In Defense of Jeffrey Wigand: A First Amendment Challenge to the Enforcement of Employee Confidentiality Agreements against Whistleblower

Brian Stryker Weinstein

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Law Commons

Recommended Citation
Weinstein, Brian Stryker (1997) "In Defense of Jeffrey Wigand: A First Amendment Challenge to the Enforcement of Employee Confidentiality Agreements against Whistleblower," South Carolina Law Review: Vol. 49 : Iss. 1 , Article 7. Available at: https://scholarcommons.sc.edu/sclr/vol49/iss1/7

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.
I. INTRODUCTION

When 60 Minutes, in November 1995, refused to air Mike Wallace’s interview with Jeffrey Wigand, the highest level tobacco company executive to break ranks with the industry and reveal what insiders allegedly knew about the dangers of smoking, CBS suffered a barrage of criticism in the name of the First Amendment.1 CBS pulled the interview after being threatened by Brown

---

1. See, e.g., Lawrence K. Grossman, CBS, 60 Minutes, and the Unseen Interview, COLUM. JOURNALISM REV. Jan./Feb. 1996, at 39, 47, 49 (discussing opponents’ views of CBS’s decision to suppress the tobacco story). 60 Minutes eventually aired the interview after the Wall Street Journal published excerpts from a deposition of Wigand taken in a Mississippi class action suit against the tobacco industry. See Jane Hall, 60 Minutes Will Present Withheld Tobacco Interview, L.A. TIMES, Jan. 29, 1996, at F2.
& Williamson Tobacco Corporation, Wigand’s former employer, with a suit for tortious interference with contract. Brown & Williamson accused CBS of interfering with contracts in which Wigand had pledged not to disclose confidential information learned as a result of employment. First Amendment specialist James Goodale called Brown & Williamson’s efforts to suppress Wigand’s disclosures “the most important press issue since the Pentagon Papers.”

While the controversial Wigand interview has received much attention,5 a less dramatic, but no less significant, First Amendment issue has gone largely unnoticed: namely, the enforceability of the employee confidentiality agreements that were the basis of Brown & Williamson’s threatened suit against CBS, agreements that increasingly are a condition of employment contracts and severance packages.6 Confidentiality agreements traditionally have been an effective way for employers to prevent trade secrets from being leaked to competitors.7 But what about Jeffrey Wigand, who has been sued by Brown & Williamson for violating his confidentiality agreements,8 or others like him who disclose inside information—not for the benefit of competitors—but for the benefit of the general public? Should courts enforce confidentiality agreements against private employees when the disclosures at issue concern matters of public interest?

Courts have not yet seriously examined this question,9 although they

3. See id.
5. See Brenner, supra note 4, at 209-10 (“In the research files of Nexis, . . . there are 220 newspaper and magazine stories that have mentioned ‘tortious interference’ since CBS News made the decision not to allow the Wigand segment to go on the air.”).
6. See Margaret A. Jacobs, Will Promises of Silence Pass Tests in Court?, WALL ST. J., Dec. 14, 1995, at B1. This article is the only one found that directly addresses the issue of whistleblowers who have been sued for violating confidentiality agreements.
7. See Alois Valerian Gross, Annotation, What Is “Trade Secret” So As to Render Actionable Under State Law Its Use or Disclosure by Former Employee, 59 A.L.R.4TH 641, 657 (1988) (observing, in a broad overview of trade secret cases, that the existence of employee confidentiality agreements has been an important factor in influencing the assignment of “trade secret” status to disclosed information).
8. See Brown & Williamson Tobacco Corp. v. Wigand, No. 95-CI-06560 (Ky. Ct. App. filed Nov. 21, 1995). As part of the landmark tobacco settlement that was reached in June of this year, Brown & Williamson, under pressure from state attorneys general, agreed to dismiss its lawsuit against Wigand. Under the terms of the settlement agreement, Wigand is released from liability for all actions taken prior to the date of the settlement, but remains bound by his confidentiality agreements until March 20 of next year or until settlement legislation is passed by Congress. See Kim Wessel, B&W Dismisses Lawsuit Against Wigand, THE COURIER-JOURNAL (Louisville, Ky.), Aug. 1, 1997, at 3B. As of the date that this article was submitted for publication, Congress had not yet approved the tobacco settlement.
9. No published opinions directly on point were found, a result that is consistent with another
may be forced to do so to resolve cases similar to the Wigand case that are currently pending and likely to follow.\textsuperscript{10} The approach courts take in resolving such confidentiality agreement cases will determine whether employers gain a powerful, new weapon to silence whistleblowers. Current protections for employee whistleblowers\textsuperscript{11} address wrongful discharge or other discriminatory treatment by one's employer, not contractual liability. Exposure to unknown amounts of contractual liability imposes an additional (and arguably even stronger) deterrent to speaking out than the fear of being fired\textsuperscript{12}—to the detriment of an informed debate on matters of public importance.\textsuperscript{13}

This article argues that a purely contractual approach is not adequate to address the enforceability of employee confidentiality agreements against whistleblowers. To the extent that the enforcement of employee confidentiality agreements restricts the vibrancy of public debate, the First Amendment should provide additional protection beyond that afforded by contract law. The First Amendment is implicated because court enforcement of contract law constitutes state action.\textsuperscript{14} Like other areas of common law, contract law must accommodate the demands of the First Amendment when state enforcement threatens public discourse.\textsuperscript{15}

Of course, in a given case a court could legitimately refuse to enforce an employee confidentiality agreement within the parameters of contract law itself, without explicitly integrating the First Amendment into the analysis, by arguing that the public interest in disclosure is sufficiently great to render the

\textsuperscript{10} See Jacobs, supra note 6, at B5 (citing pending cases in which whistleblowers have been sued for violating confidentiality agreements and noting that this novel issue is one with which courts will have to struggle).

\textsuperscript{11} See generally DANIEL P. WESTMAN, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE (1991) (discussing various statutory and common-law forms of whistleblower protection).

\textsuperscript{12} See Rützel, supra note 9, at 26.

\textsuperscript{13} Commentators have recently highlighted the threat of confidentiality agreements to debate on matters of public importance in a different context—the funding of scientific research. See Ralph T. King Jr., Bitter Pill: How a Drug Firm Paid for University Study, Then Undermined It, WALL ST. J., Apr. 25, 1996, at A1.

\textsuperscript{14} See discussion infra Part II.

contract void as against public policy. However, this article challenges a court's willingness to enforce the contract without accounting for the First Amendment consequences. Recognizing the First Amendment implications of enforcing employee confidentiality agreements is constitutionally required and is also likely to provide greater protection for whistleblowers than contract law alone.

While a purely contractual approach would begin with a strong presumption of enforceability, to be overcome only by the unpredictable application of the public policy exception, a First Amendment defense would require a more rigorous showing that enforcement of the contract is necessary to further state interests substantial enough to justify the restrictions placed on speech. To the extent that courts look to state statutes and common law as sources of public policy, wide disparities will exist in the ability of whistleblowers to avail themselves of a public policy defense to contract enforcement because the protections afforded whistleblowers vary greatly from state to state. Introducing the First Amendment into the analysis, where it properly belongs, would ideally promote more even-handed protection.

Even if court enforcement of employee vows of silence raises a First Amendment issue, one might argue that employees arguably may have waived their rights to assert a First Amendment defense by signing confidentiality agreements. Part III of this article explains why such an argument fails. Many cases involving whistleblowers who have signed confidentiality agreements arguably fail to fulfill the requirement that waivers of constitutional rights be "knowing, voluntary, and intelligent." Even if these formal requirements are met, courts must balance the interests for and against enforcement of

18. See infra text accompanying notes 95-97.
19. See generally WESTMAN, supra note 11, at 61-117 (discussing state statutory and common-law protections for employees in the private sector). Recognizing that the enforcement of confidentiality agreements against whistleblowers is a First Amendment issue also opens up the possibility of Supreme Court review, cf. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 609-10 (1874) (holding that the Supreme Court may review federal, but not state, questions decided in state court), which in turn guarantees a constitutional floor below which protection cannot fall. Of course, state courts often interpret the scope of constitutional liberties more, rather than less, broadly than the Supreme Court, a phenomenon that has received much attention in recent decades and that is reflected in the outcome of a case discussed below, Cohen v. Cowles Media Co. See infra Part IV.A. Compare Cohen v. Cowles Media Co., 501 U.S. 663, 669-72 (1991) (holding that the First Amendment provides no defense to a promissory estoppel claim based on a violation of a confidentiality agreement by a newspaper reporter), with Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990) (granting the First Amendment defense).
20. See infra Part III.A.
waivers of constitutional rights. The First Amendment interests at stake therefore cannot be ignored by arguing that they have been waived, but must be accounted for before the validity of the waiver can be determined. Finally, the very notion of waiving First Amendment rights is problematic when the speech at issue affects public discourse, an imperative beyond the power of any individual to bargain away.

Having argued that "waiver" may not foreclose First Amendment scrutiny, Part IV then performs this scrutiny, weighing the First Amendment interests in disclosure against the state interests in confidentiality, and concluding that the First Amendment interests are superior as a general matter. This conclusion must necessarily be a general one because the substantiality of the interests at stake will vary depending on the circumstances of a given case. As such, Part IV identifies some of the factors that should be relevant to the outcome of a particular case, and others that should not.

Finally, Part V analyzes three modern Supreme Court cases that could be cited in favor of the enforceability of confidentiality agreements against disclosures in the public interest: Cohen v. Cowles Media Co., Seattle Times Co. v. Rhinehart, and Snepp v. United States. These cases, each distinguishable in crucial ways from the context of employee whistleblowing, provide little support for silencing employees who wish to speak out on matters of public concern.

II. STATE ACTION

Although employee confidentiality agreements involve private parties and the constraints imposed by the First Amendment apply only to government actions, private agreements still can raise a First Amendment question because court enforcement of private contracts is subject to constitutional scrutiny. When a court applies common-law rules to a private dispute, the state intervenes authoritatively to regulate conduct—just as if it had done so legislatively. Therefore, the application of common law by state courts constitutes state action.

