SPEAKING OUT: THE NORMATIVE DESIRABILITY OF ASSERTING NEW LEVELS OF PROTECTION FOR WORKPLACE SPEECH

by

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INTRODUCTION

"Congress shall make no law…abridging the freedom of speech."[1] These ten words embody perhaps the most simple, elegant, and concise command of the United States Constitution. Indeed, Justice Black noted in his dissent in *Konigsberg v. State Bar* that "the First Amendment's unequivocal command…shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."[2] *Despite the First Amendment's facially perspicuous free speech tenet, the interpretation, limitation, elucidation, and application of free speech protections and values*[3] *has proven to be one of the modern judiciary's most obfuscating endeavors.*[4] The Court and scholars alike have long concluded that freedom of speech, political speech in particular, is an element inseparable from the democratic process.[5] Studies also indicate that Americans are spending increasing amounts of time at work and that the workplace is becoming perhaps the primary forum for political discussion outside of the home, yet protection of such dialogue is minimal.[6] Thus, given that political speech is essential to the democratic process and that emp loyers represent nodes of power with tremendous influence on citizens, it seems inimical to the notion of self-government that the workplace could be a zone where an employer may quash the right to freedom of political speech arbitrarily or capriciously.[7]

Part I of this article will discuss the value that democratic society places on freedom of political speech. In doing so, this author hopes to establish that unfettered political speech is not only desirable but also essential to the proposition of self-government. The frameworks developed by Professors Meiklejohn, Chafee, and Emerson will ultimately prove useful for this task.

Part II of this article will explore how the Court has treated the issue of speech in the workplace. Of particular importance is the distinction the Court has drawn between public and private employees.

Part III of this article will discuss whether the workplace speech should properly be included within the definition of public discourse. There is considerable scholarly debate on the question of the proper realm of workplace speech and the works of Professors Post and Estlund provide valuable insight.

Part IV of this article will explore the need for protection of workplace speech if it can be ascertained that workplace speech is properly part of a democratic discourse relevant to self-government, particularly given the rise of participative management techniques in the contemporary workplace. Some have suggested that the use of participative management programs represent a trend toward the democratization of the workplace. Professor Yamada's work will play a role in so determining.

Part V of this article posits a tentative solution to the problem of limited political speech in the workplace. Where the First Amendment applies directly, a broader reading of the public concern test seems desirable; where the protections of the First Amendment do not apply directly, federal legislation incorporating First Amendment values ought to be enacted.

I. FREE SPEECH VALUES IN A DEMOCRATIC SOCIETY

Before one can begin to tackle the issue of whether the workplace represents an appropriate forum for dialogue regarding matters of politics, a fundamental question must be addressed: what are the values associated with free speech? More specifically, why should freedom of political speech receive the highest degree of protection under the aegis of the First Amendment? Noted scholars, such as Alexander Meiklejohn, Zechariah Chafee, and Thomas Emerson have debated this question and constructed various theoretical models to explain the importance of free political speech. One must realize that while scholars have long debated the degree to which speech is to be protected, there is a common thread amongst the several frameworks: they all conclude that some form of free speech is necessary to the proposition of democratic self-government.

A. Meiklejohn's "Essential" Speech

Alexander Meiklejohn posited that the essence of free speech is related to its ability to foster enlightened self-government.[8] To Meiklejohn, the need for free speech centers on a managerial framework designed to accomplish a communal end via an electoral process. The optimal managerial structure is compared to the "American style" town meeting.[9] The participants in this structure meet as political equals with duties to think and express their thoughts while listening to the thoughts of others pursuant to the business at hand. The concept of voting "wise decisions" is the ultimate value of free political speech. Indeed, Meiklejohn states:

> As the self-governing community seeks, by the method voting, to gain wisdom in action, it can find it only in the minds of individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged…*It is the mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed* [emphasis in original]. The principle of freedom of speech springs from the necessities of the program of self-government…It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.[10]

Despite these impassioned words, it is important to understand that Meiklejohn does not advocate the need for completely unrestricted political speech. Indeed, the First Amendment is not "the guardian of unregulated talkativeness", nor does it guarantee that all citizens will have the opportunity to speak in all public debates.[11] Despite the assertion that "what is essential is not that everyone shall speak but that everything worth being said shall be heard", we are left with the proposition that some degree of unfettered political speech is necessary to the process of self government. Meiklejohn has apparently confined the need for free political speech to a very limited venue. One must ask, however, is the "town meeting" or the halls of the legislature the only proper forum for discussion related to the process of self-government?

B. Chafee's First Amendment Functions

Zechariah Chafee, Meiklejohn's contemporary, conceptualized the need for freedom of political speech in a different fashion than did Meiklejohn. Conceptual differences notwithstanding, both recognized, as the Court has, the need for political speech to be "uninhibited, wide open and robust."[12] Chafee posits that one of the most important functions of society and government is the discovery and spread of truth on matters of public concern.[13] The freedom of speech furthers that objective. Censorship of ideas through force exacerbates the possibility that the truth seeking function will misfire. Chafee believed that truth loses its natural advantage in the face of the power of censorship.[14]

Unlike Meiklejohn, who asserted that the First Amendment shielded managerial decision making as the primary value of free speech, Chafee asserted that the value of speech, aside from its truth seeking function, is its promotion of individual and social interests.[15] The First Amendment thus serves to protect those interests. Free speech facilitates both the individual need of persons to express their opinions on "matters vital to them if life is to be worth living" and the "social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."[16] One need not make a great leap of faith to conclude that political speech falls within bounds of both the private and public speech to which Chafee accords protection. Thus, Chafee's model, in protecting both private and public speech interests, is far broader in terms of according protection than Meiklejohn's.[17]

Exactly what lessons can be learned from Chafee's model? First, free political speech is not only valuable but is of the utmost importance because said speech is coterminous with the social discovery of general truths. Second, the First Amendment is considered a guarantor of free political speech. Third, an argument indicating that perhaps the overt forums of the political process are not the only places where speech should be accorded a degree of protection develops.

C. Emerson's Foundational Speech Values

Professor Thomas Emerson takes a slightly different tack than Meiklejohn and Chafee. Emerson examines the value of speech from the perspective and ideals of the American founders. According to Emerson, the founders hoped to instill "four basic functions of a system of expression" in the burgeoning United States.[18] First, the founders viewed freedom of expression, like Chafee, as a mechanism of arriving at truth via the vigorous discussion of fact and testing of opinions.[19] Second, freedom of expression was an essential element to the democratic political process; the founders believed that free expression provided the cornerstone of the development individual judgments necessary to arrive at collective decisions.[20] Third, the founders believed that free expression provided a means of social control.[21] Finally, according to Emerson, the founders believed that freedom of expression provided a means of individual fulfillment.[22]

D. Summary

There exists a decided similarity between the speech values of the founders, as articulated by Emerson, and those of Meiklejohn and Chafee. All three views indicate the need for free political speech for purposes of collective decision making and the discovery of truth. Meiklejohn and Chafee merely emphasize the primacy of certain aspects of the need for free political speech within their respective frameworks. Yet one cannot help but see that some degree of free and uninhibited political speech is necessary to the proposition of self-government. There is a consonance among the arguments of the aforementioned commentators that the First Amendment exists for the protection of political speech. Thus, the question becomes where are the boundaries of free political speech and does workplace speech fall within those boundaries?

II. COURT TREATMENT OF SPEECH IN THE WORKPLACE

As previously stated, the courts have wrestled with the issue of defining the boundaries of the freedom of speech for much of the past hundred years. In the matter of protecting the right of employees to exercise rights guaranteed under the First Amendment, the Court has been less than consistent in according similar protections to all employees. The distinction drawn by the Court as to who will be protected is based on a public/private status. By examining the recent cases of *Pickering v. Board of Education*[23], *Connick v. Myers*[24], *Novosel v. Nationwide Ins.*[25], and *Schulz v. Industrial Coils Incorporated*.[26], the tension between the employment at will doctrine and the speech protections granted by the First Amendment becomes apparent.

