PROMISES, PROMISES: RETHINKING THE NLRB'S DISTINCTION BETWEEN EMPLOYER AND UNION PROMISES DURING REPRESENTATION CAMPAIGNS

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I. INTRODUCTION

As Congress once again considers proposed legislation that, by its title, purports to support employee free choice in union representation decisions, it is perhaps an appropriate time to reconsider whether the existing legal regulation of union organizing campaigns actually promotes employee free choice.[1] This Article takes the position that at least one longstanding and widely-cherished rule of labor law—the prohibition on employer promises during union representation campaigns—does not further employee free choice in union campaigns. Moreover, the rule also fails to comport with the law's stated goal of neutrality in union-organizing campaigns because it allows unions to make grandiose promises about the

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1. The Employee Free Choice Act, H.R. 1696, 109th Cong. (2005), would require employers to recognize not only unions created by secret-ballot elections under the National Labor Relations Board, but also unions based merely on union authorization cards signed by 51% of the workforce. The proposed legislation also includes provisions that require mediation and arbitration in first contract disputes, and stiffer penalties for employer violations of the National Labor Relations Act, including treble back-pay awards. For conflicting viewpoints on the value of the proposed legislation, see the opinions expressed on the websites of the AFL-CIO, What is the Employee Free Choice Act?, http://www.aflcio.org/joinaunion/voiceatwork/efca/whatis.cfm (last visited February 5, 2008) (promoting the Employee Free Choice Act), and the Statement of the U.S. Chamber of Commerce, by Charles I. Cohen, to Senate Subcommittee on Labor, Health and Human Services, and Education of the Committee on Appropriations, (July 16, 2004), *available at* http://www.uschamber.com/issues/testimony/2004/040716employeefreechoiceact.htm (follow "View Testimony" hyperlink) (defending the NLRB's election process and criticizing the use of neutrality/card check agreements).

benefits that will flow from a union victory in a representation election, while denying employers that same right.

The prohibition against employer promises during representation campaigns is so well-entrenched that it has become an axiomatic principle of labor law: Employers cannot make promises to employees about the consequences of a "no" vote in a representation campaign, while unions are free to make any promises about the benefits employees purportedly can achieve through collective bargaining if the union wins the election. The rationale behind this rule is that an employer's promises are more coercive and damaging to employees' rights than a union's promises, because employees understand that an employer can fulfill its promises while a union cannot guarantee any result. This Article examines this rationale, concludes that it is flawed, and argues that any distinction between employer and union promises does not support the purposes of the National Labor Relations Act ("NLRA" or the "Act").[2]

More specifically, the National Labor Relations Board's ("NLRB" or the "Board") distinction between employer and union promises during representation campaigns is based on faulty reasoning and a flawed understanding of the workplace. Employees have an existing relationship with their employer, but not with the organizing union. Employees have far more experience with, and greater information about, their employer. They are therefore better equipped to assess the legitimacy and value of promises made by their employer as an entity with whom they have an ongoing relationship and considerable first-hand experience. On the other hand, employees typically have no experience with an organizing union or its representatives, leaving little or no information with which to evaluate union promises. Also, non-union employees likely have little experience with the process of collective bargaining, the vehicle through which unions promise improvements during an organizing campaign.[3] Given the disparity in employee experience and knowledge about the two parties to a union representation election, it is counterintuitive, to say the least, to prohibit promises from the entity with which employees have an active and ongoing relationship, while sanctioning promises from an entity with which employees have little or no experience.

Moreover, the Board's oft-used mantra in other areas of labor law—that persuasion is not coercion—should apply with equal force in union

2. 29 U.S.C. §§ 141-187 (2000).

3. In fact, only a small portion of the current American workforce has had any experience with unions and collective bargaining. *See, e.g.*, Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of Labor Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 101-02 (2005) (noting that, by 2004, unions represented only 7.9% of the private sector workforce and only 12.5% of the non-agricultural workforce overall).

representation campaigns. An employer's ability to deliver on its promises made during a union campaign does not constitute coercion solely because such promises may more effectively convince employees to vote against a union. Rather, employee knowledge supports the stated goal of any representation election: more informed employee decision-making and greater freedom of choice for employees in union campaigns.

Union representation campaigns are perhaps the only type of elections that prohibit one party from explaining to voters exactly what the consequences of their vote for that party will be. Instead, employees are left to guess or surmise what an employer plans to do if it wins the election. The union, on the other hand, can tell employees exactly what it will seek (and purportedly achieve) if the employees vote in favor of union representation. Such a rule is neither neutral nor helpful to an employee's ability to make an informed decision in a representation election. Free choice is aided by providing employees with more—not less—information about the consequences of their decision.

II. THE NLRB'S TREATMENT OF EMPLOYER AND UNION PROMISES DURING REPRESENTATION CAMPAIGNS

A. The Exchange Parts Rule

Any discussion of the Board's treatment of employer promises during representation campaigns must begin (and end) with the Supreme Court's decision in *NLRB v. Exchange Parts Co.*[4] In *Exchange Parts*, the Court considered the legality of an employer's decision to confer benefits upon employees during the pendency of a union's organizing campaign.[5] The employer sent a letter to employees several weeks before the election to decry the "Empty Promises of the Union" and to state that the employees did not need a union for the benefits that they already had, or to gain "additional improvements in the future."[6] The employer's letter then continued to list a detailed statement of the benefits employees already received from the employer and an estimate of the monetary value of each of those benefits.[7] Included in the list of employee benefits were several improvements to the benefits package, such as a "birthday holiday, a new system for computing overtime during holiday weeks which [sic] had the effect of increasing wages for those weeks, and a new vacation schedule which [sic] enabled employees to extend their vacations by sandwiching

4. 375 U.S. 405 (1964).
5. *Id.* at 406-07.
6. *Id.* at 407.
7. *Id.*

them between two weekends."[8] Employees voted against union representation after an NLRB-conducted secret-ballot election.[9]

The NLRB found that the employer's grant and announcement of new benefits was intended to induce employees to vote against the union.[10] Thus, the Board concluded that the employer's announcement of new benefits violated employees' rights under Section 8(a)(1) of the NLRA.[11] The United States Court of Appeals for the Fifth Circuit rejected the Board's reasoning, finding that the employer's actions did not interfere with, coerce, or restrain employees' rights under the Act.[12] Specifically, the court held:

> The argument that an increase of benefits by the employer may persuade the employees not to vote for the union overlooks the fact that the employer is entitled to try to persuade his employees to vote against a union, provided that he does so by non-coercive means. Antiunion bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act is not itself an unfair labor practice. In a free democracy, it is the citizen, not the Government, who fixes his own beliefs. The right of the employer to make his appeal to the workers is expressly preserved by the statute. . . . Although freedom to increase benefits in an effort to make a union seem unnecessary does not follow as a necessary incident of the right to argue against the union, it is scarcely any more coercive. . . . The whole tenor of the statutory language and decisions interpreting it indicate that the evil to which the statute is directed is the use of force and pressure. Persuasive efforts are not outlawed. Testing the increase of benefits effected by [the employer] against these considerations, we feel that this action is persuasive, not coercive.[13]

The Supreme Court, however, rejected the reasoning of the Fifth Circuit, finding that the employer's actions did interfere with employees'

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8. *Id.*

9. *Id.*

10. *Id.* at 408. Promises aside, the NLRB's finding is not particularly instructive, as the actions of most employers during union campaigns presumably are intended to convince employees to vote against union representation. Such a motive, in and of itself, is not a violation of the NLRA.

