
AT-WILL EMPLOYMENT AND THE ROLE OF FREE SPEECH: SHOULD IOWA’S PUBLIC POLICY EXCEPTION PROTECT SPEECH OF PUBLIC CONCERN IN THE PRIVATE WORKPLACE?

ABSTRACT

For many Americans, the First Amendment is broadly understood to protect individuals from the suppression of their speech. In reality, the First Amendment is rather limited in its reach and largely concerns only the government’s restrictions on speech. Despite the reused and familiar aphorism “I can say what I like. It’s a free county,” the private employment workplace provides very little room for the First Amendment and the protection of an employee’s speech.¹ After the Charlottesville rally in August of 2017 and after ESPN commentator Jemele Hill’s tweets about President Trump in September of 2017 (both activities that occurred outside of the workplace), many advocated for the termination of the protestors and Jemele Hill. At first glance, negative consequences for those who espouse views others deem harmful or offensive could be understood as a useful societal check on those ideas. However, upon further consideration and given the current political climate, disincentivizing speech of public concern by failing to provide reasonable protections for the political speech of private employees raises more concerns than it quells.

Although a majority of Americans broadly support the protection of speech, even speech they may find offensive, Iowa does little to protect speech of public concern as it relates to the private workplace—a place where many Americans spend a great deal of their time. Americans should not have to choose between engaging in political commentary and maintaining their source of income. It is time Iowa addresses the chilling of political speech by expanding the current public policy exception in employment law to include protections for at-will employees engaging in speech of public concern which encompass the legitimate business concerns of private employers.

TABLE OF CONTENTS

Table of Contents.....	101
------------------------	-----

1. See generally Jeannette Cox, *A Chill Around the Water Cooler: First Amendment in the Workplace*, INSIGHTS ON L. & SOC’Y, Winter 2015, at 12.

I. Introduction.....	102
II. Speech and Private Employment on the National Stage.....	105
A. Charlottesville Unite the Right Protest.....	106
1. Overview of the Charlottesville Rally.....	106
2. The Social Pushback and Employment Implications After the Charlottesville Protest.....	107
3. Can You Be Fired for Being a White Supremacist?— Responses to Charlottesville from a General Employment Law Standpoint.....	108
B. Jemele Hill, Donald Trump, and ESPN.....	109
1. An Overview of the Controversy Around Jemele Hill’s Tweet—“Donald Trump is a White Supremist”.....	109
2. Can Jemele Hill be Fired for Calling President Donald Trump a White Supremacist?—Jemele Hill’s Tweet in the Context of Connecticut Law.....	110
III. Is There Legitimate Concern for a Chilling Effect on Speech of Public Concern in the Current State of At-Will Employment?— Arguments for and Against Speech Protections in Private Employment.....	111
A. The Lack of Laws Protecting Speech-Related Termination Creates a Chilling Effect on Self-Expression and Public Discourse.....	111
B. The Laws Protecting Speech-Related Termination Would Unduly Restrict the Interests of Private Employers.....	113
IV. Iowa as an At-Will Employment State and the Importance of a Recognized Public Policy Exception for Free Speech.....	114
A. Private Employment in the Context of Iowa Law.....	114
B. The Public Policy Exception and At-Will Employment Termination—Analysis on the National Stage.....	116
C. The Inclusion of the First Amendment as a Source for Iowa’s At-Will Employment Public Policy Exception.....	118
V. Conclusion.....	120

I. INTRODUCTION

Justice Oliver Wendell Holmes Jr. described one of the backbone principles of the First Amendment as “the principle of free thought—not free thought for those who agree with us but freedom for the thought that

we hate.”²

For many Americans, the importance of free speech is understood as an indispensable aspect of our democracy—a fundamental value of the United States.³ While many agree on the importance of free speech, the reach and application of it has been hotly debated in the news.⁴ This debate can be seen with the Charlottesville Unite the Right rally as well as former ESPN commentator Jemele Hill’s tweet about President Trump.⁵ While the Charlottesville rally undeniably extended beyond speech (resulting in violence, physical assaults, and the tragic death of Heather Heyer), the following analysis is intentionally limited to the speech of public concern expressed at the rally.⁶

The Supreme Court has, time and time again, declared matters of public concern and issues involving social or political commentary to be “at the heart of the First Amendment’s protection.”⁷ Additionally, the Court has also expressed, “The First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be

2. *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting), *overruled in part by* *Girouard v. United States*, 328 U.S. 61 (1946). *But see* RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 149–62 (1997).

3. *See* Steven Pinker, Opinion, *Why Free Speech is Fundamental*, BOS. GLOBE (Jan. 27, 2015), <https://www.bostonglobe.com/opinion/2015/01/26/why-free-speech-fundamental/aaAWVYFscrhFCC4ye9FVjN/story.html>.

