Response

Truth, Lies, and Power at Work

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In her Article entitled *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, Professor Helen Norton has highlighted an Achilles' heel of labor and employment law, and has sought to address it: that body of law is almost completely dependent for its enforcement on employees' assertion of their own rights; yet employees are widely ignorant of their rights, and employers sometimes actively mislead them.[1] Her focus is not on how the law might intervene to educate employees and protect them from misinformation; there are some familiar policy tools at hand both to regulate employer misrepresentations and to compel truthful disclosures. Her focus instead is on a particular kind of legal challenge to those legal measures, one grounded in the First Amendment. Her Article joins a burgeoning critical literature on the "deregulatory First Amendment," in which legal scholars have sought to expose and push back against the transformation of the First Amendment from a shield for dissidents, outsiders, and grassroots activists into a sword for wealthy corporations.[2] Her particular focus on employer speech about employee rights is a

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1. *See generally* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016).

2. *See, e.g.*, Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015) (discussing the emergence of the First Amendment as a deregulatory tool); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (detailing trends that "have led to the growing constitutional conflict between the First Amendment and the regulatory state" and comparing the modern and *Lochner* era versions of constitutional deregulation); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016) (tracing the development of First Amendment claims deployed in order to deregulate the workplace as well as the potential and far-reaching consequences for workers should courts accept those arguments).

valuable contribution to that literature, and highlights some old and new challenges within employment law. Let us first back up to survey the landscape on which these challenges have emerged.

The basic foundations of the American legal regime for protecting employees and their rights and interests were constructed in the New Deal. The New Dealers' primary strategy was not direct regulation of terms and conditions of employment (although there was some of that); it was rather a market reconstruction strategy, embodied in the National Labor Relations Act (NLRA).[3] Workers were empowered to form or join independent labor organizations, and, through those organizations, to bargain collectively with their employers.[4] For a few prosperous decades this collective bargaining strategy worked pretty well for the workers—mostly white and male—employed in leading sectors and major firms within the American economy. It worked not only for those who were represented by unions but also for many others whose employers sought to avoid unionization and to keep good employees. Things have changed.

Especially in the wake of union decline, American society has grown more dependent on a secondary strategy of worker protection that was also launched in the New Deal: individual rights and minimum labor standards. Beginning with the NLRA itself and the Fair Labor Standards Act of 1938, Congress has enacted a multitude of laws establishing nonwaivable employee entitlements. The Civil Rights Act of 1964 vastly expanded the rights strategy in the form of laws against discrimination on the basis of various traits,[5] as well as against retaliation based on legally protected activities.[6] State and municipal lawmakers have enacted additional protections.[7]

3. National Labor Relations Act, 29 U.S.C. § 157 (2012).

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

5. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a) (2012)).

6. *See, e.g.*, 42 U.S.C. § 2000-e-3(a) (prohibiting employer retaliation based on opposing discrimination or participating in proceedings under Title VII).

7. *See, e.g.*, CAL. GOV'T CODE § 12940(a) (West 2016) (prohibiting discrimination on the basis of gender identity, gender expression, or sexual orientation); N.Y. EXEC. LAW § 296 (McKinney 2016) (prohibiting discrimination on the basis of sexual orientation).

These laws obviously do not enforce themselves. Large, reputation-conscious firms do devote organizational resources to the business of compliance, but their investments bear some relation to the likelihood that violations will be detected and the severity of sanctions or penalties. Simply stated, enforcement tends to breed compliance. But how do these laws get enforced? Government agencies can scout out and detect no more than a tiny fraction of violations. By and large, employees have to do much of the work of enforcement themselves. They have to detect violations and complain—perhaps to the employer, and eventually to enforcing agencies or the courts.[8]

That brings us to Professor Norton's central concern: employees do not know enough about their legal rights at work—especially about how legal rights and rules affect their own situation—and they get much of their knowledge from employers, who sometimes misrepresent the nature of those rights or how they apply to particular workers or workplaces.[9] For example, they might falsely tell employees that they have no right to overtime, or that they are not even employees but independent contractors.

There are other impediments, of course, to employees' self-enforcement. Even well-informed employees may fear reprisals. Although retaliation against employees who assert their rights at work is usually unlawful, the law is far from swift or sure in its response. Really well-informed employees would hesitate to rely on anti-retaliation laws to protect them, and might thus hesitate to complain. They might quit and then complain; but their ability to quit is constrained by market conditions and personal circumstances. (More on that point below.)

