FREE SPEECH RIGHTS IN PRIVATE EMPLOYMENT? THE FIRST AMENDMENT, THE PRESENT PATCHWORK, AND A BALANCED IMPROVEMENT

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INTRODUCTION

Since the First Amendment only limits government action, the vast majority of American workers lack constitutional protection for speech in at-will private employment; the amendment can even protect private employers in hiring and firing. Yet private-sector workers can find other sources for unintuitive protections for free speech and political activity, though they remain "spotty and sparse."[1] The nation's robust market economy depends on businesses' ability to maintain functional workplaces, but the foundational place of First Amendment ideals in American democracy need not bow to a *Lochner*-esque emphasis on the sanctity of contract.

This Note argues for more—and more precise—state statutes to improve clarity for both employees and employers while balancing civic and economic priorities. Part I explains how the default of at-will employment means workers generally can be fired for speech or politics. Part II outlines how the First Amendment can protect private employers from compelled speech. Part III examines the limited speech protections provided by federal statutes including the National Labor Relations Act, which applies regardless of union status. Part IV shows how state constitutions and common law might protect free speech in private employment but rarely do. Finally, Part V surveys the promising patchwork of statutes in the majority of states that protect at least some off-duty speech or conduct; this concludes with a proposed model statute balancing First Amendment ideals with legitimate employer interests.

I. "FOR WHATEVER REASON": THE VULNERABILITY OF AT-WILL EMPLOYMENT

Unique among developed democracies,[2] United States law assumes that private employment is an "at-will" contractual relationship—meaning either party can end the relationship at any time, for any reason not otherwise prohibited by law.[3] This

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[1] Cynthia Estlund, *Freedom of Expression in the Workplace*, *in* THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 410, 429 (Adrienne Stone and Frederick Schauer, eds., 2021).

[2] Kate Andrias & Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide for Just Cause Reform*, ROOSEVELT INST. 4 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf; *id.* at 7 (summarizing discharge requirements elsewhere and citing the International Labor Organization Employment Protection Legislation Database).

[3] *Wrongful Discharge* § 1, *in* 82 AM. JUR. 2D (updated February 2023); *see also* Michael A. DiSabatino, Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 554 (first published in 1982).

common law presumption originated with an 1877 treatise writer's misreading of key precedents[4] but gradually became the default rule, with the U.S. Supreme Court in 1908 stating that workers could be fired "for whatever reason."[5] Critics argue this "divine right of employers" ignores the reality that most employees cannot bargain with employers on equal footing and lets employers unfairly benefit from employees' incorrect assumptions about their rights.[6] Indeed, about three-quarters of American workers incorrectly believe they have more rights in the employment context.[7] On the other hand, defenders see the at-will rule as essential to the dynamic market economy[8] that has fueled the United States' economic prosperity and geopolitical preeminence since World War II.

Of course, employment at-will is a legal default, not an absolute mandate. The parties may agree otherwise by contract, either individually (such as by setting a fixed term) or as a union

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[4] Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1083 n.7 (1984) (discussing the precedents misread and ignored by Horace Gray Wood in his treatise that won over the common law, *see* H.G. WOOD, MASTER AND SERVANT § 134 (1877)); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 124–27 (1976); Rebecca Dixon, *Cities Are Working to End Another Legacy of Slavery — 'At Will' Employment*, NAT'L EMP. L. PROJ. (Oct. 19, 2021), https://www.nelp.org/commentary/cities-are-working-to-end-another-legacy-of-slavery-at-will-employment/ (arguing at-will employment "grew out of the soil of slavery and servitude and was cemented in the legal system as a product of industrialists' efforts to repress worker organizing") (citing Lea VanderVelde, *The Anti-Republican Origins of the at-Will Doctrine*, 60 Am. J. Legal Hist. 397 (2020)).

[5] Adair v. United States, 208 U.S. 161, 174–75 (1908) ("So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee."), *abrogated on other grounds by* Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 187 (1941).

[6] Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000); *see also* Andrias & Hertel-Fernandez, *supra* note 2, at 4–18; Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *supra* note 4.

[7] Andrias & Hertel-Fernandez, *supra* note 2, at 15. *See also* SAMUEL ESTREICHER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW: THE FIELD AS PRACTICED 4 (5th ed. 2016) ("Employees may not, for instance, understand what it means to have no contractual protection against arbitrary discharge, because they make erroneous assumptions about what employers lawfully may do . . . .").

[8] *In Defense of Employment-at-Will*, MISES INST. (May 23, 2005), https://mises.org/library/defense-employment-will (arguing that "weakening employment-at-will necessarily raises the potential and perceived costs of all hiring decisions" and "labor market flexibility is not just a benefit for entrepreneurs and business people; it is essential to economic growth in general"); *see also* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (discussing the benefits of legal predictability).

with a collective bargaining agreement. One state, several territories, and a few cities have legislatively altered the presumption. The only state is Montana, which in 1987 passed a statute[9] that is not very protective in practice.[10] Senator Bernie Sanders proposed universal just-cause protection while seeking the Democratic presidential nomination in 2019,[11] but such a sweeping national proposal is unlikely to become law.[12] Overall,

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[9] MONT. CODE ANN. § 39-2-904.

[10] Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act*, 57 MONT. L. REV. 375, 376–77 (1996). Beyond Montana, just cause is required for all workers in Puerto Rico and the U.S. Virgin Islands, for parking-lot workers in Philadelphia, and in New York City for workers at fast-food chain restaurants. Andrias & Hertel-Fernandez, *supra* note 2, at 4 n.1. A restaurant industry group challenged the New York City law, but a federal district judge granted summary judgment to the city in February 2022. Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. 2022), *appeal pending* (2d Cir. No. 22-491); *see also* Max Kutner, *2nd Circ. Skeptical of Restaurant Groups' 'Just Cause' Take*, LAW360 (May 18, 2023), https://www.law360.com/articles/1589244. Advocates also seek protections in Democrat-dominated jurisdictions including Illinois; New Jersey; and Seattle, Washington. Josh Eidelson, *Most Americans Can Be Fired for No Reason at Any Time, But a New Law in New York Could Change That*, BLOOMBERG BUSINESSWEEK (June 21, 2021), https://www.bloomberg.com/news/features/2021-06-21/new-york-just-cause-law-is-about-to-make-workers-much-tougher-to-fire; *see also* Jeff Schuhrke, *The Movement to End At-Will Employment Is Getting Serious*, IN THESE TIMES (Apr. 6, 2021), https://inthesetimes.com/article/at-will-just-cause-employment-union-labor-illinois.

[11] Ian Kullgren, *How Bernie Sanders Would Boost Unions*, POLITICO (Aug. 21, 2019), https://www.politico.com/story/2019/08/21/how-bernie-sanders-would-boost-unions-1674854.

[12] Even advocates acknowledge "ending at-will employment would represent a major shift in US employment law" that would upend "the bedrock of the legal relationship between workers and employers." Andrias & Hertel-Fernandez, *supra* note 2, at 5, 49. Legislation has not advanced even in blue states, though a management-side observer predicts "statewide legislation to implement just-cause protections is likely to succeed somewhere at some point," but likely limited to certain industries rather than across the board. Mike LaSusa, *4 Types Of Failed Wage and Hour Bills States Could Resurrect*, LAW360 (July 29, 2021), https://www.law360.com/employment-authority/articles/1404915. Any federal bill is dead on arrival in Congress, where only progressive Democrats support such a radical change. The leading advocate is Senator Bernie Sanders, the Vermont socialist who has twice unsuccessfully sought the Democratic presidential nomination; his 2019 call to end the at-will default was so distinctive as to be newsworthy. Bernie Sanders, *The Workplace Democracy Plan*, https://berniesanders.com/issues/workplace-democracy/ (last accessed Mar. 25, 2023); Kullgren, *supra* note 11. The Congressional Progressive Caucus counts 101 of 435 representatives and only one of 100 senators—Sanders. *Caucus Members*, CONG. PROGRESSIVE CAUCUS, https://progressives.house.gov/caucus-members (last accessed June 3, 2023). To reach the president's desk, legislation generally needs 218 votes in the House, and sixty in the Senate, thanks to the filibuster, which is not ending anytime soon. *See* VALERIE HEITSHUSEN, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE (updated Apr. 7, 2017), https://crsreports.congress.gov/product/pdf/RL/RL30360; *Manchin Again Reiterates His Commitment to Protecting Filibuster*, Office of Senator Joe Manchin (Jan. 13, 2022), https://www.manchin.senate.gov/newsroom/press-releases/manchin-again-reiterates-his-commitment-to-protecting-filibuster.

U.S. employment is generally at-will—covering up to 78.8 percent of all American workers.[13]

Those at-will workers generally can be fired for exercising First Amendment rights. Private employers can discriminate based on politics in a way that would be completely repugnant to fundamental American values if done by the government; indeed, courts have developed an extensive body of case law concerning First Amendment rights in *public* employment.[14] Yet private employers can, and sometimes do, terminate at-will employees for political speech, as these recent incidents illustrate:

- Audrey Lynn Henson founded the nonprofit College to Congress in 2016 to support underrepresented congressional interns and led the organization until November 2021, when she alleges she was "unlawfully terminated, penalized, and mistreated based solely on her conservative values" because she ran for Congress as a Republican.[15]
- Juli Briskman said she was forced to resign her job as a marketing analyst for a federal contractor after drawing national attention for holding up her middle finger to President Donald Trump's motorcade in 2017;[16] a

[13] Calculations based on latest federal data: Some 85% of American workers are in the private sector. Audrey Watson, *Occupational Employment and Wages in State and Local Government*, U.S. BUREAU OF LAB. STAT. (Dec. 2021), https://www.bls.gov/spotlight/2021/occupational-employment-and-wages-in-state-and-local-government/home.htm. Unions represent only 7% of private-sector workers. *News Release*, U.S. BUREAU OF LAB. STAT. tbl. 3 (Jan. 19, 2023) https://www.bls.gov/news.release/pdf/union2.pdf. Montana accounts for just 0.23% of the U.S. population. U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/MT/PST120221 (last visited Jan. 30, 2023); U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last visited Jan. 30, 2023).

[14] Paul M. Secunda, *Reflections on the Technicolor Right to Association in American Labor and Employment Law*, 96 KY. L.J. 343, 346–56 (2008); C.R. McCorkle, Annotation, *Governmental Control of Actions or Speech of Public Officers or Employees in Respect of Matters Outside the Actual Performance of Their Duties*, 163 A.L.R. 1358.

[15] Complaint at 2, Henson v. College to Congress LLC, No. 1:22-cv-03483 (D.D.C. Nov. 14, 2022); *see also* Justin Moyer, *Nonprofit Founder Says She Was Fired for Being Conservative Republican*, WASH. POST (Dec. 12, 2022), https://www.washingtonpost.com/dc-md-va/2022/12/12/audrey-henson-interns-capitol-hill/.