4. *See, e.g., id.*

5. *See* Kevin Draper, *If ESPN Wants to Discipline Jemele Hill, She Might Have Law on Her Side*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/sports/jemele-hill-espn.html>; Gillian B. White, *Is Being a White Supremacist Grounds for Firing?*, ATLANTIC (Aug. 14, 2017), <https://www.theatlantic.com/business/archive/2017/08/charlottesville-employment/536838/>. Twitter is a social media site where users post short, 280-character updates called tweets. *See* Daniel Zeevi, *Twitter 101: What is Twitter Really About?*, SOC. MEDIA TODAY (Apr. 12, 2013), <https://www.socialmediatoday.com/content/twitter-101-what-twitter-really-about>; *see also* Selena Larson, *Welcome to a World with 280-Character Tweets*, CNN BUS. (Nov. 7, 2017), <https://money.cnn.com/2017/11/07/technology/twitter-280-character-limit/index.html>.

6. *See* Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.564dcde9868e; *infra* Part II.A, Part III.A.

7. *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985)).

uninhibited, robust, and wide-open.”⁸ Beyond cementing the importance of robust political debates, the Court has also said, “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”⁹ Despite these profound and precedented sentiments regarding free speech, the extent and reach of the First Amendment is often falsely understood as an absolute protection against the silencing of or pushback against one’s expression.¹⁰

In response to the speech from those who attended the Charlottesville rally and the speech contained within Jemele Hill’s tweet, many have cried for the termination of their respective positions of employment.¹¹ Contrary to popular belief, a private employer who fires an employee based on white supremacist and anti-Semitic ideas, or based on their beliefs about President Trump, is not the type of behavior the First Amendment prohibits.¹² Although the First Amendment does not protect these individuals from being terminated from their private employment, existing constitutional rationales for promoting and protecting speech of this nature paves a path for public policy concerns associated with termination in at-will employment based on political speech within Iowa’s existing public policy exception framework.¹³

Important to the understanding of First Amendment speech protections is recognizing the First Amendment is not viewpoint specific.¹⁴ The First Amendment protects the views many agree with as well as the views some—or many—are offended by.¹⁵ Despite the large volume of

8. *Id.* at 452 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

9. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

10. See AJ Willingham, *The First Amendment Doesn’t Guarantee You the Rights You Think It Does*, CNN POL., <http://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html> (last updated Sept. 6, 2018).

11. Draper, *supra* note 5; Alyssa Newcomb, *Twitter Users Are Outing Charlottesville Protesters*, NBC NEWS (Aug. 14, 2017), <https://www.nbcnews.com/tech/social-media/twitter-users-are-outing-charlottesville-protesters-n792501>.

12. The First Amendment protects individuals against government intrusion, not necessarily intrusions from private citizens. Willingham, *supra* note 10; see Draper, *supra* note 5; Newcomb, *supra* note 11.

13. See Willingham, *supra* note 10.

14. See Opinion, *The Free Speech-Hate Speech Trade-Off*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/opinion/berkeley-dean-erwin-chemerinsky.html>.

15. *Id.*

commentary across the political spectrum regarding employment termination of the Charlottesville protestors and Jemele Hill, roughly 70 percent of Americans agree “people should have the right to free speech, even if their words are highly offensive.”¹⁶ When speech is not within the reach of First Amendment protections but is of public concern, all is not lost. Public policy exceptions for at-will employment termination provide courts with the means to extend this needed speech protection to at-will employees.¹⁷

This Note provides an overview of both the Charlottesville rally and the tweet written by Jemele Hill and analyzes general legal commentary surrounding each controversy in Part II. Part III of this Note addresses whether legitimate concerns exist as to the chilling of speech done by private employees without protections for that speech. Part IV assesses Iowa as an at-will employment state currently and the importance of a recognized public policy exception for speech of public concern in the private workplace. Part V addresses an expansion of Iowa’s public policy exception for at-will employment to promote political engagement and understanding through protecting individuals’ employment in the private workplace after engaging in speech of public concern.

II. SPEECH AND PRIVATE EMPLOYMENT ON THE NATIONAL STAGE

The wave of public advocacy for private employers to fire employees based on the employee’s speech is not specific to one political party; there has been a push for the termination of individuals who espoused controversial political views across the political spectrum.¹⁸ Whether individuals spoke in support of white supremacy or in opposition to President Trump, they were met with a similar response—they should be fired.¹⁹ Although the events at the Charlottesville rally extend beyond speech, and Jemele Hill’s position and resulting fame demonstrates a unique situation, this Note focuses specifically on the aspects of the rally regarding speech of public concern and Hill’s tweet.²⁰

16. *11 Facts About Free Speech*, DOSOMETHING.ORG, <https://www.dosomething.org/facts/11-facts-about-free-speech> (last visited Nov. 18, 2017).

17. *See infra* Part IV.

18. *See* Draper, *supra* note 5; Newcomb, *supra* note 11.

19. Draper, *supra* note 5; Newcomb, *supra* note 11.

20. *See infra* Part II.