21. See infra Part III.B.
22. See infra Part III.C.
23. See infra Part IV.A.B.
24. See infra Part IV.C.
29. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by
The Court in New York Times Co. v. Sullivan\textsuperscript{30} readily concluded that the application of libel law by Alabama state courts was a form of state action;\textsuperscript{31} and in subsequent cases involving the application of common-law rules, the Court has either presumed the existence of state action\textsuperscript{22} or has found state action to be present without much elaboration.\textsuperscript{33} In none of these cases did any of the Justices dissent on the finding of state action. As Professor Tribe has stated: "The general proposition that common law is state action—that is, that the state 'acts' when its courts create and enforce common law rules—is hardly controversial."\textsuperscript{34}

Perhaps more controversial is whether this proposition applies to contract law in particular. The argument that the application of contract law would not qualify as state action, even if the application of other areas of common law does, is that while other regimes of law embody the substantive policies of the state, contract law merely establishes the ground rules for private bargaining which the state then neutrally applies.\textsuperscript{35}

However, such an argument is not ultimately persuasive. In applying contract law, courts do not merely ratify private preferences. Instead, courts decide which choices the state will sanction,\textsuperscript{36} employee confidentiality agreements being a perfect example of such a decision, and how the terms of the bargain should be construed when the intent of the parties is unclear.\textsuperscript{37}

Just as it has come to be accepted that the principles of contract and tort, once thought to be such separate and discrete areas of law, tend to converge, overly

the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)); Laurence H. Tribe, American Constitutional Law § 18-1, at 1688-89 (2d ed. 1988) ("[T]he rule of decision expressly invoked or necessarily relied upon by a state's highest court—either to grant relief against one party or to deny the relief sought by another party—constitutes 'state action' reviewable on the merits by the Supreme Court.").

31. See id. at 265.
34. Tribe, supra note 29, § 18-6, at 1711.
36. Cf. 1, 2 FarNsworth, supra note 17, chs. 4-5 (discussing when courts will refuse to enforce contracts on grounds of unconscionability or public policy).
37. See id. § 7.15-.17. Disputes over the intent of the parties can be expected to arise when courts are asked to enforce employee confidentiality agreements against whistleblowers, given the likelihood of disagreement as to the type of disclosures anticipated by such agreements. Cf. infra Part III.A (noting the fact that employees' intent in signing confidentiality agreements may often be unclear).

https://scholarcommons.sc.edu/sclr/vol49/iss1/7
sharp lines cannot be drawn between them for purposes of state action.\textsuperscript{38} More basically, we have understood, at least since the time of the Legal Realists, that even the background principles of contract law, like other forms of common law, necessarily reflect the positive choices of the state and that the state can never claim to have left private choices entirely unimpaired by enforcing contracts in an apparently "neutral" fashion.\textsuperscript{39}

In \textit{Shelley v. Kraemer}\textsuperscript{40} the Supreme Court recognized that court enforcement of private contracts—in particular, racially restrictive covenants—constitutes state action.\textsuperscript{41} However, as is well known, the Supreme Court rarely cites \textit{Shelley},\textsuperscript{42} and commentators refer to it "as one of the most controversial and problematical decisions in all of constitutional law."\textsuperscript{43}

The problem with \textit{Shelley} is not its holding that court enforcement of common law, or of contract law in particular, constitutes state action; that position is proper and should be considered good law.\textsuperscript{44} Rather, the problem is that the Court never explained why judicial enforcement of the contract violated the Equal Protection Clause.\textsuperscript{45} While enforcement of racially restrictive covenants by Missouri courts clearly amounts to state action, whether this enforcement is at odds with the requirement of state neutrality under the Equal Protection Clause is uncertain.\textsuperscript{46} Indeed, the Court never explicitly addressed the issue. By failing to articulate clearly the distinction between the arguably neutral enforcement of the covenant\textsuperscript{47} and the discriminatory private action of entering into the covenant, the \textit{Shelley} Court suggested that the initial private action could be subjected to constitutional scrutiny based

\textsuperscript{38} Tribe, supra note 29, § 18-6, at 1713-14.
\textsuperscript{39} Compare Cass R. Sunstein, The Partial Constitution 159 (1993), stating that [t]he lesson of the [Legal Realist] attack on status quo neutrality is emphatically not that there is no line between public and private action, or that private action is constitutionally restricted. The lesson is that the law of contract, tort, and property is just that—law. It should be assessed in the same way in which other law is assessed.
\textsuperscript{40} 334 U.S. 1 (1948).
\textsuperscript{41} See id. at 13-19.
\textsuperscript{42} See Strickland, supra note 28, at 606.
\textsuperscript{43} Geoffrey R. Stone et al., Constitutional Law 1617 (2d ed. 1991).
\textsuperscript{44} See Sunstein, supra note 39, at 160 ("Shelley v. Kraemer . . . was a remarkably easy state action case. How could the government's enforcement of a racially restrictive covenant, through its courts, be anything but state action?").
\textsuperscript{45} See id. (stating "[t]he case was difficult only because it is unclear whether the Constitution forbids the state's apparently neutral use of its courts to enforce contracts").
\textsuperscript{46} See Tribe, supra note 29, § 18-6, at 1713-15.
\textsuperscript{47} Although the Court never explicitly argued that Missouri failed to enforce restrictive covenants neutrally with respect to race, some commentators have. See Strickland, supra note 28, at 604 n.87 (quoting Laurence H. Tribe, Refocusing the "State Action" Inquiry: Separating State Acts from State Actors, in Constitutional Choices 260 (1985)).
on the mere prospect of court ratification.\(^{48}\)

However, even if the potential for court enforcement of private agreements does not transform private actors into state actors subject to constitutional standards, as *Shelley* seemed to suggest, the enforcement of private agreements by state courts is still state action that must satisfy Fourteenth Amendment scrutiny.\(^{49}\) Whereas race-neutral application of contract law would ordinarily survive such scrutiny when the constitutional provision at issue is the Equal Protection Clause,\(^{50}\) which is concerned with differential treatment by the state, even neutral enforcement of contracts to the detriment of public debate offends the First Amendment.\(^{51}\) Although content-neutral restrictions of speech are not scrutinized as closely as content-based restrictions, they are still not free from constitutional exactitude.\(^{52}\)

The case that appears on the surface to pose the greatest challenge to the "application of common law" branch of the state action doctrine is *Hudgens v. NLRB*,\(^{53}\) which found that the First Amendment had no relevance to a private shopping center's exclusion of picketers from its property by threatening a trespass prosecution.\(^{54}\) *Hudgens*, however, did not reject the proposition that a trespass prosecution\(^{55}\) would have constituted state action, but indeed failed to address this potential source of state action at all.

The predecessors to *Hudgens*—*Marsh v. Alabama*\(^{56}\) and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*\(^{57}\)—held that the First Amendment prohibited using state trespass law to exclude speakers from privately held property which for all practical purposes

---

48. See id. at 603-05.
49. See *supra* notes 29-35; see also SUNSTEIN, *supra* note 39, at 160-61 (shifting state action analysis to "real issue" of whether a constitutional provision is violated).
50. Cf. SUNSTEIN, *supra* note 39, at 161 ("[T]he enforcement of a contract and the availability of contract law are state action; but usually contract law does not offend the Constitution.").
51. See *infra* text accompanying notes 101-109.
52. See *infra* text accompanying notes 101-103.
54. See id. at 520-21.
55. See id. at 508 (the prosecution was only threatened). A similar procedural posture existed in *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). *Flagg Bros.* held that a private warehouseman's threatened sale of bailed goods pursuant to a New York commercial code provision, codifying the common-law right of self-help repossession, was not subject to due process scrutiny. Then-Justice Rehnquist noted, however, that "[t]here is no reason . . . to believe that either Flagg Brothers or respondents could not . . . seek resort to the New York courts in order to [obtain relief]." *Id.* at 161 n.11. Presumably, had Ms. Brooks brought an action challenging the provision and been denied relief by the New York courts, that decision itself, whatever its constitutional merits, would at least have been constitutionally contestable. See TRIBE, *supra* note 29, § 18-6, at 1712-13.
57. 391 U.S. 308 (1968).
constituted public fora.58 The "publicness" of the forum may have been crucial to the outcome of First Amendment scrutiny, at least in Logan Valley, but what triggered scrutiny in the first place was the common-law cause of action.59 Lloyd Corp. v. Tanner60 challenged Logan Valley's characterization of the massive modern-day shopping center as a public forum;61 and Hudgens,-

viewing the two cases as irreconcilable, adopted the position of Lloyd as stare decisis.62 While Hudgens adopted Lloyd's position that shopping centers are private fora and therefore undeserving of First Amendment protection, it never rejected or even addressed the fact that a state trespass prosecution at least provides the basis for a First Amendment challenge.63 Under Hudgens's view of shopping center property, such a challenge would be unsuccessful; but this outcome only reflects the Court's First Amendment public-forum jurisprudence—not its rejection of the principle that court enforcement of common-law regimes constitutes state action.

To the contrary, a 1991 study of the Rehnquist Court's treatment of the state action doctrine concluded that all members of the Court at the time considered judicial application of common-law rules to constitute state action.64 This conclusion was confirmed by Cohen v. Cowles Media Co.,65 which is of special relevance because it involved a confidentiality agreement (albeit not an employee confidentiality agreement). While the state court of appeals found no state action in the trial court's enforcement of the contract (resting on a perceived distinction for state action purposes between the enforcement of contract and tort law),66 the United States Supreme Court was

58. Logan Valley, 391 U.S. at 319-20; Marsh, 326 U.S. at 507-09.
59. Tribe, supra note 29, § 18-5, at 1708-09.
60. 407 U.S. 551 (1972).
61. Id. at 568-69. Although cryptically noting that the First and Fourteenth Amendments place limits only on the state and not private property owners, see id. at 567, the Lloyd Corp. Court never doubted the presence of state action. While the Fourteenth Amendment clearly does not directly limit private actors, the authorization of private action by state law is state action. See supra text accompanying notes 40-44.
63. The "functional equivalence" test [of Lloyd and Logan Valley] determined only whether particular property was private or public for a particular purpose as a matter of constitutional law. If the Hudgens Court had framed the question as Marsh originally did, the issue would have been whether a state, in choosing to enforce what it deemed private property rights, denied some individuals free speech rights without adequate justification. The relevant inquiry would not have been whether the property was public or private, but whether state-protected freedom of speech in the shopping center context was required in order to secure first amendment values.

Tribe, supra note 29, § 18-5, at 1710-11.
64. See Strickland, supra note 28, at 645.
unanimous in holding that:

The rationale of our decision in *New York Times Co. v. Sullivan* and subsequent cases compels the conclusion that there is state action here. Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment.67

The Court has been clear, in short, that the application of common law by state courts is state action, and neither principle nor precedent suggests an exception for contract law. Court enforcement of employee confidentiality agreements against disclosures made in the public interest, therefore, must satisfy the demands of the First Amendment.

III. WAIVER

One might argue that even if state action is present in court enforcement of employee confidentiality agreements, the First Amendment presents no obstacle because the employees have waived their First Amendment rights.68 This part of the article explains why such an argument fails.