11. *Id.* Section 8(a)(1) of the NLRA states that an employer's interference with the rights granted to employees under Section 7 of the Act constitutes an unfair labor practice. 29 U.S.C. § 158(a)(1) (2000). Section 7 of the Act gives employees the right to "form, join, or assist" unions, as well as "*the right to refrain from such activities* . . . ." 29 U.S.C. § 157 (2000) (emphasis added).

12. NLRB v. Exch. Parts Co., 304 F.2d 368, 375-76 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

13. *Id.* (citations and quotations omitted).

rights under the Act and thus constituted an unfair labor practice.[14] Although the Court acknowledged the possibility that its decision, which intended to safeguard the rights of employees, may have actually prevented employers from providing greater benefits to employees, it nonetheless determined that the employer's actions constituted unlawful interference with employees' rights to organize.[15] With very little analysis to support such a conclusion, the Court instead relied upon a now oft-repeated metaphor: "The danger inherent in well-timed increases in benefits is the suggestion of a *fist inside the velvet glove*."[16] Thus, according to the Court, an employer's unconditional grant or promise of union benefits during an organizational campaign is inherently coercive because "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."[17]

B. The NLRB's Distinction Between Employer and Union Promises

Since the Supreme Court's decision in *Exchange Parts*, the Board has consistently found that employers' promises or grants of benefits during organizational campaigns violate the Act.[18] Just as consistently, however, the Board has found that unions' promises to employees of the purported improvements that they will achieve with respect to the terms and conditions of employment during collective bargaining are not coercive because employees recognize that employers have the ability to effect changes in benefits, while unions do not.[19] For example, as the Board stated in *Smith Co.*:[20]

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14. NLRB v. Exch. Parts Co., 375 U.S. 405, 409-10 (1964).

15. *Id.* at 410.

16. *Id.* at 409 (emphasis added).

17. *Id.* The NLRA specifically exempts a "promise of benefit" from the so-called free speech proviso contained in the Act. *See* 29 U.S.C. § 158(c) (2000) (defining acceptable expression of views).

18. The Board's decisions in these cases do very little to flesh out whether a specific employer promise actually coerced employees in their decision on union representation; instead, the Board tends to repeat the Court's velvet glove metaphor and to invalidate the results of the election with little or no time spent on how a particular promise interfered with an employee's freedom of choice. For example, in *St. Francis Hosp. v. NLRB*, 729 F.2d 844, 847-48 (D.C. Cir. 1984), the court upheld the Board's decision to invalidate an election due to promises made by the employer during a representation campaign. Specifically, with very little analysis or discussion whatsoever, the court found that vague statements to employees to "give [the employer] one year" and similar comments constituted unlawful employer promises that justified overturning the results of the election. *Id.* at 852-53.

19. *See, e.g.*, Acme Wire Prods. Corp., 224 N.L.R.B. 701 (1976) ("Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election, but must seek to achieve them through collective bargaining.").

20. 192 N.L.R.B. 1098, 1101 (1971).

> With respect to the benefits which the two employees say the [u]nion promised, it is concluded that the statements attributed to the [u]nion did not exceed the bounds of privileged campaign propaganda. Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises of the type involved herein are easily recognized by employees to be dependent on contingencies beyond the [u]nion's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits.[21]

The specific union promises complained about in *Smith* were quite extensive and included:

> pension and dental plans; elimination of home workers; prohibition of supervisors touching machines; job specialization; pay for the highest rated machine operated during the week, even though the balance of the week was on a lower rated job; union ability to keep an employee on the job even if the [e]mployer wished to fire him, whereas in the absence of a union victory the [e]mployer was free to fire; tickets for Frontier-land at a discount; availability of a blood bank and loans from a credit union; special discounts on tires, cars and appliances.[22]

Another good example of the Board's attempts to distinguish between employer and union promises can be found in *Lalique N.A., Inc.*[23] In that case, the Board considered whether the following statement by a union to employees during a campaign was objectionable:

> Remember when Local 223 is elected on April 19th you will no longer have to pay for you and your families [sic] medical benefits. As a Local 223 member you will be entitled to free medical care, free hospitals, free dental care, free optical care and eyeglasses not only for you but for your immediate family members as well. And nothing will be taken out of your paycheck to pay for those benefits.[24]

The employer responded to the union statements by informing employees that the union's promises of improved terms and conditions of employment could not be guaranteed and had to be earned through

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21. *Id.* at 1101; *see also* El Monte Tool & Die Casting, Inc. v. NLRB, 633 F.2d 160 (9th Cir. 1980) (affirming Board order dismissing challenge to union campaign promises).

22. *Id.* at 1101. Clearly, such benefits constituted significant improvements to the working conditions and terms and conditions of employment for the employees in the proposed bargaining unit.

23. 339 N.L.R.B. 1119 (2003).

24. *Id.* at 1119.

collective bargaining.[25] Despite those statements, the union won the election.[26] In rejecting the employer's objections to the union's campaign promises, the Board, with no analysis whatsoever into whether the union's promises had misled or tricked employees in the exercise of their rights under the Act, merely trotted out its oft-repeated justification for allowing union promises during an organizing campaign: "[E]mployees are generally able to understand that a union cannot obtain most benefits automatically by winning an election but must seek to achieve them through collective bargaining . . . ."[27]

These decisions result in the somewhat strange legal dichotomy prohibiting employer promises of benefits during representation campaigns, while allowing union promises to employees.[28] This distinction is so entrenched in labor law that some management campaign treatises warn employers against debating union organizers:

> Occasionally, a union representative will request the opportunity to reply to the employer's talk or to debate the issues. As a general rule, such requests should be rejected. A union organizer can make promises; the employer lawfully cannot make any promises, other than to give vague assurances that it will continue to treat employees fairly. Since the employer cannot out-promise the union, it may look like the loser in the debate.[29]

So, in a system designed to (1) guarantee the right of employees to both unionize and to refrain from unionization; (2) uphold employee freedom of choice; and (3) preserve the neutrality of the election process, unions are free to promise better wages or health insurance, a new pension plan or some other enhanced employee benefit, while an employer cannot make the same promise. As set forth below, the premise of this Article is that the current distinction between employer and union promises during organizing campaigns makes no sense and should be abandoned.

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25. *Id.* at 1119-1120.

26. *Id.* at 1119.