[16] Juli Briskman, *Opinion: Why I'm Suing for My Right to Flip Off the President*, WASH. POST (Apr. 5, 2018) https://www.washingtonpost.com/opinions/im-suing-for-my-right-to-flip-off-the-president/2018/04/05/a0abcf10-38e8-11e8-9c0a-85d477d9a226_story.html ("The First Amendment bars retaliation against me by Trump. But Trump doesn't need to punish me for my speech if fear of him spurs my employer to do it.").

Virginia state judge dismissed Briskman's wrongful-termination claim because she was an at-will employee.[17]

- In June 2020, Kris Hauser said she was fired from her longtime restaurant job for refusing to wear a face mask with a "Trump 2020" logo, which the restaurant owner had declared a "[r]equired uniform."[18]
- John Gibson was a cofounder and CEO of the video-game company Tripwire Interactive until 2021 when he tweeted his support for a Texas law that effectively banned abortion after six weeks of pregnancy; he quit following an online outcry and criticism and contract cancellation threats from corporate partners.[19]

While these examples represent extreme instances that made the news, political pressure is not rare: "one in four private-sector employees said in a 2015 survey that they received political messages or requests from their bosses."[20] For instance, while rallying support for the 2017 tax cuts, some companies invited leading lawmakers to address their employees in the workplace.[21]

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[17] Braden Campbell, *Woman Who Flipped Trump Off Loses Unfair Firing Claim*, LAW360 (June 29, 2018), https://www.law360.com/articles/1059108/woman-who-flipped-trump-off-loses-unfair-firing-claim. However, in 2019, Briskman defeated a Republican incumbent to win a seat on the Loudoun County (Virginia) Board of Supervisors, where she remains as of June 2023. Poppy Noor, *'I Don't Regret It': How Juli Briskman Went from Giving Trump the Finger to Winning an Election*, THE GUARDIAN (Nov. 9, 2019), https://www.theguardian.com/us-news/2019/nov/09/trump-middle-finger-julie-briskman-virginia; *see also* Board of Supervisors, LOUDOUN CNTY., https://www.loudoun.gov/86/Board-of-Supervisors (last visited June 3, 2023).

[18] Jelisa Castrodale, *Restaurant Worker Says She Was Fired for Refusing to Wear 'Trump 2020' Mask*, VICE (June 9, 2020), https://www.vice.com/en/article/wxqdwb/restaurant-worker-says-she-was-fired-for-refusing-to-wear-trump-2020-mask.

[19] Even if Gibson had been fired rather than resigning under pressure, he would not have had a viable claim under the at-will default. He might have argued his departure amounted to a constructive discharge. *See* Matt Egan, *Video Game CEO Is Out After Praising Texas Abortion Law*, CNN (Sept. 7, 2021), https://www.cnn.com/2021/09/07/business/tripwire-ceo-texas-abortion-law; Khristopher J. Brooks, *TripWire Interactive CEO Steps Down After Supporting Texas Abortion Law*, CBS NEWS MONEYWATCH (Sept. 7, 2021), https://www.cbsnews.com/news/tripwire-texas-abortion-john-gibson-gaming-tweet/.

[20] Charlotte Garden, *Was It Something I Said? Legal Protections for Employee Speech*, ECON. POL'Y INST. 3 (May 5, 2022) (citing ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS (2018)), https://files.epi.org/uploads/215894.pdf.

[21] Richard Rubin, *Companies Promote Corporate-Tax Overhaul*, WALL ST. J. (Aug. 22, 2017), https://www.wsj.com/articles/companies-promote-corporate-tax-overhaul-1503441184 (noting visits with workers at UPS, Best Buy, AT&T, Intel, Boeing, and other companies).

II. THE FIRST AMENDMENT FOR PRIVATE EMPLOYERS, BUT NOT WORKERS

Even a well-informed citizen might think the adverse employment actions described above violated the First Amendment, as online commenters and even news articles sometimes claim.[22] However, the amendment only regulates actions by the government: While "Congress shall make no law . . . abridging the freedom of speech,"[23] private employers are not so limited because their actions are not state actions. As the Supreme Court stated in 1976:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.[24]

The full Fourth Circuit thus rejected a private right of action for alleged First Amendment violations by private

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[22] Natasha Anderson, *Google Executive Infringed on Fired Engineers [sic] First Amendment Rights by Telling Him NOT to Post His Right Wing Views on Internal Message Boards, Lawsuit Finds*, DAILYMAIL.COM (Sept. 23, 2021), https://www.dailymail.co.uk/news/article-10022371/Emails-Google-exec-broke-labor-laws-firing-conservative-engineer.html. Illustrating the way that governmental pressure can infringe First Amendment rights of *employers*, Google's settlement with the National Labor Relations Board came after President Trump tweeted his support for an ex-employee who said he was fired for expressing unpopular conservative views. Rob Copeland, *Government Orders Google: Let Employees Speak Out*, WALL ST. J. (Sept. 12, 2019), https://www.wsj.com/articles/government-orders-google-let-employees-speak-out-11568284582.

[23] U.S. CONST. amend I. While the amendment explicitly addresses only the national legislature, the Supreme Court has consistently held it also governs the other branches of the federal government. Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2090 (2019). After the Fourteenth Amendment, the First Amendment was gradually incorporated against the states. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[24] Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976) (citations omitted). *See also* Pub. Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 461 (1952) (stating that the First and Fifth Amendments "apply to and restrict only the Federal Government and not private persons").

employers because Congress "notably has refrained from extending free speech rights to the private work force."[25]

Though the First Amendment does not protect private-sector workers from their employers, it does protect employers from the government. The Eighth Circuit explained it succinctly in rejecting an employee's claim that a defendant employer wrongfully fired her for exercising First Amendment rights: "Simply put, the defendant is a private entity, not a governmental entity, and thus is legally incapable of violating anyone's First Amendment rights. *Any First Amendment rights germane to this case are those of the defendant* . . . ."[26]

A. Employers' Speech

The principle of employers' rights features in ongoing high-profile challenges to limits on workplace diversity training. For instance, in April 2022, Florida Governor Ron DeSantis signed a law he called the "Stop WOKE Act."[27] Much of the statute constrained public schools, but it also took aim at the private sector. The law prohibited workplace diversity trainings that endorse ideas including white privilege.[28] Requiring any such training as a condition of employment was deemed an unlawful employment practice,[29] subjecting employers to civil

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[25] Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 819 (4th Cir. 2004) (en banc) (rejecting First Amendment claims of private-sector worker fired after refusing to remove Confederate-flag stickers from his toolbox).

[26] Manson v. Little Rock Newspapers, Inc., 200 F.3d 1172, 1173 (8th Cir. 2000) (affirming summary judgment for defendant-employer newspaper) (emphasis added). That court did not seem to treat a media outlet differently from other employers, but some courts may. Washington state's highest court has held "a state law prohibiting employment discrimination based on an employee's political conduct was not constitutionally applicable to newspaper publishers." Steven J. Mulroy & Amy H. Moorman, *Raising the Floor of Company Conduct: Deriving Public Policy from the Constitution in an Employment-at-Will Arena*, 41 FLA. ST. U. L. REV. 945, 990 n.250 (2014) (citing Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1127 (Wash. 1997)).

[27] 2022 FL. H.B. 7 (NS); *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, Florida Governor's Office (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/. "Stop the Wrongs to Our Kids and Employees" provided the statute's catchy acronym—a common political signaling technique. *See* Pub. L. No. 107-56 (2001), ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001").

[28] FLA. STAT. § 760.10(8)(a)(3) (2022) (labeling as a divisive concept the idea that a person's "status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin").

[29] § 760.10(8)(a).

liability.[30] A honeymoon registry company and a diversity consultant soon filed a constitutional challenge and, in August 2022, a federal district court blocked the restriction on private employers as "a naked viewpoint-based regulation on speech that does not pass strict scrutiny."[31]

The district court relied on longstanding free-speech principles and precedents.[32] Even if Florida's legislators found some diversity trainings repugnant, "the 'remedy' for repugnant speech 'is more speech, not enforced silence.'"[33] The district court drew on the Supreme Court's longstanding assessment that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[34] "If Florida truly believes we live in a post-racial society, then let it make its case," the district court held—"[b]ut it cannot win the argument by muzzling its opponents."[35] While Florida has appealed the district court's ruling and preliminary injunction,[36] the case illustrates how the First Amendment can protect some speech in the private sector—speech by employers.

The Free Speech Clause can protect private employers even when they do contract work for the government. In September 2020, President Donald Trump signed an executive order heavily penalizing federal contractors that promoted "divisive concepts" in anti-bias trainings.[37] Training providers

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[30] However, the statute does not limit optional trainings, and the topics are not banned entirely—they may be offered "in an objective manner without endorsement of the concepts." *Id.* § 760.10(8)(b); Cristina Portela Solomon & Kate L. Pamperin, *Florida's "Stop Woke" Act Limits the Topics Employers Can Discuss in D&I Training*, FOLEY & LARDNER LLP LAB. & EMP. LAW PERSP. BLOG (Mar. 28, 2022), https://www.foley.com/en/insights/publications/2022/03/florida-stop-woke-act-limits-topics-employers.

[31] Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 2022 WL 3486962, at *1 (N.D. Fla. Aug. 18, 2022), *appeal docketed*, No. 22-13135 (11th Cir. Sept. 19, 2022).

[32] *Id.* at *11.

[33] *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). This line has become a fundamental First Amendment principle, notwithstanding the Court's recognition that "*Whitney* has been thoroughly discredited by later decisions." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (citation omitted).

[34] Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 2022 WL 3486962, at *11 (N.D. Fla. Aug. 18, 2022), *appeal docketed*, No. 22-13135 (11th Cir. Sept. 19, 2022) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

[35] *Id.* The district court also rejected any suggestion that covered speech could fall into the less-protected "commercial speech" category and thus avoid strict scrutiny. *Id.* at *7 (applying the *Central Hudson* test).

[36] No. 22-13135 (11th Cir. Sept. 19, 2022) (state's reply brief filed Feb. 22, 2023).

[37] Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020) (revoked by Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021)). *See also* Alyssa Aquino, *Trump*

challenged the order, and within two months a California federal district court blocked the order nationwide because it likely violated the Free Speech Clause.[38] The district court noted a recent Ninth Circuit statement that "[t]here can be little question that vocational training is speech protected by the First Amendment."[39] Although the government sometimes may impose speech-related conditions on the use of public funds,[40] the district court found the order also violated the First Amendment rights of federal grant recipients because the grants were "wholly unrelated" to the banned concepts.[41] The district court appeared to recognize the government's purpose as suppressing speech based on viewpoint,[42] which precedents declare highly suspect.[43]

While these examples show private employers fending off governmental speech regulation by Republicans, the same First Amendment freedoms also constrain actions that might be favored by Democrats. For example, after a conservative editor jokingly tweeted amid a wave of media labor organizing that

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Outlaws Contractors' 'Divisive' Anti-Bias Trainings, LAW360 (Sept. 23, 2020), https://www.law360.com/articles/1312973 (discussing penalties including contract termination, debarment from federal contracting, and U.S. Department of Justice investigations).

