THE FIRST AMENDMENT IN THE WORKPLACE: AN ANALYSIS AND CALL FOR REFORM

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I. INTRODUCTION

The first amendment has been called "the Constitution's most majestic guarantee."[1] Although nothing in either the text or history of the Constitution expressly defines "freedom of speech,"[2] scholars have attributed certain basic values to the concept. Some believe that Americans must be free to discuss their ideas so that they can participate intelligently in the electoral process. Supporters of this theory may define the tools of self-governance very broadly to include any expressive activity which hones the individual citizen's ability to think clearly and rationally

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1 L. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-1, at 576 (1978).

2 BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307-08 (1978).

so as to develop a political viewpoint.[3] Others, narrowly construe "freedom of speech," applying it only to explicit political speech.[4] Still others, including jurists, have emphasized individual self-fulfillment: "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality."[5] According to this view, self-fulfillment is appropriately buttressed by the first amendment, especially in a society where advancing technology has brought changes which tend to impinge upon privacy.[6] It is possible to interpret these values as providing interlocking support for the concept of freedom of expression.[7] Generally, any gains for the individual resulting from an open exchange of ideas and opinions will benefit society as a whole.

The first amendment must allow and encourage all points of view to be expressed in order to operate beneficially at either a macro or a micro level. Since the mass media often provides a mouthpiece for well-financed opinions, these views are widely disseminated within society. More fragile and in need of legal support, however, are the opinions of ordinary American citizens who may lack the resources to amplify their ideas competitively.

If contributions to our society from ordinary citizens are to be encouraged, then relatively inexpensive arenas where discus-

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[3] Meiklejohn, *The First Amendment Is An Absolute*, SUP. CT. REV. 245, 256-57 (1961).

[4] *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Bork notes that a function of political speech is "to deal explicitly, specifically and directly with politics and government. . . ." *Id.* at 26. For an argument against such a narrow view, see *generally* Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978).

[5] Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis omitted); *see also* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

[6] *See generally* Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978).

[7] *See* Emerson, *supra* note 5, at 879-84. The author discusses three values served by the concept of freedom of expression: the development of the human personality and potential, the advancement of knowledge and the discovery of truth, and the empowering of all Americans to participate in "the building of the whole culture," including the shaping of its political structure. *Id.*; *see also* Cohen v. California, 403 U.S. 15 (1971). In *Cohen*, Justice Harlan, writing for the majority, noted that the "constitutional right of free expression" places

> the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 24 (citations omitted).

sion can occur must be protected. One such arena is the common, everyday workplace, which is a desirable alternative to the cost prohibitive traditional channels of communication. This article will discuss free speech rights in the workplace. First, it will describe recent social and judicial developments which have limited access to traditional forums for speech while simultaneously granting protection to commercial speech and giving the well-funded corporate voice a very powerful megaphone. Next, the article will focus on the protections assuring first amendment rights in the workplace, including those for public employees, those under the National Labor Relations Act, and those under the common law. Additionally, this article will discuss the state action barrier to controlling abridgement of speech by a private employer. The use of state constitutions and other circumventions of the state action requirement will also be examined. Finally, the article will address one state's statutory protection of employee's first amendment rights in the workplace and delineate the reasons why it is the most appropriate response to the problem.

II. THE IMPORTANCE OF THE WORKPLACE AS A FIRST AMENDMENT FORUM

A. Limits on Convenient Alternatives

Americans must have relatively free access to settings where ideas may be exchanged in order for the expression of opinion to have any real impact. Indeed, the Supreme Court has acknowledged the use of public spaces,[8] leafletting,[9] and door-to-door canvassing[10] as traditional bulwarks of first amendment freedoms. Access to these avenues of communication is not as critical to an individual or corporation with the means to utilize more expensive channels such as the media to circulate their opinions.

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[8] *See* Hague v. CIO, 307 U.S. 496 (1939). Justice Roberts, in discussing the first amendment in public forums, stated: "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515.

[9] *See* Schneider v. State, 308 U.S. 147, 164 (1939) ("To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.").

[10] *See* Martin v. City of Struthers, 318 U.S. 141, 146-47 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people. Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society . . . it must be fully preserved.").

Accessibility is crucial, however, to the speaker who cannot afford other mediums of communication.[11]

Simultaneous developments in society and in federal constitutional law have made it increasingly difficult for the "little people" to be heard in any meaningful sense. In the decades since World War II, for instance, a growing percentage of Americans live in privately owned multiple-unit housing, such as apartments, planned retirement communities, nursing homes, and condominium complexes. From the point of view of the underfunded speaker seeking to disseminate ideas at these residences, the common denominator is that the speaker is not on "public" ground and, as a result, may not seek constitutional protection. Furthermore, in an ordinary residential neighborhood where the streets and sidewalks are publicly owned, an individual occupant may effectively exclude communication with a "no canvassing" sign.[12] A would-be speaker seeking to communicate with multiple-unit residents, moreover, may be barred by the policies of the owner of the complex unless specifically invited in by a tenant.[13]

Another significant development confronting the individual speaker is the proliferation of privately owned shopping malls. As early as 1973, statistics revealed that 13,240 shopping centers existed in the United States.[14] Currently, there are 25,000 such centers and 1,000 new malls are being built each year.[15] Shopping centers are not solely a dense collection of stores. In many ways, they replace typical downtown shopping areas and provide a great variety of facilities, including moviehouses, libraries, gymnasiums, post offices, banks, restaurants, and even churches. Malls also mimic urban life by offering a setting for city-like social interaction. The benches, walkways, fountains, and other pleasant surroundings in shopping malls encourage people to shop, stroll, relax, and meet other people. The vast array of goods and services together with the enclosed, climate-controlled ambience, suggest to the consumer that, in the mall, he or she might be conveniently placed to carry on nearly all of the essential and nonessential activities of life.

The shopping mall, therefore, is an excellent arena for the

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11 *See id.*

12 *Id.* at 147 n.12.

13 *See* Commonwealth v. Richardson, 313 Mass. 632, 48 N.E. 2d 678 (1943).

14 *Shopping Center World*, Jan. 1973, at 27-30.

15 K. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

exchange of ideas and opinions. The Supreme Court seemed to adopt this view in 1968 when it decided *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[16] The *Logan Valley* situs was a large shopping mall located between a heavily traveled highway and another roadway.[17] In the process of upholding the constitutional right of union members involved in a labor dispute to picket a store in the mall, the Court likened the shopping center to the company town at issue in *Marsh v. Alabama*.[18] The *Marsh* case involved a Jehovah's witness who wanted to distribute religious literature on the sidewalk of a privately owned town where solicitation was forbidden.[19] Reasoning that "[o]wnership does not always mean absolute dominion,"[20] the *Marsh* Court held that the town functioned exactly as an ordinary municipality.[21] Moreover, the Court determined that private ownership of the town did not justify censorship of the free flow of information within its borders.[22] Reasoning by analogy, the *Logan Valley* Court held that property rights were outweighed by first amendment rights in the mall setting.[23] Writing for the *Logan Valley* majority, Justice Marshall initially found state action and stated that:

> the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town.[24]

In dictum, the *Logan Valley* majority also noted the migration of many Americans from the city to the suburbs and the "advent of the suburban shopping center."[25] The Court foresaw that, if store owners located in malls were able to exclude picketers, "[b]usiness enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by

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16 391 U.S. 308 (1968).

17 *Id.* at 310.

18 *Id.* at 316 (discussing Marsh v. Alabama, 326 U.S. 501 (1946)).

19 Marsh v. Alabama, 326 U.S. 501, 502-03 (1946).

20 *Id.* at 506.

21 *Id.*

22 *Id.* at 507-08.

23 *Logan Valley*, 391 U.S. at 319-21.

