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POLITICAL IDEOLOGY AS A LIMITED PROTECTED CLASS UNDER FEDERAL TITLE VII ANTIDISCRIMINATION LAW

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As the political climate in the United States becomes increasingly divided, more and more employees are fired for their off-duty political speech. Political speech is highly protected from government interference under the First Amendment, but it is not well protected from discrimination in employment matters. This is despite the fact that employers can be just as powerful and influential as the government. Although employee political speech is not currently protected at the federal level, there are a myriad of state statutes that protect employee speech from employer retaliation. Some of these state statutes protect speech on a broader level, others protect only political speech, and some states do not protect any employee speech from retaliation. Because state statutes can vary so widely, a comprehensive federal statute protecting off-duty political speech (that includes a framework for addressing speech made on social media) is a better approach to protecting employee speech. This Note proposes the inclusion of political ideology and speech as a limited protected class under Title VII of the Civil Rights Act of 1964, to protect applicants and employees from discrimination based on their off-duty political speech.

Political speech has been defined as words or conduct intended to marshal public support for an issue, position, or candidate,[1] and it

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is essential to a participatory democracy. The Supreme Court has noted that "interactive communication concerning political change"[2] is also considered political speech.[3] The widespread use of social media platforms means that many political discussions, once expressed through protests and personal interactions, now take place on online news and social networking services, such as Twitter or Facebook. This change in the way we communicate has also changed the nature of political discourse. The rise of these platforms has also given rise to complicated employment law matters in the form of discrimination and employer retaliation in reaction to an employee's online social media content.[4] Furthermore, cases of private employers firing employees for their political speech or affiliation have gained national attention.[5]

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and Professor Joel Gora for all of their suggestions and contributions that have helped refine this Note.

[1] *Protection of Core Political Speech*, USLEGAL, INC., https://civilrights.uslegal.com/freedom-of-speech-and-expression/protection-of-core-political-speech/ (last visited May 1, 2018).

[2] Meyer v. Grant, 486 U.S. 414, 422 (1988).

[3] *Id.* at 422. Thus, naturally, interactive speech regarding politics that takes place online constitutes political speech. *See Protection of Core Political Speech*, *supra* note 1 (intimating that communicating on issues of politics in *any* form or forum constitutes political speech) (emphasis added).

[4] *See infra* Section I.C; Megan McArdle, *The Power of Social Media Mobs and the Permanence of the Wreckage They Leave Behind*, GOV'T TECH. (Aug. 23, 2017), http://www.govtech.com/social/The-Power-of-Social-Media-Mobs-and-the-Permanence-of-the-Wreckage-They-Leave-Behind.html ("The Internet transformed the degree of scrutiny, the extent of its reach and the shelf life of the scandal, so much as to make it different not just in degree, but in kind.").

[5] *See infra* Section I.C; *see also* Jeannette Cox, *A Chill Around the Water Cooler: First Amendment in the Workplace*, AM. BAR ASS'N, https://www.americanbar.org/publications/insights_on_law_andsociety/15/winter-2015/chill-around-the-water-cooler.html (last visited May 1, 2018) (describing the "broad power" that employers have to terminate employees for speech and the subsequent self-censorship effect it will have on employees); Alina Tugend, *Speaking Freely About Politics Can Cost You Your Job*, N.Y. TIMES (Feb. 20, 2015), https://www.nytimes.com/2015/02/21/your-money/speaking-about-politics-can-cost-you-your-job.html (detailing the story of a woman who was fired for a bumper sticker in support of a presidential candidate and the story of a waitress who was fired for wearing a bracelet with a political message).

Most American employees are in private employment relationships governed by the at-will doctrine.[6] Under this doctrine, employees can be fired for any reason barring well-known discriminatory practices.[7] However, political ideology and speech is not federally protected in the private employment realm.[8] Although not federally protected, approximately half of Americans live in jurisdictions with state statutes that bar private employers from disciplining or discharging employees for their political beliefs.[9] These protections vary greatly. Some statutes offer protection for off-duty speech, but the great many only cover activities such as endorsing a political candidate, signing petitions, and giving campaign contributions.[10] The former attempt to cover statements made on social media during non-working hours, while the latter do not.

This Note argues that the addition of political ideology as a protected class under the Title VII Antidiscrimination Act of 1964 (Title VII) statute would effectively and efficiently protect private employees from retaliation by their employers for off-duty political speech. This Note maintains that the imposition of the off-duty[11] limitation to the claims under this Amendment to Title VII would reduce infringement upon private companies' constitutional rights. In addition, the proposed Amendment would create a clearer and

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[6] *See, e.g.*, *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last visited May 1, 2018); *At-Will Employment*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/at-will-employment (last visited May 1, 2018).

[7] *The At-Will Presumption and Exceptions to the Rule*, *supra* note 6 ("Federal and state discrimination statutes prohibit employers from basing employment decisions on an employee's race, color, religion, sex, national origin, age, disability, or veteran status.").

[8] Gail Lin, *Can You Be Fired for Political Social Media Posts?*, OUTTEN & GOLDEN LLP (Mar. 2, 2017), https://www.employmentlawblog.info/2017/03/can-you-be-fired-for-political-social-media-posts.shtml.

[9] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. POL. 295, 297 (2012).

[10] *Id.* at 302–33.

[11] Off-duty statements are those made during nonworking hours. *Id.* at 309.

more uniform standard in light of inconsistencies in the state courts' application of their statutes.[12]

While some of the aforementioned state statutes do protect off-duty speech,[13] this Note argues that the widely varying, often confusing state statutes are problematic to the efficient administration of justice and modern employment. Thus, a comprehensive federal statute would better protect employee speech. In addition, a clear framework for classifying speech made on social media must be incorporated into the Amendment to enable the courts to tackle potential cases that fall under this federal law, as well as to inform citizens of what the Amendment does and does not protect.

In Part I, this Note explains the rationales behind the need for the increased protection of political speech. This part includes an analysis of the longstanding importance of political speech in the United States of America's history, the value of free speech in general, and the current political climate's effective chill of political speech. Part II provides an overview of the at-will doctrine that governs public and private employees and discusses the current exceptions to this doctrine. Part III proposes the Amendment to Title VII and suggests how the courts would address claims that fall under it. Finally, Part IV examines the policy implications of the proposed Amendment.

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[12] Statutes that do not specifically delineate the off-duty and on-the-job distinction have been interpreted by some state courts to cover both off-duty and on-the job speech, while other state courts interpret their respective statutes to only cover off-duty speech. *See, e.g.*, Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003), *rev'd*, 369 F.3d 811 (4th Cir. 2004); Cotto v. United Tech. Corp., 711 A.2d 1180, 1185–86 (Conn. App. Ct. 1998).

[13] *See infra* Section II.A.3.

I. RATIONALES BEHIND INCREASED PROTECTION OF POLITICAL SPEECH

A. Historically Political Speech Has Received the Utmost Protection

Voter protection laws first came into effect in the 1700s, when ballots were still public.[14] In the nineteenth century, corrupt political figures openly bought votes and encouraged judicial corruption.[15] By the twentieth century, America had adopted the secret ballot that we know of today, shielding voters from any backlash based upon which political party they supported and freeing them from coercion to vote for a certain party.[16] The voter protection laws in place also relieved voters from this backlash by protecting against threats of physical violence, coercion, and economic retaliation.[17] These voter protection laws spread to many states across the country and eventually led to statutes protecting people from discrimination not only based on their vote, but on their political opinion as well.[18] This historically staunch voter protection, stemming from the 1700s, is

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[14] Volokh, *supra* note 9, at 297.

[15] *See* Alexander B. Callow, Jr., *The House that Tweed Built*, AMERICAN HERITAGE, Oct. 1965 (naming various political figures engaged in corrupt dealings); *1876 "Boss" Tweed Delivered to Authorities*, HISTORY, http://www.history.com/this-day-in-history/boss-tweed-delivered-to-authorities (last visited May 1, 2018). For example, William Tweed ("Boss Tweed") was a corrupt political figure in the 1860s and 1870s whose political organization bought votes and embezzled city funds. Eventually the entire organization, known as the "Tweed Ring," was tried and sentenced to prison. *Id.*

[16] *What Have We Got to Hide? The Origins of Secret Voting in America*, IN THE PAST LANE (Nov. 4, 2012), http://inthepastlane.com/the-origins-of-secret-balloting-in-america-november-4-2012/. This style of ballot is sometimes called the "Australian ballot" as Australia was one of the first countries to use it. *Id.* *See* Isidora Koutsoulias, Note, *Ballot Selfies: Balancing the Right to Speak Out on Political Issues and the Right to Vote Free from Improper Influence and Coercion*, 26 J.L. & POL'Y 349, 384–87 (2018).

[17] Volokh, *supra* note 9, at 298–99.

[18] *Id.* at 298–301. "In 1868, Louisiana and South Carolina banned discrimination against most private employees based on 'political opinion.'" *Id.* at 300–01.

evidence of the value we put on political expression. This is likely due to its essential position in a functioning democracy.[19]

Furthermore, the Supreme Court has held political speech to require the utmost protection.[20] Although political speech is not the only type of speech protected under the First Amendment, former Supreme Court Associate Justice John Paul Stevens, in *NAACP v. Claiborne Hardware Co.*, described political speech as the highest valued speech protected by the First Amendment and urged that "debate on public issues should be uninhibited, robust, and wide-open."[21] In addition, this speech is vital to the ability to self-govern.[22] Additionally, the Court stated in *Abood v. Detroit Board of Education* that protecting political discourse is the First Amendment's core purpose.[23] This judicial history of staunch protections for political speech can likely be traced to the Founding Fathers, who were concerned with creating a new nation free from the tyranny of England, that allowed for government criticism.[24] The United States would not exist if it were not for the Founders' exercise of their right to criticize the government.[25] Most recently,

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[19] *Freedom of Expression: Essential Principles*, DEMOCRACY WEB: COMPARATIVE STUDIES IN FREEDOM, http://democracyweb.org/freedom-of-expression-principles (last visited May 1, 2018).