27. *Id.* at 1120; *see also* Wolfrich Corp., 234 N.L.R.B. 525 (1978) (rejecting employer objection based on promises of benefits made by union representative who falsely informed employees that he was calling them from the offices of the NLRB and finding such promises to be "innocuous").

28. Judge Richard Posner has commented that the distinction between employer and union promises aids unions because it prevents employees from economic free-riding. That is, the legal distinction between employer and union campaign promises prevents employees from enjoying the benefits of unionization—presumably enhanced employee benefits—while avoiding responsibility for the costs of such benefits, namely union dues. Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1004 (1984).

29. JACKSON LEWIS, WINNING NLRB ELECTIONS 89 (4th Ed. 1997) (quotations omitted).

III. RETHINKING THE NLRB'S DISTINCTION BETWEEN EMPLOYER AND UNION PROMISES

A. The Principles of Neutrality and Employee Freedom of Choice

In arguing in favor of a system that treats employer and union promises equally, this Article relies upon a simple premise—the NLRA does not and should not *promote* unionization. Rather, consistent with the statutory language, the Act promotes employee freedom of choice in deciding whether or not to unionize.[30] As stated in one article, the prevailing view is "that the NLRA now does not promote unionization . . ., but instead *protects* unionization only insofar as it is the *employees' choice*."[31] Put another way: "[a]ny procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. The Act is *wholly neutral* when it comes to that basic choice."[32]

Indeed, in *NLRB v. Savair Manufacturing Co.*, the United States Supreme Court directed the NLRB to apply its rules concerning representation elections in a neutral manner.[33] The *Savair* Court considered whether a union's practice of waiving initiation fees for all employees who signed authorization cards violated the Act.[34] The NLRB had determined that such a practice did not violate the Act because "it is completely illogical to characterize as improper inducement or coercion to vote 'Yes' a waiver of something that can be avoided simply by voting 'No.'"[35] In

30. As noted above, the Act not only protects an employee's right to engage in protected activities such as union organizing, but it also protects an employee's "r*ight to refrain from any or all of such activities* . . . ." 29 U.S.C. § 157 (2000) (emphasis added).

31. Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits under the National Labor Relations Act*, 131 U. PA. L. REV. 1, 53 (1982) (emphasis added); *see also Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1245-46 (1963). *But cf.* Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 55 (1991) (suggesting that employers should play no role in a "process purporting to promote the best interests of workers"); Elizabeth J. Masson, Note, *"Captive Audience" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage*, 56 HASTINGS L.J. 169, 180-81 (2004) ("The NLRA was intended to enable workers to obtain power so that respect for their rights and interests was not dependent solely on the interests of the employers or the state.").

32. John W. Teeter, *Keeping the Faith: The Problem of Apparent Bias in Labor Representation Elections*, 58 U. CIN. L. REV. 909, 910 (1990) (emphasis added); *see also* Alexia M. Kulwiec, *"On the Road Again" (to Organizing): Dana Corp., Metaldyne Corp., and the Board's Attack on Voluntary Recognition Agreements*, 21 LAB. LAW. 37, 50 (2005) ("The goal of NLRB elections [is] to permit employees to choose their bargaining representatives, *if any*, in so-called laboratory conditions . . . .") (emphasis added).

33. 414 U.S. 270 (1973).

34. *Id.* at 272-73.

35. *Id.* at 275-76. It is interesting, to say the least, to compare the Board's reasoning sanctioning the union's conduct in *Savair* with its reasoning, as set forth above, in the cases finding employer promises to be coercive.

rejecting the Board's reasoning, the Court noted the neutrality of the NLRA, finding that *"[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it."*[36] The Court concluded with an explicit directive to the NLRB to safeguard freedom of choice during union representation campaigns: "The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union."[37] In fact, the Board has recognized its duty to safeguard neutrality and freedom of choice on numerous occasions: "An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative."[38]

Thus, the Board's distinction between the lawfulness of employer and union promises during union representation campaigns must be evaluated against the backdrop of the Act's twin concerns of supporting employee freedom of choice and safeguarding the neutrality of the election process.

B. Employer Promises: Coercion or Persuasion?[39]

Despite the Supreme Court's conclusion to the contrary in *Exchange Parts*, there is very little evidence to support a blanket assertion that all employer promises during union representation campaigns are inherently coercive. Indeed, if a union promise to employees is merely free speech, then why should an employer promise automatically be regarded as the proverbial "fist inside the velvet glove?"[40] In distinguishing between whether promises amount to persuasion or coercion, it is perhaps appropriate to start with the definition of both terms. According to Webster's New Collegiate Dictionary, the word "coerce" has three meanings:[41] "(1) to restrain or dominate by force;" "(2) to compel to an act

36. *Id.* at 278 (emphasis added).

37. *Id.* at 280.

38. General Shoe Corp., 77 N.L.R.B. 124, 126 (1948). In *General Shoe*, the Board established a "laboratory conditions" standard for union representation elections, determining that certain campaign conduct warranted setting aside a union election even if the conduct in and of itself did not constitute an unfair labor practice. *Id.* at 127.

39. Judge Wisdom addressed the difference between coercion and persuasion in the Fifth Circuit's decision in *Exchange Parts,* which the Supreme Court ultimately overturned: "It is good, homey, country-lawyer advocacy to argue that a carrot on a stick may have the same effect on a donkey as a club. But a carrot is not a club. Labor is not a donkey. Persuasion is not coercion." NLRB v. Exch. Parts Co., 304 F.2d 368, 376 (5th Cir. 1962), *rev'd*, 375 U.S. 405 (1964).

40. NLRB v. Exch. Parts Co., 375 U.S. 405 (1964).

41. WEBSTER'S COLLEGIATE DICTIONARY 256 (9th ed. 1990).

or choice;" or "(3) to enforce or bring about by force or threat."[42] The act of persuasion has two definitions: "(1) to move by argument, entreaty, or expostulation to a belief, position or course of action;" or "(2) to plead with."[43]

So, in comparing these definitions, the question becomes whether employer promises during a union representation campaign restrain employee freedom of choice by nullifying employee free will, or whether they move employees to a course of action (a "no" vote) through argument or entreaty. Given that employer promises during a campaign do not involve any overt force, threat, or other act of compulsion,[44] they more clearly fit the definition of persuasion. More importantly, there does not appear to be any legitimate reason to find that an employer's promise interferes with the exercise of employee free choice any more than a promise made by a union during an organizing campaign.

