# *NOTE*

# FREE SPEECH AND THE NLRB'S LABORATORY CONDITIONS DOCTRINE

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*In response to worries that the National Labor Relations Board was protecting free speech insufficiently, particularly during representation election campaigns, Congress amended the National Labor Relations Act in 1947 to include section 8(c), which imposes broad restrictions on the Board's ability to regulate speech under its unfair labor practice authority. The efficacy of that provision, however, is limited severely by the Board's "laboratory conditions doctrine," famously announced in* General Shoe Corp., *which expressly authorizes expansive regulation of representation election campaign speech under another of the Board's statutory powers. In this Note, Shawn Larsen-Bright challenges the use of the laboratory conditions doctrine to regulate otherwise protected speech. Larsen-Bright argues that the doctrine is in serious tension with congressional intent and cannot be reconciled with modern free speech jurisprudence. He concludes by examining and endorsing a recent case arising under the Railway Labor Act in which the D.C. Circuit similarly and persuasively rejected laboratory conditions reasoning.*

> "If the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation."[1]

## INTRODUCTION

During the 1947 debates over the proposed amendments to the National Labor Relations Act (NLRA or Act),[2] the apparent failure of the National Labor Relations Board (NLRB or Board) to respect First Amendment values adequately became a prominent topic of

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1 Livingston Shirt Corp., 107 N.L.R.B. 400, 406 (1953).

2 29 U.S.C. §§ 151-169 (1994) (consisting of National Labor Relations (Wagner) Act, Pub. L. No. 372-198, 49 Stat. 449 (1935), amended by Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 120-101, 61 Stat. 136 (1947)), the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959), and Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395).

congressional conversation.[3] Of particular concern was the Board's "too restrictive"[4] treatment of speech in the complex context of the representation election campaign, during which unions and employers attempt to persuade employees about the possible benefits and burdens of unionization.[5] This concern manifested itself in Congress's adoption of section 8(c),[6] an amendment to the NLRA designed to provide statutory reinforcement of the constitutional protection for campaign speech containing neither a "threat of reprisal or force [n]or promise of benefit."[7] Although the Board often invokes these protections, Board doctrine continues to provide for extensive regulation of this speech, rendering the statutory and constitutional protections hollow.[8]

The need for some regulation of campaign speech has been defended as necessary to protect the ability of employees to properly exercise their statutorily conferred organizational rights.[9] Minimal

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[3] See, e.g., H.R. Rep. No. 80-245, at 8 (1947) ("Although the old Labor Board protests it does not limit free speech, it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them[.]"), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 299 (1959) [hereinafter LMRA History]; H.R. Rep. No. 80-245, at 33 (1947) ("Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely."), reprinted in 1 LMRA History, supra, at 324; 93 Cong. Rec. 4893 (1947) (statement of Sen. McClellan) ("The language of the . . . [National Labor Relations Act (NLRA or Act)] has been so distorted by court decisions and by administrative decisions that freedom of speech has definitely been abridged and denied to many of our citizens."), reprinted in 2 LMRA History, supra, at 1433.

[4] S. Rep. No. 80-105, at 23-24 (1947) (internal citations omitted), reprinted in 1 LMRA History, supra note 3, at 429-30.

[5] Unless otherwise indicated, "election" refers to union representation elections; "campaign speech" refers to employer or union speech during the representation campaign; "labor speech" refers generally to speech in labor-related contexts; "employer speech" refers to labor-related employer speech, usually campaign speech; and the "laboratory conditions doctrine" refers specifically to the use of that doctrine to regulate speech.

[6] Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act] if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (1994). Generally, section 8 of the Act identifies the acts of employers or unions that constitute unfair labor practices. See id. § 158.

[7] § 158(c).

[8] See, e.g., Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 & n.11 (1962) (stating that "[t]he strictures of the first amendment, to be sure, must be considered in all cases," but holding section 8(c) inapplicable to representation cases and dismissing election results).

[9] See, e.g., Alan Story, Employer Speech, Union Representation Elections, and the First Amendment, 16 Berkeley J. Emp. & Lab. L. 356 (1995) (arguing broadly that employer speech should not be constitutionally protected); Tammy L. deCastro, Note, Discrimination and Unionization Elections: A Common Sense Approach to Sewell, 52 Rutgers L. Rev. 1161, 1166 (2000) (arguing for limitations on "racial, ethnic, or religious inflammatory speech"). The Supreme Court has agreed that limited regulation of cam-

constraints on employer speech seem especially appropriate because an employer's position of economic power may render its speech inherently coercive to an employee.[10] Moreover, society's interest in the proper functioning of representation elections is particularly acute, as the outcome of the election ideally should reflect the employees' true preferences for a bargaining representative.[11]

Accordingly, the Supreme Court has partially endorsed arguments for regulation of this speech, finding that coercive campaign speech is completely unprotected—and thus freely regulable.[12] That holding, however, contains an inherent restriction on the Board's ability to regulate noncoercive campaign speech. That limitation is nominally statutory—the broad protection for speech in section 8(c) prohibits the Board from finding a violation of the Act based on noncoercive campaign speech—but essentially constitutional, as the Supreme Court has interpreted the statute merely to implement the protection already awarded to campaign speech by the First Amendment.[13]

Current NLRB jurisprudence minimizes these constraints on the Board's ability to regulate protected campaign speech through its

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paign speech is necessary. See NLRB v. Gissel Packing Co., 395 U.S. 575, 617-19 (1969) (holding that coercive campaign speech is not constitutionally protected); infra notes 12-13 and accompanying text (discussing *Gissel*'s limited holding).

[10] Cf. infra notes 32-33 and accompanying text (describing justifications of National Labor Relations Board (NLRB or Board) for regulating campaign speech).

[11] In this way, representation elections mirror political elections. The general parallel to political elections, and thus to regulation of political campaign speech, is compelling if not precise. See NLRB v. A.J. Tower Co., 329 U.S. 324, 331 (1946) (drawing broad comparisons to political elections); Thomas v. Collins, 323 U.S. 516, 546 (1945) (Jackson, J., concurring) ("The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation."); Derek C. Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 68 (1964) (describing representation elections as "closely akin to political contests"); see also Craig Becker, Democracy in the Workplace: Union Representation Elections and Federal Labor Law, 77 Minn. L. Rev. 495 (1993) (scrutinizing analogy between political and representation elections). The Supreme Court's jurisprudence on the regulation of campaign speech was first developed in Buckley v. Valeo, 424 U.S. 1, 26-29 (1976), in which the court upheld restrictions on political campaign contributions but struck down limitations on political campaign expenditures. For some of the best recent academic work in this area, see Symposium, Campaign Finance Reform, 94 Colum. L. Rev. 1125 (1994), and Symposium, Money, Politics, and Equality, Is Election Speech Different?, 77 Tex. L. Rev. 1751 (1999).

[12] See *Gissel*, 395 U.S. at 617 ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed . . . . so long as such expression contains no threat of reprisal or force or promise of benefit." (internal quotation marks omitted)). This Note follows the common device of generally referring to speech containing a threat of reprisal or force or promise of benefit as "coercive." See, e.g., Story, supra note 9, at 416-17.

[13] *Gissel*, 395 U.S. at 617.

"laboratory conditions" doctrine, developed in the 1948 decision *General Shoe Corp.*[14] one year after Congress's adoption of section 8(c). The doctrine, an expansive interpretation of the Board's statutory authority, roughly states that the Board's election regulatory power under section 9 of the Act—which authorizes the Board to "direct an election by secret ballot and . . . certify the results thereof"[15]—includes the ability to substantively regulate union and employer campaign conduct. If the Board finds, post hoc, that the employees' preferences for a bargaining representative may have been tainted, the doctrine enables it to set aside the otherwise valid election and direct a new one—even if the alleged taint was the result of campaign speech that could not statutorily or constitutionally ground an unfair labor practice under section 8. The Board's application of this doctrine has severely undermined the protections for campaign speech mandated by Congress, the Supreme Court, and the Constitution. Surprisingly, few courts have carefully reviewed the doctrine for either statutory or constitutional consistency. Those courts that have analyzed the doctrine uniformly have adopted a broadly deferential posture toward the Board and affirmed.[16]

This Note argues that the laboratory conditions doctrine is untenable on statutory and constitutional grounds.[17] Part I.A outlines the development of statutory and constitutional protection for campaign speech and the Board's corresponding laboratory conditions doctrine. Part I.B discusses the prominent circuit court decisions addressing the doctrine and examines the courts' reasons for their nearly universal

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14 77 N.L.R.B. 124 (1948). For the derivation of the "laboratory conditions" moniker, see text accompanying note 65.

15 29 U.S.C. §§ 159(c)(1), 159(e)(1) (1994). The Supreme Court has read section 9 to grant the Board "a wide degree of discretion" to "ensure the fair and free choice of bargaining representatives." *A.J. Tower Co.*, 329 U.S. at 330. But see infra Part II.A.3 (arguing that this discretion should be limited).

16 See infra Part I.B.

17 Research turned up only one other direct examination of the laboratory conditions doctrine, James W. Wimberly Jr. & Martin H. Steckel, NLRB Campaign Laboratory Conditions Doctrine and Free Speech Revisited, 32 Mercer L. Rev. 535 (1981), an article that appeared twenty years ago, before many major developments in the jurisprudence of free speech. The academic literature on labor-related speech generally is more substantial, although much less has been written in recent years. For a representative sample, see generally Becker, supra note 11; Bok, supra note 11; Thomas G.S. Christensen, Free Speech, Propaganda and the National Labor Relations Act, 38 N.Y.U. L. Rev. 243 (1963); Julius Getman, Labor Law and Free Speech: The Curious Policy of Limited Expression, 43 Md. L. Rev. 4 (1984); Charles C. Killingsworth, Employer Freedom of Speech and the NLRB, 1941 Wis. L. Rev. 211; Robert F. Koretz, Employer Interference with Union Organization Versus Employer Free Speech, 29 Geo. Wash. L. Rev. 399 (1960); Story, supra note 9; Note, Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections, 127 U. Pa. L. Rev. 755 (1979).

affirmation of the Board's broad interpretation of its authority. Part II engages in a more critical analysis and concludes that the doctrine represents an unconstitutional and statutorily unjustifiable interpretation of the Act. It then examines and endorses a recent decision[18] regarding the Railway Labor Act (RLA)[19] that rejected laboratory conditions reasoning. The Note concludes by sketching how the arguments presented here might fit into more comprehensive proposals for labor reform.

## I
## THE LABORATORY

Two provisions of the NLRA empower the Board to regulate representation elections: section 8, identifying as "unfair labor practices" the set of employer and union actions that constitute per se violations of the Act;[20] and section 9, directly authorizing the Board to oversee representation election procedures.[21] The Board's ability to use its section 8 authority to regulate employer speech has been limited both by Congress, in amending the Act to include section 8(c),[22] and by the Supreme Court, in a series of First Amendment decisions beginning with *NLRB v. Virginia Electric & Power Co.*[23] Neither limitation, however, has had much practical effect: Under the laboratory conditions doctrine, the Board's section 9 authority includes the power to regulate speech that is statutorily and constitutionally unregulable under section 8.[24]

This Part describes this development, illuminating the context in which the laboratory conditions doctrine arose. Part I.A examines the early positions of the Board, Congress, and the Supreme Court with regard to the regulation of campaign speech, and presents the *General Shoe* laboratory conditions doctrine. Part I.B then reviews the major appellate court decisions that have analyzed the Board's use of the

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18 US Airways, Inc. v. Nat'l Mediation Bd., 177 F.3d 985 (D.C. Cir. 1999).

19 ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151-163, §§ 181-188 (1994)).

20 Unfair labor practices can be committed at any time, and include discriminating to encourage or discourage membership in a union, creating an employer-controlled union, and refusing to bargain in good faith. 29 U.S.C. § 158 (1994). The Board is granted the authority to prevent unfair labor practices under § 10. § 160.

21 See supra note 15 and accompanying text (describing Board's section 9 authority).

22 For the text of section 8(c), see supra note 6.

23 314 U.S. 469 (1941).

24 For example, in *General Shoe* itself the Board set aside an election on the basis of employer remarks that the Board admitted were never coercive. See Gen. Shoe Corp., 77 N.L.R.B. 124, 125 (1948); see also infra notes 62-66 and accompanying text.

laboratory conditions doctrine to regulate representation campaign speech.[25]

### *A. Purification: Congress and the NLRB's Employer Speech Doctrine Through* General Shoe

Until the creation of federal labor legislation in the 1920s and 1930s, the common law and the federal government left labor speech completely unrestrained.[26] Congress was accordingly concerned that adoption of the NLRA[27] might lead to inappropriate limitations on speech.[28] Subsequent developments demonstrated that this concern was well warranted.

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[25] The laboratory conditions doctrine restrains the conduct and speech of both employers and unions. Because employer speech is regulated much more often than union speech, virtually all of the prominent cases involve restrictions on employers. Consequently, this Note focuses almost exclusively on employer speech. Nearly all of what is argued here, however, applies equally to Board regulation of union speech.

