

PRIVATE EMPLOYEES’ SPEECH AND POLITICAL  
ACTIVITY: STATUTORY PROTECTION AGAINST  
EMPLOYER RETALIATION

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## I. INTRODUCTION

About half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation. Some of these jurisdictions protect employee speech generally. Others protect only employee speech on political topics. Still others protect only particular electoral activities such as endorsing or campaigning for a party, signing an initiative or referendum petition, or giving a political contribution. Moreover, though the matter is not clear, federal law may often protect private employees who speak out in favor of a federal candidate.<sup>1</sup> To my knowledge, these protections have not been systematically cataloged, and some have never been cited in a law review article.<sup>2</sup>

Some employee free speech protections were enacted following the Civil Rights Act of 1964, which banned employment discrimination based on race, religion, sex, and national origin, and are modeled on that statute. But many of the protections long preceded the Act, and similar state civil rights laws. Indeed, the first date back to 1868.

These early protections for private employee speech and political action were likely based on 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.<sup>3</sup> (Recall that this was the era before the secret ballot.) As early as the 1700s, several colonies and states barred any “attempt to overawe, affright, or force, any person qualified to vote, against his inclination or conscience,”<sup>4</sup> and some also

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1. See *infra* Part II.H.

2. See, e.g., MINN. STAT. ANN. § 10A.36 (West 2012).

3. See A COMPILATION OF THE LABOR LAWS OF THE VARIOUS STATES AND TERRITORIES AND THE DISTRICT OF COLUMBIA 561–603 (Washington, Gov’t Printing Office 1892) (indexing “Protection of employés as voters,” p. 592, but no other antidiscrimination laws).

4. An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province, § 9, 1761 Ga. Laws 109; see also An Act to Ascertain the Manner and Form of Electing Members to Represent Inhabitants of this Province, § 14, 1721 S.C. Acts 115 (prohibiting the use of certain threats to influence elections); An Act to Regulate the General Elections of this Commonwealth, § 27, 1785 Pa. Laws 351 (same); An Act to Regulate Elections, ch. 50, § 17, 1800 Md. Laws 30 (same). Other states had similar though slightly differently worded statutes, which banned attempts to “directly or indirectly” influence votes by “bribery[,] menace or other corrupt means or device.” An Act to Regulate Elections Within this State, ch. 16, 1778 N.Y. Laws 36; see also An Act Dividing the State into Districts for Electing Representatives, § 12, 1793 Vt. Acts & Resolves 13 (prohibiting bribes and threats made to influence elections); An Act

barred, “after the . . . election is over, menac[ing], despitefully us[ing] or abus[ing] any person because he hath not voted as he or they would have had him.”<sup>5</sup>

These voter protection laws seem to have covered threats not just of physical violence but also of legal coercion,<sup>6</sup> and they may have covered threats of economic retaliation as well—a similarly general 1854 English statute<sup>7</sup> was applied to threats of economic retaliation and not just those of physical attack.<sup>8</sup> The bans on threats, from 1721 to the 1860s, were included alongside bans on bribery; given that offering to provide a financial benefit in

Regulating the General Elections of the Indiana Territory, § 14, 1811 Ind. Acts 234 (same); An Act to Support the Privilege of Free Suffrage in Election, §§ 4–5, 1814 La. Acts 98 (same). The New York and Vermont statutes expressly provided for enforcement by the victim, with half the penalty to be given to the victim. The other statutes were cast as normal criminal statutes, but at the time the norm for criminal law generally was that victims would act as prosecutors. A similar statute was passed in 1727 in another English colony, St. Kitts. ACTS OF ASSEMBLY, PASSED IN THE ISLAND OF ST. CHRISTOPHER; FROM 1711, TO 1735, INCLUSIVE 126 (London, John Baskett 1739). [Editors’ Note: Throughout this Article, historical statutes are listed chronologically.]

5. An Act to Ascertain the Manner and Form of Electing Members to Represent Inhabitants of this Province, § 14, 1721 S.C. Acts 115; An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province, § 9, 1761 Ga. Laws 109; *see also* An Act to Regulate General Elections, § 17, 1837 Mich. Pub. Acts 206–07 (making it a crime to “on the day of election give any public threat . . . with a view to obtain any . . . votes for . . . [any] candidate”); An Act to Preserve the Purity of Elections, § 5, 1849 Iowa Acts 133 (making it a crime to threaten or compel any elector to vote against his inclination); An Act to Preserve the Purity of Elections, § 11, 1857 Wis. Sess. Laws 105 (likewise); An Act to Regulate Elections in this State, § 57, 1859 Minn. Laws 161 (likewise).

6. Consider Fargues McDowell’s prosecution and conviction, described in *Right of Suffrage*, NILES’ WEEKLY REGISTER, Nov. 25, 1815, at 213–14. McDowell operated a jail in which Jacob Parker was detained before trial. Though Parker had been unable to make bail, McDowell had given Parker a bail-like release (something that a jailer was apparently allowed to do), but then threatened to revoke it if Parker voted for a candidate of whom McDowell disapproved. McDowell was prosecuted under the South Carolina statute and convicted.

