A NEW METHODOLOGY FOR TESTING PERMISSIBLE POLITICAL COMMUNICATIONS IN THE WORKPLACE

Gary W. Spring[*]

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ABSTRACT

While political discussions in the workplace are often considered impolite or divisive, for individuals working for private employers, they also are protected under section 7 of the National Labor Relations Act (NLRA). Thirty years ago in *Eastex, Inc. v. National Labor Relations Board*, the Supreme Court recognized this protected right and held that political discussion need not be confined to concerns over which the employer has the power to control, but instead extends to state and national issues that are relevant to the workplace.

The courts, however, have strayed from the principles established in *Eastex* and have restricted political communications, even those that have

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[*] Visiting Professor, University of Cincinnati Law School. Thanks to Lou Jacobs for his insightful assistance with earlier drafts of this Article, and all who attended a colloquium at Rutgers School of Law, Newark and offered helpful comments. I would also like to thank John Baranello, Lauren Marcus, and Rosina Caponi for their able research assistance.

ramifications within places of employment. While public employees may discuss matters of public concern, private employees have faced uncertainty as to what may be communicated. The courts have utilized a subjective continuum that often has restricted and chilled political discourse within workplaces. This has occurred despite the fact that these restrictions are contrary to the legislative intent that sought to create free speech and associational rights under the NLRA.

This Article seeks to eliminate those restrictions by extending the deregulatory holding reached by the Supreme Court in *Federal Election Commission v. Wisconsin Right to Life* to political discussions within places of employment. In the *Wisconsin Right to Life* case, a statutory provision barring all corporate and union-funded issue advocacy advertisements referencing a candidate in close proximity to elections was challenged. The Court found the provision unenforceable except in situations where express advocacy takes place. Express advocacy was held in the case to not be dependent on the intent underlying the advertisement or on contextual factors, but to only arise when there is no reasonable interpretation other than an appeal to vote for a particular candidate. This objective standard should be applied to the workplace under section 7 to allow all relevant political communications so long as they do not expressly call for the election or defeat of an individual candidate. This workable standard is a significant improvement that will benefit the tenor of political discourse.

INTRODUCTION

"I tell new employees in orientation not to discuss three things: sex, religion and politics."[1]

"[C]ertain employee political advocacy is protected activity under the Act."[2]

In the first quotation above, an executive controlling employment policies for a Fortune 500 retailer articulates the three common prohibitions on communication in the workplace. The prohibitions on workplace discussions about sex and religion make sense because of the legal concerns raised

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1. Interview with Theron Garcia, Director – Human Resources, Ross Distribution, in Moreno Valley, Cal. (July 7, 2008) (on file with author).

2. Memorandum 08-10 from N.L.R.B. Gen. Counsel Ronald Meisburg to all Regional Directors, Officers-in-Charge and Resident Officers 1, 2, (July 22, 2008), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2008/GC%200810%20Guideline%20Memorandum%20Concerning%20ULP%20Charges%20Involving%20Political%20Advocacy.pdf [hereinafter Memorandum 08-10 from Meisburg].

relating to sexual harassment[3] and restrictions on religious discrimination.[4] There is no similar legal entanglement, however, that arises from discussing political matters. If anything, as the second quote from the National Labor Relation Board's General Counsel, Ronald Meisburg, who was formally issuing guidance on the subject of workplace advocacy, demonstrates, the law actually encourages such discussions. Thus, why is there this commonly held fear of political communications in places of employment?

Often social norms, not legal considerations, prompt this frequent admonition concerning political discussions.[5] Political discussions in the workplace may cause disharmony[6] and are often considered impolite.[7] Sometimes in discussing political issues, a person may violate the etiquette of the workplace. For example, heated discussions can offend personal sensitivities and cause discomfort.

The content of the communication—politics in this case—does not determine the form. That is, communication about politics does not infer irresponsible methods. If traditional voting patterns are followed, upper management may have different views and party affiliations from their subordinates in rank and their file workers.[8] One obviously expresses views (of any kind) different from the boss, but this is often at his or her own jeopardy.

While the wisdom of expressing one's political views to co-workers and superiors may be debatable, what should be certain is that the NLRA[9] protects such expression. Section 7 of the NLRA[10] was intended to create a safe haven for free speech, freedom of association, and political activism for

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3. 29 C.F.R. § 1604.11 (2008); Merritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). *But see* Jonathan Segal, *The Expressive Workplace Doctrine: Protecting the Public Discourse from Hostile Work Environment Actions*, 15 UCLA ENT. L. REV. 1, 24 (2008).

4. 42 U.S.C. §§ 2000e-2(a), (d) (2000); *see, e.g.*, Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024 (8th Cir. 2008).

5. Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 177-78 (2004).

6. The NLRB has recently addressed work rules requiring civility in the context of section 7 of the National Labor Relations Act. *E.g.*, Holling Press Inc., 343 N.L.R.B. No. 45 (2004); *see also* William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability,* 27 BERKELEY J. EMP. & LAB. L. 23, 28 (2006).

7. JIM WALLIS, GOD'S POLITICS xiii (2005) ("Why can't we talk about religion and politics? These are two topics you are not supposed to discuss in polite company."); *see also* E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 10 (2004).

8. STEVEN L. WASBY, AMERICAN GOVERNMENT AND POLITICS 347 (1973); *see also* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? 14-20 (2004); DAVID SIROTA, HOSTILE TAKEOVER 3 (2006).

9. 29 U.S.C. §§ 151-169 (2000).

10. 29 U.S.C. § 157 (2000).

employees,[11] not only within unionized companies, but also within the non-union, private sector.[12] However, unlike the public sector, where the First Amendment independently protects political speech,[13] private sector employees have been disciplined and, in some cases, discharged for raising issues deemed inappropriate in the workplace.[14]

While some may shudder at the thought of a place of employment as a forum for political discourse, few can question the centrality of the workplace within our nation's social fabric. This is particularly true as our society becomes more compartmentalized and withdrawn from communal activities.[15] As Cynthia Estlund stated:

> The workplace is where most employed adults converse most often, outside of the family, about political, social, and personal matters. The workplace and the relationships and conversations that it spawns may in fact be more important for the formation and interchange of political and social views among the majority of adult citizens than the voluntary civic and political organizations that make up much of civil society as it is conventionally defined.[16]

Thus, it is important to determine with increasing clarity which discussions are protected and open to employees within their places of employment.

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11. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 118-19 (1995) ("The NLRA is rarely used by and is largely unfamiliar to nonunion employees outside the organizing context. But section 7 is a potentially significant source of free speech rights in the workplace on issues of concern to workers; it protects speech about unionization or other forms of employee representation, discussion of work-related grievances, and petitioning for their redress.").

12. *See* JOHN E. HIGGINS, THE DEVELOPING LABOR LAW 197 (5th ed., vol. I 2006) ("[C]oncerted activity that is not specifically union oriented may be protected by section 7."); *accord* NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983 (7th Cir. 1948); Modern Motors, Inc. v. NLRB, 198 F.2d 925 (8th Cir. 1952); *see also* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 265 (2005) (citing 29 U.S.C. § 152(3) (2000)) ("Section 7 protects employee rights to engage in concerted activities for mutual aid or protection, with no requirement that a union be in the picture. The breadth of 'employee' in section 7 is affirmed in, and supported by, the definition of 'employee' in section 2(3): 'The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . .'").

13. *See infra* notes 129-50 and accompanying text.

14. *See, e.g.*, Fun Striders, Inc. v. NLRB, 586 F.2d 659 (9th Cir. 1981); New Rivers Indus., Inc. 945 F.2d 1290 (4th Cir. 1991).

15. Diana C. Mutz & Jeffery J. Mondak, *The Workplace as a Context for Cross-Cutting Political Discourse*, 68 J. POL. 140, 141 (2006). Mutz and Mondak posit that the workplace is a unique and healthy place for political discourse compared to other social contexts because "[h]omogeneity in the voluntary association, church, or neighborhood may occur due either to the impact of self-selection on entry into the context, or as a result of conformity or persuasion within those social contexts, or from norms against the expression of dissent." *Id.*

16. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 3-4 (2000).

Federal courts have not applied a practical and effective standard governing workplace political communications. Thirty years ago in *Eastex, Inc. v. NLRB*,[17] the United States Supreme Court recognized section 7 as a vehicle for political communications in places of employment. The lower courts, however, have either misinterpreted this decision or whittled away at its holding by making fine distinctions. While recognizing that protection is necessary and legally required for collective bargaining and union organizational activities, the lower courts have made an unwarranted distinction in reviewing any activity that can be labeled "political" and outside of the immediate employer/employee relationship.[18]

There is an unlikely vehicle to put the courts back on track and to restore political advocacy in the workplace to its rightful protected status: the Supreme Court's often criticized[19] 2007 decision in *FEC v. Wisconsin Right to Life, Inc.*[20] Although outside the context of employment, this decision leaves little doubt as to the proper parameters of protected conduct in the workplace. The test offered, when the principles of *Wisconsin Right to Life* are applied to the context of section 7, provides protection for communications that are relevant to the workplace, which do not expressly endorse or oppose a political candidate by name. Accordingly, section 7 protection does not insulate a discussion about abortion or an attempt to distribute literature for a populist candidate such as John Edwards.[21] However, its protection still is extensive and significant. It provides the ability to discuss political issues having tangible ramifications for employees.