[20] *Protection of Core Political Speech*, *supra* note 1 (stating that laws attempting to regulate political speech must pass the "strict scrutiny" analysis which is usually a "death knell for the law being challenged").

[21] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980) and New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[22] *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75, 85 (1964)).

[23] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 258–59 (1977).

[24] Stephen D. Solomon, *The Cost of Criticism: America's Journey from Suppression of Speech to Freedom of Speech*, COLONIAL WILLIAMSBURG, http://www.history.org/Foundation/magazine/Winter17/PastForward.cfm (last visited May 1, 2018) ("The struggle to create a political culture of free and open discussion began with the Nation's founding generation, which rebelled against seditious libel even before they rebelled with muskets against British rule. This had to be the case, because only by embracing dissent and rejecting restrictions on speech could they make their case against Britain and develop the broad support necessary for the Declaration of Independence.").

[25] *Revolutionary War*, HISTORY.COM, http://www.history.com/topics/american-revolution/american-revolution-history (last visited May 1, 2018) (stating that dissatisfaction with the King of England sparked the Revolutionary

in *Citizens United v. Federal Election Commission*, the Court overruled *Austin v. Michigan Chamber of Commerce* and held that even a corporations' political speech may not be suppressed, giving corporations more leeway to participate in governmental affairs and elections.[26] Historically, political speech has been afforded the highest protection under the First Amendment.[27] Aside from the essential role political speech plays in a democracy,[28] free speech, political and nonpolitical alike, has value for many reasons; free speech contributes to individual autonomy, the search for truth in the marketplace of ideas, and the ability to self-govern.[29]

Notwithstanding the increase in voter protection over the centuries, in the extremely divided and hostile political climate today,[30] private employees are being terminated from their places of

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War and resulted in the birth of a new Nation, the ultimate display of government criticism).

[26] Citizens United v. Federal Election Com'n, 558 U.S. 310, 351–61 (2010) (overruling Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)).

[27] *Protection of Core Political Speech*, *supra* note 1. While political speech receives the highest amount of protection, there are some categories of speech that are afforded little to no First Amendment protection, such as: (1) words that incite others to the commission of an immediate crime, see Brandenburg v. Ohio, 395 U.S. 444 (1969); (2) true threats, see Virginia v. Black, 538 U.S. 343 (2003); (3) obscene depictions, see Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Miller v. California, 413 U.S. 15 (1973), Roth v. US, 354 U.S. 476 (1957), and Alberts v. California, 354 U.S. 476 (1957); (4) fighting words, see Gooding v. Wilson, 405 U.S. 518, 524 (1972) (describing fighting words as "words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed") and Chaplinsky v. Ohio, 315 U.S. 568 (1942); (5) indecent broadcast speech, see FCC v. Pacifica, 438 U.S. 726 (1978); and (6) commercial speech, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) and Virginia Board of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748 (1976).

[28] *See Democracy Thrives on Free Speech*, THE AGE (Jan. 13, 2015), http://www.theage.com.au/comment/the-age-editorial/democracy-thrives-on-free-speech-20150113-12nfpj.html; *see also Freedom of Expression: Essential Principles*, *supra* note 19.

[29] *See infra* Section I.B.

[30] Maxwell Tani, *Obama Says the Current Political Climate Sometimes Feels Like the '19th Century'*, BUS. INSIDER (Oct. 19, 2017),

employment or threatened with termination for their political speech.[31] While federal law threatens fines or imprisonment for anyone who "intimidates, threatens, [or] coerces" a person with the hopes of interfering with their right to vote, there is no overarching federal law that protects private employees' political speech from retaliation by their employers.[32]

B. The Value of Free Speech/Philosophical Rationales for Free Speech

Freedom of speech is one of the most celebrated and distinct aspects of the United States of America.[33] There is not one justification behind free speech, but rather there are many overlapping philosophical reasons supporting it.[34] Some scholars, in discussing these philosophical tenets, have described them as consequentialist or nonconsequentialist.[35] Consequentialist reasoning attributes value to a notion because it "contributes to some desirable state of affairs" and nonconsequentialist reasoning attributes value to a notion because it is either "right or wrong independent of the consequences."[36] The categorization of these rationales is not crucial in applying them but merely informative in discussing them and their merits. These rationales, when applied to private employees' off-duty political speech supports the need for extended protection of such speech from employer retaliation.

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http://www.businessinsider.com/obama-campaign-ralph-northam-phil-murphy-2017-10.

[31] *See infra* Section I.C (providing a discussion of employees recently fired for speech).

[32] Intimidation of voters, 18 U.S.C. § 594 (2006).

[33] *See* Rodney A. Smolla, *Speech Overview*, NEWSEUM INST., http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/speech-overview/ (last visited May 1, 2018); *First Amendment Rights*, USHISTORY.ORG, http://www.ushistory.org/gov/10b.asp (last visited May 1, 2018).

[34] *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 127 (1989).

[35] *See id.*; Guy E. Carmi, *Dignity–The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 969 (2007).

[36] Greenawalt, *supra* note 34, at 128.

Judge Andrew Napolitano,[37] constitutional law scholar, argues that the Founders did not believe that they *created* the right to freedom of speech by including it in the Constitution, but rather they were writing down a right inherent to all human beings.[38] In addition to support from historical documents, this idea is supported by the fact that the First Amendment refers to "*the* freedom of speech."[39] The carefully crafted language of this Amendment implies that this right to speak "predated the government . . . [and] . . . emanates from human nature."[40] Additionally, James Madison, the drafter of the Bill of Rights, along with the other Founders, recognized that free speech was a natural right and only added the list of amendments to the Constitution to quell the public's concern that their rights were "not sufficiently guarded."[41] Under this Natural Law theory, rights such as freedom of speech and press already exist in nature, while other rights such as the right to a jury trial were simply acquired rights that do not exist irrespective of a civil government.[42] Not only this, but Madison believed that a person's beliefs and opinions were a form of property that should be protected by the Government.[43] These arguments are nonconsequentialist in that they rest on the belief that restricting speech would be an injustice or an infringement on the speaker's rights.

One justification for free speech that touches upon both consequentialist and nonconsequentialist reasoning is the desire for

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[37] *See Biography*, JUDGE ANDREW P. NAPOLITANO, http://www.judgenap.com/bio (last visited May 1, 2018).

[38] *See* Andrew P. Napolitano, *Protecting Hatred Preserves Freedom: Why Offensive Expressions Command Constitutional Protection*, 25 J. L. & POL'Y 161, 165–66 (2016) (emphasis added).

[39] *Id.* at 165 (emphasis added in original).

[40] *Id.*

[41] *Id.* at 167–68 n. 20 (quoting 1 ANNALS OF CONG. 441 (J. Gales & W. Seaton eds., 1789) (statement of Rep. James Madison)).

[42] Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 918–22 (1993) (discussing how the right to bear arms, the right to assemble, and the right of self-defense were traditionally believed to be natural rights; and the existence of natural liberties was based on the assumption that in the state of nature all human beings are equally free).

[43] *See* Napolitano, *supra* note 38, at 168 n. 21.

individual autonomy and self-realization.[44] This concept is that government censorship and control of our speech stifles our ability to become the best version of ourselves and limits our ability to have independent judgment.[45] Not only is independent speech and thought crucial in our efforts to communicate and relate to others, it is vital to the development of our personalities and selves.[46] According to Justice Thurgood Marshall, to stifle human expression would "affront the individual's worth and dignity."[47] Stifling expression limits individuals' self-development and also precludes potential listeners from being exposed to new ideas.[48]

Additionally, Justice Brandeis argued in his famous concurrence in *Whitney v. California*, that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties . . . They believed liberty to be the secret of happiness."[49] Therefore, the consequentialist reasoning behind this concept is that the promotion of self-fulfillment and autonomy enriches communication and therefore the lives of the everyone.[50] Moreover, as constitutional law scholar Professor Vincent Blasi posits, this high value on communication could stem from the idea that the human race's ability to communicate distinguishes us from

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[44] *See* Greenawalt, *supra* note 34, at 143–44 ("[F]reedom of discussion is thought to promote independent judgment and considerate decision, what might be characterized as autonomy. . . Both the valuation of autonomy for its own sake and the belief that it contributes to other satisfactions are aspects of traditional liberty theory.").

[45] *See id.*

[46] *See id.* at 144–45.

[47] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

[48] THOMAS PAINE, THE AGE OF REASON: BEING AN INVESTIGATION OF TRUE AND FABULOUS THEOLOGY vii (1852) (explaining that denying someone their right to his or her own opinion "makes a slave of himself to his present opinion, because he precludes himself the right of changing it.").

