Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace

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In recent years, the United States Supreme Court has decided several cases on the speech rights of public employees. The Court's emerging public employee speech doctrine reflects considerations beyond those applied in previous first amendment decisions. This Article identifies the values generally relied upon by the Court in first amendment cases and contrasts these with the values playing a key role in labor cases, particularly those involving employee speech. Having discussed the Supreme Court's approaches to earlier cases, the Article examines a critical shift of first amendment values in the Court's recent public employee speech decisions.

INTRODUCTION

The issues surrounding first amendment coverage of speech in the public sector workplace recently have begun to demand more attention from the judiciary, particularly from the United States Supreme Court. The Supreme Court's initial problem was whether public employee speech, a "new" category of expression, would be covered by the first amendment.[1] More recently, the inquiry has moved to the next stage:

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[1] Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Prior to extension of first amendment coverage to public employees, the Supreme Court had subscribed to the "right-privilege distinction," which allowed public employers to set the requirements of government employment regardless of the chilling effects on the exercise of first amendment rights. *See* Adler v. Board of Educ., 342 U.S. 485 (1952). In 1967, however, in Keyishian v. Board of Regents, 385 U.S. 589 (1967), the Supreme Court recognized the application of the first amendment to public employees. *See* Van Alstyne, *The Demise*

how broad will this coverage be? This increased attention to public employee expression flows naturally from the recent increase in public sector organizing activities and collective bargaining.[2] While the structure of public sector collective bargaining has been modeled primarily on the private sector system of collective bargaining,[3] public sector employment is different because of the government's special role as employer. As these differences surface, they present complex issues regarding first amendment coverage of employee speech.

The private sector cases that present employee speech issues address the questions almost exclusively on a statutory basis, by analyzing whether the National Labor Relations Act (NLRA) protects private employees' expression.[4] Of course, the reason for the exclusively statutory focus is the absence of the governmental action necessary to trigger constitutional protection. Except for a brief period, the Supreme Court's view has been that actions by private employers are not state action. However, the narrow coverage of the NLRA constrains protection of employee speech, and judicial deference to managerial and property interests conflicts with employees' interests in exercising their statutory rights to engage in protected concerted activity.[5]

Public sector employment is actually a hybrid of elements from the public and private sectors. The government acts in a dual capacity when it regulates speech by its employees. On the one hand, the government acts like private employers; it controls employees' speech by taking actions such as discharging them for speaking in ways of which the government/employer does not approve. On the other hand, in taking actions against employees based on their speech, the government

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of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968); *Developments in the Law — Public Employment*, 97 HARV. L. REV. 1611, 1739-44 (1984) [hereafter *Public Employment*].

[2] The statistics show both the growth of the government as an employer and the growth of union membership and organization among public employees. Among the most impressive numbers showing levels of employment and organization are public employment by 1984 of 17% of the nonagricultural civilian work force, and membership in employee organizations of 48.8% of all state and local workers by 1980. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 45 table B-I (Feb. 1984); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR-MANAGEMENT SERVS. ADMIN., LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS: 1980, at 1 (1981), *cited in Public Employment*, *supra* note 1, at 1614-15.

[3] *Public Employment*, *supra* note 1, at 1687, 1699.

[4] *See, e.g.*, Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Hudgens v. NLRB, 424 U.S. 507 (1976).

[5] *See infra* text accompanying notes 159-236.

regulates the speech of its citizenry. This hybrid context presents the judiciary with the task of decisionmaking based on two different value systems. In the private sector, courts have attempted to reconcile the competing interests of employers and employees. This has yielded broad judicial deference to managerial control and interests in uninterrupted production.[6] In the public sector, however, first amendment standards normally place a high burden on the government to justify any interference with freedom of speech.[7]

The first major case in which the Supreme Court considered the degree of first amendment coverage for public employee speech was *Pickering v. Board of Education*[8] in 1968. Since that time, particularly within the past few years, the Court has decided several cases dealing with the exercise of expression within the public sector employment relationship. These decisions reveal the Court's view of how employee speech should be regulated under the first amendment and the interaction of private sector labor concepts with the first amendment.

The development of a coherent first amendment theory describing the values underlying freedom of expression is essential to determining the scope of first amendment coverage and protection.[9] Thus, a theory of freedom of expression that supports the promotion of certain values may determine whether first amendment coverage should be broadened to encompass new classes of expression, such as employee speech.[10] For

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[6] *See generally* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 1-16 (1983).

[7] In general, analysis of governmental restrictions of first amendment rights requires judicial review under the "strict scrutiny" standard. This standard requires the government to carry the burden of proving a compelling state interest for the restriction and proving that the means used to further the compelling state interest are as narrowly drawn as possible. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983); Carey v. Brown, 447 U.S. 455, 461-62 (1980); Grayned v. City of Rockford, 408 U.S. 104 (1972).

[8] 391 U.S. 563.

[9] *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15-17 (1970); Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1141-42 (1983); Schauer, *Must Speech be Special?*, 78 NW. U.L. REV. 1284, 1287-89 (1983).

[10] Schauer, *supra* note 9, at 1287-88. The structure of the this Article's discussion of the distinction between first amendment coverage and protection as well as the creation of categories of first amendment coverage and protection relies heavily on the discussion of these concepts by Frederick Schauer, especially in his 1981 article. *See* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). Schauer shows that through the process of categorization and subcategorization of speech, the questions of first amendment coverage and first amendment protection become importantly different questions. Thus, through the process of categorization and

example, the scope of first amendment coverage has recently been defined by emphasizing the value of consumer information to include protection for commercial speech.[11]

Theories of freedom of expression generally fall under the rubric of either a "governmental process" theory[12] or a "self development" theory.[13] These theories promote different values and, therefore, result in a correspondingly different breadth of first amendment coverage. Consequently, the choice of the freedom of expression theory will determine the scope of first amendment coverage for public employee speech. The choice of a theory of freedom of expression in the public sector workplace is especially difficult because of the competing values at play. Generally stated, the values of preservation of managerial control and institutionalized structures of the private collective bargaining system conflict with the promotion of democracy and worker autonomy in the workplace. Thus, while one set of values calls for a theory resulting in narrow first amendment coverage, the other set of values demands a theory resulting in broad coverage.

This Article begins with an examination of the various freedom of expression theories and their application in general Supreme Court doctrine. The focus then narrows to the labor context, both private and public, continuing with an in-depth analysis of first amendment coverage in the public sector workplace.

I. The Search for a Theory Underlying Freedom of Expression

Many theorists have attempted to identify the essential values underlying freedom of expression. First, commentators describe the key values promoted by a system of freedom of expression.[14] Then they attempt to encompass these essential values within their theoretical construct. Thus, the problem becomes one of designing a theory broad

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subcategorization of speech, varying degrees of protection under the first amendment are achieved based on differing values placed on the type of speech involved.

[11] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[12] Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 592 (1982).

[13] Schauer, *supra* note 9, at 1289-90. While the labels for the governmental process and self-development theories are general labels, the labels "governmental process" and "self-development" will be used to identify the theories that fall within each of these two main categories. The specific characteristics identifying the various theories under these two main headings are discussed *infra* text accompanying notes 14-58.

[14] *See, e.g.*, T. Emerson, *supra* note 9, at 6-8; Perry, *supra* note 9, at 1142; Redish, *supra* note 12, at 593; Schauer, *supra* note 9, at 1288.

enough to encompass all expression worthy of protection.[15] At the same time, the theory should be narrow enough to identify only those values unique to expression, in order to avoid protecting areas of human behavior beyond expression.[16]

Before attacking the problem of identifying those values integral to a theory of freedom of expression, it is useful to conceptualize the process of constructing the theory. One approach is to view the first amendment as a category that covers certain aspects of behavior.[17] This approach requires a delineation between behavior that falls within the category covered by the first amendment from behavior that does not raise issues of freedom of expression.[18] This process of defining the category of first amendment coverage is tantamount to defining the meaning of the word "speech" in the first amendment.[19] Once the category of speech coverage is defined, whether particular speech is protected may be addressed in deciding whether the government abridged freedom of speech.[20]

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[15] Redish, *supra* note 12, at 593-94.

[16] This issue has been the subject of much debate, revolving around the attempt to identify an independent underlying value of a system of freedom of expression that justifies strict scrutiny of governmental restrictions on speech and, thus, special protection of speech as opposed to other activities. Theorists in the self-development school of thought generally identify a broad value of speech such as self-realization, or some type of epistemic value of speech that would require protection of a broad range of expressive activities to maintain the values underlying the activities. *See* Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 445 (1983); Perry, *supra* note 9, at 1155-58; Redish, *supra* note 12, at 593. However, the self-development theories have been sharply criticized for their failure to identify a value unique to speech. These criticisms are grounded in the breadth of activities that would promote the general values underlying the self-development theories. Thus, a value such as self-realization would be promoted by many activities apart from speech. This failure to identify a unique characteristic of the value of speech that separates it from other types of activities has led some commentators to conclude that the self-development theories are merely arguments for "general liberty." Bollinger, *supra*, at 442; Schauer, *supra* note 9, at 1290-93. The difficulty of identifying a broad, yet unique value of speech has also led some commentators to conclude that it is impossible to construct a satisfactory theory of freedom of expression. Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U.L. REV. 1319, 1322, 1356-57 (1984).

[17] Schauer, *supra* note 10, at 267.

[18] *Id.* at 267, 282.

[19] *Id.* at 273.

[20] *Id.* at 273-82. Schauer views the distinction between first amendment coverage and first amendment protection as crucial to development of a sufficiently flexible theory of the first amendment, which allows for broad constitutional coverage, while maintaining the flexibility to deny protection to speech when there are weighty countervailing governmental interests. *Id.* at 275-78.

After constructing these broad first amendment categories, one must decide whether all expression should be regulated under a "uniform test," or whether the broad category of first amendment coverage should be further divided into subcategories for different types of speech.[21] Subcategories would permit the protection of expression to be determined according to differing standards specifically tailored to certain types of speech.[22] Subcategorizing speech in this way necessarily entails assigning differing values to the various subcategories.[23] However, despite this inherent characteristic of subcategorizing, the process has been justified because the creation of any speech subcategories must be consistent with the broader underlying theory of freedom of expression.[24]

The question of subcategorization within the first amendment is central to analyzing the Supreme Court's treatment of employee speech, as will become clear. Putting aside the creation of subcategories for the moment, though, initially choosing the parameters of the overall category of first amendment "speech" coverage is itself problematic. Determining the breadth of the boundaries of first amendment coverage in turn determines the types of conduct that are worthy of analysis under first amendment standards. Areas of conduct that fall outside those boundaries will under no circumstances receive first amendment protection.

First amendment theories may be grouped under two major headings according to their scope of speech coverage. One group of theories, governed by a "governmental process" model, represents the narrower view of first amendment coverage.[25] The theoretical approaches promoting broader coverage of expression have been characterized as the "self-development" theories.[26] The theorists in each group maintain

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[21] *Id.* at 282.

[22] *Id.* at 283-96.

[23] *Id.* at 283, 288.

[24] *Id.* at 290, 293, 296. Schauer recognizes that there is much resistance to assigning differing values to different subcategories of speech, especially as that resistance ties to an aversion to content or viewpoint regulation. *Id.* at 283-86. However, he believes that this difficulty can be guarded against by creating well-defined subcategories of speech, which are carefully constructed and justified according to the theoretical premises of freedom and speech. *Id.* at 287-90. He uses the examples of commercial speech and defamation as subcategories of speech that are justifiably treated with standards differing from other types of speech. *Id.* at 290-92.

[25] Meiklejohn, Bork, BeVier, and Blasi are theorists identified with the governmental process model. For a description of these different theorists, see generally Perry, *supra* note 9, at 1142; Redish, *supra* note 12, at 592-93.

[26] The foremost scholars identified with the self-development theories are Redish

differing views of the purposes of the first amendment and the goals of a system of freedom of expression. The governmental process theorists take a consequentialist approach to the first amendment. Process theories provide first amendment coverage and protection for speech that furthers discrete goals of a particular governmental system.[27] These process theories, therefore, represent a pragmatic approach to first amendment analysis, with the boundaries of the theory determined directly by the boundaries of a governmental system.[28] In contrast, the self-development theorists view protection of speech to have intrinsic value not tied to the promotion of externally determined systemic goals.[29] Thus, under this view, speech is protected because of its intrinsic value to individual self-development rather than because the speech is useful to any external system.[30]

The governmental process theorists share a belief that the values un-

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and Baker. For a description of this theoretical area, see generally Perry, *supra* note 9, at 1142-43; Schauer, *supra* note 9, at 1289-90. Other scholars have developed theories attempting to identify the underlying values of the first amendment. Some of these theorists appear to be closely tied to the self-development school of thought (*e.g.*, Perry, who identifies an epistemic value of the first amendment, and Bollinger, who also identifies free speech as based on an "epistemological inquiry"). *See* Bollinger, *supra* note 16, at 444-45; Perry, *supra* note 9, at 1156-58.

[27] *See generally* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-47 (1982); Bollinger, *supra* note 16, at 443-44; Perry, *supra* note 9, at 1142; Redish, *supra* note 12, at 601-02. For criticism of viewing the first amendment only for its instrumental value, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 576-79 (1978).

[28] Bollinger, *supra* note 16, at 444.

[29] *See generally* L. TRIBE, *supra* note 27, § 12-1, at 576-79; Bollinger, *supra* note 16, at 442-45; Redish, *supra* note 12, at 594-95; Schauer, *supra* note 9, at 1289-90, 1301; Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 240 (1978).

[30] *See* sources cited *supra* note 29. Some self-development theorists have attempted to show the compatibility and complementary nature of the values underlying the governmental process theories and the self-development theories, with the difference identified by the scope of the theories. That is, the values identified by the governmental process theories are viewed as compatible with the values underlying the self-development theories. The latter simply extends first amendment boundaries by moving the systemic values to an individual level. *See* Perry, *supra* note 9, at 1143; Redish, *supra* note 12, at 593-94. As Redish recognizes, however, this attempt to unify the two theoretical approaches is only viable insofar as a governmental process theory assumes the existence of a democratic political process. Redish, *supra* note 12, at 601-02. As this Article's discussion of the first amendment in the public workplace demonstrates, a shift to a system run on a nondemocratic structure highlights the crucial differences between speech protection dependent on an externally imposed system and a theory based on intrinsic values.

derlying the first amendment further a democratic system of government.[31] These theories therefore describe first amendment coverage to include speech that is essential to the functioning of a democracy at a systemic level.[32] The leading theorist in this area was Alexander Meiklejohn, who described the first amendment as protecting "the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility."[33] In Meiklejohn's view, the purpose of freedom of expression is the promotion and preservation of "the presence of self-government."[34] In order to achieve these goals, Meiklejohn's theory defines first amendment coverage to include all activities contributing to informed decisionmaking by the electorate, essential to a democratic system of government.[35] Government process theories differ in their judgment of which types of expression provide essential input into democratic decisionmaking. Meiklejohn described a wide area of such essential activities, including education, the achievements of philosophy and the sciences, literature and the arts, and public discussion and dissemination of information and ideas regarding public issues.[36]

Other theorists who claim to follow the governmental process view do not envision the need for such a well-rounded electorate. Robert Bork represents this opposite extreme among the process theorists in extending first amendment coverage only to "political speech," which he defines as speech concerned with governmental behavior, policy, or

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[31] A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) [hereafter SELF-GOVERNMENT]; BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principles*, 30 STAN. L. REV. 299, 300-02 (1978); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 538-42; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 [hereafter *First Amendment*].

[32] *See* sources cited *supra* note 31; *see also* Bollinger, *supra* note 16, at 439-40; Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 191 (1984).

[33] *First Amendment*, *supra* note 31, at 255; *see also* SELF-GOVERNMENT, *supra* note 31, at 24-27.

[34] *First Amendment*, *supra* note 31, at 252.

[35] *Id.* at 255-57; *see also* SELF-GOVERNMENT, *supra* note 31, at 24-27.

[36] *First Amendment*, *supra* note 31, at 256-57. Meiklejohn justifies the inclusion of these forms of expression as being "within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." *Id.* at 256.

personnel in any governmental unit.[37] Bork's exclusion of many expressive activities stems from his overriding concern with leaving minimal room for judicial discretion.[38]

Other theories of freedom of expression are similar to the process model because of their concern with the societal benefits attained by protecting speech. Among these are the "search for truth" or "marketplace of ideas" theories developed by John Stuart Mill[39] and expressed in Supreme Court doctrine by Justice Holmes.[40] Under these theories, the individual growth and development resulting from tolerance of unpopular ideas is beneficial to society because the airing of conflicting views in the "marketplace" may result in finding the truth.[41] Blasi's theory identifying the "checking value" of the first amendment also envisions the benefits of a principle of freedom of expression on a systemic level by extending first amendment coverage to expression that guards against problems of governmental corruption and excessive gov-

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[37] Bork, *supra* note 31, at 27-28. Bork would include in his category of governmental units those in the executive, legislative, judicial, or administrative branches. Even within the narrowed category of political speech that Bork would include within first amendment coverage, he excludes from coverage and protection the category of political speech that "consists of speech advocating forcible overthrow of the government or violation of law." *Id.* at 29-30.

[38] *Id.* at 20-21. Bork has been severely criticized by other commentators for the narrowness of his first amendment theory, as well as its internal inconsistencies. *See* Perry, *supra* note 9, at 1148-49; Redish, *supra* note 12, at 597-601 (noting that under Bork's very narrow first amendment theory, he would not include political actions, despite the fact that many such actions have "as an essential part of their purpose a communicative aspect").

[39] J. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 13-48 (Oxford ed. 1946). *See* discussions of the marketplace of ideas theory as derived from the theories of John Stuart Mill in Bollinger, *supra* note 16, at 455; Redish, *supra* note 12, at 616-17. Redish notes that the marketplace of ideas theory has been criticized because of the danger that if the search for "truth" at some point attains the goal of finding the truth, then there will be no further purpose in protecting so-called false ideas or expression. *Id.* at 616-17. As Schauer notes, while the Millian principle is consequentialist, it does not depend on the existence of a particular political organization. *See* F. SCHAUER, *supra* note 27, at 35.

[40] The embodiment of Mill's theories most often cited is Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting): "the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *See* discussions of the *Abrams* dissenting opinion in Bollinger, *supra* note 16, at 463-64; Redish, *supra* note 12, at 616-17.

[41] *See supra* note 40.

ernmental regulation.[42]

Theorists of the self-development school criticize the process theories principally on the ground that their scope of coverage is overly narrow.[43] Rather than justify the coverage and protection of speech based on its utility in furthering the goals of a democratic political system, the self-development theorists identify intrinsic values of speech protection, such as individual self-fulfillment,[44] liberty,[45] autonomy,[46] and individual self-realization.[47] While these values may themselves underlie a democratic political structure,[48] the first amendment coverage of speech under the self-development theories is independent of the political structure in which the expression takes place.[49] The importance of this crucial theoretical distinction is evident when first amendment coverage

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[42] Blasi, *supra* note 31, at 538-44, 546, 557-58. For discussion of Blasi's first amendment "checking value" as part of the overall systemic value placed on "protecting information and ideas useful in evaluating public policy and performance," see Perry, *supra* note 9, at 1152 n.62; *see also* Redish, *supra* note 12, at 611-16.

[43] Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 992 (1978); Bollinger, *supra* note 16, at 443-44; Redish, *supra* note 12, at 593-94.