A. Pickering v. Board of Education

Marvin Pickering was a teacher in Township High School District 205 in Illinois. Following the defeat of a tax levy in District 205, Mr. Pickering wrote and published a letter criticizing the Board of Education's allocation of funds amongst academic and extracurricular activities as well as the manner by which the superintendent of schools informed (or failed to inform) the districts taxpayers of the real reason behind a request for additional tax revenues.[27] Mr. Pickering was released from his employment with said school district after the letter appeared in a local newspaper. The State of Illinois required that school boards conduct full hearings regarding teacher dismissals. The board charged that many of Mr. Pickering's statements had been false, impugned the motives, honesty, competence etc. of the school administration and generally concluded that the publication of the letter was detrimental to the efficient operation of the school.[28] Pickering then sued the School Board arguing that his termination was unconstitutional, claiming it violated his freedom of political speech protected under the First and Fourteenth Amendments.

The analysis of the Court hinged on Pickering's status as an employee of the State of Illinois. The Court turned to its previous ruling in, amongst others, *Keyishian v. Board of Regents*[29] that the state may not condition public employment upon, nor condition continued employment upon, a relinquishment of First Amendment rights.[30] However, it cannot be said the state, as an employer, does not have a legitimate interest in regulating the speech of employees differently than citizens in the general public.[31] The Court ruled that the key question is how to arrive at a balance between the interests of teachers, as public employees, to comment on matters of public concern and those of the state in promoting the efficiency of its operations through its employees.[32] From the facts at hand, the majority concluded that, while at times factually inaccurate, Pickering's letter: 1) did not hinder revenue raising (the letter was published after the tax increase was rejected); 2) the factual inaccuracies were matters of public record which the board could have easily refuted via its own publication; 3) accusations were matters of opinion clearly related to public interest (the assertion that too much money is being spent on athletics cannot be demonstrably proven false); 4) did not impede his ability to perform his job or generally interfere with school operations. Thus, absent proof that false statements were knowingly and recklessly made by Pickering and absent any evidence of interference with school operations, the Court held his interest in speaking on matters of public concern to be of greater weight than the state's need to regulate employee speech.[33]

B. Connick v. Myers

Sheila Myers was employed as an Assistant District Attorney in the Orleans Parish in Louisiana. Myers served as a criminal prosecutor for 5 and one half years during which time she performed her duties competently.[34] Myers was then informed that she would be transferred to a different department of the criminal court. Myers strongly opposed the transfer but was notified that the transfer would take place despite her objections.[35] Myers then prepared and distributed a questionnaire to fifteen other assistant district attorneys, soliciting their opinions regarding office transfer policies, office morale, level of confidence in supervisors, the need for a grievance committee and degree of pressures felt to work in political campaigns.[36] Myers was subsequently terminated for her refusal to accept the transfer and because her questionnaire constituted insubordination.[37]

The Court held that it has been established that the state cannot condition employment in government upon an agreement to relinquish all First Amendment rights.[38] However, the state does have an interest as an employer that necessitates the regulation of employee speech differently than speech by the general populace in order to maintain stability, efficiency, and close working relationships within the office. Thus, the Court relied on *Pickering v. Board of Education*[39], which developed a balancing test weighing the interests of the state as an employer in regulating speech against those of the employees right to comment upon "matters of public concern". While the District Court held that the survey as a whole related to the effective functioning of the District Attorney's office and was thus a matter of public concern, the Supreme Court disagreed, holding that only the portion regarding pressure to work on political campaigns was a matter of public concern.[40] In so holding, the Court examined the content, form and context and concluded that the bulk of the questionnaire were matters of personal interest and only the pressure to work on campaigns fell under the rubric of "public concern".[41] The majority ruled that while such "personal workplace speech" is not without all protection, only under rare circumstances is the federal court the proper place to resolve questions relating to government employment decisions.[42] Because a portion of the speech was a matter of public concern, the Court applied the *Pickering* balancing test. The Court ruled that the First

Amendment concerns were limited and did not require the state to tolerate speech that would disrupt office conditions and undermine working relationships.[43]

C. Novosel v. Nationwide Insurance Co.

John Novosel was an employee of Nationwide Insurance from 1966 until his discharge in 1981.[44] He had advanced through the corporate ranks, was unmarred by disciplinary actions, the recipient of several promotions, and was a candidate for a divisional claims manager position. In October 1981, a memorandum was circulated throughout the Nationwide Office, soliciting all employees to actively participate, in various ways, in the corporate sponsorship of Pennsylvania's "No Fault Reform Act".[45] Novosel was in personal opposition to the proposed Act and refused to participate in the solicited activity. Novosel was then discharged for, he claims, for refusing to participate in the employer's political activity and sued for wrongful discharge on several bases. Novosel's most important claim for the purposes of this article is his claim of discharge in opposition to public policy.[46]

The Third Circuit Court of Appeals did indeed find that Mr. Novosel had cause of action to sue under the law of Pennsylvania, citing in particular *Geary v. United States Steel Corporation*[47]. The court held in *Geary* held that "where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship *and no clear mandate of public policy is violated thereby*, an employee at will has no right of action against his employer for wrongful discharge."[48] Despite the holding in *Geary*, the language of the opinion was construed to provide legal remedy to private employees in wrongful discharge cases.[49] The court of appeals subsequently held that cognizable expression of public policy could be found in either the First Amendment to the federal constitution or under Article I, section 7 of the Pennsylvania constitution.[50] The court then asserted that the political beliefs and associations of employees are at the core of protected First Amendment protections. While there is no state action involved in this case and direct implication of the First Amendment is difficult, the Amendment and attendant case law have value in implicating a clear public policy preference regarding the acceptability of using hiring/firing to coerce employees to political action.[51] Perhaps most importantly, the court then established the factual bases necessary to argue wrongful discharge based on the public policy exception to at-will employment. The factual bases established by the Third Circuit Court were drawn from the rulings in *Pickering* and *Connick* and are as follow:

> 1) Whether, because of the speech, the employer is prevented from efficiently carrying out its responsibilities; 2) whether the speech impairs the employee's ability to carry out his own responsibilities; 3) whether the speech interferes with essential and close working relationships; 4) whether the manner, time and place in which the speech occurs interferes with business operations.[52]

D. Schulz v. Industrial Coils Incorporated

Schulz was an employee at Industrial Coils' Baraboo, Wisconsin plant.[53] In 1982 he wrote a lengthy letter to the editor of the local newspaper, the nature of which was highly critical of the company and several of its officers. The letter itself touched on the ostensibly "public issue" of belittling of school teachers by the Baraboo community; however, the letter also excoriated the president of the local school board, who happened to be an officer at Industrial Coils, for the manner in which the company was run.[54] Schulz was fired after the publication of the letter.[55] Schulz subsequently sued Industrial Coil claiming that his discharge was wrongful as it was grounded solely upon his exercise of free expression, and thus contravened express public policy of Wisconsin.[56]

The court began under the assumption that Schulz is an employee at will. The court had established in *Brockmeyer v. Dun & Bradstreet*[57] a narrow exception to the employment at will doctrine, holding that an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law. The court emphasized that this exception is limited in nature.[58] It is the burden of the plaintiff to show that the he has been terminated contrary to a fundamental public policy.[59] Schulz asserted that his dismissal violated a clear public policy, namely article 1, section 3 of the Wisconsin constitution, which holds that "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."[60] The court held that Schulz was fired because of the derogatory remarks regarding corporate management in the letter. However, the remarks were mixed with commentary on a public issue and Wisconsin constitution's free speech clauses do articulate a clear preference for speech activities.[61] The question becomes whether public policy was contravened by Schulz's release. The appeals court cited *Connick v. Myers*[62] and indicated that employer's need not tolerate speech that would undermine authority or discipline, or are otherwise disruptive of office routine or employment relations, in the name of a limited free speech interest.[63]

E. Summary

Given the cases above, one can see that in drawing the line between acceptable and unacceptable speech activities in the workplace, the Court has construed the right to said speech activities in a very narrow fashion indeed. Pickering

reiterated said right for public employees to the extent that employee speech does not subvert the normal operations of the workplace. Connick narrowed the boundaries of acceptable speech in the workplace and seemed to indicate the speech must not merely be of public interest but of a substantive public interest.[64] Novosel and Schulz represent the proposition that private employers have near total authority to terminate employees for speech conduct, unless the employee happens to file suit where a public policy exception to the at will employment doctrine is recognized.[65] Thus, the proper question is not whether the Court should engage in judicial line drawing with respect to workplace; rather, one must ask whether the line drawn by the Court is normatively desirable. The next section addresses the conceptual nature of public discourse and the how the workplace as a speech forum fits into said concept.