7. Corrupt Practices Prevention Act, 1854, 17 & 18 Vict., c. 102, § 5 (Eng.), *reprinted in* HENRY JEFFREYS BUSHBY, A MANUAL OF THE PRACTICE OF ELECTIONS IN THE UNITED KINGDOM app. at 28–29 (2d ed. 1865) (barring, in relevant part, “mak[ing] use of, or threaten[ing] to make use of any force, violence, or restraint, or inflict[ing], or threaten[ing], the infliction . . . of any injury, damage, harm, or loss, or in any other manner practis[ing] intimidation upon, or against, any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrain[ing] from voting, at any election” or “by abduction, duress, or any fraudulent device or contrivance, imped[ing], prevent[ing], or otherwise interfer[ing] with the free exercise of the franchise of any voter”).

8. *Regina v. Barnwell*, 5 Weekly Rep. 557 (1857); *see also* FRANCIS JAMES NEWMAN ROGERS, ROGERS’ LAW AND PRACTICE OF ELECTIONS AND REGISTRATION 368 (8th ed. 1857) (likewise concluding that the statute covered “dismissal of a person employed,” a “notice to quit given to a tenant,” or “withdrawal of custom from a tradesman” based on the targets’ votes); 1 REPORTS OF THE DECISIONS OF COMMITTEES OF THE HOUSE OF COMMONS IN THE TRIAL OF CONTROVERTED ELECTIONS, DURING THE SEVENTEENTH PARLIAMENT OF THE UNITED KINGDOM 90–91 (F.S.P. Wolferstan & Edward L’Estrange Dew eds., London V & R Stevens & G.S. Norton 1859) (reporting that a vote was disallowed on the grounds of “undue influence” because the voter was pressured by threat of loss of employment).

exchange for a vote was forbidden, it makes sense that threatening to deny a financial benefit in exchange for a vote would have been forbidden as well.<sup>9</sup>

And some voter protection laws enacted in the mid-1800s explicitly covered threat of economic retaliation. The proposed federal criminal code drafted in 1828 by Edward Livingston—who had earlier participated in drafting the Louisiana Civil Code, was at the time a Congressman (and soon to be Senator) from Louisiana, and would later become Secretary of State—expressly covered “threats of withdrawing custom or dealing in business or trade . . . or any other threat of injury”<sup>10</sup> aimed at influencing votes. The 1832 proposed D.C. criminal code would have done the same.<sup>11</sup> Laws using this language were enacted in Mississippi (1839), Iowa (1850), the Nebraska Territory (1855), Illinois (1871), and Delaware (1881).<sup>12</sup>

Likewise, in 1839, Pennsylvania expressly barred threats of “loss of any appointment, employment or pecuniary benefit” aimed at “influenc[ing] any voter.”<sup>13</sup> Also in 1839, Ohio made it a crime for “any person [to] . . . use any threat or coercion to procure any voter in his employ . . . to vote contrary to the

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9. See Message from His Excellency, Isaac Toucey to the Legislature of Connecticut (May 1846), in JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF CONNECTICUT, May 1846, at 25–26 (New Haven, Osborn & Baldwin 1846) (justifying the proposed Connecticut law banning threats of retaliation by employers on the grounds that such threats are “a compound of bribery, undue influence and intimidation”).

10. EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA 45 (Washington, Gales & Eaton 1828). For more on Livingston, see U.S. Dep’t of State Office of the Historian, *Biographies of the Secretaries of State: Edward Livingston*, <http://history.state.gov/departmenthistory/people/livingston-edward>. Livingston had a remarkable and varied political career, as Congressman from New York (and noted opponent of the Sedition Act), U.S. Attorney for the District of New York, and Mayor of New York City from 1795 to 1803, then state legislator, Congressman, and Senator from Louisiana from 1820 to 1832, and Secretary of State and Ambassador to France from 1831 to 1835, shortly before his death.

11. 2 PUBLIC DOCUMENTS PRINTED BY THE ORDER OF THE SENATE OF THE UNITED STATES 329 (Washington, Duff Green 1832).

12. Of Offenses Against the Rights of Suffrage, § 4, 1839 Miss. Laws 151, 152; IOWA CODE § 2700 (1851); Offenses Against the Right of Suffrage, ch. 8, § 136, 1855 Neb. Laws 244; An Act in Regard to Elections, § 82, 1871 Ill. Laws 393; An Act to Secure Free Elections, ch. 329, 16 Del. Laws 334 (1881). These statutes were limited to threats of discharge aimed at influencing a future election, and didn’t expressly prohibit retaliatory discharge for a vote at a past election, though a retaliatory discharge might have been seen as covered on the grounds that it was a threat to other employees for the future. See *Davis v. La. Computing Corp.*, 394 So.2d 678, 680 (La. Ct. App. 1981) (“[T]he actual firing of one employee for political activity constitutes for the remaining employees . . . a threat of similar firings.”). The Delaware statute also expressly provided for civil liability for such behavior.