Still, employees' knowledge of the law is a necessary if not a sufficient condition for their own pursuit of a remedy, and thus for enforcement of the entire edifice of employment law. And employers can and do sometimes lie, distort, or conceal the relevant legal facts. What can the law do about that problem? Roughly speaking, the law might either compel the employer to disclose truthful information, or penalize their circulation of false or misleading information. Professor Norton's chief contribution is to highlight and explore the threat posed by the First Amendment, especially in its increasingly anti-regulatory

8. For my own extended exploration of these matters, see CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010).

9. *See* Norton, *supra* note 1, at 37.

form, to some public policy efforts to counter employee ignorance and misunderstanding of the law by regulating what employers are permitted or required to say or do.

The most spectacular recent illustration of this anti-regulatory threat is the D.C. Circuit's rejection of a rule adopted in 2011 by the National Labor Relations Board (NLRB) that required employers to post in the workplace a notice of employees' rights under the NLRA, including their right to join or refuse to join a union.[10] Employers argued that the NLRB did not have the authority to enact such a rule—that Congress knew how to grant that power and had failed to do so.[11] That argument prevailed in the Fourth Circuit.[12] But employers were delighted when the D.C. Circuit, in *National Association of Manufacturers v. NLRB* (*NAM*), instead adopted a version of their more audacious argument that employers had a First Amendment right to refuse to give over 1.3 square feet of wall space to an official description of federal labor law rights.[13]

The *NAM* case vividly illustrates the nature of the threat that Professor Norton addresses. The decision extrapolates from cases striking down government compulsion of individuals' affirmation, for purely symbolic reasons, of values and beliefs that listeners might attribute to the individual.[14] It defies reason to extend that prohibition on "compelled speech" to the highly functional mandate that employers display an accurate official statement of employees' legal rights, where there is no conceivable risk that any viewer will attribute to any individual beliefs he or she does hold. (Indeed, the D.C. Circuit appears to

10. *See* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 949, 963 (D.C. Cir. 2013).

11. *Id.* at 963.

12. *See* Chamber of Commerce v. NLRB, 721 F.3d 152, 154 (4th Cir. 2013).

13. *See Nat'l Ass'n of Mfrs.*, 717 F.3d at 956–59. Technically the court relied on § 8(c) of the NLRA, 29 U.S.C. § 158(c), colloquially known as the "employer free speech" provision of the NLRA (though it protects both union and employer speech), and was said to "implement[] the First Amendment." NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969); *see also infra* note 34. The *NAM* court drew exclusively on First Amendment cases in explicating the infringement on employer free speech rights.

14. *See id*. at 957–59 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (holding that a compulsory flag salute and pledge of allegiance amounted to allowing "public authorities to compel [an individual] to utter what is not in his own mind"); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (barring New Hampshire from compelling its citizens to "display 'Live Free or Die' to hundreds of people each day" on their license plates)).

have backed off of the broader implications of *NAM*.[15]) One would like to believe no great doctrinal advance is required to expose the absurdity of this decision. It is like using a hand grenade to kill a horsefly. But this horsefly has already stung the body of labor law, and threatens, with the ongoing expansion of the deregulatory First Amendment, to grow into a dragon. So maybe a hand grenade is in order after all.

Most of the case law and controversy surrounds not laws that compel employers' disclosure of accurate information, but rather those that regulate employers' own communications, especially with employees.[16] Professor Norton's concern is with statements of fact, specifically, "employers' objectively verifiable speech about workers' rights and other working conditions (such as pay, benefits, job security, hours, and hazards)."[17] That is what she means by "employer speech" in her Article. But it is helpful to situate that speech in the larger landscape of employer expression that might trigger First Amendment scrutiny.

Nearly all of the First Amendment doctrine in this area has been elucidated in relation to the NLRA and employer speech relating to unions and union organizing. The NLRA charged the NLRB with preventing and remedying employer "unfair labor practices," including interference, restraint, or coercion of employees in the exercise of their rights to form unions and act in concert; and that role immediately put the NLRB in the position of assessing employer speech that was alleged to have that effect.[18] The NLRB's role in regulating employer speech has been a perpetual subject of controversy, and

15. In *American Meat Institute v. Department of Agriculture*, the court partially overruled *NAM*, disavowing language that implied narrow First Amendment constraints on the compelled disclosure of factual information. 760 F.3d 18, 22–23 (D.C. Cir. 2014); *see also* Nat'l Ass'n of Mfrs. v. Perez, 103 F. Supp. 3d 7 (D.D.C. 2015) (upholding a Department of Labor rule requiring federal contractors to post an almost identical notice of NLRA rights, and rejecting *NAM* as a statement of applicable First Amendment principles). These subsequent decisions do not directly disturb the holding of *NAM* regarding the NLRB's limited authority under § 8(c) of the NLRA, though they do undermine its reasoning.