A. Charlottesville Unite the Right Protest

The Unite the Right rally was publicly planned for Saturday, August 12, 2017, to protest the removal of a Robert E. Lee statue from Emancipation Park in Charlottesville, North Carolina.²¹ Prior to Saturday's planned march, there was a less publicized torchlight march held on Friday, August 11, 2017.²² After their participation in the Charlottesville events, several individuals were terminated from their at-will employment positions.²³

1. Overview of the Charlottesville Rally.

With a permit secured and unlit torches in hand, Unite the Right demonstrators gathered on the University of Virginia campus on Friday August 11, 2017.²⁴ Roughly 250 people, "mostly young white males, many wearing khaki pants and white polo shirts," gathered at 8:45 p.m. behind the Memorial Gymnasium.²⁵

Moments later, the demonstrators lit their torches and the march began.²⁶ The demonstrators chanted different slogans, such as "Blood and soil! 'You will not replace us!' 'Jews will not replace us!'" as they marched to the Jefferson statue on the University of Virginia's campus.²⁷ Some Unite the Right demonstrators "made monkey noises at the black counterprotestors . . . [and] began chanting, 'White lives matter!'"²⁸

The following morning, around 8:00 a.m., Emancipation Park filled with a variety of protestors, including those carrying nationalist banners,

21. Heim, *supra* note 6.

22. *See id.*

23. *See* Naomi LaChance, *More Nazis are Getting Identified and Fired After Charlottesville*, HUFF POST, https://www.huffingtonpost.com/entry/more-nazis-are-getting-identified-and-fired-after-charlottesville_us_599477dbe4b0eef7ad2c0318 (last updated Aug. 17, 2017). This Note specifically addresses Cole White and Nigel Krofta by name, but they are only two of the many individuals who received employment consequences as a result of attending the Charlottesville rally. *See infra* Part II.A.2.

24. Heim, *supra* note 6; *see* German Lopez, *Why the ACLU Defends White Nationalists' Right to Protest—Including in Charlottesville*, VOX (Aug. 12, 2017), <https://www.vox.com/policy-and-politics/2017/8/12/16138326/aclu-charlottesville-protests-racism>.

25. Heim, *supra* note 6.

26. *Id.*

27. *See id.*

28. *Id.*

shields, and clubs, as well as a large number of attendees with guns.²⁹ At 11:00 a.m., “a swelling group of white nationalists carrying large shields and long wooden clubs approached the park . . . [and] [a]bout two dozen counterprotesters formed a line across the street, blocking their path.”³⁰ Before noon, a state of emergency and unlawful assembly was declared, and authorities stepped in.³¹

2. *The Social Pushback and Employment Implications After the Charlottesville Protest*

The mainstream media and online social media users were in a frenzy, posting updates and reactions to the Charlottesville events.³² Most relevant to this Note, many Twitter users focused their efforts on exposing attendees of the Charlottesville rally “to make sure their employers, friends, and neighbors kn[e]w their names.”³³ An individual by the name of Cole White was discovered to be in attendance by the Twitter account @YesYoureRacist, which has over 290,000 followers.³⁴ White, who was previously employed at Top Dog, a restaurant in Berkeley, California, was fired from his job due to his participation in the Charlottesville events.³⁵

White was not alone; another individual by the name of Nigel Krofta, who was employed in South Carolina at Limehouse & Sons, was also fired because of his attendance at the Charlottesville rally.³⁶ Krofta was seen photographed in the *New York Times* next to James Alex Fields Jr., the individual who drove into the crowd of counterprotestors, killing Heather Hayer.³⁷ The Monday following the rally, Limehouse & Sons posted on its Facebook page that “Krofta was ‘no longer an employee of Limehouse &

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* Newcomb, *supra* note 11.

33. *Id.*

34. *Id.* The Twitter account @YesYoureRacist “has been on a mission to call out racism on the internet since the account was opened in October 2012.” *Id.*

35. *Id.*

36. Alexis Simmons, *Ridgeville Man Fired After Spotted at Charlottesville Rally*, LIVE 5 NEWS WCSC, <http://www.live5news.com/story/36134125/ridgeville-man-pictured-next-to-charlottesville-murder-suspect-reportedly-facing-firing> (last updated Aug. 16, 2017). Limehouse & Sons is a welding and industrial construction services business based out of Ladson, South Carolina. LIMEHOUSE & SONS, <https://www.limehousesons.com/> (last visited Nov. 18, 2017).

37. Simmons, *supra* note 36.

Sons,' adding they 'do not condone the actions of the people involved in this horrific display that has taken place in Charlottesville.'"38 White and Krofta are just two examples of the several known individuals fired for their participation in the Charlottesville rally.³⁹

3. Can You Be Fired for Being a White Supremacist?—Responses to Charlottesville from a General Employment Law Standpoint

From a federal law standpoint, generally speaking, an at-will employee can be fired for publicly espousing racist views.⁴⁰ The First Amendment, contrary to popular belief, does not protect speech in the private workplace.⁴¹ Terminating at-will employees "for their political ideas raises few legal issues," largely because "federal law doesn't offer any protections for expressing political views or participating in political activities for those who work in the private sector."⁴²

Although it is not uncommon for at-will employees to be fired for activities and events they participate in outside of their workplace, the termination of several individuals based on their attendance at the Charlottesville rally sparked controversy among political and legal commentators alike.⁴³ Those in favor of firing Charlottesville protestors should be warned against the "quick fix" of firing individuals based on their affiliation with white supremacy.⁴⁴ While the push for employers to fire employees who attended the Charlottesville rally could be an important example of societal checks against the ideas espoused at the rally, and an important move for companies to demonstrate their disapproval of the sentiments expressed, this approach is not without criticism.⁴⁵ In regard to effectuating social change, it can be problematic to send individuals "out into the world without any means of changing," forcing them to "connect with

38. *Id.*

39. *See* LaChance, *supra* note 23.