[49] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[50] *See* Greenawalt, *supra* note 34, at 144–45.

other species.[51] The nonconsequentialist reasoning is simply that autonomy is a good thing that should be valued for its own sake.[52]

This value put on the free flow of ideas is better articulated through the discussion of another consequentialist justification for free speech, which is the search for truth, sometimes known as the marketplace of ideas. Justice Brandeis, argued in *Whitney v. California* that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"[53] This process of freely exchanging ideas was advanced by John Stuart Mill in *On Liberty*, where he theorized that censorship of ideas damages all parties involved in that regardless of whether one's idea is right or wrong, censorship deprives people of the collision of truth with error, and thus deprives them of a "livelier impression of truth."[54] In Justice Holmes' often-quoted dissent in *Abrams v. United States*, he states "that the best test of truth is the power of the thought to get itself accepted in the competition of the market" and that the free exchange of ideas furthers an "ultimate good."[55]

Furthermore, the censoring of speech that is unpopular hinders peoples' ability to respond to the speech in furtherance of a more accurate "truth."[56] Essentially the more speech we are able to rebut, the closer we will come to the truth. Beyond this theoretical idea of reaching the truth is the more pragmatic reason behind the marketplace of ideas theory which the Supreme Court has identified as "the opportunity to persuade to action."[57] However, the Supreme Court has recognized that certain speech, like speech that causes an

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[51] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 545 (1977).

[52] *See* Greenawalt, *supra* note 34, at 144.

[53] *Whitney*, 274 U.S. at 375.

[54] JOHN STUART MILL, ON LIBERTY 35–36 (Boston et al., 2d ed. 1863); Napolitano, *supra* note 38, at 172–73.

[55] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[56] *See* Napolitano, *supra* note 38, at 174.

[57] *See* Thomas v. Collins, 323 U.S. 516, 537 (1945); W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV. 1, 18 (1994).

incitement to imminent lawless action, can be regulated because it will cause an *imminent* act that leaves no time to rebut it.[58]

Although some may be skeptical that the freedom of ideas will actually lead to real truth,[59] there is still a benefit to having government policy that favors nonregulation in this arena because it enables a " . . . theoretical possibility that error can be corrected by persistent and persuasive appeals to the public consciousness . . . "[60] Additionally, support for the freedom of speech does not rest alone on the existence of a reachable or measurable truth, but rather it rests upon other concepts such as autonomy, self-governance, societal tolerance, and that "people will be more autonomous under a regime of free speech than under a regime of substantial suppression."[61]

Perhaps the most pertinent philosophical reason behind free speech is the concept of self-governance. This theory's rationale, eloquently argued by Alexander Meiklejohn in *Free Speech and Its Relation to Self-Government*, is to protect speech relating to the political system and the voting process.[62] The purpose of this is to have a well-informed body of citizens who desire the welfare of the public and "to inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and therefore, the dignity of a governing citizen."[63] This theory puts great importance on education and public discussions and desires the unfettered ability for citizens to take part in these activities.[64] Ideally, this well-informed citizen will then go on to participate in the government by engaging in political debate and voting for the government officials they deem suitable.[65] This ability of "We, the People" to check the power of the government is a fundamental element in a country

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[58] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[59] Greenawalt, *supra* note 34, at 131–32.

[60] Blasi, *supra* note 51, at 550.

[61] Greenawalt, *supra* note 34, at 143–44, 146.

[62] Blasi, *supra* note 51, at 554, 557–58 (citing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper & Brothers, 1948).

[63] *Id.* at 555–56.

[64] *Id.* at 559.

[65] *See* Napolitano, *supra* note 38, at 175.

founded by dissatisfied citizens who fought to preserve their right to govern themselves.[66]

Another theory presented by Blasi, called the checking value, is similar to the idea of self-governance but much narrower in scope.[67] This theory focuses on the prevention of government corruption and seeks almost exclusively to protect speech about government officials' behavior and their for fitness for public office.[68] Not only does this idea frame free speech as enabling the exposure of governmental wrongdoing, but it also frames it as a deterrence of wrongdoing because a government that knows it is under public scrutiny has much more incentive to refrain from corruption.[69] Blasi argues that this rationale is likely to endure because of the prevalence of abuse of political power throughout history and the present.[70]

There are many persuasive rationales for free speech, ranging from increased autonomy and self-realization, the increase in the free flow of ideas, and the ability for citizens to self-govern.[71] Because speech, in particular political speech, is essential to our democracy and has many societal benefits, private employees should not fear discharge or discipline from their employer for engaging in political discourse on their own time.

C. Today's Hostile Political Climate Calls For More Protection

Title VII protection for off-duty political speech is necessary because people are increasingly at risk of being publicly reprimanded or fired for their political speech.[72] While some have been fired for speech that was likely considered on-the-job, these examples show that the firing of employees will eventually chill

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[66] *See id.*; Blasi, *supra* note 51, at 555.

[67] Blasi, *supra* note 51, at 558.

[68] *Id.*

[69] Greenawalt, *supra* note 34, at 142–43.

[70] Blasi, *supra* note 51, at 546.

[71] *See generally* Greenawalt, *supra* note 34 (discussing various justification for free speech).

[72] *See infra* Section I.C.

employees' political speech out of fear of employer retaliation.[73] In Part III, an analysis of these examples under the proposed Amendment will show when and under what type of circumstance a private employee would be protected. They also help in the analysis of delineating what is off-duty and what is not.

For example, in 2017, a Google employee was fired after using an internal Google mailing list to distribute a memo expressing discontent with Google's diversity initiatives.[74] That same year, a sociology professor from the University of Tampa was fired for his tweet posted after Hurricane Harvey stating, "I don't believe in instant Karma but this kinda feels like it for Texas. Hopefully this will help them realize the GOP doesn't care about them."[75] A CBS executive was also fired for her Facebook comment following the Las Vegas shooting, in which she stated, "[i]f they wouldn't do anything when children were murdered I have no hope that Repugs will ever do the right thing."[76] Although an ESPN host that tweeted derogatory statements about President Trump was not fired, the tweet garnered national attention and sparked a discussion of private employee protections.[77] One month later, the ESPN host was

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[73] "Chilling effect is a term in law and communication that describes a situation where a speech or conduct is suppressed by fear of penalization at the interests of an individual or group. It can affect one's free speech." *Chilling Effect Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/c/chilling-effect/ (last visited May 1, 2018); *see* Chilling Effect, BLACK'S LAW DICTIONARY (10th ed. 2014). While the term "chilling effect" is normally used to describe circumstances where government action deters speech, in the context of this Note, the same idea is being applied to the deterrence of speech by private entities.

[74] Jim Edwards, *James Damore, the Google Employee Fired for His Controversial Manifesto, is (Almost Certainly) Not a Victim of a Free-Speech Violation*, BUS. INSIDER (Aug. 8, 2017), http://www.businessinsider.com/james-damore-google-anti-diversity-manifesto-free-speech-2017-8.

[75] David K. Li, *Professor Fired Over Harvey 'Instant Karma' Tweet for Texas*, N.Y. POST (Aug. 29, 2017), http://nypost.com/2017/08/29/professor-fired-over-harvey-instant-karma-tweet-for-texas/.

[76] Amanda Luz Henning Santiago, *CBS Exec Fired After Making Insensitive Remarks about Las Vegas Shooting Victims*, BUS. INSIDER (Oct. 2, 2017), http://www.businessinsider.com/cbs-exec-hayley-geftman-gold-fired-las-vegas-victims-remarks-2017-10.

[77] Kevin Draper, *If ESPN Wants to Discipline Jemele Hill, She Might Have Law on Her Side*, N.Y. TIMES (Sept. 15, 2017), https://www.nytimes.com/2017/09/15/sports/jemele-hill-espn.html.

suspended for encouraging followers on twitter to boycott an NFL teams' advertisers in response to the team's owner's statements regarding the NFL protests.[78] The ESPN host has since left her position, and although ESPN claims that doing so was Hill's choice, her co-host stated that ESPN effectively silenced them.[79]

One exceptionally high-profile example of a workplace free speech issue is the recent movement by professional football players kneeling in protest during the national anthem.[80] These displays led many Americans to argue that football players were exercising their constitutional rights; however, their employer, the National Football League (NFL), is a private company, and thus not under the purview of the First Amendment.[81] Legal experts have explained that the NFL is constrained only by its own collective bargaining agreement, and not the First Amendment.[82] If the NFL had the contractual right to fire players, they could legally do so without violating the Constitution.[83] Furthermore, NFL teams can choose not to sign certain players.[84] Although the NFL has not amended its policy to require players to stand,[85] there seems to have been at least one

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[78] Brian Flood, *Anti-Trump ESPN Star Jemele Hill's Former Co-host: They Silenced Us*, FOX NEWS (Feb. 8, 2018), http://www.foxnews.com/entertainment/2018/02/08/anti-trump-espn-star-jemele-hills-former-co-host-silenced-us.html.

[79] *Id.*

[80] Andrew P. Napolitano, *Is Taking a Knee Protected Speech?*, FOX NEWS (Oct. 12, 2017), http://www.foxnews.com/opinion/2017/10/12/judge-andrew-napolitano-is-taking-knee-protected-speech.html.

[81] Sean Illing, *Can the NFL Fire Players for Kneeling During the Anthem? 9 Legal Experts Say Yes.*, VOX (Sept. 25, 2017), https://www.vox.com/culture/2017/9/25/16360580/nfl-donald-trump-national-anthem-protest; Kyle Sammin, *The First Amendment is a Double-Edged Sword for Kaepernick And Rapinoe*, THE FEDERALIST (Sept. 7, 2016), http://thefederalist.com/2016/09/07/first-amendment-double-edged-sword-kaepernick-rapinoe/ (stating that "almost everyone" agrees that players' kneeling is protected by the First Amendment).

