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## Raising the Floor of Company Conduct: Deriving Public Policy from the Constitution in an Employment-at-Will Arena

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RAISING THE FLOOR OF COMPANY CONDUCT:  
DERIVING PUBLIC POLICY FROM THE CONSTITUTION  
IN AN EMPLOYMENT-AT-WILL ARENA

STEVEN J. MULROY\* & AMY H. MOORMAN

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I. INTRODUCTION

Consider an employer that requires all employees to attend rallies for a particular presidential candidate, or to sign petitions supporting that candidate, or to lobby government for a particular position. Employees who fail to comply are subject to denial of bonuses, postponement of promotions, or even termination.

If the employer were a government agency, this would clearly violate the employees’ free speech rights under the First Amendment.<sup>1</sup>

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1. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 517-19 (1980) (stating that with the exception of certain instances where political affiliation would “interfere with the discharge of his public duties . . . continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party”); *Elrod v. Burns*, 427 U.S. 347

In some states, a private employee might have some sort of statutory protection.<sup>2</sup> But, in the many cases where such explicit statutory protection is lacking, the vast majority of private employees would have no remedy. That is so because, for the last century or two, the general rule has been that absent explicit contract language to the contrary, employment in the private sector is “at will.”<sup>3</sup>

However, in recent decades, courts have, on some occasions, applied a common law doctrine known as the “public policy exception” (PPE) to the at-will employment rule to protect employees in extreme cases when the employer’s conduct runs contrary to a definite public policy. Originating in such relatively clear-cut cases, as where an employer fired an employee for refusing to violate the law,<sup>4</sup> or for complying with a legal obligation like jury service,<sup>5</sup> the exception has expanded into other areas where the employer’s adverse employment action seems contrary to a clear, widely accepted public policy in the state. The doctrine stands as a last line of defense for an employee who cannot point to express statutory text, explicit contractual language, or specific facts creating an implied contract. It creates a “floor” for fair treatment by employers to which all private employees are entitled. To the extent one considers such a floor necessary to safeguard important public policies, then, the PPE is important.

Courts vary in their application of this doctrine in wrongful discharge claims. In the “forced speech” example above, which has actually occurred and is not strictly hypothetical, some courts have granted the employee relief while others have not.<sup>6</sup> While courts that recognize the PPE may theoretically allow use of constitutional principles to inform their determination of what is clear and substantial public policy within their states, there has been less enthusiasm for using constitutional principles in PPE cases as opposed to statutory

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(1976) (holding termination of public employees based on party affiliation unconstitutional under the First and Fourteenth Amendments).

2. See *infra* Part V.B.1.c (discussing state statutory protections of free speech rights of private employees).

3. A noteworthy exception to the general rule exists in the State of Montana, which statutorily protects employees from being discharged absent good cause. MONT. CODE ANN. § 39-2-904 (2013); see also *infra* notes 233-38 and accompanying text (describing state statutes and case law providing protection against termination for off-duty, off-premises conduct). Cf. ARIZ. REV. STAT. ANN. § 23-1501 (2013) (regulating employment termination in the private sector).

4. See, e.g., *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992) (recognizing a public-policy exception where “the employer directed the employee to perform an illegal act as part of the employee’s work related duties”).

5. See, e.g., *Nees v. Hocks*, 536 P.2d 512, 515-16 (Or. 1975) (concluding that employer’s termination of employee for refusing to be excused from jury duty was driven by a “socially undesirable motive” which created a viable cause of action for wrongful discharge based on public policy).

6. See *infra* Part V.B.1.a (discussing such “forced speech” cases).

or regulatory rules.<sup>7</sup> In large part, this is because constitutional principles are generally considered to apply only where there is state action, and thus may be seen as less directly analogous to the setting of a private employment dispute.<sup>8</sup>

Such a dilemma can occur in many different situations where private employers fire employees under circumstances at odds with confirmed policy behind a constitutional principle. For example, cases have arisen in which employers allegedly fired employees for having an abortion.<sup>9</sup> Other cases have involved other types of “free speech” issues, such as when employers forbade workers from speaking out on matters of public concern,<sup>10</sup> forced them to engage in political speech with which they disagreed,<sup>11</sup> or pressured them into making political contributions.<sup>12</sup> Controversies also have arisen over private employer decisions to fire employees for wearing long hair,<sup>13</sup> for smoking off-duty and off-premises,<sup>14</sup> and for drinking off-duty and off-premises.<sup>15</sup> Such cases indicate that employees expect their fundamental rights to be respected in the workplace.

Similarly, society places high value on the right to vote, the freedom of worship, and the right to be free from unwarranted intrusion into intimate matters. When employers use the coercive power at their disposal to undermine these values, one might be inclined to

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7. See *infra* Part III.A (discussing the use of constitutional versus other sources of law in determining public policy under the PPE).

8. See *infra* Part III.A (discussing the use of constitutional versus other sources of law in determining public policy under the PPE).

9. Barbara Presley Noble, *A Firing for Cause, or for Abortion?*, N.Y. TIMES, Jan. 16, 1994, at F23. Not all such cases were resolved, *id.*, and at least one was resolved through confidential settlement. See Alan J. Craver, *Stylist Who Said Her Abortion Led to Firing Settles Suit*, THE BALT. SUN, Feb. 5, 1995, at 11C. Most of these cases went resolved or unsettled. *Id.*

10. See *Flesner v. Technical Commc'ns Corp.*, 575 N.E.2d 1107, 1111 (Mass. 1991) (applying the PPE to termination for cooperating with a federal investigation of the employer).

11. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir. 1983) (recognizing a PPE where company fired worker for refusing to lobby state legislature for policies favored by the company).

12. See Robert Kelner, *Allegations of Employer Coercion of Political Activity Are on the Rise*, INSIDE POLITICAL LAW (Oct. 17, 2012), <http://www.insidepoliticallaw.com/2012/10/17/allegations-of-employer-coercion-of-political-activity-are-on-the-rise/> (describing such incidents).

13. *Miller v. Safeway, Inc.*, 102 P.3d 282, 295 (Alaska 2004).

14. Debra J. Saunders, *Where There's Smoke, You're Fired*, S.F. CHRON., Feb. 17, 2005, at B13; see also Amy H. Moorman, *Employer Regulation of Off-Duty Smoking: Meeting the Needs of Employers and Employees with Smoking Cessation Programs*, J. INDIVIDUAL EMP'T RTS, 1994-95, at 243, 243 (discussing the merits of employing non-smokers from an organizational perspective, but cautioning against the “slippery slope” of involvement with employees' off-duty activities).

15. *Best Lock Corp. v. Review Bd. of the Ind. Dep't of Emp't & Training Servs.*, 572 N.E.2d 520, 521-22 (Ind. App. 1991) (concluding that employer did not have just cause to fire employee for violating work policy prohibiting the off-duty consumption of alcohol).

believe that courts should provide employees with common law protections. But the law's laissez-faire preference for "at-will" employment arrangements, and an intuitive distinction between the application of constitutional principles to public versus private employers, tug in the opposite direction.

For example, in *Novosel v. Nationwide Insurance Company*, the Third Circuit, applying Pennsylvania law in a diversity case, explained at length how constitutional principles could legitimately form the basis for a judicially found "public policy" under the PPE.<sup>16</sup> Several years later, after intervening Pennsylvania cases rejected constitutionally inspired PPE claims,<sup>17</sup> the Third Circuit sharply limited *Novosel*, holding that the absence of state action undercut the utility of constitutional doctrine in deciding the contours of the state's public policy.<sup>18</sup>

This divergence mirrors one shown among various state courts. While many of them either explicitly or implicitly drew upon constitutional sources,<sup>19</sup> and no state that recognizes a broad PPE specifically excludes constitutional sources from its public policy analysis,<sup>20</sup> a fair number of courts have criticized the practice over the years.<sup>21</sup> Many, but not all, of the later cases involved First Amendment issues.

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16. 721 F.2d at 899-900.

17. See, e.g., *Booth v. McDonnell Douglas Truck Servs., Inc.* 585 A.2d 24, 28 (Pa. Super. Ct. 1991) (stating that certain state constitutional provisions protecting contract rights and obligations did not support employee's right to collect unpaid commissions as a public policy claim because there was no state action).

18. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 620 (3d Cir. 1992).

19. See, e.g., *Gantt v. Sentry Ins.*, 824 P.2d 680, 687-88 (Cal. 1992) (referencing only "the constitution or statutory provisions"); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) (determining that a clear mandate of public policy is violated when "the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme"); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. 2010) (en banc) (listing "the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body"); *Dohme v. Eurand America, Inc.*, 956 N.E.2d 825, 829 (Ohio 2011) (noting that the Constitution is one source of public policy in applying the PPE); *Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 342 (Pa. Super. Ct. 1988) (stating that public policy must be articulated "in law or a constitutional provision"); *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 380 (Wash. 1996) (examining whether employer's conduct "contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme" (quoting *Parnar*, 652 P.2d at 631 (emphasis added))); *Birthisel v. Tri-Cities Health Servs. Corp.*, 424 S.E.2d 606, 612 (W. Va. 1992) (noting a constitutional basis for public policy in applying the PPE); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983) (listing only "constitutional or statutory provision"). While state courts vary, most draw upon both federal and state constitutions as sources of public policy. See *infra* Part III.B.

20. See generally *infra* Part III.A.

21. See *Grzyb v. Evans*, 700 S.W.2d 399, 402 (Ky. 1985) (rejecting a "freedom of association" basis for a wrongful discharge claim, because the freedom of association right only applies to governments (citing *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825 (1985) (dealing with a state action requirement when suing *directly* under the First Amendment, not a PPE)); *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 1344

Some scholars have urged that federal or state constitutional provisions should be among the potential sources of relevant public policy for purposes of allegedly wrongful employment practices.<sup>22</sup> However, they have not given the issue extensive analysis and discussion. In recent years, scholars have examined the issue from a more topic-specific perspective, such as the right of employee privacy,<sup>23</sup> or with a state-specific or even case-specific focus.<sup>24</sup>

Other scholars have discussed more generally the connection between constitutional law and private law. One approach is to examine when private action may be treated as equivalent to public action, and thus be subject to constitutional norms.<sup>25</sup> Furthermore, international law recognizes a doctrine known as “direct horizontal effect,” wherein the constitutional human rights guarantees of a country are applied to govern relations between private parties.<sup>26</sup> Just recently, in 2012, the Supreme Court dramatically changed constitutional criminal procedure law by importing private, common law property

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(Pa. Super. Ct. 1984) (rejecting presumption of innocence-based PPE claim and stating that constitutional rights were not meant to be “superimposed into” one’s “remaining life experiences”); *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 172 (Wis. 1986) (narrowly construing the PPE and rejecting a free speech-based PPE claim, lest it open a “Pandora’s box” of due process and equal protection arguments which would “eliminate any distinction between private and governmental employment”). *Cisco* echoes similar choices made by other courts within Pennsylvania. See *Booth*, 585 A.2d at 28 (finding no constitutional basis for a public policy cause of action because no state action was involved), *appeal denied*, 597 A.2d 1150 (Pa. 1991); *Veno v. Meredith*, 515 A.2d 571, 581 (Pa. Super. Ct. 1986) (rejecting on similar grounds a PPE claim by newspaper editor fired for publishing an article criticizing a judge); *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 844 (Pa. Super. Ct. 1986) (rejecting free speech-based PPE claim against private newspaper).

22. See, e.g., Richard L. Alfred & Ben T. Clements, *The Public Policy Exception to the At-Will Employment Rule*, 78 MASS. L. REV. 88, 93-94 (1993); Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 402-03 (1989) (urging ready use by courts of both federal and state constitutional sources in applying the PPE).

23. See, e.g., Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 22-24 (2013) (referencing the issue briefly as background with respect to free speech); John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799 (2000) (contrasting drug testing rules for public and private employers); Jill Yung, *Big Brother IS Watching: How Employee Monitoring in 2004 Brought Orwell’s 1984 to Life and What the Law Should Do About It*, 36 SETON HALL L. REV. 163 (2005) (discussing electronic monitoring of employees via video surveillance, GPS tracking, and Internet usage tracking software).

24. See, e.g., Ivo Becica, Note, *Privacy—State Constitutional Privacy Rights Against Private Employers: A “Hairy” Issue in Alaska*. *Miller v. Safeway, Inc.*, 102 P.3d 282 (Alaska 2004), 37 RUTGERS L.J. 1235 (2006) (discussing Alaska case involving privacy of private employee); Maureen Binetti, *Minding Your Business: Is Your Life After Work Really Private?*, N.J. LAW. MAG., Apr. 2008, at 33 (discussing law in New Jersey on employer interference with off-duty, off-premises behavior such as smoking).

25. See Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281 (2013).

26. See Willmai Rivera-Pérez, *What’s the Constitution Got to Do with It? Expanding the Scope of Constitutional Rights into the Private Sphere*, 3 CREIGHTON INT’L & COMP. L.J. 189 (2012) (comparative analysis of the “direct horizontal effect”).

notions of trespass.<sup>27</sup> In evaluating police investigative acts, the Court held that where the common law would recognize a trespass to private property, the acts constitute a “search” within the meaning of the Fourth Amendment.<sup>28</sup> Just as fruitful is an evaluation of the reverse dynamic, wherein constitutional principles inform the application of a common law cause of action.

Assuming that constitutional principles indeed have some significant role to play in evaluating such a common law claim, significant questions remain as to *which* constitutional principles, and how to apply them to arguably analogous factual situations in the private employment sphere. If we acknowledge a strong public policy in favor of the right to vote, should we reason similarly with respect to the right to bear arms? If we apply free speech principles to protect an employee from being forced to sign a petition with which she disagrees, should we apply them equally to allow her to publicly criticize her employer and bring it into disrepute? Scholarship has not discussed the issues in this manner.

This Article discusses the use of the PPE to vindicate constitutional interests. It takes an interdisciplinary approach, mixing analysis from business law, tort law, and constitutional law. It argues that courts can and should consider constitutional principles when deciding PPE claims. Constitutional principles have as valid a place in the PPE analysis as do statutory principles. This Article also argues that some constitutional rights are more amenable to a private-sector analogy, and/or more appropriate for a PPE analysis. For example, the right to informational privacy is more translatable to the private employment context than the rights guaranteed by the Establishment Clause. And the right to free speech enjoys more of a current public policy consensus than the right to abortion, or to bear arms. For each of several different constitutional provisions examined, this Article recommends general principles to guide courts in applying the PPE.

Part II lays out background on the PPE. Part III discusses the extent to which courts have used constitutional principles to inform their discussion, and argues that such principles are appropriate sources of policy, at least in certain limited situations. Part IV discusses the extent to which the PPE cause of action is necessary or advisable, given existing statutory remedies for similar types of employee complaints. Part V suggests how one might apply to the PPE such specific constitutional provisions or doctrines as: free speech, the Fourth Amendment, equal protection, reproductive rights, substantive due process, procedural due process, and the Second Amendment. Part VI offers concluding thoughts.

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27. See *United States v. Jones*, 132 S. Ct. 945 (2012).

28. *Id.* at 949-50.

## II. THE PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT

A fundamental rule of employment contract law is, in the absence of a contractual term or statutory provision to the contrary, employment is presumed to be at will. That is, the employer can fire the employee for a good reason, a bad reason, or no reason at all.<sup>29</sup>

One well-recognized exception to the at-will employment rule is the PPE.<sup>30</sup> This judicially created exception emerged in recent decades, representing a departure from traditional common law at-will employment principles.<sup>31</sup>

In some ways, the rise of this exception constitutes a movement back toward the law of the eighteenth century, when masters had implied obligations to “treat the servant humanely” and to “furnish him with suitable lodging.”<sup>32</sup> Back then, for example, instead of a presumption of at-will employment, the common law presumed an implied one-year term of employment if the term was not specified.<sup>33</sup> This made sense in a largely agrarian society. It protected the servant from being used during the growing and harvest season only to be let go when the ground was barren; it also protected the master from having to support a servant during the winter only to be abandoned for a better offer once serious work had to be done.<sup>34</sup>

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29. 10 LEX K. LARSON, EMP. DISCRIMINATION § 174.01 (2d ed. 2012); *see, e.g.*, Phipps v. IASD Health Servs. Corp., 558 N.W.2d 198, 202 (Iowa 1997) (noting that, unless a valid employment contract exists between parties, “an employer may discharge an employee at any time, for any reason, or no reason at all”); Fleschner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 91 (Mo. 2010) (en banc) (asserting that “[g]enerally, at-will employees may be terminated for any reason or for no reason”);.

30. LARSON, *supra* note 29, § 174.01.

31. Donald C. Carroll, *At-Will Employment: The Arc of Justice Bends Towards the Doctrine's Rejection*, 46 U.S.F. L. REV. 655, 668-69 (2012) (supporting the PPE); R. Scott Oswald & Michael L. Vogelsang Jr., *The ABCs of Common Law Wrongful Termination Claims in the Washington Metropolitan Region*, 3 LAB. & EMP. L.F. 197, 199-202 (2013) (tracing the development of the PPE from initial emergence to broad acceptance among jurisdictions); Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1594-98 (1994) (same, and criticizing its application); Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?*, 61 MERCER L. REV. 551, 553-63 (2010) (opposing the PPE).

32. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 83, at 165-66 (William S. Hein & Co. 1981) (1877) (emphasis omitted); *see generally* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.03 (5th ed. 2008) (discussing how the Industrial Revolution influenced an economy-driven approach to employment that undermined traditional employer obligations regarding public policy).

33. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (Oxford, Clarendon Press 1765) (“The contract between [servants] and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it be a hiring for a year.”); *see also* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 860 (1994) (discussing the American courts’ adoption of this one-year presumption during the nineteenth century).

34. Pennington, *supra* note 31, at 1584-85 n.7.



With the advent of industrialization came a different approach, one which emphasized the freedom of contract so as to enhance commerce and reduce burdens on business.<sup>35</sup> This approach enshrined a default at-will rule by the end of the nineteenth century.<sup>36</sup> It preceded a near-parallel development in constitutional law, the so-called “*Lochner* era,” during which the Supreme Court imposed a laissez-faire approach to employment regulation based on a supposed constitutional freedom of contract.<sup>37</sup> This development is another example of the interplay between constitutional law and the common law of employment.

Later in the twentieth century, two decades after the end of the *Lochner* era, courts began to recognize policy-based exceptions to the at-will rule.<sup>38</sup> One prominent expert in the field has called the erosion of the at-will doctrine “[t]he most significant employment law development in the last quarter of the 20th century.”<sup>39</sup> Under the PPE, an employee can bring suit for wrongful discharge where the termination was in violation of a clear public policy.<sup>40</sup> For example, courts may intervene when an employer fires workers because they refused to violate the law,<sup>41</sup> complied with a legal requirement,<sup>42</sup> or engaged in some form of protected activity.<sup>43</sup> Jurisdictions vary as to which

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35. *Id.* at 1585; *see also infra* notes 137-139 (discussing the perceived burden on employers as the motivating factor behind limiting statutory causes of action).

36. Pennington, *supra* note 31, at 1585.

37. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (finding a statutory regulation of labor hours within private businesses to be an unconstitutional infringement on the “freedom of contract” due process right as well as an invalid use of police power). The *Lochner* era ended thirty years later when the Court rejected the notion that the freedom to contract precluded government regulation of the labor market. EDWIN CHEREMINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 8.2 (4th ed. 2011) (analyzing this laissez-faire philosophy as stemming from a “social Darwinism” in which the individual’s freedom to contract limited the government’s regulatory power). *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31-32 (1937).

38. The first case to recognize a PPE to the at-will rule was *Petermann v. Int’l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959). Pennington, *supra* note 31, at 1593.

39. Perritt, *supra* note 22, at 397.

40. LARSON, *supra* note 29, § 174.04[1]; *see also Mello v. Stop & Shop Cos.*, 524 N.E.2d 105 (Mass. 1988) (the PPE may apply to termination of employee for reporting employer’s criminal conduct); *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995) (establishing sexual harassment as a valid basis for the PPE); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984) (holding that it violated clear public policy to discharge plaintiff for complying with federal statute on accounting procedures).

41. *See, e.g., Woodson v. AMF Leisureland Ctrs., Inc.*, 842 F.2d 699 (3d Cir. 1988) (upholding a PPE action when barmaid was fired for refusing to serve alcohol to visibly intoxicated persons).

42. *See, e.g., Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (creating a PPE where employee was fired for refusing employer’s request to ask for excuse from jury duty).

43. *See, e.g., Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 937-38 (Mo. Ct. App. 1998) (recognizing exception for “whistleblower” activity).

public policies qualify for the PPE,<sup>44</sup> but virtually every jurisdiction recognizes some form of this exception.<sup>45</sup>

Some courts explicitly limit the cause of action to cases where the employee has actually been discharged.<sup>46</sup> But there is no theoretical reason why this doctrine could not apply to other adverse employment actions besides termination. Some courts have so held.<sup>47</sup> However, the overwhelming majority of the cases involve full termination, leading courts to speak of this as a “wrongful discharge” cause of action. It also sometimes is referred to as the tort of “retaliatory discharge,” at least where the complaint alleges termination in retaliation for the exercise of a protected right, or for the failure to violate a clear law or policy upon the direction of a superior.<sup>48</sup>

The cause of action is normally characterized as a tort.<sup>49</sup> Some authorities suggest that the cause of action also may be partially

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44. Compare *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. Ct. App. 1976) (creating a PPE cause of action where an employee filed workers' compensation claim), and *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71 (Ind. Ct. App. 2002) (finding cause of action for retaliatory discharge where employee refused to commit illegal act for which he would be personally liable), and *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. Ct. App. 1990) (applying PPE where employee was fired for complying with jury duty summons), with *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980) (denying cause of action where employee was terminated for reporting supervisor misconduct to company officials), and *Price v. Carmack Datsun, Inc.*, 485 N.E.2d 359 (Ill. 1985) (finding no cognizable PPE for an employee who filed insurance claim because it did not affect the public interest), and *MacDonald v. E. Fine Paper, Inc.*, 485 A.2d 228 (Me. 1984) (declining to find a PPE for wrongful discharge of an employee who was fired for filing a workers' compensation claim because remedy already existed under Workers' Compensation Act).