[26] See Christensen, supra note 17, at 255 ("Until the enactment of the Wagner Act in 1935 the issue of what an employer might lawfully say to his employees in the course of a labor dispute was no issue at all; neither statute nor common law rule stayed his hand or tongue.").

[27] Notably, Senator Wagner's original version of the NLRA mirrored the recently drafted Railway Labor Act (RLA), supra note 19, in including language prohibiting as an unfair labor practice employers "influenc[ing]" employees about their statutory organizational rights. S. 2926, 73d Cong. (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3 (1959) [hereinafter NLRA History]. That language, which did not make it into the final draft of the bill, had been upheld in the RLA context by the Supreme Court, which essentially read the constitutionally troublesome language out of the statute. In Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 568 (1930), the Supreme Court found that the RLA prohibited "coercive measures" and noted that the "influenc[ing]" language meant "pressure," and was "not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee." The Court's interpretation recently prompted Judge Silberman to note that the RLA's influencing language "has been interpreted to mean pretty much the same thing" as the corresponding NLRA provisions. US Airways, Inc. v. Nat'l Mediation Bd., 177 F.3d 985, 991 (D.C. Cir. 1999). For a discussion of this case, see infra Part II.B.

[28] Congress "believed that both employees and employers ought to enjoy the right of peaceful persuasion with respect to joining or not joining a labor organization." 78 Cong. Rec. 10,560 (1934) (statement of Sen. Walsh), reprinted in 1 NLRA History, supra note 27, at 1125. Concern about possible limitations on speech was so prevalent that Congress considered amending the bill to state explicitly: "Nothing in this act shall abridge the freedom of speech or the press, as guaranteed in the first amendment of the Constitution." 79 Cong. Rec. 9730 (1935), reprinted in 2 NLRA History, supra note 27, at 3227. That Congress later rejected this amendment does not indicate that Congress was indifferent to or unaware of speech concerns. Contra Story, supra note 9, at 367 (arguing congressional rejection of amendment indicates lack of concern with employers' speech rights). On the contrary, Congress's eventual rejection of the language hinged fundamentally on a strong belief that the language would be superfluous, demonstrating that Congress was aware of First Amendment concerns in the Act. See H.R. Conf. Rep. No. 74-1371, at 6 (1935) ("The amendment could not possibly have had any legal effect, because it was merely a restatement of the first amendment to the Constitution, which remains the law of the land irre-

Soon after its creation, the Board announced its approach toward speech during organizing activities.[29] From these early decisions emerged severe restrictions against the employer's use of persuasion during election campaigns. Essentially the Board required the employers to "maintain strict neutrality,"[30] refraining from all persuasion during any organizing activity or face being found to have committed an unfair labor practice.[31] This position was predicated on the Board's acceptance of two still controversial premises: (1) that employers' positions of economic power over employees created an inherently coercive environment for campaign speech,[32] and (2) that an employer has "no legitimate interest as to whether or not his employees selected a collective representative."[33] Modern labor law scholars continue to employ similar, if more nuanced, arguments.[34]

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spective of Congressional declaration."), reprinted in 2 NLRA History, supra note 27, at 3258; 79 Cong. Rec. 10,300 (1935) (statement of Rep. Ramspeck) (arguing that "writing a provision of the Constitution into the bill could not add anything to it," but reiterating that it was not "the intention of this bill to violate any section of the Constitution"), reprinted in 2 NLRA History, supra note 27, at 3267. Senator Walsh made explicit the belief that limiting the right to persuade with respect to unionization would rise to the level of a constitutional violation, stating that "an employee, like an employer, of course, has the right to discuss the merits of any organization. Indeed, Congress could not constitutionally pass a law abridging the freedom of speech." 79 Cong. Rec. 7661 (1935), reprinted in 2 NLRA History, supra note 27, at 2376. See generally Charlotte LeMoyne, Comment, The Unresolved Problem of Race Hate Speech in Labor Union Elections, 4 Geo. Mason U. Civ. Rts. L.J. 77, 79-81 (1993) (examining concerns about freedom of speech in Wagner Act legislative history).

29 The Board's very first decision involved issues of speech. See Pa. Greyhound Lines, Inc., 1 N.L.R.B. 1 (1935), enforced as modified on other grounds, 91 F.2d 178 (3d Cir. 1937), rev'd on other grounds, 303 U.S. 261 (1938).

30 Harry Millis & Emily Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations 176 (1950).

31 Specifically, the Board would find a violation of section 8(a)(1), which makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1994). Section 7 provides in relevant part that employees have the right to (as well as the right to refrain from) "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." § 157.

32 See, e.g., Wheeling Steel Corp., 1 N.L.R.B. 699, 709 (1936) ("[T]he employee is sensitive to each subtle expression of hostility upon the part of one whose good will is so vital to him, whose power is so unlimited, whose action is so beyond appeal."); Millis & Brown, supra note 30, at 176 ("It was thought that in the employer's position of economic power any indication of his preference might prevent the employees from exercising free choice.").

33 Christensen, supra note 17, at 255.

34 For example, Professor Weiler famously argued that an employer's interest in a representation election is analogous to Canada's interest in a United States election in that the employer is affected by the outcome of the election but has no legitimate interest in taking part in the campaign. Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1814 (1983).

Until 1941, the courts of appeals split on whether these restrictions on employer speech were consistent with the First Amendment.[35] Then, in *NLRB v. Virginia Electric & Power Co.*,[36] the Supreme Court resolved the issue in favor of speech, finding that the First Amendment generally protects employer campaign speech as it protects other potentially controversial speech.[37] Because employees must be able to exercise their organizational rights free from undue influence, however, the Court found that the First Amendment protects only pure, or noncoercive, campaign speech.[38] While this doctri-

[35] Before 1941, courts of appeals typically deferred to the Board, although the Ninth Circuit questioned the constitutionality of strict neutrality by 1938. NLRB v. Union Pac. Stages, 99 F.2d 153, 178-79 (9th Cir. 1938) (doubting whether "Congress intended to forbid an employer from expressing a general opinion" about unionization, a position that would "be in violation of the First Amendment"). The circuits began to split after the Supreme Court found constitutional protection, in a slightly different context, for "the dissemination of information concerning the facts of a labor dispute." Thornhill v. Alabama, 310 U.S. 88, 102 (1940). Compare NLRB v. Burry Biscuit Corp., 123 F.2d 540, 543 (7th Cir. 1941) (upholding Board's strict neutrality doctrine), with Continental Box Co. v. NLRB, 113 F.2d 93, 96-97 (5th Cir. 1940) (holding employers had constitutional right to express unionization preferences when not coercive), Midland Steel Prods. Co. v. NLRB, 113 F.2d 800, 804 (6th Cir. 1940) (same), NLRB v. Sunshine Mining Co., 110 F.2d 780, 786 (9th Cir. 1940) (same), and Press Co. v. NLRB, 118 F.2d 937, 942 (D.C. Cir. 1940) (same). The First Circuit indicated that employer campaign speech would be viewed in light of the surrounding campaign circumstances, NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 890 (1st Cir. 1941), while the Second Circuit found that it was the Board that must determine whether the coercive effect was outweighed by the speech rights. NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941). Given *Thornhill*, one early commentator noted that even this fragmented support for the strict neutrality doctrine was "surprising." Christensen, supra note 17, at 256.

[36] 314 U.S. 469 (1941).

[37] The Court found that the employer was "as free now as ever to take any side it may choose on" unionization. Id. at 477. *Virginia Electric* involved an employer who reminded its employees that in the fifteen years since a failed organizational campaign, confidence and understanding among the employer and its employees had been pervasive. Id. at 471-72 & 471 n.5. The employer stated that it believed that the interests of both employer and employee would "best be promoted through confidence and cooperation." Id. at 471 n.5. The Board appeared to find that this communication alone constituted an unfair labor practice. Id. at 476-77. Finding that the First Amendment would not allow the prohibition of such speech without other evidence of coercion, the Supreme Court remanded the case to the Board to determine whether the unfair labor practice was premised on a broader course of coercive conduct. Id. at 479-80. On remand, the Board found such a violation, and the Court affirmed. Va. Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943).

[38] Unfortunately the language of the opinion left much of this implicit. In Thomas v. Collins, 323 U.S. 516 (1945), however, the Court made clear, albeit in what was technically dicta, that *Virginia Electric* established that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty . . . [unless] to this persuasion other things are added which bring about coercion, or give it that character." Id. at 537-38. The *Thomas* Court continued: "The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." Id. at 538.

nal course was not without its defects—the contours of the scope of "coercion" certainly remained unclear[39]—the conflicting rights involved arguably justified the Court's position. In sum, after *Virginia Electric* only coercive campaign speech could constitutionally be held to violate the Act. Regardless of content, noncoercive speech remained constitutionally protected.[40]

Four years after *Virginia Electric*, the Board reasserted a position regarding campaign speech that was, in Judge Friendly's words, "rather halting."[41] In *A.J. Showalter Co.*[42] an employer: (1) warned the employees that the company's primary customer strongly preferred not to work with union shops, indicating a genuine chance that unionization might force a closing;[43] and (2) notified the employees that pay raises previously had been authorized but for legal reasons could not be issued.[44] The Board found "self-evident" coercion and a

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[39] After Congress's enactment of section 8(c) to protect speech devoid of threat of reprisal or force or promise of benefit, it seemed likely that this test also would govern the scope of the term "coercion" for First Amendment protection, especially since section 8(c) was meant to codify the Supreme Court's speech doctrine. See infra note 56 and accompanying text; see also Christensen, supra note 17 at 265 (writing in 1963 that "[t]o the extent that a consensus has been reached, it is in favor of regarding section 8(c) as a restatement of the constitutional guarantee"). The Supreme Court adopted just this position in NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) ("[A]n employer is free to communicate to his employees any of his general views about unionism . . . so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"). See infra text accompanying notes 188-90.

[40] As *Virginia Electric* was decided before the Board began to use section 9 to regulate campaign speech, see infra notes 60-65 and accompanying text, the Court had no reason to distinguish between the section 8 and section 9 contexts.

[41] NLRB v. Golub, 388 F.2d 921, 926 (2d Cir. 1967).

[42] 64 N.L.R.B. 573 (1945).

[43] Id. at 577. It is now well established that employers may communicate predictions about the effects of unionization on the company, though "the prediction must be carefully phrased on the basis of objective fact." *Gissel*, 395 U.S. at 618. At the time of *A.J. Showalter*, however, the legal status of such predictions was somewhat less certain. See, e.g., NLRB v. Asheville Hosiery Co., 108 F.2d 288, 293 (4th Cir. 1939) (upholding Board's unfair labor practice determination regarding prediction of closing primarily for lack of evidence that employer actually might shut down plant); see also Mylan-Sparta Co., 78 N.L.R.B. 1144, 1145 (1948) ("A prophecy that unionization will ultimately lead to loss of employment is not coercive where there is no threat that the Respondent will use its economic power to make its prophecy come true." (citing Electric Steel Foundry, 74 N.L.R.B. 129 (1947))). It is plausible, though, that the prediction of objective consequences should have been regarded as one of the "facts" of the labor dispute as contemplated by the Supreme Court when it wrote in 1940 that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[44] *A.J. Showalter*, 64 N.L.R.B. at 576-77. The union's organizing presence meant that providing the raise would almost certainly constitute an unfair labor practice. See, e.g., F.W. Woolworth Co. v. NLRB, 121 F.2d 658, 660 (2d Cir. 1941) (upholding Board's finding that proffered wage increase violated section 8(1)); M.H. Ritzwoller Co. v. NLRB, 114 F.2d 432, 435 (7th Cir. 1940) (same). This rule was endorsed by the Supreme Court in

consequent unfair labor practice, despite the fact that the employer had assured the employees that it had no objection to their unionization,[45] and further despite the fact that this speech merely informed the employees about the legal constraints and objectively possible effects of unionization on the employer.[46]

Congress's strong belief that the Board was seriously mishandling speech in such election campaign cases eventually gave rise to what some in Congress considered a regrettable[47] need for legislative involvement.[48] Consequently, as one of the proposed Taft-Hartley

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NLRB v. Exchange Parts Co., 375 U.S. 405, 410 (1964) ("[A]n employer is not free to violate § 8(a)(1) by conferring benefits simply because it refrains from other more obvious violations.").

45 The Board dismissed the contention that the coercion was at all "neutralized" by this remark. *A.J. Showalter*, 64 N.L.R.B. at 576-77.

46 Id. Similarly, in Clark Bros., 70 N.L.R.B. 802, 804 (1946), an employer paused operations just prior to the election to broadcast speeches arguing against unionization. The Board candidly rejected the application of *Virginia Electric*: "[Forcing] employees to receive such aid, advice, and information . . . is calculated to, and does, interfere with the selection of a representative of the employees' choice. And this is so, wholly apart from the fact that the speech itself may be privileged under the Constitution." Id. at 805. The opinion thus made clear the Board's willingness to regulate constitutionally protected speech.

