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Captive Audience Meetings: Employer Speech vs. Employee Choice

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"The talk of restoring free speech to the employer is a polite way of reintroducing employer interference, economic retaliation, and other insidious means of discouraging union membership and union activity, thereby greatly diminishing and restricting the exercise of free speech and free choice by the working men and women of America. No constitutional principle can support this."
– Senator Robert Wagner, 1947[1]

I. WHAT'S GOING ON IN OUR WORKPLACES?

Imagine walking into work one day and having your boss tell you who to vote for, who to socialize with, and who to worship. Now imagine being fired because you choose not to listen. This notion is an anathema to most Americans who believe that individuals should have a right to hold their own political, social, and religious views, free from interference by others. Yet, this practice is increasingly common. For example, during the 2004 presidential election, "the National Association of Manufacturers and other politically-charged business groups made a concerted effort to get employers to use the workplace for partisan politics. Employers responded by urging workers to help by opposing candidates deemed 'unacceptable' to the company."[2] During the 2008 presidential election, the Wall Street Journal reported that Wal-Mart warned its managers against voting for President Barack Obama.[3]

Generally, the at-will nature of employment in the United States means that employers can fire employees on any basis they choose.[4] Aside from the 1964 Civil Rights Act[5] (which prohibits discharge based on gender, race, or religion), no federal statute prevents private employers from firing their employees for any reason they wish.[6] Some states, such as New Jersey,[7] Missouri,[8] and California,[9] have responded with more protective statutes designed to

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[1] Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2429 (2003) (citing 93 CONG. REC. A895 (1947)).

[2] Center for Policy Alternatives, *Worker Freedom from Mandatory Meetings*, http://www.stateaction.org/issues/issue.cfm/issue/workerfreedom.xml (last visited Nov. 11, 2007).

[3] Ann Zimmerman & Kris Maher, *Wal-Mart Warns of Democratic Win*, WALL ST. J., Aug. 1, 2008, at A1 (While, "[t]he Wal-Mart human-resources managers who run the meetings don't specifically tell attendees how to vote in November's election, but make it clear that voting for . . . Barack Obama would be tantamount to inviting unions in[.]").

[4] The baseline underlying the employment-at-will rule—the purchase and sale—is that employers grant employees a license to enter the workplace and generate units of labor that are sold to employers in return for what we call wages, fringe benefits, and other consideration. Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 137 (2006). Because each payment of wages is simply compensation for the last set of labor units that an employee has sold to the employer, the relationship may be terminated at any time without violating the contract or property rights of either party. *Id.* at 137-38.

[5] *See* 42 U.S.C. § 21 (2010).

[6] Lewis Maltby, *Civic Speech Shouldn't Get Employees Fired*, LEGAL TIMES, Aug. 29, 2005, at 44.

[7] The New Jersey statute states that "[n]o employer or employer's agent, representative or designee may, except as provided in section 3 of this act, require its employees to attend an employer-sponsored meeting or

safeguard individuals employed within their jurisdictions. Nationally, however, individuals are largely subject to the will of their employers, who often see themselves as benevolently providing employees with a job, a courtesy they feel obliged to extend for only as long as they desire. As a result, workers are often intimidated into giving up their rights at the behest of their bosses – even coerced into giving up their constitutionally afforded First Amendment guarantees, such as the right to be free from unwanted communication. [10]

In response to increasing efforts by employers to hold meetings such as those in which Wal-Mart attempted to dissuade its employees from voting for Barack Obama,[11] Worker Freedom Acts have been introduced to a number of state legislatures, supported primarily by the American Federation of Labor – Congress of Industrial Organizations ("AFL-CIO").[12] If enacted, this legislation would prohibit employers from holding mandatory meetings to discuss religious[13] or political matters, and from attempting to influence an employee's views or actions on such matters.[14] In pertinent part, the Model Worker Freedom Act put forth by the AFL-CIO provides:

> a) No employer or an employer's agent, representative or designee may require an employee to attend an employer-sponsored meeting or participate in any mandatory communication with the employer or its agents or representatives, a purpose of which is to communicate the employer's opinion about religious or political matters or attempt to influence the employee's opinions or actions with respect to religious or political matters. No employer or employer's agent, representative or designee shall discharge, discipline or otherwise penalize or threaten to

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participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matters." N.J. STAT. ANN. § 34:19-10 (West 2006).

[8] The Missouri statute states, "[o]n the part of any employer, making, enforcing, or attempting to enforce any order, rule, or regulation or adopting any other device or method to prevent an employee from engaging in political activities, accepting candidacy for nomination to, election to, or the holding of, political office, holding a position as a member of a political committee, soliciting or receiving funds for political purpose, acting as chairman or participating in a political convention, assuming the conduct of any political campaign, signing, or subscribing his name to any initiative, referendum, or recall petition, or any other petition circulated pursuant to law[.]". MO. ANN. STAT. § 115.637 (West 2005).

[9] The California statute states, "[n]o employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." CAL. LAB. CODE § 1101 (Deering 2003).

[10] The author recognizes that some employees may be willing listeners who wish to hear their employer's viewpoints on political matters. The Model Worker Freedom Act does not prohibit such dialogue from occurring. *See* e-mail from Nancy Schiffer, Associate General Counsel, AFL-CIO, to Allie Robbins, Student of Law, CUNY School of Law (Aug. 22, 2007, 11:58 EST) (on file with author). Present jurisprudence neglects to protect the unwilling listener, however, and this is of grave first amendment concern. Therefore, this paper focuses on those who do not wish to be subject to their employer's viewpoints on political matters.

[11] Zimmerman & Maher, *supra* note 3, at A1.

[12] The AFL-CIO was formed in 1955 and is a voluntary federation of fifty-seven national and international labor unions, whose mission includes building a strong political voice for workers. AFL-CIO, *About Us*, http://www.aflcio.org/aboutus (last visited Dec. 11, 2007).

[13] This article deals exclusively with political matters. *See, e.g.*, Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959 (1999) (providing a discussion of speech regarding religious matters in the workplace).

[14] *See* Schiffer, *supra* note 10.

> discharge, discipline or otherwise penalize or take any adverse employment action against any employee: as a means of requiring an employee to attend a meeting or participate in a mandatory communication described in this section; or,
>
> b) because the employee refused to attend, respond to, address, or participate in a meeting or mandatory communication that the employee reasonably believes violates or would violate this section; or,
>
> c) because the employee has challenged or opposed any practice that the employee reasonably believes violates or would violate this section, or because the employee has made a charge, filed suit, testified, or assisted in doing any of these things, or assisted or participated in any manner in any investigation, proceeding, or hearing under this section.[15]

Further, the Model Worker Freedom Act specifically states that it will not "[a]pply to communications about religious matters by a religious corporation, association, educational institution, or society," nor will it:

> Prohibit any employer from requiring its employees to participate in any communications with the employer if receipt of the communication is reasonably necessary to the performance of actions by the employees that may lawfully be required by the employer and are related to the normal operation of the employer's business or enterprise. [16]

Captive audience meetings are precisely what the term implies – meetings in which the audience is not free to leave.[17] In the employment context, "[e]mployers assemble employees, usually during work time, and present them with anti-union speeches and videos."[18] One of the most common subjects discussed in mandatory captive audience meetings around the country is unionization. When faced with a union organizing drive in their workplace, eighty-seven percent of employers in the United States hold mandatory employer meetings to communicate an anti-union message.[19] During these meetings, employers are free to "silence workers who offer dissenting opinions during these forced encounters, and they can place restrictions on when and where employees engage in pro-union speech."[20] Further, employees can be fired for not attending these meetings.[21]

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[15] *Id.*

[16] *Id.*

[17] Elizabeth J. Masson, Note, *"Captive Audience" Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?*, 56 HASTINGS L.J. 169, 171 (2004).

[18] *Id.* at 170 (citing AFL-CIO, *The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States*, ISSUE BRIEF (Sept. 2005)).

