Do Corporate Rights Trump Individual Rights? Preserving an Individual Rights Model in a Pluralist Society

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Government employees — public employees — who engage in expressive activities cannot be sanctioned or terminated due to the free speech protections of the First Amendment. However, non-government employees — private employees — do not receive First Amendment protection because of the state action doctrine. Instead these employment relationships are governed by the at-will doctrine, the presumption that — barring a contractual agreement — the nature of an employment relationship can change at any time for any reason. This Note argues that in the context of large corporations, the First Amendment, not the at-will doctrine, should control for three reasons. First, to the extent that corporations have rights, they exist because individuals have decided to exercise their rights for a common purpose and, thus are derivative of individual rights. Second, private corporations should be considered state actors because the government provides incorporation statutes and other corporate governance mechanisms that allow small firms to become large corporations, giving them the leverage to fire employees for engaging in expressive speech. Third, the at-will doctrine, in the context of employee free speech, is outdated. This reasoning is supported by the Supreme Court's decisions in Burton v. Wilmington Parking Authority *and* Norwood v. Harrison*, and it is consistent with the proper role of the federal courts in the American constitutional structure. Even if a finding of state action is unwarranted, these argu-*

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ments provide a policy basis for statutory and common law reforms to protect employees' free speech rights.

I. INTRODUCTION

While the First Amendment protects the free speech and association rights[1] of public employees,[2] it does not protect these same rights for private employees.[3] This is because the state action doctrine, shields private persons, including corporations,[4] from having to comply with the Constitution.[5] Instead, private employment relationships are generally governed by the at-will doctrine: the presumption that, barring a contractual agreement, an employment relationship can end at any time for any reason.[6] Consequently, private employers can terminate their employees for engaging in speech that is protected by the First Amendment. Recently, a Google employee was fired for speculating online about his employer's finances, and a flight attendant for Delta was fired for posting online a provocative picture of herself in her uniform.[7] In another example, an ambulance service fired a medical technician for criticizing her supervisor on Facebook.[8] As the

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1. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668 (1996); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

2. Public employees are employees of public employers such as federal, state, or local governments. Private employees are employees of private employers, non-governmental entities such as IBM, Sony, or Ford. *See infra* notes 76–77 and accompanying text.

3. *See, e.g.*, Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453 (2008); Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149 (2005); Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996); Laura B. Pincus & Clayton Trotter, *The Disparity Between Public and Private Sector Employee Privacy Protections: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 AM. BUS. L.J. 51 (1995); James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235 (2007); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825 (1998).

4. *See infra* note 97.

5. *See infra* note 97; *see also*, Wilborn, *supra* note 3.

6. 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2010). A corollary is that either party in an at-will employment relationship may change its terms at any time for any reason, though the other party may then end the relationship instead of assenting to the change.

7. Joel Roberts, *Fired for Blogging*, CBS NEWS (Mar. 7, 2005), *available at* http://www.cbsnews.com/stories/2005/03/07/tech/main678554.shtml.

8. In a controversial decision, the National Labor Relations Board held that the employer's actions were illegal under the National Labor Relations Act, which prevents employers from firing their employees for discussing working conditions or unionization.

basis for disparate treatment of public and private employees is seriously flawed in the context of corporations, this Note argues the First Amendment should protect employees of corporations.[9]

Conventional constitutional thought suggests that corporations are private actors, and, thus, the state action doctrine shields them from constitutional strictures.[10] However, in the context of employment decisions, the public-private distinction has been extensively criticized for allowing big business to suppress employee liberty interests.[11] Such criticism is appropriate. For one, the distinction ignores the fact that in at least one circumstance, the law treats corporations as state actors.[12] This is particularly evident as employees with equal bargaining power are generally protected.[13] In addition, it fails to recognize the important role the government plays in providing corporations with the resources necessary to attain their size and power as well as the significant limitations corporations impose on an employee's right to engage in off-duty speech.[14] Furthermore, as the above examples of employees being fired demonstrate, the ability of employers to fire their employees for engaging in off-duty speech is particularly acute today, when technological developments allow employers greater access to the private lives of their employees.[15]

There are three reasons the First Amendment should protect the employees of large corporations. First, requiring state action ignores the fact that the Constitution is a compact between individual citizens, represented by their states, and the federal government.[16] This implies that the rights of corporations — and

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Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES, Nov. 9, 2010, at BU1.

9. For the purposes of this Note, a large corporation is one that has developed leverage over its employees as a result of the corporate law mechanisms afforded to it by state and federal law. For further discussion on this point, see *infra* Part III.B, note 199.

10. *See, e.g.*, San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542–44 (1987) (the Court, in dicta, presumed without discussion that a corporation was not a state actor).

11. *See, e.g.*, *supra* note 3.

12. State courts will subject corporations to mandamus, an extraordinary writ usually reserved for public officials. *See, e.g.*, *infra* note 151.

13. *See infra* note 72 and accompanying text.

14. By off-duty speech, this Note refers to speech made when not discharging the duties required by employment.

15. Estlund, *supra* note 3; Wilborn, *supra* note 3.

16. *See infra* Part III.A.

other groups — are derived from and subsidiary to the rights of individuals. Second, it incorrectly views the state as a neutral party in employment contracts. In an effort to improve economic productivity, government — at both the state and federal levels — has empowered employers through legal devices, such as the right of incorporation. Although this aid has allowed companies to compete effectively in a complex international economy and presumably improved overall societal productivity, it has generally allowed employers to develop greater leverage in employment negotiations.[17] Third, the at-will doctrine, in the context of free speech rights, is outdated. In modern American society there is a greater need for a zone of independent thought, where individuals are free from the invasiveness of society.[18] In response, tort law, contract law, statutes, and the First Amendment have carved out a number of exceptions to the at-will doctrine.[19]

Moreover, when understood in the context of the line of decisions stemming back to *Reid v. Covert*,[20] the Supreme Court's decision in *Burton v. Wilmington Parking Authority*[21] offers an appropriate and principled basis for finding state action in employment decisions by large corporations without subjecting every corporate decision to constitutional requirements.[22] Alternatively, the same principles that support extending First Amendment protections to private employees also justify new statutes or state common law developments to protect employees' free speech and association rights.[23] To be clear, this Note does not argue that corporations are "bad." Indeed, in America's interdependent modern society, large corporations play an essential role in effectively mobilizing economic and social resources. This Note merely argues that the unique legal status of a corporation vis-à-vis an individual warrants the constitutional protection of the expressive activities of corporate employees.

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17. Many states have right to work laws that make the formation of labor unions difficult. *See* Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and Its Implications for Public Policy*, 70 U. COLO. L. REV. 871, 928–31 (1999).

18. *See infra* Part III.C.

19. *See infra* Part II.

20. 354 U.S. 1 (1957).

21. 365 U.S. 715, 723–24 (1961).

22. *See infra* Part IV.D.

23. *See infra* Part III.

Part II of this Note provides an overview of the at-will doctrine and how the common law, statutes, and the First Amendment already limit it. Part III explains why the law should reject the distinction between the free speech rights of public and private employees. Finally, Part IV argues that the state action doctrine should not bar the application of the First Amendment to private employment decisions.

II. THE CURRENT LAW OF EMPLOYEE LIBERTY

Currently, private employment relationships are governed by the at-will doctrine.[24] The breadth of the exceptions to the at-will doctrine, combined with the weight of critical commentary,[25] demonstrates the extreme unease many feel in applying the doctrine today. Part II.A begins with a discussion of the at-will default rule. Parts II.B–II.D examine how tort law, contract law, statutes, and the First Amendment have come to limit the doctrine's effect. Part II.E describes the state action requirement, an important limit on the First Amendment.

A. THE AT-WILL DOCTRINE

The at-will doctrine is a default rule supplied by the common law.[26] Every state applies the doctrine in some form except Montana,[27] which requires termination to be for "good cause."[28] In its pure form, the at-will doctrine allows an employer to terminate or sanction an employee at any time for any reason — even if arbitrary or capricious — without penalty.[29] Horace Gay Wood, a late-nineteenth-century legal scholar, provided the most famous articulation of the rule in his 1877 work, *A Treatise on the Law of Master and Servant*, in which he wrote:

> [T]he rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will. . . . It is competent for either

24. *See supra* note 3.
25. *See, e.g.*, *supra* note 3.
26. 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2010).
27. Bales, *supra* note 3, at 459.
28. *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2007).
29. 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2010).

> party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party . . . .[30]

As Wood's description suggests, the at-will status of an employment relationship is subject to contractual modification.[31]

It is unclear how the at-will doctrine became the dominant common law default rule.[32] Prior to its widespread acceptance in the late nineteenth century, employment law was unsettled. While some courts applied a version of the at-will standard,[33] many courts rejected it and applied the traditional English rule[34] that employment contracts should last for one year.[35] Nevertheless, Wood's articulation of the rule was extremely influential.[36] Soon after its publication, many state courts of last resort

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30. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 272 (1877).

31. Bales, *supra* note 3, at 458–59. Courts, however, have held that a valid employment contract could not protect the employee's job for an indefinite period of time. *Id.* at 458–59 (citing Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minn. 1936) (holding that an employee could be terminated despite the fact that the employment contract stated that the position was "permanent" and that, in consideration for accepting the job, the employee had expressly rejected other offers and purchased his supervisor's house)).

32. *See* Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 91–94 (1996) (arguing that Horace Wood's account of employment law as at will was not the original source of the rule).

33. *See, e.g.*, *id.* at 102–03.

34. The English rule, as described by Blackstone, prevented opportunism. *See* Bales, *supra* note 3, at 456; Deborah A. Ballam, *The Traditional View on the Origins of the Employment-At-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1, 2 (1995). It prevented employers from firing their employees at the end of the harvest, when it would be extremely difficult to find employment. Bales, *supra* note 3, at 456. At the same time, it prevented employees from quitting during the planting and harvesting season, which they could threaten to do to force higher wages. *Id.* Not surprisingly, the shift from the English rule occurred during the late nineteenth century, when the Industrial Revolution was fundamentally reshaping the American economy, causing many workers to leave agriculture to enter the industrial workforce. *See* Ballam, *supra* note 32, at 93–94 (sketching and criticizing this conventional model of the development of at-will employment).

35. Bales, *supra* note 3, at 456–57.

36. Bales, *supra* note 3, at 458.

adopted Wood's standard[37] until it eventually became the dominant rule.[38]

The at-will doctrine serves a number of functions. It simultaneously allows employers to fulfill their shifting labor needs and employees to leave jobs they find unsatisfactory. While this right of exit produces a great deal of uncertainty, both parties are free to contract around the uncertainty. It ensures that American courts do not meddle in private business affairs and reduces litigation. Finally, it is an easy rule to administer.