24 *Id.* at 319. Justice Marshall relied on the "public function" analysis enunciated in *Marsh*. *Id.*

25 *Id.* at 324.

creating a *cordon sanitaire* of parking lots around their stores."[26]

Only four years later, however, in *Lloyd Corp. v. Tanner*,[27] the Supreme Court held that antiwar demonstrators did not have a constitutional right to distribute leaflets in a shopping center since there was no relationship between their activity and the business in the mall.[28] Then, in *Hudgens v. NLRB*,[29] the Court explicitly overruled *Logan Valley* positing:

> that the property of a large shopping center is "open to the public," serves the same purposes as a "business district" of a municipality, and therefore has been dedicated to certain types of public use. . . reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.[30]

The "relatedness to use" distinction espoused in *Lloyd* would force the Court to treat labor speech differently from antiwar speech. This would amount to a content based restriction on speech, an absolute anathema under the first amendment.[31] As it becomes increasingly difficult for Americans to exchange ideas where they live and where they shop, the only other meaningful option, at least for ordinary citizens, is to exchange ideas where they work.

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26 *Id.* at 324-25.

27 407 U.S. 551 (1972).

28 *Id.* at 564-65, 570; *see also* L. TRIBE, *supra* note 1, at 1166 (discussing *Lloyd* in the context of *Logan Valley*).

29 424 U.S. 507 (1976).

30 *Id.* at 519 (quoting *Lloyd*, 407 U.S. at 568-69). In *Marsh*, the company town provided the "full spectrum of municipal powers and stood in the shoes of the State." *Lloyd*, 407 U.S. at 569. Evidently the shopping centers in the *Logan Valley* line of cases were merely places to shop and, therefore, there was no state action. *See id.* The *Marsh* public function doctrine has been carefully confined to activities exclusively performed by state governments. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159-63 (1978).

31 *See Hudgens*, 424 U.S. at 520. In other cases, the Supreme Court has further narrowed access to relatively inexpensive forums. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), for instance, a candidate for the state legislature wanted to campaign via public transit car advertisement cards. *Id.* at 299. The contract between the municipality and the corporation which managed advertising on the city's buses, however, prohibited all political advertising. *Id.* at 299-300. Mr. Lehman challenged this as a violation of his first amendment rights. *Id.* at 301. While the Court identified state action in this case, it held that limiting ads on public transportation was within the city's discretion, stating "[w]ere we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds and other public facilities immediately would become Hyde Parks. . . ." *Id.* at 304; *see also* Greer v. Spock, 424 U.S. 828 (1976) (disallowing political campaigning on unrestricted streets and parking lots at Fort Dix).

B. Meanwhile—"Commercial Speech"

In the 1886 case of *Santa Clara County v. Southern Pacific Railroad Co.*,[32] the Supreme Court found that corporations were "persons" for the purposes of the equal protection clause of the fourteenth amendment.[33] Subsequently, certain other constitutional rights were granted to corporations.[34] Thus, free speech rights of corporations have expanded during the last twenty years while there has been a diminishing ability of American citizens to amplify their opinions.

Until recently, the Supreme Court refused to apply first amendment protections to "commercial speech."[35] The Court had attempted to distinguish between the marketplace of ideas, where governmental restraint is rarely tolerated, and the marketplace of goods and services, where government regulation may be tolerated.[36] This distinction was repudiated, however, in the 1976 case of *Virginia State Board v. Virginia Citizens Consumer Council, Inc.*[37] There, the Court deemed a state law which prohibited drugstores from advertising prices unconstitutional and held that speech does not necessarily lose all first amendment protection simply because it proposed a commercial transaction.[38] Apart from the advertisers' purely economic interest, the Court recognized the consumers' interest in hearing what the advertisers had

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[32] 118 U.S. 394 (1886).

[33] *Id.* at 396.

[34] *See, e.g.*, Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) (corporations protected against double jeopardy); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) (freedom of press applies to corporations); Hale v. Henkel, 201 U.S. 43, 76 (1906) (corporations protected from unreasonable searches and seizures); *but see* California Bankers Ass'n v. Schultz, 416 U.S. 21, 65 (1974) (corporations do not have privacy rights equivalent to individuals); Hale v. Henkel, 201 U.S. 43, 75 (1906) (privilege of self-incrimination does not apply to corporations).

[35] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects [sic] purely commercial advertising.").

[36] In *Valentine*, a New York City ordinance forbade advertising handbills in the public streets. *Id.* at 53. Advertisements may be labeled misleading, although they contain no false statements. Federal Trade Commission Act, Pub. L. No. 94-925, 90 Stat. 575 (codified as amended at 15 U.S.C. § 55 (1982)); *see also* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384-92 (1965) (demonstration of shaving cream's ability to soften sandpaper so it could be shaved found deceptive where plexiglass "mock up" was used for visual clarity). The federal government may also regulate advertising, for instance, by forcing the advertising company to display specific warnings. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 283 (codified as amended at 15 U.S.C. § 1333 (Supp. 1985)).

[37] 425 U.S. 748 (1976) [hereinafter *Virginia Pharmacy Board*].

[38] *Id.* at 761, 773.

to say.[39] The Court noted that "[the consumers] whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged."[40]

In *Virginia Pharmacy Board*, the Court appeared to link the "right to receive information and ideas" with values that underlie the first amendment, as if intelligent consumers were the functional equivalent of intelligent voters. The Court stated: "[a]nd if [the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."[41]

Two years after *Virginia Pharmacy Board*, the Supreme Court again struck down a state law on the ground that it violated the first amendment rights of a commercial speaker. In *First National Bank v. Bellotti*,[42] a Massachusetts statute made it a crime for a corporation to spend money to influence voters on issues that did not "materially affect" that corporation's business.[43] In addition, the statute specified that no law regarding taxation would "materially affect" a corporation.[44] The plaintiff bank wanted to publicize its opposition to a proposed graduated income tax and challenged the statute's prohibition as a violation of first amendment rights.[45] The *Bellotti* Court relied on its decision in *Virginia Pharmacy Board* and stated that the first amendment "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from

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39 *Id.* at 763-74.

40 *Id.* at 763.

41 *Id.* at 765. For a detailed criticism of *Virginia Pharmacy Board*, see Jackson & Jeffries, *Commercial Speech: Economic Due Process And The First Amendment*, 65 VA. L. REV. 1 (1979). The authors were concerned with the way the *Virginia Pharmacy Board* majority seemingly interfered with the legislative process in a *Lochner*-esque fashion, while claiming to be making first amendment arguments. Accordingly, the authors noted that:

> [e]ven if that tradition were to be revived, one would expect to find the constitutional safeguards of economic liberty to be housed within the flexible contours of due process of law. Instead, economic process is resurrected, clothed in the ill-fitting garb of the first amendment, and sent forth to battle the kind of special interest legislation that the Supreme Court has tolerated for more than forty years.

Id. at 30 (footnote omitted); *cf. Virginia Pharmacy Board*, 425 U.S. at 748 (Rehnquist, J., dissenting).

42 435 U.S. 765 (1978).

43 *Id.* at 767-68 (quoting MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977)).

44 *Id.* (quoting MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977)).