[82] Illing, *supra* note 81.

[83] *Id.*

[84] Tom Goldman, *He Took A Knee on the Field in Protest; And He Still Has No Team*, NPR (Aug. 10, 2017), https://www.npr.org/2017/08/10/542562923/he-took-a-knee-on-the-field-in-protest-now-he-has-no-team.

[85] Reuters, *NFL: We Won't Make Players Stand for Anthem*, N.Y. POST, (Oct. 13, 2017), https://nypost.com/2017/10/13/nfl-we-wont-make-players-stand-for-anthem/.

example of backlash stemming from the protests: Colin Kaepernick, the first NFL player to kneel during the national anthem in protest, remains unsigned by an NFL team, leading some to believe that the team owners are sending a message by refusing to sign him.[86]

Recently, an Ohio man who helped found the Traditionalist Worker Party and his wife were fired from their jobs[87] after the New York Times ("Times") published a profile describing the man as a "Nazi sympathizer" with a "disdain for democracy and belief that the races are better off separate."[88] In defense of the piece, the national editor of the Times stressed that it is important "to shed more light, not less, on the most extreme corners of American life."[89] Not only are seemingly innocuous personal social media statements having severe ramifications for their senders, but a journalistic piece published by one of the most influential and successful newspapers in the world has impacted the lives of those featured in the article.[90] This is problematic because the man interviewed by the Times was not fired for personal statements that he had complete control over, but rather for the way his life and political viewpoints were portrayed by a writer.[91]

These ramifications for employees can be severe; individuals have not only been fired, but have been thrust into the public eye, subject to nationwide scrutiny. Private employees, who cannot invoke the protections of the First Amendment, need comprehensive legal protection as it seems that companies arguably can contribute to the chilling of political speech just as easily as the government can.[92] The power and wealth that corporations have today enables

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[86] Goldman, *supra* note 84.

[87] John Bacon, *'Nazi Next Door' Says 'New York Times' Profile Cost Him Job, Home*, USA TODAY (Nov. 30, 2017), https://www.usatoday.com/story/news/nation/2017/11/30/nazi-next-door-says-new-york-times-profile-cost-him-job-home/908317001/.

[88] Richard Fausset, *A Voice of Hate in America's Heartland*, N.Y. TIMES (Nov. 25, 2017), https://www.nytimes.com/2017/11/25/us/ohio-hovater-white-nationalist.html?_r=0.

[89] Bacon, *supra* note 87.

[90] *See id.*

[91] *See id.*; Fausset, *supra* note 88.

[92] *See* Bacon, *supra* note 87 (discussing man's allegation that he and his wife were fired for their political views); Goldman, *supra* note 84 (stating that NFL

them to force employees to be heavily dependent upon them for their livelihoods.[93] Other factors that contribute to these companies' power are the decrease in union membership, more time spent at the workplace, economic insecurity, and the ability for employers to electronically monitor their employees.[94] Additionally, most Americans work in the private sector, leaving their ability to speak on certain issues subject to employer interference, except where state statutes afford protection.[95]

Even the President of the United States has contributed to this chilling effect, as he recently advocated the firing of NFL players who kneel for the National Anthem.[96] The chilling of political speech effectively contributes to a degradation of the autonomy of the individual and hinders their quest for truth.[97] Social media has enabled the quick, easy, and transparent sharing of public political sentiments; it has sparked controversial political, as well as First Amendment debates on a regular basis.[98] Also, social media has enabled interactive communal experiences for presidential debates, encouraging the sharing and gathering of political information on sites like Facebook and Twitter.[99] As a result of these events and the

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owners may be sending a message to other players by failing to sign Kaepernick); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 830 (1998) (suggesting that today's booming commercial sector can infringe on employee privacy rights just as much as the government can).

[93] 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, 8 (1998) (citing LEE BALLIET, SURVEY OF LABOR RELATIONS 1–2 (2d ed. 1987)).

[94] *Id.* at 9.

[95] *See* Wilborn, *supra* note 92, at 865; *infra* Section II.A.3.

[96] *Trump to NFL Owners: Fire Players Who Kneel During National Anthem*, CBS NEWS, https://www.cbsnews.com/news/trump-to-nfl-owners-fire-players-who-kneel-during-national-anthem/ (last updated Sept. 23, 2017).

[97] *See supra* Section I.B.

[98] Sean Sullivan, *What Twitter Has Meant for Politics (and What It Hasn't)*, WASH. POST, (March 21, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/03/21/what-twitter-has-meant-for-politics-and-what-it-hasnt/.

[99] Dan Pfeiffer, *How Social Media is Revolutionizing Debates*, CNN (Sept. 15, 2015), http://www.cnn.com/2015/09/15/opinions/pfeiffer-social-media-debates/index.html.

hostile political climate,[100] voters on both sides of the political spectrum are more likely to be concerned or afraid of being fired for their political speech and thus, more likely than ever before to push for stronger protections.

Voter protection laws that have been established for centuries have recognized the negative effects of the public ballot and protected voters from retaliation based on political beliefs and sentiments.[101] Additionally, the free speech rationales are applicable to this new protected class for political speech. With the increase in technology and the resulting transparency of people's political beliefs, employers have increased access into the private lives of their employees.[102] The ability to be terminated due to the expression of political beliefs threatens the very core of democracy. While the importance of political speech has long been understood in constitutional law, current employment law must become better equipped to address new types of cases involving employer retaliation based on employee speech.

II. EMPLOYEE RIGHTS UNDER THE AT-WILL DOCTRINE

Private employees are employees that work for non-governmental entities.[103] The at-will doctrine,[104] which stems from

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[100] Tani, *supra* note 30.

[101] *See* Volokh, *supra* note 9, at 297–98.

[102] *See, e.g.*, Andrew S. Hazelton & Ashley Terhorst, *Legal and Ethical Considerations for Social Media Hiring Practices in the Workplace*, 7 HILLTOP REV. 53, 53–55 (2015); Peter O'Connor & Paula McDonald, *Is Your Employer Watching You? Online Profiling Blurs the Boundary of Our Public and Private Lives*, THE CONVERSATION (Aug. 26, 2016), https://theconversation.com/is-your-employer-watching-you-online-profiling-blurs-the-boundary-of-our-public-and-private-lives-64300; Stacy Rapacon, *How Using Social Media Can Get You Fired*, CNBC (Feb. 5, 2016), https://www.cnbc.com/2016/02/05/how-using-social-media-can-get-you-fired.html.

[103] Public employees work for either the local, state, or national government or their agencies. *See* Wilborn, *supra* note 92, at 865.

[104] The at-will doctrine is followed by all states except Montana. *See* Volokh, *supra* note 9, at 310.

the common law of England,[105] gives both employer and employee the right to terminate their relationship at any time, for any reason.[106] While this doctrine can seem harsh, it is based on the longstanding concept of contract law that parties have the freedom to contract however and with whomever they want.[107] However, many exceptions to the doctrine have been created to prevent publicly condemned practices.[108] While these exceptions have created a multitude of types of protections for employees, they have resulted in a confusing patchwork of legal remedies, none of which are comprehensive enough with regard to political speech protection.

A. Current Exceptions to the At-Will Doctrine Protecting Private Employees

Current exceptions to the at-will doctrine range from contractual modifications, public policy exceptions, state statutes protecting employees from retaliation, and federal statutory protection against discrimination.

1. Contractual Modifications

Some private employees have the ability to negotiate a provision into their contract specifying that they may only be terminated for "just cause"; however, these employees are usually at a high level within a company.[109] Firing for "just cause" usually means that the

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[105] Adam S. Mintz, Note, *Do Corporate Rights Trump Individual Rights–Preserving an Individual Rights Model in a Pluralist Society*, 44 COLUM. J.L. & SOC. PROBS. 267, 271–72 (2011).

[106] 82 AM. JUR. 2D *Wrongful Discharge* §1 (2010) ("Under the at-will doctrine, an employer may with impunity terminate an employee not only for any reason, or no reason at all, but also for improper reasons. The fact that employment was terminated for arbitrary or irrational reasons or for indifferent and illogical reasons does not give the discharged employee a cause of action where he or she was an employee at-will.").

[107] Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1658 (1996) [hereinafter Estlund, *Wrongful Discharge*].

[108] *Id.* at 1658 ("As particular exercises of employer discretion provoked public disfavor, legislatures carved out exceptions from the general rule of freedom of contract.").