[38] Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 541 (N.D. Cal. 2020) (applying the *Pickering* balancing test first developed for public employees). After a change in administration, the case was dismissed with prejudice in May 2021. However, such laws limiting "divisive concepts" might survive constitutional challenges when limited to public entities. *See, e.g.*, 2021 Ark. L. Act 1100 (S.B. 627) ("A state entity shall not teach, instruct, or train any employee, contractor, staff member, or any other individual or group, to adopt or believe any divisive concepts."), *codified at* Ark. Code § 25-1-902(a). That is because the relatively new "government speech" doctrine effectively exempts official expression from First Amendment scrutiny. *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 695–97 (2011) ("'[T]he Government's own speech ... is exempt from First Amendment scrutiny,' even when it has the effect of limiting private speech." (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005))); *see also* Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. ILL. L. REV. 1943, 1947–51 (2022).

[39] *Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 542 (quoting Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer, 961 F.3d 1062, 1069 (9th Cir. 2020)).

[40] *Id.* (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991) (allowing limits on abortion-related speech for federal family-planning funds)). *But see* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (striking down a limitation on grantee speech because the grant's purpose was "not to promote a governmental message" and the grant did not make the grantee "the government's speaker").

[41] *Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 543 (citing Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 218 (2013)).

[42] *Id.* at 546 ("That this Government dislikes this speech is irrelevant to the analysis but permeates their briefing.").

[43] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." (citation omitted)).

"first one of you tries to unionize I swear I'll send you back to the salt mine,"[44] the Third Circuit found freedom of speech precluded the National Labor Relations Board from penalizing the employer's speech: "To give effect to Congress's intent and avoid conflict with the First Amendment, we must construe the Act narrowly when applied to pure speech, recognizing that only statements that constitute a true threat to an employee's exercise of her labor rights are prohibited."[45]

B. Compelled Speech

The "compelled speech" doctrine also protects private employers from government mandates about workplace training and other matters because "freedom of speech prohibits the government from telling people what they must say."[46] The poorly defined principle dates back to the landmark ruling that public schools could not require students to salute the American flag—even during a world war: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[47] Workplace trainings could amount to compelled speech by implicitly or explicitly requiring workers to support certain ideas, such as gender equality or preferred pronouns.[48]

The doctrine of compelled speech has limits. The Court did not find compelled speech when Congress penalized law schools that excluded military recruiters, partly because "[a] law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper."[49] One commenter suggested a compelled-speech challenge to LGBT pronoun-usage mandates would also fail, because private

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[44] Ben Domenech (@bdomenech), TWITTER (June 6, 2019, 11:39 PM), https://twitter.com/bdomenech/status/1136839955068534784.
[45] FDRLST Media, LLC v. N.L.R.B., 35 F.4th 108, 126 (3d Cir. 2022). However, the decision reaffirmed the NLRB's authority to pursue an unfair labor practice charge regardless of the filer's identity; the statute "empowers a politically-motivated busybody as much as a concerned employee or civic-minded whistleblower." *Id.* at 119.
[46] Rumsfeld v. F. Acad. & Institutional Rts., Inc., 547 U.S. 47, 61 (2006).
[47] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[48] *See, e.g.*, text accompanying notes 129–133 regarding *Brennan*.
[49] *Rumsfeld*, 547 U.S. at 64.

employers retain "the space and the means to disavow the pronoun laws' required speech."[50]

In a somewhat ironic application, the prohibition on compelled speech also protects private employers from being forced to allow free speech: "[C]ategorical governmental imposition of First Amendment obligations on private parties presumptively conflicts with the First Amendment's core protection against government-compelled orthodoxy—including a government-compelled orthodoxy of the First Amendment itself."[51] Essentially, the Free Speech Clause not only protects the speech of private employers; it also guarantees their freedom from free speech by their workers.[52]

C. Freedom of Association

Another First Amendment right further protects private employers: the implicit freedom of association, the logical byproduct of the express freedoms of speech and assembly that was explicitly recognized in 1958.[53] Like other First Amendment rights,[54] expressive associational freedom applies not just to natural persons but also to corporations and other entities. As a leading scholar put it, "employers may have a legitimate interest in not associating themselves with people whose views they despise."[55] Employers thus have some associational right to hire and fire as they please.

Yet the Supreme Court has long recognized that employers' associational freedom is not absolute,[56] as in the 1937

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[50] Tyler Sherman, Note, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219, 242–43 (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980)).

[51] Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1539 (1998).

[52] States may provide more speech protection than the federal First Amendment does alone. *See infra* Section IV.

[53] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); *see also* Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 121 (1981) (incorporating associational freedom against states); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1813 (2007) (noting predecessor cases implying a freedom of association).

[54] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

[55] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 301 (2012) [hereinafter Volokh (2012)].

[56] Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 187 (1941) ("We have already recognized the power of Congress to deny an employer the freedom to discriminate

decision to uphold the National Labor Relations Act and its prohibition on discrimination by union affiliation.[57] Another ruling the same year reversed course from the *Lochner* era to permit minimum-wage legislation and more generally defer to Congress in employment law.[58] Decades later, following the express recognition of associational freedom, the Court said it could yield to nondiscrimination rules and explicitly put employment on the outer fringes of protection, saying that a non-expressive association "such as a large business enterprise" would appear "remote from the concerns giving rise to this constitutional protection."[59] The Court memorably added that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."[60]

In an employment ruling the same year, the Court reaffirmed that "'[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.'"[61] Thus, nondiscrimination statutes may override associational interests of private employers. Federal courts regularly find that nondiscrimination statutes trump employers' First Amendment rights,[62] even to the point of court-mandated promotions.[63]

However, nondiscrimination statutes generally cover status—such as race, religion, or sex—rather than speech or expressive conduct. Furthermore, recent decades have seen an

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in discharging." (citing N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937))).

[57] *Jones & Laughlin Steel Corp.*, 301 U.S. at 33.

[58] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion . . . .").

[59] Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

[60] *Id.*

[61] Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (citation omitted) (finding Title VII's ban on sex discrimination in employment did not violate law firm's associational rights).

[62] *See, e.g.*, Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1136 (11th Cir. 2022) ("Anti-discrimination statutes ordinarily regulate non-expressive conduct."); Telescope Media Grp. v. Lucero, 936 F.3d 740, 756 (8th Cir. 2019); Greater Philadelphia Chamber of Com. v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020) (upholding city ordinance limiting employers' use of salary history).

[63] Hopkins v. Price Waterhouse, 920 F.2d 967, 979–80 (D.C. Cir. 1990).

"antiregulatory turn in First Amendment law and litigation,"[64] which Justice Elena Kagan has denounced as "weaponizing the First Amendment."[65] It remains to be seen whether private employers beyond religious institutions might be held exempt from certain antidiscrimination rules under freedoms of speech and association,[66] much as courts recognized religious institutions' ministerial exception under the Free Exercise Clause.[67]

III. FEDERAL STATUTES WITH BROAD COVERAGE BUT NARROW PROTECTIONS

A. National Labor Relations Act

While private-sector employees cannot claim First Amendment speech protections, federal statutes shield a surprising breadth of workplace speech. The main coverage comes from the National Labor Relations Act, the 1935 law regulating union representation and establishing the National Labor Relations Board. Along with unionization, the statute protects "the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[68] These "concerted activities for . . . mutual aid or protection" need not take place during a unionization campaign or at a unionized workplace; all employees may take collective action to address workplace matters, regardless of any connection with a union. The Act expressly excludes independent contractors, supervisors, agricultural workers, and domestic workers.[69]

A leading scholar said the NLRA's speech protection remains "[f]irst and still foremost" for most workers, offering "a

[64] Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209, 210, 223 (2020).
[65] *Id.* at 223 n.60 (citing Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (describing the majority as "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy")).
[66] Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016); Paul Marshall, *Can For-Profit Corporations Be Religious?*, RELIGIOUS FREEDOM INST., https://religiousfreedominstitute.org/can-for-profit-corporations-be-religious/ (last visited Nov. 7, 2022); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–09, 736 (2014) (holding corporations constitute persons under the Religious Freedom Restoration Act without reaching First Amendment claims).
[67] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188. Owing to that exception, this Note is limited to secular employers.
[68] 29 U.S.C. § 157.
[69] 29 U.S.C. § 152(3).

rudimentary analogue to the First Amendment for the private sector workplace, complete with its own 'public forum' doctrine."[70] However, "its protections are in some ways the reverse of the actual First Amendment in public sector employment," covering "speech about working conditions, but *not* speech on matters of public concern unrelated to the interests of employees as such."[71]

In a foundational 1978 decision, the Supreme Court held that "mutual aid or protection" requires only that workers be seeking to "improve terms and conditions of employment or otherwise improve their lot as employees [even] through channels outside the immediate employee-employer relationship."[72] The "concerted activities" can range from organizing for a union and starting a worker newsletter to picketing in public and lobbying legislators.

The statute's language is "broad enough to protect concerted activities whether they take place before, after, or at the same time" as communicating collective demands to employers.[73] Discussing pay with coworkers and raising the issue with a supervisor qualifies, the Board held, because "wage discussions among employees are considered to be at the core of" concerted activities and "are often the precursor to organizing and seeking union assistance"—and "an employer violates the Act when it acts to prevent future protected activity."[74]

"Concerted activities" generally require multiple workers, but not always:

> First, individual employees are acting concertedly when they make an appeal on behalf of a group, such as when workers discuss a problem together and then designate one member of the group to discuss the issue with the boss. Second, individual employees act concertedly when they attempt to initiate group activity or make a statement that implicitly seeks support from coworkers, even if the attempt falls flat. Third, individual employees retain NLRA protection when they continue

[70] Estlund, *supra* note 1, at 427. Some workers have more generous protection from other laws.
[71] *Id.*
[72] Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 565 (1978).
[73] N.L.R.B. v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962).
[74] Parexel Int'l, LLC, 356 N.L.R.B. 516, 518–19 (2011) (citations omitted).

> earlier concerted activity, as when one employee asserts rights under a collective bargaining agreement.[75]

The second category—implicitly seeking coworkers' support—memorably protected a single employee who sent a long, companywide, reply-all email in response to management's request for comments on a change to their vacation policy.[76] "Assuming anyone actually cares about the company and being productive on the job," the employee wrote, the new vacation policy would hurt productivity.[77] The Board held the email alone constituted concerted activity because the employee "had a specific objective in mind for which he hoped to elicit 'mutual aid,'" namely, "to incite the other employees to help him preserve a vacation policy which he believed best served his interests, and perhaps the interests of other employees."[78] This protection extends to social media, even merely "liking" a coworker's online criticism of employment practices.[79]

However, protected purposes might be pursued "in so intolerable a manner as to lose the protection" of the Act.[80] Since the 1940s, the governing test has asked if the expression or conduct was "so violent or of such serious character as to render the employee unfit for further service."[81] The Supreme Court held that a "vitriolic attack" on the employer may cross the line into "a demonstration of such detrimental disloyalty as to provide 'cause'" for termination.[82] In the enduring "Jefferson Standard" case, the Court found disloyalty when employees "sponsored or distributed 5,000 handbills making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."[83]

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[75] Garden, *supra* note 66, at 34 n.31 (citations omitted).
[76] Timekeeping Sys., Inc., 323 N.L.R.B. 244, 246 (1997).
[77] *Id.*
[78] *Id.* at 248.
[79] Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921, 935–36 (2015) (discussing Hispanics United of Buffalo, Inc., 359 N.L.R.B. 368, 369 (2012); Triple Play Sports Bar & Grille, 361 N.L.R.B. 308, 310 (2014)).
[80] *Timekeeping Sys.*, 323 N.L.R.B. at 248 (citation omitted).
[81] N.L.R.B. v. Ill. Tool Works, 153 F.2d 811, 816 (7th Cir. 1946).
[82] N.L.R.B. v. Local Union No. 1229, IBEW, 346 U.S. 464, 468, 472 (1953) ("Jefferson Standard").
[83] *Id.* at 471.