45 *Id.* at 770.

which members of the public may draw."[46] Writing for the majority, Justice Powell noted that the Massachusetts law curbed the type of exchange which was essential to democratic decision making.[47] Justice Powell further noted that, in this context, there was no reason to treat a corporation more harshly than an individual.[48] In support of this position, Justice Powell observed that there had been no showing that a corporate speaker's vast economic resources would cause its speech to drown out the speech of other individuals.[49] Moreover, Justice Powell noted that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."[50]

Justice White, joined by Justices Brennan and Marshall in dissent, asserted that corporate speech deserved less protection because it does nothing to further the important first amendment values of self-expression and fulfillment.[51] Furthermore, the dissent opined that there could be no unanimity among shareholders regarding political views; for example, they would only want to be represented by one voice on the issue of profits.[52] Therefore, Justice White concluded, when a corporation spends money to influence the public vote on political issues that have no material connection with its business, it necessarily uses corporate resources to express views with which shareholders may disagree.[53] The dissent also expressed its concern regarding "the special status of corporations [that] has placed them in a position to control vast amounts of economic power" and the danger of corporations "using that wealth to acquire an unfair advantage in the political process. . . ."[54] Justice White held that "[t]he state need not permit its own creation to consume it."[55]

In a separate dissenting opinion, Justice Rehnquist emphasized that states provide corporations certain blessings, such as potential perpetual life and limited liability.[56] Although this preferential treatment improves corporate profitmaking efficiency,

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46 *Id.* at 783.
47 *Id.* at 789.
48 *See id.* at 777.
49 *Id.* at 789-90.
50 *Id.* at 791.
51 *Id.* at 804-05 (White, J., dissenting).
52 *Id.* at 805 (White, J., dissenting).
53 *See id.* at 804-12 (White, J., dissenting).
54 *Id.* at 809 (White, J., dissenting).
55 *Id.*
56 *Id.* at 825-26 (Rehnquist, J., dissenting).

Justice Rehnquist noted that a special risk is created where an entity so empowered moves in the political, as opposed to the economic sphere.[57] The Massachusetts law, the Justice posited, was not a significant restriction on the free flow of information since "[a]ll natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity."[58]

Indeed, the dissenting opinions in *Bellotti* correctly perceived that the critical element for effective free speech is access to an audience. Corporate speech acquires a superior effectiveness compared to individual speech because the former can afford a vastly more expensive "megaphone." The issue then becomes one of amplification of ideas rather than the right to express ideas. The first amendment was never designed, and should not be used, to protect the rights of a small minority of American citizens acting through the "person" of a corporation to *amplify* their particular beliefs in such an omnipotent manner.[59]

III. Present Protections of First Amendment Rights in the Workplace

A. Public Employees

Since 1968, the first amendment has been interpreted to give public employees certain speech protections.[60] In *Pickering v. Board of Education*,[61] a public schoolteacher was fired for publishing a letter in the local paper that was critical of the Board of

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57 *Id.* at 826 (Rehnquist, J., dissenting).

58 *Id.* at 828 (Rehnquist, J., dissenting) (citation omitted).

59 *Bellotti* opened a "Pandora's Box" regarding freedom of speech. In Consolidated Edison Co. v. Public Service Comm'n., 447 U.S. 530 (1980), for instance, the commission's prohibition of propaganda regarding nuclear power in monthly bill statements was held to be a violation of the utility's first amendment rights. Similarly, in Central Hudson Gas & Electric Corp. v. Public Service Comm'n., 447 U.S. 557 (1980), an agency regulation which banned the utility's advertisements promoting the use of electricity also violated the first amendment. Justice Rehnquist, once again, was in dissent and stated: "[t]here is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that [Adam Smith's] invisible hand will always lead to optimum economic decisions in the commercial market." *Id.* at 592 (Rehnquist, J., dissenting) (citation omitted).

60 *See* Pickering v. Board of Educ., 391 U.S. 563 (1968). Before 1968, public employees had less protection than non-public employees. *See* Adler v. Board of Educ., 342 U.S. 485, 492 (1952) (people who sought public employment subject to "the reasonable terms laid down by the proper authorities [of the state]").

61 391 U.S. 563 (1968).

Education's allocation of funds to its athletic program.[62] Employing a balancing test, the *Pickering* Court stated that the employee's interest in free speech outweighed the employer's interest in running an efficient operation.[63] The *Pickering* test has been subsequently applied to private communications.[64]

The invocation of the *Pickering* test in the public workplace results in a tipping of the scales in favor of the employer because the expressive activity has more negative effects on close working relationships and the work environment in general.[65] Since employee statements on sensitive issues tend to disrupt the work atmosphere, the *Pickering* test may be applied to suppress such expression. Arguably, only relatively innocuous statements will be afforded protected status under the *Pickering* test. For example, when an air traffic controller was fired by the Federal Aviation Administration for making comments on television during the Professional Air Traffic Controller's Organization strike urging strikers to "[s]tay together, please, because if you do, you'll win," the potential of these remarks to cause controversy was used to uphold his dismissal.[66]

In 1983, a new component was introduced into the *Pickering* test when the Supreme Court decided *Connick v. Myers*.[67] The *Connick* Court held that employee speech must involve "matters of public concern" in order for the balancing test to be employed.[68] In other words, speech involving a mere intra-office problem is not protected by the first amendment. In *Connick*, Sheila Myers had distributed a questionnaire at her place of employment.[69] The circular inquired not only about internal matters, such as an office transfer policy, but also about external ones, including pressure that was put on employees to work on

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62 *Id.* at 566.

63 *Id.* at 568.

64 *See, e.g.*, Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1979).

65 Courts, however, have given considerable weight to public criticism of superiors. *See, e.g.*, Clark v. Holmes, 474 F.2d 928 (7th Cir.), *cert. denied*, 411 U.S. 972 (1973) (university professor discharged for complaining about administration and teachers to his students); Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir.), *cert. denied*, 412 U.S. 932 (1973) (university professor terminated for using "profane and obscene language . . . discredit[ing] the University administration and the governing board of the University").

66 Brown v. Department of Transp., 735 F.2d 543, 545, 548 (D.C. Cir. 1984).

67 461 U.S. 138 (1983).

68 *Id.* at 147.

69 *Id.* at 141.

certain political campaigns.[70] Ultimately, the *Connick* Court determined that the questionnaire was tinged with enough public interest to be examined under the *Pickering* test.[71] Prior to *Connick*, the Court had placed certain narrowly defined types of speech, such as obscenity and "fighting words," beyond the protective ambit of the first amendment.[72] In *Connick*, however, the Court acted unequivocally to create this new threshold requirement, noting that expression by public employees had only recently been embraced by its protections.[73]

B. National Labor Relations Act Protections

Employee speech is protected by Section 7 of the National Labor Relations Act (Act) when it involves "concerted activities" for worker "mutual aid or protection."[74] In *NLRB v. Mount Desert Island Hospital*,[75] Malachy Grange, a nurse, along with a number of his fellow employees, discussed their concerns about working conditions and managerial ineptitude.[76] Mr. Grange repeatedly made his superiors aware of these concerns.[77] Receiving no response, he wrote a letter detailing his complaints to the editor of a local paper.[78] Meanwhile, Mr. Grange resigned to pursue an advanced degree in nursing;[79] thereafter, he reapplied for a job

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70 *Id.*

71 *Id.* at 149. As the Court applied the *Pickering* test, however, it found that the questionnaire was not of "substantial" concern to the public, so the state's burden in justifying Myers's dismissal was lessened. *See id.* at 149-50. Since the questionnaire disrupted close working relationships, her dismissal was justified. *See id.* at 151-52.

72 *Id.* at 147 (citations omitted).

73 *See id.* at 144.

74 National Labor Relations Act, ch. 372, 61 Stat. 152 (codified as amended at 29 U.S.C. §§ 151-68 (1982)). The Act states in pertinent part: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Worker rights to free speech are considered so "fundamental" that they may not be bargained away by union negotiators. NLRB v. Magnavox Co., 415 U.S. 322 (1974). Although "concerted activity" once applied only to disputes between the actual employee and employer at hand, recent case law indicates that concerted activity includes speech aimed at improving the circumstances of a group of employees. *See, e.g.*, Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (Section 7 protection covers union newsletter that criticized Presidential veto of increase in federal minimum wage).

75 695 F.2d 634 (1st Cir. 1982).

76 *Id.* at 636.