16. *See generally* Joseph K. Pokempner, *Employer Free Speech Under the National Labor Relations Act*, 25 MD. L. REV. 111 (1965) (discussing early cases in which the NLRB grappled with "the delicate duty of balancing the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign," in the context of misrepresentation).

17. *See* Norton, *supra* note 1, at 35.

18. National Labor Relations Act, 29 U.S.C. § 158(a) (2012).

has generated several Supreme Court constitutional pronouncements on the matter that are of general application to employer speech bearing on employee rights.

In its earliest pronouncement on employer speech rights, in *Virginia Electric & Power*, the Supreme Court suggested two principles that have come to delineate the role of the First Amendment in protecting employer speech to workers about their rights.[19] First, the employer is free to express to employees its own *opinion* on matters relating to workers' rights (or other matters).[20] Second, the employer has no right to *threaten or coerce* its employees in the exercise of their rights, even if it does so through speech, and even if the threat is implicit rather than explicit.[21] Between those two boundary principles governing *opinions* and *threats* lie the kind of employer communications that Professor Norton's Article addresses: *statements of fact*, and in particular statements about employees' legal rights and entitlements. Here the First Amendment constraints are murkier, and well deserving of the kind of close scrutiny that Professor Norton brings to the matter.

For First Amendment purposes, it is worth subdividing the category of employer statements of fact into true and false statements. But of course that oversimplifies things. A statement of fact might be intentionally false and intended to defraud; or it might be knowingly or recklessly or negligently or even non-negligently false. Or it might be vague and misleading without being clearly false. And even a clear and knowing falsehood might be harmful or not.[22]

In existing doctrine, the gradations of truth and falsity interact with another dimension of the speech, that is, its subject

19. NLRB v. Va. Elec. & Power Co., 314 U.S. 469 (1941).

20. *Id*. at 477. Norton accepts this principle. *See* Norton, *supra* note 1, at 62 n.117.

21. *See Va. Elec. & Power Co.*, 314 U.S. at 477.

22. The significance of this last distinction was highlighted recently in *United States v. Alvarez*, a case that involved the Stolen Valor Act, which made "it a crime to falsely claim receipt of military decorations or medals and provide[d] an enhanced penalty if the Congressional Medal of Honor [was] involved." 132 S. Ct. 2537, 2539 (2012). A majority of Justices agreed that false statements do not, as a categorical matter, fall outside of the protective ambit of the First Amendment, even though no majority of Justices could agree upon a single rationale. *See id.* at 2544–45. A majority agreed that the Stolen Valor Act violated the First Amendment, and Justice Kennedy, for the plurality, reasoned that the Act would prohibit speech that did not actually cause harm by diminishing the integrity of the military honors system. *See id.* at 2550.

matter. Speech on "public issues," or "matters of public concern" is at "the highest rung of the hierarchy of First Amendment values."[23] At least as to that speech, it is clear that the government may not penalize even false and defamatory speech unless it is uttered with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[24] Much would thus seem to turn on whether employer speech on employees' rights and labor standards counts as speech on "matters of public concern" or rather as speech of mere economic significance, such as "commercial speech."[25]

As Professor Norton demonstrates, the Supreme Court has issued a stream of inconsistent pronouncements on this issue since the 1930s, most of them involving not employer but union speech on workers' terms and conditions of employment, including through peaceful picketing.[26] One might attempt to derive

23. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))); Pickering v. Bd. of Educ., 391 U.S. 563, 673 (1968) ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." (citing N.Y. Times Co. v. Sullivan 376 U.S. 254 (1964))).

24. *Sullivan*, 376 U.S. at 280. *New York Times v. Sullivan* itself involved speech about the conduct of public officials, but it was later extended to other speech on "matters of public interest." *See* Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1964).

25. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) ("The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").

26. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 99 (1940) (holding that union pickets conveying "information concerning the facts of a labor dispute" was speech on "matters of public concern," and "[f]ree 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"); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909–10 (holding that civil rights boycotts entailed protected speech on matters of public concern, but distinguishing cases upholding regulation of union picketing as a form of regulable economic activity); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 576 (1988) (finding that union handbills that "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" were not mere commercial speech, and that prohibiting them would raise serious First Amendment questions); Harris v. Quinn, 134 S. Ct. 2618, 2623, 2632 (2014) (holding that public sector union speech on "core issues such as wages, pensions, and benefits are important political issues" and "matters of public

from these union speech cases a principle, and extend it to the First Amendment treatment of *employer* speech about employee rights and conditions of employment. The theory would be that "what's good for the goose is good for the gander"—that whatever level of scrutiny applies to restrictions on union speech about unionization and employees' rights and conditions of employment, the same must be applied to employer speech. But that would not be Professor Norton's position.

Sidestepping the problematic distinction between speech on public issues and economic or commercial speech, Professor Norton would instead focus constitutional attention on "the dynamics of certain speaker-listener relationships," specifically the power imbalance that characterizes some of those relationships.[27] She finds divergent outposts of support in other areas of First Amendment law for the proposition that, in relationships characterized by a systematic asymmetry in power and access to information, the constitutional focus should shift towards protecting the interests of less-powerful listeners and not only the interests of more-powerful speakers, even when speaking on matters of public concern. The upshot would presumably be asymmetric First Amendment protections for the speech of employers and unions, as the latter rarely exercise economic power over employees.

In one sense Professor Norton's "listener-based approach to First Amendment analysis" simply amounts to diluting the protection accorded some speech and speakers.[28] How is it different, after all, from simply lowering the level of scrutiny accorded some speech restrictions (as in the case of some commercial speech), and thereby admitting a wider range of justifications for regulation? It is not wholly different, but I take Professor Norton to be arguing that *the interest of listeners within an asymmetric relationship sometimes is and ought to be accepted as a justification for regulating speech of more powerful or better informed speakers*.

Part of the burden of the Article is to identify the outposts of support in positive law for this proposition. The constitutionality of regulation of professional speech by a doctor or a lawyer to a patient or client is an obvious example.[29] So is speech that

concern" in the public sector and that requiring objecting non-members to pay dues to support such speech violated the First Amendment).

27. *See* Norton, *supra* note 1, at 52.

28. *Id.* at 56.

29. *Id.* at 59.

sellers direct toward consumers.[30] Of course, most of the latter is pure commercial speech, but that does not undermine Professor Norton's reliance on the example. It is fair to say that traditional commercial speech doctrine is a crystalized recognition of the weighty interests of consumers/listeners in truthful information about goods and services, and the superior knowledge of sellers.[31] Professor Norton urges the courts to recognize that employer speech about employees' legal rights implicates analogous concerns, whether or not that speech qualifies as "commercial speech."

The "captive audience" doctrine is the most powerful and pertinent strain of First Amendment jurisprudence allowing regulation of speech in the interest of less powerful listeners in an asymmetric relationship.[32] Surely employees at work are the quintessential captive audience.[33] But that proposition has had limited traction against employers' freedom to communicate with their employees in the highly charged context of employers' anti-union speech. That is partly because of the NLRA's "employer free speech provision," adopted in 1947 in response to aggressive NLRB regulation of employers' anti-union speech.[34] The statutory limit on NLRB regulation of speech has also limited the generation of rulings about the constitutionality of such regulation (though it is not clear that the NLRB has made use of all the statutory authority it might have in this area).

Consider the so-called "captive audience" doctrine under the NLRA. Unfortunately, it stands for the proposition that employers are *allowed* to hold "captive audience" meetings, compelling employees to attend and listen to employer speeches on pain of dismissal.[35] Commentators have argued that the

30. *Id.* at 62 n.116.

31. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 599 n.6 (1980) (noting that content-based regulation of commercial speech can be justified, in part, by the fact that "commercial speakers have extensive knowledge of both the market and their products").

32. *See* Norton, *supra* note 1, at 78.

33. *See* Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423 (1990) ("Few audiences are more captive than the average worker.").

34. *See* 29 U.S.C. § 158(c) (2012) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.").

35. *See generally* Paul M. Secunda, *The Contemporary "Fist Inside the*

NLRB could regulate such meetings—not the speech but the compelled attendance—more than it does; no clear Supreme Court ruling precludes its doing so.[36] But the ironic example of lawful "captive audience meetings" highlights the limited success of the captive audience notion in expanding the scope for regulation of employers' anti-union speech.