13. An Act Relating to the Elections of this Commonwealth, no. 192, ch. 8, § 123, 1839 Pa. Laws 546.

inclination of such [employee].”<sup>14</sup> Several years later, Connecticut (1846) and Massachusetts (1852) barred “threatening to discharge [an elector] from . . . employment” in order to influence a vote.<sup>15</sup>

By the 1860s, some states also barred discrimination based on past votes rather than just threats aimed at future votes.<sup>16</sup> This was especially visible in 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.<sup>17</sup> (In some instances, Union generals administering the military occupation of the South issued such rules as military orders, violations of which were triable before military commissions.<sup>18</sup>)

It is this post-Reconstruction batch of voter protection laws that led to the first protections that went beyond voting to speech. In 1868, Louisiana and South Carolina banned discrimination against most private employees based on

14. An Act to Punish Betting on Elections, § 1, 1838 Ohio Laws 79.

15. Act of June 15, 1846, ch. 20, 1846 Conn. Pub. Acts 20 (also contemplating private prosecution by the injured voter); An Act to Protect the Right of Suffrage, ch. 321, 1852 Mass. Acts 257. The Connecticut law came in response to a proposal from the governor. See Message from His Excellency, *supra* note 9, at 25. The Governor of Massachusetts had also proposed such a law as early as 1840, ACTS AND RESOLVES PASSED BY THE LEGISLATURE OF MASSACHUSETTS, IN THE YEAR 1840, at 311 (Boston, Dutton & Wentworth 1840), though the statute was not ultimately enacted until 1852.

16. See, e.g., An Act in Addition to “An Act Concerning Crimes and Punishments,” ch. 152, § 2, 1867 Conn. Pub. Acts 166 (expressly prohibiting “dismiss[ing] from . . . employment any operative on account of any vote he may have given”).

17. See An Act to Regulate Elections in this State, § 89, 1868 Ala. Acts 286 (prohibiting an employer from “disturb[ing] or hinder[ing]” an employee exercising the right of suffrage); An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64 (making it a crime for employers to discharge their employees because of their political opinions, or to attempt to control the way they vote); Intimidation of Voters, N.C. CODE § 2715 (1883) (enacted 1868), *reprinted in* 2 WILLIAM T. DORTCH ET AL., THE CODE OF NORTH CAROLINA 195 (New York, Banks & Bros. 1883) (prohibiting employers from threatening their employees on account of their votes); An Act Providing for the Next General Election and the Manner of Conducting the Same, §11, 1868 S.C. Acts 135, 137 (special session) (same); An Act to Regulate the Conduct and to Maintain the Freedom and Purity of Elections, § 67, 1870 La. Acts 158 (same); An Act to Provide for the Mode and Manner of Conducting Elections, § 46, 1870 Tex. Gen. Laws 137 (same). All these expressly barred “threats of discharge from employment” aimed at influencing a person’s vote; all except Alabama also banned discharge based on past votes. Mississippi already had a law banning threats of discharge from employment for votes, Of Bribery and Undue Influence, § 4, 1839 Miss. Laws 152; a proposal to specify in the state constitution that dismissal from employment based on one’s past or future vote shall be a crime, JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 352 (Jackson, E. Stafford 1868), apparently wasn’t enacted.

18. See, e.g., Major-Gen. Meade, Gen. Ord. No. 57, Apr. 10, 1868 (applicable to Georgia); Major-Gen. Canby, Gen. Ord. No. 45, Mar. 23, 1868, ¶ Tenth (applicable to North Carolina); Major-Gen. Canby, Gen. Ord. No. 99, Oct. 16, 1867, ¶ Ninth (applicable to South Carolina).

“political opinion.”<sup>19</sup> And several decades later, both the voter protection laws (which I will not focus on in this Article) and the statutes protecting political opinion and political activity began to spread to other states.

I am not sure such restrictions on private employers are a good idea. First, employers may have a legitimate interest in not associating themselves with people whose views they despise.<sup>20</sup> Second, employees are hired to advance the employer’s interests, not to undermine it. When 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. Perhaps such statutes should not be copied by other states, and perhaps they should even be repealed, which is what happened in 1929 when Ohio repealed its “political activities” statute.<sup>21</sup>

But whether the statutes are sound or not, they strike me as worth investigating. I therefore thought it would be useful to

19. The Louisiana law provided for a fine for any employers who “discharged from their employ any labor or laborers on account of their political opinions,” though limited this only to discharge before the “expiration of the term of service” of the employee. An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64 (protecting laborers in the exercise of their privilege of free suffrage). This was more significant than it would be now, because many employees were then, by default, seen as having one-year contracts, rather than contracts terminable at will. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 122–23 (1976). The South Carolina law stated that any company or corporation that had a legislative charter could not “discharge, or threaten to discharge, from employment . . . any operative or employee, . . . for or on account of his political opinion, or for voting or attempting to vote as he or they may desire,” and provided both for civil liability and for cancellation of the corporate charter. An Act Providing for the Next General Election and the Manner of Conducting the Same, §11, 1868 S.C. Acts 137 (special session). A similar law was proposed in Virginia in the Constitutional Convention on Dec. 9, 1867, but was “defeated after a most heated discussion.” DAVID LLOYD PULLIAM, *THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME* 134 (1901); *see also* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 22, 23 (Richmond, New Nation 1867) (describing the rejection of the proposal).