40. Suzanne Lucas, *Should You Fire the Charlottesville Protesters?*, INC. (Aug. 14, 2017), <https://www.inc.com/suzanne-lucas/should-you-fire-the-charlottesville-protesters.html>. Lucas also noted that, under federal law, an at-will employee can also be fired for almost anything. *Id.*

41. *See id.* In this context, *workplace* is intended to be understood as excluding public-sector employment.

42. White, *supra* note 5.

43. *See id.*

44. *Id.*

45. *Id.*

others who share that same hate.”⁴⁶ Perhaps it is not as detrimental to the company who continues to employ a Charlottesville protester, for example, as some may think.⁴⁷ Nevertheless, the individuals who attended the rally and received negative social feedback have not traditionally been the ones at risk of experiencing adverse employment consequences. As one historian put it, “Historically, it [was] more dangerous as an employee to be associated with racial justice . . . than it was to be affiliated with the KKK.”⁴⁸

B. Jemele Hill, Donald Trump, and ESPN

1. An Overview of the Controversy Around Jemele Hill’s Tweet—“Donald Trump is a White Supremist”

Jemele Hill, a former ESPN commentator, tweeted from her personal Twitter account on September 11, 2017, “Donald Trump is a white supremacist who has largely surrounded himself [with] other white supremacists.”⁴⁹ Many, including Sarah Huckabee Sanders, were outraged by Hill’s tweet, deeming it a fireable offense.⁵⁰ Others joined the conversation on social media, asking is it appropriate for a commentator on a nonpolitical network such as ESPN to publicly denounce the President?⁵¹ In response to the controversy around Hill’s tweet, ESPN issued a statement asserting Hill’s tweet did not represent the network.⁵² ESPN further stated political statements from employees while they are representing the company would be inappropriate.⁵³ Bob Iger, CEO of Disney (which owns ESPN), publicly addressed the concern regarding Hill’s continued

46. *Id.*

47. *See id.*

48. *Id.*

49. Brett Bodner, *ESPN’s Jemele Hill Opens Up About Donald Trump Tweet*, DAILY NEWS (Sept. 28, 2017), <https://www.nydailynews.com/sports/espn-jemele-hill-opens-donald-trump-tweet-article-1.3527486> (the tweet has since been deleted); Draper, *supra* note 5.

50. Draper, *supra* note 5. Sarah Huckabee Sanders was the White House Press Secretary as of March 18, 2018. Eliza Relman, *The Rise of Sarah Huckabee Sanders, a Trump Administration Star Who Just Became the New White House Press Secretary*, BUS. INSIDER (July 21, 2017), <https://www.businessinsider.com/sarah-huckabee-sanders-press-secretary-spicer-job-2017-7>.

51. *See* Emily Jane Fox, *Here’s Why Bob Iger Didn’t Fire Jemele Hill*, VANITY FAIR: HIVE (Oct. 3, 2017), <https://www.vanityfair.com/news/2017/10/why-bob-iger-didnt-fire-jemele-hill>.

52. *Id.*

53. *Id.*

employment at ESPN.⁵⁴ In support of Hill's commentary about the President on Twitter, Iger stated, "It's hard for me to understand what it feels like to experience racism," and further stated, "I felt we needed to take into account what other people [at] ESPN were feeling at this time and that resulted in us not taking action."⁵⁵ However, Hill was subsequently suspended after making an additional controversial and politically charged tweet.⁵⁶

Jemele Hill, well aware of the public's reaction to her social media commentary and before her suspension, astutely articulated the difficulty of defining where to draw the line between the reach of employment and an individual's expression.⁵⁷ Hill stated, "Yes, my job is to deliver sports commentary and news. But when do my duties to the job end and my rights as a person begin?"⁵⁸ More generally, Hill's comment joins the conversation questioning where an employee's opinion stops representing the employer, or at the very least impacting the employer.⁵⁹ Hill's position as a well-known sports commentator does represent a specific and narrow example of employment where the line-drawing between employee and individual is more difficult than less publicized employment positions. However, Hill's commentary on questioning this line is transferable to employment situations similar to those who attended the Charlottesville protest in distinguishing when an employee's out-of-workplace actions begin to impact the employer and the workplace.

2. Can Jemele Hill be Fired for Calling President Donald Trump a White Supremacist?—Jemele Hill's Tweet in the Context of Connecticut Law

ESPN is based in Connecticut, which is an at-will employment state.⁶⁰ As an at-will employment state, "[P]rivate employers can generally . . . fire

54. *Id.* This statement was made at a conference in Los Angeles, California in early October of 2017.

55. *Id.*

56. Joe Pompeo, *Inside ESPN's Jemele Hill Headache*, VANITY FAIR: HIVE (Oct. 11, 2017), <https://www.vanityfair.com/news/2017/10/inside-espn-jemele-hill-headache>.

57. Hill made this statement in an article for The Undeclared, a site operated by ESPN. See Jemele Hill, *Jemele Hill on Doing the Right Thing*, UNDECLARED (Sept. 27, 2017), <https://theundeclared.com/features/jemele-hill-on-doing-the-right-thing/>.