Under that standard, the full Eighth Circuit recently found disloyalty when sandwich-shop workers seeking paid sick leave made public posters noting that sandwiches look the same whether made by sick or healthy employees.[84] However, some jurisdictions are more generous: In affirming the reinstatement of cable technicians who, dressed in company uniforms during TV interviews, accused the employer of pressuring them to "lie to the customers," the D.C. Circuit said public statements are protected unless "the employees' appeal rises to the level of flagrant disloyalty, wholly incommensurate with any employment-related grievance, or if the employees make maliciously untrue statements about their employer."[85]

Employees appealing to the public regarding a workplace grievance featured in a recent high-profile dispute that did not result in litigation. Amid mass protests following George Floyd's murder in May 2020, the *New York Times* published an op-ed by Senator Tom Cotton in which the Arkansas Republican called for sending in the military for an "overwhelming show of force to disperse, detain and ultimately deter lawbreakers."[86] Many *Times* employees responded by tweeting variations of "Running this put Black @nytimes staff in danger."[87] As a media-industry publication noted at the time,[88] this may well have violated the *Times*' social media policy, which said that "journalists should be especially mindful of appearing to take sides on issues that *The Times* is seeking to cover objectively."[89] But the employees'

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[84] MikLin Enters., Inc. v. N.L.R.B., 861 F.3d 812 (8th Cir. 2017) (en banc).
[85] DIRECTV, Inc. v. N.L.R.B., 837 F.3d 25, 28 (D.C. Cir. 2016).
[86] Tom Cotton, *Send In the Troops*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html.
[87] Laura Hazard Owen, *"This Puts Black @nytimes Staff in Danger":* New York Times *Staffers Band Together to Protest Tom Cotton's Anti-Protest Op-Ed*, NIEMANLAB (June 4, 2020, 2:20 PM), https://www.niemanlab.org/2020/06/this-puts-black-people-in-danger-new-york-times-staffers-band-together-to-protest-tom-cottons-anti-protest-editorial/; Jazmine Hughes (@jazzedloon), TWITTER (June 30, 2020, 7:35 PM), https://twitter.com/jazzedloon/status/1268325453061898243; Jazmine Hughes (@jazzedloon), TWITTER (June 30, 2020, 8:05 PM), https://twitter.com/jazzedloon/status/1268332919652782080 (explicitly framing debate as "a labor issue"). Cotton said he was "enjoying the @nytimes meltdown," concluding that "[t]he @nytimes is now run by the woke mob." Tom Cotton (@TomCottonAR), TWITTER (June 4, 2020, 9:40 PM), https://twitter.com/tomcottonar/status/1268719321473310720; Tom Cotton (@TomCottonAR), TWITTER (June 5, 2020, 7:20 PM), https://twitter.com/TomCottonAR/status/1269046399305486337.
[88] Owen, *supra* note 87.
[89] N.Y. TIMES, *The Times Issues Social Media Guidelines for the Newsroom* (Oct. 13, 2017), https://web.archive.org/web/20200602012916/https://www.nytimes.com/2017/10/13/reader-center/social-media-guidelines.html.

appeals to the public may have constituted collective action protected under the National Labor Relations Act, as noted at the time by a Bloomberg labor reporter[90] and an L.A. Times reporter who is also a union leader.[91]

This NLRA protection applies regardless of the workplace's unionization status and thus offers surprisingly broad protection, but it suffers a critical shortcoming: unreliability.[92] Precedents of the National Labor Relations Board are much less durable than judicial precedents because a new president often names a new partisan majority that reverses course.[93] For example, in a pro-management change late in the Trump administration, the NLRB abandoned a forty-year-old precedent in holding that concerted activity loses protection when it veers into "opprobrious" speech that is uncivil or abusive.[94] Now, under the Biden administration, the NLRB is likely to reverse course.[95]

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[90] Josh Eidelson (@josheidelson), TWITTER (Jan. 3, 2020, 7:56 PM), https://twitter.com/josheidelson/status/1268330795761975296; Josh Eidelson (@josheidelson), TWITTER (Jan. 3, 2020, 9:24 PM), https://twitter.com/josheidelson/status/1268352943603896320.

[91] Matt Pearce (@mattdpearce), TWITTER (June 3, 2020, 7:35 PM), https://twitter.com/mattdpearce/status/1268325344836112385.

[92] Garden, *supra* note 66, at 15.

[93] *See* Robert Iafolla, *Labor Board Repeatedly Topples Precedent Without Public Input*, BLOOMBERG LAW (July 12, 2019, 6:15 AM), https://news.bloomberglaw.com/daily-labor-report/labor-board-repeatedly-topples-precedent-without-public-input; Robert Iafolla, *New NLRB Majority Can Swiftly Alter Labor Law with Cases at Hand*, BLOOMBERG LAW (Sept. 8, 2021, 5:47 AM), https://news.bloomberglaw.com/daily-labor-report/new-nlrb-majority-can-swiftly-alter-labor-law-with-cases-at-hand ("'Board members aren't judges, they're policymakers,' said Anne Lofaso, a labor law professor at West Virginia University and former NLRB lawyer.").

[94] Gen. Motors LLC, 369 N.L.R.B. No. 127, 2020 WL 4193017 at *9 (rejecting Atl. Steel Co., 245 N.L.R.B. 814 (1979)); *see also* Jonathan J. Spitz & Richard D. Landau, *Labor Board Sets New Standard for Determining When Abusive Workplace Conduct Is Unprotected*, JACKSON LEWIS (July 22, 2020), https://www.jacksonlewis.com/publication/labor-board-sets-new-standard-determining-when-abusive-workplace-conduct-unprotected.

[95] Garden, *supra* note 66, at 15; Braden Campbell, *Lawmakers Reopen Rift over Labor, Bias Laws' Intersection*, LAW360 (May 18, 2022, 8:42 PM), https://www.law360.com/employment-authority/articles/1494622/lawmakers-reopen-rift-over-labor-bias-laws-intersection; Braden Campbell, *5 Cases that Could Shift NLRB Precedent in 2022*, LAW360 (Jan. 3, 2022, 12:03 PM), https://www.law360.com/employment-authority/articles/1450602/5-cases-that-could-shift-nlrb-precedent-in-2022; Gary Enis & Amber M. Rogers, *Memo from NLRB General Counsel Signals Upcoming Shifts in Board Precedent*, HUNTON EMPLOYMENT & LABOR PERSPECTIVE (Aug. 26, 2021), https://www.huntonlaborblog.com/2021/08/articles/nlrb/memo-from-nlrb-general-counsel-signals-upcoming-shifts-in-board-precedent/.

B. Whistleblowers and Anti-Retaliation Provisions

Private-sector workers can find some protection under a wide variety of federal statutes that prohibit retaliation against whistleblowers and other employees. The U.S. Department of Labor tallies anti-retaliation provisions in twenty-five distinct laws ranging from occupational safety to finance to health insurance.[96] Anti-retaliation provisions continue to receive fairly broad interpretation to accomplish the legislative purpose of effective enforcement, even as new precedents in other areas often side with management.[97] For instance, the Sarbanes-Oxley Act of 2002 "protects employees who provide information about suspected violations to law enforcement, members of Congress, or their own supervisors, as well as employees who participate in enforcement proceedings"[98]—and not just direct employees but also "employees of contractors and subcontractors."[99] However, a leading scholar calls the anti-retaliation provisions "islands of protection in a sea of employer discretion."[100] They often protect only reporting through specific avenues.

C. Civil Rights Laws

Eugene Volokh found a relatively obscure federal statute that can protect "supporting or advocating for a federal candidate . . . probably, in some circuits":[101] the Civil Rights Act of 1871. The Reconstruction-era statute, also known as the Ku Klux Klan Act, provides a private right of action when "two or more persons" conspire to interfere with civil rights—including "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner" for candidates in federal elections, "or to injure any citizen in person or property on account of such support or advocacy."[102]

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[96] OSHA, *Statutes*, U.S. DEP'T OF LAB., https://www.whistleblowers.gov/statutes (last visited June 4, 2023).

[97] *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 416–17 (2010) ("[T]he win-loss record for employees in retaliation cases conflicts with the conventional wisdom that this Court generally favors business interests in employment cases." (footnote omitted)).

[98] Garden, *supra* note 66, at 20; *see also* 18 U.S.C. § 1514A.

[99] Lawson v. FMR LLC, 571 U.S. 429, 459 (2014).

[100] Estlund, *supra* note 1, at 428.

[101] Volokh (2012), *supra* note 55, at 321 (capitalization altered).

[102] 42 U.S.C. § 1985(3).

Crucially for the employment context, Volokh notes a 1998 Supreme Court decision "interpreting a closely analogous portion of the same statute" and holding that injury to property "includes getting the person fired from his job, and that an agreement among two or more managers of a company to get the employee fired from the company may constitute an actionable 'conspir[acy]'"[103]—even though the fired employee was employed at-will. The succinct unanimous opinion by Chief Justice William Rehnquist recognized a viable claim by an at-will employee allegedly fired for obeying a subpoena and testifying about the company's health care fraud,[104] "hold[ing] that the sort of harm alleged by petitioner here—essentially third-party interference with at-will employment relationships—states a claim for relief under § 1985(2)."[105]

But lower courts have "substantially limited, or even erased" the 1871 statute's application in employment.[106] Volokh notes the claim appears precluded in about half of the regional federal circuits "by the 'intra-corporate conspiracy' doctrine, under which a conspiracy is not actionable if the conspirators consist of employees of the same corporation (plus perhaps the corporation itself)."[107] The doctrine does not apply to Section 1985 claims in at least two circuits, perhaps more.[108] Craig R. Senn notes other judicial limitations requiring "'state action' or 'violation of an independent, substantive federal right.'"[109] Although Volokh argues for allowing employment claims under the 1871 statute, Senn views it as a narrow and unreliable path.