45. GERARD P. PANARO, EMPLOYMENT LAW MANUAL: RECRUITMENT, SELECTION, TERMINATION ¶ 7.02 (1990); see also PERRITT, *supra* note 32, § 7.09[B][1] (acknowledging that most courts recognize a PPE to at-will employment where an employee is fired for serving jury duty).

46. See, e.g., *Darchak v. City of Chi. Bd. of Educ.*, 580 F.3d 622, (7th Cir. 2009) (declining to extend Illinois PPE to any injury short of actual discharge); *Dixon v. Denny's Inc.*, 957 F. Supp. 792, 799 (E.D. Va. 1996) (concluding “that the public policy exception to Virginia's employment at will doctrine does not yet encompass constructive discharges as well as actual discharges”); *Roberts v. Dudley*, 993 P.2d 901 (Wash. 2000) (limiting the PPE to termination).

47. See, e.g., *Hunter v. Port Auth. of Allegheny Cnty.*, 419 A.2d 631 (Pa. Super. Ct. 1980) (recognizing doctrine's applicability to a refusal to hire); MISSOURI APPROVED JURY INSTRUCTIONS (CIVIL) § 38.03 cmt. A (Robert T. Adams et al., eds., 7th ed. 2012) (contemplating such a cause of action in cases of “constructive discharge, demotion, or adverse job consequences,” but declining to take a position on the validity of such a claim).

48. See, e.g., *Turner v. Mem'l Med. Ctr.*, 911 N.E.2d 369, 375-76 (Ill. 2009) (using the terms “wrongful discharge” and “retaliatory discharge” interchangeably in a case involving a medical employee allegedly fired in retaliation for speaking out about patient safety); *Birthisel v. Tri-Cities Health Servs. Corp.*, 424 S.E.2d 606, 611 (W. Va. 1992) (using both terms to describe a claim by a medical employee fired for choosing professional ethics standards over a conflicting company policy).

49. See, e.g., *Vigil v. Arzola*, 699 P.2d 613, 619 (N.M. Ct. App. 1983) (acknowledging that the majority of courts find the public policy cause of action to sound in tort, which “provides a more appropriate rationale than one [sounding] in contract”).

grounded in the common law's implied covenant of good faith and fair dealing, which sounds in contract law.<sup>50</sup>

The basic rationale for the exception is that, while an employer should generally be free from interference in choosing whom to employ, the public has an interest in ensuring that the inherently coercive power of an employer to discharge is not used to pressure employees to disregard the law, forfeit important rights, or otherwise contravene substantial public policy interests.<sup>51</sup> Even where such public interests are implicated, though, the employer may still prevail where there is some "separate, plausible and legitimate reason" for taking the challenged action.<sup>52</sup>

A typical listing of the elements of the cause of action includes:

- (1) The existence of a clear public policy: i.e., the "clarity" element;
- (2) The termination placed that policy in jeopardy: i.e., the "jeopardy" element;
- (3) The plaintiff's termination was actually motivated by conduct related to the public policy: i.e., the "causation" element; and
- (4) The employer lacked a legitimate business justification for terminating the employee: i.e., the "overriding justification" element.<sup>53</sup>

While there is a theoretical difference between the second and third elements, there is little distinguishing them in practice. Typically, the public policy at issue is placed in jeopardy precisely because of the causal link between the termination and the policy. Thus, the causation proxy leads to the jeopardy prong.

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50. See, e.g., *Norcon, Inc. v. Kotowski*, 971 P.2d 158, 167 (Alaska 1999) (public policy tort largely encompassed by implied covenant); *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) (concluding that a contract cause of action is most appropriate for a wrongful discharge claim); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983) (finding the remedies provided by wrongful discharge statutes to be more applicable to contract causes of action than tort causes action).

51. MARK W. BENNETT ET AL., *EMPLOYMENT RELATIONSHIPS: LAW AND PRACTICE* § 2.02[F][b] (2014) (describing the PPE as having particular significance in situations where an employee refuses to commit illegal acts, exercises a legal right, performs a public duty, or reports an employer's misconduct); see also *Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 453 (Wis. 2000) (asserting that the exception "properly balances the need to protect employees from terminations that contradict public policy with the employer's historical discretion to discharge employees under the freedom to contract embodied in the at-will doctrine").

52. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 616 (3d Cir. 1992) (citing *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984)).

53. See *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 282 n.2 (Iowa 2000) (referencing this four-part elemental foundation as being a sufficient basis for a PPE cause of action); *Collins v. Rizkana*, 652 N.E.2d 653, 657-58 (Ohio 1995) (same); PERRITT, *supra* note 31, § 7.04 (recognizing these four elements as the basic analytical framework for a public policy tort cause of action).

Courts caution that the PPE should be narrow and not expanded lightly.<sup>54</sup> The default position is still at-will employment. Other than contractual terms between the parties, courts say, deviations from this default arrangement should be specified by the legislature.<sup>55</sup>

Further, the public policy alleged to have been violated by the adverse employment action must be “substantial.”<sup>56</sup> As one court stated, the public policy must “strike at the heart of a citizen’s social rights, duties, and responsibilities.”<sup>57</sup> The existence of the policy, as well as its contours and scope, must be relatively clear so as to place employers on proper notice of a potential violation.<sup>58</sup> The analogy here would be to qualified immunity for public officials, where the court must find a violation of “clearly established law.”<sup>59</sup>

A listing of categories of typical situations in which PPE cases arise includes those where employers fired employees:

- (1) For refusing to commit an illegal act;
- (2) For performing a legal duty;
- (3) For exercising a legal right or privilege; or
- (4) In retaliation for reporting misconduct.<sup>60</sup>

An example of category (1) would be termination for refusing to commit perjury before an official panel overseeing or investigating the company.<sup>61</sup> An example of category (2) would be an instance in which an employee must report for jury duty, or has an affirmative

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54. See, e.g., *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 380 (Wash. 1996) (stating that courts should exercise caution when declaring public policy absent express legislative or judicial expression on the subject (citing *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984))); *PERRITT*, *supra* note 32, § 7.05[B] (describing courts’ general reluctance to extend the exception beyond the express language of a statute).

55. See *Horn v. N.Y. Times*, 790 N.E.2d 753, 756 (N.Y. 2003) (“[S]ignificant alteration of employment relationships . . . is best left to the Legislature . . . because stability and predictability in contractual affairs is a highly desirable jurisprudential value.” (quoting *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 923 (N.Y. 1987))); see also *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990) (cautioning that the courts should not “usurp the legislative function” by making their own decisions regarding the public policies which would trump the general rule of at-will employment).

56. *Birthisel v. Tri-Cities Health Servs. Corp.*, 424 S.E.2d 606, 612 (W. Va. 1992).

57. *Dicomes v. State*, 782 P.2d 1002, 1006 (Wash. 1989) (en banc) (quoting *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981)); see also *Booth v. McDonnell Douglas Truck Servs., Inc.*, 585 A.2d 24, 28 (Pa. Super. Ct. 1991) (using similar language).

58. *Birthisel*, 424 S.E.2d at 612.

59. *Id.* at 612 n.8.

60. See, e.g., *Field v. Phila. Elec. Co.*, 565 A.2d 1170, 1176 (Pa. Super. Ct. 1989) (discussing safety problems at nuclear power plant); see also JOHN C. MCCARTHY, *RECOVERY OF DAMAGES FOR WRONGFUL DISCHARGE* 2D §§ 1.5, 1.9, 1.22, 1.24 (1990) (providing an in-depth analysis for each of these four distinct situations).

61. See *Woodson v. AMF Leisureland Ctrs., Inc.*, 842 F.2d 699, 702 (3d Cir. 1988) (upholding PPE action where barmaid was fired for refusing to serve alcohol to visibly intoxicated persons); *Petermann v. Int’l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959).

duty to report misconduct at the place of work.<sup>62</sup> An example of (4) would be any legitimate whistleblowing case.<sup>63</sup>

It is the third category that is relevant to this Article. An uncontroversial and common example for this category would be cases involving terminations for filing a workers' compensation claim.<sup>64</sup> But what remedy, if any, does an employee have who is fired for exercising a *constitutional* right—in other words, for engaging in a constitutionally protected activity?

### III. CONSTITUTIONAL SOURCE OF PUBLIC POLICY VERSUS OTHER LEGAL SOURCES

#### A. Generally

Courts discussing the PPE uniformly recognize statutes and judicial decisions as valid sources of the public policy at issue in these cases.<sup>65</sup> Regarding the former, to get a sense of the public policy of the state, a court can look not only to statutory text, but also to legislative history.<sup>66</sup>

But the use of constitutional law as a source has not always been viewed favorably. Some commentators have suggested generally that it is more difficult to use as a source of public policy,<sup>67</sup> or that certain states exclude such use.<sup>68</sup> In most of these states, rather than being specifically hostile to constitutional sources per se, courts are actually just hostile to the PPE in general. They either reject it out-

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62. See *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. Ct. App. 1990) (granting cause of action for employee's executing statutory duty to comply with a summons to appear for jury duty); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 119-20 (Pa. Super. Ct. 1978) (employee fired for missing work due to jury service).

63. See *infra* Part V.B.1.b.

64. See, e.g., *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1979); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Hrab v. Hayes-Albion Corp.*, 302 N.W.2d 606 (Mich. Ct. App. 1981).

65. PANARO, *supra* note 45, ¶ 7.02.

66. See, e.g., *Hansen v. Am. Online, Inc.*, 96 P.3d 950, 954 n.7 (Utah 2004) (bypassing a statutory text analysis by looking to legislative history and debate as a legitimate means of defining the public policy of weapons in the workplace).

67. See PANARO, *supra* note 45, ¶ 7.03[2].

68. See BENNETT ET AL., *supra* note 51, at app. 2B, 2-71 to 2-89 (2014) (listing Arizona, Colorado, Delaware, Florida, Georgia, Louisiana, New York, Pennsylvania, and Wisconsin as states that do not look to constitutional sources for public policy claims).

right,<sup>69</sup> or else view it so narrowly as to effectively preclude use of constitutional sources.<sup>70</sup>

Indeed, the use of constitutional principles as a source now is generally accepted, though it has received some criticism by state courts. Some state courts explicitly refer to constitutional provisions as a potential source of the public policy. A typical formulation is to ask whether the employer's action "contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme."<sup>71</sup> This reference to at least constitutional and statutory sources of public policy is common.<sup>72</sup> Other courts have implicitly recognized constitutional sources while rejecting constitution-sourced PPE claims on their facts, considering in detail claims involving employer actions interfering with free speech,<sup>73</sup> religious freedom,<sup>74</sup> and the right to

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69. See, e.g., *Bruley v. Village Green Mgmt. Co.*, 592 F. Supp. 2d 1381, 1387-88 (M.D. Fla. 2008), *aff'd per curiam*, 333 Fed. App'x 491 (11th Cir. 2009); *Wright v. Dothan Chrysler Plymouth Dodge, Inc.*, 658 So. 2d 428, 431 (Ala. 1995); *Pacheo v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) (per curiam).

70. See, e.g., *Poole v. In Home Health, LLC*, 742 S.E.2d 492, 494 (Ga. Ct. App. 2013) (judicially created exceptions to at-will employment disfavored, so Georgia courts defer to legislature to create exceptions); *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993) (recognizing only two circumstances in which the PPE applies: (1) where an employee refuses to participate in an illegal act; (2) where an employee is discharged for reporting illegal acts of his employer); *Wieder v. Skala*, 609 N.E.2d 105, 110 (N.Y. 1992) (creating a narrow exception to employment at-will employment but reiterating that further alterations are "best left to the legislature"); *Ed Rachal Found. v. D'Unger* 207 S.W.3d 330, 333 (Tex. 2006) (PPE limited to employees terminated for whistleblowing only where reporting the employer's illegal conduct is a legal obligation rather than a mere civic duty); Paul H. Tobias, *State-by-State Compendium of Leading and Representative Decisions Concerning the Public Policy Tort Doctrine*, 1 LIT. WRONG. DISCHARGE CLAIMS app. 5A (last updated Dec. 2013), available at Westlaw, 1 LITWDCS App. 5A (collecting cases establishing that Indiana courts have so far limited the PPE to cases involving workers' compensation or terminations for refusing to commit an illegal act).

71. *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 380 (Wash. 1996) (quoting *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984)).

72. See *Gantt v. Sentry Ins.*, 824 P.2d 680, 687-88 (Cal. 1992) (en banc) (referencing "constitutional or statutory provisions"); *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. 2010) (en banc) (listing "the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body"); *Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 342 (Pa. Super. Ct. 1988) (public policy must be articulated "in law or constitutional provision"); *Payne v. Rozendaal*, 520 A.2d 586, 587 (Vt. 1986) (listing constitution, statute, judicial decision, and "customs and conventions of the people"); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983) (listing only "constitutional or statutory provision").

73. See, e.g., *Korb v. Raytheon Corp.*, 574 N.E.2d 370 (Mass. 1991) (holding that a company spokesperson whose official remarks conflicted with employer interests did not have a cognizable wrongful discharge claim on the basis of free speech).

74. See, e.g., *Kolodziej v. Smith*, 588 N.E.2d 634, 638 (Mass. 1992) (acknowledging the existence of the PPE where an employer inhibits the free exercise of religion in the workplace or dismisses an employee on the basis of religion, but finding that requiring attendance at an employee training seminar referencing Christian ideology does not restrict religious exercise under this public policy).

privacy.<sup>75</sup> Had the courts rejected constitutional sources of public policy, such extensive discussions would not have been necessary.

Given the uniform acceptance of statutory provisions as potential sources of the public policy, recognition of constitutional provisions has at least some intuitive appeal. After all, since statutes are “subordinate” to constitutional provisions, “it would make little sense” to draw upon the former but not the latter for guidance.<sup>76</sup>

Of course, at first glance, the argument for not drawing upon constitutional sources in PPE cases is equally justifiable. Generally, constitutional provisions are designed to restrict government behavior.<sup>77</sup> Arguably, constitutional principles are ill-suited to govern employment relations between private parties.<sup>78</sup> It would make little sense, and would, perhaps, unduly restrict commerce, to make private employers abide by all the same requirements of procedural due process as a government employer.<sup>79</sup>

Based on this latter objection, courts in a few cases have flatly declined to draw upon constitutional sources in examining PPE claims. In a series of cases, the Pennsylvania Superior Court rejected PPE claims based on constitutional sources of policy, at least where applied to private employers.<sup>80</sup> One opinion emphasized that constitu-

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75. See, e.g., *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 914 (Mass. 1982) (denying specific claim of wrongful discharge for failing to fill out employee questionnaire with arguably unwarranted and intrusive questions because employee also refused to answer clearly relevant and warranted questions, but nonetheless recognizing that employee privacy rights limited the scope of questions for which refusal to answer constituted valid grounds for discharge).

76. *Alfred & Clements*, *supra* note 22, at 93-94.

77. See, e.g., *CHEMERINSKY*, *supra* note 37, § 6.4 (examining the “state action doctrine” and indicating that the Constitution applies to the government and does not regulate private conduct “no matter how discriminatory or how much [private wrongs] infringe fundamental rights”); see also *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356-57 (Ill. 1985) (stating that provisions of the Illinois Constitution mandate public policy protecting free speech restrict the actions of governmental or public officials, not of private employers); *Hatfield v. Rochelle Coal Co.*, 813 P.2d 1308, 1311 (Wyo. 1991) (holding that “private employers are not subject to due process claims under their state constitutions for wrongful termination of employees”).

78. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 903 (3d Cir. 1983) (Becker, J., dissenting from denial of rehearing en banc); *Perritt*, *supra* note 22, at 400-03 (articulating, but rejecting, this argument).

79. *Cf. Turner*, *supra* note 25, at 282 (“Our dinner invitations, marriage proposals, and even business ventures certainly must be immune to at least some of the constitutional law that requires public actors to afford equal treatment, due process, and respect for all viewpoints.”).

80. *Veno v. Meredith*, 515 A.2d 571, 578-81 (Pa. Super. Ct. 1986) (rejecting on similar grounds a PPE claim by newspaper editor fired for publishing an article criticizing a judge); *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 843-45 (Pa. Super. Ct. 1986) (rejecting argument that free speech rights could form basis of a PPE claim against a private employer); *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 1344 (Pa. Super. Ct. 1984) (rejecting presumption of innocence-based PPE claim and stating that constitutional rights were not meant to be “superimposed onto” one’s “remaining life experiences”).

tional provisions applied directly only to government conduct and not to disputes between private parties.<sup>81</sup> Thus, the PPE claim did not apply because there had been no allegation of state action.<sup>82</sup>

Citing this line of cases, the Third Circuit (applying Pennsylvania law in a diversity case) declined to accept a PPE claim grounded, in part, on Fourth Amendment-based notions of privacy against a private employer, holding that the absence of state action was fatal to the use of constitutional principles in a wrongful discharge suit.<sup>83</sup> Summarizing its view of the Pennsylvania case law, the Third Circuit criticized the use of constitution-inspired PPE causes of action, suggesting a certain level of skepticism to any further use of constitutional principles in future applications of the PPE.<sup>84</sup> For similar reasons, the Third Circuit reasoned, state constitutional principles were also ineligible as evidence of public policy in evaluating a PPE claim.<sup>85</sup>

Pennsylvania is not alone. At one point, the Supreme Court of West Virginia had stated, with respect to free speech-based PPE claims, that “[t]he prevailing view among the majority of courts addressing the issue” was that absent state action, “state or federal constitutional free speech cannot . . . be the basis of a PPE in wrongful discharge claims.”<sup>86</sup> This does not appear to be the majority view regarding free speech-based PPE claims today,<sup>87</sup> and even West Virginia still allows theoretical consideration of constitutions in divining public policy under the PPE.<sup>88</sup> But, a number of other states have explicitly rejected particular constitutional sources for the PPE in many instances, using language suggesting overall hostility to the transfer of constitutional policy norms to the private employment setting.<sup>89</sup>

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81. Booth v. McDonnell Douglas Truck Servs., Inc., 585 A.2d 24, 28 (Pa. Super. Ct. 1991).

82. *Id.*

83. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 619 (3d Cir. 1992).

84. *Id.* at 618-20.

85. *Id.* at 620.

86. Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578, 589 (W. Va. 1998).

87. *See infra* Part V.B.1.

88. *See* Wounaris v. W. Va. State Coll., 588 S.E.2d 406, 414 (W. Va. 2003) (noting the constitution as one of many sources for public policy for purposes of the PPE (citing *Birthisel v. Tri-Cities Health Servs. Corp.*, 424 S.E.2d 606, 612 (W. Va. 1992))).

89. *See* *Bruley v. Village Green Mgmt. Co.*, 592 F. Supp. 2d 1381, 1385 (M.D. Fla. 2008) (“Florida has no exception even where termination is founded on an employee’s exercise of constitutional rights.”); *Deiters v. Home Depot U.S.A., Inc.*, 842 F. Supp. 1023, 1027-29 (M.D. Tenn. 1993) (declining to make the “open courts” provision of the Tennessee constitution a basis for wrongful discharge claims because it did not apply to private employers, and further stating that even if the provision did apply to private employers, the constitutional provision “does not clearly and unambiguously create a public policy which would prevent the discharge of at-will employees who sue their employers”); *Hart v. Seven Resorts Inc.*, 947 P.2d 846, 850-51 (Ariz. Ct. App. 1997) (rejecting the right of privacy as an appropriate basis for the PPE because such a right “applies only to intrusions by the *government* or where there is state action”); *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, (Idaho 2003) (determining the constitutional right of free speech to be a source



In some instances, the reasoning supporting such a rejection seems superficial. Some courts simply note authority requiring state action for liability under the Constitution, and then reject PPE claims where there is no state action. For example, the Kentucky Supreme Court once rejected a “freedom of association” basis for a wrongful discharge claim, citing *United Brotherhood of Carpenters and Joiners of America v. Scott*<sup>90</sup> for the proposition that the right to free association applies only as against government action.<sup>91</sup>

But that seems to beg the question. No one asserts that *direct* constitutional liability exists against private employers.<sup>92</sup> The basis for liability is instead a common law cause of action which indisputably *does* regulate private action. The question is whether a constitutional right suggests a strongly held public policy which courts ought to uphold as against private employers under this common law claim. That question must be answered on some other basis besides the conclusion that a distinct constitutional claim would fail.

In like manner, courts adjudicating PPE claims often draw upon statutory sources for public policy, even under circumstances in which the employer has no direct liability under the statute.<sup>93</sup> This may be because the statutes in question are criminal and provide for no civil liability; or because they apply only to larger employers; or because the employee’s claim is precluded by statute of limitations concerns; or for other reasons.<sup>94</sup> Nonetheless, courts rely on the statutes for the underlying public policy and then hold that the common law claim can be used to vindicate that public policy. The analysis is no different with respect to constitutional sources of public policy.<sup>95</sup>

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of public policy when applied to state regulation only, and not in the context of private employment); *McGarvey v. Key Prop. Mgmt., LLC*, 211 P.3d 503 (Wyo. 2009) (rejecting free speech-based PPE claim while noting that no Wyoming case expressly endorsed application of Wyoming constitution to private entities).

