

NEW YORK UNIVERSITY
JOURNAL OF INTELLECTUAL PROPERTY
AND ENTERTAINMENT LAW

VOLUME 8

SPRING 2019

NUMBER 2

SPEAKING ABOUT POLITICS, A FIREABLE OFFENSE?
THE LEGALITY OF EMPLOYEE SPEECH RESTRICTIONS
IN THE ENTERTAINMENT INDUSTRY

CHLOE L. KAUFMAN*

Despite the commonly shared belief that Americans have an undeniable right to freedom of speech, private-sector employees receive no constitutional protection for employer regulations of or reactions to their speech and federal and state statutes provide extremely limited protections. Consequently, on-air professionals in the entertainment industry, including Curt Schilling, Kathy Griffin, Colin Kaepernick, Jemele Hill and Tomi Lahren have been terminated, suspended or otherwise retaliated against after making expressions of political speech deemed controversial by the public and their respective employers.

Tomi Lahren's dispute against her employer demonstrates the severity of a private employer's ability to restrict political speech under U.S. law. By analyzing Lahren's complaint and the existing legal framework, this Note highlights how private employers' unrestricted power disproportionately affects employees in the entertainment industry, risks a chilling effect on private employee speech across industries, and consequently cuts against the foundational values of American democracy.

* J.D. Candidate, New York University School of Law, 2019; B.A., History of Art, summa cum laude, University of Pennsylvania, 2016. The author would like to thank the 2018-19 Editorial Board of the Journal of Intellectual Property & Entertainment Law and Professor Day Krolik for their invaluable assistance in the editing process.

INTRODUCTION.....	377
I. LAHREN V. BECK	383
A. <i>Wrongful Termination Suit</i>	385
B. <i>Settlement</i>	387
II. LEGAL PROTECTIONS FOR PRIVATE EMPLOYEE POLITICAL SPEECH.....	388
A. <i>Shortcomings of the First Amendment</i>	388
B. <i>Federal Statutory Protection for Employee Political Speech</i>	391
1. <i>National Labor Relations Act</i>	391
2. <i>Federal Voter Protection Laws</i>	391
C. <i>State Statutes Protection for Employee Political Speech</i>	393
1. <i>Protections for Political Activity</i>	393
2. <i>Protections Against Private Discrimination Based on Politics</i>	395
3. <i>Protections for Political Speech</i>	398
i. Connecticut’s Free Speech Statute.....	399
ii. Narrow Judicial Interpretation of Connecticut’s Free Speech Statute	400
.....	400
iii. Additional Limitations of Connecticut’s Free Speech Statute....	402
III. CONSEQUENCES AND PROPOSED SOLUTIONS	403
A. <i>Chilling Effect of Inadequate Protection for Private Employee Political</i>	
<i>Speech in the Entertainment Industry</i>	403
B. <i>Proposals</i>	406
1. <i>Contractual Solutions</i>	406
i. Negotiate for Protections in the Employment Contract.....	406
ii. Collective Bargaining for Enhanced Speech Protection.....	406
2. <i>Statutory Solutions</i>	406
i. Amend Title VII to Include “Political Beliefs” as a Protected	
Class	407
ii. Federal Statute Protecting Employee Speech Relating to Public	
Concern	407
iii. State Statutory Solution.....	407
CONCLUSION	407

INTRODUCTION

“I can say what I want—it’s a free country” is a familiar phrase in the United States. This schoolyard retort and its variations are emphatically repeated and believed by American citizens. Children and adults alike frequently utter the phrase to end both petty arguments and serious debates. The prevalence of this aphorism is a reflection of the significance of the First Amendment in American society. Freedom of expression, widely recognized as one of the most cherished

constitutional rights,¹ is more than just an aspirational value, it is the foundation on which American democracy rests.

Representative government depends upon an open marketplace of ideas. The ability to express and exchange ideas is essential to establishing an informed and engaged public, who can in turn elect officials to effectively represent their interests. Justice Brennan, a staunch defender of the freedom of speech and a key figure in the development of modern First Amendment doctrine, recognized that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”² Moreover, Justice Brennan acknowledged that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”³ Because of the interdependent relationship between freedom of speech and democratic governance, the Supreme Court has consistently recognized that speech relating to public concern is entitled to special protection.⁴

However, despite the importance of the First Amendment, the state action doctrine limits First Amendment protection to the actions of the government.⁵ Since the First Amendment does not extend to the private sector, private-sector employees receive no constitutional protection for employer regulations of or reactions to their speech.⁶ The combination of the increasing privatization of the workforce, the rise of technological innovations enabling employees to work beyond the physical boundaries of the office, and the burgeoning of social media have introduced new issues regarding private employee speech, particularly speech relating to public concern.

Numerous on-air professionals in the entertainment industry have learned the hard way that the pervasive “I can say what I want—it’s a free country” sentiment is not true in reality.⁷ This American belief in unbounded freedom of speech is

¹ See Mark T. Carroll, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. LEGIS. 35 (1981).

² *Roth v. United States*, 354 U.S. 476, 484 (1957).

³ *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

⁴ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

⁵ *State Action Requirement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/state_action_requirement (last visited Mar. 27, 2019); see, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

⁶ See *State Action Requirement*, *supra* note 5.

⁷ See Richard Sandomir, *ESPN Fires Schilling Over Offensive Post*, N.Y. TIMES, Apr. 21, 2016, at B11; William Cummings, *Tomi Lahren Settles Lawsuit with Glenn Beck, 'The Blaze,' USA TODAY* (May 1, 2017, 6:40 PM), www.usatoday.com/story/news/politics/onpolitics/

misguided because, as discussed *infra*, a significant portion of American society, those working in the private sector, cannot say whatever they want. Private employers have an unconstrained ability to censor the speech of their employees and retaliate against their employees for speech at or outside of the workplace.

Admittedly, there are certain limitations on speech in the private employment context that are reasonable and often deemed necessary to maintain a safe and productive work environment and to protect an employer's brand and values. For example, it is important that employees follow specific employer-provided directions for communicating with clients and coworkers at the workplace. Still, private employers' unbounded ability to limit expressions relating to public life and government outside of the workplace threatens a foundational American value in the freedom of expression and the system of democratic governance.

The termination and suspension of employees in the entertainment industry for expressing political speech is not a new issue. However, the heightened political divide within Trump's America has brought the employment status of entertainers who make controversial, and in some cases distasteful, statements regarding public life and politics to the forefront of the twenty-four-hour news cycle. Curt Schilling, Kathy Griffin, Colin Kaepernick, Jemele Hill, and Tomi Lahren are a sampling of high-profile, on-air professionals who have recently been terminated, suspended, or otherwise retaliated against after making expressions of political speech deemed controversial by the public and their respective employers.⁸ While the speech conveyed by each of these individuals varied in substance, form, and decency, the expressions all constituted a communication of views and opinions on public life.

ESPN fired Major League Baseball analyst Curt Schilling in April 2016 after he shared a post on his Facebook page that commented on the then-current debate surrounding a proposed North Carolina law to bar transgender people from using bathrooms not matching the gender on their birth certificates.⁹ The post included a meme of a man in a wig and women's clothing that says, "LET HIM IN! to the

2017/05/01/tomi-lahren-settles-glenn-beck-lawsuit/101177334/; 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>; Sandra Gonzalez, *CNN Fires Kathy Griffin*, CNN (May 31, 2017, 2:37 PM), <http://money.cnn.com/2017/05/31/media/cnn-kathy-griffin>; see also Sophie Tatum, *Trump: NFL Owners Should Fire Players Who Protest the National Anthem*, CNN (Sept. 23, 2017, 4:05 PM), <https://www.cnn.com/2017/09/22/politics/donald-trump-alabama-nfl/index.html>.

⁸ See Sandomir, *supra* note 7; Cummings, *supra* note 7; Draper, *supra* note 7; Gonzalez, *supra* note 7; Tatum, *supra* note 7.

⁹ See Sandomir, *supra* note 7.

restroom with your daughter or else you're a narrow-minded, judgmental, unloving racist bigot who needs to die."¹⁰ Schilling added his own commentary below the image: "A man is a man no matter what they call themselves. I don't care what they are, who they sleep with, men's room was designed for the penis, women's not so much. Now you need laws telling us differently? Pathetic."¹¹

One month after Schilling's termination, comedian and actress Kathy Griffin posted on her Instagram and Twitter accounts an image of herself holding a fake, but nonetheless realistic and gory, decapitated head of President Trump.¹² Although the comedian explained on Twitter that she created the image to mock the "Mocker in Chief," the violent image struck a chord with the public.¹³ Following the backlash, CNN terminated Griffin from her 10-year contract as the co-host of the network's annual New Year's Eve program, Squatty Potty fired her as the company's marketing spokesperson, and the venues for Griffin's remaining scheduled tour dates canceled her upcoming engagements.¹⁴

In August 2016, Colin Kaepernick, then-quarterback of the San Francisco 49ers, sat on the bench during the national anthem before the start of a game. Kaepernick explained his rationale to NFL Media:

I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color To me, this is bigger than football and it would be selfish on my part to look the other way. There are bodies in the street and people getting paid leave and getting away with murder.¹⁵

Then on September 1, 2016, instead of sitting, Kaepernick decided to kneel during the anthem.¹⁶ This action inspired other players to follow suit and incited a national controversy. While some praised Kaepernick for his courage, others

¹⁰ *Id.*

¹¹ *Id.*

¹² Gonzalez, *supra* note 7.