B. COMMON LAW EXCEPTIONS

Beginning at least as early as 1959, courts used tort and contract law to carve out exceptions to the at-will rule. Unlike the First Amendment protections of the *Pickering-Connick* test,[39] these exceptions apply to private employees and protect them from a number of abuses, not just impositions on free speech. While not all states recognize these exceptions to the same extent, the unwillingness of courts to apply the at-will doctrine in its most stringent form demonstrates that it is inconsistent with modern understandings of employee rights.

1. *Tort Law Exceptions*

Tort law provides several important employee protections. One significant example is a termination in violation of public policy. The exception has generally been applied only to matters of "public concern."[40] Reasons for termination that most commonly trigger the exception are an employee's refusal to commit an unlawful act[41] or an employee's performance of a public duty such as jury duty or a deposition.[42] Some states recognize a broader

37. *See* Martin v. N.Y. Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (endorsing Wood's rule as "correc[t]," consistent with Arkansas, Missouri, and Wisconsin).

38. Bales, *supra* note 3, at 458.

39. *See infra* Part II.D.

40. Mark E. Brossman et al., *Beyond the Implied Contract: The Public Policy Exception, the Implied Covenant of Good Faith and Fair Dealing, and Other Limitations on an Employer's Discretion in the At-Will Setting*, *in* HANDLING WRONGFUL TERMINATION CLAIMS 7, 49 (PLI Litig. & Admin. Practice Course, Handbook Series, 2001).

41. *Id.* at 52–53.

42. *Id.* at 55–56.

exception that includes protection for whistleblowing[43] or an employee's exercise of legal rights, such as participation in political speech or refusal to take a polygraph test.[44]

The scope of the exception varies from state to state depending on the public policies adopted by the state and the willingness of a state's courts to rely on non-constitutional or statutory legal sources.[45] The most conservative courts only recognize those public policies expressly stated with sufficient particularity in a statute or constitution, while more progressive courts require less particularity and refer to case law, administrative decisions, and non-governmental sources such as professional codes.[46] Despite this disparity, every state except Alabama, Georgia, and New York recognizes some form of the public policy exception as a valid basis for limiting the at-will doctrine;[47] those three states view it as a question better suited for the legislature.[48]

The tort of intentional infliction of emotional distress also protects employee rights. However, case law suggests courts have only applied it in a limited category of cases where the treatment was draconian or was an extreme invasion of privacy.[49] For example, in a case involving employees stealing from a restaurant, the manager ordered the servers into a room, organized them in alphabetical order, and began firing them until the server who was stealing admitted to it.[50] Another example involved a K-Mart customer who accused the checkout attendant of stealing. When the male manager could not find the money at the register, he forced the female attendant to strip to her underwear in a bathroom in front of a female assistant manager and the female customer.[51]

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43. *Id.* at 62–65.
44. *Id.* at 57–61.
45. *Id.* at 19–21, 49–50.
46. *Id.* at 21–35.
47. *Id.* at 17–18.
48. *Id.*
49. Bales, *supra* note 3, at 459.
50. Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976).
51. Bodewig v. K-Mart, Inc., 635 P.2d 657 (Or. Ct. App. 1981).

2. *Contract Law Exceptions*

Contract law also provides an important protection in the doctrine of implied contract. Courts have found implied contracts where oral promises or formal employee policies, such as those stated in employee handbooks, have caused employees to believe they were not at risk of losing their job.[52] Courts may require employers to demonstrate cause in these situations.[53] However, many employers have been able to avoid implied contract liability by adding written disclaimers to their employee handbooks.[54]

Another contract principle courts have applied is the implied covenant of good faith and fair dealing.[55] However, courts rarely apply this principle to the termination of at-will employees.[56] This reticence stems from contract law's focus on the objective expectations of both parties.[57] If the law presumes both parties enter the employment relationship on the assumption that firing an employee for bad reasons is acceptable, an employer does not act in bad faith by actually firing an employee for a bad reason.[58]

C. STATUTORY AND STATE CONSTITUTIONAL EXCEPTIONS

The judiciary is not the only branch to have responded to the harshness of the at-will doctrine. To remedy some of the draconian effects of the at-will doctrine, state legislatures and Congress have enacted a variety of statutes to protect employee liberty. Montana enacted the most comprehensive rejection of the at-will doctrine when it passed the Wrongful Discharge from Em-

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52. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 383–88 (Cal. 1988); *see also* E. ALLAN FARNSWORTH, CONTRACTS § 7.17 (4th ed. 2004); Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 67 (2008).

53. *See* FARNSWORTH, *supra* note 52, § 7.17; *see also* Porter, *supra* note 52, at 67.

54. *See* E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 62 (6th ed. 2001); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 195 (2007).

55. *See* FARNSWORTH, *supra* note 52, § 7.17; *see also* Porter, *supra* note 52, at 67–68.

56. Porter, *supra* note 52, at 67–78; *but see* Wakefield v. N. Telecom, Inc., 769 F.2d 109 (2d Cir. 1985); Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

57. *See, e.g.*, Lucy v. Zehmer, 196 Va. 493 (1954).

58. *See* FARNSWORTH, *supra* note 52, § 7.17; *see also* Porter, *supra* note 52, 67–68.

ployment Act in 1987.[59] The Act allows employers to fire employees only for "good cause," which it defines as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[60]

Another important development was an amendment to the California Constitution. The word "privacy" was added to article I, section 1, so that the California Constitution now states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."[61] Although the protection applies to employment terminations,[62] it is not as comprehensive as that afforded by the First Amendment. Unlike the First Amendment, which protects the right of employees to engage in expressive activity in public, California's *privacy* provision protects only expressive activity that occurs outside of the public eye.[63]

Aside from these broad exemptions, most legislation that seeks to protect employee liberty interests targets specific problems with the at-will doctrine. There are several categories of legislation with this aim.[64] The first protects against discrimination. This category includes Title VII, which seeks to prohibit discriminatory employment practices that target "race, color, religion, sex, or national origin."[65] Following Title VII's enactment in 1964, Congress passed further legislation targeting discrimination based on age[66] and disability.[67] Similar legislation has been

59. 1987 Mont. Laws ch. 641, § 4 (codified as amended at MONT. CODE ANN. § 39-2-901 to -915 (2007)). The Act, however, limits the types of damages that can be claimed. MONT. CODE ANN. § 39-2-905 (2007).

60. MONT. CODE ANN. § 39-2-903(5) (2007).

61. CAL. CONST. art. I, § 1 (emphasis added). Before being amended in 1972, section 1 did not expressly state that privacy was a constitutional right. CAL. CONST. art. I, § 1 (amended 1972).

62. *See, e.g.*, Ortiz v. L.A. Police Relief Ass'n, 120 Cal. Rptr. 2d 670 (Cal. Ct. App. 2002).

63. *Id.* 676–81 (for a claimant to assert a constitutionally based right of privacy claim against a public or private entity, the claimant must demonstrate there was an "expectation of privacy").

64. Porter, *supra* note 52, at 68–70.

65. 42 U.S.C. § 2000e-2(a)(1) (2000).

66. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–34 (2010)).

enacted on the state level, which in some cases affords broader protection than federal law.[68] There is also whistleblower protection. All fifty states, as well as the federal government, have enacted whistleblower statutes.[69] These statutes aim to ensure employees report their employers' illegal activities, by preventing employers from firing them for such disclosures.[70]

In addition, Congress has also sought to protect the collective bargaining process. The National Labor Relations Act ("NLRA"), enacted in 1935, ensures that labor unions can collectively bargain with employers.[71] The collective bargaining process generally ensures employment contracts include "just cause" termination provisions.[72] These provisions typically prohibit termination decisions that are excessive, capricious, or discriminatory.[73] As a result, many unionized workers are able to protect their rights by contracting out of the at-will doctrine. In addition, in a controversial decision, the National Labor Relations Board has extended protections designed to allow employees to criticize their work environment to employees who publish criticism on the Internet.[74]

D. THE FIRST AMENDMENT EXCEPTION TO THE AT-WILL DOCTRINE

One of the most significant limits to the at-will doctrine is the First Amendment's protection of public employees engaging in expressive speech. These protections do not apply to private employees. Before 1968, there was little protection of government employee speech, as this speech was viewed as unworthy of protection.[75] In that year, the Supreme Court issued *Pickering v.*

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67. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

68. Porter, *supra* note 52, at 69.

69. *Id.*

70. *Id.*

71. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2010)).

72. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594 (1985).

73. *Id.* at 595.

74. *See supra* note 8.

75. *See* Connick v. Myers, 461 U.S. 138, 143–44 (1983); *see also* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1010–11 (2005); Law-

Board of Education, which extended free speech protections to both state and federal government employees,[76] eventually including independent contractors.[77] The subsequent case of *Connick v. Meyers* clarified *Pickering* and formalized a second element, the public concern test.[78]

Today, the *Pickering-Connick* test requires a government employee to satisfy two elements: a public concern test and a balancing test. First, the employee must demonstrate that his or her firing was a result of an expressive activity on a matter of public concern.[79] The "public concern" test ensures the speech at issue has significant First Amendment implications.[80] As the Court explained, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[81] The Court also noted that "the content, form, and context of a given statement"[82] are important to the inquiry, thereby making it fact-specific. Consequently, determining what constitutes a matter of public concern can be difficult.[83]

If an employee fails to satisfy the public concern test, the court will dismiss the action. If the employee succeeds, the court will move to the second element, which is to weigh the interests of the

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rence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 530 (1998); Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 945 (2001) ("Courts used to begin and end their analysis of public employee speech issues by treating the government like a private firm, free to set whatever restrictions it pleased on employee speech.").

76. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

77. Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668 (1996).

78. *Connick*, 461 U.S. at 143–49.

79. *Id.*

80. *Id.* at 143.

81. *Id.* at 146.

82. *Id.* at 147–48.