90. 463 U.S. 825, 831-33 (1983).

91. *Grzyb v. Evans*, 700 S.W.2d 399, 402 (Ky. 1985).

92. But there are unusual instances in which a state constitution has been interpreted to restrict private action. See *Kraslawsky v. Upper Deck Co.*, 65 Cal. Rptr. 2d 297, 301-03 (Cal. Ct. App. 1997) (state constitutional guarantee of the right to pursue and obtain privacy creates a right of action against private as well as government entities). Indeed, even the U.S. Constitution’s abolition of involuntary servitude restricts private actors. See U.S. CONST. amend. XIII.

93. See *infra* Part IV.

94. *Id.*

95. Even where a court has rejected constitutional provisions as a legitimate source of public policy in evaluating wrongful discharge claims, constitutional precedent may still inform the analysis. For example, after rejecting federal and state constitutional provisions as evidence of public policy, the Third Circuit analyzed the employee privacy claim under state tort law—but it used Supreme Court Fourth Amendment case law to evaluate the contours of the privacy interests at stake. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 n.10 (3d Cir. 1992).

A better argument against the use of constitutional sources is the “slippery slope” concern. As the Wisconsin Supreme Court put it, giving courts the authority to scour constitutions for employer-restricting public policies would “open a Pandora’s box” of due process and equal protection arguments which would “eliminate any distinction between private and governmental employment.”<sup>96</sup>

However, this concern seems overblown. It is uncontroversial for courts to look to the entirety of common law doctrine and all statutes within the state as sources of public policy. This is a very deep well of potential public policies to draw upon in deciding whether to add to the list of protections afforded employees. In comparison the incremental increase in potential public policies, and thus potential extra employee protections, from allowing constitutional analysis would not seem to be that great. We would not be adding that much extra employee protection simply by allowing constitutional sources along with the already plentiful statutory and regulatory sources. This is particularly so where courts are circumspect about which constitutional rights they will draw upon, and how broadly or narrowly they apply them, as this Article advocates.<sup>97</sup>

On balance, while the distinction between public and private settings may justify some caution in drawing upon constitutional principles for PPE purposes, it does not justify wholesale exclusion. Constitutional principles are foundational. They often represent the most deeply held beliefs of a society, and enshrine our most cherished rights. Many of them are at least as important as the right to file a workers’ compensation claim, which almost all jurisdictions recognize as sufficiently important to form the basis of a PPE claim.<sup>98</sup> Why would we *not* look to them when deciding what public policies are clear and substantial? The challenge is simply to decide when constitutional policies governing public entities are sufficiently apt analogies such that they can be logically related to a private setting. As one commentator put it in a different context, the question is “whether the values protected by declared rights are threatened by concentrated private power in a way fairly analogous to the threat presently or formerly posed by unlimited government power.”<sup>99</sup>

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96. See *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 172 (Wis. 1986) (rejecting a free speech-based PPE claim).

97. See *infra* Part V (discussing these questions and making recommendations).

98. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899 (3d Cir. 1983) (making a similar observation).

99. See 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 9-2(b)(2) (3d ed. 2000).

### B. State versus Federal Constitutions

In determining the public policy underlying a PPE claim, some state courts make no distinction between federal and state constitutional sources.<sup>100</sup> Others expressly reference both federal and state constitutions. For example, in outlining the elements of the PPE, the Supreme Court of Ohio has listed the existence of a “clear public policy . . . manifested in a *state or federal constitution*, statute or administrative regulation, or in the common law.”<sup>101</sup> One of the broadest statements of sources of public policy lists, “among others:”

our *federal and state constitutions*, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government . . . is factually established.<sup>102</sup>

On the other hand, a few courts have looked to state constitutions but not to the federal constitution. For example, the Supreme Court of Illinois referred specifically (and only) to the *state* constitution when listing potential sources for the public policy.<sup>103</sup>

Others take a more nuanced approach. For example, in Oklahoma, federal statutes, standing alone, cannot provide the public policy that triggers the exception, because the exception is geared toward state policy.<sup>104</sup> But Oklahoma would not preclude the use of the PPE to protect an employee who reports the defrauding of a federal government program in violation of a federal statute, where such fraud also would be subject to criminal or civil penalties under Oklahoma law.<sup>105</sup> Further, a federal *constitutional* provision can provide such policy guidance if it “prescribes a norm of conduct for the state.”<sup>106</sup>

This Oklahoma doctrine actually points the way toward the appropriate approach on this question. The better view is not to require that the policy be formulated by an agent of that state’s government, but rather to require simply that the public policy does indeed apply within that state, regardless of its original source. The PPE is a

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100. See, e.g., *Borse*, 963 F.2d at 618-20 (rejecting both federal and state constitutional provisions as evidence of public policy for the PPE).

101. *Dohme v. Eurand Am., Inc.*, 956 N.E.2d 825, 829 (Ohio 2011) (emphasis added).

102. *Birthisel v. Tri-Cities Health Servs. Corp.*, 424 S.E.2d 606, 611 (W. Va. 1992) (quoting *Allen v. Com. Cas. Ins. Co.*, 37 A.2d 37, 39 (N.J. 1944) (emphasis added)).

103. *Turner v. Mem’l Med. Ctr.*, 911 N.E.2d 369, 374 (Ill. 2009) (quoting *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981)).

104. *Darrow v. Integrus Health, Inc.*, 176 P.3d 1204, 1212 (Okla. 2008).

105. *Id.*

106. *Id.*

common law doctrine applied by state courts; in evaluating a PPE claim, it is only sensible to look to laws and policies which apply within that state.

This approach suggests a distinction among different constitutional provisions as inspiration for a PPE claim. It would allow the use of only those individual rights from the federal constitution that have been “incorporated,” i.e., applied to the States through the Due Process Clause of the Fourteenth Amendment.<sup>107</sup>

### C. *Treating Private Action as State Action*

A separate ground for importing constitutional principles into PPE claims might be cases where the private action could be viewed legitimately as tantamount to state action. In constitutional law, there are well-recognized exceptions to the state action doctrine that allow courts to treat action by private entities as state action. In sum, courts may do so when (1) the private entity is engaging in a public function;<sup>108</sup> (2) public and private entities are intertwined in a close relationship;<sup>109</sup> or (3) government ratifies and adopts the action of the private entity.<sup>110</sup>

The best example of the “public function” exception is primary elections. Political parties run these elections, but they nonetheless engage in a public function while doing so. Courts have thus held they are bound by equal protection restrictions on discrimination.<sup>111</sup>

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107. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010) (discussing the incorporation doctrine). The Supreme Court has held most of the individual rights guaranteed by the Bill of Rights to be “incorporated” and applicable to the States, although some have never been addressed by the Court. CHEMERINSKY, *supra* note 37, § 16.3 (discussing the “selective incorporation” doctrine). The Court has specifically declined to incorporate the Fifth Amendment right to a grand jury and the Seventh Amendment right to a jury trial in civil lawsuits. *Branzburg v. Hayes*, 408 U.S. 665, 687 (1972) (Fifth Amendment right to Grand Jury not incorporated); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (Seventh Amendment right to civil jury trial not incorporated); see also *McDonald*, 130 S. Ct. at 3035 n.13 (providing the latest statement by the Court of the status of selective incorporation doctrine). Thus, even if the grand jury or civil jury trial rights could sensibly and feasibly be applied to private employers under the PPE, see *infra* Part V.A.3, they would be poor candidates for the PPE.

108. See, e.g., *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (finding state action where private political party ran primary election).

109. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding that where government agency leased space to private parking authority, it created “interdependence” and “joint partnership” in the challenged discrimination sufficient to establish state action).

110. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 18-19 (1948) (finding state action where court enforced racially restrictive covenant in private deed).

111. See, e.g., *Terry*, 345 U.S. at 469-70 (1953) (designating a private group’s running of a statewide primary election as state action for purposes of constitutional limitations on race discrimination); *Smith v. Allwright*, 321 U.S. 649, 663-65 (1944) (declaring a private political party’s racially discriminatory motives in conducting a primary election to be unconstitutional because it was operating under statutory authority of the state).

Courts also have found state action present under this category in older cases involving “company towns,” settlements owned and operated by a corporation but that functioned as municipalities for the employee residents, with the company maintaining streets, providing sanitation, and the like.<sup>112</sup>

The second category arose in *Burton v. Wilmington Parking Authority*, which involved a government agency that leased space to a private company running a parking lot.<sup>113</sup> The Court noted that the government agency stood to profit from the racial discrimination being committed by the private company.<sup>114</sup> Thus, the Court reasoned, the two entities were “interdependen[t],” with the government essentially a “joint participant” in the discrimination.<sup>115</sup> State action was therefore present.<sup>116</sup>

The final category first arose in a case where a court was called upon to enforce a racially discriminatory restrictive covenant in a dispute between two private parties.<sup>117</sup> The Court held that the trial court’s action to enforce the covenant amounted to ratification of the discrimination and thus state action.<sup>118</sup>

This line of authority may inform courts’ decisions as to when to use constitutional principles in enforcing the PPE. Where the private employer is engaging in a public function, as in a private prison, the argument may be stronger that it should afford its employees constitutional rights comparable to those enjoyed by public employees. Courts also might be more open to such arguments where the private employer is a monopoly, wielding the kind of power analogous to that of the government.<sup>119</sup> Analogizing from the second category, the same

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112. See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946) (enforcing First and Fourteenth Amendment rights for a woman distributing religious material in a company-owned suburb because it was accessible to the public and functioned as any other town within the community); cf. *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, (D. Mass. 1990) (holding that a private corporation could not regulate free speech activities on land it had leased from city because the land was a public forum for public use).

113. 365 U.S. 715 (1961).

114. *Id.* at 725.

115. *Id.*

116. *Id.* The continuing vitality of *Burton* is under serious question, and its holding may be sharply limited to its facts or else to the specific situation of private commercial leasing of government property. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (citing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-3, at 1701 n.13 (2d ed. 1988)).

117. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

118. *Id.* at 18-20.

119. Turner, *supra* note 25, at 292-93, 317 (2013) (arguing that private action should be treated as state action where the private entity enjoys a monopoly). This argument makes sense from a market perspective. Where an employer effectively holds a monopoly within a particular job market, employees have markedly limited ability to seek employment with a competitor if they consider employee policies too rights-restrictive. See *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 595 (Cal. 1979) (making this observation).

result may be obtained if the private employer is a government contractor whose operations are closely intertwined with those of government, as are some military contractors engaged in combat operations with U.S. armed forces.<sup>120</sup> Finally, where the government is asked to enforce a problematic rule of a private employer—for example, an overly speech- or privacy-restrictive rule that provides not only for termination, but also allows the employer to claim some reimbursement of recently accrued business expenses from the employee—courts may be less willing to affirmatively enforce such provisions if the employer sues the employee, and be less willing to countenance the discharge in the first place if called upon by the employer to do so.

#### IV. THE RELEVANCE OF EXISTING STATUTORY REMEDIES

In evaluating the eligibility of constitutional provisions as sources for the public policy behind the application of the PPE, one issue bound to emerge is the applicability (if any) of statutory remedies for the kind of wrongful discharge at issue. This is a double-edged sword. On the one hand, the existence of relevant statutes covering the same or similar types of alleged wrongful discharge provides powerful evidence that the related constitutional provision does indeed express a strongly held, substantial, and clear public policy. On the other hand, the existence of statutory remedies might suggest that the PPE would be unnecessary.<sup>121</sup>

However, there are a number of instances in which a PPE claim might be needed, even where a statutory claim exists covering the same general grounds for termination. For example, the availability of the PPE drawing upon constitutional principles is a relevant concern in those cases where the employee is precluded from pursuing a statutory claim by missing a limitations period,<sup>122</sup> failing to exhaust administrative remedies,<sup>123</sup> or working for an employer with too few

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120. Of course, one rationale for using such private security forces is their ability to act without constitutional restraints. But that very ability has become highly controversial. See Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 135 (2006) (analyzing the “separate community doctrine” to highlight the uncertain balance between civilian society and the armed forces).

121. Cf. *Borden v. Johnson*, 395 S.E.2d 628, 630 (Ga. Ct. App. 1990) (refusing to recognize the PPE for dismissal based on gender or pregnancy due to a lack of state or federal statutes specifically addressing such rights).

122. Under Title VII of the Civil Rights Act of 1964 (“Title VII”), employees must file an EEOC complaint within 180 days of discovering the alleged discrimination. 42 U.S.C. § 2000e-5(e) (2012). Once the EEOC either fails to respond within 180 days or issues a “right to sue” letter, the employee then must file a complaint in federal court within ninety days. § 2000e-5(f).

123. *Rojo v. Kliger*, 801 P.2d 373, 389 (Cal. 1990) (allowing PPE claim to proceed where plaintiff was barred from analogous statutory claim for failing to exhaust administrative remedies); see also *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1285 (Ill. 1984) (col-

employees to trigger coverage under the statute.<sup>124</sup> Yet another example would be where the common law claim provides for needed remedies that are not provided for under the corresponding statute.<sup>125</sup>

This latter problem of employer size may be a relatively common occurrence, since *most* United States employers have five or fewer employees<sup>126</sup> and thus would be outside the scope of many federal and state employment antidiscrimination statutes. Indeed, state courts have recognized PPE claims in exactly such circumstances.<sup>127</sup> But, there is still significant variation among the states as to whether PPE claims should go forward against employers too small to be covered by the applicable statute, with some states rejecting such PPE claims.<sup>128</sup>

Statute of limitations issues are another salient example. Limitation periods for PPE claims vary. Generally, limitation periods for common law tort claims range from one to three years.<sup>129</sup> States have

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lective bargaining agreement requirement that employees go through internal grievance procedure did not bar PPE claim, since the latter sounded in tort and not contract).

124. See § 2000e(b) (defining an employer for purposes of Title VII as one with fifteen or more employees); *Thurdin v. SEI Bos., LLC*, 895 N.E.2d 446, 448-49, 455, 455 n.18 (Mass. 2008) (discussing alternate liability theory of, inter alia, PPE where state pregnancy antidiscrimination statute applied only to employers with more than six employees); *Roberts v. Dudley*, 993 P.2d 901, 909-11 (Wash. 2000) (allowing PPE claim based on sex discrimination to proceed against small business where state sex antidiscrimination statute exempted small employers).

125. Even if a PPE claim was necessary to assist a particular employee plaintiff for one of these reasons, it might suffice for the court to draw upon the existing statutes for inspiration as to the nature of the clear public policy, avoiding reference to constitutional principles as unnecessary. But because there is no good reason for treating constitutional sources as somehow inferior to statutory ones in divining public policy, see *supra* Part III.A., it seems unwise for a court to wear such blinders.

126. According to 2012 Census Bureau estimates, in nine of the ten most populous states, the majority of employers have fewer than five employees. See *Firm Size Data*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/advocacy/849/12162> (last visited Feb. 16, 2014) (spreadsheet based on census data for California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Georgia, Michigan, and North Carolina).

127. See, e.g., *Thurdin v. SEI Bos., LLC*, 895 N.E.2d 446, 448-449 n.18 (Mass. 2008) (discussing alternative liability theory of, inter alia, PPE where state pregnancy antidiscrimination statute applied only to employers with more than six employees); *Badih v. Myers*, 43 Cal. Rptr. 2d 229 (Cal. Dist. Ct. App. 1995) (recognizing PPE claim involving pregnancy discrimination, even though employer had fewer than the five individuals required to be covered by the analogous anti-discrimination statute); *Molesworth v. Brandon*, 672 A.2d 608 (Md. 1996) (ruling in like manner regarding sex discrimination); *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995) (same, for sexual harassment PPE claim); *Roberts*, 993 P.2d at 901 (same, for pregnancy discrimination); *Williamson v. Greene*, 490 S.E.2d 23 (W. Va. 1997) (same, for sex discrimination and harassment).

128. See *Thibodeau v. Design Grp. One Architects, LLC*, 802 A.2d 731, 745-46 (Conn. 2002) (declining to find PPE extended to pregnancy-related discrimination by employers with fewer than the three employees required by statute, and explicitly stating that common law doctrines could not trump such statutory exemptions); *Weaver v. Harpster*, 975 A.2d 555, 567 (Pa. 2009) (declining to find employee's sex discrimination claims actionable under PPE because workplace employed fewer than four employees, the amount required to invoke remedy under Pennsylvania Human Relations Act).

129. PERRITT, *supra* note 32, § 9.15.

adopted a similar range for PPE claims, applying limitation periods of at least one year, and often up to three years.<sup>130</sup> Because some state and federal antidiscrimination statutes involve requirements that the complainant file a claim in a shorter time period,<sup>131</sup> there may be situations in which an employee victim of discrimination, who otherwise might have pursued a typical discrimination claim, may need to pursue a PPE claim instead.<sup>132</sup>

Further, states vary as to whether the limitation period begins to run when the termination actually occurs, when the employee receives notice of termination, or at the moment the employer decides to terminate.<sup>133</sup> Again, where this deviates from the rule regarding an analogous statutory claim, a PPE claim may be viable where the statutory claim may no longer be viable. Thus, in a few jurisdictions courts have allowed a common law action based on public policy to proceed, even if the limitations period of the relevant employment antidiscrimination statute has expired.<sup>134</sup>

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130. See, e.g., VA. CODE ANN. § 8.01-248 (2013) (two years for Virginia); *Kamen v. Int'l Bhd. of Elec. Workers*, 505 F. Supp. 2d 66, 78 (D.C. Cir. 2007) (three years for D.C., under the “catch-all” statute of limitations); *Funk v. Sperry Corp.*, 842 F.2d 1129, 1133 (9th Cir. 1988) (California PPE limitation period of one year); *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292, 1301 (Or. 1984) (two years for Oregon); *Barnett v. Sequim Valley Ranch, LLC*, 302 P.3d 500, 505 (Wash. Ct. App. 2013) (three years for Washington).

131. See, e.g., 29 U.S.C. § 160(b) (2012) (six months for unfair labor practice claims under the NLRA); 29 U.S.C. § 626(d) (2006) (same, for ADEA claims); 42 U.S.C. § 2000e-5(e) (2012) (depending on state, federal Title VII claims must be filed within six to ten months); OHIO REV. CODE ANN. § 4112.02(N) (West 2013) (six months to file age discrimination claim); TENN. CODE ANN. § 8-50-103 (West 2009) (six months to file employment discrimination claim).

132. For some types of PPE claims, though, this may not matter. When a federal claim does not have an express statute of limitation, federal courts adopt the statute of limitations of an analogous state law claim, unless doing so would interfere with the substantive policy behind the federal claim. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). But for all federal statutory causes of action-based laws passed after 1990, Congress has adopted a “catch-all” limitations period of four years. 28 U.S.C. § 1658 (2012).

133. Compare *Stupek v. Wyle Labs. Corp.*, 963 P.2d 678, 682 (Or. 1998) (determining that limitation began to run when termination became effective), and *Lorenz v. Martin Marietta Corp.*, 802 P.2d 1146, 1149 (Colo. Ct. App. 1990) (same), with *Huff v. Great W. Seed Co.*, 885 P.2d 723, 726 (Or. Ct. App. 1994) (finding that one-year statute of limitations began to run when plaintiff found out her dismissal was related to her workers' compensation claim, not the date of actual termination).

134. See, e.g., *Wendeln v. Beatrice Manor, Inc.*, 712 N.W.2d 226, 238 (Neb. 2006) (concluding that public policy-based retaliatory discharge claim based in tort was governed by the general four-year statute of limitations period found in NEB. REV. STAT. § 25-207 (2004) rather than employment discrimination claim under the NFEPA); *Klopfenstein v. NK Parts Indus., Inc.*, 870 N.E.2d 741, 747 (Ohio Ct. App. 2007) (finding at-will employee's independent claim for wrongful discharge was governed by general four-year statute of limitations rather than one-year statute of limitations for claims brought under the workers' compensation anti-retaliation statute); *Pytlinski v. Brocar Prods., Inc.*, 760 N.E.2d 385, 388-89 (Ohio 2002) (applying general four-year limitations period to an independent cause of action based in common law for violation of public policy where employee's OSHA complaint was otherwise barred by the 180-day limitations period of the Ohio Whistleblower Act).



Similarly, a PPE claim may be relevant despite the existence of an analogous statutory claim, because the two claims may involve different potential remedies.<sup>135</sup> When an analogous statutory cause of action allows for administrative remedies, courts have still recognized an independent cause of action for the public policy claim.<sup>136</sup>

Of course, even if there are procedural or remedial reasons why an employee needs to bring a PPE claim, despite the existence of a statutory claim protecting the same type of employee behavior, the jurisdiction may not be willing to allow the PPE claim to proceed. After all, there are reasons why jurisdictions bar antidiscrimination statutes' coverage of firms with fewer than the minimum number of employees. One is to limit the drain on enforcement resources of the courts, the EEOC, and similar state enforcement agencies.<sup>137</sup> Another is to limit the hardship on small "mom and pop" operations, which may be more vulnerable to the burdens of regulation and litigation.<sup>138</sup> Although the first concern does not really apply with respect to judicial enforcement of a common law PPE claim, the second policy rationale does.

Similarly, there are reasons why we have statutes of limitations: ensuring certainty and finality, saving defendants from abusive litigation, and saving courts from adjudicating stale claims with fading evidence.<sup>139</sup> These concerns simply do not go away when the plaintiff pursues a common law PPE claim. Title VII, like many state antidiscrimination statutes, requires administrative procedures for similar logistical, screening, and judicial economy reasons.<sup>140</sup> To the extent

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135. See *Roberts v. Dudley*, 993 P.2d 901, 909-11 (Wash. 2000) (en banc) (holding that statutory claim, but not wrongful discharge claim, provided for administrative proceedings and potential attorney's fee remedies).