58. *Id.*

59. *See id.*

60. Haley Britzky, *The Law That Could Protect ESPN's Jemele Hill*, AXIOS (Sept. 16, 2017), <https://www.axios.com/the-legal-argument-for-espn-jemele-hill-2486021129.html>.

employees for any reason, or for no reason at all.”⁶¹ However, Connecticut also has a statute, General Statute 31-51q, that confers upon an at-will employee the rights protected under the First Amendment, specifically with respect toward justifications for discipline or discharge.⁶² Todd Steigman, one of the attorneys who helped try the case that further defined General Statute 31-51q, thinks Hill’s speech (referring to her first tweet that labeled President Trump as a white supremacist) is protected under the statute.⁶³ *Trusz v. UBS Realty Investors*, a Connecticut case on point, held comments made by employees on matters of public concern are protected under the Connecticut statute.⁶⁴ The Connecticut statute does contain an exception that concerns the impact the employee’s activity had on job performance as well as the work relationship between employee and employer.⁶⁵ Arguably, Hill’s tweet interfered with her job performance as well as the work relationship between her and ESPN.⁶⁶ It is not unimaginable for viewers and sponsors to retract support for ESPN as a result of Hill’s commentary of the President.⁶⁷

III. IS THERE LEGITIMATE CONCERN FOR A CHILLING EFFECT ON
SPEECH OF PUBLIC CONCERN IN THE CURRENT STATE OF AT-WILL
EMPLOYMENT?—ARGUMENTS FOR AND AGAINST SPEECH PROTECTIONS
IN PRIVATE EMPLOYMENT

A. *The Lack of Laws Protecting Speech-Related Termination Creates a
Chilling Effect on Self-Expression and Public Discourse*

The concern over the use of economic power, such as employment termination, as a means of restriction on political speech is not a recent concern.⁶⁸ While many Americans have long repeated the aphorism “I can say what I like. It’s a free county,” the reality in the workplace, specifically

61. *Id.*

62. Draper, *supra* note 5.

63. *Id.*

64. Britzky, *supra* note 60; *Trusz v. UBS Realty Inv’rs*, 123 A.3d 1212, 1221 (Conn. 2015).

65. Richard Deitsch, *What Happens if ESPN Attempts to Fire Jemele Hill Over Trump Tweets?*, SPORTS ILLUSTRATED: TECH & MEDIA (Sept. 17, 2017), <https://www.si.com/tech-media/2017/09/17/jemele-hill-tweets-espn-discipline>.

66. Draper, *supra* note 5.

67. *Id.*

68. See Cox, *supra* note 1, at 12.

the private workplace, is to the contrary.⁶⁹ Justice Oliver Wendell Holmes Jr. more accurately captured the climate of employee speech rights in the workplace in this 1891 statement: “A[n] employee may have a constitutional right to talk politics, but [they have] no constitutional right to be employed.”⁷⁰ Generally, private employers have broad discretion to terminate employees for statements they have made.⁷¹ For example, in 2004 Lynne Gobbell was lawfully terminated by her employer, who supported President Bush, from her insulation-packing job due to her employer’s disapproval of her John Kerry bumper sticker.⁷² Equally surprising, Michael Italie was lawfully terminated from his machine operator job after appearing on a local radio program where he declared his bid for a local campaign on the Socialist Workers Party ballot.⁷³ When approximately 70 percent of Americans support “the right to free speech, even if their words are highly offensive,”⁷⁴ actions such as placing a bumper sticker on the vehicle used to travel to work being labeled and accepted as legally sufficient grounds for termination seems to run afoul with the beliefs “at the heart of the First Amendment’s protection.”⁷⁵

The discretion private employers have regarding the termination of their employees based on their speech creates three areas of concern for a society founded on ideals such as free speech.⁷⁶ First, United States citizens are increasingly working multiple jobs and longer hours, meaning more citizens spend an increasing amount of time at work.⁷⁷ When choosing between engaging in political speech or engaging in recreational activities, many employees in their limited off-work time choose the latter, which means “forfeiting [their] speech rights at work often means that [they] forfeit [their] speech rights altogether.”⁷⁸ Secondly, the workplace has become one of the few remaining “forums” where individuals of differing political backgrounds have the opportunity to substantially interact in the ever-

69. *Id.*

70. *Id.* (alterations in original).

71. *Id.*

72. *Id.*

73. *Id.*

74. *11 Facts About Free Speech*, *supra* note 16.

75. *See Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985)); *see also Cox*, *supra* note 1, at 15.

76. *See Cox*, *supra* note 1, at 15.

77. *Id.* at 15.

78. *Id.*

increasing politically polarized society.⁷⁹ Studies indicate, “[E]ven though Americans are working longer hours and are spending more time with their coworkers than in the past, workplace conversations have become more superficial.”⁸⁰ Lastly, and most relevant to the Charlottesville protestors and Hill, technology plays a role in blurring the line between work and private life for employees.⁸¹ Technology has increased the possibility employers will hear and be impacted by the speech an employee made while off the clock.⁸² This, in turn, discourages employees from discussing topics of public concern at *any* time.⁸³ In all three examples, the level of civic engagement decreases as a result of the absence of speech-related protections for private employees.⁸⁴ While the First Amendment exclusively protects against government suppression of speech, employment law protections need to be reshaped to include protections for speech of public concern in the private-employment sphere. While some control over the speech of private employees is appropriate, the risk of speech-related termination is a strong disincentive to conversations regarding political controversies, which is a necessary aspect of a working democracy.⁸⁵

B. The Laws Protecting Speech-Related Termination Would Unduly Restrict the Interests of Private Employers

Although this Note argues for a recognized public policy exception regarding free speech for at-will employment, such an exception could indeed place undue restrictions on private employers if constitutional protections existed for private employees.⁸⁶ Because private employers are not public employers, it would “make little sense . . . to make private employers abide by all the same requirements of procedural due process as a government employer.”⁸⁷ The Wisconsin Supreme Court went so far as to refer to the possibility of requiring courts to look for constitutional public policy exceptions for private employee termination claims as the opening of

79. *Id.*

80. *Id.* Cox comments on these studies in her article for Insights.