Such communication can be a powerful force when topics such as spiraling health care costs,[22] compensation limits for chief executive officers,[23]

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17. 437 U.S. 556 (1978).

18. *See* Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1, 2 (1981).

19. *See* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064 (2008). *See also* Editorial, *Three Bad Rulings*, N.Y. TIMES, June 26, 2007, at A20; Editorial, *A Horrible Ruling: Court Decision Could Mean a Return to the Days of Attack Ads Funded by Corporations and Unions Just Before an Election*, MILWAUKEE JOURNAL SENTINEL, June 26, 2007, at A8.

20. 127 S. Ct. 2652 (2007).

21. Senator Edwards in the democratic primaries in both 2004 and 2008 sounded a populist theme with "harsh anti-corporate rhetoric" designed to appeal particularly to the working class. Christopher Hayes, *Populism's Candidate*, THE NATION, Jan. 28, 2008, at 6. *See also* Adam Nagourney, *Staking His Campaign on Iowa, Edwards Makes a Populist Pitch to the Left*, N.Y. TIMES, June 18, 2007, at A15.

22. *See* Jill Quadagno, *Aging Nation: The Economics and Politics of Growing Older in America*, 32 J. HEALTH POL. POL'Y & L. 887, 888 (2007) ("Health care costs have been increasing faster than the gross national product for several reasons, including an increase in treated disease prevalence, greater reliance on prescription drugs, and technological innovations in medical care.").

23. *See* Jennifer S. Martin, *The House of Mouse and Beyond: Assessing the SEC's Efforts to Regulate Executive Compensation*, 32 DEL. J. CORP. L. 481, 483 (2007) (citing

immigration reform,[24] the impact of unchecked oil profits upon inflation and their relationship to wage trends,[25] funding and support for the Occupational Safety and Health Administration[26] and its stance on ergonomics,[27] the economic theories shifting the relative tax burden to the working class away from the highest income earners,[28] various economic stimulus possibilities,[29] and other issues of the day all can be discussed and debated in the workplace. In sum, employees "have an interest in individual rights and power, equity and justice and equality and participation in their workplace."[30]

LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004)). Between 1992 and 2000 alone, the compensation of chief executive officers (CEOs) at S&P 500 companies more than quadrupled. In 1991, the average large company CEO earned 140 times the wage of the average company employee; by 2003 it was 500 times. *Id.* at 1.

24. *See* Marlin W. Burke, *Reexamining Immigration: Is it a Local or National Issue?*, 84 DENV. U. L. REV. 1075, 1075 (2007) ("Since the late 1990s, undocumented immigration is thought to have equaled and may even have exceeded legal immigration."). *See also* Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93 (2007); Rachel M. Simon, *Workers on the March: Work Stoppages, Public Rallies, and the National Labor Relations Act*, 56 CATH. L. REV. 1273 (2007).

25. *See* Tim Wheeler, *Huge Oil Profits Linked to Economic Slowdown*, PEOPLE'S WEEKLY WORLD, Aug. 3, 2006, *available at* http:/pww.org/article/view/9595/1/333. Josh Bevins, an economist with the Washington-based Economic Policy Institute, points out that "[o]ver the past two years, real wages adjusted for inflation have been falling," and that "[t]he problem [of higher oil company profits] is aggravated by stagnating worker income." *Id.*

26. *See* Ames Alexander, *Congress Looks at Workers' Safety: Experts Blame Some Injuries, Deaths on Inadequate Funding*, CHARLOTTE OBSERVER, Apr. 10, 2008, at A12; Stephen Labaton, *OSHA Leaves Worker Safety Largely in Hands of Industry*, N.Y. TIMES, Apr. 25, 2007, at A1; Tom Brune, *Erasing the Rules: Many Federal Agencies are Being Run by Industry Veterans on a Mission to Scale Back Regulation*, NEWSDAY (USA), Oct. 9, 2004, at A5.

27. *See* James L. Nash, *Ergonomics, OSHA Rulemaking Haunt 2004 Election: What's at Stake in the Upcoming Election for Partisans of Occupational Safety?*, 66, No. 10, OCCUPATIONAL HAZARDS, Oct. 1, 2004, at 33 ("Ergonomics was, is and promises to be the single most decisive issue in the politics of occupational safety . . . . The demise of [the ergonomics] standard…as well as OSHA's failure to issue any other major rules . . . further polarized an already deeply divided workplace health and safety community.").

28. *See* Edmund L. Andrews, *Bush Tax Cuts Offer Most For Very Rich, Study Finds*, N.Y. TIMES, Jan. 8, 2007, at A16 (noting a study conducted by the nonpartisan Congressional Budget Office, which shows that families earning more than one million dollars annually had a sharper federal tax rate drop than any other group under President Bush's tax cuts. In addition, "tax rates for middle-income earners edged up").

29. *See* Matthew Bandyk, *Analyzing the Economic Stimulus Package; Big Families and Businesses are Among the Winners*, U.S. NEWS & WORLD REPORT, Feb. 13, 2008, http://www.usnews.com/articles/business/2008/02/13/analyzing-the-economic-stimuluspackage.html.

30. Kenneth T. Lopatka, *A Contemporary First Amendment Analysis of the NLRA Section 8(A)(2)-2(5) Anachronism*, 2 CHARLESTON L. Rev. 1, 39 (2007).

This Article seeks to eliminate unnecessary and unwarranted restrictions on section 7's protection by extending the *Wisconsin Right to Life* holding to political discussions within places of employment. As a necessary starting point, Part I examines the nature and history of section 7 rights. Part II looks closely at *Eastex*, the landmark Supreme Court case interpreting the scope of section 7 protections. In Part III, the *Wisconsin Right to Life* holding is considered and applied to the context of workplace communications. Part IV highlights the important distinction between private and public sector places of employment in determining what speech is protected. And finally, Part V considers a number of cases decided after *Eastex* and then analyzes the outcomes of these cases using the objective standard gleaned from the modified *Eastex*/*Wisconsin Right to Life* test. Under this test, section 7 would protect all relevant political communications as long as they do not expressly call for the election or defeat of an individual candidate. This would significantly open political communications within the workplace back to the level consistent with the legislative intent underlying section 7 and the *Eastex* decision.

I. THE NATURE OF SECTION 7 RIGHTS

Section 7 provides in pertinent part that employees shall have the right to engage in "*concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*."[31] While the NLRA is universally recognized as governing union and management relations, it also provides guarantees to employees in the private sector, even those who are not members of labor unions.[32] For example, non-union employees have been protected in concerted actions when they left work because conditions were too cold,[33]

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31. 29 U.S.C. § 157 (2002) (emphasis added). The entire statutory section reads:

> 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id.

32. Salt River Valley Water Users Ass'n v. NLRB, 206 F.2d 325 (9th Cir. 1953); Teamsters, Chauffeurs & Helpers Local Union No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963); Mojave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183 (D.C. Cir. 2000).

33. NLRB v. Wash. Aluminum Co., 370 U.S. 9 (1962); *see also* QSI, Inc., 346 N.L.R.B. 1117 (2006).

when they protested due to unsafe work conditions,[34] or when they sought to ensure payment for work performed.[35]

While one commentator suggested that "[s]ection 7 rights are weak rights, trumped every step of the way by property rights, by employer free speech, [and] by liberty of contract,"[36] this characterization does not adequately consider the meaningful protections section 7 offers to employees in a number of varied contexts. Though sometimes balanced against other considerations, such rights include the right to strike,[37] the right to representation in disciplinary matters,[38] the right to protest work issues,[39] and the right to share wage information among employees.[40]

The concept of concerted activity for mutual aid and protection, found within section 7, is well established. History demonstrates that political "[e]xpression was central to early labor."[41] The concept was included in the Wagner Act (the NLRA) in 1935 as a carry over from the Norris-LaGuardia Act of 1932,[42] which had as an antecedent Section 20 of the Clayton Act of

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34. *See, e.g.*, Kayser-Roth Hosiery Co. v. NLRB, 447 F.2d 396 (6th Cir. 1971); NLRB v. E-Sys., Inc., 642 F.2d 118 (5th Cir. 1981).

35. Annalee Griffin, 346 N.L.R.B. 293 (2006); *see also* Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121 (2003).

36. David Brody, *Labor vs. the Law: How the Wagner Act Became a Management Tool*, NEW LABOR FORUM, Spring 2004, at 14. *See also* Dannin, *supra* note 12, at 261. It has also been contended that employee speech needs to be protected by a public policy exception to the doctrine of employment at will. Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341 (1994).

37. NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274 (1960). This right has been claimed by one veteran labor scholar to have been effectively emasculated in the course of the Supreme Court committing "the perfect crime." James Gray Pope, *How American Workers Lost the Right to Strike and Other Tales*, 103 MICH. L. REV. 518, 553 (2004).

38. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). *But see* IBM Corp., 341 N.L.R.B. 1288 (2004) (holding that unrepresented employees are not entitled to co-worker representation during investigatory interviews). *See also* Christine Neylan O'Brien, *The NLRB Waffling on* Weingarten *Rights*, 37 LOY. U. CHI. L.J. 111 (2005).

39. *See* Central Valley Meat Co., 346 N.L.R.B. 1078 (2006) (employees protected in walking off the job to protest coworker's termination); OPW Fueling Components v. NLRB, 443 F.3d 490 (6th Cir. 2006) (protest of working conditions); Joliff v. NLRB, 513 F.3d 600, 608-09 (6th Cir. 2008); *see also* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 175-79 (2007).

40. NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1990); Double Eagle Hotel & Casino v. NLRB, 414 F.3d 1249 (10th Cir. 2005); Cintas Corp. v. NLRB, 482 F.3d 463, 469 (D.C. Cir. 2007).

41. Jim Hawkins, *Papers, Petitions, and Parades: Free Expression's Pivotal Function in the Early Labor Movement*, 28 BERKELEY J. EMP. & LAB. L. 63, 106 (2007).

42. Norris-LaGuardia Act, ch. 90, §§ 1-15, 47 Stat. 70-73 (1932) (codified as amended at 29 U.S.C §§ 101-15 (2002)). *See also* F. FRANKFURTER & N. GREENE, THE

1914.[43] Section 2 of the Norris-LaGuardia Act codified the concept of concerted activity and was a strong declaration of policy that American Federation of Labor President William Green sought to incorporate into this subsequent legislation.[44]

It has been recognized that "[section] 7 has a wide compass, providing general protection to workers' efforts to 'improve their lot as employees.'"[45] The NLRA's congressional history is replete with references to the importance of liberty,[46] free association,[47] and the use of the First Amendment's concepts as a model for section 7's reach in governing employees' activities.[48] As one commentator has summarized, "[t]he purpose of the Wagner Act, and therefore the purpose of the undisturbed language of Section 7, was to bring to the workplace a legally protected right of association."[49] Congress envisioned a democracy within an industrial plant.[50]

LABOR INJUNCTION 2-46 (1930) (addressing section 2 and explaining the perspective of Felix Frankfurter, a principal drafter of the legislation).

43. 29 U.S.C. § 52 (2002).

44. Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 337 (1981) (quoting *National Industrial Recovery: Hearings on HR 5664 Before the H. Comm. on Ways and Means* 117, 73d Cong., 1st Sess. (1933) (statement of William Greene)). The language was included in the ill-fated National Industrial Schecter Recovery Act, ch. 90 § 7(a), 48 Stat. 193, that was struck down in the controversial case of *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). It was, however, resurrected in section 7 of the Wagner Act.

45. NLRB v. Griffin, 243 F. App'x 771 (4th Cir. 2007) (quoting Eastex Inc. v. NLRB, 437 U.S. 556, 565 (1978)).

46. *To Create a National Labor Board: Hearings on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) [hereinafter *Hearings*] (statement of Sen. Robert F. Wagner); H.R.J. Res. 375, 73d Cong., § 2 (1934). Introduced in the House June 15, 1934 and referred to Committee on Labor. 78 CONG. REC. 11938 (1934).

47. *NLRB, Declaration of Policy: Hearings on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of Sen. Robert F. Wagner).

48. *Hearings*, *supra* note 46 (statement of Sen. Robert F. Wagner); *see also* Charles J. Morris, *Collective Rights as Human Rights: Fulfilling Senator Wagner's Promise of Democracy in the Workplace—The Blue Eagle Can Fly Again*, 39 U.S.F. L. REV. 701, 713 (2005).

49. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1683 (1989) (citing Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U ILL. L. REV. 689, 697). *See also* Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283 (2006).

50. Staughton Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720, 726 (1975); Richard Michael Fishl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 846 (1989). A perfect democracy has hardly been achieved. As one commentator noted with respect to labor law, "[o]ne can scarcely imagine an arrangement better designed to hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery." Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 19 (1988).

Under an ideal model of democracy,[51] management would also have the ability to actively advocate its position on issues and candidates in the forum it controls to a great degree—the workplace. However, the Federal Election Campaign Act (FECA),[52] as modified by the Bipartisan Campaign Reform Act of 2002 (BCRA),[53] has led to the establishment of election rules that limit corporate communications.[54] FECA, in particular, was passed to "protect the integrity of the marketplace of political ideas"[55] from undue corporate influence.

Accordingly, although employers still undertake efforts to state their positions on candidates and legislative issues,[56] their means are regulated. An employee of a corporation may not be paid during normal business hours to work on behalf of a campaign, because this is considered to be a contribution or expenditure by the employer.[57] Express advocacy communications[58] supporting or opposing a candidate for office may not be made to a corporation's hourly workers, although they may be made to its stockholders, executives, and administrative personnel.[59] The political process seeks to avoid coercion, whether intended or not.[60]

However, the playing field is hardly tilted unfairly against management, which can still get its view across despite these regulatory restrictions. Management cannot hold "captive audience"[61] speeches to exhort its em-

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51. *See* Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 ILL. L. REV. 599 (contending that the democratic ideal utilized in recent campaign reform efforts is unrealistic).

52. 2 U.S.C. §§ 431-42 (2002).

53. Pub. L. No. 107-155, 116 Stat. 81 (2002).

54. *See* 11 C.F.R. § 114.3 (2008).

55. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986). Stated more fully, the purpose of FECA was "to curb the political influence of 'those who exercise control over large aggregations of capital,' and to regulate the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.'" *Id.* (citations omitted). *See also* FEC v. Nat'l Rifle Assoc., 254 F.3d 173, 179 (D.C. Cir. 2001).

56. Ann Zimmerman & Kris Maher, *Wal-Mart Warns of Democratic Win*, WALL ST. J., Aug. 1, 2008, at A1 (detailing employers concerned with passage of the Employee Free Choice Act, which would bolster union organizing, who were reported to oppose Democratic presidential candidate then-Senator Barack Obama). One Wal-Mart customer-service supervisor was quoted as follows: "I am not a stupid person. They were telling me how to vote." *Id.*

57. 11 C.F.R. § 114.9 (2008).

58. FEC v. Wisc. Right to Life, Inc., 127 S. Ct. 2652, 2667 (2007) (per curiam). *See also* Ryan Ellis, *"Electioneering Communication" Under the Bipartisan Campaign Reform Act of 2002: A Constitutional Reclassification of "Express Advocacy"*, 54 CASE W. RES. L. REV. 187 (2003).

59. 2 U.S.C. § 441b(b)(2)(A) (2002).

60. *See* 18 U.S.C. § 610 (2002).

61. NLRB v. Permanent Label Corp., 657 F.2d 512, 521 (3d Cir. 1981). *See also* NLRB v. Glades Health Care Ctr., 257 F.3d 1317, 1319 (11th Cir. 2001); Peerless Plywood

ployees to vote in a particular way or include political brochures with paychecks or payroll information,[62] but its managers can informally express the employer's viewpoint. If anything, section 7's protection of speech between coworkers is necessary to counter the employer's considerable clout.

While in some notable situations the courts have pulled back on section 7 protection,[63] this is not consistent with congressional intent as discerned from a thorough review of its legislative history, which reveals that section 7 was intended to offer broad protection in warding off government intervention akin to that offered by the First Amendment.[64] The concerted activity clause appears within section 7 in a broad form, unrestricted by express limitations to matters of concern between employees and their own particular employers. Further, the Supreme Court has recognized that section 7's protection is not limited to issues arising within the four walls of a place of employment, but also protects actions involving national and international concerns.[65]

While it is normally necessary to have two or more individuals working together to act "in concert," this requirement is not absolutely necessary in all contexts under section 7.[66] It is, however, assumed for purposes of the simplified analysis contained herein that a union or group of employees seeks to communicate on political issues. It is also assumed that the discussions will be undertaken in a responsible and non-disruptive fashion, because otherwise, in these instances, discipline may be warranted.[67]

Co., 107 N.L.R.B. No. 106 (1953) (explaining that the NLRB has established rules regulating the common practice of employers requiring the assemblage of all workers on paid time during a union election campaign). *See also* Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008).

62. 11 C.F.R. § 114.3(c)(1) (2008).

63. *See infra* notes 162-74, 180-201 and accompanying text.

64. *National Industrial Adjustment Act: Hearing on S. 1958 before the S. Comm. on Education and Labor*, 73d Cong. 10,559-61 (1934) (statement of Sen. David I. Walsh).