77 *See id.*

78 *Id.*

79 *Id.*

at the hospital and discovered that he was blacklisted.[80] Grange challenged his employer's actions, and the First Circuit ruled that Grange's workmates had been drawn into the matter both before and after his letter was printed; therefore, Grange's efforts qualified as "concerted activity" and thus were protected.[81]

In order to trigger the protections of the Act, worker speech must be either entwined with worker group action or involve preparation for such action.[82] In *Mushroom Transportation Co. v. NLRB*,[83] for example, where an employee was in the habit of talking to other employees in order to advise them of their rights as delineated in their bargaining agreement, the Third Circuit held the activity was not "concerted."[84] The court noted this was not group action, nor was it preparation for group action; rather, in the court's opinion, this was mere griping and the speech was not protected by the Act.[85]

Even where employees behave in a concerted fashion, however, their activities may not be protected if they are viewed as "disloyal." In *NLRB v. Local Union No. 1229, International Brotherhood of Electric Workers*,[86] strikers at a broadcasting company distributed leaflets attacking the company's programming as substandard and amateurish.[87] The Supreme Court held that these attacks were unrelated to labor conditions and, as a result, did not qualify as protected activities.[88] In its reasoning, the Court noted "[t]here is no more elemental cause of discharge . . . than disloyalty."[89]

In subsequent decisions, courts have determined disloyalty by examining a variety of factors, including the reasonableness of the means chosen to express opinion.[90] In sum, though certain

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80 *See id.* at 636-37.

81 *Id.* at 639-42.

82 *See, e.g.*, NLRB v. Buddies Supermarket, Inc., 481 F.2d 714 (5th Cir. 1973).

83 330 F.2d 683 (3d Cir. 1964).

84 *Id.* at 684-85.

85 *Id.* at 685. In addition, in order to qualify for protection under Section 7, the employer must be *aware* of the concerted activity. NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977).

86 346 U.S. 464 (1953).

87 *See id.* at 467-68.

88 *Id.* at 476-77.

89 *Id.* at 472.

90 *See* Abilities & Goodwill, Inc. v. NLRB, 612 F.2d 6 (1st Cir. 1979) (employee strike over firing of high-ranking manager). Where employee speech or protest needlessly tarnishes the employer's image, or "unfair[ly] inflict[s] economic harm," it will not be protected. *See* Sullair P.T.O., Inc. v. NLRB, 641 F.2d 500 (7th Cir. 1981) (employees obscene language and disruptive behavior); National Vendors v.

employee speech in the workplace may theoretically be protected by the Act, in reality such expression may often be unprotected.

C. *Common Law Protection: The Public Policy Exception to Employment-At-Will*

To what extent does the common law protect free speech activity in the workplace? Among the non-unionized private sector, the doctrine of employment-at-will mandates that, in the absence of a contract for a specific duration, an employee may be fired "for good cause, for no cause or even for cause morally wrong."[91] Recently, scholars have criticized this general rule rather harshly[92] and its effect has been ameliorated by the willingness of some courts to find an implied or express promise to fire only for just cause[93] or to find an implied covenant of good faith and fair dealing in contracts of employment.[94] In addition, in cases involving expressive activity at work, employees have made successful claims under the rubric of the tort of wrongful discharge by alleging that they have been fired in circumstances which contradict sound public policy.[95]

The problem with employing the tort of wrongful discharge, however, is the unevenness of court decisions interpreting public policy.[96] One commentator has described the decisions as "ad hoc judgment[s] uninformed by detailed examination of the merits of drawing the line in one place rather than in another . . .

NLRB, 630 F.2d 1265 (8th Cir. 1980) (employee conducted disruptive meeting in company cafeteria).

91 Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884). The origin of the employment-at-will doctrine in the United States is attributed to Horace Wood through his treatise, THE LAW OF MASTER AND SERVANT (1877). *See also* Comment, *Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis*, 16 SETON HALL L. REV. 465, 467-71 (1986) (tracing development of rule).

92 *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

93 *See, e.g.*, Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985).

94 *See, e.g.*, Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 772 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

95 *See, e.g.*, Petermann v. Local 396, Int'l Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

96 *See* Note, *supra* note 92, at 1949.

[creating] an unpredictable and sometimes counterintuitive pattern of holdings."[97] Most courts will look to statutory law in order to determine whether or not they are confronting a clearly mandated public policy. Courts differ widely, however, as to which statutes should be applicable. In some states, the public policy exception is only triggered when an employee is fired in retaliation for exercising a statutorily created right directly related to employment such as filing a worker's compensation claim.[98] This was the limited view embraced by the Texas Court of Appeals in *Maus v. National Living Centers, Inc.*[99]

In *Maus*, a nursing aid repeatedly complained to her superiors about substandard care of patients in the nursing home where she had been an excellent employee for thirteen years.[100] The employee was subsequently fired in retaliation.[101] Thereafter, Maus commenced an action against the nursing home contending that her termination was illegal. In her complaint, Ms. Maus cited a Texas statute which created a duty for nursing home personnel to report abuse and neglect cases to the appropriate state authorities.[102] In holding for the defendant employer, the court noted that the Texas Legislature did not create a remedy for employees who were fired as a result of attempting to follow the statute.[103] The court posited, however, that a cause of action would exist against an employer guilty of "discharging or discriminating against an employee who proceed[ed] under the Texas Worker's Compensation Act."[104]

In contrast, some courts have found public policy concerns implicated when an employee is expected to ignore, or even to cooperate in, violations of a statute. Jurists in these jurisdictions are uncomfortable with the situation where an employee must choose between the proverbial "rock" of being fired and the "hard place" of having to participate in an employer's illegal scheme. Employees speaking out against such a scheme are

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97 *Id.*

98 *See, e.g.*, Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980); Gil v. Metal Service Corp., 412 So.2d 706 (La. App. 1982). Some jurisdictions simply refuse to recognize a cause of action for wrongful discharge based on the public policy exception to employment-at-will. *See, e.g.*, Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130 (Ala. 1977).

99 633 S.W.2d 674 (Tex. Ct. App. 1982).

100 *Id.* at 675.

101 *Id.*

102 *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 4442c § 16 (Vernon 1982)).

103 *Id.*

104 *Id.* at 677 n.2 (quoting TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1982)).

often categorized as "whistleblowers." In *Harless v. First National Bank*,[105] a bank consumer credit department manager was dismissed for reporting illegal overcharging practices by his employer to the authorities, which resulted in an audit and investigation.[106] Acknowledging the important public policy of consumer protection, the court allowed the employee to state a cause of action because "[s]uch manifest public policy should not be frustrated by . . . [injury to the person] who seeks to ensure that compliance is being made. . . ."[107]

Similarly, in *Petrick v. Monarch Printing Corp.*,[108] a vice-president of finance discovered a "discrepancy" of $130,000 in the defendant's corporate records, which he later identified as misconduct that had possible state criminal law implications.[109] Upon reporting his findings to the president of the corporation, the employee was terminated.[110] Thereafter, the employee instituted suit claiming retaliatory discharge.[111] In holding in favor of the employee, the Appellate Court of Illinois acknowledged the nationwide increase in "judicial receptivity" toward recognition of the public policy exception.[112] Moreover, the court noted that since this action involved "something more than an ordinary internal dispute between an employee and his employer," public policy supported the employee's communication of the discrepancy.[113]

Consistency is a chimera, however, even regarding whistleblowers with considerable power and responsibility. The Eighth Circuit, for instance, affirmed a summary judgment ruling for the employer in *Percival v. General Motors Corp.*[114] In that case, the plaintiff was a mechanical engineer and an executive who had worked for General Motors for over twenty-five years.[115] Mr. Percival claimed that he was fired for complaining about General Motors' deceptive practices, for refusing to submit false information to a government regulatory agency, and for attempting to

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105 246 S.E.2d 270 (W. Va. 1978).
106 *Id.* at 272.
107 *Id.* at 276.
108 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982).
109 *Id.* at 503, 444 N.E.2d at 589.
110 *Id.*
111 *See id.*
112 *Id.* at 505, 444 N.E.2d at 590.
113 *Id.* at 508, 444 N.E.2d at 592.
114 539 F.2d 1126 (8th Cir. 1976).
115 *Id.* at 1127.

