Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions

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I. INTRODUCTION

A private-sector[1] employer in the United States may fire an employee for the employee's political views.[2] During the 1992 presidential campaign, employers required that employees sit through a presidential candidate's stump speech as part of a company-wide captive audience.[3] Employees commented to

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[1] As used in this paper, "private sector" employment includes all but government employment. The term includes nonprofit employers and private employers with substantial government contracts or grants. "Public sector" employment includes employment by federal, state, and local government, including municipalities, school boards, state institutions of higher education, and similar boards or commissions that represent political subdivisions of a state.

[2] There are limited areas of protection for certain categories of expression. For example, the National Labor Relations Act protects speech on unionization. 29 U.S.C. §§ 157, 158(c) (1988). *See generally* Staughton Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One?*, 1 INDUS. REL. L.J. 711 (1977) (arguing that similar limits are applied to public employees and *unionized* private sector employees who engage in disruptive speech). To varying degrees, the developing cause of action for wrongful or retaliatory discharge protects whistleblowers. *See generally* 1 LEX K. LARSON, UNJUST DISMISSAL (1993); IRA MICHAEL SHEPARD ET AL., WITHOUT JUST CAUSE (1989); PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE (Jack Steiber & John Blackhorn eds., 1983).

Most states protect employees' right to vote, see *infra* notes 48-50 and accompanying text, but only Connecticut explicitly protects employees' free speech rights, CONN. GEN. STAT. § 31-51q (1992). For more detailed discussion of employees' existing protection, see Terry Ann Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42 (1987).

[3] Rowland Evans & Robert Novak, *Bush Takes Message of Care to New Hampshire*,

reporters that they did not feel free to leave.[4] A CEO sent faxes to regional managers strongly recommending that they purchase seats at a candidate's fundraiser if they intended to have a future with the corporation; one who failed to do so lost his job.[5] These examples illustrate the trend that employees are increasingly experiencing pressure to support the political candidate or cause that the employer believes best serves the corporate interest.

This Article examines this trend and suggests a framework for a private legal remedy when the employer crosses the boundary from influence to coercion by dismissing an employee in retaliation for that employee's exercise of the right to free speech. First, the Article addresses how the problem has evolved and the traditional reluctance of courts to protect employees' political activities from employer retaliation. Second, the Article discusses policy reasons why state courts should use the First Amendment in wrongful discharge actions to protect employee political speech and discusses the results of a survey on employer influence upon employee political activities.[6] Third, it

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THE HERALD-TIMES (Bloomington, IN), Jan. 18, 1992, at A6.

[4] The courts have long held that the right to be free from unwanted speech is itself a form of free speech. *See, e.g.*, Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970).

[5] Neiss v. Cherry Payment Sys., Inc., No. 92-C-403-S (W.D. Wis. July 17, 1992). The plaintiff alleged his employer fired him the day after he refused to contribute to the President's Dinner, a Republican fundraiser for House and Senate candidates. Federal District Court Judge Shabaz denied the employer's motion to dismiss a wrongful discharge claim made under Wisconsin law.

[6] The term "wrongful discharge" refers to causes of action sounding in tort or contract. Historically, all employment was terminable at will, that is, with or without cause. 1 LARSON, *supra* note 2, § 2.04; Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). Since the late 1970s, state courts have begun to limit the doctrine of employment at will through a civil cause of action for retaliatory or wrongful discharge. 1 LARSON, *supra* note 2, § 2.07. In general, an employee may recover damages if the employer terminated employment in retaliation for employee conduct that is protected by a substantial and important public policy. The employee has the burden of proving that the conduct is protected, that the public policy at stake is sufficiently important, and that the employer actually fired the employee in retaliation for the conduct. The burden of proof then shifts to the employer. The employer may avoid liability by proving a permissible ground for dismissal. What represents a sufficiently important public policy varies from state to state. The highest courts of more than two-thirds of the states have recognized the cause of action. *Id. See generally* Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4TH 544 (1982). This Article suggests a remedy that uses the First Amendment and comparable state constitutional provisions as a source of public policy in wrongful discharge actions under state law. Although in some circumstances state constitutions may provide broader protection for speech than does the First Amendment, this Article does not

addresses the constitutional issue implicit in courts' condoning employer conduct that infringes upon employee free speech rights. Specifically, in the common law tort of wrongful discharge, state courts have created a classification based on the content of a private-sector employee's speech. State courts do recognize a cause of action when an employee speaks out on violations of law or when the employee claims benefits to which she is legally entitled but do not recognize a cause of action when an employee engages in political speech outside the workplace. This classification disadvantages political speech, the category of speech courts traditionally give the highest protection in First Amendment jurisprudence. State courts engage in state action within the reach of the Constitution by creating this classification. Courts may avoid the constitutional problem by using the First Amendment as the basis for a wrongful discharge claim.

Finally, this Article examines the limits of this new remedy, which can be drawn from analogous public-sector cases. In the public sector, an employee may speak out on a matter of public concern, but the courts will weigh the employee's interest in speech against the public employer's interest in the efficient operation of the workplace. In addition, courts have recognized exceptions for certain categories of policy-making and confidential employees, who forfeit certain First Amendment protections by virtue of their job function. Courts should move to recognize the tort of wrongful discharge in instances when an employer retaliates against an employee for nondisruptive political speech.

II. HOW COURTS TREAT EMPLOYER INTERFERENCE WITH EMPLOYEE FREE SPEECH RIGHTS

In *Coppage v. Kansas*, the Supreme Court held that it did not represent any form of duress, coercion, or undue influence for an employer to fire an employee who joined a labor union in breach of a written agreement that he

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separately consider state law protection of free speech. The basic argument would apply equally to state and federal constitutional provisions. This Article does not attempt a comprehensive review of the ever-growing literature on wrongful discharge and employment at will. For a review of major pieces in the literature, see PAUL C. WEILER, GOVERNING THE WORKPLACE (1990). *See also* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1983); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

would not do so.[7] Apart from the tumultuous history of early labor

[7] Coppage v. Kansas, 236 U.S. 1 (1915). The Kansas legislature had adopted a statute forbidding employers to exact a promise not to join or retain membership in a labor organization as a condition of securing or retaining employment. In an early application of substantive due process, the Court held that this statute infringed upon the Fourteenth Amendment right of freedom of contract:

> [W]e have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employé by means unlawful without the act. In the case before us, the state court treated the term "coerce" as applying to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employé.

Id. at 8. Justice Oliver Wendell Holmes dissented, reasoning that there was nothing in the Constitution to prevent a state from "establishing an equality of position between the parties in which liberty of contract begins." *Id.* at 27 (Holmes, J., dissenting). The more articulate dissent was Justice Day's:

> The right to join labor unions is undisputed . . . . Acting within their legal rights, such associations are as legitimate as any organization of citizens formed to promote their common interest. They are organized under the laws of many States, by virtue of express statutes passed for that purpose, and being legal, and acting within their constitutional rights, the right to join them, as against coercive action to the contrary may be the legitimate subject of protection in the exercise of the police authority of the States.
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> It would be impossible to maintain that because one is free to accept or refuse a given employment, or because one may at will employ or refuse to employ another, it follows that the parties have a constitutional right to insert in an agreement of employment any stipulation they choose. They cannot put in terms that are against public policy either as it is deemed by the courts to exist at common law or as it may be declared by the legislature as the arbiter within the limits of reason of the public policy of the State.

Id. at 32, 35 (Day, J., dissenting). As one of a number of examples of how the state might impose a limit on employers in the interest of public policy, Day observed: "Would it be beyond a legitimate exercise of the police power to provide that an employé should not be required to agree, as a condition of employment, to forego affiliation with a particular political party, or the support of a particular candidate for office?" *Id.* at 37. On the question of "coercion," Day reasoned: "[I]n view of the relative positions of employer and employed, who is to deny that the stipulation here insisted upon and forbidden by the law is essentially coercive? No form of words can strip it of its true character." *Id.* at 38. The employer argued that because a union has a constitutional right to deny membership in some circumstances, there cannot be a more restrictive rule for employers. Justice Day responded that a church may deny membership to those who intermarry but that a railroad

unionization,[8] there are few published cases in which an employee has brought suit against an employer for interference with political expression.[9] The earliest reported cases involved direct employer attempts to control how an employee voted. This practice was apparently prevalent enough to give rise to early state legislation making it a crime for an employer to attempt to influence votes by threatening discharge from employment.[10]

In 1928, in *Vulcan Last Co. v. State*, the Supreme Court of Wisconsin held

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may not compel a worker to join or refrain from joining a church. *Id.* at 39. Instead, the railroad may unite with other railroads to form organizations to protect their common interests.

> The law should be as zealous to protect the constitutional liberty of the employé as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

Id. at 40. For an interesting commentary on the case, see Kenneth M. Casebeer, *Teaching an Old Dog Old Tricks:* Coppage v. Kansas *and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765 (1985). Remarkably, modern courts continue to conclude that an employer's threat to fire an at will employee does not constitute duress or coercion. *E.g.*, Zaccardi v. Zale Corp., 856 F.2d 1473 (10th Cir. 1988) (reasoning that the threat to exercise a legal right is not duress). However, the NLRB will consider such threats coercive in the context of a union election campaign. *See generally* Julius G. Getman et al., *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975).

[8] Issues of labor and politics have shaped our First Amendment jurisprudence. In Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917), Judge Learned Hand first articulates his broad view of the First Amendment which he later persuades Justice Oliver Wendell Holmes to embrace. *Masses* involved the protesting of military conscription through cartoons with captions such as "Making the World Safe for Capitalism." The import of another cartoon was "obviously that conscription is the destruction of youth, democracy, and labor, and the desolation of the family." *Id.* at 536.

[9] *See generally* R.D. Hursh, Annotation, *Discharge from Private Employment on Ground of Political Views or Conduct*, 51 A.L.R. 2D 742 (1957).

[10] *See generally* E.H. Schopler, Annotation, *Constitutionality of Statute Respecting Employer's Control of or Interference with Political Affiliations or Activities of Employees*, 166 A.L.R. 707 (1947). In general, courts have held that such statutes do not unconstitutionally interfere with the employer's First Amendment rights. *E.g.*, Santiago v. Puerto Rico, 154 F.2d 811, 813 (1st Cir. 1946). In addition, these statutes are not unconstitutionally vague. *E.g.*, Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21, 23-24 (Cal. 1946) (en banc). For current state statutes on employer interference with voting and political activity, see *infra* notes 48–49.

an employer criminally liable under such a statute[11] when the employer called a captive meeting of employees and publicly dismissed an employee who, in his capacity as a member of the city common council, had voted against a resolution on constructing waterworks that would benefit the employer.[12] However, such criminal statutes did not give rise to a private cause of action for damages. In 1934, a court overturned a jury award of punitive damages in a case in which the employee claimed he was fired because he would not vote for certain candidates at a city election and because he would not coerce members of his family to vote for those candidates.[13] The court held that the trial judge should have directed a verdict for the employer based upon the doctrine of employment at will. Since the employee was employed for an indefinite term, the employer could terminate his employment with or without cause at any time. The court reasoned that even if the employer had violated a statute making it a felony to attempt to influence an employee's vote by threatening dismissal, the employment at will doctrine precluded a damage award.[14]

Communism provided a new ground for employer interference with employees' political views. In 1946, the California Supreme Court held that an employer could discharge "an employee who advocates the overthrow of our government by force or whose loyalty to the United States has not been established to the satisfaction of the employer" and that such dismissal would not violate a criminal statute prohibiting employers from controlling or directing employees' political activities.[15] In 1954, the Ninth Circuit Court of Appeals held that Twentieth Century Fox could fire writer Ring Lardner because he refused to answer the House Un-American Activities Committee's questions on whether he was a member of the Communist Party.[16] The Committee held him in contempt of Congress, and Lardner brought suit

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[11] Vulcan Last Co. v. State, 217 N.W. 412 (Wis. 1928).

[12] *Id.* at 413.

[13] Bell v. Faulkner, 75 S.W.2d 612, 613 (Mo. Ct. App. 1934).

[14] *Id.* at 614. See also, Harmon v. United Mine Workers, 266 S.W. 84 (Ark. 1924), in which a union expelled an employee from membership for joining the Ku Klux Klan. The employer fired the employee pursuant to a union shop agreement. The employee sought actual and punitive damages, but the court dismissed the case on the basis of the doctrine of employment at will. In Mims v. Metropolitan Life Insurance Co., 200 F.2d 800, 801 (5th Cir. 1952), an employee suspected that his employer had fired him after 32 years because he refused to contribute $1 to the campaign fund of Senator Taft of Ohio. He asked a friend in the Senate to investigate his dismissal. The company president replied that the employee had been dismissed for inefficiency, and the employee then unsuccessfully sought to recover damages for libel and slander.

[15] Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21, 24 (Cal. 1946) (en banc).

[16] Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954), *cert. denied*, 348 U.S. 944 (1955).

claiming breach of contract. The court reasoned that Lardner had violated a clause of his employment contract that required that he not commit offenses involving moral turpitude.[17]

Courts reached analogous conclusions in cases where a collective bargaining agreement covered employees. It was common practice for the National Labor Relations Board (NLRB) to require that union officials file affidavits that they were not communists in order to be certified to represent a bargaining unit.[18] More recently, a court held that an employer may refuse to permit a union to distribute leaflets recommending that employees vote for certain political candidates for governor, senator, or state supreme court.[19] The court reasoned that a leaflet focusing on the election of four candidates to political office is not one intended to educate employees on political issues relevant to employment conditions and thus does not fall within the National Labor Relations Act's protection of activities for mutual aid and protection.[20]

The issue reached the United States Supreme Court in 1956. In *Black v. Cutter Laboratories*,[21] the Court let stand the California Supreme Court decision that it was the "common knowledge of mankind" that a member of the Communist Party could not be loyal to his private employer.[22] The Court expressly found no state action triggering federal constitutional rights.[23] Vociferously dissenting, Chief Justice Warren, joined by Justice Douglas and Justice Black, argued that there was ample state action to present a federal question.[24] In 1982, the Supreme Court again held that, in the absence of state action, it would not intervene when a private employer fires employees in

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[17] *Id.* at 852. In a parallel case, Lester Cole lost his suit against Loew's on similar grounds. Loew's, Inc. v. Cole, 185 F.2d 641, 658 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951).

[18] *See, e.g.*, Stewart-Warner Corp. v. NLRB, 194 F.2d 207, 210 (4th Cir. 1952) (holding that employer did not violate National Labor Relations Act by continuing to bargain with union that had filed requisite noncommunist affidavits while noncomplying union pursued unfair labor practice charges); NLRB v. Pratt, Read & Co., Inc., 191 F.2d 1006, 1009 (2d Cir. 1951) (noting that employer was not obliged to bargain with union that failed to file noncommunist affidavits).

[19] Local 174, UAW v. NLRB, 645 F.2d 1151, 1153–55 (D.C. Cir. 1981).

[20] *Id.* at 1154. For a discussion of the impact on labor of the narrowing of the permissible range of political discourse, see James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841, 841 (1985).

[21] 351 U.S. 292 (1956).

[22] Black v. Cutter Labs., 278 P.2d 905, 916 (Cal. 1955), *cert. dismissed*, 351 U.S. 292 (1956).

