSAGE, H.R. Doc. No. 80-334, at IV.5.(5) (1947), *reprinted in* 93 CONG. REC. 7502 (1947) *and in* 1 LMRA LEG. HIST., *supra* note 319, at 918.

331. *See, e.g.,* 93 CONG. REC. 6673-74 (1947) (statement of Sen. Pepper), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1590-91; *id.* at 6610 (statement of Sen. Morse), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1555; *id.* at 6604 (statement of Sen. Taft), *reprinted in* 2 LMRA LEG. HIST., *supra* note 319, at 1545-46. Even if one assumes that by omitting Section 8(d)(3) of the House bill from the conference bill, the conferees manifested an affirmative intention that the conference bill should not be construed as permitting what Section 8(d)(3) would have allowed, the proposed construction of the conference bill is not necessarily inconsistent with that intent. There is a difference between permitting an employer to form or maintain nonunion employee involvement committees that address terms and conditions of employment, provided the employer does not coerce employees through such conduct, and permitting an employer, "[n]otwithstanding any other provision of [Section 8]" to "[f]orm[] or maintain[] . . . a committee of employees and [to] discuss[] with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has

Ultimately, it appears that Congress did not have a clear understanding as to how Section 8(c) would affect the Board's enforcement of Section 8(a)(2). Ordinarily, such legislative uncertainty would afford a slim reed upon which to hang a claim that a statutory provision brings about a substantial change in the law. In the case of Section 8(c), however, Congress appears to have made a conscious leap in the dark. That is to say, because the principles set forth in Section 8(c) were so unobjectionable in themselves, Congress was prepared to endorse the consequences of those principles, come what may.

If this is a plausible account of Congress' intentions, then the proposed construction of Section 8(c) would appear to be a permissible one under the rule of statutory interpretation relied upon by the Supreme Court in *DeBartolo Corp.* Congress clearly intended that the protections afforded by Section 8(c) would be at least as great as those provided by the First Amendment and devised a statutory protection of speech that, when interpreted in a more literal manner than the Board has heretofore favored, achieves that purpose. Had Congress adopted what were thought to be the weaker protections of speech in Section 8(c) of the Senate Bill, including that section's express incorporation of the protections of the First Amendment, there would be no question that the Wagner Act, as so amended, would be susceptible to a construction consistent with the First Amendment even though that construction might not have been anticipated by the bill's supporters. Similarly, if, because of an attachment to the principles set forth in Section 8(c), congressional proponents of the Taft-Hartley Act resisted efforts to amend it notwithstanding their conscious uncertainty as to its full ramifications, then the fact they did not anticipate the construction of Section 8(c) proposed here would not necessarily render that construction contrary to congressional intent.

### Conclusion

In sum, the Board's historical application of Section 8(a)(2) violates the First Amendment. This defect can be corrected if the

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not certified or the employer has not [lawfully] recognized a representative as their representative . . . ." H.R. 3020, 80 Cong. § 8(d)(3) (1947) (as passed by House, April 18, 1947), reprinted in 1 LMRA LEG. HIST., *supra* note 319, at 183. The conferees would have had reason for concern that such statutory language might permit an employer to compel employees' participation on such a committee, to form such a committee in response to a trade union's organizing campaign, and to engage in other coercive conduct prohibited under the proposed construction of the conference bill.

Board requires proof that an employer's initiation, administration or support of any employee involvement program through which management and employees discuss workplace issues has coerced employees before finding that conduct to be unlawful under Section 8(a)(2). As Section 8(c) appears to warrant this revised construction of the Wagner Act, as amended, the Board should take the initiative on its own in demanding such proof and not wait for a reviewing court to order it to do so.

The abandonment of the Board's historical application of 8(a)(2) should not be mourned by those sympathetic to the goal of increasing employees' say in decisions affecting their working lives, while protecting employees' free choice regarding trade unionism. There is little reason to believe that restricting the freedom of employers and nonunion employee groups to discuss terms and conditions of employment continues to assist trade union organizational efforts in any significant way, assuming it ever did. The percentage of non-agricultural workers in the American private sector who are members of a trade union has been in almost continuous decline for the past 50 years. The net result of this decline is that only about 6.6% of non-agricultural workers in the American private sector were members of a trade union in 2012.<sup>332</sup> This is less than one-half the 16.3% rate reckoned to have existed in the American private sector in 1934, the year before the Wagner Act and its restrictions on company unionism were enacted.<sup>333</sup> It is also less than one-half the 16% rate found to have existed in the Canadian private sector in 2011,<sup>334</sup> despite the fact that Canada historically has imposed "few statutory impediments to running non-union representation plans that expressly deal with terms and conditions of employment."<sup>335</sup> Indeed, it has been plausibly

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332. Hirsch & Macpherson, *supra* note 43.