20. *See, e.g., Voting by Ballot*, U.S. DEMOCRATIC REV., July 1854, at 19, 22, 24 (supporting the secret ballot, so as to diminish the risk that poor voters will be coerced to vote a particular way by their employers or by others, but arguing that bans on “discharging an operative from employment, or withdrawing . . . custom from a tradesman, or changing . . . tenants” based on “political considerations” improperly interfere with a property owner’s rights).

21. An Act Prohibiting Employers from Interfering with the Political Activities of their Employes, § 5175-26a, 1917 Ohio Laws 601, *repealed by* Election Laws of the State of Ohio, § 4785-234, 1929 Ohio Laws 307, 412. *See also* OHIO REV. CODE ANN. § 2901.43 (West 1965) (“No person shall prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of any lawful issue [or candidate] . . . . No person shall injure any person or property on account of such support or advocacy.”), *repealed by* Act of Dec. 14, 1972, § 2, 1971 Ohio Sess. Laws 1866, 2032.

publish a list of the statutes that I could find and a summary of some of the key court decisions interpreting those statutes.

## II. THE STATUTES

I arrange the statutes roughly in descending order of the breadth of speech that they cover. I say “roughly” because some of the laws are hard to compare, and some of them have unclear scopes.

### A. Cross-Cutting Questions

#### 1. Criminal Liability, Civil Liability, or Both?

Some of the statutes expressly provide for civil liability, some for criminal liability, and some for both. But courts generally treat these sorts of criminal statutes as also generating a private right of action, either as a matter of statutory interpretation or as an application of the “wrongful discharge in violation of public policy” tort.<sup>22</sup>

#### 2. Coverage for Existing Employees or Also for Applicants?

Some of the statutes expressly cover all employer decisions. Others only cover discharge or discipline of current employees rather than refusal to hire applicants. Note, though, that the California Supreme Court has read its statute as covering discrimination in hiring, even though the statutory text refers just to actions with regard to “employee[s].”<sup>23</sup>

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22. See, e.g., *Shovelin v. Cent. N.M. Elec. Coop.*, 850 P.2d 996, 1008 (N.M. 1993) (dictum) (stating that a criminal statute banning firing employees because of the employees’ political activity would “support a cause of action for retaliatory discharge” for such a firing); *Culler v. Blue Ridge Elec. Coop.*, 422 S.E.2d 91, 92–93 (S.C. 1992) (inferring a civil cause of action based on the criminal prohibition against firing people for political beliefs); cf. *Carl v. Children’s Hosp.*, 702 A.2d 159, 165 (D.C. 1997) (Terry, J., for four Justices) (reasoning that a criminal statute barring “injur[ing any] witness in [his or her] person or property . . . on account of . . . testifying or having testified” in particular proceedings supports a civil cause of action for firing an employee based on such testimony); *id.* at 166 (Ferren, J., for two Justices) (endorsing this analysis). Compare *Bell v. Faulkner*, 75 S.W.2d 612, 614 (Mo. Ct. App. 1934) (refusing to infer a civil cause of action from a criminal statute banning firing an employee for his vote in an election), with *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877 (Mo. Ct. App. 1985) (“[W]e believe that no modern Missouri court would, on the egregious facts presented in *Bell v. Faulkner*, decide the case against Bell as the court of appeals did in 1934.”).

23. *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 n.16 (Cal. 1979).



### 3. Application Only to Established Policies, or Also to Individual Employment Decisions?

Some of the statutes expressly cover all employer actions, but others cover only policies restricting speech. Such policies need not be published ones; an accepted course of conduct would suffice.<sup>24</sup>

The question is whether the statutes that ban speech-restrictive “polic[ies]” should also apply to individual incidents of discrimination, animated by an employer’s concerns at that moment rather than by some coherent general plan. The Louisiana Supreme Court has answered the question yes, holding that the ban on enforcing any “rule, regulation or policy” restraining political activity extends to individual firing decisions made even without any express policy. “[T]he actual firing of one employee for political activity constitutes for the remaining employees both a policy and a threat of similar firings.”<sup>25</sup> On the other hand, the California Supreme Court has defined “policy” as “[a] settled or definite course or method adopted and followed” by the employer,<sup>26</sup> and a California federal district court has specifically concluded that an individual retaliatory decision does not suffice to show the existence of a “rule, regulation, or policy.”<sup>27</sup>

### 4. Application Only to Threats, or Also to Employment Decisions Made Without Threats?

Some of the statutes expressly cover all employer actions, but others cover only “threat[s] . . . calculated to influence the political . . . actions” of other employees.<sup>28</sup> But, as the Louisiana case cited above notes, “the actual firing of one employee for political activity constitutes for the remaining employees both a policy and a threat of similar firings.”<sup>29</sup> Once coworkers learn that an employee was fired based on his speech or political activities, the coworkers will perceive that action as a threat, even if no express threatening words were used. This is especially so given that, as the Supreme Court has recognized, employees’

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

25. *Davis v. La. Computing Corp.*, 394 So.2d 678, 680 (La. Ct. App. 1981).

26. *Lockheed Aircraft Corp.*, 171 P.2d at 24.