[44] T. EMERSON, *supra* note 9, at 6. While this value identified by Emerson fits within a self-development theory, Emerson also identifies process values as part of his theory of a system of freedom of expression. *Id.* at 6-8.

[45] Baker, *supra* note 43, at 996-97.

[46] Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215-22 (1972). Scanlon has since revised his theory to identify political speech as a "distinctively important category of expression." Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 535 (1979) [hereafter *Freedom of Expression*].

[47] Redish defines this term as referring "either to development of the individual's powers and abilities — an individual 'realizes' his or her full potential — or to the individual's control of his or her own destiny through life-affecting decisions — an individual 'realizes' the goals in life that he or she has set." Redish, *supra* note 12, at 593. Perry could also be designated a self-development theorist, since he defines his "epistemic" value of the first amendment as "an essential characteristic of human beings [which] is their need for, and their capacity to pursue and achieve, an ever better understanding of reality." Perry, *supra* note 9, at 1155. For a discussion of the theoretical bases of the self-development school of thought, see F. SCHAUER, *supra* note 27, at 47-72.

[48] Redish, *supra* note 12, at 594-95.

[49] While Redish finds that his identified value of individual self-realization ultimately underlies a democratic system of government, he recognizes the divergence of a process theory and a self-development theory, stating that "[t]he logic employed by Meiklejohn and Bork to reach their conclusion that the protection of speech was designed to aid the political process would have absolutely no relevance except in a democratic system." *Id.* at 601. *See also* Bollinger, *supra* note 16, at 443-44; Perry, *supra* note 9, at 1157 (the value of individual self-development may not in fact underlie a democratic political system).

is tested in an environment other than a democratic system. In a nondemocratic political system that values authoritarian control and discipline, a process theory could justify first amendment coverage only for speech that is instrumental to furthering the goals of that system. For example, criticism of authority figures would not help maintain the control structure. Applying a self-development theory in an authoritarian structure yields a different result in first amendment coverage, because the criticism of government officials continues to be instrumental to promoting individual development. The intrinsic values underlying the self-development theories do not shift with the political system in which the speech occurs. Thus, any congruence between first amendment coverage under the governmental process theories and under the self-development theories is contingent on the speech being made in a democratic political structure.[50] Furthermore, the congruence between first amendment coverage under the process and self-development theories is not complete even in a democratic structure, since the values of a democratic system need not include values of individual self-development.[51] Therefore, the convergence of constitutional coverage under the two major theoretical approaches is only superficially meaningful. Their underlying values are fundamentally different.[52]

The self-development theories have been criticized for their failure precisely to define speech to distinguish it from other expressive conduct fulfilling self-development values.[53] This criticism focuses on the self-development theories' failure to isolate characteristics of speech that

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[50] *See* Redish, *supra* note 12, at 601.

[51] Perry, *supra* note 9, at 1157. Meiklejohn's theory, based on promotion of a democratic political system, provides first amendment coverage only for speech that "serves the 'collective' or 'public' interest." Bollinger, *supra* note 16, at 449; *see also* Redish, *supra* note 12, at 603 (discussing distinction between "classical democracy," which would lead to "development of the individual's human faculties," and "Lockean democracy," which was "concerned with the *policies* which might be produced in a democracy." (emphasis in original)).

[52] Bollinger identified this divergence of the basic theoretical approach of the process theories and the self-development theories:

> What is troublesome is the self-definition, the identity, implicit in the systemic theory itself. Free speech is not just a practical tool for making systemic repairs, but an affirmation or statement of what we value as a people. To define ourselves exclusively in terms of our political functions, however important they may be to us, is too limited a self-conception, even if all the forms of expression we value can be brought within the First Amendment's sphere under the political speech designation. The reason we shelter speech is as important as the speech we shelter.

Bollinger, *supra* note 16, at 444.

[53] *Id.* at 442; Bork, *supra* note 31, at 23-26; Schauer, *supra* note 9, at 1290-94.

differentiate it from other expressive conduct.[54] This distinction has been viewed as essential to justifying first amendment coverage and the special constitutional status given to speech.[55]

The self-development theorists are not as concerned as the governmental process theorists with ensuring "absolute protection"[56] for all expression covered by their respective first amendment theories. Instead, the self-development theorists insist on "full protection" for speech, which may mean that governmental restrictions on speech are constitutionally valid in certain cases.[57] Thus, given the broad scope of their theories' coverage, self-development theorists concede the necessity of weighing competing governmental and individual interests to deter-

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[54] *See* sources cited *supra* note 53. Schauer criticizes this aspect of the self-development theories as "collaps[ing] into an argument for general liberty," rather than a justification for a stronger principle of free speech. Schauer, *supra* note 9, at 1292-93.

[55] Schauer, *supra* note 9, at 1292-93. Schauer requires a theory that distinguishes speech covered under the first amendment from other expressive conduct because he wishes to justify the strict scrutiny standard of review for governmental restrictions on speech. *Id.* Therefore, if the self-development theories simply collapse into an argument for general liberty, there is no basis for a judicial review above the level of the rational basis test. *Id.* Schauer justifies treating speech differently from other forms of expressive activities because of "sufficient dangers in government regulation of a wide range of communication — dangers different in kind and degree from government regulation of other activities." *Id.* at 1300-01. However, Schauer's theory has been criticized, in turn, as proving a "definition of 'speech' [that] is so inclusive that the picture dissolves into ambiguity and even self-contradiction." Alexander & Horton, *supra* note 16, at 1355. While Alexander and Horton recognize that a theory of speech must distinguish speech from nonspeech activities, they contend that "any plausible deontological theory [of freedom of speech] will not have its own principle, but instead will be part of a more general liberty." *Id.* at 1321, 1353. Alexander and Horton do not find this lack of an independent principle of free speech to invalidate such theories, however. *Id.* at 1353. They prefer the successful definition of speech for construction of a theory of speech over Schauer's "attempt to *justify*, rather than merely to identify, a Free Speech Principle." *Id.* at 1356 (emphasis in original).

[56] The restrictions of the boundaries of the process theories have permitted the theorists to discuss the first amendment coverage of such expression as providing "unqualified protection." *First Amendment*, *supra* note 31, at 255. Bork expresses this concept when he justifies limiting the parameters of the first amendment to political speech as defining "the only form of speech that a principled judge can prefer to other claimed freedoms." Bork, *supra* note 31, at 26. However, Bork would not even provide absolute protection to political speech, as he would not protect the category "of speech advocating forcible overthrow of the government or violation of law." *Id.* at 29-30. Schauer expresses this same concern with "principled adjudication," which he labels "articulate consistency," as shaping a theory of free speech that courts can apply with a large degree of consistency. Schauer, *supra* note 9, at 1296-97.

[57] Perry, *supra* note 9, at 1158; Redish, *supra* note 12, at 595.

mine the issue of speech protection.[58]

II. The First Amendment and the Supreme Court

A. A Freedom of Expression Theory

Commentators have criticized the Supreme Court for its failure to arrive at a single coherent theory of freedom of expression.[59] Much of this criticism stems from the Court's use of a series of "tests" for determining first amendment protection, including the "bad tendency test,"[60] the "clear and present danger test,"[61] the "incitement test,"[62] and the "balancing test."[63] Notwithstanding this hodgepodge of tests, the Court has shown a consistent concern with the value of expression on a systemic level.[64] Thus, the Court has been influenced mainly by the governmental process theories, which are concerned with the contribution of expression to the "marketplace of ideas," the "search for truth," and the preservation of a system of "self-government."[65]

Early Supreme Court opinions that are mainstays of modern first amendment doctrine include the dissenting and concurring opinions of Justices Holmes and Brandeis in *Abrams v. United States*,[66] *Gitlow v.*

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[58] Redish suggests that the balancing process should be made with "a thumb on the scales" in favor of protecting speech. Redish, *supra* note 12, at 624. Perry, expressing the balancing involved in deciding questions of speech protection in the form of presumptions, states that "freedom of expression (presumptively) forbids government to interfere with information or ideas (plausibly) useful to the people in their capacity as seekers after understanding." Perry, *supra* note 9, at 1158.

[59] *See, e.g.*, T. Emerson, *supra* note 9, at 15; BeVier, *supra* note 31, at 299; Blasi, *supra* note 31, at 526; Redish, *supra* note 12, at 591.

[60] *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Gilbert v. Minnesota, 254 U.S. 325 (1920); Du Val, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 Geo. Wash. L. Rev. 161, 164 (1972).

[61] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Thornhill v. Alabama, 310 U.S. 88, 105 (1940); Schenk v. United States, 249 U.S. 47, 52 (1919).

[62] *See, e.g.*, *Whitney*, 274 U.S. at 376; Pierce v. United States, 252 U.S. 239, 271 (1920); Schaefer v. United States, 251 U.S. 466, 483 (1920).

[63] The Court has used both an "ad hoc balancing" test, *see, e.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959), and a "definitional balancing" test, *see, e.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964). For a discussion of the use of these tests in the foregoing cases, see Du Val, *supra* note 60, at 174-75, 178-79.

[64] *See* Pope, *supra* note 32, at 191, 200. *See generally* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

[65] *See supra* text accompanying notes 27-42. *See also* Baker, *supra* note 43, at 968.

[66] 250 U.S. 616 (1919).

New York,[67] and *Whitney v. California*.[68] Particularly important was the Justices' expression of the importance of freedom of speech in the "marketplace of ideas" through which "true" ideas prevail.[69] By focusing on speech's contribution to the process of societal well-being through individual development, these opinions were themselves shaped by the Millian approach to speech protection.[70] In *Abrams* and *Gitlow*, the dissents by Holmes, joined by Brandeis, find the concept of the marketplace of ideas as the "best test of truth" to be the proper approach to protecting expression. Holmes began the process of tying these principles to a broader theory of government in *Abrams*.[71] The theory emerged more clearly in *Whitney*. In *Whitney*, Justice Brandeis, joined by Justice Holmes, discussed the value of free expression as reflecting the values of the existing political system:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[72]

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[67] 268 U.S. 652 (1925).

[68] 274 U.S. 357 (1927).

[69] *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); *Gitlow*, 268 U.S. at 673 (Holmes and Brandeis, JJ., dissenting) ("If in the long run, . . . beliefs . . . are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas. . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

[70] *See supra* text accompanying notes 39-41.

[71] In *Abrams*, Holmes refers to the free trade of ideas in the marketplace as "the theory of our Constitution" and discusses the marketplace of ideas as an "experiment [that] is part of our system." 250 U.S. at 630.

[72] 274 U.S. at 375. But see Blasi, *supra* note 31, at 544, for the view that Justice Brandeis' opinion reflects values of individual autonomy, and L. TRIBE, *supra* note 27, at 578-79, for the view that Brandeis demonstrated a "broader vision" of the first amendment by basing his concurrence primarily on the importance of freedom of speech to individual development as well as to the ideals of a democratic political

Later decisions echoed the ideas of Holmes and Brandeis with occasional reference to self-development values also. For instance, in *Cohen v. California*,[73] the Court identified the basis of first amendment protection as the development of an informed "citizenry" on a systemic level,[74] as well as the promotion of "the premise of individual dignity and choice upon which our political system rests."[75] However, despite some Supreme Court decisions supporting the value of speech to individual development, the process theories have prevailed.[76] In particular, the Court has been strongly influenced by the self-governance theory of Alexander Meiklejohn, with his emphasis on the protection of expression concerning public issues as a means of promoting a democratic form of government. Although the Court did not directly acknowledge Meiklejohn's influence[77] on its decision of *New York Times v. Sullivan*,[78] the opinion itself shows an unmistakable connection, as does the commentary on the case.[79] In fact, Meiklejohn stated that the decision was "an occasion for dancing in the streets."[80]

In *New York Times v. Sullivan*, public officials sued the *New York Times* and certain individuals for libel, based on statements in an advertisement placed by the Committee to Defend Martin Luther King

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system.

[73] 403 U.S. 15 (1971).

[74] 403 U.S. at 24. "The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Id.*

[75] *Id.*

[76] *See, e.g.*, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); New York Times v. Sullivan, 376 U.S. 254 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940); *see also* Brennan, *supra* note 64; Pope, *supra* note 32, at 229.

[77] Though Justice Brennan, who authored *New York Times v. Sullivan*, has not explicitly acknowledged that the Court was directly influenced by Meiklejohn's first amendment theory, Brennan has described the case as "a classic example of an activity . . . of 'governing importance,'" which Brennan also identifies as the underlying principle of Meiklejohn's theory. Brennan, *supra* note 64, at 14.

[78] 376 U.S. 254.

[79] For example, Justice Brennan has stated that in *New York Times* the Court concluded that the central meaning of the first amendment is "revealed in Madison's statement 'that the censorial power is in the people over Government, and not in the Government over the people.'" Brennan, *supra* note 64, at 15 (quoting 4 ANNALS OF CONGRESS 934 (1794); New York Times v. Sullivan, 376 U.S. at 282).

[80] Kalven, *The* New York Times *Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 221 n.125.

and the Struggle for Freedom in the South.[81] The Court ruled the jury verdict finding that the public officials had been libeled violated the first amendment rights of the *New York Times* and individuals who had placed the advertisement.[82] The Court based its decision on the importance of protecting the rights of individuals to engage in free and open public debate about the conduct of public officials.[83] Reflecting Meiklejohn's theory, the Court stated: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[84] Consistent with Meiklejohn's self-governance theory, the end of this uninhibited political debate was the maintenance of the principle of a democratic system in which change can be effected through a free exchange of ideas.[85] To ensure protection for political participation, therefore, the Court created the "actual malice" standard for libel actions by public officials. Under this standard, a plaintiff must prove that the defendant knew her libelous statement was false or that the defendant acted in reckless disregard of the truthfulness of her statement.[86]

The Court's use of the self-governance theory reflects its view of the scope of freedom of expression within the range of governmental process theories. Though more limited than the self-development theories, Meiklejohn's theory is the broadest of the process theories, acknowledging the need for input into political decisionmaking from areas far beyond strictly political debate.[87] Other Supreme Court opinions, including some preceding *Sullivan*, reflected this broad process view. For example in *Roth v. United States*,[88] while excluding obscenity from first amendment coverage, the Court expressed a broad process theory view of coverage, stating that "[a]ll ideas having even the slightest re-

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[81] 376 U.S. at 256-57.

[82] *See id.* at 283.

[83] *Id.* at 269-83.

[84] *Id.* at 270.

[85] " 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' " 376 U.S. at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

[86] 376 U.S. at 279-80.

[87] *See supra* text accompanying notes 33-37.

[88] 354 U.S. 476 (1957).

deeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guarant[ee]"[89] of freedom of speech. Thus, expression of ideas on a wide range of subjects, including "[t]he portrayal of sex, e.g. in art, literature and scientific works,"[90] falls within first amendment coverage.

The Court's broad vision of freedom of expression, within the range of process theories, is consistent with the Meiklejohn governmental process view. The Court's approach is far broader than that of narrow process theorists, such as Bork, who espouses a theory that protects only speech dealing specifically with the functions of governmental agencies and officials.[91] Additionally, Supreme Court decisions reflect the approach of other governmental process theorists, including the mistrust of government theory, the checking value theory, and further application of the search for truth and marketplace of ideas concepts.[92]

The Supreme Court's theoretical approach to the first amendment logically reflects a concern with the effect of freedom of speech on a systemic level. Most issues brought to the Court under the first amendment concern governmental abridgment of some sort of public discussion taking place on public property in general,[93] in a public assembly,[94] in a governmental prosecution for public expression,[95] or as in *Sullivan*, in governmental processes leading to jury verdicts of libel based on expression about public officials.[96] Thus, in line with its case by case approach, the Court has developed a body of law addressing the curtailment of a public exchange of ideas, which may be fully resolved by the values of free public discussion under a democratic system of

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[89] *Id.* at 484. Justice Brennan has stated that the concept of "social importance" in *Roth* is equivalent to the principle of "governing importance" developed by Meiklejohn. Brennan, *supra* note 64, at 19.

[90] 354 U.S. at 487.

[91] *See supra* text accompanying notes 37-38.

[92] *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982); City of Madison Jt. School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976); Mills v. Alabama, 384 U.S. 214 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964).

[93] *See, e.g.*, United States v. Grace, 461 U.S. 171 (1983) (picketing in front of the United States Supreme Court); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Carey v. Brown, 447 U.S. 455 (1980); Neimotko v. Maryland, 340 U.S. 268 (1951).

[94] *City of Madison*, 429 U.S. 167; Edwards v. South Carolina, 372 U.S. 229 (1963).

[95] *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. O'Brien, 391 U.S. 367 (1968).

[96] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967).

government. Even if the protection of public debate from multiple sources (including politics, art, and literature) furthers values of individual development, the Court can avoid discussion of these underlying individual values by basing protection of public interchange of ideas on systemic values. However, as will be discussed, the Court's focus on systemic values can result in a loss of first amendment coverage for certain speech by public employees.[97]

B. Categorization

The Court's focus on the governmental process theories of the first amendment is also significant in approval of categorization of speech types.[98] The application of the process theories permits exclusion from first amendment coverage of expression falling outside the defined systemic values of the process theories.[99] The Court has excluded three categories of expression from first amendment coverage because their protection would not contribute to societal interests. These familiar categories of speech are fighting words,[100] libelous statements,[101] and obscenity.[102] The Court has denied them coverage because they are not an "essential part of any exposition of ideas, and are of . . . slight social

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[97] *See infra* part IV.

[98] On the use of categorization of speech in Supreme Court first amendment analysis, see generally Pope, *supra* note 32, at 202-04; Redish, *supra* note 12, at 624-43; Schauer, *supra* note 10.

[99] *See* Redish, *supra* note 12, at 625-43; Schauer, *supra* note 10, at 274-76.

[100] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

[101] Beauharnais v. Illinois, 343 U.S. 250, 255 (1952).

[102] Roth v. United States, 354 U.S. 476, 484-85 (1957).

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . All ideas having even the slightest redeeming social importance . . . have the full protection of the [first amendment] guarant[e]es, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Id.

value as a step to truth. . . ."[103]

The category of commercial speech has undergone an evolution in treatment under the first amendment. Initially, commercial speech was excluded from first amendment coverage by the Supreme Court as purely private speech that did not contribute to the exchange of ideas on issues of public concern.[104] However, in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,[105] using a systemic approach to the first amendment, the Court held that commercial speech qualified for first amendment coverage.[106] In applying a systemic theory to commercial speech, however, the Court stretched the bounds of the Meiklejohn self-governance theory beyond the coverage of speech on public issues contributing to political decisionmaking in a democratic system.[107] The speech at issue was advertising of drug prices by pharmacists. As the nature of this speech did not seem to contribute to political decisionmaking, the Court focused instead on the contribution of such speech to the preservation of the "free enterprise economy."[108] This speech would provide information for private economic decisions, which in turn affects the "allocation of our resources."[109] The Court then made a leap of logic by concluding that such decisions affecting the free enterprise system are tied to "public decisionmaking in a democracy."[110] Thus, the Court expanded its governmental process theory to cover speech promoting individualistic values of a capitalist economic system as well as the values of public participation in a democratic political system.[111] Justice Rehnquist, dissenting, identified the illogic

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[103] *Chaplinsky*, 315 U.S. at 572. For strong criticism of the Supreme Court's exclusion of these categories of speech from first amendment coverage, see Redish, *supra* note 12, at 625-43.