Commentator Barbara Anderson's analysis of the differences between coercion and persuasion in the secondary boycott context supports the conclusion that employer promises are not inherently coercive.[45] Ms. Anderson wrote:

> To be protected under the first amendment, the boycott advocates' appeal to their listeners must be persuasive rather than coercive. The distinction is crucial. Persuasive speech has always been accorded the highest first amendment protection on the theory that the free flow of ideas is central to our democratic system of government: "the best test of truth is the power of the thought to get itself accepted in the competition of the market." By contrast, speech that deprives its listeners of freedom of choice, i.e., coercive speech, distorts the marketplace of ideas by causing listeners to accept an idea not for its "truth" but to avoid some sanction. . . .
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> . . . Because the degree of any infringement of an actor's free will is necessarily measured against the base line of the actor's rights and privileges under the law, it is not surprising to find that conduct is usually considered coercive, and the listener's free will infringed, *only after a court has concluded that the listener*

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42. *Id.* at 878 (defining "persuade"). Likewise, the Barron's Law Dictionary definition of coercion includes the following: "Any form of compulsion or constraint which compels or induces a person to act otherwise than freely; it may be physical force but is more often used to describe any pressure which is brought to bear on another's free will." BARRON'S LAW DICTIONARY 85 (5th ed. 2003).

43. WEBSTER'S COLLEGIATE DICTIONARY 878 (9th ed. 1990).

44. Such conduct would clearly constitute unfair labor practices under the Act. 29 U.S.C. § 158(a)(1) (2000) (prohibiting employers from interfering, restraining, or coercing employees).

45. Barbara J. Anderson, Comment, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811 (1984).

> *has a legally protectible interest in avoiding the consequences threatened by the "coercing" party.*[46]

As employer promises during union representation campaigns do not involve any overt threat impinging on a legally-protected interest of an employee, it follows that a rule assuming that in all cases and situations employers' promises are threatening or coercive to employees cannot be supported under the normal definition of legal coercion.[47] Rather, in appealing to employees to decide to vote against a union because of promised improvements to the employees' terms and conditions of employment, employers would seek to move employees by appealing to their economic self-interest—the precise definition of persuasion—not coercion.

The inherent fallacy of a rule that presumes coercion for every employer promise was noted by commentators Charles Jackson and Jeffrey Heller as long ago as 1982.[48] Messrs. Jackson and Heller argue persuasively that the underlying assumption behind the *Exchange Parts* decision is wrong, and that a party challenging the results of a representation election should have to produce evidence of actual employee coercion before an election is overturned based on an employer promise:[49]

> We propose, therefore, making a simple, almost surgical change in promises and grants law: eliminating the *Exchange Parts* presumption of inherent coercion. Facially beneficial or benign acts such as wage increases should be held unlawful only if the General Counsel proves by objective evidence that the promise or grant actually coerced employees in the sense that they suffered a threat to job security or a diminution in other employment benefits, or that the employer violated an independent policy prohibited by the NLRA.[50]

Messrs. Jackson and Heller also note one of the perverse results of the *Exchange Parts* rule. In a system designed to advance the freedom of choice of employees, treating employer and union promises differently

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46. *Id.* at 825-26 (citations omitted) (emphasis added).

47. And, a rule that presumes that all promises made by a union during an organizing campaign concerning how the union can improve the terms and conditions of employment for employees through collective bargaining contain no elements of coercion is equally indefensible. Indeed, promises made by a union representative may cause employees to feel that if they do not vote for and openly support a union then they will be left behind and their interests will not be equally represented if the union wins the election.

48. Jackson & Heller, *supra* note 31.

49. *See* James A. Campbell, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541 (2006) (discussing "actual legal coercion" in the context of establishment clause violations).

50. Jackson & Heller, *supra* note 31, at 58-59 (citations omitted).

works to undermine employees' ability to make an informed choice: "If the employer or union has something tangible to offer, it should be disclosed before the election is held. Employee choice is enhanced to the degree all the benefits from voting for or against the union are disclosed."[51]

Put simply, advising employees of the potential consequences of a vote for an employer is no more coercive than a union's attempt to persuade employees by promising improvements to the terms and conditions of employment as the result of unionization.[52] With all the cards on the table, employees are in a position to make a better and more informed decision concerning their economic self-interest and their interest in having a union represent them in their working life.[53]

The fallacy that all employer promises are inherently coercive has been noted by the United States Court of Appeals for the District of Columbia Circuit. In *Skyline Distributors, Inc. v. NLRB*,[54] the court considered whether an employer's grant of benefits during a union representation campaign warranted an order requiring the employer to bargain with the union.[55] The employer in *Skyline* had improperly applied a wage freeze to maintenance employees that had not been intended to be applied to that group.[56] Following complaints about the application of the wage freeze to the maintenance employees, management met and agreed

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51. *Id.* at 56.

52. For a contrary view, see Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 363 (1995) (discussing and ultimately disagreeing with research suggesting that employer promises of benefits and other campaign speech seldom influence voters in representation elections).

53. It could be argued that because employer promises are not enforceable, employees may be tricked into voting against a union in the hope that the employer will provide certain improvements that never materialize after a union defeat in an election. This is not a significant concern for several reasons. First, this concern applies equally to union promises, which often never materialize, despite union claims during representation campaigns. Second, if an employer breaks its promise, then the employees are clearly in a position to know who can be trusted the next time a campaign arises. Such information ultimately will allow employees to make a more informed choice with respect to union representation. Finally, unions likely will inform employees during representation campaigns that employer promises are not binding and can be taken away, and that employees need a union to make sure promises are not broken. *But see* Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton NLRB*, 16 LAB. LAW. 103, 116 (2000) (arguing that the employer's ability to give captive audience speeches makes any employer speech inherently coercive); Masson, *supra* note 31, at 190 (arguing that employer captive audience speeches should be banned because they are inconsistent "with the democratic ideals embodied in the National Labor Relations Act").

54. 99 F.3d 403 (D.C. Cir. 1996).

55. *Id.* at 403-05. In certain instances, after a finding that an employer has committed egregiously unfair labor practices, the NLRB will order the employer to bargain with a union even in the absence of the union winning a Board-conducted election. NLRB v. Gissel Packing Co. 395 U.S. 575 (1969).

56. *Skyline Distribs.*, 99 F.3d at 405.

that the wage freeze was not meant to be applied to that particular group of employees and, thus, decided that the freeze should be rescinded.[57] Unaware of management's decision to rescind the wage freeze and unhappy about its application to their work group, the maintenance employees contacted a union to inquire about potential representation.[58] During a meeting with representatives of the union, a majority of the maintenance employees signed union authorization cards.[59] The union then presented the cards to the employer and requested voluntary recognition.[60] Confronted with the demand for recognition, the employer informed the employees that it already had decided to lift the wage freeze.[61] Thereafter, management officials held another meeting with the maintenance group during which employees complained about the company's wage scale.[62] Subsequently, the company announced that it would adopt a new wage scale for the maintenance employees.[63] The union challenged the employer's grant of benefits to employees by filing an unfair labor practice charge.[64]

The Board acknowledged that the employer had decided to lift the wage freeze before the onset of the union campaign.[65] However, the Board found the timing of the announcement of the removal of the wage freeze (after the institution of the union representation campaign) to be unlawful, as was the employer's decision to "entice" employees with a promise of a new wage scale.[66] Based on these unfair labor practice findings, the Board "issued a *Gissel*-style bargaining order," requiring the employer to bargain with the union even in the absence of a union victory in an election.[67] On appeal to the District of Columbia Circuit, the court discussed at length the propriety of the *Exchange Parts* rule forbidding employer promises during union representation campaigns.[68] While noting that it was bound by the *Exchange Parts* prohibition on employer promises, the court concluded that such a rule made little sense:

> Although the Board's finding of an [unfair labor practice] must be sustained, it cannot be gainsaid that this finding stands

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* As set forth in note 1, *supra*, under the proposed Employee Free Choice Act, the union's actions may have been sufficient to require the employer to represent the employees.
61. *Skyline Distribs.*, 99 F.3d at 405-06.
62. *Id.*
63. *Id.*
64. *Id.* at 406.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 407-10.