27. *Ross v. Indep. Living Res.*, No. C08-00854 TEH, 2010 WL 2898773, at \*9 (N.D. Cal. July 21, 2010).

28. See *infra* note 103 and accompanying text.

29. *Davis*, 394 So.2d at 680.

economic dependence on the employer reasonably leads them to pick up even subtle signals when their jobs are at stake.<sup>30</sup>

### 5. Off-the-Job Speech or All Speech?

Some statutes expressly cover only off-the-job speech, while others have no such limitation. Should courts implicitly read in such a limitation? In *Dixon v. Coburg Dairy, Inc.*, later reversed on procedural grounds by an en banc decision, a Fourth Circuit panel held that one such statute does not include on-the-job speech.<sup>31</sup> A contrary view, the panel held, would have the “absurd result of making every private workplace a constitutionally protected forum for political discourse.”<sup>32</sup>

But the Connecticut Supreme Court in *Cotto v. United Technologies Corp.* held that the absence of any statutory language limiting protection to off-the-job speech means that the statute may indeed apply to such speech.<sup>33</sup> Likewise, a California Court of Appeal decision suggested that the California statute generally applies to on-the-job speech.<sup>34</sup>

### 6. Implicit Exceptions for Speech and Political Activity That Sufficiently Undermines Employer Interests?

Some statutes expressly allow employers to restrict speech or political activity that sufficiently undermines employer interests. These will be discussed in the next subsection.

Other statutes, though, categorically cover speech without any express accommodation of employer concerns. In Louisiana, for example, even when “the ‘business’ justification for firing plaintiff in this case is a real one”—such as that plaintiff’s political advocacy “would antagonize persons who could withdraw business from plaintiff’s employer”—“the policy of the statute is unmistakable: the employer may not control political candidacy of his employees. We see no exemption from the

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30. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

31. *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250, 262 (4th Cir. 2003), *rev’d*, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state courts).

32. *Id.*

33. *Cotto v. United Techs. Corp.*, 711 A.2d 1180, 1185–86 (Conn. App. Ct. 1998).

34. *Cal. Teachers Ass’n v. Governing Bd. of San Diego Unified Sch. Dist.*, 45 Cal. App. 4th 1383, 1387 n.2 (1996). The court held that a specific state statute, CAL. EDUC. CODE § 7055 (2002), that allows certain public education agencies to restrict on-the-job “political activity” carves out an exception from the general California statute protecting such political activity. But the opinion suggests that the general statute would apply to on-the-job speech in workplaces that are not exempted by a specific statute such as § 7055.

legislative purpose because of the nature of the employer's business."<sup>35</sup>

One federal district court took a contrary view, concluding that the California statute should be read as containing an implied exception for cases "when the employee's political activities are patently in conflict with the employer's interests."<sup>36</sup> But this was based on what strikes me as a misreading of an earlier California state precedent.<sup>37</sup> And California state courts have never read the statute as having such an implied exemption.

A few of the political activity protections come in antidiscrimination statutes that (1) ban discrimination based on various classifications, including political ideology or affiliation, and (2) carve out a "bona fide occupational qualification" (BFOQ) exception for certain antidiscrimination categories, such as sex and religion, but *not* for political ideology.<sup>38</sup>

Such drafting strongly suggests that there is indeed no exception from the political ideology discrimination ban. "*Expressio unius, exclusio alterius*";<sup>39</sup> the inclusion of sex and religion in the BFOQ provision suggests that the excluded antidiscrimination categories are not subject to a BFOQ defense. This is in fact how federal courts have reasoned in holding that race cannot be a BFOQ under Title VII, given that it is "conspicuously absent from the [BFOQ] exception" (which lists religion, sex, and national origin, but not race or color).<sup>40</sup>

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35. *Davis v. La. Computing Corp.*, 394 So.2d 678, 679 (La. Ct. App. 1981).

36. *Smedley v. Capps, Staples, Ward, Hastings & Dodson*, 820 F. Supp. 1227, 1230 n.3 (N.D. Cal. 1993).

37. *Smedley* held that *Mitchell v. Int'l Ass'n of Machinists*, 196 Cal. App. 2d 796 (1961), suggested such a rule, but I do not see anything in *Mitchell* so stating.

38. *See, e.g.*, SEATTLE, WASH., MUN. CODE § 14.04.050(A) (2011) (stating that discrimination is not forbidden "in those instances where religion, sex, national origin, or age is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," but not including political ideology or various other prohibited bases in the list); MADISON, WIS., MUN. CODE § 39.03(8)(e) (2010) (likewise).

39. *E.g.*, *Bruesewitz v. Wyeth L.L.C.*, 131 S. Ct. 1068, 1076 (2011).

40. *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 652 (5th Cir. 1980); *see also* *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 (11th Cir. 1999); *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 273 (1982); *Knight v. Nassau Cnty. Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981); *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361, 370 n.13 (4th Cir. 1980).

### 7. What Is the Scope of Explicit Exceptions for Speech and Political Activity That Sufficiently Undermines Employer Interests?