[104] Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942).

[105] 425 U.S. 748 (1976).

[106] *Id.* at 764-70.

[107] The majority acknowledged the influence on the Court of the view that the first amendment is "primarily an instrument to enlighten public decision making in a democracy. . . ." *Id.* at 765. Further, the Court cited Meiklejohn as "a leading exponent of this position." *Id.* at 765 n.19.

[108] *Id.* at 765.

[109] *Id.*

[110] *Id.*

[111] As the Court discussed, in Bigelow v. Virginia, 421 U.S. 809 (1975), some degree of protection for commercial speech was afforded with the protection of newspaper advertisement announcing the legality of abortions in New York and offering the services of a referral agency for abortions. 425 U.S. at 759-60. However, as the Court acknowledged, the protection of this "commercial speech" was more akin to prior Supreme Court protection of material of "clear 'public interest'" than was the protection of an advertisement directed solely at the goal of profitmaking. *Id.* at 760-61.

of the Court's reasoning, stating that he had understood the self-governance theory "to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo."[112]

The relationship between the process theory and the limiting of first amendment coverage by excluding categories of speech according to the value of the speech in promoting the goals of an external system is further demonstrated by the rejection of such categorization by the self-development theorists.[113] For example, Redish advances the value of self-realization as a basis for coverage of the categories of fighting words, obscenity, and defamation.[114] Under a theory identifying self-realization as the underlying value for the first amendment, Redish would provide first amendment coverage for these categories of speech, with the ultimate question of protection determined by weighing the competing interests involved.[115] Thus, according to Redish, the Supreme Court's view that the purpose of the first amendment is the attainment of truth is overly narrow.[116] Redish argues that each of the excluded categories could promote "the development of one's human faculties" in some manner.[117] However, by determining the coverage of

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[112] *Id.* at 787.

[113] Redish, *supra* note 12, at 625-26, 635. While Redish accepts the necessity of determining the ultimate protection of speech by applying a balancing test and states that he is not basing a preference on the merits of either ad hoc or definitional balancing (categorization), his discussion of the concept of self-realization strongly rejects categorization that assigns differing values to speech and excludes certain categories from first amendment coverage. *Id.* at 624 n.115, 625-26, 635. While Perry states that in some cases a "categorization approach" is preferable to an ad hoc balancing approach because of its "comparative predictability when litigation does occur," his first amendment theory based on an epistemic value leads to the conclusion that the categories of commercial speech and obscenity must be included within first amendment coverage. Perry, *supra* note 9, at 1171-84, 1191. Additionally, though Perry differs from Redish in his willingness to find commercial speech generally less valuable than political speech, he states that "distinctions in terms of degree of protection afforded among different protected categories must remain as few as possible." *Id.* at 1173-74. Further, Perry considers the category of speech he labels "falsehood" excludable from first amendment coverage based on his theory of freedom of expression, because "falsehood is itself without epistemic value." *Id.* at 1176.

[114] Redish, *supra* note 12, at 625-43.

[115] *Id.* at 626-43.

[116] *Id.* at 625, 637.

[117] *Id.* at 627. The value of individual development is the value that Redish identifies as the second "branch of self-realization." He identifies the element of self-realization as the key to inclusion of the broadest range of categories of expression under the first amendment. *Id.* Redish identifies the first branch of the self-realization theory as

categories of expression according to the goals of an external system, the state, not the individual, decides which forms of expression promote valid aspects of self-realization.[118]

The Supreme Court's broad categorization of types of expression according to their relative values lends itself to further subcategorization.[119] The Supreme Court has engaged in this process of subcategorizing speech in areas including commercial speech, defamation, and public employee speech. In *Virginia Pharmacy*, while extending first amendment coverage to commercial speech, the Court simultaneously created subcategories of commercial speech that would receive varying protection according to their relative values.[120] The Court stated that the degree of first amendment protection for commercial speech would depend on the truth of the commercial information:

> Even if the differences [from other forms of speech] do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. . . .
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> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate state-

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"self-rule." *Id.* at 603. Redish finds that both the value of self-rule (which he calls a "cornerstone of every theory of democracy) and the value of development of an individual's human faculties (which he calls "a goal to which a democratic system is designed to lead") are "process" values which "may be grouped under the broader heading of 'self-realization.'" *Id.* at 602-03. Because he concludes that these values "may be achieved by and for individuals in countless nonpolitical, and often wholly private, activities," Redish rejects the exclusion of categories of speech such as obscenity and defamation. The process theorists would exclude these from first amendment coverage. *Id.* at 603-04, 626-43.

[118] Perry, *supra* note 9, at 1157; Redish, *supra* note 12, at 595, 618. Redish speaks generally in terms of the invalidity of "external forces" excluding speech from first amendment coverage. This notion could apply to both the external governmental determination that speech should be excluded from first amendment coverage and the determination that speech does not serve the purposes of an external system. Both conclusions are consistent with distinguishing between the process and the self-development theories in terms of the determination of the value of speech against an external as opposed to internal measure.

[119] Schauer, *supra* note 10, at 282-83. In his discussion of subcategorization Schauer recognizes that resistance to subcategorization by some theorists is motivated by "an extreme reluctance to assign differing values to the speech that is covered by the first amendment," *id.* at 283, with the criticism "expressed in terms of the question of content regulation." *Id.* at 283 n.78. Schauer presents four arguments in favor of subcategorization within the first amendment. *Id.* at 286-90.

[120] 425 U.S. at 771.

ments for fear of silencing the speaker.[121]

Redish, under his self-realization theory, rejects the Court's differential protection of commercial speech according to its contribution to a systemic value of the search for truth.[122]

The Supreme Court similarly subcategorized speech within the defamation category. The Court's initial reaction to first amendment coverage of defamation was complete exclusion, in *Beauharnais v. Illinois*.[123] However, the Court then created subcategories for defamation under the first amendment, depending on the value of the expression in preserving a democratic system. The influence of the Meiklejohn theory led the Court in *New York Times v. Sullivan* to extend first amendment coverage to defamatory statements directed toward public officials, unless actual malice was proved.[124] The logic of the self-governance theory resulted in broadening first amendment coverage to defamation by publishers and broadcasters of "public figures" as well, based on the input into political decisionmaking of information about private individuals involved in public issues and events.[125] In *Time, Inc. v. Hill*,[126] the Court attempted to retain the political/systemic theoretical basis for first amendment coverage of defamation, but stretched the Meiklejohn approach beyond its original bounds; the Court justified application of the actual malice standard to misstatements concerning a private individual[127] when the expression concerned "a matter of public inter-

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[121] *Id.* at 771 n.24.

[122] Redish, *supra* note 12, at 631-35. For views accepting the validity of differential treatment of commercial speech based on its truth or falsity, see Perry, *supra* note 9, at 1176-77; Schauer, *supra* note 10, at 290-91. *See also* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 14-25 (1976) (profit motive underlying commercial speech justifies its exclusion from constitutional coverage). For discussion of the Supreme Court's recent cases dealing with commercial speech and the Court's use of "a flexible, multifactor approach in classifying particular types of speech," see Pope, *supra* note 32, at 203-04.

[123] 343 U.S. 250 (1952).

[124] 376 U.S. 254 (1964). *See supra* text accompanying notes 77-86.

[125] Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967). The case concerned a magazine's charge of a conspiracy between two well-known college football coaches to fix a football game between their teams. *Id.* at 135-36. *See* discussion of the *Butts* case and the extension of the *New York Times* rule to defamation of public figures in Redish, *supra* note 12, at 640-45.

[126] 385 U.S. 374 (1967). The case involved Life magazine's depiction of the play, "The Desperate Hours," as an accurate portrayal of the plaintiff's experiences. *Id.* at 377-79.

[127] The Court emphasized that the case was brought under a New York statute protecting the right of privacy, as opposed to a libel action by a private individual. *Id.* at 390-91. In Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971), the plurality

est,"[128] regardless of its input into political decisionmaking.[129] Eventually, however, the Court abandoned *Hill*. It left to the states determination of the proper standard of liability for defamation by publishers or broadcasters of private individuals on issues of "public interest." The Court still enshrined such expression as a subcategory under the first amendment by prohibiting the states from imposing strict liability.[130]

The Supreme Court's consistent reliance on a process theory of the first amendment to justify coverage of a category of expression or of particularized treatment of a subcategory of expression puts the Court's treatment of public employee speech in historical and theoretical perspective. Like other categories of speech, such as commercial speech and defamation, public employee speech initially was considered to be beyond first amendment coverage.[131] Following its 1967 holding that speech by public employees would enjoy first amendment coverage,[132] the Court in *Pickering v. Board of Education*[133] began to categorize public employee speech based on a governmental process theory. The Court has further refined its approach in recent decisions that subcat-

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opinion extended the *New York Times* standard to defamation of a private person if the statements concerned matters of public interest.

[128] 385 U.S. at 388. See Redish, *supra* note 12, at 641-42, for criticism of the Court's lack of a consistent theoretical basis for the extension of the Meiklejohn theory to private defamation.

[129] *See* Redish, *supra* note 12, at 641-42.

[130] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-49 (1974), *discussed in* Redish, *supra* note 12, at 642-45. Redish criticizes the Court's lack of a coherent first amendment theory for its decisions in the defamation cases, but concludes that the self-realization principle may explain the Court's holding in *Gertz*. *Id.*

[131] The lack of constitutional protection for public employee speech was part of the general judicial doctrine that public employment was a privilege that the government could constitutionally withhold. Justice Holmes is generally cited for his discussion of the "right-privilege doctrine" as a judge on the Massachusetts Supreme Judicial Court in the case of McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (finding no constitutional violation in the government's dismissal of a public employee based on that employee's political speech). For discussion of the right-privilege distinction and the Supreme Court's ultimate rejection of that doctrine in public employment, see Pope, *supra* note 32, at 205; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); *Public Employment*, *supra* note 1, at 1741-44.

[132] Keyishian v. Board of Regents, 385 U.S. 589 (1967). This holding actually dealt with the application of the first amendment right of association to public employees and generally rejected the doctrine of conditioning public employment on the surrender of constitutional rights. *Id.* at 605-06; *see also Public Employment*, *supra* note 1, at 1744.

[133] 391 U.S. 563 (1968).

egorize public employee speech under a narrow version of a governmental process theory. However, the Court has defined the scope of first amendment protection for public employee speech in the context of existing labor relations doctrine, in addition to general first amendment doctrine. Therefore, it is appropriate to examine the values expressed in Supreme Court labor relations cases to understand the role of those values in the Court's definition of first amendment coverage for public employee speech.

III. The Supreme Court's Approach to Labor Relations

The history of capitalism in the United States and other capitalist economies has been, to a great extent, the history of the structure of the workplace.[134] Historians have described the interwoven nature of the development of the capitalist economic system with the development of the workplace structure, concluding that the goal of profitmaking has shaped the design of technology as well as the production process.[135] The overriding characteristic identified as essential to profitmaking has been the ability to direct the maximum use of labor power.[136] Management has sought to achieve its goals by retaining unilateral control of the work process.[137]

The exercise of power by the employer in a hierarchical system of control has been characteristic of all stages of capitalist development and its workplace structure.[138] An early developed feature of capitalism, therefore, was that the work process assured the repository of con-

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[134] J. Atleson, *supra* note 6, at 102-03; R. Edwards, Contested Terrain: The Transformation of the Workplace in the Twentieth Century ch. 1 (1979); E. Hosbawm, The Age of Capital 213-23 (1979); S. Meyer, The Five Dollar Day: Labor Management and Social Control in the Ford Motor Company, 1908-1921, at 3-4 (1981); D. Montgomery, Workers' Control in America 9-10 (1979). The foregoing sources are cited by J. Atleson, *supra*. *See also* Stone, *The Origins of Job Structure in the Steel Industry*, in Root and Branch: The Rise of Workers' Movements 123-58 (1975).

[135] J. Atleson, *supra* note 6, at 105; R. Edwards, *supra* note 134, at 16, 20, 111; E. Hosbawm, *supra* note 134, at 35-37; S. Meyer, *supra* note 134, at 3; D. Montgomery, *supra* note 134, at 2-4, 9-10.

[136] R. Edwards, *supra* note 134, at 12-13, 16-17, 19-20, 51; E. Hosbawm, *supra* note 134, at 216-17; S. Meyer, *supra* note 134, at 3, 70, 195, 198-99; Stone, *supra* note 134, at 131-32.

[137] R. Edwards, *supra* note 134, at 12-13, 16-17, 19-21, 49, 51, 98, 104, 146-47; S. Meyer, *supra* note 134, at 4-5, 200; Stone, *supra* note 134, at 129, 131-32, 152-57.

[138] J. Atleson, *supra* note 6, at 102-05; R. Edwards, *supra* note 134, at 16-17, 21, 33, 51-52, 131, 147; E. Hosbawm, *supra* note 134, at 216; Stone, *supra* note 134, at 140-44, 153-57.

trol and direction of production from the top down.[139] This required a reshaping of the precapitalist work structure, which had vested control over the work process primarily in artisans and skilled workers.[140] The wresting of control from the skilled workers, in conjunction with technological changes, resulted in the stratification of the job structure. Now, workers performed specifically assigned tasks that were isolated from the broader production process.[141]

With the growth of business enterprises came corresponding changes in the forms of control and direction of labor power in the production process. Thus, the early stages of capitalism were characterized by the "one-man or . . . one-family, owner-managed business"[142] which applied a form of hierarchical control exercised directly by the owner, identifying loyalty and ties of workers to the owner.[143] As business expanded,[144] the hierarchical structure was institutionalized into a bureaucratic form of control.[145] The bureaucratic structure emphasizes the stratification of work,[146] rewarding "rules orientation," "habits of predictability and dependability," and the "internalization of the enterprise's goals and values."[147] This final characteristic focuses on the demand for worker loyalty to the enterprise.[148]

Control over the production process helps ensure continuity of production and maximization of profits.[149] Key to achieving uninterrupted production is the need to reduce, and if possible, eliminate the expression of conflict resulting from the clash of opposing management and worker interests.[150] Control over the production process is one method

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[139] *See* sources cited *supra* note 138.

[140] J. ATLESON, *supra* note 6, at 63-65, 102-04; R. EDWARDS, *supra* note 134, at 30-34, 98-99, 104; E. HOSBAWM, *supra* note 134, at 222; S. MEYER, *supra* note 134, at 195; Stone, *supra* note 134, at 124-33.

[141] J. ATLESON, *supra* note 6, at 63-65, 104-05; R. EDWARDS, *supra* note 134, at 19-21, 30-31, 90-91, 98-99, 104, 135, 146; S. MEYER, *supra* note 134, at 3-4, 195-96, 200; Stone, *supra* note 134, at 129-44, 152-57.

[142] E. HOSBAWM, *supra* note 134, at 214.

[143] *Id.* at 213-14; R. EDWARDS, *supra* note 134, at 18-19, 24, 27, 30, 147.

[144] The growth of businesses from the single owner form was marked by increased hierarchical control, modelled on a military structure. R. EDWARDS, *supra* note 134, at 30-31; E. HOSBAWM, *supra* note 134, at 216-17.

[145] J. ATLESON, *supra* note 6, at 105; R. EDWARDS, *supra* note 134, at 130-62.

[146] R. EDWARDS, *supra* note 134, at 135, 149-50.

[147] *Id.* at 149-50.

[148] *Id.* at 150.

[149] R. EDWARDS, *supra* note 134, at 12, 16, 20, 85, 152; D. MONTGOMERY, *supra* note 134, at 2-3; Stone, *supra* note 134, at 128-29, 131-32.

[150] J. ATLESON, *supra* note 6, at 102-04; R. EDWARDS, *supra* note 134, at 10, 13, 16, 49; S. MEYER, *supra* note 134, at 4; Stone, *supra* note 134, at 135-36, 157.

to avoid the disruption to production resulting from class conflict.[151] Other methods and procedures have also been applied to avoid the results of workplace conflict. For example, disciplinary actions for failure to follow work rules control worker behavior.[152] Another approach is to present an image of nonconflicting management and workers who share values of loyalty and commitment to the firm.[153] This focus reinforces the legitimacy of the employer's imposition of work rules and discipline for their breach.[154]

The development by employers of company unions, another attempt to control conflict, also demonstrated the value of formal grievance procedures for reducing expression of conflict at the workplace.[155] Such "pseudo-legal"[156] structures placed a veneer of democratic process over a fundamentally undemocratic work structure.[157] This overlay of democratic process also assisted in the rationalization of the coexistence of an authoritarian workplace and an external democratic political system.[158]

The United States legal system has supported the values of the capitalist economic structure in its various manifestations, including the primacy of private property and attendant privileges, the hierarchical control of decisionmaking in the production process, and the need to eliminate conflict to ensure continuity of production. The judiciary, and particularly the Supreme Court, has protected these values of the economic system in its development of private sector labor relations theory through interpretation of the NLRA.[159]

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[151] Stone, *supra* note 134, at 135-36, 157.

[152] J. ATLESON, *supra* note 6, at 102-03; R. EDWARDS, *supra* note 134, at 18, 147; S. MEYER, *supra* note 134, at 4-5, 196-200.

[153] J. ATLESON, *supra* note 6, at 86, 94-95; R. EDWARDS, *supra* note 134, at 150, 152.

[154] J. ATLESON, *supra* note 6, at 94-96.

[155] R. EDWARDS, *supra* note 134, at 108-09.

[156] *Id.* at 109.

[157] *Id.*

[158] *Id.*; Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1572-73 (1981).

[159] 29 U.S.C. § 141 (1982). The National Labor Relations Act (Wagner Act), was amended in 1947 by the Labor Management Relations Act (Taft-Hartley Act), in 1959 by the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act), and in 1974 by the Health Care Institution Amendments. 29 U.S.C. §§ 141-190 (1982).

This Article's discussion of the consistent themes that emerge from the labor cases as well as the selection of cases that characterize these themes rely heavily on J. ATLESON, *supra* note 6. Further, the discussion of these themes and in particular the privatized nature of the collective bargaining system in the United States rely heavily on the work of Karl Klare, especially in Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982) [hereafter *Public/Private Distinction*], and Klare, *Labor*

As applied by the Supreme Court, the NLRA did not generally change the underlying structure of the employer/employee relationship as it existed prior to 1935.[160] The view that management possessed certain inherent "rights" to make unilateral business decisions and to require employee obedience remained intact.[161] Therefore, the Court interpreted the passage of the NLRA to create certain employee rights which would coexist with the broad managerial control of the workplace that was seen as an inherent right of ownership.[162] Rather than accomplishing a shift in the uneven balance of power, the NLRA merely described discrete employee rights that would partially limit the inherent rights of management.[163]

The NLRA's effect on employment conditions has been severely restricted by the retention of a hierarchical, authoritarian employment structure.[164] The Supreme Court has been instrumental in maintaining the hierarchical nature of the private employment structure, by reinforcing management's right to discipline employees who do not show proper "loyalty" and deference to the employer.[165] For example, the Court held that employees who engaged in concerted action by leafletting the public about the quality of the employer's product during a labor dispute were not protected from discipline under Section 7 of the NLRA, because the leaflets disparaged the employer's product.[166] Therefore, the employees' Section 7 right to engage in concerted activity was overridden by a judicially created managerial right to demand "loyalty" to the employer's product, even in the context of labor

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Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 INDUSTRIAL REL. L.J. 450 (1981) [hereafter *Labor Law as Ideology*].