> on a shaky foundation. The [Administrative Law Judge ("ALJ")] found that [the employer's] officials made the decision to lift the wage freeze before there was any indication that the maintenance employees were considering a union. In other words, the decision to lift the freeze was not designed to influence any workers against joining a union. The problem, according to the ALJ, arose when company officials decided to announce the lifting of the freeze and the accompanying wage increase shortly after learning about the employees' interest in the union. . . .
>
> . . .
>
> There are many ironies here. *Exchange Parts* suggests that employees like those at [this employer] are threatened by "a fist inside the velvet glove" upon receiving benefits that they demand. This is a counterintuitive notion. In support of its principal premise, *Exchange Parts* says that employees never "miss the inference that the source of benefits . . . conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Some scholars have effectively responded, "So what?" This skeptical reaction to *Exchange Parts* is better understood if one thinks hard about the situation in this case. In reality, the maintenance employees at [the employer] were playing an age-old game, attempting *to threaten management* with a union to induce the grant of benefits. Their threat succeeded, because the employees got exactly what they wanted, with no acts of reprisal or other adverse actions taken against them. The employees played their cards well: they knew that, even after getting their wage increase and other benefits, they still could have demanded a representation election and voted for a union; and they knew that if the employer was foolish enough to withdraw the grant of benefits, the union could have been recalled. This hardly looks like a situation in which employees were intimidated by the figurative "fist inside the velvet glove."[69]

The *Skyline* case demonstrates the fallacy of the *Exchange Parts* rule and the Board cases distinguishing between employer and union promises.[70] In a system designed to protect employee freedom of choice and neutrality in representation decisions, these rules do nothing more than limit employees' ability to make a reasoned and well-informed decision. Meanwhile, the rules also clearly provide unions with an advantage of

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69. *Id.* at 407-09 (citations omitted). The court went on to discuss some of the legal scholarship and research that has criticized the *Exchange Parts* rule. *Id.* at 410-11.

70. For a sharp criticism of the Board's rules governing employer decisions to implement (or not) wage increases during union representation campaigns, see *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 839-41 (D.C. Cir. 1998) (dissenting opinion) ("When a traffic light simultaneously blinks 'Stop' and 'Go' everyone knows repairs are needed.").

convincing employees of what is in their economic self-interest.[71] After all, the union's decision to file an unfair labor practice charge demonstrates clearly that the employer's actions were sufficient to convince employees that a union was not necessary—a clear statement that the employees had exercised their freedom of choice based upon an assessment (and ultimate acceptance) of the employer's promises.

The fine distinction between coercion and persuasion is not unique to the Board's prohibition on employer promises. In various other contexts, the NLRB has often held that persuasion is not coercion. That is, speech designed to influence a party is not equivalent to coercion.[72] Indeed, when struggling with such questions, the Board has often come down in favor of balancing tests rather than blanket findings of coercion. For example, in *International Union, United Mine Workers of America, and District 29 and New Beckley Mining Corp.*,[73] the Board considered an Administrative Law Judge's decision that a middle-of-the-night mass rally of striking union members and their supporters in the parking lot of a motel where strike replacement workers were staying violated the secondary boycott provisions of the NLRA.[74] During this impromptu rally, between 50 and 140 persons gathered in the parking lot and, among other things, called the motel guests "scabs," encouraged them to go home, and asked the motel manager if he knew that the replacement workers should not be staying at the establishment.[75] The Administrative Law Judge found that such actions did not violate the NLRA since the demonstration "was intended only to demonstrate [the union's] displeasure with replacement workers, and to persuade them not to report to work at [the mine]."[76] In so holding, the Administrative Law Judge concluded that the actions were not to threaten, coerce or restrain anyone within the meaning of the Act, but rather only "to communicate with the strikebreakers . . . ."[77]

The NLRB reversed the Administrative Law Judge's decision, finding that the union's actions did violate the secondary boycott provisions of the

71. Indeed, in rejecting the remedy of a *Gissel*-style bargaining order in *Skyline*, the court emphasized the importance of employee freedom of choice in union representation elections. *See Skyline Distribs*, 99 F.3d at 411 ("[T]he Board's bargaining order cannot be enforced in this case because the Board has given no credence whatsoever to employee 'free choice.'").

72. For an interesting discussion of the history of attempts to distinguish speech and conduct in the labor law context, see Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, 8 U. PA. J. CONST. L. 255 (2006).

73. 304 N.L.R.B. 71 (1991).

74. *Id.* at 75-77.

75. *Id.* at 71-72.

76. *Id.* at 77 (citation omitted).

77. *Id.*

Act.[78] Specifically, the NLRB found that the activities in question strayed beyond the boundaries of mere speech and, instead, constituted picketing, a coercive activity that involves elements of both speech and conduct.[79] Thus, given the existence of an unlawful secondary motive, the NLRB found that the New Beckley union's conduct violated the Act.[80] More recently, the NLRB's General Counsel has used *New Beckley Mining* to argue that conduct joined with speech generally is necessary to establish a finding of coercion:

> All this activity is analogous to the mass gathering or coercive blocking and interference with the neutral employers' business found unlawful in *New Beckley Mining*. Such activity is not the persuasive 'communication' protected by *DeBartolo*.[81] Therefore, we conclude that the demonstrators used unprotected coercion, rather than protected persuasion, to achieve their goals.[82]

Accordingly, unlike the blanket assumption of coercion in the context of employer promises during representation campaigns, in other contexts the Board analyzes the speech more closely, looking for threatening or coercive conduct joined with the challenged speech.

In short, there is very little support for a generalized finding that every employer promise during a union representation campaign constitutes coercion that violates the Act. Some employer promises, like union promises, merely persuade employees to vote against a union because they convince employees that such a pro-union decision is not in their economic self-interest. Ultimately, such a decision is the essence of the exercise of employee free choice.