[19] Chirag Mehta & Nik Theodore, *Undermining The Right To Organize: Employer Behavior During Union Representation Campaigns*, Center for Urban Economic Development University of Illinois at Chicago 15 (2005, *available at* http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEDcompressedfull report.pdf.

[20] Andrias, *supra* note 1, at 2439.

[21] *Id.* (citing Litton Sys., Inc., 173 N.L.R.B. No. 1024, 1030, 1968-2 NLRB Dec. (CCH) ¶ 20,371 (Dec. 2, 1968)).

Captive audience meetings and the discrimination and dismissal to which they often lead should be cause for concern, not only for those who support the formation of workplace unions, but also for all those who support the First Amendment's guarantee of freedom of speech. Supreme Court jurisprudence on employer captive audience meetings largely centers on the free speech of private employers within their workplaces, rendering practically invisible the free speech rights of employees.[22] In permitting such behavior by private employers, the Supreme Court has distinguished the workplace from nearly all other arenas in which unwilling listeners are protected from unwanted speech.[23] The Model Worker Freedom Act seeks to ensure that the First Amendment rights of employees are upheld, so that they do not have to fear losing their employment – the very foundation of survival for both individuals and families – for disagreeing with their employer's politics or choosing not to hear to those views.[24] Yet, Worker Freedom Acts are likely to come under attack on the very same First Amendment grounds that originally inspired advocates to draft the legislation. Employers repeatedly claim a nearly absolute First Amendment right to communicate with employees while those employees are on the employer's private property during business hours.

This Article seeks to refocus the debate over captive audience meetings in order to prioritize the free speech rights of employees, and demonstrate that the Model Worker Freedom Act fully comports with the Supreme Court's interpretation of First Amendment captive audience jurisprudence. Part II begins with the threshold question of how political speech is defined, maintaining that speech about unions is political speech and is thus appropriately covered by the Model Worker Freedom Act. Part III outlines the history of Supreme Court captive audience jurisprudence and argues that workers on a jobsite, forced to choose between being subjected to employer indoctrination and the loss of their livelihoods, are a captive audience of unwilling listeners and should be treated as such by the Supreme Court. Part IV explores recent lower court jurisprudence, which characterizes employees as captive audiences and, thus, grants employees the protections of unwilling listeners. Part V seeks to respond to contentions that the Model Worker Freedom Act is unconstitutionally restrictive of employer speech and that it is an unconstitutional restriction on expressive conduct, not on speech alone. The Article concludes that, if passed, the Model Worker Freedom Act would ensure employee access to the free speech rights guaranteed to them by the First Amendment of the United States Constitution for more than 200 years, but which have been increasingly eroded by statute, litigation, and employer practice in the sixty years since the passage of the Taft-Hartley Act.[25] Worker Freedom Acts provide an essential protection to workers who do not wish to be subjected to mandatory indoctrination at the behest of their employer and should thus be adopted by all fifty states. These acts fully comport with the captive audience doctrine articulated by the United States Supreme Court and should thus survive a First Amendment challenge.

II. UNION SPEECH IS POLITICAL SPEECH

[22] *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
[23] *See infra* Part III.
[24] *See* Schiffer, *supra* note 10.
[25] 29 U.S.C.S. § 141 (LexisNexis 2010).

"[P]olitical speech has always been considered that form of expression most protected by the First Amendment."[26] Union speech is inherently political speech; thus, the protections of the Model Worker Freedom Act reach those workers subject to anti-union captive audience meetings. The Model Worker Freedom Act itself defines political matters as including "candidates for government office, incumbent government office holders, ballot initiatives and referenda, proposed law, political parties, lawful political, social, community and labor organizations, and related matters[.]"[27] The classification of union speech as political speech is of paramount importance as the Supreme Court has traditionally placed a "high value" on political speech, while history suggests "speech which is part of a labor dispute is low in value."[29] Aside from helping to permanently eliminate this disparity, successfully defining union speech as political speech within Worker Freedom Acts will serve to ensure that employees in private workplaces continue to maintain their First Amendment rights in the face of captive audience meetings about unionization.[30]

The Supreme Court has not expressly defined political speech. The Court has found that despite the name "political," "core political speech need not center on a candidate for office."[31] A number of scholars have attempted to expand upon this definition in order to develop a more workable description. One commentator has described political speech as "political expression . . . [relating to] public issues[,]"[32] while another defines it as "expression or association based on current events, controversial viewpoints, and governmental or 'political' issues that are of widespread public interest."[33] Scholar Cass Sunstein broadly defines political speech as "speech which 'is both intended and received as a contribution to public deliberation about some issue.'"[34] Similarly, Professor Marion Crain finds all "speech that advances the public good" to be political speech.[36] Additionally, renowned First Amendment philosopher Alexander Meiklejohn found political speech to include "[e]ducation[] in all its phases, . . . [t]he achievements of philosophy and . . . science[,] . . . [l]iterature and the arts[,] . . . [and] [p]ublic discussions of public issues[.]"[37]

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[26] Melvin I. Urofsky, *A Symposium On Campaign Finance Reform: Past, Present, And Future: Article: Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 13 (2008).

[27] Schiffer, *supra* note 10.

[29] Jeffrey Shaman, *The Theory of Low Value Speech.* 48 SMU L. REV. 297, 299 (1995) (citing Geoffrey R. Stone, et al., CONSTITUTIONAL LAW 1200-03 (Little, Brown & Co. 2nd vol. 1991)).

[30] Already, where a Worker Freedom Act has been introduced and adopted, "drafters of the New Jersey law eliminated the phrase 'labor organizations' from the Act's definition of 'political matters.' Consequently, employers may continue to hold mandatory captive-audience speeches to communicate with employees their position on unions without running afoul of the Act." Jackson Lewis, *Worker Freedom from Employer Intimidation Act Goes into Effect Immediately*, http://www.jacksonlewis.com/legalupdates/article.cfm?aid=979 (Aug. 16, 2006) (last visited Nov. 10, 2007). The elimination of union speech from the Model Worker Freedom Act in this manner not only undermines the purpose of the legislation itself, but continues the erosion of first amendment protections for working people nationwide.

[31] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

[32] Shaman, *supra* note 29, at 344.

[33] Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 937 n.6 (1987).

[34] Karen M. Kowalski, Note & Comment, *National Endowment For The Arts V. Finley: Painting A Grim Picture For Federally-Funded Art*, 49 DEPAUL L. REV. 217, 237 (1999) (quoting CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 130 (1993)).

[36] Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1969 n.303 (1994).

[37] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57 (1961).

The simplest – and most useful – definition is that political speech is any speech having to do with public affairs.[38] Private employers may counter that what happens behind the closed doors of a private workplace is not public business. Yet, anti-union employer speech and mandatory captive audience meetings are of public concern precisely because it is this nation's policy to promote collective bargaining.[39] Additionally, the public has an interest in knowing whether a business is upholding the right to organize and freedom of speech in order to decide whether to patronize a particular establishment. Thus, even a private workplace is an extremely important venue within the public arena.[40]

The most constructive definition to draw from this dialogue is that of political speech encompassing all matters of public affairs or public discourse. This definition is not only useful to fit speech about unions into the definition outlined in the Model Worker Freedom Act;[41] this definition also comports with Supreme Court jurisprudence, where the Court has found speech to be political outside of the electoral politics context.[42] Given the importance of the right to organize as a codified national value,[43] the role that speech about this value plays in consumer

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[38] Some people have criticized the use of so many definitions as being too vague and providing more questions than answers, as depicted in the following statement:

> One of the fundamental flaws with the category of political speech is the inability to define "political." One may define political speech as that which pertains to the "discovery and spread of political truth." However, to the extent that this definition is essentially self-referential, it is unhelpful. Political speech may also be that which relates to "democratic self-governance." The question that this definition raises, however, is the extent to which a particular expression "relates" to democratic self-governance. For instance, do expressions relating to democratic self-governance only encompass endorsements for and criticisms of candidates for public office, or do they extend to any issue-based advocacy?

R. Scott Shieldes, *Suturing Discourses within the First Amendment*, 34 HOUS. L. REV. 1531, 1536 (1998) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 94 (1980)); (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA 333 (1990); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 5 (1992)).

