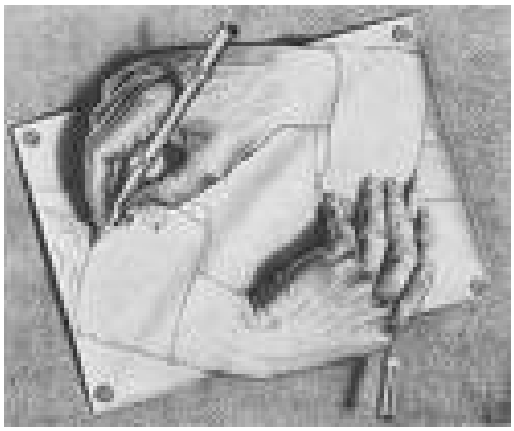

The Top Ten Contradictions of American Labor Law

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Michael T. Anderson
MurphyAnderson PLLC
111 Devonshire St. 5th Floor
Boston, MA 02109
(617) 227-5720; (617) 227-5767(fax)
manderson@murphypllc.com

SUMMARY

American labor law only displaced Nineteenth Century common law partially, hesitantly and inconsistently. Modern labor law is riddled with contradictions between the original goals of the Act and the enduring prejudices of pre-1935 law. This paper discusses ten of these contradictions. I'll discuss the first two at length:

– Why does management have party standing in R cases? (pp. 2-7)

– Why does management get to propagandize on worktime? (pp. 7-14)

I sketch seven more in a nutshell:

– Why can management implement its final offer on impasse? (pp. 14-15)

– Why is supervisor persuasion "coercive" only when it is pro-union? (p. 16)

– Why are strike replacements deemed to be in the unit for a decertification vote, but out of the unit otherwise? (pp. 16-17)

– Why can employers withdraw recognition without an election? (pp. 17-18)

– Why doesn't the Board take its remedial power seriously? (p. 18)

– Why does the Board reconstruct what would have happened in organizing to cut down the violating employer's liability, but refuse to do so when it favors the union? (p. 19)

– Why are bankruptcy courts allowed to treat labor agreements as executory contracts for commercial goods? (p. 20)

The final contradiction affects how all others can be resolved:

– What branch of Government is the Board in, anyway? (pp. 20-23)

1. **Why Does Management Have Standing in R Cases?**

The NLRB claims to administer a system where union organizing is the employees' choice, not their employer's. Yet under current R case procedure, the Employer is not just an observer from the public gallery. The Board makes the Employer a full party to the election. Why?

- **The accident of employer standing in R cases**

Current R case procedure gives the Employer subpoena power, the right to call witnesses, the right to file briefs, and the right to petition the Board for review of its position over how its employees may exercise their free choice. The Employer has an equal say over the place and time of the election, and an equal right to challenge ballots and preside over "their" vote. The petitioning workers must either stipulate to the Employer's position or suffer protracted delay. After the vote, the Employer has standing to litigate the election before the Region and on review to the Board. The agency's own decisions speak of employers "winning" and "losing" representation elections. *See*, *e.g.*, *Avis Rent-A-Car Systems*, 280 NLRB 580, 586 (1986) (Chairman Dotson, concurring); *Hospital del Maestro*, 323 NLRB 93, 106 (1995); *Holly Farms*, 311 NLRB 273, 311 (1993). Courts speak of the Board as a referee who must protect the Employer's rights to "win" NLRB elections. *See*, *e.g.*, *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 911 (2d Cir. 1981).

This is an indefensible contradiction. The whole point of the NLRA is that employers have no right to control the terms of their employees' free choice.

- **No statutory mandate for employer standing**

Employer standing in R cases is not a necessary feature of the NLRA. It is a historical accident of agency procedure, not a dictate of Congress. The contradiction is all the more galling because the Board does not follow a liberal standing rule for anyone else: for example, the Board flatly refuses standing to unit employees, 2 Casehandling Manual §11194.4, even though they are voters in the election.

Section 9(c) requires a hearing to determine whether a question concerning representation exists, but it does not mandate that employers have standing to

litigate there. Instead, Section 9 gives only one objective for representation determinations: "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act."

Employer intervention in representation elections was one of the primary defects of pre-NLRA law. Even though many "employee representation plans" guaranteed a secret ballot, Congress believed the employer's power to dictate the unit and preside over the vote made such elections inherently coercive. *See* remarks of Sen. Wagner, 1 *Legislative History of the NLRA* at 1416-17 (reciting evils of company union to include employer control over scope of bargaining unit.) Senator Wagner explained that even in government-run elections under the pre-1935 NIRA, the right of employers to litigate for up to a year before an election made the system unworkable. *See id*. at 1425. The Chairman of the NIRA Board testified: "The Employer has no place in elections. Elections deal with the problem of the men as to whom shall represent them and here the employer has no place. I am informed that in elections held by the National Mediation Board the employer is not a party in any way to the election proceeding. Obviously an employer should not be allowed to hold up an election." Remarks of NLRB Chairman (under pre-NLRA Pub. Res. 44) Francis Biddle, 1 *Legislative History of the NLRA* at 1474.

Yet current Board procedure guarantees employers the very ability to intervene and delay that the 1935 Congress intended to deny.