C. *Unraveling the Purported Rationale Supporting a Distinction between Employer and Union Promises in Representation Campaigns—The Value of Experience and Information in Evaluating Campaign Promises*

Viewed through the twin lenses of neutrality and employee freedom of choice, the reasoning behind the distinction between employer and union promises during representation campaigns simply does not withstand

78. *Id.* at 72.
79. *Id.* at 73-74.
80. *Id.*
81. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) (holding that a union's distribution of handbills at a shopping mall's entrance encouraging shoppers to forego their shopping until the mall's owner paid fair wages to construction contractors did not violate the NLRA).
82. 2000 N.L.R.B. G.C.M. LEXIS 66, at *6 (July 18, 2000).

scrutiny. As set forth above, that distinction would prevent an employer from promising improvements to wages and benefits for employees, while allowing unions to engage in the very same activity. The Board's rationale for deciding that a union's promise is less problematic because employees recognize that the union does not have the ability to deliver on its promises makes no sense for a variety of reasons.

Allowing unions to make promises during a campaign because employees presumably understand that such promises cannot be guaranteed through the process of collective bargaining ignores perhaps the most basic and fundamental characteristic of a union-organizing campaign. That is, employees know and have experience with their employer, while they do not have the same type of relationship with the organizing union.[83] Indeed, in most instances, a union organizer attempting to convince employees that unionization is in their best interest generally is not an employee at all, but an outsider who has no relationship or experience with the proposed bargaining unit.[84] Thus, the Board's assumption about why union promises are not damaging to employees overlooks the fact that employees have little or no experience with the individual or entity making those promises. In such circumstances, employees are much less able to assess what is a meaningful promise and what is not. Employees simply have no experience or information that would assist them in evaluating a promise made by a union. Thus, in contrast to the Board's reasoning, the lack of information about the entity or individual making the promises to employees makes such union promises much more likely to mislead or deceive an employee than an employer promise would.

Likewise, employees in a union campaign often have little or no information about the process of collective bargaining and what it means for a union to make promises about the results of collective bargaining.[85] As noted above, the percentage of unionized employees, particularly in the private sector over which the NLRB has jurisdiction, has dwindled to the point that less than 10% of the private-sector workforce is currently

83. Presumably, that experience is often what led the employees to initiate an organizing campaign in the first place.

84. Many union organizers are outgoing individuals who are skilled at making strangers feel comfortable in almost any setting, including parking lots, bars, churches and employees' living rooms. *See* DONALD P. WILSON, TOTAL VICTORY! 134-35 (1997).

85. This lack of information is the reason why employers generally attempt to educate employees about the process of collective bargaining during representation campaigns. Employees simply have no idea what the process involves when union representatives speak to them about the purported benefits the union will bring to the employees' workplace. *See, e.g.*, LEWIS, *supra* note 29, at 190-92 (setting forth a hypothetical agenda for a management presentation on the respective powers of unions and management in negotiations).

unionized.[86] Clearly, labor markets and the American workforce have moved away from unionization and collective bargaining.[87] Given that fact, it seems presumptuous, if not downright inaccurate, for the NLRB to assert that employees have sufficient experience and knowledge to allow them to ascertain that union promises about the results of collective bargaining are nothing more than speculative assertions designed to influence their votes. Employees simply do not have sufficient information or experience to allow them to consistently recognize that union promises are essentially meaningless.

Contrast the information available to employees about union promises and union organizers with the information and experience that employees possess about their employers. Employees know their supervisors and managers and have dealt with them over a long period of time. Employer promises have been made and evaluated before and employees can compare what is said in a campaign with what has happened over time. Thus, employees are in a much better position to be able to recognize empty campaign rhetoric when it comes from an employer. They also are more equipped to recognize what constitutes meaningful change on the employer's part and what does not. For example, if an employer makes promises about new employee pension benefits, the employee can assess whether the benefits currently provided have been acceptable, whether the employer has made promises about such benefits in the past, whether the employer has lived up to those promises, and the employer's overall record in dealing with problems or issues once they have been identified. Such

86. *See* Hogler, *supra* note 3 (noting that, by 2004, unions represented only 7.9% of the private sector workforce and only 12.5% of the non-agricultural workforce overall). According to the United States Department of Labor's Bureau of Labor Statistics, the overall percentage of the American workforce that was unionized in 2006 fell to just 12%. Press Release, Bureau of Labor Statistics, Union Members in 2006 (Jan. 25, 2007), *available at* http://www.bls.gov/news.release/union2.nr0.htm. In the private sector, just 7.4% of the workforce was unionized in 2006. *Id.* And since 1983, overall union membership in the American workforce has been on a steady decline. *Id.*

87. Indeed, the economy has moved away from traditional union strongholds such as manufacturing and moved towards less traditional union workplaces, such as the service sector. *See generally* Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 69 (2006) ("The American labor movement is in a moribund state."); Michael H. Gottesman, *In Despair, Starting Over: Imagining A Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 64-65 (1993) (suggesting that decline in labor unions has resulted in part from decline in traditional unionized industries); Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2799 (1991) (same). Unions, with mixed success, have attempted to deal with these changes to the economy by seeking to organize in non-traditional workplaces. *See, e.g.*, Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW. 243 (2004) (discussing current state of law with respect to attempts to unionize graduate students at private universities).

information allows employees to make an educated choice about whether an employer promise of benefits during a campaign should influence their votes.[88] By contrast, an employee has no such information or experience that would allow an educated assessment of a union's promise to sweeten pension benefits as the result of collective bargaining.[89]

A rule that allows promises made by the entity with which employees have little or no experience and prohibits promises from the organization with which employees have a mountain of experience simply makes no sense. If employees can be misled or unfairly influenced by employer promises during a campaign, then that concern is even more acute where the person or entity making the promises is a relative stranger with no track record or history on which such promises can be judged.

D. Promises and Informed Employee Decision-Making

In a system designed to favor employee freedom of choice and neutrality, it is unfair to allow one side to make promises about what a victory in an election will bring, while not allowing the other side to do the same. After all, union representation decisions hinge on whether or not an employee believes that being represented by a union will be more beneficial than remaining non-union. In that context, any restriction on the amount of information provided to employees about the consequences of their decision is problematic.[90] The value of such information allows a more educated choice:

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88. For a discussion of the value of providing information to employees about potential health and environmental hazards in the workplace, see Matthew F. Weil, Comment, *Protecting Employees' Fetuses from Workplace Hazards: Johnson Controls Narrows the Options*, 14 BERKELEY J. EMP. & LAB. L. 142, 178 (1993) (discussing importance of providing information to employees concerning potential fetal hazards in the workplace in order to promote informed employee decision-making about jobs).

89. For example, with little or no experience about the union available to employees, how is an employee supposed to evaluate a promise such as the one made by the union in Lalique N.A., Inc., 339 N.L.R.B. 1119 (2003) (promising immediate, free medical benefits to employees if elected)?