[160] J. ATLESON, *supra* note 6, at 9-10, 20-21, 171.

[161] *Id.* at 94, 102, 117, 177-79.

[162] *Id.* at 2-16.

[163] *Id.* at 7, 20-21, 171, 177, 179.

[164] *Id.* at 94, 102, 106, 177; *Labor Law as Ideology*, *supra* note 159, at 452, 459-61.

[165] J. ATLESON, *supra* note 6, at 85-86, 94.

[166] NLRB v. Local 1299, IBEW, 346 U.S. 464 (1953); *see* J. ATLESON, *supra* note 6, at 84-87 (discussing NLRB v. Local 1299). In this decision, known as the *Jefferson Standard* case, during collective bargaining, the technicians for a broadcasting company distributed handbills to the public that criticized the employer's programming and equipment. The Court found that the employees' statement about the employer's product warranted discharge because it was an act of disloyalty, particularly because the Court believed the employees' speech was not related to employment issues. 346 U.S. at 467-77; *see also Public/Private Distinction*, *supra* note 159, at 1363-64 (discussing *Jefferson Standard* in light of application of the "indefensible disloyalty" doctrine to reinforce the private nature of the employment relationship, even when employees are providing information to the public "in the course of a labor dispute with a publicly licensed TV station").

struggle.[167]

The Supreme Court's role in legitimizing a hierarchical structure under the NLRA stems from its view of conflict in the employment relationship.[168] The Court's decisions consistently deny the central and functional role of conflict when employees engage in protected, concerted activity.[169] Instead, the Court has subscribed to the view that employers and employees have "common interests and objectives and shared values,"[170] which is antithetical to the view that struggle at the workplace is an outgrowth of the fundamentally different values and goals of workers and management.[171] Furthermore, the Court's description of these common interests reflects only the employer's values, which are based on an authoritarian and nondemocratic workplace structure.[172] Therefore, by attributing interest in these values to the employees, the Court assumes that employees accept the legitimacy of an employment structure that leaves employees unprotected from employer control and discipline if employees are not sufficiently "loyal" or deferential.[173] An example of this lack of protection at the level of National Labor Relations Board decisions is the Board's view that in cases outside the formal collective bargaining processes, an employer may discipline employees who show a lack of deference toward management by using "insulting, derogatory or obscene language toward

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[167] As Atleson and Klare note, the Supreme Court legitimated the employer's discharge of employees for "disloyalty" in disparaging the employer's product, regardless of the truth of the employees' statements. J. ATLESON, *supra* note 6, at 86; *Labor Law as Ideology*, *supra* note 159, at 452, 454, 459-60, 463, 482. Klare ties the Supreme Court's denial of the existence and function of conflict to the Court's continual policy of strengthening the institutionalized aspects of collective bargaining, particularly through the use of the grievance/arbitration procedure. *Id. See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975); Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); *see also infra* text accompanying notes 189-206.

[168] *Labor Law as Ideology*, *supra* note 159, at 465.

[169] J. ATLESON, *supra* note 6, at 94, 177, 233 n.20; *Labor Law as Ideology*, *supra* note 159, at 452, 454, 459-60, 463, 482. Klare ties the Supreme Court's denial of the existence and function of conflict to the Court's continual policy of strengthening the institutionalized aspects of collective bargaining, particularly through the use of the grievance/arbitration procedure. *Id. See, e.g.*, *Emporium Capwell*, 420 U.S. at 62; *Boys Markets*, 398 U.S. 235; *United Steel Workers*, 363 U.S. 593; *Lincoln Mills*, 353 U.S. 448. *See infra* text accompanying notes 189-206.

[170] J. ATLESON, *supra* note 6, at 94-96.

[171] *Id.*

[172] *Id.*

[173] *Id.*

supervisors."[174]

The Supreme Court recently has been instrumental in preserving the hierarchical workplace structure by limiting the scope of mandatory subjects of collective bargaining to exclude business decisions that are at the "core of entrepreneurial control."[175] The Court has described these as decisions that "involv[e] a change in the scope and direction of the enterprise."[176] This derogation of the value of the collective bargaining process goes hand in hand with a nondemocratic decisionmaking structure, and the view that property ownership carries with it the right of unilateral control over the business and employees.[177]

In the private employment relationship, the Supreme Court often holds that "inherent" rights tied to property ownership and business transactions outweigh explicitly protected statutory rights of employees.[178] This balancing act by the Court goes to the heart of Section 7 rights to engage in organizational activity and to strike. Two Supreme Court cases clearly demonstrate its preference for managerial prerogative. In *NLRB v. Babcock & Wilcox*,[179] the Court held that an employer could bar nonemployee union organizers from the employer's private property, even though the organizer sought access not to the plant, but to the parking lot, to communicate with employees about unionization.[180] The Court placed the burden of proof on the union to show that there were no reasonable alternative means of communication with the employees, a burden which has proved to be almost insurmountable.[181] Thus, the technical fact that the parking lot was the

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[174] *Id.* at 94-95, 213 nn.31-34. As Atleson notes, arbitration decisions are consistent with the Board's approach of approving employer discipline of employees who show a lack of deference toward management. Atleson gives an example of the extent to which one arbitrator interpreted the employer's right to demand deference from employees, upholding a suspension of an employee "who responded to a supervisor's order to speed up her work with 'Dammit, I can't!' " *Id.* at 214 n.34.

[175] Justice Stewart used this phrase in his concurrence in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964), noting the limits of the Court's holding that the decision to subcontract work was a mandatory subject of bargaining. This limitation became crucial in the Court's decision in First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

[176] 452 U.S. at 677. In *First National Maintenance*, the Court held that the decision to partially close a business was not a mandatory subject of bargaining. *Id. See* discussion in J. ATLESON, *supra* note 6, at 132-35.

[177] J. ATLESON, *supra* note 6, at 8-9, 111, 134-35; *Labor Law as Ideology*, *supra* note 159, at 479-80.

[178] J. ATLESON, *supra* note 6, at 2, 8, 60-62, 93-94.

[179] 351 U.S. 105 (1956).

[180] *Id.* at 112-13.

[181] *See, e.g.*, Belcher Towing Co. v. NLRB, 614 F.2d 88 (5th Cir. 1980); Sabine

company's private property was sufficient to interfere with the employee's right under Section 7 to receive information about unionization.[182]

The right to strike is explicitly protected in Section 13 of the NLRA[183] and generally protected as concerted activity under Section 7.[184] In *NLRB v. Mackay Radio & Telegraph Co.*,[185] however, the Court diluted this fundamental and central form of concerted activity by holding that an employer may permanently replace economic strikers to continue production.[186] There is, at best, a fine line between permanently replacing and discharging a striker.[187] Yet, the Court's rationale for this holding rests solely on the perceived overriding importance of maintaining an employer's ability to continue production free of interruption by employees' protected concerted activity.[188]

In its decisions, the Court has promoted a private system of collective bargaining the major goal of which is to maintain industrial stability and uninterrupted production.[189] Two aspects of this system represent

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Tulling & Transp. Co. v. NLRB, 599 F.2d 663 (5th Cir. 1979); Hutzler Bros. Co., 241 N.L.R.B. 914 (1979), *enforcement denied*, 630 F.2d 1012 (4th Cir. 1980). Generally, the cases holding an employer's refusal of access to nonemployee organizers to be a violation of § 8(a)(1) of the NLRA are those involving isolated and remote employment locations such as lumber camps. *See, e.g.*, NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); Huskey Oil NPR Operation, Inc., 245 N.L.R.B. 358 (1979), *enforced*, 669 F.2d 643 (10th Cir. 1982). These cases are discussed in THE DEVELOPING LABOR LAW 90 (C. Morris 2d ed. 1983).

[182] J. ATLESON, *supra* note 6, at 60-62, 93-94.

[183] 29 U.S.C. § 163 (1982).

[184] 29 U.S.C. § 157 (1982).

[185] 304 U.S. 333 (1938).

[186] *Id.* at 345-46.

[187] An employer has no obligation to discharge permanent replacements for economic strikers. Further, economic strikers who are permanently replaced are entitled to reinstatement only "upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." Laidlaw Corp., 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

[188] 304 U.S. at 345-46; *see* J. ATLESON, *supra* note 6, ch. 1. As Atleson discusses, the impact of the Court's holding on this point is even more striking in light of the fact that the issue of whether permanently replacing economic strikers violated § 8(a)(3) was not even presented to the Court. Specifically, the only issue before the Court was whether the employer violated § 8(a)(3) by discriminatorily deciding which strikers it would reinstate. *Id.* at 22-23.

[189] J. ATLESON *supra* note 6, at 7, 78, 106, 177, 182 n.10, 207 n.34, 233 n.21; *Labor Law as Ideology*, *supra* note 159, at 459, 463, 465-66, 468 n.65, 480; *Public/*

the principal focus of the institutionalized collective bargaining structure that the Court seeks to preserve. First, the Court has emphasized the principle that the union chosen by a majority of bargaining unit employees should be the exclusive bargaining representative for all employees in that unit.[190] *Emporium Capwell Co. v. Western Addition Community Organization* clearly illustrates the central role of the exclusivity principle in the system of private sector collective bargaining.[191] In *Emporium Capwell*, black employees in the bargaining unit were without statutory protection when they took separate concerted action, unauthorized by the union, to protest delay in processing their grievances concerning racial discrimination.[192] The Court focused primarily on the need to follow the principle of exclusive representation in order to preserve industrial stability, finding that the employees had attempted to bargain separately with the employer.[193] In the Court's view, the employees' proper recourse was solely through institutionalized channels of contractual grievance/arbitration processes or through Title VII litigation.[194]

Emporium Capwell also highlights the primary importance that the Court places on the contractual grievance/arbitration process to achieve a second principle, that of resolving disputes through a nondisruptive system of arbitration rather than through concerted strike activity.[195] The Court views the grievance/arbitration system as the *quid pro quo* for the union's waiver of the right to strike during the contract term.[196]

Private Distinction, *supra* note 159, at 1364, 1388-1415.

[190] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J.I. Case v. NLRB, 321 U.S. 332 (1944); 29 U.S.C. § 159(a) (1982).

[191] 420 U.S. 50 (1975).

[192] The employees engaged in picketing and handbilling to publicize the alleged racial discrimination and to ask consumers to boycott the employer. The employees also demanded the employer meet with them to discuss the alleged racial discrimination. *Id.* at 52-56.

[193] *Id.* at 65-69.

[194] *Id.* at 69-70.

[195] *See* J. ATLESON, *supra* note 6, at 233 n.20 (quoting Justice Marshall's opinion for the Court in *Emporium Capwell*, 420 U.S. at 62 (employees' § 7 rights "are protected not for their own sake but as an instrument of the national labor policy of minimizing strife")); *see also Public/Private Distinction, supra* note 159, at 1410-11.

[196] *See, e.g.*, *Boys Markets*, 398 U.S. at 248; *Lincoln Mills*, 353 U.S. at 455; *see also Public/Private Distinction*, *supra* note 159, at 1410 n.221 (describing the inaccurate and misleading use of the term *quid pro quo* which "connotes an equal exchange, but the basic tradeoff under discussion is usually dramatically skewed in management's favor for two reasons. . . ."). The reasons for the inequality of the exchange are identified as the absolute nature of the union's no-strike obligation as opposed to management's agreement to arbitrate only arbitrable matters, and the prevalent acceptance of

In *Boys Markets*,[197] the Court held that a union may be enjoined from striking in violation of a contractual no-strike clause.[198] The Court made clear its preference for the use of the institutionalized grievance/arbitration process as the appropriate forum for resolving contract disputes.[199]

The Court's deference to the contractual grievance/arbitration process has been called representative of its general adherence to the ideology of industrial pluralism. This ideology describes collective bargaining as a privatized process between elected union representatives and management as equal parties.[200] According to this view, the NLRA does not create substantive rights in bargaining but only a " 'bare legal framework' to facilitate private ordering by management and labor."[201] This theory views private sector collective bargaining as creating a "mini-democracy"[202] at the workplace, analogous to the democratic political process.[203] Commentators have criticized industrial pluralism for its false premise that the parties bargain as equals when in fact management retains unilateral decisionmaking power over the business.[204] These commentators conclude that because the notion of the workplace

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management's view of the contract by most arbitrators. *Id.*

[197] 398 U.S. 235.

[198] The Court held that the Norris-LaGuardia Act did not bar injunctions against strikes over arbitrable issues under a contract that contained both a no-strike clause and grievance/arbitration machinery. *Id.* at 254; *see* discussion of *Boys Markets*, in *Public/Private Distinction*, *supra* note 159, at 1414-15.

[199] The majority referred to arbitration and no-strike clauses as "a vital element of stable labor-management relations." 398 U.S. at 249. Klare criticizes the Supreme Court's decision in *Boys Markets*, stating that the decision

> embodies the supreme irony of an appeal to public necessity and the reintroduction of an historically much reviled form of public intervention, all in the name of nurturing the parties' private dispute-resolution system. It is consistent with the logic of a system that executes national labor policy by elevating private contractual rights over the statutory, public law rights of employees.

Public/Private Distinction, *supra* note 159, at 1415.

[200] Klare, *Labor Law and the Liberal Political Imagination*, 12 SOCIALIST REV. 45, 52-3 (1982) [hereafter *Liberal Political Imagination*]; *Labor Law as Ideology*, *supra* note 159, at 458-68; *Public/Private Distinction*, *supra* note 159, at 1391-92; Stone, *supra* note 158, at 1511-16.

[201] *Labor Law as Ideology*, *supra* note 159, at 458, 480; *Liberal Political Imagination*, *supra* note 200, at 52-3; *Public/Private Distinction*, *supra* note 159, at 1388, 1391; Stone, *supra* note 158 at 1513.

[202] Stone, *supra* note 158, at 1515-16.

[203] *Id. Public/Private Distinction*, *supra* note 159, at 1359.

[204] *Liberal Political Imagination*, *supra* note 200, at 52-53; Stone, *supra* note 158, at 1511, 1516-17, 1545, 1547-48.

as a mini-democracy successfully controls conflict and portrays the political and the economic systems as consistent, the fiction of workplace democracy is retained.[205] However, the image of harmonious political and economic structures can survive only through a private system of adjudication of workplace disputes that maintains the fiction of workplace democracy while actually favoring management in the balance of power.[206]

In the area of first amendment protection of private sector employee speech, the concept of private property has been the focal point.[207] Certainly, the requirement of state action necessitates consideration of whether a governmental or private entity is abridging freedom of speech.[208] For a short time, however, the Supreme Court moved away from a technical definition of private property ownership that carried with it rights to suppress speech. The Court focused instead on the actual functions of the private employer in relation to the public and those seeking freedom of expression.

The Court's emphasis on the functions fulfilled by the private property owner rather than the fact of ownership began in a nonlabor case, *Marsh v. Alabama*.[209] In *Marsh*, the corporation that owned the property of a company town prevented Marsh, a Jehovah's Witness, from leafletting on one of the streets of the business district.[210] As the Court

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[205] *See Labor Law as Ideology*, *supra* note 159, at 455; *Liberal Political Imagination*, *supra* note 200, at 57-61; *Public/Private Distinction*, *supra* note 159, at 1401, 1410-11, 1416-17; Stone, *supra* note 158, at 1516-17, 1573-77.

[206] *Public/Private Distinction*, *supra* note 159, at 1410 n.221, 1416-17; *see Labor Law as Ideology*, *supra* note 159, at 468 n.65; Stone, *supra* note 158, at 1565, 1579-80.

[207] *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); *see also* J. ATLESON, *supra* note 6, at 60-62, 93-94; *Public/Private Distinction*, *supra* note 159, at 1366-71.

[208] However, many commentators have noted that the distinction between a governmental and a privately owned corporation has no real substantive meaning, in light of the fact that the modern corporation rivals the government in size, power, and the ability to regulate and intrude on the lives of its employees both in the workplace and the community. *See* D. EWING, FREEDOM INSIDE THE ORGANIZATION 11-12 (1977); A. MILLER, THE MODERN CORPORATE STATE (1975); Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience*, 24 OKLA. L. REV. 279, 299 (1971); *Public/Private Distinction*, *supra* note 159, at 1367 n.32 (citing Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1129 (1980)); Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 38-39 (1981) [hereafter Note, *Freedom of Political Speech*]; Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 530 & n.45 (1982) [hereafter Note, *Free Speech*].

[209] 326 U.S. 501 (1946).

[210] When Marsh refused to cease distributing her religious writings, she was ar-

stated, "[Chickasaw, Alabama] and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation."[211] Because the company town was the "functional equivalent"[212] of a public municipality, the corporation was obliged to respect the first amendment rights of individuals who wished to express themselves on the streets to which the public had access, regardless of the technical title to the property.[213] Certainly, *Marsh* represented the extreme case of a private entity acting as a public body, thus presenting the Court with the simplest case of applying constitutional standards to private property owners.

The Court, however, did not limit *Marsh* to its facts involving a company town. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[214] the Court applied the *Marsh* rationale to provide first amendment coverage and protection to labor picketing in a privately owned shopping mall.[215] Once again, comparing the functions fulfilled by the mall to those of a shopping area located along public

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rested, charged, and convicted under a state trespass law. *Id.* at 503-04.

[211] *Id.* at 503. As the Court described, the town contained "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' . . . [where] the United States uses one of the places as a post office. . . ." *Id.* at 502-03.

[212] This term was used by the Court to extend *Marsh* in Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319 (1968).

[213] *Marsh*, 326 U.S. at 505-09. In balancing the property rights of the company against the first amendment rights at stake, the Court found that the first amendment rights must be given more weight, especially in light of the fact that they occupy "a preferred position." *Id.* at 509. In discussing the free speech aspects of the case, the majority employed a governmental process theory, which emphasized the importance of the audience interest:

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.

Id. at 508. Further, since Marsh had challenged her conviction as a violation of her rights to freedom of the press and religion, in balancing the rights of owners of property against the first amendment rights, the Court specifically stated that they were weighing the rights to freedom of press and religion. *Id.* at 504, 509.

[214] 391 U.S. 308.

[215] *Id.* at 316-19. The picketing concerned area standards and was directed at a supermarket that employed only nonunion employees. The picketing took place in front of the supermarket in the parcel pickup area and the privately owned parking lot. *Id.* at 310-11.

streets, the Court "unambiguously concluded: 'The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*.' "[216] Thus, the fact of property ownership was secondary to the importance of assuring that traditional channels of communication remain free.[217] The reasoning of *Marsh* and *Logan Valley* shows that the distinction between public and private ownership of property had been blurred to expand the constitutional coverage of the first amendment without the technical element of state action.[218]

With the Burger Court, the public/private property title distinction for first amendment coverage reemerged.[219] *Lloyd Corp. v. Tanner*[220] again presented the issue of the first amendment right to handbill inside a shopping mall, but in contrast to *Logan Valley*, the literature carried a political message.[221] The Court, therefore, addressed the question it had reserved in *Logan Valley* and held that the mall owner constitutionally could prohibit the handbilling; the speech, in protest of the Vietnam War, was not " 'directly related in its purpose to the use to which the shopping center property was being put. . . .' "[222] The

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[216] Hudgens v. NLRB, 424 U.S. 507, 516 (1976) (quoting *Logan Valley*, 391 U.S. at 318).