¹³ Sandra Gonzalez, *Kathy Griffin: 'I Beg for Your Forgiveness' for Gruesome Anti-Trump Photo Shoot*, CNN (May 31, 2017 1:32 PM), <https://www.cnn.com/2017/05/30/entertainment/kathy-griffin-trump-tyler-shields/index.html>.

¹⁴ Gonzalez, *supra* note 7.

¹⁵ Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL (Aug. 28, 2016, 4:33 PM), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-protest-of-national-anthem>.

¹⁶ Billy Witz, *This Time, Colin Kaepernick Takes a Stand by Kneeling*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/sports/football/colin-kaepernick-kneels-national-anthem-protest.html>.

perceived this action as disrespectful to the American flag. Public opinion polls suggested that many fans boycotted the NFL in response to these protests.¹⁷ President Trump expressed his views at a rally, saying that team owners should fire players who kneel during the national anthem.¹⁸

The Trump administration maintained a similar stance when White House press secretary Sarah Huckabee Sanders weighed in on the employment of Jemele Hill, an ESPN sportscaster, after Hill tweeted, “Donald Trump is a white supremacist who has largely surrounded himself w/ other white supremacists.”¹⁹ Sanders claimed that by posting this tweet, Hill committed a “fireable offense.”²⁰ While Hill was not fired for her disparaging comments about the President, ESPN did consider it to be a violation of their social media policy.²¹ About a month later, in fact, ESPN sanctioned Hill with a two-week suspension for violating their social media policy once again—this time, by suggesting on Twitter that fans should boycott the Dallas Cowboys’ advertisers in retaliation for Cowboys’ owner Jerry Jones’ statement about benching NFL players who “disrespect the flag.”²²

The firing of political commentator, Tomi Lahren, is one of the most provocative employment terminations immediately following a highly-publicized expression of political speech. Two days after Lahren expressed her opinion that the government should not make abortion illegal, her employer, TheBlaze, a conservative media organization, suspended her self-titled show, *Tomi*, and revoked her access to her social media accounts. Lahren sued TheBlaze for wrongful termination.²³ However, the parties came to a settlement before going to trial.²⁴

¹⁷ Mike Ozanian, *Confirmed: NFL Losing Millions of TV Viewers Because of National Anthem Protests*, FORBES (Oct. 5, 2016, 12:58 PM), <https://www.forbes.com/sites/mikeozanian/2016/10/05/confirmed-nfl-losing-millions-of-tv-viewers-because-of-national-anthem-protests/#7efac3e3226c>.

¹⁸ Tatum, *supra* note 7.

¹⁹ Jemele Hill (@jemelehill), TWITTER (Sept. 11, 2017, 8:54 PM), <https://twitter.com/jemelehill/status/907391978194849793>.

²⁰ Draper, *supra* note 7.

²¹ Kevin Draper & Ken Belson, *Jemele Hill Suspended by ESPN After Response to Jerry Hones*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/sports/football/jemele-hill-suspended-espn.html>.

²² *Id.*

²³ Alana Abramson, *Tomi Lahren Sues Glenn Beck for Wrongful Termination over Abortion Comments*, FORTUNE (Apr. 7, 2017), <http://fortune.com/2017/04/07/tomi-lahren-glenn-beck-the-blaze-wrongful-termination-abortion/>.

²⁴ Cummings, *supra* note 7.

Lahren's employment dispute demonstrates the severity of a private employer's ability to restrict political speech under U.S. law and the particular challenges facing professionals in the entertainment industry. This Note analyzes Lahren's legal complaint against TheBlaze to demonstrate the near limitless ability for private employers to restrict and retaliate against an employee's political speech in certain, if not all, jurisdictions. Further, this Note highlights how this unrestricted power disproportionately affects employees in the entertainment industry, risks a chilling effect on private employee speech across industries, and consequentially cuts against the foundational values of American democracy.

Part I offers context to the argument by providing an overview of the history of Tomi Lahren's employment with TheBlaze, the details of her employment contract, the facts and circumstances preceding her suit, her legal claims against TheBlaze, and the public details of her settlement.

Part II discusses the limited nature of existing constitutional, federal, and state statutory protections for private employee political speech, such as Lahren's. This section discusses the First Amendment's inability to protect private employee speech and analyzes the narrow and scattered existing federal protections, as well as the varying state statutory protections, for political expression. While the extent of many states' protection for private employee political expression is limited to electoral activity (including Texas, the state in which Lahren filed suit), some states have enhanced statutory safeguards. To illustrate, this section will focus on Connecticut's free speech statute, which is by far the most protective statute. In doing so, this section demonstrates the need for even greater protection for political speech because of the nature of employer-employee relations in the entertainment industry.

Part III highlights the consequences of insufficient protections for private employee political speech in the entertainment industry as well as the broader consequences for private employees in general. This section also proposes possible solutions to this pressing issue. The two most plausible solutions that can and should be implemented by private parties are (1) for employees, especially those like Lahren who are hired to discuss controversial topics, to negotiate with their employers to include protections against retaliation for expressions of speech relating to politics in their employment contracts and (2) for unions to collectively bargain for enhanced speech protections for members. Legislation may offer a third possible solution. Since employer restriction of speech relating to politics is of immense importance to American democracy and is an issue facing employees across industries, a statutory solution would be ideal because it would protect all employees, not just those who have the foresight or bargaining power to negotiate for protection. Admittedly, a statutory solution would not provide immediate protection and perhaps is not

realistic because of political gridlock and the challenges involved in garnering support for proposed legislation. That said, Congress could, at least in theory, address this pressing issue by either (1) amending the federal anti-discrimination law to include “political beliefs” as a protected class or (2) enacting a federal free speech statute based on Connecticut’s employee speech protection law. Alternatively, state legislatures could enact state versions of either of these statutes.

I LAHREN V. BECK

Tomi Lahren is a conservative political commentator who prides herself on her self-proclaimed ability to represent and connect with the people of Middle America.²⁵ Lahren’s media career catapulted immediately after graduating from college when an interview for an internship at One America News Network resulted in an offer to host her own show.²⁶ At only twenty-two-years-old, Lahren began hosting the self-titled *On Point with Tomi Lahren*, which reached an average of fifteen million American homes.²⁷ Lahren rapidly developed social media fame amongst the conservative media.²⁸

In September 2015, less than two years after Lahren began *On Point*, she signed a two-year employment contract with TheBlaze as a “broadcast host commentator” for *Tomi*, a new self-titled one-hour television program to be aired on BlazeTV, and as an “online video commentator and writer” for TheBlaze.com.²⁹ Lahren’s forthright patriotism, incendiary demeanor, and right-leaning opinions resonated with her conservative viewers.³⁰ She became best-known for her three-minute segments called “Final Thoughts,” which one BBC journalist characterized as “biting, outlandish, dripping with sarcasm and - depending on your political perspective - either righteous and rousing or obnoxious and infuriating.”³¹

²⁵ *Tomi Lahren Labels Herself ‘The Voice of Middle America’ on ‘The View,’* NEWSONE (Mar. 17, 2017), <https://newsone.com/3697068/tomi-lahren-makes-first-appearance-on-the-view/>.

²⁶ Christy Hammond, *Rapid City Woman Anchors Political Talk Show at 22*, RAPID CITY JOURNAL (Sept. 21, 2014), https://rapidcityjournal.com/lifestyles/local/rapid-city-woman-anchors-political-talk-show-at/article_a59b782a-2f96-5b4a-9dad-a7b920d4e79d.html.

²⁷ *Id.*

²⁸ Kyle Chayka, *Tomi Lahren Has Some Thoughts*, RINGER (Oct. 12, 2016, 9:15 AM), <https://www.theringer.com/2016/10/12/16039472/tomi-lahren-profile-499f9e1930f9>.

²⁹ Complaint at Exhibit A, *Lahren v. Beck*, No. DC-17-04087 (Tex. Dist. Ct. Dallas Cty. filed Apr. 7, 2017).

³⁰ Hammond, *supra* note 26.