A. Formal Requirements

Constitutional rights may be waived only if the waiver is voluntary, knowing, and intelligent.69 Although the precise requisites of this standard

67. *Cohen*, 501 U.S. at 668 (citations omitted). Neither of the two dissents objected to the state action finding. The state supreme court in *Cohen* decided that a valid contract had not been formed and that the case should be analyzed under the principles of promissory estoppel. *See Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203-05 (Minn. 1990). Although noting that promissory estoppel is "a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties," *Cohen*, 501 U.S. at 668, the United States Supreme Court seems to have made this observation more by way of defining the issue before it than through an effort to distinguish promissory estoppel from traditional contract law. Certainly no such express distinction was drawn, which is revealing given the decision by the state court of appeals. Nor would such a distinction be persuasive. *See supra* text accompanying notes 36-39.

68. *Cf.* Erie Telecommms., Inc. v. City of Erie, 853 F.2d 1084, 1101 (3d Cir. 1988) (holding that a valid contractual waiver barred a First Amendment claim).

69. *See, e.g.*, D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972) (finding rights waived where the party is sophisticated and the release is not an adhesion contract); Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1394-95 (9th Cir. 1991) (stating the same standard but requiring a fuller development of the facts before reaching a conclusion); *Erie*, 853 F.2d at 1095-96 (discussing Supreme Court jurisprudence on waiver of constitutional rights). When First Amendment rights are at issue, waiver will not be found "in circumstances which fall short of being clear and compelling." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967).
have not been established, the general requirement is that "the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." Among the relevant facts to consider in making the determination are "the language of the purported waiver, the sophistication of the parties, the balance of bargaining power, and whether the parties received advice from counsel."  

While circumstances will vary from case to case, conceivably employees' waiver of their rights to disclose some kinds of confidential information will often fail to satisfy this "voluntary, knowing, and intelligent" standard. Because "confidentiality agreements are [often] phrased in general terms" forbidding the disclosure of all confidential information, employees may not understand that the agreement covers not only traditional trade secrets, but disclosures of employer malfeasance affecting the public interest. Presumably, representation by counsel or even individualized discussion of terms would be rare. Disparities in sophistication and bargaining power between employer and employee might also be at issue in some cases.

An argument about disparities in bargaining power, in fact, need not rely on often dubious notions of the employee's relative unsophistication or of his being at the mercy of the employer offering him a job. The stronger argument concerns the information asymmetries between employer and employee when the bargain over confidentiality is struck. While the employer ordinarily knows what information needs or might need to be kept secret, the employee lacks the information required to value the speech rights being relinquished. At the time of contracting, the employee has no idea what activities the employer is engaged in that might later compel the employee to divulge confidential information and should not be expected to enter the agreement under a presumption that the employer is hiding information important to the public's well-being.

Admittedly, the "voluntary, knowing, and intelligent" standard seems to

---

70. *Erie*, 853 F.2d at 1095 ("While the Supreme Court has never defined precisely what constitutes a voluntary, knowing, and intelligent waiver, the Court has stated that whether a constitutional right has been waived depends in each case upon the particular facts and circumstances surrounding that case . . . .").

71. *Id.* at 1096.


73. Rüttel, *supra* note 9, at 25.

74. *Cf. id.* (stating employees do not usually anticipate confidentiality agreements to apply to their employer's illegal behavior). Additionally, in choosing between various interpretations of the agreement, any ambiguity would be construed against the drafter and would require the public interest to be considered. *See id.*

75. Even if the employee were able to price accurately the personal value of foregone speech, this private valuation would underestimate its total social value. The notion that speech rights are public goods which resist bargaining paradigms is discussed *infra* note 89.
be more concerned with parties’ actual and uncoerced awareness that they are relinquishing a valuable right, rather than with the importance the right ultimately assumes to the parties as circumstances change. Unquestionably, “[i]t is possible to knowingly waive a general right without contemplating the specific circumstances under which that waiver will be enforced.”

However, a genuinely intelligent waiver should require not merely an understanding that one is waiving a certain right, but some substantial ability to measure the true implications of doing so. Recognizing that the primary justification for permitting rights to be waived is an interest in preserving individual autonomy, a legitimate waiver must bear some strong relationship to what one would do if possessed of all relevant information.

B. Substantive Enforceability

Even if the formal requirements for waiver are met, a court must decide whether the waiver is substantively enforceable. The standard for answering this question when the rights being waived are guaranteed by federal law was established in Town of Newton v. Rumery. In Rumery the Supreme Court, relying on the traditional common-law principle that contracts are void when contrary to public policy, found that a waiver of federal rights “is unenforceable if the interest in its enforcement is outweighed . . . by a public policy harmed by enforcement.”

Therefore, First Amendment interests that would be harmed by enforcement of a confidentiality agreement may not be ignored simply by asserting that they have been waived. Instead, those interests must be taken into account initially to determine whether the waiver is enforceable at all.

76. Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1395 (9th Cir. 1991).
79. Id. at 392. One circuit, in a case involving the waiver of First Amendment rights, has refused to apply the Rumery balancing test, arguing “that the ‘knowing, voluntary and intelligent’, standard established by the Supreme Court for the waiver of constitutional rights, subsumes consideration of the public’s interests.” Erie Telecommuns., Inc. v. City of Erie, 853 F.2d 1084, 1099 (3d Cir. 1988). How the public’s interest in the First Amendment rights at issue in Erie is subsumed by the formal requirements of waiver is hard to imagine, as is how Erie can be squared with the Supreme Court’s requirement of a separate public-interest balancing test. If anything, one would assume that the waiver of constitutional rights, and especially First Amendment rights, would deserve more careful scrutiny than the waiver of the statutory rights at issue in Erie. See Davies, 930 F.2d at 1397 (noting that a waiver of constitutional rights might require a stricter standard than Rumery). But see Leonard v. Clark, 12 F.3d 885, 890-91 & n.8 (9th Cir. 1993) (applying Rumery to waiver of constitutional rights but declining Davies’s invitation to apply a stricter standard). Erie did little to justify this departure from Rumery other than to note summarily that the facts of Rumery were different. See Erie, 853 F.2d at 1099-1100.
80. In some cases, statutes that have expressly identified a public policy of protecting
In effect, the contractual analysis of the waiver collapses with the balancing of interests required by the First Amendment\(^1\) — although the result of this contractual analysis remains subject to First Amendment scrutiny to the extent that it fails to protect speech adequately.

One might respond that the First Amendment is not a cognizable public policy interest in determining whether to enforce a waiver of speech rights because the First Amendment protects only against infringements by the government. Some courts have in fact approved of this argument in wrongful discharge cases, refusing to recognize the First Amendment as grounds for a public policy exception to employment-at-will.\(^2\)

This argument fails to account for the doctrine described in Part II—that court application of common law is itself state action. Courts that have considered the First Amendment to be irrelevant to the availability of wrongful discharge actions have failed to appreciate that in determining which speech deprivations will be sanctioned by state law, the court itself provided the state action required to activate the First Amendment.\(^3\) The availability vel non particular types of speech may make a contractual waiver unenforceable, thereby rendering recourse to the First Amendment unnecessary. See, e.g., United States v. Northrop Corp., 59 F.3d 953, 963-65 (9th Cir. 1995) (refusing to enforce employee's release of claims against the corporation because barring the initiation of a *qui tam* action is contrary to Congress's intent to encourage whistleblowing). However, the First Amendment not only provides protection in the absence of relevant statutes, but also may buttress policy arguments in cases where some statutory ammunition is also available.

81. See Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990) ("In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated."); see also infra text accompanying notes 95-97 (stating that content-neutral restrictions of speech require balancing of interests).


83. Cf. Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 362-72 (1994) (questioning the constitutionality of granting wrongful discharge remedies based on specified types of employee speech without extending this remedy to political speech). While correct to view the denial of wrongful discharge claims as state action, Bingham's analysis errs in assuming that the state only "acts" for First Amendment purposes when it fails to be neutral in restricting speech. *See supra* text accompanying notes 49-51. Content-neutral actions by the state, if subject to lower scrutiny, still activate the First Amendment when they impair speech. In sum, the First Amendment is implicated by all publicly important employee speech restricted by the state, not just expressions of employees' political sympathies.
of state tort remedies to determine the degree to which a private party may exact penalties from another for speaking on a matter of public concern implicates the First Amendment in wrongful discharge cases as surely as it did in *New York Times Co. v. Sullivan.* 84 Similarly, when a court determines whether the state will recognize a contract that restricts speech on matters of public importance, the First Amendment implications of that choice must be assessed. 85 Whether the First Amendment interests are invoked as a policy basis for challenging enforcement within the framework of contract law, or on their own terms in the form of a First Amendment defense, they must be given their due consideration.

C. The Problem of Waiving First Amendment Rights

The very notion of waiving First Amendment rights is problematic when the speech involves matters of public concern. Apart from the fact that arguing waiver does not prevent First Amendment interests from being considered, waiver is a conclusion that may be reached only after the court considers those interests. The First Amendment protects not only the individual speaker, but also the marketplace of ideas and the public's interest in collective self-determination. 86 Accordingly, individuals' rights to speak

84. Possible grounds for distinction exist, but they are unconvincing. For instance, arguably the state has acted when it provides certain common-law remedies, but not when it refuses to provide such remedies and leaves the parties to their own devices. The problem with this argument is that regardless of how the constitutional implications of these two types of state choices may differ (and the degree to which they differ has been the subject of much debate, *see* Strickland, *supra* note 28, at 608-12), they both are state choices. *See id.* at 606-17. In any case, the argument does not apply to the issue of employee confidentiality agreements where state action comes in the form of courts granting a remedy otherwise unavailable to the employer, namely the enforcement of contracts.

85. Of course, the calculus will not be quite the same as for the related wrongful discharge issue, and none of this analysis on the enforcement of employee confidentiality contracts requires any necessary conclusion about the First Amendment merits of the wrongful discharge issue. For example, the First Amendment harms of denying a wrongful discharge action arguably may not be as serious as enforcing a confidentiality agreement. While the former allows the employee to be fired from a particular job for speaking out, the latter exposes the employee to an unknown amount of liability and is therefore likely to chill speech more severely. The state's interest in refusing to force employers to continue to employ workers against the employer's wishes, similarly, is different from, and arguably stronger than, its interest in enforcing confidentiality agreements. The factors relevant to the outcome of a given wrongful discharge case would also differ from those relevant here. *See infra* Part IV.C.

on matters of public concern are never solely theirs to bargain away.\textsuperscript{87} Without becoming embroiled in the debate over the central function of the First Amendment,\textsuperscript{88} in some large measure, it indisputably is not merely about protecting self-expression—an interest that fits neatly into a paradigm of individual choice; but it also is about the vibrancy of public debate—an interest that does not.\textsuperscript{89}

A strong body of precedent does not exist to indicate the degree to which courts will accept the waiver of First Amendment rights even if the formal requirements of waiver are met.\textsuperscript{90} Some circuit courts have upheld the

\textsuperscript{87} See Cohen v. Cowles Media Co., 501 U.S. 663, 677-78 (1991) (Souter, J., dissenting); see also G. Richard Shell, \textit{Contracts in the Modern Supreme Court}, 81 CAL. L. REV. 433, 516 (1993) ("[R]ights to free speech and a free press are arguably so fundamental to the functioning of a democratic society that they ought not to be subjected to unregulated market ordering backed by the state power of contract enforcement."). Compare Kreimer, \textit{supra} note 77, at 1387, stating: The case for recognition of waivers rests on the conviction that constitutional rights protect individual choice. But many constitutional rights protect other values or protect individual choice only as a means to the realization of other ends. For such rights, there is no paradox in asserting that the choice of the individual should not decide the applicability of the right in question.