83. 63C AM. JUR. 2D *Public Officers and Employees* § 199 (2010). For example, the court used a broad definition of public concern in *Rankin v. McPherson*, holding that a private discussion in which an employee, in response to an assassination attempt on President Reagan, said, "If they go for him again, I hope they get him," was a matter of public concern. 483 U.S. 378, 380, 384–87 (1987). The Court used a narrow definition of public concern in *Garcetti v. Ceballos*, which held that a prosecutor's internal memorandum recommending the dismissal of a case due to government misconduct was not a matter of public concern. 547 U.S. 410, 420–25 (2006).

employee against those of the employer.[84] Justice Marshall, explaining how to perform the *Pickering* balancing test, wrote, "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[85]

Overall, the *Pickering-Connick* test provides significant protection for employee speech interests.[86] Courts have used the test to protect employees' liberty in a variety of cases.[87] However, the test faces significant criticism. First, the test is difficult for courts to apply, as it requires an "ad hoc, case-by-case balancing of governmental efficiency interests against employee speech interests."[88] Second, critics argue that the test does not adequately protect employee liberty interests; for one, it does not apply to private employees.[89] Additionally, it grants judges a great deal of discretion to balance the interests of the employer and the employee, meaning that judges, in a number of cases, have ruled against important employee liberty interests.[90]

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84. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

85. *Id.* at 568.

86. Arguably, Montana's rejection of the at-will rule in favor of a default "good cause" rule offers greater protection for employees than the *Pickering-Connick* test because it does not explicitly require a *Connick* public concern test.

87. *See, e.g.*, *Rankin*, 483 U.S. 378; Reuland v. Hynes, 460 F.3d 409 (2d Cir. 2006) (holding that a Brooklyn prosecutor who made a hyperbolic statement about Brooklyn's death rate was protected by the First Amendment); Yniguez v. Arizonans for Official English, 42 F.3d 1217 (9th Cir. 1994) (holding an Arizona law that banned government employees from speaking languages other than English was unconstitutional under *Pickering*), *reh'g en banc granted*, 53 F.3d 1084 (9th Cir.), *aff'd in part and rev'd in part*, 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 517 U.S. 1102 (1996), *vacated*, 520 U.S. 43 (1997) (case was vacated as moot); Childers v. Indep. Sch. Dist. No. 1, 676 F.2d 1338 (10th Cir. 1982) (a pre-*Connick* decision that held that a school could not decrease a teacher's pay because of his support of a teacher's union and of a candidate for the school board); Reidenbach v. U.S.D. No. 437, 912 F. Supp. 1445, (D. Kan. 1996) (finding that plaintiff bus driver had valid First Amendment claim where she asserted that her contract was not renewed when she complained that there were too many children on her bus, which posed a safety hazard).

88. Kozel, *supra* note 75, at 1017.

89. *Id.* at 1018–28.

90. *Id.*

E. THE STATE ACTION DOCTRINE AS A LIMIT ON THE FIRST AMENDMENT

The state action doctrine, which was formulated at least as early as the *Civil Rights Cases*, prevents the extension of First Amendment protections to private employees.[91] The doctrine limits the application of the First Amendment, and other constitutional provisions, to cases where federal, state, or local government is sufficiently involved in the challenged action. The doctrine is supported by two important considerations. First, there is strong textual evidence that the First and Fourteenth Amendments apply to government action and not to actions of private persons. The first Congress structured the First Amendment as a limitation on Congress alone, as evidenced by the language, "Congress shall make no law . . . ."[92] Similarly, the Fourteenth Amendment states, "*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the

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91. *See* The Civil Rights Cases, 109 U.S. 3 (1883). It could be argued that *Pickering* cannot be extended to private employees. From this perspective, public employees' speech is protected because public employees have intimate knowledge of the government, not because individuals should feel comfortable speaking without sanction. If *Pickering* is read narrowly, the presence of state action in private employment relationships is irrelevant. Because private employees do not have intimate knowledge of the government, their speech would not be valuable and worthy of protection. However, this narrower reading misinterprets the *Pickering* line of cases and the meaning of the First Amendment. The narrower reading contends that it is the fact that the government employee's speech is closer to the "truth" that justifies its protection. But the verity of an opinion is irrelevant to the First Amendment. As Justice Holmes stated in his dissent in *Abrams v. United States*:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct 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 . . . . That at any rate is the theory of our Constitution.

250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The truth of a statement cannot be determined in advance, but rather must be tested through its engagement with other ideas. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *see also* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990). Moreover, *Pickering* adopted this understanding of free speech. It stated the value of the speech is the need to protect a vigorous public debate. Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968). The fact that a government employee might have more information does not necessarily make his or her speech more valuable.

92. U.S. CONST. amend. I.

United States; *nor shall any State deprive* any person of life, liberty, or property . . . ."[93] To elucidate the standard, the Court has used the public-private distinction to differentiate between what is and is not state action.[94] In the context of race, the Court demonstrated the extremes of this distinction:

> On the one hand, the Fourteenth Amendment plainly prohibits a State itself from discriminating because of race. On the other hand, s 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections.[95]

Second, aside from the doctrine's strong textual basis, it encapsulates a fundamental tenet of American legal and political theory: the belief in a limited government and, its analog, the idea that in a free society, a citizen is free to live his or her life in a way that conflicts with the fundamental beliefs of the majority.[96]

III. THE TENUOUS PUBLIC-PRIVATE DISTINCTION

There are three problems with applying the state action doctrine's public-private distinction to corporate employees for the purposes of free speech and association rights. First, the U.S. Constitution is a compact between individuals, represented by their states, and the federal government. This implies that, to the extent corporations have constitutional rights, these rights are derived from individual rights and are subsidiary to them. Second, the distinction falsely presumes that the state is not involved in private employment contracts. This flawed premise ignores how state incorporation laws play a fundamental role in

93. U.S. CONST. amend. XIV, § 1, cl. 2 (emphasis added).

94. NCAA v. Tarkanian, 488 U.S. 179, 191 (1988); Jackson v. Metro. Edison Co., 419 U.S. 345, 349–50 (1974).

95. Adickes v. S.H. Kress & Co., 398 U.S. 144, 169 (1970).

96. *See* William P. Marshall, *Diluting Constitutional Rights: Rethinking 'Rethinking State Action*,' 80 NW. U. L. REV. 558, 560–61 (1985); Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 473 (2007) [hereinafter Rosen, *New Answers*]; *see also* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1066, 1066 n.50 (1998) [hereinafter Rosen, *Outer Limits*].

structuring the bargaining position of employers and employees. Third, the at-will doctrine conflicts with modern understandings of an individual's free speech and association rights.

A. INDIVIDUAL RIGHTS TRUMP CORPORATE RIGHTS

Under the Constitution, individual rights trump corporate rights.[97] The Constitution is a compact between the government and individual citizens,[98] not groups such as corporations.[99] Group rights are not granted independent protection; rather, they are derivative of an individual's right to associate.[100] As such, corporations are unable to invoke the right against self-incrimination,[101] nor are they entitled to vote. As Justice Scalia has explained:

> All the provisions of the Bill of Rights set forth the rights of individual men and women — not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak in association with other individual persons. . . . It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf.[102]

As will be demonstrated in Part III.A.2, this premise is consistent with Supreme Court practice.

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97. It is important to note that for the purposes of the Constitution's Due Process Clause, corporations are "persons." *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.15 (1978) (citing Cnty. of Santa Clara v. S. Pac. R. Co., 118 U.S. 394 (1886)). The argument in this section is that a corporation is in reality a group.

98. For an insightful discussion recognizing the distinction between an individual rights model and a group rights model (often referred to as "the pluralist model"), see Marke DeWolfe Howe, Foreword, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953). The author would like to thank Professor Monaghan for his guidance on this point.

99. For an extensive discussion of the Founders' view of corporations, see *Citizens United v. FEC*, 130 S. Ct. 876, 948–51 (2010) (Stevens, J., concurring in part and dissenting in part).

100. Justice Scalia appears to espouse this analysis, and Justice Stevens, at least in principle, appears to endorse it. *See id.* at 928–29 (Scalia, J., concurring), 951–52 (Stevens, J., concurring in part and dissenting in part).

101. Hale v. Henkel, 201 U.S. 43 (1906), *overruled on other grounds by* Murphy v. Waterfront Comm'n of N.Y., 378 U.S. 52 (1964).

102. *Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring).

Consequently, in the employment context, corporate assertions of the right to associate with the employee it chooses will give way when balanced against the individual's right to engage in speech.

1. *The Nature of Group Rights*

The fact that individual rights trump corporate rights does not mean that corporations or other groups have no rights. The existence of group rights is evident in several situations[103]: the right of corporations to participate in elections;[104] the right of religious groups to remove their children from public schools;[105] and the right to engage in commercial speech.[106] In all of these cases, the Court has accepted the premise that groups have constitutionally recognized rights.

Such rulings are not surprising. Unlike the Privileges and Immunities Clause,[107] which protects "citizens," the Due Process Clause[108] protects persons and, thus, protects a broader spectrum of entities.[109] The use of the term "persons" is significant as it is

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103. Historically, the rights of corporations and other unnatural entities were limited. Hague v. Comm. for Indus. Org., 307 U.S. 496, 527 (1939) (Stone, J., concurring) (citing Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); W. Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907)). As understood in this Note, group rights exist under the Constitution out of a practical necessity. Given the dynamics of modern society, if individual rights could not be exercised through the medium of groups, individuals could not influence society effectively. As future cases arise that require defining the scope of group rights, the inquiry should be whether such a right is practical and necessary for the effective exercise of individual rights.

104. *Citizens United*, 130 S. Ct. 876; First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (invalidating on First Amendment grounds a Massachusetts criminal statute that prevented corporations from making campaign contributions on matters unrelated to its business). For a discussion of the contentious nature of *Citizens United*, see Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html?nav=emailpage&sid=ST2010021702073; Adam Liptak, *A Rare Rebuke, In Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12.

105. Wisconsin v. Yoder, 406 U.S. 205 (1972).

106. In commercial speech cases, attempts to regulate the advertising rights of commercial enterprises in order to allow small businesses to have an opportunity to compete with larger commercial enterprises have been invalidated. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (unanimously invalidating on First Amendment grounds a statute that prohibited advertising the price of alcohol outside of liquor stores).

107. U.S. CONST. amend. XIV, § 1, cl. 2.

108. U.S. CONST. amend. V, XIV, § 1, cl. 2.

109. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 33–54 (1975).

well established that it includes groups, not just individuals.[110] The Court's construction of the Due Process Clause is appropriate. In modern society, groups facilitate the ability of individuals to participate in society in a politically and economically meaningful way. For example, civil rights activists can join groups such as the ACLU or the NAACP and be far more effective at delivering their message. From an economic perspective, the corporate structure is essential to deliver goods and services efficiently and to provide employment for vast segments of the population.