The forceful dissent accused the majority of being "in derogation of [the] well-established canon of judicial procedure" that "[o]nce a broad principle on a disputed issue of constitutional law has been determined by the highest court, it [is] incumbent upon tribunals which have followed another rule of decision to acquiesce in the ultimate judicial pronouncement." Id. at 808-09 (Reilly, Member, dissenting). Member Reilly chastised the Board for its recent and "disturbing tendency" to return to the repudiated doctrine of strict neutrality, which at any rate rested on "unpersuasive," "fallacious," and "far-fetched" policy grounds. Id. at 811-13 (Reilly, Member, dissenting).

Cases like *Clark Bros.* have been described as involving a "captive audience," a term that refers generally to situations in which employees are unable to avoid hearing campaign speech—for example, when an employer makes antiunion remarks over the company's loudspeaker or during a mandatory employee meeting. See Story, supra note 9, at 416 (describing "captive audience" situations). One might argue that "captive audience" scenarios justify further regulation of speech because, for instance, the union might not have the opportunity to respond adequately, or the captivity might reinforce the employer's economic power. Congress, however, seems to have rejected such a rationale. See infra note 48. The Board later adopted a similar position, generally declining to impose restrictions on the employer's ability to assemble and control a captive employee audience. See, e.g., Litton Systems, Inc., 173 N.L.R.B. 1024, 1030-31 (1968) (holding that employers may require employee attendance at meeting for disseminating noncoercive antiunion speech); cf. Livingston Shirt Corp., 107 N.L.R.B. 400, 408-09 (1953) (allowing employers generally to refuse union access to respond to captive audience speeches).

47 "With free speech guaranteed to every American citizen under the Constitution, it seems unfortunate that this section should have been necessary in any legislation." 93 Cong. Rec. A2012 (1947) (statement of Rep. Meade), reprinted in 1 LMRA History, supra note 3, at 869.

48 Congress found the Board's treatment of speech in cases involving captive audiences to be particularly problematic. Supra note 46; see also Archibald Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 16 (1947) (noting that Board captive audience decisions were "plainly overruled" by section 8(c)); Note, supra

amendments to the Act, Congress began considering the adoption of section 8(c), which would provide significant statutory protection for labor speech.[49]

Despite charges that the amendment's laudable free speech rhetoric "cloak[ed] an evil design to encourage unfair labor practices by employers,"[50] and that at any rate the amendment was superfluous,[51] members of Congress remained concerned that the Board had "stretched its authority"[52] to regulate speech, in cases both before and after *Virginia Electric*,[53] and felt compelled to send a message of disapproval.[54] Indeed, the explicit purpose of the bill was to reverse the

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note 17, at 761 ("[The bill] was clearly intended to . . . prevent the Board from finding captive audience speeches to be unfair labor practices."). A Senate Report stated:

> The Board has [held] . . . speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even if severable or unrelated or if the speech was made in the plant on working time [as in *Clark Bros.*]. The committee believes these decisions to be too restrictive.

S. Rep. No. 105, at 23-24 (1947) (internal citations omitted), reprinted in 1 LMRA History, supra note 3, at 429-30. One Senator explicitly analogized the "captive audience" cases to other "abuses [of] Board procedure and practice" such as the strict neutrality doctrine. 93 Cong. Rec. 4137 (1947) (statement of Sen. Ellender), reprinted in 2 LMRA History, supra note 3, at 1066.

[49] Although section 8(c) is worded broadly to reflect Congress's general concern for speech, the amendment was driven by a desire "to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." H.R. Conf. Rep. No. 510, at 45 (1947), reprinted in 1 LMRA History, supra note 3, at 549; see also, e.g., 93 Cong. Rec. 6282 (1947) (statement of Rep. Case) (stating that section dealt with freedom of speech for employer), reprinted in 1 LMRA History, supra note 3, at 872.

[50] H.R. Rep. No. 245, at 85 (1947) (minority report), reprinted in 1 LMRA History, supra note 3, at 376. One notable opponent of the amendment was Senator Wagner, the drafter of the original NLRA (now colloquially known as the Wagner Act) who wrote scathingly: "The talk of restoring free speech to the employer is a polite way of reintroducing employer interference, economic retaliation, and other insidious means of discouraging union membership and union activity . . . ." Robert Wagner, The Wagner Act—A Reappraisal, Sign, Mar. 1947, reprinted at 93 Cong. Rec. A844 (1947).

[51] See, e.g., 93 Cong. Rec. 4767 (1947) (statement of Sen. Thomas) ("Would an injustice be corrected by providing legislation that employers be given a right they already enjoy under the strongest of all guaranties—the protection of our Constitution?"), reprinted in 2 LMRA History, supra note 3, at 1340-41; 93 Cong. Rec. 4893 (1947) (statement of Sen. Ferguson) ("The highest law of the land, namely, the Constitution, is being cited in this amendment. If the same court is to construe this law which has been construing the Constitution, how can any change be effective?"), reprinted in 2 LMRA History, supra note 3, at 1433.

[52] 93 Cong. Rec. 4433 (1947) (statement of Sen. Ball), reprinted in 2 LMRA History, supra note 3, at 1201.

[53] 93 Cong. Rec. 4137 (1947) (statement of Sen. Ellender) (referring to strict neutrality doctrine as an "abuse[ ] [of] Board procedure and practice" and analogizing that doctrine to Board's recent decisions), reprinted in 2 LMRA History, supra note 3, at 1066.

[54] 93 Cong. Rec. 1845 (1947) (statement of Sen. Morse) (proposing amendment to section 8(c) to state explicitly that it could not be construed to interfere with First Amendment merely "to impress upon the Board its obligation under the Constitution"), reprinted

Board's insufficient cognizance of speech rights[55] and to codify the Supreme Court's campaign speech doctrine.[56]

In an attempt to ensure that section 8(c) would never be "susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech,"[57] Congress rejected proposals to qualify the section's wording. The language eventually adopted[58] was believed necessary to "make it clear that the Board is not to construe utterances containing neither threats nor promises of benefit as an unfair labor practice standing alone or as making some act which would otherwise be legal an unfair labor practice."[59]

Instead of responding "in the shadow of a specific statutory provision intended to correct"[60] its attitude toward speech, however, the Board soon developed a doctrine that enabled it to avoid this statutory restatement of constitutional limitations on its authority to regulate campaign speech.[61] In *General Shoe Corp.*,[62] a 3-2 decision, the Board found that section 9[63] of the Act authorized it to regulate otherwise protected speech during representation election campaigns.[64]

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in 2 LMRA History, supra note 3, at 984; see also supra note 3 (quoting language indicating congressional concerns about the Board's treatment of speech).

55 See H.R. Rep. No. 245, at 5-6 (1947) ("The bill . . . guarantees to employees, to employers, and to their respective representatives, the full exercise of the right to free speech."), reprinted in 1 LMRA History, supra note 3, at 296; 93 Cong. Rec. A3043 (1947) (reprinted radio address by Sen. Taft) ("Without these provisions there would be no freedom of speech on the part of employers any more than there has been for the last 10 years."), reprinted in 2 LMRA History, supra note 3, at 1624.

56 Senator Taft explained that the amendment states "approximately the present rule laid down by the Supreme Court of the United States [in *Virginia Electric*]. It freezes that rule into the law itself, rather than to leave employers dependent upon future decisions." 93 Cong. Rec. 3837 (1947), reprinted in 2 LMRA History, supra note 3, at 1011.

57 93 Cong. Rec. 6443 (1947), reprinted in 2 LMRA History, supra note 3, at 1541.

58 For the text of section 8(c), see supra note 6.

59 93 Cong. Rec. 6859 (1947) (statement of Sen. Taft), reprinted in 2 LMRA History, supra note 3, at 1622. In June of 1947, President Truman's veto of the bill was overridden and section 8(c) became law. Notably, Senator Wagner would have voted to uphold the President's veto, but was unable to vote due to illness. See 93 Cong. Rec. 7538 (1947), reprinted in 2 LMRA History, supra note 3, at 1656.

60 Crown Cork & Seal Co. v. NLRB, 36 F.3d 1130, 1138 (D.C. Cir. 1994).

61 Of section 8(c), the Board noted, it "appears to enlarge somewhat the protection previously accorded by the original statute and to grant immunity beyond that contemplated by the free speech guarantees of the Constitution." 13 NLRB Ann. Rep. 45, 49 (1948). The statement is rather extraordinary, suggesting that the Board later regulated speech it believed to be protected even beyond the Constitution.

62 77 N.L.R.B. 124 (1948).

63 Supra text accompanying note 15 (providing text of section 9).

64 *General Shoe* involved a broad employer antiunion campaign that was, according to the Board, "calculated to influence the rank-and-file employees in their choice . . . [but] contained no threat of reprisal or promise of benefit . . . ." 77 N.L.R.B. at 125. Nonetheless, the Board employed its novel construction of section 9 to overturn the election. Id.

Manufacturing a scientific metaphor to guide its inquiry, the Board declared:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.[65]

With this language the Board held that discharging its election regulation duties under section 9 required it to ensure the presence of laboratory conditions—conditions that may be tainted by acts not themselves constituting unfair labor practices. Crucially, the Board thus found that its section 9 authority to oversee election procedures allowed it to regulate speech that it could not reach through the Act's unfair labor practice mechanisms.[66]

The astonished dissenting members found it "paradoxical, to say the least," that the Board would adopt such an intrusive interpretation of its section 9 power "after Congress ha[d] so strongly rejected the

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[65] Id. at 127 (internal citations omitted). The majority explained their position in more detail:

> Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative. . . . When a record reveals conduct so glaring that it is almost certain to have impaired employees' freedom of choice, we have set an election aside and directed a new one. Because we cannot police the details surrounding every election, and because we believe that in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. The question is one of degree.

Id. at 126 (internal citations omitted). The cases referred to in the Board's opinion uniformly arose prior to Congress's enactment of section 8(c). Id. at 126-27, 127 n.10. It is also noteworthy that the "conduct" in question in *General Shoe* was employer speech that by the Board's admission "contained no threat of reprisal or promise of benefit and appear[ed] to be only such expressions of opinion as are excluded from our consideration in an unfair labor practice case by [section 8]." Id. at 125.

[66] Although the Board's ability to regulate elections in some fashion has never been questioned seriously, the statute itself provides for only the most ministerial of duties. See supra note 15 and accompanying text (providing text of and describing Board's authority under section 9).

One essential structural point is that the initial use of section 9 to regulate speech instead of section 8 typically results in the same conclusion: The employer is found to have committed an unfair labor practice. See infra note 113 and accompanying text (describing how employers commit unfair labor practice to obtain review of representation election decision). See generally Part II.A.1 (arguing against distinctions between section 8 and section 9 powers).

Board's prior construction of the Act in its relation to the Constitutional guarantee of free speech."[67] The dissent argued that, given the "full freedom which the amended Act envisages," the Board cannot be justified in setting aside an election in circumstances where the employer merely "avails himself of the protection [for speech] which the statute specifically provides."[68] As *General Shoe* has received rather minimal judicial examination, however, the expansive laboratory conditions doctrine continues to govern the field of representation campaign speech.

### *B. Stasis:* General Shoe *in the Circuit Courts*

The Board's expansion of its own authority, arguably in circumvention of Congress's intent in enacting section 8(c), should have made *General Shoe* the target of vigilant judicial review. The Board, however, has employed the doctrine for over fifty years;[69] the Supreme Court has never reviewed the doctrine,[70] and few courts of appeals cases have presented it directly. Courts that have examined the

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[67] *General Shoe*, 77 N.L.R.B. at 131 (Reynolds & Gray, Members, dissenting in part).

[68] Id. (Reynolds & Gray, Members, dissenting in part).

[69] The Board, however, has not applied the doctrine consistently. Rather, "[t]he Board need not be haunted by that 'foolish consistency' which 'is the hobgoblin of little minds.'" Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 409 (9th Cir. 1954). In fact, the Board's treatment of speech highlights the political composition of the Board and its influence on doctrine. See, e.g., Note, supra note 17, at 764-65 ("The Eisenhower Board . . . essentially returned to the pre-General Shoe notion that an election would not be set aside unless an unfair labor practice was found. The Kennedy [Board], on the other hand, . . . vigorously enforced the 'laboratory conditions' concept."). The Board's vacillation on speech issues is most glaring in the misrepresentation context, where it reversed itself twice in five years. Compare Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962) (holding that substantial departure from truth justifies setting aside election), and Gen. Knit, Inc., 239 N.L.R.B. 619, 620 (1978) (same), with Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 132-33 (1982) (holding that Board will not set aside elections based on factual misrepresentations absent extraordinary circumstances), and Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1311-12 (1977) (same). In response, Judge Posner unleashed a scathing criticism of the Board's "inability to decide what standard to use in policing elections." Mosey Mfg. Co. v. NLRB, 701 F.2d 610, 613 (7th Cir. 1983).