- **No due-process right for employers in R cases**

Employers have no due-process right to litigate as parties. Early NLRA decisions rejected such a right. For example, the Supreme Court upheld the Board's refusal to permit a company representative aboard a ship during voting: "The Board enjoys a wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees. It is wholly reasonable to remove any possibility of intimidation by conducting the election in the absence of the employer's representatives." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 37 (1942).

It was self-evident in the early days of the NLRA that employers had no right to litigate representation cases. Judge (later Justice) Minton pointed out that employers have no more standing in NLRB elections than employees do in shareholder votes that select who represents management:

> It is the agent of the employees that is being chosen, and not the agent of the employer. . . The employer's interest and his great concern about whom the employees shall have as their representative for bargaining purposes are easily demonstrated as very unsubstantial. Suppose the stockholders of the respondent company or any corporation were holding a stockholders' meeting for the purpose of electing the bargaining representative of the stockholders, namely, the directors; and suppose fraud, forgery and sharp dealing of many kinds were used in the procurement and handling of the stockholders' proxies in such an election. Would the employer be likely to tolerate the protest of its employees, who were not stockholders, that the election was crooked and invalid? In what forum in this land of ample legal machinery could the employees be heard to challenge the election of the stockholders' representative for collective bargaining?

NLRB v. National Mineral Co., 134 F.2d 424, 426-427 (7th Cir.1943) (emphasis added.) Judge Edelstein explained the same point:

> Of course the employer has an obvious ultimate interest in who the collective bargaining representative is to be; and he may ultimately secure judicial review on the issue of whether the Board properly followed the proceeding required by legislation and whether there is substantial evidence to support its action. But it has no such immediate legal interest as to authorize its appearance, as a matter of right, clothed with all the armor of due process in contentious litigation, in an administrative investigatory proceeding held to determine the employee representative with whom it must bargain in good faith. In these circumstances, the claim of denial of due process on the ground advanced is utterly unpersuasive.

American Cable & Radio v. Douds, 111 F.Supp. 482, 485 (S.D.N.Y. 1952) (emphasis added.)

This point remains the law. While courts occasionally criticize the Board for not holding a hearing on an employer's disputed issues of fact in R cases, *see NLRB v. Lovejoy Industries, Inc*., 904 F.2d 397, 400 (7th Cir. 1990), these decisions simply enforce the Board's existing Rules, without passing on whether the Board must allow employers standing in the first place. When courts do reach this issue, as the *en banc* Third Circuit did, they recognize that there is no such right: "[The employer] contends that the failure to hold an evidentiary hearing as to [objections

to a union election victory] violated its due process right. We reject that contention. The governmental policy being implemented is employee free choice of bargaining representative, not employer freedom from collective bargaining. Board supervision and Board investigation with no provision for a hearing on employer complaints would be perfectly consistent with due process for employers." *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 67 (3d Cir. 1983) (*en banc*).

– **Employers have no standing in Railway Labor Act cases.**

The NLRB's procedure contradicts its sister agency's practice under the Railway Labor Act. The Supreme Court approves the National Mediation Board's refusal to permit employers standing in RLA representation cases:

> United [Air Lines] sought to have the District Court require the Board to hold a hearing on the craft or class issue in which it would participate as a 'party in interest.' But the Act does not require a hearing when the Board itself designates those who may participate in the election . . . Nor does the [Railway Labor] Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board.

Brotherhood of Railway Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 666-667 (1965).

There is nothing in the NLRA that mandates a different result.

- **Employers' <u>interest</u> in the outcome of employee representation votes does not give them party standing.**

The current assumption (that employers are "necessary" parties because they have an economic interest in the outcome) contradicts the original premise of the NLRA. From the dawn of the Act, employers and unions <u>affected</u> by Board rulings have not been indispensable parties to the litigation, until and unless the Board seeks a coercive order against them. *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 271 (1938); *National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940).

It may be that, in determining an appropriate unit, the Board will need information from an employer. It may need to subpoena documents or employer witnesses to the non-adversary hearing. Employers also have a First Amendment right to communicate with the agency by letter or amicus submission.

But neither the First nor the Fifth Amendments gives anyone a right to party-litigant status in a hearing that does not directly order relief against them. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 155 (1941). Although the Act protects some interests of importance to employers (*e.g.*, the ban on certifying mixed guard unions under §9(c)(3), the exclusion of supervisors under §14(a)), these interests are protected by the employer's right to test certification if and when the Board seeks to enforce a bargaining duty against it. *Id*. Even when an employer files an RM petition under §9(c)(1)(B), it is in the position of an interpleader who tenders a disputed issue to the Board, with no further right to dictate how the Board will conduct the vote. There are already important administrative issues (like the sufficiency of the showing of interest) that affect the Employer's interests, but this does not give it a due-process right to litigate those issues.

- **Employer standing in R cases contradicts all other law forbidding employer involvement in employee votes.**

Employers' current standing to intervene in R cases elections grants a right that the law prohibits in every other context.

The LMRDA forbids employers from participating in, or even financing challenges to, internal union elections. *See* 29 U.S.C. §§411(a)(4) and 481(g). So why may an employer intervene, and force expensive litigation, over an election that is just as much a matter of worker self-determination? A representation election is no different from employee votes within the union.

Employers have no right to object to the validity of union affiliation votes. "The Board's rule [formerly allowing employers to withdraw recognition where they object to the method of union affiliation] effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference." *NLRB v. Financial Institution Employees*, 475 U.S. 192, 209 (1986). If union affiliation votes are none of the employer's business, the policy against "outside interference" should be even stronger as to the initial representation question.