81. *Id.*

82. *Id.*

83. *See id.*

84. *Id.*

85. *Id.*

86. *See* Steven J. Mulroy & Amy H. Moorman, *Raising the Floor of Company Conduct: Deriving Public Policy from the Constitution in an Employment-At-Will Arena*, 41 FLA. ST. U. L. REV. 945, 958–59 (2014) [hereinafter Mulroy].

87. *Id.* at 958.

“‘a Pandora’s box’ of due process and equal protection arguments which would ‘eliminate any distinction between private and governmental employment.’”⁸⁸ Beyond the distinction between public and private employers, concerns also exist regarding the complexity of introducing constitutional rationales into the public policy exception sphere.⁸⁹ Many courts are concerned with how broadly to draw the line when deciding to include (or not include) constitutional rationales in the public policy exception.⁹⁰ While the distinction between public and private employment is important to the line-drawing conversation for constitutional rationales, it is not the end-all-be-all.⁹¹

Instead of a wholesale exclusion, this Note argues for the use of the foundational principles found within constitutional sources to inform judicial decisions with claims involving speech of public concern in the private workplace.⁹² The question should not be whether to use constitutional rationales but instead “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.”⁹³ While there is merit to the slippery slope or Pandora’s box concerns, the current political climate stresses the importance of promoting and protecting speech of public concern—even if the speech impacts private employment.

IV. IOWA AS AN AT-WILL EMPLOYMENT STATE AND THE IMPORTANCE OF A RECOGNIZED PUBLIC POLICY EXCEPTION FOR FREE SPEECH

A. Private Employment in the Context of Iowa Law

Iowa is an at-will employment state, meaning absent contractual details specifying otherwise, an employer has great discretion in declaring a reason to terminate an employee. Termination in at-will employment can occur “at

88. *Id.* at 961 (quoting *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 172 (Wis. 1986)) (noting the court rejected a public policy exception for a free speech claim).

89. *See id.* at 987.

90. *See id.*

91. *See id.* at 988.

92. *See id.*

93. Mulroy, *supra* note 86, at 961 (quoting 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 9-2(b)(2) (3d ed. 2000)).

any time, for any reason, or no reason at all.”⁹⁴ However, Iowa does have exceptions to this general rule for at-will employment termination.⁹⁵ The Iowa Supreme Court has recognized several public policy exceptions for at-will employment termination.⁹⁶ A common, uncontroversial example of the public policy exception in action is the legal recognition that an employee cannot be fired for missing work due to jury duty.⁹⁷ Another equally uncontroversial example of the public policy exception is the legal recognition that an employee cannot be fired for seeking workers’ compensation for an injury incurred while on the job.⁹⁸ Not included within Iowa’s current public policy exceptions is an exception for at-will employees who were terminated by their employer for speaking on matters of public concern, on *or* off the job.

When determining whether a public policy fits in a cause of action for wrongful termination, Iowa courts look for a clear, well-recognized public policy.⁹⁹ Although Iowa has primarily gathered public policy understanding from statutory sources, the Iowa Supreme Court has also indicated the Iowa constitution is an additional source from which public policy is understood.¹⁰⁰ The Iowa Supreme Court has also clearly stated, “Some statutes articulate public policy by specifically prohibiting employers from discharging employees for engaging in certain conduct Yet, we do not limit the public policy exception to specific statutes which mandate protection for employees.”¹⁰¹ However, the court is ultimately clear in articulating that reluctance should be used when searching beyond legislative and constitutional sources to establish a public policy exception.¹⁰²

94. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000) (quoting *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 202 (Iowa 1997)).

95. *Id.* at 281; *see also* *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 309 (Iowa 2013) (holding the public policy exception to the at-will employment doctrine applied).

96. *See, e.g., Fitzgerald*, 613 N.W.2d at 282 (citing *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988)).

97. *See* IOWA CODE § 607A.45 (2019); *see also Fitzgerald*, 613 N.W.2d at 283 n.3.

98. *Fitzgerald*, 613 N.W.2d at 284 (citing *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684–85 (Iowa 1990)) (“[P]ublic policy for employees to file [a] workers’ compensation claim [is] implicated when [an] employee is terminated after receipt of workers’ compensation benefits.”).

99. *Id.* at 283 (citing *Borschel v. City of Perry*, 512 N.W.2d 565, 567 (Iowa 1994)).

100. *Id.*

101. *Id.* (citing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 300 (Iowa 1998)).