90. In almost every other context, legislators, courts and administrative agencies favor providing as much information as possible to employees about their respective rights and entitlements. *See, e.g.*, the notice requirements contained in the Fair Labor Standards Act, 29 U.S.C. § 206 (2000) (mandating that written notice of minimum wage provisions be provided to employees before start of employment); the Age Discrimination in Employment Act, 29 U.S.C. § 627 (2000) (requiring conspicuous posting of information deemed appropriate by the Equal Employment Opportunity Commission); the Occupational Safety and Health Act, 29 U.S.C. § 655 (2000) (specifying the manner for promulgation of occupational safety and health standards); the Employee Polygraph Protection Act, 29 U.S.C. § 2003 (2000) (mandating conspicuous posting of pertinent provisions); the Family and Medical Leave Act, 29 U.S.C. § 2619 (2000) (same); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-10 (2000) (requiring that employers post official summaries of

> Union organizing campaigns often consist of heated battles between employers and bargaining representatives. Embellishments, harsh words, and extreme charges commonly characterize the atmosphere prior to a Board representation election. Rather than policing or censoring this propaganda, the Board and courts recognize that the liberty to speak for a specific cause in the organizational context goes to the heart of the contest over whether an employee chooses to be represented or not. Because it is the employee's ultimate decision as to which position to support, the Court has decided that the employee should make an educated choice after sifting through the free flow of information.[91]

This point is illustrated by the following scenario. A union organizing drive begins at a plant that is faced with mounting health care costs. The employees are unhappy about the health insurance plans offered and the monthly cost to members. A union organizer tells the employees that if the union is voted in, they will ensure that employees are offered the opportunity to participate in the union's health and welfare fund—a fund that has better coverage at no cost to the employee. The employer, surprised by the union organizing drive and the employee concerns behind it, is willing to change the health plan and take on more of the cost of health insurance to deal with the employees' concerns. These changes would be sufficient to convince the employees that a union is unnecessary. Indeed, the employees would rather have these changes made than take on the expense of union dues.

In this scenario, however, the employer is constrained from explaining how it would deal with the issue raised by the employees that resulted in the organizing campaign. While the union freely promises sweeping new benefits and cuts in health care costs, the employer is resigned to give merely vague assurances that it will work with employees to address their

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pertinent provisions of the act); and the Americans with Disabilities Act, 42 U.S.C. § 12115 (2000) (requiring posting of notices explaining relevant provisions). At least one commentator has proposed that the NLRB adopt a rule requiring that a notice be posted in workplaces that outlines employees' rights under the NLRA. *See* Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431 (1995).

91. Stephen F. Befort & Bryan N. Smith, *At the Cutting Edge of Labor Law Preemption: A Critique of* Chamber of Commerce v. Lockyer, 20 LAB. LAW. 107, 126 (2004) (citations omitted). Presumably, it would be better for employees if the "free flow of information" in a representation campaign involved clear statements about the consequences of a "no" vote, as opposed to vague employer assurances and other campaign rhetoric suggesting with little amplification that the employer understands the employees' concerns and will address them when and if the union loses the election. *See, e.g.*, WILSON, *supra* note 84, at 318-19 (providing sample language for management in encouraging "no" vote reminding employees that all power to change compensation and benefits rests with the employer).

issues.[92] Does such a situation really favor informed employee choice? Do employees make a more informed choice while only hearing the promises of the union? The answer to these questions is clearly no. Employee free choice in an election is not supported by allowing one side of an election to make promises while covering the mouth of the other side.[93] Nor does this rule support the principle of neutrality in employee decision-making during union elections. As noted by one commentator:

> Employers may not . . . promise special benefits in the event of a union election or defeat, even though a more lenient attitude prevails as to union promises. In these asymmetric restrictions on employers, the law does more than champion the rights of an informed electorate of independent decisionmakers. It actually favors the formation of unions . . . .[94]

In advocating a relaxation of the NLRB's prohibition on union conferral of benefits on employees during organizing campaigns, Professor Catherine L. Fisk's argument clearly provides support for the analogous conclusion that unconditional employer promises of benefits during organizing campaigns should be permitted:

> The second rationale for prohibiting the conferral of benefits [during organizing campaigns] is that an employee choice should be reasoned as well as free. An employee who votes for or against a union because he or she has been promised or given money may be exercising a free choice, just one that is more directly affected by economic concerns than the Board and the courts consider seemly. Of course, all union elections are affected in part by the employees' perception of what is going to be in their economic best interest—will unionization lead to higher wages and better working conditions or not? As one court had noted, however, employees should choose unionization based

92. An employer likely will also follow such vague assurances with attacks on the credibility of the union and its purported inability to deliver on its promises, as well as ominous statements regarding the uncertainty of the process of collective bargaining. *See, e.g.*, LEWIS, *supra* Note 29, at 188, 192 (sample handout proclaiming that there are no guarantees once negotiations begin and significant downside); WILSON, *supra* note 84, at 163 (poster emphasizing the downside risks inherent in collective bargaining); *Lalique N.A., Inc.*, 339 N.L.R.B. 1119 (describing leaflet from employer to employees, emphasizing that health care benefits will not follow election victory for union, but rather will require further bargaining).

93. As discussed in note 28, *supra*, there may be an argument that allowing employees to enjoy the results of the union organizing drive—better health care benefits—without having to pay the cost to get those benefits (i.e., union dues) creates a classic economic free-rider situation. However, in a system designed to protect the rights of employees, not necessarily unions, such a problem does not constitute a serious concern under the Act.

94. Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1015 (1986) (citations omitted).

> on a reasoned "consideration of the advantages and disadvantages of unionization in his or her work environment" and not "any extraneous inducements of pecuniary value." Thus, the prohibition is on extraneous economic inducements, not on voting one's own pocketbook interests. In more recent cases, the NLRB has elaborated on this notion, asserting that expenditures that a union or employer make that are germane to the issues (wages and working conditions) are permissible because they appeal to *employees' reasoned vision of their economic self-interest*; gifts of money or things are impermissible because they are not germane to the issues of wages and working conditions.[95]

If, as Professor Fisk argues, promises that appeal to employee concerns about their own economic self-interest are permissible on the union side, then there is little justification why similar employer promises are forbidden. Indeed, a prohibition on employer promises undercuts employees' ability to make a reasoned decision about what is in their self-interest; it limits the relevant information available to employees about the consequences of a "no" vote.[96]

Similarly, in arguing for lifting the ban on union grants of benefits during representation campaigns, Professor Michael J. Hayes actually supports, albeit unintentionally, the conclusion that providing employees with as much information as possible about the consequences of their decision with respect to union representation, including employer promises, is the correct result.[97] Professor Hayes criticizes case law appearing to prohibit union grants of benefits outside the so-called "sphere or [sic] relevance"—i.e., unrelated to employees' terms and conditions of employment.[98] The crux of Professor Hayes' argument appears to be that such a rule "erroneously disregards a major dimension of the relationship between unions and employees."[99] Thus, a rule prohibiting union grants of benefits outside employees' immediate terms and conditions of employment actually inhibits free choice because it limits the information available to employees about the potential benefits of unions and unionization:

> Thus, contrary to the assertion that union benefit grants "pervert the employees' free choice," it is the prohibition on benefit grants that interferes with choice. The prohibition artificially minimizes

95. Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 68-69 (2002) (emphasis added) (quoting NLRB v. L & J Equip. Co., 745 F.2d 224, 231 (3d Cir. 1984)).