³¹ Mike Wendling, *Tomi Lahren: The Young Republican Who's Bigger than Trump on Facebook*, BBC NEWS (Nov. 30, 2016), www.bbc.com/news/world-us-canada-38021995.

A little over a year into her contract with TheBlaze, Lahren denied to reporters that differences in opinion amongst employees caused tension in the studios. She stated: “Luckily we have an environment where we can disagree.”³² Ironically, less than three months after that interview, TheBlaze publicly denounced and suspended Lahren as a host and a contributor because of a one-off expression of her political views which she had made while sitting as a guest on another TV show.³³

In the lawsuit Lahren filed against TheBlaze, she alleged that her suspension resulted from her guest appearance on *The View*, a mainstream daytime television show targeted towards female viewers, on March 17, 2017.³⁴ During the political segment of the show, Lahren answered the hosts’ questions about her rise to fame and her views on highly-debated issues, with a particular emphasis on those involving women’s rights.³⁵ Towards the end of the segment, one of the hosts, Sunny Hostin, observed, “You call yourself a conservative Republican and a constitutional conservative, but you also consider yourself pro-choice.”³⁶ Stunned, another host, Paula Faris, interjected, “Are you? You’re pro-choice?”³⁷ Unruffled by the question, Lahren answered in the affirmative and collectedly reconciled her position as a pro-choice conservative:

I’m pro-choice and here is why. I am a constitutional, you know, someone that loves the Constitution. I am someone that is for limited government, so I can’t sit here and be a hypocrite and say I’m for limited government but I think the government should decide what women do with their bodies. Stay out of my guns, and you can stay out of my body as well. . . . And you know, I get a lot of attacks from conservative women as well. Equal hate from all sides for me.³⁸

Immediately after her appearance on *The View*, Tomi alleged that she was “applauded for her participation by her producer” who was present for her appearance and that she “received several congratulatory emails from [TheBlaze] employees.”³⁹ However, Lahren’s pro-choice statements stirred a fervent public backlash on social media. Conservatives accused Lahren of being inconsistent in her

³² *Id.*

³³ Complaint, *supra* note 29, at 4-5.

³⁴ *Id.* at 4.

³⁵ *The View: Tomi Lahren* (ABC television broadcast Mar. 17, 2017).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Complaint, *supra* note 29, at 4.

beliefs and of having “#NoPrinciples.”⁴⁰ The day after the episode aired, Lahren posted on her Twitter account, “I speak my truth. If you don’t like it, tough. I will always be honest and stand in my truth.”⁴¹ Lahren’s followers expressed disappointment in her statement by replying to the tweet with posts such as “conservative values will never include a pro-abortion stand”⁴² and “so you’re a fake. How sad. I, like many, looked up to you. What a disappointment.”⁴³

A. WRONGFUL TERMINATION LAWSUIT

On April 7, 2017, Lahren filed a complaint for breach of employment contract in the District Court of Dallas County, Texas against her employer, TheBlaze (referenced in the complaint as “TBI”), and the company’s founder, Glenn Beck.⁴⁴ Since Lahren’s employment contract only allowed termination for cause, she alleged that TheBlaze breached the contract by terminating her without sufficient cause.⁴⁵ She argued that termination for her political expression on *The View* did not fall under any of the contractually agreed upon provisions constituting cause.⁴⁶

Lahren’s legal complaint alleged that a few days after the airing of the episode and the Twitter backlash, TheBlaze’s Human Resources Director/Supervisor informed her that she was “suspended indefinitely and that she need not return to TBI’s office(s), all because of her pro-choice opinions expressed on *The View*.”⁴⁷ The complaint further alleged that several days after that notice, Lahren received another call informing her that “her employment was terminated, she would have no more shows, but TBI would nevertheless continue to pay [her salary].”⁴⁸ Lahren was also instructed to remain silent, and TheBlaze allegedly forced her to “go dark” on social media by withdrawing access to her social media accounts and prohibiting her from making any public comments.⁴⁹

⁴⁰ The Reagan Battalion (@ReaganBattalion), TWITTER (Mar. 17, 2017, 6:27 PM), <https://twitter.com/ReaganBattalion/status/842864932311982080>.

⁴¹ Tomi Lahren (@TomiLahren), TWITTER (Mar. 18, 2017, 11:04 AM), <https://twitter.com/TomiLahren/status/843115966477164544>.

⁴² @shejambert, TWITTER (Mar. 18, 2017, 12:01 PM), <https://twitter.com/shejambert/status/843130237818982402>.

⁴³ @Jali_Cat, TWITTER (Mar. 20, 2017, 8:47 PM), https://twitter.com/Jali_Cat/status/843987443653271552.

⁴⁴ Complaint, *supra* note 29.

⁴⁵ *Id.*

⁴⁶ *Id.* at Exhibit A §11.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.*

⁴⁹ *Id.* at 4-5.

Lahren claimed that she was wrongfully terminated by TheBlaze; however, whether she was even in fact “terminated” from her employment is subject to debate. Although TheBlaze canceled *Tomi*, revoked Lahren’s employment duties, and withheld access to her social media accounts, TheBlaze agreed to continue to pay her salary, which is a strong indication of her continued employment with TheBlaze.⁵⁰ Still, while the factual issue of whether or not Lahren was formally terminated is debatable, her suspension from employment and the retaliation she experienced from TheBlaze and its employees is indisputable.

TheBlaze and Beck’s actions and inactions following Lahren’s expression of her personal political views on *The View* clearly constituted retaliation against Lahren. In addition to suspending her show, preventing her from accessing her social media accounts, and terminating her email account, Beck went so far as to use his own Twitter account and Glennbeck.com as platforms to publicly chastise Lahren for the political views and opinions she expressed on *The View*.⁵¹

Furthermore, as Lahren’s employer, TheBlaze and Beck allowed for harassment in the workplace. Days after her appearance on *The View*, Lahren returned to the office to find that co-workers had affixed yellow caution tape stretched in the formation of an “X” to her dressing room door.⁵² There is no doubt that Beck’s public rhetoric and opinions about Lahren’s statements encouraged and condoned such behavior by employees within TheBlaze’s office. Moreover, in response to Lahren’s statements made on *The View*, TheBlaze published a scathing article which inaccurately portrayed her as having “suddenly reversed course on abortion,”⁵³ misrepresented her stance on abortion,⁵⁴ and accused her of pandering to *The View*’s mainstream audience.⁵⁵

⁵⁰ *Id.* at 4.

⁵¹ Glenn Beck (@glennbeck), TWITTER (Mar. 20, 2017, 12:16 AM), <https://twitter.com/glennbeck/status/843677593719242752?s=20>; Glenn Addresses Tomi Lahren's Pro-Choice Stance on 'The View,' GLENNBECK.COM (Mar. 20, 2017), <https://www.glennbeck.com/2017/03/20/glenn-addresses-tomi-lahrens-pro-choice-stance-on-the-view/>.

⁵² Complaint, *supra* note 29, at 5.

⁵³ Lahren had publicly shared these same pro-choice views on abortion months prior to her appearance on *The View*, and Lahren alleged that TheBlaze knew of these expressions and never took any issue with it. Complaint, *supra* note 29, at 4.

⁵⁴ Lahren’s position is not that abortion is an okay practice, but rather that the government should not have a role in deciding whether or not it is acceptable. *The View: Tomi Lahren*, *supra* note 35.

⁵⁵ Matt Walsh, *Pro-Lifers Aren't the Ones Being Hypocrites, Tomi.*, THEBLAZE (Mar. 20, 2017, 2:56 PM), www.theblaze.com/contributions/pro-lifers-arent-the-ones-being-hypocrites-tomi (“Tomi Lahren . . . went on *The View* this past Friday, suddenly reversed course on abortion, . . .

Both Beck's conduct as well as TheBlaze's apparently retaliatory measures invalidated Lahren in her professional capacity and undermined her ability to reach her social media audience. At the same time, Lahren was prevented from working for any other employer because her employment agreement with TheBlaze remained in place. In the article that TheBlaze published the day after the controversial episode of *The View* aired, the author Matt Walsh, a colleague of Lahren, stated, "as far as I know, [Lahren] is the only pro-choicer" at TheBlaze.⁵⁶ TheBlaze's decision to publish this article, in conjunction with Beck's Twitter posts and the retaliatory actions taken against Lahren, suggests the company had a *de facto* policy of promoting pro-life positions and, as argued in court filings, that Beck and TheBlaze had been subjecting employees to a "political-opinion litmus test."⁵⁷

B. SETTLEMENT

Lahren, Beck, and TheBlaze announced having reached an out-of-court settlement on May 1, 2017.⁵⁸ The agreement formally released Lahren from her contract and allowed her to keep the Facebook page associated with her time as a pundit for TheBlaze, which had amassed more than four million followers by the time of the agreement.⁵⁹ However, the agreement also required that Lahren return all "intellectual property" owned by TheBlaze that had been posted on the Facebook page.⁶⁰

Although this settlement prevented Lahren's lawsuit from going to trial and rendered the questions of fact moot, both the legal issues raised and not raised in the litigation that would have otherwise proceeded warrant further scrutiny. The underlying rationale for Lahren's claim against TheBlaze was the retaliatory action taken against her almost immediately after she expressed political views that did not align with those of her employer or of the network's core viewership. Although Lahren's complaint made reference to her "First Amendment" expressions and "free speech" rights, her cause of action was not speech infringement or employment discrimination. Rather, the complaint was for wrongful termination "without cause" and material breach of employment contract.⁶¹

and basked in the patronizing applause from the liberal audience . . . when given the spotlight on a mainstream network . . .").