[23] *Black*, 351 U.S. at 299.

[24] *Id.* at 300 (Douglas, J., dissenting).

retaliation for their exercise of First Amendment rights.[25]

A handful of cases have addressed the issue since the recognition of a public policy exception to the doctrine of employment at will. The prevailing view is that the First Amendment cannot be the basis of a public policy exception in wrongful discharge claims in the absence of state action. The Illinois Supreme Court gave the clearest statement of this view in *Barr v. Kelso-Burnett Co.*[26] The employer fired a group of foremen at its nuclear power plant after they discussed the employer's layoff procedures with rank and file employees.[27] The foremen alleged wrongful discharge[28] based upon their exercise of free speech rights protected by the Illinois and United States Constitutions. In rejecting their claims, the court reasoned that the mere recitation of a constitutional provision does not establish a clear mandate of public policy. Instead, the court examined the First Amendment and held that it represents a public policy against *government* interference with speech. The court held that because the Constitution limits only government, it cannot provide a public policy basis in a wrongful discharge action involving a private-sector employer.[29]

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[25] Rendell-Baker v. Kohn, 457 U.S. 830, 837–43 (1982). The employer was a private nonprofit school providing special education services to students placed there by Massachusetts public schools. *Id.* at 831–32. The employer fired five teachers after they wrote a letter to the editor of a local paper protesting certain policies regarding the student council, which had become a matter of public debate and local concern. *Id.* at 835. The teachers alleged only constitutional violations, so the Court never addressed the wrongful discharge issue. *Id.* at 837. In NCAA v. Tarkanian, 488 U.S. 179, 193–99 (1988), the Court refused to consider due process claims in the absence of state action holding that the NCAA's participation in UNLV's suspension of Coach Tarkanian did not constitute state action.

[26] 478 N.E.2d 1354 (Ill. 1985).

[27] *Id.* at 1355.

[28] They cited Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978), in which the Illinois Supreme Court recognized a cause of action for retaliatory discharge when the employer dismisses the employee in violation of a clearly mandated public policy. *Id.* at 357. Later, in Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981), the court held it would find a clear mandate of public policy "in the state's constitution and statutes and, when they are silent, in its judicial decisions."

[29] Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356–57; *accord*, Rozier v. St. Mary's Hosp., 411 N.E.2d 50, 54 (Ill. Ct. App. 1980) (holding that hospital employee failed to state cause of action for dismissal in violation of her First and Fourteenth Amendment rights to free speech because hospital was private and therefore termination involved no state action); Chin v. AT&T, 410 N.Y.S.2d 737, 740 (Sup. Ct. 1978) (mem.) (holding that employee failed to state a cause of action when he alleged discharge due to his political beliefs, activities and associations), *aff'd*, 416 N.Y.S.2d 160 (App. Div. 1979) (mem.). The court declined to reach the issue in Schultz v. Industrial Coils, Inc., 373

Similarly, in *Shovelin v. Central New Mexico Electrical Cooperative, Inc.*, the court rejected an employee's claim that the employer wrongfully discharged him upon his election as mayor.[30] The court held that neither the state constitutional guarantee of free speech nor various statutes protecting the right to vote afforded a public policy exception to the employment at will doctrine to the new mayor;[31] but rather that a private employee's freedom of political expression was not a clearly mandated public policy.[32]

The Third Circuit Court of Appeals eloquently stated the minority view in *Novosel v. Nationwide Insurance Co.*[33] John Novosel had worked for

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N.W.2d 74, 75-77 (Wis. Ct. App. 1985). While reserving judgment on whether the First Amendment could provide a clear mandate of public policy in other cases, the court held that a trial court properly dismissed an employee's complaint when the employee had engaged in disruptive speech highly critical of the employer. The employee had written a letter to the local newspaper critical of the company and several of its officers. In a similar case, the Eighth Circuit Court of Appeals held that an insurance agent, an independent contractor, had no cause of action under civil rights conspiracy laws when the insurer unilaterally terminated the relationship because the agent was the fundraiser for a congressional candidate whom the insurer did not support. Gill v. Farm Bureau Life Ins. Co., 906 F.2d 1265, 1266-70 (8th Cir. 1990). The court reasoned that there is no constitutional right to be a fundraiser for a political candidate free from private pressure. *Id.* at 1271. The court intimated that economic coercion of political choices is business as usual in the United States. The court also revisited an analogue to Bell v. Faulkner, 75 S.W.2d 612 (Mo. Ct. App. 1934). It examined the agency contract, and determined that the insurance company could terminate the agreement at any time. Therefore, there was no harm done to the plaintiff. *Id.* at 1269-70. This decision is consistent with Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 506 (4th Cir. 1974), in which the court held that an employee who alleged that he was fired because he was a member of the Ku Klux Klan failed to state a cause of action under a civil rights statute because there was no involvement of government in the alleged conspiracy.

[30] Shovelin v. Central N.M. Elec. Coop., Inc., 850 P.2d 996 (N.M. 1993).

[31] *Id.* at 1009-10.

[32] *Id.* at 1010.

[33] 721 F.2d 894 (3d Cir. 1983). The case involved application of Pennsylvania law. Some years later, the Pennsylvania Supreme Court held that the Third Circuit had misconstrued the law. Paul v. Lankenau Hosp., 569 A.2d 348 (Pa. 1990). The decision thus has no binding effect, and it has not been widely followed. Shaitelman v. Phoenix Mutual Life Ins. Co., 517 F. Supp. 21, 24 (S.D.N.Y. 1980) suggests that New York would recognize an action for wrongful discharge derived from New York constitutional law and cites for that proposition Chin v. AT&T, 410 N.Y.S.2d 737 (Sup. Ct. 1978) (mem.), *aff'd*, 416 N.Y.S.2d 160 (App. Div. 1979) (mem.). *See also* Kovalesky v. A.M.C. Associated Merchandising Corp., 551 F. Supp. 544 (S.D.N.Y. 1982); Brink's, Inc. v. City of New York, 533 F. Supp. 1123, 1125 (S.D.N.Y. 1982). However, in Boniuk v. New York Medical College, 535 F. Supp. 1353, 1355-56 (S.D.N.Y.), *aff'd.*, 714 F.2d 111 (2d Cir. 1982), the court held that there is no such cause of action in New York. For an example of

Nationwide for fifteen years, had never been disciplined, and had a good employment record. In October 1981, Nationwide circulated a memorandum through all of its offices directing employees to sign a petition to the Pennsylvania House of Representatives supporting no-fault insurance reform.[34] Novosel would not sign the petition and privately stated opposition to the company's political stand. Nationwide fired him; he brought suit alleging wrongful discharge in retaliation for his exercise of freedom of speech protected by the state and federal constitutions. The federal district court dismissed the complaint, reasoning that an employee relinquishes or waives otherwise valid constitutional rights when he or she voluntarily engages in employment.[35]

The Third Circuit reversed this decision and directed a trial. Glossing over the state action issue, the court held that the First Amendment represents a cognizable expression of public policy for purposes of Novosel's wrongful discharge claim against a private-sector employer.[36] The court adopted Illinois's "definition of a 'clearly mandated public policy' as one that 'strikes at the heart of a citizen's right, duties and responsibilities . . . .'" [37] The court then looked to cases concerning public employees' First Amendment rights to support its finding of public policy.[38]

Novosel has been widely criticized.[39] Very few courts have indicated

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how *Novosel* affected the debate on employment at will, see William B. Gould, *The Rights of Individual Workers*, CENTER MAGAZINE, July/Aug. 1984, at 2, 8–9.

[34] *Novosel*, 721 F.2d at 896.

[35] *Id.* at 898.

[36] *Id.* at 899–90.

[37] *Id.* at 899 (quoting Palmateer v. International Harvester Inc., 421 N.E.2d 876, 878–79 (Ill. 1981). In *Novosel* the parties settled the case after the federal district court denied the employer's motion for summary judgment on remand. Novosel v. Nationwide Mut. Ins. Co., 118 L.R.R.M. (BNA) 2779, 2782 (W.D. Pa. 1985) (denying summary judgment on all but one count).

[38] *Novosel*, 721 F.2d at 900.

[39] *Novosel* has been described as the most far-reaching extension of the public policy doctrine and as a dramatic break with precedent because prior cases had unanimously required that government action be present in order for a constitutional violation to exist. DANIEL WESTMAN, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 95 (1991). Professor Henry Perritt acknowledges that there may be "a conceptual path for imposing on private employers the obligation not to dismiss employees for exercising their free speech and associational rights outside the workplace . . . ." HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 183 (1987). In addition, Perritt compares *Novosel* to the classic, early wrongful discharge case, Nees v. Hocks, 536 P.2d 512, 516–17 (Or. 1975), in which the court relied in part on the state constitutional right to jury trial to protect an employee dismissed for engaging in jury service. However, Perritt states that the precedent

willingness to recognize a retaliatory discharge tort relying on the Constitution for a statement of public policy.[40] The Pennsylvania Supreme Court has indirectly indicated that *Novosel* does not represent Pennsylvania law;[41] as a result, the Third Circuit has declined to extend the rule of *Novosel* to cases in which there is no state action.[42]

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for such an application is weak, probably because it generally is agreed that the Constitution does not protect persons against purely private conduct. PERRITT, *supra*, at 182. Perritt characterizes *Novosel* as greatly expanding the range of public policies upon which tort claims can be based. Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 402–03 (1989).

[40] *E.g.*, Parner v. Americana Hotels, Inc., 652 P.2d 625 (Haw. 1982) (remanding for trial employee's claim that employer fired her to prevent her from testifying before a grand jury); Chavez v. Manville Prod. Corp., 777 P.2d 371, 372, 375–78 & n.1 (N.M. 1989) (remanding for trial case in which plaintiff alleged discharge was in retaliation for his protest of employer's using plaintiff's name in employer's political lobbying effort, and in which employer failed to raise as an issue on appeal lower court's finding of public policy); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (holding that employee allegedly dismissed for serving on jury stated a cause of action for wrongful discharge because Oregon Constitution provides a right to jury trial in civil cases, and provides for jury service); Jones v. Memorial Hosp. Sys., 677 S.W.2d 221, 224–25 (Tex. Ct. App. 1984) (ruling that nurse stated cause of action for retaliatory discharge when she alleged that a hospital fired her for her publication of an article critically describing the conflict between the wishes of the terminally ill and their attending physicians).

[41] In Paul v. Lankenau Hosp., 569 A.2d 346, 348 (Pa. 1990), the court held that "this Court did not announce a cause of action for wrongful discharge" in Geary v. United States Steel Corp., 319 A.2d 174 (1974). The Court in *Paul* emphasized the narrowness of any exception to the doctrine of employment at will in Pennsylvania. *Paul*, 569 A.2d at 348.

[42] The Third Circuit had an opportunity to extend *Novosel* in a case in which an employee alleged that her private employer's drug-testing program violated her right to privacy and right to freedom from unreasonable searches under the Fourth Amendment. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 613, 620 (3d Cir. 1992). The court declined to do so, concluding that the Pennsylvania Supreme Court would not look to the First and Fourth Amendments as sources of public policy when there is no state action. *Id.* at 620. Nevertheless, the court did not overrule *Novosel*, and it cited favorably a number of Pennsylvania lower-court decisions that used the state or federal constitutions as evidence of public policy together with other statutory provisions. *Id.* at 619 (citing Hunter v. Port Auth., 419 A.2d 631 (Pa. Super. Ct. 1980) (finding cause of action in case involving state action, in which a job applicant was denied employment because of assault conviction for which he had been pardoned under Art. I, § 1 of Pennsylvania Constitution) and Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120–21 (Pa. Super. Ct. 1978) (holding that employee dismissed for serving on a jury stated cause of action for wrongful discharge based upon jury statute and Pennsylvania constitutional guarantee of trial by jury)). In Waas v. Colonial Penn Group, Inc., 125 Lab. Cas. (CCH) ¶ 57,369 (E.D. Pa. 1992) (citing *Borse*), the court declined to follow *Novosel*, holding that the Pennsylvania Supreme Court

Several courts have used a state statute protecting rights of political activity or expression as a basis for public policy in a wrongful discharge case. In *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*,[43] California Supreme Court Justice Tobriner, writing for the majority, held that the employer discriminated against homosexuals in the hiring, firing, and promotion of employees and that this conduct violated a state statute prohibiting employers from controlling or directing the political activities or affiliations of employees.[44] The court analogized the struggle for gay rights to the continuing struggle for civil rights waged by blacks, women, and minorities.[45] In *Davis v. Louisiana Computing Corp.*,[46] the court held that an employee stated a cause of action for wrongful discharge when he alleged that he was fired because he became a candidate for political office and when a state statute provided that employers may not prevent employees from participating in politics.[47] Many states have statutory provisions addressing the right to vote or participate in the political process.[48] A number of states also protect an employee from an

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would not look to the First Amendment as a source of public policy when there is no state action. *See also*, Brown v. Hammond, 810 F. Supp. 644, 646–47 (E.D. Pa. 1993) (citing *Novosel* favorably but not following it). For an interesting discussion of the early dialogue between the state and federal courts on this issue, see Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227 (1984).

[43] 595 P.2d 592 (Cal. 1979).

[44] *Id.* at 610 (citing CAL. LAB. CODE §§ 1101–02 (West 1989) and Lockheed Aircraft Corp. v. Superior Court, 171 P.2d 21 (Cal. 1946)).

[45] *Id.*

[46] 394 So. 2d 678 (La. Ct. App.), *cert. denied*, 400 So. 2d 668 (La. 1981).

[47] *Id.* at 679 (applying LA. REV. STAT. ANN. § 23:961 (West 1985)).