65. Eastex, Inc. v. NLRB, 437 U.S. 556, 564 (1978). *Cf.* David Wright, *Unions and Political Action: Labor Law, Union Purposes and Democracy*, 24 QUEENS L.J. 1, 3 (1998) (saying that Canadian courts have traditionally protected union political activity only when it is directly linked to the collective bargaining process).

66. NLRB v. City Disposal Syss., Inc., 465 U.S. 822, 828 (1994). Individual activity may be considered concerted if undertaken "on behalf of other employees or at least . . . made with the object of inducing or preparing for group action." *Id.* (quoting ARO, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979)); *accord* Compuware Corp. v. NLRB, 134 F.3d 1285, 1288 (6th Cir. 1998); Holling Press, Inc., 343 N.L.R.B. 301, 306 (2004) (Liebmen, Member, dissenting) ("Section 7 requires neither altruism nor unequivocal solidarity, on the part of an individual who seeks help from coworkers with respect to working conditions."); *see also* Raymond T. Mak, City Disposal Systems *and the Interboro Doctrine: The Evolution of the Requirement of "Concerted Activity" Under the National Labor Relations Act*, 2 HOFSTRA LAB. L.J. 265, 265 (1985).

67. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 283 (2002) (recognizing

Moreover, as noted above, a communication must contain an element of the employees' self-interest[68] in the workplace in order to gain section 7 protection.[69] That defined self-interest, however, is not diminished because the communication involves a national issue. For example, one federal appellate court correctly recognized that a group's communication fell under section 7 where it had "a legitimate concern in national immigration policy insofar as it might affect their job security."[70]

Section 7 was never intended to offer narrow protection limited to union organizing activities. Certainly the *Eastex* decision broadly interpreted its reach to offer significant protection to employees in undertaking political communications.

II. THE *EASTEX* DECISION

The paramount case in this area of political communications within the workplace is the Supreme Court's decision in *Eastex*, which arose against the historical backdrop of section 7 described above. In *Eastex*, the United Paperworkers Local sought to distribute a union newsletter in non-working areas of an industrial plant when employees were not actively working.[71] This distribution during non-work time in non-work areas was in conformity with the Supreme Court's precedent governing distribution of pro-union materials during an organizing campaign.[72]

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that there is a "[l]imitation for [e]gregious, [o]pprobrious, [i]llegal and [d]isloyal [c]onduct" so that such activities are not protected under section 7); *see also infra* notes 151-161.

68. Tradesmen Int'l, Inc. v. NLRB, 275 F.3d 1137, 1141 (D.C. Cir. 2002) ("Thus an essential element before section 7's protections attach is a nexus between one's allegedly protected activity and 'employees' interests as employees.'"); *see also* Fishl, *supra* note 50, at 798 ("[B]oth the Board and the courts assume that protester['s] self-interest is a prerequisite of section 7 protection.").

69. The NLRB makes fine distinctions in this regard, as the following recent review of its precedent reveals:

> In contrast, complaints to governmental bodies that do not involve working conditions are not protected under the 'mutual aid or protection' clause. Accordingly, while the school bus drivers in *Five Star Transportation* who raised concerns about the maintenance of working conditions did engage in protected activity, other drivers who sent letters to the school district raising more general safety concerns on behalf of students did not. Likewise, nursing employees who informed state agencies about staffing levels were protected, but those who complained about patient care quality were not.

Memorandum 08-10 from Meisburg, *supra* note 2, at 6 (footnotes omitted).

70. Kaiser Eng'rs v. NLRB, 538 F.2d 1379, 1385 (9th Cir. 1976).

71. Eastex, Inc. v. NLRB, 437 U.S. 556, 558 (1978).

72. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). *Republic*'s holding is based upon recognizing common law property rights. It has been argued that such rights should be trumped by express statutory provisions, such as section 7. Carlos E. Gonzalez, *Popular Sovereign Generated Versus Governmental Institution Generated Constitutional*

Two sections of the newsletter,[73] which were not at issue in the case, involved union themes of encouraging participation in the local and the benefits of union solidarity.[74] Two other sections encouraged employees to contact their state legislatures to oppose inclusion of the Texas "right-to-work" statute into a revised state constitution and discussed a presidential veto of an increase in the federal minimum wage.[75] It was because of the legislative propaganda contained within these two sections that the employer banned distribution of the newsletter.[76]

The NLRB found distribution of the materials to be protected by section 7.[77] The Fifth Circuit Court of Appeals affirmed despite the claim by the company that the mutual aid and protection clause of section 7 should be narrowly interpreted to protect only concerted activity concerning working conditions over which the employer had the power to control.[78]

The Supreme Court found that the ban on distribution of the newsletter was unlawful.[79] It held that "employees' appeals to legislators to protect their interests as employees are within the scope of [the mutual aid or protection] clause."[80] It thus found that section 7's protection for concerted activity "encompasses employee endeavors to improve terms and conditions of employment, or the wellbeing of workers outside the immediate employee-employer relationship."[81] In effect, the Court held that section 7 was not to be narrowly construed, but instead was properly interpreted broadly in light of its underlying legislative intent.[82]

Even when section 7's protection is properly construed, however, this protection is limited. The Supreme Court in *Eastex* noted that a point of attenuation can be reached so that the activity is not protected.[83] Obviously not all political activism falls within the concept of mutual aid or protection.[84] The Supreme Court deferred to the expertise of the NLRB and ex-

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Norms: When Does a Constitutional Amendment Not Amend the Constitution?, 80 WASH. U. L.Q. 127, 147-48 (2002).

73. Union newsletters are common within the labor movement. *See* Louis A. Jacobs & Gary W. Spring, *Fair Coverage in Internal Union Periodicals*, 4 INDUS. RELS. L. REV. 204, 205 (1980).

74. *Eastex*, 437 U.S. at 561.

75. *Id.* at 569 (citation omitted).

76. Eastex, Inc. v. NLRB, 550 F.2d 198, 202 (5th Cir. 1977).

77. Eastex, Inc., 215 N.L.R.B. 271, 274-75 (1974).

78. *Eastex*, 550 F.2d at 202.

79. *Eastex*, 437 U.S. at 566.

80. *Id.*

81. Local 174, UAW v. NLRB, 645 F.2d 1151, 1154 (D.C. Cir. 1981) (citing *Eastex*, 437 U.S. at 565-67).

82. Morris, *supra* note 49, at 1697.

83. *Eastex*, 437 U.S. at 567-68.

84. *Id.* at 568 n.18. The Court noted with approval a prior decision by the NLRB that had reached an opposite finding. *Id.* (quoting Ford Motor Co., 221 N.L.R.B. 663, 666

pressly recognized that it should set the appropriate boundaries for such communications on a case by case basis.[85] Immediately following *Eastex*, the NLRB sought to foster political communications.[86] However, it continuously found its interpretation of permissive conduct to be more liberal than that of the federal circuits and eventually saw its interpretation reined in by the appellate courts.[87]

III. THE *WISCONSIN RIGHT TO LIFE* DECISION

A similar analysis to that undertaken in *Eastex* arose in 2004 and was resolved by the Supreme Court in 2007 in a very different context—when limits on political communications were challenged in the context of campaign finance reform. The similarity of the campaign regulatory issue to that arising under section 7 is striking.

A. The Holding

In a splintered ruling in *Federal Elections Commission v. Wisconsin Right to Life*,[88] the United States Supreme Court created a major exception to the Bipartisan Campaign Reform Act's restrictions on political advertisements. The provision at issue barred corporate and union-funded advertisements referencing a candidate within sixty days before a general election or thirty days before a primary.[89] The Wisconsin non-profit group, Wisconsin Right to Life, sought to run three ads that it characterized as "grassroots lobbying" during this blackout period.[90] The ads contained pointed criticism of senatorial filibustering of President Bush's federal judicial nominees and at one point directed the viewer to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster."[91] The advertisements also requested viewers to visit the group's website, which contained the message to vote against Senator Feingold.[92]

(1975), *enforced*, 546 F.2d 418 (3d Cir. 1976)) (holding a communication seeking rejection of the established political parties and a formation of an independent workers party to be "unprotected[,] even though the election of any political candidate may have an ultimate effect on employment conditions").

85. *Eastex*, 437 U.S. at 570 n.20.

86. *E.g.*, Fun Striders, Inc., 250 N.L.R.B. 520, 525 (1980).

87. *E.g.*, Fun Striders, Inc. v. NLRB, 686 F.2d 659, 662 (9th Cir. 1982); NLRB v. Motorola, Inc., 991 F.2d 278 (5th Cir. 1993).

88. 127 S. Ct. 2652 (2007) (per curiam).

89. 2 U.S.C. § 441b (b)(2) (2000 & Supp. IV 2004).

90. *Wisc. Right to Life*, 127 S. Ct. at 2660.

91. *Id.*

92. *Id.* at 2668-69.