Some statutes do expressly allow employers to restrict employee speech when abstaining from the speech is a BFOQ,<sup>41</sup> when the speech is “in direct conflict with the essential business-related interests of the employer,”<sup>42</sup> or when the speech creates “reasonable job-related grounds for dismissal.”<sup>43</sup> Do these exceptions cover speech that interferes with the employer’s activities by leading customers or coworkers to dislike the employer—for instance, when the speech is critical of the employer, or when the speech offends some people?

Generally speaking, when the term “bona fide occupational qualification” is used with regard to sex discrimination or religious discrimination, customer or coworker hostility is *not* seen as sufficient to trigger the BFOQ exception. In the Equal Employment Opportunity Commission’s words, “the preferences of coworkers, the employer, clients or customers” “do not warrant the application of the bona fide occupational qualification exception.”<sup>44</sup> Thus, for instance, that some people are offended or alienated by an employee’s religion does not justify the employer in firing the employee. When laws that ban discrimination based on off-duty conduct (including speech), speech, or political affiliation use the same phrase, this suggests that employers likewise may not fire an employee just because his

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41. *E.g.*, COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2012).

42. N.D. CENT. CODE ANN. § 14-02.4-03 (West 2011).

43. MONT. CODE ANN. § 39-2-903(5) (2011).

44. 29 C.F.R. § 1604.2(a)(1)(iii) (2012); *see also* *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (preference of clients in South America for dealing with males cannot make sex into a BFOQ); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (preference of airplane passengers for female flight attendants cannot make sex into a BFOQ); *Bohemian Club v. Fair Emp’t & Hous. Comm’n*, 187 Cal. App. 3d 1, 21 (Cal. Ct. App. 1986) (client preference for male service personnel, based upon the supposed “inhibiting effect women employees might have on men” in a private club, cannot make sex into a BFOQ); *Ray v. Univ. of Ark.*, 868 F. Supp. 1104, 1126–27 (E.D. Ark. 1994) (even if race could ever be a BFOQ, students’ preference for police officers of their own race is insufficient); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) (preference of religious parents for male school bus drivers doesn’t make sex into a BFOQ); *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196, 1201 (N.D. Tex. 1983) (“mere customer preference of one religion over another is not enough to raise religious discrimination to the level of B.F.O.Q.,” though Saudi law that imposes the death penalty for non-Muslims who go to Mecca does suffice to make religion a BFOQ for a job as helicopter pilot flying to Mecca). *But see* *Brown v. F.L. Roberts & Co., Inc.*, 896 N.E.2d 1279, 1289 n.11 (Mass. 2008) (“We leave to another day whether or to what degree customer preference could allow an employer to discriminate based on religion. But see 804 Code Mass. Regs. § 3.00 (1995) (customer or coworker preference is not bona fide occupational qualification).”).

off-duty actions offend customers or coworkers.

Nonetheless, some cases interpreting the statutes give employers a good deal of authority to restrict speech that turns customers against the employer. Thus, a district court interpreting the Colorado statute's exception for restrictions that "relate[] to a bona fide occupational requirement" held that (1) an employer could treat an employee's loyalty as a bona fide occupational requirement, and that (2) an employee's letter to a newspaper complaining about alleged mistreatment of employees and poor customer service breached such a duty, though (3) public complaints about safety would not breach the duty.<sup>45</sup>

Likewise, a New York appellate court read an exception for activity that "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest" as allowing the German National Tourist Office to fire an employee for becoming known as the translator of some Holocaust revisionist articles.<sup>46</sup> Presumably the court's view was that the activity could lead to public hostility to the office, and that this hostility created a "conflict of interest" between the employee and the employer's "business interest."

Other cases, however, consider some speech to be protected even when it does injure the employer. The Colorado case mentioned above is a partial example, because it concluded that public complaints about safety would be protected against employer retaliation even when they injure the employer. Likewise, a Connecticut case held that a statutory exception for speech that "substantially or materially interfere[s] with the employee's bona fide job performance or the working relationship between the employee and the employer"<sup>47</sup> did not cover an employee's report to a state agency of "allegedly

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45. *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1461–62 (D. Colo. 1997). As to nonspeech conduct, *see Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 822 (N.D. 1998) (concluding that a mortuary chaplain's off-duty act of masturbating in a public restroom stall, if legal, might be covered by the BFOQ exception, on the grounds that the "activity undermined his effectiveness as a chaplain and therefore directly conflicted with [the employer funeral home's] business-related interests," and leaving the decision to the jury).

46. *Berg v. German Nat'l Tourist Office*, 248 A.D.2d 297 (N.Y. App. Div. 1998); Paul Schwartzman, *It Just Isn't Write[;] German Axed Over Hate Mag Article*, DAILY NEWS (N.Y.), May 11, 1995, at 6.