[48] Federal law prohibits "attempts to intimidate, threaten, or coerce [ ]any other person for the purpose of interfering with the right . . . to vote" for a candidate for federal office. 18 U.S.C. § 594 (1988). Federal law also prohibits expenditures to influence voting, that is, soliciting, receiving, or accepting an expenditure in consideration of a vote or withholding a vote. 18 U.S.C. § 597 (1988). Federal law prohibits promises and threats in connection with employment made possible by an act of Congress in exchange for political activity. 18 U.S.C. §§ 600–01 (1988). State laws generally prohibit buying and selling votes, that is, giving or taking something of value in exchange for a promise to vote a certain way, and many also prohibit threats or coercion to influence voting. ALA. CODE §§ 17-23-4 to -5 (1988); ALASKA STAT. § 15.56.030 (1988); ARIZ. REV. STAT. ANN. § 16-1014 (1984); ARK. CODE ANN. § 7-1-104(4) (Michie 1993); CAL. ELEC. CODE § 29622 (West 1989); COLO. REV. STAT. § 1-13-303 (1986); CONN. GEN. STAT. ANN. § 9-364a (West 1989); DEL. CODE ANN. tit. 15, § 8006 (1993); D.C. CODE ANN. § 1-1318(b)(3) (1992); FLA. STAT. ANN. §§ 104.045, 104.061 (West 1992); GA. CODE ANN. § 21-2-570 (Michie 1993); HAW. REV. STAT. § 19-3 (1) to (3) (1985); IDAHO CODE §§ 18-2305, 18-2320 (1987); ILL. COMP. STAT. ANN. ch. 10, paras. 5/29-1 to 5/29-3 (Smith-Hurd 1993); IND. CODE ANN.

employer's attempt to influence the employee's vote by threats, intimidation, or other forms of coercion.[49] Only one state, Connecticut, has a statute creating a private right of action for employees who are fired by private-sector employers in retaliation for their exercise of First Amendment rights.[50]

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§ 3-14-3-20 (West 1988); IOWA CODE ANN. § 722.4 (West 1993); KAN. STAT. ANN. § 25-409 (1986); KY. REV. STAT. ANN. § 119.205(1)-(3) (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. § 14:119 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 602 (West 1983 & Supp. 1993); MD. CODE ANN., ELEC. § 24-2(7) (1993); MASS. ANN. LAWS ch. 56, § 32 (Law. Co-op. 1990); MICH. COMP. LAWS ANN. § 168.931(a)-(c) (West 1989); MINN. STAT. ANN. § 211B.13 (West 1992); MISS. CODE ANN. § 23-15-889 (1990); MO. ANN. STAT. § 115.635(1), (6) (Vernon 1980); MONT. CODE ANN. § 13-35-214 (1993); NEB. REV. STAT. § 32-1209 (1988); NEV. REV. STAT. ANN. § 293.700 (Michie 1990); N.H. REV. STAT. ANN. § 640:2 (1986); N.J. ANN. STAT. § 19:34-25 (West 1989); N.M. STAT. ANN. § 1-20-11, -12 (Michie 1991); N.Y. ELEC. LAW § 17-142 (McKinney 1978); N.C. GEN. STAT. § 163-275(2) (Supp. 1993); N.D. CENT. CODE § 12.1-14-03 (1985); OHIO REV. CODE ANN. § 3599.01, .02 (Anderson 1988); OKLA. STAT. ANN. tit. 26, § 16-106 (West 1991); OR. REV. STAT. § 260.665 (1991); PA. STAT. ANN. tit. 25, § 3539 (1963); R.I. GEN. LAWS § 17-23-5 (1988); S.C. CODE ANN. § 7-25-60 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 12-26-15 (1982); TENN. CODE ANN. § 2-19-126 (1985); TEX. PENAL CODE ANN. § 36.02 (West 1989 & Supp. 1994); UTAH CODE ANN. § 20-13-1, -2 (1991); VT. STAT. ANN. tit. 17, § 2017 (1982); VA. CODE ANN. § 24.2-1007 (Michie 1993); WASH. REV. CODE ANN. § 29.85.090 (West 1993); W. VA. CODE § 3-9-12, -16 (1990); WIS. STAT. ANN. § 12.09, .11 (West 1986 & Supp. 1993); WYO. STAT. § 22-26-109 (1992).

[49] ALA. CODE § 17-23-10 (1991); ARIZ. REV. STAT. ANN. § 16-1012 (1984); CAL. LAB. CODE § 1101 (West 1989); COLO. REV. STAT. ANN. § 8-2-108 (West 1986); CONN. GEN. STAT. ANN. § 31-51q (West 1987); FLA. STAT. ANN. § 104.081 (West 1992); IOWA CODE ANN. § 49.110 (West 1991); KY. REV. STAT. ANN. § 121.310 (Michie/Bobbs-Merrill 1993); MD. CODE ANN. ELEC., § 26-16(a)(6) (1993); MASS. ANN. LAWS ch. 56, § 33 (Law. Co-op. 1990); MICH. COMP. LAWS ANN. § 168.931(d) (West 1989); MINN. STAT. ANN. § 211B.15(16) (West 1992 & Supp. 1994); MISS. CODE ANN. §§ 23-15-871, 79-1-9 (1990); MO. ANN. REV. STAT. § 115.637(6) (Vernon Supp. 1993); MONT. CODE ANN. § 13-35-226 (1993); NEB. REV. STAT. § 32-1223 (1988); NEV. REV. STAT. ANN. § 613.040 (Michie 1992); N.J. STAT. ANN. § 19:34-27 (West 1989); N.M. STAT. ANN. § 1-20-13 (Michie 1991); N.Y. ELEC. LAW § 17-150 (McKinney 1978); OHIO REV. CODE ANN. § 3599.06 (Anderson 1988); R.I. GEN. LAWS § 17-23-6 (1988); S.D. CODIFIED LAWS ANN. § 12-26-12 (1982); TENN. CODE ANN. § 2-19-135 (Supp. 1993); UTAH CODE ANN. § 20-13-7 (1991); W. VA. CODE § 3-8-11(d) (1990); WIS. STAT. ANN. § 12.07 (West 1986 & Supp. 1993); WYO. STAT. § 22-26-116 (1992).

[50] CONN. GEN. STAT. ANN. § 31-51q (West 1987). The legislative history of this law reveals little, except for a general recognition that, "Whether you know it or not, right now, you do not have certain rights of freedom of speech in terms of your employment." 1983 CONN. GEN. ASSEMBLY HOUSE PROC. 5312 (1983) (statement of Rep. Shays). *See generally* 1983 CONN. GEN. ASSEMBLY HOUSE PROC. 5288-323, 9090-93 (1983); 1983 CONN. GEN.

In response to judicial recognition of the wrongful discharge tort, some states have considered or enacted a wrongful termination statute.[51] In addition, the National Conference of Commissioners on Uniform State Laws adopted the Model Employment Termination Act (META) in 1991.[52] The META provides that an employer may not terminate an employee without "good cause"[53] and defines good cause as

> (i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.[54]

Professor St. Antoine reports that the drafters intended a standard similar to that of just cause in a collective bargaining agreement;[55] how broadly courts will construe the "good cause" definition remains an open question. Courts presumably would construe this language to prohibit dismissal in retaliation for

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ASSEMBLY SENATE PROC. 3596-604, 3721, 3757, 4408-10, 4665-66 (1983).

[51] *E.g.*, MONT. CODE ANN. §§ 39-2-901-915 (1993); OR. REV. STAT. § 659.035 (Supp. 1992); *see also* WESTMAN, *supra* note 39 at 183-87 (summarizing state statutes); Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 651-52 (1991) (summarizing proposed state statutes).

[52] MODEL EMPLOYMENT TERMINATION ACT (1991). These developments promise to reduce the costs to employers of wrongful discharge litigation by diverting these cases to binding arbitration. *See* William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404 (1988); Michelle Laque Johnson, *Arbitrators Help to Cut Workers Lawsuits: Some Companies Favor Neutral Third Parties to Give Employees 'Day in Court,'* INVESTOR'S DAILY, Jan. 8, 1990, at 1.

[53] MODEL EMPLOYMENT TERMINATION ACT § 3 (a) (1991).

[54] *Id.* § 1(4).

[55] Theodore J. St. Antoine, *The Model Employment Termination Act: Fairness for Employees and Employers Alike*, 43 LAB. L.J. 495, 498 (1992). Professor St. Antoine served as reporter for the drafting committee of the Uniform Law Commissioners. *Id.* at 496. Arbitrators tend not to distinguish between "cause" and "just cause." *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS, 652-53 (4th ed. 1985). For a critical view of META, see Paul H. Tobias, *Defects in the Model Employment Termination Act*, 43 LAB. L.J. 500 (1992).

conduct protected by a substantial public policy; the statute probably incorporates the existing case law and provides some protection from wholly arbitrary dismissal. However, it does not expressly protect an employee from dismissal for off-the-job political activity or speech with which the employer disagrees.

III. THE CASE FOR USING THE FIRST AMENDMENT AS A SOURCE OF PUBLIC POLICY

In 1967, Professor Lawrence Blades published an influential article laying out the argument for judicial intervention in light of the growing unequal bargaining power between employer and employee.[56] If anything, the arguments for the tort are even stronger in light of a number of factors that decrease employees' mobility, specifically a long-term economic recession,[57]

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[56] Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *see also*, Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (also widely cited by courts recognizing the tort). Blades argued that the ever-increasing concentration of economic power in fewer employers and the comparative immobility of employees in the face of increasing job specialization rendered the old common law rule of employment at will obsolete. He reasoned that concern over job security renders employees vulnerable to inappropriate employer coercion. Blades, *supra*, at 1405. Blades pointed out that 500 corporations controlled two-thirds of the nonfarm economy. *Id.* at 1404 n.1. In 1991 gross domestic product was $5,677.5 billion, and the nonfarm economy $4,702.8 billion. BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURV. OF CURRENT BUS. 5, table 1.7 (1992). The Fortune 500's gross sales in 1991 were $2,263 billion. Alison Rogers & Ricardo Sookdeo, *The Fortune 500 Largest U.S. Industrial Corporations: It was the Worst of Years*, FORTUNE, Apr. 20, 1992, at 212, 213. Thus, during a recession the Fortune 500 controls approximately 40% of the total economy and slightly more than 40% of the nonfarm economy. Although the economy has become more decentralized, the Fortune 500 still employs a significant proportion of all workers. In 1991, the Fortune 500 employed almost 12 million employees. *Id.* Government in 1990 employed over 18 million people (full-time and part-time including state, federal, and local government). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUBLIC EMPLOYMENT v (1990). Government employees enjoy the protection of the First Amendment, while their private counterparts do not. As of 1989, only 18.6% of all full-time wage and salary workers were represented by a union. This figure represents a decline from 23.3% in 1983. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, EMPLOYMENT & EARNINGS 228 (Jan. 1991).

[57] Household moving rates drop during a recession. The annual rate of moving has fallen from 21% to 18% since the 1950s, and the overwhelming majority of these are renters. In general, people fear losing their jobs, and this contributes to the lower moving rate. Pamela Reeves, *Americans Still Moving, but Not as Much as in the '50s and '60s,*

the deepening health care problem,[58] and the advent of two-career families.[59]

Corporations have increasing influence on external political issues.[60] It

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STAR TRIBUNE, Jan. 4, 1992, at 2R; Carrie Teegardin, *Harder Times Keep Americans From Loading up the Moving Van*, ATLANTA CONSTITUTION, Feb. 26, 1992, at A1.

[58] A recent survey indicates that 20% of Americans say they or a family member are locked in their jobs because new work offers limited or no health insurance. *One in Five American Families Victim of "Job Lock:" High Cost and Lack of Insurance Top Reasons*, Business Wire, Oct. 15, 1992, *available in* LEXIS, News Library, BWIRE File. The survey was conducted by Lou Harris and the Kaiser Foundation. Of the 20% reporting job lock, 35% said the cost of insurance at the new job was too high, 30% reported that the new job offered no health insurance, 11% reported that the new job offered no coverage for dependents, and 4% reported problems with pre-existing conditions that would not be covered. *Id.* A California survey reported that one in four survey respondents did not change jobs because of health insurance. Susan Moffat, *Health Care vs. Job Mobility: Many Workers Stay on out of Fear of Losing Medical Benefits*, L.A. TIMES, Aug. 20, 1992, at D1; *Benefits Keep Californians Tied to Their Jobs, Survey Finds*, BNA Pensions & Benefits Daily, Aug. 24, 1992, *available in* LEXIS, News Library, BNAPEN File.

[59] It takes two salaries and careers to maintain the standard of living that one salary financed in the 50s and 60s. Two-thirds of all U.S. households now consist of two or more wage earners. Often, the employee who wants to change jobs must take into consideration the trailing spouse, or spouse who will also need a new job if the family relocates. One study found that 90% of all trailing spouses suffered a career setback when their spouses were relocated. This can mean a net reduction in family income that can deter families from relocating. *New Study Indicates Spousal Relocation Assistance Can Prevent Downward Mobility in Job Changes*, PR Newswire, Feb. 1, 1990, *available in* LEXIS, News Library, PRNEWS File. Another survey showed that in 1990, 37% of those surveyed were reluctant to relocate because their spouses did not wish to leave their jobs, up 7% from 1989. Kathie Eynon, *Trailing Spouses: Firms are Making Effort to Place Better Halves*, OAKLAND BUS. MONTHLY BUS. DATELINE, Nov. 1990, at 63, *available in* LEXIS, NEWS Library, ARCNWS File. *See generally* Don L. Boroughs et al., *Love & Money*, U.S. NEWS & WORLD REPORT, Oct. 19, 1992, at 54; Echo Montgomery Garrett, *Some Trailing Spouses Drag Their Heels*, CRAIN'S N.Y. BUS., Mar. 11, 1991, at 19, *available in* LEXIS, News Library, ARCNWS File; *More Women Relocated, Greater Assistance Offered for "Trailing Spouses,"* BUS. WIRE, Apr. 30, 1992, *available in* LEXIS, News Library, BWIRE File.

[60] Arthur S. Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539 (1960); Charles A. Reich, The Individual Sector, 100 YALE L. REV. 1409 (1991); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689 (1986). In his work, Atleson calls attention to the irony that the Supreme Court is increasing limits on public fora and union speech at the very time that it has dramatically expanded the area of protected corporate speech. Atleson, *supra* note 20, at 856–67. Even then-Associate Justice Rehnquist dissented from the opinion holding corporations to be persons eligible for full constitutional protection. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (striking down state statute limiting the use of corporate funds to influence a state referendum).

would appear that the willingness of corporate employers to influence external political affairs has grown with their legal right to do so.[61] Not only have corporations achieved personhood under the Constitution, but they have also acquired a powerful new tool for influencing political affairs: the corporate political action committee or PAC.[62] Prior to 1975, corporations had no right to make political contributions. The 1971 amendments[63] to the Federal Election Campaign Act (FECA) empowered corporations for the first time to create corporate PACs. Initial interpretations of the new law permitted corporations to solicit stockholders and administrative and managerial employees for voluntary contributions to the PAC. Once such contributions are made, the donor has no say in how they are spent. However, in a 1975 Advisory Opinion to the Sun Oil Co.,[64] the Federal Election Commission permitted corporations to assume the full expenses of running the PAC under FECA, to create multiple PACs to get around contribution limits, and to hire employees to engage in political fundraising fulltime. The decision led to an explosion in corporate political advertising.[65] These businesses may now expend unlimited amounts of money to produce written solicitations and advertise particular political views, provided they include a line welcoming donations to the PAC.[66]

Professor Thomas I. Emerson expressed concern over the need to protect free expression from infringement by "private centers of power." THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 675–96 (1970).

[61] For a quantitative analysis showing the growth of corporate political action committees, see HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 158–74 (1990).

[62] Much of this discussion is drawn from an invaluable contribution to the literature on corporate PACs, DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 27–52 (1992).

[63] Pub. L. No. 92-225, 86 Stat. 3 (1971).

[64] Establishment of Political Action Committee and Employee Political Giving Program by Corporation, Federal Election Commission, 40 Fed. Reg. 56,584 (1975).

[65] CLAWSON, *supra* note 62, at 12–13.