[109] *The At-Will Presumption and Exceptions to the Rule*, *supra* note 6.

employer can fire an employee for poor performance, misconduct, or out of economic necessity.[110] In the future, employees with contracts could potentially try to include an employment provision that protects against termination as a result of off-duty speech. However, contractual modification leaves little protection for employees without a contract.[111] If the circumstances allow, the contractual exception to the at-will doctrine may also be asserted for implied contracts.[112] Thirty-eight states recognize "oral or written representations to employees regarding job security or procedures that will be followed when adverse employment actions are taken," as constituting an implied contract.[113] In the leading case regarding implied contracts, *Toussaint v. Blue Cross & Blue Shield of Michigan*, the Supreme Court of Michigan recognized that even without a contract, a provision in an employee manual specifying that the employer could only fire for "just cause" created an obligation that the employer must comply with.[114] Employers can avoid this obligation by including a disclaimer stating that the company policies do not create contractual obligations.[115] Although the ability to assert this exception to implied contracts helps protect some, the ability to do so is contingent on the employee proving that the employer made representations regarding job security, thus forming an implied contract. If the company policies are unclear or the employer makes vague oral assertions, this could leave

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[110] *Id.*

[111] *See id.* "Contingent workers" can be defined "as those without 'an explicit or implicit contract for long-term employment.'" U.S. GOV'T ACCOUNTABILITY OFFICE, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 11 (2015), https://www.gao.gov/assets/670/669899.pdf. Depending on how contingent work is defined, the U.S. Government Accountability Office found in a 2015 study that anywhere from 5% to over 33% of the total workforce is in a contingent labor relationship. *Id.* at 3–4. *See also* Elaine Pofeldt, *Shocker: 40% of Workers Now Have 'Contingent' Jobs, Says U.S. Government*, FORBES (May 25, 2015), https://www.forbes.com/sites/elainepofeldt/2015/05/25/shocker-40-of-workers-now-have-contingent-jobs-says-u-s-government/#3da85c0814be.

[112] Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 7–8 (2001).

[113] *Id.* at 7.

[114] Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 885 (Mich. 1980).

[115] Muhl, *supra* note 112, at 8.

employees unsure of whether they are protected from termination as a result of off-duty speech until they are in court and therefore is an unreliable remedy. In addition, it leaves many employees, who have neither a written or implied contract, without an appropriate remedy.

2. Tort Protections

Another exception to the at-will doctrine, recognized by all but three states, is the public policy exception (PPE).[116] This exception was created by the judiciary and takes the form of a tort claim.[117] It allows an individual to bring a suit for wrongful discharge when their employer fires them for "reasons that violate or offend public policy."[118] The public policy that the action allegedly offended must, however, be based in either "legislation; administrative rules, regulations or decisions; [or] judicial decisions."[119] Some reasons that qualify as violations of public policy are firing someone because they refused to break the law,[120] engaged in whistleblower activity,[121] performed a legal duty, or exercised a legal privilege.[122] Reliance on state constitutions' free speech clauses as the basis for PPE tort claims in private employment disputes has proven to be unsuccessful.[123] State courts have refused to find the presence of state action and thus have not reached the free speech issues.[124] The

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[116] Mintz, Note, *supra* note 105, at 274. Currently Alabama, Georgia, and New York do not recognize a PPE as limiting the at-will doctrine. *Id.*

[117] Steven J. Mulroy & Amy H. Moorman, *Raising the Floor of Company Conduct: Deriving Public Policy from the Constitution in an Employment-At-Will Arena*, 41 FLA. ST. U.L. REV. 945, 951, 953 (2014).

[118] Yamada, *supra* note 93, at 22.

[119] Pierce v. Ortho Pharm. Corp. 417 A.2d. 505, 512 (N.J. 1980).

[120] Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (finding that firing an employee for refusing to commit perjury was against public policy).

[121] Porter v. Reardon Mach. Co., 962 S.W.2d. 932, 937–38 (Mo. Ct. App. 1998).

[122] Estlund, *Wrongful Discharge*, *supra* note 107, at 1655; Yamada, *supra* note 93, at 22–35 (discussing cases addressing employer retaliation against employees for exercising their First Amendment right).

[123] Yamada, *supra* note 93, at 34.

[124] *Id.*

implementation of an amendment to Title VII would eliminate the need for state courts to address these constitutional issues.

3. State Statutory Protections

While some private employees in some states enjoy protection from employer retaliation for their speech, the breadth of speech and protection for such speech varies by jurisdiction.[125] Currently, there are approximately thirty-six statutes throughout the country protecting private employee speech.[126] The types of coverage run the gamut of what types of speech are covered.

i. Strong Protection States

Some states protect against termination for engaging in any off-duty lawful activity,[127] engaging in activity that doesn't create "reasonable job-related grounds for dismissal,"[128] exercising "rights guaranteed by the First Amendment,"[129] or engaging in off-duty "recreational activities."[130]

ii. Medium Protection States

Other states focus on protecting only politically motivated activities such as engaging in political activities,[131] "holding or

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[125] Volokh, *supra* note 9, at 297.

[126] *Id.* at 309–33 (listing statutory protections across various states and U.S. territories).

[127] COLO. REV. STAT. § 24-34-402.5(1) (2017); N.D. CENT. CODE § 14-02.4-03(1) (2017).

[128] MONT. CODE ANN. § 39-2-903(5) (2017).

[129] CONN. GEN. STAT. § 31-51q (Supp. 2018).

[130] N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2018) (enacted 1992).

[131] CAL. LAB. CODE § 1101 (West 2018); COLO. REV. STAT. § 8-2-108(1) (2017); 3 GUAM CODE ANN. § 8213 (2016); LA. STAT. ANN. § 23:961 (2017); 2017 MINN. LAWS § 10A.36 (2017); MO. ANN. STAT. §§ 115.637(6), 130.028 (2017); NEB. REV. STAT. § 32-1537 (2017); NEV. REV. STAT. § 613.040 (2015); S.C. CODE ANN. § 16-17-560 (2018); W. VA. CODE § 3-8-11(b) (2017); SEATTLE, WASH. MUN. CODE. § 14.04.040(C) (Supp. XII 2018); MADISON, WIS. MUN. CODE §§ 39.03(1), (2)(cc), (8)(c), (8)(d)(1) (2010); *see also* Volokh, *supra* note 9, at 313.

expressing political ideas or beliefs,"[132] "belonging to, endorsing, or affiliating with a political party,"[133] "engaging in electoral activities,"[134] signing referendum or candidate petitions,[135] contributing to campaigns,[136] or freely exercising "the right of suffrage."[137] Additionally, to add to the confusion, some statutes only allow for civil liability, some only for criminal liability, and some for both.[138] Some cover discharge of employees and not the refusal to hire them.[139] Furthermore, some statutes only cover established policies, while others cover individual actions against employees.[140]

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[132] Volokh, *supra* note 9, at 319; *see also* N.M. STAT. ANN. § 1-20-13 (West 2018).

[133] Volokh, *supra* note 9, at 325; *see also* D.C. CODE §§ 2-1401.02(25), 2-1402.11(a) (2018); IOWA CODE ANN. § 39A.2(c)(4) (2017); LA. STAT. ANN. § 18:1461.4(A)(1) (2017); P.R. LAWS ANN. tit. 29, § 140 (2011); V.I. CODE ANN. tit. 10, § 64-1(a) (2018); BROWARD COUNTY, FLA. CODE OF ORDINANCES art. 3, div. 1, § 16½-33(a)(1); URBANA, ILL. CODE OF ORDINANCES ch. 12, art. 3, div. 2, § 12-62(a) (Supp. XXXIX 2017).

[134] Volokh, *supra* note 9, at 326; *see also* 10 ILL. COMP. STAT. ANN. § 5/29-4 (West 2018); N.Y. LAB. LAW § 201-d (McKinney 2018); WASH. REV. CODE ANN. § 42.17A.495(2) (West 2018).

[135] ARIZ. REV. STAT. ANN. §§ 19-116, -206 (2012); D.C. CODE § 1-1001.14(b)(3) (2018); GA. CODE ANN. § 21-4-20(b) (2017); IOWA CODE § 39A.2 (2018); LA. REV. STAT. ANN. § 18:1461.4(A)(1) (2018); MINN. STAT. § 211C.09 (2017); MO. REV. STAT. § 115.637(6) (2017); OHIO REV. CODE ANN. § 731.40 (West 2017); OR. REV. STAT. § 260.665(2)(i) (2017); WASH. REV. CODE §§ 29A.84.250(4), .220(5) (2017).

[136] LA. REV. STAT. §§ 18:1461.1(A)(2), 1505.2(D)(1)-(3)(a)(iii) (2018); MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2018); OR. REV. STAT. § 260.665(2)(e) (2017).

[137] IDAHO CODE § 18-2305 (2018); *see also* HAW. REV. STAT. ANN. § 19-3(4) (West 2011); TENN. CODE ANN. § 2-19-134(b) (2018); W. VA. CODE ANN. § 3-8-11 (West 2012); WYO. STAT. ANN. § 22-26-116 (2018). IDAHO CODE § 18-2305 (2018); *see also* HAW. REV. STAT. ANN. § 19-3(4) (West 2011); TENN. CODE ANN. § 2-19-134(b) (2018); W. VA. CODE ANN. § 3-8-11 (West 2012); WYO. STAT. ANN. § 22-26-116 (2018).

[138] Volokh, *supra* note 9, at 302.

[139] *Id.*

[140] *Id.* at 303.

iii. Minimal to No Protection States

Excluding basic whistleblower protections, some states have no statute to protect employees from termination based on political ideology, speech, or even giving campaign contributions, including: Alabama, Alaska, Delaware, Indiana, Kansas, Maine, Maryland, Michigan, Mississippi, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, and Virginia.[141]

Overall, courts have differed in their application of these statutes because some do not expressly limit coverage to off-duty speech.[142] For example, in *Dixon v. Coburg Dairy, Inc.*, an en banc panel refused to allow a South Carolina statute that made it unlawful to fire an employee "because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution," to apply to on-the-job speech.[143] However, in *Cotto v. United Technologies Corp.*, the court held that a Connecticut statute that was silent regarding the on-duty or off-duty distinction applied to "some activities and speech that occur at the workplace."[144] Similarly, the California Court of Appeals suggested that a California statute[145] would generally apply to on-the-job speech in addition to off-duty speech,[146] although in the case at

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[141] *See generally id.* (discussing statutes affording the referenced protections and the states in which they exist). Volokh's table of contents names each state in which employees are afforded statutory protection from termination for the given reasons. *Id.* at 295–96.