136. See, e.g., *Holien v. Sears, Roebuck & Co.*, 689 P.2d 1292, 1303-04 (Or. 1984) (determining a female employee was entitled to common law tort damages based on sexual harassment because the equitable remedies available through employment antidiscrimination statute were inadequate to compensate plaintiff for the personal nature of her injuries).

137. See LARSON, *supra* note 29, § 174.06[3] (discussing divergence of court decisions on this question, and reasons for and against allowing PPE claim to proceed).

138. *Id.*; see also *Thibodeau v. Design Grp. One Architects, LLC*, 802 A.2d 731, 740-41 (Conn. 2002) (affirming that the primary purpose of exempting small employers from employment discrimination claims is to avoid subjecting such employers to the significant financial burdens of litigation). Aside from regulatory burden, there is also the more abstract libertarian concern regarding such "mom and pop" firms, which often involve a more intimate setting raising greater "freedom of association" issues. See *infra* Part V.B.1.

139. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (stating that the primary purpose of most statutes of limitations is "to protect defendants against stale or unduly delayed claims").

140. See Title VII, 42 U.S.C. § 2000e-5 (2012); see also, e.g., ARIZ. REV. STAT. ANN. § 41-1463 (2013) (prohibiting employers from hiring, segregating, or classifying employees on the basis of "race, color, religion, sex, age or national origin or on the basis of disability"); NEB. REV. STAT. § 48-1104(1) (2012) (declaring discrimination on the basis of "race, color, religion, sex, disability, marital status, or national origin" an unlawful employment practice); OR. REV. STAT. ANN. § 659A.030 (2013) (stating it unlawful to "refuse to hire or em-

that the coverage, time limitation, and administrative exhaustion provisions of these statutes leave “gaps” that are conscious policy determinations rather than oversights, there may be sound policy reasons for rejecting PPE claims in such situations.<sup>141</sup>

Thus, where the same type of employee behavior may be protected by both claims, courts may prefer to hold that the statutory remedy renders unnecessary the common law claim, both to show deference to the legislative branch and also to honor the common law presumption of at-will employment. A court could thus hold that the statute exhaustively outlines the manner in which such employee rights are vindicated.<sup>142</sup>

However, such seeming “preemption” appears not to be the majority approach. Those courts that have addressed the issue have tended to say that the existence of a statutory remedy protecting the same type of employee conduct does not bar a PPE claim, at least where that statute is not the *sole* source for the clear public policy the court derives in recognizing a PPE claim under those facts.<sup>143</sup> Instead, courts will look to see if there is any indication of legislative intent that the statutory remedy, or remedies, provided were designed to replace, rather than supplement, preexisting common law remedies like the PPE. In the absence of such indication, the common law cause of action continues.<sup>144</sup> Therefore, where, in a given case, the statutory remedy is unavailable due to some procedural or coverage

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ploy . . . bar or discharge” any individual from employment on the basis of “race, color, religion, sex, sexual orientation, national origin, marital status or age”).

141. For an excellent discussion of these issues, see LARSON, *supra* note 29, §§ 174.06[2]-.06[4].

142. See *Parlato v. Abbott Labs.*, 850 F.2d 203, 206-07 (4th Cir. 1988) (dismissing plaintiff's common law claims for wrongful discharge based on race and age because statutory remedy already existed); *Rupp v. Purolator Courier Corp.*, 790 F. Supp. 1069, 1073 (D. Kan. 1992) (Title VII and the Kansas Act Against Discrimination provided exclusive remedies for employee's common-law claims of retaliation, constructive discharge and whistleblowing); *Northrup v. Farmland Indus.*, 372 N.W.2d 193, 197 (Iowa 1985) (stating that “the procedure under the civil rights act is exclusive, and a claimant asserting a discriminatory practice must pursue the remedy provided by the act”).

143. *Phillips v. J.P. Stevens & Co., Inc.*, 827 F. Supp. 349, 352-53 (M.D.N.C. 1993) (recognizing that the availability of statutory remedy does not affect the availability of an alternative wrongful discharge claim); *Collins v. Rizkana*, 652 N.E.2d 653, 660 (Ohio 1995) (noting that a statute will not preempt common law remedies unless it is the *sole source* of the public policy); *Atkinson v. Halliburton Co.*, 905 P.2d 772, 774 (Okla. 1995) (quoting *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1226 (Okla. 1992)) (“[W]here the common law gives a remedy, and another is provided by statute, the latter is merely cumulative, unless the statute declares it to be exclusive”).

144. See *Collins*, 652 N.E.2d at 660; *Atkinson*, 905 P.2d at 774. Of course, the legislature can also make express its intent to allow a parallel common law cause of action continued viability. See, e.g., N.J. STAT. ANN. § 34:19-14 (West 2013) (allowing plaintiff to choose between suing under statute or under common law public policy claim).

problem, the common law PPE tort can fill in the gap.<sup>145</sup> This result can also be obtained where the analogous statutory claim is based on a federal statute.<sup>146</sup>

A number of courts taking this approach have tended to allow PPE claims to go forward despite parallel statutory remedies. For example, the Kentucky Supreme Court recently acknowledged that a statute protecting employees' rights to bear arms explicitly recognized a civil cause of action, yet it also held that an employer's violation of the statute violated a wider public policy, thus creating a PPE cause of action.<sup>147</sup> Indeed, the Supreme Court of Wisconsin has explained that in deciding whether a clear public policy exists, courts should not focus on the "literal language" of a statutory provision or the circumstances it describes but should examine whether the employer "contravene[d] the spirit as well as the letter of a constitutional, statutory, or administrative provision."<sup>148</sup> Thus, courts have allowed PPE claims to go forward despite the existence of a comparable statutory claim.<sup>149</sup>

The above approaches—leaning away from a general "preemption" rule where statutory language exists, and declining to hold that the absence of such statutory language definitively excludes the recognition of a common law PPE claim—make sense, for reasons similar to

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145. See, e.g., *Thibodeau v. Design Grp. One Architects, LLC*, 802 A.2d 731, 733 (Conn. 2002) (recognizing a PPE where a female employee was fired for missing work due to pregnancy even though she was one of two employees and the statutory remedy applied only to employers with three or more employees); *Mitchell v. Univ. of Ky.*, 366 S.W.3d 895, 903 (Ky. 2012) (allowing claim for wrongful discharge based on gun ownership despite analogous statutory claim).

146. *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372, 375-76 (Ill. 1985) (holding that the federal nuclear safety statute with whistleblower protection provision did not preempt state law PPE claim).

147. *Mitchell*, 366 S.W.3d at 903.

148. *Strozinsky v. Sch. Dist. of Brown Deer*, 614 N.W.2d 443, 455 (Wis. 2000) (quotation marks omitted).

149. *Phillips v. J.P. Stevens & Co., Inc.*, 827 F. Supp. 349, 352-53 (M.D.N.C. 1993) (recognizing that the availability of statutory remedy does not affect the availability of an alternative wrongful discharge claim); *Collins v. Rizkana*, 652 N.E.2d 653, 660 (Ohio 1995) (noting that a statute will not preempt common law remedies unless it is the sole source of the public policy); *Atkinson*, 905 P.2d at 774 (quoting *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1226 (Okla. 1992)) ("[W]here the common law gives a remedy, and another is provided by statute, the latter is merely cumulative, unless the statute declares it to be exclusive.").

The converse is also true: the *absence* of statutory language barring the kind of conduct at issue does not necessarily preclude recognition of the PPE. Though a court could take an *expressio unius est exclusio alterius* approach and infer a decision to exclude other common law remedies where a statutory remedy exists, courts do not seem to do so. *Payne v. Rozendaal*, 520 A.2d 586, 588 (Vt. 1986) (recognizing PPE cause of action for age discrimination even though termination occurred prior to the passage of state legislation barring such discrimination).

This approach is sensible. At bottom, the question is a straightforward one of statutory construction. Sometimes the legislature intended to "preempt" common law causes of action, and sometimes it did not. Courts can, of course, use tools of statutory construction to divine legislative intent

the continued recognition of common law causes of action in the first place. The legislature cannot anticipate all potential situations when drafting statutory language. Case-by-case, incremental development of legal doctrine is useful for that reason and also because it provides the flexibility needed for adapting older principles to new situations. These new situations emerge constantly, and the legislature cannot always keep up.

Such judicial latitude is nonetheless consistent with the general preference for having the legislature make the kinds of policy decisions involved in formulating a PPE.<sup>150</sup> Where the legislature intends a statutory remedy to be exhaustive and exclusive of common law remedies, it need only say so explicitly to prevent judicial overreach. Such language effectively preempts otherwise applicable common law causes of action.<sup>151</sup> The legislature also can assert such preeminence after the fact: when a court applies an overly broad PPE, the legislature may legislatively overrule the decision with proper preemption language.<sup>152</sup>

Also, recognition of PPE claims based in whole or in significant part on *constitutional* principles may be especially appropriate. After all, constitutional principles are foundational. They are designed to supersede statutory and regulatory principles. And by its very na-

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150. See, e.g., *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990) (discussing the court's precedent resting on the principle that the legislature is the body most qualified to set public policy for purposes of interpreting the PPE); *Horn v. N.Y. Times*, 790 N.E.2d 753, 756-57 (N.Y. 2003) (same).

151. See, e.g., ARIZ. REV. STAT. ANN § 23-1501B (West 2012) (remedies provided for in statutes creating liability for wrongful discharge at the sole and exclusive remedies for vindicating any "public policy . . . arising out of the statute").

152. Analogizing once again from constitutional principles, courts can also find "implied preemption" in some circumstances. Where the state has so pervasively regulated in an area to create an inference that it intended to "cover the field," courts may decide that the existence of statutory remedies for a given situation may indeed crowd out a PPE claim. Similarly, where the recognition of a PPE claim would stand as a substantial "obstacle" to the fulfillment of the legislature's underlying policy in an area, courts may infer a different category of implied preemption. See *Arizona v. United States*, 132 S. Ct. 2492, 2502-03 (2012) (describing "field" and "obstacle" preemption).

For the reasons stated immediately above, these kinds of "implied preemptions" of PPE claims should not be the norm. Nor do they seem to be the existing norm, according to the case law. See *supra* notes 143-149 and accompanying text. The mere existence of a statutory remedy based on a comparable ground for termination need not create a negative inference of an intent to have such ground be the *sole* remedy. The law is filled with examples of parallel statutory and common law remedies, and having alternate theories of liability can serve a salutary purpose. Nonetheless, there may indeed be especially compelling occasions where legislative history, statutory purpose, or the overall structure of the statutory scheme in a given state evince a legislative purpose to crowd out all common law claims, or at least PPE claims, even in the absence of express preemption language in the statutes. Allowing courts the ability to recognize such "implied preemption" provides needed flexibility. It also provides adequate deference to legislative prerogatives, effectively rebutting criticisms that recognition of a PPE cause of action parallel to an analogous statutory remedy represents judicial usurpation.

ture, PPE liability exists only when the public policy at issue is both clear and substantial. If any public policy deserves vindication even when the facts place it in a “gap” within the statutory framework, it would be a policy that is clear, substantial, *and* foundational.

In sum, the existence of statutory remedies for comparable employer actions involving similar public policies may or may not warrant precluding a supplemental PPE claim. Reasonable arguments exist on both sides. Resolution of the question should most appropriately turn on the specifics of the intent of the legislature which passed the statute in question: whether it intended to supplant or supplement common law remedies.<sup>153</sup> But at least where such remedies do *not* “crowd out” the PPE, courts should still be able to look to *constitutional* as well as statutory sources of authority.

#### V. SPECIFIC CONSTITUTIONAL PROVISIONS AS CANDIDATES FOR THE PPE

If constitutional provisions can indeed inform a court’s analysis of the prevailing public policy under the PPE, which types of constitutional provisions can most properly fill that function? Are there any constitutional doctrines that are particularly appropriate, or inappropriate, for this role?<sup>154</sup> To begin to answer this question, this Article uses provisions of the U.S. Constitution as examples, keeping in mind that state constitutions often have analogous provisions.<sup>155</sup>

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153. See *supra* note 144 and accompanying text.

154. One overarching consideration might be the constitutional standard of review applied when evaluating alleged deprivations of a specific constitutional right. Obviously, the higher the standard of review, the more important the right, and therefore, the stronger the employee’s argument for the PPE. Most constitutional claims of alleged deprivations of individual rights are evaluated using (from most lenient to most exacting) “rational basis” review, “intermediate scrutiny,” or “strict scrutiny.” 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3(a)(v) (4th ed. 2008). In most of the examples considered *infra* Parts V.B-C, as potential candidates for the PPE, the applicable standard is either “strict scrutiny,” e.g., free speech, or “intermediate scrutiny,” e.g., gender discrimination. See *United States v. Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting) (noting that the Court applies intermediate scrutiny in gender discrimination cases); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980))). In a few cases, the standard of review is outside the traditional three tiers of constitutional review (abortion) or still undefined (the Second Amendment). See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046-48 (2010) (applying individual Second Amendment right to bear arms to the states but failing to specify a particular standard of review); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (applying unique “undue burden” standard for abortion rights).

155. See, e.g., W. VA. CONST. art. III, § 7 (“No law abridging the freedom of speech, or of the press, shall be passed.”).

A. *Provisions that Should Not Form the Basis of a PPE Claim*

1. *“Structural” Constitutional Doctrines*

There are certain types of constitutionally based policies which are obviously inappropriate sources for the PPE. Some are *structural* policies that do not implicate individual rights and would thus afford no basis in drawing an analogy with respect to the interests of an individual employee fired from her job. For example, the doctrine of separation of powers is a well-respected, longstanding policy that is arguably both substantial and clear.<sup>156</sup> But no terminated employee could plausibly claim her termination violated this policy. The same is true with respect to the doctrine of federalism.

2. *Restrictions Uniquely Focused on Government*

Similarly, inherent in Establishment Clause doctrine is the idea that it is only the *government*, not private entities that may not endorse religion.<sup>157</sup> While as a legal matter, all federal constitutional provisions restrict only government action, the Establishment Clause, by its very nature, focuses uniquely on government action. Thus, the doctrine stands in contrast to constitutional provisions guaranteeing individual rights of privacy, free speech, or nondiscrimination, all of which can easily be analogized to a private setting.

True, one could imagine situations in which a terminated employee might coherently invoke the values affirmed by this Clause: say, a Jewish employee fired for objecting to a “Keep Christ in Christmas” sign outside a workplace, to printing Christian Bible verses on all

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156. Actually, while the existence of a separation of powers doctrine is clear, its contours are not. See ROTUNDA & NOWAK, *supra* note 154, § 3.12(a) (describing the concept of separation of powers as one that evades “precise legal definition” and often provides nebulous solutions to intra-governmental disputes); see also Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) (characterizing the modern court’s treatment of the doctrine as “something of a split personality,” seemingly wavering from strict and “formalistic” to the use of a lenient, “functional” approach). The uncertain state of the law in this area is beyond the scope of this piece.

157. See *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (explaining that: (1) the Establishment Clause forbids only government speech endorsing religion, while private speech endorsing religion is actually constitutionally protected; and (2) that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect”); *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 484 (2d Cir. 2009) (affirming an Establishment Clause violation only where religious material was displayed on postal units serving a public function, but declaring the private business surrounding in which the units operated free from such restrictions); *Ams. United for Separation of Church & St. v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (holding that a private organization’s menorah display in a public forum did not constitute an endorsement of religion for purposes of Establishment Clause restrictions).

paychecks, or to holding weekly Christian evangelical rallies on employer premises. Indeed, at a certain point, such situations might trigger employer liability for religious harassment under Title VII or analogous state antidiscrimination statutes.<sup>158</sup> But applying a “no endorsement of religion” restriction on a private employer seems overly intrusive. Indeed, a court order preventing an employer from endorsing religion would likely violate the *employer’s* rights under the Free Speech and Free Exercise Clauses.<sup>159</sup>

Certainly, one might have legitimate concerns about an abusive employer coercing employees into engaging in unwelcome religious observances or preventing employees from engaging in their own non-disruptive religious practices. Can the employer require its Jewish employee to attend Christian services, make him sport a “Keep Christ in Christmas” button, or prevent him from wearing a yarmulke? But such concerns can be addressed adequately by reliance on the Free Exercise Clause, discussed below, which is indeed designed to protect *individual* rights.<sup>160</sup> Thus, the Establishment Clause makes a poor candidate for a source of public policy underlying a PPE claim.

For the same reason, the Fifth Amendment Takings Clause guarantee of “just compensation” also seems an unlikely source for policy under the PPE. It clearly focuses uniquely on the responsibility of *government* to reimburse private parties for “takings” by that government. Disputes under the Clause typically arise in cases involving eminent domain, a doctrine uniquely applicable to the right of the *government* to take private property for *public* uses.<sup>161</sup> Moreover, where it is a private employer who has engaged in some form of analogous “taking,” a *common law* PPE claim is entirely superfluous. A more mundane common law claim in contract, property, or tort (e.g., conversion, tortious damage to property) will be a far more straightforward path to just compensation.

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158. See *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 620-21 (9th Cir. 1988) (recognizing the ability of employers to express themselves in the workplace but distinguishing this ability from coercing employees to conform with conflicting religious convictions); Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL’Y 959, 1002 (1999) (“[W]hen an employer encourages a worker to attend church, the worker is likely to feel more pressure to do so than if a co-worker urged it. These activities, then, are quite likely to be prima facie covered by Title VII or analogous state anti-harassment statutes.”).

159. *Mergens*, 496 U.S. at 250 (“[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”).

160. See CHEMERINSKY, *supra* note 37, § 12.1.1 (stating that the Free Exercise Clause “clearly safeguards individual liberty” while the Establishment Clause “seems directed at the government”).

161. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (describing the aim of the Takings Clause as preventing the government “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

If, for example, an employer required employees to contribute their own money, property, or uncompensated services toward the employer's enterprise, or toward the employer's own pockets, without compensation, one could plausibly consider this a deduction from the employee's pay, one for which there is either no liability or liability in contract, property, or tort. An employee fired for protesting such harsh contractual terms would have either no PPE remedy or else a remedy analyzable under Free Speech principles.<sup>162</sup> As an example of the latter, consider an employee terminated for reporting or protesting "wage theft;"<sup>163</sup> if she has a PPE claim at all, it would seem to lie better within a whistleblower theory than under some sort of analogy to a "taking."

At least one court has explicitly distinguished constitutional provisions which by their very nature apply only to government action. For example, in *Booth v. McDonnell Douglas Truck Services, Inc.*, the Pennsylvania Superior Court rejected a wrongful discharge claim based on a provision of the state constitution prohibiting any "laws which impair the obligations of contracts."<sup>164</sup> The court specifically emphasized that by its plain terms, the constitutional provision bars only the passage of a "law" impairing contract rights; thus, since the case involved no allegation of state action, the constitutional provision did not apply.<sup>165</sup>

### 3. *Due Process/Criminal Procedure Safeguards*

Procedural safeguards guaranteed by the Bill of Rights might conceivably form the basis of a PPE claim, most likely because the employer failed to provide an analogous version of them in any investigation of employee misconduct. But it is unreasonable to expect that every private employer provide every employee charged with job-related misconduct the full panoply of procedural protections guaranteed by the Bill of Rights.

In some cases, this is obvious. For example, as applied to a private employer, the Sixth Amendment right to a trial by jury would seem to be either inherently inapplicable, overly burdensome, or both. Courts hardly could be expected to require firms to assemble "juries" of fellow employees to settle disputed claims of employee misconduct.

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162. See *infra* Part V.B.1.

163. "Wage theft" occurs when an employer unlawfully "deprives a worker of legally mandated wages," either by not paying proper overtime compensation, paying less than what the employee deserves, or not paying the employee at all. KIM BOBO, WAGE THEFT IN AMERICA 6 (2009); see also *Barbosa v. Impco Techs., Inc.*, 101 Cal. Rptr. 3d 923, 927 (Cal. Ct. App. 2009) (qualifying an employer's duty to pay overtime wages as a "well-established fundamental public policy affecting the broad public interest").

164. 585 A.2d 24, 28 (Pa. Super. Ct. 1991) (citing PA. CONST. art. I, § 17).

165. *Id.*



Similarly inapplicable and/or unduly burdensome are the rights to a speedy trial, a public trial, and a trial with a proper venue and jurisdiction, as well as the rights to counsel and compulsory process in one's defense.<sup>166</sup> The right to a grand jury and a jury trial in civil lawsuits are inapt sources of policy for similar reasons and for the additional reason that they do not apply to state governments.<sup>167</sup> In other cases, the inapplicability of traditional criminal procedure safeguards is less obvious and perhaps less convincing; for example, a Pennsylvania court has rejected a PPE claim based on the right of an accused's presumption of innocence.<sup>168</sup>

However, there is no shortage of PPE cases protecting employees discharged for completing jury service.<sup>169</sup> Most of these cases rely on statutory provisions requiring persons to perform jury service and protecting those who do from adverse employment action.<sup>170</sup> However, at least one court has based this PPE claim on the constitutional right to a jury trial.<sup>171</sup> To the extent courts can draw upon the constitutional basis of the jury trial right to underscore the importance of protecting employees' ability to perform jury service free from retaliation, such use of that constitutional provision is certainly appropriate and uncontroversial. But given that jury service is both required by statute and protected from retaliation by statute in virtually all jurisdictions, the use of this constitutional provision is unnecessary as a practical matter.