[39] *See* Labor Management Relations Act of 1947, Pub. L. No. 101-120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 151-166).

[40] *See* Andrias, *supra* note 1, at 2448 (rejecting

> the notion that the site where Americans spend much of their waking lives is or can ever be outside the domain of public discourse [is rejected]. In fact, the workplace is central to citizenship, identity, and community. It is not merely a marginal part of the general domain of public discourse; it serves important functions within the larger system of freedom of expression. For many citizens, particularly the vast majority who are not political activists, the workplace is a main site of discussion about political and social issues in addition to matters of individual personal significance. Rather than being outside the domain of public discourse, the workplace is a critical locus in which speech rights are exercised and in which the public debate is formed).

Similarly, J.M. Balkin stated that:

> [T]he workplace should be an arena of special, not lessened, free speech protection. Precisely because people spend so much of their lives in the workplace, the workplace is an important site of public discourse. Much employee speech in the workplace is not, nor should it be considered, exclusively "managerial," "instrumental," or "private." We may talk more about public matters, sports, gossip, politics, and the affairs of the day at our workplace than we do at home.

J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2313 (1999).

[41] *See* Schiffer, *supra* note 10.

[42] *See generally* Bridges v. California, 314 U.S. 252, 268-71 (1941) (dealing with speech about pending litigation).

[43] *See* Labor Management Relations Act of 1947, 29 U.S.C. § 141.

choice,[44] and the public nature of all workplaces,[45] speech about unions fits easily within the definition of political speech. Forcing individuals to be exposed to unwanted political speech must be viewed with exacting scrutiny, and it must not be tolerated absent a particularly compelling governmental purpose.[46] As such, the Model Worker Freedom Act must include union speech as political speech, and mandatory captive audience meetings regarding unionization must be seen as a violation of the First Amendment.

III. EMPLOYEES ARE A CAPTIVE AUDIENCE

A. The History Behind Anti-Union Captive Audience Meetings

Anti-union consultants insist that captive audience meetings are the key to ensuring union defeat in the workplace.[47] This pervasive employer practice has particular implications for workers in the private sector due to the nature of the National Labor Relations Act ("NLRA"), which created the National Labor Relations Board ("NLRB").[49] Through the NLRA, employees are afforded a statutory right to join a union;[50] the NLRB regulates the process through which employees may exercise that right.[51] Within that regulation done by the NLRB, employers are permitted to say anything they wish to try to stop workers from exercising their statutory right.[52] As Andrias stated:

> In contrast [to this statutory right], employers are deemed to have a constitutional right to speak against unionization; that is, any constraint placed on employer campaigning by the NLRB is viewed as state action, and, therefore is suspect under the First Amendment. Thus, even though both workers and employees are protected from government interference, employers enjoy a constitutionally protected right to speak while employees within a private-sector workplace effectively do not.[53]

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[44] Massachusetts AFL-CIO, *Buy Union Made*, http://www.massaflcio.org/buy-union-made (last visited Nov. 22, 2008).

[45] *See* Andrias, *supra* note 1, at 2448.

[46] *See McIntyre*, 514 U.S. at 347.

[47] As one anti-union blog explains:

> Both union-sponsored research and our own vast experience conclude conclusively that the odds of a company victory increase with each captive audience meeting held. Up to 5 meetings the effect of each meeting is dramatic. Even after the 5th meeting the chances of a company victory continue to improve, but at a much slower pace.
>
> The captive audience meeting is management's most important weapon in a campaign. It gives the company the opportunity to tell its story. The company gets a chance to counter any union propaganda. Finally, it helps to reinforce the company's leadership position and gives companies leaders a chance to build trust and familiarity.

Labor Relations Institute, Inc., Employee Free Choice Act Blog, *Anti-Union Campaign Tips – How Many Meetings?* (July 25, 2006), http://laboringattheinstitute.blogspot.com/2006/07/anti-union-campaign-tips-how-many.html.

[49] 29 U.S.C. § 153(a) (2010).

[50] *Id.* § 157 (2010).

[51] *Id.* § 156 (2010).

[52] *See* Andrias, *supra* note 1, at 2420.

[53] *Id.* at 2420.

Consequently, when employees attempt to speak out or avoid unwanted communication, the free speech rights of their employers preempt their own constitutional guarantees. Instead of being protected by the First Amendment, employees can be fired for refusing to allow their employers to subject them to political indoctrination.[54]

Yet this was not always the case. Permitting employers to hold these captive audience meetings in order to intimidate employees and prevent them from joining unions is a relatively recent phenomenon.[55] Under the original NLRA (the Wagner Act), employers were required to remain neutral during union organizing drives.[56] In 1945, however, the United States Supreme Court "bestowed on employers a right to campaign against unions," in the landmark case *Thomas v. Collins*.[58] Two years later, Congress codified this position in its 1947 amendment to the National Labor Relations Act (known as the Taft-Hartley Act), explicitly allowing employers to present their views on union membership to their employees and permitting employers to hold mandatory captive audience meetings.[59] In lobbying for this amendment, "the bill's proponents expressed virtually no concern about how the legislation might affect worker speech or public debate."[60]

This dramatic turnaround in both the legislative and judicial arenas can largely be traced to the socio-political climate in the United States following the culmination of World War II. Subsequent to "passage of the Wagner Act, total union membership in the United States increased sharply[.]"[61] After World War II, "American industry was racked by a series of paralyzing strikes. Responding to the surge in union activity, corporate and business leaders pressured Congress to enact amendments to the NLRA that would constrain further union growth and enable management to reassert control."[62] Creating a right for employers to campaign against union elections – and characterizing it as an employer's freedom of speech – was a critical component in this concerted anti-union effort, and one that has had a lasting effect.[63]

Today, workers in the United States are repeatedly subjected to anti-union messages with little or no opportunity to refute those messages or to choose not to hear them. "Under the free speech provisions of the NLRA, 'employers have virtually unlimited opportunities to communicate aggressively with their employees during union campaigns' and these 'communications can and often do include distortion, misinformation, threats, and

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[54] *See id.* at 2419-20.

[55] *See id.* at 2420-21.

[56] Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 537-38 (1993) (citing *In re* American Bending Tube Co., 44 N.L.R.B. 121, 129 (1942)).

[58] Becker, *supra* note 56, at 544 (citing Thomas v. Collins, 323 U.S. 516, 537-38 (1945)).

[59] 29 U.S.C. § 158(c), (d)(4)(C) (providing that "[t]he 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[.]").

[60] Andrias, *supra* note 1, at 2427.

[61] *Id.* at 2424 (citing CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA; 1880-1960 148, 252 (1985)).

[62] *Id.* at 2425 (citing Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 358 (1995)).

[63] Andrias, *supra* note 1, at 2425.

intimidation.'"[64] During a United Auto Workers organizing drive at a Nissan plant in Tennessee, for example, "'Nissan used its plant-wide video system and the daily work group meetings to hammer home its anti-union message . . . The day before the vote, Nissan shut down the line for up to an hour on each shift for captive audience meetings.'"[65] Frito-Lay "routinely not only compels its employees to listen to anti-union diatribes, on company time and property, but also forces its drivers to allow anti-union advocates to accompany them on their routes, requiring the captive drivers to listen to their anti-union speech."[66] Despite the intimidating and emotionally trying nature of such encounters,[67] it has become quite commonplace across the country for employers to repeatedly force their employees to hear their positions on unions and other political matters, while not affording employees the same opportunity or the ability to choose not to be subjected to this speech. [68]

Since the passage of the Taft-Hartley Act, the discussion of workplace captive audience meetings has largely centered on the employer's right to freedom of speech.[70] However, as with all constitutionally afforded rights, the right to free speech is not absolute.[71] Nevertheless, the Supreme Court has repeatedly upheld the right of the unwilling listener to be free from unwanted communication and, in so doing, has deemed constitutional restrictions on speech made to individuals in a captive audience setting.[72] In fact, "[t]he notion that, in certain circumstances, the unwillingness of persons to receive a message outweighs another's right to speak has been a

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[64] *Id.* at 2435 (quoting KATE L. BRONFENBRENNER, EMPLOYER BEHAVIOR IN CERTIFICATION ELECTION AND FIRST CONTRACT CAMPAIGNS: IMPLICATIONS FOR LABOR LAW REFORM, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 82 (Sheldon Friedman et al. eds., 1994)).