[142] *See id.* at 304.

[143] Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 261–62 (4th Cir. 2003), *rev'd*, 369 F.3d 811 (4th Cir. 2004); *see also* S.C. CODE ANN. § 16-17-560 (2018).

[144] Cotto v. United Tech. Corp., 711 A.2d 1180, 1185–86 (Conn. App. Ct. 1998); *see also* CONN. GEN. STAT. § 31-51q (Supp. 2018).

[145] CAL. LAB. CODE §1101 (West 2018) ("No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office[;] (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.").

[146] California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist., 53 Cal. Rptr. 2d 474, 477 n.2 (stating that policy prohibiting employees

issue, an Education Code section allowed for an exception to the statute because it was specifically directed at school district employees.[147] Consequently, these vague state statutes resulted in court decisions that would allow companies' free speech rights to be infringed upon by allowing employee protections to extend to on-the-job political speech.[148]

Not only are some of these statutes overly broad, but some are unclear and difficult to enforce. For example, the New York statute which protects against discrimination based on "recreational activities,"[149] has been interpreted to include discussing politics at a social event,[150] but by another court not to include picketing.[151] This disparate treatment of the New York statute by the courts makes it difficult for employees to predict and be on notice about what they can and cannot do under the law. Also, unclear statutes, like the Colorado off-duty protection statute, have little precedent to provide

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from engaging in political speech or activity during work hours violates a section of the Labor Code).

[147] CAL. EDUC. CODE §7055 (West 2018) ("The governing body of each local agency may establish rules and regulations on the following: (a) Officers and employees engaging in political activity during working hours[;] (b) Political activities on the premises of the local agency."); *California Teachers Ass'n*, 53 Cal. Rptr. 2d at 477 n.2.

[148] *See, e.g.*, *Cotto*, 711 A.2d at 1185–86 ("We conclude that [the statute] applies to some activities and speech that occur at the workplace because there are no words in the statute limiting the place at which the constitutionally protected activity occurs, there is no prohibition that prevents a legislature from protecting employee speech wherever it occurs, and other legislation governing the same general subject matter includes speech occurring at the workplace."); *California Teachers Ass'n*, 53 Cal. Rptr. at 480–81 (concluding that the state's Education Code allows a school to prohibit on-the-job employee speech during work hours only in "instructional settings," but not in "noninstructional settings," such as when teachers are speaking amongst themselves).

[149] N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2018).

[150] Cavanaugh v. Doherty, 675 N.Y.S.2d 143, 146 (App. Div. 3d Dep't 1998) (stating that termination arising from political disagreement with employer at restaurant outside of work hours is a cause of action for violation of N.Y. Labor Law barring termination for recreational activities).

[151] Kolb v. Camilleri, No. 02-CV-0117A(Sr), 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008).

guidance to individuals on what topics they can safely blog about or post on social media without fear of employer retaliation.[152]

In this vein, David Yamada, an employment law scholar,[153] posits that the numerous protections for private employees, such as Title VII, the NLRA, state statutes, and tort claims, have created a situation in which employees would need to pay for legal advice merely to determine whether their anticipated action is protected.[154] Yamada argues that without seeking legal advice, in order to determine what protections they have, employees are left to "digest the equivalent of a law student's course outline."[155] Yamada concludes that, unfortunately, many people whose free speech rights have been infringed by private entities have likely not identified the correct arena to bring their suit, thus leaving them without a legal remedy.[156]

Moreover, the non-uniformity of state statutes across the country is also potentially harmful to large corporations with many subsidiaries in different states.[157] Navigating compliance within each of these states is a difficult endeavor for Human Resources departments and the assemblage of laws could open corporations up to liability from multiple states. Large employers must create very detailed and specific policies to prevent every branch of the company from violating varying state laws.[158] Additionally, some jurisdictions favor the employer and some courts tend to favor the employee.[159] For example, a New York appellate court held speech to be unprotected where it would injure the employer, while a

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[152] Joseph Lipps, Note, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 645–57 (2011).

[153] *See David C. Yamada*, SUFFOLK U. L. SCH., http://www.suffolk.edu/law/faculty/DavidYamada.php (last visited May 1, 2018).

[154] Yamada, *supra* note 93, at 45–46.

[155] *Id.* at 45.

[156] *Id.* at 46.

[157] *See* William B. deMeza Jr. & Kenneth A. Jenero, *Politics in the Workplace: What Must Employers Allow?*, HOLLAND & KNIGHT (July 16, 2016), https://www.hklaw.com/publications/politics-in-the-workplace-what-must-employers-allow-07-19-2016/.

[158] *Id.*

[159] Volokh, *supra* note 9, at 307–08.

Colorado federal court protected speech even though it injured the employer.[160]

Another form of protection for private employees exists under "whistleblower protection" statutes.[161] These statutes prevent employers from firing employees that bring their illegal activity to light or bring charges against them.[162] These statutes have been adopted by all fifty states, the federal government, and have been used as the basis for PPE tort claims.[163] This conglomeration of state statutes present difficulties for private employees and private employers alike, and while some employees are afforded political speech protection, the likelihood of successful litigation is uncertain as not only are the remedies confusing to navigate, but the courts' interpretations of their state's statute have been inconsistent and unreliable.

4. Federal Statutory Protections

More prevalent exceptions to the at-will doctrine are the commonly known federal anti-retaliation statutes within the National Labor Relations Act of 1935 (NLRA)[164] and the Title VII Antidiscrimination Act of 1964.[165] The NLRA protects employees' rights to form a union and partake in collective bargaining agreements.[166] It also protects employees from retaliation for engaging in protests[167] and for speech directly related to the terms and conditions of employment.[168] Because of this qualification, the more general the political speech is, the less likely it will be protected under the NLRA, as it most likely will not be related to

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[160] *Id.*

[161] Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 117 (1995) [hereinafter Estlund, *Free Speech*].

[162] *Id.*

[163] Mintz, *supra* note 105, at 277.

[164] 29 U.S.C § 158(a)(4) (1988).

[165] 42 U.S.C. § 2000e-3(a) (2012).

[166] Mintz, *supra* note 105, at 277.

[167] Estlund, *Wrongful Discharge*, *supra* note 107, at 1658.

[168] Mary Becker, *How Free Is Speech at Work*, 29 U.C. DAVIS L. REV. 815, 842 (1996).

the specific terms and agreements of that employee's job.[169] Furthermore, employees are not safe from retaliation for speech during a "secondary boycott."[170]

Title VII currently protects employees against discrimination based on race, color, religion, sex or national origin.[171] Title VII originated with the fight against slavery and has solidified itself as an unchallenged law protecting an individual's right to equal treatment.[172] It also led to more antidiscrimination legislation such as the Age Discrimination in Employment Act,[173] the Pregnancy Discrimination Act,[174] and portions of the Americans with Disabilities Act.[175]

Overall, federal statutes have helped ensure protections against discrimination for employees; however, protection has never extended to speech-related discrimination. While the traits included under these acts are largely immutable characteristics, religion is an example of a membership in a group that influences the core morals and values of an individual.[176] Political ideologies and the speech stemming from those beliefs are arguably at times associated with religious beliefs, or are at the very least, closely associated with an individual's core beliefs.[177] Thus, political speech has the potential

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[169] *Id.*

[170] *Id.* at 843.

[171] Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e–2000e-17.

[172] Estlund, *Wrongful Discharge*, *supra* note 107, at 1659.

[173] *Id.*; *see also* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

[174] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)); Estlund, *Wrongful Discharge*, *supra* note 107, at 1659.

[175] Americans with Disabilities Act of 1990, Pub L. No. 101-336, §§ 101–108, 104 Stat. 327, 330–337 (codified as amended at 42 U.S.C. §12111–12117 (2012)) (ADA employment discrimination provisions); Estlund, *Wrongful Discharge*, *supra* note 107, at 1659.

[176] *See* PEW RESEARCH CTR., PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS 67–75 (2012), http://assets.pewresearch.org/wp-content/uploads/sites/5/legacy-pdf/06-04-12%20Values%20Release.pdf.

[177] *See Political Ideology*, PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/political-ideology/ (last visited May 1, 2018); *U.S. Public Becoming Less Religious*, PEW RESEARCH CTR.

to fall under the purview of Title VII, and as a comprehensive federal statute, it would satisfy the need for uniform protection for private employees.

III. POLITICAL IDEOLOGY AS A LIMITED PROTECTED CLASS UNDER FEDERAL TITLE VII ANTIDISCRIMINATION LAW

When employees are fired from their jobs due to various tweets, political statements, and conduct, many Americans erroneously raise the right of free speech as a defense.[178] Although this demonstrates the value that Americans put on their right to free speech when they feel it is threatened, studies have shown that large numbers of Americans and students do not know what is protected under the First Amendment and what is not.[179] What seems to be overlooked is the fact that the First Amendment only protects one's speech from being restricted by the government.[180] Free speech protections are not available for private employees under the First Amendment.[181]

This Part argues that off-duty political speech should be a limited protected class under the Federal Title VII

(Nov. 3, 2015), http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/ ("Some religious groups (including evangelical Protestants and Mormons) are generally supportive of the Republican Party, while other groups (including Jews, religious 'nones,' Hispanic Catholics and members of churches that belong to the historically black Protestant tradition) tend to be more Democratic in their partisan allegiances.").