In addition, Title VII of the Civil Rights Act of 1964 offers broad protection for workers who participate in relevant investigations or otherwise oppose unlawful workplace discrimination,[110] whether it be intentional "disparate treatment" or statistical "disparate impact."[111]

Of course, anti-discrimination rules can create tension with free-speech principles. Title VII expressly includes

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[103] Volokh (2012), *supra* note 55, at 321 (citing Haddle v. Garrison, 525 U.S. 121, 123, 126 (1998)).
[104] *Haddle*, 525 U.S. at 122–23.
[105] *Id.* at 126.
[106] Craig R. Senn, *Ending Political Discrimination in the Workplace*, 87 MO. L. REV. 365, 395 (2022).
[107] Volokh (2012), *supra* note 55, at 321–22.
[108] *Id.* at 322.
[109] Senn, *supra* note 106, at 400.
[110] *See* Moberly, *supra* note 97, at 408–13, 423–25.
[111] Ricci v. DeStefano, 557 U.S. 557, 577 (2009); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432–33 (1971).

religion,[112] but the Supreme Court notably held in *Bostock* that it also covers sexual orientation and gender identity within the term "sex."[113] So what happens when religious accommodation and LGBT inclusion are at odds—not under the First Amendment, as in *Masterpiece Cakeshop*[114] and *303 Creative*,[115] but under anti-discrimination law? Two employment-law practitioners posed this hypothetical:

> An LGBTQ employee attends a gay pride celebration, and while there, notices that his colleague (and that colleague's church) are present to protest the celebration. If the LGBTQ employee later complains that the religious employee is harassing him at work, can the employer properly consider whether the religious employee's off-duty conduct suggests an on-duty bias on the basis of sexual orientation?[116]

The practitioners warn that "the employer must carefully balance its response to these allegations to ensure that it is demonstrating sufficient efforts to prevent discrimination or harassment based on sexual orientation without also signaling a bias against religious employees."[117]

Well before *Bostock*, the Ninth Circuit allowed termination for insubordination where a conservative Christian employee refused to take down posters with anti-gay Bible verses amid a diversity campaign.[118] The company did not interfere when the employee of twenty years wrote a letter to the editor decrying the company's push "to promote the homosexual agenda"; it did not limit his parking lot access when he displayed a bumper sticker proclaiming that "Sodomy is Not a Family Value."[119] The court held the plaintiff failed to provide evidence of disparate treatment and made unreasonably inflexible demands for accommodation.[120]

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[112] 42 U.S.C. § 2000e-2(a).
[113] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020).
[114] Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).
[115] 303 Creative LLC v. Elenis, No. 21-476 (U.S. argued Dec. 5, 2022).
[116] Shannon S. Pierce & Veronica A. Peterson, *Does the First Amendment Protect Employees in Private Employment? Not Really, but the Answer Is Not That Simple*, 26 NEV. LAW. 11, 11–12 (Nov. 2018).
[117] *Id.* at 12.
[118] Peterson v. Hewlett-Packard Co., 358 F.3d 599, 604–05, 608 (9th Cir. 2004).
[119] *Id.* at 604.
[120] *Id.* at 605, 608.

However, a more recent district court ruling[121] shows how employers might be limited in what LGBT inclusion can be required of traditionalist religious employees. A conservative Christian employee charged that his employer failed to accommodate his religion when it refused to excuse him from an online ethics test that he could only pass by using updated gender pronouns for a hypothetical transgender colleague; in 2019 a federal district judge in Maryland denied summary judgment for the employer.[122] The worker ultimately lost at trial because the jury did not agree that "the plaintiff's sincerely held religious conflicted with an employment requirement" of the employer.[123] Regardless of the trial outcome, this case clearly illustrates the tension that can arise within nondiscrimination requirements—especially given that the employer required the ethics training pursuant to a 2016 EEOC settlement and consent decree following alleged discrimination against a transgender employee.[124]

IV. STATE CONSTITUTIONS AND COMMON LAW: DEAD ENDS FOR EMPLOYEES

While the state-action doctrine means the federal First Amendment does not protect workers' speech in private employment,[125] all but six state constitutions have free-speech provisions not expressly limited to governmental conduct.[126] The wording is typically similar to that which Connecticut adopted in 1818: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."[127] The linguistic lineage appears to stretch back at least to 1776, when Pennsylvania's first constitution used

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[121] Brennan v. Deluxe Corp., 361 F. Supp. 3d 494 (D. Md. 2019).
[122] *Id.* at 508.
[123] Verdict Sheet, Brennan v. Deluxe Corp., 361 F. Supp. 3d 494 (D. Md. 2022) (No. ELH-18-2119), https://www.courtlistener.com/docket/8410371/159/brennan-v-deluxe-corporation/.
[124] Anne Cullen, *Trans Bias Course Didn't Trample Worker's Beliefs, Jury Says*, LAW360 (Mar. 4, 2022), https://www.law360.com/employment-authority/articles/1470922/trans-bias-course-didn-t-trample-worker-s-beliefs-jury-says.
[125] *See supra* Part I.
[126] *See* Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 180 n.79 (1980).
[127] CONN. CONST. art. I, § 4 (amended 1818 (as Section 5, https://www.cga.ct.gov/asp/Content/constitutions/1818_Constitution.pdf)). For a listing of the many states with the phrasing: http://stateconstitutions.umd.edu/Search/Search.aspx (search "freely speak").

similar phrasing.[128] The lack of explicit language limiting the protection to state action opens the door to finding protection against private suppression of free speech.

A liberal lion of the U.S. Supreme Court urged that approach in 1977. After two decades on the Court, Justice William J. Brennan Jr. mourned the end of an era in which the "decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our [F]ourteenth [A]mendment."[129] Early in the conservative backlash to the Warren Court's expansive interpretations, Justice Brennan suggested "the full realization of our liberties" required reaching beyond federal law: "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[130] He argued the federal Supreme Court had grown less protective of First Amendment freedoms,[131] among others, and suggested appeals to state constitutional provisions[132]—even those identical to clauses of the federal Constitution.[133]

As a federal circuit judge focused on state constitutional law explained, "state constitutions provide a greater chance to vindicate rights because state supreme courts, the decisions of which affect only one state, often feel less constrained than does the U.S. Supreme Court and have greater flexibility to tailor their

[128] "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." PA. CONST. OF 1776, ch. I, cl. 12. That soon shifted to a permutation of the more common phrasing: "[E]very citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." PA. CONST. of 1790, art. 9, § 7. This common phrasing is found in Pennsylvania's current constitution. *See* PA. CONST. art. 1, § 7. Notably, the 1776 Virginia Declaration of Rights, a precursor of the federal Bill of Rights, discusses press freedom but not a general freedom of speech. VA. DECLARATION OF RIGHTS § 12 ("That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.").

[129] William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490 (1977). *See also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986).

[130] Brennan, *State Constitutions and the Protection of Individual Rights*, *supra* note 129, at 491.

[131] *Id.* at 496.

[132] *Id.* at 502.

[133] *Id.* at 495.

interpretations to 'local conditions and traditions.'"[134] And while federal preemption prevents states from curtailing federal rights, states are free to *expand* those rights.[135]

However, many state constitutions' speech clauses have also been limited to state action even when they do not expressly limit their scope to governmental conduct.[136] For example, although Wisconsin's constitution contains the common phrasing without an express governmental reference, the state's highest court in 1987 limited the protection to state action because "[t]he historical intention of state constitutions, including Wisconsin's, was a reaction to the dire experience with England to recognize rights of the people and protect them from *governmental* interference."[137] The court found strong evidence of the state-action requirement in the second clause,[138] which requires that "no laws shall be passed to restrain or abridge the liberty of speech or of the press."[139]

In many other state constitutions, however, the speech protection stands alone, without any reference to governmental action.[140] The California Supreme Court thus held in 1979 that the state constitution's "protective provision [is] more definitive and inclusive than the First Amendment" to the federal

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[134] Recent Book (reviewing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)), 132 HARV. L. REV. 811, 812 n.10 (2018) (citing page 17 of the book).

[135] "The Supreme Court has recognized for some time that the states possess the authority to provide greater protection against encroachments upon individual liberties than those provided under the federal constitution." Gregory Allen, *Ninth Amendment and State Constitutional Rights*, 59 ALB. L. REV. 1659, 1659 (1996) (citing Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."); Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

[136] David Schultz & David L. Hudson Jr., *State Constitutional Provisions on Expressive Rights*, THE FIRST AMEND. ENCYCLOPEDIA (2009, updated 2017), https://www.mtsu.edu/first-amendment/article/874/state-constitutional-provisions-on-expressive-rights ("Most state high courts continued to interpret their state freedom of expression guarantees similarly, if not identically, to the way the U.S. Supreme Court has interpreted the First Amendment.").

[137] Jacobs v. Major, 407 N.W.2d 832, 840 (Wis. 1987) (emphasis added).

[138] *Id.* at 837 ("They are related to each other with the first expressing the right to free speech *and* the second stating the entity, the state, against whom the right is shielded.").

[139] WIS. CONST. art. I, § 3.

[140] *See* CONN. CONST. art. I, § 4. California's speech provision stands alone but is followed by this statement: "A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a).

Constitution.[141] The state high court rejected a private shopping center's decision "not to permit any tenant or visitor to engage in publicly expressive activity," even though "[t]he policy seems to have been strictly and disinterestedly enforced."[142] The state free-speech provision, together with the subsequent petition clause, led the court to "hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution."[143] This went far beyond the federal First Amendment's reach at private shopping centers, as interpreted in *Lloyd*[144] and *Hudgens*.[145] Yet the federal Supreme Court agreed that the California high court's interpretation did not "violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments."[146]

Following *PruneYard*, a few other state high courts similarly found broader protection in state speech provisions.[147] Five months after the U.S. Supreme Court's green light, New Jersey's highest court found the state freedoms of speech and assembly went beyond the federal freedoms, requiring a private university to let a visitor distribute political literature.[148] The state high court has more recently emphasized that the New Jersey Constitution's speech provision[149] offers "greater

[141] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (citation omitted).
[142] *Id.* at 342.
[143] *Id.*
[144] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
[145] Hudgens v. N.L.R.B., 424 U.S. 507 (1976).
[146] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 76–77 (1980).
[147] Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2302 (2021) ("Although state constitutional law has proven to be less of an important source of free speech protection than some hoped or predicted after the *Pruneyard* decision, courts in New Jersey, California, and a number of other states have for many decades now interpreted state constitutional guarantees of expressive freedom to confer rights that the First Amendment does not confer." (footnotes omitted)).
[148] State v. Schmid, 423 A.2d 615, 628 (N.J. 1980) ("These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property.").
[149] N.J. CONST. art. I, § 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.").

protection than the First Amendment" with a provision "broader than practically all others in the nation."[150]

Yet New Jersey's high court appears reluctant to extend speech protections to employment, even in the public sector. In 1998, the court acknowledged it sometimes finds broader speech rights under the state constitution but nevertheless applied federal First Amendment case law to a municipal employee.[151] The unanimous decision reinstated discipline against an off-duty firefighter who directed a racial slur at a police officer when pulled over in a drunk-driving traffic stop, finding the slur was not protected under the framework for public employees' speech.[152] The state speech provision received one solitary citation in a 2009 case that relied almost entirely on the federal First Amendment to reject a labor union official's conviction for deploying an inflatable giant rat under "a municipal sign ordinance that prohibited all but a few exempted signs and that expressly prohibited 'portable signs[,] balloon signs or other inflated signs (excepting grand opening signs).'"[153]