96. *Id.*; *see also supra* discussion accompanying note 53.

97. Michael J. Hayes, *Let Unions Be Unions: Allowing Grants of Benefits During Representation Campaigns*, 5 U. PA. J. LAB. & EMP. L. 259 (2003).

98. *Id.* at 280-81.

99. *Id.* at 281.

> the experience employees can have of union assistance and thus skews employees' perceptions of how a union can benefit them.[100]

Professor Hayes then quotes Justice Byron White's similar assertion in the *Savair* case: "*[R]estrictions on the communications of the union as to potential benefits may unduly prevent the intelligent exercise of such choice.*"[101]

Of course, immediately following this discussion, Professor Hayes attempts to justify why his compelling argument should not also be applied with equal force to employer promises.[102] The crux of his distinction basically is an unsupported reliance on the court's conclusion in *Exchange Parts* that employer promises somehow constitute "implied threat[s] to employees."[103] Absent repeating the oft-cited *Exchange Parts* metaphor, Professor Hayes does little to explain why such a conclusion is justified or why there should be a blanket rule prohibiting employers from providing employees with information that is clearly relevant to the union representation decision. This is contrary to his article's main premise, promoting employees' freedom of choice.[104] Interestingly, Professor Hayes acknowledges that unions, like employers, can abuse the use of employee promises during representation campaigns: "Although unions could also trick employees by granting them benefits before an election and retracting them after the union wins the election, unions have greater disincentives to do that than employers do."[105] Put simply, unsupported assumptions and aged metaphors are insufficient to justify a rule violating the goal of neutrality and limiting employees' freedom of choice—employer promises are no more damaging than union promises to employees during representation campaigns.

As noted by Professor Hayes, in certain contexts, the Board has found that union promises during representation campaigns are unlawful. However, unlike its treatment of employer promises, the Board has done so only in the somewhat unusual circumstance where a union has made promises to employees that are unrelated to the collective bargaining process. For example, in *Alyeska Pipeline Service Co.*, the Board invalidated an election where a union promised employees favorable job

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100. *Id.* at 287 (citing NLRB v. Whitney Mus. of Am. Art, 636 F.2d 19, 22 (2d Cir. 1980)).

101. *Id.* (citing NLRB v. Savair Mfg. Co., 414 U.S. 270, 285 n.4 (White, J., dissenting) (emphasis added)).).

102. *Id.* at 293-95.

103. *Id.* at 294.

104. *Id.* at 293-98.

105. *Id.* at 297.

referrals if they voted for the union.[106] If such promises are sufficient to set aside an election, then the Board also should set aside elections where the union makes promises concerning purported improvements that they can make to terms and conditions of employment as a result of collective bargaining.[107] After all, the purpose of union representation elections is deciding whether the union can improve the terms and conditions of employment.[108] Thus, the NLRB's jurisprudence has the perverse effect of allowing union promises about the potential "gains" of collective bargaining, prohibiting similar promises by employers, and prohibiting union promises about extraneous matters that have little or nothing to do with how or why employees typically vote in representation elections. Put simply, these rules make no sense.[109]

IV. CONCLUSION

If neutrality and freedom of choice are the twin goals of the NLRB's regulation of union representation elections, then the current rules governing campaigns—which prohibit employer promises during union campaigns, while allowing union promises—simply make no sense. There is little or no evidence supporting a blanket and unequivocal assumption that all employer promises are inherently coercive and should be prohibited. Moreover, it is quite possible that union promises to employees about the collective bargaining results that the union will purportedly achieve are more problematic for employees than employer promises. Indeed, in most instances, employees have no experience with the promising union or its representatives and may have little or no understanding about the process of collective bargaining. Employees will thus have very little ability to separate the wheat from the chaff in assessing such promises.

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106. 261 N.L.R.B. 125, 127 (1982). The Board, however, has not been as consistent in invalidating elections based on similar union promises. *See* NLRB v. L & J Equip. Co., 745 F.2d 224 (3d Cir. 1984) (accepting NLRB's finding that union campaign promises to provide free dinner and victory dance was not objectionable and did not warrant setting aside election results).

107. *See supra* notes 23 and 27 and accompanying discussion.

108. In a union representation election, the employees decide whether unionization ultimately is in their economic self-interest.

109. Stated another way, the prohibition on employer promises should be repealed for the simple reason that employees are not naïve. They have the ability to assess employer promises and recognize genuine change or empty rhetoric. Employees wade through political promises nearly every year and are capable of doing the same in the workplace. They know their employer, their managers, and their supervisors. They have the ability to assess whether voting for the union is in their economic self-interest or not. Thus, any rule limiting employee access to information about the consequences of their decision ultimately impinges on employee freedom of choice.

In contrast to the lack of information available to employees with respect to the promises made by unions during representation campaigns, employees are in possession of a vast amount of information about their respective employers. Employees are familiar with supervisors and management, generally know the history of the employer's treatment of its employees and, thus, have the information and experience that would allow them to critically evaluate any promises made by the employer. Accordingly, viewed from this perspective, the current legal prohibition on employer promises during representation campaigns is backwards.

In any event, it is clear that any rule limiting the amount of information available to employees about the economic consequences of a "yes" or "no" vote in a union representation election impinges upon employee freedom of choice and therefore corrodes the election process. That concern is particularly acute where the rule imposes such a limitation only on one side of the election. If the goal of the law is to allow employees to decide through a neutral election process whether unionization is in their best interest, then a rule which prevents employees from learning how a "no" vote will improve (or not) the terms and conditions of their employment cannot be reconciled with that goal.

Finally, as noted above, Congress is currently considering proposed legislation that purportedly seeks to achieve "freedom of choice" in union representation decisions. Such a goal is laudable.[110] This Article does not necessarily seek to allow all employer promises or grants of benefits in representation campaigns, nor even to assert that such employer actions are always acceptable and appropriate in union representation campaigns. Rather, the purpose of this Article is merely to point out that the current legal regulation of such promises is illogical and should be reexamined in light of the goals of neutrality and employee freedom of choice in union representation elections. While the Supreme Court's catchy and oft-repeated metaphor of the "fist inside the velvet glove"[111] makes for a great quote, it does not necessarily justify the current regulation of employer promises during union representation campaigns or the distinctions that have been drawn between employer and union promises.

110. This Article takes no position on the propriety of the Employee Free Choice Act. Such legislation should be critically examined to determine whether it, in fact, furthers employee freedom of choice or whether, instead, it merely constitutes a political gift to unions. Unions, dismayed by the failure of their own message to convince employees of their value (and hence stop the steady decline of unionization in the American workforce), may be using this legislation to simply change the rules of the game to make organizing efforts easier.

111. *See supra* note 16.