[217] *Hudgens*, 424 U.S. at 539 (Marshall, J., dissenting); *see Logan Valley*, 391 U.S. at 319:

> We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.

[218] *Logan Valley*, 391 U.S. at 325. The Court did reserve the question that became the issue in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), namely "whether respondents' property rights could, consistent with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." 391 U.S. at 320 n.9.

[219] *See* Van Alstyne, *The Recrudescent of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66 (Summer 1980). Van Alstyne identifies the Burger Court decisions as a return to the view that "private property, its acquisition, ownership and disposition [is] the pivot of civil liberties." *Id.* at 73.

[220] 407 U.S. 551 (1972).

[221] The handbills informed the public about a meeting of the "Resistance Community" in protest of the draft and the Vietnam War. The individuals ceased handbilling within the mall after they were told by security guards that they would be arrested unless they stopped. *Id.* at 556. *Logan Valley*, of course, concerned picketing, while *Lloyd* involved handbilling.

[222] *Id.* at 563 (quoting *Logan Valley*, 391 U.S. at 320 n.9). Referring to the district court's findings, the dissenting justices noted that the handbills about the Vietnam War

majority retreated from its earlier position that the technical title to property should not determine the scope of free expression. The Court characterized its decision in *Logan Valley* as "not depend[ing] upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion of the Court is necessary or appropriate."[223] Instead, the Court shifted its focus from the functional equivalence between the public streets and the private shopping center to the "purpose" of the shopping center and whether the picketers had "reasonable opportunities . . . to convey their message to their intended audience. . . ."[224]

With *Lloyd*, the Court paved the way for its return to the view that property title determines the scope of first amendment coverage. While the facts in *Hudgens v. NLRB*[225] were virtually identical to *Logan Valley*,[226] in *Hudgens* the Court overruled *Logan Valley*. The Court

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were consistent with purposes to which the mall was put, such as inviting "schools to hold football rallies, presidential candidates to give speeches, and service organizations to hold Veteran's Day ceremonies on its premises . . . [and] the Salvation Army, the Volunteers of America, and the American Legion to solicit funds in the Mall." Because of such first amendment activities already taking place at the mall, it appeared that the handbilling concerning the Vietnam War was prohibited "solely because Lloyd Center was not enamored of the form or substance of their speech." *Id.* at 578 (Marshall, Douglas, Brennan, and Stewart, JJ., dissenting).

[223] 407 U.S. at 563. The dissenting Justices' reading of *Logan Valley* conceptually opposed the majority's. The dissent stated that in *Logan Valley*, "[t]he critical issue was whether the private property had sufficient 'public' qualities to warrant a holding that the Fourteenth Amendment reached it. We answered this question in the affirmative, and the answer was the pivotal factor in our decision." *Id.* at 581 n.5.

[224] *Id.* at 563. The majority found that the handbills could be distributed to pedestrians and persons in automobiles from the public streets and sidewalks surrounding the privately owned parking lot. *Id.* at 566-67. The dissenting Justices found that the majority incorrectly overturned the lower courts' findings of fact, that distribution of the handbills from public property was hazardous to the individuals doing the handbilling as well as to pedestrians and automobile passengers. *Id.* at 583 n.7. Further, the dissenting justices relied on a governmental process theory; they emphasized the importance of guaranteeing communication with the public by inexpensive means to individuals who do not have access to expensive mass media such as television, radio, or major newspapers. The dissenters noted that as public entities continually increase their reliance on private businesses to perform former governmental functions, only wealthy individuals will be able to communicate their messages to the public effectively. *Id.* at 580-81, 586; *see also* Van Alstyne, *supra* note 219, at 67-68, 77-79, 82.

[225] 424 U.S. 507.

[226] In *Hudgens*, picketers were warehouse employees of Butler Shoe Co., engaged in primary labor picketing against their employer. The picketing at issue in *Hudgens* took

found the similarity between the business function of a shopping mall and of a public business district insufficient to place constitutional obligations on the mall owner.[227] The majority accepted the reasoning of Justice Black's *Logan Valley* dissent, that the business district function was not

> sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it. . . . To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests . . . .[228]

This reasoning reveals not only the Court's expansive view of the rights of private property owners but also the Court's complete disregard of the communicative value and purpose of the labor picketing at issue. In *Hudgens*, the picketers in the mall engaged in primary picketing in furtherance of a strike that occurred during collective bargaining with the Butler Shoe Company. The Court's position that such picketing served only to prevent customers from buying shoes is a far cry from its position in *Thornhill v. Alabama*,[229] in which the Court relied on the first amendment to place a high value on public information about labor disputes.[230]

Despite the public function served by the property in *Hudgens*, the Court removed expression on private property from first amendment

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place inside the shopping mall in front of the Butler Shoe Store. *Id.* at 509.

[227] *Id.* at 520. The majority recognized that the holdings of *Lloyd* and *Logan Valley* could not be reconciled, because the lack of protection given to the handbillers in *Lloyd* would be content-based regulation of speech. Rather than overrule *Lloyd*, the majority chose to overrule *Logan Valley*, concluding that the shopping mall was not the functional equivalent of a municipality. *Id.* at 520-21.

[228] *Id.* at 517 (quoting *Logan Valley*, 391 U.S. at 332-33 (Black, J., dissenting)).

[229] 310 U.S. 88 (1940).

[230] The Court in *Thornhill* based its decision on a governmental process theory and found that the information concerning labor issues advanced the theory's purpose:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . .
>
> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

Id. at 101-02. Dissenting in *Hudgens*, Justices Marshall and Brennan adhered to this conceptual approach, finding that *Marsh* should apply in *Hudgens* because "[t]he underlying concern in [*Marsh*] was that traditional public channels of communication remain free, regardless of the incidence of ownership." 424 U.S. at 539.

coverage. Instead, the Court left protection for picketing on a solely statutory basis, applying the *Babcock & Wilcox* standard. Under that standard, Section 7 protection turns on whether alternate means of communication exist.[231] As discussed above, the *Babcock & Wilcox* balancing test grows out of the Court's concern for employer retention of control over access to private property and places a high burden of proof on nonemployees seeking access.[232]

Conceptually, the extension of first amendment coverage to private sector employers, at least in a context like *Hudgens*, makes sense. As Justice Marshall noted in his *Hudgens* dissent, private employers who displace the government by controlling traditional forums of communication must take on a corresponding obligation to protect freedom of expression in those forums.[233] Even beyond the shopping center context, modern corporations rival the government in size and power as well as in their ability to intrude on their employees' lives.[234] The nature of such a "public" corporation with its government-like power supports the broadening of first amendment coverage to private corporate entities, regardless of the "formalities of title."[235] In *Hudgens*, however, the Court rejected this approach by exalting the technicalities of private property ownership as the determinative factor in first amendment coverage, regardless of the private entity's functions.[236]

However, public sector employment presents the potential for expanding freedom of expression in the workplace through the presence of state action. Furthermore, depending on the first amendment theory applied, the coverage and protection of public employee expression could be quite broad. Under a self-development theory, the value of speech to an individual's internal growth and development should accord first amendment coverage to public employee speech.[237] This focus on an internal measure of the intrinsic value of speech is consistent

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[231] *Id.* at 521-22. On remand, the NLRB found that the mall owner violated § 8(a)(1) of the NLRA by refusing access to the picketers for primary picketing. Hudgens, 230 N.L.R.B. 414 (1977).

[232] *See supra* text accompanying notes 178-82.

[233] 424 U.S. at 539, 542-43.

[234] *See* D. EWING, *supra* note 208, at 11-12; Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1129 (1980); *Public/Private Distinction*, *supra* note 159, at 1367 n.32; Note, *Freedom of Political Speech*, *supra* note 208, at 37-39; Note, *Free Speech*, *supra* note 208, at 530-32.

[235] 424 U.S. at 538 (Marshall and Brennan, JJ., dissenting); *see also* Note, *Freedom of Political Speech*, *supra* note 208, at 38-39; Note, *Free Speech*, *supra* note 208, at 532.

[236] Van Alstyne, *supra* note 219, at 77-78.

[237] *See supra* text accompanying notes 29-30 & 44-52.

among all the specific theories under the self-development umbrella.[238] The emphasis on internally determined values in turn supports the interest of the public employee in exercising free expression, at least as much as it does the interests of the audience in receiving the information.[239] Thus, broad coverage of public employee speech would result under a self-development theory, as the utility of speech to an external system is not the measure of first amendment coverage.

The values underlying the self-development theories clearly are at odds with the values underlying the system of labor relations and collective bargaining developed in Supreme Court cases. The Court consistently has measured the scope of employee rights against the interests in maintaining an orderly, institutionalized system of collective bargaining.[240] Thus, the utility of the speech to furthering the goals of an external system of collective bargaining will also determine the scope of first amendment coverage of public employee speech.

While this systemic approach is generally consistent with the Court's systemic approach to first amendment cases, there is a crucial shift in the nature of the external system used to determine the scope of coverage. This shift results from the clash of systemic values that occurs with judicial resolution of public employment first amendment issues. Whereas private sector workplace conflicts are resolved through a privatized system of arbitration,[241] the presence of first amendment issues creates a federal cause of action.[242] Thus, the courts no longer can adjudicate separately questions in the economic and political systems.[243] The clash in systemic values becomes apparent with adjudication of public employee speech issues in the federal courts. In its nonlabor first amendment cases, the Supreme Court has applied a governmental pro-

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[238] *See supra* text accompanying notes 44-49.

[239] *See Freedom of Expression*, *supra* note 46, at 521-23; Perry, *supra* note 9, at 1145; Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 143 (1981); Redish, *supra* note 12, at 603.

[240] *See supra* text accompanying notes 159-99.

[241] While determination of unfair labor practice charges in the unionized setting is within the NLRB's jurisdiction, the NLRB has adopted a policy of deferring adjudication of charges that also may be defined as contract violations. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). Further, the NLRB has recently expanded its deferral policy to encompass almost all employer unfair labor practices. *See* United Technologies Corp., 268 N.L.R.B. 557, 559 (1984).

[242] *See, e.g.*, Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984); Connick v. Myers, 461 U.S. 138 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[243] *See Public/Private Distinction*, *supra* note 159, at 1415-18; Stone, *supra* note 158, at 1514-17, 1529-31, 1573-80.

cess theory, which measures speech coverage and protection according to the utility of the speech in furthering the goals of a democratic political system.[244] However, public employee speech takes place in the workplace context. In order to ensure uninterrupted production, the workplace is nondemocratic and hierarchically controlled. Thus, courts will measure the utility of public employee speech in terms of the values of the dominant economic system rather than the democratic political system.

The inherent incompatibility of the protected values within the economic structure and those within a democratic political structure creates problems in determining first amendment coverage according to the values of the labor relations system. The essential characteristics of each system (capitalist/economic and democratic/political) line up neatly as direct opposites. Most of the governmental process theorists extend first amendment coverage to a wide range of expression beyond strictly political speech, as long as the speech informs the electorate in ways that aid democratic decisionmaking.[245] This value of permitting broad dissemination of full information is at odds with the hierarchical decisionmaking structure in the employment system. In a system that places decisionmaking at the top of a hierarchical structure, broad first amendment coverage of ideas and information serves no function.[246]

Under the governmental process theories, the value placed on the "search for truth" in the "marketplace of ideas" acknowledges the inevitability and necessity of conflict resulting from tolerance of viewpoints challenging the status quo.[247] Again, the promotion of these democratic values is antithetical to the values protected in Supreme Court labor cases. Protection of a hierarchical, authoritarian management structure leaves little room for first amendment coverage of public employee speech that questions or challenges such authority. This becomes increasingly clear in light of cases upholding an employer's ability to discipline employees who do not show sufficient loyalty to the employer's business.[248]

The toleration of conflict within a democratic governmental process theory is also inconsistent with the Supreme Court's promotion of an institutionalized system of collective bargaining. Features essential to

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[244] *See supra* text accompanying notes 64-130.

[245] *See supra* text accompanying notes 31-36.

[246] Redish, *supra* note 12, at 601-02.

[247] *See supra* text accompanying notes 39-41; *see also* T. EMERSON, *supra* note 9, at 12.

[248] *See supra* text accompanying notes 164-74.

the Court's collective bargaining model include bargaining by exclusive representatives who speak with one voice for all bargaining unit employees, and a grievance/arbitration system which the Court values for eliminating conflict and disruption of production resulting from strikes.[249]

Reliance on a systemic or process theory in the area of public employee speech reveals the precarious and unstable scope of measuring first amendment coverage against externally determined values. Democratic values call for broad speech coverage because full information and conflicting views further the goals of broad-based decisionmaking and participation. When speech takes place in a nondemocratic economic system that depends on hierarchical control and stability of institutionalized representation structures, broad speech loses its utility. As a result, promotion of the external values of the labor relations system calls for restriction of first amendment protection for public employee speech.

The application of the first amendment in public employment also highlights the fundamental difference between the process and self-development theories. Whereas the scope of first amendment coverage under a process theory shifts according to the utility of speech in promoting externally imposed values, the coverage of public employee speech under a self-development theory remains consistent.[250] The self-development theories determine first amendment coverage based on the speaker's internally determined values, not on the utility of coverage to promoting the set values of an external system. Thus, public employee speech that contributes to individual self-development would receive first amendment coverage regardless of its utility in promoting economic goals. The strict scrutiny standard, then, would resolve the issue of protection for covered speech.[251] In determining protection, the government surely would raise as governmental interests the values underlying the preservation of the private system of labor relations within the economic structure. However, strict scrutiny judicial review would not

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[249] *See supra* text accompanying notes 189-99.

[250] As noted earlier, there exists a fundamental difference between process theories and self-development theories in determining the scope of first amendment coverage, based on externally imposed as opposed to internally developed values. Thus, any convergence or overlap of the actual categories of speech protected under the two theories is superficial; the scope of coverage under process theories will shift according to the systemic values against which the scope of coverage is measured. *See supra* text accompanying notes 50-52.

[251] *See* Redish, *supra* note 12, at 595, 624-25. For examples of Supreme Court first amendment cases that apply the strict scrutiny standard, see *supra* note 7.

permit these values to prevail unless the government could prove that its interests are both compelling and carried out through the least drastic means possible.[252] As will be discussed, a self-development theory would have led to different results in the recent Supreme Court public employee speech cases.[253]

IV. The "Deconstitutionalization" of the Public Sector Workplace

The Supreme Court faces inconsistent values, applying a governmental process theory to its first amendment cases on the one hand, and on the other using the economic system's values in labor cases. In light of this dilemma, how did the Court define first amendment coverage of public sector employee speech? The Court took the only route that allowed it to preserve the values expressed in its labor cases. The Court's public sector employee speech cases, beginning with *Pickering* and continuing through recent cases, reveal a process of "deconstitutionalizing" the treatment of public sector employee speech. Consequently, the Court has treated the public sector employment structure as closely parallel to that of the private sector. The Court has applied a first amendment process theory that measures the utility of speech against the goals of the economic system rather than the democratic political system. The Court has not openly acknowledged this shift in the basis of its systemic theory, however. Instead, the Court has continued to rationalize its holdings by applying a democratic governmental process theory. In fact, however, the Court's use of a theory based on economic values restricts the governmental process theory to its narrowest theoretical base. As a result, the first amendment extends only to protect public employee speech that clearly concerns the public and poses no perceived threat either to managerial control or to institutionalized collective bargaining structures. Analysis of the Court's public sector employee speech cases reveals this continual narrowing of first amendment coverage and a corresponding concern for maintaining an employment relationship and collective bargaining structure identical to those of the private sector.

A. Pickering

In *Pickering*, the Court, consistent with its approach to nonlabor cases, dealt with first amendment coverage of employee speech on a

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[252] *See supra* note 7.

[253] *See infra* text accompanying notes 326-34, 390-98 & 432-35.

systemic level. Pickering was discharged from employment as a public school teacher because he wrote and published a letter in the newspaper criticizing the School Board. He assailed the board's handling of a bond issue and its allocation of financial resources, and charged the school superintendent with attempting to suppress verbal opposition to the bond issue.[254] The Supreme Court held that the School Board's discharge of Pickering abridged his freedom of speech. The Court stated that in cases presenting a conflict between a public employee's freedom of speech and the public employer's regulation of speech, "[t]he problem . . . is to arrive at a balance between the interests of the teacher, 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."[255]

This well-known quotation from *Pickering* places in opposition the values of conflicting systems to measure the scope of protection for public employee speech. Consistent with the governmental process theory based on the values of a democratic political system, the Court recognized the importance of protecting speech by a public employee acting as a citizen to contribute to the "free and open debate [that] is vital to informed decisionmaking by the electorate."[256] On the other side of the Court's balancing test is the interest of the governmental employer in efficiently providing services. This latter interest parallels the values underlying the private sector employment system.[257]

In striking the balance between the opposing systems, the content and context of Pickering's speech permitted first amendment coverage and protection of his statements on the basis of a democratic political process theory. As the Court noted, by writing to the newspaper, Pickering acted as a citizen outside the physical workplace environment rather than as an employee.[258] Moreover, Pickering directed his letter

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[254] Pickering v. Board of Educ., 391 U.S. 563, 566 (1968).

[255] *Id.* at 568.

[256] *Id.* at 571-72; *see* Pope, *supra* note 32, at 206.

[257] The Court recognized the conflict between the values of a democratic political system and the values of a hierarchical system of employment: "[A]t the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those that it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568; *see also* Pope, *supra* note 32, at 206; *Public Employment*, *supra* note 1, at 1757-58.

[258] The Court stated that when, as in Pickering's case, the "fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, . . . it is necessary to regard the teacher as the member of the general public he seeks to be." 391 U.S. at 574; *see* Pope, *supra* note 32, at 206.

to an electoral issue concerning the schools, for which his position as teacher qualified him as one of "the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent."[259] Thus, protecting Pickering for his statement on this issue would further "[t]he public interest in having free and unhindered debate on matters of public importance,"[260] which the Court identifies as "the core value of the Free Speech Clause of the First Amendment."[261]

The Court in *Pickering*, however, also began to develop the other side of its balancing test, which applies the values of the private sector economic system. Pointing out the importance of these employer interests, the Court indicated that the values underlying the employment system might overcome the democratic political systemic values of free and open debate in future cases.[262] For as the Court noted, in Pickering's case there was

> no question of maintaining either discipline by immediate superiors or harmony among coworkers . . . [Pickering's] employment relationships with the [School] Board and, to a somewhat lesser extent, with the [school] superintendent, are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.[263]

These values in the employment hierarchy (maintaining discipline over employees, undisrupted working conditions, and loyalty toward superiors) mirror the values that determine the scope of employee rights in the Court's private sector labor cases.[264] The results in *Pickering* parallel the Court's approval of discipline against private sector employees who disparage an employer's product;[265] the *Pickering* Court stated in dictum that the discharge of a public employee may be lawful even when the employee's statements on public issues are "completely cor-

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[259] 391 U.S. at 571-72.

[260] *Id.* at 573.

[261] *Id.*

[262] For criticism of the Court's overdevelopment of the interests of public employers in *Pickering*, and the continued development of these employer interests by lower courts, see *Public Employment*, *supra* note 1, at 1760, 67.

[263] 391 U.S. at 570. *See also* T. EMERSON, *supra* note 9, at 581, for the view that *Pickering*, read carefully, "rest[s] upon those considerations relevant to the question whether the publication of Pickering's letter was incompatible with his commitments as an employee in the school system. . . . [T]he Court . . . finds no impairment of the employment relation."