333. See L. TROY & N. SHEFLIN, U.S. UNION SOURCEBOOK: MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY app. A, at A-1 (1985).

334. See Sharanjit Uppal, *Unionization 2011*, 23 PERSP. ON LABOUR AND INCOME, October 26, 2011, at 6, available at <http://www.statcan.gc.ca/pub/75-001-x/2011004/article/11579-eng.htm> (follow "PDF" hyperlink and then follow "Perspectives on Labour and Income (vol. 23, no. 4) (PDF version, 170 kb)" hyperlink).

335. Daphne Taras, *Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance*, 28 COMP. LAB. L. & POL'Y J. 167, 188 n.37 (2007); see also Daphne Gottlieb Taras, *Portrait of Nonunion Employee Representation in Canada: History, Law and Contemporary Plans*, in NONUNION EMPLOYEE REPRESENTATION, *supra* note 47, at 121, 136-137 (noting that neither Canada's Federal statutes nor the provincial statutes for its nine predominantly English-speaking provinces contained a provision prohibiting the existence of employer-dominated employee organizations "or empowering the labor boards to order their dissolution").

suggested that an increase in the number of nonunion employee involvement programs that fall within the Wagner Act's broad definition of a "labor organization" might actually stimulate workers' interest in trade union organization "by making communication skills and group interaction an integral part of their work lives."<sup>336</sup> In any case, given that trade unions in the private sector have been adding so few workers to their membership rolls in recent years through Board-supervised representation elections,<sup>337</sup> there is not much opportunity for such programs to do much harm to trade unions.

Conversely, as it is now applied by the Board, Section 8(a)(2) suppresses what the responses to the WRPS indicate is, for most employees, the preferred means of dealing with their employer regarding terms and conditions of employment. Given that employers historically have reciprocated employees' interest in cooperative mechanisms for labor-management dealings regarding terms and conditions of employment, it seems safe to say that, as now applied, Section 8(a)(2) on balance "discourages . . . enhanced employee voice and involvement."<sup>338</sup>

Restricting the application of Section 8(a)(2) to coercive employer conduct would enhance the voice of employees at the workplace not merely because it would permit employers to sponsor employee involvement committees for the express purpose of obtaining their employees' input regarding terms and conditions of employment. It also would enhance the voice of employees by removing the illiberal influence that the Board's current application of Section 8(a)(2) has on employers' administration of employee involvement committees that are primarily concerned with operations and efficiency. From the point of view of a discussion of the efficient operation of a production line, the distinction between terms and conditions of employment and other subjects is an artificial one. Left free to follow the paths where its members' muses take it, a committee that is entrusted with the task of developing proposals to

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336. Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: the Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 154 (1994).

337. See Drew M. Simmons, *National Labor Relations Board (NLRB) Union Representation Elections, 1997-2009*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, Table 1 (June 30, 2010), <http://www.bls.gov/opub/cwc/cb20100628ar01p1.htm> (indicating that during the 13-year period from 1997-2009 there was an average of approximately 76,257 eligible voters in elections won by unions each year).

338. Samuel Estreicher, *Nonunion Employee Representation: A Legal/Policy Perspective*, in NONUNION EMPLOYEE REPRESENTATION, *supra* note 47, at 196, 208.

improve operational efficiency will quite naturally veer into discussions of “subjects such as safety, work schedules, pay incentives and bonuses, and grievances.”<sup>339</sup> Because under the current state of the law a discussion of these issues may transform a committee into an unlawfully dominated labor organization, an employer is obliged to keep a tight rein over an employee committee’s discussions regarding operational efficiency to ensure that they don’t venture into forbidden areas. Such a practice is not conducive either to unleashing employees’ creativity or to spurring employees’ interest in production matters.

In any event, one can anticipate that, were Section 8(a)(2)’s prohibitions confined to coercive employer conduct, the quantity of employer-employee dialogue regarding terms and conditions of employment would expand significantly. In view of the fact that the current application of its prohibitions to noncoercive conduct is not constitutionally permissible, the curtailment of this speech should no longer be tolerated.

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339. Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL’Y REV. 729, 744 (1999).