Given the modern paradigm, group rights are necessary for individuals to effectively influence society. Thus, the Constitution simply cannot protect individual rights while disregarding group interests. A pure individual rights model makes sense in the small New England town hall setting where each member of the community is able to directly offer a valuable perspective to the community. In such a setting, to give groups — which would be few in quantity and large in size — an equal status would effectively shut out the views of individuals. In the modern paradigm, however, the New England town has generally been replaced by the metropolis: a place with vast commercial and industrial interests, as well as important identity interests such as gender, race, religion, ethnicity, and sexual orientation. In such a setting, groups play a necessary role because individuals by themselves cannot effectively influence the community.

2. *Balancing Individual and Group Rights*

The issue becomes finding the appropriate balance between individual and group rights. The premise that individual rights trump corporate rights is generally consistent with Supreme Court practice. Precedents demonstrate that the group's right to engage in expressive association can only prevent an individual from participating in that group if two conditions are met: (1) the message is integral to the group; and (2) the individual has no adequate alternative means of expression.

In several cases, the Court has found that if the speech is not integral to the group, the individual's free speech rights will outweigh those of the group. For example, in two cases, the Su-

110. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

preme Court found an individual can be a member of a religion even if the member does not agree with important tenets of that religion.[111] It is also seen in the "union speech" cases. The Court has found in favor of the union's right to speak as long as the speech is integral to the union.[112] In these cases, employees made First Amendment challenges to the state's requirement that they pay fees to the unions that represented them.[113] The Court held that requiring these fees is constitutional as long as it is "germane" to a union's — and presumably the individual's — rational interest in having a collective bargaining agent.[114] However, the union's (i.e. the group's) right is trumped by the individual employee's right when the fee is "non-germane" (i.e. not integral).[115]

The "integral" requirement is also seen in cases where the court examined whether there is a compelling interest in protecting individual access to the group.[116] In *Roberts v. United States Jaycees*, the Court found that excluding women was not integral

111. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 832–34 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Thomas v. Review Bd. of the Ind. Emp't Sec. Div. 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensive to others in order to merit First Amendment protection.").

112. *See, e.g.*, Locke v. Karass, 129 S. Ct. 798, 803–04, 806 (2009); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Railway Emps. Dep't v. Hanson, 351 U.S. 225 (1956).

113. *See, e.g.*, *Locke*, 129 S. Ct. at 803–04, 806; *Lehnert*, 500 U.S. 507; Abood, 431 U.S. 209; Railway Emps. Dep't, 351 U.S. 225 (1956).

114. *See, e.g.*, Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Emps., 466 U.S. 435, 447 (1984).

115. *Id.*

116. The *Jaycees* cases involved suits by groups challenging the legality of state laws that allegedly limited their freedom to engage in expressive association, which forced the Court to examine whether the state's interest in protecting individuals outweighed the interests of the group. Roberts v. United States Jaycees, 468 U.S. 609 (1984). On their own, these cases only hold that the interests of the group can be outweighed in this specific context. It does not necessarily mean the First Amendment protects the individual's rights to assert that interest. However, this distinction may not be particularly important. Since *Ex parte Young*, the Court has departed from the traditional understanding that the Constitution was just a shield against government action, which meant the Constitution would only apply if the government brought a suit against the individual or if the individual could assert a right of action under the common law. 209 U.S. 123 (1908). In *Ex parte Young*, the Court found the Constitution created a right of action to challenge government action. *Id.* Thus, the Constitution became a sword with which plaintiffs could assert constitutional rights without asserting a right of action recognized by statute or common law. *Id.* For an informative discussion, see Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

to the Jaycees expressive activities.[117] In contrast, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[118] the Court found that the Boston St. Patrick's Day parade organizers' desire to express traditional family values was integral to the parade's message. Thus, the parade organizes could deny the participation of a group that supported the rights of gays, lesbians, and bisexuals.[119]

In other cases, the Court has intimated that even if the speech is integral to the group's message, the individual's right trumps a group's right if protecting the group's rights will leave the individual without an adequate alternative. In *Wisconsin v. Yoder*, the Court protected the group's right over that of the individual on the premise that the individual's interests were adequately protected.[120] The Court examined whether the Amish had the right to take their children out of public school at age fifteen, rather than at sixteen, the age allowed by the state.[121] Central to this case was the right of the family to decide the values of the child's upbringing versus the child's interests in having the capacity to choose whether or not to remain in the Amish community. The Court held that the family's right outweighed the individual right in this case.[122] It went out of its way, however, to note what would happen if the family's decision posed a significant detriment to the child's development.[123] The Court noted the outcome would be different

> if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly

117. 468 U.S. 609 (1984).
118. 515 U.S. 557 (1995).
119. *Id.* The Court has also found that preservation of a traditional family lifestyle was essential to the Boy Scouts' message and, thus, the Boy Scouts could discriminate on the basis of sexual orientation. Boy Scouts of America v. Dale, 530 U.S. 640 (2000). *See also* Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (arguing that there is no right of access in the small group setting).
120. 406 U.S. 205 (1972).
121. *Id.* at 207.
122. *Id.* at 219–29
123. *Id.* at 233–34.

> indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.[124]

Had the Court found that the Amish practice significantly threatened the interests of the child, it would have held the individual's interests trump the group's interests.

3. *The* Pickering *Balancing Test Would Adequately Protect a Corporation's Economic and Speech Rights*

It could be argued that subjecting corporations to the First Amendment would unduly interfere with their ability to pursue their economic and speech interests. This criticism is unjustified. If corporate employment decisions were subject to the First Amendment, *Pickering* analysis would apply.[125] In the event of such a development, this analysis would protect an employer's legitimate free speech interests. Those interests include the right to maintain its own beliefs on how best to run a business and the right to ensure employees carry out the values of the business when acting in their official capacity.[126] *Pickering* only prevents an employer from making employment decisions based on how employees express themselves when not engaging in work-related duties,[127] a concern that is not integral to the corporation's purposes.[128]

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124. *Id.* at 234.
125. *See supra* Part II.D.
126. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).
127. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
128. Determining the line past which a group's integral purpose is at stake has proven problematic for the courts in the context of public employees who are sanctioned for exercising their free speech rights. In my view, the courts have taken an improperly expansive view of what constitutes an employer's purpose. *See, e.g.*, Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007) (finding that a police officer's membership in a motorcycle gang interfered with his employer's purpose); Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006) (finding racist expressions by police and fireman at a parade interfered with their employer's purpose).

B. THE MISCONCEPTION OF GOVERNMENT NON-INTERVENTION

When a corporation fires an employee for engaging in protected off-duty speech, the effect on the employee's speech comes in two forms. The immediate effect comes from actually being fired for exercising those rights. The more subtle effect is the "chilling" it has on other employees who now know that if they say something controversial, it could result in a pink slip.

In most cases, the state presumably does not tell an employer whether to fire or retain an employee because of First Amendment issues. However, this Note argues the state has altered the natural bargaining relationship between employers and employees through state incorporation laws which provide employers with greater leverage over their employees. This argument makes three assumptions: (1) state incorporation laws are necessary for allowing small businesses to transform into large firms; (2) attaining large firm status is a significant factor in developing leverage over employees; and (3) once a firm develops leverage over employees, the power of employees to protect their free speech rights through negotiation is severely impeded.

The premise of the first assumption is that state incorporation laws are a necessary condition for businesses to develop the leverage they have over employees. This is not to say other factors do not affect the ability of a business to develop into a large firm. Strong management, valuable products and services, and economic conditions are certainly important. The argument is instead that even if all of those conditions existed, the overwhelming majority of firms — exceptions may exist — would not develop into the large regional, national, and multi-national firms that constitute a significant portion of employers in modern society.[129]

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129. While contracts can at times provide this same benefit, contracting is costly in terms of time and money and is generally not as effective as corporate governance norms in allowing the formation of corporations. *See* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985); *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); *but see* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). Easterbrook and Fischel argue that corporate law should emphasize the contractual nature of the relationship and use the law of contracts to resolve problems that arise within the firm by asking what the parties would have agreed to ex ante. EASTERBROOK & FISCHEL, *supra*. This approach cuts against the claim that the state is providing significant assistance to corporations, as it suggests the various agents involved will engage in

State incorporation laws provide two important developments to ensure that managers act in the best interests of the corporation.[130] These developments provide investors with the confidence necessary to invest in a business with the limited information they have about the firm's managers.[131] As a result, businesses have greater access to cheaper capital, which allows them to grow and expand.

What developments do state incorporation laws provide to create such investor confidence? They are at least two: limited liability and fiduciary duties. Limited liability ensures investors are only risking the money they have invested in the company and will not be responsible for any excess losses incurred by the business.[132] Meanwhile, the fiduciary duty imposed on the board of directors and corporate managers sufficiently ensures that the company will be operated for the corporate purpose rather than for directors' and managers' private benefit.[133] These two developments resolve the prisoner's dilemma that would otherwise exist between investors and the company's managers.[134] That is, they can alleviate the mistrust that might otherwise exist between managers and investors in order to allow for a relatively free flow of investment into the corporate structure.[135] They allow investors to not be concerned about being held personally liable for corporate misdeeds or about self-serving company managers using their investment for the managers' own purposes.[136]

Second, once a business has developed into a large firm, that status will provide important leverage over employees. This is not to say that other factors — such as the job market, the skill

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business activity on their own and without excessive state assistance. However, even from this normative perch, Easterbrook and Fischel would be hard pressed to claim corporations could and do exist as purely voluntary associations. In fact, they appear to concede that there is more to the corporation. As one commentator put it, "Easterbrook and Fischel do not bother to pursue the claim that corporate law is contractual at a deep structural level even when mandatorily phrased. It is just, they say, that the voluntary is more important than the mandatory to everyday operation and ultimate welfare." William W. Bratton, Commentary, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 191 (1992).

130. *See generally* Jensen & Meckling, *supra* note 129.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

required by the position, and the skill and experience of the employee — might not mitigate an employer's leverage over its employees. For example, during periods of low unemployment, employees may have some leverage as employers become desperate for workers. As an extension of this principle, certain highly specialized positions such as artisans, architects, doctors, or lawyers may have greater leverage than the average employee wields. There will also be individual employees who by virtue of their talents and long experience have a unique bargaining position. These qualifications, however, do not change the leverage attained by an employer as a result of its becoming a large firm.