[70] The Court has heard at least one case that might suggest the Court's implicit endorsement of the laboratory conditions doctrine. In NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973), union officials circulated "recognition slips" among the employees, telling the employees that if the union won the election those who signed the cards would not have to pay what was alternately called a "fine" and an "initiation fee." Id. at 272-73. The Court found that this scheme violated the principles of employee free choice, stating "[b]y permitting the union to offer to waive an initiation fee . . . the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." Id. at 277. This case, however, seems much more like the early procedural regulation cases than the substantive regulation of speech in *General Shoe*. See infra note 174.

doctrine have uniformly upheld it for a variety of reasons including, most prominently, the application of broad principles of deference.[71]

The Ninth Circuit's decision in *Foreman & Clark, Inc. v. NLRB*,[72] the first to review *General Shoe*, exemplifies this deferential posture. There, the Board directed an election for a unit consisting of certain employees in nine of the employer's retail stores. During the two days prior to the election, the company's president visited each of these stores, making informal speeches to the employees on company time.[73] The union lost the election by a single vote, and immediately protested, arguing that they did not have the opportunity to reply to the employer's speeches.[74] The company responded by arguing that because the speeches were neither threatening nor promising, setting aside the election "would directly contravene Section 8(c) of the Act . . . and the guaranty of freedom of speech in the First Amendment to the Constitution of the United States," and requested that the Board certify the results of the election.[75] Although the Board conceded that there was no suggestion that the employer's speech went beyond the protection of section 8(c), it invoked the laboratory condi-

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[71] For a fascinating and persuasive historical analysis of the jurisprudence allowing administrative expertise to govern constitutional decisionmaking, see generally Reuel E. Schiller, Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment, 86 Va. L. Rev. 1 (2000). Although Schiller examines the trend toward removing determinations of substantive constitutional law from the purview of administrative agencies, he notably recognizes that labor law is one area where "expertise still protects administrative agencies from constitutional scrutiny in certain instances." Id. at 101.

Although the case law appears to be based on deference, the courts' disinterest in the constitutional difficulties presented by these cases has other plausible explanations. In particular, the major cases regarding the value of campaign speech were decided before the recognition of constitutional value in commercial speech. See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (developing constitutional protection for commercial speech); infra notes 147-57 and accompanying text (discussing relationship between commercial and labor speech and the common justifications for both types of speech); cf. Aleta G. Estreicher, Securities Regulation and the First Amendment, 24 Ga. L. Rev. 223, 223 (1990) (noting that regulatory limitations on speech related to securities markets, while "unremarkable" before development of commercial speech protection, now "seem[ ] anomalous").

[72] 215 F.2d 396 (9th Cir. 1954).

[73] Id. at 400. As a statutory matter, the fact that the employer's speeches may have been in "captive audience" situations seems irrelevant. See supra notes 46, 48.

[74] *Foreman*, 215 F.2d at 400.

[75] Id.

tions doctrine,[76] set aside the election, and subsequently certified the results of the second election in favor of the union.[77]

On appeal, the Ninth Circuit affirmed, arguing that "it will not do for courts to give lip-service to the 'expertise' of an administrative agency, and then scrutinize with a captious eye and weigh with an apothecary's scale every finding made by such an agency."[78] Guided by this deferential framework, the court found that the Board's decision was "a proper exercise of the Board's wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."[79]

A year later, in *NLRB v. Shirlington Supermarket,*[80] a divided Fourth Circuit upheld a Board order similar to that in *Foreman*. The majority's reasoning consisted of three parts. First, the court quoted *General Shoe* at length for the proposition that "[w]hile an unfair labor practice might or might not be ground upon which the Board would be justified in acting in invalidating an election, infringement of rules adopted to secure a fair and untrammeled expression by the em-

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[76] The Board found that the "locations of the nine stores involved" and the "amount of time necessary to cover these distances . . . [made] it clear that the Employer by so timing his remarks precluded the possibility of the union being able to request and be given a similar opportunity to speak." Id. at 401. Thus, the Board concluded, the employer improperly "prevented the employees from hearing 'both sides of the story.'" Id.

[77] Id. at 400-01. After a technical unfair labor practice proceeding based on the company's failure to bargain with the newly elected union, the Board upheld its previous decisions and directed the company to cease and desist from its refusal to bargain. Id.

[78] Id. at 398. The Court also "consider[ed] . . . briefly" the merits of the company's argument that the lack of evidence or mere allegation that its speeches were unprotected meant that setting aside the first election was a "violation of the guaranty of freedom of speech in the First Amendment." Id. at 408. Proving that models of brevity are not always models of clarity, the court stated in full: "As we have already seen, representation proceedings are essentially informal, not adversary. They are not even litigation, but investigation. There was no interference with the Company's freedom of speech in this proceeding." Id. at 408-09 (internal quotation marks and citations omitted).

[79] Id. at 410 (internal quotation marks omitted, quoting NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946)).

[80] 224 F.2d 649 (4th Cir. 1955). Here, the employer began making antiunion speeches to his employees a few hours prior to the election. Id. at 650-51. After the union lost the election it argued that the timing of the speeches denied it the opportunity to respond. The Board set aside the election, stating the timing of the speeches denied the union "a substantially equal opportunity for presentation of the Union's views" and that "such conduct . . . prejudiced that atmosphere we believe is essential to a fair exercise of their franchise by the voters." Id. at 651. The Board found further that the timing "was not counteracted by the absence of evidence as to a no-solicitation rule or the opportunities which the Union may have had to present its views to the employees under other circumstances." Id. In other words, even if the union had extensive opportunities to solicit and propagandize otherwise, the employer's speech still would have violated laboratory conditions.

ployees would unquestionably furnish such ground."[81] Second, the court cited *Foreman* as authority, noting that it was "practically on all fours with the case at bar."[82] Finally, as in *Foreman*, the court found that the Board had wide discretion in regulating election procedures,[83] and thus refused to consider the merits of the First Amendment claim, stating that "[t]he question here is not one of free speech . . . but of the Board's judgment."[84] Concluding that the Board's judgment must have been sound because the election results changed, the court affirmed.[85]

Judge Soper offered an insightful dissenting opinion. In language strongly reminiscent of the dissent in *General Shoe* itself,[86] Judge Soper attacked the majority and the Board for adopting a position contrary to the "pronouncements of the courts and of Congress."[87] By removing its regulation from the unfair labor practice domain, Judge Soper argued, the Board enabled itself ostensibly to avoid the impact of section 8(c) while "reach[ing] precisely the same end by invoking the provisions of Section 9 of the statute."[88] Referring to these arguments as "sophistry,"[89] Judge Soper found that no matter how broadly the Board construed its section 9 authority, that section could not possibly confer upon the Board the power to infringe upon constitutional rights, which is just what the laboratory conditions doctrine appeared to enable the Board to do.[90] These cases, Judge Soper concluded, could not merely involve questions of discretion and deference.

The doctrine was again sustained on just those grounds, however, by the Third Circuit in *NLRB v. Clearfield Cheese Co.*,[91] which similarly ignored the argument that such a level of deference may be inap-

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81 Id. at 652. In support of its decision that the Board had this power, the majority therefore did not go beyond the case in which the Board first asserted it had the power.

82 Id.

83 The court stated "[w]hether a representation election has been conducted under conditions compatible with the exercise of a free choice by the employees, is a matter which Congress has committed to the discretion of the Board." Id. at 651 (citing *A.J. Tower Co.*, 329 U.S. at 330).

84 Id. at 653.

85 Id. Although this conclusion was unnecessary to the opinion, any number of factors, including turnover, could have affected the outcome of the second election. Most importantly, the Board's sanction against the employer obviously could have a significant effect on employee preferences.

86 See supra note 67 and accompanying text.

87 *Shirlington*, 224 F.2d at 658 (Soper, J., dissenting).

88 Id. at 658-59 (Soper, J., dissenting).

89 Id. at 659 (Soper, J., dissenting).

90 Id. (Soper, J., dissenting).

91 322 F.2d 89 (3d Cir. 1963).

propriate when an agency is charged with a violation of constitutional rights.[92]

With these precedents before it, the Ninth Circuit readdressed the question in *Sonoco Products Company v. NLRB*.[93] The court generally seemed sympathetic to the petitioner's contention that the Board was without the authority under section 9 to regulate pure speech, but it ultimately rejected the claim.[94] The court emphasized the text of section 8(c), and found key the distinction between the unfair labor practice mechanisms explicitly limited by section 8(c) and the Board's election regulatory authority in section 9.[95] Admitting that there was "some force" to the argument that this distinction was "not really meaningful so far as the strictures of section 8(c) are concerned,"[96] the court then found that *Foreman* committed it "to the contrary position."[97] Stating that it could not find the position expressed there "unsound," the court upheld the Board's order.[98]

Finally, the Second Circuit reviewed this doctrinal development in *Bausch & Lomb Inc. v. NLRB*,[99] giving substantial weight to section 8(c)'s textual limitation, and agreeing "with the Third and Ninth circuits that Section 8(c) does not limit the Board's discretion in determining whether an election was conducted under 'laboratory' condi-

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92 Asserting that "[i]t serves no useful purpose to expand upon the proposition that the establishment of procedures and safeguards to insure fairness in elections is entrusted to the Board with a wide degree of discretion," id. at 92 (citing NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946)), the court also cited *Foreman* for the proposition that "in the appraisal by the Board of the bases for refusing to certify an election deemed contaminated, it is not required to rely only on conduct which would qualify as an unfair labor practice...." Id. (citing Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 409-10 (9th Cir. 1954)).

93 399 F.2d 835 (9th Cir. 1968).

94 Id. at 838. The court noted that the Board "may here have approached [the] limit" where "isolated and insignificant remarks by employer or union representatives may be taken out of context or blown out of proportion by the Board," but felt "constrained to hold that the line was not crossed." Id.

95 Id. The text of section 8(c) explicitly limits its applicability to the unfair labor practice context. But see infra Part II.A.1 (arguing that section 8(c) should apply to election contexts).

96 *Sonoco Products*, 399 F.2d at 838; see infra Part II.A.1 (arguing that textual distinction cannot support laboratory conditions doctrine).

97 *Sonoco Products*, 399 F.2d at 838.

98 Id.

99 451 F.2d 873 (2d Cir. 1971).

tions."[100] A much more recent Sixth Circuit decision, *Contech Division, SPX Corp. v. NLRB*,[101] rests on similar grounds.

Review of these cases indicates that although courts consistently have upheld the Board's application of the laboratory conditions doctrine to regulate speech, their analysis of the issue has been unsatisfactory.

## II

## FROM THE LABORATORY TO THE MARKETPLACE

The cases presented in Part I indicate the unwillingness of the courts of appeals to examine the substantive merits of the laboratory conditions doctrine's regulation of pure speech. This Part provides reasons to reject the soundness of those decisions. Part II.A.1 argues that the doctrine constitutes an untenable statutory interpretation of the Act. Part II.A.2 then argues that the Board's application of the doctrine often infringes on constitutionally valued and protected free speech rights. Especially given the accepted canon of statutory construction advising rejection of interpretations that may contravene constitutional principles,[102] this section provides powerful reasons to reject the doctrine even if it were a defensible construction of the statute. Finally, Part II.A.3 argues that a general policy of according the Board an appropriate level of discretion or deference should not affect this analysis. Certainly, deference to the Board must not trump

[100] Id. at 877-78. Uniquely, however, the Second Circuit addressed the merits of the employer's First Amendment claim. The court admitted that the doctrine might have a "minimal chilling effect" on speech but found that "the incidental effects of regulation on the rights of employer and union must be weighed against the interest of employees and the public at large in free, fair and informed representation elections," and concluded that a balance of those interests justified this regulation. Id. at 879. This case is distinguishable from the cases reviewed above, however, in that it dealt specifically with the Board's regulation of factual misrepresentation. Id. at 874-75. In such a situation, the content of the speech diminishes both the employer's interest in conveying its position and the employee's interest in receiving information relevant to her decision. Indeed, the court specifically noted that the case before it did not involve an attempt by the Board to "censor or evaluate the 'mere expression of antiunion sentiment,'" suggesting its analysis would not apply to an application of the laboratory conditions doctrine to regulate pure speech. Id. at 879 (quoting Luxuray v. N.L.R.B., 447 F.2d 112, 116 (2d Cir. 1971)).

[101] 164 F.3d 297, 307 (6th Cir. 1998).

[102] See, e.g., Jones v. United States, 526 U.S. 227, 239 (1999) ("'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" (quoting United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909))); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) (noting, regarding NLRA, that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). But see generally William K. Kelley, Avoiding Constitutional Questions as a Three-Branch Problem, 86 Cornell L. Rev. 831 (2001) (criticizing canon of avoidance).

legitimate constitutional concerns, and upon close examination the case law relied upon by courts reviewing the laboratory conditions doctrine fails to authorize broad deference in these situations. Part II.B concludes with an analysis and endorsement of a recent D.C. Circuit case that decisively rejected *General Shoe* reasoning in the RLA context.