Wisconsin Right to Life sought declaratory and injunctive relief,[93] relying upon the First Amendment's guarantee of free speech, to allow it to run the ads during the statutory blackout period. This challenge faced an uphill battle because the Supreme Court had just a few years prior upheld the statutory section in question.[94]

In the case's principal opinion, Chief Justice Roberts reached an opposite result to this precedent without expressly overruling it.[95] In his opinion, Justice Roberts stressed the importance and dominance of the First Amendment[96] and the irrelevance of the sponsoring group's subjective intent.[97] The conveyance of information seeking to educate the viewer on an on-going controversy within the Senate made the message one of issue advocacy and not electioneering for a candidate.[98] The holding, in this sense, definitively favored deregulation of political communications.[99]

The timing of the ads, the express advocacy against one candidate on a one-step-removed website, the expenditure of the group's PAC funds against the candidate, and the pertinence of the issue to an election, while acknowledged by the majority, did not carry the day.[100] "[C]ontextual factors" were stated to seldom, if ever, play a major role in the inquiry as to whether such issue advocacy should be permitted.[101] Indeed, as the Fourth

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93. *Id.* at 2661. A direct appeal was taken to the Supreme Court from a special three judge court authorized under the Bipartisan Campaign Reform Act of 2002. *See* 2 U.S.C. § 437h (2000 & Supp. IV 2004); 28 U.S.C. § 2284 (2000).

94. McConnell v. FEC, 540 U.S. 93 (2003); *see* Lyrissa Barnett Lidsky & Thomas Cotter, *Authorship, Audiences and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1547 (2007).

95. *Wisc. Right to Life*, 127 S. Ct. at 2673-74; Hasen, *supra* note 19, at 1079 ("Given its middle position between the opinions of Justices Scalia and Souter, the principal opinion is decisive here, meaning that Chief Justice Roberts and Justice Alito now control the direction of campaign finance law on the Court.").

96. *Wisc. Right to Life*, 127 S. Ct. at 2669.

97. *Id.* at 2668; *accord* Davis v. FEC, 128 S. Ct. 2759 (2008).

98. "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad—to factor it into their voting decisions." *Wisc. Right to Life*, 127 S. Ct. at 2667.

99. Hasen, *supra* note 19, at 1103.

100. The majority opinion, in responding to criticism, noted:

> [W]e agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.

Wisc. Right to Life, 127 S. Ct. at 2669 n.7.

101. *Id.* at 2669.

Circuit has subsequently stressed, *Wisconsin Right to Life* "emphatically rejects the resort to a multi-factored totality of the circumstances approach for defining regulable [sic] electoral advocacy."[102]

The four justices considered by most to be the liberal/moderate wing of the Court joined in a lengthy dissent authored by Justice Souter.[103] Souter's opinion lamented that following the *Wisconsin Right to Life* decision, "the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear."[104]

In actuality, the Chief Justice's opinion provided clarity. Following *Wisconsin Right to Life*, the only ads that could be regulated are those with the message that is "the functional equivalent of . . . express advocacy."[105] Further, the only communications that potentially fit in that category under the majority's analysis are those "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[106] Accordingly, the FEC's regulatory ban was effectively gutted; only those advertisements appealing for support or opposition to a candidate or conveying an equivalent message can be regulated under the First Amendment.[107] The decision explicitly rejected a subjective approach that entailed testing a speaker's intent,[108] adopting instead an objective and more manageable standard.

B. Application to Workplace Communications

The Supreme Court's decision in *Wisconsin Right to Life* was grounded entirely upon strong First Amendment considerations that are absent in places of private employment due to a lack of state action in those settings.[109] Admittedly, section 7 does not have the same legal force or predominance as the constitutional provision. However, Congress did not seek to limit section 7's reach, and no other legislative authority limits the protection it offers for concerted activities undertaken for mutual aid.[110]

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102. N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 298 (5th Cir. 2008).

103. *Wisc. Right to Life*, 127 S. Ct. at 2687.

104. *Id.* at 2705.

105. *Id.* at 2674.

106. *Id.* at 2677.

107. *Id.* at 2673-74.

108. *Id.* at 2668.

109. United Bhd. of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 833 (1983); United States v. Price, 383 U.S. 787, 799 (1996).

110. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1536 (2002) ("Part of the Act's durability may come from the enduring power of its core provisions, which continue to command a broad political consensus (in *principle*).

The analysis created by *Eastex* is functionally the same as *Wisconsin Right to Life*, albeit in the context of section 7. There is no reason that the corporate speech at issue in *Wisconsin Right to Life* should be accorded greater protection than communications undertaken for mutual aid within the workplace. Indeed, in some contexts, corporate speech has been found to have a "lower level of constitutional protection," even where it is addressed to political matters.[111]

Accordingly, section 7 should be given the same deregulatory deference and generous protection that the Chief Justice attributed to the First Amendment in *Wisconsin Right to Life*. Furthermore, the goal and the breadth of the constitutional and statutory provisions are analogous. Both are founded on the motivation to allow meaningful discourse. Why should the setting (a place of employment) make a difference so long as communication is undertaken in a responsible manner? Certainly the provisions of the NLRA constitute a compromise between the interests of employee and employer in many ways,[112] but this basic right cannot be undermined by unrealistic fears of discord within a workforce.[113] Section 7 already requires concerted action, appropriate ends (mutual aid or protection), and proper means that balance employer and employee interests.[114]

Considering the safeguards built into section 7 that balance employer/employee interests, there is no need for an additional subjective, shifting continuum that in effect stifles political speech because of the uncertainty that it creates. Following *Eastex*, however, some lower courts focused upon whether the activity at issue was what the Supreme Court considered too attenuated for protection.[115] In essence, the courts viewed "union political communication along a continuum, placing at one end literature dominantly aimed at inducing votes for specific candidates, and at

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The statutory rights of workers under section 7 of the Act to associate, to discuss their grievances, to form a union, and to bargain collectively over terms and conditions of employment appear to be politically untouchable (again in principle).") (emphasis added).

111. *See* Michael Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247, 256 (2008); *see also* David Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA. L. REV. 651 (2005).

112. *See* Karl Kalre, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 266 (1977); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981).

113. *See* Orly Lobel, *The Paradox of Extra Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 943 (2007).

114. Calvin William Sharpe, "*By Any Means Necessary"—Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 BERKELEY J. EMP. & LAB. L. 203, 207-213 (1999) (recognizing the required components of concerted action, appropriate ends and means).

115. *E.g.*, NLRB v. Motorola, Inc., 991 F.2d 278, 284 (5th Cir. 1993).

the other, literature designed principally to educate employees on political issues that may impinge on their employment conditions."[116] In part, this was a contextual approach advocated by the NLRB.[117]

The problem with this approach was that it lacked certainty and invited subjectivity, and the lower courts subsequently utilized it to severely limit protected activity despite *Eastex*'s broad holding.[118] The approach focused upon the intent or the design of the underlying message.[119] The *Wisconsin Right to Life* holding should drastically redefine or eliminate this continuum. Unless the communications are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,"[120] they should be permitted as long as they bear an arguable relationship to issues arising in the workplace or larger employee issues nationwide. The intent of those designing the message should be irrelevant, just as intent was found to be irrelevant in *Wisconsin Right to Life*.

In this context, *Wisconsin Right to Life* provides a better test for workplace communications[121] by allowing nearly bright-line certainty in reviewing issue-based political messages. It also opens a path for greater issue advocacy in places of employment. If the courts are consistent in reviewing such materials, only those expressly supporting or opposing a particular candidate or candidates will be prohibited. The courts will not be called upon to translate the predominate thrust of messages.[122] Rather, courts will judge the messages on their face by determining whether they expressly call for the election or defeat of an individual.

A communication crafted by an international union or an advocacy group should be found to pass muster for distribution so long as it allows an interpretation that it is not a direct appeal to vote for or against a particular person, and as long as it discusses employment issues. Under this test, a union can write a pamphlet steeped in union activism or issue driven messages (perhaps concerning desired reform) with virtual certainty that this communication is protected as long as it bears some relevance to the workplace. In addition, messages containing references and links to an interest

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116. Local 174, UAW v. NLRB, 645 F.2d 1151, 1155 (D.C. Cir. 1981).

117. *Id.*

118. *See infra* notes 162-174, 180-201 and accompanying text.

119. *See Local 174*, 645 F.2d at 1155.

120. *See* FEC v. Wisc. Right to Life, Inc., 127 S. Ct. 2652, 2680 (2007) (per curiam).

121. An entirely different analysis applies when the communications are directed to the public and not fellow employees. Salmon Run Shopping Center v. NLRB, 534 F.3d 108, 115 (2d Cir. 2008).