The Board continues to hold that employer polls, even ones that purport to offer a secret ballot, are coercive where high-ranking managers are present. *Grenada Stamping & Assembly*, 351 NLRB No. 74 (2007). Yet the Board mandates the presence of these managers, not to mention their high-priced lawyers, as full parties at the table when employees petition the government to direct an election. If the former is coercive, why isn't the latter?

- **Employer standing can be abolished just by changing the Board's Rules and Regulations.**

This is not a contradiction that requires a Congressional fix. The Board made this mistake, and the Board has the authority to fix it. Section 9 of the Act gives the Board wide latitude to develop and change its procedural rules.

If the Board were to align its procedure to conform to RLA practice, by denying employers standing as party-litigants in R cases, there would be no basis for any judicial challenge. The Board would, of course, continue to give employers full due process in any ULP proceeding based on its representation decision. But the underlying representation case would not be derailed by the employer litigation the 1935 Congress intended to prevent.

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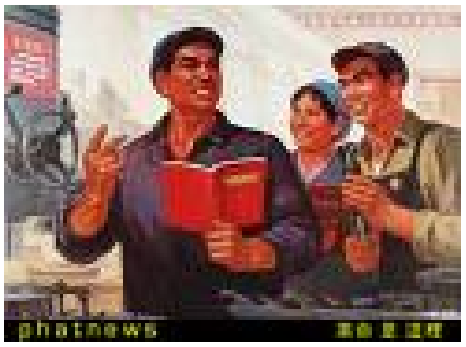
2. **"Working Time Is for Work": Why Do Employers Get to Propagandize Against Unions on Work Time?**

Employer intervention in NLRB elections goes hand-in-hand with an exclusive employer right to use worktime for anti-union solicitation. *Beverly Enterprises–Hawaii*, 326 NLRB 335, 361-368 (1998).

Employers commonly assume they have a Constitutional right to use worktime for anti-union solicitation. They do not. Employers' right to do so is only the result of statutory policy under §8(c). That section of the Act could be modified, if Congress chose, with a proviso that employers may not use working time to solicit employees for the ends already regulated in the "persuader" section of the LMRDA, 29 U.S.C. §433(b)(1). The employer's First Amendment claim is really an assertion of property rights, which if valid, would obliterate most of the NLRA.

- **Employers' unilateral communication advantage**

Employers now have a right to require employees, on pain of discharge, to attend mandatory captive-audience meetings, as well as individual "persuasion" sessions with supervisors who have the power to discipline them. "[A]n incessant program of visual communication . . . for the obvious purpose of instilling revulsion of, and disassociation from [the Union] . . . is a privilege of an employer under Section 8(c) of the Act. . . " *Flamingo Hilton-Laughlin*, 324 NLRB 72, 133 (1997) *modified on other grounds*, 148 F.3d 1166 (D.C.Cir.1998). The defining feature of workplace campaigning is the blurred distinction between work directives and "persuasion." Employers may, for example, transmit "VOTE NO" instructions on the same mobile units that transmit work directives, *Virginia Concrete Corp.*, 338 NLRB 1182 (2003). Anti-union campaigns typically subject workers to extended one-on-one encounters with their supervisors, whose sole mission is to break down employee resistance to the employer's anti-union message. *See*, *e.g.*, *Frito-Lay, Inc.*, 341 NLRB 515 (2004) (supervisors lawfully rode in individual drivers' trucks for entire shifts of 10-12 hours, solely to press the driver against the union);*Wal-Mart Stores*, 339 NLRB 1187 (2003) (supervisors lawfully followed workers through the store for the duration of their shifts, "coaching" them not to vote for the union even as they reviewed their job performance.)



This is a one-sided right. The employer is currently allowed to forbid employees from soliciting for the union during the same working time reserved for unlimited anti-union pressure. *Beverly Enterprises*, 326 NLRB 335 (1998). If it chooses, management may segregate known union supporters from its meetings, while requiring workers it deems "persuadable" to attend on pain of discharge. *Fleming Companies*, 336 NLRB 192, 218 (2001).

- **A schizophrenic definition of "coercive" speech**

One remarkable contradiction in §8(c) law is the inconsistent standard for employer speech compared to union speech. When managers conduct one-on-one persuasion sessions with their employees, the coercive background of the supervisor's power to discipline the subordinate is irrelevant, unless there is specific proof that the supervisor uttered an explicit threat.

This is a stark contrast to union speech, which is presumed to invoke real or imagined constraints of union discipline, whether or not that power is actually exercised. After the Taft-Hartley Act was passed, unions clamored that peaceful secondary appeals were protected by §8(c) unless there was proof of actual threat. The Supreme Court rejected this argument, on the dubious theory that unions have inherent coercive power over their own members, as well as any other workers (whether organized or non-union) who hear them. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 690-691 (1951). Even though the law has since protected employees' Section 7 right to refrain from union support in the face of union disciplinary rules, s*ee, e.g., Pattern Makers v. NLRB*, 473 U.S. 95, 107 (1985), this doctrine remains alive. *See Oil Capitol Sheet Metal,* 349 NLRB 1348, 1349 n.6 (2007), where the Board held that even unpaid volunteers who belong to a union must be deemed instruments of the union because they are "subject to the union's disciplinary control." Yet the inherent coercive background of management discipline is invisible to the Board – it only appears where unions speak.