To be sure, the concern for employees' "captivity" and dependence at work has accorded the NLRB greater latitude than it might otherwise have to scrutinize employer statements of opinion or fact to determine whether they contain an implicit threat. It is necessary, said the Court in *NLRB v. Gissel Packing Co.*, to "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[37] A greater willingness to detect implied threats in statements of fact or opinion or prediction is part but not all of what Professor Norton hopes to accomplish through her "listener-based approach" to employer free speech claims.[38]

A stronger precedent might have arisen out of the NLRB's episodic regulation of factual misrepresentations in the context of union representation campaigns, but such regulation has been tightly constrained by the NLRA's "employer free speech" provision, and in any case was long ago abandoned without generating any authoritative First Amendment rulings.[39]

So Professor Norton finds somewhat sparse support for her "listener-based approach" in positive law, especially in the most relevant and highly litigated setting. But that does not undermine the normative claim that the law *should* take greater account of asymmetries of power between speakers and listeners, particularly in evaluating the constitutionality of laws restricting employer's false speech or compelling their truthful disclosures on employee rights at work.

Velvet Glove": Employer Captive Audience Meetings Under the NLRA, 5 FIU L. REV. 385 (2010) (reviewing and criticizing prevailing treatment of captive audience meetings).

36. *See id.*; Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995).

37. 395 U.S. 575, 617 (1969).

38. *See* Norton, *supra* note 1, at 38.

39. Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982).

Professor Norton makes a strong case, in my view, that greater regulation of employer lies and misrepresentations about employee rights is necessary and should be constitutional. When the legislature has granted employees non-waivable entitlements to minimum labor standards or to rights against retaliation or discrimination, it necessarily has a powerful interest in enforcing those entitlements; employees' knowledge of their legal rights is a necessary condition of that enforcement. But employee knowledge is highly susceptible to self-interested manipulation on the part of employers. That is because of the power that employers exercise over employees, as well as employers' superior knowledge of employment law and how it applies in particular circumstances. It might seem obvious, but it is worth unpacking that notion of employer power a bit.

The appeal to "unequal bargaining power" as a justification for regulation meets much skepticism among economists.[40] In perfectly competitive markets there is no such thing as "bargaining power"; buyers and sellers of labor are both "price takers." Even in labor markets that are imperfectly but mostly competitive, economists tend to depict "bargaining power" as shifting if not illusory, and not inherently favorable to employers, as it depends on the relative supply and demand for particular skills at any given time. Workers with scarce and valuable skills may have significant bargaining power if employers are competing for their services.

Professor Norton sides (as I do) with what is probably the dominant view among labor and employment scholars (and certainly, in my experience, among law students and lay people):

40. *See, e.g.*, Stewart J. Schwab, *The Law and Economics Approach to Workplace Regulation*, *in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 91, 111–13 (Bruce E. Kaufman ed., 1997) (explaining the "law and economics" view that unequal bargaining power does not justify legal intervention in the labor market because it does not impede "efficient" results); Michael L. Wachter, *Neoclassical Labor Economics: Its Implications for Labor and Employment Law*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 20 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) (explaining the neoclassical economic theory of labor markets, and why efforts aimed at equalizing bargaining power in reasonably competitive markets, such as most external labor markets, will often produce inefficient results). For a comprehensive review and a critique of different schools of labor economists' approaches to inequalities in bargaining power between employees and employers in competitive labor markets, see Bruce Kaufman, *Economic Analysis of Labor Markets and Labor Law: An Institutional/Industrial Relations Perspective*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 53 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

the realities of the employment relationship almost always give employers power over their employees. At one level, employer power is inherent in the relationship: once a firm hires an employee (rather than, say, buying the relevant services from an independent business), they buy the employee's time, and with it the right to control what the employee does during that time. At another level, that barely counts as "power" if both parties agreed to the terms, especially when the employee remains free to walk away in case the terms change or become less attractive. But there's the rub: it's hard to walk away from the sole source of one's livelihood—especially if one has dependents, or little by way of savings or family resources to fall back on. For the great bulk of workers—especially those without scarce, in-demand skills—good jobs are not easy to find, and there are many competitors in the search for those jobs. By the same token, it's risky for employees to stay and speak up against what they regard as new or unexpectedly onerous terms or conditions; they might get fired, and then they are back looking for another job, now with the possible stigma of having been fired. In short, both exit and voice are costly and constrained for workers. Under those conditions, employers have a lot of what we have to count as "power" over nearly all their employees, even before considering information asymmetries.