### *A. Rejecting the Laboratory Conditions Doctrine*

#### *1. Statutory Interpretation*

Both the courts and the Board have relied heavily on the textual divide in the Act between unfair labor practice and representation election contexts, but there are compelling reasons to reject this distinction as the key to interpreting the Act's protection of speech. The somewhat hyperbolic free speech rhetoric during the debates over section 8(c)[103] simply does not fit comfortably within the statutory interpretation favored by the Board, one that in practice reduces Congress's extremely prospeech position to a technical provision allowing the Board to continue to regulate pure speech. In the face of such a strained reading, the textual distinction is not compelling.[104]

Although section 8(c) explicitly restricts itself to unfair labor practice proceedings, its enactment took place before the Board's expansion of its section 9 power in *General Shoe*.[105] This fact is crucial; Congress could not have anticipated the extent to which the Board would expand its section 9 power, and there is no evidence that Congress considered that the Board would be able to regulate speech beyond the section 8 unfair labor practice arena. Congress's decision, then, to house its free speech provision within section 8 was entirely appropriate, and cannot be relied upon to justify the laboratory conditions doctrine.

Whatever the implications of the arguments proffered by the Board and courts on behalf of *General Shoe*,[106] at no point did Congress ever decide to adopt any significant limitations on its free speech

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103 See supra notes 47-59 and accompanying text.

104 As this Note does not argue for a complete deregulation of campaign speech, it does not succumb to the charge that similar critiques of *General Shoe* just "overlook [the] fundamental paradox" that statutory organizational rights of employees "simply cannot coexist with unfettered free speech rights." deCastro, supra note 9, at 1166.

105 Section 8(c) became law in 1947, supra note 59, one year before the Board decided *General Shoe*. Gen. Shoe Corp., 77 N.L.R.B. 124 (1948).

106 Note, for example, the Board's statement in Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 n.11 (1962), that "Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases."

provision.[107] In fact, Congress designed the provision in large part to limit the Board's regulation of speech in representation election contexts.[108] Moreover, given the prospeech milieu surrounding section 8(c)'s adoption, it is unlikely that had Congress foreseen *General Shoe* it would have so limited that section's efficacy by restricting its applicability. Hence, the statutory language cannot justify the Board's regulation of this speech.

Nor can any distinction between the unfair labor practice and election regulatory contexts serve to justify the laboratory conditions doctrine. One possible distinction would involve remedies: If a speaker faced a more severe penalty under section 8 than under section 9, perhaps speech under the latter would be less chilled, justifying more liberal regulation under that section. In most circumstances, however, the penalties under both sections are virtually identical.

Assuming that section 8(c) had never been adopted, an employer whose speech was later found to constitute an unfair labor practice likely would face a cease and desist order and, where the violation has an impact on the election, the vacation of a favorable election result. If the Board finds, under section 9, that employer speech tainted an

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[107] On the contrary, ambiguous qualifications of the section were removed to ensure that the provision could not be construed to restrict speech. See supra notes 57-59 and accompanying text.

In NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 62-63 (1964), the Supreme Court endorsed a similar rationale, rejecting a very broad statutory interpretation by the Board that simply was unsupported by the legislative history. Such broad interpretations of the Act have been viewed with particular skepticism when they may implicate constitutional values. See, e.g., *Catholic Bishop*, 440 U.S. at 505-06 ("[I]n the absence of a clear expression of Congress' intent . . . we decline to construe the Act in a manner that could [require] the Court to resolve difficult and sensitive [constitutional] questions."); cf. infra Part II.A.2 (arguing that laboratory conditions doctrine is unconstitutional as applied).

One may be tempted to argue that Congress's failure to enact corrective legislation indicates that the Board's statutory interpretation is correct, especially given that at least some in Congress were aware of the interpretation. See Note, Free Speech and Free Choice in Representation Elections: Effect of Taft-Hartley Act Section 8(c), 58 Yale L.J. 165, 174 n.38 (1948) (quoting Sen. Ball's suggestion during year *General Shoe* was decided that Board's "refusal to apply [section 8(c)] to representation cases" may require further legislation) (citations omitted). Ensuring proper application of section 8(c) to representation cases was in fact one of the proposed amendments to the Act on the legislative agenda in 1978, amendments that made extensive progress before being stalled by a Senate filibuster. See generally Note, supra note 17, at 792-97 (discussing and analyzing various proposals considered by Congress in 1978). Given the political complexities involved in enacting labor law reform, however, as well as the broad focus of bills actively considered by Congress, it would seem implausible to read much from Congress's failure to explicitly reject *General Shoe*. For an excellent examination of the Supreme Court's inconsistent jurisprudence on legislative inaction, see generally William N. Eskridge Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67 (1988).

[108] See generally supra notes 47-59 and accompanying text (examining adoption of section 8(c)).

election, the sanction is almost precisely the same. Both the activity (speech) and the crucial penalty (setting aside a favorable election result) are identical under section 8 and section 9.[109] Consequently, speech suffers identical chilling or subsequent punishment under either section. Thus, the impact on a campaign speaker of the Board's regulation under section 9 is the same as it would be under section 8.[110]

Noting that regulation under section 9 does not require finding that the speaker violated the Act does not save this position. Unlike Board decisions regarding unfair labor practices, Board decisions under section 9 are not subject to direct appeal.[111] Employers are therefore forced to commit some formal violation of the Act—typically a refusal to bargain with the union after losing the rerun election[112]—in order to obtain judicial review of unfavorable section 9 rulings. Thus, whether speech is regulated under section 8 or section 9, the employer will end up breaking the law. This eliminates any institutional incentive for employers to avoid violating the Act and eviscerates the stigma of doing so.[113]

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109 The cease-and-desist order, which does not follow a laboratory conditions violation, provides essentially no difference. One could argue that without the threat of a contempt sanction employers would just continue to violate laboratory conditions, but not the Act, indefinitely. Not only is this inherently implausible—employers are simply not clever enough to tread the perilously indefinite line—but the evidence bears out that employers do not even try. See, e.g., US Airways, Inc. v. Nat'l Mediation Bd., 177 F.3d 985, 988 (D.C. Cir. 1999) (reporting that after National Mediation Board (NMB) found laboratory conditions violation employer remained silent on issues barred by NMB order). Moreover, the union ultimately is successful in many cases in which the Board directs a second election, such as those examined supra Part I.B. Thus, even if the employer initially was successful at calibrating its behavior, its efforts soon might be rendered useless.

110 This may be an overstatement, as the Board's relatively infrequent and inconsistent use of the laboratory conditions doctrine allows employers to discount possible penalties. See supra note 69 (discussing vacillating and political use of this doctrine). This is offset, though, by the fact that the Board has never produced any concrete guidelines for what the employer can say and still avoid *General Shoe*. Consequently, employers may withhold more speech than necessary to avoid the Board's vaguely defined violations.

111 The Act provides aggrieved parties access to federal courts only upon a "final order of the Board." 29 U.S.C. § 160(f) (1994). Since Board decisions in representation cases under section 9 are not designated as "final orders," they are not subject to direct review. See Am. Fed'n of Labor v. NLRB, 308 U.S. 401, 409 (1940). When final orders in unfair labor practice proceedings are based "in whole or in part" on representation decisions, however, review of the final order includes review of the underlying representation decisions. § 159(d).

112 It is an unfair labor practice for an employer to refuse to bargain with representatives of employees. § 158(a)(5).

113 Moreover, it is not true that a speaker's pure speech will never result in a violation of the Act. As noted in the text, if the Board sets aside an election because of a laboratory conditions violation and the union wins the second election, an employer very often will commit a technical violation of the Act in order to obtain judicial review. Presuming the reviewing court affirms the Board's finding of an unfair labor practice, the employer will

Moreover, the distinction is inherently implausible. In the section 9 scenario, the Board punishes the speaker after finding that she, for instance, "created an atmosphere calculated to prevent a free and untrammeled choice by the employees."[114] The Board both condemns and punishes the action, and there is no reason to think that the mere invocation of the words "unfair labor practice" makes the condemnation any more than marginally worse. Since the specific desire not to be labeled a lawbreaker likely never enters into the speaker's decisionmaking calculus, Board regulation of speech has identical consequences no matter what grant of authority the Board chooses to employ.

Finally, recalling arguments made with regard to political elections,[115] one might argue that the special circumstances of representation elections serve to distinguish the section 8 and section 9 contexts. Even if the particular qualities of representation elections might justify such a distinction,[116] both the statute itself—which relies on both section 8 and section 9 to regulate elections—and the legislative history—where section 8(c) was adopted in large part to limit the Board's regulation of campaign speech—appear to reject such a distinction.

### 2. *Constitutional Law*

To this point this Note has argued that neither a distinction based on statutory language nor a distinction between the unfair labor practice and representation election contexts can justify the Board's statutory interpretation allowing it to regulate speech through the laboratory conditions doctrine.[117] This section argues that the Board's statutory interpretation is also unconstitutional.

Several features of the Board's doctrine serve as useful background for this analysis. First, remember that the speech involved here is at least prima facie due the same level of constitutional protec-

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have been found to have violated the Act simply because the employer sought appellate review of the restriction on its speech. This unfortunate scenario was noted (but disregarded) in Sonoco Products Co. v. NLRB, 399 F.2d 835, 838 (9th Cir. 1968).

114 Gen. Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

115 See infra note 132 and accompanying text.

116 Contra infra notes 158-65 and accompanying text.

117 Scholars have suggested practical worries about the application of section 8(c)'s limitations to representation elections. See Sylvia G. Eaves, Note, Employer Free Speech During Representation Elections, 35 S.C. L. Rev. 617, 646 (1984) (arguing section 8(c) "ignores completely the inability of the Board and the federal courts . . . to articulate a clear and reliable standard"); Note, supra note 17, at 779 (calling congressional application of section 8(c) to representation elections "positive step" but stressing importance of "procedural safeguards").

tion as speech on virtually any other matter.[118] Our constitutional practice, then, dictates that regardless of the countervailing considerations, campaign speech is not receiving the constitutional respect it is due. Even assuming that the statutory protection for speech was limited to the unfair labor practice context,[119] section 8(c) would not be the last word on the protection afforded this speech. Neither the Board nor the courts have appreciated that a thin construction of the provision necessitates a constitutional inquiry.

Second, note that section 8(c) essentially acts as the functional equivalent of the rule barring prior restraints on speech.[120] The Board's original doctrinal stance toward employer speech, strict neutrality, was fundamentally a prior restraint: The speaker was not permitted to speak and was punished immediately for violating the rule.[121] By enacting section 8(c), Congress indicated that it would not tolerate that position with regard to pure speech any more than it tolerates other prior restraints.[122] With its laboratory conditions doctrine, the Board responded to Congress's mandate by enacting an ex post restraint in which speakers nominally are not barred from speaking, but are punished for doing so in ways virtually identical to those under the unconstitutional strict neutrality regime.[123]

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118 See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) ("An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"); Thomas v. Collins, 323 U.S. 516, 537-38 (1945) ("[A]ttempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty.").

119 Contra supra Part II.A.1 (rejecting possible distinctions between section 8 and section 9 contexts).

120 See generally Lovell v. Griffin, 303 U.S. 444 (1938) (finding facially invalid a statute requiring city's written permission prior to publication); Near v. Minnesota, 283 U.S. 697 (1931) (holding that perpetual injunction of seditious newspaper was unconstitutional prior restraint).

121 See Alexander v. United States, 509 U.S. 544, 550 (1993) ("The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." (internal quotation marks omitted)).

122 Prior restraint doctrine has previously been invoked in labor contexts. See *Thomas*, 323 U.S. at 538-41 (employing prior restraint language to strike down statute requiring organizers to register).

123 See supra notes 109-14 and accompanying text (demonstrating substantive similarity in punishment under section 8 and section 9). The failure of the statute to provide for direct appellate review compounds this worry. See Freedman v. Maryland, 380 U.S. 51, 58 (1965) ("[I]f it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final."); Stephen R. Barnett, The Puzzle of Prior Restraint, 29 Stan. L. Rev. 539, 556-57 (1977) (arguing that even expeditious review of gag orders may not prevent imposition of prior restraints on free speech). Moreover, many of the noted defects of prior restraints are particularly applicable to the present context. See generally Vincent Blasi, Toward a Theory of Prior Restraint: The

Finally, standardless doctrines generally should be viewed with skepticism. The Board has never set any real guidelines for its application of the laboratory conditions doctrine; instead, each decision is made with nearly unrestrained agency discretion. Unguided discretion in situations involving constitutionally protected rights is often a touchstone of unconstitutionality.[124] It is appropriate, then, to review the doctrine with care.[125]

Traditional First Amendment analysis confirms that the use of the laboratory conditions doctrine to restrict campaign speech is constitutionally infirm. Unfortunately, the Supreme Court has provided little guidance regarding exactly how to characterize this type of regulation for First Amendment purposes.[126] In *Thomas*, the Court found that restrictions on labor speech are justified only by a "clear and present danger,"[127] but such a First Amendment analysis has become anachronistic.[128] Instead, the Court now considers a variety of factors to de-

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Central Linkage, 66 Minn. L. Rev. 11, 84-85 (1981) (noting defects of prior restraints, including abstract and unduly speculative adjudication, overuse by regulatory agents, and distortion of audiences' perception of challenged message).