122. There is a line of cases involving public sector employees that with considerable difficulty tries to determine the primary concern being raised or motive of the employee to determine if it is a matter of public concern that triggers First Amendment protection. *C.f., e.g.*, Morgan v. Ford, 6 F.3d 750, 755 (11th Cir. 1993); Sparr v. Ward, 306 F.3d 589, 594-95 (8th Cir. 2002).

group's website that endorses an individual should also be upheld under this new methodology.[123]

Under the old case law's contextual continuum, those seeking to communicate on political issues were well advised to make no mention of any candidate's name, because such a reference would likely invalidate the entire message. Under an approach that takes into account the *Wisconsin Right to Life* standards, reference to a candidate (or all candidates) for office does not doom the communication, just as reference to Senators Feingold and Kohl did not make the advertisements impermissible in that case.[124]

An objective chart listing the respective candidates for office and their stated positions on various workplace issues could certainly serve a substantial educational purpose and one consistent with section 7 and *Eastex*'s protection.[125] While it could be argued that such a comparison was slanted or incompletely represented a candidate's views, this cannot rise to the level of being "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[126] Unless it makes no attempt at objectivity and is by all standards unreasonable, a brochure[127] discussing issues related to the workplace thus could reference where candidates stand on various matters. Educating workers may lead them to conclusions, but

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123. *See supra* notes 92-100 and accompanying text.

124. *See Wisc. Right to Life*, 127 S. Ct. at 2680.

125. Such a chart was prepared by the National Education Association (NEA) in the NEA Today, May 2008 edition. This chart would be permitted by this approach. On one axis, the chart lists the names of the leading presidential candidates in the 2008 election, Sen. Hilary Clinton, Sen. Barack Obama, Sen. John McCain, together with the NEA. On the other axis, the chart details various issues of substantial importance to the NEA, such as increasing the minimum wage, overall approach to healthcare reform, the privatization of social security, the no child left behind program, and so on. The chart is then filled in with each candidate's position on each of these important topics, together with the position of the NEA.

126. *See Wisc. Right to Life*, 127 S. Ct. at 2680.

127. If communications via e-mail are considered concerted activity and thus protected, this significantly improves the ability of workers to exchange political information. In a previous decision the National Labor Relations Board recognized a flippant e-mail sent criticizing a change in a company's vacation policy to have "clearly constituted 'concerted' activity," Timekeeping Sys., 323 N.L.R.B. 244, 247 (1997), and most of the commentators reviewing this issue supported this view. *See* Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 309 (2007); Christine Neylon O'Brien, *The Impact of Employer E-Mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act*, 106 DICK. L. REV. 573, 589 (2002). Subsequently, in late 2007 the NLRB held that "employees have no statutory right to use the . . . e-mail system for section 7 purposes." Guard Publishing Co., 351 N.L.R.B. 70, 73 (2007). The NLRB's majority decision in Guard Publishing was grounded upon recognition of an employer's basic property right to restrict the use of the company's equipment or media. This conclusion is on a shaky foundation in light of section 7's intended reach and a mixed bag of governing precedent. Either appellate review or a change in the NLRB's composition could make this holding short lived. *Id.*

simply reporting positions on a host of issues cannot be viewed as express advocacy.

IV. REGULATING SPEECH IN EMPLOYMENT SETTINGS

The NLRA does not apply to public employees.[128] Governmental employees, however, enjoy the protection of the First Amendment and do not check these rights at the door of their workplaces. A public employer that limits a worker's rights is considered to be taking state action, and this triggers constitutional protection.[129] As discussed above, it is beyond dispute that private sector employees have the right to discuss relevant employment issues (national issues and those within their places of employment) and issues involving union organizing or administration of a collective bargaining agreement under section 7. The governing analysis is to a great degree the opposite where the First Amendment is involved.[130]

A. A Study in Contrast: The Public Sector

The Constitution generally offers no protection where employees are seeking to discuss "their official duties,"[131] seeking to raise internal workplace gripes,[132] or attempting to raise issues about their working conditions or supervision.[133] It has been recognized that "government offices could not function if every employment decision became a constitutional matter."[134] A "round table for employee complaints" is not created by this constitutional protection.[135]

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128. 29 U.S.C. § 152(2) (2002).

129. *See* Quon v. Arch Wireless Operating Co., 529 F.3d 892, 903-04 (9th Cir. 2008).

130. Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 926-27 (1992) ("[A] work-related grievance is the key to protection under section 7; it may sound the death knell of the public employee's claim under the First Amendment.").

131. *See* Garcetti v. Ceballos, 126 S. Ct. 1951 (2006). *See also* Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMP. & LAB. L. 175 (2008); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 670 (2008).

132. Weeks v. Bayer, 246 F.3d 1231, 1235 (9th Cir. 2001) (recognizing that the First Amendment does not safeguard "individual personnel disputes" or the "minutiae of workplace grievances") (internal citations omitted). *See also* Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003).

133. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415 n.4 (1979); *see also* Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 29-30 (1999).

134. Connick v. Myers, 461 U.S. 138, 143 (1983).

135. Hinton v. Conner, 366 F. Supp. 2d 297, 307 (M.D.N.C. 2005).

Government employees do, however, have a constitutional right to discuss matters of public concern.[136] It has been recognized that a "public employee does not relinquish [the] First Amendment rights to comment on matters of public interest by virtue of government employment."[137] While it is often difficult to identify whether a matter is private[138] or a civic issue concerning the functioning of government,[139] this typically is not an issue in a political context.[140] It has been held that campaigning for a political candidate is a protected concern.[141] An interest in a "politically neutral workplace" will not withstand the exacting scrutiny required in this situation."[142]

If disruption is caused by raising matters of public concern through political activity, then the employee's interest in speech is subjected to a balancing test, where the employee's First Amendment rights are weighed against the government's interest in maintaining efficiency in its operations.[143] The burden is on the public employer to justify and show the necessity for taking action.[144] An employee may be disciplined only if the balance favors the governmental interest in efficiency.[145] Sparking a spirited

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136. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); *see also* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and §1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 573-74 (2008).

137. *Connick*, 461 U.S. at 140. *See also* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

138. *See, e.g.*, Barnes v. Small, 840 F.2d 972, 982-83 (D.C. Cir. 1988) (holding employee to be unprotected in writing about poor behavior of coworkers); Gillum v. City of Kerrville, 3 F.3d 117, 121 (5th Cir. 1993) (holding that a police chief violating the law was a matter of public concern but that the police officer's complaints regarding his role in an internal investigation were not protected); Gonzalez v. City of Chicago, 239 F.3d 939, 941 (7th Cir. 2001) (finding investigator's claims regarding police misconduct were not protected conduct).

139. *See, e.g.*, Lee v. Nicholl, 197 F.3d 1291, 1295 (10th Cir. 1999) (discussion of traffic safety from highway department employee was a matter of public concern); Branton v. City of Dallas, 272 F.3d 730, 740-41 (5th Cir. 2001) (finding Internal Affairs officer's communications regarding alleged false testimony of a police officer to be protected even though her job required her to make such reports).

140. *See* Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM & MARY BILL RTS. J. 1173, 1200-02 (2007).

141. *See, e.g.*, Brady v. Fort Bend County, 145 F.3d 691, 706-07 (3d Cir. 1998); Bass v. Richards, 308 F.3d 1081, 1088-89 (10th Cir. 2002); Curinga v. City of Clairton, 357 F.3d 305, 313 (3d Cir. 2004).

142. Utah Educ. Ass'n v. Shurtleff, 512 F.3d 1254, 1266-67 (10th Cir. 2008).

143. Rankin v. McPherson, 483 U.S. 378, 388 (1987); Commc'n Workers of Am. v. Ector County Hosp. Dist., 467 F.3d 427, 442 (5th Cir. 2006) (en banc).

144. *See, e.g.*, Murphy v. Cockrell, 505 F.3d 446, 452 (6th Cir. 2007); McFall v. Bednar, 407 F.3d 1081, 1089-90 (10th Cir. 2005); Commc'n Workers of Am. v. Ector County Hosp. Dist., 392 F.3d 733 (5th Cir. 2004), *rev'd en banc*, 467 F.3d 427 (stating that the basic thrust of the Supreme Court's *Pickering* line of cases has been to "ensure that public employers do not use authority over employees to silence discourse . . . simply because superiors *disagree with the content of the employees' speech*" (quoting *Rankin*, 483 U.S. at 384)).

145. *See Rankin*, 483 U.S. at 388.

lunch hour debate or a discussion outside work has not been held sufficient to outweigh a worker's free speech guarantee.[146] While there are permissible limits as to the means of communication because of the Hatch Act[147] and other laws,[148] communications over matters of public concern are generally protected.[149] Certain speech in both the public and private sectors is also protected by retaliation provisions.[150]

B. Section 7's Required Balancing in Private Employment

It is well established under the NLRA that unions may solicit prospective members so long as they do not impair the efficiency of the company's operations.[151] Thus, to be protected under section 7, such activities must take place in non-working areas on non-work time.[152] A union is free to communicate with someone who is on break and in a lunch room or distribute brochures at the employer's entrance as employees are coming from or going to work.[153] Similar restrictions on political discussions make sense particularly when First Amendment precedent is reviewed.