– **Current §8(c) policy is not constitutionally required.**

Employers, like unions and workers, have a First Amendment right to express their views in public fora like sidewalks, or in private domains like the home, the political club, or the church. The industrial workplace is neither. The question of who may use industrial working time is a question of property rights, which are in turn subject to Commerce Clause regulation through the Board.

The notion that employers enjoy First Amendment rights to monopolize worktime speech is usually attributed to *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477-478 (1941). Yet this decision did not say that employer speeches were absolutely protected by the First Amendment. This was the employer's argument, but not one that the *Virginia Electric* Court accepted at face value. *Virginia Electric* ruled simply that the Board had to show that such speeches were coercive against the background of all other conduct. Four years later, however, the Court approved the Board's use of categorical presumptions to define "coercion" as to employee communication in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Court gave the Board great leeway to decide what types of communication the employer could prohibit as a "product of the Board's appraisal of normal conditions about industrial establishments." *Id*., 324 U.S. at 804.

After *Republic Aviation*, the Board proceeded to develop similar rules

requiring equal treatment of solicitation during work time. In *Clark Bros.*, 70 NLRB 802 (1946) *enfd*. 163 F.2d 373 (2d Cir.1947), the Board had held that a no-solicitation policy against pro-union speech was illegal if the employer itself indulged in anti-union solicitation in the same time and place. Section 8(c) was a specific rejection of *Clark Bros*. S.Rep. No. 105, 80th Cong., 1st sess. at 23-24. *Legislative History of the Labor-Management Relations Act*, Vol. I at 429-430.

When Congress passed §8(c), it was not merely applying the First Amendment. If it had, §8(c) would be meaningless – the First Amendment applies regardless of whether Congress specifically consents. The slogan that §8(c) "merely implements the First Amendment" comes from *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). But this association with the First Amendment is usually invoked in decisions that restrict employer rights to speak in the workplace, as in *Gissel*, because it suggests that employers enjoy no more right under §8(c) than the bare minimum of the First Amendment. When the courts expand the right of employer speech, they generally read §8(c) to embody a statutory policy that extends further than the First Amendment. For example, the Court held this year in *Chamber of Commerce v. Brown*, ___ U.S. ____, 128 S.Ct. 2408, 2413-14 (2008) that employers have a §8(c) right to use state funds to finance anti-union campaigns, even though they certainly had no First Amendment right to such funds.

- **Restricting worktime solicitation is a property regulation, not a prohibition on expression.**

There is a reason employers need to avoid a congruence between §8(c) and the First Amendment. Modern First Amendment law is not favorable for them, because the workplace is not a public forum. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 806 (1985). For example, the Hatch Act forbids civil servants, both managers and non-managers, from expressing political views while they are on the clock; this is not a violation of their First Amendment rights, because the workplace is a place for work and not expression, and they are free to express themselves after work. *See Burrus v. Vegliante*, 336 F.3d 82, 86-91 (2d Cir.2003). In the private sector, the workplace is already socialized by a host of state and federal laws, that would all have been invasions of the employer's property rights from the standpoint of 19th Century common law.

The employers' First Amendment theory is really that industrial working time is a private domain, no different than the employer's home, church or political

club. This is a claim based on property rights, not the right of expression. For example, the First Amendment protects the right to promote unionism, but it does not give union demonstrators a right to do so wherever they wish. *Hudgens v. NLRB*, 424 U.S. 507, 522-523 (1976); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Yet for the same reason, Congress has the power under the Commerce Clause to supersede the employer's property rights, and require it to permit union speech on its property that the employer would wish to prevent. *See also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994); *Hudgens*, 424 U.S. at 522-523. This is what *Republic Aviation* does, by giving off-duty employees "ownership" of their breaktime, even though it occurs on the employer's property. Worktime solicitation by employees may be forbidden, not because the employer has an absolute property right over the workplace, but because worktime solicitation disrupts the government's industrial policy. The workers in *Republic Aviation* were, after all, making P-47 fighter planes in 1943. The government had ample reason to regulate the war economy by separating breaktime from working time: "Working time is for work." 324 U.S. at 803 n.10. The government may surely say the same thing to employers.

If employers' use of worktime were purely an issue of a First Amendment "right to speak as it pleases on its own property," then the whole of the NLRA would violate the First Amendment.

To begin with, both the Norris-LaGuardia Act ban on "yellow dog" contracts, 29 U.S.C. §103, and §8(a)(3) of the NLRA would be unconstitutional restrictions of the employer's right to associate only with those who share its beliefs. The early NLRA courts rejected this First Amendment attack on the Act. *See Associated Press v. NLRB*, 301 U.S. 103 (1937). But if the industrial workplace were the employer's private forum like its home, church or political club, modern First Amendment law would require a different result. For example, it violates the First Amendment to require Republicans to allow Democrats to crash their private fund-raising parties, or to require synagogues to allow Mormon missionaries to solicit during Sabbath services. *See Hurley v. Irish-American Gay & Lesbian Group*, 515 U.S. 557, 567-568 (1995) (conservative Irish group had a First Amendment right to exclude gay participants from its St. Patrick's Day parade, since their presence would conflict with the parade's own right of expression.) If industrial worktime counts as the employer's private domain, then it follows that employers have a First Amendment right to exclude anyone from its workplace who disagrees with its anti-union beliefs. This would mean that §8(a)(3) and the Norris-LaGuardia Act violate the First Amendment under *Hurley*.