[178] Paul Callan, *There is No Constitutional Right to Take a Knee While You're at Work*, CNN (Sept. 26, 2017), http://www.cnn.com/2017/09/26/opinions/first-amendment-football-protest-callan-opinion/index.html; *see supra* notes 74–76 and accompanying text.

[179] *See* John Kass, *Shocking Number of Students Don't Understand First Amendment*, NEWSMAX (Sept. 22, 2017), https://www.newsmax.com/JohnKass/speech-college-students-political/2017/09/22/id/815034/; Ken Shepherd, *37 Percent of Americans Can't Name Any of the Rights Guaranteed by First* Amendment, WASH. TIMES (Sep. 13, 2017), https://www.washingtontimes.com/news/2017/sep/13/37-percent-of-americans-cant-name-any-of-the-right/.

[180] U.S. CONST. amend. I (stating that "Congress shall make no law . . . "); deMeza & Jenero, *supra* note 156 ("Employees, as well as many employers, commonly but mistakenly believe that the First Amendment to the U.S. Constitution guarantees 'freedom of speech' at work.").

[181] *See supra* note 180 and accompanying text.

Antidiscrimination Law. As discussed above, there are many persuasive philosophical reasons for free speech. Additionally, this nation and our judicial system have historically recognized political speech to be deserving of the utmost protection.[182] Citizens today are apt to recognize the necessity of guaranteed freedom to criticize the government.[183] However, the lack of robust protection for political speech in private employment, coupled with the increase in claims of employment retaliation, is effectively chilling political speech.

A. Proposed Amendment to Title VII

While the addition of a protected class to Title VII is a monumental decision,[184] this Note argues for an amendment to Title VII that is limited to only cover off-duty political speech. The amended Title VII Antidiscrimination Law with the addition of political speech would be as stated:

> **(a) Employer practices.** 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

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[182] *Protection of Core Political Speech*, *supra* note 1; *see also* discussion *supra* Section I.A.

[183] *See* Jenna Johnson, *A Brief History of Donald Trump's Mixed Messages on Freedom of Speech*, WASH. POST (Sept. 29, 2017), https://www.washingtonpost.com/politics/a-brief-history-of-donald-trumps-mixed-messages-on-freedom-of-speech/2017/09/28/dd44160c-a3b6-11e7-ade1-76d061d56efa_story.html?utm_term=.a71dcb45a75b; *see also Many Americans Stressed about Future of Our Nation, New APA Stress in America™ Survey Reveals*, AM. PSYCHOL. ASS'N (Feb. 15, 2017), http://www.apa.org/news/press/releases/2017/02/stressed-nation.aspx.

[184] The last time a protected class was added to Title VII was in 1990 when President George Bush signed the Americans with Disabilities Act. *See The Law*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/history/35th/thelaw/index.html (last visited May 1, 2018). However, Title VII has subsequently been amended procedurally and substantively, albeit on a smaller scale, more recently. *Id.* In 2000, President Bill Clinton issued an Executive Order preventing discrimination in federal employment based on genetic information. *See id.*; Exec. Order No. 13145, C.F.R. § 235 (2000).

> such individual's race, color, religion, sex, national origin, or political ideology; 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 adversely affect his status as an employee, because of such individual's race, color, religion, sex, national origin or political ideology.
> **Amendments to § 2000e Definitions.**
> **(a)** "Political ideology" means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes speech or conduct, reasonably related to political ideology, which occurs off-duty.
> **(b)** "Off-Duty" is defined as speech or conduct that takes place off the employer's premises and that takes place during the employee's nonworking hours. Regarding online posting, "off-duty" is defined as using a personal account during personal, noncompany time, including lunch breaks.
> **(c)** "Personal Account": Employees must not make assertions to speak on behalf or as an agent of their employer. If the speech is made with an email or social media account with the name of the company or institution listed or associated in any way shape or form, this takes the post outside the purview of "off-duty." If a person has their employer listed on their account profile, a disclaimer on their account or on the individual post would suffice to enable their posts to fall under the protections of this statute.

This Amendment would protect private employees from employer retaliation based on political ideology and speech, without infringing on the rights of private employers. Employees would be able to freely discuss their political beliefs on their own time without

the fear that it would adversely affect their employment. The off-duty limitation would prevent government infringement on the First Amendment rights of private employers.[185] If Title VII protected private employees' political discourse inside the workplace, it would unfairly enable employees to voice potentially contentious political views on the company's time, lead to disruption in the workplace, and potentially lead to an influx of hostile work environment claims, which ironically, are typically brought under Title VII.[186] Allowing political speech in the workplace could conflict with a private employer's legal duty under Title VII to prevent discrimination in the workplace based on sex, race, religion, ethnicity and to prevent harassment.[187] A private entity should not have the burden of both allowing political speech during their time of business, as well as preventing a hostile work environment. As the court held in *Dixon v. Coburg Dairy, Inc*., allowing a statute that does not limit coverage to off-duty speech only would create the "absurd result of making every private workplace a constitutionally protected forum for political discourse."[188] Furthermore, barring employers from disciplining employees for speech made on-the-job would allow for employees to not perform their job duties effectively and therefore hinder the company's ability to conduct its business in the most productive way. For instance, an employee would be able to make political statements or conduct political activity during their working hours, instead of doing their job, and their employer would have no disciplinary recourse.

Due to the technological nature of our society today, defining "off-duty" presents itself as a challenge. Some of the current examples of employer retaliation do in fact involve statements made

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[185] As mentioned in Part I, the Supreme Court held in *Citizens United* that corporations have the First Amendment protections for their political speech. *See supra* note 29 and accompanying text.

[186] "[I]solated or sporadic expressions of political support tainted with racial or sexist undertones" have been used as circumstantial evidence in Title VII harassment and hostile work environment claims. Martha M. Lemert & Angela N. Johnson, *Political Speech Vs. Title VII–Which Trumps Which?*, LAW360 (July 1, 2016), https://www.law360.com/articles/812560.

[187] *Id.*

[188] Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003), *rev'd*, 369 F.3d 811 (4th Cir. 2004) (reversed for a procedural issue).

on social media sites like Twitter and Facebook.[189] While First Amendment case law and current state statutes are informative in defining "off-duty," more of a distinction must be made with regard to social media posts, given that an increasing number of instances involve retaliation resulting from speech made online.[190] The addition of the "personal account" definition would provide clarity regarding what type of social media post would not be protected, and would provide a way for employees listing their employer on their profiles to ensure that their posts were still protected under this federal law.

Although it is tempting to import the well-established standards under which First Amendment retaliation claims[191] are analyzed given that such a claim is the functional equivalent of the one at issue, simply protecting off-duty political speech is in the best interest of both the employee and the employer. An "off-duty political speech" limitation provides much more clarity than the *Pickering-Connick* test seen in First Amendment law, that requires

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[189] *See* Li, *supra* note 75; Santiago, *supra* note 76.

[190] *See supra* Section II.C.

[191] Public employees, unlike private employees, enjoy First Amendment protection against retaliation by their employer for exercising their right to free speech. U.S. CONST. amend. I; deMeza, Jr. & Jenero, *supra* note 157 ("Employees, as well as many employers, commonly but mistakenly believe that the First Amendment to the U.S. Constitution guarantees 'freedom of speech' at work."). The Supreme Court has established, in what is now known as the *Pickering-Connick* test, that a public employee's speech is protected if: (1) he or she spoke as a citizen on a matter of public concern; and (2) his or her interest in the speech is not outweighed by the government's interest in the efficient provision of public services. Estlund, *Free Speech*, *supra* note 161, at 116; *see* Connick v. Myers, 461 U.S. 138, 150–51 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568, 571–72 (1968). If an employee passes the first prong, he or she still has to pass the arguably, more difficult second prong, which allows an employer to claim that there was "disruption or a threat of disruption" that justified the employer's decision to discharge the employee. Estlund, *Free Speech*, *supra* note 161, at 125; *see Connick*, 461 U.S. at 150–51. The Court tends to afford public employers' great deference in analyzing these cases because "close working relationships are essential to fulfilling public responsibilities." *Connick*, 461 U.S. at 151–52, 154; *see also* Garcetti v. Ceballos, 547 U.S. 410, 413 (2006); Branti v. Finkel, 445 U.S. 507, 515–16 (1980); Perry v. Sindermann, 408 U.S. 593, 597 (1972); *Pickering*, 391 U.S. 563; Estlund, *Free Speech*, *supra* note 161, at 124–25.

"ad hoc, case-by-case balancing" of employer rights against employee rights in addition to inquiries into "how disruptive the speech is or is likely to be."[192] This inquiry into disruption has been noted as a flaw in the *Pickering-Connick* test in that it "is inconsistent with the notion of robust exchange of divergent ideas, as it leaves vulnerable the speech that is most likely to have a strong effect."[193]

The "off-duty political speech" distinction allows for the protection of employee speech regardless of whether it is "on a matter of public concern" and does not require an inquiry into actual or potential disruption. Given that political speech is "almost always" a matter of public concern due to its essential function in democracy,[194] it eliminates the extra step and only calls for the court to determine if the speech was political. Also, government employees' speech sometimes falls outside the protections of the First Amendment because their personal interest in the speech causes it to fail the "public concern" prong.[195] The *Pickering-Connick* balancing test is applied in cases with government employers and therefore the balancing of interests is tailored to maintain the efficient functioning of our government. While the efficient functioning of a private company is important, many sectors of the government, such as law enforcement, have additional worries, such as maintaining taskforces that regularly enter life-threatening situations. Therefore, the *Pickering-Connick* standard is inappropriate in this context.