\textsuperscript{88} See Fiss, \textit{supra} note 86, at 5-6 (discussing conflict between competing First Amendment camps, one stressing expressive autonomy and the other the richness of public debate).

\textsuperscript{89} Even if we accepted the applicability of the bargaining paradigm to employee whistle-blowing, there are factors internal to the bargain that might cause us to reject the unchecked alienability of speech rights. Namely, information about how an employer's activities affect the public is a public good, or a good whose value cannot be fully internalized by the purchaser (in this case, the employee who signs a confidentiality agreement), and which is therefore not produced in a quantity that accurately represents the public's demand. See \textit{generally} Daniel A. Farber, \textit{Free Speech Without Romance: Public Choice and the First Amendment}, 105 HARV. L. REV. 554 (1991) (analyzing First Amendment jurisprudence from the perspective of public choice theory). As with other public goods, such as clean air or national defense, additional efforts (the approach taken here being one) may be necessary to produce employee speech in a quantity greater than the market level. \textit{Cf.} Cynthia L. Estlund, \textit{Free Speech and Due Process in the Workplace}, 71 IND. L.J. 101, 111-12 (1995) (noting the need to protect employee speech in order to increase employee production of information).

\textsuperscript{90} See Norman M. Sinel et al., \textit{Recent Developments in Cable Law}, in \textit{1 Cable Television Law} 1995: \textit{Coping with Competition and Regulation} 9, 110 (1995) (noting that "[w]hile the doctrine of waiver of constitutional rights is not new, it has rarely been applied in the context of the First Amendment").

One writer relied on \textit{Snepp v. United States}, 444 U.S. 507 (1980), \textit{Cohen}, 501 U.S. 663, and \textit{Rust v. Sullivan}, 500 U.S. 173 (1991), to argue that the Court has broadly sanctioned the waiver of First Amendment rights. G. Michael Harvey, \textit{Confidentiality: A Measured Response to the Failure of Privacy}, 140 U. PA. L. REV. 2385, 2450-60 (1992). These cases simply do not support such a reading. \textit{Snepp} did not hold that First Amendment rights had been waived. See \textit{infra} note 206. To the extent that it addressed contractual issues at all, \textit{Snepp} is more consistent with the contrary position (expressly taken by the Fourth Circuit in \textit{Snepp}, 595 F.2d 926, 935 (4th Cir. 1979)) that the mere existence of a contract does not bar the assertion of First Amendment rights. \textit{See infra} text accompanying notes 205-09. \textit{Cohen}'s treatment of waiver is problematic—in fact the Court never directly addressed the issue—but its refusal to apply any
contractual waiver of First Amendment rights in a few instances,\textsuperscript{91} but notably, the restrictions of speech in these cases were perceived to be more in the nature of commercial limitations amenable to the give and take of the bargaining process, rather than genuine restrictions upon the public store of information.\textsuperscript{92} In other cases, courts have expressly disapproved of the notion of waiving First Amendment rights.\textsuperscript{93}

If precedent on the issue is slim, the intuition that individuals ordinarily may not bargain away their rights to speak at the expense of the public is powerful. However, we need not and may not rely on intuition because First Amendment jurisprudence prescribes the proper inquiry—namely, whether the state interests supporting a particular bargain outweigh the threat posed to

scrutiny to a contract restricting freedom of speech was not grounded upon waiver of that right. See infra text accompanying notes 170-79. Finally, \textit{Rust} was framed as a question of the conditions the government may place upon its expenditures and never held that doctors who received such funds had thereby waived their right to speak. See \textit{Rust}, 500 U.S. at 196-200.

\textsuperscript{91} See Leonard v. Clark, 12 F.3d 885, 889-92 (9th Cir. 1993); American Fed’n of Gov’t Employees Local 3884 v. FLRA, 930 F.2d 1315, 1327-28 (8th Cir. 1991); Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1096-97 (3d Cir. 1988).

\textsuperscript{92} See Leonard, 12 F.3d at 891-92; Local 3884, 930 F.2d at 1328; \textit{Erie}, 853 F.2d at 1089-90. \textit{Leonard}, for example, concerned a provision in a firefighters’ union contract offsetting against current salaries any future legislative increases in wages or benefits endorsed by the union. While this provision indirectly impeded the union’s right to petition the government, it only restricted lobbying for payroll-increasing legislation. The court noted that if the provision amounted to a broader ban on union speech, “we might well hold that the public interest in allowing and hearing such speech outweighs the public interests in enforcing the waiver.” \textit{Leonard}, 12 F.3d at 891.

\textsuperscript{93} See United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972) (“Marchetti . . . by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights.”); cf. Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1397 (9th Cir. 1991) (emphasizing the distinction between waiving private rights and waiving rights affecting the public in refusing to enforce the latter).

In \textit{Karetnikova v. Trustees of Emerson College}, 725 F. Supp. 73, 80-81 (D. Mass. 1989), the court held that a professor’s claim that she had been denied tenure based on her expression of political beliefs did not depend on an interpretation of a collective bargaining agreement and was therefore not preempted by § 301 of the Labor Management Relations Act because freedom from interference with speech does not necessarily depend upon the expectations and agreed-upon arrangements between the employer and employee. . . .

. . . . . [T]he conditions or restrictions which may be placed on . . . speech as conditions of employment are also of concern to society as a whole, and may properly be determined . . . not by reference to the agreement of the parties, but in light of the values of safeguarding robust speech in the marketplace generally.

\textit{Id.}
public discourse. The next part of this article asks this question in the context of employee confidentiality agreements.

IV. FIRST AMENDMENT BALANCING

A. First Amendment Interests

Content-neutral restrictions on speech, such as the enforcement of confidentiality agreements against disclosures on matters of public concern, are permissible only if the state interests supporting the restriction are substantial enough to outweigh the resulting burdens upon First Amendment rights. The burden also must be no greater than necessary to effectuate the state interests. In applying this balancing test, "the first amendment . . . requires a 'thumb' on the scale to assure that the balance struck in any particular situation properly reflects the central position of free expression in the constitutional scheme." When employee confidentiality agreements are so weighed, the balance generally should tip in favor of the First Amendment.

The Supreme Court "has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values."" Given the essential role employee whistleblowing can play in

94. See infra Part IV.

95. At first glance this restriction may not appear to be content-neutral at all, but rather to depend on the content of the information disclosed by the whistleblower. However, this initial reaction merely reflects the imprecision of the term "content-neutral" to demarcate the proper level of scrutiny. Courts make content distinctions frequently in First Amendment jurisprudence, but the type of content-regulation against which strict scrutiny is genuinely aimed involves government hostility toward a particular message. See R.A.V. v. City of St. Paul, 505 U.S. 377, 430-31 (1992) (Stevens, J., concurring); Fiss, supra note 86, at 81. See generally Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 233-51 (1983) (exploring the often ambiguous line between content-neutral and viewpoint-based restrictions).

However, while enforcing employee confidentiality agreements does not target a particular message, the First Amendment should be particularly wary of this restriction because whistleblowing is a politically charged act, the very performance of which expresses a message about which people have strong, opposing reactions. See, e.g., MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 1 (1992).

96. See, e.g., City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984) (balancing speech interests in cardboard election signs against state interests of preventing clutter); TRIBE, supra note 29, at § 12-2, at 791 (describing the balancing test for content-neutral restrictions of speech).

97. TRIBE, supra note 29, § 12-2, at 791 (borrowing the image from Harry Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1, 28).

shaping debate on public issues, it deserves "special protection." 99 The fact that whistleblowers may be speaking in violation of confidentiality agreements does not make their speech of less concern to the First Amendment because the First Amendment protects not only individual speakers, but public debate in general. 100 This principle has a firm basis in our jurisprudence—regardless of its relative prominence vis-à-vis more purely self-expressive theories of the First Amendment 101—commonly associated with Justice Brennan's exhortation in New York Times Co. v. Sullivan 102 that the First Amendment requires public discourse to remain "uninhibited, robust, and wide-open." 103

The way Jeffrey Wigand and other recent high-level tobacco whistleblowers have galvanized debate over the regulation of cigarettes 104 is compelling testimony to the contribution whistleblowers can make to public discourse; but these whistleblowers are simply the most recent, visible examples of a phenomenon whose importance to public debate and self-governance has been recognized for several decades. The development of a spate of statutory and common-law protections for whistleblowers has signalled a recognition that an informed public depends on having access to certain vital

99. Id.

100. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) ("The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); see also supra note 86 (listing a few of the prominent scholarly treatments of this issue).

101. Professors Fiss and Sunstein, among others, have discussed and criticized the unwillingness of the Court to support a vision of the First Amendment that would emphasize the "public debate" imperative at the expense of unbridled expressive autonomy. See Fiss, supra note 86; Cass R. Sunstein, Democracy and the Problem of Free Speech (1993). This unwillingness does not affect the argument here because, unlike the issues discussed by Professors Fiss and Sunstein, the contribution to public debate made by whistleblowers does not come at the expense of any of the employer's First Amendment expressive interests. Whatever interests an employer may have in keeping certain business practices confidential, they are certainly not First Amendment interests.


103. Id. at 270. The idea that a vibrant marketplace of information is indispensable to a healthy and legitimate system of self-governance was prominent in the minds of the Framers themselves. See, e.g., 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910), quoted in Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) ("A popular Government, without popular Information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy . . . . And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

104. See, e.g., Timothy Noah & Suein L. Hwang, Phillip Morris, in Voluminous Comment, Denies Manipulating Cigarette Nicotine, WALL ST. J., Apr. 23, 1996, at A24 (discussing the FDA's release of new regulations for tobacco products as a reaction to allegations by three former employees of Philip Morris that the company manipulates nicotine levels).
information passed through the workplace.\textsuperscript{105} Whistleblowers inform the public on matters ranging from consumer fraud, to product safety, to environmental protection.\textsuperscript{106} In many cases, this information would otherwise remain hidden from the public entirely. Therefore, whistleblowers not only make important contributions to public debate, but they often perform the critical role of sparking debate where none previously existed. Consequently, they are deserving of robust First Amendment protection, as is well captured by the oft-quoted dictum from \textit{Thornhill v. Alabama}:\textsuperscript{107} “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”\textsuperscript{108}

Whistleblowers may legitimately claim First Amendment protection not only because of their contribution to public debate, but also because of the significant interest in self-expression that is jeopardized when they are silenced. The fact that employees sign away their right to speak may make this interest less compelling than the interest in enhancing public discourse, but the silence employees thought they were agreeing to might be very different from the silence ultimately expected of them.\textsuperscript{109} More importantly, the waiver itself is only valid if it does not unduly compromise free speech.\textsuperscript{110} The expressive interests of whistleblowers are in many ways unique, and are therefore another important consideration beyond the concern for public discourse.