The NLRB's General Counsel, Ronald Meisburg, accurately summarized the Board's position on discipline of employees engaged in political activities as follows:

> We can distill the following principles from these lines of Board authority:

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146. Swineford v. Snyder County, 15 F.3d 1258 (3d Cir. 1994); Baldasarre v. New Jersey, 120 F.3d 188, 197-98 (3d Cir. 2001). *See also* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990).

147. 5 U.S.C. §§ 7321-26 (2007).

148. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 476 n.21 (1995); Burrus v. Vegliante, 336 F.3d 82, 91 (2d Cir. 2003).

149. Blackman v. N.Y. City Transit Auth., 491 F.3d 95, 96-97 (2d Cir. 2007). *But see* Rhodes, *supra* note 140, at 1180.

150. *See, e.g.*, Barnes v. Wright, 449 F.3d 709, 718 (6th Cir. 2006). *See also* Michael L. Wells, *Section 1983, The First Amendment, and Public Employees Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 957 (2001).

151. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). *See also* Ralph M. Dereshinsky, *The Solicitation and Distribution Rules of the NLRB*, 40 U. CIN. L. REV. 417 (1971); Lyrissa Barnett, *Maintaining Order in the Post-Strike Workplace: Employee Expression and the Scope of Section 7*, 15 BERKELEY J. EMP. & LAB. L. 87, 91 (1994).

152. *See* United Parcel Serv., Inc. v. NLRB, 228 F.3d 772 (6th Cir. 2000); Valmont Indus. v. NLRB, 244 F.3d 454 (5th Cir. 2001); *cf. In re* Haw. Gov't Employees Assoc'n 170 P.3d 324, 345-46 (Haw. 2007) (striking down a union bulletin board posting supporting various candidates as impermissible under a state's statute and *Eastex*'s authority was distinguished because the political posting was displayed continuously during "working" and "nonworking" hours).

153. ITT Indus., Inc. v. NLRB, 413 F.3d 64 (D.C. Cir. 2005).

- non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in non-work areas, is protected;
- on-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally-applied work rules; and
- leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-applied work rules.[154]

This last point is particularly important because it often can lead to an employee's discharge. These principles were demonstrated in late 2006 when the NLRB considered a series of charges involving discipline of employees who did not work as scheduled. The employees instead participated in demonstrations organized nationwide to protest proposed legislative changes that sought to impose greater restrictions and penalties on those violating immigration laws.[155] In each instance, the Board assumed the activity to fall under section 7, but found the means utilized to be a violation of work rules and thus to be unprotected.[156]

Section 7 protection may also be lost when the communication is considered to be disloyal or to disparage a company's product or services.[157] Thus, one can envision a company taking a position that communications should not be protected if critical of or adverse to the political interests of the company's CEO or its shareholders.[158] However, "concerted activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer."[159] To date there has not been an issue relating to such political discourse, because the courts have so narrowly con-

154. Memorandum 08–10 from Meisburg, *supra* note 2, at 13.

155. *See* Michelle C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93 (2007).

156. *See, e.g.*, Applebee's Neighborhood Bar & Grill, Case 30-CA-17444, Advice Memo (Oct. 17, 2006) (upholding discipline because employees walked off the job without permission); Reliable Maint., Case 18-CA-18119, Advice Memo (Oct. 31, 2006) (holding that worker violated neutral attendance policy); CALMEX, Inc., Case 32-CA-22778, Advice Memo (Dec. 4, 2006).

157. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464 (1953); *In re* Am. Golf Corp., 330 N.L.R.B. 1238, 1240 (2000), *enforced sub nom.* Jensen v. NLRB, 86 F. App'x 305 (9th Cir. 2004); Endicott Interconnect Techs., Inc. v. NLRB, 453 F.3d 532, 537 (D.C. Cir. 206); *see also* Matthew W. Finkin, *Disloyalty! Does* Jefferson Standard *Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541, 568 (2007).

158. Such contentions were recently raised in *Five Star Transportation, Inc. v. NLRB*, 522 F. 3d 46, 52 (1st Cir. 2008).

159. NLRB v. Circle Bindery, Inc., 536 F.2d 447, 452 (1st Cir. 1976).

strued what is permissible activity.[160] However, once the implications of *Wisconsin Right to Life* are applied in the section 7 context, the issue may be revisited through the disloyalty characterization.[161] This can best be seen by reviewing cases that have been decided under the primary authority of *Eastex*, but with the benefit of the gloss added by *Wisconsin Right to Life*, as seen in the next Part.

V. THE DECISIONS FOLLOWING *EASTEX*

Surprisingly, in the period following the *Eastex* decision, there have not been many reported decisions contesting the distribution of political materials in the workplace. For the most part, the few decisions that have arisen have held against the union or group seeking to engage in political communications.

Following *Eastex*, one of the first cases to shape the precedent was *Local 174, United Auto Workers v. NLRB*,[162] which challenged denial of distribution of a leaflet at a Firestone plant. The two-page communiqué entitled, "Protect your hard-won collective bargaining gains—VOTE on Tuesday, November 7,"[163] did not address election issues in depth, but instead focused on showing how state and national issues had a bearing upon collective bargaining.[164] The communiqué also urged the reader to vote for all union-endorsed candidates and specifically set out four candidates, with their pictures, to support in the election. The appellate decision, written by Justice Ginsburg, then on the D.C. Circuit, correctly found that the thrust of the leaflet was not to educate employees on relevant political issues, but instead to endorse specific candidates.[165]

This conduct also violates the *Wisconsin Right to Life* test because it involves express advocacy for candidates. The Firestone leaflet was in stark contrast to the *Eastex* material and the ads in *Wisconsin Right to Life*, which focused on issues, not candidates. The express advocacy on behalf of the four candidates was unprotected. An expanded issue-driven message, ab-

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160. Work rules seeking to promote or maintain civility in the workplace have been held to be unlawful if they have a chilling effect on section 7 rights. *See, e.g.*, Lafayette Park Hotel, 326 N.L.R.B. 824 (1998), *enforced sub nom.*, Lafayette Park Hotel v. NLRB, 203 F.3d 52 (D.C. Cir. 1999) (unpublished). *But see* Adtranz ABB Daimler-Benz Transp. v. NLRB, 253 F.3d 19, 28 (D.C. Cir. 2001); Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 75 (2004). One can imagine such rules governing offensive speech to be utilized in seeking to restrict political discussions.

161. *See Jefferson Standard*, 346 U.S. at 479-80 (Frankfurter, J., dissenting) ("Many of the legally recognized tactics and weapons of labor would readily be condemned for 'disloyalty' were they employed between man and man in friendly personal relations.").

162. 645 F.2d 1151 (D.C. Cir. 1981).

163. *Id.* at 1152.

164. *Id.* at 1156-57.

165. *Id.* at 1154.

sent the pictures and endorsements of specific candidates, should be upheld as valid today under a proper reading of *Eastex* and *Wisconsin Right to Life*.

A case arose during the 2004 presidential election that involved a union seeking to distribute political brochures in a nonpublic area using teachers' mailboxes and a school's internal mail system.[166] The District Court undertook an analysis of the principal focus of these brochures endorsing John Kerry and found that the materials were not intended to educate school personnel on issues relating to their employment, but instead sought to induce them to vote for the Democratic candidate.[167] The court followed *Firestone* and denied relief to the union.[168] The same result would occur under the latest governing precedent discussed herein. Certainly passing out the stock literature universally utilized within a campaign will not withstand scrutiny. The express advocacy for Kerry would cause the brochures to lose protection.

As this demonstrates, the *Eastex/Wisconsin Right to Life* analysis would not transform places of employment into convenient mail drops for campaign literature. Instead, it would allow meaningful communication of campaign messages related to employment issues.[169] A group may have to tailor its message to meet this requirement, but this is not a great burden. Places of employment cannot be the predominant or only forum for political discourse, but employees should not be stifled in communicating on employment issues.

Fun Striders, Inc. v. NLRB[170] provides another example of how the *Eastex/Wisconsin Right to Life* test would not alter a proper interpretation of section 7 protection. In *Fun Striders*, the issue of the discharge of four employees for distributing a leaflet that advocated communism was upheld. The company justified the discharges based upon the extreme message contained within the leaflet.[171] The leaflet "advocated 'violent revolution,' [including] 'destruction of all bosses,' and 'armed revolution of all the working class.'"[172] In a divided decision, the Ninth Circuit upheld the discharges despite acknowledging that the communication involved protected activity

166. Educ. Minn. Lakeville v. Indep. Sch. Dist. No. 194, 341 F. Supp. 2d 1070, 1071 (D. Minn. 2004). The primary basis for the litigation seeking a preliminary injunction was a claim that the First Amendment was being violated by the School District's denial of access to its communication channels for political messages. *Id.* at 1073-74. Secondary theories of labor rights under Minnesota's Public Employee Labor Relations Act and the NLRA (section 7) were also addressed by the District Court. There was no explanation as to how these public employees would fall under and be governed by the NLRA.