The Fifth Amendment's privilege against self-incrimination should likely be on this same "ineligible" side of the line, for a somewhat distinct reason. Arguably, it could apply by analogy to private employment situations. For example, it could be said to apply when an employer investigating workplace misconduct calls an employee in

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166. See U.S. CONST. amend. VI. Protection under double jeopardy doctrine also falls into this category. See U.S. CONST. amend. V.

167. See *supra* note 107.

168. *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 1344 (Pa. Super. Ct. 1984).

169. See, e.g., *Wiskotoni v. Mich. Nat'l Bank-W.*, 716 F.2d 378, 383 (6th Cir. 1983) (stating that discharge based on subpoena to testify before a grand jury violates public policy); *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225, 1230 (Ind. Ct. App. 1990) (recognizing valid PPE claim where employee was terminated for fulfilling duty to appear for jury duty); *Shaffer v. Frontrunner, Inc.*, 566 N.E.2d 193, 196 (Ohio Ct. App. 1990) (establishing valid claim for employee fired for jury service); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 899 (Tenn. 1992) (reinstating lost wages to employee fired for serving on jury duty).

170. See, e.g., *Call*, 553 N.E.2d at 1230 (reasoning that the public policy was "expressed by the statutes enacted by the legislature"); *Wright v. Faggan*, 773 S.W.2d 352 (Tex. App. 1989) (considering the underlying statutory purpose as a basis for making jury service a PPE).

171. See *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975); see also *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 120-21 (Pa. Super. Ct. 1978) (relying on statute making jury service mandatory, as well as state constitutional provision granting the right of trial by jury, in defining the state's public policy).

for questioning. This is especially the case if the employer's grievance procedures or a collective bargaining agreement provide for some sort of hearing prior to termination. Furthermore, it would not necessarily be fatally burdensome on an employer to forbid firing (or threatening to fire) all those who wish to remain silent until they can adequately prepare for such a grievance hearing, or until they can consult with a union official, or lawyer, for example.

The Supreme Court has made clear that the reason an accused has a right to remain silent is that *custodial* interrogation is inherently coercive.<sup>172</sup> It is the ability of the state to use force to detain a suspect, as well as its ability to threaten a suspect with jail time, that makes the interrogation process so fraught, and the need for a bright-line right to keep silent so imperative.<sup>173</sup> Certainly, being summoned to the boss's office with one's job on the line can be an intimidating experience. But the boss can neither physically force the employee to stay and cooperate with questioning, nor credibly threaten a significant curtailment of physical liberty in the future (although the threat of termination can certainly create substantial psychological pressure). For this reason, the right to remain silent seems a less than compelling candidate for a source of public policy under the PPE.

Finally, the Eighth Amendment's protections against excessive fines and "cruel and unusual punishment"<sup>174</sup> seem an unlikely PPE candidate for a different reason. First, in jurisdictions recognizing the PPE only in cases of actual discharge,<sup>175</sup> it would not apply to cases where an employer imposed fines or other punishments for employee misconduct short of termination.<sup>176</sup> Where adverse employment actions short of termination could give rise to a PPE claim, or where termination itself is considered the "cruel and unusual punishment," applicability still would seem to be rare. Even as to clear state action,

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172. *Miranda v. Arizona*, 384 U.S. 436, 455, 502 (1966) (explaining that such interrogation "exact[s] a heavy toll on individual liberty and trades on the weakness of individuals" through "psychologically coercive pressures").

173. *Id.* at 512 (emphasizing the important premise that "pressure on the suspect must be eliminated").

174 U.S. CONST. amend. VIII.

175. *See supra* note 47.

176. Of course, were the punishment excessive enough, it might constitute constructive discharge. *Pa. St. Police v. Suders*, 542 U.S. 129, 147 (2004) (determining the requirements for "constructive discharge" to be satisfied where "working conditions [become] so intolerable that a reasonable person would have felt compelled to resign"); *see also* LARSON, *supra* note 29, § 15.08 (stating that most courts apply some form of this "reasonable person" test). Given that Eighth Amendment claims succeed only in cases of the most extreme, "grossly excessive" fines and punishments, it may rarely matter whether a jurisdiction recognizes a PPE claim for action short of termination.

these clauses apply only in the most extreme cases of grossly excessive fines and punishments.<sup>177</sup>

This area closely tests the requirement that only policies that “go to the heart of a citizen’s rights, duties, and responsibilities” can support a PPE claim.<sup>178</sup> The public may have a strong interest in ensuring that private employees are not forced to forfeit their privacy, their right to choose to participate in (or refrain from participating in) worship, or their freedom of speech about matters of public concern. Does it have a similarly strong interest in policing the presumably rare instance in which an abusive employer, for example, docks a month’s pay because an employee forgot to properly log her start time on the sign-in sheet?<sup>179</sup> Given the strong presumption toward at-will employment, this seems a less viable candidate for the PPE.

While some of the procedural protections from the Bill of Rights seem implausible sources of the public policy applicable to the PPE cases, it still may be that society has an interest in promoting basic notions of fairness in the workplace, such that the procedural due process protections created by the Due Process Clause itself may be a legitimate source of policy. Where a company is large enough to afford internal grievance procedures, for example, it may be appropriate to require that employees using such procedures should be informed of the basis for the allegation of misconduct, and be given notice and an opportunity to rebut the accusation before being discharged.<sup>180</sup> This is certainly a requirement for state action under procedural due process, applicable not only in criminal matters, but also

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177. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 425 (2001) (finding this constitutional constraint to be applicable only where punishments are “grossly disproportional to the gravity of the offense”); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (acknowledging that “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare”); see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 559-61 (1996) (declaring a punitive damages award “excessive” only after concluding that none of the elements associated with reprehensible conduct were present, the ratio of punitive damages to actual harm was five hundred to one, and the economic sanction was substantially greater than any civil penalty available in the state where the harm occurred); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 444 (1993) (admitting that a \$10 million punitive damage award alongside a \$19 thousand actual damages award was “certainly large” but refusing to classify it as “grossly excessive”).

178. *Booth v. McDonnell Douglas Truck Servs., Inc.*, 585 A.2d 24, 28 (Pa. Super. Ct. 1991).

179. Many state statutes forbid employers from deducting their employees’ pay unless authorized to do so by federal law, state law, or contract. See, e.g., ARIZ. REV. STAT. ANN. §§ 23-352, -355 (2013); COLO. REV. STAT. § 8-4-105 (2013); OR. REV. STAT. § 652.610(3) (2013). An arbitrary, spontaneous employer decision of punishment “overkill” in such a situation might trigger a statutory cause of action for the employee, arguably mooting any potential PPE issue. But if such overkill is part of existing managerial policy or practice, these statutes would be of no help to the employee, for they do not create any minimum “floor” of protection against unreasonable deductions from pay.

180. Cf. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-68 (1975) (holding that National Labor Relations Act supported administrative rule entitling union employee to have union representative present at any meeting which might lead to disciplinary action).

when a government employer purports to act against a government employee.<sup>181</sup> The requirement of notice, at least, is one that private employers may need to respect, even where the at-will doctrine otherwise applies.<sup>182</sup> Or, if the company perversely punishes an employee for availing herself of those grievance procedures, it may be seen as violating fundamental fairness.<sup>183</sup> In like manner, at least one court has stated that where the employee bypasses the usual grievance channels, he is less likely to have a claim.<sup>184</sup>

But this seems to be an area calling for great caution. Due process cases involving government employer-employee relationships seem more closely analogous to the PPE situation than due process cases involving individual defendants in criminal or civil cases. And, in Due Process doctrine, a government employee has no legally cognizable due process interest, and thus may not even assert a due process claim, if that employee is an at-will employee as opposed to one who has a right to continued employment (absent bad behavior) under either contract or statute.<sup>185</sup> It would be incongruous, at the least, and possibly unduly burdensome and economically inefficient, to apply stricter standards to private employers via the PPE than are applied to public employers under the analogous constitutional doctrine.

### *B. Constitutional Provisions that Should Form the Basis of a PPE Claim*

#### *1. Free Speech: Political Expression*

Let us begin with the First Amendment right of free speech. Can it support a PPE claim? An illustrative case is *Novosel v. Nationwide Insurance Company*.<sup>186</sup>

Novosel, a district claims manager at an insurance company, was fired after he refused to participate in his employer's political agenda

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181. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985) (balancing employer interests with employee interests in concluding that due process requires that a government employee receive notice and an opportunity to respond before being denied a constitutionally protected property or liberty interest); CHESTER JAMES ANTIEAU & WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 35.18 (2d ed. 1997) (discussing procedural due process rights in public employment dismissal proceedings as requiring proper notice and an opportunity to respond).

182. See *Person v. Bell Atl.—Va., Inc.*, 993 F. Supp. 958, 961 (E.D. Va. 1998) (characterizing Virginia common law at-will employment doctrine as incorporating requirement that employer give reasonable notice before termination, in the absence of any agreement to the contrary).

183. Cf. *Wounaris v. W. Va. St. Coll.*, 588 S.E.2d 406 (W. Va. 2003) (upholding PPE claim against state actor when college rehired employee after she won an ALJ proceeding, only to immediately re-fire her while an appeal was still pending).

184. See *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 179-80 (Pa. 1974).

185. *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976).

186. 721 F.2d 894 (3d. Cir. 1983).

and efforts to lobby the Pennsylvania House of Representatives.<sup>187</sup> Defending against a PPE claim, the insurance company argued that a wrongful discharge action depended upon the violation only of a *statutorily* recognized policy, and that a constitutional provision could not provide the source of a PPE claim.<sup>188</sup> The Third Circuit rejected this argument and held for the employee. Even though the dismissal did not violate a specific statute, it was enough that it contravened a “clearly mandated public policy” that arose “directly from the Constitution,” i.e., political and associational freedoms.<sup>189</sup> Accordingly, the court reasoned that a corporation’s interest in supporting its state legislature did not outweigh societal interests in free political expression.<sup>190</sup> As the Third Circuit explained, “the protection of an employee’s freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers’ compensation claim.”<sup>191</sup>

*Novosel* represents perhaps the high-water mark for aggressive use of constitutional principles for the PPE. The Third Circuit declined to extend *Novosel* a decade later, holding that intervening Pennsylvania cases cast doubt on the availability of constitutional sources, and that, at any rate, the narrowness of the PPE counseled against extending *Novosel* to reach the First and Fourth Amendments.<sup>192</sup> Instead, the Third Circuit relied on normal tort law (in that case, invasion of privacy) rather than the “search and seizure” provision of the Fourth Amendment.<sup>193</sup>

Of course, a too robust PPE may actually interfere with the free speech rights of employers. Arguably, an employer who wishes to further ideological aims with his business ought to be able to hire (and fire) based on whether an employee shares the employer’s sense of mission. An eco-friendly energy company should be able to decide to hire only “green” employees and to terminate the employee who denies the existence of human-induced climate change. For that matter, ought not a diehard, conservative, Republican small-business owner have the right to decide to spend his workdays only with like-minded employees who share his values—including his party affiliation? At least, in a small business setting, such an employer may have a free association interest in choosing the persons with whom he spends forty hours a week. It is partly for this reason that antidiscrimination

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187. *Id.* at 895-96.

188. *Id.* at 898.

189. *Id.* at 899-901.

190. *Id.* at 899.

191. *Id.*

192. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 619-20 (3d Cir. 1992).

193. *Id.* at 621-22.

statutes exempt small businesses with only a very small number of employees.<sup>194</sup> The Supreme Court has recognized a right of freedom of association in membership organizations that is greater for smaller, more intimate groups than it is for larger, more widespread groups.<sup>195</sup> Such a freedom of association is not as great when it comes to choosing with whom one works,<sup>196</sup> but it should enjoy some respect.<sup>197</sup>

It is precisely the right to hire and fire based on party affiliation which the law denies to a public employer, except for high-ranking political appointments.<sup>198</sup> A government employer cannot fire an employee for being of the wrong political party.<sup>199</sup> But a private employer presumably can: there is no direct First Amendment protection given the lack of state action, and while some state anti-discrimination statutes list party affiliation as a protected status for private employees,<sup>200</sup> Title VII<sup>201</sup> and many state anti-discrimination statutes do not.<sup>202</sup>

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194. Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1, 15 (1994). It is certainly for this reason that part of the Civil Rights Act's public accommodations provision, 42 U.S.C. § 2000a(b)(1) (2012), and part of the Fair Housing Act, 42 U.S.C. § 3603(b)(2) (2012), have the so-called "Mrs. Murphy's boardinghouse" exemption for dwellings with at most four or five units or families. James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 606 (1999).

195. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621-22 (1984) (stating that a large national organization with large, otherwise nonselective memberships did not have a First Amendment Free Association right to engage in sex discrimination illegal under state law).

196. *Id.* ("[T]he Constitution undoubtedly imposes [free association] constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."); *see also* *Guesby v. Kennedy*, 580 F. Supp. 1280, 1284 (D. Kan. 1984) ("[I]n the context of an employment relationship, the scope of the right of association is much more limited than in the context of membership in an organization.").

197. *See* Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191 (2005) (arguing that employers with an avowed religious or theological mission and orientation, even if not themselves a religious organization, should enjoy a free association-based latitude to prefer co-religionists as employees).

198. *See, e.g., Branti v. Finkel*, 445 U.S. 507, 517-19 (1980) (stating that with the exception of certain instances where political affiliation would "interfere with the discharge of his public duties . . . the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party").

199. *See* *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (stating that termination of public employees based on party affiliation unconstitutional under the First and Fourteenth Amendments).

200. CAL. LAB. CODE § 1101 (West 2012) (prohibiting private employers from controlling or directing the political affiliations of employees); D.C. CODE § 2-1401.01 (2013) (prohibiting private employers from making employment decisions based on political affiliation).

201. 42 U.S.C. § 2000e-2 (2012).

202. *See, e.g.,* 775 ILL. COMP. STAT. ANN. 5/1-102 (2012) (not including political affiliation among categories protected from employment discrimination); IOWA CODE § 216.6 (2013) (same); TENN. CODE ANN. § 4-21-401 (2012) (same); MISS. CODE ANN. § 33-1-15 (2013) (same).

So it seems sensible to say that not every free speech-centered limit constitutionally imposed on a government employer action ought to apply to private employers. But that should not mean that there are *no* proper free speech-type rights enjoyed by employees. Some should exist, subject to limitations, based on the considerations below.

(a) *Forced Speech*

The *Novosel* case illustrates a prime candidate for such protection, namely when employers force employees to engage in unwelcome speech. The problem is real, and in recent years, reports of employers who have pressured employees into making political campaign contributions or even attending political rallies have risen.<sup>203</sup> These employers make attendance at political rallies mandatory, and strongly encourage monetary contributions.<sup>204</sup> They keep track of who cooperates and who does not, with the latter group subject to sanctions like demotions and the withholding of bonuses.<sup>205</sup>

Given the rising influence of large corporations on the political scene,<sup>206</sup> this potential to arm-twist armies of surrogate speakers bodes ill for the political process. This danger to the political process justifies the application of the PPE to protect free speech values, at least where the employer is using the employer-employee relationship to unduly influence employees. So, while a private employer may be able to burden employee free speech values more than the government, this ability is still somewhat constrained: at a minimum, they should not be able to force their employees to engage in expressive political activity.

Existing FEC regulations prohibit such coercion if designed to result in a financial contribution in a federal election.<sup>207</sup> However, such protections at the state level for state and local elections are far more rare. Even at the federal level, the regulations apply only to coerced

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203. See, e.g., Robert Kelner, *Allegations of Employer Coercion of Political Activity Are on the Rise*, INSIDE POLITICAL LAW (Oct. 17, 2012), <http://www.insidepoliticallaw.com/2012/10/17/allegations-of-employer-coercion-of-political-activity-are-on-the-rise/>; Alec MacGillis, *Coal Miner's Donor*, THE NEW REPUBLIC (Oct. 4, 2012), <http://www.newsrepublic.com/article/politics/108140/coal-miners-donor-mitt-romney-benefactor> (describing pressure tactics used by Murray Energy to get employees to attend political rallies and to make contributions).

204. MacGillis, *supra* note 203.

205. *Id.*

206. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (recognizing the free speech rights of corporations through political spending and holding invalid campaign finance reform rules which treat corporate entities different from natural persons); see also *Developments in the Law: Corporations and Society*, 117 HARV. L. REV. 2272 (2004) (discussing the prominence of corporations in the political sphere that has led to an increase in their social accountability).

207. 11 C.F.R. § 114.2(f)(2)(E)(iv) (2013).

contributions, and not forced attendance at rallies, pressure to sign petitions, or the like.

Most state provisions ban discrimination based only on a refusal to contribute rather than upon the act of making a financial contribution.<sup>208</sup> States more commonly protect the right to vote,<sup>209</sup> sometimes classified as “the right of suffrage.”<sup>210</sup> However, some courts construe this protection to extend to other forms of political activity besides actually casting a vote.<sup>211</sup> This construction supports the tendency among jurisdictions to provide protection to employees seeking to express political beliefs in a way that does not substantially interfere with their employer’s interests.

(b) *Whistleblowing*

Another prime candidate for protection is “whistleblowing.” Certainly, there are no shortage of whistleblower cases, where employees reporting misconduct obtain relief either through statutes<sup>212</sup> or the PPE itself.<sup>213</sup> The case for a clear and substantial public policy here is compelling. First, there is the impressive number of statutes at the

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208. ALA. CODE §§ 10A-21-1.01(b), 17-5-17 (2012); IDAHO CODE ANN. § 67-6605 (2012); LA. REV. STAT. ANN. § 18:1461.1(A)(2), :1483, :1505.2 (2011); MASS. GEN. LAWS ch. 56, § 33 (2012); MO. REV. STAT. §§ 130.028.1(2)-(3) (1997); N.H. REV. STAT. ANN. § 664:4-a(II) (2012); S.C. CODE ANN. § 8-13-1332(2) (2011); TEX. ELEC. CODE ANN. § 253.102 (West 2011); WASH. REV. CODE § 42.17A.495(2)(a) (2011); WIS. STAT. § 12.07(4) (2011); WYO. STAT. ANN. § 22-26-111(a)(ii) (2011).

209. HAW. REV. STAT. § 19-3 (2011); IDAHO CODE ANN. § 18-2305 (2012); KY. REV. STAT. ANN. § 121.310(1) (West 2011); 25 PA. CONS. STAT. § 3547 (2012); TENN. CODE ANN. § 2-19-134(b) (2012); W. VA. CODE § 3-8-11 (2012); WYO. STAT. ANN. § 22-26-111 (2011).

210. See BLACK’S LAW DICTIONARY 712 (9th ed. 2009) (defining “suffrage” as “[t]he right or privilege of casting a vote at a public election”).

211. See, e.g., *Am. Indep. Party in Idaho, Inc. v. Cenarrusa*, 442 P.2d 766, 768 (Idaho 1968) (recognizing the right of citizens to gather and express political beliefs as inherent to the term “suffrage”); *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 228 (Md. 2003) (indicating that the term “suffrage” includes the right to sign a referendum petition).

212. See, e.g., ALASKA STAT. § 39.90.100 (2013); ARIZ. REV. STAT. ANN. § 23-1501(3)(c)(ii) (2013); N.D. CENT. CODE § 34-01-20(1)(a) (2012); R.I. GEN. LAWS § 28-50-3(4) (2012).

213. See, e.g., N.J. STAT. ANN. § 34:19-4 (West 2013) (allowing plaintiff to choose between suing under statute or under common law public policy claim); *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 938 (Mo. Ct. App. 1998) (recognizing whistleblower exception to doctrine of employment at will).



federal<sup>214</sup> and state<sup>215</sup> levels providing whistleblower protection of one manner or another. Recognizing this as a clear and substantial public policy is almost tautological, inasmuch as the activity is often recognized as whistleblowing only when the misconduct alleged is a matter of significant public concern or implicates significant matters of public policy.<sup>216</sup>

While whistleblowing activities are often mentioned as the kind of socially desirable activity that might trigger the PPE, in practice, whistleblowing has not always sufficed. Courts often distinguish between whistleblowing to vindicate a *public* interest versus exposing mere private wrongdoing. For example, the Supreme Court of Oklahoma expressly distinguished between the employee reporting of “crimes,” “violation of health or safety laws,” or other actions breaching a public trust, that would be protected under the PPE, and the employee reporting of conduct harming “private or proprietary interests,” that would not.<sup>217</sup> Thus, exposing an employer’s Medicare fraud was protected, but exposing a co-employee’s embezzlement from a private employer was not.<sup>218</sup> Examples of cases applying the PPE for “whistleblowing” activities aimed at actual violations of law

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214. *See, e.g.*, Asbestos Emergency Response Act, 15 U.S.C. § 2651 (2012) (protects employees from discrimination or retaliation for reporting alleged violations of environmental laws relating to asbestos in elementary and secondary school systems); Sarbanes-Oxley Act, 18 U.S.C. § 1514(A) (2012) (protects employees of publicly traded companies, and their contractors, subcontractors, and agents from discrimination or discharge for reporting violations of the federal mail, wire, bank, or securities fraud statutes, or any other provision of federal law relating to fraud against shareholders); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2012) (protects employees from discrimination or retaliation for reporting workplace or safety hazards); 33 U.S.C. § 1367 (2006); Energy Reorganization Act, 42 U.S.C. § 5851 (2006) (protects employees in the nuclear power and nuclear medicine industries against discrimination or discharge for reporting violations of nuclear safety laws); 42 U.S.C. § 6971 (2006) (each protecting employees from discrimination or discharge for reporting violations of certain environmental laws or regulations); 42 U.S.C. § 7622 (2006); International Safe Container Act, 46 U.S.C. App. § 1506 (2006) (protects employees who are discharged or discriminated against for filing an OSHA complaint alleging unsafe containers for internal cargo); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (2006) (protects employees of the trucking industry who are discharged, disciplined, or discriminated against for reporting commercial motor vehicle safety hazards, health, or safety concerns).