III. WORKPLACE SPEECH AND THE BOUNDARIES OF PUBLIC DISCOURSE

If indeed free political speech is essential to the concept of the democracy, the concept of public discourse is the logical extension of that value. Cynthia Estlund indicates that public discourse consists of political deliberation that engages citizens in a way that transcends the ballot box and in a fashion that improves the quality of political decisions.[66] Considerable debate exists as to whether the workplace is properly a forum for public discourse and whether such speech should receive protection of the First Amendment.

A. Public Discourse as a Theoretical Construct

Robert Post states that one of the primary purposes of the First Amendment is the establishment of a protected space for public discourse.[67] However, the continuation of this public space presupposes knowledge of what a public is and what its discourse is contingent upon. Some have suggested that a public comes into existence when group confrontation arises regarding the normative value of the rules (implicit or explicit) that govern behavior patterns and resulting judgment of consequences in a society sufficiently complex that multiple and incompatible group behaviors arise.[68] What guarantees the continuation of the public is the ability of groups to engage in discourse.[69] Thus, an appropriate question to ask is whether persons interacting in the workplace could be described as a "public?"

i. Discursive Preconditions: The Building Blocks of a "Public"

The continuation of public discourse is dependent upon at least five preconditions. First, the community in question must contain a plurality of cultures and traditions; the behavioral norms of a homogenous community will not provide the necessary catalyst to spring discourse free from the regulatory effect of said norms.[70] Second, the community in question must value heterogeneity such that mechanisms are in place to counteract powerful tendencies toward uniformity.[71] Third, the participants in the discourse must be subject to a degree of common social stimuli; the community must have something in common to talk about.[72] Fourth, participants need to have a reason to enter the extra-communal discourse; Post cites the marketplace as one of the most visible public spheres.[73] Individuals from various groups interact in a venue where decision-making proceeds based on common assumptions about profit, not cultural traditions. Fifth, public discourse requires a set of commonly available, accepted standards of evaluation and meaning; the participants need to be able to understand each other.[74] The balance required to achieve this fifth requirement of discourse is extremely difficult to achieve. If the participants share too many standards of behavior and cultural norms, they cannot fulfill the first requirement of discourse, communal heterogeneity; if the participants are so different that they share to few sets of tradition that there exist no common standards of interpretation and evaluation, any discourse becomes absurd.[75]

ii. Workplace Speech: Part of the Public?

To decide whether a workforce could be conceived of as a public, one must analyze the workforce according to the aforementioned preconditions. As previously stated, a relatively heterogeneous community with varying cultural viewpoints is a necessary element of a public. The workplace may actually be the single most important arena for interaction between adults of different racial, ethnic, and class backgrounds.[76] Research indicates that even in the present day, living patterns, secondary education, religious congregations, and voluntary associations tend to be dominated by members of a single race.[77] Professor Estlund notes that while true workplace integration remains far from complete, studies indicate that work is one of the most significant sites in which interracial interaction occurs.[78] Further credence is lent to this position considering that while great strides in racial and ethnic integration have been made in the field of higher education and the military, these segments affect only a small portion of potential participants in the public discourse and generally only for a limited time.[79] Consequently, for the majority of the potential participants in public discourse, the workplace becomes the primary site for regular cross-cultural exchanges. The problem of partial integration remains, however, as comparative matter, the workplace seems to satisfy the precondition of diversity at least as well as other domains considered part of the public.

The second precondition of a public is the value of heterogeneity and the presence of mechanisms designed to counteract tendencies toward uniformity. The workplace may actually be well suited to achieve the continuation of

heterogeneity as a community value. While tendencies toward uniformity exist in the workplace as in other forums, the workplace is significant because businesses, unlike purely private groups, are subject to significant governmental regulation.[80]

> "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[81]

The previous quotation is part of Title VII of the Civil Rights Act of 1964; the Act stands out as a control mechanism designed to preserve and inculcate the values of diversity in the workplace community. Some might argue that Title VII's chief purpose is to remedy explicit hierarchies of class, race, and sex in the workplace; that the workplace does not voluntarily accept communal heterogeneity; thus the workplace fails to satisfy the second precondition of a public. However, this author argues that the workplace is not a compartmentalized forum[82]; values are omnipresent and tend to span the boundaries between different forums of discourse, in this case between a workplace forum and an explicitly political forum. That the initial impetus for the value of diversity originated outside the workplace does not necessarily indicate that communal diversity is not currently valued in the workplace. Results of an ongoing New York Times study, focusing on the New York area, indicate that as many as 94% of job seekers would rather work in a diverse workplace, 77% seek a diverse workplace in their next job, and 76% say that diversity improves the work environment.[83] While one must be careful of making gross generalizations, the results of the New York study, at the very least, suggest that workplace diversity is becoming of greater importance to both prospective job seekers and hiring managers.

The third public precondition is that of common social stimuli. Given the volume of time that Americans spend in the workplace, interaction with coworkers is the most significant interchange outside of the home.[84] It cannot be gainsaid that employees have numerous opportunities for interaction before work, after work, on breaks and lunches, and during the conduct of work itself. The fact that employees tend to interact with many of the same coworkers on a regular basis fosters discourse that frequently transcends casual conversation about sports or popular culture to discussion of news and political events.[85] The ubiquitous nature of news services, both broadcast and print, practically assures that employees will be exposed to a certain degree of similar stimuli, particularly significant national news while the relative geographic closeness of employee domiciles provides the potential for exposure to a more local breed of stimuli.[86] Therefore, the workplace community seems to satisfy the common stimuli precondition of a "public."

The next precondition of a "public" is a reason to enter into the extra-communal discourse. As previously stated, Post cites the marketplace as one of the more common public spheres where decisions are based on facts and news rather than upon tradition.[87] It seems far more likely, however, that employees enter into the workplace and the attendant dialogue based on the basic economic necessity of earning a living. Clearly, participants have a significant interest in entering the discursive forum of the workplace, satisfying the fourth precondition of the public.

The final precondition of a public is the presence of a set of commonly available standards of evaluation and meaning, yet not share too many standards such that participants fuse into single community. Again, the workplace may be able to supply the necessary balance between standards and diversity. How? Common assumptions about, and commitment to, firm missions/principles and the enhancement of stockholder value drive successful business decisions.[88] Employees must subordinate themselves to these goals, all of which require a degree of unity in thought and evaluative standards. However, workplace diversity initiatives and control mechanisms, like Title VII, ensure that workers of diverse backgrounds are subject to a level playing field within the firm. Given these controls, workers are forced to adopt common sets of meaning with regards to firm business yet maintaining a degree of autonomy, particularly related to their political views; discourse may flourish as a result.

Therefore, certain characteristics of the workplace suggest that it may be amenable to the creation of a public sufficient to engage in discourse. However, there exists a legitimate concern about the power relationships that characterize the typical workplace and the effect that such power structures have on the degree of autonomy that workers exercise in their discourse.

B. Workplace Discourse and the Problem of Power

Though this author argues that employees may constitute a public, there are certain problems associated with the nature of the workplace that cast doubt upon its ability to function as a medium of public discourse. One of the problems associated with speech activities in the workplace is the notion that the time spent at work is spent pursuant to the business goals of the employer; speech activities do not necessarily fall within the employer's business goals. This assertion is strongly supported by the relatively free reign given to employers to "monitor, censor, and punish communication among

coworkers."[89] Such power relationships are pervasive within the workplace and tend to place participants in discourse on unequal footing.[90]

Philosopher Jurgen Habermas states that the purpose of public discourse is the creation of an uncoerced common will pursuant to the task of self-government.[91] To achieve an uncoerced public will, a regulative structure designed to foster substantive equality amongst participants must be imposed, such that the only persuasive force in the debate is that of rational argument.[92] Habermas terms this structure "the ideal speech situation."[93] Thus, a quandary exists. How can the workplace be utilized as a forum for public discourse given the disparities of power inherent in the hierarchically organized business environment?[94] Indeed, one could argue that because the only entity capable of imposing an ideal speech situation on the working environment is the state, the continuity of and uncoerced nature of resulting discourse is questionable. The purpose of self-governance is subverted by the governmental imposition upon the discourse.