⁵⁶ *Id.*

⁵⁷ Complaint, *supra* note 29, at 5; Walsh, *supra* note 55.

⁵⁸ Cummings, *supra* note 7.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Complaint, *supra* note 29, at 3-12.

Lahren did not raise a cause of action for speech infringement or discrimination because she could not have done so. There is no federal statute or Texas state law which protects private employees' political speech, such as Lahren's statements on *The View*. Although this case should be about freedom of expression, it could not have been adjudicated along those lines because the First Amendment does not regulate the actions of private organizations and the speech protections provided for by existing federal and state statutes are largely insufficient.

II

LEGAL PROTECTIONS FOR PRIVATE EMPLOYEE POLITICAL SPEECH

Tomi Lahren's complaint raised important and complicated issues regarding the intersection of American employment law and freedom of political expression, particularly for private employees in the entertainment industry. In light of the plethora of highly-publicized employment terminations and suspensions in the entertainment industry resulting from political expression and the Trump administration's suggestion that these are "fireable offenses,"⁶² Lahren's legal dispute with TheBlaze raises an important question: can a private-sector employer lawfully fire or reprimand an employee for expressing political speech, simply because the employer does not agree with the statement or because the speech could affect profits? The simple answer is yes. An employer may impose restrictions on speech relating to politics and decide to terminate employment based on expression of such speech, absent any specific state statutory protections or a specific contractual agreement. In fact, employers are able, and have even been encouraged by legal counsel,⁶³ to limit employees' speech relating to politics and topics of public concern, with few statutory restrictions.

A. SHORTCOMINGS OF THE FIRST AMENDMENT

The First Amendment of the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech"⁶⁴ This guarantee of freedom of speech is commonly misunderstood as an unlimited right, extending to all situations. The state action doctrine limits this right to free speech to protection against abridgement by the government, not by private actors.⁶⁵ This

⁶² See Draper, *supra* note 7.

⁶³ William B. deMeza Jr. & Kenneth A. Jenero, *Politics in the Workplace: What Must Employers Allow?*, HOLLAND & KNIGHT (July 19, 2016), www.hklaw.com.

⁶⁴ U.S. CONST. amend. I.

⁶⁵ See, e.g., *State Action Requirement*, *supra* note 5; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566 (1995) (noting the First Amendment only provides protections against state action).

limited application of the First Amendment allows private employers to monitor, restrict, and retaliate against the speech of their employees to the extent allowed by other statutory or contractual provisions. In other words, speech by a public employee receives First Amendment protection because the government's position as employer entails state action, while speech by a private employee, such as Lahren, does not receive First Amendment protection because there is no state action involved. Had Lahren been an employee of the government, she would have been able to claim that her employer violated her First Amendment rights. The state action doctrine has a disproportionate adverse effect on professionals in the entertainment industry because the industry is predominately composed of private employees.⁶⁶ The state action doctrine is particularly burdensome for entertainers, for many of whom expressing ideas and opinions is central to their career value.

The risk of employer retaliation or termination posed by the lack of constitutional protection for entertainers' speech is exacerbated by the at-will employment doctrine. In the United States, with the exception of Montana, employment relationships are presumed to be at-will.⁶⁷ This conception of the employer-employee relationship originated in the early twentieth century to protect employees' rights by preventing an employee from being confined to a specific

⁶⁶ *Arts, Entertainment and Recreation: NAICS 71*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/iag/tgs/iag71.htm#workforce> (presenting "data on the number of establishments in arts, entertainment, and recreation").

⁶⁷ The general rule that an employer may terminate an at-will employment contract for any reason without thereby incurring legal liability has been stated in scores of cases. See, e.g., *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977) (noting Alabama abides by the "general rule" that termination of an "at will" employment contract, even if "done from bad motives or with bad intent toward the person so injured," does not give rise to liability); *Wynne v. Ludman Corp.*, 79 So. 2d 690, 691 (Fla. 1955) (affirming appellant's employment termination did not present a cognizable claim given "uncontradicted" evidence the employment was terminable "at will"); *Roemer v. Zurich Ins. Co.*, 323 N.E.2d 582, 585-86 (Ill. App. Ct. 1975) ("We must . . . assume that the legal relation between the parties was an employment at will. . . . Consequently, plaintiff had no cause of action . . . for mere termination of his employment at any time . . . with or without cause."). *But cf.* *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54, 57 (Idaho 1977) ("The employment at will rule is not, however, an absolute bar to a claim of wrongful discharge. As a general exception . . . an employee may claim damages . . . when the motivation for the firing contravenes public policy."); *Lorson v. Falcon Coach, Inc.*, 522 P.2d 449, 457 (Kan. 1974) (finding the fact of termination of at-will employment does not support actionable claims for lost wages but could support an actionable claim of promissory reliance for expenses reasonably induced by the agreement, such as claimant's moving and storage costs). See generally *W. E. Shipley, Annotation, Employee's Arbitrary Dismissal as Breach of Employment Contract Terminable at Will*, 62 A.L.R.3d 271, 271-73 (1975) ("[F]ew legal principles would seem to be better settled than the broad generality that an employment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party for any reason or for no reason at all.").

employer by allowing the employee to leave at any time without being held liable for damages.⁶⁸ However, the flexibility this creates for employees also allows employers to terminate an employment relationship without cause, unless otherwise limited by a statute, public policy, or an agreement between the parties.⁶⁹ In the modern economy, however, the balance of power has shifted to employers because of limited mobility in the labor market and the small number of corporations dominating the industry, limiting the employment opportunities available.⁷⁰ This shift in the power dynamic is particularly apparent in the entertainment industry, where television and film are dominated by a small number of media outlets and where each sport has only one prominent professional league.⁷¹

Since speech by private employees is not protected by the First Amendment and employers may terminate employees without cause, absent any additional statutory or contractual protection, private employees may be fired merely for saying something with which their employer disagrees.⁷² Moreover, as demonstrated by the private employee who was fired for having a bumper sticker advocating a presidential candidate affixed to the back of her car, this unprotected speech is not limited to verbal expression.⁷³

In this particularly contentious political climate, it is not uncommon for an employer to disagree with their employees' political opinions. This reality demonstrates the necessity to enact statutes which protect political speech, such that private employers would be unable to fire employees merely for expressing opposing political beliefs outside of the workplace.

There are existing federal and state statutes which limit a private employer's ability to retaliate against an employee's speech, however these laws are under inclusive, vary greatly in scope from state to state, and generate unpredictable results.⁷⁴ The present maze of statutes and balancing tests requires private employees

⁶⁸ See, e.g., *Watson v. Gugino*, 98 N.E. 18 (N.Y. 1912).

⁶⁹ See Paul M. Secunda, *Constitutional Employment Law: Zimmer's Intuition on the Future of Employee Free Speech Law*, 20 EMP. RTS. & EMP. POL'Y J. 393 (2016).

⁷⁰ *Id.* at 405-06.

⁷¹ See Mara Lesemann, *The World's Top 10 Entertainment Companies (CMCSA, CBS)*, INVESTOPEDIA (Feb. 4, 2016), www.investopedia.com/articles/investing/020316/worlds-top-10-entertainment-companies-cmcsa-cbs.asp.

⁷² Jeannette Cox, *A Chill Around the Water Cooler: First Amendment in the Workplace*, 15 INSIGHTS ON L. & SOC'Y 12 (2015).

⁷³ Timothy Noah, *The Insubordinate Bumper Sticker*, SLATE (Sept. 14, 2004), www.slate.com/articles/news_and_politics/chatterbox/2004/09/bumper_sticker_insubordination.html.