[65] William C. Green, *Negotiating the Future: The NLRA Paradigm and the Prospects for Labor Law Reform*, 21 OHIO N.U. L. REV. 417, 433-34 (1994) (quoting Jane Slaughter, *Behind the UAW's Defeat at Nissan,* LABOR NOTES, Sept. 1989 at 1, 13; MARTIN KENNY & RICHARD FLORIDA, BEYOND MASS PRODUCTION: THE JAPANESE SYSTEM AND ITS TRANSFERS TO THE U.S. 284, 305 (1903)). In the wake of this intimidation, workers voted 69% to 31% against forming a union with the United Auto Workers. Green, *supra* note 65, at 434 (citing Slaughter, *supra* note 65, at 1).

[66] Dmitri Iglitzin & Steven Hill, *Businesses Impeding Free Speech Rights in the Workplace*, HUFFINGTON POST, Dec. 6, 2007, *available at* http://www.huffingtonpost.com/steven-hill/businesses-impeding-free_b_75733.html. This anti-union communication is thrust upon workers who are already union members, in an attempt to drive the Teamsters union out of the company. *See id.*

[67] *See* Mehta & Theodore, *supra* note 19, at 15. As one worker explained:

> At the time, those meetings frustrated me so much I cried a lot. Oh my goodness, we had so many mandatory meetings. He had them at 9:00 a.m., 1:00 p.m., and 5:00 p.m. He paid us to sit there and hear him bash the union. We had anti-union meetings every other week. Our executive director had people coming in to talk to us that were from the outside. It's their job. They would tell us that the union was just going to take our money. It could take years to get a contract. The union is not going to get you a raise. They were really trying to scare us. The first meeting we had, the boss didn't want us to ask questions. He just got up there and degraded the union.

Id.

[68] *Id.*

[70] *See* Adrias, *supra* note 1, at 2426-34; *see also Gissel Packing*, 395 U.S. 575, 618-19 (1969).

[71] Andrias, *supra* note 1, at 2423 (citing *In re* American Tube Bending Co., 44 N.L.R.B. 121, 133-34 (1942)).

[72] *See* Packer Corp. v. Utah, 285 U.S. 105, 110-11 (1932) (acknowledging that the presence of billboards can create a captive audience of unwilling viewers); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (finding that recipients of mailings are not captive because they can easily throw them away); Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (determining that employees on their way to and from work are a captive audience).

part of First Amendment analysis for over fifty years."[73] As the Supreme Court has clearly articulated, "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[74] As the Court has further explained, "regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment[.]"[75] Yet, in the context of employment, the Supreme Court has found that employers may hold mandatory meetings in which they discuss their views on unionization, despite the right of employees not to listen.[76]

Mandatory captive audience meetings "are now considered to be integral to the employer's right to freedom of speech, even though in most other contexts there is no First Amendment right to speak to a captive audience."[77] This inconsistency threatens to undermine the First Amendment by exempting the one place where most people spend the majority of their time – the workplace – from its protection. The Model Worker Freedom Act would eliminate this inconsistency.[78] "Not only could a ban on captive audience meetings be supported under current doctrine, but such regulation would also further the democratic aims of the First Amendment by allowing free, rather than forced, deliberation."[79]

The notion that employees are discharged for attempting to leave mandatory meetings or asking questions in these meetings is not mere speculation; it is an unfortunate reality.[80] Although the Supreme Court has not directly addressed the issue, it also has not overturned the findings of the National Labor Relations Board or any lower court in upholding the right of an employer to discharge an employee for refusing to attend a mandatory meeting in which an employer discusses his or her views on unionization.[81] As such, the jobsite has been placed incongruently outside of the Supreme Court's captive audience jurisprudence.

B. In Public and in Private: Supreme Court Captive Audience Jurisprudence

One of the areas in which the Supreme Court has deemed individuals to be a captive audience is when they are in their homes.[82] The Court described the home as both the "'last

[73] Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991-1992).

[74] Frisby v. Schultz, 487 U.S. 474, 487 (1988).

[75] *Bolger*, 463 U.S. at 84.

[76] *See Gissel Packing*, 395 U.S. at 617 (holding that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board[,]" as long as that speech contains no express "threat of reprisal or force or promise of benefit").

[77] Andrias, *supra* note 1, at 2439.

[78] *See* Schiffer, *supra* note 10.

[79] Andrias, *supra* note 1 at 2456.

[80] *See, e.g.*, NLRB v. Prescott Indus. Prod. Co., 500 F.2d 6, 7-8, 11 (8th Cir. 1974) (upholding the firing of an employee for demanding to ask questions in a mandatory meeting at which the employer told employees of its anti-union position); Litton Systems, Inc., 173 N.L.R.B. 1024, 1027-28, 1030-31 (1968) (upholding the discharge of an employee who left a mandatory meeting early in which the employer spoke about a union organizing drive).

[81] Andrias, *supra* note 1, at 2424.

[82] *Frisby*, 487 U.S. at 484-85.

citadel'" and a "'retreat.'"[84] While this may comport with the ideals of the American dream (in which one leaves one's home to join the public at work and retreats to one's private tranquility at home), present day reality means that many people are spending as much (if not more) time at their jobs than in their homes.[85] Some even argue that, "home is being invaded by the pressures of work, while the workplace is becoming a haven from a hectic, unrewarding home life."[86] Responding to this trend, a recent *Business Week* article urged employers to make the workplace feel like home.[87] As home and work merge into one, and individuals increasingly split their time between these two locations, it is ever more necessary for the Supreme Court to recognize this reality and treat people in their workplace as just as captive as those within their homes.[88] While in some cases individuals can easily circumvent unwanted speech and are thus required to do so, the Supreme Court has found that people should not have to avoid such speech when they are in their homes.[89] Just as people are not required to move to a new home to evade unwanted speech, people should not be required to leave their jobs in order to escape undesired communication.[90]

Another domain in which the Supreme Court repeatedly invokes captive audience jurisprudence is advertising. Individuals are considered captive when they cannot avoid objectionable advertisements, even where they can simply turn off their radio or television.[91] Additionally, the Supreme Court in *Lehman v. Shaker Heights*[92] deemed constitutional advertisement restrictions on public buses.[93] Justice Breyer's dissent argued, "Transit passengers are not forced or compelled to read any of the messages, nor are they incapable of declining to receive them. Should passengers chance to glance at advertisements they find offensive, they can 'effectively avoid further bombardment of their sensibilities simply by averting their

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[84] *Id.* at 484 (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring); Carey v. Brown, 477 U.S. 436, 471 (1986)).

[85] *See The American Workplace - How Much Time Do Americans Spend At Work?*, State University.com, http://jobs.stateuniversity.com/ pages/17/American-Workplace-HOW-MUCH-TIME-DO-AMERICANS-SPEND-AT-WORK.html (last visited November 22, 2008). Accordingly, it was reported that "[o]f the respondents to an August 2005 Gallup Poll, 45% reported that they worked between thirty-five and forty-four hours per week; 30% worked between forty-five and fifty-nine hours per week; and 9% worked more than sixty hours each week." *Id.* Further, "[i]n 2005, 5.3% of workers aged sixteen and older held multiple jobs, according to the Bureau of Labor Statistics in *Employment and Earnings*." *Id.*

[86] Marilyn Snell, *Home Work Time*, MOTHER JONES (May/June 1997), *available at* http://motherjones.com /print/ 18510.

[87] Rachael King, *Using Consumer Tech for Workplace Good*. BUSINESSWEEK, *available at* http://www.businessweek.com/technology/ceo_tipsheet/2007_6.htm (last visited November 11, 2007).