Whistleblowing is a compelling form of self-expression because it is an act that is critical to the employee-speaker’s identity as citizen. Deciding to speak out for the public’s benefit, despite possible recriminations not only from one’s employer but also from co-workers, neighbors, and family members, presumably for most whistleblowers is among the most intense and indeed the most politically charged choices the employee is ever likely to make.\textsuperscript{111} An individual who decides to blow the whistle becomes personally involved in a public issue in a way that finds few counterparts for the ordinary citizen.\textsuperscript{112} Such involvement is a form of self-expression that our constitu-

\textsuperscript{105} For one of the many discussions of the development of whistleblower protection law, see \textsc{Westman}, \textit{supra} note 11.

\textsuperscript{106} For an in-depth treatment of the contributions and experiences of a number of influential whistleblowers, see \textsc{Myron Peretz Glazer & Penina Migdal Glazer}, \textsc{The Whistleblowers} (1989).

\textsuperscript{107} 310 U.S. 88 (1940).

\textsuperscript{108} \textsc{Id.} at 102.

\textsuperscript{109} \textit{See supra} Part III.A.

\textsuperscript{110} \textit{See supra} Part III.B.

\textsuperscript{111} \textit{See generally} \textsc{Glazer & Glazer}, \textit{supra} note 106 (discussing personal tribulations of individual whistleblowers).

\textsuperscript{112} Of course, certain instances of whistleblowing may result not from agonized choices
tional system should not lightly permit to be bargained away. As Professor Sunstein has observed, "Liberal republicanism prizes citizenship. . . . [I]t refuses to treat political participation as simply another ‘taste’ that some people have, or as dispensable in a well-functioning democracy."113

B. State Interests Favoring Enforcement

The state has essentially the following three types of interests in enforcing employee confidentiality agreements: the general interest in contract enforcement, the protection of property rights, and the preservation of fiduciary duties. Not only are these interests insufficient as a general matter to justify substantial impairments of speech such as those at issue here,114 but these interests lose much of their influence when asserted to bar the public from having access to information important to the public’s well-being and capacity for self-governance. Although the factors discussed in Part IV.C could influence the proper outcome of a given case, the state interests in enforcing employee confidentiality agreements should generally give way to the more compelling interests in free speech.

The state’s interests in freedom of contract and allowing parties to rely on the enforcement of contractual obligations cannot warrant substantial impairments of speech. While important, these interests, unlike the interest in free speech, have not been considered central constitutional values since the fall of the Lochner115 era.116 Revealingly, under the Due Process Clause, interference with economic expectations receives only the most minimal scrutiny,117 while restrictions on speech are accorded the heightened scrutiny appropriate to the First Amendment’s favored position in our constitutional order.118 The state’s interest in contract enforcement is represented by the

about one’s role as a citizen, but from an employee’s animus toward the employer. See, e.g., MICELI & NEAR, supra note 95, at 1 (noting the view that whistleblowers are “company traitors who reveal secrets for their own personal glorification”). However, as long as the disclosures are truly of public import, the employee (if less noble) still performs an important role as a citizen and still possesses legitimate expressive interests in speaking out—even if personal fame or fortune is the primary catalyst. Additionally, motivation has little, if any, relevance to the contribution to public discourse. See infra text accompanying notes 145-49 (discussing employee motivation as a factor in the First Amendment balancing).

113. SUNSTEIN, supra note 39, at 135.
114. See supra Part IV.A.
115. 198 U.S. 45 (1905).
116. See TRIBE, supra note 29, §§ 8-6, 8-7, 11-1.
118. [W]ithout freedom of expression, thought becomes checked and

https://scholarcommons.sc.edu/sclr/vol49/iss1/7
common-law presumption in favor of enforcing contracts; but like other principles of common law, this interest must accommodate the higher demands of the First Amendment. Even when the First Amendment is not at issue, contract law provides ample room for countervailing policies to trump the general presumption of contract enforceability, making it all the more clear that this presumption must give way to core constitutional values, such as free speech, when a conflict between the two exists.

More basically, the state's interest in contract enforcement is only a relevant interest when a contract is one that the state would deem properly enforceable. Thus, asserting the interest in contract enforcement as a basis for enforcing contracts that arguably offend public policy or constitutional principles largely begs the question. One cannot argue for the enforcement of employee confidentiality agreements simply on the basis of vindicating the parties' expectations because these expectations are precisely what are at issue—the question being what may properly be expected regarding the free speech rights of employees. To argue for the enforcement of employee confidentiality agreements that impair public discourse, one must look beyond the interest in contract enforcement itself.

However, even when we look beyond the interest in contract enforcement, the additional state interests supporting the enforcement of employee confidentiality agreements, namely the protection of the employer's property rights and the fiduciary relationship between employer and employee, generally fail to overcome the significant interests in free speech at stake. The Supreme Court has made clear that "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy [First Amendment freedoms], ... we remain mindful of the fact that the latter occupy a preferred position."}

atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

119. See cases cited supra note 15.

120. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8 (1981) (including public policy, restraint of trade, commission of tort, and violation of fiduciary duties as grounds for unenforceability).

121. Cf. Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1398 (9th Cir. 1991) (arguing that some important public interest other than an interest in contract enforcement must be asserted before waiver of constitutional rights can survive scrutiny under Town of Newton v. Rumery, 480 U.S. 386 (1987)).

The Court has given fiduciary duties substantial weight in cases involving the free speech of public employees where the preservation of such duties is linked to the government employer's interest in effectively fulfilling its public responsibilities. However, when private fiduciary relationships are at issue, the calculus changes drastically. In such cases, preserving the employer-employee relationship and ensuring the loyalty and effectiveness of employees has no direct bearing upon the government's ability to serve as custodian of the public interest. Although the state has a broad interest in the efficiency of private enterprises—an interest vitally dependent upon the preservation of the employer-employee fiduciary relationship—in the case of a given private employer this interest boils down to little more than an interest in protecting the employer's property, which again cannot ordinarily pass muster under the First Amendment. If the state has a legitimate interest in the loyalty of its own employees—without which it could not as effectively perform its public functions—it does not have a strong interest in patrolling private employees' sense of loyalty to their employers for loyalty's sake, particularly when individuals' decisions to disclose confidential information reflect a choice between individuals' duties as employees and their duties as citizens.

Moreover, the particular property rights and fiduciary duties implicated here are of dubious value even on their own terms because the rights and duties are based on keeping the public ignorant of matters on which the public's well-being depends. The strength of property claims generally diminishes as the public's interest in the property increases, a principle recognized not only by our due process jurisprudence, but—of more direct

STATE 91-114 (Geoffrey R. Stone et al. eds., 1992) (defending the preferred place of the First Amendment over property rights in our constitutional scheme). The preferred place of the First Amendment is not altered because the Court failed to extend Marsh to cover modern-day shopping centers in cases that famously and controversially addressed the conflict between property and speech. See Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (holding picketers had no First Amendment right to advertise a strike against their employer in a shopping mall where the employer was a lessee); Lloyd Corp. v. Tanner, 407 U.S. 551, 564-66 (1972) (finding handbill distributors had no entitlement to exercise First Amendment rights in a privately owned shopping center). Nor are these cases, which only addressed whether a particular forum should be considered public or private, relevant here. Employee confidentiality agreements do not raise a "forum" issue at all, but concern whether certain speech may be withheld from the public altogether.

123. See Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion). See generally John E. Theuman, Annotation, Public Employee's Right of Free Speech Under Federal Constitution's First Amendment—Supreme Court Cases, 97 L. Ed. 2d 903, 912-14 (1989) (summarizing Supreme Court cases that have balanced the government's legitimate interests in regulating the speech of its employees against the employee's interest in expressive freedom).


125. See text accompanying note 122.

relevance here—by the exceptions carved out of the various forms of trade secret protection law to allow disclosures in the public interest.127 Like the law of trade secret protection, the common law of agency also recognizes a privilege to use or disclose confidential information for "the protection of a superior interest."128 In addition to their fiduciary duties as employees, individuals have competing duties as citizens which the state presumably has at least as great an interest in promoting. The various forms of whistleblower protection129 signal a recognition by Congress, state legislatures, and courts that in many instances the employee's duties as a citizen are paramount.

The property and agency interests in preventing employees from disclosing confidential information that is of legitimate concern to the public are relatively weak by common-law standards. When First Amendment scrutiny is applied, this weakness becomes fatal—except where the circumstances of a particular case weigh so heavily in favor of enforcement and against the First Amendment interests that the ordinary position of the scales is tipped. This article now turns to the factors that may influence the proper outcome of a given case.

C. Factors Affecting the Balancing

Not surprisingly, the predominant factor that should influence the outcome of the First Amendment balancing is the importance of the particular disclosure to public debate as compared with its importance to the employer.


128. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1958). The only example of a privileged disclosure given by the RESTATEMENT involves criminal activity, see id., leading some to contend that the RESTATEMENT meant to extend the privilege no further than criminal acts. See Phillip I. Blumberg, Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry, 24 OKLA. L. REV. 279, 286-87 (1971). The fact that this example is the only one given does not warrant the conclusion that it is exclusive, nor would such a limitation be tenable given that the public interest can be far more greatly affected by certain harmful activity that is not strictly illegal than by minor criminal offenses. In any case, this article does not rely on the RESTATEMENT to defend employee disclosures, but rather on the First Amendment, which protects all information relevant to self-governance—not merely express violations of law. The RESTATEMENT's position that confidential information can be disclosed by an agent to protect a superior interest, however ambiguous its reach, merely reinforces that the common-law interests opposing the First Amendment are divided within their own ranks.

129. See WESTMAN, supra note 11.
In many cases, these two criteria may coincide—that is, the employer's interest in keeping the information private is strong because of the great importance the public would assign to it if it were provided access.\(^1\) In such cases, the preferred position of the First Amendment in our constitutional system should protect disclosure despite the employer's interests.\(^2\) Only when the employer's property interest in the information is strong and the public's interest in the information is relatively weak should confidentiality agreements be enforced.

In practice, determining whether and to what degree a particular disclosure constitutes a matter of public concern will often be a difficult task.\(^3\) Indeed, this task is an undertaking that some members of the Court have considered the judiciary ill-suited to perform in certain contexts.\(^4\) Ultimately, determining whether a particular disclosure involves a matter of public concern requires sensitivity to the circumstances of the individual case.\(^5\) However, some general precepts provide guidance.