Most NLRB law would never pass muster if the workplace were the

employer's private ideological preserve. For example, the First Amendment protects the right to circulate petitions, *Meyer v. Grant*, 486 U.S. 414, 425 (1988), or to canvass others for their position on public issues. *American Broadcasting Co. v. Miller*, 550 F.3d 786 (9th Cir. 2008). If this First Amendment law applies to the workplace, employers would have a First Amendment right to solicit decertification signatures, *cf. Canter's Fairfax Restaurant*, 309 NLRB 883, 884 (1992), or to question workers about their union support, *see Allentown Mack & Sales v. NLRB*, 522 U.S. 359, 386-388 (1998). Absent an explicit criminal threat, the NLRB would be powerless to regulate such conduct.

The incoherence of the First Amendment claim is also clear from the NLRB's half-hearted rule against captive audience meetings within 24 hours of an election. *Peerless Plywood Co.*, 107 NLRB 427 (1953). Such a rule would never pass muster as to a campaign rally in a public election. If, on the other hand, the government has the power to forbid such meetings within 24 hours, there is no constitutional reason why the Board could not expand the ban to 48 or 72 hours, or indeed the entire critical election period.

- **The law <u>already</u> forbids worktime speech on other topics.**

The incoherence of a First Amendment right to worktime solicitation is shown by the existing legal prohibitions on employer speech on other topics:

  - **Political speech**

Employers are already forbidden to use the workplace to promote candidates for political office. If Wal-Mart held a mandatory meeting to present speeches and films urging employees to vote Republican, it would flagrantly violate the Federal Election Campaign Act, 2 U.S.C. §441(a); 11 C.F.R. §§114.3(f)(2)(i), 114.9. The FEC regulations define a "restricted class" of people to whom a corporate employer may campaign for a political candidate – namely, its supervisors, but not its rank-and file employees.

There is no principled reason why Wal-Mart may be barred from using the workplace to urge a vote against Obama, but not a vote against a union. Wal-Mart's First Amendment right to oppose Obama is at least as strong as its right to speak against employee organizing. If anything, Wal-Mart has even <u>less</u> right to campaign in an NLRB election, because (unlike a political election) Wal-Mart managers are not fellow voters.

- **Religious speech**

Wal-Mart would violate Title VII if it required employees to attend meetings to promote the employer's religious beliefs. This is so even where the employer does not make any threats or promises of benefits. *See EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 613 (9th Cir.1988); *Young v. Southwestern Savings & Loan*, 509 F.2d 140, 144 (5th Cir.1975).

To be sure, the right to proselytize for one's religious beliefs is a basic First Amendment right, at least as strong as the right to oppose union organizing. But as these courts held, an employer has no Free Exercise right to subject its employees to religious persuasion as a condition of employment. There is no reason why anti-union speech should enjoy a higher First Amendment status.

- **Sexual/romantic persuasion**

Most speech deemed actionable sexual harassment in the workplace would enjoy First Amendment protection in any other context. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). For example, a man may ask a woman in a bar for a date, and while she may reject him, he cannot be sued for it provided that he does not commit a criminal assault. But in the workplace, a supervisor's proposition of a subordinate is actionable, simply because of the inherent power the supervisor enjoys over a captive audience. *See, e.g.*, *Saxe v. State College Area School District,* 240 F.3d 200, 210 (3d Cir.2001) (Alito, J.), *citing Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal.4th 121, 87 Cal.Rptr.2d 132, 980 P.2d 846, 863 (1999) (Werdegar, J., concurring).

If employers had a First Amendment right to expression in the workplace indistinguishable from public free speech rights, there would be little left of sexual harassment law. Supervisors would have a constitutional right to persuade subordinates romantically with the same intense but "non-coercive" tactics that the Board now permits in cases like *Frito-Lay* and *Wal-Mart*.

- **LMRDA restrictions on internal union elections**

The LMRDA already imposes multiple restrictions on employer speech in union elections that would be unconstitutional if the workplace were a private domain for speech.

For example, unions are forbidden to use union facilities or union staff on

their work time to promote the incumbent's election. 29 U.S.C. §481(g). The same provision prohibits employers from promoting a favored candidate for union office. *Donovan v. Local 70, Teamsters*, 661 F.2d 1199 (9th Cir.1981). If the First Amendment absolutely protects the right of an owner to use its property and staff to promote its ideological beliefs, a union would have a First Amendment right to use its business agents to promote the incumbent in elections. Nor could an employer be prohibited from holding mandatory meetings to express its preference for a favored candidate in a union election.

There is no principled distinction between advocating the employer's preferred candidate in an internal union election (illegal under §481(g)), and advocating the employer's preferred outcome in a union representation election. If the First Amendment guarantees employers a right to advocate anything they want in the workplace, then the LMRDA is unconstitutional.

- **LMRDA restrictions on persuader activity**

The LMRDA also places direct, albeit weak, restrictions on professional consultants who persuade employees in NLRB elections. 29 U.S.C. §433(b)(1). These restrictions have been affirmed against First Amendment attack. *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1221-22 (6th Cir. 1985); *Master Printers of America v. Donovan*, 751 F.2d 700, 708 (4th Cir. 1984).