⁷⁴ See *infra* Sections II.B, II.C; see also 10 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 171.08 (2d ed. 2019).

to conduct advanced legal research and analysis before determining whether they are protected under the law against employment retaliation for expressing political opinions.⁷⁵

B. FEDERAL STATUTORY PROTECTION FOR EMPLOYEE POLITICAL SPEECH

Generally, there is an absence of direct federal protection for private employee political expression or private political discrimination.⁷⁶ The First Amendment is only applicable to public employees because of the state action doctrine,⁷⁷ and anti-discrimination statutes such as Title VII are silent on politics. Despite the lack of legislation directly protecting political speech in private-sector employment, a hodgepodge of federal statutes provides narrow protections for specific instances of private employee political expression. Labor law professor Cynthia Estlund playfully analogizes the tenuous protections for expression afforded to private-sector employees resulting from these disconnected sources of law as “islands of protection in a sea of employer discretion.”⁷⁸ The following statutes curtail the near-omnipotent power of private employers to discipline, discriminate, or terminate an employee for their political speech or activity. However, the failure of these federal statutes to protect Tomi Lahren’s speech demonstrates their insufficiency.

1. National Labor Relations Act

Congress enacted the National Labor Relations Act (NLRA) in 1935 “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private-sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”⁷⁹ Section 7 outlines the rights of private employees to include “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁸⁰ Section 8(a)(1) deems it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”⁸¹

⁷⁵ 10 LARSON, *supra* note 74, § 171.08.

⁷⁶ *Id.*

⁷⁷ *See State Action Requirement, supra* note 5.

⁷⁸ Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 113 (1996).

⁷⁹ *National Labor Relations Act*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Mar. 29, 2019).

⁸⁰ National Labor Relations Act of 1935 § 7, 29 U.S.C. § 157 (2012).

⁸¹ National Labor Relations Act § 8.

Within the scope of these rights, the NLRA protects private employee expression related to the workplace, including speech regarding wages, hours, and union rights.⁸² Therefore, employee speech relating to the terms of employment that also happens to be political in nature is protected under the NLRA. However, any political speech that is unrelated to labor organization or the bargaining process, but rather “aimed at broad social change, affecting employees beyond their work relationship as members of a political community” is likely unprotected.⁸³ The limited scope of the NLRA does not reach Lahren’s speech because her comments regarding government involvement in the regulation of abortions are in no way related to her terms of employment with TheBlaze. The NLRA’s inability to protect Lahren’s speech demonstrates the inadequacy of this federal statute to protect private employee political speech.

2. *Federal Voter Protection Laws*

Since the founding of the United States, Congress has passed constitutional amendments and a variety of federal laws to protect the most treasured form of political expression: the right to vote.⁸⁴ Federal voter protection laws serve to protect American citizen’s right to vote and to facilitate the exercise of that right. While there is no federal law requiring employers to give workers time off to vote, it is a federal crime to intimidate, threaten, or coerce someone for the purpose of interfering with their voting behavior in federal elections or to use financial inducements to get someone to vote or not vote a certain way.⁸⁵ Consequently, it is illegal for employers to use promises of jobs, promotions, or financial rewards to induce specific voting behavior on the part of employees.⁸⁶

While the risk of federal criminal prosecution for interfering with employee voting behavior is an effective tool to protect private employees’ rights to express political preferences through casting a ballot, voting is only one aspect of political expression. What good is protecting an employee’s right to vote if discourse amongst citizens on the candidates and the issues on which their platforms rest is severely restricted? The fact that protection for political expression is limited to voting risks a chilling effect on free political discourse amongst private-sector employees, which in turn limits the public’s ability to cast informed votes. In order to safeguard voting

⁸² See Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75 (2012).

⁸³ See Carroll, *supra* note 1, at 52.

⁸⁴ See, e.g., U.S. CONST. amends. XV, XIX; 42 U.S.C. § 1973.

⁸⁵ 18 U.S.C. § 594.

⁸⁶ BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* 112 (2007).

rights and uphold core democratic values, it is necessary that employees in both the public and private sector enjoy the right to speak more freely about politics. Since the protection of voting rights is dependent upon legal protection to speak about politics, this right ought to be reinforced and safeguarded by law.

C. STATE STATUTES PROTECTION FOR EMPLOYEE POLITICAL SPEECH

The existing state statutory protections for political speech and activity vary widely in substance and scope.⁸⁷ States protect political expression by way of various statutory schemes, such as laws that safeguard political activities (including state civil rights acts which prohibit political discrimination),⁸⁸ laws that protect employee speech generally,⁸⁹ and laws that specifically protect speech relating to political topics.⁹⁰ The following section provides an overview of the range of existing state legal protections available to private employees. The variety of these state laws and the range of state-specific conditions and definitions adjoining these statutes demonstrate the confusion and inconsistency of protection. Because of the diversity of state statutory schemes, whether an employee's political expression is protected is highly dependent on the state in which the employment issue arises.

1. Protections for Political Activity

Some states provide protection for employee political activity outside of the workplace. The definition of "political activity," however, differs from state to state. The most literal and narrow definition of "political activity" is the exercise of voting rights, and the extent of protection for employee electoral activity varies across states. The majority of states provide some provision to allow employees to take time off to vote, but the details of these laws vary: disparities appear in how much time is guaranteed, whether that time is paid, or what the consequences for violations are.⁹¹ Additionally, some states prohibit employers from taking adverse action against an employee based on whom the employee voted for or for refusing to reveal how the employee voted.⁹²

⁸⁷ See *infra* Sections II.C.1–II.C.3. See generally BARRY, *supra* note 86.

⁸⁸ See *infra* Section II.C.1. See generally BARRY, *supra* note 86.

⁸⁹ See *infra* Section II.C.3.i.

⁹⁰ See *infra* Section II.C.2.

⁹¹ Lisa Natele-Piazza, *Do Employees Get Time Off to Vote?*, SOC'Y FOR HUM. RESOURCE MGMT. (Aug. 22, 2016), www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/state-voting-leave.aspx.

⁹² See, e.g., TEX. ELEC. CODE ANN. § 276.001 (West 2010).

In Texas, the state in which Lahren filed her complaint, statutory protection for employee political expression is limited to electoral activities.⁹³ For example, under section 276.001 of the Texas Election Code, it is unlawful for an employer to retaliate against an employee for voting for or against a candidate or refusing to reveal how the employee voted with the threat of removing a benefit of employment. Under section 276.004, it is unlawful for an employer to prohibit an employee from voting by refusing to permit the employee from being absent from work on election day to attend the polls or by subjecting or threatening to subject the employee to a penalty for attending the polls on election day to vote.⁹⁴ While guaranteeing a private employee's ability to vote is essential to a well-functioning democracy, this voting right is still dependent on an open exchange of political ideas.

New York Labor Law's definition of "political activities" is broader than just voting rights. New York's definition for "political activities" includes "(i) running for public office, (ii) campaigning for a candidate for public office, [and] (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group."⁹⁵ New York prohibits discriminating against employees on the basis of political activities as follows:

[I]t shall be unlawful for an employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of . . . an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property.⁹⁶

Similarly, section 1101 of the California Labor Code provides that "[n]o employer shall make, adopt, or enforce any rule, regulation, or policy . . . [f]orbid[ding] or prevent[ing] employees from engaging or participating in politics or from becoming candidates for public office" or "[c]ontroll[ing] or direct[ing] . . . the political activities of affiliations of employees."⁹⁷ Section 1102 states that "[n]o employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action

⁹³ *Id.* §§ 276.001, 276.004.

⁹⁴ *Id.* § 276.004.

⁹⁵ N.Y. LAB. LAW § 201-d (McKinney 2015).

⁹⁶ *Id.*

⁹⁷ CAL. LAB. CODE § 1101 (West 2011).

or political activity.”⁹⁸ The California Labor Code does not provide a statutory definition for “political activity,” but the California Supreme Court has construed an expansive reading of the term.⁹⁹ The court reasoned that because the California legislature enacted Section 1101 in response to the potential for employers abusing their economic power to interfere with the political activities of their employees, the purpose of the Section 1101 is to protect the fundamental right of employees’ political activity without interference from employers.¹⁰⁰ The court concluded that Sections 1101 and 1102 cannot be “narrowly confined to partisan activity”¹⁰¹ and defined the boundaries of the term as activity “related to or connected with the orderly conduct of government and the peaceful organization, regulation and administration of the government.”¹⁰² In support of this conclusion, the court highlighted the United States Supreme Court’s recognition that “political activities” can include participation in litigation, the wearing of symbolic armbands, and the association with others for the advancement of beliefs and ideas.¹⁰³ Under this broad interpretation, the California Supreme Court recognized the “struggle of the homosexual community for equal rights,” especially in relation to employment, as a “political activity” within the meaning of the California Labor Code.¹⁰⁴

Other states provide a middle ground level of protection for political activity, falling in between the broad protections afforded in New York and California and the states which lack any protection for political speech beyond federal voting rights. For instance, in Nevada, it is unlawful “for any person, firm or corporation doing business or employing labor in the State of Nevada to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state.”¹⁰⁵ In Minnesota, an employer may not threaten employment against an individual because of his/her political affiliations and contributions.¹⁰⁶

2. *Protections Against Private Discrimination Based on Politics*

State civil rights laws offer another legislative approach for protecting private employee political expression, and some jurisdictions have amended their respective

⁹⁸ *Id.* at § 1102.