correct certain misrepresentations made to the government.[116] Ironically, the plaintiff's status gave even more weight to defendant's interests, according to the court, because "a large corporate employer such as General Motors . . . must be accorded wide latitude in determining whom it will employ and retain in high and sensitive managerial positions particularly where developments in the field of mechanical engineering are involved."[117]

When employees are complaining about unethical practices rather than actual illegalities, they are no longer seen as caught between the "rock" and "hard place." Instead, they often are viewed as nuisances or troublemakers. An employer's right to employee loyalty thus becomes a countervailing public policy consideration. The majority of whistleblowers—those who speak out regarding mere matters of conscience—are not protected under the public policy exception.[118]

Another approach to recovery for "wrongful" discharge under public policy is to identify a constitutional basis. In *Novosel v. Nationwide Insurance Co.*,[119] for example, the plaintiff was a district claims manager who refused to join in the lobbying efforts of his employer to support a proposed No-Fault Reform bill.[120] As a result, he was fired.[121] The Third Circuit upheld Mr. Novosel's claim for wrongful discharge under the public policy exception.[122] In analogizing the private employment at issue to public employment, the court stated:

> An extensive case law has developed concerning the protection of constitutional rights, particularly First Amendment rights, of government employees. As the Supreme Court has commented . . . "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."[123]

The *Novosel* court determined that public policy concerns were

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116 *Id.* at 1128.

117 *Id.* at 1130.

118 *See, e.g.*, Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (salesman unprotected when warning supervisors about unsafe product).

119 721 F.2d 894 (3d Cir. 1983).

120 *Id.* at 896. Prior to his termination, Mr. Novosel was "one of three candidates for the position of division claims manager." *Id.*

121 *Id.*

122 *Id.* at 900.

123 *Id.* at 899 (citations omitted).

reflected in the free speech provisions of both the federal and state constitutions.[124] Not every jurisdiction, however, has adopted the Third Circuit's reasoning. For example, in *Chin v. American Telephone & Telegraph Co.*,[125] the plaintiff alleged that he was fired from his position at American Telephone & Telegraph as a result of his arrest following a political demonstration.[126] The New York Supreme Court refused to recognize a cause of action for wrongful discharge and reasoned that the "[p]laintiff herein has not sufficiently demonstrated that public policy, derived from or bottomed on New York constitutional, statutory or decisional law, exists that would restrict the right of a private employer to discharge an employee at will due to the employee's political beliefs, activities and associations."[127] Similarly, in Wisconsin, although public policy may be expressed through constitutional free speech protections,[128] employees claiming wrongful discharge on this theory have been unsuccessful.[129]

Perhaps the constitutional route to public policy has had limited success due to an argument posited by Judge Becker of the Third Circuit. Although Judge Becker was not on the panel that decided *Novosel*, he dissented from the denial of a petition for rehearing en banc.[130] Judge Becker stated that the *Novosel* decision applied the first amendment while ignoring the state action requirement.[131] Consequently, he did not believe that the private employer should be put under constitutional constraints in this manner.[132] If Judge Becker's assertions are valid, then it would be objectionable to allow the "public policy against government interference with free speech of government employees [to] be readily extended to private actors. . . ."[133]

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124 *Id.* at 898-99.

125 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (N.Y. Sup. Ct. 1978).

126 *Id.* at 1072, 410 N.Y.S.2d at 740.

127 *Id.* at 1075, 410 N.Y.S.2d at 741; *see also* Edwards v. Citibank, N.A., 100 Misc. 2d 59, 418 N.Y.S.2d 269 (N.Y. Sup. Ct. 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1980) (bank employee fired for bringing to superiors' attention illegal foreign currency manipulation practices).

128 Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 573, 335 N.W.2d 834, 840 (1983) ("the provisions of the Wisconsin Constitution initially declared the public policies of this state. Each time the constitution is amended, that also is an expression of public policy.").

129 *Id.* at 574, 335 N.W.2d at 840-41; *see also* Harman v. La Crosse Tribune, 117 Wis.2d 448, 344 N.W.2d 536 (1984).

130 *See Novosel*, 721 F.2d at 903 (Becker, J., dissenting from denial of petition for rehearing).

131 *Id.*

132 *See id.*

133 *Id.*

D. *State Constitutional Interpretation: Circumventing the State Action Requirement*

The Supreme Court has found state action when there is a sufficient interconnection between a private entity and government to constitute a "symbiotic relationship."[134] In the years since this approach was introduced, however, the nature of the symbiotic relationship has been refined in such a way as to limit its applicability to private employers.[135] At present, very few private employers would be bound by the constraints of the first and fourteenth amendments under any of the various state action theories.[136]

As ultimate interpreter of constitutional guarantees, the Supreme Court establishes minimum standards which must be met. State courts may not give their citizens less rights, but they

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[134] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). State action may also be found when the state permits shopping mall owners to make use of criminal trespass laws to exclude would be speakers. *See* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L. Q. 375, 412 (1958).

[135] In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Supreme Court required the showing of a "nexus" between a utility's interrelatedness with the government and the actions challenged by the plaintiff to establish state action. *Id.* at 351. A private entity is engaged in a "public function" only if the activity it performs is traditionally the exclusive prerogative of the state. *Id.* at 352. The following courts have used the *Jackson* standard to find no state action: Yiamouyiannis v. Chemical Abstracts Serv., 578 F.2d 164 (6th Cir.), *cert. denied*, 439 U.S. 983 (1978) (chartering of corporation by Congress not enough to establish state action); Avallone v. Wilmington Medical Center, 553 F. Supp. 931, 933-35 (D. Del. 1982) (hospital's receipt of medicare/medicaid money, licensing by state, and fact that it was regulated by state did not amount to state action); Heiskala v. Johnson Space Center Fed. Credit Union, 474 F. Supp. 448, 451-52 (S.D. Tex. 1979) (no "nexus" created between firing of employee and federal bylaws controlling credit union employee termination, since plaintiff was not dismissed under those bylaws); Johnson v. Southwest Detroit Community Mental Health Serv., 462 F. Supp. 166, 167, 171 (E.D. Mich. 1978) (no symbiosis or "nexus," although non-profit agency received 90% of its income from government, enjoyed state tax benefits, and was subject to extensive regulation); Edwards v. Citibank, N.A., 100 Misc. 2d 59, 60-61, 418 N.Y.S.2d 269, 270 (1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1980) (no state action although bank was regulated by state).

[136] Although the Supreme Court has taken several routes to state action, it has failed to develop any clear rules on the subject. The Court itself has acknowledged the problem: "[t]his Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations." Reitman v. Mulkey, 387 U.S. 369, 378 (1967). Moreover, one commentator has described the state action cases as "a conceptual disaster area." Black, *The Supreme Court, 1966 Term—Foreward: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

may, under our system of federalism, provide more protection.[137] In a number of recent decisions, state courts interpreting their state constitutions have provided more civil protection rights than the Supreme Court.[138]

The first amendment is one area where a few states have chosen to circumvent federal minimum standards. In some cases, courts have utilized linguistic differences between their first amendments and the federal counterpart. Instead of merely forbidding governmental interference, forty-three state constitutions create an affirmative right to free speech.[139] The text of the New Jersey guarantee, for example, states in pertinent part:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.[140]

The New Jersey Constitution also specifically protects individuals' right to assemble and provides that:

> The people have the right freely to assemble together, to consult for the common good to make known their opinions to their representatives and to petition for redress of grievances.[141]

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137 *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

138 *See, e.g.*, Reeves v. State, 599 P.2d 727 (Alaska 1979); Ravin v. State, 537 P.2d 494 (Alaska 1975); Dupree v. Alma School Dist., 279 Ark. 340, 651 S.W.2d 90 (1983); Santa Barbara v. Adamson, 27 Cal.3d 123, 610 P.2d 436 (1980); State v. Nelson, 354 So.2d 540 (La. 1978); State v. McGann, 124 N.H. 101, 467 A.2d 571 (1983); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982); In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); In re Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983) (en banc); Peters v. Narick, 270 S.E.2d 760 (W. Va. 1980).