Additionally, this Amendment would adequately protect private-sector employer's interests, given that it would not prevent their ability to discipline or discharge an employee for their inadequate job performance. As long as the political speech was off-duty and did not translate to a failure to complete the duties of the employee's job, both the employee's and the employer's rights would be adequately safeguarded.[196] As an example, consider a

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[192] *See* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1017–18 (2005).

[193] *Id.* at 1018.

[194] *See* Draper, *supra* note 77.

[195] Estlund, *Free Speech*, *supra* note 161, at 115.

[196] Some state statutes that protect against discrimination based on off-duty conduct include an exception that allows employers to restrict speech that

staunch believer in the pro-life movement working at a clinic informing women of options including abortion. As long as the employee did not try and prevent patients from hearing all of their options that the clinic professes to give all patients, the employee could still assert his or her beliefs off-duty, while performing the duties of the job. On the other hand, if the employee was not performing her duties, the employer would have every right to discipline or discharge the employee. Therefore, even in an extreme and unlikely scenario, the employer would only be limited in the sense that it could not fire the employee solely because it found out she expressed pro-life views while off-duty.

Under this proposed Title VII Amendment, the Google employee would not have been protected, given the fact that he circulated his controversial memo to coworkers while at work, using his company email address.[197] The CBS executive, who was fired because of her insensitive Facebook comments, would also not be covered under this Amendment.[198] Both her Twitter and Facebook represented that she worked for CBS,[199] and it is unlikely that she had any disclaimer that her posts were personal opinions that should not be attributed to CBS. It is important to note that in the event that this Amendment were enacted, employees who list their employers

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conflicts with employers' business-related interests or when the restriction relates to a bona fide occupational qualification, however this language has not been interpreted by the courts to cover instances where other employees are offended by the speech. Volokh, *supra* note 9, at 306–07. In addition, the Equal Employment Opportunity Commission mentioned that the bona fide occupational qualification exception should not be triggered by "the preferences of coworkers, the employer, clients or customers." 29 C.F.R. 1604.2(a)(1)(iii) (2012). Despite this, some courts have interpreted these exceptions to allow employers to terminate employees whose speech or conduct could cause "public hostility" towards the employer or interfered with the employee's loyalty. *See, e.g.*, Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458, 1461–62 (D. Colo. 1997); Berg v. German Nat'l Tourist Office, 670 N.Y.S.2d 90 (App. Div. 1st Dep't 1998). This Note asserts that the off-duty standard, without the inclusion of this exception, is sufficient protection for both the employee and employer and will eliminate the confusion and uncertainty that the non-uniform application of the bona fide occupational qualification has created.

[197] Edwards, *supra* note 74.

[198] Santiago, *supra* note 76.

[199] *Id.*

on their social media accounts would be on notice to include a disclaimer into their profile in order to preserve their protections under the Amendment.

The ESPN host fired for her tweet also would not have been protected under this Amendment because she listed her employer on her Twitter account, thus taking the account out of the purview of a "personal account" as specified by the Amendment.[200] However, hypothetically, if the ESPN host had put in the disclaimer, she would likely receive better protection under this Amendment than under the Connecticut state statute that would govern in this case. Although the Connecticut statute covers "the exercise . . . [] . . . of rights guaranteed by the First Amendment," it limits the protection to activities that do "not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer"[201] It could be argued that the ESPN host's tweet did interfere with her performance as "part of her job is to attract sponsors and viewers, and her comments could have alienated them."[202] Given that no such qualification is incorporated into the proposed Amendment, it would likely be a better option to seek protection under the federal Amendment rather than the state statute. The NFL football players would not receive protection from this Amendment simply because their protest happened at the start of the game, which is considered their working hours. If they partake in protests or political speech outside of their workplace, which for them is the football field, then they would be able to seek protection under this Amendment.

In the case of the professor who was fired by a private university for his tweet, this Amendment would likely have afforded him protection. The university even acknowledged in its condemnation of the statement, that the professor's tweet was "made via his private social media account."[203] Although a detailed analysis of all the

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[200] Draper, *supra* note 77 ("[T]here is a fair argument to make that Hill's speech interfered with her job performance. As a high-profile ESPN employee, part of her job is to attract sponsors and viewers, and her comments could have alienated them.").

[201] CONN. GEN. STAT. § 31-51q (Supp. 2018).

[202] Draper, *supra* note 77.

[203] Clara Turnage, *U. of Tampa Fires Professor Who Called Hurricane Harvey 'Karma' for Texas*, CHRON. OF HIGHER EDUC. (Aug. 29, 2017),

facts would be necessary to determine this professor's fate under the statute, from the facts available it seems that the tweet would qualify as political speech made off-duty, given that he was not acting as an agent of the institution.[204] The Ohio man who was fired from his job at a restaurant would also have received protection under this proposed amendment, as the New York Times profile written about him clearly covered his "off-duty" speech.[205] However, this case does not trigger the social media account analysis as this profile of him was published in a newspaper and not on a personal social media account.[206]

IV. POLICY IMPLICATIONS

One counterargument is that private employers have free speech and expression rights, and the addition of this protected class under Title VII would infringe on these rights. However, the limitation to political speech and sentiments expressed off-duty sufficiently protects employers' rights, as it allows private employers to terminate an employee if the speech occurs at work or on the company's time or dime. It is reasonable to allow the company to protect its rights and interests by giving it the power to make sure employees are doing their job while at work and not making political statements that could be attributed to the company. Issues could arise in cases involving employees that work in media, because even if their speech is made off-duty, it has potential to alienate viewers and sponsors. However, companies do have the platform necessary to denounce views that they don't agree with or want to be associated with.

Furthermore, private companies have historically been regulated by the government. The many employment law statutes, antidiscrimination statutes, harassment laws, and state speech statutes have been in place and enforced for years. Even companies regulated by the government for mainly non-employment matters,

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https://www.chronicle.com/blogs/ticker/u-of-tampa-criticizes-professor-who-called-hurricane-harvey-karma-for-texas/119867.

[204] *Id.*

[205] *See* Bacon, *supra* note 87.

[206] *Id.*

such as pollution control, are also prohibited from retaliating against an employee for speaking up about violations of these regulations.[207] Many companies are already regulated by the varying state statutes discussed previously,[208] and adding protection for political speech to Title VII would simply provide a more comprehensive, one-size-fits all approach.

A. Effect on Current State Statutes

This Amendment to Title VII would work in conjunction with state statutes, as Title VII only applies to employers with greater than fifteen employees.[209] Additionally, employees are allowed to choose the forum, state or federal, they wish to bring suit in, therefore leaving the door open for employees to choose which forum is best suited for their case.[210] For example, if the Title VII Amendment regarding off-duty political speech were less inclusive than an employee's state law, for example the broad Colorado statute that protects "any lawful activity off the premises,"[211] the employee could choose to file their claim under the state law. On the other hand, employees in states with narrower statutes, such as Washington, which only protects employees from discrimination due to their engagement in electoral activities,[212] could have legal recourse under Title VII.

Another potential concern regarding the enactment of this Amendment is that it could potentially conflict with other claims

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[207] Estlund, *Free Speech*, *supra* note 161, at 117.

[208] *See supra* Part I.

[209] *See* 42 U.S.C. §2000e(b) (2012) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day.").

[210] *See* Valeriya Safronova, *When You Experience Sexual Harassment at Work*, N.Y. TIMES (Nov. 10, 2017), https://www.nytimes.com/2017/11/10/style/sexual-harassment-work-advice-lawyers.html (discussing how to file an antidiscrimination claim under Title VII and mentioning that employees can file with both state and federal agencies).

[211] *See* COLO. REV. STAT. § 24-34-402.5(1) (2017).

[212] WASH. REV. CODE ANN. § 42.17A.495(2) (West 2018) ("No employer . . . may discriminate against an . . . employee . . . for . . . in any way supporting or opposing [or not supporting or opposing] a candidate, ballot proposition, political party, or political committee.").

under Title VII. In the past, employees have used racially charged remarks made by their co-workers as circumstantial evidence for discrimination or harassment claims falling under Title VII.[213] However, this Amendment would not conflict with the ability for people to do this as the Amendment is limited to purely political and off-duty speech. Any political speech made at the workplace to coworkers would not be protected under the Amendment. In the event that statements that are viewed as derogatory are made at the workplace, employees suing for harassment or discrimination would still be able to use these statements as circumstantial evidence.

V. CONCLUSION

The rising number of employees fired for their off-duty political speech poses a threat to the functioning of our democratic country. Private employees on all points of the political spectrum are left to choose between adding to the political discourse by speaking out on political issues they feel strongly about or risking discharge by their employers, thus losing their livelihoods. The members of a democracy should not have to choose between participating in the democracy and providing for themselves or their families. This Note proposes a solution to prevent the chilling effect on political speech that is likely to continue if greater employee protections are not established. The proposed Amendment to Title VII, incorporating political ideology as a protected class, considers the need for citizens to be able to express their political beliefs on their own time in addition to private employers' needs to run their businesses. While roughly half of all states have some protections for their private employees, a comprehensive federal statute would provide greater clarity for both employers and employees, as well as more uniform protection.

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[213] *See* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 645–48 (1997); Lemert & Johnson, *supra* note 186.