[264] *See supra* text accompanying notes 160-99.

[265] *See supra* text accompanying notes 165-67.

rect,"[266] if "the need for confidentiality is so great"[267] or "the relationship between superior and subordinate is so personal"[268] that "public criticism would seriously undermine the effectiveness of the working relationship."[269]

B. Connick v. Myers

In *Connick v. Myers*,[270] the Court focused almost exclusively on the values underlying the economic system to determine first amendment coverage of public employee speech. *Connick* concerned the discharge of Sheila Myers, a New Orleans Assistant District Attorney.[271] The speech at issue resulted from a meeting between Myers and her supervisor, at which Myers opposed a proposed transfer for herself and expressed other concerns about office conditions.[272] Following this meeting, and in response to her supervisor's statement that other employees did not share her concerns, Myers distributed a questionnaire to fifteen assistant district attorneys concerning "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[273] Myers' supervisor reacted to the questionnaire by informing District Attorney Connick "that Myers was creating a 'mini-insurrection' within the office."[274] Connick responded by firing Myers, stating that her refusal to accept the transfer and her "insubordination" in distributing the questionnaire were the grounds for her discharge.[275]

Factual differences between *Connick* and *Pickering* resulted in the Court's emphasis in *Connick* on the values of the economic system rather than those of the democratic political structure. As opposed to

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[266] 391 U.S. 569-70 & n.3.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] 461 U.S. 138. Justice White delivered the majority opinion, joined by Justices Burger, Rehnquist, Powell, and O'Connor. Justice Brennan wrote the dissent, joined by Justices Marshall, Blackmun, and Stevens.

[271] 461 U.S. at 140-41.

[272] *Id.* at 140.

[273] *Id.* at 141. The Court included the questionnaire in its opinion as an appendix. *Id.* at 155-56.

[274] *Id.* at 141.

[275] *Id.* The Court accepted the district court's finding that "there was no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities." *Id.* at 151. The majority also accepted "the District Court's factual finding that Myers' reluctance to accede to the transfer order was not a sufficient cause in itself for her dismissal. . . ." *Id.* at 153.

the speech in *Pickering*, Myers' speech was made squarely within the employment setting and was directed at her immediate superiors. Pickering spoke as a private citizen in a nonemployment forum and directed his speech at officials who were not his immediate supervisors. In *Connick*, these distinctions of context and content resulted in a balance of systemic values favoring the interests of the hierarchical employment structure within the economic system.[276] Thus, analysis of *Connick* demonstrates that the Court alters the first amendment process theory applied to public employee speech according to the function of speech in furthering goals of the economic structure.[277] The Court maintained the narrowest adherence to a democratic political systemic theory, however, by restricting the boundaries of the governmental process theory to cover only public employee speech of the clearest public concern.

The Court in *Connick* accomplished this shift in the theoretical basis of the first amendment by creating four subcategories of public employee speech. The Court analyzed these subcategories according to different levels of judicial review, ranging from the rational basis test to the *Pickering* balancing test.[278] The degree of protection placed on the first two subcategories directly correlates with the speech's utility to the economic system. Only when the speech is in the latter two categories, of "substantial public concern" or "inherently of public concern," are the values of the democratic political system used to measure constitutional protection.

Consistent with the importance placed on context in *Pickering*, the four subcategories in *Connick* are defined according to whether the employee speaks as an employee, rather than a private citizen, and whether the speech is part of an employment grievance.[279] The Court's

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[276] The Court acknowledged the importance of the content and context of the speech in deciding whether "an employee's speech addresses a matter of public concern," and, therefore, is within first amendment coverage. *Id.* at 147. The Court also acknowledged the importance of the contextual distinction between the speech in *Pickering* and *Connick*, both in the aspects of addressing the speech to an immediate superior and in carrying out the speech at the workplace. *Id.* at 153. For discussion of the importance of the context in determining constitutional coverage, see Pope, *supra* note 32, at 204.

[277] *See Public Employment*, *supra* note 1, at 1767 (arguing the Court's decision "was premised on a particularly managerial theory — that rigidly hierarchical management maximizes workplace efficiency").

[278] The Court did not explicitly acknowledge that it was creating these four subcategories of public employee speech.

[279] The Supreme Court used the characterization of speech on "matters of public concern" to differentiate its treatment of speech by public employees in their roles either as citizens or as employees. *See* Pope, *supra* note 32, at 211 n.127. Pope sees the speech as part of an employment grievance as significant to his theory that speech in

first subcategory of employee speech is public employee "speech on private matters."[280] This subcategory includes speech by a public employee "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."[281] In the Court's view, all of Myers' questionnaire, with the exception of the question concerning pressure to work in political campaigns, falls within this "private speech" subcategory.[282] Though the majority asserts that the "private speech" subcategory of public employee speech is covered by the first amendment, unlike obscenity and "fighting words,"[283] the Court appears barely to provide a rational basis level of protection.[284] In fact, the stated coverage is illusory. The majority equates public employees' "private speech" with speech by private sector employees, stating that the first amendment rights of public employees do "not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state."[285]

The Court's second subcategory is comprised of issues of "limited public concern,"[286] which includes Myers' question concerning pressure to work in political campaigns.[287] Although this subcategory receives a

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labor cases will not be protected if the speech attempts to influence policy through "internal" rather than "external democratic channels." *Id.* at 211. Pope's use of the terms "internal" and "external" are different from this Article's use of them. Pope uses the terms strictly to identify where the speech has taken place. Thus, under Pope's definition, external channels would include processes such as the legislature and the courts. Internal channels would include speech within bureaucratic contexts. *Id.* at 202 n.73.

[280] 461 U.S. at 147.

[281] *Id.*

[282] *Id.* at 148.

[283] *Id.* at 147.

[284] The Court stated that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id.

[285] *Id.*

[286] The Court did not use this exact phrase. The label for this subcategory is taken from the Court's statement that "Myers' questionnaire touched upon matters of public concern in only a most limited sense." *Id.* at 154. The label is also used in light of the majority's statements contrasting Myers' question about pressure to work in political campaigns with employee speech that "more substantially involved matters of public concern." *Id.* at 152.

[287] *Id.* at 149-54.

higher level of judicial review than "private speech," the majority refused to place the burden on the government to " 'clearly demonstrate' that the speech . . . 'substantially interfered' with official responsibilities."[288] Instead, the Court created a low level standard of first amendment review, finding that "a wide degree of deference to the employer's judgment is appropriate."[289] Therefore, for issues of "limited public concern," the public employer's restrictions of expression will be upheld when the government "reasonably believe[s] [that the speech] would disrupt the office, undermine his authority, and destroy close working relationships."[290] While the test is cast in objective terms, it necessarily entails a large degree of subjectivity, as the government may take action based on its view of a "potential" for disruption.[291]

The majority appears to define speech on issues of "limited public concern" as speech that addresses a public issue, stated in the context of the employment relationship by the "employee *qua* public employee,"[292] particularly when the speech concerns the conduct of direct supervisors.[293] The employment context, therefore, becomes all important in transforming speech on an issue of public concern to speech of only "limited public concern."[294] In Myers' questionnaire, the question on political campaigns undeniably addressed a matter of public concern.[295] However, analysis of the speech in the context of an employ-

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[288] This is the standard the district court had applied in finding that Myers' discharge abridged her freedom of speech. *Id.* at 149-50. The dissenting justices in *Connick* would apply this standard as well. 461 U.S. at 168-69 (dissenting opinion). This is the standard applied in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969).

[289] 461 U.S. at 151-52; *see Public Employment*, *supra* note 1, at 1767.

[290] 461 U.S. at 154.

[291] *Id.* at 152. The majority repeatedly failed to require actual evidence of disruption resulting from employee speech that is viewed as directly challenging the supervisorial authority. *Id.* at 151-53; *see* Pope, *supra* note 32, at 210 (*Connick* supports the conclusion "that speech which supports government policies is entitled to more protection than speech which criticizes them — a peculiar reversal of First Amendment concerns.").

[292] Schauer used this phrasing in discussing the Supreme Court case of Givhan v. Western Line School Dist., 439 U.S. 410 (1979). Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 242.

[293] The Court emphasized this point in presenting its view that the "manner, time, and place in which the questionnaire was distributed" is part of the determination of first amendment protection. 461 U.S. at 152.

[294] *See* Pope, *supra* note 32, at 204, 211.

[295] The Court stated that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political ser-

ment dispute lowered the scrutiny given to her discharge.[296]

The majority created a third subcategory by way of warning: "We caution that a stronger showing [by the government] may be necessary if the employee's speech more substantially involved matters of public concern."[297] This statement contrasted the Court's applying a low burden of proof to Myers' question concerning pressure to work in political campaigns.[298] It is difficult to think of a statement that more clearly presents a matter of public concern than this question, which focuses on an issue of federal statutory policy. Therefore, it appears that the context, rather than the content, distinguishes the third subcategory of speech.[299] The third subcategory would include speech on matters of public concern made by a "public employee *qua* private citizen" in a nonemployment setting. This definition would encompass Pickering's letter to a newspaper concerning an electoral issue. It is not clear which level of scrutiny would apply to this category of speech on matters of "substantial public concern," though courts probably would require the government to show objective evidence of actual workplace disruption resulting from the speech.[300]

In a footnote the Court identified a fourth and final subcategory of public employee speech: "matter[s] inherently of public concern."[301] The Court's example is *Givhan v. Western Line Consolidated School District*,[302] described as

> a case . . . where an employee speaks out as a citizen on a matter of general concern, not tied to an employment dispute, but arranges to do so privately. The Court ruled that Mrs. Givhan's right to protest racial discrimination — a matter inherently of public concern — is not forfeited by her choice of a private forum.[303]

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vice." 461 U.S. at 149. The designation of this issue as a matter of public concern has been interpreted as the Court's "judicial assessment" that Myers' questionnaire supporting government policy deserved greater protection than her speech criticizing government policy. Pope, *supra* note 32, at 210.

[296] The Court stated that "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." 461 U.S. at 153.

[297] *Id.* at 152.

[298] *Id.* at 149-50.

[299] *See supra* text accompanying notes 292-96.

[300] 461 U.S. at 151-52.

[301] *Id.* at 148 n.8.

[302] 439 U.S. 410 (1979).

[303] 461 U.S. at 148 n.8. Givhan was a junior high school teacher who made numerous complaints to the principal of her high school claiming that appointments and assignments of nonprofessional employees in the school were racially discriminatory. Giv-

Again, the Court envisions the fourth subcategory as involving an employee who acts as a citizen rather than an employee who seeks to affect working conditions.[304] However, in "a matter inherently of public concern," the Court noted that an employee *qua* citizen need not communicate directly to the public.[305] It is not clear if this subcategory extends beyond race discrimination.[306] Further, even in matters of inherent public concern, since the speaker is still an employee, the *Pickering* balancing test (weighing values of a democratic political system against the values of the economic system) would be applied, rather than the stronger first amendment standard of review for nonlabor cases.[307]

The subcategories created by the Court and the standard of review applied to each can be explained by the shift in the theoretical basis of the Court's process theory. Instead of measuring the utility of speech against the values of a democratic political system, the Court measures the utility of public employee speech against the values underlying the economic system. Initially, the Court drew the boundaries of the first amendment to include only public employee speech of sufficient public concern. In *Connick*, the Court stated "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by

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han stated her complaints to the principal in his office. Givhan's teacher's contract was not renewed. The Supreme Court used *Pickering*'s reasoning to hold that Givhan's speech was covered by the first amendment, and that the *Pickering* balancing test should be used to determine whether the discharge of Givhan violated her first amendment rights. However, the Supreme Court remanded the case to determine if the dismissal was based on grounds independent of Givhan's speech, applying the principles of Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). 439 U.S. at 417. *See* Schauer, *supra* note 292, at 217-23.

[304] 461 U.S. at 148 n.8. The *Connick* majority emphasized that Givhan was speaking as a citizen in a "private forum," without focusing at all on the fact that the speech took place at the workplace. Therefore, it appears that the content of the speech is most significant in determining first amendment analysis. The context of speech not concerning a personal grievance is also a strong aspect of the *Givhan* decision. This focus appears to restrict the potential protection that *Givhan* identified in providing public employees a forum at the workplace for criticism of internal policies. *Compare* Schauer, *supra* note 292, at 242-48, *with* Pope, *supra* note 32, at 215-16.

[305] 461 U.S. at 148 n.8.

[306] Pope, *supra* note 32, at 215-16.

[307] *See* Schauer, *supra* note 292, at 224-25 (noting that Givhan's employee status triggers added considerations described in *Pickering* for weighing the governmental employer's interests in public employee speech cases).

the judiciary in the name of the First Amendment."[308] In the first two subcategories, the Court measures the employee's first amendment interests against the governmental employer's power in a hierarchical structure to maintain control over employees and to decide whether employee discipline is necessary to prevent work disruption.[309] In the first subcategory, "speech on private matters," the majority expressly rejects the democratic political system as a model for judicial review. "While as a matter of good judgement, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."[310] Instead, public employee speech on private matters is analyzed as if the speech had taken place in the private sector workplace.[311]

With regard to the second subcategory of public employee speech of "limited public concern," the hierarchical employment structure values continue to set the standard of first amendment protection. The Court gives " 'the Government, as an employer, . . . wide discretion and control over the management of its personnel and internal affairs . . . . includ[ing] the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.' "[312] In Myers' case, despite the lack of evidence of work disruption, the Court accepted the employer's characterization of Myers' speech as a "mini-insurrection,"[313] and "an act of insubordination which interfered with working relationships."[314] The Court broadly defers to employer judgment in these cases because these close working relationships are "essential to fulfilling public responsibilities."[315] The Court specifically acknowl-

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[308] 461 U.S. at 146.

[309] *Id.* at 149-54.

[310] *Id.* at 149. With this unequivocal statement, the Court crushed the potential that had been identified following *Givhan*, that "[i]n protecting the internal critic, the gadfly, the Court partially commits itself to a philosophy of workplace democracy." Schauer, *supra* note 292, at 247.

[311] 461 U.S. at 147-49. The *Connick* Court's removal of public employee criticism of governmental policies from first amendment coverage and the Court's explicit statement that public employees will not be given any further protection than private employees also denies the validity of the view expressed following *Givhan*. *See* Schauer, *supra* note 292, at 248 ("The constitutionalization of the workplace makes clear . . . that public employment and private employment are becoming increasingly dissimilar.").

[312] 461 U.S. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974)).

[313] 461 U.S. at 151.

[314] *Id.*

[315] *Id.* at 151-52; *see* Tribe, *Seven Deadly Sins of Straining the Constitution through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 156 (1984) (describing the

edged its shift in external values for speech of public concern made in the employment setting, because "additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."[316]

Only in the third and fourth subcategories of speech does the Court include the values of a democratic governmental process theory in its analysis. The shift in theories again corresponds to the removal of the speech from the employment context to a context in which the employee speaks *qua* private citizen. This thereby lessens the direct threat to the employer's maintenance of control and authority.[317] Once the systemic context of speech is changed, a higher standard of review applies, requiring the government to carry a burden of proof closer to that in nonlabor first amendment cases.[318]

Rather than acknowledge that it has shifted the theoretical base of its first amendment analysis, the *Connick* majority purports to determine first amendment coverage under a democratic governmental process theory.[319] To retain this approach and also promote the values of the economic system, however, the Court restricts the governmental process theory to its narrowest terms. Thus, public employee speech will be analyzed under a governmental process theory only when the employee speaks as a private citizen on political issues. While the *Connick* majority stated that " '[t]he First Amendment does not protect speech and assembly only to the extent that it can be characterized as politi-

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Burger Court's decisions as reflecting "a vision that seeks . . . 'efficient policy through bureaucratic rule' . . . a managerial vision of deference to authority and expertise, couched in the technocratic garb of 'cost-benefit' analysis").

[316] 461 U.S. at 153.

[317] *See supra* text accompanying notes 297-305.

[318] The *Pickering* balancing test, which was also applied in *Givhan*, weighs the employee's interest in freedom of expression under the values of a governmental process theory, against the governmental employer's interest, which is identified according to the values of a hierarchical employment structure. Thus, the employment setting and the speaker's status as a public employee extend the restrictions that the Court permits the government to impose on employee speech. *See supra* text accompanying notes 256-69; *see also* Schauer, *supra* note 292, at 225.

[319] Among its many statements identifying the values of a democratic political process underlying protection of speech, the Court stated that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " 461 U.S. at 145 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). The Court also stated that it "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." 461 U.S. at 145 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

cal,' "[320] and that matters of public concern may be "any matter of political, social, or other concern to the community,"[321] the Court's subcategorization process enables it to construe matters of public concern as encompassing only part of an area of strictly defined political speech. As the dissenting justices noted, "in concluding that the effect of [the District Attorney's] personnel policies on employee morale and the work performance of the District Attorney's Office is not a matter of public concern, the Court impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal."[322] The majority's restrictive definition of matters of community concern is certainly a far cry from Meiklejohn's self-governance theory.[323] The definition is even more restrictive than Bork's narrow "political speech" theory, which protects "speech concerned with governmental behavior, policy or personnel" in any governmental unit.[324] Through its narrow coverage and protection for public employee speech, the Court has "privatized" or "deconstitutionalized" the public sector workplace, leaving public employees with little more first amendment protection than private sector employees.[325]

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[320] 461 U.S. at 147 (quoting United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967)).

[321] 461 U.S. at 146.

[322] 461 U.S. at 158.

[323] The *Connick* Court used a governmental process theory, closely aligned with Meiklejohn's self-governance theory, for determining the coverage and protection of public employee speech. As the dissent stated, Myers' questionnaire

> seeking information about the effect of petitioner's personnel policies on employee morale and the overall work performance of the District Attorney's Office [is] speech about 'the manner in which government is operated or should be operated' [which] is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment.

461 U.S. at 156 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). The instrumental value of the public employee speech in *Connick* leads the dissent to conclude that the burden of proof on the government should be that of Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), which requires the government to show material and substantial disruption resulting from the speech. 461 U.S. at 168-69.

[324] Bork, *supra* note 31, at 27-28.

[325] The view that the Court's approach to public employee speech results in the "deconstitutionalization" of the public sector directly opposes the position of commentators who describe private sector employment as mirroring broader public sector constitutional rights of free speech. *See, e.g.*, Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One?*, 1 INDUSTRIAL REL. L.J. 711, 712 (1977). This view of deconstitutionalization also conflicts with the view that the Supreme Court has shown a willingness to introduce concepts of a democratic structure into the public

It has been stated that "a shift in the basic philosophy of law . . . results in an epoch-making difference in the way a concrete case is decided."[326] *Connick* exemplifies the truth of this statement; the Court's shift in first amendment theory from a democratic political process theory to an economic process theory results in restricted coverage and protection for employee speech. As the dissenting justices asserted, the governmental restriction on Myers' speech should have been reviewed under a stricter standard. Under a governmental process theory, Myers' speech concerned the functioning of governmental agencies and officials and informed the public on issues relevant to self-governance.[327] The Court's change in first amendment theories also underscores the fundamental difference between a process theory (which determines coverage and protection on the basis of external values) and a self-development theory (which makes these determinations according to intrinsic values of individual growth and self-actualization).[328] Under a process theory, the *Connick* Court could maintain its traditional analysis of first amendment questions according to the instrumental value of speech in promoting the goals of an external system. Thus, the skeletal theoretical structure remained consistent with other first amendment cases, while the shift in external systemic values completely altered the outcome of the case.[329]

The holding of *Connick* would have been different under a self-development theory. Initially, the value of the speech to Myers' self-development would have determined first amendment coverage of Myers' questionnaire. There are many ways of characterizing the aspects of self-development that would be promoted by this speech, such as the expansion of Myers' autonomy in the workplace[330] or an increase in

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employment setting. *See* Schauer, *supra* note 292, at 247-48. Instead, the Court is holding fast to its vision of the nature of the employment relationship. This view is consistent with those commentators who describe the Court's view of statutory rights created by the NLRA as providing only discrete, isolated limitations on management's otherwise unlimited discretion. *See supra* text accompanying notes 159-63.