139 *See, e.g.*, ALA. CONST. art. I, § 4; ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; ARK. CONST. art. II, § 6; CAL. CONST. art. I, § 2(a); COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 4; FLA. CONST. art. I, § 4; IDAHO CONST. art. I, § 9; ILL. CONST. art. 1, § 4; IOWA CONST. art. I, § 7; KAN. BILL OF RIGHTS, § 11; KY. BILL OF RIGHTS, § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. DECLARATION OF RIGHTS, art. 40; MASS. CONST. art. LXXVII; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.J. CONST. art. I, ¶ 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 20; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; VT. CONST. ch. I, art. 13; WASH. CONST. art. I, § 5; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20; *cf.* DEL. CONST. art. I, § 5. Although the text of the Delaware provision protects only freedom of the press, the Delaware courts also have construed it to protect speech. State v. Ceci, 255 A.2d 700 (Del. Super. Ct. 1969).

140 N.J. CONST. art. I, ¶ 6.

141 *Id.* at ¶ 18.

Arguably, the opportunity for more generous protection of expressive activity exists through state courts and state constitutions. The validity of this approach was affirmed in *PruneYard Shopping Center v. Robins*.[142] In *PruneYard*, a group of high school students peacefully distributed pamphlets on shopping center property and solicited signatures for a petition protesting a United Nations resolution against Zionism.[143] The students were ejected from the property by security guards enforcing the policies of the shopping center.[144] Thereafter, the students instituted an action seeking to enjoin the shopping center from denying them access to the premises.[145] Ultimately, the California Supreme Court held that the California Constitution protected both speech and petitioning, reasonably exercised, despite the fact that the shopping malls are privately owned.[146] The decision was then appealed to the United States Supreme Court.

The Supreme Court, speaking through Justice Rehnquist, affirmed the state court decision.[147] Justice Rehnquist distinguished *Hudgens*[148] and noted that the Court's past decisions do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[149] The Court further noted that the student demonstrations on the private property did not amount to a "taking" under the fifth or fourteenth amendments because their presence would not curtail the use or value of the property.[150]

Similarly, in *Alderwood Associates v. Washington Environmental Council*,[151] the Washington Supreme Court upheld the free speech rights of environmentalists petitioning in a shopping mall.[152] The Supreme Court of New Jersey also adopted the *PruneYard* Court's reasoning in *State v. Schmid*.[153] In *Schmid*, the court upheld the free speech rights of a member of the United States Labor Party to dis-

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142 447 U.S. 74 (1980).
143 *Id.* at 77.
144 *Id.*
145 *Id.*
146 *Id.* at 78.
147 *Id.* at 88.
148 *See supra* notes 29-30 and accompanying text.
149 *PruneYard Shopping Center*, 447 U.S. at 81 (citation omitted).
150 *Id.* at 83.
151 96 Wash.2d 230, 635 P.2d 108 (1981) (en banc).
152 *Id.* at 246, 635 P.2d at 117.
153 84 N.J. 535, 423 A.2d 615 (1980).

tribute political literature on the campus of Princeton University.[154]

The vast majority of state courts remain unimpressed with the idea of allowing textual distinctions to have consequences upon the rights of property ownership. If courts decide to examine their state charters at all, most will construe these clauses *in pari materia* with the first amendment.[155] For instance, the Supreme Court of North Carolina recognized that it could have protected the solicitation of signatures in the parking lot of a large shopping center under the state constitution; however, the court simply stated "we are not so disposed."[156]

Although state courts may adopt the *PruneYard* approach for raising the federal "floor," the state action requirement is nevertheless an obstacle to according constitutional protection. A concurring justice in *Alderwood* observed that elimination of the state action requirement would allow Washington courts to intervene in a host of private activities on constitutional grounds.[157] State courts, however, need not abandon state action in order to interpret their constitutions more broadly than Supreme Court adjudications.[158] Yet, this is the path that has most frequently been chosen by state courts. Consequently, state court justices may shy away from such analysis since the logical ramifications of such action appear overwhelming.[159]

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154 *Id.* at 560-64, 423 A.2d at 628-30; *see also* Cologne v. Westfarms Ass'n., 37 Conn. Supp. 90, 442 A.2d 471 (Conn. Super. Ct. 1982) (shopping center could not prevent plaintiffs from soliciting signatures in support of proposed federal equal rights amendment); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981) (private college could not prevent defendants from distributing pamphlets outside campus building normally held open to public).

155 *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1419 (1982).

156 State v. Felmet, 302 N.C. 173, 178, 273 S.E.2d 708, 712 (1981); *see also* Woodland v. Michigan Citizens Lobby, 128 Mich. App. 649, 341 N.W.2d 174 (1983).

157 *Alderwood*, 96 Wash.2d at 250-51, 635 P.2d at 119 (Dolliver, J., concurring) ("this is the first time the court has held the Declaration of Rights in our constitution is designed not just to protect the individual from government but that it may also be used by one individual against the other. It is constitution-making by the judiciary of the most egregious sort.").

158 Comment, *State Constitutional Rights of Free Speech on Private Property: The Liberal Loophole*, 18 GONZ. L. REV. 81, 94 (1982).

159 Often state courts are so uncomfortable with trying to reconcile private property interests and free speech interests that they prefer to avoid, if possible, carving out their holdings in constitutional stone. For example, the New Jersey Supreme Court, in State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971), found that journalists had the right to visit migrant workers in a privately owned agricultural camp by interpreting the common law of real property, rather than by handling the constitutional claim. *Id.* at 302-03, 277 A.2d at 371-72. Similarly, a New Jersey court used the common law duty of innkeepers to serve without discrimination in ruling

Several commentators advocate that state constitutional provisions are the best means to protect privately abridged speech.[160] This mechanism, however, may not be the most desirable approach, especially when expressive activity takes place at a work site. Without exception, the state courts that have been willing to use their constitutions "expansively" were careful to note that the challenged activity was carried on peaceably and in a way which was not disruptive of the private owner's business. In *PruneYard*, for example, the Court noted that the high school students who had set up a card table in a corner of the mall's central courtyard were involved in a "peaceful and orderly" activity which "was not objected to by PruneYard's patrons."[161] Similarly, in *Alderwood*, the court stated that the environmentalists conducted themselves in a "nonobstructive manner" and "no one allege[d] that [they] annoyed or harassed the patrons of the mall or in any way interfered with business activities."[162] Furthermore, in *Schmid*, " 'there [was] no indication that [defendants'] activities in any way . . . disrupted the regular and essential operations of the University. . . .' "[163] When this approach is implemented at the workplace, however, the expression of opinion could much more frequently be viewed as "disruptive." If state courts are deciding whether or not to apply their own constitutional protection to speech based largely upon whether or not that speech seems to "make waves," then the much heralded state constitutional route will tend to aid the expressive activity that is least in need of rescue. That is, the more popular, bland, or peaceful message, whose transmittal causes less uproar, may result in that expression being protected, while more abrasive or uncommon opinions which may stir emotions, will not be protected.

In *Schmid*, the New Jersey Supreme Court stated that "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property."[164] The *Schmid* court delineated three factors which are to be used in determining whether or not the state constitution requires owners of private property to permit citi-

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against a gas station owner who refused to serve a motorist with a peace symbol bumper sticker on his car. Streeter v. Brogan, 113 N.J. Super. 486, 274 A.2d 312 (Ch. Div. 1971).

160 *See, e.g.*, Richards, *Raising the Banner of States' Rights to Prevent Private Abridgment of Speech*, 23 AMER. BUS. L.J. 155 (1985); Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980).