A further problem is that the wide-open and uninhibited nature of free speech that is normatively desirable cannot occur in the workplace due to the need for rules of civility that are beyond the scope of the discourse.[95] How can workplace discourse be considered robust if the "rules of the road" themselves are not subject to the discourse? Post terms this problem the paradox of public discourse and would argue that given the explicit presence of the paradox in the workplace, it is a forum incompatible with optimal public discourse.[96]

One cannot deny that power relationships are present in the workplace and the presence of civility rules, like Title VII, preclude the possibility of completely unfettered discourse.[97] Despite these problems, this author suggests that to eschew protections on the aforementioned bases alone is undesirable. While Habermas's ideal speech situation, a structure that strips the participants of their power disparities, is attractive as an ideal, implementation of such an ideal is extremely problematic.

Habermas assumes that state action can, in fact, neutralize power disparities amongst discursive cohorts. Doubtless, the state can impose a temporary legal neutralization of power relationships; indeed this author suggests that the imposition of a legal remedy is essential to solving the problem of limited political speech in the workplace. This author argues, however, that no state action can completely mitigate the power relationship inherent in the workplace. It seems as though Habermas assumes that the subordination of hierarchical power to a set of discursive rules engenders a state of complete power mitigation. While a discussion between the corporate chief executive and a mid-level manager may take place in a legally enforced, power neutral status, the mid-level manager remains aware of the fleeting nature of the power neutrality and may tailor dialogue accordingly. If indeed Habermas's ideal speech situation can *only* be achieved in a state of total power neutrality, workplace speech will assuredly be unable to function as an exemplary forum of discourse pursuant to self-governance. Yet to argue that discourse relevant to governance does not occur in the workplace or that such discourse should not receive protection merely because of an inability to completely satisfy an ideal theoretical construct is foolish.[98]

Much the same can be said for Post's argument that wide-open discourse cannot occur in forums that are governed by rules of civility. While workplace debate may not be fully robust in terms of Post's critical interaction/rational deliberation[99] model, it cannot be gainsaid that discourse relevant to self-government does occur in the workplace; to deny at least a de minimus set of protections to such speech denigrates the value that democratic society places on political speech. Practical considerations, such as the increasing amount of time spent in the workplace and sociological data indicating the rising importance of the workplace as a site of interaction regarding matters political must factor into the equation. To deny speech potentially relevant to democracy protection on the basis of abstract theory alone, absent practical considerations, seems likely to be dangerously under-inclusive.[100]

IV. THE NEED FOR PROTECTIONS: PREVAILING WORKPLACE NORMS

While this author argues that workplace speech is indeed a proper forum for public discourse, speakers may have difficulty directly accessing the protections of the First Amendment[101]; it seems quite clear that the values ensconced within the First Amendment constitute a preference for free speech and should not disappear entirely because one is in the workplace.[102] Given that workplace communities fulfill the definition of a public and evidence suggests that discourse occur in the workplace, there exists a clear need for establishing protection of political speech in the workplace, despite the troubling inability to establish power neutrality. Also, recent developments in managerial philosophy, like participative management[103], that suggest consonance with free speech values indicate a preference for and a need to protect employee speech.

A. Yamada's Indicators of Chilled Speech

Yamada suggests that there are five major indications that workplace speech is being chilled to the detriment of discourse. First, workers have a strong interest in self- censorship based on changing expectations about labor structures and economic insecurities.[104] No longer can a worker expect to establish a long-term relationship with a firm; outsourcing, temporary help, and part time workforces have become the norm rather than the exception, particularly given the trend away from a manufacturing based economy.[105] Media coverage of "downsizing anecdotes"[106] and the individualistic attitude of many workers further reinforce the need to self-censor speech in the pursuit of job security.[107]

A second indicator of chilled speech relates to the decline in membership in unions and related forms of worker representation.[108] The collective bargaining process allows workers to collectively address key issues such as job security, compensation, working conditions, and the disciplinary process. At-will employees have no comparable mechanism for protection, with the exception of anti-discrimination legislation, from arbitrary dismissal and will be less willing to participate in speech activities without explicit protection.[109]

Third, as information technology has become more prevalent, so has electronic monitoring of employees. Yamada asserts that nearly two-thirds of employers record employee e-mail, voice mail, phone calls, and review computer files; some employers do not inform employees of such monitoring.[110] Advocates of monitoring employees via electronic means analogize the situation to days of yesteryear when the employer merely looked over the shoulder of the employee as a means of supervision; however, unlike the past, when employees knew when the boss was looking over one's shoulder, contemporary employees never know when the employer might be looking.[111] It constitutes no great leap of faith to believe that Orwellian monitoring of this type has a chilling effect on both legitimate and illegitimate employee activities.[112] The question becomes whether the price of restrained speech is one that society be willing to pay?

Fourth, Yamada cites growing corporate social and political partisanship as having the potential for chilling employee speech.[113] Though Yamada admits that the rise of corporate commitment to social values has had a positive effect, it is possible that that commitment to firm social/political philosophy creates a screening mechanism designed to keep certain applicants out while creating a new requirement for current employees hoping to keep their jobs.[114] Though there is little sociological data available as evidence of quashing speech, Novosel suggests that there may indeed be a quid pro quo pressure applied to employees who speak out against the "party line."[115]

Finally, the simple fact that employees are spending more time on the job than in previous years necessarily decreases the potential time spent in speech activities outside the workplace.[116] Thus, the workplace as a site of discourse and self-expression becomes far more important.

B. Participative Management and Democratic Values

As indicated by Yamada, there seem to be ample reasons available indicating that workplace speech is subject to a chilling effect. Yet it cannot be gainsaid that the last twenty-five years have seen revolutions in management techniques[117]; one must ask if it is possible that modern participative management techniques encompass many of the same values as democratic society. If so, one could assert that an increased level of free speech in the workplace is appropriate.

There are numerous values associated with the democratic process. Among those values most associated with the need for free speech is the notion of pluralistic participation in the political process; participation in the political process is inextricably linked to a process of national self-determination and preservation. Pluralistic participation in the political decision making process also allows social issues to framed in multiple perspectives; discussants of varying perspectives are expected to clash and reconcile their views in terms of a common policy. Participation increases discussant efficacy by fostering a sense of ownership in collective decisions. This is not to suggest that all discussants will agree with the decision; however, the discussants will have been able to voice objections and suggest alternative views. Thus, the running discourse reconciling multiple viewpoints leads to a fuller, more robust decision. One of the purposes of the First Amendment is to preserve the space necessary to a robust decision making process.[118]

Unlike the American political process, the workplace has not been traditionally viewed as inclusive in terms of participation.[119] Yet Thomas Cummings suggests that the contemporary American managerial landscape is dramatically different from times past; Cummings asserts that for contemporary organizations to make timely decisions, generate new ideas, implement new technologies and competitive techniques requires a highly involved workforce.[120] There seems to be an apt parallel between the realm of the political participation and business decision-making. Much as political decision making requires multiple perspectives to construct policies that are conducive to the survival and prospering of the collective, the aforementioned statement by Cummings, seems to indicate that full utilization and participation of employees is necessary to activities that ensure commitment to firm goals and firm survival.

Cotton posits that the goal of participative management programs is to implement participative processes designed to encourage employee commitment to organizational success.[121] Without doubt, "organizational success" encompasses the maintenance, growth, and perpetual continuity of the firm.[122] A concurrent effect of the participative management philosophy is the demonstration of a preference for democratic values. There are techniques of note that provide evidence linking the values of workplace participation with pluralistic political participation and thereby indicating a preference for free speech values. These techniques include, most notably, self-directed work teams.