Third, once a business becomes a large firm and attains leverage over its employees, employees are less able to protect their free speech rights. Once an employer has greater leverage, even effective employees can be replaced for engaging in behaviors the employer disfavors — such as controversial off-duty speech activities. If the bargaining imbalance is removed, employees have the capacity to protect their interests. For example, when unions negotiate employment contracts, they are able to protect their free speech rights, among other interests, by securing a requirement for "just cause" dismissals.[137] However, given the difficulties of unionizing[138] and the fact that unions arguably may not always serve the interests of its members,[139] the opportunity to form a union is not an adequate remedy for mitigating corporate leverage.

It is important to note that this is not an argument that state interference in private business affairs is improper. Rather, such interference has presumably been highly beneficial, for an efficient and effective use of capital as well as improved economic output. But, the involvement of the state has also caused an imbalance in the employment relationship, leaving employees unable to protect their First and Fourteenth Amendment rights through contract, as readily as they could in a traditional small-business economy. Without this freedom, individuals are less

137. *See* Holger & Shulman, *supra* note 17, at 929–99.

138. Many states have right to work laws that make the formation of labor unions difficult. *Id.* at 928–29. Furthermore, without similar rules assisting employees in forming groups, it is difficult for them to form groups to protect their interests.

139. *See supra* notes 112–115 and accompanying text.

able to effectively engage in self-government, something the Founders considered troubling.[140]

C. IN THE CONTEXT OF EMPLOYEE SPEECH AND ASSOCIATION RIGHTS, THE AT-WILL DOCTRINE IS OUTDATED AND DANGEROUS

In modern American society, the at-will doctrine has no place in governing employee free speech and association rights.[141] It is

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140. During the colonial and founding eras, freedom was irreparably linked to economic independence. ERIC FONER, THE STORY OF AMERICAN FREEDOM 9–10 (1998); PHILIP PETTIT, REPUBLICANISM (1997); Morton J. Horwtiz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 66–67 (1987). This theory was grounded in the idea that an individual who was subservient to another was unable to engage in self-government. FONER, *supra*, at 9. Eric Foner, a noted historian, suggests this proposition was, at the time, "axiomatic." *Id.* As Thomas Jefferson explained, dependence "begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 274–75 (London, John Stockdale 1787). This belief in the necessity of economic independence also explained the pervasiveness of stringent property rights as a prerequisite for voting rights. FONER, *supra*, at 9. Sir William Blackstone explained property requirement on the grounds that men without property would be "under the immediate domination of others." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Oxford, Clarendon Press 1775). Without economic independence, a citizen could not be trusted to assert his own political will, which could threaten the "general liberty." *Id.* Moreover, like many others of his generation, Jefferson believed that without economic resources an individual could not be free. FONER, *supra*, at 21. These requirements persisted into the early years of the American Republic. It was not until the early decades of the nineteenth century that efforts to democratize voting access eviscerated the belief that property — and thus economic independence — was a prerequisite to political participation. *Id.* at 51–52.

141. Richard Epstein critiques the application of the First Amendment to employment decisions. Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984). He argues that save for the standard contract exceptions of fraud and duress and a limited public policy exception, liberty is fundamentally freedom of choice irrespective of the unfairness of the situation in which that choice occurs. *Id.* Thus, as long as there is no fraud, duress, or a contract to commit murder or perjury, the at-will doctrine should apply. *Id.* He writes:

> Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations. Just as it is regarded as prima facie unjust to abridge these liberties, so too is it presumptively unjust to abridge the economic liberties of individuals. The desire to make one's own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and it is doubtless more pervasive than the desire to participate in political activity. Indeed for most people, their own health and comfort, and that of their families, depend critically upon their ability to earn a living by entering the employment market. If government regulation is inappropriate for personal, religious, or political activities, then what makes it intrinsically desirable for employment relations?

not enough to protect these rights in an individual's life outside of work. The need to keep one's job creates powerful incentives for an employee to submit to limits on his speech. How can a society that proclaims itself free have open debate if individuals cannot speak without fear of losing their jobs? The employer's ability to fire and sanction employees unduly burdens liberty interests of employees. Common law exceptions and statutory developments already recognize this oppressiveness by chipping away at the at-will doctrine's presumptive influence.[142] In addition, it is firmly

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Id. at 953–54. His argument is not simply that the law must guarantee *a choice*. Rather, at the heart of his account is *the nature of the choice* the law should afford employees. Although he does not directly discuss this point in depth, the assumption is apparent. The extent of leverage exerted by an employer is irrelevant to the law's treatment of employer-employee relationships. Even if a contract allows an employer to tell an employee who she can marry or what she can say, it does not matter, because the employee can always protect these values by leaving. It does not matter if the employee is unable to find a new job, causing her to lose her home. After all, if freedom to marry and speak is so important to the employee, she will make this sacrifice and correct this problem in future contracts. As Epstein explains, "If the arrangement turns out to be disastrous to one side, that is his problem; and once cautioned, he probably will not make the same mistake a second time." *Id.* at 955. Disastrous consequences of individual contracts are unimportant to Epstein because, to him, the valor of both parties will allow them to vindicate their values. Thus, the at-will doctrine produces the most economically efficient outcome, and courts should continue to apply it. While Epstein does not address the case of public employees, it is possible to apply his theory to them as well, as seen in the Supreme Court's pre-*Pickering* decisions. *See* Connick v. Myers, 461 U.S. 138, 143–44 (1983) (citing Adler v. Bd. of Educ., 342 U.S. 485 (1952), *overruled on other grounds by* Keyishian v. Bd. of Regents of the Univ. of N.Y. (1967); Garner v. Bd. of Pub. Works of L.A., 341 U.S. 716 (1951); United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947); United States v. Wurzbach, 280 U.S. 396, (1930); *Ex parte Curtis*, 106 U.S. 371 (1882)).

There are two problems with Epstein's theory. First, it contradicts modern understandings of liberty. This argument is discussed in Parts III.A and C. The other problem with Epstein's argument is that, in the context of public employees, it is in tension with Supreme Court precedent. The Supreme Court has firmly established that the First Amendment protects the right of government employees to speak on matters of public concern. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 573–74 (1968); *see also Connick*, 461 U.S. at 143–49. In *Pickering*, the Court explained, "The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment . . . ." 391 U.S. at 573. The protection of vigorous public debate, however, could not be limited to an individual's life outside of work. The threat of losing one's job poses too great a threat to the individual's ability to speak. *Id.* at 574. Thus, before the government can fire an employee speaking on a matter of public concern, *Connick*, 461 U.S. at 146, it must satisfy the *Pickering* balancing test, which requires the court to balance the interests of the government as an employer against the free speech interests of the employee. *Id.* at 149–50. Moreover, this demonstrates that Epstein's argument that employees are only entitled to a right to contract freely has been thoroughly repudiated by the Supreme Court. The First Amendment provides a guaranteed right of employee expression that trumps the liberty of public employers to negotiate freely.

142. *See supra* Parts II.B–C.

established in First Amendment doctrine that public employees can engage in expressive activities, while being protected from their employers' sanctions.[143]

Moreover, in modern American society, there is a greater need for individual liberty — an area where individuals can develop their own thoughts free from the invasiveness of society. An interdependent economy and modern technology continually bombard this zone of liberty. The recent collapse of the capital markets has demonstrated that the store owner on Main Street is dependent upon credit created on Wall Street.[144] The restaurant owner in Maine relies on fruits and vegetables grown in California, Florida, and South America; the small American farmer has been replaced by big agriculture. Moreover, the Internet and other technologies have allowed employers unfettered access into the private lives of employees.[145] Electronic EZ-pass records can allow authorities to know where an individual has been. With the help of GPS technology in an employee's cell phone, an employer can track an employee's daily movements. Meanwhile, websites like Facebook and MySpace allow employers a window into the personal lives of their employees, with pictures, no less.

Furthermore, the at-will doctrine was created almost a century before the modern understanding of the First Amendment as a rigorous protector of free speech. Evolving social norms that emphasize tolerance and expression have altered our understanding of the First Amendment.[146] Under such conditions, liberty is not simply freedom from government interference; it is the freedom to define oneself. It is the right to disagree with the majority.[147] It is the right to do what is unpopular, to be different, innovative, and independent. It is the right to hate a president,[148] to

143. *See supra* Part II.D.

144. *See, e.g.*, Peter L. Bernstein, *What's Free About Free Enterprise?*, N.Y. TIMES, Sep. 28, 2008, at BU1; Stephen Labaton & Edmund L. Andrews, *In Rescue to Stabilize Lending, U.S. Takes over Mortgage Finance Titans*, N.Y. TIMES, Sep. 8, 2008, at A1.

145. *See* Pincus & Trotter, *supra* note 3; Wilborn, *supra* note 3.

146. *See, e.g.*, Blades, *supra* note 3; Pincus & Trotter, *supra* note 3.

147. Professor Post emphasizes the importance of protecting minority viewpoints in his article, *The Constitutional Concept of Public Discourse*. Post, *supra* note 91. However, it is important to note that what I call the right to be a dissident is not absolute. For example, once speech becomes conduct or the speech imminently poses a significant threat of harm, it can no longer be protected. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

148. *See* Rankin v. McPherson, 483 U.S. 378 (1987). For a summary of the case, see *supra* note 83.

criticize a city's crime rate,[149] and to wear a jacket that says "FUCK THE DRAFT."[150] Given this shift in values, the at-will doctrine is fundamentally at odds with modern understandings of the First Amendment.

IV. EXTENDING FIRST AMENDMENT PROTECTIONS TO PRIVATE EMPLOYMENT DECISIONS

This Part argues that the government's role in private employment decisions described in Part III.B constitutes state action. Part IV.A summarizes the state action doctrine. Parts IV.B and IV.C explain why government intervention in corporate employment decisions would be consistent with two separate lines of Supreme Court precedent. The idea that corporations are state actors is not novel. It is established in some state courts that corporations are subject to mandamus,[151] an extraordinary writ that traditionally was only issued against state actors[152] for failing to perform ministerial, as opposed to discretionary, functions.[153] Finally, Part IV.D addresses several important criticisms of a constitutional remedy for resolving the problem of employee free speech rights, including the concern that all corporate decisions would be subject to constitutional scrutiny. It also argues that if the approach is repudiated, there are alternative solutions in the form of legislative or state common law reforms.

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149. Reuland v. Hynes, 460 F.3d 409 (2d Cir. 2006) (a Brooklyn prosecutor making a hyperbolic statement about Brooklyn's death rate was protected by the First Amendment).

150. Cohen v. California, 403 U.S. 15 (1971) (the Court overturned, on First Amendment grounds, a conviction for disturbing the peace where a nineteen year old had worn a jacket that said "FUCK THE DRAFT" into a courthouse).