[326] Brennan, *supra* note 64, at 10 (quoting Northrop, *Philosophical Issues in Contemporary Law*, 2 NATURAL L.F. 41, 48 (1957)).

[327] *See supra* text accompanying note 322. For discussion of the benefits to the public of applying democratic principles protecting expression of conflicting ideas in the workplace, see Schauer, *supra* note 292, at 247-48; *Public Employment*, *supra* note 1, at 1768-69.

[328] *See supra* text accompanying notes 44-52.

[329] As discussed *supra* text accompanying notes 105-12, in *Virginia Pharmacy* the Supreme Court made this same shift in the external value system in order to expand first amendment coverage to commercial speech.

[330] *See Freedom of Expression*, *supra* note 46, at 215-22.

her understanding of the realities of the workplace, which corresponds to the epistemic value of speech.[331] Thus, first amendment coverage would be established irrespective of the utility of Myers' questionnaire in promoting the goals of an external system.[332] Protection then would be determined under a strict scrutiny standard, placing the burden on the government to show a compelling state interest carried out by the least drastic means.[333] The government could not fulfill this burden of proof in *Connick*, as its asserted interest in maintaining authority and an undisrupted workplace is an unsubstantiated claim. The undisputed evidence showed no disruption of employees' work.[334]

C. *The Unionized Public Employment Setting:* Perry *and* Minnesota State Board

The Supreme Court continued its deconstitutionalization of the public sector workplace in *Perry Education Association v. Perry Local Educators' Association*[335] and *Minnesota State Board for Community Colleges v. Knight*,[336] which presented first amendment issues in unionized settings. In both cases, the first amendment process theory followed the pattern developed in *Connick*, by determining first amendment boundaries according to the instrumental value of speech in promoting the goals of the economic system. As in *Connick*, the Court's holdings are based on the systemic goals of maintaining stability and uninterrupted production. While in *Connick* these systemic values were manifested by employer interests in maintaining authority and discipline over individual employees, the unionized settings of *Perry* and *Minnesota State Board* bring additional values into play. In these unionized contexts, the Court measures speech's utility in terms of protection of the private sector institutionalized system of collective bargain-

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[331] *See* Perry, *supra* note 9, at 1155.

[332] See *Public Employment*, *supra* note 1, at 1769, for the view that in *Connick* and other public employee speech cases, "courts cannot give due weight to employee interests unless they develop a conception of those interests that embraces not only the purely instrumental interests in informing the public, but also the personal value of expression to the employee."

[333] *See* cases cited *supra* note 7.

[334] 461 U.S. at 151-52, 168. Furthermore, even a government showing that some disruption resulted from circulation of the questionnaire should not necessarily legitimate restriction of the speech, as an "independent free speech principle" recognizes that speech is protected not because it is harmless, but despite the fact that it may be harmful. *See* F. SCHAUER, *supra* note 27, at 7-12; *see also* Blasi, *supra* note 31, at 525.

[335] 460 U.S. 37 (1983).

[336] 465 U.S. 271 (1984).

ing. In particular, the *Perry* Court focused on the exclusivity principle and the protection of private property interests. In *Minnesota State Board*, the paramount concerns were the concept of exclusivity and the traditional "hands off" approach to private sector collective bargaining, as well as the retention of managerial prerogative over business decisions. These principles are fundamental to retention of the institutionalized structure of collective bargaining. The collective bargaining structure in turn promotes a system based on avoiding strikes and protecting managerial decisionmaking, to achieve the ultimate systemic goals of uninterrupted production and profit maximization.[337]

Both *Perry* and *Minnesota State Board* involved competition between rival unions. In *Perry*, the majority union, the Perry Education Association (PEA), was certified as exclusive bargaining representative for the teachers in the Perry Township schools.[338] Prior to PEA's certification, both PEA and the Perry Local Educators' Association (PLEA) had access to the interschool mail system and teacher mailboxes. The mailboxes normally were used to send official and personal messages among teachers and administrators.[339] Individual school principals also authorized other private organizations to use the mail system.[340] Following certification of PEA, the union and the school board entered into a collective bargaining agreement providing that PEA, but no other union, would have access to the interschool mail system and teacher mailboxes.[341]

In a five to four decision, the Supreme Court rejected the lower court's holding that the differential treatment of the majority and minority unions abridged PLEA's right to free speech under the first amendment and to equal protection under the fourteenth amendment.[342] The Court's rationale reveals that the majority perceives the Perry school board solely as an employer in a private system of collec-

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[337] *See supra* text accompanying notes 175-99.

[338] 460 U.S. at 40.

[339] *Id.* at 39.

[340] *Id.* at 39. The outside private organizations that used the mail system were local parochial schools, church groups, YMCA's, and Cub Scout units. *Id.* at 39 n.2.

[341] *Id.* at 40. PLEA was permitted to continue using other school facilities, which included posting notices on school bulletin boards, holding meetings on school property after school hours, and with the principal's approval, using the public address system to make announcements. Further, during a challenge to representation resulting in an election campaign, unions are given equal access to the mail system as well. *Id.* at 41.

[342] *Id.* at 54-55. The majority opinion was written by Justice White, joined by Justices Burger, Rehnquist, Blackmun, and O'Connor. Justice Brennan wrote the dissenting opinion, joined by Justices Marshall, Powell, and Stevens.

tive bargaining. This perception contrasts with the board's actual dual role both as an employer and as a government agency regulating access to publicly owned property for the purpose of expression. Thus, the theoretical basis of the first amendment analysis is shifted to focus solely on the interests of the employer in maintaining a traditional employment structure.

In *Perry* as in *Connick*, the Court subcategorizes speech to assign differing values to different types, and thereby adjust the level of judicial review of governmental speech restrictions. However, unlike *Connick*, *Perry* does not explicitly acknowledge that the subcategories reflect speech content. Instead, the Court subcategorizes the speech according to the type of property on which the speech takes place.[343] Despite the Court's characterization of its reasoning as objectively based merely on the "forum" involved,[344] the categorization further restricts freedom of expression in public sector employment. The Court's theory specifically rejects the fundamental values of a governmental process theory based on a democratic political system. Instead, the Court's definitions of the different types of "public fora" exclude from first amendment protection speech that conflicts with majority views.

The Court's levels of judicial review for different "fora" range from the "quintessential"[345] and "limited public forum[s],"[346] analyzed under a strict scrutiny standard,[347] to the "nonpublic forum,"[348] reviewed under the rational basis standard.[349] The Court defines "quintessential public forums" as "places which by long tradition or by government fiat have been devoted to assembly and debate,"[350] such as streets and parks.[351] The "limited public forum" is "public property which the state has opened for use by the public as a place for expressive activity . . . even if [the state] . . . was not required to create the

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[343] *Id.* at 45-47. For a discussion on the use of categories of public fora in first amendment analysis, and particularly in the *Perry* case, see Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1253-57 (1984).

[344] 460 U.S. at 44, 47-48.

[345] *Id.* at 45.

[346] *Id.* at 45-47.

[347] *Id.* at 45-46.

[348] *Id.* at 46.

[349] *Id.* The Court also stated that in the nonpublic forum, in addition to the requirement that restriction of the forum must be reasonable, the restriction must not be "an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

[350] *Id.* at 45.

[351] *Id.*

public forum in the first place,"[352] such as a school board meeting.[353] Finally, the "nonpublic forum" includes "property not by tradition or designation a forum for public communication,"[354] such as a military base or a jail.[355]

Even though the interschool mail system and mailboxes had been opened to both unions prior to PEA's certification and the mail system and mailboxes remained open to PEA after certification, the Court determined that the school mail facilities were a "nonpublic forum."[356] The Court justified its denial that such access created a "limited public forum" by claiming that the PEA's exclusive representative status provided the basis for exclusive access.[357] The Court stated that previous access given to civic organizations did not create a limited public forum because PLEA was not "of similar character" to these private groups.[358] Having ignored the fact that the school mail system had been "opened for use by the public as a place for expressive activity,"[359] the Court reviewed the differential access to communication with the teachers under the rational basis test, for which "the touchstone for evaluating the distinctions [in access] is the reasonableness in light of the purpose which the forum serves."[360] As in all rational basis cases, the governmental restriction inevitably was upheld.[361] In *Perry*, the Court essentially treated the government as a private employer. Indeed, the Court acknowledged the identical treatment of public and private em-

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[352] *Id.*

[353] *Id.* (citing City of Madison Jt. School Dist. v. Wisconsin Pub. Relations Comm'n, 429 U.S. 167 (1976)).

[354] 460 U.S. at 46.

[355] The Court did not explicitly include these fora in this category, but cited two cases involving these fora to support the creation of this third category. *Id.* (citing Greer v. Spock, 424 U.S. 828 (1976) (military base); Adderley v. Florida, 385 U.S. 39 (1966) (jail)).

[356] 460 U.S. at 46.

[357] *Id.* at 48. The Court's characterization of the change in status of PEA when it became the exclusive bargaining representative of the teachers goes further than simply viewing PEA as the majority union. The Court describes PEA's duties as the exclusive bargaining representative as part of "the forum's official business." *Id.* at 53 (citation omitted). This description by the Court brings to mind the views expressed by Karl Klare regarding institutionalized collective bargaining structures, which give majority unions a stake in perpetuation of that institutionalized system. *See Labor Law as Ideology*, *supra* note 159, at 452; *Liberal Political Imagination*, *supra* note 200, at 57.

[358] 460 U.S. at 48.

[359] This is the phrase used by the Court to describe the category of a limited public forum. *Id.* at 45.

[360] *Id.* at 49.

[361] *See Public Employment*, *supra* note 1, at 1777.

ployers in its discussion of the nonpublic forum, finding that "the state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[362] The Court's emphasis on the "private" property owner's control over the property is identical to the Court's reverence for private property in *Babcock & Wilcox*.[363]

In addition to this general analogy to control over privately owned property, the Court's discussion of the school board's exclusive access policy borrows other concepts developed in measuring employer conduct under the NLRA. For example, the Court upholds the reasonableness of the policy in *Perry* based on the existence of alternative means by which PLEA can communicate with the teachers.[364] In *Babcock & Wilcox* as well, the Court used the presence of alternative means of communication with employees to justify the employer's denial of union access to private property.[365] The Court also found that the *Perry* exclusive access policy was reasonable, based on the need to preserve the collective bargaining exclusivity principle[366] and on accompanying concerns for maintaining labor peace and stability of labor relations.[367] The Court found a reasonable, if speculative, connection between these labor policies and the differential access to the mail system despite the fact that equal access had not resulted in any disruption prior to PEA's certification.[368] The Court also relied on the exclusivity principle to dismiss the argument that discrimination based on viewpoint violates basic first amendment principles even under the rational basis standard.[369] The Court found that the exclusive access policy did not constitute viewpoint discrimination, because after certification, "PEA thereby assumed an official position in the operational structure of the District's schools, and obtained a status that carried with it rights and obligations

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[362] 460 U.S. at 46 (quoting United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 120 (1981) (quoting *Greer*, 424 U.S. at 836)).

[363] *See supra* text accompanying notes 178-82; *see also* Farber & Nowak, *supra* note 343, at 1235 n.81 ("[t]he recent prominence of public forum analysis may well relate to the Burger Court's tendency to stress property concepts in first amendment cases").

[364] The Court stated that "[t]hese means range from bulletin boards to meeting facilities to the United States mail." 460 U.S. at 53.

[365] 351 U.S. at 112.

[366] The exclusivity principle and its role in assuring stability are instrumental to maintaining the private sector system of collective bargaining under the NLRA. *See supra* text accompanying notes 189-99.

[367] 460 U.S. at 50-53.

[368] *Id.* at 52 n.12.

[369] *Id.* at 49.

that no other labor organization could share."[370]

Comparing the school mail system to privately owned property and stating that the government had not created a limited public forum by opening the property for public expression, the Court used only a rational basis standard to test the government's restriction of PLEA's expression. The Court majority then found that the interests in preserving private property and exclusivity easily outweighed PLEA's interests in equal access to the mail system; the value underlying the systems of private property and institutionalized collective bargaining easily eliminated any issue of viewpoint discrimination. Since there was no first amendment violation, the Court also found no violation of the equal protection clause of the fourteenth amendment. The Court determined that there was no burden on fundamental rights through discrimination against the exercise of PLEA's first amendment rights.[371]

As with *Connick*, *Perry* can be explained by the shift in the first amendment process theory values from those underlying a democratic political system to those underlying the economic system.[372] In *Perry*, the systemic goals are manifested by the values of private property and institutionalized collective bargaining. The shift in theoretical value systems is especially clear in *Perry*, as the speech at issue would have directly promoted the goals of a governmental process theory, but was destructive to the goals of the economic system.

An economic system based on values of control of private property and preservation of uninterrupted production does not require property owners to open a forum for discussion of conflicting ideas and opinions which could threaten to disrupt production processes.[373] These values form the basis of the Supreme Court private sector labor decisions of *Babcock & Wilcox* and *Hudgens*, which confirmed a property owner's power to control the content of speech on private property.[374] In *Perry*, the Court extended these private property values to public sector employment under the guise of creating different categories of public fora. By defining the school mail system as a nonpublic forum, the Court

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[370] *Id.* at 49 n.9.

[371] *Id.* at 54-55.

[372] For discussion of the importance of the employment system context in *Perry*, see Pope, *supra* note 32, at 208 ("the citizen-employee dichotomy was more important to the results than the public forum analysis"); *see also* Farber & Nowak, *supra* note 343, at 1240 (discussing importance of retaining first amendment government process values when regulation of speech takes into account the "harmful effects" of a specific environment).

[373] *See supra* text accompanying notes 178-82.

[374] *See supra* text accompanying notes 178-82 & 207-36.

transformed the governmental entity of the school board into the "functional equivalent" of a private sector employer.[375] Further, having measured first amendment access rights according to the values of a private property system, the Court applied private sector collective bargaining values to justify exclusion of minority views that ostensibly threatened the exclusivity principle and labor peace.[376]

Retaining the democratic systemic values of a governmental process theory, the dissenting justices (as in the *Connick* dissent) reached a different result.[377] The *Perry* dissent noted that tolerance of conflicting views is essential to the marketplace of ideas in spite of the discomfort or antagonism conflicting views may create.[378] Applying a strict scrutiny test, the dissent rejected the asserted state interests in exclusivity and labor peace. The dissent found that the policy was not drawn narrowly to support exclusive representation[379] and that no objective evidence of labor instability was shown.[380] Thus, the dissenting justices would have ruled that the minority union's freedom of speech furthered systemic goals of a democratic political process and that no compelling state interests outweighed its interest in free expression.[381]

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[375] Viewing the public sector employer as holding the unilateral control of a private sector employer is, of course, a reversal of the use of the term "functional equivalent" in the line of cases beginning with *Marsh* and including *Logan Valley*, in which the private sector employer was treated as having public sector obligations under the first amendment. *See supra* text accompanying notes 207-32.

[376] *See supra* text accompanying notes 189-99.

[377] In *Connick*, Justices Brennan, Marshall, Blackmun, and Stevens dissented. In *Perry*, these same Justices, with the exception of Justice Blackmun, again dissented. Justice Powell joined the majority in *Connick*, but dissented in *Perry*.

[378] The Court of Appeals in *Perry* recognized the need under the first amendment to allow conflicting ideas to coexist as well as the detrimental results of excluding conflicting views. The Court noted that under the exclusive access policy, "teachers inevitably will receive from [PEA] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [PLEA]." Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1296 (7th Cir. 1981), *quoted in* 460 U.S. at 65 (Brennan, J., dissenting).

[379] The dissenting Justices accepted the court of appeals' conclusion that the exclusive access policy was "over-inclusive because [the policy] does not strictly limit the [PEA's] use of the mail system to performance of its special legal duties . . . ." 460 U.S. at 67.

[380] *Id.* at 70.

[381] The dissent clearly identifies values underlying the governmental process theories, finding that

> [o]nce the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not. . . . We have never held that government may allow discussion of a subject and then discrimi-

The determinative nature of the Court's conversion of the school board into the equivalent of a private sector employer is demonstrated by comparing *Perry* to *City of Madison Joint School District v. WERC*.[382] In *City of Madison*, the school board was involved in negotiations with the majority teachers' union, which had been certified as exclusive bargaining representative.[383] The state labor relations board found an unfair labor practice when, during negotiations, the school board allowed a teacher representing a minority group of teachers to speak at a public school board meeting on a subject under negotiation.[384] The Court held that restriction of this teacher's speech violated the first amendment, based on the rationale that the school board had created a "limited public forum" by opening the school board meeting to the public, even if the board was not initially required to allow public participation.[385] Under the Supreme Court's strict scrutiny standard, the exclusivity principle was not sufficiently compelling to overcome the fundamental first amendment principle against viewpoint discrimination.[386]

In contrast to *City of Madison*, the expression in *Perry* took place at the workplace strictly within the employment relationship.[387] In *City of Madison*, the school board acted both as a governmental entity and as an employer in negotiations. The case focused on the school board's public meeting, held as part of its role as a governmental body.[388] Consistent with this focus, the Court conducted its first amendment analysis under a governmental process theory, finding that the minority speech furthered the goals of open discussion of conflicting views to inform the public in a democratic political system.[389]

City of Madison and *Perry*'s differing analyses and results demon-

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> nate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussions of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values.

Id. at 61-62 (footnote omitted).

[382] 429 U.S. 167 (1976).

[383] *Id.* at 169.

[384] *Id.* at 172-73.

[385] *Id.* at 175.

[386] *Id.* at 175-76.

[387] *See* Pope, *supra* note 32, at 206-16 (explaining the differing results in *City of Madison*, *Perry*, and other cases as protection of speech "when advanced through external channels" rather than internal channels).

[388] 429 U.S. at 176.