[88] *See* Balkin, *supra* note 40, at 2311-14. Further, "[c]hildren may be subject to discipline in the home, but for most adults, the place they are most subject to the discipline of others and least free to leave is at work." *Id*. at 2312.

[89] *Frisby*, 487 U.S. at 484 (finding that "[a]lthough in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different").

[90] This point is underscored by rising unemployment rates (6.5% in October of 2008), which make the possibility of leaving one's job instead of participating in a captive audience meeting even more daunting. U.S. Dept. of Labor, Bureau of Labor Statistics, *The Employment Situation: November 2008* (Dec. 5, 2008), *available at* http://www.bls.gov/news.release/ archives/empsit_12052008.htm.

[91] *See Packer Corp.*, 285 U.S. at 110; Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974); FCC v. Pacifica Found., 438 U.S. 726, 759-760 & n.2 (1978) (Powell, J., concurring).

[92] 418 U.S. 298.

[93] *Lehman*, 418 US at 304.

eyes.'"[94] Despite these alternatives being nothing more than "minor inconvenience[s]," the bus passengers' momentary status as unwilling viewers was enough for the Court to classify them as a captive audience.[96] Similarly, in *Packer Corp. v. Utah*,[97] the Supreme Court found that – consistent with the First Amendment – a speech on billboards could be restricted as individuals "have the message of the billboard thrust upon them by all the arts and devices that skill can produce."[98] The Court distinguished billboards from other types of advertisements, such as those found in newspapers and other periodicals, because billboards "are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part."[99] Again, the Court upheld a restriction on speech in order to protect the unwilling viewer, despite no obstacle preventing that viewer from simply looking away.[100] Employees in a workplace cannot, however, simply turn off their employer(though many wish they could), and they cannot merely avert their eyes. The very nature of the mandatory meeting requires that the employee stay and listen. The only alternative is to lose one's job – a far greater sacrifice than having to look away when glancing at a distasteful advertisement on a bus or city street.[101] An employee at work is, therefore, just as captive as (if not more captive than) a rider on a bus or a pedestrian within view of an undesired billboard.

The Supreme Court's reasoning in the advertising cases largely centers around protecting individuals from unwanted speech as they carry out their daily activities such as walking down the street, traveling on a bus, or listening to a radio program.[102] The Supreme Court recognized the right to be free of unwanted communication of "people who because of necessity become commuters and at the same time captive viewers or listeners."[103] The Court has also expressly articulated that workers traveling to and from work are a captive audience and must not be subjected to unwanted communication.[104] If a person becomes a commuter by necessity of having to go to work, and can be a part of a captive audience on his or her way to work because of that necessity, it follows that such a person would by necessity have to be at work, and would be captive in that workplace as well. Yet, absent the Model Worker Freedom Act, individuals are stripped of this essential First Amendment protection as soon as they cross the threshold into their places of employment.

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[94] *Id.* at 320 (Breyer, J., dissenting) (quoting Cohen v. California, 403 U.S. 15, 21 (1971) (first quotation marks omitted)).

[96] *See id.*

[97] 285 U.S. 105.

[98] *Packer Corp.*, 285 U.S. at 110.

[99] *Id.*

[100] *Id.* at 112.

[101] Given the economic downturn, requiring someone to leave his or her job in order to avoid unwanted speech is more than just asking someone to switch employers. Economic hardship makes finding a new job extremely difficult. In fact, "[a]s the slowing economy forces employers to put the brakes on new hiring, job seekers have seen their searches lengthen by nearly one month[.]" Mark Huffman, *Finding a Job Takes Longer in a Slow Economy*, CONSUMERAFFAIRS.COM, Oct. 20, 2008, *available at* http://www.consumeraffairs.com/news04/2008/10/economic_stress06.html.

[102] *See, e.g., Lehman,* 418 U.S. at 306-07 (Douglas, J., concurring).

[103] *Id.*

[104] *Hill*, 530 U.S. at 717 (quoting *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921) (finding that "[i]n going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege.") (upholding a restriction on protest and distribution of literature within eight feet of a health care facility).

A third area in which the Supreme Court has found a captive audience is in the schoolhouse.[105] In this context, the Court has stated, "Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences."[106] While cases involving school children typically focus on the impressionable and immature nature of youth,[107] a school assembly falls firmly in line with captive audience jurisprudence for the same reason that employees in a workplace are captive – the consequences of avoiding the unwanted speech are severe.[108] If a student in a school chooses not to attend a mandatory assembly he or she is likely to be disciplined – suspended, placed in detention, or given a write-up in the oft-feared "permanent record." A child is not likely to be expelled for choosing once not to attend an assembly. Yet, he or she is deemed captive. A worker on the other hand, may be written up, suspended, or fired for refusing to attend a mandatory workplace meeting on political matters. As the consequences are more severe for an employee than a student, and because both share heavy burdens in avoiding unwanted speech, both should be considered part of a captive audience.

The only potential explanation for failing to uphold First Amendment rights in the workplace would be that workers are not actually a captive audience or unwilling listeners. Yet, this argument is clearly without merit. The Supreme Court has upheld restrictions on speech to captive audiences in both the public and private spheres.[109] As the workplace bridges both spheres (being of public concern to consumers in choosing with whom to do business, as well as the location in which most individuals spend the bulk of their time outside the home), there is no reason for the Supreme Court not to uphold restrictions on captive audience meetings within private places of employment. Workers are also no less captive than students who would be subject to discipline for refusing to attend an assembly.[110] Additionally, employees facing potential discharge for not attending a mandatory meeting are no less captive than bus riders who could merely avert their eyes from an objectionable advertisement[111] or radio listeners who can turn off their radio.[112] A heavy burden is placed on workers in a workplace who must avoid their employers' speech during mandatory meetings.[113] As the Supreme Court did not inquire into whether an individual has the ability to move before determining that "[t]here simply is no right to force speech into the home of an unwilling listener[,]"[114] the ability to seek other employment

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[105] *See, e.g.,* Bethel Sch. Dist. No 403 v. Fraser, 478 U.S. 675 (1986).

[106] *Id.* at 681.

[107] *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No 403*, 478 U.S. at 682 (reasoning that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings).

[108] *See generally Bethel Sch. Dist. No. 403*, 478 U.S. at 683-84.

[109] *See generally id.*; *Lehman*, 418 U.S. 298; *Packer Corp*, 285 U.S. 105.

[110] *See generally Bethel Sch. Dist. No 403*, 478 U.S. 675 (1986).

[111] *See Lehman*, 418 U.S. at 320 (Brennan, J., dissenting) (citing *Cohen*, 403 U.S. at 21).

[112] *FCC*, 438 U.S. at 726.

[113] Masson, *supra* note 18, at 188. Masson stated that:

> [i]n balancing the right to free speech with the right to choose what one hears, courts consider the burden the listener should bear in avoiding the speech, such as walking away from the speaker or averting one's eyes to written speech. If an individual's choice not to hear speech cannot be freely made, that burden should be found to be unreasonable. The greatest justification for regulating expression based on the captive audience doctrine exists when the speech is highly intrusive upon the right to choose not to listen, and the burden of avoiding such speech is extreme.

Id.

[114] *Frisby*, 487 U.S. at 485.

should also not be considered an adequate alternative to participating in mandatory indoctrination.