161 *PruneYard Shopping Center*, 447 U.S. at 77.

162 *Alderwood*, 96 Wash.2d at 233, 635 P.2d at 110.

163 *Schmid*, 84 N.J. at 565-66, 423 A.2d at 631 (citation omitted).

164 *Id.* at 562, 423 A.2d at 629.

zens reasonably to exercise their rights of speech and assembly. According to the court, the factors are:

> (1) the nature, purposes, and primary use of [the] private property, generally, its "normal" use,
> (2) the extent and nature of the public's invitation to use that property, and
> (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.[165]

Writing for the *Schmid* court, Justice Handler determined that, even if private property is available for these expressional purposes, reasonable restrictions may nevertheless be placed on the challenged activity. Thus, the three part analysis is to be used only to decide whether the state constitutional umbrella can be opened at all and not to decide how far to open it.

After the New Jersey Supreme Court enunciated the tripartite *Schmid* test, the Superior Court of New Jersey, Chancery Division, decided *Bellemead Development Corp. v. Schneider*.[166] In *Bellemead*, the plaintiffs were owners of property within the privately owned Meadowlands Corporate Center (Center), a complex which consisted of several office buildings, an athletic club, a car dealership, a hotel, and a number of warehouses.[167] The defendants were a group that sought to unionize certain workers employed within the plaintiff's buildings.[168] On eight different occasions, the defendants waited by the buildings, without permission, and distributed leaflets.[169] The plaintiffs instituted an action seeking to enjoin the defendants from trespassing.[170]

Analyzing the facts in the light of *Schmid*, the court first looked at the "normal" use of the property.[171] Private business transactions were being conducted at the Center, usually by appointment, with clients of the many corporate tenants.[172] Thus, the primary use was not public.[173] As for the extent of the public's invitation, the court observed that visitors were required to identify themselves and to state their business at an entry checkpoint.[174] This was not

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165 *Id.*, 423 A.2d at 630.
166 193 N.J. Super. 85, 472 A.2d 170 (Ch. Div. 1983).
167 *Id.* at 90, 472 A.2d at 173.
168 *Id.* at 91, 472 A.2d at 173.
169 *Id.*
170 *Id.*
171 *Id.* at 94-95, 472 A.2d at 175.
172 *Id.*
173 *Id.* at 95, 472 A.2d at 175.
174 *See id.* at 96, 472 A.2d at 176.

the equivalent welcome that a shopping mall, for instance, extends to all persons.[175] The court next examined the relationship between "the purpose of the expressional activity" and the use of the property—the third factor in *Schmid*.[176] While the owner argued that unionizing efforts were contrary to the employers' interests, the court stated that "*Schmid* directs [us] to look to whether the expressional activities are discordant with the use of the property and not whether they are discordant with the owner's desires or interests."[177] The court further reasoned, however, that office workers were necessary to conduct business, and the defendants were trying to organize the workers. Thus, the court concluded that "[t]he relationship between the use and the expressional activities could not be closer and the court finds nothing incompatible with the two."[178]

In the absence of any guidance from *Schmid* as to how to weigh the three factors, however, the court found that the first two favored the property owner and that the second was the most important of the three factors.[179] As a result, the court granted the injunction.[180] The *Bellemead* case is an example of how, even in a jurisdiction expressing willingness liberally to employ its own constitutional provisions, expressive activity at a workplace may be left unprotected.

IV. State Action and the First Amendment in the Workplace

A. Weaknesses in the Public/Private Distinction

The argument that state action must always be present in order to activate free speech protection is weak in a number of respects, especially regarding an employee who is fired for expressing an opinion. In *New York Times Co. v. Sullivan*,[181] the Supreme Court recognized for the first time that first amendment concerns were involved when the common law doctrine of libel became a weapon for public officials to recover large, chilling recoveries against the press.[182] Under *New York Times* and its progeny, public officials must prove actual malice in order to recover damages in defamation, since the founding fathers considered the "right of free public discussion of the stewardship of public

175 *Id.* at 95, 472 A.2d at 175.
176 *Id.* at 98, 472 A.2d at 177.
177 *Id.*
178 *Id.*
179 *Id.*
180 *Id.* at 100, 472 A.2d at 178.
181 376 U.S. 254 (1964).
182 *See id.* at 256.

officials" fundamental to our system of government.[183]

Although *New York Times* was a civil action between private parties, state action was implicated because the power of the state supported the defamation attack.[184] It made no difference to the *New York Times* Court that government was giving teeth to a common law principle instead of to an actual statute. The Court posited: "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has been exercised."[185]

Arguably, an analogy to the private employment context seems inappropriate, since in *New York Times* the "bad guy," in terms of first amendment abridgment, was the plaintiff, whereas, when a dismissed worker sues, it is the defendant employer who is the "bad guy." Moreover, under *New York Times*, a damage-seeking party employs the common law of defamation to constitutional effect. In the workplace scenario, the defendant is often accused of abusing the common law theory of employment-at-will. In both situations, however, a principle of common law has the effect of silencing opinion. It is interesting that the Supreme Court made a similar analogy when it first granted protection to the speech rights of public employees. In *Pickering*,[186] the Court stated: "[w]hile criminal sanctions [for criminal defamation] and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."[187]

There are a number of cases in which first amendment concerns have been used to justify control of private behavior. As in the employment context, the defendant in these cases is the constitutional "bad guy." In *Zelenka v. The Benevolent and Protective*

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183 *Id.* at 275.

184 *Id.* at 265.

185 *Id.* (citations omitted). In expression-based actions, however, the media need not always be the defendant, and defamation need not always be the theory of recovery. In NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), for example, a group of white owned businesses were not permitted to recover damages for losses caused by NAACP organized boycotts. In *Claiborne*, state action was implicated when the private litigant employed state rules in a constitutionally restrictive manner. *Id.* at 916 n.51.

186 391 U.S. 563 (1968); *see also supra* notes 61-63 and accompanying text.

187 *Pickering*, 391 U.S. at 574. The *Pickering* Court held that malice must be proved by the public employer in order to justify the discharge just as malice must be proved by a public official in a case of defamation brought against the media. *Id.* at 573.

Order of Elks,[188] for example, a member of the Elks objected to an organization rule which confined membership to white male citizens.[189] He published a letter in a newspaper urging against racial restriction, and he was later expelled for not submitting this letter to the Grand Exalted Ruler for approval in accordance with Elk policy.[190] The court reinstated the plaintiff to membership, and stated:

> There is probably no right more fundamental to the liberties of the people and to the successful functioning of the democratic system than that of individual freedom of expression.
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> The public policy undergirding the principle of free discussion of issues of such broad public interest . . . entirely independently of its constitutional sanction in respect of state abridgment, appears to us to far outweigh the private interest of defendants in restricting public discussion. . . .[191]

Similar cases have involved free speech in opposition to union policies.[192] One commentator, who analyzed judicial control of private organizations, noted that judicial intervention is most justified when the group sanctions effectively impair an individual's performance of either a duty or function that the state normally relies on individuals to perform.[193]

An argument can be made that the private/public distinction is increasingly inappropriate due to the tremendous power that is wielded by the large private corporations in American society.[194] That these giant "persons" have enormous political and social influence is a fact that has been noted and analyzed for decades.[195] Commentators have viewed large corporations as governments

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188 129 N.J. Super. 379, 324 A.2d 35 (App. Div. 1974).

189 *Id.* at 381, 324 A.2d at 36.

190 *Id.*

191 *Id.* at 386-87, 324 A.2d at 38-39.

192 *See, e.g.*, Dudek v. Pittsburgh City Fire Fighters, Local No. 1, 425 Pa. 233, 228 A.2d 752 (1967); Spayd v. Ringing Rock Lodge No. 665, 270 Pa. 67, 113 A. 70 (1921).