⁹⁹ *Id.*

¹⁰⁰ *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979).

¹⁰¹ *Id.*

¹⁰² *Lockheed Aircraft Corp. v. Superior Court*, 171 P.2d 21, 24 (Cal. 1946).

¹⁰³ *Gay Law Students Ass'n*, 595 P.2d at 610.

¹⁰⁴ *Id.*

¹⁰⁵ NEV. REV. STAT. ANN. § 613.040 (West 2014).

¹⁰⁶ MINN. STAT. ANN. § 10A.36 (West 2013).

civil rights acts by adding “political beliefs” and “political affiliations” as protected classes. For example, the District of Columbia Human Rights Act (“DCHRA”) includes “political affiliation” as a protected class against discriminatory practices¹⁰⁷ and defines “political affiliation” as “the state of belonging to or endorsing any political party.”¹⁰⁸ Despite the promising nature of this statutory solution, the D.C. Court of Appeals—in *Blodgett v. University Club*—severely limited the scope and thrust of the amended law by constructing a narrow definition of “political affiliation.”¹⁰⁹ There, the court concluded that an individual’s involvement with a right-wing group called the National Alliance did not constitute a “political affiliation” because of the lack of evidence that the group was a political party “under any ‘ordinary sense and with the meaning commonly attributed to’ that term.”¹¹⁰ Under this constricted definition, “political affiliation” includes only affiliations with groups that nominate candidates for recognized public elections, such as the Democratic and Republican parties. Therefore, under the D.C. Court of Appeal’s definition, participation with groups such as Planned Parenthood or the National Rifle Association would not be protected under the DCHRA, even though the ideals of the groups are strongly aligned respectively with the Democratic and Republican parties and both organizations present views on pressing issues of public concern. In other words, the court held that political expression is not protected under the DCHRA, and therefore determined that actions such as signing a petition are not protected unless a plaintiff can show discrimination on the basis of membership of a political party.¹¹¹ Under this definition of “political affiliation,” Lahren’s expression on government involvement in abortion would not be protected, despite its distinctly political nature. Even though Lahren’s pro-choice sentiment is closely aligned with the platform of the Democratic party, this expression does not fall within the DCHRA’s protection because it is an expression of opinion and Lahren is not claiming to be a member of the Democratic party.

By sheer happenstance, a member of the Texas House of Representative proposed a bill similar to the DCHRA just two weeks before Lahren appeared on *The View*. Representative James White introduced Texas House Bill 2787 on March 3, 2017 because he perceptively recognized the need for protection of private employee political speech.¹¹² The bill, which proposed to amend section 21.051 of

¹⁰⁷ D.C. CODE ANN. § 2-1402.11 (West 2013).

¹⁰⁸ *Id.* at § 2-1401.02(25).

¹⁰⁹ *Blodgett v. Univ. Club*, 930 A.2d 210, 221-22 (D.C. 2007).

¹¹⁰ *Id.*

¹¹¹ *McCaskill v. Gallaudet Univ.*, 36 F. Supp. 3d 145, 152-53 (D.D.C. 2014).

¹¹² H.R. 2787, 85th Leg. (Tex. 2017).

the Texas Labor Code to include “political beliefs” as a protected class from employment discrimination, provided that:

An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, age, or political beliefs the employer: (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual for any employment opportunity or adversely affect in any other manner the status of an employee.¹¹³

The bill limits the definition of “political beliefs” to the political expressions of an individual made “outside the workplace and outside the course and scope of the individual’s employment.”¹¹⁴

White conceived of this bill after several employers expressed to him that they felt public pressure to fire employees based on those employees’ political views.¹¹⁵ White recognized the importance of protecting and celebrating the marketplace of ideas and explained his intent for the bill: “We need to get back into a situation where we conduct civil discourse with the person we disagree with instead of these flashpoints of protests against the employer and every other organization the person you disagree with belongs to.”¹¹⁶ The legislative goal was to protect private employees’ ability to express their political beliefs outside of work, including the ability to attend protests and post their thoughts on social media without fear of losing their job.¹¹⁷ Despite White’s efforts, however, these off-site political activities remain unprotected in Texas because the bill died in committee after its public hearing on May 1, 2017.¹¹⁸

While Texas House Bill 2787’s proposal for the inclusion of “political beliefs” as a protected class is nearly indistinguishable from D.C.’s “political affiliation” protected class, White hoped for the application and interpretation of the Texas Bill

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Brandi Smith, *New Bill Preventing Firing Employees for Political Expression*, KHOU (Mar. 6, 2017), www.khou.com/article/news/local/texas/new-bill-preventing-firing-employees-for-political-expression/285-419922545.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Tex. H.R. 2787.

to be more inclusive. Had White's proposed bill been enacted into law when Lahren's dispute arose, she could have tested that by filing a claim against TheBlaze for discrimination based on her political beliefs. Interestingly, White explicitly expressed his intention for the proposed bill to protect on-air professionals by allowing individuals in the news media industry to post their political opinions on social media and attend protests without fear of losing their jobs.¹¹⁹ White argued that because the public would know that the media outlet cannot fire the employee because their speech is protected by law, the pressure on TV and radio stations to fire individuals for their off-site political expressions would be lessened.¹²⁰

While the spirit of Texas House Bill 2787 clearly intended to cover Lahren's speech on *The View*—an opinion she never expressed on *Tomi*, on TheBlaze's other media outlets, or within TheBlaze's business premises—whether her expression fell within the scope of her employment is a viable question. Even if Texas House Bill 2787 had been enacted prior to Lahren filing suit, the success of her claim would have turned on a question of fact—whether her appearance on *The View* fell within the scope of her employment.

3. *Protections for Political Speech*

Lahren sued Beck and TheBlaze for wrongful termination without cause and in breach of the employment contract.¹²¹ She could not have sued for speech infringement because the state of Texas has no statutory or constitutional protection for speech by private employees beyond voting interference.¹²² Like most states, the Texas Constitution contains a free speech clause. Article I, section 8 of the Texas Constitution provides that “[e]very person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.”¹²³ Although the Texas Constitution provides its citizens with this right to speak, write, or publicize opinions on any subject, including those relating to politics and issues of public concern, it does not extend protection for abridgement of this right by private individuals or corporations.¹²⁴ However, while Texas' and most states' free

¹¹⁹ Smith, *supra* note 115.

¹²⁰ *Id.*

¹²¹ Complaint, *supra* note 29, at 3.

¹²² See *supra* Section II.C.1.

¹²³ TEX. CONST. art. I, § 8.

¹²⁴ Republican Party v. Dietz, 940 S.W.2d 86, 89 (Tex. 1997); Furman v. Compucom Sys., No. 3:03-CV-1433-L, 2004 U.S. Dist. LEXIS 14331, *27-28 (N.D. Tex. July 23, 2004).

speech clauses are inapplicable to private parties,¹²⁵ Connecticut is unique insofar as it enacted a free speech statute which attempts to extend First Amendment protection beyond government action.¹²⁶

i. Connecticut's Free Speech Statute

Connecticut's employee speech protection law—section 31-51q of the Connecticut Code—is recognized as “the most sweeping recognition to date of ‘First Amendment’ values in the private sector workplace.”¹²⁷ It provides the most favorable statutory protection for private employee political speech. Section 31-51q bars employers from disciplining or discharging employees “on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution . . . provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer.”¹²⁸

What if Lahren had worked in Connecticut instead of Texas? Lahren would have been able to raise a claim of free speech infringement in Connecticut, but, as explained below, whether her claim would have succeeded is indeterminable. The uncertainty of whether Lahren would have had a successful claim for speech infringement under section 31-51q—the most favorable protection for private employee speech—demonstrates the faults of the Connecticut law's application to on-air professionals, such as Lahren, in the entertainment industry and by extension to private employees of all sectors in the age of social media.

The spirit of Connecticut's free speech statute is to protect public and private employee speech at the same level of the First Amendment, thereby allowing private employees to express thoughts and opinions relating to public concern to the same extent as public employees and citizens in public forums.¹²⁹ Despite the legislative

¹²⁵ David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplaces*, 19 BERKELEY J. EMP. & LAB. L. 1, 34 (1998) (“The foregoing analysis strongly suggests that state constitutions have little viability as sources of speech protections for private employees.”).