[66] *See generally* Benjamin M. Vandegrift, *The Corporate Political Action Committee,* 55 N.Y.U. L. REV. 422 (1980). The author observes:

> Perhaps most bizarre, however, is the overall economic effect of the system. While the Act limits the amount of financial resources that corporations may direct to partisan political activity, it also provides a means by which corporations may control the flow of individual campaign contributions. A corporation is prohibited from contributing to political campaigns directly. It is permitted, however, to devote unlimited resources in the form of in-kind contributions to obtaining from shareholders and employees, through PAC solicitations, funds that management may then earmark for the candidates of its choice. Assuming there are limits on the amount of money that individual voters are willing to devote to political campaigning, contributions to PAC

In addition, corporations may solicit managerial and administrative employees with few limitations; they do so aggressively.[67] In recent years, corporate PACs have engaged in a practice called "bundling." The PAC collects individual contributions to specific candidates from corporate middle and upper management. The PAC then puts the checks together in a bundle, in an envelope from the PAC, and the PAC representative hands these "individual" contributions directly to the candidate.[68] Under federal law, the

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> funds represent money that might otherwise be contributed to candidates directly by individuals. Thus, a PAC may operate to concentrate campaign contributions under the control of corporate management, a perverse effect if decentralizing financial political influence is a goal.

Id. at 470.

[67] *See generally* Kenneth A. Gross, *The Corporate PAC: Should We PAC It In?*, 34 FED. B. NEWS & J. 63 (1987). Gross reports that almost three-quarters of all corporate PACs surveyed solicit senior executives, and almost two-thirds solicit middle management. *Id.* He also reports:

> Some have argued that solicitation of corporate management is inherently coercive. While claims of inherent coercion are largely unsubstantiated, PAC managers may view funding of the PAC as "a cost of doing business," with a specific budget, expecting either a fixed amount or percentage of salary from corporate executives. This type of thinking can lead to problems. Whether an executive contributes and how much he or she contributes must be voluntary. The solicitation may suggest how much to contribute, but it can only be presented as a guideline. Problems may ensue if the request for funds does not expressly state that the contribution is voluntary and that the executive may decline to contribute.

Id. at 63–64 (footnote omitted). Gross cites a case in which a bank president sent a memo to all the vice presidents, urging them to contribute: "Every single officer of this institution should—must—consider it a part of his or her position to contribute" to both of his designated PACs. *Id.* at 64; *see also* Bernadette A. Budde, *Business-Related Political Action Committees—A Permanent Force After One Decade*, 3 J.L. & POL. 449, 456 n.7 (1987) (reporting that 88% of all managerial and executive personnel are solicited directly by PACs). Budde stresses the importance and usefulness to business of the PAC and expresses concern that with shrinking managerial ranks through layoffs and reductions in force, potential sources of PAC funds are drying up. *Id.* at 456. Obviously, with declining numbers, there will be added incentive for corporate PACs to become more aggressive about collecting from the managerial employees who remain, and those employees likely will feel vulnerable to pressure for fear of losing their jobs.

[68] Sara Fritz, *"How Lawmakers Get Their Bundle,"* L.A. TIMES, July 1, 1992, at A18. The author reports that the New York investment banking firm Goldman, Sachs & Co. contributed nearly $450,000 to congressional candidates during the 1990 election, most of it through individual contributions and bundling. Corporate PACs were the biggest overall

corporate PAC may solicit employees as frequently as twice a year for donations, provided it informs the employees that donations are voluntary.[69]

From 1974 to 1988, the number of corporate PACs grew from 89 to 1,816, while during the same period, the number of labor union PACs grew from 201 to 354.[70] Corporate PAC political contributions were lower than labor union contributions in the 1977–78 election cycle, but as of 1987–88 were 26% higher than those of labor unions; between 1977–78 and 1987–88, corporate PAC spending increased 586%.[71]

Unions challenged the voluntariness of contributions solicited by employer PACs in *International Ass'n of Machinists and Aerospace Workers v. FEC*,[72] but the court ruled that there was no cognizable violation of employees First Amendment rights. The Commission reasoned that the Act merely authorized

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contributors during the 1992 campaign. Tim Curran, *PACs Increase Donations by 10% over 92, Giving 82% of their Money to Incumbents*, ROLL CALL, Sept. 17, 1992, at 2, *available in* LEXIS, News Library CURNWS file.

[69] Employers may solicit employees and their families twice a year, provided they do so in a written solicitation mailed to the employee's residence, and provided that contributions are mailed to an independent third-party custodian to preserve the anonymity of noncontributing employees. Vandegrift, *supra* note 66, at 463–64. However, employers must report the names of any employees who make contributions of $50 or more, and this requirement defeats the effort to maintain anonymity. *Id.* at 465. The employer will learn the names of all employees who refuse to contribute at least $50, although among those employees, the employer will be unable to determine who contributed less than $50 and who contributed nothing. *Id.*

[70] STANLEY & NIEMI, *supra* note 61, at 160. Corporate PACs represented approximately 43% of the total number of PACs as of 1988 (1,816 out of 4,268). By contrast, in 1974, corporate PACs represented approximately 15% of the total (89 out of 608). *Id.*

[71] *Id.* at 163. Specifically, in 1977–78, corporate PACs spent $15.2 million, while labor PACs spent $18.6 million. By 1987–88, corporate PACs spent $89 million, while labor PACs spent $70.4 million. It is interesting to note that while contributions increased, voter turnout declined until the 1992 presidential election. From 1976 through 1988, voter turnout in presidential elections declined from 54.4% to 50.2%. CONGRESSIONAL QUARTERLY, INC., THE PEOPLE SPEAK: AMERICAN ELECTIONS IN FOCUS 229 (Ann Davies ed. 1990). *See generally* BUREAU OF THE CENSUS, U.S. DEP'T OF COM. THE DECLINE IN AMERICAN VOTER TURNOUT (1991); WARREN E. MILLER & SANTA TRAUGOTT, AMERICAN NATIONAL ELECTION STUDIES DATA SOURCEBOOK, 1952–1986 (1989). In the 1992 presidential election, voter turnout increased to 55% based upon preliminary estimates. David G. Savage, *High Voter Turnout Reverses 32-Year Slide*, L.A. TIMES, Nov. 5, 1992, at A36. However, that turnout is still lower than the turnout in 1972, which was 55.4%, and significantly lower than the turnout in 1960, which was 63.1%. CONGRESSIONAL QUARTERLY, INC., *supra*, at 229.

[72] 678 F.2d 1092 (D.C. Cir. 1981), *aff'd*, 459 U.S. 983 (1982) (mem.).

the solicitation; it did not compel contribution.[73] Thus, even assuming there is state action, the mere fact of solicitation in the employment setting does not establish an inference of coercion. It is well documented that corporate PACs can buy political access, and influence the outcome of legislation, in ways with which individual employee contributors would strongly disagree.[74] However, corporate PACs are unique in that employers have the power to penalize employees who fail to contribute. One study showed that while employers would rarely admit to taking direct action against an employee for a refusal to contribute, the employer would consider such refusal as one factor influencing the employee's evaluation.[75] Thus, there is a powerful incentive for corporate employers to solicit contributions from employees and very few limits on precisely how they do so.[76] This development has occurred only since 1975, well after Professor Blades's groundbreaking article.[77] Recent commentators have emphasized the moral argument for the remedy: employees often work decades for the same employer and come to rely on that employment in unique ways distinct from the relationship of employer and casual or temporary employee.[78]

As part of the research supported by the Fund for Labor Relations Studies, the Indiana University Center for Survey Research was commissioned to conduct a random telephone survey (the Indiana Poll)[79] during the weeks surrounding the 1992 presidential election. Interviewers first established

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[73] *Id.* at 1111–12, 1115.

[74] CLAWSON, *supra* note 62, at 88–119; *see also* Budde, *supra* note 67.

[75] CLAWSON, *supra* note 62, at 38.

[76] There are penalties for employers who coerce contributions to a PAC (up to a $5,000 fine and one year in prison, under 2 U.S.C. § 269 (1988)), but the employee has no private cause of action. *See* Cort v. Ash, 422 U.S. 66, 82–83 (1975) (holding that FECA does not create private cause of action for shareholders alleging corporate expenditures in federal election campaign). In general, federal courts have been reluctant to recognize a federal wrongful discharge tort and have even held that the states have no interest in enforcing public policies stemming from federal law. *See, e.g.*, Adler v. American Standard Corp., 830 F.2d 1303, 1306–07 (4th Cir. 1987) (holding that under Maryland law employee failed to state a cause of action when he alleged he was fired for stating he intended to disclose the employer's illegal kickback scheme); Rachford v. Evergreen Int'l Airlines, 596 F. Supp. 384, 385–86 (N.D. Ill. 1984) (holding that under Illinois law employee failed to state a cause of action when he alleged he was fired for reporting employer violations to the FAA).

[77] *See* Blades, *supra* note 56.

[78] WEILER, *supra* note 6, at 68.

[79] Indiana Poll 20A, Unofficial Responses to Interviewers Questions (1992) (questioning employees about their work environment) (unpublished manuscript, on file with the *Ohio State Law Journal*).

whether respondents had worked within the private-sector in the past twelve months. If so, interviewers asked respondents the following question: "At any time over the past twelve months, have you ever felt that your employer wanted you to support a particular political stand, party, group, or candidate?" Seven percent of 585 people surveyed answered in the affirmative. When asked to elaborate, they supplied varying explanations, a selection of which follows:

> My boss is a die-hard Republican. I don't know if he's ever tried to sway me, but every time the topic pops up he's very adamant in his beliefs.
>
> [My] employer is running for District 17 of Indiana.
>
> They gave out brochures telling us to support certain candidates and certain parties.
>
> They're a union and they support certain areas of politics.
>
> I work in the medical field for a contract company. I do not think they would want me to vote for any way that is going to change the medical field as it now exists. I am obviously going to vote the opposite of how they would have me to vote.
>
> It was a certain bill before Congress. We were encouraged to phone and send letters to both Senators and local Congressmen. It was the cable TV bill. They even called a special meeting, had all the employees come in, gave a handout sheet of all the Senators and Congressmen, [and] encouraged us to do this. That's the only time it's ever happened, political dealing or something like that.
>
> Really just with my immediate supervisor—he just advises on a lot of the issues and what they say.
>
> Through PAC contributions.
>
> By asking me who I was going to vote for and telling me how business has been so bad and that Bill Clinton will make it worse.
>
> They pretty much at each meeting tell you who they think you should vote for and they pass out stickers and stuff. We get a local newspaper with their choice of political parties on the front cover.[80]

Although no respondent reported losing a job, the survey indicated that employers were making an effort to influence employee political views.

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[80] *Id.* Interviewees' oral responses remain in unedited form.

In sum, there is a substantial potential for employers to abuse their power over employees in the realm of political expression, and virtually no effective counterbalancing remedy. In similar circumstances involving the exercise of an individual employee right, courts have recognized a private right of action for wrongful discharge.

IV. THE IMPLICIT CONSTITUTIONAL PROBLEM

There is a substantial argument that state action triggers constitutional protections when a state court rejects an employee's claim that a private employer fired him or her in violation of the public policy embodied in the First Amendment. The essence of this argument is that the state court's decision itself provides the requisite government involvement. Although private parties are not otherwise bound by constitutional protections, the judiciary may not countenance the deprivation. In the tort of wrongful discharge, state courts create classifications for protected and unprotected employee speech based on the content of the speech. Some speech is protected by reference to an important public policy, for example, reporting a crime; however, these courts do not protect political speech. This section reviews the current law on state action and argues that under current Supreme Court standards, a state court's dismissal of a wrongful discharge complaint concerning free speech represents state action.

The source of the state action requirement is in the language of the Fourteenth Amendment: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."[81] The Supreme Court has held that this language sets forth an "essential dichotomy . . . between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."[82] Although an act of a state legislature or executive clearly provides state action, the doctrine also encompasses the acts of the judicial branch. In *Shelley v. Kraemer*,[83] the Court held that a state court could not constitutionally enforce a racially restrictive covenant in a real estate deed:

> It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial

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[81] U.S. CONST. amend. XIV, § 1.

[82] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (citing The Civil Rights Cases, 109 U.S. 3 (1883) and quoting Shelley v. Kraemer, 334 U.S. 1 (1948)).

[83] 334 U.S. 1 (1948).

> proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.[84]

The Court cited as its authority for this holding two First Amendment cases, one in which it had held that a state-court injunction against peaceful picketing violated the right to freedom of discussion of labor union members[85] and one in which it had held that a state court violated the Free Exercise Clause when it found certain religious practices to represent the common-law crime of breach of the peace.[86]

In *New York Times Co. v. Sullivan*,[87] the Court intervened when a state court applied its common-law rules on libel and slander in a manner that interfered with the First Amendment's protection of freedom of the press. An Alabama public official had brought suit against the New York Times Company for civil libel arising out of a paid advertisement published in the *Times* at the behest of the Committee to Defend Martin Luther King and the struggle for freedom in the South. The state court awarded the plaintiff half a million dollars in damages, an award that the Alabama Supreme Court upheld.[88] The Court dismissed arguments that the Alabama courts had not engaged in state action:

> We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the state supreme Court—that "The Fourteenth Amendment is directed against state action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[89]

In *Hustler Magazine, Inc. v. Falwell*,[90] the Court did not even find it necessary

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[84] *Id.* at 17.

[85] American Fed'n of Labor v. Swing, 312 U.S. 321 (1941).

[86] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[87] 376 U.S. 254 (1964).

[88] *Id.* at 256–63.

[89] *Id.* at 265 (citing American Fed'n of Labor v. Swing, 312 U.S. 321 (1941)) (citations omitted).

[90] 485 U.S. 46 (1988). The Court overturned a damage award that Jerry Falwell had recovered from Hustler Magazine, Inc. for a political cartoon portraying him engaged in an incestuous act with his mother in an outhouse. The entire opinion is devoted to the First

to address the question of state action. The Court held that a state court could not construe the common-law tort of intentional infliction of emotional distress so as to interfere with the First Amendment freedom of the press.[91]

The Court has also found state action when a state court authorizes a private act that violates a provision of the Constitution. In *Lugar v. Edmondson Oil Co., Inc.*,[92] the Court found that the state acted jointly with a private creditor to deprive the debtor of property without due process when a clerk of the state court issued an *ex parte* writ of attachment, which was executed by the county sheriff.[93] The Court adopted a two-part test for state action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.[94]

Amendment limits on recovery for intentional infliction of emotional distress and follows the framework of *New York Times Co. v. Sullivan.*

[91] *Id.* at 50–53.

[92] 457 U.S. 922 (1982).

[93] *Id.* at 924, 939–42. The Court distinguished these facts from the facts of Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), in which it found no state action. In *Flagg Brothers*, a New York law patterned on the Uniform Commercial Code allowed a warehouseman to sell the property of its debtors; the law authorized self-help, but no public official participated in the sale. The court held that this activity was private and not subject to the Fourteenth Amendment. *Id.* at 155–66. In *Lugar*, the Court followed a line of cases in which there was an implicit finding of state action because in each case the Court subjected garnishment actions or prejudgment attachments to the standards of procedural due process under the Fourteenth Amendment. *Lugar*, 457 U.S. at 927. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court struck down a garnishment procedure as violating due process. The procedure permitted one private party to a pending lawsuit to garnish another private party's wages by filing an affidavit with the clerk of court. The clerk then issued the writ of garnishment, which could be dissolved only by the filing of a bond. *See also* Mitchell v. W.T. Grant Co., 416 U.S. 600, 601–20 (1974) (execution of a vendor's lien); Fuentes v. Shevin, 407 U.S. 67, 69–92 (1972) (holding unconstitutional replevin statutes that permitted creditor to repossess goods sold on an installment contract by getting the clerk of court to issue a writ to a sheriff at the creditor's behest); Sniadach v. Family Fin. Corp., 395 U.S. 337, 337–42 (1969) (holding unconstitutional a state statute that authorized garnishment of wages without notice and a hearing).