First, to be protected by the First Amendment, a disclosure should be of concern to the public not merely because it is newsworthy in some respect, but in the stronger sense that it has an appreciable impact on the public's capacity for informed self-governance. This conclusion is proper because it is the First Amendment's protection of public discourse and collective self-determination that largely provides the rationale for holding confidentiality agreements enforceable against whistleblowers.\(^6\)

Even information that has a more significant instrumental value to the public than news which merely satisfies public curiosity might not deserve protection unless the public's failure to have such information would distort public decision making in some way.\(^7\) For example, reporting that an

\(^{10}\) See Estlund, supra note 89, at 133.

\(^{11}\) Cf. Estlund, supra note 89, at 133 ("[T]he speech the law protects often harms the employer for the very reason for which it is protected: It brings information to the public . . . that may threaten the employer's chosen way of doing business.").

\(^{12}\) See Westman, supra note 11, at 34 & n.41.

\(^{13}\) See Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting). But see Connick v. Myers, 461 U.S. 138, 146-49 (1983) (holding that courts should inquire into whether a public employee spoke on a matter of public concern to determine the constitutionality of terminating public employees); Gertz, 418 U.S. at 368-69 (Brennan, J., dissenting) (noting that in determining what is an issue of public interest courts "would only be performing one of their traditional functions," even if it "would not always be easy").

\(^{14}\) Cf. Connick, 461 U.S. at 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

\(^{15}\) See supra Part IV.A.

\(^{16}\) Of course, although First Amendment protections would be less readily available to these disclosures, a court would still remain free under the rubric of contract law to refuse to
employer overcharged for its products or misled suppliers or competitors about its future plans should not give rise to a First Amendment defense unless this information was also relevant in some significant way to self-governance. Self-governance is a broad concept encompassing all kinds of information—including, for example, information needed to determine whether the government is properly regulating certain industries or practices. As such, the absence of any connection to self-governance is the rare case, and the focus instead would normally be on the strength of the connection. Still, self-governance must remain the benchmark for First Amendment protection, as it is largely the justification for such protection in the first place.

A second conclusion naturally follows from the understanding that self-governance and public debate are the proper criteria in determining what speech the First Amendment protects from contractual liability. In determining the scope of the protectible speech, courts should not limit themselves to disclosures of illegal activity or disclosures that fall within the current protections afforded whistleblowers in statutory and common-law sources.\textsuperscript{137} The uninhibited public debate demanded by the First Amendment cannot be limited by public policy as currently embodied in positive law because such debate is essential to the continued legitimacy and development of the law. Because the First Amendment is concerned with debate that is properly constitutive of public policy, its protection should extend beyond the comparatively narrow scope of public policy as currently encoded by the legislature and as currently defined by the courts.

Apart from the problem of defining whether disclosures are of public concern, potential discrepancies are likely to emerge between the expected and the actual public import of employee disclosures.\textsuperscript{138} While neither a purely

\textsuperscript{137} In cases of whistleblower discharge, courts have often limited their inquiry in precisely this way, refusing to find an exception to the employment-at-will doctrine unless the speech at issue could be expressly pigeonholed within existing sources of whistleblower protection. See, \textit{e.g.}, Wagner v. General Elec. Co., 760 F. Supp. 1146, 1153 (E.D. Pa. 1991) ("Absent a legally recognized public policy exception to employment at-will, \ldots this Court \ldots would be in error to allow an action for wrongful discharge to proceed."). This outcome is consistent with these courts' failure to recognize the applicability of the First Amendment in such cases, a result challenged above in the text accompanying notes 82-85. Even within the narrower field of vision that remains once the First Amendment is disregarded, ignoring the public policy of supporting public discourse when the speech at issue does not fall within narrowly prescribed statutory or common-law categories is an unduly restrictive approach.

\textsuperscript{138} This question is different from whether the disclosures are factually correct. False disclosures potentially subject whistleblowers to defamation claims. Defamation raises its own host of First Amendment issues. See \textit{John E. Nowak \& Ronald D. Rotunda, Constitutional Law} \textsection{} 16.33-.35 (5th ed. 1995). Additionally, the extent to which common-law privileges would shield whistleblowers from liability in the defamation context is unclear. See Rützel, supra note 9, at 26-27. Because these questions are separate from the question of contractual liability, they are beyond the scope of this paper. However, to the extent that disclosures are false, they

Published by Scholar Commons, 1997
objective nor a purely subjective measure of the public interest in a given disclosure would be appropriate, a substantial objective component should be required for the speech to be protected. Because the whistleblower’s First Amendment right to disclose confidential information depends largely on the imperative of public debate, an actual contribution to the public should be a condition of protection. However, a purely objective approach that failed to credit in any way an employee’s subjective, yet reasonable, expectations about the importance of the information disclosed would unduly chill speech. Employees can never be completely certain of the impact their revelations will ultimately have upon the public, and some room for error must be preserved so long as one has a reasonable expectation of contributing to public debate.

Consideration of the public interest in the disclosures—which breeds questions as to how public interest is to be defined and according to what standard it is to be measured—is only one factor (albeit the most crucial one) among many that may influence the First Amendment calculus. Other factors will be relevant to the strength of the contractual and fiduciary interests that can be asserted in favor of enforcing the contract. For example, one relevant consideration is how specifically the agreement identified the information an employee was obliged to keep confidential, with more detailed agreements giving rise to more substantial contractual claims. The amount of negotiation, if any, that took place regarding the confidentiality agreement should also affect the strength of the contractual interests because in-depth discussions regarding the true intent of the parties are more likely to guarantee a knowing, intelligent waiver. Whether the contract was signed at the inception of the employment relationship or as part of a severance package may also be relevant. Agreements signed upon the termination of employment raise stronger contractual claims because employees will have been on notice as to the speech rights being relinquished—although allowance must be made for the possibility that the public significance of certain information is not recognized until later.

Regarding the interest in preserving fiduciary relationships, the employment position held by the whistleblower may be relevant because higher-level employees are often held to owe a correspondingly higher level

will not be objectively relevant to the public’s capacity for self-governance and would therefore lose First Amendment protection from contractual liability under the standard established here. See infra text accompanying note 140.

139. This component of objective public significance should be required of all the information disclosed, excluding such information that would be unreasonably difficult for employees to avoid relaying while still being able to disclose the publicly important material.

140. Cf. supra Part III.A (discussing the problem of the proper inferences that can be drawn regarding employees’ understandings of the scope of broadly framed confidentiality agreements).

141. See supra Part III.A.
of fiduciary duty.\textsuperscript{142} Whether or not the information disclosed was likely to be transmitted to the public regardless of the employee’s intervention would also be a relevant consideration. If the public was likely to obtain the information anyway, contractual liability would be more justifiable because it would allow the maximum protection of the fiduciary relationship consistent with the requirement that public debate remain “uninhibited, robust, and wide-open.”\textsuperscript{143} None of the factors discussed above clinches the balancing test—because even strong contractual and fiduciary interests will ordinarily fall to strong First Amendment interests—but all of these factors are relevant to the overall balancing a court would need to perform.

However, some factors are generally considered important in assessing the ethical dimensions of whistleblowing and the appropriateness of protecting whistleblowers from termination, but are less relevant in determining whether enforcing a confidentiality agreement would violate the First Amendment. The employee’s motives, while often critical in whistleblower discharge cases where the issue of loyalty is central,\textsuperscript{144} are less important when the question is one of contract enforcement. For this reason, other factors that are significant in discharge cases as reflections upon the employee’s motives—such as the outlet to whom the information is disclosed\textsuperscript{145} and the efforts made to exhaust internal remedies prior to disclosure\textsuperscript{146}—are similarly irrelevant here.

Contract law is not concerned with the motivation behind the breach as long as the contract is enforceable.\textsuperscript{147} The question when an employee like Wigand breaches a confidentiality agreement is whether it is enforceable in the first place, given the burdens the contract would place upon public discourse. The First Amendment is likewise unconcerned with the employee’s motives because the effect of a given disclosure upon public debate will be largely the same regardless of an employee’s reasons for speaking out. Ill-motivated disclosures might be less prudently made and therefore less likely to satisfy the requirement that disclosures be substantially and objectively relevant to the public,\textsuperscript{148} but this possibility differs from the argument that the First Amend-

\textsuperscript{142} See Westman, supra note 11, at 24.
\textsuperscript{144} See Westman, supra note 11, at 43-44.
\textsuperscript{145} See Dworkin & Callahan, supra note 127, at 378-79. Although inconsistencies exist between different sources of whistleblower protection, see id. at 379, the general tendency has been to treat disclosures to public authorities more favorably than those to the media, see id. at 364. The thinking behind this trend appears to be that a whistleblower who goes directly to the media is more likely to be an unreliable speaker seeking publicity, rather than one genuinely and reliably acting in the public interest. See generally id. at 364 (discussing fact that reporting to media is not favored).
\textsuperscript{146} See Westman, supra note 11, at 38-39.
\textsuperscript{147} See Farnsworth, supra note 17, § 12.8, at 190.
\textsuperscript{148} Such disclosures are also more likely to expose the employee to a defamation suit. See supra note 138.
ment is less solicitous of speech based on the disloyal motives of the speaker.

V. MODERN SUPREME COURT CASES APPEARING TO SUGGEST ENFORCEABILITY

Three modern Supreme Court cases that required the First Amendment to yield to interests in confidentiality might be considered particularly relevant to the question of the enforceability of employee confidentiality agreements: Cohen v. Cowles Media Co., 149 Seattle Times Co. v. Rhinehart, 150 and Snepp v. United States. 151 These cases could foreseeably be cited in a number of different ways in support of the argument that enforcing employee confidentiality agreements against whistleblowers is generally unobjectionable. This part of the article explains why these cases support no such proposition.