¹²⁶ David C. Yamata, *Dignity, “Rankism,” and Hierarchy in the Workplace: Creating a “Dignitarian” Agenda for American Employment Law*, 28 BERKELEY J. EMP. & LAB. L. 305, 319 (2007) (reviewing ROBERT W. FULLER, *ALL RISE: SOMEBODIES, NOBODIES, AND THE POLITICS OF DIGNITY* (2006)).

¹²⁷ Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1 (1991).

¹²⁸ CONN. GEN. STAT. § 31-51q (2019).

¹²⁹ Kevin Draper, *Connecticut Law May Shield Anchor from Discipline*, N.Y. TIMES, Sept. 16, 2017, at D1.

intent and promising language of this statute, the actual protection provided to employees since the statute's enactment in the 1980s has been circumscribed by judicial interpretation and the qualifying language embedded in the statute.¹³⁰

Courts have interpreted Connecticut's statute as an extension of the rights available to public-sector workers to employees in the private sector.¹³¹ While the equalization of free speech rights afforded to public and private employees is an improvement because public-sector workers receive *some* protection under the First Amendment, the extent and boundaries of First Amendment protection in public-sector workforce is far from simple. Since public-sector employees maintain First Amendment protection only for expressions relating to matters of public concern, the Connecticut law's protection for employees against adverse employment action only extends to expressions on matters of public concern.¹³²

ii. Narrow Judicial Interpretation of Connecticut's Free Speech Statute

In the landmark case *Pickering v. Board of Education*, the United States Supreme Court held that public employees maintain First Amendment rights in the employment context when speaking on matters of "legitimate public concern" because "free and open debate is vital to informed decision-making by the electorate."¹³³ The Court reasoned that because the relationship between the government and its citizens in the employment context is distinctive from its relationship with citizens in general, the government can regulate speech of public employees in a way that it could not in general because of legitimate interests as an employer.¹³⁴ This regulatory power, however, is not unlimited.¹³⁵ Justice Thurgood Marshall provided a balancing test to curtail the government's ability to regulate speech relating to public concern and allow public employees to speak on these matters without fear of retaliatory actions or dismissal.¹³⁶ Under this test, courts balance the interests of the public employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹³⁷

¹³⁰ CONN. GEN. STAT. § 31-51q.

¹³¹ *Schumann v. Dianon Sys., Inc.*, 43 A.3d 111, 120-21 (Conn. 2012).

¹³² Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 670 (2004).

¹³³ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968).

¹³⁴ *Id.*

¹³⁵ *Id.* at 570.

¹³⁶ *Id.* at 568.

¹³⁷ *Id.* at 568, 572.

Though this holding serves as an important protection for public employee speech, Marshall's opinion left important questions unanswered: what constitutes speech on public concern? What standards should judges apply in balancing an employee's right to expression and the State's interest as an employer in promoting efficiency of public services? In Marshall's analysis, he considered factors such as maintaining discipline in the workplace, ensuring harmony among coworkers, and preserving close working relationships.¹³⁸ However, he did not provide clear standards for balancing the diverging interests between public employee and employer.¹³⁹

In *Connick v. Myers*, about two decades after *Pickering*, the United States Supreme Court recognized that speech concerning public affairs is the "essence of self-government" and established the standard to determine whether speech is a matter of public concern.¹⁴⁰ The court instructed for review of the "content form, and context [of the speech], as revealed by the whole record."¹⁴¹ As part of their analysis, courts consider whether an employee is making a statement as a "concerned citizen or as an employee set on airing a personal grievance"¹⁴² because when expression is not "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."¹⁴³

While Lahren's speech likely qualifies for protection under section 31-51q of the Connecticut Code, the precise boundaries delineating whether employee speech relates to public concern, thereby falling within the ambit of section 31-51q, remains ambiguous and subject to judicial discretion after *Connick*. Estlund fears that this minimally defined standard gives the judiciary too much discretion and creates a "judicially approved catalogue of legitimate subjects of public discussion."¹⁴⁴ Moreover, since Connecticut courts have shown great deference to employer interests in applying the balancing test, even if speech is related to public concern, the interest in free speech is not valued enough in relation to the employer's interest

¹³⁸ *Id.* at 578.

¹³⁹ *Id.*

¹⁴⁰ *Connick v. Myers*, 461 U.S. 138, 145 (1983).

¹⁴¹ *Id.* at 147-48.

¹⁴² *Daley v. Aetna Life & Cas. Co.*, 734 A.2d 112, 113 (Conn. 1999).

¹⁴³ *Connick*, 461 U.S. at 146.

¹⁴⁴ Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3 (1990).

such that the speech is unprotected.¹⁴⁵ The shortcoming is exacerbated by other constraints on the protection afforded to an employee's free speech in Connecticut.

iii. Additional Limitations of Connecticut's Free Speech Statute

In addition to the narrow interpretation of the statute, another significant issue with section 31-51q of the Connecticut Code is the requirement that the employee's expression does not "substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer."¹⁴⁶ This caveat limits the safeguard for employee speech by carving out a robust argument for employers to defend retaliations or terminations based on an employee's political speech. Further, in order to sustain an action under section 31-51q, employees bear the additional burden to affirmatively plead and prove a lack of interference with job performance and working relationship.¹⁴⁷ These substantive and procedural limitations established by the statute and common law greatly reduce the likelihood of an employee raising an action under section 31-51q, let alone succeeding.

Notwithstanding these hurdles, had Lahren filed suit under section 31-51q in Connecticut, she would have had a strong argument that her comments opposing government intervention in a woman's right to choose to have (or not to have) an abortion were a matter of public concern. Her speech was not made within the workplace or on property owned by TheBlaze. Her speech was arguably made within her capacity as a private citizen.

However, her claim would have been far from bulletproof. She would have had to prove that her speech, though clearly on a public issue, did not substantially interfere with her performance or her working relationship with TheBlaze. Since attracting and maintaining viewers and sponsors is a central feature of her job performance, the scathing public backlash on social media by her viewers presents convincing evidence that her comments alienated viewers and thus interfered with her performance within the terms of her employment contract.

¹⁴⁵ BARRY, *supra* note 86, at 119.

¹⁴⁶ CONN. GEN. STAT. § 31-51q (2019).

¹⁴⁷ King v. Connection, Inc., No. CV106015682S, 2011 Conn. Super. LEXIS 1629, at *11 (Super. Ct. 2011).

III CONSEQUENCES AND PROPOSED SOLUTIONS

A. *CHILLING EFFECT OF INADEQUATE PROTECTION FOR PRIVATE EMPLOYEE POLITICAL SPEECH IN THE ENTERTAINMENT INDUSTRY*

Section 31-51q of the Connecticut Code provides more protection than any other state statute for private employee speech relating to public concern,¹⁴⁸ and yet it is more likely than not that Lahren's speech would not have been protected by this law because of the disparaging public reaction to her political opinion and the subsequent effect that the response had on her job performance. The preference for employer interests over employee interest in expressing thoughts relating to public concern (as well as the general public's interest in public discourse) is apparent both in the language of the statute and the judicial history of balancing these interests.

While the general lack of federal and state constitutional and statutory protection for political speech in American employment law is problematic for all private employees, these limitations are particularly burdensome for on-air employees in the entertainment industry because of the unique nature of their profession.

Employment in the entertainment industry is distinct because of the imprecise boundaries of the physical workplace, the celebrity status of the employees, and the business model's dependence on viewership and sponsorship. While a TV station's offices, sets, and on-location shoots are clearly part of the physical workplace, was Lahren considered "at the workplace" when she appeared on *The View*, an off-site interview with another network? Was she being interviewed as an employee of TheBlaze or as a private citizen? This raises the more important question: is it ever possible for an on-air entertainer, such as Lahren, to be interviewed or quoted solely in their capacity as a private citizen?

The advances in communication technology and the rising prominence of social media in contemporary society blur the line between private-citizen conduct and employee conduct. This blurring introduces employment issues, unprecedented in both substance and volume, that have disproportionately affected employees in the entertainment industry. Social media platforms such as Twitter, Facebook, and Instagram have become central arenas for discourse on public life and politics.¹⁴⁹ Many professionals in the entertainment industry are national and/or local celebrities

¹⁴⁸ See *supra* Section II.C.3.i.

¹⁴⁹ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 2, 2019, 7:41 AM), <https://twitter.com/realDonaldTrump/status/1113089157683953665>.

with extensive followings on social media, ranging from thousands to millions of individual followers.¹⁵⁰ The combination of direct access to a large audience and the immediacy of expression supported by these platforms enables individuals in the entertainment industry to almost instantaneously share their political views with others by writing, sharing, and liking posts. As demonstrated by Schilling, Griffin, Hill, and Lahren, entertainment industry employees who post political speech on their social media platforms are at risk of employer retaliation.