102. *See id.*

Once the public policy has clearly been identified, the terminated employee must then show the termination jeopardized or undermined the public policy at issue.¹⁰³ Furthermore, an employee must “show the conduct engaged in not only furthered the public policy, but dismissal would have a *chilling effect* on the public policy by *discouraging the conduct*.”¹⁰⁴ The mandatory inclusion of a connection to the public policy and the subsequent chilling of the public policy guarantees the employer an element of control over company management, balancing the “competing interests of society, employers, and employees in light of the modern business experience.”¹⁰⁵ This necessary connection also emphasizes the court’s continued adherence to traditional at-will employment practices.¹⁰⁶

Speech of public concern, grounded in both the United States Constitution and the Iowa constitution, remains an area of public policy within at-will employment in which protection is not provided, despite the likely chilling effect the lack of protections has on political speech among Iowans.¹⁰⁷

B. *The Public Policy Exception and At-Will Employment Termination—
Analysis on the National Stage*

In the twentieth century, post-*Lochner* era, policy-based exceptions for at-will employment issues were beginning to be accepted by courts.¹⁰⁸ While courts do recognize public policy exceptions at varying degrees, there has been less enthusiasm among courts for recognizing exceptions in public policy cases based on constitutional principles, such as the First Amendment, than those exceptions grounded in statutory or regulatory rules.¹⁰⁹ Other courts have rejected the use of constitutional rationales in determining

103. *Id.* at 283–84.

104. *Id.* at 284 (emphasis added) (citing *Teachout*, 584 N.W.2d at 303).

105. *Id.* at 283.

106. *Id.*

107. *See* U.S. CONST. amend. I; IOWA CONST. art. I, § 7.

108. *See* *Petermann v. Int’l Bhd. of Teamsters, Local 396*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959); *see also* Mulroy, *supra* note 86, at 952. *Lochner v. New York* “symbolizes the era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures” in the employment sphere. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (citation omitted).

109. *See* MARK W. BENNETT ET AL., EMPLOYMENT RELATIONSHIPS: LAW & PRACTICE § 4.06(B) (Supp. 2016) (listing nine states that do not reference constitutional rationales for claims of the public policy exception).

public policy exceptions altogether.¹¹⁰ However, other courts have accepted reliance on constitutional rationales for public policy exceptions.¹¹¹

Generally, the rationale behind the public policy exceptions for private employees is that the exceptions provide for the public interest of preventing overly coercive employers, as well as protecting employees from the loss of personal rights.¹¹² The elements for a cause of action under a public policy exception include the following: “(1) The existence of a clear public policy . . . (2) The termination placed that policy in jeopardy . . . (3) The plaintiff’s termination was actually motivated by conduct related to the public policy . . . and (4) The employer lacked a legitimate business justification for terminating the employee”¹¹³ In addition to these foundational elements, public policy exceptions refer to the need for an adverse employment action to be substantial and clear in order for employers to be put on proper notice.¹¹⁴ There are four categories that typically arise in public policy exception claims—most notable to this Note is the termination of an employee for exercising a legal right or privilege.¹¹⁵

110. See Mulroy, *supra* note 86, at 959; *see, e.g.*, Bruley v. Vill. Green Mgmt. Co., 592 F. Supp. 2d 1381, 1387–88 (M.D. Fla. 2008) (holding the employee’s claim of wrongful discharge must rely on a statutory cause of action), *aff’d sub nom.* Bruley v. LBK, L.P., 333 F. App’x 491 (2009).

111. See Mulroy, *supra* note 86, at 958–60; *see, e.g.*, Gardner v. Loomis Armored Inc., 913 P.2d 377, 380 (Wash. 1996) (“In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.”) (quoting Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984)). It is not uncommon for courts to reference constitutional provisions in a similar manner. *See* Gantt v. Sentry Ins., 824 P.2d 680, 687–88 (Cal. 1992) (using “constitutional or statutory provisions” language), *overruled by* Green v. Ralee Eng’g Co., 960 P.2d 1046 (Cal. 1998); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. 2010) (using “the constitution, statutes, regulations, promulgated pursuant to statute, or rules created by a governmental body” language); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983) (using “constitutional or statutory provision” language).

112. Mulroy, *supra* note 86, at 954.

113. *Id.* (citing Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 282 n.2 (Iowa 2000) (referencing this four-part foundation for a public policy exception claim)); Collins v. Rizkana, 652 N.E.2d 653, 657–58 (Ohio 1995)).

114. *Id.* at 955 (citing Birthisel v. Tri-Cities Health Servs. Corp., 424 S.E.2d 606, 612 (W. Va. 1992)).

115. See *id.* (citing Field v. Phila. Elec. Co., 565 A.2d 1170, 1176 (Pa. Super. Ct. 1989)). The other common situations include “those where employers fired employees: (1) For refusing to commit an illegal act; (2) For performing a legal duty; . . . or (4) In retaliation for reporting misconduct.” *Id.* (citing Field, 565 A.2d at 1176).