If the Supreme Court were to be true to its jurisprudence and consider the burden placed on unwilling listeners in the employment context, it would see the alternative of losing one's job (either through forced dismissal or voluntary resignation) as highly burdensome. The burden of being momentarily insulted by an offensive advertisement or forced to broach an unpleasant topic with his or her child after exposure to such speech has been found by the court to be unacceptable.[115] Further, the Supreme Court has deemed any burden on a person to accept unwilling communication into his or her home as too much to expect a person to bear.[116] Yet, the Supreme Court has not found the loss of one's livelihood to be a burden severe enough to warrant protection for employees being subjected to political indoctrination by their employers.[117] If individuals are forced out of their jobs, they lose their sources of income and their ability to provide for themselves and their families. "[T]he very existence of an employer's legally-sanctioned right to hold such captive audience meetings, to prevent the union from holding them, to forbid the asking of questions at such meetings, and to discharge employees who ask 'loaded questions' is a manifestation of coercive power and domination."[118] Despite this coercion and the extreme burden placed on the listener who chooses to avoid such speech in his or her workplace, the Supreme Court has thus far placed employees outside of the sphere of individuals who have the First Amendment right to be free from unwanted speech. This has been done in the name of the employer's right to free speech in the workplace. The Model Worker Freedom Act seems to remedy this inconsistency, by placing employees into the realm of a captive audience where they belong.[119]

In addition to being contrary to the Supreme Court's definition of a captive audience, however, the characterization of the workplace as outside of captive audience doctrine is also at odds with NLRB adjudication:

> On the one hand, the coerciveness of the speech's content, the making of direct appeals to race prejudice, or the presentation of forged materials during such a speech are all considered as part of the "public" election sphere and, hence subject to regulation by the [National Labor Relations] Board. Yet, on the other hand, the holding of such meetings and requiring employee attendance is viewed as an inherent or reserved "private right" of management and occurring in the employer's private or "natural forum."[120]

These inconsistencies can be rectified through the adoption of the Model Worker Freedom Act, which would once again bring into balance the First Amendment rights of employers and employees. To be consistent with its own captive audience precedent, the Supreme Court must uphold this legislation.

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[115] *See generally id.* at 474.

[116] *See, e.g., Frisby*, 487 U.S. 474; Kovacs v. Cooper, 336 U.S. 77 (1949); Martin v. Struthers, 319 U.S. 141 (1943).

[117] *See NLRB*, 500 F.2d at 12.

[118] Story, *supra* note 62, at 421.

[119] *See* Schiffer, *supra* note 10.

[120] Story, *supra* note 62, at 421.

C. The State's Interest in Protecting the Unwilling Listener

In upholding restrictions on the freedom of speech to captive audiences, the Supreme Court has acknowledged that the state has a compelling interest in protecting individuals who cannot avoid the imposition of such speech.[121] The Supreme Court defined its own jurisprudence as having "repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'"[122] Thus, ensuring employees receive First Amendment protection as unwilling listeners is merely the balance of the equation of free speech rights, an equation that presently only affords free speech protections to employers. Just as "one person's right to swing his or her fists ends at another person's nose,"[123] so too does one person's right to speech end at another person's eyes or ears when that person is captive and unable to readily escape. It is the province of the state to maintain the rights of all individuals, and no interest can be more compelling than the state's interest in upholding the First Amendment of the United States Constitution.

In addition to having upheld the state's interest in protecting unwilling listeners from unwanted speech, the Supreme Court has also upheld the interest of the unwilling listener as compelling. "The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be left alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'"[124] The state's interest in protecting the unwilling listener from unwanted speech should naturally include a sphere in which one can avoid the speech only at the risk of losing one's job. Thus, if enacted, the Model Worker Freedom Act would simply require states to protect an interest that the Supreme Court has already deemed compelling.

Not incidentally, the Supreme Court has also recognized the protection of an individual's right to organize a union as a compelling state interest, by repeatedly upholding cases decided under the National Labor Relations Act.[125] The NLRA itself promotes collective bargaining by declaring it the policy of the nation to encourage such a process.[126] Further, the freedom of

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[121] *See Lehman*, 418 U.S. 298; *Packer Corp*, 285 U.S. 105.

[122] *Hill*, 530 U.S. at 718 (quoting Erznoznik v. Jacksonsville, 422 U.S. 205, 209 (1975)).

[123] Timothy Sandufer, *Liberal Originalism: A Past For The Future*, 27 HARV. J.L. & PUB. POL'Y 489, 526 (2004).

[124] *Hill*, 530 U.S. at 716-17 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[125] *See, e.g.*, Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359 (1998) (upholding an NLRB decision that created a "objective reasonable doubt" test where an employer wanted to conduct a poll of workers to determine their support for union membership); *Davis v. United Automobile, Aerospace & Agric. Implement Workers Of Am.*, 475 U.S. 1057 (1986) (denying certiorari to review an action against the United Auto Workers for allegedly violating the rights of one of its members when he was discharged for violating the union's constitution).

[126] 29 U.S.C. § 151. The statute states that:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

association is a core tenet of the First Amendment, and exercising the right to join a union is an exercise of that freedom. Clearly, upholding a provision of the Constitution is a compelling state interest. As the court has repeatedly upheld a state's interest in protecting unwilling listeners, as well as a state's interest in the promotion of collective bargaining, it should surely allow the amalgamation of those two interests, such that a state could protect the rights of unwilling listeners as a means of supporting the national policy of promoting collective bargaining. The Model Worker Freedom Act simply provides a mechanism through which states can assert this important interest.

IV. EMPLOYEES ARE CAPTIVE WHERE THE ALTERNATIVE IS RESIGNATION

A number of courts have already held that employees in the workplace are captive audiences where the only means they have of avoiding the speech is to resign. In *Resident Advisory Board v. Rizzo*,[127] for example, a United States District Court for the Eastern District of Pennsylvania found that construction workers were a captive audience on their construction site where demonstrators held regular protests outside of the site.[128] Courts have similarly found workers to be captive where they were subject to sexual harassment.[129] For example, a Florida District Court found that, "female workers . . . are a captive audience in relation to the speech that comprises the hostile work environment. 'Few audiences are more captive than the average worker[.]'"[130] The court went on to explain that, "[t]he free speech guarantee admits great latitude in protecting captive audiences from offensive speech."[131] Adopting this reasoning, the U.S. Court of Appeals for the Tenth Circuit also found employees in a sexual harassment case to be a captive audience.[132] Other courts have followed this rationale as well, finding that "acts of

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[127] 503 F. Supp 383, 402 (E.D. Pa.1980).

[128] *Id.* (holding that,

> [t]he workers at the Whitman jobsite are a captive audience, who must remain on the jobsite during the workday and, for security reasons, even during their lunch break…. [T]he workers at the Whitman jobsite are powerless to avoid bombardment by derisive speech and noise from the Whitman defendants' amplification system short of giving up their jobs. As several of the workers testified, the harassment by the demonstrators has been such that they would have quit the job except that there was no other work available to them).

[129] Even people in their homes are not physically prevented from leaving them. The point of captive audience doctrine, however, is that they should not have to be put to such a choice. The coercion brought upon them is unfair. In like fashion, minimum wage workers may have to move from job to job to avoid harassment. But the question is not whether there is another equally low-paying job available. The question is whether they should have to leave a job to avoid being sexually harassed. It would undermine the central purpose of Title VII to argue that it gave workers no right to stay in a job free from sexual harassment. Moreover, as noted before, the kind of employment discrimination at issue here promotes gender segregation in job opportunities precisely by surrounding the plaintiff in a hostile environment of speech and conduct. If the plaintiff's only remedy is to leave, the mechanisms of job segregation will simply proceed unabated. Captive audience doctrine should not focus on particular spaces like the home. Rather, it should regulate particular situations where people are particularly subject to unjust and intolerable harassment and coercion. Captive audience doctrine, like the doctrines of Fourth Amendment privacy, should protect people in coercive situations, not places. *See*, Balkin, *supra* note 40, at 2312.

[130] Robinson v. Jacksonville Shipyards, 760 F. Supp 1486, 1535-36 (M.D. Fla. 1991) (quoting J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423-24 (1990)).

[131] *Id.* at 1536 (citing *Frisby*, 487 U.S. at 487).