[94] *Lugar*, 457 U.S. at 937. The Court goes on to observe: "Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some

Although the two requirements collapse into one when there is action by a state official, they diverge when a constitutional claim is directed against a private party. The Court reasoned that action by a private party in reliance on a state statute, such as the *Flagg Brothers* case[95] or the discriminatory membership policies of a Moose Lodge under its liquor license,[96] without more, will not establish state action. The Court will look to a number of other factors and tests depending upon the factual context.[97]

Edmonson v. Leesville Concrete Co.[98] is the most recent statement of the state action doctrine in the context of state courts. The case involved civil litigation between private parties, specifically, a jury trial on a tort claim; neither party to the lawsuit was a state actor. During voir dire, the defendant exercised its rights under state law to exclude potential jurors using the peremptory challenge by excluding three African American jurors solely on the basis of race. Although the state court played no part in the defendant's decision, the Supreme Court nevertheless found sufficient state action to trigger Fourteenth Amendment protections, and held that the defendant's exclusion of potential jurors solely on the basis of race violated the Equal Protection Clause. The Court reasoned:

> Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.[99]

The Court then applied the *Lugar*[100] test. It held that peremptory challenges result from the exercise of a right or privilege that has its source in state authority because by their very nature they have no significance outside a court

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state rule governing their interactions with the community surrounding them." *Id.*

[95] *See Flagg Bros.*, 436 U.S. at 164–66.

For an excellent critique of *Flagg Brothers*, see Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982), part of that volume's now classic symposium on the public-private distinction.

[96] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171–77 (1972).

[97] For example, the Court has looked at whether the private party performs a public function. *See generally* Evans v. Newton, 382 U.S. 296 (1966) (city park established by private trust); Terry v. Adams, 345 U.S. 461 (1953) (private Democratic primaries); Marsh v. Alabama, 326 U.S. 501 (1946) (company town).

[98] 111 S. Ct. 2077 (1991).

[99] *Id.* at 2082.

[100] *See id.* at 2082–84 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–42 (1982)).

of law. In essence, they permit the litigants to help the government select an impartial trier of fact. As to the second prong of the *Lugar* test, the Court held that a private litigant must be deemed a state actor when using a peremptory challenge because that private party made extensive use of a state procedure with the overt, significant assistance of state officials.[101] The party who exercises a peremptory challenge invokes the formal authority of the state court, which discharges the prospective juror; the court thereby makes itself a party to the biased act.

By analogy to *Edmonson*, a state court makes itself a party to an employer's deprivation of an employee's First Amendment rights when it dismisses the employee's wrongful discharge complaint. In dismissing the complaint, the court condones and sanctions the employer's retaliation for the exercise of protected speech. By rejecting the First Amendment as a source of public policy in wrongful discharge cases, the state court itself infringes upon the employee's First Amendment rights. Just as a state court must construe the doctrine of libel in a way that is consistent with free press, construe private racially restrictive covenants in a way that is consistent with the Fourteenth Amendment, and monitor the exercise of private peremptory challenges so that they do not violate Equal Protection, so too must a state court construe the common law tort of wrongful discharge in a manner that comports with the First Amendment. Were a legislature to enact a statute that provided by its terms that private-sector employers may fire employees for their political views, that statute would most assuredly violate the First Amendment. That the state actor is a court and not the legislature is immaterial: the Supreme Court itself has stated that it makes no difference that the source of a rule is judge-made common law.

In other words, the state action lies not in the employer's act of dismissing the employee; it lies in the court's act of creating an exception to the employment at will rule for certain categories of employee speech, but consciously refusing to include free speech. Private parties may violate the Constitution with wild abandon, but under certain circumstances courts may not countenance that conduct. Applying the *Lugar* test, it becomes clear that the private employer's deprivation of the employee's First Amendment rights has its source in a state-created right or privilege, specifically the judicial doctrine of employment at will and the common law of contract. The deprivation is fairly attributable to the state in that a state official, namely a judge, has construed that doctrine not to protect speech. There is a nexus between the official act to dismiss an employee's wrongful discharge complaint and the deprivation; the employee is deprived of any state judicial remedy for loss of

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101 *See id.* at 2084.

employment. Other employees may be deterred from exercising their free speech rights if they know that courts will not recognize the exercise of their rights as protected by a public policy.

Professor St. Antoine suggests an interesting hypothetical case: Suppose a property owner discriminates on the basis of race as to whom the owner will permit to enter his or her property. An African American enters the property without the owner's consent, and the owner brings an action for trespass. May the court sanction the property owner's race-based classification without violating the Constitution? The answer is yes, but there is a key analytical difference between this hypothetical case and the cause of action advocated in this Article. In the common-law tort of trespass, the element at issue is only whether the owner consents to the presence of the defendant on the property. The race-based classification is not an element of the tort; the tort is content neutral. The race-based classification is a creation of the property owner, but the court need not address it to render a decision. In wrongful discharge cases, the classification of public policy is an essential element of the tort, an element created by the courts.

Perhaps one can distinguish between a wrongful discharge case and the situation in *Shelley v. Kraemer*[102] because the latter case involves affirmative judicial action, while the former involves judicial inaction. Specifically, in *Shelley*, the state court was called upon to evict an African American family;[103] in a wrongful discharge case, the court is simply failing to recognize a cause of action. However, this distinction fails when one examines the *Edmonson* case. In *Edmonson*, the Court held that judicial inaction—standing idly by while private parties disqualified civil jurors based upon race—itself violated the Fourteenth Amendment.[104]

Moreover, one could argue that the wrongful discharge case itself represents a case of judicial action, as distinguished from inaction. The state courts have actively created a classification based on the content of a dismissed employee's speech. They have interfered with political speech by making it a disfavored category in wrongful discharge suits. They have chosen to protect the employee who files a workers' compensation claim and the employee who blows the whistle on employer misconduct, but not the employee who lobbies for political causes of which the employer disapproves. By creating a classification for protected and unprotected speech that adversely impacts upon political speech rights, the courts have engaged in state action that arguably violates the Constitution.

The Supreme Court will subject a classification of speech based upon its

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[102] 334 U.S. 1 (1948).

[103] *Id.* at 13–21.

[104] *See supra* notes 98–101 and accompanying text.

content to strict scrutiny. Recently, in *R.A.V. v. City of St. Paul*, the Court reiterated that "[c]ontent-based regulations are presumptively invalid."[105] In addition, the Court struck down a hate speech ordinance that classified proscribable speech—fighting words—on the basis of its content. As part of its justification for striking down the statute, the Court observed:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use fighting words in connection with other ideas—*to express hostility, for example, on the basis of political affiliation*, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.[106]

Granted, the statute in question *proscribed* certain speech, while the wrongful discharge tort *protects* employees' speech. This case does suggest however, that in the area of speech, an underinclusive classification based on content deserves constitutional scrutiny.

That courts engage in state action within the reach of the Constitution is consistent with Professor Laurence Tribe's position.[107] Tribe suggests that a plaintiff may establish state action either through direct suit against a state actor, or by a direct challenge to a rule of the state's highest court. Even when that challenge involves private parties, the action of the state's courts will provide the requisite government involvement.[108] Moreover, the state may not construe its laws in a way that facilitates private interference with free speech. In *Brown v. Socialist Workers '74 Campaign Committee*, the Supreme Court held that a state could not facilitate private "threats, harassment, and reprisals"[109] against contributors to minor political parties by forcing them to make public their list of contributors.

In the case of wrongful discharge, the judicially created and enforced rule excluding free speech from protection similarly puts private-sector employers in the position of being able to knowingly coerce vulnerable and economically dependent employees. The courts had no obligation to recognize a tort for wrongful discharge, but having done so, they must create a classification of protected and unprotected employee activity that conforms to the Constitution.

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[105] R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).

[106] *Id.* at 2547 (emphasis added).

[107] LAURENCE TRIBE, CONSTITUTIONAL CHOICES 246–266 (1985).

[108] *See generally id.* at 253–65 (discussing "state action" in the context of a state court's invocation of a permissive state rule to deny relief to a plaintiff injured by the action of a private party).

[109] Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 97 (1982).

It is this classification and its status as law that gives rise to the implicit constitutional problem in current wrongful discharge doctrine.

There is an easy way out of this box: courts need only construe the law of wrongful discharge in a way that affords protection to free speech and recognize that there is no logical nor doctrinal impediment to using the First Amendment as a source of substantial and important public policy in these cases. By going beyond mere payment of lip service to the principle that the Constitution may provide the necessary public policy, courts can avoid the implicit constitutional problem.[110]

It is a commonplace of statutory construction that courts should interpret a statute to avoid finding it unconstitutional. The Supreme Court's treatment of labor unions that use union dues for political purposes presents a case in point.[111] The use of union dues for political purposes also provides an opportunity for a private entity to coerce individual employee political expression, by using mandatory union dues to finance political activities with which an individual employee may disagree.[112] Although it has avoided the inherent constitutional issues, in the case of labor unions, the Supreme Court has nonetheless intervened. First, in *Steele v. Louisville and Nashville Railroad Co.*,[113] the Court avoided an Equal Protection issue raised by a labor union's discrimination on the basis of race, by devising a duty of fair representation which it read into the governing labor relations statute. This technique enabled it to avoid the state action issue implicit in the certification of an exclusive bargaining representative. Next, the Court read a limit on the use of mandatory union dues into the terms of the Railway Labor Act.[114] Most recently, the

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[110] In his comments on Novosel v. Nationwide Ins., 721 F.2d 894 (3d Cir. 1983), Professor Perritt acknowledges the logic of using the Constitution, and suggests that it is inevitable. It is one of his arguments for statutory intervention to protect employers. *See* PERRITT, *supra* note 39, at 182–83.

[111] *See generally* David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135 (1992) (discussing the Supreme Court's reluctance to reach the state action issue).

[112] *Cf.* EMERSON, *supra* note 60, at 684–88.

[113] 323 U.S. 192 (1944). The Court prohibited a union from negotiating a separate seniority list for black employees that would result in all black employees being laid off before any white employee lost his job. The black members of the craft, which the union had exclusive statutory authority to represent, had argued that the white employee union violated the Fourteenth Amendment's Equal Protection Clause by denying black employees membership and a right to vote on contracts that the white employee union negotiated. Because the black employees were in the same bargaining unit, these contracts were binding on the black employees. The Court avoided the state action question, but held that the union had a duty to fairly represent all members of the craft. *Id.* at 204–07.

[114] *See* Railway Labor Act, 45 U.S.C. §§ 151–88 (1988); International Ass'n of

Court has imported analogous limitations into the National Labor Relations Act.[115]

The Illinois Supreme Court's decision in *Barr*[116] best represents the current resistance to the analogous solution in wrongful discharge cases. In *Barr* the Court reasoned that the First Amendment represents a policy placing limits only on the state; it does not represent a bar against private deprivations. Accordingly, in the absence of state action, the First Amendment affords no remedy.[117] This argument, however, is a *non sequitur* in a wrongful discharge case. The courts have recognized a tort for wrongful discharge to remedy certain cases in which a private-sector employer abuses its power. The courts recognized this tort because the statute, case, or regulation the employee cited as embodying public policy did not prohibit the employer from firing him or her.[118] In other words, it was precisely *because* there was no other remedy that the courts had to intervene. Where there are statutory remedies available, courts will not recognize the tort.[119] Similarly, in the case of free speech, the

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Machinists v. Street, 367 U.S. 740 (1961); Railway Employees v. Hanson, 351 U.S. 225, 238 (1956). The Court held that there are limits on how a union may use dues paid by an employee who objects to the union's political activities. An objecting employee may only be required to pay that proportion of annual dues used for activities related to collective bargaining, contract administration, and grievance adjustment. *Street*, 367 U.S. at 765–75.

The Court later extended this rule to all public sector employees. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977). *See generally* Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After* Chicago Teachers Union v. Hudson, 29 B.C. L. REV. 857, 867–73 (1988) (discussing *Abood's* ambiguous treatment of First Amendment freedom of association).

[115] *See* Communications Workers v. Beck, 487 U.S. 735, 744–62, *cert. denied*, 487 U.S. 1233 (1988). *See generally* Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: the Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51 63–72 (1990) (discussing the importation of the *Street* Railway Labor Act holding into the National Labor Relations Act and the Court's avoidance of the constitutional question).

[116] *See* Barr v. Kelso-Burnett Co., 478 N.E.2d 1354 (Ill. 1985).

[117] *Id.* at 1356–57.

[118] In Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984), the court held that the "failure of the legislature to enact a statute expressly forbidding retaliatory discharge for filing workmen's compensation claims does not preclude this Court from providing a remedy for what we conclude to be tortious behavior." *Id.* at 396.

[119] For a discussion of preemption of common-law wrongful discharge claims by other remedies and the requirement that employees exhaust administrative remedies before filing a wrongful discharge suit, see SHEPARD ET AL., *supra* note 2, at 251–74. In the public sector, the Supreme Court took an analogous position in Bush v. Lucas, 462 U.S. 367 (1983). In *Bush*, an aerospace engineer made public statements to the news media critical of a NASA facility. The Court held that while the employee did raise a First Amendment

First Amendment affords a private-sector employee no *direct* remedy against a private-sector employer.[120]

For example, the classic wrongful discharge paradigm involves employees who file a claim for workers' compensation following a workplace injury. Prior to recognition of the wrongful discharge tort, such employees were subject to dismissal and had no recourse. Typically, an employer would fire an employee in retaliation for the employee's filing of a workers' compensation claim. A pattern of such dismissals would deter other injured employees from exercising their rights to workers' compensation under the statutes. Because employer's contributions for workers' compensation insurance had been determined by their claims experience, employers had a direct financial incentive to deter employees from filing claims. The important public policy at stake was the protection of injured workers, and their financial security. Because the workers' compensation statutes themselves provided no remedy for an employee who was dismissed under these circumstances, the courts intervened to recognize a cause of action for wrongful discharge. In doing so the courts rejected the argument that employers had violated no part of the workers' compensation statute.

Similarly, it is no answer to reason that the First Amendment itself provides no remedy to the employee in the absence of state action. Employees have constitutional rights to participate in our democracy—rights to speak in support of candidates they want to elect. They also have a First Amendment right *not* to support candidates or political positions, whether through financial contributions, attendance at a captive audience speech, or signing a petition or political endorsement. This right is part of the public policy underlying the First Amendment. It is precisely because there is no direct remedy that the courts should use the doctrine of wrongful discharge to protect the public

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question, his claim was covered by a comprehensive procedural and substantive remedy under federal civil service rules; therefore, the Court refused to create a new remedy, and deferred to the administrative process. *Id.* at 380–90. For examples related to employee health and safety, see Theresa Ludwig Kruk, Annotation, *Liability for Discharge of At-will Employee for In-plant Complaints or Efforts Relating to Working Conditions Affecting Health or Safety*, 35 A.L.R. 4TH 1031, 1032–35 (1985).