215. *See, e.g.*, FLA. STAT. § 448.102(1) (2013) (prohibiting “retaliatory personnel action” where an employee reports employer’s unlawful conduct or refuses to engage in illegal activity); NEV. REV. STAT. § 281.631 (2013) (prohibiting the use of “authority or influence to prevent disclosure of improper governmental action by another state or local governmental officer or employee”); TENN. CODE ANN. § 50-1-304 (2013) (providing that “[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities”); W. VA. CODE § 6C-1-1 (2013) (providing protection to a discharged employee “where the employer’s motivation for the discharge is to contravene some substantial public policy principle”).

216. *See supra* notes 142-145.

217. *Darrow v. Integris Health, Inc.*, 176 P.2d 1204, 1213-15 (Okla. 2008).

218. *Id.* (citing *Hayes v. Eateries, Inc.*, 905 P.2d 778, 785 (Okla. 1995)).

abound.<sup>219</sup> But, the employee is less likely to be protected when the speech concerns employment grievances or generic concerns about quality control not involving illegality.<sup>220</sup>

The extent to which courts recognize a whistleblowing-based PPE suit may involve whether the employee had a legal duty to report the alleged impropriety; whether the employee followed proper internal reporting procedures or violated the chain of command; and whether the employee had the requisite expertise in the area in question to recognize a legitimate need for whistleblowing.<sup>221</sup> At least one court has held that an employee enjoys no right to champion “product safety” where the employee is not qualified to render an expert opinion on product safety, or where safety assessment was not part of his duties.<sup>222</sup>

The somewhat tepid protection given to whistleblowing activities is actually consistent with constitutional rules. In free speech cases involving public employees who criticize their organizations, the Supreme Court has provided First Amendment protection only when (1) the speech relates to a matter of “public concern;” (2) it is *not* spoken by the employee as part of the employee’s job duties; and (3) its value outweighs any potential damage to the government office’s reputation, efficiency, or the like.<sup>223</sup> This is because public employers have a legitimate interest in controlling speech that can directly affect the performance of their agency or office.<sup>224</sup> If the speech satisfies conditions (1) and (2) above, and the court determines that the legitimate interests of the government employer in efficient operations do not

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219. See, e.g., *Sheets v. Teddy’s Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (state labeling and licensing laws); *Palmer v. Brown*, 752 P.2d 685, 689-90 (Kan. 1988) (Medicaid fraud); *Harless v. First Nat’l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978) (state and federal consumer credit protection laws).

220. Compare *Flesner v. Technical Comm’n Corp.*, 575 N.E.2d 1107, 1111 (Mass. 1991) (applying exception to termination for cooperating with a federal investigation of the employer), with *Wright v. Shriners Hosp. for Crippled Children*, 589 N.E.2d 1241, 1245 (Mass. 1992) (declining to apply PPE to termination for criticizing employer to national medical accrediting body), and *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 614 A.2d 1021, 1033 (Md. App. 1992) (declining to apply PPE where hospital employee, claiming right to “promote quality health care,” engaged in extensive criticisms of the hospital). See also *Suchodolski v. Mich. Consol. Gas Co.*, 316 N.W.2d 710 (Mich. 1982) (corporate management dispute regarding internal accounting procedures did not amount to violation of a clearly mandated public policy).

221. *Field v. Phila. Elec. Co.*, 565 A.2d 1170, 1180-81 (Pa. Super. Ct. 1989)

222. *Geary v. U.S. Steel Corp.*, 391 A.2d 174, 180 (Pa. 1974).

223. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (“When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”).

224. *Garcetti*, 547 U.S. at 421-23.

outweigh the employee's free speech interests, then the employer may not engage in any adverse employment action.<sup>225</sup>

Something analogous ought to apply in the private employment sphere under the PPE. Speech on matters not of a public concern ought not to trigger PPE protection. And, if a job's duties require an employee to make presentations, write memos, etc., the employer must fire the employee based on the content of what she says. The tougher question arises when the speech concerns a matter of public interest and is not made pursuant to job duties.

*(c) Coverage Inspired by Statutory Speech Protection for Private Employees*

While the above principles apply equally to state government employees,<sup>226</sup> neither federal nor state constitutional principles directly provide free speech protection to private employees.<sup>227</sup> Further, most states lack any explicit statutory free speech protection for private employees.

However, a minority of states have promoted similar free speech principles in varying degrees within the realm of private employment.<sup>228</sup> Over a half-dozen states generally prohibit employers from punishing employees for engaging in political activities.<sup>229</sup> A few prohibit discrimination based narrowly on election-related speech,<sup>230</sup> and a few others extend employment protection to the expression of "political" ideas, opinions, or beliefs.<sup>231</sup>

Another area of variation is whether anti-discriminatory provisions apply only to expressions occurring outside of the employer's

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225. *Id.*

226. See *Gitlow v. New York*, 268 U.S. 652, 630 (1925) (Fourteenth Amendment Due Process Clause incorporates First Amendment right to free speech); *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508 (Cal. Ct. App. 2007).

227. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (stating that the Constitution does not directly provide free speech protection to private corporations or persons); *Jacobs v. Major*, 407 N.W.2d 832, 836 (Wis. 1987) (stating that the free speech clause of the state constitution provides protection only against state action).

228. See Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012) (discussing the ways in which state statutes provide protection for employee political speech and activity).

229. See CAL. LAB. CODE § 1101 (West 2012); COLO. REV. STAT. § 8-2-108 (2013); LA. REV. STAT. ANN. § 23.961 (2011); MO. ANN. STAT. § 115.637(6) (West 2012); NEB. REV. STAT. § 32-1537 (2012); NEV. REV. STAT. § 613.040 (2012); S.C. CODE ANN. § 16-17-560 (2011); W. VA. CODE § 3-8-11(b) (2012). See also SEATTLE, WASH. MUN. CODE § 14.04.040 (2011) (creating similar general free speech rights for private employees at the municipal level); MADISON, WIS. MUN. CODE §§ 39.03(1), .03(2)(cc), .03(8)(c), .03(8)(d)(1) (2010) (same).

230. See 5 ILL. COMP. STAT. ANN. § 5/29-4 (2012); N.Y. LAB. LAW § 201-d (McKinney 2012); WASH. REV. CODE § 42.17A.495(2) (2012).

231. See MINN. STAT. § 10A.36 (2012); N.M. STAT. ANN. § 1-20-13 (West 2012).

premises, or additionally, to expressions taking place at the work site.<sup>232</sup> Even where the statute expressly provides protection to off-premises speech, there is variation as to degree. For example, in mandating employers to terminate employees only for “[g]ood cause,” Montana clarifies that the scope of protection applies, but is not limited to, “[t]he legal use of a lawful product by an individual off the employer’s premises during nonworking hours.”<sup>233</sup> While such statutes are often applied to smoking and drinking after hours and off-site,<sup>234</sup> they also can be applied to more inherently expressive products like political signs and social media programming.<sup>235</sup> Colorado and North Dakota broaden the reach of this protection by forbidding employers to terminate employees for engaging in “any lawful activity” that occurs off the employer’s premises.<sup>236</sup> Finally, state statutes also vary the breadth of protection afforded by the use of the term “political,”<sup>237</sup> and whether protection extends to hiring practices, or to only disciplinary actions against current employees.<sup>238</sup>

The variations above alert one to several salient issues regarding the proper breadth of free speech protections in the private sphere. Courts using free speech principles to inform their PPE analysis would do well to consider such issues as, for example, the extent to which the expression is political, off-site, or after-hours.

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232. Compare *Cotto v. United Techs. Corp.*, 711 A.2d 1180 (Conn. App. Ct. 1998) (finding statutory language that does not explicitly limit protection to off-the-job speech extends to on-the-premises speech through implication), with *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250, 262 (4th Cir. 2004) (interpreting a similar state statute to apply only to off-premises speech, for fear of making the workplace a “constitutionally protected forum for political discourse”).

233. MONT. CODE ANN. § 39-2-903 (2011).

234. See, e.g., MINN. STAT. § 181.938 (2012) (employers may not discipline or discharge employee based on use of lawful products off-premises during nonworking hours).

235. See, e.g., *Angel v. Rayl*, No. 04CV3420, 2005 WL 6208024, at \*2 (D. Colo. Dec. 1, 2005) (interpreting lawful activity off the job premises to include “attend[ing] certain political or social-activism events”); Joseph Lipps, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 652-54 (advocating for a distancing between blogs and social networking activities and adverse employment action). But see *Kolb v. Camilleri*, No. 02-CV-0117A(Sr), 2008 WL 3049855, at \*13 (W.D.N.Y. Aug. 1, 2008) (concluding that picketing did not constitute a “recreational activity[y]” for purposes of a statute protecting such activity when conducted off the job premises).

236. COLO. REV. STAT. § 24-34-402.5(1) (2013); N.D. CENT. CODE ANN. § 14-02.4-03, 4-08 (West 2011).

237. Compare *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at \*9 (N.D. Cal. Mar. 11, 1996) (finding the term “political activities” to include opinions on alcohol and drug policies within the meaning of sections 1101 and 1102 of the California Labor Code), with *Vanderhoff v. John Deere Consumer Prods., Inc.*, No. C.A. 3:02-0685-22, 2003 WL 23691107, at \*2 (D.S.C. March 13, 2003) (holding that a confederate flag decal was not a “political opinion” as intended by S.C. CODE ANN. § 16-17-560).

238. Compare *Bools v. Gen. Elec. Co.*, 70 F. Supp. 2d 829, 832 (S.D. Ohio 1999) (limiting statute’s protection to persons already employed), with *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 n.16 (Cal. 1979) (interpreting a statute that protects “employees” to include job applicants).

As noted above,<sup>239</sup> in jurisdictions protecting private employees' speech, the existence of such statutory claims need not prevent a court from considering a PPE claim. And, the existence of such statutory remedies can help a court decide that a clear public policy to that effect exists, such that a PPE claim should be recognized. But, even where such statutory remedies do *not* exist, the constitutional basis alone for free speech protections ought to be sufficient to convince courts that a clear public policy favoring free speech rights supports a PPE claim.

(d) *Toward a Balance of Employee and Employer Interests*

It is axiomatic that the right of free speech is "fundamental" in our country, and the Supreme Court has repeatedly so held.<sup>240</sup> It is the very first right listed in the Bill of Rights.<sup>241</sup> It was the first substantive (i.e., non-procedural) right to be recognized as "fundamental," and thus, "incorporated" through the Fourteenth Amendment's Due Process Clause and applied to the states.<sup>242</sup> There is no individual right more celebrated in the United States. A leading scholar has termed it "the Constitution's most majestic guarantee," one which helps to preserve all other rights.<sup>243</sup> If constitutional principles can ever inform a courts' application of the PPE, then such constitutional inspiration must include free speech rights.<sup>244</sup>

Certainly, the kind of free speech protection offered to conventional government whistleblowers also should apply to private employees who blow the whistle on illegal acts. But should the PPE extend beyond such a straightforward type of employer harassment, to adverse employment action taken against an employee for engaging in other types of speech? If one is committed to a vibrant, free speech-oriented society, the answer should be yes.

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239. See *supra* Part III.A.

240. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3061 (2010); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

241. U.S. CONST. amend. I.

242. See *Gitlow*, 268 U.S. at 666.

243. *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1129 (Wash. 1997) (quoting LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1 (2d ed. 1988)).

244. Cf. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) (National Labor Relations Act's protection of union employees' picketing rights preempted contrary state law principles). The existence of strong NLRA preemption of state law might suggest that much of the Free Speech-based PPE discussion in this Section was unnecessary: perhaps federal labor law statutes preempted the analysis entirely. But, analogizing from Supreme Court First Amendment case law, this Article suggests that the PPE should not apply to job-related speech. This approach would thus apply the PPE only in situations in which federal labor law did not apply, and could thus raise no legitimate issue of federal preemption.

First, the case for protecting employees from “forced speech” is quite compelling. Even in relatively trouble-free economic times, employees are simply not that portable. Being fired from one’s job and being forced to find new employment is a traumatic experience for many, especially those who live paycheck to paycheck. Employers, thus, have a potent coercive influence over their employees.<sup>245</sup> Allowing them to abuse that power to influence the political process would skew our political debate and undermine our democratic process.

Even beyond forced speech situations, there is a strong public policy interest in granting private employees a certain amount of free speech latitude. We protect free speech not merely as a means of promoting discussion and participation in democratic government, and not merely to further the discovery of truth through “the marketplace of ideas,” but also because individual self-expression is good for its own sake.<sup>246</sup> It leads to happier, more fulfilled lives: a better quality of life for the individuals doing the expressing, and because these individuals are more fulfilled, a more pleasant environment for the friends and coworkers around them.

The vast majority of Americans are employees who spend about one-third of their lives, and almost half their waking lives, at their place of work. It is a prime place for them to communicate with their peers, and for them to receive information from their peers. For workers to be denied a certain range of motion in their expression could seriously dampen this individual self-fulfillment, not to mention sabotage the search for truth and diminish the vitality of our democracy.

Again, it is no answer to suggest that anyone who does not like the free speech restrictions of their employer can find other employment. For most of these people, the prospect of losing their jobs is a significant hardship, and has a formidable chilling effect on their speech.

Current law recognizes certain limitations on the PPE doctrine to recognize the legitimate interests of employers. Again, *Novosel*

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245. A similar analysis informs federal labor law. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court explained that the “economic dependence” of employees required that employers be very careful in expressing anti-union sentiments prior to union elections, lest employees be unduly influenced by coercive “intended implications” of such efforts. *Id.* at 617. And in *NLRB v. Exch. Parts Co.*, 375 U.S. 405 (1964), the Court held that the NLRA kept employers from granting benefits on the eve of a union election, even if they were unconditional and permanent. The potential coercive influence of such employer action was so great, the Court reasoned, that even the implicit threat of such a move—i.e., the suggestion that future benefits could dry up if employees did not vote the way the employer wanted—could constitute a “fist inside the velvet glove” and thus violate the NLRA. *Id.* at 409-10.

246. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 147 (1967) (free speech protection advances “truth, science, morality, and arts in general as well as responsible government” (quotation marks omitted)); 25 JOHN STUART MILL, *ESSAY ON LIBERTY* 246-49 (Charles W. Eliot ed., 1909) (1859) (famously expounding the “utilitarian” rationale for free speech protections).

provides a good example. Even as it drew upon constitutional principles to extend free speech protection to private employers via the PPE, the court stated guidelines to protect the employers' prerogatives.<sup>247</sup> It called for other courts considering such claims to weigh, *inter alia*, the employer's contractual interests; whether the time, place, and manner of the speech interferes with business operations, or with "essential and close working relationships;" and whether it prevents the employer or employee from efficiently carrying out the requisite responsibilities.<sup>248</sup>

Although such employer interests do not typically qualify for the bona fide occupational qualification exception, state legislatures have included provisions within their statutes to constrain broad employee protection in order to protect employer interests.<sup>249</sup> As an illustration, courts have held that a newspaper could prevent its reporters from engaging in political activity when such activity frustrates the employer's purpose by creating an apparent conflict of interest,<sup>250</sup> or from engaging in speech when that speech was placing an advertisement in a rival newspaper.<sup>251</sup> Similarly, a New York court found a discharge lawful where an employee's affiliation with Holocaust deniers threatened to harm the reputation of the employer.<sup>252</sup>

Even where the speech involved does not present a conflict of interest or bring the company into public disrepute generally, it may be unprotected if it is a publicly expressed opinion at odds with that of the employer's and potentially injurious to the employer's financial interests. For example, a Massachusetts court found it legitimate for a defense contractor to fire its spokesperson for publicly advocating a decline in defense spending, a topic of "acute concern" to the company in which it had a direct "financial stake."<sup>253</sup> In general, then, courts

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247. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 901 (3d Cir. 1983).

248. *Id.*

249. See MONT. CODE ANN. § 39-2-903(5) (2013) (establishing "good cause" for dismissal where employees cause "disruption of the employer's operation, or other legitimate business reason"); N.D. CENT. CODE § 14-02.4-03 (2011) (limiting employee protection to activities that are "not in direct conflict with the essential business-related interests of the employer").

250. See *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1127 (Wash. 1997) (determining that a state law prohibiting employment discrimination based on an employee's political conduct was not constitutionally applicable to newspaper publishers).

251. See *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 844 (Pa. Super. Ct. 1986).

252. See *Berg v. German Nat'l Tourist Office*, 248 A.D.2d 297, 298 (N.Y. App. Div. 1998) (affirming the lower court's dismissal of the wrongful discharge suit, without referencing the initial grounds for the discharge); Salvatore Arena, *Tourist Office KOs Damage Suit*, N.Y. DAILY NEWS (Feb. 12, 1997, 12:00 AM), <http://www.nydailynews.com/archives/news/tourist-office-kos-damage-suit-article-1.760157> (explaining that the employee was fired for Holocaust denial associations, and that the lower court upheld the termination because Holocaust denial conflicts with the business interests of the German National Tourist Office).

253. *Korb v. Raytheon Corp.*, 410 N.E.2d 581, 584-85 (Mass. 1991).

may reject free speech-based PPE claims where the employee speaks “against the interests” of the employer.<sup>254</sup> There is no protection for speech which actively disrupts the employer or provides assistance to competitors.

A middle-ground approach is needed, one which balances the public interest in protecting employees’ rights of expression with those of the employer. Existing PPE case law already points the way. For example, protected whistleblowing activity is more likely to be protected when it involves actual illegality, as opposed to mere criticism of a firm’s products or procedures. Employees should not have the right to trash their employers publicly or to engage in conduct that diminishes their reputation, but they certainly should have the right to point out illegal employer conduct. At the same time, even where the Supreme Court recognizes a legitimate business prerogative on the part of an employer, it has shown its willingness to withdraw such deference when the facts show that the employer is using its business rationale as a pretext for more ordinary unfair labor practices.<sup>255</sup>

Drawing upon existing statutory and case law protections for guidance, we recommend some basic guidelines for PPE claims based on free speech principles. First, an employer should not be able to discharge an employee for expression protected by the First Amendment taking place while the employee is off-duty and off-premises, unless such activity is against the employer’s interest. Expression can run counter to the employer’s interest if it (1) aids a competitor; (2) exposes confidential information; (3) runs counter to the avowed mission of the firm or organization; (4) harms the reputation of the employer; or (5) materially and substantially disrupts productivity (e.g., by harming morale). The latter two exceptions would not apply if the employee speech was not merely criticism but actual whistleblowing, i.e., accurate factual assertions exposing illegal or unethical practices, or practices threatening the public health or welfare. Further, the above exceptions would not apply where the facts showed that the employer’s proffered business justification was pre-textual.

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254. *Id.* at 284. *See also* Rossi v. Pa. St. Univ., 489 A.2d 828 (Pa. 1985) (employee who lost PPE claim had continuously complained to supervisors about financial waste in his department, thus becoming “troublesome”). *See, e.g.*, COLO. REV. STAT. § 24-34-402.5(1)(b) (2012) (prohibiting employers from firing employees based on their lawful conduct off the employment premises *unless such conduct conflicts with their responsibilities to the employer*); N.Y. LAB. LAW § 201-d(3)(a) (2011) (making it unlawful for an employer to discriminate based on employees’ off-duty political activities *unless such activities interfere with the employer’s interest*).

255. *See* Assoc’d Press v. NLRB, 301 U.S. 103, 131 (1937) (NLRA restrictions on firing for attempting to organize a workforce did not violate media employer’s free press rights where the employer acted not out of editorial prerogative but out of a desire to suppress union membership).



Tying the PPE to expression protected by the First Amendment means an employer can fire an employee for off-premises, off-duty speech that, e.g., is obscene or defamatory, or constitutes “fighting words.” Speech that is highly offensive but constitutionally protected—e.g., racist or anti-Semitic slurs, or sexually “indecent” but non-obscene speech—could be grounds for termination to the extent it was open, public, and notorious, and could plausibly be connected back to the employer by the public, thus harming the employer’s reputation.

For speech made on-duty, on-premises, or using the employer’s facilities, resources, or materials, the employer should have wide latitude to discipline or terminate an employee. Courts should intervene only where the employer is using its power to pressure employees to make political contributions, vote a certain way, or express a certain political opinion.

## 2. *Fourth Amendment Privacy*

The personal privacy rights<sup>256</sup> guaranteed by the Fourth Amendment’s protection against unreasonable searches and seizures are also excellent candidates for constitutional rights driving a PPE analysis. These rights are well known to citizens at large, as the recent controversy over domestic surveillance by the National Security Agency demonstrates.<sup>257</sup> The Fourth Amendment’s privacy protections apply to the states through incorporation, of course.<sup>258</sup> Moreover, all state constitutions have some comparable provision.<sup>259</sup> And,

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256. The privacy concerns protected by the Fourth Amendment are analytically distinct from the “right to privacy” held to apply under the Due Process Clause as part of substantive due process. The latter protects individuals from unwarranted state interference in deeply personal matters such as childrearing, family, reproduction, and intimate relations. *See infra* Part V.C.1-2. The Fourth Amendment search and seizure brand of privacy is sometimes referred to as “informational privacy.” *See Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789 (9th Cir. 2002) (defining “informational privacy” as encompassing “privacy interest in avoiding disclosure of sensitive personal information”); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 135 (1991) (asserting that an individual’s “interest in informational privacy is a right that the Constitution protects under the due process clauses’ protection of both liberty and property”).