47. *Mendez v. Utopia Home Care, Inc.*, No. CV096006222, 2010 WL 4885347, at \*3 (Conn. Super. Ct. Nov. 5, 2010) (quoting CONN. GEN. STAT. ANN. § 31-51q (West 2012)).

wrongful or illegal conduct” by the employer’s customer.<sup>48</sup>

The employee, a worker for a home nursing company that sold services to nursing facilities, reported substandard care at one of the facilities.<sup>49</sup> The court acknowledged that “[i]t may be true that [the employer’s] business relationship with their customer was impacted negatively as a result of the reporting of violations by the plaintiff.”<sup>50</sup> But, the court concluded, such speech is “the exact kind of ‘expression[] regarding public concerns that are motivated by an employee’s desire to speak out as a citizen’ to which . . . this statute applies.”<sup>51</sup>

#### 8. Do General Bans on “Threats” Apply to Threats of Loss of Employment?

Though most of the statutes discussed below expressly bar discrimination in employment, or threats of loss of employment, some speak generally of threats, intimidation, or coercion. But in similar statutes, the terms “threats,” “intimidation,” and “coercion” have indeed been interpreted to include threat of economic retaliation.

Thus, for instance, federal law bans “intimidat[ing], threaten[ing], coerc[ing], or attempt[ing] to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person . . . to vote as he may choose.”<sup>52</sup> The Fifth and Sixth Circuits have interpreted this law as prohibiting threats of economic retaliation.<sup>53</sup> Likewise, the Fair Housing Act makes it illegal “to coerce, intimidate, threaten, or interfere with any person . . . or on account of his having aided or encouraged any other person in the exercise or enjoyment [of housing nondiscrimination rights].”<sup>54</sup> Circuit courts have interpreted this as barring the firing of employees

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48. *Id.* at \*4.

49. *Id.*

50. *Id.*

51. *Id.* at \*5 (quoting *Cotto v. United Techs. Corp.*, 738 A.2d 623, 632 (Conn. 1999)).

52. 18 U.S.C. § 594 (2006).

53. *United States v. Bd. of Educ. of Greene County*, 332 F.2d 40, 44, 46 (5th Cir. 1964) (concluding that the refusal to renew a year-to-year employment contract based on a person’s exercise of her right to vote could be “intimidation”); *United States v. Bruce*, 353 F.2d 474, 476–77 (5th Cir. 1965) (likewise, as to property owners’ decision to bar a person from their property, when this decision seriously interfered with the person’s ability to work as an insurance premium collector); *United States v. Beaty*, 288 F.2d 653, 656 (6th Cir. 1961) (likewise, as to landlords’ retaliation against their sharecropper tenants).

54. 42 U.S.C. § 3617 (2006).

who rented to black and Mexican-American applicants,<sup>55</sup> and barring the denial of agency funds to an organization that complained about a discriminatory permit denial.<sup>56</sup>

*B. Engaging in Any Off-Duty Lawful Activity—Colorado and North Dakota*

On, then, to the specific laws, beginning with what seem like the broadest ones. Two state statutes generally bar employers from restricting employees’ off-duty lawful activity. “Lawful activity off the premises of the employer” is broad enough to include speech, and court decisions have expressly interpreted such a statute to cover speech.<sup>57</sup>

**Colorado:** [No employer may] terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

(a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.<sup>58</sup>

**North Dakota:** [No employer may discriminate against an employee or applicant] because of . . . participation in a lawful activity that is off the employer’s premises and that takes place during nonworking hours

[a] [unless that participation is] in direct conflict with the essential business-related interests of the employer . . . [or]

55. *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975); *see also* *United States v. Bowen Prop. Mgmt.*, 2005 WL 1950018, at \*3 (E.D. Wash. Aug. 15, 2005) (finding a possibility of illegal coercion where an employee was allegedly terminated for helping others file Fair Housing Act complaints); *Hall v. Lowder Realty Co., Inc.*, 160 F. Supp. 2d 1299, 1323 (M.D. Ala. 2001) (treating allegation that a real estate agency employer cut off customer calls to an agent employee as an allegation of coercion).

56. *Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002).

57. *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458 (D. Colo. 1997) (letter to the editor of a newspaper criticizing the employer); *Gwin v. Chesrown Chevrolet, Inc.*, 931 P.2d 466 (Colo. App. 1996) (employee’s demand to an off-the-job lecturer for a refund of money paid to attend the lecture); *Angel v. Rayl*, No. 04-CV-3420, 2005 WL 6208024 (Colo. Dist. Ct. Dec. 1, 2005) (dictum (“read[ing] certain books,” “see[ing] certain movies,” “attend[ing] certain plays,” “attend[ing] certain political or social-activism events,” and “express[ing] certain opinions in letters-to-the-editor of the local newspaper”).

58. COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2012) (enacted 1990).

[b] contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer.<sup>59</sup>

Colorado also has another statute, discussed in Part II.F, protecting employees’ “engaging or participating in politics.”<sup>60</sup>

*C. Engaging in Activity That Doesn’t Create “Reasonable Job-Related Grounds for Dismissal”—Montana*

Montana is the only state that generally bars employers from firing people absent good cause; this would include many dismissals based on an employee’s speech or political activity.

**Montana:** [An employer may not discharge an employee] if . . . the discharge was not for [reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reasons<sup>61</sup>] and the employee had completed the employer’s probationary period of employment [or six months, if the employer did not establish a specific probationary period] . . . .<sup>62</sup>

This provision is limited to actual and constructive discharge, and is not violated by minor demotions, failures to promote, or failures to hire.<sup>63</sup> But, as described below in Part II.G, certain Montana employers are barred from all discrimination based on certain kinds of political activities.