Self-directed work teams are groups of no more than fifteen employees who essentially take over the functions of a production supervisor and are given the opportunity to make group decisions regarding day-to-day work operations.[123] Team members in a production area decide how the team manpower will be distributed, what types of maintenance should be performed, as well as interacting with suppliers and customers of the internal and external variety.[124] In certain systems, the team even takes over certain administrative functions such as making performance appraisals as well as making decisions regarding hiring and firing.[125] The self-directed work team is premised on both participation and autonomy; the team is required to reconcile dissimilar plans for daily operation into a unified plan while maintaining the commitment of the

dissenting individuals to the both the plan and the process. This requirement of team autonomy and reconciliation of different operational plans necessarily requires and values a degree of freedom in terms of speech norms.[126] Indeed, the process of the self-directed work team could be viewed as a quasi-microcosm of the political process, at least in terms of participative structure and associated values. It would be incorrect to argue that such self-directed work teams are a part of all workplaces; however, their increasing importance indicates a preference for a degree of free workplace speech, a preference that should be fostered and protected by federal legislation.[127]

V. INEFFICACIOUS WORKPLACE SPEECH: A LEGISLATIVE SOLUTION?

Drawing upon the previous discussion, one can see that there are numerous sources indicating a value preference for robust speech on political issues. Evidence, including sociological studies that indicate the presence of political dialogue in the workplace, the increasing use of participative management techniques, and prevailing workplace norms that have a chilling effect on speech suggest a need for protection of workplace political discourse. Given the existing dichotomy between the value preferences for political speech and the currently narrow vision of acceptable workplace speech adopted by the federal courts, this author suggests that federal legislation be enacted as a leveling mechanism, designed to offset the power disparity between employer and employee. The legislation should provide a uniform cause of action for persons who have suffered adverse employment action as a result of their speech and is premised on two assumptions: first, a balance must be struck between the employer's right of control and the employee's right to speech; second, this balance exists regardless of the public/private status of the employee. Thus, the proposed legislation represents a blending of the public policy exception to the employment at will doctrine and the balancing test articulated in *Pickering*.[128]

While tempted to suggest that legislation protecting employee speech rights ought to be both broad and pervasive, this author recognizes that it is well established that the right to free speech is not absolute, regardless of the forum.[129] The workplace is no different; practical matters must be taken into consideration. The workplace is, after all, a place of business; to suggest that an employer need tolerate speech of an excessively unruly and disruptive nature would represent a legitimate burden upon the employer's conduct of business.[130] On the other hand, however, it is not inconceivable that the law should be willing to accept inconveniencing the employer in the name of a more perfect polity. Consequently, drawing the line between acceptable and unacceptable speech is a matter of considerable difficulty.

Rather than leave the question of what speech ought to be protected by the proposed legislation to the vagaries of judicial interpretation, this author proposes that the statute encompass all speech that is not disruptive and does not violate other federal statutory provisions. Protecting a broad range of speech is consistent with the notion that public discourse should be unconstrained by categorical definitions.[131] The Third Circuit Court of Appeals in *Novosel*[132] articulated an exemplary test that, with some modification, serves as an ideal evaluative basis for determining whether workplace speech is considered disruptive and is worthy of legal protection. There ought to be three evaluative bases that constitute the modified *Novosel* test. *First, does the speech substantially interfere with the employee's official working duties*? *Second, does the speech substantially interfere with and impose an undue hardship upon the normal operations of the business based on the time, place, and manner of the speech*? *Third, does the speech undermine essential, close working relationships*? With such guidance, the application of the modified *Novosel* test is left to the judiciary in the hopes that the speech values so highly revered in other discursive forums become inculcated in the workplace.

CONCLUSION

The First Amendment serves as both gospel and shield to the American political system; it is a document that serves as an authoritative source of values and as a procedural protector of said values. The speech values of the First Amendment are not simply of the pedestrian variety but rather those upon which the continuity of our democracy is based. Consequently, it seems unthinkable that national commitment to those values should cease to exist the moment one enters the workplace. As Americans spend an increasing portion of their lives in the workplace, opportunities to dialogue about matters of political and social importance elsewhere necessarily diminish. The analytical framework and tentative solution provided in this article is but one of many potentially viable solutions to the problem of unprotected workplace speech. While the pros, cons, merits, and faults of such frameworks should be vigorously debated, one must recognize that whatever alternative is adopted, the fundamental commitment of said alternative to the proposition of unfettered speech is paramount.

Footnotes:

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[1] U.S. CONST. amend I.
[2] Konigsberg v. State Bar, 366 U.S. 36 (1961).

[3] The distinction between First Amendment protections and values is significant given the scope of this article. Public employees, by virtue of their government jobs, have little difficulty implicating their employer as a state actor, thus allowing them to directly accessing the protections of the First Amendment in cases of discharge for speech activities. The protections may be limited given the time, place and manner of the speech in question; however, the protections apply nonetheless. Yet, the scope of this paper addresses the plight of both public and private employees. Private employees generally cannot access the protections of the First Amendment directly; however, First Amendment jurisprudence does serve as useful source of values in assessing the desirability of certain types of speech, particularly political speech, in certain types of places.

[4] In this case, the author refers to the "modern judiciary" not as a description of philosophical viewpoint (e.g. pre-modern, modern, or postmodern) but merely as the body of cases decided in the twentieth century.

[5] Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J.), ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. *They believed that freedom to think and speak as you think are means indispensable to the discovery and spread of political truth*; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to society is an inert people; *that public discussion is a political duty; and that this should be a fundamental principle of the American government*.")

[6] Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 3 (2000); David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 20-21 (1998).

[7] ROBERT LEVERING, A GREAT PLACE TO WORK 62 (1988). Levering states that "we generally accept as a given the contrast between our time at work and the rest of our lives. Once you enter the office or factory, you lose many of the rights that you enjoy as a citizen."

[8] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF- GOVERNMENT 24 (1948).

[9] *But see* ROBERT POST, CONSTITUTIONAL DOMAINS 268-289 (1995). Meiklejohn's "town meeting" managerial structure as a guardian of free speech is certainly subject to criticism and is, at times, a problematic framework. First, Meiklejohn asserted this optimal structure in 1948. 1948 is a time far different from the incipient days of the nation in the late 18th and early 19th century. 1948 is also very different from the U.S. of 2002. The U.S. population had changed in size, in composition, in mobility, in political attitudes, and generally in diversity of viewpoints. Consequently, one might question how analogous the current process of American government is to the "town meeting"? Furthermore, given the vastness of the nation, does the possibility of American government conforming to Meiklejohn's structure exist on a national level? Is such a conformance even remotely possible? Second, Meiklejohn enlists the services of a neutral moderator to enforce the rules of the managerial structure as determined by the meeting. Meiklejohn deftly avoids the problem of how the moderator decides between legitimate and illegitimate speech for the purpose of public discourse. Meiklejohn states that the task of the moderator is to abridge speech "if the speaker wanders from the point at issue, is abusive, or in other ways threatens to defeat the purpose of the meeting." Indeed, in the course of determining managerial purpose, the assumptions, values, and world-view of the moderator may have the effect of unduly chilling certain speech. Third, the ability of those present at the meeting to agree upon a set of rules seems to be predicated on some prior, commonly held assumptions and norms; for example a majority vote is to be the mechanism of choice in arriving at a final decision. These norms, particularly those related to majoritarian rule, combined with the neutral moderator concept, run afoul of what Post aptly terms the necessary indeterminacy of public discourse. According to Post, public discourse ought to be conceived as an arena in which "citizens are free to continuously reconcile their differences and to (re)construct a distinctive and ever changing national identity." Post views the inherent censorship of Meiklejohn's model as contradictory to the "voting of wise decisions" because the model seeks to censor dialogue on the basis of "function and procedure." In other words, Meiklejohn's model is suspect in Post's eyes because it assumes that the function of a democracy is the rational, orderly conduct of public business. Post believes that those who do not hold this common assumption are denied a place in the public discourse and consequently from the public process of self-determination.

[10] *Id*. at 26-27.

[11] *Id*. at 26.

[12] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[13] ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 31 (1941).

[14] *Id*. Like Meiklejohn, Chafee does not support an absolutist reading of the First Amendment. Chafee acknowledges that there are certain legitimate governmental objectives with which complete freedom of speech may interfere, such as the education of youth and national defense from foreign aggression. Thus Chafee endorses the restriction of free speech in those instances only after a balancing has taken place between legitimate governmental objectives and the value of free speech on said issue. Chafee cautions that the need for free speech should weigh heavily in the balancing act and believes that the First Amendment functions to give "binding force to this principle of political wisdom."

[15] *Id*. at 33.