124 See, e.g., City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) (noting "long line of precedent" for "the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship"); *Freedman*, 380 U.S. at 56 ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office."); see also Henry P. Monaghan, The First Amendment's "Due Process," 83 Harv. L. Rev. 518, 520 (1970) ("Central to first amendment due process is the notion that a judicial, rather than an administrative, determination of the character of the speech is necessary.").

125 Requiring judicial review of determinations on speech questions seems particularly appropriate in the labor context. "[A] labor board . . . when dealing with questions of speech, is more likely to see the problem in terms of labor-management relations than in terms of first amendment interests. Courts, on the other hand, do not suffer congenitally from this myopia." Monaghan, supra note 124, at 523.

126 The laboratory conditions doctrine must be analyzed like any other binding regulation. It is irrelevant that the doctrine is quasi-judicially created, especially given that the Board has refused to employ its rulemaking authority effectively despite severe criticism. E.g., Samuel Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 Admin. L. Rev. 163 (1985) (arguing for increased use of rulemaking authority); Note, NLRB Rulemaking: Political Reality Versus Procedural Fairness, 89 Yale L.J. 982, 995 (1980) (arguing that NLRB's failure to engage in rulemaking enables it to "legislate in controversial areas without giving critics a clear and final rule to attack"). See generally David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965) (examining benefits of rulemaking by agencies). Whatever the propriety of the Board's decisions regarding when to engage in rulemaking, those decisions should not immunize Board policy from constitutional scrutiny.

127 *Thomas*, 323 U.S. at 530.

128 Notably, the Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the last Supreme Court case to address the issue of campaign speech, failed even to mention the "clear and present danger" test.

termine what level of scrutiny the regulation deserves. Of particular relevance here are the doctrines governing the regulation of speech through time, place, and manner restrictions,[129] the regulation of speech combined with nonspeech elements,[130] and the regulation of commercial speech.[131] The remainder of this section demonstrates that neither these constitutional doctrines, nor the suggestion of recent commentators that the unique circumstances surrounding political elections may justify special regulation of political campaign speech,[132] can sustain the current laboratory conditions regime.

That the laboratory conditions doctrine is merely a legitimate time, place, or manner restriction is perhaps the most intuitive among these doctrinal frameworks.[133] Such limitations on speech "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[134]

Although it is arguable that the Board's restrictions on speech under the laboratory conditions doctrine are content based, and thus presumptively unconstitutional, it can be assumed that the Board's true aim is not to chill speech, but to discharge its section 9 duty to ensure accurate elections.[135]

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129 See generally, e.g., Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (holding Park Service regulations restricting camping area for protesters met time, place, and manner requirements).

130 See generally, e.g., United States v. O'Brien, 391 U.S. 367, 376 (1968) (permitting incidental limitations on First Amendment freedoms upon showing sufficiently important governmental interest).

131 See generally, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (limiting suppression of commercial speech to "not more . . . than is necessary to serve [the state] interest").

132 See generally, e.g., C. Edwin Baker, Campaign Expenditures and Free Speech, 33 Harv. C.R.-C.L. L. Rev. 1 (1998) (developing argument for regulation of political campaign speech).

133 Time, place, and manner restrictions actually have little in common with laboratory conditions cases in which the Board sets aside the election because the employees' freedom of choice was somehow impaired by campaign speech. This doctrinal framework, therefore, is only plausible if the analysis of time, place, and manner restrictions is limited to those cases in which the Board's use of laboratory conditions consists of placing presumptive restrictions on speech in certain very limited and well-defined contexts. E.g., Peerless Plywood Co., 107 N.L.R.B. 427 (1953) (holding that laboratory conditions are violated when massed assembly speeches are held within twenty-four hours of election); Bonwit-Teller, Inc., 96 N.L.R.B. 608 (1951) (holding that employers violate Act by denying union's request to reply to captive audience speech), overruled by Livingston Shirt Corp., 107 N.L.R.B. 400 (1953). As this Section will explain, the doctrine fails even in that narrow category of cases.

134 *Clark*, 468 U.S. at 293.

135 Wimberly and Steckel have argued that, along with having other constitutional infirmities, the laboratory conditions doctrine is content based. Wimberly & Steckel, supra

Similar to the doctrinal hurdles facing the time, place, or manner restrictions on speech, the regulation of nonspeech elements must "further[ ] an important or substantial governmental interest . . . unrelated to the suppression of free expression," and only impose those incidental restrictions on speech that are "no greater than is essential to the furtherance of that interest."[136]

The laboratory conditions doctrine cannot satisfy the standard of constitutionality under either of these frameworks, for the Board has little interest, let alone a significant, substantial, or important interest in regulating this conduct. Certainly, determining the appropriate scope of the regulation of campaign speech must take into account the strong interests that employers, employees, the Board, and the public at large have in accurate elections and weigh those interests against the free speech rights of the employer,[137] but that calculus is not the Board's to perform.

Under the current administrative regime, the Board and Congress fulfill distinct roles. Congress works to set policy goals that strike the appropriate balance between competing societal interests and enact labor legislation that enables the Board to resolve concrete disputes in furtherance of that balance. The Board, in turn, must use its statutorily conferred authority to effectuate the policies adopted by Congress. In the evaluation of labor speech, Congress has twice

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note 17, at 553-54. Their argument is not without merit. The Board only sets aside an election after it finds a laboratory conditions violation. Because some speech will be found to have tainted the election, while other speech will not, and the only relevant difference is the content of the speech, the regulation itself seems content based. If accepted, such arguments provide independent reason to reject the doctrine, though their real force applies only to those broader applications of laboratory conditions that have been presumptively removed from the time, place, and manner inquiry. Supra note 133.

136 United States v. O'Brien, 391 U.S. 367, 376-77 (1968). One might argue that the doctrine is unconstitutional simply because the Board's interest in regulation stems from the communicative quality of the conduct being regulated and such regulation would not be "unrelated to the suppression of free expression." Id.; see, e.g., John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1497 (1975) ("The critical question . . . [is] whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating."). Since there really is no noncommunicative aspect of campaign speech, this may prove only that the nonspeech framework is clearly inappropriate. See Wimberly & Steckel, supra note 17, at 554 (noting that many laboratory conditions cases are unrelated to conduct). Because the Board often refers to speech as conduct, however, the nonspeech argument cannot be ignored. For example, in *General Shoe* the Board wrote in reference to employer speech: "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." Gen. Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

137 NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (discussing need to balance various rights, including speech rights of employer and statutory rights of employee).

crafted such a balance of competing interests. First, Congress determined the need for comprehensive labor legislation of this sort and created the limited regulatory framework within which the Board operates.[138] In addition, after considering the Board's use of section 8 to regulate campaign speech—a situation directly analogous, if not identical, to the Board's use of section 9 toward the same end[139]—Congress emphatically mandated that constitutional free speech rights trump the statutorily defined organizational rights that it had created. Arguments for the constitutional validity of the laboratory conditions doctrine may have been meritorious if Congress had asserted a compelling state interest in regulating pure campaign speech, but Congress in fact appears to have adopted the opposite course.[140] And although the Board must be allowed to exercise some discretion to interpret its authority to reach situations not expressly contemplated by Congress's original delegation,[141] such a concern is not implicated in the present context; there is nothing novel about representation elections or the Board's corresponding regulation of campaign speech. Being wholly a creature of the regulatory framework from which it operates, the Board may not assert a substantial government interest where Congress has disclaimed one.[142] There is, therefore, no justification for substituting the Board's alternate calculation of the relevant interests for Congress's clearly applicable one.[143] In fact, Congress's

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138 For a unique account of Congress's enactment of the original NLRA (the Wagner Act), see generally Kenneth M. Casebeer, Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act, 42 U. Miami L. Rev. 285 (1987).

139 See supra Part II.A.1 (arguing there is no substantial difference).

140 See supra notes 47-59 and accompanying text.

141 See Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) ("An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." (internal citations and quotation marks omitted)); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) ("[W]e must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life.").

142 See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."); 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951) ("[Courts] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.").

143 An attempt to justify the doctrine by referencing, for example, a theory that employer speech is inherently coercive to an employee, is misplaced. Even if some of the speech is "coercive" in some other sense, by adopting section 8(c) Congress meant to protect all speech that did not include a threat of reprisal or promise of benefit, and the Board is bound by that determination. Moreover, the Supreme Court, a body much more competent than the Board to evaluate constitutional interests, has found a constitutional ground for that protection. See, e.g., *Gissel*, 395 U.S. at 617 ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.").

calculus seems even more compelling in the section 9 context, where the doctrine's intentionally vague and constitutionally troublesome contours leave the Board with nearly unbounded discretion.

Moreover, the extant doctrinal exceptions to the constitutional protection of speech make any claim by the Board of a substantial interest inherently suspect. Since coercive speech is unprotected, the only situations contemplated by regulation of speech under section 9 are those in which constitutionally protected noncoercive speech so taints an election that it justifies the extraordinary remedy of setting that election aside. It is implausible that noncoercive speech in this context could have such an impact.[144] In sum, finding that the Board's regulation of speech here narrowly advances a substantial interest requires not only imagining unrealistic factual scenarios, but supplanting a considered judgment by Congress on an issue that is, at the very least, directly analogous.

Finally, the laboratory conditions doctrine is not narrowly tailored. On the contrary, the Board specifically has left the metaphoric doctrine "vague and flexible,"[145] allowing it to use the doctrine to further specific policy objectives and achieve specific results.[146] Neither the doctrines related to time, place, or manner restrictions, nor the regulation of nonspeech elements, therefore, can justify *General Shoe*.

Similar infirmities infect attempts to justify the laboratory conditions doctrine with an appeal to commercial speech doctrine. While the exact level of protection that the First Amendment affords com-

144 The classic empirical study of the impact of election campaigns upon employees, Julius G. Getman et al., Union Representation Elections: Law and Reality (1976), came to a much stronger conclusion: Employees generally are unlikely to be affected by election campaigns at all. Id. at 27-32; see also Stephen B. Goldberg et al., Union Representation Elections: Law and Reality: The Authors Respond to the Critics, 79 Mich. L. Rev. 564 (1981); Laura Cooper, Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision, 79 Nw. U. L. Rev. 87, 102-03 (1974) (finding partial support for Getman study's conclusions). But see generally, e.g., Patricia Eames, An Analysis of the Union Voting Study From a Trade-Unionist's Point of View, 28 Stan. L. Rev. 1181 (1976) (criticizing and challenging Getman study); Thomas A. Kochan, Legal Nonsense, Empirical Examination and Policy Evaluation, 29 Stan. L. Rev. 1115 (1976) (same); Weiler, supra note 34 (same). Even if campaigns sometimes do affect employees, the study suggests empirical support for the intuitive conclusion that noncoercive speech is unlikely to impact election results seriously.

145 Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1312 (1977).

146 That the laboratory conditions doctrine is easily manipulated to effectuate the Board's contingent policy goals is evident in, for example, the Board's oscillating use of the doctrine depending upon the political composition of the administration and, consequently, the Board itself. See supra note 69. Such oscillation may be expected in many fields of regulation but seems unacceptable where constitutional values such as free speech are implicated.

mercial speech may be currently in flux,[147] the presently still-accepted doctrine is that developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[148] which, like the above frameworks, requires that restrictions on commercial speech directly and narrowly advance a substantial government interest.[149] Thus, just as above, because the doctrine is neither narrowly tailored nor supported by a substantial governmental interest, it would fail under this constitutional analysis. Because commercial speech provides an analogy to labor speech, and is consequently perhaps the most appropriate doctrinal framework from which to analyze restrictions on that speech, this conclusion may be the best evidence of the doctrine's unconstitu tionality.[150]

In fact, commercial speech jurisprudence strongly reinforces the conclusion that representation election speech should be protected. Although commercial speech, being devoid of opinion, does not implicate the metaphoric marketplace of ideas, the Court consistently has found that our actual marketplace, that is, our free enterprise economy, requires that private decisions "be intelligent and well informed. To this end, the free flow of commercial information is indispensable."[151] Similarly, if employees are to make responsible decisions regarding their selection of a bargaining representative, they must be allowed access to all of the information that might be relevant to that

147 The Supreme Court has been actively taking commercial speech cases in recent terms. Various members of the Court have expressed serious dissatisfaction with aspects of their present commercial speech doctrine, best exemplified by the set of conflicting opinions in 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996), and a substantial doctrinal shift may be forthcoming. If anything, however, it appears from such opinions that the Court may be in favor of expanding constitutional protection for nonmisleading commercial speech, a decision that would reinforce the conclusions in this Note. See also, e.g., United States v. United Foods, Inc., 121B S. Ct. 2334, 2337 (2001) (stating that Court has accorded commercial speech less protection than other forms of expression, but noting criticism of that approach within Court); Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2421 (2001) (Westlaw, SCT File) (noting Court's internal conflict over whether current doctrine insufficiently protects commercial speech).