As this Note has previously addressed regarding Iowa public policy, legal rights and privileges such as jury duty or workers' compensation are understood as uncontroversial public policy exceptions.¹¹⁶ *Novosel v. Nationwide Insurance Co.*, a leading case on the topic, stated, "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 Worker's Compensation claim," thus suggesting the possibility of expansion for Iowa to include speech of public concern.¹¹⁷ The *Novosel* court fleshed out when the public policy exception applied to speech by proposing a four part inquiry:

(1) Does the speech prevent the employer from efficiently carrying out its responsibilities?; (2) Does it impair the employee's ability to carry out his or her own responsibilities?; (3) Does it interfere with essential and close working relationships?; and (4) Does the manner, time, and place in which the speech occurs interfere with business operations?¹¹⁸

This four-part inquiry aimed to strike the proper balance between the interests of the employee and the employer.¹¹⁹ When free speech, as guaranteed through the First Amendment, is understood as a legal right or privilege and the *Novosel* four-part inquiry is applied, a workable standard of protection for free speech by an at-will employee is provided.

C. The Inclusion of the First Amendment as a Source for Iowa's At-Will Employment Public Policy Exception

Considering the reactions to the speech made by both the Charlottesville protestors and Jemele Hill, it is clear that speech, as it relates to one's private employment status, is of national interest. If a situation similar to either the Charlottesville protest or Hill's tweet were to occur in Iowa, it is likely the current law would favor the employer's prerogative to terminate the respective positions of employment.¹²⁰ However, California, Colorado, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South

116. *Fitzgerald*, 613 N.W.2d at 283 n. 3.

117. Frank J. Cavico, *Employment At Will and Public Policy*, 25 AKRON L. REV. 497, 509 (1992) (quoting *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899 (3d Cir. 1983)).

118. *Id.* (citing *Novosel*, 721 F.2d at 901).

119. *Id.*

120. *See Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 303 (Iowa 2013) (defining the public policy exception as narrow).

Carolina, West Virginia, Washington, and Wisconsin all have legislation that bars employers from retaliating against employees due to their engagement in political activities.¹²¹ While these protections in each state came from the legislative branch and range from broad (political activities concerning participation in social movements)¹²² to narrow (political activities concerning party affiliation and campaign contributions),¹²³ they exist and are a step in the right direction against chilling speech of public concern.¹²⁴

The most recent expansion of Iowa's public policy exception for at-will employment occurred in the divided opinion of *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*¹²⁵ The *Dorshkind* holding was specific to whistleblowing and made clear the public policy exception is narrow.¹²⁶ Because whistleblowing was a divided decision in *Dorshkind* regarding the expansion of the public policy exception for private employment, a public policy exception for speech of public concern seems like a stretch.¹²⁷ However, the topics the Charlottesville protestors voiced and the issues related to President Trump are matters that Iowans need to hear more about, not less. By relying on the Iowa constitution as a source for public policy, speech of public concern can—and should—be encompassed by the public policy exception in at-will employment termination.¹²⁸ Speech of public concern is a clear goal of public policy, and dismissal based on this speech could have a chilling effect by discouraging speech altogether.¹²⁹

121. Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 313 (2011).

122. See, e.g., *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979).

123. See, e.g., *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at *9 (N.D. Cal. Mar. 11, 1996); Volokh, *supra* note 121, at 313.

124. See Volokh, *supra* note 121, at 313.

125. *Dorshkind*, 835 N.W.2d at 309; Fran Haas, *Iowa Supreme Court Expands Exception to At-Will Employment*, ON BRIEF: IOWA'S APPELLATE BLOG (Aug. 7, 2013, 1:57 PM), <https://www.iowaappeals.com/iowa-supreme-court-expands-exception-to-at-will-employment/>.

126. See Haas, *supra* note 125.

127. See *Dorshkind*, 835 N.W.2d at 311 (Mansfield, J., concurring in part and dissenting in part) (noting the court's description of Iowa's public policy exception as narrow).

128. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 283 (Iowa 2000) (citing *Borschel v. City of Perry*, 512 N.W.2d 565, 568 (Iowa 1994)).

129. See *id.* at 284 (citing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 303 (Iowa 1998)); Cox, *supra* note 1, at 15.

V. CONCLUSION

Given the history of the United States and the devotion to promoting free speech, as well as the current climate of political intolerance, protections for private employees who engage in speech of public concern are needed.¹³⁰ The protections provided to public employees regarding speech of public concern during off-work hours is in sharp contrast with the lack of protections for speech of public concern during off-work hours for private employees. The First Amendment is, of course, only a protection against undue government restriction.¹³¹ However, the rationales that gave rise to the First Amendment can be—and should be—applied to the power structure of private employment as well. When the value in need of protection from a concentrated power, such as a private employer, is the declared right of speech of public concern, the imposition of power can be understood as analogous to the recognized threat of unrestricted government power.¹³²

The implementation of a public policy exception that includes protection for speech of public concern in Iowa law would not be unprecedented in the United States.¹³³ It is in the public's best interest for Iowa to follow in the footsteps of the states with protections for private employee speech in hopes of promoting increased political engagement and understanding among Iowans.

*Olivia Brooks**

130. See *11 Facts About Free Speech*, *supra* note 16; see also Cox, *supra* note 1, at 15.

131. See Willingham, *supra* note 10.

132. Mulroy, *supra* note 86, at 961 (quoting FRIESEN, *supra* note 93, § 9-2(b)(2)).

133. Volokh, *supra* note 121, at 311.

*B.A., Luther College, 2016; J.D., Drake University Law School, May 2019.