A. Cohen v. Cowles Media Co.

Cohen arose in the context of a Minnesota gubernatorial race. Dan Cohen, a well-known supporter of the Independent Republican Party campaign, approached reporters and offered to give them potentially damaging information regarding the opposing party’s candidate for Lieutenant Governor. 152 He offered to provide the information only on the condition of anonymity. 153 The newspaper editors later determined that Cohen’s identity was a newsworthy aspect of the story and revealed him as the source of the information. 154 The state supreme court “balance[d] the constitutional rights of a free press against the common law interest in protecting a promise of anonymity” 155 and determined that the promise the reporter made to Cohen was unenforceable. In a brief five-to-four opinion, the United States Supreme Court reversed the state supreme court and held that the First Amendment did not bar Cohen from recovering damages from the newspaper under state promissory estoppel law. 156

After concluding that state action was present in the lower court’s enforcement of the agreement, the Court based its opinion on the “well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the

152. See Cohen, 501 U.S. at 665.
153. See id.
155. Id. at 205.
press has incidental effects on its ability to gather and report the news."\textsuperscript{157} Arguing that the press was not privileged to violate laws of general applicability, the Court found that the promise was enforceable without engaging in any First Amendment balancing whatever. If speech were chilled, this result was "no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them."\textsuperscript{158}

The Court's very framing of the issue as a rejection of "press privilege" is problematic. As Justice Blackmun points out in dissent, the opinion of the Minnesota Supreme Court did "not . . . create any exception to, or immunity from, the laws of that State for members of the press. . . . [T]he court's decision [was] premised, not on the identity of the speaker, but on the speech itself."\textsuperscript{159} State promissory estoppel law should accommodate the demands of the First Amendment not because a reporter made the promise, but because the promise itself threatened public discourse.\textsuperscript{160} The Court has consistently held that when common-law causes of action threaten to chill public debate, the interests supporting them must be weighed against the harm caused to the First Amendment.\textsuperscript{161} In refusing to apply state promissory estoppel law to penalize the publication of newsworthy political information, the state court did not carve out a privilege for the press, but merely adhered to the privilege demanded by the First Amendment whenever public debate is directly threatened by any regime of law, however broadly applicable.

Neither does the application of contract or promissory estoppel law to vows of silence on matters of public concern constitute an "incidental, and constitutionally insignificant"\textsuperscript{162} threat to public debate. Whatever might be said for the limitations placed upon the press in the cases relied upon by the majority, in which the press was found to have no privilege to violate the NLRA,\textsuperscript{163} to ignore the antitrust laws,\textsuperscript{164} to refuse to pay non-discriminatory taxes,\textsuperscript{165} or to respond to a grand jury subpoena,\textsuperscript{166} imposing liability

\textsuperscript{157} Id. at 669.
\textsuperscript{158} Id. at 672.
\textsuperscript{159} Id. at 673 (Blackmun, J., dissenting).
\textsuperscript{160} Cf. id. ("Necessarily, the First Amendment protection [that should have been] afforded respondents would be equally available to nonmedia defendants.").
\textsuperscript{161} See supra text accompanying note 15; see also Cohen, 501 U.S. at 677 (Souter, J., dissenting) ("[T]here is nothing talismanic about neutral laws of general applicability' . . . for such laws may restrict First Amendment rights just as effectively as those directed specifically at speech itself." (quoting Employment Div. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring))).
\textsuperscript{162} Cohen, 501 U.S. at 672.
\textsuperscript{163} Associated Press v. NLRB, 301 U.S. 103 (1937).
\textsuperscript{164} Associated Press v. United States, 326 U.S. 1 (1945).
\textsuperscript{165} Murdock v. Pennsylvania, 319 U.S. 105 (1943).
\textsuperscript{166} Branzburg v. Hayes, 408 U.S. 665 (1972).
based on the disclosure of publicly important information is of an entirely different constitutional magnitude.\textsuperscript{167}

Additionally, a principled distinction exists between journalist-source and employer-employee confidentiality agreements. Had Cohen properly engaged in the balancing required by the First Amendment, it could legitimately have found that enforcing the agreement was entirely consistent with the First Amendment. Journalist-source confidentiality agreements arguably support public debate by encouraging sources to come forward with information. A plausible argument exists that enforcing such agreements, which are critical to the effective functioning of the press, actually benefits the marketplace of speech in the long run.\textsuperscript{168} The imperative of robust public debate, quite simply, exists on both sides of the issue of whether to enforce journalist-source confidentiality agreements. In contrast, employee confidentiality agreements serve the instrumental interests of the employer in keeping certain information private, but do nothing to advance the cause of public discourse.

Cohen touches upon two additional issues relevant to the enforceability of employee confidentiality agreements in ways that require explanation. The first is the issue of waiver. Although the Court never addressed this question directly, it criticized Justice Blackmun's reliance on cases such as Florida Star v. B.J.F.\textsuperscript{169} and Smith v. Daily Mail Publishing Co.\textsuperscript{170} by noting that:

In those cases, the State itself defined the content of publications that would trigger liability. Here, by contrast, Minnesota law simply requires those making promises to keep them. The parties themselves... determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.\textsuperscript{171}

This emphasis on the self-imposition of speech restraints was made in the context of distinguishing Florida Star and Daily Mail Publishing Co. from the

\textsuperscript{167} See Cohen, 501 U.S. at 674-75 (Blackmun, J., dissenting).

\textsuperscript{168} Cf. Farber, supra note 89, at 576 ("[I]n the long run, applying promissory estoppel to cases involving promises of confidentiality by members of the press should actually increase the stock of public information."). Cowles Media relied on this very argument in its Supreme Court brief, see Brief for Petitioner at 27-29, as did the dissenters in the State Supreme Court, see Cohen v. Cowles Media Co., 457 N.W.2d 199, 206 (Yetka, J., dissenting), 207 (Kelley, J., dissenting).

\textsuperscript{169} 491 U.S. 524, 541 (1989) (finding a First Amendment violation when damages were imposed on a newspaper for publishing the name of a rape victim obtained from a publicly released police report).

\textsuperscript{170} 443 U.S. 97, 103-06 (1979) (finding that a statute that makes a newspaper's act of publishing the name of a charged juvenile offender a crime violative of the First Amendment).

\textsuperscript{171} Cohen, 501 U.S. at 670-71.
case before the Court.\textsuperscript{172} Because those cases applied strict scrutiny to laws prohibiting the reporting of certain kinds of truthful information, the Court’s distinction should be regarded merely as a way of explaining why strict scrutiny, which Justice Blackmun seemed to consider to be appropriate in Cohen,\textsuperscript{172} was not warranted. This rejection of strict scrutiny in itself is not problematic and indeed is not inconsistent with the approach taken in this article to apply intermediate scrutiny.\textsuperscript{174}

However, the Court’s remarks about the self-imposition of speech restraints should not be read as sanctioning the free waivability of First Amendment rights—a proposition that the Court never addressed. The Court’s failure to engage in any First Amendment scrutiny in Cohen was not grounded upon an argument that First Amendment rights had been waived, but on the problematic notion that the press was not to be “privileged.”\textsuperscript{175} Indeed, Justice Souter was correct to point out in dissent that the Court’s “suggestion [of] the possibility of waiver”—“suggestion” itself being a proper characterization of the majority’s cursory treatment of the issue\textsuperscript{176}—was misguided because the formal requirements for waiver had not been met.\textsuperscript{177} More importantly, he was correct to argue that the very notion of waiving the right to participate in public debate is problematic because it is based upon “a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse.”\textsuperscript{178}

In distinguishing Florida Star and Daily Mail Publishing Co. from Cohen, the Court also addressed the question of whether information gained by virtue of a promise of confidentiality is “lawfully” obtained.\textsuperscript{179} Whereas Florida Star and Daily Mail Publishing Co. had applied strict scrutiny to restrictions upon the publication of truthful, lawfully obtained information, the Court remarked that “it is not at all clear that respondents obtained Cohen’s name ‘lawfully’ in this case, at least for purposes of publishing it.”\textsuperscript{180} The Court did not expressly hold that such information was unlawfully obtained and that its disclosure was therefore unprotected, nor would it have been justified in doing so.\textsuperscript{181} (Indeed, even where information has been unlawfully

\textsuperscript{172} See id.
\textsuperscript{173} See id. at 676 (Blackmun, J., dissenting) (requiring compelling state interest).
\textsuperscript{174} See supra text accompanying notes 95-97.
\textsuperscript{175} See Cohen, 501 U.S. at 670.
\textsuperscript{176} See id. at 671 (noting restrictions placed on publication were “self-imposed”).
\textsuperscript{177} Id. at 677 (Souter, J., dissenting).
\textsuperscript{178} Id. at 677-78; see also supra Part III.C.
\textsuperscript{179} See Cohen, 501 U.S. at 671.
\textsuperscript{180} Id.
\textsuperscript{181} While access to the relevant information in Cohen was gained by virtue of a confidentiality agreement that was later breached, nothing is strictly illegal about this means of
obtained, whether its disclosure can be penalized separately is unclear.\textsuperscript{182} The Court's doubts about the means of acquisition, rather, simply distinguished \textit{Cohen} from cases where strict scrutiny had been considered appropriate. As with the distinction regarding the self-imposition of speech restraints, doubts about the means of acquisition were not the basis for the Court's abandonment of First Amendment scrutiny altogether. Justice Souter again properly clarified the issue, noting that "the circumstances of acquisition are [not] irrelevant to the balance... although they may go only to what balances against, and not to diminish, the First Amendment value of any particular piece of information."\textsuperscript{183} In the case of employee confidentiality agreements, incorporating the circumstances of acquisition into the balance is precisely to account for the contract, property, and fiduciary interests that this article has found insufficient as a general matter to justify silencing whistle-blowers who have substantial contributions to make to public debate.\textsuperscript{184} \textit{Cohen} does not support the proposition that where access to information is conditioned upon a breached promise of confidentiality, a court may dispense with First Amendment balancing in considering whether such information can be disclosed. However, a different Supreme Court case, \textit{Seattle Times Co. v. Rhinehart},\textsuperscript{185} seems to suggest just such a conclusion.

\textbf{B. Seattle Times Co. v. Rhinehart}

\textit{Seattle Times Co.} upheld the constitutionality of a state rule of procedure\textsuperscript{186}—modeled upon the federal rule\textsuperscript{187}—permitting courts, upon a showing of good cause, to issue protective orders that prohibit the dissemination of information obtained during pretrial discovery.\textsuperscript{188} As such, \textit{Seattle Times Co.} might be read to stand for the proposition that where one does not have an unbridled right of access to information, the First Amendment is not offended if access is granted subject to the condition of confidentiality.\textsuperscript{189}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{182} See Florida Star v. B.J.F., 491 U.S. 524, 535 n.8 (1989).
\item \textsuperscript{183} \textit{Cohen}, 501 U.S. at 679 (Souter, J., dissenting).
\item \textsuperscript{184} \textit{See supra} Part IV.B.
\item \textsuperscript{185} 467 U.S. 20 (1984).
\item \textsuperscript{186} \textit{WASH. SUPER. CT. CIV. R. 26(c).}
\item \textsuperscript{187} \textit{FED. R. CIV. P. 26(c).}
\item \textsuperscript{188} \textit{Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984).}
\item \textsuperscript{189} Notably, the petitioner in \textit{Cohen} relied on \textit{Seattle Times Co.} (along with \textit{Snepp}) to argue that "the First Amendment does not bestow a right to publish information in violation of
\end{itemize}
\end{footnotesize}
Such a broad reading would misconstrue the actual holding of *Seattle Times Co.* and would fail to account for the special circumstances of that case.