[16] *Id.*
[17] *See* MEIKLEJOHN, *supra* note 8 at 54-60. Meiklejohn's position stands in sharp contrast to that of Chafee's; while both scholars make a distinction between private and public speech, Meiklejohn and Chafee accord the two speech categories different levels of protection. Chafee asserts that the First Amendment is not only the guarantor of public speech pursuant to the attainment of truth for the purpose of self-government but also of private speech pursuant to the needs of persons to express their opinions on matters vital to their lives. Meiklejohn, on the other hand, accords First Amendment protection only to public speech. Meiklejohn sees the First Amendment as the guarantor of "the common needs of all the members of the body politic." Meiklejohn subordinates the individual need for speech to the collective will of the nation and castigates Chafee for according First Amendment protection to both categories, believing that to do so places the very freedom of political speech at risk. Meiklejohn assumes that there are instances when private speech must be abrogated and if such private speech falls within the purview of the First Amendment, public speech becomes differentiated from private speech by only a level of "proximity and degree". Meiklejohn fears that without a clear difference between the protections granted to public and private speech, the abrogation of protected private speech will lead down the slippery slope to the abrogation of protected public speech. This author is inclined to disagree with Meiklejohn for the simple reason that the line between private and public speech is not in any way a bright one; rather the line between the categories is fuzzy and indistinct. To accord no First Amendment protection to private speech seems dangerously under-inclusive, particularly given this author's assertion that speech related to the process of self-government occurs in multiple rather than singular forums.
[18] Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 740-745 (1977). *See also* Yamada, *supra* note 5 at 6-7.
[19] *Id.* While some might argue that the values of the founders should not necessarily guide modern jurists, it cannot be said that exposure to facts/opinions and vigorous dialogue as a means of discovering truth has lost its appeal. Justice Holmes, for example, in his *Abrams v. U.S.* 250 U.S. 616 (1919) dissent, asserted that "when men have realized…the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely be carried out."
[20] *Id.*
[21] *Id.*
[22] *Id.* Emerson indicates the values of social control and individual fulfillment were "not as clearly articulated" by the founders and that "the essential point is that the process is necessary for reaching the best social decision, regardless of what values are conceived of in absolute or relative terms."
[23] Pickering v. Board of Education of Township High School 205, 391 U.S. 563 (1968).
[24] Connick v. Myers, 461 U.S. 563 (1983).
[25] Novosel v. Nationwide Insurance Co. 721 F. 2d 894 (1983).
[26] Schulz v. Industrial Coils Inc., 373 N.W.2d 74 (1985).
[27] Pickering, *supra* note 23 at 566. Specifically, Pickering charged the Board of Education of mishandling funds appropriated to the school district via a bond issue in 1961.
[28] *Id.* at 567. The Board charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district.
[29] Keyishian v. Board of Regents, 385 U.S. 589 (1967).
[30] Pickering, *supra* note 23 at 568. The incorporation of First Amendment rights via the Due Process Clause of the Fourteenth Amendment and its subsequent application to state governments in their capacity as employers is what makes the distinction between a public and a private employee so important. To invoke the protections of the First and Fourteenth Amendments, one must demonstrate overt state action or be able to demonstrate a link between a private actor and the state. Pickering's employment by the public school system easily establishes the state action requirement. Invoking the aforementioned constitutional protections becomes a far more difficult when the Court perceives the abrogation of rights as a conflict between purely private parties.
[31] *Id.* In this case, when the Court refers to the power of the state to regulate the speech of the general public, reference is being made to the power of the state to regulate speech in forums traditionally held open for public discourse. The speech of employees of non-governmental entities has not generally, as we shall see, been held to be a forum of public discourse.
[32] *Id.* at 568-569. The balancing test weighing speech rights versus the need for efficiency of administrative operations represents a judicial compromise between the tests asserted as proper by the litigating parties. The School Board asserted a strict standard, arguing that the "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Pickering argued that the Court should apply the defamatory statements test established in New York Times v. Sullivan 376 U.S. 254 (1964), which ruled that statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not."

The Court refused to apply either test on the grounds that establishing a general rule would be unwieldy and imprecise given the potentially innumerable situations in which a teacher might be released for speech activities.

[33] *Id*. at 574-575. Despite the Court's protestations to the contrary, the majority seems to have constructed its balancing test squarely in favor of the speech rights of the employee. The confusion may stem from the Court's use of demonstrable harm and/or knowing or reckless falsity as the key factors. The Court noted that in the absence of demonstrable harm or knowing or reckless falsity, the speech of a public employee receives protection under the First Amendment. However, the Court does not indicate which of the two factors is the controlling one, though the Court does suggest that even knowing or reckless falsehood may receive First Amendment protection if no demonstrable harm can be proven. Justice White, in his dissent, construes this line of argumentation as inconsistent with the Court's previous ruling in Garrison v. Louisiana 379 U.S. 64, 75 (1964), which stated that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Therefore, some question exists as to whether a public employee who makes an unwittingly false statement on a matter of public importance could be terminated if some harm could be proven despite the absence of knowing or reckless falsehood.

[34] Connick, *supra* note 24 at 140.

[35] *Id*. at 140-141.

[36] *Id*. at 141. Connick was most concerned about the questions regarding the trustworthiness of the supervisory attorneys and the potential negative fallout that could occur should the public become aware that certain members of the District Attorney's office felt pressure to work on political campaigns.

[37] *Id.* Both the District Court and the Fifth Circuit Court of Appeals ruled in favor of Myers, finding that although Connick cited Myer's refusal to accept transfer as the reason for her dismissal, the controlling factor was her issuance of the questionnaire. More importantly, both courts ruled that the matters discussed in the questionnaire were matters of public concern and the state did not demonstrate that the questionnaire substantially interfered with office operations.

[38] *See infra* note 29.

[39] Pickering, *supra* note 23.

[40] *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 28-33 (1990) (Professor Estlund rightly recognizes that the concept of basing speech protections on a "public concern" test is ultimately flawed. Estlund argues that the Court has increasingly realized the need for protection of speech on matters of public concern. However, until the Court's ruling in Connick, the added protections for speech were not expressly limited to the "sphere of expression on public affairs." Estlund theorizes that the Court may have feared its constitutional doors open to a plethora of "glorified workplace grievances" if it did not severely limit the protection to the matters of overtly public, not private concern. Therein lies the rub; the whole purpose of establishing a category of protected speech is to protect public discourse related to self-government. The nature of public discourse is necessarily indeterminate and depends largely on the interests of the individuals engaged in the debate. Thus, the line between a public interest and a private one is blurry and indistinct. Indeed, Robert Post states: "there is no principled method of determining what kinds of issues ought to be excluded from the domain of public discourse." Estlund recognizes that there is certainly a difference between ordinary work complaints and discussing matters such as the corruption of a public functionary but denies that it is possible to establish any bright line test suitable to guide judges in deciding what is a matter of public concern.).

[41] Connick, *supra* note 24 at 148-150. There was little debate that potential pressure to work on political campaigns was a matter of public concern, however, the other matters addressed in the questionnaire were discounted by the majority as matters of public concern by virtue of their personal nature. That office transfer policy and its effects on morale and operational efficiency were not matters of public concern was contested by the minority. The minority held that morale, efficiency, and the manner in which the office was operated were matters of interest to those seeking to develop an informed opinion of the performance of the elected district attorney.

[42] *Id*. at 147.

[43] *Id*. at 153. The majority held that while the questionnaire did not impede Myer's ability to perform her duties, the Pickering calculus weighed squarely in favor of the government in this case for two major reasons: 1) the questionnaire was distributed on work time, thus taking time away from normal duties 2) the nature of the questions were such that there existed a *potential* undermining of close working relationships. The Court stated that wide deference should be granted to the judgment of a supervisor in determining the potential for undermining work relationships; it is not reasonable to expect the supervisor to wait until damage is done before taking prompt corrective action.

[44] Novosel, *supra* note 25 at 896.

[45] *Id*.

[46] *Id*. (Nationwide's motion to dismiss was granted by the District Court in question.)

[47] Geary v. United States Steel Corporation, 319 A.2d 174, 180 (1974).