[389] *Id.* at 175.

strate that the external nature of value determination in a first amendment process theory facilitates a shift in the system by which freedom of expression is measured. In both cases, as in *Connick*, the context of the speech determined the first amendment analysis. Thus, the move to the employment setting in *Perry* and *Connick* was accompanied by a corresponding shift in the theoretical basis of first amendment analysis. Again, in *Perry*, as in *Connick*, application of a self-development theory would have provided protection from the restriction of first amendment boundaries based on the external context of the speech. The relevant interests in *Perry* would include those of the minority union, which asserted infringement of its first amendment rights, and the teachers as the audience for the minority union's speech.[390] The minority union's interests under a self-development theory would focus on the union's participation in speech or dialogue. From this perspective, self-development theorists have identified relevant participatory values as "inherent rights of equal political participation,"[391] and communication as "a mode of political participation,"[392] with value independent of audience access to the expression.[393] The values identified by self-development theorists also would provide a basis for protection of the minority union's speech because of audience interests in increasing both collective self-rule and individual self-rule.[394] The minority views would contribute to development of an epistemic value in the teachers' seeking "an even better understanding of reality."[395]

Thus, under a self-development theory, the importance of avoiding viewpoint discrimination stems from the intrinsic value of protecting minority views to develop the faculties of both participants and audience, rather than from the instrumental value of the speech in promoting the goals of an external system. The development of these internal values would mandate a strict scrutiny standard for analyzing the governmental restrictions of the minority views in *Perry*.[396] As in *Connick*, under this test, the government would be unable to carry its burden of proving a compelling state interest. The undisputed evidence showed that the nondiscriminatory access prior to certification did not result in

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[390] Identifying the relevant interests as those of the speaker as well as the audience-employees is consistent with the self-development theorists' recognition of both speaker and audience interests. *See, e.g.*, Perry, *supra* note 9, at 1145.

[391] Bollinger, *supra* note 16, at 442 (describing the views of Professor Tribe).

[392] Perry, *supra* note 9, at 1145.

[393] *Id.*

[394] Redish, *supra* note 12, at 605-07.

[395] Perry, *supra* note 9, at 1155.

[396] *See* Redish, *supra* note 12, at 624-25.

any disruption.[397] Further, as the dissent noted, the state interests were not fulfilled by the least restrictive means, because the exclusive access policy was "both overinclusive and underinclusive."[398]

Collective bargaining in the academic environment was also the setting for *Minnesota State Board*, which provided a continued contrast from the Court's first amendment cases promoting the values of a democratic political system, particularly the values of a system based on concepts of academic freedom. *Minnesota State Board* concerned the constitutionality of part of the Minnesota Public Employment Labor Relations Act (PELRA).[399] PELRA requires state employers to bargain with employees' exclusive bargaining representatives concerning mandatory subjects of bargaining.[400] PELRA also grants state professional employees the right to "meet and confer," but not formally negotiate, with their employers on permissive bargaining subjects such as public policymaking decisions of the public employer.[401] However, if a union represents the employees, under PELRA, the public employer may negotiate or "meet and confer" only with the exclusive bargaining representative.[402] The plaintiffs, faculty members who were not members of their exclusive bargaining representative (union), challenged PELRA's meet and confer provision as violating their first and fourteenth amendment free speech and associational rights by denying them participation in the policymaking process.[403]

The Court majority rejected the claim that the meet and confer provision infringed freedom of speech and association. Similarly, the Court denied that the provision violated the fourteenth amendment equal protection clause by its classification of permissible speech based on ex-

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[397] 460 U.S. at 70 (Brennan, J., dissenting).

[398] *Id.* at 66-67. The policy was overinclusive because it did not limit PEA to use the mail system to perform its duties in connection with its status as an exclusive bargaining representative. It was underinclusive because outside organizations were permitted to use the mail system even though they could not claim a special status requiring them to use the system. *Id.*

[399] MINN. STAT. ANN. § 179.61 (Supp. 1985) (repealed).

[400] The statute was passed to establish "orderly and constructive relationships between all public employers and their employees. . . ." *Id.*

[401] *Minnesota State Bd.*, 465 U.S. at 273-74. This provision is based on the idea "that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies." MINN. STAT. ANN. § 179.73 (Supp. 1985) (repealed).

[402] 465 U.S. at 274.

[403] *Id.* at 278-79.

pression of a majority or minority view.[404] The Court based its holding on two grounds. First, relying on *Smith v. Arkansas State Highway Employees, Local 1315*,[405] the Court concluded that the plaintiffs had no first amendment interest. The Court explained that the right to speak does not guarantee to minority employees that their public employer will listen, stating that "Minnesota has simply restricted the class of persons to whom it will listen in its making of policy."[406] Responding to the objection that this restriction was based on whether the speech expressed a majority or minority view, the Court then focused on the state interest in preserving the exclusive representation status of the certified union; it stated that "amplification" of the majority voice does not infringe freedom of speech.[407] The Court's holding that fundamental first amendment rights were not infringed by the denial of access to the meet and confer process permitted review of the equal protection claim under the rational basis standard, resulting in deference to the state's interest in listening only to the majority view.[408] The Court agreed that "[t]he state has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions."[409]

The Court's analysis in *Minnesota State Board* led to denial of first amendment coverage for the speech of the public employees. The Court's reasoning reveals the continued use of a process theory based on the utility of the speech at issue. However, the Court again determined first amendment coverage in a public employment case on the basis of the utility of the speech in preserving a private sector model of

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[404] *Id.* at 280-81, 291. The evidence showed that the majority union, the Minnesota Community College Faculty Association (MCCFA), selected only its own members for representation on the meet and confer committees. *Id.* at 276.

[405] 441 U.S. 463 (1979). In *Smith*, the Supreme Court found that a public employer could not constitutionally prohibit employees from organizing or joining unions. However, the Court ruled that a public employer was not constitutionally obligated to bargain with or otherwise acknowledge the existence of a union as an employee representative. *Id.* at 465-66.

[406] 465 U.S. at 282.

[407] *Id.* at 288. The majority stated that "[a]mplification of the sort claimed is inherent in government's freedom to choose its advisors." *Id.* The majority also found that although these teachers might feel pressure to join the MCCFA in order to have a voice on the meet and confer committees, there was no violation of the nonmembers' freedom of association. "[This] pressure is no different from the pressure to join a majority party that persons in the minority always feel." *Id.* at 290.

[408] *Id.* at 291-92.

[409] *Id.* at 291.

employment and collective bargaining, rather than its utility to a political system based on democratic ideals.

The Court's rejection of a governmental process theory based on input into the political process becomes evident in the *Minnesota State Board* majority's response to Justice Stevens' dissenting opinion.[410] Justice Stevens relied exclusively on a governmental process theory:

> [T]he First Amendment does guarantee an open marketplace for ideas — where divergent points of view can freely compete for the attention of those in power and of those to whom the powerful must account. The Minnesota statute places a significant restraint on that free competition, by regulating the communication that may take place between the government and those governed.
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> . . . .
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> . . . Thus the PELRA has substituted a union-controlled process for the formerly free exchange of views that took place between faculty and the administration.[411]

The majority unequivocally and repeatedly denied that minority employees' speech provides valuable input into the political system.[412] The Court stated that Justice Stevens' position "has shocking implications for our political system wholly unsupported by anything this Court has ever held,"[413] and that "[t]o recognize a constitutional right to participate directly in government policy-making would work a revolution in existing government practices."[414]

The Court's unconvincing denial of the instrumental value of minority views to promotion of a democratic political system can again be explained by the shift in the Court's theoretical base. The Court fo-

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[410] Justices Stevens, Brennan, and Powell dissented in *Minnesota State Board*. Justice Marshall concurred in the judgment, but emphasized that a different result might be warranted in a case in which the academic setting more significantly impaired the communicative ability of teachers. *Id.* at 292-95 (Marshall, J., concurring). Justices Brennan and Powell joined Justice Stevens' dissenting opinion, although they did not join certain parts of the opinion. However, the parts of this dissent that all the dissenters agreed on show a consensus on the values underlying the governmental process theory. Justice Brennan also filed a separate dissenting opinion that emphasized the principles of academic freedom.

[411] *Id.* at 300 (Stevens, J., dissenting) (footnotes omitted).

[412] The majority viewed the constitutional claim in terms of a "claim [to] an entitlement to a government audience for [the minority employees'] views." *Id.* at 282. In resolving this issue the majority stated that the employees "have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.*

[413] *Id.* at 281 n.6.

[414] *Id.* at 284.

cuses on the value of the exclusivity principle as a tool for promoting an orderly, stable collective bargaining system, as it did in *Perry*.[415] Once again, this systemic value is completely at odds with the inherent value of conflict in a democratic political system. However, the Court's rejection in public employment cases of the values underlying the governmental process theories shows that it rejects the functional role of conflict in a privatized system of collective bargaining.[416]

Minnesota State Board reinforces a hierarchical employment structure, another value central to the private sector labor cases and to the overriding values of the economic system; this further explains the Court's rejection of a governmental process theory. The Court sounded the familiar refrain of managerial prerogative to make unilateral policy decisions, stating that the plaintiffs' "status as public employees . . . gives them no special constitutional right to a voice in the making of policy by their government employer."[417] Ironically, the Court's statement identifies the dual role of the government as both employer and governor. The values expressed in this assertion and in the Court's holding, however, are consistent solely with the role as employer in a position of control over public employees.[418]

Justice Brennan's dissent in *Minnesota State Board* also highlights the importance of the systemic values applied in first amendment analysis. Brennan's dissenting opinion specifically derives from the values underlying the academic system.[419] These values are consistent with values in a democratic political system, receiving added emphasis because of the instrumental value of free speech within the schools to achieving a democratic political system.[420] Thus, Brennan stated: "This

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[415] *See supra* text accompanying notes 366-70.

[416] *See supra* text accompanying notes 247-49 & 312-16.

[417] 465 U.S. at 287.

[418] The Court's view of the governmental employer's role primarily as employer over employees rather than in the role of government vis-à-vis its citizens is also highlighted by the Court's recognition that "public employees . . . have a special interest in public policies relating to their employment," but that this special interest in expressing themselves on such public policies is satisfied by the Minnesota public sector labor relations statute. *Id.* Further, the Court's use of Smith v. Arkansas State Highway Employees Local 1315, 441 U.S. 463 (1979), as controlling in the *Minnesota State Board* case is significant. The *Smith* Court emphatically stated that the Constitution is not a substitute for statutory regulation and protection in the labor relations sphere. *See* 441 U.S. at 464.

[419] 465 U.S. at 295-96 (Brennan, J., dissenting).

[420] *See generally* T. EMERSON, *supra* note 9, at 593-610; Murphy, *Academic Freedom — An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447 (1963); Schauer, *supra* note 292, at 244-47; Van Alstyne, *The Constitutional Rights of Teach-*

Court's decisions acknowledge unequivocally that academic freedom is 'a special concern of the First Amendment,' and that protecting the free exchange of ideas within our schools is of profound importance in promoting an open society."[421] Given the fundamental importance of promoting these values, Brennan rejected the asserted state interest of protecting the exclusivity principle in meetings over permissive subjects of bargaining.[422]

The contrast between the systemic values in the employment context and those underlying the academic system is illuminated by comparing *Minnesota State Board* with *Tinker v. Des Moines Independent Community School District*.[423] In *Tinker*, the Court held that high school officials had violated students' first amendment rights by prohibiting them from wearing black armbands to protest the Vietnam War.[424] The Court's discussion of the first amendment coverage and protection of the students' expression relied on the importance of protecting minority views within the schools to promote the goals of a democratic political system.[425] In *Tinker*, the Court recognized the presence of the competing systemic values of protection of conflicting ideas and retention of hierarchical control.[426] The Court resolved this conflict of values by rejecting the asserted importance of preserving intact the hierarchical system, especially when the government did not show that the speech caused any interference or disturbance in the school system.[427]

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ers and Professors, 1970 DUKE L.J. 841; Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS 140 (1972).

[421] 465 U.S. at 296 (Brennan, J., dissenting) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). Justice Brennan also refers to other concepts of the governmental process theories stating that " '[t]he classroom is peculiarly the marketplace of ideas.' " 465 U.S. at 296 (Brennan, J., dissenting) (quoting *Keyishian*, 385 U.S. at 603).

[422] Justice Brennan contrasts the state interest in allowing only one viewpoint to express positions regarding permissive subjects of bargaining "which embrace a broad array of sensitive policy matters and which serve only to provide information, not to establish any element of a collective-bargaining agreement," with the compelling state interest in allowing only the exclusive representative to speak when the parties are seeking to reach "an enforceable agreement." 465 U.S. at 299 (Brennan, J., dissenting).

[423] 393 U.S. 503 (1969).

[424] *Id.* at 508.

[425] *Id.* at 508-12.

[426] The issue occurred "in the area where students in the exercise of First Amendment rights collide with the rules of school authorities." *Id.* at 507.

[427] *Id.* at 508-09. The Court noted that the state had the burden of showing that the students' "conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . .' " *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

The Court reached this conclusion relying on a governmental process theory:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. . . . But our Constitution says that we must take this risk . . . and our history says that it is this sort of hazardous freedom — this kind of openness — that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[428]

The Court also rejected the treatment of the school authorities as private property owners, stating that "the constitutional rights of persons entitled to be [at a school are not] to be gauged as if the premises were purely private property."[429]

In both *Tinker* and *Minnesota State Board* the expression took place within educational institutions, related to public policy, and presented views in conflict with the majority position. The glaring difference between the cases resulted because the expression in *Minnesota State Board* occurred within the employment relationship, which placed the speech within the context of a privatized system that rejects the values underlying a democratic political system. In *Tinker*, the Court could apply a governmental process theory because it viewed the speech as fulfilling the goals of a governmental system that accepts conflict as a necessity; the "marketplace of ideas"[430] is a means to achieving "[t]he Nation's future [which] depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.' "[431] In *Minnesota State Board* there was another kind of system to protect. Despite the academic environment and the utility of input by educators into academic policymaking, first amendment coverage of the minority views directly conflicted with preservation of the institutionalized system of collective bargaining and the protection of unilateral managerial decisionmaking power.

Comparison of the results of *Minnesota State Board* under an economic process theory with application of a self-development theory follows the same pattern as the analyses of *Connick* and *Perry*. In *Minnesota State Board*, however, the contrast is even more striking, because the majority used the institutionalized system of collective bargaining to

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[428] 393 U.S. at 508-09.

[429] *Id.* at 512 n.6.

[430] *Id.* at 512.

[431] *Id.* (quoting *Keyishian*, 385 U.S. at 603).

exclude the minority views from first amendment coverage.[432] The denial of coverage, therefore, made the question of protection unnecessary. This result also demonstrates the narrow confines of the first amendment process theory in public employment, which covers only "political speech" from the majority view.[433] Under a self-development theory, coverage could be established through the intrinsic values of individual self-rule, autonomy, or the act of speaking as a mode of political participation.[434] The minority speech also would receive first amendment protection, in weighing these values against the asserted governmental interest in exclusivity. As Justice Brennan noted, in the "meet and confer" sessions over nonmandatory subjects of bargaining, "which embrace a broad array of sensitive policy matters and which serve only to provide information, . . . the state's interest in admitting no one other than an exclusive union representative is substantially diminished."[435]

CONCLUSION

The choice of a theoretical base for a system of freedom of expression is integral to determining the scope of coverage and protection speech will enjoy. The theory chosen also attests to the values underlying the philosophical components of the theory. In the study of the first amendment, theories have fallen under the broad rubrics of a governmental process theory or a self-development theory. The governmental process theories are founded on values growing out of a systemic view of the first amendment; that is, the coverage and protection of speech is determined by what will further the goals of a democratic political system. Thus, within the governmental process group are theories that identify

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[432] 465 U.S. at 282. *See Public Employment*, *supra* note 1, at 1779 (discussing the tension between the exclusivity principle and public employees' first amendment rights).

[433] The Court's discussion of the majority union's input regarding policymaking by the governmental employer fits within the confines of political speech, narrowed even more significantly than Bork's definition of this area of speech. *See supra* text accompanying notes 37-38.

[434] *See supra* text accompanying notes 330, 391-92 & 394.

[435] 465 U.S. at 299 (Brennan, J., dissenting); *see* Farber & Nowak, *supra* note 343, at 1259, 1261 (discussing the conflict between the holding in *Minnesota State Board* and the values underlying the first amendment from different theoretical approaches). The authors state that the statutory policy in *Minnesota State Board* "undermined the libertarian values of the first amendment, and by restricting the exchange of information over policy decisions to a discussion of views acceptable to a governmentally recognized entity (the union), the law undercut the first amendment's marketplace value as well." *Id.* at 1259.

the value of the "marketplace of ideas," the "self-governance" theory, the "search for truth," and the "checking value" of the first amendment. Common to these theories is the vision of a theory of expression that is tied to the utilitarian function of speech in furthering specific goals of an externally determined system. In the self-development theories, the utility of speech to furthering the goals of an external system is irrelevant. Instead, the protection of speech depends on the possibility that the expression may contribute to individual self-realization or actualization, regardless of its external effects. Thus, under the self-development theories, protection of speech has intrinsic value.

The Supreme Court has generally applied a governmental process theory to determine the scope of first amendment coverage and protection. While the governmental process theory measures the value of speech according to how it promotes the goals of a democratic political system, the Supreme Court has also shifted the systemic focus of its process theory to include a weighing of the utility of the speech to the promotion of the goals of the capitalist economic structure within which the political system of the United States is contained. For example, the Court expanded first amendment coverage for commercial speech by focusing on the function of commercial speech in furthering economic system goals. However, applying economic values to questions of freedom of expression more often results in contracting the boundaries of first amendment coverage. This result is preordained by the underlying profit motive and values of uninterrupted commerce and production in capitalism. Such values are inherently inconsistent with first amendment governmental process values — tolerance of dissension, encouragement of conflicting views, and protection of minority opinions — in spite of their potentially disruptive effects.

The Supreme Court's recent public employment cases illustrate the repressive results of applying a process theory that promotes goals of the economic system. In its labor cases, the Court generally relies on values crucial to furthering capitalism and entrepreneurial control. Among these values are control of private property, maintenance of a hierarchical employment structure, preservation of unlimited managerial prerogative in decisionmaking, and promotion of a private system of institutionalized collective bargaining. These values are completely at odds with the values of a governmental process theory. Yet the Court has been able to maintain a superficial continuity of first amendment analysis in public employment cases by determining the scope of public employee speech according to the instrumental value of the speech to the goals of an external system. In public employment, however, the process theory severely restricts first amendment coverage and protec-

tion, due to the Court's shift in systemic analysis from measuring the utility of speech in promoting the values of a democratic political system to the utility of speech within the economic system.

The restrictive results of the Court's process theory in public sector employment cases demonstrate the fundamental difference between a process theory and a self-development theory. While the specific holdings of the Supreme Court's nonlabor first amendment cases might have been the same under a governmental process theory or a self-development theory, the difference in analytical approaches becomes crucial for public employee speech, which is subject to competing systemic values. Had the Court applied a self-development theory in its nonlabor cases, the first amendment analysis (based on intrinsic values of speech in individual development) would have remained constant in the employment context. However, the Court's traditional application of a process theory in nonlabor cases permitted it to react to the shift in speech to the employment setting with a corresponding shift in systemic values. Thus, by applying a process theory based on the values of the economic system, the Court protects only speech that furthers these values. However, as broad protection of speech threatens, rather than serves, the values of managerial control, the Court's systemic theory results in narrow first amendment coverage and protection of public employee speech.

The Court has effectively deconstitutionalized or privatized the public sector workplace, leaving public employees with little more constitutional speech protection than private sector employees. Under *Connick*, this privatization of individual employee speech results in judicial deference to employer restriction of speech on "personal matters" or on matters of "limited public concern." Only restriction of speech on matters of "substantial" or "inherent public concern" spoken by a public employee as a private citizen will receive a higher level of judicial review. Under *Perry* and *Minnesota State Board*, the Court displays deference to the employer's restriction of all but majority views. Thus, in the unionized public employment setting, the privatization is complete.