Further, in the twenty-first century, a corporation's brand image is considered of utmost importance and employees are expected to represent the brand at all times.¹⁵¹ Employers in the entertainment industry have exploited the rise of social media as a marketing platform by creating accounts for specific talent to increase viewer engagement.¹⁵² Actors, commentators, TV hosts and the like are encouraged, if not required, to maintain a social media presence to directly promote programming and indirectly promote themselves and increase their celebrity status.¹⁵³ While entertainers can engage millions of people to effectuate the objectives of employers on these social media platforms, does that mean that these accounts must be used to the benefit of the employer?

The combination of the celebrity status of these individuals and technological advances in communication has resulted in an increasing ability to share opinions and views in a public forum, as well as an expectation of the public that these individuals will do so. On-air professionals are considered to always be representing their employer,¹⁵⁴ whether it be their network, show, team, or league. And while it is reasonable to expect these individuals to forgo their ability to say or do anything while on the job, it seems plainly excessive for employers to be able to demand their

¹⁵⁰ As of April 3, 2019, Tomi Lahren had over 1.3 million Twitter followers. Tomi Lahren (@TomiLahren), TWITTER (Apr. 3, 2019), https://twitter.com/TomiLahren?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor. As of April 3, 2019, Kathy Griffin had over 2.1 million Twitter followers. Kathy Griffin (@kathygriffin), TWITTER (Apr. 3, 2019), https://twitter.com/kathygriffin?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor.

¹⁵¹ Marilyn Nagel, *How Are Your Employees Affecting Your Brand?*, HUFFINGTON POST (Sept. 23, 2013), https://www.huffingtonpost.com/marilyn-nagel/employee-engagement_b_3956204.html?guccounter=1.

¹⁵² Jeff Beer, *Inside the Secretly Effective—and Underrated—Way Netflix Keeps Its Shows and Movies at the Forefront of Pop Culture*, FAST COMPANY (Feb. 28, 2019), <https://www.fastcompany.com/90309308/by-any-memes-necessary-inside-netflixs-winning-social-media-strategy>.

¹⁵³ See, e.g., Alissa Schulman, *Studios Are Now Looking for Actors Who Are Insta-Famous*, N.Y. POST (May 27, 2018), <https://nypost.com/2018/05/27/studios-are-now-looking-for-actors-who-are-insta-famous/>.

¹⁵⁴ See *supra* text accompanying notes 8–24.

employees contract away their right to ever participate in public discourse (while with the employer) because they decided to pursue a career in the limelight.

On-air personalities, hired for their expertise or influence, are contracted as hosts and commentators to discuss controversial current events and issues and expected to provide a unique viewpoint or spin to attract and entertain viewers. Networks encourage thought-provoking commentary and debate by news anchors, TV show hosts, and sportscasters, such as Tomi Lahren and Jemele Hill, to stimulate discussion, increase viewership and cultivate audience engagement. These occupational expectations place talent in a precarious position: employees are expected to express interesting opinions on current events and controversial topics to increase viewership, while also not being so controversial as to alienate viewers. With diverse audiences and an increasingly polarized political climate, these entertainers are constantly walking a fine line and are at risk of unemployment for either being too boring or too provocative.

The lack of speech protection for entertainers has far-reaching effects beyond the risk of adverse employment action. For example, the American public is dependent on the media, whether it be television or social media, to receive their news and develop their thoughts and opinions on issues of public importance and government. If the information and opinions presented to the public is censored by the media outlets, the employers will have a disproportionate control over political discourse and consequently electoral activity. Thus, the retaliatory consequences for political speech that goes against the employer's preferences or approval creates a disturbing chilling effect, harming the individuals whose speech is suppressed, the general public, and the proper functioning of American democracy.

While the need for statutory protection for private employees in the entertainment industry is most salient, this additional protection is increasingly important for private employees across industries because of the rise of social media. Although the average Joe with a few hundred followers receives less daily attention than a celebrity with millions of followers, any public tweet, Instagram post, or Facebook post could go viral and gain national attention, thereby placing the average American employee at risk of unemployment for sharing an opinion on public life. The severe chilling effect produced by the failures of the First Amendment to protect private employee speech and the general lack of federal or state protection illustrates the need for a reformulation of statutory protection of political expression in the private sector.

B. PROPOSALS

1. Contractual Solutions

i. Negotiate for Protections in the Employment Contract

As a consequence of the insufficient protection available in the American legal system, on-air employees in the entertainment industry, especially those who are hired to address controversial issues, need additional speech protections. The most immediate and effective solution available to these at-risk on-air professionals is contractual. Individuals like Lahren should negotiate with employers for contractual protections against termination and retaliation for expressions of political affiliations or beliefs. The more specific these individuals can be for the kinds of expressions they want to be protected from, the better. Of course, the ability to contract for adequate speech protections is limited by both an individual's foresight when they begin employment and the bargaining power they have when they first sign a contract.

ii. Collective Bargaining for Enhanced Speech Protections

The entertainment industry happens to be one of the few industries still dominated by unions.¹⁵⁵ In addition to negotiating on an individual level, unions such as SAG-AFRA, NFLPA, MLBPA, and NHLPA can and should bargain for greater protection for employee speech relating to politics and public concern expressed on social media and outside of the workplace. Collective bargaining for enhanced speech protections is an ideal solution because of the significant negotiating power these unions, especially in comparison to less famous and established individuals in the industry. This solution would provide protection for union members who lack the foresight or the bargaining power to negotiate for these more favorable employment terms.

2. Statutory Solutions

Although legislative action is not an immediate or politically viable solution (at least based on Representative White's inability to pass Texas House Bill 2787), a statutory protection for private employee speech relating to politics and public concern would be a more effective and far-reaching solution than private contracting. Although these issues are heightened within the context of employment for on-air personalities in the entertainment industry, employees across industries

¹⁵⁵ David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, L.A. TIMES (May 9, 2017), <https://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html>.

are at risk of termination or employer retaliation due to political speech expressed outside of the workplace. While contractual solutions are sufficient to protect those with the knowledge, access, and bargaining power, a statute would extend this protection to those who lack such knowledge, access, and bargaining power.

i. Amend Title VII to Include “Political Beliefs” as a Protected Class

The most effective (and legislatively efficient) solution to protect private employee political speech would be to adopt Representative White’s proposed solution on a national level by amending Title VII of the Civil Rights Act of 1964¹⁵⁶ to include “political beliefs” as a protected class. In effect, this amendment would prevent an employer from discriminating against an employee for expression of political beliefs. Title VII is sufficiently broad to forbid discrimination in any aspect of employment including hiring, firing, compensation, assignment, conditions, and privileges of employment. It is important that the amendment includes a broad definition of “political beliefs” to include any expression made in relation to matters of public concern.

ii. Federal Statute Protecting Employee Speech Relating to Public Concern

Another possible legislative solution would be to draft and enact a new federal statute, modeled after Connecticut’s free speech statute, that explicitly protects employee speech relating to public concern from any adverse employment action. However, this solution would be subject to the same limitations facing the Connecticut statute.

iii. State Statutory Solution

In the event that it is not possible for Congress to pass a federal statute or until a federal statute is passed, the next best option would be for state legislatures to either include “political beliefs” as a protected class in their state anti-discrimination law or pass statutes modeled after Connecticut’s free speech statute.

CONCLUSION

Employer silencing of employee speech relating to politics and matters public concern is particularly unsettling because speech relating to public concern is recognized as “some of the most highly protected forms of speech.”¹⁵⁷ American citizens watch reporters, pundits, and personalities on television, listen to them on podcasts and radio, and follow them on social media to learn about current events

¹⁵⁶ 42 U.S.C. §§ 2000e to 2000e-17 (2012).

¹⁵⁷ Draper, *supra* note 129.

and develop their own thoughts and opinions. Allowing employers to limit these influential individuals' ability to contribute to public discourse is a violation of core American values and stunts the democratic system of government. Though at times frustrating and contentious, political speech is a profoundly valuable form of expression in American society because it allows for a strong and functioning democracy. The recent suggestions by the Trump administration that certain on-air employees should be terminated for expressing their opinions about public life¹⁵⁸ sheds light on the overall lack of protection that these private employees enjoy both within and outside of the workplace.

Tomi Lahren learned from experience the limits of the prized American saying, "I can say what I want—it's a free country." She did say what she wanted. And she lost her job for it. Though there are valid and strong reasons for limitations of employee speech in specific situations and circumstances, private employers should not have such strong control over their employees' expressions outside of the context of work, especially over expressions relating to public life. Perhaps American jurisprudence should better reflect the American aspiration for free speech.

¹⁵⁸ See Draper, *supra* note 7.