257. *See* David Aronofsky & Matthew Cooper, *The War on Terror and International Human Rights: Does Europe Get it Right?*, 37 DENV. J. INT’L L. & POL’Y 567, 576 (2009) (describing the NSA’s surveillance program as having deleterious effect on privacy rights by “reaching into the homes and offices of Americans all throughout the United States and elsewhere”); Joshua Kopstein, *Senators Strike at Surveillance Laws Authorizing NSA’s Warrantless Data Collection*, THE VERGE (June 24, 2013, 6:25 PM), <http://www.theverge.com/2013/6/24/4460334/senators-strike-at-nsa-surveillance-laws>.

258. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

259. ALA. CONST. art. I § 5; ALASKA CONST. art. I § 14; ARIZ. CONST. art. II § 8; ARK. CONST. art. II § 15; CAL. CONST. art. I § 13; COLO. CONST. art. II § 7; CONN. CONST. art. I § 7; DEL. CONST. art. I § 6; FLA. CONST. art. I § 12; GA. CONST. art. I, § 1, § XIII; HAW. CONST. art. I § 7; IDAHO CONST. art. I § 17; ILL. CONST. art. I § 6; IND. CONST. art. I § 11; IOWA CONST. art. I § 8; KAN. CONST. BILL OF RIGHTS § 15; KY. CONST. § 10; LA. CONST. art.

all states are subject to certain federal statutes protecting privacy interests of even private employees. For example, Congress has restricted the use of polygraph tests for pre-employment screening,<sup>260</sup> inquiries about employee disabilities,<sup>261</sup> and the use of genetic information in employment decisionmaking.<sup>262</sup>

At least one state constitution includes a right of privacy that applies to private action.<sup>263</sup> Further, as with free speech rights, many states have passed statutes guaranteeing private employee privacy, at least in specific contexts, such as drug testing.<sup>264</sup> This privacy interest is perhaps even stronger than free speech as a PPE candidate, given that the common law recognizes a variety of privacy-based causes of action.<sup>265</sup>

The strength of this interest is intuitive. We all have certain sensitive information concerning our lives away from the office—off-duty matters which have no effect on one’s work productivity. It should not be controversial that society has an interest in protecting the ability of workers to keep that information private. As the Third Circuit put it:

It may be granted that there are areas of an employee’s life in which [the] employer has no legitimate interest. An intrusion into

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I § 5; ME. CONST. art. I § 5; MD. CONST., DECLARATION OF RIGHTS, art. XXVII; MASS. CONST. PT. 1, art. XIV; MICH. CONST. art. I § 11; MINN. CONST. art. I § 10; MISS. CONST. art. III § 23; MO. CONST. art. I § 15; MONT. CONST. art. II § 11; NEB. CONST. art. 1, § 7; NEV. CONST. art. I § 18; N.H. CONST. PT. 1, art. XIX; N.J. CONST. art. I § 7; N.M. CONST. art. II § 10; N.Y. CONST. art. I § 12; N.C. CONST. art. I § 20; N.D. CONST. art. I § 8; OHIO CONST. art. I § 14; OKLA. CONST. art. II § 30; OR. CONST. art. I § 9; PA. CONST. art. I § 8; R.I. CONST. art. I § 6; S.C. CONST. art. I § 10; S.D. CONST. art. VI § 11; TENN. CONST. art. I § 7; TEX. CONST. art. I § 9; UTAH CONST. art. I § 14; VT. CONST. CH. 1, art. I § 11; VA. CONST. art. I § 10; WASH. CONST. art. I § 7; W. VA. CONST. art. III § 6; WIS. CONST. art. I § 11; WYO. CONST. art. I § 4.

260. Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (2012).

261. Americans with Disabilities Act, 42 U.S.C. § 12112 (2012).

262. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff-1 (Supp. II 2008).

263. See, e.g., CAL. CONST. art. I § 1; *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 627-28 (Cal. Ct. App. 1990) (forcing employee to offer urine sample violated her right of privacy as articulated in state constitution).

264. See, e.g., CAL. CIV. CODE § 56.20 (West 2013) (providing standards of confidentiality regarding employee medical records); CONN. GEN. STAT. §§ 31-51t to -51aa (2012) (regulating an employer’s right to enforce drug testing of current employees in the private sector); HAW. REV. STAT. § 378-26.5(5) (2013) (making it unlawful for an employer “to [u]tilize any device that intrudes into any part or cavity of the body for the purpose of truth verification”); MASS. GEN. LAWS ch. 214, § 1B (2013) (protecting an individual from “unreasonable, substantial or serious interference with his privacy”); see generally Wefing, *supra* note 23 (comparing drug testing policies of public employers with that of private employers).

265. See RESTATEMENT (SECOND) OF TORTS § 652A-E (1977) (listing the types of torts grounded in the right of privacy). See e.g., GA. CODE ANN. § 16-11-62(1) (2013) (prohibiting by law any form of eavesdropping or surveillance performed in a “clandestine manner”); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (recognizing the tort of false light invasion of privacy).

one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.<sup>266</sup>

Some courts have recognized a privacy-based PPE cause of action. In some cases, courts have merely drawn on statutory sources,<sup>267</sup> but sometimes they have drawn, at least in part, on constitutional interests.<sup>268</sup> These courts have often engaged in a balancing-of-interests approach, weighing the privacy interests of the employee with the legitimate business interests of the employer.<sup>269</sup> In the context of drug testing, for example, courts have been willing to recognize a wrongful discharge claim where a mandatory drug-testing policy tested for drug use outside the workplace and work hours, was not based on individualized suspicion, and did not involve sensitive safety-related positions.<sup>270</sup> These factors are also central to the Supreme Court's Fourth Amendment analysis of government-imposed drug testing programs on public employees.<sup>271</sup> Similarly, some courts have recognized a privacy-related PPE cause of action where plaintiffs

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266. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 622 (3d Cir. 1992) (quoting *Geary v. U.S. Steel Corp.*, 456 A.2d 174, 180 (Pa. 1974)). The Third Circuit actually had rejected use of the Fourth Amendment as a source for public policy, but acknowledged that the privacy concerns under state tort law and the Constitution were similar. *See id.* at 621 n.10.

267. *See, e.g., Doyon v. Home Depot USA, Inc.*, 850 F. Supp. 125 (D. Conn. 1994) (private employer's post-accident drug-testing policy violated statutory provision prohibiting employers from requiring an employee to submit to urinalysis testing without reasonable suspicion).

268. *See, e.g., Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1130 (Alaska 1989); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 16-17 (N.J. 1992); *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 55 (W. Va. 1990).

269. *Twigg*, 406 S.E.2d at 55-56; *but see Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 502 (Tex. App. 1989) (rejecting a balancing approach, and holding drug testing within an employer's prerogative). The analysis is different, and more employee-favorable, in California, where the state constitution's privacy right actually applies directly to private employers. *See Kraslawsky v. Upper Deck Co.*, 65 Cal. Rptr. 2d 297 (1997) (state constitutional guarantee of the right to pursue and obtain privacy creates a right of action against private as well as government entities). Some cases have also recognized a PPE cause of action against employee drug testing based on non-constitutional statutory sources. *See, e.g., Doyon*, 850 F. Supp. at 125 (private employer's post-accident drug testing policy violated statutory provision prohibiting employers from requiring an employee to submit to urinalysis testing without reasonable suspicion).

270. *Compare Luedtke*, 768 P.2d at 1123 (rejecting PPE claim where plaintiffs performed safety-sensitive jobs), *with Twigg*, 406 S.E.2d at 55 (accepting PPE claim because the positions did not involve safety and the employer lacked "reasonable good faith objective suspicion"). *Cf. Borse*, 963 F.2d at 625-26 (these factors were relevant and probative but their absence was not necessarily fatal to a private employer's mandatory drug testing policy).

271. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 603, 624 (1989) (justifying employee drug tests by asserting the government's interest in regulating "safety-sensitive tasks" which outweighs the "requirement of individualized suspicion").

challenged employer policies mandating polygraph testing<sup>272</sup> and personal property searches.<sup>273</sup>

Not all PPE claims involving employee drug testing have been successful. Sometimes, the court explicitly rejects a constitutional privacy right as a basis for a PPE claim.<sup>274</sup> In others, the court examines only statutory sources of public policy before rejecting the employee's claim.<sup>275</sup>

As a general matter, the privacy right would normally not extend to information reasonably related to activity at the workplace for which the employer would have a legitimate business interest, especially where the investigative methods were not overly intrusive. For example, a federal district court in Pennsylvania rejected a privacy-based PPE claim brought by an employee fired after an allegedly intrusive investigation of a personal matter, an alleged affair with a co-worker.<sup>276</sup> Noting that the employer confined its investigation to interviewing other employees and examining company records, the court found that the employer's methods were reasonable and rejected the wrongful discharge claim.<sup>277</sup>

Furthermore, although it declined to use constitutional principles as evidence of public policy, the Third Circuit has analyzed privacy issues (based on common law privacy torts) as affected by employer drug-testing policies.<sup>278</sup> The court found an employer's policy requiring employees to provide urine samples for drug screenings to be a significant intrusion of privacy.<sup>279</sup> This was both because of the extremely intrusive manner in which a urine sample is collected, and because urine samples can yield "a host of private medical facts about an employee," together creating a very strong expectation of privacy.<sup>280</sup>

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272. See, e.g., *Leibowitz v. H.A. Winston Co.*, 493 A.2d 111, 115 (Pa. Super. Ct. 1985).

273. See, e.g., *Borse*, 963 F.2d at 625.

274. See, e.g., *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Cal. Dist. Ct. App. 1989) (private employer's offer of employment conditional on submission to the drug test not a violation of the right to privacy under the state constitution); *Hennessey v. Coastal Eagle Point Oil Co.*, 589 A.2d 170, 176 (N.J. Super. Ct. App. Div. 1991), *aff'd*, 609 A.2d 11 (N.J. 1992) (declining to apply federal and state constitutional privacy protections to private employers); *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997) (no constitution-based public policy protecting employees from random drug testing-based terminations).

275. See, e.g., *Webster v. Motorola, Inc.*, 637 N.E.2d 203 (Mass. 1994) (holding private employer's universal drug testing program did not violate employee driver's statutory privacy rights); *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 630 N.E.2d 586 (Mass. 1994) (holding private employer's universal drug testing program did not violate employee driver's statutory privacy rights).

276. *Rogers v. Int'l Bus. Mach. Corp.*, 500 F. Supp. 867, 868 (W.D. Pa. 1980).

277. *Id.* at 870.

278. *Borse*, 963 F.2d 611.

279. *Id.* at 620-21.

280. *Id.* at 619-21.

Drawing again on statutory and case law protection for guidance, and analogizing to the free speech rules set out above, we propose Fourth Amendment-inspired contours to the PPE claim. Where an employee enjoys a reasonable expectation of privacy regarding particular information,<sup>281</sup> an employer should not be able discharge an employee for failure to disclose such information unless it could reasonably affect productivity, or materially and substantially affect the work environment. For example, for drug testing, intrusive employee questionnaire inquiries, or searches of personal areas owned by the employee like the employee's car or purse, the employer must have some form of individualized suspicion that the "search" will uncover information relevant to actual employer interest. In the case of drug testing, individualized suspicion would not be required if the employment positions involved were safety-related. In like manner, the level of individualized suspicion required in any manner might decline for particularly sensitive positions, e.g., inquiries into an employee's financial affairs for positions entrusting employees with large sums of money.

### 3. *Equal Protection*

The Fourteenth Amendment's guarantee of "equal protection" is another substantive right that quite logically translates to the private work sphere. The salience of employment discrimination issues is obvious, as demonstrated by the plethora of federal and state statutes providing protection against various types of employment discrimination. There is no serious question that all states have a strong public policy against invidious discrimination in employment, at least with respect to such commonly protected categories as race, color, creed, national origin, and sex.<sup>282</sup> There is a widespread societal consensus that such types of discrimination are invidious.<sup>283</sup> While disapproval of these other types of discrimination may not be as

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281. This "reasonable expectation of privacy" is a well-recognized concept in Fourth Amendment jurisprudence. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Courts applying the PPE as suggested above would be able to draw upon a rich body of analogous case law to help make the initial determination of whether an employee had such an expectation of privacy.

282. *See, e.g.*, 42 U.S.C. § 2000e-2 (2006) (declaring the discharge or refusal to hire on the basis of "race, color, religion, sex, or national origin" an "unlawful employment practice"); LA. CONST. art. I, § 12 (all prohibiting discrimination on the basis of race, religion, or nationality); MICH. COMP. LAWS § 37.2202 (2013); OHIO REV. CODE ANN. § 4112.02 (2013).

283. *E.g.*, Frank Newport, *Little "Obama Effect" on Views About Race Relations*, GALLUP (Oct. 29, 2009), <http://www.gallup.com/poll/123944/Little-Obama-Effect-on-Race-Relations.aspx> (addressing views on equal job opportunities, or the lack thereof, among non-whites); Regina Corso, *Three in Five Americans Say U.S. Has Long Way to Go to Reach Gender Equality*, THE HARRIS POLL (Aug. 16, 2010), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ct/ReadCustomDefault/mid/1508/ArticleId/452/Default.aspx> (addressing views on gender equality in the workplace).

longstanding, both age discrimination and disability discrimination should probably also be counted as categories for which there is a clear policy of nondiscrimination.<sup>284</sup>

Moreover, the rights of women are implicated whenever employers engage in sexual harassment. Although such cases are normally resolved by reference to federal or state antidiscrimination statutes, procedural issues or the absence of statutory protection due to the small size of an employer may leave a common law claim like the PPE as the only available course.<sup>285</sup> And, courts have recognized PPE claims in the context of sexual harassment.<sup>286</sup> There also would seem to be no reason to exclude racial or religious harassment from coverage under the PPE. For commonly recognized workplace harassment claims, the PPE seems appropriate where necessary to vindicate constitutional principles regarding sex discrimination.

Indeed, in this general area of employment discrimination, statutory remedies may be so abundant that they may very well “crowd out” much of the use of the PPE. In Georgia, an appellate court held that the absence of state statutory protection for pregnancy discrimination ruled out recognition of a wrongful discharge cause of action on that ground.<sup>287</sup> However, in Vermont, the state’s highest court ruled that the absence of state statutory protection against age discrimination did *not* prevent recognition of a common law PPE action.<sup>288</sup> In addition, Washington’s Supreme Court recognized a wrongful discharge claim based on sex discrimination where the employer had too few employees to fall within the state’s otherwise applicable antidiscrimination statute.<sup>289</sup> Even though the state had recognized a public policy of protecting small businesses by limiting statutory remedies against them, the state Supreme Court allowed a sex-discrimination-based PPE claim to proceed against a small business.<sup>290</sup> The court noted salient differences between the statutory and common law causes of action: only the former provided for adminis-

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284. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 631(a) (2012) (forbidding discrimination against anyone at least forty years of age); Americans with Disabilities Act, 42 U.S.C. § 12112 (2012) (stating that a “covered entity shall not discriminate against a qualified individual on the basis of disability”); GA. CODE ANN. § 34-6A-4 (2013); OR. REV. STAT. § 659A.112 (2013) (all generally forbidding employer discrimination based on certain disabilities); VA. CODE ANN. § 51.5-41 (2013); *Payne v. Rozendaal*, 520 A.2d 586, 589 (Vt. 1986) (“[D]ischarge . . . solely on the basis of age is a practice so contrary to our society’s concern for providing equity and justice that there is a clear and compelling public policy against it.”).

285. *See, e.g.*, *Collins v. Rizkana*, 652 N.E.2d 653, 660-61 (Ohio 1995).

286. *Id.* at 660-62.

287. *Borden v. Johnson*, 395 S.E.2d 628, 629-30 (Ga. Ct. App. 1990).

288. *Payne*, 520 A.2d at 593-94.

289. *Roberts v. Dudley*, 993 P.2d 901, 909-11 (Wash. 2000).

290. *Id.* at 908; *Griffin v. Eller*, 922 P.2d 788, 792 (Wash. 1996).

trative proceedings, attorney fee remedies, and potential liability for adverse employment action other than full termination.<sup>291</sup>

Certainly, the availability of a PPE cause of action under common law could help a wronged employee where a state or federal statute covers the same type of discrimination, i.e., the same protected class, but the common law claim provides better remedies, has a more forgiving limitations period, or allows suit against small employers with too few employees to be statutorily covered.<sup>292</sup> Moreover, the availability of the PPE also might be desirable if the protected class in question is not covered by statute. For example, suppose an employer fires a worker for living with a romantic partner without being married, or for having children out of wedlock. Or, suppose the employer discriminates against the employee because the employee had been born out of wedlock, or because the employee proceeded to marry someone the employer disapproved of against the employer's advice. In some jurisdictions, this might be covered by statutes barring discrimination on the basis of marital status.<sup>293</sup> However, in most states, no statutory relief would be available.<sup>294</sup>

Such are prime examples of the importance of using constitutional principles as evidence of public policy. The Supreme Court has long held that government discrimination against children of unmarried parents violates the Equal Protection Clause,<sup>295</sup> and has subjected such types of discrimination to heightened, so-called "intermediate," scrutiny.<sup>296</sup> It also has held that a combination of sex plus marital discrimination violates the Equal Protection Clause.<sup>297</sup> Further, the Court has held that marriage is a "fundamental right."<sup>298</sup>

It might very well be the case that, despite the absence of any substantive statutory protection for that type of discrimination, an employee fired under any of the circumstances described above could

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291. *Id.* at 911.

292. *See supra* Part IV.

293. *See, e.g.*, MASS. GEN. LAWS ch. 151B, § 4 (2013); MINN. STAT. § 363A.08 (2013); OR. REV. STAT. § 659A.030 (2013) (all prohibiting employment discrimination based on marital status).

294. Federal antidiscrimination law does not provide employment discrimination protection on the basis of marital status. *See* 42 U.S.C. § 2000e-2 (2012) (Title VII bars discrimination on the basis of race, color, religion, sex, or national origin).

295. *See, e.g.*, N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619, 620-21 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972).

296. *United States v. Virginia*, 518 U.S. 515, 570-71 (1996) (analyzing "intermediate scrutiny" as an inquiry into whether a statutory classification is "substantially related to an important governmental objective").

297. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652-53 (1975) (holding that a statute that treats widower less favorably than widows is an invalid "sex plus marital status" type of discrimination).

298. *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

make out a PPE claim, using constitutional principles as a basis.<sup>299</sup> Under such circumstances, the constitutionally-inflected common law claim would actually expand the scope of protected categories from those listed in the applicable antidiscrimination statutes. Rather than deviating from analogous statutes in such procedural ways as statute of limitations or types of remedies available, this use of the PPE would depart from an analogous statute in substance.

If successful, such a use of the PPE might have a dramatic effect on the gay rights debate. Many states, like the federal government, lack any statutory protection for employees discriminated against because of their sexual orientation. However, governmental discrimination against homosexuals has come under fire from the Supreme Court in recent decades, and this past year's decisions have only increased the pressure.<sup>300</sup> Such decisions, plus the large number of lower court decisions striking down anti-gay discrimination,<sup>301</sup> may establish a strong public policy against discrimination on the basis of sexual orientation, such that discharging a private employee would create wrongful discharge liability.

#### 4. *Free Exercise*

The Free Exercise Clause prevents the government from interfering in the worship practices of individuals.<sup>302</sup> At a minimum, it cre-

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299. However, at least one court rejected a PPE claim alleging termination because the employee had married a coworker, rejecting the idea that an employee had a right to marry the person of their choice free of employer action. *McCluskey v. Clark Oil & Ref. Corp.*, 498 N.E.2d 559, 561 (Ill. App. Ct. 1986).

300. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (invalidating on equal protection and federalism grounds a provision of a federal statute denying federal benefits to same-sex couples legally married in their home state); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating on substantive due process grounds a statute criminalizing same-sex sodomy); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating on equal protection grounds a state constitutional amendment which barred local jurisdictions from passing gay rights ordinances).

301. See, e.g., *MacDonald v. Moose*, 710 F.3d 154, 166 (4th Cir. 2013) (concluding that statute prohibiting sodomy between two persons is facially unconstitutional); *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (declaring Oklahoma's adoption statute unconstitutional under the Full Faith and Credit Clause because it denied recognition to valid out-of-state adoptions by same-sex couples); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (state's same-sex marriage ban violated both federal equal protection and due process); *Jegley v. Picado*, 80 S.W.3d 332, 353 (Ark. 2002) (determining that a statute prohibiting certain sexual conduct between members of same sex violated the fundamental right to privacy and equal protection clause of the state constitution); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (granting same-sex couples the protections, benefits, and obligations of civil marriage on equal protection grounds).

302. Thomas Berg, *Free Exercise of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 309-11 (Edwin Meese III et al. ed., 2005) (summarizing the Free Exercise Clause as protecting a person's religiously motivated conduct and belief from government action); see also *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (defining the free exercise of religion as "the right to believe and profess whatever religious doctrine one desires").



ates a clear and substantial public policy against religious discrimination, one which is mirrored in federal and state statutes barring religious discrimination in employment.<sup>303</sup> If use of the Free Exercise Clause in the PPE did no more than this, it would not contribute much, since antidiscrimination statutes of this type are so widespread. However, as with the Equal Protection Clause discussed above, it could provide the basis for a PPE claim in those instances where the comparable statute(s) do not apply, e.g., where the employer is too small for statutory coverage, or where the plaintiff seeks a different remedy from the one provided by the statute.