[132] Baty v. Willamette Indus., 172 F.3d 1232, 1246 (10th Cir.1999). Stating that:

> imposing Title VII liability on an employer for failing to regulate its employees' harassing speech does not violate the First Amendment for the following reasons: (1) the employer

expression which may not be proscribed if they occur outside of the work place may be prohibited if they occur at work[,]"[133] and that "the captive audience doctrine is not reserved for situations in which listeners are physically unable to leave, such as passengers on airplanes or inmates in prison. The Constitution does not require plaintiffs to sacrifice their employment to avoid a racially clamorous work environment[.]"[134] Unfortunately, the Supreme Court denied certiorari to review the latter case, thus choosing not to overturn the lower court's decision or to formally disagree with the court's position.[135]

These lower courts have all come to the conclusion that the situation of employees in the workplace fits squarely within the Supreme Court's articulation of a captive audience. From a theoretical perspective, the findings of these courts make sense. "One is captive to the speech of others simply by being in their presence . . . . Most of us must work, and hence cannot exercise 'volition' not to hear the messages of workplace colleagues."[136] Despite its failure to hear any recent cases specifically regarding captive audience meetings in the workplace, there is some indication that the Supreme Court would not be entirely hostile to including the workplace within captive audience jurisprudence, as an opinion by Justice Alito may have opened the door for such a decision.[137] Prior to joining the Supreme Court, then-Judge Alito found that, "speech may be more readily subject to restrictions when a school or workplace audience is 'captive' and cannot avoid the objectionable speech."[138] The Supreme Court should take note of the decisions of lower courts interpreting its jurisprudence and recognize that employees in the workplace are captive. In this way, the Model Worker Freedom Act seeks merely to reaffirm what courts throughout the country have already decided, and what at least one Supreme Court Justice appears to have accepted as true prior to his appointment to the United States Supreme Court.[139]

V. OBJECTIONS OVERRULED

> does not seek to express itself through the speech of its employees; (2) the speech in question amounts to discriminatory conduct, not just speech; (3) regulation of discriminatory speech in the workplace is simply a time, place and manner regulation of speech; (4) workers are a captive audience; (5) Title VII is a narrowly drawn regulation serving a compelling governmental interest; and (6) analogizing to public employee speech cases, a court "may, without violating the first amendment, require that a private employer curtail the free expression in the workplace of some employees in order to remedy the demonstrated harm inflicted on other employees.

Id. (quoting *Robinson*, 760 F. Supp. at 1534-36).

[133] Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 (D.C. Minn. 1993) (finding that an employer created a hostile work environment where it permitted female workers to be exposed to sexual explicit visual materials, as well as physical and verbal conduct that was sexual in nature).

[134] Aguilar v. Avis Rent a Car Sys., 980 P.2d 846, 872 (Cal. 1999) (declining to uphold as constitutional racial epithets so pervasive that they constituted employment discrimination, and finding that, and finding that, "[t]he relative captivity of plaintiffs here supports the restriction on defendant Lawrence's speech. Plaintiffs were not present at their job because they wished to hear Lawrence's particular views on their Latino heritage, but neither were they reasonably free to walk away when confronted with his racial slurs[]").

[135] *Aguilar*, 529 U.S. at 1138.

[136] Thomas P. Crocker, *Displacing Dissent: The Role Of "Place" In First Amendment Jurisprudence*. 75 Fordham L. Rev. 2587, 2634 (2007).

[137] *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 210 (3d Cir. 2001).

[138] *Saxe*, 240 F.3d at 210 (upholding the anti-discrimination policy adopted by a school district which prohibited harassment of all members of the school community).

[139] Similarly, one scholar argues that, "[i]f speech directed at employees during work time can be regulated in some contexts, then employer speech may be restricted if that speech is intended to deter employees from exercising their statutorily protected rights." Masson, *supra* note 18, at 188.

In addition to countering that employees are not captive audiences, employers will likely argue that the Model Worker Freedom Act is unconstitutionally restrictive of employer speech, in that it restricts the content of speech permitted by employers.[140] Employers may also challenge the Model Worker Freedom Act as not speaker-neutral and, therefore, violative of the First Amendment. Other employers will argue that, instead of restricting the ability of employers to hold captive audience meetings, the solution should simply be to give unions equal time at such meetings. Further, employers will contend that the Model Worker Freedom Act is an unconstitutional restriction on expressive conduct. This section seeks to counter those arguments.

A. Privileging Employee Rights Over Employer Rights?

1. The Model Worker Freedom Act Restricts the Manner of Speech, Not the Content

If the Model Worker Freedom Act is successfully adopted by state legislatures, employers are likely to argue that the legislation privileges the employee's right to be free from unwanted communication over the employer's rights to freedom of speech; therefore, legislatures are not balancing the equation, but instead tipping it in favor of employees.[141] However, "the First Amendment permits, and indeed requires, us to revise the flawed regime governing workplace representation elections, even if doing so entails some further limits on employer speech."[142]

A state is permitted to enact a time, place, and manner restriction, if it is justified without reference to the content of the regulated speech, if the restriction serves a significant or substantial government interest and if the restriction is narrowly tailored to serve that government interest. [143] The means of achieving this interest need not be the least restrictive, but must allow ample alternative means of communication.[144] Content-based restrictions themselves are presumptively invalid, however, as the Government cannot regulate speech merely because of the ideas expressed.[145] "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[146] In *Hill v. Colorado*,[147] for example, the Supreme Court found a restriction on speech surrounding a health care facility to be content-neutral because the "statute's restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the

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[140] *See generally* Richard A. Epstein, *The Employee Free Choice Act is Unconstitutional: Free Speech and the Takings Clause*, WALL ST. J., Dec. 19, 2008, at A15.

[141] *See* Tula Connell, *America's Real Patriot Act: The Employee Free Choice-Act, available at* http://blog.aflcio.org/2008/12/26/americas-real-patriot-act-the-employee-free-choice-act/.

[142] Andrias, *supra* note 1, at 2418.

[143] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[144] *Id*.

[145] R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992).

[146] *Ward*, 491 U.S. at 791 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984)).

[147] 530 U.S. 703 (2000).

content of the speech."[148] The Court further found that it is appropriate to look at the content of a communication or statement.[149] Here, a court would only have to look at the content of employer speech to the extent necessary to determine whether the speech is directly related to the job function of an employee. The inquiry would then immediately shift to the manner in which the speech was given.

The restriction placed on employers by the Model Worker Freedom Act is content neutral.[150] State legislatures would not be adopting the legislation because of disagreement with anything employers wish to communicate. It does not matter what views employers hold or the content of their message. The Model Worker Freedom Act does not regulate what employers can say about political matters; it merely restricts when and how such communication occurs.[151] The question before a court adjudicating a matter under this legislation would not be what the employer said, but the manner in which the employer made his or her statements. The speech would only be a violation of the statute if it were made during a mandatory meeting where employees faced discipline or dismissal for failing to attend.[152]

In contrast, in a landmark case illustrating a content-based regulation, the Supreme Court in *Texas v. Johnson*[153] invalidated a Texas statute that prohibited the burning of the United States flag.[154] The Court found the restriction to be content-based and unconstitutional because, "[w]hether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct."[155] Here, in order to determine whether an employer violated the Model Worker Freedom Act, the question before the court would not be the communicative impact of the employer's speech; it does not matter what an employer is saying. Neither the broad content of the employer's speech nor the employer's specific viewpoint is at issue. Instead the court must inquire into the manner in which the speech was relayed. An employer is still free to discuss political matters with employees who choose to participate in such conversations, to hand out leaflets portraying the employer's positions on political issues, or to place signs relating to political matters throughout the workplace.[156] It is not the message being communicated that is the subject of this legislation, but the manner in which that message is conveyed and the consequences for those who choose not to receive it.

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[148] *Id.* at 719.

[149] *Id.* at 721. Finding that:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies[.]

Id.

[150] *See* Schiffer, *supra* note 10.

[151] *See id.*

[152] *See id.*

[153] 491 U.S. 397 (1989).

[154] *Id.*

[155] *Id.* at 411.

[156] *See* Schiffer, *supra* note 10.

The Model Worker Freedom Act also satisfies the second prong of the time, place, and manner test, which requires that a restriction on the time, place, or manner of speech serve a significant government interest.[157] The significant interest protected by the Model Worker Freedom Act is that of protecting unwilling listeners from unwanted speech, thereby upholding the First Amendment rights of employees. Additionally, the restriction is narrowly tailored to serve the Government's interest by permitting employers to voice whatever views they wish, while merely prohibiting them from forcing employees to hear those viewpoints at the risk of discipline or discharge.[158] Employers have many other avenues to convey their messages. They simply may not do so in a manner that infringes on the constitutional protections afforded to captive audiences. This restriction is extremely narrow as it only restricts speech in one limited context – the mandatory meeting. Optional meetings are still permitted, as are all other avenues through which an employer may wish to express his or her thoughts on a political matter.[159] The legislation, thus, allows for ample alternative means of communication, and it is narrowly tailored to serve the significant government interest in upholding the constitutional rights of employees in a workplace.