148 447 U.S. 557 (1980).

149 Id. at 564.

150 Although there has never been a doctrinal merging of the two categories, the Supreme Court has analogized them, see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762-63 (1976), and it recently has been argued that labor speech is really just a species or variant of commercial speech. See Story, supra note 9, at 390-91 (presenting variety of arguments for conclusion that employer speech is "corporate commercial speech"). At the very least, their similarities are several: Both types of speech are economically motivated and doctrinally limited to somewhat less First Amendment protection than, for example, pure political speech.

151 *Va. State Bd.*, 425 U.S. at 765; see also, e.g., *44 Liquormart*, 517 U.S. at 495-96 (noting importance of commercial speech in public life).

decision.[152] The constitutional right of employers and unions to use noncoercive speech to persuade employees about unionization also ensures that employees are fully informed about the consequences of unionization.[153] The Board's use of the laboratory conditions doctrine to penalize speech chills the dissemination of relevant information to the employees and, consequently, taints employees' true preferences.[154] If we are to take seriously the notion that there is considerable value in having informed consumers in the market,[155] a notion that grounds our constitutional protection for commercial speech,[156] courts must not allow the promulgation of doctrine that impairs employees' ability to become well informed.[157]

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[152] See, e.g., NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1108 (9th Cir. 1971) ("It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right."); Bok, supra note 11, at 46-53 (arguing that one basic purpose of election is to permit voters to make well-informed and rational decisions, and that legal limitations are unlikely to "bring about more reasoned decisions").

[153] Cf. *44 Liquormart*, 517 U.S. at 496 (Stevens, J., plurality opinion) ("[T]he same interest that supports regulation of potentially misleading advertising, namely, the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages."); Daniel Halberstam, Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions, 147 U. Pa. L. Rev. 771, 831 (1999) (arguing that commercial speech case law "disclaims significant reliance on the speaker-based model and instead focuses on the listener . . . with the result that the cognizable interests of speaker and listener are harmonized").

[154] See deCastro, supra note 9, at 1191 ("A certification election is indeed arguably more valid under real life conditions . . . than under any sort of 'laboratory conditions.'").

[155] See Getman, supra note 17, at 12 (arguing for recognition of "the value of diversity of expression and the ability of the hearer, as consumer, to make an intelligent choice").

[156] Moreover, labor speech, unlike commercial speech, strongly implicates the marketplace of ideas. Although partially economically motivated, labor speech also represents strongly held beliefs about essentially political issues. This distinction from commercial speech suggests that labor speech should be more protected in the constitutional order; indeed, the Supreme Court has implied just that conclusion. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 576 (1988) (suggesting that labor speech might sometimes constitute commercial speech and be correspondingly "entitled to a lesser degree of constitutional protection," but finding that communications in question did "not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, 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").

[157] It may be argued that labor speech is not as highly valued as other kinds of speech, and thus that some chilling of labor speech may be permissible, but that argument cannot do the work it would need to do. Although the Supreme Court has often invoked a spectrum or hierarchy of different kinds of speech, labor speech must lie relatively high on that spectrum, regardless of the years of Board doctrinal insistence to the contrary. Evidence of the relative value of labor speech is found not only in Congress's specific statutory protection, but in numerous Supreme Court decisions. See, e.g., Thomas v. Collins, 323 U.S. 516, 532 (1945) ("Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." (inter-

Perhaps the most plausible argument for the constitutionality of the laboratory conditions doctrine is one that has not appeared explicitly in either the relevant case law or academic literature. Recent scholarship regarding the constitutionality of the regulation of political campaign speech suggests that elections present exceptions to normal First Amendment doctrine.[158] According to this exceptionalist position, the "institutionally bound"[159] nature of political campaign speech constitutionally allows it to be more widely regulated than other types of public speech.[160] Correspondingly, one might plausibly argue that the institutionally bound nature of representation campaign speech allows it to be more broadly regulated than a traditional First Amendment analysis would originally imply.[161]

Whatever its merits as a theory regarding the regulation of political campaign speech,[162] however, exceptionalism cannot justify the laboratory conditions doctrine. Exceptionalist positions in this context rely for their plausibility on the primacy of political elections, their "special role in democracy."[163] Unlike political elections, how-

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nal quotation marks omitted)). The semipolitical nature of the speech, not to mention its intimate connection with property rights and the freedom of association, provides strong reason to locate labor speech very near the top of any speech-value spectrum. Finally, since the laboratory conditions doctrine would fail even a commercial speech analysis, attempting to justify speech regulation based on the value of labor speech requires the implausible argument that it is less valuable than commercial speech, which is by definition devoid of opinion worth protecting.

158 See generally Baker, supra note 132 (developing and arguing for electoral exceptionalism); Frederick Schauer & Richard H. Pildes, Electoral Exceptionalism and the First Amendment, 77 Tex. L. Rev. 1803 (1999) (arguing that exceptionalist position is consistent with First Amendment doctrine).

159 Institutionally bound speech "refers to situations where resources and activities are authoritatively organized to further or accomplish particular objectives within a limited realm of social life." Baker, supra note 132, at 19.

160 "According to electoral exceptionalism, elections should be constitutionally understood as (relatively) bounded domains of communicative activity. . . . [T]he most common version of electoral exceptionalism would permit restrictions on communicative activity in the context of elections that would not be permitted in other contexts." Schauer & Pildes, supra note 158, at 1805-06.

161 See Burt Neuborne, The Supreme Court and Free Speech: Love and a Question, 42 St. Louis U. L.J. 789, 801 (1998) (stating that union representation elections are already treated as institutionally bound); see also NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969) (noting that representation election takes place in context of "nonpermanent, limited relationship" between employer and employee); supra note 11 and accompanying text (noting similarities between political elections and representation elections).

162 One challenge regards how exceptionalism would specify or delimit relevant categories, such as the distinction between "election" and "politics." See, e.g., Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 Tex. L. Rev. 1751, 1753-55 (1999) (noting that "[d]rawing a line between elections and politics is, in some sense, logically and practically impossible," but defending one such definition of election-related speech).

163 Schauer & Pildes, supra note 158, at 1804.

ever, which plausibly might be said to require certain restrictions on speech to ensure the proper functioning of our democratic processes,[164] a fundamental value underlying our constitutional structure, the representation election is merely a statutory construct meant to facilitate the compilation of employee preferences for a bargaining representative. Devoid of a constitutional value competing with free speech, the exceptionalist position is no longer plausible. Given the jurisprudential background strongly favoring speech, statutory rights may not trump legitimate constitutional rights, whether institutionally bound or not. Such a conclusion echoes the decisions of both Congress and the Supreme Court regarding the value of free speech during representation election campaigns.[165]

### 3. *Administrative Deference and the Board's Discretionary Authority to Regulate Elections*

The arguments presented above generally have been ignored by the courts of appeals. Instead of engaging in their own interpretation of section 9 and the authority it confers upon the Board, the courts have upheld the Board's use of the laboratory conditions doctrine by invoking Supreme Court precedent regarding the Board's discretionary authority to regulate election procedures.[166] This Section argues that, notwithstanding the arguments above, the level of deference

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[164] See, e.g., Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) ("[R]estrictions upon [individual campaign contributions] seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action."); Stephen Breyer, Our Democratic Constitution, 77 N.Y.U. L. Rev. (manuscript at 18, on file with the *New York University Law Review*) (forthcoming June 2002) (same).

[165] If exceptionalism did apply to representation elections, justifying the laboratory conditions doctrine's restrictions on speech would still require a coherent normative argument. Perhaps exceptionalism may in fact ground the Supreme Court's denial of constitutional protection for coercive campaign speech. See *Gissel*, 395 U.S. at 617-18 (holding First Amendment protection extends only to noncoercive representation campaign speech). But see id. (suggesting difference between election in context of "nonpermanent, limited relationship" between employer and employee and "election of legislators"). At the very least, there are clear, albeit statutory, values competing with the very unclear constitutional status of coercive campaign speech. The parallel argument, in defense of the laboratory conditions doctrine, is much more difficult: Generally, the constitutional value of noncoercive campaign speech is well established, see id., and it is at best very unclear how speech that is by statutory and constitutional definition noncoercive could seriously and negatively impact employees' exercise of their organizational rights.

[166] See, e.g., NLRB v. Clearfield Cheese Co., 322 F.2d 89, 92-99 (3rd Cir. 1963) (deferring broadly to Board decision (citing NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946))); Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 400-01 (9th Cir. 1954) (same). But see NLRB v. Savair Mfg. Co., 414 U.S. 270, 272 (1973) (affirming denial of enforcement of Board order that employer bargain with union following contested election).

courts of appeals have to date accorded the Board's interpretation of section 9 requires an overly expansive application of precedent.

The relevant decisions of the courts of appeals have relied extensively on a small set of Supreme Court decisions interpreting the scope of the Board's section 9 authority. The seminal case is *NLRB v. A.J. Tower Co.*,[167] in which an employer challenged the ballot of an individual who was still on the payroll and thus technically eligible to vote but no longer officially an employee of the company.[168] In a decision laden with dicta, the Court upheld the Board's rejection of the employer's complaints.[169] This dicta, consumed in *General Shoe* contexts, has been read to imply virtually plenary authority for the Board to regulate elections.[170] Beyond its dicta, however, *A.J. Tower* is in fact a narrow decision.

The *A.J. Tower* Court began by noting that the Board has wide discretion to regulate election procedures and safeguards,[171] but it went on to engage in a careful inquiry into the particular question before the Court. A prudent interpretation of the decision therefore would emphasize the Court's limited holding and the truly procedural aspects of the Board's regulation. Specifically, the Court held that "[l]ong experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge . . . its validity cannot later be challenged" and that this rule is "universally recognized as consistent with the democratic process."[172] Given the absence of significant drawbacks to the rule, as both the employer and the union had sufficient pre-election opportunities to challenge voter eligibility, the Court found "no basis . . . for disregarding the Board's policy," which was "a justifiable and reasonable adjustment of the democratic process."[173]

This scenario differs radically from *General Shoe*. Limitations on speech under the laboratory conditions doctrine constitute extensive substantive regulation. Unlike a rule generally barring postelection ballot challenges, therefore, the regulation of speech is not merely the

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167 329 U.S. 324 (1946).

168 The employer and union agreed to conduct an election for which all individuals on the payroll would be eligible. Id. at 326. After the union won an extremely close election, the employer challenged the ballot of an individual who apparently, about a month before the election, had stopped coming to work (except, it seems, to cast her vote), but had never been eliminated from the payroll. Id. at 327-28.

169 Id. at 332-33.

170 See supra note 166.

171 "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A.J. Tower*, 329 U.S. at 330.

172 Id. at 332.

173 Id. at 331-34.

adjustment or refinement of election procedures that was contemplated by the *A.J. Tower* Court's interpretation of the Board's discretion under section 9. Further, use of the laboratory conditions doctrine to regulate speech strongly implicates First Amendment concerns, distinguishing it from the pure decision of labor policy at issue in *A.J. Tower*. Thus, *A.J. Tower*, with or without its dicta, does not provide adequate support for such a broadly deferential posture in these contexts.[174]

Finally, broad administrative deference[175] is inappropriate under circumstances in which the Board's statutory interpretation raises seri-

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[174] Like *A.J. Tower* itself, none of the cases cited by the *A.J. Tower* Court involved regulation of speech. Instead, they dealt with more strictly procedural defects, and consequently do not themselves support extensive deference to the Board's regulation of pure speech. In NLRB v. Falk Corp., 308 U.S. 453 (1940), with several unions competing for employee affections, the Board directed an election not including the company-dominated Independent Union. Id. at 454-55. The Seventh Circuit modified the Board's order, allowing Independent to participate. Id. The Supreme Court reversed, stating that "§ 9 of the Act vests power in the Board, not in the court, to select the method of determining what union, if any, employees desire as a bargaining agent." Id. at 457-58. In NLRB v. Waterman Steamship Corp., 309 U.S. 206 (1940), the Board ordered the employer to cease and desist discriminatory treatment against representatives of the Committee for Industrial Organization in favor of those from the American Federation of Labor. Id. at 209-10 & n.4. The Fifth Circuit refused to enforce the order, and the Supreme Court reversed, stating that "[t]he control of election proceeding[s], and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." Id. at 207-08, 226. Finally, in Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942), the employer challenged the Board's refusal to permit its representative to be present while the election took place on its steamship City of Houston. Id. at 32. The Court upheld the Board's decision, stating that the "possibility of intimidation" made the Board's decision "wholly reasonable" and noting that "[t]he Board enjoys a wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees." Id. at 37. Other early examples of proper Board regulation of representation cases were similarly procedural and included situations of misconduct of Board agents, defects in the election machinery, improper union behavior, and prejudicial acts by third parties; when employer conduct was at issue, the regulation of the election merely followed "as a matter of course from its evaluation of the speech as an unfair labor practice." Note, supra note 107, at 168-70; see also Avondale Indus., Inc. v. NLRB, 180 F.3d 633, 638 (5th Cir. 1999) (rejecting voter identification procedures as "utterly insufficient"); Marriott In-Flite Servs. v. NLRB, 417 F.2d 563, 564 (5th Cir. 1969) (setting aside Board order and requiring ballots printed in Spanish when large percentage of electorate was primarily Spanish-speaking); Austill Waxed Paper Co., 169 N.L.R.B. 1109 (1968) (setting aside election after ballot box was left unsealed and unattended for several minutes).