151. *See, e.g.*, Mixson v. First Nat'l Bank of Miami, 136 So. 258 (Fla. 1931) (to compel a corporate officer to transfer stock); Faro v. Simplex Med. Sys., Inc., 748 So. 2d 342 (Fla. Dist. Ct. App. 1999) (to require a corporation to recognize the plaintiff as owner of stock); Young v. Jebbett, 211 N.Y.S. 61 (App. Div. 1925) (to require a corporation to accept as valid the proxy votes of shareholders); Brodsky v. Bd. of Managers of Dag Hammarskjold Tower Condo., 765 N.Y.S.2d 227 (Sup. Ct. 2003) (to declare the validity of the election of a condominium board).

152. *See* Stern v. S. Chester Tube Co., 390 U.S. 606, 608–09 (1968).

153. *See, e.g.*, 4 WEST'S MCKINNEY'S FORMS CIVIL PRACTICE LAW AND RULES § 10:244 (2011).

A. THE STATE ACTION APPROACH

In order for the Constitution to apply, there must be state action.[154] Although the doctrine is clearly established, its application is anything but clear. A state action analysis requires "a case-by-case approach"[155] because "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[156] A state action inquiry has two elements: a responsibility prong and a balancing prong.[157]

The responsibility prong requires that "the deprivation of a federal right be fairly attributable"[158] to the local,[159] state, or federal government. The responsibility prong can be met in two ways: either by direct or indirect government involvement in the challenged action. Direct state action occurs when the government or an "arm of the state" is the entity that actually performs the challenged action.[160] The formal title of the entity is irrelevant as long as the government retains control of the entity.[161]

Indirect state action occurs when the government acts in such a way as to be responsible for the acts of a private actor.[162] The Supreme Court has identified indirect state action in a wide variety of cases. Some cases have emphasized that the private actor's contested action occurred while assuming a traditional public function,[163] while others have required that the government

154. The Civil Rights Cases, 109 U.S. 3 (1883).

155. Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18 (1st Cir. 1999).

156. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

157. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

158. *Lugar*, 457 U.S. at 937.

159. Avery v. Midland Cnty., 390 U.S. 474, 479–80 (1968).

160. *See, e.g.*, Lebrón v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995).

161. *Id.* (holding that the National Railroad Passenger Corp.'s ["Amtrak's"] actions constituted direct state action, even though Congress had disclaimed it as a government agency).

162. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

163. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627–28 (1991) (holding that a private civil defendant could not use racially motivated peremptory challenges in a case where the defendant concrete company had been working on a federal enclave); West v. Atkins, 487 U.S. 42, 56 (1988) (holding that prisoner's examination by physician brought in by state prison constitutes state action).

and private entity have a symbiotic relationship.[164] A symbiotic relationship exists when the government "has so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity."[165] In another case, the Court found state action due to the "entwinement" between the state and the private actor.[166]

Secondly, the balancing prong of the state action inquiry requires balancing the value of the right asserted against the burden of protecting that right.[167] The Court explained that the purpose of the inquiry is to "'preserv[e] an area of individual freedom by limiting the reach of federal law' and [to] avoi[d] the imposition of responsibility on a State for conduct it could not control."[168]

Under existing Supreme Court precedent, there are two ways state incorporation laws could be characterized as state action. The first is an indirect state action approach. Under the *Burton*[169] line of cases, these laws could be considered government incentives for private actors to suppress employee free speech rights. The second is through a direct state action approach, which would involve convincing state supreme courts that their state incorporation laws constitute intentional efforts by the states to suppress employee free speech rights. The Court has historically given deference to such findings.[170]

B. THE *BURTON* APPROACH

In *Burton*, the Supreme Court found a private restaurant to be a state actor when it refused to serve an African American.[171] It reasoned that the restaurant became a state actor by virtue of the

164. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–24 (1961) (holding that the lease of public property to a restaurant owner who maintained a racially discriminatory policy constituted state action).

165. *Id.* at 725.

166. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001).

167. *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179, 191 (1988).

168. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982)).

169. *See Burton*, 365 U.S. at 723–24.

170. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (upholding the California Supreme Court's interpretation that Proposition 14, which prohibited the state from denying a person's right to sell or rent property on a discriminatory basis, constituted state action because the California Supreme Court read it not as the repeal of statute barring discrimination but as a statute that encouraged racial discrimination).

171. *See Burton*, 365 U.S. at 723–25.

city agency leasing the building space while disregarding whether the tenant would engage in racial discrimination.[172] The case is striking in that the city never asserted a preference for a racially discriminatory policy.[173] Instead the holding is premised on the ground that the city provided a benefit, in the form of a lease, to a private actor engaged in racially discriminatory practices.[174]

Without referencing *Burton*, the Court in *Norwood v. Harrison* used the same logic in striking down a Mississippi policy that provided textbooks to private schools engaged in racially discriminatory practices.[175] The Court explained: "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'"[176] As in *Burton*, Mississippi provided a public benefit without regard to whether the beneficiary was engaged in public discrimination.

The *Burton* line of reasoning is criticized for the difficulty of distinguishing it from the case of public goods such as public utilities, police, and fire protection, to which all parties receive a benefit.[177] If receipt of benefits in *Burton* and *Norwood* constituted state action, recipients of police and fire protection would be state actors.[178] Such a finding would eliminate "an area of individual freedom"[179] for private citizens. This criticism is addressed in Part IV.D.1. While the Court has noted the *Burton* approach is not favored,[180] the case has never been overturned.[181]

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172. *Id.*
173. *Id.*
174. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1612 (5th ed. 2005).
175. Norwood v. Harrison, 413 U.S. 455 (1973).
176. *Id.* at 465 (quoting Lee v. Macon Cnty. Bd. of Educ., 267 F. Supp. 458, 475–76 (M.D. Ala. 1967)).
177. *See, e.g.*, Thomas P. Lewis, Burton v. Wilmington Parking Authority — *A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).
178. Driven by these concerns, the *Norwood* Court went to great lengths to distinguish itself from such situations. *Norwood*, 413 U.S. at 465.
179. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).
180. Presumably, the Court's concern stems from the problem of distinguishing situations like in *Burton* from the state's involvement in police and fire protection. For a response to this concern, see *infra* Part IV.D.1.
181. *See* Blum v. Yaretsky, 457 U.S. 991, 1011 (1982). However, other courts have used this reasoning to find state action. *See, e.g.*, McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (holding the tax exempt status of fraternal orders to be unconstitutional).

Using a *Burton* analysis, there are two factors[182] that warrant a finding of state action when corporate employees are terminated for exercising their free speech rights. The first factor is the extent to which government benefits provide corporations the leverage to fire employees for engaging in off-duty expressive speech. This is why the government is responsible for the challenged action, the first prong of a state action inquiry.[183] The second factor evaluates whether the free speech interests of private employees can be protected without burdening the associational interests of corporations. This balances the interests of the injured party against the party claimed to be a state actor, the second prong — the balancing prong — of a state action inquiry.[184] Since Part III.A already demonstrated that on balance an employee's interests outweigh the employer's interests, the rest of this discussion focuses on the first factor.

With respect to the first factor, state incorporation laws provide a powerful and unique benefit to corporations. As discussed in Part III.B, incorporation laws are necessary to allow small business to manage risks so that they can develop into large firms. This increase in size relative to that of employees provides them with the leverage to terminate an employee who expresses views the corporation disfavors. This leverage is powerful not

182. These factors distinguish a Supreme Court case that addressed the issue of incorporation as state action. In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, the Supreme Court rejected a finding of state action where the U.S. Olympic Committee, a private corporation, prevented an athletic association from using the term "gay Olympics," because it claimed it had trademarked the term Olympics. 483 U.S. 522, 525–28 (1987). The plaintiffs argued the trademark violated their First Amendment free speech rights. *Id.* In a five-to-four opinion, the Court held that the creation of an additional right by creating a corporation did not constitute state action. *Id.* at 542–44. The four dissenters thought there was enough state responsibility to justify a finding of state action. *Id.* at 548 (O'Connor, J., concurring in part and dissenting in part); *id.* at 548–49 (Brennan, J., dissenting). *San Francisco Arts & Athletics*, however, is easily distinguishable from the argument for state action presented in this Note. In that case, there is nothing inherent in creating a corporation that suggests the corporation would improperly trademark certain ideas. Another important distinction is the present-day attitude towards gay rights. The case was decided a year after *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court upheld the constitutionality of Georgia's anti-sodomy law. Since then, the Court, in *Lawrence v. Texas*, 539 U.S. 558 (2003), overturned *Bowers* by finding a similar Texas law unconstitutional. Because of the importance of the constitutional interests at stake in a state action analysis, the fact that gay rights have received heightened protection alters this analysis.

183. *See supra* Part IV.A.

184. *See supra* Part IV.A.

just when an employer uses it to fire dissidents, but also because of its "chilling effect" on employee speech. Moreover, corporate rights are categorically different from traditional property and contract rights.[185] Property and contract rights, at least theoretically, could pre-exist the formation of the state. While the state certainly makes it easier to enforce these rights, individuals — without the state — could develop self-help mechanisms to protect these rights. Although many of the functions of a corporation could be achieved through contract and, presumably, contracts would have some effectiveness without the state, it is hard to see how a moderately sized corporation could effectively exist without the state.[186]

From this premise, there are two factors that make a corporation unique. First, it confers a primary right and not a remedial right.[187] In the context of state action inquiries, the allocation of primary rights is a categorically different sort of government involvement in private relationships.[188] This is not to say that regulatory statutes or remedial rights do not upset the private state of affairs: they do. But, the Court has held that regulatory statutes do not qualify as state action.[189] Unlike regulatory statutes or remedial rights, awarding a primary right directly confers an ad-

185. For a discussion of whether a central consideration of the state action inquiry is the government's altering preexisting norms, see STONE ET AL., *supra* note 174, at 1597–99.

186. *See supra* note 129.

187. For a discussion of the distinction, see Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 249–52 (1991). Regulatory statutes do not create rights. They are simply the exercise of the government's constitutionally conferred powers. An example would be a rule prescribing a speed limit. Other statutes confer remedial rights. They allow individuals to seek redress, usually through a tribunal, for violations of their primary rights. *Id.* at 251–52. An example would be a law allowing a person to sue another for a breach of contract. Finally, there are statutes that confer primary rights. They recognize legally cognizable interests that should not be violated. *Id.* at 249–51. An example of a primary right is the First Amendment right to publish an article criticizing the government.