[120] This paper does not advocate that we dispense entirely with the state action requirement for all constitutional litigation. It argues that the state action requirement is satisfied when a state court creates a classification based on the content of an employee's speech when deciding a wrongful discharge claim. Beyond that, following the same arguments that courts used to justify the wrongful discharge tort for other forms of public policy, extension of the tort to discharges based on employee speech is necessary to protect society's interest in the public policy underlying the First Amendment. Even if the state action argument fails, there are significant public policy reasons for expanding the wrongful discharge tort to protect employee political speech.

policy inherent in the First Amendment, namely the policy that affords our citizens full political participation in our democracy.

V. THE LIMITS ON A WRONGFUL DISCHARGE SUIT USING THE FIRST AMENDMENT AS PUBLIC POLICY

One can speculate that most courts have been reluctant to choose this course for fear it would effectively "constitutionalize" the workplace.[121] There is already ample concern that the wrongful discharge tort has vastly increased potential employer liability. Some argue that the employer hysteria in response to the tort is a product of the self-interested exaggeration of risk by employers' advisors.[122] However, a review of existing wrongful discharge decisions and cases involving public employee free speech shows that we have nothing to fear but fear itself. Courts would find ready-made limits on disruptive employee speech in the public forum doctrine and in the balancing test developed by the U.S. Supreme Court in *Connick v. Myers*.[123] Moreover, courts probably would adopt the exception for high policymaking and confidential employees which occasionally justifies dismissal of a public sector employee. Furthermore, the workplace would not qualify as a public forum, but an employee could use traditional public fora outside work without fear of retaliation. Although an employee who spoke out on primarily personal matters would not benefit from extension of the tort, it would protect employees who engage in nondisruptive speech on matters of public concern.

In the area of public employee speech, federal courts have developed an entire analytical structure based upon concern for the efficiency of public employees. If the courts can balance employee free speech against workplace efficiency even in the public sector, it stands to reason that the same balancing test would apply to private-sector employee speech. Government functions effectively as an employer even though the First Amendment protects its employees; private-sector employers would function effectively as well. Finally, the tort would not limit employer free speech; it would simply prohibit employers from firing employees in retaliation for the employees' speech or political activities.

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[121] *See, e.g.*, PERRITT, *supra* note 39, at 402: "The *Novosel* doctrine has attracted few supporters, but it is an important model for possible future expansion of the public policy tort into a constitutionalization of private employment."

[122] Lauren B. Edelman, et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 74–78 (1992).

[123] 461 U.S. 138 (1983).

A. *In Response to the Slippery Slope Argument Against Constitutionalizing the Workplace*

Some might argue that the First Amendment cannot provide a public policy rationale for protection of speech in wrongful discharge cases because it would lead to the incorporation of the entire Bill of Rights into the workplace. For example, some might contend that protecting employees' constitutional right to privacy under the Fourteenth Amendment is the next logical step after this development. Some wrongful discharge cases have addressed employees' rights to socialize or have sexual relationships with coworkers; employees generally have not prevailed in these cases.[124] For example, the Supreme Court reiterated in *Bowers v. Hardwick* that it has never recognized a constitutional right to engage in either heterosexual or homosexual consensual sex.[125] Thus, it is

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[124] In Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983), the court dismissed a wrongful discharge complaint in which an employee alleged that his employer had fired him for having an open affair with his secretary while he was still married, among other reasons. While recognizing the exception to the employment at will doctrine for employer conduct that violates a clear mandate of public policy, the court held that the employee had failed to prove such a policy through evidence of a constitutional or statutory provision. *Id.* at 840. In Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985), the employee alleged that a hospital fired him for fraternizing with a female employee. The court held that the constitutional protection of freedom of association did not provide a public policy justification for his wrongful discharge claim. To the extent that the plaintiff made arguments of sex discrimination, the court replied:

> [a]ssuming it was sufficiently alleged, the claim of sex discrimination would not qualify as providing the necessary underpinning for a wrongful discharge suit because the same statute that enunciates the public policy prohibiting employment discrimination because of 'sex' also provides the structure for pursuing a claim for discriminatory acts in contravention of its terms.

Id. at 401. The employee also lost in Patton v. J.C. Penney Co., 719 P.2d 854 (Or. 1986). The employee alleged that he was fired for maintaining an off-work social relationship with a female employee, after the employer had asked him to break it off. The employee claimed that the employer invaded his personal right of privacy, but the court rejected his claim holding that it would pertain at best to a right against *government* infringement of his privacy. *Id.* at 857.

[125] Bowers v. Hardwick, 478 U.S. 186 (1986). The Court observed: "Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in Carey twice asserted that the privacy right, which the Griswold line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far." *Id.* at 191.

difficult to see how employees' activity other than speech could establish a classification that is subject to constitutional scrutiny, let alone an expansion of the tort for reasons of public policy. Employees would have to rely on a state constitutional provision for their arguments in nonspeech cases.[126]

Moreover, to the extent that employer decisions adversely affect issues of family choice, childbearing, and abortion, they would be subject to scrutiny under Title VII of the Civil Rights Act[127] and the Pregnancy Discrimination Act.[128] State courts faced with these issues would probably defer to these other available remedies and refuse to recognize a wrongful discharge cause of action.[129] The recent litigation concerning an employee's right to work free from pressure to submit to voluntary sterilization is instructive on this point. In *UAW v. Johnson Controls, Inc.*,[130] the Supreme Court held that an employer violated Title VII of the Civil Rights Act of 1964 when it established a policy barring all women except those whose infertility was medically documented from jobs involving actual or potential lead exposure. The employer attempted to use OSHA standards to justify its policy, but the Court held that a gender-

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[126] The employee prevailed in Rulon-Miller v. International Business Mach. Corp., 208 Cal. Rptr. 524 (Cal. Ct. App. 1984). She alleged that she was fired because of her romantic involvement with the manager of a rival firm. The court found that IBM fired her in subjective bad faith because it was aware of her relationship before it appointed her manager. The court also found that IBM violated a public policy, specifically California's state constitutional protection of the right to privacy. *Id.* at 534.

[127] 42 U.S.C. § 2000e-2 (1988). *See generally* MACK PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 127–28 (1980). Courts have not used Title VII to protect employees fired for their political views or expression. One employee alleged discrimination on the basis of personal religious creed when his employer allegedly fired him because he apparently consumed Kozy Kitten Cat Food on the job; the employee alleged that it contributed significantly to his state of well-being and therefore to his overall work performance. The court rejected the claim. *See* Brown v. Pena, 441 F. Supp. 1382, 1384–85 (S.D. Fla. 1977).

Title VII does protect a specific form of employee speech, namely, speech in opposition to an unlawful employment practice. 42 U.S.C. § 2000e-3 (1988); *see also* EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1011–14 (9th Cir. 1983). However, one court has observed that "Congress certainly did not mean to grant sanctuary to employees to engage in political activity for women's liberation on company time, and an employee does not enjoy immunity from discharge for misconduct merely by claiming that at all times she was defending the rights of her sex by opposing discriminatory practices." Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976).

[128] 42 U.S.C. § 2000e (1988).

[129] *See, e.g.*, Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985); Allen v. Safeway Stores, Inc., 699 P.2d 277, 283 (Wyo. 1985).

[130] 499 U.S. 187 (1991).

based fetal-protection policy must pass the test for a bona fide occupational qualification. The Court did not resort to the constitutional right to privacy.[131]

Due process under the Fifth and Fourteenth Amendments would have limited application, because employees in the private-sector generally have no property right to their job, and in the absence of a protected interest, no process is due.[132] Generally, any property interest is the product of an express written contract of employment for a definite term not covered by the employment at will doctrine. In the alternative, a few courts have implied a contract from an employee's reasonable reliance on employer representations contained, *inter alia*, in an employee handbook.[133] In that case, the procedure for terminating that property interest would likely lie within the four corners of the contract; there would be no public policy at issue.

The employee interest in reputation is protected under existing libel and slander tort remedies,[134] so courts would not feel pressed to invent a new remedy. For example, in *Paul v. Davis*,[135] the plaintiff argued that the state deprived him of due process when it circulated his name and photograph on a flyer captioned "active shoplifters," thereby depriving him of his liberty interest in reputation. The Supreme Court rejected the claim, holding that one must prove something more than simple defamation by a state official to establish a constitutional claim.

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[131] *Id.* at 197–200.

[132] Whether the employee works in the public or the private sector, such property interests are created and their dimensions defined by state law. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 463–87 (4th ed. 1991).

[133] *E.g.*, Finley v. Aetna Life & Casualty Co., 499 A.2d 64, 72–76 (Conn. App. Ct. 1985) (holding that employee stated a cause of action when he alleged that the employer fired him in breach of an employment contract contained in employer's personnel policy and procedures manual), *rev'd*, 520 A.2d 208 (Conn. 1987). *See generally* Theresa Ludwig Kruk, *Right to Discharge Allegedly At-will Employee as Affected by Employer's Promulgation of Employment Policies as to Discharge*, 33 A.L.R. 4TH 120 (1984).

[134] *E.g.*, Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 881–84 (Minn. Ct. App. 1985) (holding that employees properly recovered for defamation when employer fired them for gross insubordination when they refused to falsify expense reports), *aff'd in part, rev'd in part*, 389 N.W.2d 876 (Minn. 1986); Lewis v. Oregon Beauty Supply Co., 733 P.2d 430, 433–34 (Or. 1987) (holding that employee stated a claim for intentional interference with an economic relationship when employer told other employees that she had given him a venereal disease, and when employee ultimately terminated employment); Agriss v. Roadway Express, Inc., 483 A.2d 456, 462–63 (Pa. Super. Ct. 1984) (holding that employee falsely charged with reading company mail stated a cause of action).

[135] 424 U.S. 693 (1976).

Similarly, search and seizure rules under the Fourth Amendment have little application, because employees generally have a limited expectation of privacy in the workplace. There might be an exception for employer surveillance of restrooms, but public opinion, unions, and state legislatures are already intervening to protect employees from this specific form of surveillance.[136] This free speech analysis might serve also as a model in wrongful discharge cases involving employee drug testing programs because courts have rejected claims using the Fourth Amendment or the right to privacy due to the lack of state action.[137] This is another area, however, in which states have intervened with legislation.[138] Moreover, one court applied a balancing test, ruling that the employer's interest in safety outweighed any employee right to privacy.[139]

The First Amendment is the only provision of the Bill of Rights in which a source of public policy matches a serious need for a remedy—a need that the courts have not met through the use of other legal theories.

B. *The Public Forum Doctrine as a Limit on Private-Sector Employee Speech*

Employers might properly be concerned that recognizing the First Amendment as a source of public policy in wrongful discharge actions would permit employees to disrupt the workplace while exercising their rights. Employers might be concerned that this remedy would permit employees to

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[136] In California, a dentist installed a two-way mirror in the restroom of his office so that he could observe employees while they changed their clothes and used the toilet. *See* North Atl. Casualty and Sur. Ins. Co. v. William D., 743 F. Supp. 1361 (N.D. Cal. 1990). The court observed that this represented a misdemeanor criminal violation, and ruled that it was not covered by the dentist's professional liability insurance policy. *Id.* at 1365–66. The employees apparently filed suit alleging state law claims of invasion of privacy, mental distress, nuisance, tortious breach of the covenant of good faith and fair dealing, misrepresentation, and constructive wrongful discharge termination. The case settled without a trial. *Id.* at 1363. In Stern v. New Haven Community Sch., 529 F. Supp. 31 (E.D. Mich. 1981), a court held that it was not a violation of the Fourth Amendment for a principal to install a two-way mirror in the boys restroom of a high school in order to observe drug dealing. The search was reasonable in light of the school's interest in the search and the student's interest in privacy. *Id.* at 36–37.

[137] *E.g.*, Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992). *See generally* Edward L. Raymond, Jr., Annotation, *Liability for Discharge of At-Will Employee for Refusal to Submit to Drug Testing*, 79 A.L.R. 4TH 105 (1990).

[138] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51x (West Supp. 1993); IOWA CODE ANN. § 730.5 (West 1993); MONT. CODE ANN. § 39-2-304 (1993); R.I. GEN. LAWS § 28-6.5-1 (Michie Supp. 1993); and VT. STAT. ANN. tit. 21, § 513 (1987).

[139] Raymond, *supra* note 137 at 116.

disrupt the workplace with leafleting, solicitation for candidates or signatures, and other employee political activities. During the past fifty years, however, the Supreme Court has developed certain limits on free speech, subjecting it to reasonable regulation as to time, place, and manner.[140] It is not an absolute right: government may suppress fighting words, obscenity, child pornography, libel, defamation, and incitement to imminent lawless action.[141]

The developing doctrine of the public forum is another significant limit.[142] Regulations are subject to strict scrutiny if they limit speech in traditional public fora, such as parks or streets, that have from time immemorial been used by the public for the free exchange of ideas.[143] The government must prove that such regulations are narrowly tailored to effectuate a compelling state interest. The same standard applies when the government designates a place as a public forum.

However, where a place is not a public forum (for example, the interior of an airport terminal), regulations limiting speech are subject to a lower level of scrutiny; such regulations need only be reasonable.[144] With increasing frequency, the Supreme Court has held that private property (and some public property), even when open to the public for general social and commercial purposes, is not a public forum.[145] This body of authority suggests that courts

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[140] *See generally* NOWAK & ROTUNDA, *supra* note 132, at 1087–106.

[141] *Id.* at 941–78; *see also* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[142] *See generally* NOWAK & ROTUNDA, *supra* note 132, at 1089–99.

[143] *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

[144] *See* International Soc'y for Krishna Consciousness, 112 S. Ct. v. Lee, 112 S. Ct. 2701, 2708 (1992).

[145] *E.g.*, *Krishna Consciousness*, 112 S. Ct. at 2705–08 (1992) (holding public port authority may prohibit public from engaging in repetitive solicitation inside publicly-owned airport terminal because it does not represent a traditional public forum that from time immemorial has been used for purposes of free expression and the exchange of ideas, and because government has not designated it as a public forum); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799–806 (1985) (holding that Combined Federal Campaign charity fund drive was not a public forum even though created by Executive Order); Greer v. Spock, 424 U.S. 828, 834–38 (1976) (holding that public areas of Fort Dix are not a public forum); Hudgens v. National Labor Relations Bd., 424 U.S. 507, 520–21 (1976) (holding shopping center may prohibit union members from engaging in peaceful picketing of employer who operated retail store in shopping center, because shopping center represents private property, and is not a public forum); Lloyd Corp. v. Tanner, 407 U.S. 551, 561–70 (1972) (holding shopping mall owner may prohibit antiwar protesters from distributing literature inside shopping mall because it is private property open for commercial purposes and does not represent a public forum). For commentary criticizing this development, see David Kairys, *Freedom of Speech, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 237, 262–64 & n.80 (David Kairys ed., 2nd ed. 1990). The Court has recognized that state constitutions may grant broader free speech rights than those

recognizing the First Amendment as a source of public policy in a wrongful discharge case would not treat the private-sector workplace as a public forum. Rather, they would review restrictions on employee speech *in the workplace* in light of the lower standard of reasonableness used by the Supreme Court for nonpublic fora.[146]

For example, in *Perry Education Ass'n v. Perry Local Educators Ass'n*,[147] the Supreme Court held that a school board adopted a reasonable regulation limiting access to school mailboxes. According to the Court, these did not represent a limited public forum so a rival union was not entitled to have access to them to distribute union campaign literature.[148] Such a rule from the public sector would apply fully to the private-sector. While a few states define the public forum more broadly for the purpose of their state constitution,[149] it is unlikely that these decisions would reach private property not open to the public. Most private-sector workplaces fall into this category. In other words, the employer could probably prohibit employee solicitation, leafleting, political campaigning, and similar potentially disruptive activities in the workplace, and courts probably would find this rule to be reasonable.