[48] Novsel, *supra* note 25 at 897-898. Novosel was decided by the U.S. Court of Appeals for the Third Circuit and thus the application public policy doctrine in wrongful discharge cases is limited. However, various other courts have recognized the public policy doctrine, including Wisconsin, which articulated an exception to the at will employment rule. The Wisconsin

court stated in Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 that an employee has a cause for action for wrongful discharge if the discharge contravenes a fundamental and well established public policy as evidenced by existing law.
[49] *Id*.
[50] *Id*. at 898-899. Article I, section 7 of the Pennsylvania Constitution states that "the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." The court of appeals declined to limit the scope of "public policy" to those statutorily enforced. The court recognized the public policy exception to at-will employment had only been applied in cases absent a statutory legal remedy. The court defined a fundamental public policy as one that "strikes at the heart of a citizen's social right, duties and responsibilities." This author wonders whether the court would have decided in favor of Novosel had the substance of his claim not been so overtly related to the political process. Novosel was essentially being asked to petition the government against his will and indeed, the court ruled that "the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim." One wonders if Novosel had been speaking out on matters generally related to the community, but not specifically related to the political process, would the court have applied the public policy exception to the employment at will rule?"
[51] *Id*. at 900.
[52] *Id*. at 901. The Third Circuit court also instructed the following factors be considered in determining the nature of the factual bases at hand: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.
[53] Schulz, *supra* note 26 at 75.
[54] *Id*. at 77.
[55] *Id*. Industrial Coils admitted that Schulz had been terminated solely because of the publication of the letter.
[56] *Id*. at 75.
[57] Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (1983).
[58] Schulz, *supra* note 26 at 75.
[59] *Id*. The court noted, in Brockmeyer, that for wrongful discharge to be actionable, the discharge must clearly contravene the public welfare, gravely violate paramount requirements of public interest and be evidenced by a statutory or constitutional provision.
[60] *Id*.
[61] *Id*. at 76.
[62] *See* Connick, *supra* note 24.
[63] Schulz, *supra* note 25 at 76-77. Industrial Coils claimed that to allow Schulz to continue in employment would hinder any future attempts to discipline employees for insubordinate behavior. The firm also stated that the letter was received by other employees with agitation and was causing a decrease in morale. Industrial Coil feared the practical effect of the letter would be loss of respect for management if Schulz were not terminated.
[64] *See generally* Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121 (1996).
[65] Although Novosel was later limited by Borse v. Piece Goods Shop Inc., 963 F.2d 611, the limitation was based on a general squeamishness surrounding the use of constitutional provisions as cognizable expressions of public policy, particularly where in situations lacking a state actor. Borse claimed that her discharge for refusal to consent to policies of drug testing and searches of personal property on workplace premises violated an expression of public policy ensconced within the Fourth Amendment of the U.S. Constitution. Although the district court in question ruled that expressions of public policy can never be grounded in constitutional provisions without state action, the Third Circuit disagreed, stating that constitutional provisions were not necessarily proscribed from the list of sources from which policy expressions can be drawn. However, the Third Circuit refused to extend the public policy exception to the employment at will rule in Borse, but did not specifically limit Novosel in instances where speech activities are implicated. Thus, the public policy doctrine may still provide some semblance of protection for workplace speech.
[66] *See* Estlund, *supra* note 6 at 51.
[67] *See* POST, *supra* note 9 at 141.
[68] Carroll D. Clark, *The Concept of the Public*, 13 SW. SOC. SCI. Q. 311, 311-315 (1933); *see also* Post, *supra* note 9 at 140-141. The term "sufficiently complex society" refers to economic and cultural differentiation.
[69] *Id*. Clark intimates that a public is in fact organized on the basis of "a universe of discourse."
[70] POST, *supra* note 9 at 141.
[71] *Id*. Post cites the tendency of authority to impose speech norms of their choosing. As an example, Post discusses the 1988 case of Hustler Magazine v. Falwell. Falwell sought to impose his own norms of civil speech upon publishing community after Hustler magazine published a parody of Falwell in a liquor ad. The advertisement referred to the Falwell's "first time",

meaning his first drink of the advertised liquor though the parody had an unmistakable sexual connotation that Falwell found "outrageous and intolerable." Falwell's subsequent suit for defamation and intentional infliction of emotional distress represents the efforts of a public figure to impose norms of speech on a society.

[72] *Id*. at 142. One of the most common forms of social stimuli is news and functions as a medium of common information. Post claims that the development of a public and a mass media are "mutually constructive developments."

[73] *Id*. To the extent that the marketplace requires a "space" where groups and individuals participate under the rubric of resource allocation for profit, public discourse is similarly situated. Public discourse represents the space in which groups participate in the democratic enterprise; groups of diverse culture and background participate in public discourse because of, at the very least, the omnipresence of the governmental machine and more likely because of a sense of shared political destiny combined with the desire to affect the direction of the nation.

[74] *Id*.

[75] *Id*. Post refers to common standards of meaning but does not explicitly state that uniform language, such as English, is a requirement of public discourse. Given the number of potential participants in the public discourse who speak a language other than the dominant language of the debate, is it possible to integrate such persons into the debate in a meaningful fashion, particularly given the inability to precisely translate the phraseology of one language into another. This author wonders how common must common standards of evaluation be in order to foster public discourse between groups of differing languages?

[76] *See* Estlund, *supra* note 6 at 14. The workplace is indeed a site of comparative integration. Estlund notes that the average workplace is not genuinely racially integrated but even a partial integration yields far more social integration than do other domains of American society.

[77] *Id*. at 14-19. Estlund notes a June 2000 New York Times survey suggesting that the vast majority of religious congregations are dominated by members of a single race; Estlund also cites findings in a Gary Orfield study that urban public schools are more racially imbalanced now than prior to 1971. Voluntary associations, according to studies conducted by the University of Chicago, tend to be more integrated, at least in the minds of those surveyed. While over 40% of whites and over 50% of nonwhites indicated that the associations they belonged to were racially mixed, Estlund notes that the respondents were left to their own judgment to determine what racial mixture constituted "mixed" versus "mostly own race" and thus the study may be somewhat suspect. The study also made no distinction between work (unions) and non-work, ethnic voluntary associations.

[78] *Id*. at n74. Citing a Memphis survey that asked residents "When you think of places where you associate most often with people of different racial or ethnic backgrounds, which of the following places comes to mind first?" Respondents indicated "work" about half the time while the options of "casual occasions", "sporting events", "church", "community events" or "other" no more than 19% of the time.

[79] *Id*. at 17.

[80] *See id*. at 48-49.

[81] 42 U.S.C. § 2000e-2 (1999).

[82] By lack of compartmentalization, this author refers to the fact that the workplace actors are not simply members of one public forum but of many. Consequently, it would be ludicrous to suggest that there exist no overlap between the values of workplace actors participating in the explicitly political community and their participation in the workplace community.

[83] *Job Seekers in the New York Area Prefer Diversity in the Workplace; Job Seekers and Hiring Managers Agree that Diversity Benefits Business Performance; The Second of a Three-Part Series on Workplace Diversity*, N.Y. Times-Business Wire, Mar. 12, 2002, *at* http://www.corporate-ir.net/ireye/ir_site.zhtml. (Hiring managers at larger firms were more likely than managers at smaller firms to report that increasing the level of diversity would benefit their business performance.)

[84] Estlund, *supra* note 6 at 9.

[85] *See* Robert Huckfeldt et al., *Political Environments, Cohesive Social Groups, and the Communication of Public Opinion*, 39 AM. J. POL. SCI. 1025, 1031-1032 (1995); *see also* Estlund, *supra* note 6 at n22. Estlund cites a study that indicated that half of all discussions of political and other important matters were with non-relatives, with coworkers representing about one-third of the non-relatives. The study also indicated that workplace conversation represents a larger share of discussion on political matters than do similar conversations with neighbors and fellow church members; *see also* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2313 (1999).

[86] *See infra* note 72.

[87] *See infra* note 73.

[88] *See* KEITH D. DENTON, HORIZONTAL MANAGEMENT 7, 14-15 (1991). Denton argues that inequity in business structures and lack of employee parity affects the degree of commitment on the part of employees. The fact that the typical American company is hierarchically organized, akin to a military structure, and fosters multiple perspectives regarding corporate decision making as information moves about the hierarchy. The top-down direction of the information flow combined with multiple interpretations of corporate vision creates a state of disunity that is detrimental to firm performance. Denton notes that the distribution of financial information combined with equity of risk and profit helps foster unitary visions.