188. The Supreme Court has made it clear that the mere fact that a private actor must comply with a regulatory statute does not mean every action by that private actor qualifies as state action. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974). However, the creation and protection of corporate structures is not just a regulation. It is the conferral of rights and privileges upon a private party. The Supreme Court recognized this fact nearly two centuries ago. *See* Osborn v. Bank of U.S., 22 U.S. (9 Wheat) 738, 806–07 (1824) (recognizing that the federal government's creation of the Bank of the United States included with it the right to sue and be sued).

189. *See Sullivan*, 526 U.S. at 52; *Blum*, 457 U.S. at 1004; *Jackson*, 419 U.S. at 350.

ditional power to a private actor.[190] In contrast, regulatory statutes merely require private actors to comply or face sanctions and remedial rights merely allow for private actors to receive compensation if their primary rights are violated.[191]

Second, unlike other government benefits, there is a strong nexus between conferring this right and the likelihood that a corporation will "chill" or suppress the employee's exercise of his or her First Amendment rights. To private corporations, labor is a cost of doing business; businesses will generally only pay as much as necessary to meet their needs. The state's allocation of a superior bargaining position to corporations — without providing employees a corresponding benefit — allows corporations to minimize the contractual rights, including free speech protections, that prospective employees will be able to negotiate.[192] Furthermore, given the government's at-times hostile attitude towards employee rights,[193] it is unsurprising that employees have generally not gained the leverage necessary to protect their First Amendment rights.

C. THE DIRECT STATE ACTION APPROACH

As discussed earlier, state action can be attributed to the state directly or indirectly.[194] The *Burton* theory of state action relies on an indirect approach. However, state incorporation laws can

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190. *See* Monaghan, *supra* note 187, at 249–52.

191. *Id.*

192. It is no surprise that employees who achieve equal bargaining power through the collective bargaining process are generally able to secure termination for cause provisions in their contracts, thereby protecting their First Amendment interests. *See* Abrams & Nolan, *supra* note 72, at 594.

193. The Court implicitly recognized this hostility in *Staub v. City of Baxley*, where a woman trying to organize a labor union without a license required by a city ordinance challenged her conviction under the city's ordinance on First Amendment grounds. 355 U.S. 313 (1958). The Court held that Georgia's procedural rule requiring claimants arguing the constitutionality of a statute to challenge specific sections of the statute (not the statute as a whole as the claimant had done in this case) was an inadequate state ground for avoiding the federal question. *Id.* at 319–21. The case demonstrates the sensitivity of the Court to the plight of employees, as the Court rarely holds that state procedural rules are not independent and adequate state grounds for review of federal questions. The cases where the Court has so held have involved state courts inhibiting the federal rights of black criminal defendants or "members of unpopular social or political movements." RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 551 (5th ed. 2003).

194. See *supra* Part IV.A.

also be thought of as a form of direct state action. For example, given the likelihood that state incorporation laws would limit employee rights vis-à-vis employer rights, it could be argued that the laws are an intentional effort by the state to interfere with constitutionally protected rights.

This approach has the advantage of allowing state supreme courts, some of which might be more receptive to claims of employer abuses than the federal courts, to decide the issue with deferential Supreme Court review. The reason for the diminished Supreme Court review is the policies behind the "adequate and independent" state grounds doctrine.[195] The doctrine allows state courts to remain the final arbiters of their own laws by preventing federal court review of state court interpretations of state law that do not improperly interfere with the enforcement of federal law.[196]

In this case, the state would be interpreting its own incorporation statutes to determine whether they expressed intent to deprive employees of their First Amendment rights. Although such a finding would not be an adequate and independent ground — which would deny Supreme Court jurisdiction entirely — if the Supreme Court did review the case, it would be obliged to give respectful weight to the state court's interpretations of state law.[197] The Court adopted this approach in an earlier controversial state action case.[198]

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195. *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. 590 (1874); *see also* FALLON ET AL., *supra* note 193.

196. For a discussion of the adequate and independent state ground doctrine, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 486 (6th ed. 2009).

197. *Id.*

198. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); *see also supra* note 170.

D. CONCERNS ABOUT A CONSTITUTIONAL REMEDY

Although a finding of state action raises several difficulties,[199] there are two that are particularly noteworthy. First, it could be argued that if corporate employment decisions are subject to constitutional scrutiny, such review would be the first step on a slippery slope that will result in all corporate decisions being subject to the Constitution. The argument assumes it is difficult to find a principled basis for distinguishing the state-conferred benefit in *Burton* from public goods such as police and fire protection.[200] Although the criticism is unpersuasive, it is an important criticism and is addressed in Part IV.D.1. The second concern is whether federal judges should even be deciding this issue.

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199. One concern with applying the First Amendment to private employment decisions is with *in terrorem* lawsuits, suits that have little chance of success but in which the costs of litigation are so high that they compel defendants to settle. The fear in this situation is that a plaintiff would be fired and then claim he was fired because some aspect of his character prevented him from fitting in. However, this should not be a problem for three reasons. First, at least in federal court, the heightened pleading standard of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), makes it more difficult for plaintiffs to gain access to discovery. Second, the standard for summary judgment, as articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), allows for summary judgment if a plaintiff is unable to provide enough evidence to support his or her claim, which means that plaintiffs will have to provide enough evidence to discredit the employer's stated justification for their termination. The mere fact that a plaintiff had unique qualities would not justify going to trial. The plaintiff must demonstrate the protected conduct was a "motivating factor" in the employment decision. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (also holding that a defendant can avoid liability if it can show by the preponderance of the evidence that it would have made the decision but for the protected speech). Third, a court can perform the *Pickering* balancing test and decide as a matter of law that the employee's claim has no merit without ever having a jury examine whether the protected conduct was a motivating factor in the employee's termination. Klunk v. Cnty. of St. Joseph, 170 F.3d 772, 775–76 (7th Cir.1999).

A second concern is that because the theory of state action in these cases focuses on the imbalance of bargaining power, a defendant corporation would raise the issue of whether it had sufficient leverage. Thus, there will be corporations that are not state actors (particularly closely held corporations). While applying such a standard could be challenging, it is not novel, as courts have to make these decisions in the context of class actions when determining whether the class size is so significant that joinder would be impracticable. FED. R. CIV. P. 23(a)(1); *see, e.g.*, Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) (holding 350 potential class members insufficient because of ease of joinder).

Furthermore, a number of factors would guide these decisions. Some of those factors are discussed in *supra* Part III.B. The decision would also be guided by the following considerations. First, is the employer of a sufficient size to show that there is unequal bargaining power? The court would have to look at such factors as whether the employer has a human resources department or some individual dedicated to hiring or whether the employer has formal employee policies. If the employer is, for example, a small family business operated from home, it is unlikely to qualify. Second, if the employer is of a

1. *Not All Corporate Decisions Would Be Subject to Constitutional Scrutiny*

The slippery slope argument is unconvincing. Past state action cases demonstrate state action inquiries require a "practicality" analysis — a case-by-case approach where past decisions offer little guidance in determining future cases.[201] The case-by-case nature of the inquiry means a finding in one particular case cannot result in a slippery slope. Although such an analysis may seem unprincipled and illegitimate for courts of law, the practice is consistent with established law and established understandings of the role of the federal courts. To demonstrate this point, this section first shows that state action inquiries embody a practicality analysis. It then argues why this practice is legitimate. Finally, by understanding that state action inquiries require a case-by-case analysis, the section concludes by discussing why corporate employment decisions are distinguishable from other corporate decisions.

a. The Legitimacy of a "Case by Case" State Action Analysis

As discussed above,[202] state action inquiries require "a case-by-case approach"[203] because "[o]nly by sifting facts and weighing

sufficient size, it must then be determined if the state assisted in allowing it to achieve that size. If the employer is a corporation, a limited liability partnership or a limited liability corporation it will likely qualify. However, a partnership — an entity that forms simply by the intent of two individuals to share profits and losses — would pose a more difficult question because the state is far less involved in these cases. UNIF. P'SHIP ACT § 202(a) (1997). While the state imposes a fiduciary duty upon the partners, *id.* §§ 404(b)–(d), 603(b)(3), the states also impose a number of rules that make it difficult for partnerships to grow significantly. For example, all partners are jointly and severally liable for the actions of other partners. *Id.* § 306. In addition, if one partner leaves, the partnership automatically dissolves. *Id.* § 602(a). Because of these inhibiting rules, it is unlikely that a partnership would ever develop to a large enough size such that it would qualify as a state actor. Even if it did, the partnership rules would likely have been of such limited use in allowing the firm to reach that size that it would be difficult to say the partnership was a state actor.

200. *See supra* notes 177–179 and accompanying text. For criticism of *Burton*, see, e.g., Lewis, *supra* note 177; but see Charles L. Black, Jr., Foreword, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) (arguing the state action doctrine should not be readily applied in race discrimination cases because of the importance of combating racial discrimination).

201. *See supra* notes 155–156 and accompanying text.

202. *See supra* Part IV.A.

circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[204] An example of the practical nature of the inquiry is the fact that private defense attorneys are considered state actors during *voir dire*.[205] It would be odd if prosecutors had to abide by the Constitution when selecting juries, but private defense attorneys did not. The consequence of this approach is that state action inquiries often lead to seemingly inconsistent results.[206] Assuming that this approach would allow a Court to conclude that corporate employment decisions qualify as state action but other corporate decisions do not, the issue becomes whether such a distinction could be legally justifiable or merely the result of judicial whim.

To be a proper judicial question, the question must at least satisfy two criteria. First, the reasoning used must be legal, not political.[207] As *Tutun v. United States* explains, the reasoning involved in a political decision is whether to "confer or withhold a favor."[208] In contrast, the reasoning in legal decisions is whether the outcome is compelled by authoritative principles.[209] Second, it must be allocated to the judicial branch.[210]

The case-by-case approach of state action inquiries — and particularly *Burton* — is legal, not political. It is analogous to another line of important constitutional cases involving whether the Constitution constrains the actions of government officials outside the territorial jurisdiction of the United States. In *Reid v. Covert*, the Court confronted the question of whether the Constitution required a jury trial for two civilian American women detained abroad who were charged with killing their husbands who

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203. Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18 (1st Cir. 1999).

204. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

205. Georgia v. McCollum, 505 U.S. 42 (1992).

206. *See, e.g.*, Marshall, *supra* note 96, at 560–61; Rosen, *New Answers*, *supra* note 96, at 473; *see also* Rosen, *Outer Limits*, *supra* note 96, at 1053, 1066, and n.50.

207. Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). Not all scholars agree with this proposition. *See, e.g.*, Black, *supra* note 200 (arguing state action decisions do not need to be principled); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

208. 270 U.S. 568, 578 (1926). The author would like to thank Professor Monaghan for his guidance on this point.

209. *Id.*

210. *See* Baker v. Carr, 369 U.S. 186 (1962).

were serving in the military overseas.[211] The Court concluded that both women were entitled to a jury trial.[212] In an illuminating concurrence, Justice Harlan explained, "The question is one of judgment, not of compulsion."[213] He elaborated:

> Decision is easy if one adopts the constricting view that these constitutional guarantees . . . do or do not "apply" overseas. But, for me, the question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.[214]

Justice Kennedy echoed this view in his concurring opinion in *United States v. Verdugo-Urquidez*[215] and in the majority opinion in *Boumediene v. Bush*.[216] Under this approach, judges determine the propriety of extending constitutional norms on a case-by-case basis by examining the practical realities at stake in the case.

These cases are analogous because both involve a preliminary determination of whether the case is subject to the Constitution. Before a court can engage in a constitutional analysis, it must first determine whether the Constitution even applies.[217] The difference between the cases is that, in the *Reid* line of cases, a court is inquiring whether the Constitution applies to cases arising outside the territorial jurisdiction of the United States, while in the state action cases, the issue is whether the state was actually involved in the decision.[218] Thus, both inquiries are obligatory and require the exercise of "judgment,"[219] they just differ on the

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211. 354 U.S. 1 (1957).
212. *Id.* at 4.
213. *Id.* at 75 (Harlan, J., concurring).
214. *Id.* (emphasis added).
215. 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 75) (in *Verdugo-Urquidez*, the Court examined whether DEA officials had to obtain a warrant when searching an accused drug lord's Mexican home).
216. 553 U.S. 723 (2008) (using this mode of analysis to find that the writ of habeas corpus extended to Guantanamo Bay detainees).
217. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
218. Another important distinction is that the *Reid* cases often implicate the right to challenge executive detention. As discussed below, see *infra* note 228, that constitutional interest is probably the only interest more important than the First Amendment. However, this does not mean that the First Amendment interests are not sufficiently important to warrant the Constitution's extension to corporate employment decisions.
219. Reid v. Covert, 354 U.S. 1, 75–76 (1957) (Harlan, J., concurring).

type of judgments being made. In the *Reid* cases, the judgment will be made based on issues such as distances involved, the difficulty of applying judicial procedures, and the importance of the constitutional interests at stake.[220] In the state action cases, the judgment involves the extent of state involvement and the importance of the constitutional interests at stake.[221] It also involves whether the extent of purely private action is such that if a judge were to second guess that decision on constitutional grounds, the person's liberty interests would be implicated.[222]

Second, the case-by-case approach and its need for "judgment" is consistent with accepted understandings of the judicial function. As already discussed, unless a court makes the *Reid* or state action decision, it cannot fulfill its obligation to decide important constitutional questions. As stated in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[223] This often-cited quote from *Marbury* reaffirms the duty of the judiciary to review cases that present constitutional questions despite the Constitution's creation of a democratic society. Unless the preliminary *Reid* or state action inquiry is made, the Court cannot fulfill this obligation.

b. Distinguishing Corporate Employment Decisions from Other Decisions

Given the case-by-case nature of the state action analysis, future cases would generally be distinguishable. Factors that would distinguish cases include whether First Amendment interests are at stake, whether corporate associational rights will be burdened, whether incorporation laws involve the conferral of primary rights, and whether the incorporation laws are likely to provide corporations with leverage over their employees.

To see how some of these distinctions would work, consider several cases. One case involves the interaction between corporations. Whatever advantage one corporation has over another, both have an equal opportunity to use state incorporation laws to

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220. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

221. *See supra* Part IV.A–B.

222. This is in essence the balancing prong of state action inquiries. *See supra* Part IV.A–B.

223. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

expand their businesses. Thus, the notion that the state was involved in the contractual relationships between corporations is not convincing. Another example appears in the context of political discourse, where the Court has recognized that corporate speech rights outweigh concerns about limiting the voice of individuals.[224] Thus, the balancing prong of the state action inquiry would prevent applying the Constitution in this setting.

Moreover, an important distinction will always be found in the constitutional interests at stake. There is no question the Court's decisions in *Burton* and *Norwood* were in part driven by the problem of race discrimination.[225] A corporate decision would have to implicate constitutional concerns as important as the First Amendment or racial discrimination. The First Amendment encapsulates "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[226] and demands a vigilant judiciary.[227] Perhaps the only constitutional concern more important than the First Amendment is the right to challenge executive detention.[228] Consequently, the sphere of corporate action beyond that of the employer-employee relationship that could be subject to constitutional scrutiny would be minimal. Furthermore, applying a *Burton* analysis outside of state incorporation laws would be difficult because such a case would have to involve a context in which a government benefit has pervasively altered how society functions.[229]

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224. For recognition of the value of corporate speech in the context of political discourse, see, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 948–51 (2010). In the context of economic discourse, see, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (unanimously invalidating on First Amendment grounds a statute that prohibited advertising the price of alcohol outside of liquor stores).

225. *See* Norwood v. Harrison, 413 U.S. 455 (1973); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

226. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

227. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984).

228. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372, 1390–96 (1953). Professor Hart argued, and most federalism scholars have agreed, that the Constitution's structure guarantees the right to challenge one's executive detention, otherwise, "government under law would exist only at the sufferance of the executive branch." Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2039 (2007) (citing Hart, *supra*, at 1390–96).

229. As discussed earlier, regulation is not enough to justify a finding of state action. *See supra* note 188.

In the context of suits against corporations, the importance of Fourteenth Amendment protections against discrimination makes these claims difficult to distinguish. However, most of these cases are protected through statute. As long as the statutory scheme is an adequate remedy, the Constitution does not provide additional remedies.[230] Fourteenth Amendment claims outside of the context of discrimination would be distinguishable because, as discussed above, the constitutional interests at stake are not nearly as significant.[231] In the context of claims by non-employees, the Fourteenth Amendment could apply if the leverage attained by the corporation played a factor.[232] But again the constitutional interests at stake would have to be significant enough to outweigh a corporation's constitutional interests.

2. *The Appropriateness of a Federal Judicial Solution*

There are two common jurisprudential critiques of the expansion of judicially mandated federal rights. The first is that in a democracy, the legislature, which is democratically accountable and allows for "the political safeguards of federalism,"[233] is the most appropriate institution to expand rights, not the unelected federal judiciary. To the extent that this is true, it does not apply to situations where the law mandates the protection of the right.[234] In this case, the First Amendment already protects the free speech rights of employees.[235] Moreover, as discussed above, the extension of these rights to private employees is consistent with Supreme Court precedent.[236] The second criticism is that there are certain issues better handled at the state level. Howev-

230. *See, e.g.*, Bush v. Lucas, 462 U.S. 367 (1983); Swain v. Pressley, 430 U.S. 372, 381 (1977).

231. These claims would likely be evaluated under a rational basis review indicating the comparatively limited weight given to these interests.

232. One potential case involves the use contracts of adhesion by corporations to waive a consumer's right to a class action. The difficulty with finding state action in that case is the right to a class action is a statutory creation, making it difficult to argue that the interests outweighs the constitutional interests of corporations. *See* FED. R. CIV. P. 23.

233. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

234. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

235. *See supra* Part II.D.

236. *See supra* Parts IV.B, IV.D.1.

er, the protection of fundamental rights — such as the employee's fundamental rights under the First Amendment — has been within the power of the federal government and the federal courts.[237] While it is true that corporate and agency law have traditionally been assigned to the states, the federal government has long had a significant role in employment decisions.[238] As discussed above, it is the role of the federal courts to protect important constitutional interests; an employee's First Amendment interests qualify as such an interest.[239]

If the propriety of a federal judicial approach to protecting employee free speech rights is rejected, the discussions in Parts III–IV justify alternative means of attaining the same protections afforded by *Pickering*.[240] These would include state or federal statutes[241] or state common law developments.[242]

V. CONCLUSION

In concluding that First Amendment protections should apply to private corporate employees, this Note overcomes two significant hurdles. First, it repudiates the notion that public and private employees — at least those in the corporate context — should be treated differently. The distinction is problematic because it fails to achieve the proper balance between the constitutional rights of individuals and groups. Group interests are only superior when those interests are integral to the group and when there are adequate alternatives for the individual. It is also problematic because it ignores the significant involvement of the government in corporate employment relationships and modern society's need for broad First Amendment protections. Second, this

237. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

238. *See, e.g.*, Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–17 (2010); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2010); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2010); National Labor Relations Act, 29 U.S.C. §§ 151–69 (2010).

239. *See supra* Part IV.D.1.

240. For a discussion of *Pickering*, see *supra* Part II.D.

241. *See, e.g.*, Wilborn, *supra* note 3.

242. *See, e.g.*, Blades, *supra* note 3.

Note concludes that the Constitution is an appropriate remedy for protecting the free speech rights of corporate employees. Despite the conventional understanding that the state action doctrine bars applying the First Amendment to corporate employers, there is state action. Under *Burton*, the theory of government involvement in employment relationships between large corporations and employees justifies a finding of state action. Moreover, *Burton*'s[243] practical "case-by-case" approach is consistent with Supreme Court precedent and the obligations of federal courts.

More broadly, this Note addresses a pervasive challenge to the American legal system.[244] While individual rights are seen as the core of our constitutional order, the reality of modern society is that large and powerful groups, such as corporations, play an essential role in America's political and economic system.[245] This shift has forced the American legal system to balance the importance of an individual rights model — an approach that seeks to resolve only what is necessary to resolve the dispute — against a public rights model — an approach that recognizes the importance private litigation has on the interests of others.[246] This Note is an attempt to achieve a balance between those two models. By protecting the First Amendment interests of employees while recognizing the importance of corporate interests, it seeks to maintain the core aspects of the individual rights model, while sensibly accommodating the realities of modern society.

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243. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

244. *See* FALLON ET AL., *supra* note 196, at 72–76 (discussing the tension between an individual rights model and public rights model of judicial adjudication).

245. *Id.*

246. The public rights model refers to a view of litigation that recognizes that when courts resolve a case, they are not simply addressing a private dispute between two individuals; rather, they are addressing legal issues that will affect the rights of a broad class of individuals and groups. *Id.*