These provisions are currently limited to full-time "persuaders," exempting the employer's regular supervisors. But these limitations are not constitutionally required. Even though 29 U.S.C. §433(b)(1) supports a weaker restriction on anti-union "persuasion," it already defines employer anti-union persuasion as an area that Congress may legitimately regulate. There is no constitutional reason why Congress may not expand that regulation to include all other agents of management.

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3. **Why Does Management Still Get to Implement its Final Offer Now That It Has the Right to an Offensive Lockout?**

A common source of contradiction in NLRA law comes from the shift from the 1935-1960 period, in which employers were generally regarded as an economically superior entity with obligations to treat unions in "good faith," to the period from 1960 onward, where employers and unions were treated as equal combatants. The earlier period enshrined the employer's privileges subject to a

"good faith" obligation, but these privileges nevertheless survived after subsequent law made employers equal combatants free of a "good faith" duty. This contradiction puts unions in the worst of both worlds—the employer is now a cage fighter with full power to fight free-style, yet with all the paternal privileges it accrued in the earlier period.

A good example is management's power to implement its final offer after reaching impasse. The doctrine arose from *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 343 (1939), where an employer faced negotiations in which the union was adamant, the employer had fully explored its position, and no further movement would occur short of a strike or a plant closing. The Court held that implementation did not violate the duty to bargain in good faith because the employer had no other choice: "It is evident that the respondent realized that it had no alternative but to operate the plant in the way the men dictated . . . or keep it closed entirely, or have a strike."

What was critical in *Sands* was that the employer had no power to pressure its employees by locking them out. As of 1939, the lockout power was generally restricted to outright shutdown of operations. The employer was given the privilege to implement after impasse only because it had no other option.

This background assumption changed in *American Ship Building v. NLRB*, 380 U.S. 300, 310 (1965). The Court struck down the Board's former rule that offensive employer lockouts violated the employer's "good faith" duty. The Court applied the new model of bare-knuckled combat in cases like *NLRB v. Insurance Agents*, 361 U.S. 477, 493-494 (1960). "No doubt a union's bargaining power would be enhanced if it possessed not only the simple right to strike but also the power exclusively to determine when work stoppages should occur, but the Act's provisions are not indefinitely elastic, content-free forms . . ."

The Board did not appear to grasp that this removed the rationale for the original implementation-on-impasse rule. Had the employer in *Sands* possessed the lockout right recognized in *American Ship Building*, it could have responded to the union's intransigence without the extra privilege of imposing its position as the default outcome. Yet now, unions are left with the worst of a contradictory regime. Employers are now entitled to wage robust economic warfare in support of their contract demands (without the "good faith" restrictions in place as of *Sands*), yet they retain the feudal privilege of implementing on impasse. If collective bargaining is now combat between equals, there is no further reason to leave employers with this seigneurial privilege.

4. **Why Is Supervisory Persuasion Coercive Only When It Is Pro-Union?**

The main vice of NLRA law on supervisors is not its breadth, but its vagueness. The uncertainty over whether an employee will eventually be deemed a supervisor imposes an unequal risk on unions compared to employers. If an employer guesses wrong, the worst that can happen is that it will owe reinstatement and back pay. If a union guesses wrong, its entire organizing drive may be destroyed, because card solicitation by the borderline supervisor will taint any election victory. This fact compels unions to avoid contact with any unit employee who is even arguably close to the grey area – a tremendous disadvantage in organizing.

This state of affairs comes from the Board's contradictory attitude toward supervisory persuasion. As I discuss above, anti-union persuasion is not objectionable absent an explicit threat, no matter how much inherent power the supervisor wields over the subordinates he "persuades." The only exception is where supervisors make pro-union statements. In this limited instance, the NLRB and the Courts are shocked, *shocked*, to learn that supervisors have inherent authority to discipline subordinates. They have discovered "coercion" from the supervisor's inherent power to discipline, regardless of whether the supervisor made an actual threat, contrary to all other §8(c) law. *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 212 (6th Cir. 2000), on remand, *Harborside Healthcare*, 343 NLRB 906 (2004).

The clearest example of the contradiction is *Madison Square Garden*, 350 NLRB 117, 118, 123 (2007), in which the Board held a pro-union supervisor "coerced" employees, *inter alia*, by taking down an anti-union flyer posted by higher management. Of course, there was no suggestion that management's initial posting of the anti-union flyer was equally coercive.

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5. **Are Strike Replacements In or Out of the Unit**?

An outrageous double standard is that strike replacements are not subject to union terms and conditions (thus saving employers a lot of money during a strike),

but they are eligible to vote in any decertification election. This rule developed from cases like *Service Electric*, 281 NLRB 633 (1986), which reasoned that unions do not like strike replacements, so they should not be expected to represent them. Such stray comments then became the "settled law" reaffirmed in *Detroit Newspapers*, 327 NLRB 871 (1999).

This gives employers the best of both worlds. While unions dislike strikebreakers, they are more acutely aggrieved that an employer may grant itself unilateral labor cost savings while operating during a strike, even a ULP strike that it provoked. If replacements were defined as temporary employees outside the unit, the employer might have an argument that they should not be covered by union employment terms. But permanent replacements are considered members of the unit with an equal right to vote in a decertification election. Elsewhere, the Board assures that strike replacements are not presumed to disfavor the union, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). Yet the Board virtually guarantees this outcome, when it keeps the replacements out of the unit for purposes of their employment terms, thus insulating them from any benefits of the union's existence.