Ideally, there would remain room for free employee speech in those cases in which the employer owns all the property upon which a community is located (the company town case).[150] The employer's actions in this

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provided in the First Amendment. It upheld a state court decision mandating that an owner of a shopping center permit free speech and petition activities on his private property. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80–88 (1980).

[146] *See* International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2708 (1992). The Court held that strict scrutiny only applies to a restriction of speech in a public forum. Because the airport terminal was a nonpublic forum, the Court held it need only apply the lesser standard of reasonableness.

[147] 460 U.S. 37 (1983).

[148] *Id.* at 45–49.

[149] *See, e.g.*, *PruneYard*, 447 U.S. at 80–88; State v. Schmid, 423 A.2d 615, 630–33 (N.J. 1980) (holding that Princeton University must open its property to free speech and assembly because of the public's invitation to use the property), *appeal dismissed*, 455 U.S. 100 (1982); Alderwood Assocs. v. Washington Env. Council, 635 P.2d 108, 117 (Wash. 1981) (holding that a private shopping center must permit free speech activities under the state constitution).

[150] Marsh v. Alabama, 326 U.S. 501, 502, 508–09 (1946) (upholding right of Jehovah's Witnesses to distribute literature on streets and sidewalks of a company town, that is, a town where the employer owned the stores, streets, sidewalks, and all other real estate on which the town was located); Thornhill v. Alabama, 310 U.S. 88, 94–96, 101–06 (1940) (overturning on First Amendment grounds the loitering conviction of union organizers who had been engaged in peaceful picketing on private property, at the entrance to the employer's plant, where practically all of the employees lived on company property and got

circumstance would be subject to the higher standard of scrutiny: to justify a restriction on speech in the public areas of the company town, there would have to be a compelling state interest.[151] In a wrongful discharge case, the employer would be the party imposing the restriction, so it would bear the burden of justifying the restriction under the appropriate standard.

However, the public forum doctrine would not limit employee speech *outside* the workplace. For example, an employer could not prohibit an employee from campaigning for a political candidate by canvassing voters on public streets and sidewalks, or working to get out the vote by making telephone calls, or having signs in his or her front yard supporting a particular candidate. All these activities would be taking place in public fora. The employer could not limit an employee's use of printed and electronic media outside the workplace to communicate a political view. Moreover, the employee's exercise of speech in nonpublic fora other than the workplace would not be subject to employer regulation. However, courts could recognize an employer's legitimate interest in regulating conduct in the workplace in the interests of productivity and efficiency by adopting limits analogous to the public forum doctrine.

C. *The Balancing Test for Disruptive Speech*

There would be other protections for employers in addition to the public forum doctrine. It is likely that state courts would adopt the same analysis that federal courts use in First Amendment cases involving public sector employees. Using the three-part test developed by the Supreme Court in *Connick v. Myers,*[152] the state court could first determine whether the employee's speech addressed a matter of public concern. If it did, the court would then determine whether the employer's interest in the efficiency and productivity of the workplace outweighs the employee's interest in speech. If the employer does not prevail in this balancing test, the court could next determine whether protected speech was a motivating factor in the employer's decision to dismiss the employee. If so, the burden of proof would shift from the employee to the employer,[153] who would have to demonstrate that it would have fired this employee—notwithstanding the speech—for other legitimate reasons such as for

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their mail from a post office on company property, and where the Union was permitted to hold its meetings on company property).

[151] *Cf.* International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2715 (1992) (Kennedy, J., concurring).

[152] 461 U.S. 138, 142–54 (1983).

[153] *See* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977).

just or good cause.

1. *Speech on a Matter of Public Concern*

This framework for analysis clarifies the existing body of wrongful discharge precedent. For example, although state courts have routinely required that employees demonstrate that their conduct was protected by an important or substantial public policy,[154] any such conduct would most likely qualify as a matter of public concern under the Supreme Court's standard.[155] The Supreme Court has ruled that speech on the school budget,[156] on a school desegregation plan,[157] on the efficient operation of a state prosecutor's office,[158] and about the performance of the President[159] all qualify as matters of public concern, and therefore as protected speech. Clearly, reports that an employer had violated criminal law or civil rules designed to protect the public safety would qualify as matters of public concern.[160] Thus, a state court would reach the same result applying a First Amendment analysis as the court that used wrongful discharge to protect a quality control inspector who reported an employer's weights and measures violations to the FDA.[161]

This analysis would cover even the classic cases in which an employee was

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[154] *See generally* 1 LARSON, *supra* note 2, §§ 2.06–.07, 6.01–.11.

[155] For a more detailed analysis of existing case law on the requirement that speech address a matter of public concern, see Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988); Cynthia K.Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109 (1988); and D. Gordon Smith, *Beyond Public Concern: New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249 (1990).

[156] *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[157] *See* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 411–17 (1979).

[158] *See* Connick v. Myers, 461 U.S. 138, 149 (1983).

[159] *See* Rankin v. McPherson, 483 U.S. 378 (1987). In this case, a county clerical employee was fired for a political remark made during a private conversation to a coworker. Upon hearing of the attempted assassination of then President Reagan, she commented: "if they go for him again, I hope they get him." The Supreme Court held that this represented a comment upon a matter of public concern and constituted protected speech under the First Amendment. *Id.* at 379–80, 384–92.

[160] For an account of cases where employees raised concerns about matters of health or safety, see Gregory G. Sarno, Annotation, *Liability for Retaliation against At-will Employee for Public Complaints or Efforts Relating to Health or Safety*, 75 A.L.R. 4TH 13, 24–27 (1990).

[161] *See* Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 388–89 (Conn. 1980).

discharged after filing a claim for workers' compensation.[162] Although at first blush such cases might seem to involve the personal exercise of a private right, the state nevertheless has an interest in maintaining records regarding occupational safety and health. It is a matter of public concern that we as a country do business in a way that minimizes the risk of physical injury employees face at the workplace. While workers' compensation was designed to act as an expeditious source of compensation outside the judicial system, it also serves as a way of keeping records on employer safety. Clearly, an administrative agency or court responsible for resolving certain disputes would qualify as a public forum for speech that initiated a dispute within its jurisdiction.

This doctrine would not reach the individual employee complaint about working conditions or compensation or other speech on matters of purely personal concern. For example, in one reported case, a court dismissed an employee's complaint that he was fired after he disclosed to coworkers that he would be attending law school.[163] The court considered such speech to represent comment on personal future career plans, and not on a matter of public concern. State courts adopting the First Amendment as a source of public policy need not protect such speech—the outcome of the case would be the same. In *Ellis v. El Paso Natural Gas Co.*, the court held that an employee failed to state a wrongful discharge claim when he alleged that he was fired for using an in-house grievance procedure to protest his failure to receive a pay increase.[164] The court held that the case did not implicate public policy issues as such had been construed by New Mexico courts.[165] Similarly, one can

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[162] For a review of the existing decisions recognizing a cause of action for retaliatory discharge when an employer fires an employee for filing a workers' compensation claim, see 1 LARSON, *supra* note 2, § 6.05 and DiSabatino, *supra* note 6, § 16. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 356–59 (Ill. 1978); Frampton v. Central Indiana Gas, 297 N.E.2d 425, 428 (Ind. 1973); Springer v. Weeks and Leo Co., 429 N.W.2d 558, 559 (Iowa 1988); Sventko v. Kroger Co., 245 N.W.2d 151, 153–54 (Mich. 1976); Hansen v. Harrah's, 675 P.2d 394, 397 (Nev. 1984); Shanholtz v. Monongahela Power Co., 270 S.E.2d 178, 182 (W. Va. 1980).

[163] *See* Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977). The employee announced his intention to attend law school at night and upon his dismissal cited Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974), for the proposition that an employer may not discharge an employee for engaging in a lawful activity in which the community has an interest. He argued that public policy favors continued education. The court rejected the claim: "We think appellant's attendance at night school was a private rather than a public concern." *Scroghan*, 551 S.W.2d at 812. Interestingly, the court used the language of public sector cases to deny relief.

[164] Ellis v. El Paso Natural Gas Co., 754 F.2d 884 (10th Cir. 1985).

[165] *See id.* at 885.

speculate that courts would consider discussions about raises, salary cuts, parking privileges, benefits, transfers from one position or plant to another, promotions, and demotions, as ordinary day-to-day personnel actions and representing speech on matters of purely private concern.

2. *Balancing Employee Speech Against Workplace Efficiency*

The courts could balance the employer's interest in an efficient workplace against the employee's interest in the speech. This balancing is precisely what the Third Circuit did in *Novosel*, in which the court made explicit reference to the public employee precedent.[166] This same test could also explain the outcome in *Pierce v. Ortho Pharmaceutical Corp.*, in which the court rejected a wrongful discharge claim.[167] The plaintiff-employee in *Pierce* was a physician, working on a chemical formula for an antidiarrheal drug containing saccharin, who refused to continue work on the project based on her concern that saccharin was possibly a hazardous additive. The employer had engaged in no illegal conduct, and the employee did not report the matter to the press or any government agency before her dismissal. In this instance, a court applying the *Connick* test would probably determine that the employer's interest in an efficient workplace outweighed the employee's interest in speech.[168] Similarly, in *Pagdilao v. Maui Intercontinental Hotel*, an employer prevailed in a wrongful discharge suit brought by an employee fired for shouting obscenities at a company picnic.[169] Clearly, the employee's speech was disruptive, and the employer's interest in the well-being of others at the picnic outweighed any interest the employee might have in the speech. In *Korb v. Raytheon Corp.*, the court held that the employer, a major defense contractor, properly fired its lobbyist after the lobbyist spoke out against military spending.[170] The employer argued that the employee could no longer be effective in his position, and the court found "no public policy" that prohibited an employer from "discharging an ineffective at will employee."[171]

One can envision other circumstances in which courts might reach a similar conclusion, for example, a letter to the editor openly critical of an employer decision might cause a disruption at the plant. For the court even to apply this balancing test, such a letter would have to address something more than an individual personnel decision—it would have to address a matter of public

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[166] *See* Novosel v. Nationwide Ins. Co., 741 F.2d 894, 899 (3d Cir. 1983).

[167] Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 506–08 (N.J. 1980).

[168] *See supra* note 152 and accompanying text.

[169] Pagdilao v. Maui Intercontinental Hotel, 703 F. Supp. 863 (D. Haw. 1988).

[170] Korb v. Raytheon Corp., 574 N.E.2d 370 (Mass. 1991).

[171] *Id.* at 372.

concern. For example, the letter might address the following: a decision to shift production of a new product line to a different plant, diverting jobs away from the community; a decision not to invest in new optional pollution control technology or delay its purchase; a decision not to contribute to some community fundraising project; or other matters involving the relationship between an employer and the community in which it is located. While an employee may legitimately hold strong views on the propriety of such a decision, and while the public might legitimately be concerned about the employer's decision, public criticism of the employer might nevertheless cause friction between the employee and her supervisor, or between the employee and other employees. In such cases, the employer might be able to establish that its interest in efficiency outweighed the employee's interest in the speech.[172] Historically, labor arbitrators have ruled against employees when they exercise political speech in a manner that disrupts the workplace.[173] Moreover, in existing judicial decisions in wrongful discharge cases, courts have rejected claims of employees whose speech disrupted the workplace.[174]

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[172] This discussion only addresses what protections might be made available by using the First Amendment in a wrongful discharge case. It does not address what protections employees may have under other laws such as the National Labor Relations Act. Professor Malin suggests a different balancing test, namely one that weighs the employee's interest in acting on his conscience against the employee's duty of loyalty to the employer. *See* Malin, *supra* note 6, at 318.

[173] *See, e.g.*, Las Vegas Bldg. Materials, Inc., 83 Lab. Arb. (BNA) 998, 1000–01 (1984) (Richman, Arb.) (holding that while employer could not discharge employee for espousing a philosophy of tax protests, it could dismiss him for disruptively refusing to cooperate when employer was forced to garnish his wages in an IRS proceeding); Huron Forge & Mach., 75 Lab. Arb. (BNA) 83, 96–97 (1980) (Roumell, Arb.) (holding that grievant's disruptive and inflammatory leaflet provided just cause for dismissal); Hygrade Food Prod. Corp., 74 Lab. Arb. (BNA) 99, 104–06 (1980) (O'Neill, Arb.) (holding that the employer had just cause to dismiss the employee for violating company rules in the course of advocating his political beliefs).

[174] *See, e.g.*, Newman v. Legal Servs. Corp., 628 F. Supp. 535, 539–40 (D.D.C. 1986) (holding that employees discharged for protesting managerial choices about the delivery of legal services to the poor under the agency's mandate failed to state a cause of action for wrongful discharge because the employer has a strong interest in assuring that employees follow employer's policies and managerial ideology); Schultz v. Industrial Coils, Inc., 373 N.W.2d 74, 74–77 (Wis. Ct. App. 1985) (holding that even if the court assumed arguendo that the state constitution protected the employee's letter to the newspaper criticizing the employer and its officers, the speech would interfere with productivity and efficiency, undermine authority or discipline, and otherwise disrupt the office within the meaning of *Connick v. Myers*); Allen v. Safeway Stores, Inc., 699 P.2d 277, 283 (Wyo. 1985) (holding that employer was protecting legitimate business interest when he dismissed employees who were rude to a state inspector, and who criticized the WIC program that he

3. *The Shifting Burden of Proof*

Even when the speech addressed a matter of public concern and the employer failed to prevail in the balancing test, that would not end a court's inquiry. Many employers have already adopted a defensive posture of better recordkeeping and supervision of problem workers. If an employer could prove that an employee was fired for just or good cause, and would have been fired regardless of the speech, state courts would probably dismiss the complaint. This practice is well established in the context of collective bargaining agreements, in which labor arbitrators developed the concept of progressive discipline and require that an employer have just cause for dismissal.[175] Essentially, an employer must demonstrate that it has adopted reasonable performance standards, made them known to employees, notified employees who are not meeting the standards, and used progressive discipline to attempt to correct the employee's performance.[176] If the employee fails to improve, arbitrators generally will find that the employer has just cause to fire the employee. Other criteria, like the employee's past record, evaluations, length of service with the company, and treatment of other similarly situated employees, can all play a role in an arbitrator's judgment of just cause. These facts and circumstances would also be relevant to a court under a First Amendment analysis. Essentially, they would have a bearing on an employer's credibility and intent. If an employee has a long record of exemplary service, and publicly supports a political stand with which the employer disagrees, a court would scrutinize carefully any claim that the employer fired the employee for performance problems rather than speech. On the other hand, if an employee were on probation for chronic unexcused lateness, a controversial speech on a public issue would not save that employee from dismissal.