[89] Estlund, *supra* note 6 at 50.
[90] *Id*. at 56-58. Estlund notes that the workplace is clearly not a democratic institution and employees do not meet as democratic equals; however, if the fear of reprisal could be controlled, positive discourse could occur.
[91] JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, 81-82 (Thomas McCarthy trans., 1987).
[92] *See* POST, *supra* note 9 at 145; *see also* Logan Atkinson, *Coming to Terms with Procedure: The Potential of the "Ideal Speech Situation" for Michael Walzer's Communitarian Justice*, 56 U.T. FAC. L. REV., 223, 235-236 (discussing the presuppositions for rational argument and additional assumptions about the nature of ideal speech); *see also* Mark W. Sandretto, *The Threat of Free Speech to Democracy: Reducing the Danger of Cacophonous Discourse*, 30 ACAD. LEGAL STUD. IN BUS. NAT'L PROC., 8 (2001).
[93] *See infra* note 91.
[94] *See generally* Robert C. Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM AND MARY L. REV. 267, 278-290 (1991) (discussing the nature and potential purposes of public discourse).
[95] *See* Estlund, *supra* note 6 at 56-58. Estlund discusses Post's location of workplace speech as "off the map" of public discourse.
[96] Post, *supra* note 9 at 147. Post discusses the potentially exclusive needs of critical interaction and rational deliberation for optimal public discourse. Critical interaction refers to the need to express negativism and freedom from communal "norms and boundaries." Rational deliberation is premised on the need for speech to be overcome resistance by force of better argument rather than psychological intimidation, ridicule or abuse. Thus, rules of civility e.g. Title VII, are adopted pursuant to the rational deliberation requirement at the expense of critical interaction. Given that the workplace is necessarily a forum governed by rules of civility, Post would argue that workplace dialogue might be inconsistent with the wide-open, robust debate associated with public discourse.
[97] *See* Estlund, *supra* note 6 at 58.
[98] *Id*. Estlund argues that freedom from constraint is not necessarily a requirement of efficacious public discourse.
[99] *See infra* note 96.
[100] *See* Balkin, *supra* note 85 at 2313-2314. Balkin suggests that the workplace ought not be a First Amendment-free zone merely because the speech occurs in the workplace. The practical realities of "economic coercion inherent in the social relations of the workplace" should not dictate a standard of lesser protection but rather greater protection. Balkin asserts, rightly, that not all speech in the workplace is private and current employment law is overbroad in allowing employers to control the speech of employees.
[101] *Cf.* Jessica M. Karner, Comment, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CALIF. L.REV. 637, 645-645 (1995).
[102] *Cf.* Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1968). (Tinker represents the proposition that constitutional rights are not necessarily shed by entering a particular institution, such as school. Teachers and students are not necessarily stripped of their rights to nondisrutptive free speech merely because of the location of said speech and the unpopularity of the idea. There are of course certain differences between the workplace and the schoolhouse. The public schools are directly subject to the constraints of the First Amendment, unlike the many workplaces. Yet the public school may still be an apt comparison given that the First Amendment interests are tempered by the substantial state interest in maintaining discipline as part of the educational process. Speech is not totally free in the public schools just as speech is not totally free in the workplace; despite the interest in regulating speech, the Court ruled that the value preference for speech remains. This author argues that while First Amendment interests are tempered in the workplace, often by a lack of state action, the principle of Tinker holds true. One does not shed ones constitutional rights at the factory door nor is an abandonment of First Amendment values normatively desirable.)
[103] *See* Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1738-1741 (1985).
[104] *See* Yamada, *supra* note 6 at 9-13. Yamada cites a New York Times study that indicates a majority of workers feel that layoffs and job losses in the U.S. are permanent rather than temporary phenomena. About half of respondents indicated a willingness to further censor their speech if job security propositions increased.
[105] *Id*. at 10.
[106] *Id*. at n49 (discussing the contribution of media coverage regarding the human consequences of layoffs contribution to worker self-censorship).
[107] *Id*. at 11-12, n50. The individualistic attitude of workers suggests the belief that success is primarily the result of internal causation. Thus the individualistic attitude fosters an ultra-competitive game of "musical chairs." Rather than banding together to challenge inequitable managerial structures and decision-making, workers compete with each other for remaining jobs within the firm. Yamada cites available literature that suggests job survival strategies designed to make one stand out compared to peers, rather than counseling employees to suggest how to save jobs, or cut other costs.
[108] MICHAEL C. HARPER & SAMUEL ESTREICHER, LABOR LAW 111 tbl.3 (4th ed. 1996); *see also* Yamada, *supra* note 6 at 13 (indicating that in 1956 51% of all manufacturing employees and 30% of non-agricultural, non-manufacturing

employees were organized while only 10.4% of private sector, non-manufacturing, non-agricultural workers were organized in 1995).

[109] *See* Yamada, *supra* note 6 at 15-16. There are numerous classifications of employees that are not protected by the National Labor Relations Act right to organize. Those classifications include managerial employees, supervisors, and independent contractors amongst others.

[110] *Id*. at 16-17. Yamada also cites an ACLU study that suggests that the number of employees subject to electronic monitoring has increased from around 8 million to at least 20 million.

[111] *Id*. at 16.

[112] *See generally* Julie A. Flanagan, Note, *Restricting Electronic Monitoring in the Workplace*, 43 DUKE L.J. 1256 (1994).

[113] *See* Yamada, *supra* note 6 at 17-20.

[114] *Id*. at 17. Firms have used their social position to support a variety of causes including AIDS research, stopping violence against women, and anti-drug efforts; however, Yamada indicates that there is little sociological data available on the issue of corporate social philosophy as a speech repressing force. While the potential for chilled speech due to corporate philosophy is inferred, the logic does not seem causally attenuated.

[115] *See infra* note 25.

[116] Yamada, *supra* note 6 at 20-21.

[117] *See generally* JOHN L. COTTON, EMPLOYEE INVOLVEMENT (1993); MIKE ROBSON, QUALITY CIRCLES IN ACTION (1984); EDWARD A. LAWLER, SUSAN A. MOHRMAN & GERALD E. LEDFORD JR., EMPLOYEE INVOLVEMENT AND TOTAL QUALITY MANAGEMENT (1992); *see also* DENTON, *supra* note 86.

[118] *See* POST, *supra* note 9 at 141.

[119] *See* Cotton, *supra* note 117 at vii. Cotton asserts that traditional management schemes emphasize control over the employee and minimal participation in the firm decision making process.

[120] *Id*. at vii-viii; *see also* Devki Kirk, Note, *Participation with Representation: Ensuring Workers' Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729, 744-747 (1994).

[121] *See* Cotton, *supra* note 117 at 3.

[122] *Id*. at 23. Cotton summarizes the findings of several models of participative management that indicate that participation leads to increases in employee efficacy, feelings of ownership regarding decisions, commitment to decisions, all of which improve organizational chances of survival.

[123] *Id*. at 173-174.

[124] *Id*.; *see also* Shannon Browne, Note, *Labor-Management Teams: A Panacea for American Businesses or the Rebirth of a Laborer's Nightmare?*, 58 OHIO ST. L.J 241, 245 (1997).

[125] *See* Cotton, *supra* note 117 at 174.

[126] A self-directed work team absent a degree of freedom with regards to speech norms is self directed in name only; if speech is restrained due to hierarchical pressures, the team is substantively little different from a "traditionally" (unilaterally) managed group.

[127] Cotton, *supra* note 117 at 173. Cotton notes that while surveys suggest only about 7% of the workforce are organized into self-directed teams, over half of the companies responding to the 1990 survey indicated that self-directed teams would become more important in the years to come.

[128] *See* Pickering, *supra* note 23.

[129] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (Murphy J.) ("There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have ever been thought to raise any Constitutional problem…[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest in order and morality.")

[130] *See* Yamada, *supra* note 6 at 47-48. Yamada asserts that speech that constitutes an act of misconduct or disloyal speech should be considered acceptable grounds for discharge.

[131] *See infra* note 9. According to Post, public discourse should be conceived of as an arena where citizens are continuously free to reconcile their differences in the pursuit of an ever-changing vision of national identity.

[132] *See* Novosel, *supra* note 25.