193 *See Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963). Similar cases involve the triggering of due process concerns when members of professional organizations are expelled. *See, e.g.*, Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 526 P.2d 253 (1974) (en banc) (rejection from private organization of orthodontists).

194 For a series of articles on the public/private distinction in American jurisprudence, see *Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

195 *See, e.g.*, A. BERLE, THE THREE FACES OF POWER (1967); R. BRADY, BUSINESS AS A SYSTEM OF POWER (1943); R. HARRISON, PLURALISM AND CORPORATISM (1980); G. MCCONNEL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966); R. NADER & M. GREEN, CORPORATE POWER IN AMERICA (1973).

themselves; yet, such entities are basically unaccountable to their constituents—the shareholders. One scholar aptly noted: "[t]he official doctrine that the corporate directors are responsible to the stockholders is so irrelevant as to be ridiculous. The directors are, if reality is considered, effectively responsible to management, and management tends to be self-perpetuating."[196] Although the power of government is constitutionally limited by the system of checks and balances, federalism, the Bill of Rights, and the electoral process, the power of private industry, in the opinion of many, is unchecked and unresponsive to either its shareholders or the general public.[197]

As long ago as 1877, the Supreme Court acknowledged that there might be reason to curb corporate behavior where it affects public interest when it upheld rate regulation of grain storage warehouses that were a virtual monopoly.[198] This particular route to control of private enterprise, however, was never fully developed by the Court.[199] Instead, the Court entered an era in which legislative attempts to limit the power of private industry were often struck down as violations of substantive due process.[200] Thereafter, the ownership of productive power in America grew and became increasingly concentrated. From 1880 to 1920, there was a rapid consolidation of corporate power because of several developments, including the growth of vertical and horizontal corporate mergers and the use of trusts and holding companies.[201] By 1937, 394 corporations, or less than one-tenth of one percent of all corporations reporting for federal tax purposes, owned about fifty-two percent of all corporate assets.[202] Concurrently, the proportion of Americans dependent on wages from these companies grew. For instance, between 1860 and 1920, non-agricultural employment rose from forty-one percent to seventy-three percent of all gainful employment.[203] In addition, an ever increasing percentage of people

196 G. MCCONNEL, *supra* note 195, at 250 (footnote omitted).

197 *See, e.g.*, Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility—Product and Process*, 30 HASTINGS L.J. 1287 (1979).

198 Munn v. Illinois, 94 U.S. 113 (1877).

199 For an exception to this principle, see the Railroad Commission Cases, 116 U.S. 307 (1886).

200 *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

201 *See* A. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 285-376 (1977).

202 FINAL REPORT AND RECOMMENDATIONS OF THE TEMPORARY NATIONAL ECONOMIC COMMITTEE, S. DOC. NO. 35, 77th Cong., 1st Sess. 11 (1941).

203 *See* E. KIRKLAND, A HISTORY OF AMERICAN ECONOMIC LIFE 485 (1933).

worked for the few largest companies.[204]

Typically, the work situation is controlled by the employer. In most cases, the employer has the right to dismiss an employee without justification at any time. Technically, the employment-at-will rule also permits the employee to quit for no good reason.[205] In practical terms, however, job loss is harder on the employee than on the employer. It often involves loss of both seniority and pension benefits as well as the intangible hardships associated with obtaining another job. There are additional means by which the employer exercises power over the employment relationship. The use of locker searches, polygraph tests, drug testing, and various other forms of surveillance, for example, provide employers with an unprecedented ability to monitor their workers.[206]

There are those who believe that the only meaningful response to the power of private industry in our society is to "constitutionalize" the large corporation; that is, to hold it constitutionally accountable in the same way the government is held accountable.[207] Under this theory, state action would be an obsolete consideration, and the first amendment would automatically be triggered when a large corporate employer silenced an employee by firing him or her. While this approach appears attractively simple, it is clearly not going to be adopted soon, if ever, by the elected representatives of the American people.

B. A Recommended Solution

A legislative attack on the problem of the power of private employers to infringe upon employee free speech has commenced. In October of 1983, the following law was passed in Connecticut:

> Any employers including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4, or 14 of article first

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204 Hayes, *Twenty Five Years of Change in the Fortune 500*, FORTUNE, May 5, 1980, at 88.

205 See *supra* notes 91-95 for a discussion of the employment-at-will doctrine.

206 Commentators, however, have noted that certain employer actions constitute invasions of worker privacy. *See, e.g.*, F. DONNER, THE AGE OF SURVEILLANCE (1980); D. EWING, FREEDOM INSIDE THE ORGANIZATION 128-38 (1977); Bazelon, *Civil Liberties—Protecting Old Values in the New Century*, 51 N.Y.U. L. REV. 505 (1976); Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1, 28-64 (1977).

207 Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539 (1960).

> of the constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.[208]

It is noteworthy that the Connecticut statute protects expressive activity as long as it does not "substantially and materially" affect the worker's performance on the job or the working relationship between the worker and the employer. The law, however, does not concern itself with whether or not the expressive activity affects other organizational interests, such as its public image.[209] In addition, the enactment does not address the content of the employee's speech; there are no exceptions for speech which turns out to be false or malicious.[210] Although other jurisdictions make it a crime for an employer to retaliate against an employee for involvement in political activity[211] and others legislatively protect "whistleblowers,"[212] no other law exists in America which is founded squarely on first amendment values.

Connecticut's statute, grounding employee protection in both the federal and state constitutions, is similar to the Third Circuit's approach in *Novosel*.[213] The legislation is also unique in that it unequivocally eliminates the public/private distinction because it applies to "any employer." Thus, private employers cannot argue that state action is necessary. In addition, governmental immunity

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208 CONN. GEN. STAT. ANN. § 31-51q (West 1986).

209 *Cf. supra* notes 86-90 and accompanying text (discussing "disloyal" exception to protected activity under the National Labor Relations Act).

210 In this aspect, Connecticut's Legislature is aligned with the policy recently adopted by the American Civil Liberties Union regarding the free speech rights of corporate employees. *See* "Policy on Free Speech Rights of Corporate Employees," American Civil Liberties Union Board Meeting, March 3-4, (adopted March 9, 1979) (Revised June, 1986).

211 *See, e.g.*, MINN. STAT. ANN. § 210A.14 (West Supp. 1987).

212 *See, e.g.*, Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 895 (codified at 29 U.S.C. § 140 (1982)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1602 (codified as amended at 29 U.S.C. § 660(c) (1982)). States have equivalent laws protecting whistleblowers. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.362 (West Supp. 1987) (making it a crime to fire employee reporting violations of state employee safety codes).

213 *See supra* notes 119-24 for a discussion of the *Novosel* opinion.

would not shield public employers; thus, recent limitations on public employee speech need not affect workers in Connecticut.

Connecticut has adopted an approach that other jurisdictions would do well to follow. As noted, the judicial response to the problem of first amendment rights in the workplace has been either to exacerbate it or to alleviate it tentatively and unevenly. While the federal judiciary continues to develop the corporate free speech doctrine, it nevertheless maintains the state action barrier against vindication of private employee speech rights. Although state courts remain free to interpret their state constitutions more liberally, few have chosen this option in the context of the private workplace. Other decisional approaches, such as the public policy exception to employment-at-will, have been used with great gingerliness, if at all, by courts across the country. Connecticut's legislative approach alleviates these concerns and establishes clear and definite sanctions for any infringement.

V. CONCLUSION

Considering the shrinking access to alternative forums for expressing ideas, the workplace has become an even more crucial arena for expressive activity. In fact, as relatively inexpensive and attainable forums for the exchange of ideas continue to be "privatized," free speech mediums have become an endangered species. In light of this trend, courts must recognize that first amendment principles require protection whether it is a public or a private organization that is preventing the full exercise of these rights. The best way to protect first amendment values is to preserve the private workplace as a forum for the direct exchange of ideas among ordinary Americans. Although cumbersome and painstaking, legislative reform is the most appropriate tool for the task.