[175] One might argue that more recent administrative case law alone would support deference to the Board's interpretation of section 9. Specifically, Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984), creates a broadly deferential two-part structure for reviewing agency constructions of the statutes they administer: If Congress has clearly addressed the precise question at issue, that interpretation governs; if not, the agency's interpretation will control as long as it is a "permissible" or "reasonable" construction of the statute. Consequently, one might argue that Congress did not address the question of whether section 9 authorizes the regulation of speech, and that, moreover, the Board's interpretation of the statute is a reasonable one. Both points, however, are

ous constitutional concerns. For instance, in *Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[176] the Supreme Court found that although the Board interpretation of the NLRA would "normally be entitled to deference . . . . where an otherwise acceptable construction of [the NLRA by the Board] 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."[177]

Thus, although certain principles of discretion developed in early Supreme Court case law are consistently invoked to justify laboratory conditions regulation of speech, a closer examination finds these arguments unsound. Appellate courts must engage these claims on their merits.

### *B.* US Airways v. National Mediation Board

Recently, the D.C. Circuit did just that, providing renewed hope that the use of the laboratory conditions doctrine to regulate speech may be carefully reexamined. In *US Airways, Inc. v. National Mediation Board*,[178] the court faced a factual situation under the RLA very similar to those presented here under the NLRA. After losing an election, the union challenged the employer's campaign, requesting that the National Mediation Board (NMB) investigate the circumstances surrounding the election.[179] Specifically at issue were the company's employee roundtables, which, although focused on opera-

problematic. Although in enacting section 8(c) Congress admittedly did not address the precise question of whether section 9 permits substantive regulation of speech—primarily because there was no reason for Congress to suspect the Board would so expand its section 9 authority—that determination is not completely dispositive, as Congress did address the closely related question of whether campaign speech should be statutorily protected. See FDA v. Brown & Williamson Tobacco Corp. 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation."). And on that question, congressional intent seems clear that noncoercive speech could not be regulated. See supra notes 47-59 and accompanying text. Even if congressional intent was found to be ambiguous on the exact question, however, the legislative history and the lack of any relevant distinction between section 8 and section 9 regulation of speech strongly imply that the laboratory conditions doctrine is not a reasonable construction of the statute. See supra Part II.A.1.

176 485 U.S. 568 (1988).

177 Id. at 574-75; see also Ian M. Adams & Richard L. Wyatt Jr., Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment, 22 J. Contemp. L. 19, 45-49 (1996) (arguing against deference to Board's interpretation of section 8(c)); Schiller, supra note 71, at 74 (noting general historical trend away from administrative deference in constitutional cases).

178 177 F.3d 985 (D.C. Cir. 1999).

179 Id. at 987.

tional concerns, had become important vehicles for direct employer-employee discussion of employment policies, resulting in a number of substantial policy changes between 1991 and 1995.[180] In early 1996, the roundtables were unified into a companywide program that continued to implement policy changes and further created several taskforces to study specific areas for change.[181] During the election campaign, the employer emphasized the positive changes that had occurred under the roundtable system and informed its employees that electing a collective bargaining representative was legally incompatible with the "face-to-face" roundtable format.[182]

The NMB held that the employer's campaign violated laboratory conditions.[183] Under its powers corresponding to the NLRB's section 9 authority,[184] the NMB consequently set aside the first election and directed a new one.[185] In its order, the NMB indicated five ways in which the employer violated laboratory conditions, including "portray[ing] the roundtables as an alternative to union representation" and "predict[ing] that the election of the union would result in the elimination of the roundtable process."[186] The employer subsequently remained silent on those issues, and the union won the second election.[187]

In analyzing this situation, the D.C. Circuit relied primarily on *NLRB v. Gissel Packing Co.*,[188] the Supreme Court's attempt to clarify the scope of the employer's First Amendment protection. *Gissel* stands for the proposition that employers generally are free to argue about unionism unless the communications contain a "threat of reprisal or force or promise of benefit."[189] Employers are free under *Gissel* to make "prediction[s] as to the precise effects" of unionization on the company, provided that the predictions are "carefully phrased on the basis of objective fact."[190]

Given this framework, the D.C. Circuit found that the NMB's order "proscribe[d] exactly what Gissel protects."[191] The employer's communication to its employees of its belief that the roundtable

180 Id.
181 Id.
182 Id.
183 Id. at 988.
184 45 U.S.C. § 152 para. 9 (1994).
185 *US Airways*, 177 F.3d at 988 & n.1.
186 Id. at 988.
187 Id.
188 395 U.S. 575 (1969).
189 Id. at 618.
190 Id.
191 *US Airways*, 177 F.3d at 992.

processes were more valuable than unionization was completely within its First Amendment right to communicate generally about its views on unionization. Likewise, the employer was within its First Amendment rights to inform the employees about the legal consequences of unionization, which would require the employer to eliminate the roundtable structure for dealing with employment policies.[192] Thus, the NMB's prohibition on the employer's pure speech with regard to the second election was unconstitutional.

This reasoning comports perfectly with the statutory and constitutional analysis offered in this Note.[193] If employees are to be an informed electorate, as both our statutory and constitutional values imply, they surely must be allowed access to the entire spectrum of facts and opinions relevant to that decision, including, for instance, that upon unionization the employer would be obligated by law to eliminate a valued mechanism for creating positive change in the workplace.

Moreover, the *US Airways* court explicitly and persuasively rejected any relevant distinction between the NLRA and RLA in this context. First, the court reiterated the fact that section 8(c), which exists in the NLRA without an RLA counterpart, provides no distinction, for it "merely implements the First Amendment."[194] Second, although the RLA uniquely bars employer "influence" of employees, that clause "has been interpreted to mean pretty much the same thing" as the corresponding NLRA provision devoid of that language.[195] In sum, the court noted, it was interpreting neither the RLA nor the NLRA but the First Amendment, the protections of which apply to both statutory frameworks.[196] Thus, the D.C. Circuit became the first court to find that laboratory conditions regulations of pure speech violate the First Amendment.[197]

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192 In nearly all circumstances, the RLA forbids employers from directly dealing with represented employees about employment policies. See, e.g., Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 548-49 (1937) (interpreting 45 U.S.C. § 152 para. 9 (1994)).

193 Indeed, the case for a broad laboratory conditions authority is more compelling in the RLA context; unlike the NLRB, the NMB does not have independent jurisdiction to enforce the "unfair labor practices" established by the RLA. § 152 para. 10.

194 *US Airways*, 177 F.3d at 991 (quoting *Gissel*, 395 U.S. at 617).

195 Id.; see also supra note 27 (discussing scope of "influencing" language).

196 *US Airways*, 177 F.3d at 991 n.4.

197 The Ninth Circuit became the first to review this doctrinal development, and unfortunately largely rejected the D.C. Circuit's persuasive analysis. In Horizon Air Indus., Inc. v. Nat'l Mediation Bd., 232 F.3d 1126 (9th Cir. 2000), the employer relied heavily on *US Airways* to charge that a similar NMB order infringed on the employer's First Amendment rights. Id. at 1135. The court first analyzed its jurisdiction to review such orders and, unlike the D.C. Circuit, employed the deferential "peek at the merits" rubric for reviewing NMB decisions, even though constitutional values were at stake. Id. at 1132-33. The D.C. Circuit had created an exception to that highly deferential rubric for claims involving the

## CONCLUSION

The NLRB's laboratory conditions doctrine, when employed to regulate pure speech, is both untenable as a matter of statutory interpretation and wholly unconstitutional. The appropriate solution in fact may be to eliminate the laboratory conditions doctrine altogether. When applied in pure speech cases the doctrine violates constitutional rights,[198] and when applied in nonspeech cases it tends to be, at best, unnecessary.[199] The doctrine's malleability to the Board's contingent policy goals implies that its elimination would bring only clarity and consistency to Board doctrine and labor relations.

Complete elimination of the laboratory conditions doctrine could be facilitated if the barriers to union entry and exit were lowered significantly.[200] If employee preferences were implemented more readily, virtually all remaining concern about the tainting of elections

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potential infringement of constitutional rights, arguing persuasively that "the 'peek' framework is simply not suited to the evaluation of constitutional claims." *US Airways*, 177 F.3d at 990. Engaging in their "peek," the Ninth Circuit then found that the NMB could use employer speech to find a violation of laboratory conditions as long as the speech was not independently dispositive but merely part of an inquiry into the "totality of the circumstances." *Horizon*, 232 F.3d at 1137. Moreover, without evidence to the contrary, the Ninth Circuit (unlike the D.C. Circuit) assumed that the NMB's decision was based on the totality test. Id. at 1137. Thus, the Ninth Circuit's peek revealed no constitutional violation. Id. at 1139.

198 One might worry that the elimination of the laboratory conditions doctrine would leave employees vulnerable to an employer's factual misrepresentations during the campaign. This worry is misplaced. First of all, the Board generally does not use the doctrine to regulate misrepresentations during election campaigns. See Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 132-33 (1982) (holding that Board will not set aside elections based on factual misrepresentations absent extraordinary circumstances). Moreover, if this is truly a considerable worry, it might be best dealt with not by the ad hoc laboratory conditions doctrine, but by holding that this speech is constitutionally unprotected. In the context of the regulation of commercial speech, at least three members of the current Court seem persuaded by such a position. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (distinguishing regulation of misleading, deceptive speech from regulation of truthful, nonmisleading speech).

199 For example, in Exelsior Underwear Inc., 156 N.L.R.B. 1236, 1239-40 (1966), the Board established the requirement that employers provide the union with a list of employees and their addresses within seven days of the direction of an election. The proposition that a fair and accurate election requires such regulation is itself dubious and, at any rate, the requirement of disclosure has been challenged independently. See generally David Greenhaus, Note, Should the NLRB Revisit Exelsior?, 16 Hofstra Lab. & Emp. L.J. 259 (1998) (arguing that *Exelsior* should be overturned on privacy grounds). More importantly, the doctrine is generally superfluous; this sort of administrative decision could and should have been promulgated under the Board's rulemaking authority. See 29 U.S.C. § 156 (1994) (granting Board authority to make rules necessary to carry out NLRA).

200 See, e.g., Samuel Estreicher, "Come the Revolution": Employee Involvement in the Workers' State, 1 U. Pa. J. Lab. & Emp. L. 87, 95 (1997-1998) (suggesting card-check certification and decertification for easy opt-in and opt-out approach of collective representation); see also Weiler, supra note 34, at 1770 (arguing for "the elimination of the representation campaign through a system of instant elections"). A complete examination

would dissolve.[201] From a policy perspective, then, elimination of these barriers would facilitate the broader protection for labor campaign speech that this Note has argued is mandated by the NLRA and the Constitution.[202]

Constitutional protection for speech generally has grown exponentially since the time of the laboratory conditions doctrine's inception. In particular, the continuing expansion of protection for commercial speech makes this issue increasingly ripe for judicial resolution.

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of the debates for and against the implementation of such proposals is beyond the scope of this Note.

201 Relevant here is the ongoing debate over the effect of election campaigns on employees. See supra note 144 (citing relevant sources and discussing conflicting viewpoints). Even if these debates prove only that it remains uncertain how modern, sophisticated employees are affected by campaigns, that conclusion alone requires a reevaluation of our labor policy, which is premised on perhaps faulty assumptions about behavior. See Myron Roomkin & Roger I. Abrams, Using Behavioral Evidence in NLRB Regulation: A Proposal, 90 Harv. L. Rev. 1441, 1442 (1977) (noting that behavioral evidence provides reason to question Board's practice of "relying almost exclusively on unverified behavioral assumptions"). See generally Symposium, Behavioral Law and Economics in the Workplace, 77 N.Y.U. L. Rev. 1 (2002). This may provide further reason to believe that lowering the barriers to union entry and exit, which would allow less concern about a "tainting" of the process, would be preferable labor policy.

202 Although this Note has focused on judicial remedies, legislative reform of the sort alluded to here is also very attractive. As part of a comprehensive set of reforms, Congress simply could make explicit that the statutory protection for campaign speech is applicable to all possible avenues of Board regulation.