Once upon a time in the New Deal era, Congress itself etched this notion of "unequal bargaining power" into the law as a reason for ensuring employees' right to form unions, to engage in concerted activity, and to bargain collectively.[41] That same notion of "unequal bargaining power" implicitly underpins the whole edifice of employment laws protecting employees within what is essentially a contractual relationship. Some of those laws might be said to address "market failures"—collective action problems, information asymmetries, and others. But those arguments are mostly ex post academic justifications for what most legislators probably understood as an effort to shield employees from the consequences of their limited bargaining power.

Still, speech is supposed to be different in our constitutional scheme, and largely immune from regulation based on claims

41. *See* 29 U.S.C. § 151 (2012) ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . .").

of unequal power.[42] In rejecting efforts to regulate corporate political speech on the ground that such speech distorts public debate, the Court has repeatedly said, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[43] The point was underscored to dramatic effect in *Citizens United v. FEC*, in which the Court reiterated that "premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."[44]

The roots of resistance to calibrating speech rights in view of power imbalances are deep, and they were planted in the very ground that Professor Norton seeks to cultivate. Close on the heels of the New Deal in 1940, the Court in *Thornhill v. Alabama* recognized that "satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible . . . are not matters of mere local or private concern."[45] The Court thus struck down a state anti-picketing law that suppressed union efforts to inform the public of its grievances and improve its bargaining position. Just one year later, however, in the *Virginia Electric & Power* case, the Court recognized (albeit in more elliptical terms) that employers, too, have First Amendment rights—rights that are implicated even when employers speak directly to their own employees, and despite the imbalance of economic power between the two sides.[46] In short, "more speech" is the First Amendment's prescribed response to debates about labor conditions and workers' rights.

Virginia Electric turns out to have been a major pivot point in the history of the First Amendment, in part because of the

42. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); First Nat'l Bank of Bos. v. Belotti, 435 U.S. 765, 791–92 (1978).

43. *Buckley*, 424 U.S. at 38–39.

44. 558 U.S. 310, 341 (2010).

45. 310 U.S. 88, 103 (1940).

46. NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 476–77 (1941) (responding to the Company's First Amendment argument, the Court said only that "neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made"). The Court was more forthright in grounding that freedom in the First Amendment in *Thomas v. Collins*, 323 U.S. 516, 538 (1945) (relying on *NLRB v. Va. Elec. & Power Co*. for the proposition that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty").

role of the ACLU, a major architect of free speech doctrine.[47] As Laura Weinrib recently elaborated in her book *The Taming of Free Speech*, the nascent ACLU in the 1910s and 1920s was closely tied to the defense of radical labor activists, especially the Industrial Workers of the World (IWW).[48] Its leaders were deeply suspicious of the courts and committed to free speech only as an instrument in the then-raging struggle for radical social and economic change.[49] The early ACLU sought to defend a "right of agitation," especially on behalf of aggrieved workers.[50] By 1940, however, after a furious internal battle over the ACLU's intervention in the *Virginia Electric* case, the ACLU had embraced employers' First Amendment right to speak to their employees in opposition to unionization.[51] That battle largely consolidated the ACLU's transformation into a mainstream legal advocacy organization committed to free speech as an ideologically *neutral* principle of democratic governance.[52] The First Amendment itself was transformed along the way—elevated to constitutional sanctity, and strengthened, but well capable of being deployed against the downtrodden workers for whom it had once served as a flimsy shield.

So Professor Norton's normative claim is up against a powerful current of resistance in First Amendment theory and doctrine toward regulating the speech of the powerful in the interest of protecting the less powerful. But she makes a persuasive case that relative power should be and sometimes is relevant to the constitutionality of both speech restrictions and compelled disclosure of information. Employers may have a robust constitutional right to express their opinions on what employee rights ought to be. But the government should be empowered to regulate their false or misleading statements of fact as to what those rights are, and to compel employers to display or disclose accurate information about those rights.

47. *See generally* LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016).

48. *Id.* at 10–11.

49. *Id.* at 26–27.

50. *Id.* at 82–110.

51. *Id.* at 304, 310.

52. *Id.* at 310.