167. *Id.* at 1080.

168. *Id.* at 1079-80.

169. *See supra* notes 22-29 and accompanying text.

170. 686 F.2d 659 (9th Cir. 1981).

171. *Id.* at 663 (finding that there is a "business need to preserve peace").

172. *Id.* at 661.

because the employer "reasonably believed that this advocacy threatened to inject violent confrontation into the plant."[173]

A strong dissent parted company with the majority because it found that despite the communist rhetoric, there was no reasonable belief by the decision-maker that immediate violence would ensue.[174] Even though the dissenting opinion's conclusion seemed to be better supported by the record from the NLRB hearing on the matter,[175] the majority decision can be squared under this modified *Eastex*/*Wisconsin Right to Life* test. There is no way to reasonably relate overthrowing the government to the workplace. Dropping a few sentences on employment into a lengthy manifesto cannot alter the predominate theme. Likewise, creatively referencing employment issues within a message on abortion cannot change its tenor and lack of protection under section 7.

Further, it has long been recognized that the time and area within the workplace and manner of communications can be regulated to minimize or eliminate disruption of operations.[176] Concerted activity inimical to business operations can be regulated in many circumstances for it is unprotected under section 7.[177] Political communications have not fallen outside this rule,[178] nor should they.

Just as free speech rights must balance the interests of efficiency in government offices,[179] so must political speech initiated under section 7. This has certainly been the view of the courts in states whose statutes guarantee free speech in places of private employment.[180]

The modified *Eastex*/*Wisconsin Right to Life* methodology would change the outcome of some decisions. *NLRB v. Motorola, Inc.*[181] provides an example. *Motorola* involved employee opposition to a company's mandatory drug testing program. The workers formed and promoted an outside organization that eventually sought to pass a municipal ordinance that would have effectively prohibited random drug testing by that community's employers (including the workers' employer).[182] One Motorola employee

173. *Id.* at 662.

174. *Id.* at 664-65.

175. *Id.* at 664-65 n.1.

176. *See supra* notes 151-56 and accompanying text. *But see* Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891 (2006).

177. *See* Fishl, *supra* note 50, at 791.

178. *See, e.g.*, Blue Circle Cement Co. v. NLRB, 41 F.3d 203 (5th Cir. 1994).

179. *See supra* notes 143-46 and accompanying text.

180. *See, e.g.*, CONN. GEN. STAT. § 31-51q, *interpreted in* Daley v. Aetna Life & Casualty Co., 734 A.2d 112, 121 (Conn. 1999); Lowe v. AmeriGas, Inc., 52 F. Supp. 2d 349 (D. Conn. 1999); Campbell v. Windham Cmty. Mem'l Hosp., Inc., 389 F. Supp. 2d 370, 381-82 (D. Conn. 2005).

181. 991 F.2d 278 (5th Cir. 1993).

182. *Id.* at 280.

associated with the organization sought permission to distribute five pieces of literature to the workforce, but was not allowed to do so.[183]

The Fifth Circuit Court of Appeals found that the communications, while issue driven, reached the point of attenuation discussed in *Eastex* and thus the activities were unprotected under section 7.[184] The court honed in on the nature and composition of the organization that sought to distribute the material rather than the message,[185] that it was established to be independent from the employer's workers. The court ignored the fact that the impetus for this movement had clearly originated with, and was being driven by, the company's employees.[186] The court expressed concern that the opposite result would allow any political splinter group with employee members to demand access to the workforce, and thus could create hostility and divisiveness.[187] The decision has been properly criticized for misinterpreting section 7's protection and interpreting *Eastex* too narrowly.[188]

It is true that a local union seeking to distribute materials to its membership or communicate as part of its organizing activities fits more squarely within traditional views of section 7's protection.[189] However, neither the legislative history of the provision nor the *Eastex* decision support a distinction based upon whether the activity is initiated by an NLRB certified union. If employees of the enterprise seek to make the communication, it should make no difference whether the impetus for the materials sought to be distributed originate from a political party, a special interest group, or the employees themselves.

The true issue is not the identity of the underlying organization that distributes or produces the communication, but whether the communication is work related. The content of the message and whether it avoids express advocacy should be the sole determining factors. Additionally, consideration of the *Wisconsin Right to Life* decision should eliminate this false issue of the communication's origination. Employees have been afforded the ability to discuss matters of "mutual aid or protection" no matter where they emanate from.[190]

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183. *Id.* at 281.

184. *Id.* at 285.

185. *Id.*

186. *Id.* at 280.

187. *Id.* at 285.

188. Bill Hylen, NLRB v. Motorola*: A Narrow Interpretation of the "Mutual Aid or Protection" Clause of the National Labor Relations Act*, 26 ARIZ. ST. L.J. 253, 262 (1994).

189. *See* Hyde, *supra* note 18.

190. Five Star Transp., Inc., 349 N.L.R.B. 8, slip op. 3 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008). It has been recognized that the NLRA protects workers seeking "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee–employer relationship." 349 N.L.R.B. 8, 3 (quoting Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978)).

Further, the concern for creating disruption or divisiveness within the workforce is misplaced. Distribution may only occur in non-working areas during off-work hours, such as time before or after scheduled shifts or break and lunch periods.[191] Discipline may still be maintained.

A year later, the Fifth Circuit backtracked on its holding in *Motorola*. In *Blue Circle Cement Co. v. NLRB*,[192] an employee who was the environmental officer of a Boilermaker Local was caught using his employer's copy machine to duplicate a Greenpeace article on "sham recycling."[193] The employee, a founder and member of the nonprofit environmental organization, Earth Concerns of Oklahoma (ECO), was discharged for using company equipment during the time he was paid to work, against his employer's business interest of burning hazardous waste in its kiln.[194]

Even though it was unclear to whom the employee intended to distribute the copies, the Fifth Circuit upheld the NLRB's finding that the worker had engaged in concerted, protected activity.[195] The court distinguished *Motorola* as involving an outside organization seeking to advance its political agenda.[196] The Fifth Circuit indicated that the Motorola employees, acting as members of the independent organization concerned with a workplace issue, do not have the same section 7 rights as a union or group of employees in a dispute with management.[197]

While this distinction may have some initial appeal because it recognizes the more typical activities involved in section 7, it is certainly not supported by the statute's terms[198] or legislative history.[199] Under *Eastex*, the involvement of a workplace issue triggers protection, regardless of its origination.[200] In *Blue Circle*, the employee was found to be "wearing two hats," one for ECO and another for his local union, undertaking "virtually inseparable activities" to protect health and safety on behalf of both groups.[201] Accordingly, the worker's activities were protected and he was ordered reinstated with back pay.[202]

The Fifth Circuit in *Blue Circle* reached the correct result in that the employee's activities were obviously concerted and involved a workplace issue. The court had to labor to distinguish its own *Motorola* precedent, but

191. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
192. 41 F.3d 203 (5th Cir. 1994).
193. *Id.* at 205.
194. *Id.*
195. *Id.* at 209.
196. *Id.* at 210.
197. *Id.* at 210-11.
198. 29 U.S.C. § 157 (2002); *see also supra* note 31 and accompanying text.
199. *See supra* notes 41-64 and accompanying text.
200. Eastex, Inc. v. NLRB, 437 U.S. 556, 564 (1978).
201. *Blue Circle Cement*, 41 F.3d at 211.
202. *Id.*

normally this would be unnecessary. While seeking to avoid a proliferation of splinter groups that utilize a place of employment as a forum for communication may seem to be a worthy goal, it is a false issue. Communications can only be undertaken by a union or a group of employees concerning workplace issues that are raised for mutual aid or protection. The workplace is not open to every political cause, but is a forum for employee groups raising issues with a nexus to their own working lives.

CONCLUSION

Some may argue that a prohibition that precludes communications expressly supporting a candidate significantly limits the ability to have a meaningful political debate in the workplace. The right, however, to have a complete discussion on issues relevant to the workplace transcends the need to act as a particular candidate's advocate. Non-profit entities like Wisconsin Right to Life recognize that issue advocacy is important on its own and also can be used as a springboard for other indirect forums to support or oppose a candidate, such as a referenced website.

The modified *Eastex/Wisconsin Right to Life* test is practical and workable and a significant improvement over a vague continuum analysis that has been used by courts in the section 7 context. This test looks at the relevance of the communication to the workplace and excludes express electioneering or its equivalent for or against a candidate. The test reflects the intent underlying section 7 in permitting robust interaction among employees. Importantly, it provides readily defined lines of demarcation that should not make employees uncertain as to whether their actions are going to put their jobs in jeopardy. Accordingly, this new methodology should significantly benefit the tenor of political discourse in the workplace.