An identical speech provision also appears in the Connecticut Constitution.[154] In 2015, the Connecticut Supreme Court said it had "clearly held that at least some employee speech in the workplace is constitutionally protected."[155] The speech provision's "broad and encompassing language supports the conclusion that the state constitution protects employee speech in the *public* workplace on the widest possible range of topics, as long as the speech does not undermine the employer's

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[150] Mazdabrook Commons Homeowners' Ass'n v. Khan, 46 A.3d 507, 513 (N.J. 2012) (citation omitted) (prohibiting private homeowners' association from banning all political signs).
[151] Karins v. City of Atl. City, 706 A.2d 706, 713 (N.J. 1998) ("We rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution."); Siss v. Cnty. of Passaic, 75 F. Supp. 2d 325, 341 (D.N.J. 1999) ("[I]f the New Jersey Constitution does protect public employees against patronage dismissals, its protections are no greater than those under the first amendment to the United States Constitution."), *aff'd*, 234 F.3d 1265 (3d Cir. 2000).
[152] *Karins*, 706 A.2d at 707.
[153] State v. DeAngelo, 963 A.2d 1200, 1202 (N.J. 2009) (brackets in original). Although the opinion does not name the rat, presumably this regarded Scabby. *See* Justin Hicks, *How a Beloved Giant Rat Won Free Speech Rights*, NPR (Aug. 6, 2021), https://www.npr.org/2021/08/06/1024315097/how-a-beloved-giant-rat-won-free-speech-rights; Tim Ryan, *NLRB Tosses Bid to Deflate Scabby the Rat*, LAW360 (July 21, 2021), https://www.law360.com/employment-authority/articles/1405368/nlrb-tosses-bid-to-deflate-scabby-the-rat.
[154] CONN. CONST. art. I, § 4 ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.").
[155] Trusz v. UBS Realty Invs., LLC, 123 A.3d 1212, 1218 (Conn. 2015) (citing Cotto v. United Technologies Corp., 738 A.2d 623 (Conn. 1999)).

legitimate interest in maintaining discipline, harmony and efficiency in the workplace."[156] As one First Amendment analyst explained,

> [T]he Connecticut state high court rejected the rule articulated by the U.S. Supreme Court . . . that when public employees make statements pursuant to their official job duties, the First Amendment provides them no protection. The *Trusz* decision is significant, because it provides an excellent example of a state high court providing greater protection for free speech under its state constitution than the U.S. Supreme Court did in interpreting the First Amendment of the U.S. Constitution.[157]

Critically for the private sector, the Connecticut Supreme Court held that the state's broad speech-protection employment statute "extends the same protection to employee speech pursuant to official job duties in the *private* workplace."[158]

Connecticut and New Jersey show how state courts might use similar speech provisions in state constitutions to provide protections even in private at-will employment. However, "New Jersey and Connecticut are more exceptions than the rule."[159] This shows that a long-sought[160] approach has yet to gain broad traction, although it continues to draw interest from commentators.[161]

State constitutions have served as one source of public policy for the common law tort of wrongful discharge in violation of public policy, which is recognized at least to some

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[156] *Id.* at 1221 (emphasis added).
[157] David L. Hudson Jr., Trusz v. UBS Realty Invs., LLC *(Conn.) (2015)*, THE FIRST AMEND. ENCYCLOPEDIA (2017), https://mtsu.edu/first-amendment/article/1546/trusz-v-ubs-realty-investors-llc-conn.
[158] *Trusz*, 123 A.3d at 1214 (emphasis added).
[159] Schultz & Hudson, *supra* note 136.
[160] Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 549 (1982).
[161] *See* Andrei Gribakov Jaffe, Note, *Digital Shopping Malls and State Constitutions–A New Font of Free Speech Rights?*, 33 HARV. J.L. & TECH. 269, 272 (2019); David M. Howard, Article, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 279 (2017) ("The doctrine's policies are even less persuasive under the state constitutions, as the state action doctrine was created partly to protect the system of federalism in this country, allowing the states to use their plenary power to regulate private relationships.").

degree in almost all states.[162] However, that has not proved a fruitful avenue for First Amendment principles. "Most courts do not recognize wrongful-discharge claims against private employers based on free-speech rights because the federal and most state constitutional free-speech protections constrain governments, and thus do not apply to private-sector employers."[163]

Notably, the Third Circuit in 1983 sought to extend protections to private employment in Pennsylvania based on "the importance of the political and associational freedoms of the federal and state Constitutions."[164] The panel in *Novosel* used those sources of public policy to find a wrongful discharge where an insurer's employee alleged he was fired for refusing to lobby state lawmakers about insurance reforms.[165] The decision held that "an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities."[166] However, the *Novosel* approach never gained traction.[167] The Pennsylvania Supreme Court rejected *Novosel*'s interpretation of the state constitution.[168] Even the Third Circuit retreated from *Novosel*, recognizing the holding as limited to the facts of the case.[169] Indeed, a leading scholar calls *Novosel* the "exception that proves the rule" because it "is widely admired by employment law scholars, but widely criticized or ignored in the courts."[170]

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[162] Stephen P. Pepe and Scott H. Dunham, Avoiding & Def. Wrongful Discharge Cl. § 1:5 (Feb. 2023 update) (identifying Alabama, Montana, New York, and possibly Nebraska as the "few states still reject the common law 'public policy' discharge theory").
[163] Restatement (Third) of Employment Law § 5.02; *see also* Garden, *supra* note 66, at 26; Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th 72, 81–82 (2004) (finding consistent decisions across jurisdictions).
[164] Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983).
[165] *Id.* at 896.
[166] *Id.* at 900.
[167] Edmondson v. Shearer Lumber Prods., 75 P.3d 733, 738–39 (Idaho 2003) (finding *Novosel* was never "endorsed by any other court"); Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578, 589 (W. Va. 1998).
[168] Paul v. Lankenau Hosp., 569 A.2d 346, 348 (Pa. 1990) ("Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy." (quoting Clay v. Advanced Computer Applications, 559 A.2d 917 (Pa. 1989) (citing Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974)))).
[169] Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992), as amended (May 29, 1992); Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 112–13 (3d Cir. 2003) ("[W]e have essentially limited Novosel to its facts—a firing based on forced political speech."), as amended (Jan. 20, 2004).
[170] Estlund, *supra* note 1, at 429.

V. THE PRESENT PATCHWORK OF STATE LAWS AND A BALANCED MODEL STATUTE

A. Current Extent

Today, at least 28 states have statutes protecting at least some speech or political activity by private-sector workers.[171] Only half of those states offer comprehensive protection from retaliation for exercising political rights.[172] Eugene Volokh has catalogued some type of protective statute in 27 states along with the District of Columbia and three U.S. territories,[173] later noting Utah's addition.[174] Only five states have statutes that broadly protect off-duty lawful conduct.[175] Another eight specifically cover political activity.[176] Fifteen more protect at least some form of political activity.[177]

A few samples provide illustration and inspiration for a model statute. Connecticut has one of the broadest statutes, which essentially extends to the private sector the protections that public employees enjoy under the First Amendment and the state constitution's speech provision—"provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between

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[171] Volokh (2012), *supra* note 55, at 297.

[172] *Id.*

[173] *Id.*

[174] Eugene Volokh, *Opinion: Can Private Employers Fire Employees for Going to a White Supremacist Rally?*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/16/can-private-employers-fire-employees-for-going-to-a-white-supremacist-rally/. Interestingly for a red-state statute predating *Bostock*, Utah's 2015 law protecting "religious, political, or personal convictions" also listed sexual orientation and gender identity as protected classes. 2015 Utah Laws Ch. 13 (S.B. 296); UTAH CODE ANN. § 34A-5-106(1)(a)(i)(I)–(J). Express exemptions cover religious entities and the Boy Scouts of America. UTAH CODE ANN. § 34A-5-102(1)(i)(ii)(C). *See also* Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. 269, 269 (2022) [hereinafter Volokh (2022)] (noting the addition of Utah and various counties and cities).

[175] Colorado, North Dakota, Montana, Connecticut, and New York; the last is probably the most narrow but would still cover most pure speech. Volokh (2012), *supra* note 55, at 296.

[176] California, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, and West Virginia, plus Guam. *Id.*

[177] *Holding or expressing political views:* Utah and New Mexico. *Party affiliation:* Iowa and Louisiana, plus D.C., Puerto Rico, and the U.S. Virgin Islands. *Electoral activities:* Illinois, New York, and Washington state. *Signing petitions and initiatives:* Arizona, Georgia, Iowa, Minnesota, Missouri, Ohio, Oregon, and Washington state, plus D.C. *Campaign contributions:* Louisiana, Massachusetts, and Oregon. *Voting and possibly signing petitions:* Hawaii, Idaho, Kentucky, Tennessee, and Wyoming, plus Guam. *Id.*

the employee and the employer."[178] The text of South Carolina's statute looks like fairly broad statutory protection for political activity—forbidding "discharge . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen"[179]—but judicial interpretations have narrowed its reach.[180]

B. History

Such statutory protection for off-duty political expression predates the Republic, which should address any qualms about whether such statutes exceed the original understanding of First Amendment principles.[181] As early as 1721, some colonies enacted "the very first American laws banning employment discrimination by private employers--voter protection laws, which barred employers from discriminating against employees based on how the employees voted . . . [in] the era before the secret ballot."[182] Starting in the 1830s, states began adopting statutes to more explicitly forbid economic retaliation for voting.[183] One scholar reports that Democrats sought to protect the party's base of working men: "Fear that Whig-supporting employers were using their economic power to prevent their supporters from voting appears to have motivated at least some of these laws--for example, [an] 1846 Connecticut law."[184]

After the Civil War, a new major political party's self-interest aligned with voter protection. The 1860s saw "a burst of such lawmaking in the Reconstruction-era South, triggered by the Republican concern that southern employers were pressuring their employees to vote against the Republicans."[185] 1868 saw the first explicit protection for political activity beyond voting as

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[178] CONN. GEN. STAT. § 31-51q(b)(1); Henry Voysey, Comment, *Can Political Activism and "At-Will" Employment Coexist?: An Examination of Political Rights in the Private Sector of the Workforce*, 290 UMKC L. REV. 965, 978–79 (2022) (citing Trusz v. UBS Realty Inv'rs, LLC, 123 A.3d 1212, 1220 (Conn. 2015); Schumann v. Dianon Sys., Inc., 43 A.3d 111, 121 (Conn. 2012) (finding the statute "serves to vitiate the state action requirement with respect to private sector employers")).

[179] S.C. CODE ANN. § 16-17-560 (1976).

[180] Voysey, *supra* note 178, at 982–83.

[181] Volokh (2012), *supra* note 55, at 297–98.

[182] *Id.* at 297. The secret ballot was not common in the United States until about 1890. Jamie L. Carson & Joel Sievert, *Electoral Reform and Changes in Legislative Behavior: Adoption of the Secret Ballot in Congressional Elections*, 40 LEGIS. STUDIES Q. 83, 83 (2015), https://doi.org/10.1111/lsq.12066.

[183] Volokh (2012), *supra* note 55, at 299–300.

[184] Lakier, *supra* note 147, at 2333.

[185] Volokh (2012), *supra* note 55, at 300 (footnotes omitted).