2. The Model Worker Freedom Act is Speaker-Neutral

Another argument that employers may make is that this legislation is not a time, place, manner restriction because it is not speaker-neutral, in that it only restricts employer's speech without similarly restricting the speech of employees. Yet this argument only serves to highlight that this legislation is merely a restriction on the manner of speech. It is not that employers cannot speak about political matters, it is only that employers may not force employees to listen to such speech.[160] If employees had the power to call mandatory meetings, they too would be restricted from speaking about such matters at one of those meetings. Given the nature of private workplaces in the United States, however, employees cannot require their fellow coworkers or their employers to attend any such meeting. Therefore, including employees in the restriction would be ineffectual and unneccessary. Employers and employees are both still free to discuss whatever matters they wish.[161] The restriction simply prohibits employers – the only party in a workplace that can realistically require others to attend a meeting – from discussing political issues in this manner.[162]

3. More Speech Will Not Eliminate the Coercion of Captive Audience Meetings

Employers may also propose that instead of proscribing mandatory meetings regarding political matters, states should merely require that unions be afforded equal time – that is, that for as long as employers are able to discuss their views on unions, union organizers have access to

[157] *Lehman*, 418 U.S. at 311.

[158] *See* Schiffer, *supra* note 10.

[159] *See id.*

[160] Employers can, for example, hold optional barbeques during which they invite employees to their homes to learn about a particular political candidate, or they may sit with a group of employees in the cafeteria at work and speak about their opinions on news of the day, as long as they do not require all employees to participate.

[161] *See* Schiffer, *supra* note 10.

[162] *See id.*

employees to express their opinions on the subject.[163] Yet the problem of coercion would not be solved by providing more time for employees to speak about their own political opinions, as the coercive nature of employee speech would still be present.[164] Further, this method would exacerbate the captive audience problem. Under this approach, not only would employees be required to listen to unwanted speech by their employers, but they would be forced to hear unwanted speech from their fellow employees, a union organizer, or a political candidate as well. Surely, holding workers captive to even more speech is not a satisfactory way of protecting their First Amendment rights as unwilling listeners. This approach would place a greater burden on the employer who, despite the at-will nature of the present employment system, need not honor employees' speech at all.

B. The Model Worker Freedom Act is a Constitutionally Permissible Restriction on Expressive Conduct

Some may argue that states that adopt the Model Worker Freedom Act are not solely proscribing speech, but are also proscribing conduct, as one justification for the legislation is to prevent employees from being subject to discipline or dismissal. Where speech and non-speech are combined the Supreme Court has held that, "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[165] In this way, "expression may be limited when it merges into conduct."[166]

Adopting momentarily the proposition that a mandatory captive audience meeting on political matters is expressive conduct, the Model Worker Freedom Act would still pass constitutional muster if attacked on these grounds. If the state were solely acting in order to promote economic stability and viability, this interest is clearly a substantial governmental interest, and one that is unrelated to the suppression of free expression. States not only have an interest in promoting the economy, it their responsibility to do so. Economic regulation is a core governmental function. It is the Government's duty to promote the vitality of the national economy, a critical component of which is ensuring that individuals have some level of job security. The promotion of this interest is wholly unrelated to the suppression of free expression.

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[163] Schwartz Hannum PC, *The Employee Free Choice Act is Down But Not Out*, Legal Updates (Aug. 2009), *available at* http://www.shpclaw.com/news/legalUpdatesDetail.php?id=628.

[164] James A. Gross, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standard*,. 4 U. PA. J. LAB. & EMP. L. 699, 704 (2002). The article states that:

> I am less enthusiastic about the more free speeech approach when applied to captive audience speeches in particular and employer speech in general. I am convinced as was the first Wagner Act NLRB (which required employers to remain strictly neutral regarding their employee's organizational activity) that any anti-union statement, no matter how artfully phrased, by employers to employees whose livelihoods depend on those employers is inherently coercive as is compulsory attendance at an employer's on-premises anti-union speech.

Id.

[165] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[166] *R.A.V.*, 505 U.S. at 414.

Additionally, the incidental restriction is no greater than is essential to the furtherance of the interest. It merely prohibits employers from firing workers for refusing to attend meetings at which employers discuss political matters. It does not prohibit employers from discussing these matters; it simply proscribes them from doing so in a way that could lead to the dismissal of their employees. Thus, it protects the rights of employees to hold political views that differ from their employers, while retaining job security and steady employment. If employees were required to maintain the same political views as their employers, the economy could grind to a halt, as countless employees would be discharged and unable to find new employment. An incidental restriction on the manner in which employers may communicate to their employees is no greater than is necessary to further the critical governmental function of promoting the national economy. As such, the Model Worker Freedom Act cannot be seen as an unconstitutional encroachment by states into the conduct of private employers.

VI. CONCLUSION

The widespread prevalence of captive audience meetings[167] throughout the United States highlights the importance of the workplace in modern society and its impact on political life. These meetings are not exclusive to union elections, but are used as a platform for employers to indoctrinate their employees on matters ranging from which political candidate to vote for to which organizations should receive an employee's personal donations. Workers face severe reprisal for not attending these meetings or for vocally disagreeing with the platforms of their employers.[168] Supreme Court jurisprudence has repeatedly upheld the rights of individuals in captive audiences to be free from unwanted speech.[169] Yet, the Supreme Court has not yet afforded that same protection to individuals in their capacities as employees.

The Model Worker Freedom Act seeks merely to remedy this inconsistency in the application of First Amendment protections. While uniform federal standards may be the ideal remedy, state legislatures are a prime location for the early introduction of such legislation because state legislatures are best suited to regulate local economies. Corporations and union-busting law firms are likely to challenge the implementation of the Model Worker Freedom Act. Hopefully, however, this litigation will reach the Supreme Court and provide the Court with an opportunity to render consistent its previous captive audience jurisprudence. In so doing, the Supreme Court will be recognizing the realities of the current economy and the captive nature of employees in their workplace. In the meantime, state legislatures should pass the Model Worker Freedom Act, and lower courts should continue to find employees as unwilling listeners.

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[167] Mehta & Theodore, *supra* note 19 at 15.

[168] *See, e.g.*, *Prescott*, 500 F.2d at 6 (upholding the firing of an employee for demanding to ask questions in a mandatory meeting at which the employer told employees of its anti-union position); *Litton*, 173 N.L.R.B. 1024 (upholding the discharge of an employee who left a mandatory meeting early in which the employer spoke about a union organizing drive).

[169] *See, e.g.*, *Packer Corp*, 285 U.S. 105 (holding that the presence of billboards can create a captive audience of unwilling viewers); *Bolger*, 463 U.S. 60 (finding that recipients of mailings are not captive because they can easily throw them away); *Hill*, 530 U.S. 703 (determining that employees on their way to and from work are a captive audience).

The Model Worker Freedom Act is essential to upholding the rights of employees as unwilling listeners as well as their right to organize. Holding intimidating captive audience meetings is a classic way in which employers coerce their employees into giving up their right to join a union. Since joining a union is presently the only way for an employee to have a voice at work, job security, and economic stability, ensuring that employees can freely do so is of paramount importance. The climate of the modern-day workplace strongly favors anti-union employers over the rights of employees who may wish to collectively bargain. The Model Worker Freedom Act seeks to level the playing field and ensure that the First Amendment rights of both employers and employees are equally upheld. The incidental restriction on employer's method of communication is not only clearly permitted by the Supreme Court's interpretation of the First Amendment, it is absolutely necessary to ensure that employees and employers alike are able to receive the guarantees laid out by the framers of the United States Constitution.