Nothing in the Act supports this accidental rule. The Board has to face up to this contradiction and decide: either replacements are unit employees entitled to enjoy the benefits of union-negotiated terms and conditions, or they are outside the unit and ineligible to vote in an election.

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6. **Why Can Management Withdraw Recognition Without an Election?**

Unions have increasingly abandoned the NLRB election process to campaign for recognition based on card-checks. This is the main feature of the pending Employee Free Choice Act. This generates opposition from employers, who accuse unions of being undemocratic.

Yet the Board and the employer bar have never had any problem with employers withdrawing recognition absent a secret ballot election. Indeed, until *Levitz Furniture*, 333 NLRB 717 (2001), the Board did not even require employers to have objective proof of a majority – it was enough that the employer surmised in

good faith, based on some evidence less than a majority, that there might be some doubt about the union's support. *Celanese Corp.*, 95 NLRB 664 (1951). (Current opponents of EFCA who strenuously defended *Celanese* as amici in *Levitz*: the Chamber of Commerce, the National Association of Manufacturers, the Labor Policy Association, the Council on Labor Law Equality, and the Small Business Survival Committee.)

Even after *Levitz*, an employer continues to enjoy the right to withdraw recognition without an election if a majority of employees signs cards. Unlike an employer (who may demand an election before it has any duty to recognize on a card showing,) a union has no right to demand an RD election prior to losing recognition, even after *Levitz*. As long as the employer is in control, the Board and the employer bar don't mind using card-checks instead of NLRB elections.

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7. **Why Doesn't the Board Take Its Remedies Seriously?**

The NLRA gives the Board open-ended power to order "affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." In theory, the Act would permit unions to claim antitrust-like market damages for systematic §8(a)(3) and §8(a)(5) violations, to restore prevailing wages that would have obtained but for the ULPs. Yet the Board's remedies are universally confined to reinstatement and back pay for individual workers, rather than any collective damage. Why?

The reason is grounded in the Board's reluctance to entertain such market-wide litigation. In*Tiidee Products*, 194 NLRB 1234, 1235 (1972) *enforced*, 502 F.2d 349 (D.C.Cir. 1974), the Board rejected a union demand for restoration of the area-wide wage levels it would have obtained but for the employer's violation. Its reason was the impossibility of proof: "We know of no way by which the Board could ascertain with even approximate accuracy from the above what the parties 'would have agreed to' if they had bargained in good faith."

This assumption has now been undermined. In *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77 (2007), the Board required unions to present

exactly this kind of market-based proof (through economic projections and expert witnesses) to prove in *Beck* cases what *Tiidee Products* had described as unknowable — the macroeconomic effects of organizing on wages within a given bargaining unit. If the Board is now demanding that unions present this kind of proof in *Beck* litigation, there is no further reason for the Board to refuse it to prove consequential damages in §8(a)(3) and (5) cases.

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8. **Why Does the Board Reconstruct the Outcome of Organizing to Limit Remedies, But Not to Award Them?**

Another recent Board decision undermines the refusal to consider collective relief in *Tiidee Products*.

Tiidee Products was equally based on the impropriety of the Board speculating as to what *might* have happened, thereby substituting its bureaucratic judgment about the likely course of the dispute for what actually happened. 194 NLRB at 1235. But this institutional reluctance to reconstruct the parties' conduct "but for" the ULP vanished in *Oil Capitol Sheet Metal,* 349 NLRB 1348 (2007), where the Board ordered wide-ranging discovery of internal union "organizing objectives, plans, anticipated deployment of personnel, and employment histories of its salts in similar salting campaigns," as a means to reconstruct the likely course and duration of the organizing campaign that never occurred because of the employer's refusal to hire. However, this reconstruction only operates in the employer's favor, to cut down the violator's back pay obligation. The *Oil Capitol* Board did not suggest that the employer might be required to grant recognition or pay the union-scale wages that the organizers "might have" won had they been lawfully hired.

However, nothing in the Act requires the Board to apply this rule in such a one-sided way. If the Board may divine what would have happened but for the employer's violation, and then impose that "realistic" outcome as the remedy, then there is no longer any justification for the *Tiidee Products* policy against consequential damages. If *Oil Capitol* permits the Board to decide how the organizing would have proceeded, then the Board must require employers to live with the union's imputed victories as well as its imputed defeats.

9. **Why Are Bankruptcy Courts Allowed to Live in the 19th Century?**

Under the Bankruptcy Code, bankrupt employers are allowed to reject collective-bargaining agreements on showing of "good cause." 29 U.S.C. §1113. The law treats union contracts as "executory contracts" no different from commercial contracts for goods or services. Bankruptcy judges are charged with restoring the health of the debtor, and union contracts are the one source of savings where rejection does not threaten non-performance by the supplier. The employer may shed its CBA, and when it emerges from bankruptcy it will have no post-discharge obligation to its workers except those it negotiates from its newly liberated position.

Bankruptcy law's assumption that CBAs are commercial executory contracts does not fit well with the original command of the Clayton Act that "the labor of a human being is not a commodity or article of commerce." All of the core assumptions of bankruptcy law are grounded in the very 19th Century managerial privilege that the NLRA was meant to displace: the assumption that capital purchases labor, not the other way around.