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administered). An analogous case is Bala v. Unemployment Compensation Bd. of Review, 400 A.2d 1359, 1368 (Pa. Commw. Ct. 1979) (holding state could deny unemployment benefits to employee who disturbed employer hotel's guest when employee's speech was not on a matter of public concern and represented rudeness to guest).

[175] *See generally* ELKOURI & ELKOURI, *supra* note 55, at 651–92; OWEN FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 442–45 (2d ed. 1983).

[176] These standards and the ones that follow are drawn from Arbitrator Carroll Daugherty's classic formulation of the seven guidelines for determining just cause, as set forth in Enterprise Wire Co., 46 Lab. Arb. (BNA) 359, 363–64 (1966) (Daugherty, Arb.). *See generally* MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 137–45 (2d ed. 1991).

D. *The Exception for High Policymaking Employees*

In the public sector, the Presidents may choose their Cabinets, and the secretaries their deputies, based entirely on their political views. The Supreme Court recognizes that some government positions are ones in which the political affiliation of the employee is a legitimate factor to consider.[177] This is a narrow exception; the Supreme Court has observed that party affiliation or political belief is not necessarily relevant to every policymaking or confidential position.[178] For example, the exception would not allow partisan considerations in the hiring of a state university football coach, but would allow a governor to select assistants to help write speeches, explain her views to the press, and communicate with the legislature.[179] By analogy, the very top managers in a corporation probably function best if they are in accord on the manner in which issues of public policy affect corporate interests. However, this exception would likely only cover the very inner circle and the chief executive officer.

This discussion is not an exhaustive analysis of how courts might apply public sector precedent to limit the scope of a wrongful discharge action using the First Amendment. However, it does point the way toward reasonable limits that would safeguard an employer's ability to conduct business.

E. *Anticipating the Scope of Protected Employee Speech*

The remedy I advocate in this Article would address precisely the conduct the Third Circuit found so reprehensible in *Novosel*.[180] It would protect an employee's use of a public forum to express political views during nonworking hours. It would protect each employee's right to campaign for, contribute to, and vote for the political candidate of his or her choice. It would also protect employees from the employer who would coerce the employee to contribute to or give overt support to a political cause or candidate with which the employee did not wish to be associated.[181] For example, an employer could not coerce an

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[177] *See* Branti v. Finkel, 445 U.S. 507, 517–518 (1980) (holding that an employer must prove that party affiliation is an appropriate requirement for the effective performance of the public office involved, and that the newly appointed county public defender failed to meet his burden of proof when he fired two assistant public defenders solely because they were Republicans).

[178] *Id.* at 518.

[179] *Id.*

[180] *See supra* notes 33–38 and accompanying text.

[181] Perhaps it would be wiser to follow Emily Post's rules: "Certain subjects, even though you are very sure of the ground upon which you are standing, had best be shunned: for example, criticism of a religious creed or disagreement with another's political

employee to sign a petition, lobby for legislation, write his congressman or representative, speak out at a public meeting, or attend a political event.

This last example may require some elaboration. How, for example, would this remedy apply to the increasingly common practice of captive audience stump speeches? In the 1992 presidential campaign, employers would often arrange to provide a captive audience at the workplace for a candidate's photo opportunity. Employees who attended these speeches said they did not feel free to leave. In essence, the employee's physical presence in the audience gave an illusion of support for the candidate. The employee was forced to associate with a political candidate she might not support. Clearly, this represents a form of coercion based upon the employee's political views. Under the remedy advocated here, if an employer fired the employee for refusing to sit through the speech, that employee would have a cause of action for wrongful discharge.

The public forum limit would subject the individual employee's exercise of speech at the workplace to reasonable rules. However, it does not address an employer's exercise of speech. In the instance of the captive audience speech, an employer invites the press to witness the entire company's support of a candidate. This is a classic case of an employer creating or designating a public forum. This designation should trigger stricter scrutiny of the employer's conduct. When an employee walks out of a captive audience speech, that employee's conduct speaks of his or her view of the candidate; it is a form of speech. For an employer to justify firing an employee in retaliation for that speech, the employer should have to demonstrate a compelling interest in maintaining the captive audience. While I am not prepared to argue in this Article that such a compelling interest could never exist, it is difficult to anticipate circumstances in which the employer could demonstrate one. Clearly, it would be permissible under these rules for the employer to make a forum and its speaker available to any employee who might wish to participate *voluntarily.* That would represent the employer's exercise of protected corporate speech under *First National Bank of Boston v. Bellotti.*[182]

Similarly, this remedy would not prohibit an employer from expressing views to its employees on political issues generally. For example, it would not prevent the employer from distributing literature on issues and candidates the employer supports. Courts would probably determine that it was reasonable—rational—for an employer to limit distribution of political literature at the

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conviction." EMILY POST, EMILY POST'S ETIQUETTE 39 (Elizabeth L. Post ed., 11th ed. 1965).

[182] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784–85 (1978) (affirming that corporate speech is protected by the First Amendment; invalidating a state law that purported to restrict corporate political speech to matters that materially affected the corporation's business.).

workplace to those candidates or issues the employer supports, or views as being in its best business interests. Under this lesser test for a nonpublic forum, the employer could freely exercise its corporate free speech rights. The employee's interests are protected because an employee can always throw away literature without reading it. We can distinguish this example from the captive audience because in the latter case the employer has invited the candidate and the press to use the workplace as a forum for a public speech, thereby creating a public forum. Moreover, the employee is not free to disregard the speech as a member of a captive audience.

F. *The Costs of this Remedy*

Rarely in constitutional jurisprudence do we balance First Amendment rights against their costs.[183] However, what this paper proposes would be a remedy in the area of employment law, albeit one that protects a public policy derived from the Constitution. One can anticipate that a chief objection to this remedy would lie in its potential economic impact upon employers. Critics of the retaliatory discharge tort contend that it simply raises the costs of hiring and firing. In fact, it merely changes one contract term in the employment relationship, but leaves the employer free to recoup its cost by reducing other benefits to the employee.[184]

Relatively little empirical information is available on the cost to employers of the wrongful discharge tort. One study of California cases concludes that the annual cost of jury trials comes to $2.56 per worker. When one includes estimates of payments and legal fees for the 95% of all cases that settle without going to trial, the total comes to an annual cost of $12.25 per worker.[185] In a later, related study, the authors conclude that the cost of preventative measures

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[183] I thank Professor Emeritus Harry Pratter, Indiana University School of Law, for this thought.

[184] *See* Note, *supra* note 6, at 1829.

[185] James N. Dertouzos et al., *The Legal and Economic Consequences of Wrongful Termination*, RAND/R-3602-ICJ (1988). In a study funded by the Rand Institute for Civil Justice, the authors analyzed 120 jury trials in California between 1980 and 1986. They determined that plaintiffs won in about 68% of these cases, and that half of the winning plaintiffs were awarded $177,000 or less. *Id.* at vii. They found that employers spent an average of $80,000 in legal fees to defend a typical wrongful termination case during this period. *Id.* at viii. However, they also determined that the majority of plaintiffs receive less than $30,000 after post-trial reductions and legal fees, and that transaction costs represent almost 60% of the money changing hands in these cases. *Id.* at ix. They suggest that given these large transaction costs, alternative dispute resolution or mandatory arbitration may benefit both parties.

to avoid wrongful termination liability are the more significant costs, significant enough to influence companies utilization of labor.[186] There is no similar information for government employers, who have functioned with these or analogous constitutional rules for at least two decades.[187] Although several

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[186] James N. Dertouzos & Lynn A. Karoly, *Labor-Market Responses to Employer Liability*, RAND/R-3989-ICJ (1992). This follow-up study estimates that the total direct costs of wrongful termination litigation are only about 0.1% of the total wage bill. *Id.* at xiii. However, because firms are risk averse or because employers are trying to avoid larger liabilities, the indirect costs of wrongful termination are analogous to the employer response to a 10% wage increase. They suggest that there are benefits to the employer in increased efficiency through limits on managers' discretion in decisions to fire employees. *Id.* They also suggest that the liberality of a state's wrongful termination rules correlates with lower employment. *Id.* at xii. Presumably, these effects would disappear if all states were to adopt uniform rules on wrongful discharge.

[187] One study documents the general rise in public employee litigiousness against state and local government in response to a handful of Supreme Court decisions, but does not focus on First Amendment issues. *See* Don Jaegal & N. Joseph Cayer, *Public Personnel Administration by Lawsuit: The Impact of Supreme Court Decisions on Public Employee Litigiousness*, 51 PUB. ADMIN. REV. 211 (1991).

The General Accounting Office did a study of the costs of resolving federal employees' discrimination complaints, including cases of discrimination based upon age, race, color, sex, national origin, religion, or handicap. UNITED STATES GENERAL ACCOUNTING OFFICE, DISCRIMINATION COMPLAINTS, Rep. No. GAOHRD-89-141 (1989). The study reports discrimination complaints at three agencies, the U.S. Dept. of Agriculture, U.S. Dept. of Labor, and Securities and Exchange Commission (SEC). *Id.* at 2. The SEC legal staff reported that one case in fiscal year 1987 cost $40,000 in back pay and attorney's fees, and in 1988 the SEC spent $147,477 ($145,000 in one large settlement, and $2,477 for six weeks backpay in another) on five cases all settled without a trial: three closed with corrective action within the agency, and two closed with backpay awards averaging $57,489 each. *Id.* at 5, 9. The attorney's fees and costs came to $32,500 for fiscal 1988, but there is no information as to how these are distributed across the five cases. *Id.* The Dept. of Agriculture spent $805,957 on 50 cases in 1987 (an average of $16,119 per case), and $340,855 on 82 cases in 1988 (an average of $4,157 per case). *Id.* at 5. When a payment is made after a lawsuit has been filed in a court, the payment generally comes from the Judgment Fund (31 U.S.C. § 1304), a permanent indefinite appropriation used to pay certain claims against the federal government. *Id.* at 1. In fiscal year 1987, this Fund paid $6.5 million for 144 discrimination cases across the whole of federal government (an average of $45,139 per case). The Judgment Fund paid $12 million for 156 cases in fiscal year 1988 (an average of $76,923 per case). *Id.* at 5.

Jaegal reports 75 public employee lawsuits in 1988 based upon Supreme Court decisions defining public employee constitutional rights. Jaegal & Cayer, *supra*, at 213. If we assume that the costs of these cases are comparable to the costs of employment discrimination cases, we can estimate that these cases, in total, cost state and local government employers between $3,385,425 and $5,769,225. There were 14,476,000 state

authors have argued against the wrongful discharge tort because of its possible economic consequences,[188] another author has determined that the tort may lead to economic efficiency by prompting employers to accept a just cause firing standard in exchange for limited liability through a wrongful termination statute.[189]

In the area of wrongful discharge, most courts have determined that the benefits of protecting previously at will employees from dismissal in certain circumstances outweigh these costs. One of the benefits for which little quantitative information is available is the enhanced enforcement of federal and state laws and regulations through the incremental acts of individual employees.[190] Another benefit is the improvement in personnel administration as employers attempt to avoid liability through more rigorous internal review of dismissal decisions.

Using the First Amendment as a source of public policy in wrongful discharge actions will expose employers to some additional liability. However, the amount of that liability and its cost would probably be marginal compared to the benefits gained through recognition of the wrongful discharge tort in employee free speech cases. The limited evidence of cost indicates that the direct costs of litigation are quite small. Most of the expense is the result of employer efforts to enhance personnel administration to avoid liability. Because these efforts have already taken place, recognizing an additional source of public policy governing discharge cases will not significantly exacerbate these costs to employers.

Finally, businesses do not vote. Whatever constitutional rights they have are derivative, stemming from the freedom of association held by those who do vote. Courts seriously disserve the First Amendment if they allow considerations of marginal costs to associative enterprises to outweigh the rights of voters.

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and local employees in 1988. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 304 (1992). Using the higher 1988 figure for total liability, we estimate that for all constitutional claims by employees the costs come to 40 cents per year per employee. This cost appears reasonable in light of the rights at stake.

188 *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 306–07 (3d ed. 1986) (arguing against a broad good cause requirement and in favor of employment at will); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Sherwin Rosen, Commentary: *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 983 (1984).

189 *See* Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644 (1991).

190 For an effort to quantify the effects of whistleblowers on organizational change in the federal sector, see James L. Perry, *The Organizational Consequences of Whistleblowing*, Final Report to the Fund for Research on Dispute Resolution dated October 19, 1990.

VI. CONCLUSION

Our democratic system is the product of careful balancing of one branch of government against another, state against federal government, and the individual against the state. When one sector aggregates too much power, the great pendulum in this dynamic and living system swings back, wrenching some of that power away. The judiciary in the majority of states caused just such a pendulum swing when they recognized the tort of wrongful discharge. Development of this tort was a significant and positive step toward balancing the relationship between employer and employed in those areas in which the relationship may affect society as a whole.

However, the pendulum has not yet swung its full course to bring the system back into balance. A significant area of employee interest remains unprotected. It is an area that directly affects the very basis for our democratic society. Moreover, it is an area in which the imbalance in power has grown dramatically since the courts first moved to recognize wrongful discharge as a cause of action. Democracy is premised on the notion that each voter, acting out of enlightened self-interest, will influence the decisionmaking of government with his vote in a way that will bring the greatest good to the greatest number.[191] When a few have the power to coerce what should be an individual decision, there is a risk that the outcome will not bring the greatest good to the majority, but rather only to that few.[192] This outcome could threaten the integrity, and ultimately the fundamental health, of the living system.

The First Amendment provides a critical tonic. We can test our ideas—the foundation of our political choices—against the ideas of our neighbors, our friends, our coworkers. This debate, and the competition of one notion with another in the marketplace of ideas, provides the basis for our vote.[193] A century of First Amendment jurisprudence stands for the proposition that in the absence of some vital, compelling government interest, it is healthier for our democracy to tolerate disparate viewpoints than to suppress them. Similarly it is healthier for employers to tolerate diverse views than to attempt to suppress

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[191] *See* John Stuart Mill, *On Liberty*, *in* CLASSICS IN POLITICAL PHILOSOPHY 436 (Jene M. Porter ed., 1989).

[192] *Cf.* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 900–01 (3d Cir. 1983).

[193] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes observed that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *Id.*

them with threats to an employee's job security. This does not mean that employers are forbidden to participate in the grand debate; they already have the power and means to do so in the form of corporate free speech and the PAC. It means only that an individual employee's disagreement with the company party line should not form the basis for dismissal.

For over fifteen years, courts have acknowledged that the Constitution may provide evidence of a substantial and important public policy in wrongful discharge cases. To place the First Amendment in a disfavored status by judicial fiat raises serious constitutional issues. There is no logical basis for excluding free speech from the protected category of important public policies. Therefore, courts can and should move to protect employees who can prove they were fired for their political views.