"Louisiana and South Carolina banned discrimination against most private employees based on 'political opinion.'"[186]

Aside from narrow protections for political activity, employers often were free to exercise extensive control over workers' lives. In the 1800s, "coal mines and steel mills imported Irish and German immigrants, put them in company housing, saw them off to church and taught them American mores."[187] "Owners of early factories believed they had the right, indeed the responsibility, to strictly control many aspects of their employees' lives, on and off the job."[188] That often included "work rules governing church attendance, place of residence, and nightly curfews."[189] Into the 1910s, Henry Ford had dozens of social workers "investigate employees' neighborhoods, home conditions, finances, and habits to determine if they were worthy of profit sharing bonuses."[190] The automaker distributed a booklet of "Helpful Hints and Advice to Employees" that discouraged "drinking, gambling, borrowing money, taking in boarders and poor hygiene."[191]

One modern wave of state laws protecting employees' off-duty conduct originated as "smoker protection" laws or "Smoker's Rights Acts" that limited how employers could consider smoking, either on or off the job. Twenty-nine states and the District of Columbia have laws protecting smokers from adverse employment actions,[192] with eighteen jurisdictions limited to tobacco while eight states protect the use of all "lawful products" and a handful broadly protect lawful off-duty conduct.[193] Illinois adopted the first in 1987, quickly followed by

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[186] *Id.* at 300–01.

[187] Peter T. Kilborn, *The Boss Only Wants What's Best for You*, N.Y. TIMES (May 8, 1994), https://www.nytimes.com/1994/05/08/weekinreview/the-nation-the-boss-only-wants-what-s-best-for-you.html.

[188] U.S. Congress Office of Technology Assessment, *The Electronic Supervisor: New Technology, New Tensions*, OTA-CIT-333 (1987) at 18–19, https://ota.fas.org/reports/8708.pdf.

[189] *Id.*

[190] *Id.* Ford also "created a department of 100 investigators for door-to-door checks." Kilborn, *supra* note 187.

[191] Kilborn, *supra* note 187.

[192] *State "Smoker Protection" Laws*, AM. LUNG ASS'N, https://www.lung.org/policy-advocacy/tobacco/slati/appendix-f (last updated Oct. 27, 2022).

[193] Joanne Deschenaux, *Is a 'Smoker-Free' Workplace Right for You?*, HR MAG. (July 1, 2011) https://www.shrm.org/hr-today/news/hr-magazine/pages/0711deschenaux.aspx. The application to state-legal marijuana is complicated. *See* Amy. J. Kellogg et al., *A Cannabis Conflict of Law: Federal vs. State Law*, BUS. LAW TODAY (Mar. 21, 2022), https://www.americanbar.org/groups/business_law/publications/blt/2022/04/can

tobacco-friendly Virginia in 1989 and more than twenty additional states in the next three years.[194] "Tobacco interests and, to some extent, the American Civil Liberties Union" engaged in "titanic lobbying struggles" to promote the laws as about 17% of American companies expressed a formal preference for hiring non-smokers.[195]

C. Debating the Merits

In his encyclopedic accounting of statutory speech protections, Volokh surprisingly questions their merit. First, he says, "employers may have a legitimate interest in not associating themselves with people whose views they despise."[196] He also argues that "employees are hired to advance the employer's interests, not to undermine it"—so if "an employee's speech or political activity sufficiently alienates coworkers, customers, or political figures, an employer may reasonably claim a right to sever his connection to the employee."[197] Volokh raises strong objections, later warning that "laws limiting private-employer-imposed speech restrictions might be a cure that's worse than the disease."[198] Do employers have to keep employing, paying, working with, and associating with workers who express controversial views the employers hate?

The point calls to mind the classic First Amendment principle that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the

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nabis-fed-vs-state-law/; Lisa Nagele-Piazza, *Marijuana and the Workplace: What's New for 2020?*, HR MAG. (Jan. 17, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/marijuana-and-the-workplace-new-for-2020.aspx.

[194] *State "Smoker Protection" Laws*, AM. LUNG ASS'N, https://www.lung.org/policy-advocacy/tobacco/slati/appendix-f (last updated Oct. 27, 2022) (citing 820 ILL. COMP. STAT. 55/5, VA. CODE ANN. § 2.2-2902, etc.). The statutes' reach varies widely; for example, Virginia is limited to public employers. *See* John Malouff et al., *US Laws that Protect Tobacco Users from Employment Discrimination*, 2 TOBACCO CONTROL 132, 133 (1993), https://www.jstor.org/stable/20747311 ("No two . . . state smokers' rights laws are identical, but there are many similarities among them. All . . . prohibit employers from discriminating against employees who smoke off the job. None of the laws requires employers to allow smoking on the job or on the employer's premises.").

[195] Malouff et al., *supra* note 194, at 132–33 (citing BUREAU OF NAT'L AFFS., *SHRM-BNA Survey No. 55, Smoking in the Workplace: 1991* (1991), https://dl.tufts.edu/pdfviewer/n583z5534/fj236d469.

[196] Volokh (2012), *supra* note 55, at 301 (footnotes omitted).

[197] *Id.*

[198] Volokh (2022), *supra* note 174, at 297.

thought that we hate.'"[199] Or, as Chief Justice John Roberts concluded for eight justices: "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[200] We take pride in "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[201]

Yet those lofty statements describe the First Amendment's firm opposition to *government* suppression of views, not adverse employment actions by *private* actors. Would Jewish survivors of the Holocaust be required not only to allow a neo-Nazi parade in the town of Skokie, Illinois,[202] but also to continue employing workers who joined the march? Should an employer—whether a small family business, a mission-driven nonprofit, or a large corporation—have to put up with an employee who advocates for insurrection? A conspiracy theory that a major political party is run by a cabal of pedophiles, who may or may not have operated out of a neighborhood pizza joint that suffered an armed attack while filled with families?[203] That part of a major city should be run as an autonomous zone free from police and other state intervention, even when it descends into anarchy and violence?[204] Transgender women's place in sports? Anti-LGBT hatred? Hatred of religion based on traditional beliefs about sexuality?

Broad protections for off-duty speech and conduct might protect much controversial speech that employers understandably despised and did not want associated with their organizations. Such statutes might have blocked the termination of employees who participated in the January 6, 2021 riot at the U.S. Capitol but were never charged with crimes. For instance,

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[199] Matal v. Tam, 582 U.S. 218, 246 (2017) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).
[200] Snyder v. Phelps, 562 U.S. 443, 461 (2011).
[201] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
[202] *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977); Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied sub nom.* Smith v. Collin, 439 U.S. 916 (7th Cir. 1978).
[203] *See* Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html.
[204] *See* Ashitha Nagesh, *This Police-Free Protest Zone Was Dismantled - But Was It the End?*, BBC (July 12, 2020), https://www.bbc.com/news/world-us-canada-53218448 ("There were four shootings at the [autonomous zone] in a 10-day period towards the end of June, two of which were fatal.").

a Texas-based insurance company fired in-house attorney Paul Davis "based on videos and images he shared on social media that showed the lawyer standing outside the Capitol with others declaring his intent to get into the building."[205] Davis, a University of Texas School of Law graduate who said he was an associate general counsel and human resources director, wrote that he "was not trying to break in. Was just talking to the police officers and praying over them."[206] Davis is not listed among those facing federal charges,[207] so he may have been fired for off-duty speech and lawful conduct that he would call political. His example may provide cause for caution if, as Volokh argues, employers should not be forced to associate with views they despise.

However, two scholars—including Steven J. Mulroy, a tenured law professor with a unique perspective as a Memphis-area county commissioner and recently elected district attorney[208]—articulate the compelling reasons for greater private-sector protection:

> We protect free speech not merely as a means of promoting discussion and participation in democratic government, and not merely to further the discovery of truth through 'the marketplace of ideas,' but also because individual self-expression is good for its own sake . . . . The vast majority of Americans are employees who spend about one-third of their lives, and almost half their waking lives, at their place of work. It is a prime place for them to communicate with their peers, and for them to receive information from their peers. For workers to be denied a certain range of motion in their expression could seriously dampen this individual self-fulfillment, not to mention sabotage the search for truth and diminish the

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[205] Anne Cullen, *Employers Have Broad Leeway to Fire Capitol Rioters*, LAW360 (Jan. 8, 2021), https://www.law360.com/employment-authority/articles/1342830.
[206] Michele Gorman, *Texas In-House Atty Fired for Role in Capitol Chaos*, LAW360 (Jan. 7, 2021), https://www.law360.com/articles/1342526/texas-in-house-atty-fired-for-role-in-capitol-chaos.
[207] U.S. Attorney's Office for the District of Columbia, *Capitol Breach Cases*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/capitol-breach-cases (last updated May 17, 2023).
[208] Shelby County District Attorney, *Meet Steve Mulroy*, https://www.scdag.com/meet-steve-mulroy (last visited Jan. 6, 2023).

vitality of our democracy.[209]

Another commentator suggests that an era of elevated partisanship demands elevated protection: "To leave employees completely helpless against political discrimination in the workplace hinders the effectiveness of a democracy. While modern politics is rapidly seeping into every aspect of life for American citizens, there needs to be protections for private sector employees to express themselves on matters of public concern."[210] Freer speech at work might also benefit democracy by providing "opportunity for those with differing viewpoints to have constructive conversations, which could increase understanding of others and maybe even lead to breakthroughs across the divide. Such healthy public discourse is essential if the country is ever going to sew up these 'divided states.'"[211]

These rationales do not vary from state to state, so some analysts favor a federal fix. One scholar recently endorsed a comparatively simple approach to "ending political discrimination in the workplace"—a federal law with uniform and immediate nationwide effect.[212] Senn, among others,[213] would have Congress add "political affiliation" to the characteristics of Title VII.[214] That would provide greater protection and perhaps greater clarity for both workers and employers.

Another federal option would be a separate statute. David C. Yamada advocated this approach to supersede the current "jumble of inconsistencies" that chills worker speech because it is hard to determine when employees have speech protections.[215] A clear national statute "would empower each worker by giving her a voice, affirm the importance of individual dignity in a free society, and encourage the kind of expression that will promote healthy businesses and overall productivity."[216] Yamada suggests that, "[e]ven if the letter of the First

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[209] Mulroy & Moorman, *supra* note 26, at 989.
[210] Voysey, *supra* note 178, at 986.
[211] *Id.* at 966–67.
[212] Senn, *supra* note 106, at 365–66 (capitalization altered).
[213] Anne Carey, Note, *Political Ideology as a Limited Protected Class Under Federal Title VII Antidiscrimination Law*, 26 J. L. & POL'Y 637, 637 (2018).
[214] Senn, *supra* note 106, at 405–06.
[215] David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 57–58 (1998).
[216] *Id.* at 57.