Perhaps someday we will live in a workers' paradise, the mirror image of current bankruptcy law. Workers will wake up one morning and declare: "we just can't make ends meet! Never mind that we have been spending beyond our means on plasma TVs and subprime mortgages. The wisdom of our past budgeting is no business of our employer. What matters now is restoring the union's members to financial health. Therefore, we apply to the bankruptcy courts for an order rejecting our collective-bargaining agreement, with an immediate court order raising our wages by $5 an hour." That'll be the day!

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10. Who's In Charge Here? The NLRB as an Executive Agency

The quasi-judicial nature of the Board since 1947 causes many to forget that it is still an Executive Agency. It does not simply administer a common law. It is an organ of executive policy.

After the New Deal, the Board was largely left to its own devices, with only court supervision. Presidential involvement was limited to appointment of Board members and the General Counsel. This has created the illusion of agency autonomy, with a cadre of career staff administering "Board law" with much institutional inertia.

This is likely to change in the coming years. As the rules of labor-management conflict come under greater pressure, there will be more pressure for direct involvement in agency decisionmaking by the Executive Branch, up to and including the White House. Once this happens, the President will have a surprising degree of power to intervene, through Presidential Memoranda directing the Board to administer the Administration's labor policy law in specified ways.

Such Orders could include directions to the General Counsel and/or the Board to change the administration of the Act to deny management standing in R cases, to revoke employer rights to implement on impasse, etc. Although this order would be unlawful if directed to a court, it would be perfectly within the President's rights as to his own agency.

- **The NLRB and its General Counsel Are Subject to Presidential Policy Dictates.**

The notion that administrative agencies are autonomous comes from *Humphrey's Executor v. United States,* 295 U.S. 602 (1935) and *Wiener v. United States,* 357 U.S. 349 (1958). In these cases, the Courts held that the President could not remove an agency officer without respect to statutory limitations on removal.

The recent trend of administrative law is in the opposite direction. *Chevron* itself is based on the rationale that agencies may change their interpretation of the statute because they must reflect the policy of the current elected Executive:

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-866 (1984) (emphasis added.) "[A]n agency is not a court.. . . [A] federal agency, which is controlled by the political branches of the federal government, is constitutionally better suited than a federal court to render policy decisions." *United Parcel Service v. NLRB*, 92 F.3d 1221, 1225 (D.C.Cir.1996), *citing Chevron,* 467 U.S. at 865-66.

Current administrative law holds that it is both inevitable and proper that the appointing Executive will influence an agency's decisionmaking. *Free Enterprise Fund v. Public Accounting Oversight Board*, 537 F.3d 667, 679-684 (D.C.Cir.

2008). Although courts occasionally describe the Board as having exclusive jurisdiction over NLRA matters against other executive offices, *see Chamber of Commerce v. Reich*, 74 F.3d 1322, 1335 (D.C.Cir.1996), this could not prevent the President from communicating his policy to his own appointees in the agency. *See UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C.Cir.2003); *Building & Const. Trades Dept. v. Allbaugh*, 295 F.3d 28, 34 (D.C.Cir.2002).

- **The General Counsel and Board Members Answer to the President.**

There is little question that the General Counsel is answerable to the President for fulfilling the Administration's policy. Unlike Board members under 29 U.S.C. §153(a), the General Counsel enjoys no for-cause restrictions on removal under 29 U.S.C. §153(d). The legislative history shows that the General Counsel's office was created in 1947 to divest the Board's members of control, and make the chief prosecutor "a statutory officer responsible to the President." *See NLRB v. United Food & Commercial Workers Local 23*, 484 U.S. 112 n.22 (1987), *quoting* remarks of Sen. Taft, 93 Cong.Rec. 6859 (1947). Sen. Taft explained that the General Counsel is "like that of the Attorney General of the United States." 93 Cong. Rec. 7000, 7001 (1947). Such prosecutorial officers serve at the pleasure of the President, even when they are appointed for fixed terms. *Swan v. Clinton*, 100 F.3d 973, 982 (D.C.Cir.1996), *citing Parsons v. United States,* 167 U.S. 324, 338-339 (1897).

Even the Board's members are theoretically accountable to the President for executing Administration policy. Under 29 U.S.C. §153(a), "any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." Similar language appeared in the statute in *Humphrey's Executor v. United States,* 295 U.S. 602 (1935). However, in *Bowsher v. Synar*, 478 U.S. 714, 729 & n.8 (1986), the Court re-interpreted the term "malfeasance" to mean disobedience to the appointing authority's policy judgment. "The statute permits removal for 'inefficiency,' 'neglect of duty,' or 'malfeasance.' These terms are very broad and, as interpreted by Congress, could sustain removal . . . for any number of actual or perceived transgressions of the [appointing agency's] will."

- **The President May Dictate Policy to Executive Agencies.**

Unlike agency rulemaking, the President's statements of policy to the Executive Branch are not subject to the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992). Nor is a policy statement by the President directed to a

subordinate agency "final agency action." *Id*., 505 U.S. at 797. Because the President's direction would not be self-executing, no private party could claim "rights" in it. "An Executive Order devoted solely to the internal management of the executive branch-and one which does not create any private rights-is not, for instance, subject to judicial review." *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C.Cir.1993).

Vigorous executive action created the NLRA. Absent the Presidential initiatives of the New Deal, the courts would never have arrived at a new model of industrial policy on their own. Those courts were mired in the precedents of 19th Century common law.

To the extent that the NLRB is now mired in the contradictions of the agency's 20th Century common law, it may require another era of Executive intervention to move the law forward.