Beyond that, its greatest impact might be to protect employees who are fired for refusing to engage in worship practices. If an employer holds weekly prayer services during working hours, can it require employee attendance on pain of termination? A Free Exercise Clause-inspired PPE would suggest not.<sup>304</sup>

Such a PPE cause of action would have to give way if the employer were itself a religious organization. Antidiscrimination statutes often create exemptions for religious organizations, which are allowed to favor coreligionists, or even exclude persons outside the faith, when hiring for certain positions. These exemptions are motivated, in significant part, by a desire to avoid interfering in the Free Exercise interests of the religious organization employers.<sup>305</sup>

Another scenario would cover an employee dismissed for engaging in non-disruptive worship practices, either on or off premises. For example, consider an employer who employs many Muslims, and treats them the same as non-Muslims, but does not permit them to pray on prayer mats during the day, even if they are on break; or, an employer who has many Jewish employees, but does not permit them to wear yarmulkes because he bars all employees from wearing headgear of any kind. They may not be guilty of religious discrimination, but they may be interfering with the employees' rights to worship as they see fit.

Of course, this is one scenario where antidiscrimination statutes may provide more protection than the PPE. Title VII, and many comparable state statutes, require that employers provide a "reasonabl[e]

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303. For examples of state statutes prohibiting employment discrimination based on religion, see NEB. REV. STAT. § 23-2513 (2012); OR. REV. STAT. § 659A.003 (2013); TEX. LAB. CODE ANN. § 21.125 (West 2013); UTAH CODE ANN. 1953 § 34A-5-106 (West 2013).

304. Of course, such a situation might already be covered under a "forced speech" theory. See *supra* Part V.A.1.

305. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (holding that the Free Exercise Clause required the "ministerial exception" to bar teacher from suing her school under workplace discrimination laws).

accommodat[ion]” of employee religious practices.<sup>306</sup> Thus, the employer might be required to take affirmative steps to make exemptions for a particular employee so as to avoid a substantial burden on that employee’s religious practices. Thus, if there were an otherwise neutral dress code which did not permit men to wear head garments indoors, an employer might be required to exempt men wearing turbans or yarmulkes for religious reasons.<sup>307</sup>

This is *not* the case under the Free Exercise Clause, where the rule is that the government has no obligation to modify neutral laws of general application, even if their effect is to place a substantial burden on religious practice.<sup>308</sup> If the PPE followed the contours of the constitutional right in this manner, it would not require reasonable accommodations for religious employees. If this were in fact the rule, it arguably addresses the concern that this application of the PPE would be too burdensome on employers.

### C. Closer Cases

The constitutional provisions discussed immediately above are strong candidates for inclusion in a PPE analysis. The provisions discussed below also represent very important liberty interests, but are controversial enough, or sufficiently ill-defined, to warrant caution regarding their usage by courts adjudicating PPE claims.

#### 1. Reproductive Rights And Gender

The Due Process Clause gives rise not only to procedural due process protections, but substantive due process protections as well. More specifically, there is a long line of cases stemming from the early to mid-twentieth century where the Supreme Court recognized a right of “privacy” that protects individuals from state intrusions into certain deeply private decisions. These decisions include both basic ones about whether to bear children,<sup>309</sup> and also, those involving chil-

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306. See 42 U.S.C. § 2000e(j) (2012); see also D.C. CODE § 1-607.01 (2013) (mandating reasonable accommodation for the free exercise of religion); TEX. LAB. CODE ANN. § 21.108 (West 2013) (prohibiting religious discrimination unless reasonable accommodation unduly burdens the employer).

307. See, e.g., *EEOC v. Reads, Inc.*, 759 F. Supp. 1150, 1158 (E.D. Pa. 1991) (describing “religious garb” as falling within the ambit of statutory protection).

308. See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (holding that neutral laws of general applicability do not implicate the Free Exercise clause).

309. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (invalidating statute prohibiting the use of birth-control devices by holding that the penumbras of the guarantees in the Bill of Rights create “zones of privacy”); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (striking down a forced sterilization act while addressing marriage and procreation as being “fundamental to the very existence and survival of the race”).

drearing,<sup>310</sup> family living arrangements,<sup>311</sup> and intimate relations.<sup>312</sup> The strength of these rights is bolstered by statutes that protect against discrimination on the basis of marital status.<sup>313</sup>

Within the general area of substantive due process, one area ripe for PPE analysis is the area of reproductive rights. In a variety of cases around the country, wrongful discharge plaintiffs have claimed they were fired for having abortions.<sup>314</sup> Most of these cases either went unresolved or were settled.<sup>315</sup>

The array of statutory remedies for persons in this situation is unclear. Employees discriminated against for having abortions likely have a claim under the Pregnancy Discrimination Act (PDA).<sup>316</sup> The Third and Sixth Circuits have so held,<sup>317</sup> and the EEOC regulations so indicate.<sup>318</sup> This right, apparently, also extends to adverse employment actions taken because an employee merely *considers* having an abortion.<sup>319</sup>

A related potential issue involves an employer taking an adverse action against an employee for *not* having an abortion. Such an employer may prefer that the employee not bring the pregnancy to term for practical reasons: for example, out of fear the employee will ask for maternity leave and flexible hours, and/or will not be able to devote the same energy to the job. Or, the employer may disapprove of the employee becoming pregnant out of wedlock, or through an illicit affair.

Several state courts have recognized the PPE for pregnancy discrimination. Both Washington and California have recognized such

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310. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (rejecting statute requiring all children to attend public elementary school); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding statute requiring all classes to be taught in English unconstitutional under a substantive due process analysis).

311. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (upholding limitations on single-family dwellings to traditional families or to two or fewer unrelated persons).

312. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that intimate consensual sexual conduct was part of the liberty protected by substantive due process).

313. *See, e.g.*, Federal Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012); ALASKA STAT. § 18.80.220 (2013) (both making it unlawful for employers to discriminate on the basis of, *inter alia*, marital status).

314. *Noble*, *supra* note 9. Not all such cases were resolved, *id.*, and at least one was resolved through confidential settlement. *See Craver*, *supra* note 9.

315. *Noble*, *supra* note 9.

316. *See* 42 U.S.C. § 2000e-2(a)(1) (2012) (barring sex discrimination); *see also* § 2000e(k) (defining sex discrimination to include discrimination on account of “pregnancy, childbirth, or related medical conditions”). In 1978, Congress passed the Pregnancy Discrimination Act as an amendment to Title VII. *See Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1213 (6th Cir. 1996).

317. *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Turic*, 85 F.3d at 1214.

318. 29 C.F.R. § 1604 app. (2013).

319. *Turic*, 85 F.3d at 1214.

claims, drawing from their state constitutions to derive the requisite public policy where the employer's small size made the relevant state statute inapplicable.<sup>320</sup> By contrast, an intermediate appellate court in Georgia rejected such a pregnancy discrimination PPE claim, reasoning that courts generally should defer to the legislature in deciding what public policies could trump the general rule of at-will employment.<sup>321</sup> Perhaps cognizant of the PDA, the Georgia opinion refers to the fact that in addition to state statutes, there are unspecified "federal statutes" that also limit the at-will doctrine.<sup>322</sup> But the extent to which such federal statutes should inform the "public policy" analysis for PPE purposes, the court reasoned, is a decision best left to the state legislature.<sup>323</sup>

This seems to be a proper area for the PPE. The constitutional right of persons to make decisions about reproduction has a long lineage. Early in the twentieth century, the Supreme Court recognized an unenumerated federal constitutional right to decide to reproduce free from government interference.<sup>324</sup> The Court extended the protection for the right to reproduce to the decision *not* to reproduce, guaranteeing a right of access to contraception.<sup>325</sup> In order to recognize such rights despite their not being expressly laid out in the Constitution's text, the Court had to find that these rights were "fundamental," i.e., that they were "implicit in the concept of ordered liberty."<sup>326</sup> Forty years ago, the Court recognized that the constitutional right to decide not to reproduce extended to the decision to have an abortion, a right which was reexamined and reaffirmed twenty years later and which is still recognized today.<sup>327</sup> Given the long history of reproductive rights,

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320. *Badih v. Myers*, 43 Cal. Rptr. 2d 229, 293 (Cal. Dist. Ct. App. 1995); *Roberts v. Dudley*, 993 P.2d 901, 911 (Wash. 2000).

321. *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990).

322. *Id.*

323. *Id.*

324. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating law providing for forced sterilization of recidivist offenders).

325. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (extending this right to persons over age sixteen); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending this right to unmarried couples); *Griswold v. Connecticut*, 381 U.S. 471, 485-86 (1965) (recognizing this right for married couples).

326. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (citing multiple Supreme Court cases using this phrase). The Court has used several different formulations of this test for being a "fundamental" right. *See id.* at 721 (observing fundamental rights to be "deeply rooted in this Nation's history and tradition"); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (noting that these fundamental rights "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").

327. *See Casey*, 505 U.S. at 869-74 (reaffirming the core holding of *Roe* regarding the right to an abortion, and adopting an "undue burden" test for all restrictions on abortion prior to fetal viability); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding a constitutional right to abortion).

it seems a good candidate for the kind of public policy which courts can rely on to protect at-will employees under the common law.

As a matter of constitutional rights, it should make no difference whether the right in question is the right to bear a child or not to bear a child. The Court has made clear that among the most fundamental rights is the “decision whether to bear or beget a child.”<sup>328</sup> Arguably, though, abortion may be properly separated from the rights to be pregnant or to use contraception. Because a difficult moral question exists as to exactly when a fetus becomes a “person,” it is distinct. This philosophical question is still largely unresolved in our society, making abortion rights extremely controversial. For this reason, perhaps courts should be cautious about wading into this area with the PPE.

Further, because so many people have strongly held religious beliefs about abortion, court-imposed limits on employers via the PPE might trigger constitutional issues about the employers’ own religious freedom rights.<sup>329</sup> If an employer considers abortion to be murder, perhaps it should not be required to (from its viewpoint) support murderers by employing them. Indeed, the awkwardness of continued employment after the abortion would seem most acute in small firms with only a few employees, where employer and employee likely personally interact. These are precisely the types of firms where the PPE might be most relevant, given its utility as a backup where statutory remedies are unavailable.

The solution may be to recognize abortion rights only narrowly through the PPE. Under current precedent, a constitutional right to abortion exists only before fetal viability.<sup>330</sup> Outside that period, the right exists only where necessary to protect the woman from serious threats to life or health.<sup>331</sup> Public opinion polls show a consistent majority of Americans favor abortion rights, at least during the very early stages of pregnancy.<sup>332</sup> But such support drops during later stages of the pregnancy.<sup>333</sup> If PPE protection were to exist for abortion at all,

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328. *Eisendstadt*, 405 U.S. at 453.

329. See Michael Dichiara, *A Case of First Impression: The Third Circuit Recognizes that Having an Abortion Is Protected by Title VII*, 33 RUTGERS L. REC. 12, 14-15 (2009) (raising this concern with respect to statutory protection for employment discrimination targeting abortion).

330. *Casey*, 505 U.S. at 846.

331. *Id.*

332. *Abortion*, GALLUP HISTORICAL TRENDS (May 13, 2014), <http://www.gallup.com/poll/1576/abortion.aspx> (over 60% of Americans believed abortions should be legal in the first trimester; percentage dropped to less than 30% with respect to the second trimester).

333. Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx> (acknowledging that “support drops off sharply, to 27%, for second-trimester abortions, and further still, to 14%, for third-trimester abortions”).

it should be limited to abortions taking place to prevent serious and legitimate health risks to women, or which take place relatively early on during pregnancy.

## 2. *Substantive Due Process*

A Native-American sales clerk wears shoulder-length hair as an expression of his identity and spirituality. His private employer, a grocery store, orders him to cut his hair; when he refuses, it fires him. Does the employee have any legal remedy? The Alaska Supreme Court said no, rejecting a claim that the employee had any right of privacy or free expression as against a private employer, given the constitutional requirement of state action.<sup>334</sup>

The court resolved the issue by rejecting the threshold notion that constitutional principles had any analogous relevance to the PPE's regulation of purely private conduct. But the case presents an interesting test for the use of substantive due process as a source of policy under the PPE.<sup>335</sup>

Substantive due process doctrine suggests that there exist certain individual rights that are so fundamental that the state may not burden them, even if they are not expressly enumerated in the text of the Constitution.<sup>336</sup> Substantive due process is controversial precisely because it is open-ended. The recognition of rights untethered to constitutional text creates the potential for subjective "judicial activism."<sup>337</sup>

Thus, with the exception of those reproductive rights like contraception for which there has emerged a sound and broad judicial and public opinion consensus, courts should not use substantive due process as a "catch-all" measure to broaden the PPE, lest the exception swallow the rule and all non-merit-related grounds for termination become invalid violations of an employee's right to be free from arbitrary action. If at-will employment is to retain any robust meaning,

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334. *Miller v. Safeway, Inc.*, 102 P.3d 282, 288-90 (Alaska 2004).

335. One can safely put aside consideration of this as a Free Speech issue. Where conduct as opposed to pure speech is concerned, the First Amendment's Free Speech Clause affords no protection unless the conduct is properly considered "expressive conduct." Here, while the Native American may have intended his long hair to express an idea, it may not be the case that most people would reasonably interpret the long hair as principally expressive. See *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (defining "expressive conduct" under the First Amendment so as to require that persons would reasonably interpret the conduct as being expressive).

336. See James W. Ely Jr., *Due Process Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 395 (Edwin Meese III et al. ed., 2005) (describing these fundamental rights to be "beyond the reach of government").

337. See Luís Roberto Barroso, *The Americanization of Constitutional Law and its Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World*, 16 *ILSA J. INT'L & COMP. L.* 579, 580, 599-604 (2010) (using this term to describe an era in which "contemporary democracies" sought to advance rights not listed in the Constitution).

employers must be able to fire people for irrational, arbitrary, idiosyncratic, even quirky reasons, as long as those reasons do not threaten broadly, strongly recognized rights.<sup>338</sup>

### 3. *Second Amendment*

Another candidate for the PPE is the Second Amendment. Within the last few years, the Supreme Court has recognized that this Amendment does indeed guarantee a right to bear arms even for an *individual* with no connection to militia service.<sup>339</sup> This right extends to the use of arms reasonably related to individual self-defense, and includes those arms, including handguns, which are not “dangerous and unusual weapons.”<sup>340</sup> It applies to state governments as well as the federal government.<sup>341</sup> While the Supreme Court cases to date have dealt with the use of guns in the home, credible arguments exist for protecting the right to carry arms outside the home into public areas to further the self-defense rationale.<sup>342</sup> Should the PPE protect the right of employees to bring weapons to work?

Courts are just beginning to address the general issue of the right to bear arms at work, and are split. In *Mitchell v. University of Kentucky*, the Supreme Court of Kentucky extended the PPE to the right to bear arms, finding wrongful discharge where a public university fired a properly licensed at-will employee for keeping a weapon in his car on university property in violation of university rules.<sup>343</sup> In that case, conflicting statutes seemed to side with both employee and employer in this situation, and the court concluded, through a general

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338. See *Hunter v. Port Auth. of Allegheny Cnty.* 419 A.2d 631, 634-35 (Pa. Super. Ct. 1980) (state constitutional provision protecting freedom to seek a livelihood prevented refusal to hire based on prior criminal convictions unrelated to job merit; though the employer was government agency, language suggests possible broader application); see also *Fellhauer v. City of Geneva*, 568 N.E.2d 870, 877 (Ill. 1991).

339. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

340. *Id.* at 627.

341. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036-44 (2010).

342. *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (“[T]here now exists a clearly-defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation.”); Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 615 (2012) (interpreting *Heller* to suggest that “the defensive role for which handguns are uniquely suited—routine carry outside the home—is also constitutionally protected”). Cf. *Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 342-43 (Pa. Super. Ct. 1988) (declining to apply exception to asserted right of self-defense in workplace fistfight, deferring to management to assign responsibility to some or all participants in disruptive workplace altercations).

343. 366 S.W.3d 895, 903 (Ky. 2012).

review of still other statutes, that the termination violated Kentucky's public policy.<sup>344</sup>

Although the employer in this case was a public entity, the court found a public policy that extended to private employers as well.<sup>345</sup> The court did not rely expressly on the Second Amendment or a Kentucky Constitution provision; indeed, it said it would "refrain from reaching constitutional issues when other, non-constitutional grounds can be relied upon."<sup>346</sup> Since the employer was a state actor, this statement could merely indicate an unwillingness to interpret directly either the state or federal constitution; it may not explicitly address whether the court felt comfortable in drawing upon Second Amendment or related constitutional doctrines in reaching the PPE merits.

Contrast *Hansen v. America Online, Inc.*, where the Supreme Court of Utah rejected a similar claim involving the keeping of guns in an employer's parking lot.<sup>347</sup> The court looked to the Utah Constitution in evaluating the state's public policy. That constitution did protect a right to bear arms, but did not specifically address rights of employees during working hours.<sup>348</sup> Given the court's general preference to apply the PPE "parsimoniously" in deference to the default at-will doctrine, it declined to extend the right to bear arms to the workplace.<sup>349</sup>

The two cases might be reconciled by noting that the Kentucky statutes provided protection for employees of private employers, whereas the legislative history of the Utah statutes suggested no application to private employers.<sup>350</sup> However, the at-will-friendly Utah case arose before the U.S. Supreme Court decisions recognizing for the first time an individual right to bear arms,<sup>351</sup> while the PPE-friendly Kentucky case arose afterwards. The difference may be simply due to evolving constitutional doctrine.

A related issue arose in West Virginia, where the state supreme court recognized a PPE claim based on a policy guaranteeing a right of self-defense.<sup>352</sup> In that case, the plaintiff was discharged for disarming a woman who was attempting to rob the employer's premises, an act that violated company policy against interfering with a store robbery.<sup>353</sup> The court looked to the state constitution, state statutes,

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344. *Id.* at 900-03.

345. *Id.* at 901.

346. *Id.* at 898 (quoting *Baker v. Fletcher*, 204 S.W.3d 589, 597-98 (Ky. 2006)).

347. 96 P.3d 950, 956 (Utah 2004).

348. *Id.* at 953.

349. *Id.* at 954.

350. *Compare Mitchell*, 366 S.W.3d at 901, with *Hansen*, 96 P.3d at 954-55.

351. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036-44 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

352. *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 723-24 (W. Va. 2001).

353. *Id.* at 716.



and West Virginia case law, finding the existence of a public policy favoring a right of self-defense.<sup>354</sup> However, the court held that this right must be balanced against the employer's legitimate interests in keeping order on its premises.<sup>355</sup> Thus, firing an employee for defending himself creates a presumption of PPE wrongful discharge liability, but the employer may rebut that presumption by showing it had a legitimate business reason for the termination.<sup>356</sup>

This latter approach seems more reasonable, especially in the context of bringing guns to work. Although some states have recognized by statute a right of employees to bring weapons to work,<sup>357</sup> in the absence of such statutes, there is a paucity of case law supporting such a right as a constitutional matter. That is not surprising, since reasonable people differ as to whether an employer has a legitimate interest in eliminating the risk of gunplay on its premises or preferring other means to ensure employee safety. Thus, standing on its own and without state statutory support, the Second Amendment, and similar constitutional provisions regarding the right to bear arms, seem unlikely candidates for the PPE.<sup>358</sup> This may change, given that the law in this area is just beginning to take shape. For example, the Supreme Court has not yet established the applicable standard of review for Second Amendment rights. Nor has the Court determined what interest an employer has in regulating arms in the workplace. How the federal courts ultimately treat this employer interest will inform the development of the PPE with respect to the Second Amendment.

## VI. CONCLUSION

Courts considering constitutional claims borrow from common law doctrine. There is no reason to treat with suspicion the reverse dynamic. Constitutional principles are compelling sources of our public policy. They stem from foundational principles embodying our most deeply held beliefs. They should certainly inform the analysis when courts apply the PPE to the at-will employment rule.

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354. *Id.* at 718-22.

355. *Id.* at 723.

356. *Id.* at 723-24.

357. *See, e.g.*, GA. CODE ANN. § 16-11-135 (2013) (certifying that private and public employers do not have the right to prohibit their employees from keeping lawful firearms locked in their vehicles); VA. CODE ANN. § 15.2-915 (2012) (“[N]o locality shall adopt any workplace rule . . . that prevents an employee of that locality from storing at that locality’s workplace a lawfully possessed firearm and ammunition in a locked private motor vehicle.”).

358. *See Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 386 (Wash. 1996) (PPE claim succeeded where company fired security guard for violating company rule in order to save woman from life-threatening hostage situation).

But courts should be circumspect in applying to the private employment context constitutional principles designed to cabin abuses by government. In doing so, they should limit their gaze to constitutional rules creating rights held by individuals—rights which are clear, uncontroversial, and readily analogous to the situation of a private employee. Matters of free speech, Fourth Amendment privacy, and equal protection fall easily into this category. Criminal procedure rights, substantive due process concerns, and Second Amendment issues do not.

Traditionally, business and employment law questions are viewed as inquiries distinct from, and perhaps more pragmatic than, the seemingly more abstract doctrines of constitutional law. The PPE provides a means for an open exchange of ideas between these two ostensibly distinct areas of the law. At the same time, the use of constitutional values in the PPE creates a fail-safe, a means of filling the gap left by statutory and contract theories to curb the most troubling employer abuses.

Understandably, employers will be concerned about adding yet another set of grounds for employees to sue them. The employer-employee relationship is, and should remain, a *business* decision and the at-will doctrine, therefore, should not be undermined. However, if we are to continue recognizing a PPE—and we should, to curb the most outrageous subversions of public policy by employers while also acknowledging the economic vulnerability of employees—then it makes no sense to consider “lesser” sources of public policy but suddenly become shy about using the “greater” source of the Constitution.

The law sets a floor for minimum fair treatment of employees. A properly robust, and properly selective, use of constitutional law to inform the PPE raises that floor where it could use some raising.