The Court in *Seattle Times Co.* did not find that the First Amendment was unconcerned with information obtained pursuant to court discovery merely because confidentiality was a prerequisite to access. Rather, the Court applied intermediate scrutiny to the rule governing protective orders, but considered the particular state interests involved sufficient to pass muster.\(^{190}\) These interests, as well as the First Amendment interests at stake in *Seattle Times Co.*, are readily distinguishable from those implicated by employee confidentiality agreements. At issue in *Seattle Times Co.* was not merely the government's interest in protecting private information, but its substantial interest in preserving the integrity of its judicial processes. In the absence of protective orders, that integrity would be jeopardized by the ability of private parties to abuse our liberal system of discovery in order to extract private information from other parties and disclose it to the world.\(^ {191}\) In the face of such potential for abuse, parties might be inclined to avoid litigation altogether, thereby also placing in jeopardy the fundamental right of individuals to have access to the state courts\(^ {192}\)—another critical interest influencing *Seattle Times Co.*, 's defense of protective orders.\(^ {193}\)

Not only does the strength of the state interests involved distinguish *Seattle Times Co.* from the issue at hand, but so does the manner in which the confidential information is obtained. In overseeing the discovery process the government itself extracts information from an involuntary source—at the request of and for the benefit of another party—in order to fulfill its essential function of resolving disputes. Because the state itself forces the release of information—based on its own substantial interests in doing so and at the expense of the possessor—it has a more legitimate interest in being able to restrict public dissemination of that information.\(^ {194}\) Private employers, conversely, are not forced by the state against their will to release information to employees in order to satisfy exogenous state imperatives.

---

190. See *Seattle Times Co.*, 467 U.S. at 32-36.

191. See id. at 34-36; see also id. at 32 n.18 (citing other cases where special exigencies of judicial system warranted restrictions on free speech).

192. See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983) (noting "that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances").

193. See *Seattle Times Co.*, 467 U.S. at 36 n.22.

194. See id. at 32. While such an interest is not entirely uncontroversial, see TRIBE, supra note 29, § 12-21, at 969 & n.21 (noting tension between *Seattle Times Co.* and the unconstitutional conditions doctrine), it is still a relevant distinction in considering the state's role in restricting speech.

Published by Scholar Commons, 1997
On the other side of the balancing test, circumstances in *Seattle Times Co.* that do not exist in the present context minimized the threat that the confidentiality requirements in that case posed to the First Amendment. In particular, protective orders such as those at issue in *Seattle Times Co.* do not limit disclosure of the information if gained from sources other than pretrial discovery—nor do they apply to information ultimately admitted at trial. The silencing effect of employee confidentiality agreements, by contrast, is likely to be more absolute, the agreements themselves evidencing the employer’s affirmative efforts to keep the information from the public.

At bottom, *Seattle Times Co.* simply manifests the principle noted by Justice Souter in his *Cohen* dissent—that the means of acquiring information are not irrelevant to the First Amendment analysis. However, the case does not suggest that when these means include a promise of confidentiality, the First Amendment is therefore unconcerned with the information acquired. The means of acquisition, again, “go only to what balances against, and not to diminish, the First Amendment value of any particular piece of information.” In *Seattle Times Co.* the means of acquisition implicated the state’s interests in ways readily distinguishable from the context of employee whistleblowing and in a way less threatening to public debate.

C. Snepp v. United States

Snepp is a third modern case susceptible to misreading regarding the enforceability of confidentiality agreements at the First Amendment’s expense. The state appellate court in *Cohen*, for example, cited *Snepp* to argue that “[t]he United States Supreme Court has implicitly found the protection of contractual rights to be a sufficient governmental interest to outweigh first amendment rights.” The case concerned a book about the CIA published by a former CIA employee without submitting it for prepublication clearance as required by his employment contract. The government conceded, for

---

195. See *Seattle Times Co.*, 467 U.S. at 34.  
196. See id. ("In sum, judicial limitations on a party’s ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context.").  
198. Id.  
199. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 257 (Minn. Ct. App. 1989). The petitioner in *Cohen* also relied on *Snepp* (along with *Seattle Times Co.*) to argue that the First Amendment does not protect the publication of information in violation of the conditions under which it was obtained. See *supra* note 189. For another example of a case broadly misapplying *Snepp*, see *American Motors Corp. v. Huffstuter*, 575 N.E.2d 116, 120 (Ohio 1991) (citing *Snepp* and *Seattle Times Co.* for the proposition that “[d]isclosure of confidential information does not qualify for protection against prior restraint under the First Amendment”).  
purposes of its suit, that the book contained no classified information. The Fourth Circuit agreed with the district court that Snepp had breached his employment contract, but found the imposition of a constructive trust on the book’s profits to be an inappropriate remedy because Snepp, having a First Amendment right to publish unclassified information, had no fiduciary obligation to submit the book for prepublication clearance. The Supreme Court reversed on the issue of fiduciary obligation, citing the special trust placed in Snepp as a CIA employee.

Contrary to the impression of the state appellate court in Cohen, Snepp has little if anything to do with contractual rights and their ability as a general matter to trump free speech. The conclusion that the contract in Snepp was enforceable had nothing to do with the imperative of contract enforcement itself. Instead, the result stemmed from the compelling national security concerns that the Court considered to have been at stake. Indeed, the Court noted that the CIA could have imposed speech restrictions that would have been unacceptable in other contexts “even in the absence of an express agreement.” Likewise, the government did not contest the fact that the contract generally could not prohibit Snepp from publishing unclassified information. The real question in Snepp was not whether the contract prevented Snepp from speaking, but whether Snepp’s fiduciary obligations required him to consult with the CIA before going public with information that he conceded had the right to disclose.

Even the Court’s holding on the question of fiduciary duties, moreover, does not translate to the context of whistleblowing by private employees because, as with the contractual issue, the unique national security context was determinative in Snepp. “Few types of governmental employment,” the

201. See id.
202. See id. at 935. This conclusion followed from United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972).
203. See Snepp, 595 F.2d at 935-36.
205. See id. at 509 n.3. While the Court noted that the contract was voluntarily signed as a basis for its holding that the contract was enforceable, see id., this mention of voluntariness was not an argument that First Amendment rights had been waived. What allowed the Court to disregard Snepp’s First Amendment objections was not any notion of waiver, but the government’s “compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.” Id. The contract itself was simply “a reasonable means for protecting this vital interest.” Id.
206. Id.
207. See id. at 511.
208. The contract clearly did not prevent Snepp from speaking about unclassified matters, and he could not speak on classified matters irrespective of the contract.
209. Apart from the bright distinction offered by the facts of Snepp, the case does not even
Court remarked, "involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties."\textsuperscript{210} The Court deemed that the violation of these duties endangered vital national security interests, impaired the CIA's ability to fulfill its statutory mandate, and threatened irreparable harm to the United States.\textsuperscript{211} The tenuousness of any connection between Snepp and the duties generally owed by employees who have signed confidentiality agreements should be clear. In fact, the best testimony in this regard came from the Court itself. Responding to the dissent's reference to a private employee's covenant not to compete with his employer, the Court observed that "[a] body of private law intended to preserve competition . . . simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to 'protect[s] [sic] intelligence sources and methods from unauthorized disclosure.'"\textsuperscript{212}

\section{VI. Conclusion}

The First Amendment substantially limits the enforceability of employee confidentiality agreements against disclosures on matters of public concern. First Amendment scrutiny is triggered because court enforcement of confidentiality agreements constitutes state action.\textsuperscript{213} Such scrutiny cannot be avoided by arguing that the employee waived his First Amendment rights. Even if the formal waiver requirements are met,\textsuperscript{214} courts must refuse to enforce waivers of rights if the resultant harms would outweigh the interests in enforcement.\textsuperscript{215} This balancing must be informed by the First Amendment interests at stake; the mere existence of a contract cannot prevent these interests from being considered in the first place.\textsuperscript{216} More generally, the very idea of waiving one's right to participate in public debate is problematic because public discourse is the bedrock of our deliberative democracy and not the bargaining chip of any single individual.\textsuperscript{217} When courts apply First Amendment scrutiny to the enforcement of employee confidentiality agreements directly address the question of the limits fiduciary duties (however compelling) may place upon employee contributions to public debate. The case, again, only concerned whether Snepp was required to clear with the CIA material that admittedly could be disclosed. If clearance had not been granted, the burden would then have been on the government to seek an injunction. See \textit{id.} at 513 n.8.

\textsuperscript{210} Snepp, 444 U.S. at 511 n.6.
\textsuperscript{211} Id. at 511.
\textsuperscript{212} id. at 513 n.9 (quoting 50 U.S.C. § 403(d)(3)).
\textsuperscript{213} See supra Part II.
\textsuperscript{214} See supra Part III.A.
\textsuperscript{215} See supra Part III.B.
\textsuperscript{216} See supra Part III.B.
\textsuperscript{217} See supra Part III.C.
against whistleblowers, the First Amendment generally prevails—although a
number of relevant factors will affect the proper outcome of a given case.218
Nor should the three Supreme Court cases most relevant to the issue tip the
scales to any significant degree because they are each distinguishable in
important ways.219

The fact that the First Amendment places limits on the enforceability of
contracts, whatever disputes exist over the proper scope of such limitations,
follows from the basic Legal Realist intuition that contract law necessarily
entails substantive choices by the state. In this respect, the issue bears an
interesting relationship to larger debates that have raged in recent years over
the future of the First Amendment. On subjects as diverse as campaign
finance, regulation of the broadcast media, pornography, and hate speech,
scholars have questioned a free market approach to speech rights that falsely
equates the substantive choices about speech ingrained in the status quo with
noninvolvement by the state.220 As Professor Balkin has observed, these new
challenges

all involve techniques first used by the legal realists in the 1920s and
1930s to deconstruct the ideology of the sacred right of freedom of
contract. The only difference is that now the attack, the assault on the
citadel if you will, is directed at the sacred right of free speech.221

This article does not join in the new assault, but has the more modest ambition
of defending, in the name of free speech, what one would assume to have been long-
won victories over the meaning of contract law itself. Cohen v. Cowles Media Co.
suggests the danger of a regressive Lochnerism that views the enforcement of
contracts governing speech rights not as substantive state decisions about free speech
needing to be tested against the First Amendment, but rather as a decision to
"require[] those who make certain kinds of promises to keep them."222 Contrary
to the impression of the Court, such an approach is anything but "constitutionally
insignificant"223 when the promises at issue threaten to restrict public debate.

218. See supra Part IV.C.
219. See supra Part V.
220. See, e.g., Fiss, supra note 86; CATHERINE A. MACKINNON, FEMINISM UNMODIFIED:
DISCOURSES ON LIFE AND LAW 127-213 (1987); SUNSTEIN, supra note 101; Mari J. Matsuda,
Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320
(1989). For one response to these arguments, see Charles Fried, The New First Amendment
221. J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First
223. Id.