Amendment cannot gain entry into the workplace, its spirit should do so."[217]

However, the political feasibility of a federal statutory change is dubious. As a policy matter, it could not pass the Senate with a simple majority under reconciliation rules, so the filibuster would necessitate support from sixty senators.[218] It is hard to fathom sixty senators agreeing on this sweeping change that would surely draw opposition from pro-business conservatives as well as liberals wary of shielding right-wing marchers and activists. Even if a federal statutory change were politically feasible, its consequences would be dramatic, unintended, and unpredictable. Speech protection in private employment seems to be the sort of issue suitable for state-level experimentation in the so-called laboratories of democracy.[219]

These commentators provide valuable points. Volokh presents a strong argument against fully extending the First Amendment into private employment, but Mulroy and Amy H. Moorman successfully address those concerns in describing how employee freedoms can be balanced against legitimate employer interests.[220] Voysey articulates how the workplace relates to democracy, though we should seek rules not just to meet the needs of the current moment but to endure for decades to come.[221] Yamada explains the how First Amendment rationales still matter in the private sector,[222] but he and Senn[223] go too far in seeking a dramatic federal solution. The wiser approach remains the state level.

D. Principles

In crafting and refining state rules, Mulroy and Moorman offer prudent recommendations, which focus on the common law but apply equally for statutes:

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[217] *Id.* at 58.
[218] *See* BILL HENIFF JR. & ROBERT KEITH, CONG. RSCH. SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (updated Sept. 28, 2022), https://crsreports.congress.gov/product/pdf/RL/RL30862.
[219] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
[220] Mulroy & Moorman, *supra* note 26, at 979–92.
[221] Voysey, *supra* note 178, at 966–67, 986–87.
[222] Yamada, *supra* note 215, at 57–58.
[223] Senn, *supra* note 106, at 405–06.

> First, an employer should not be able to discharge an employee for expression protected by the First Amendment taking place while the employee is off-duty and off-premises, unless such activity is against the employer's interest. Expression can run counter to the employer's interest if it (1) aids a competitor; (2) exposes confidential information; (3) runs counter to the avowed mission of the firm or organization; (4) harms the reputation of the employer; or (5) materially and substantially disrupts productivity (e.g., by harming morale) . . . . Speech that is highly offensive but constitutionally protected--e.g., racist or anti-Semitic slurs, or sexually "indecent" but non-obscene speech--could be grounds for termination to the extent it was open, public, and notorious, and could plausibly be connected back to the employer by the public, thus harming the employer's reputation. For speech made on-duty, on-premises, or using the employer's facilities, resources, or materials, the employer should have wide latitude to discipline or terminate an employee.[224]

Volokh floated the idea of a broad multipurpose exemption for when employers would suffer an "undue hardship," borrowing the language, and thus presumably the court interpretation, of Title VII's requirement for religious accommodations.[225] He also suggests another "possibility might be to borrow the *Pickering* balance from government employee speech cases";[226] however, that open-ended balancing test would leave both employers to guess at an individual judge's interpretation. Yamada's proposed federal statute takes a cleaner approach, giving broad protection for free speech both on-duty and off, exempting five specifically defined categories: disruption, disloyalty, insubordination, defamation, and verbal acts of misconduct.[227]

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[224] Mulroy & Moorman, *supra* note 26, at 991–92.
[225] Volokh (2022), *supra* note 174, at 292–93 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
[226] *Id.* at 293; *see also* Pickering v. Bd. of Ed. of Twp. High Sch., 391 U.S. 563 (1968); 16A Am. Jur. 2d Constitutional Law § 491: Public Employee as Having Right to Freedom of Speech and Press, Generally.
[227] Yamada, *supra* note 215, at 59.

Another commentator recently proposed a thoughtful model statute for states that first forbids "adverse employment action[s] based upon an employee's political beliefs, affiliations, or choice of vote" and additionally protects off-duty lawful conduct (including use of lawful products) and "exercise of rights guaranteed by the First Amendment," so long as "such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between employer and employee."[228]

While that proposal incorporates many important concepts, it is too vague to offer much clarity—especially the final clause generally protecting employees' "exercise of rights guaranteed by the First Amendment." As the Supreme Court has noted, a rule incorporating the First Amendment by reference may be void for vagueness when it gives "officials alone the power to decide in the first instance whether a given activity" is covered "because '[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.'"[229]

Even in the private sector, the need for democratic discourse and mutual respect across ideological lines demands some protection for expressive and political activities. A strong statute should clearly protect both employees past, present, and future:[230] current workers, applicants, and former employees who can be harmed by defamatory references or other acts. It should take a broad view of "employee" to encompass independent contractors who depend on specific hiring parties for their livelihood, using the broader "economic realities" test for employee status rather than the narrower "right to control" test.[231]

To offer clarity and avoid vagueness, such a statute should not attempt to incorporate First Amendment principles by reference. Protected activities should be listed, though the list need not be exclusive. The list should certainly cover voting, affiliating with a political party, running for office, signing petitions or initiatives, and making political contributions. It

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[228] Voysey, *supra* note 178, at 984 (drawing on CONN. GEN. STAT. § 31-51q). Volokh similarly suggests statutes might "borrow the 'bona fide occupational qualification' doctrine from Title VII's disparate treatment law." Volokh (2022), *supra* note 174, at 293 (citing 42 U.S.C. § 2000e-2).
[229] Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 575–76 (1987).
[230] *See* Mulroy & Moorman, *supra* note 26, at 987 n.238.
[231] *See* ESTREICHER ET AL., *supra* note 7, at 11–22.

should probably include supporting or advocating for political candidates, although this could be drafted in a way that recognizes employers might want to keep such politicking outside the office. It should also cover some amount of political speech and expression, although this too should be drafted to recognize that some hateful speech that substantially interferes with professional relationships could be defended as political.

States might also use these statutes to protect lawful off-duty conduct, including use of products that are lawful (at least under state law, as in the case of marijuana).[232] Such laws could draw broad ideological support: The right would be glad to ban discrimination based on gun ownership or membership in a religious organization that advocates traditional views on sexuality, while the left would want to protect people who use marijuana in states where it is no longer criminalized and prohibit discrimination based on off-duty intimate relationships.[233] They might also require advance notice and the identification of legitimate business interests before employers could demand private information about employees' speech, including on social media.[234] Such issues are beyond the scope of this Note.

However, private employers understandably seek the ability to maintain a productive workplace, avoid association with views they abhor, and protect their reputation. A German tourist agency need not employ a Holocaust denier.[235] As other statutes and writers have suggested,[236] a balanced statute would not protect speech and activity that disloyally harms the employer's interest, tends to seriously harm the employer's reputation, amounts to harassment, or reasonably and materially interferes with critical workplace relationships (without granting

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[232] *See* Amy J. Kellogg et al., *supra* note 193.
[233] This was a contested point about New York's statute, although it would seem *Bostock* provided national protection. "New York courts have limited their off-duty conduct statute by finding that personal relationships do not constitute 'lawful recreational activities.'" PAUL M. SECUNDA ET AL., UNDERSTANDING EMPLOYMENT LAW 79 (3d ed. 2019) (citing McCavitt v. Swiss Reins. Am. Corp., 237 F.3d 166, 167 (2d Cir. 2001)).
[234] Several states already have relevant online privacy statutes that "prohibit employers from demanding access to an applicant's or employee's social media posting." Garden, *supra* note 66, at 28–29.
[235] Mulroy & Moorman, *supra* note 26, at 990 (discussing Berg v. German Nat'l Tourist Office, 670 N.Y.S.2d 90 (N.Y. App. Div. 1998)).
[236] *See* text accompanying notes 224–27.

a heckler's veto).[237] It would need to walk a fine line on speech that might be considered hateful, like the selective citation of Bible verses by the anti-LGBT employee of Hewlett Packard.[238]

Off-duty, off-premises activity should be granted broad protection—up to the point that it harms the employer's legitimate interests. Employers should retain the ability to limit what workers do on employer property, while being paid for work, and when interacting as an agent or employee rather than as a citizen. Examples that should not be protected include divisive political stickers in visible locations of the workplace, campaigning for office during the work shift, and using interactions with customers for personal expressive purposes, such as a plumber who evangelizes with every emergency call.

Some exceptions would be prudent. It would strike a reasonable balance to exempt small employers beneath a certain headcount, as many laws do. As the Supreme Court has suggested, expressive associational rights may be stronger in smaller groups.[239] States might choose thresholds between fifteen and fifty,[240] which would let small businesses employ people with shared values without giving midsize employers license to punish speech. Additionally, Supreme Court case law regarding the ministerial exception would probably require complete exemption for religious employers. A discussion of remedies is beyond the scope of this Note.

E. A Model Statute

Taking into account all these concerns and caveats, and drawing on the scholarship discussed above, here is a model for a strong but balanced statute to protect private-sector workers speech and political activity:

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[237] *See* R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 159 (2017) ("Roughly put, the heckler's veto doctrine holds that opponents of a speaker should not be permitted to suppress the speech in question through their own threatened or actual violence."); Patrick Schmidt, *Heckler's Veto*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto ("A heckler's veto occurs when the government accepts restrictions on speech because of the anticipated or actual reactions of opponents of the speech.").

[238] *See* text accompanying note 118.

[239] Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

[240] These are common thresholds for employment laws. Title VII, 42 U.S.C. § 2000e(b), and the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A), cover employers with at least fifteen employees; the Family and Medical Leave Act only applies to employers with fifty employees within a certain radius, 29 U.S.C. § 2611(2)(B)(ii).

I. It shall be an unlawful employment practice for any employer to take an adverse employment action against an individual because of that individual's political or personal views, affiliations, speech, expression, or other activities, so long as they do not:

a. occur within the scope of employment,
b. constitute disloyalty, insubordination, defamation, misconduct, or material disruption,
c. substantially and reasonably harm job performance,
d. substantially and reasonably interfere with relationships necessary to the employer's activities,
e. directly harm the employer's interests, such as by aiding a competitor, revealing confidential employer information, or running counter to the employer's clearly stated mission or strategy, or
f. reasonably tend to harm the reputation of the employer.

II. Definitions: For the purposes of this section,

a. "Employer" shall include any hiring party that exerts primary economic control over an individual, regardless of formal employment classification.
b. "Individual" shall include any natural person economically dependent upon a primary hiring entity, regardless of formal employment classification. It shall cover prospective, current, and former workers.
c. Protected political activities shall include—but not be limited to—voting, running for office, endorsing or supporting a candidate for office, affiliating with a political party, signing petitions or initiatives, or making campaign contributions.
d. "Scope of employment" shall include:
    1. Activity conducted while occupying or using employer property,
    2. Time for which the individual is compensated, if such employee has a set schedule or is paid on an hourly basis, or
    3. Interactions in which the individual acts as the identifiable agent of the employer.

III. Exceptions: This section shall not apply to

a. Employers with fewer than 15 employees, or
b. Religious organizations, when the individual's position falls within the ministerial exception.

CONCLUSION

The First Amendment represents not just restrictions on government but also core principles of American democracy. The great experiment in self-government depends on citizens who can express and hear opinions, debate in public, and participate in the political process. While private employers might not be constrained by the First Amendment—and are even protected by it—they still should not be able to constrain the civic life of the great majority of American adults who work in the private sector. If states adopt broader and clearer statutes like this proposed model, employees will be protected in their speech and politics while employers will know they can protect their legitimate business interests.