*D. Exercising “Rights Guaranteed by the First Amendment”—Connecticut*

Connecticut bars employment discrimination based on any “exercise . . . of rights guaranteed by the First Amendment.”<sup>64</sup> Connecticut courts have interpreted this as largely applying the same rules to private employers as are applied to public employers under the First Amendment.<sup>65</sup> Connecticut courts

59. N.D. CENT. CODE ANN. § 14-02.4-03, -08 (West 2011) (enacted 1991).

60. COLO. REV. STAT. ANN. § 8-2-108 (West 2012) (enacted 1929).

61. MONT. CODE ANN. § 39-2-903(5) (2011) (enacted 1987).

62. MONT. CODE ANN. § 39-2-904(1)(b), (2)(b) (2011) (enacted 1987).

63. *Compare* Clark v. Eagle Sys., Inc., 927 P.2d 995, 999 (Mont. 1996) (holding demotion is not covered by statute), *with* Howard v. Conlin Furniture No. 2, Inc., 901 P.2d 116, 119 (Mont. 1995) (holding termination of managerial position and an immediate offer of a position with 75% pay cut is covered by statute).

64. CONN. GEN. STAT. § 31-51q (2012).

65. Cotto v. United Techs. Corp., 738 A.2d 623, 627 (Conn. 1999).



apply the *Connick v. Myers* rule that employee speech is protected only if it is on “matters of public concern” and not motivated by the employee’s personal employment grievance.<sup>66</sup> They also apply the *Pickering v. Board of Education* test, under which speech is unprotected if its value is exceeded by its potential to disrupt the employer’s operation.<sup>67</sup> And they apply the *Garcetti v. Ceballos* rule, under which even otherwise public-concern and nondisruptive speech is unprotected when it is part of the employee’s job duties.<sup>68</sup>

**Connecticut:** [No employer may] discipline or discharge [an employee] on account of the exercise by such employee of rights guaranteed by the First Amendment . . . , provided such activity does not substantially or materially interfere with the employee’s bona fide job performance or the working relationship between the employee and the employer . . . .<sup>69</sup>

Courts have held that this statute does not apply to decisions denying promotion,<sup>70</sup> or to decisions denying tenure (even though this would generally lead to the expiration of the employee’s contract).<sup>71</sup> A fortiori, the statute would not apply to decisions not to hire.

#### E. *Engaging in “Recreational Activities”*—New York

New York bars employer retaliation for off-duty “recreational activities,” including, among other things, “reading and the viewing of television, movies, and similar material.” A separate part of the statute, discussed in Part II.J below, expressly protects partisan political activities.

The New York law’s protection for receiving speech suggests there is similar protection for conveying speech. Court decisions have indeed treated “recreational activities” as including arguing about politics at a social function<sup>72</sup> and participating in a vigil for

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66. *Id.* at 632; *Daley v. Aetna Life & Cas. Co.*, 734 A.2d 112, 124–25 (Conn. 1999).

67. *Cotto*, 738 A.2d at 649.

68. *Perez-Dickson v. City of Bridgeport*, 304 Conn. 483, 497–98 (2012).

69. CONN. GEN. STAT. § 31-51q (2012) (enacted 1983).

70. *Bombalicki v. Pastore*, 27 Conn. L. Rptr. 183 (Conn. Super. Ct. 2000).

71. *Avedisian v. Quinnipiac Univ.*, 387 Fed. Appx. 59, 60 (2d Cir. 2010); *McIntyre v. Fairfield Univ.*, 34 Conn. L. Rptr. 219 (Conn. Super. Ct. 2003); *Douglas v. Bd. of Trs.*, No. CV 950372571, 1999 WL 240736, at \*2 (Conn. Super. Ct. Apr. 8, 1999).

72. *Cavanaugh v. Doherty*, 243 A.D.2d 92, 100 (N.Y. App. Div. 1998) (treating an allegation that plaintiff was fired “as a result of a discussion during recreational activities outside of the workplace in which her political affiliations became an issue” as covered by the statute).

a man killed because of his homosexuality.<sup>73</sup>

But one court has held that picketing is not sufficiently “recreational” to qualify.<sup>74</sup> Other New York courts have likewise held that certain non-speech activities—dating<sup>75</sup> and organizing and participating in “after-work celebrations with fellow employees”<sup>76</sup>—that might normally be seen as recreational nonetheless are not covered by the statute. This suggests that “recreational activities” might likewise be read narrowly in some speech cases.

**New York:** (1) . . . (b) “Recreational activities” shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material . . . .

(2) . . . (c) [No employer may discriminate against an employee or prospective employee] because of . . . an individual’s legal recreational activities outside work hours, off of the employer’s premises and without use of the employer’s equipment or other property . . . .

(3)(a) [This section shall not be deemed to protect activity that] creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest . . . .

(4) [A]n employer shall not be in violation of this section where the employer takes action based on the belief . . . that: . . . (iii) the individual’s actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.<sup>77</sup>

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73. *El-Amine v. Avon Prods., Inc.*, 293 A.D.2d 283 (N.Y. App. Div. 2002) (affirming denial of summary judgment in a § 201-d(2) case apparently brought based on plaintiff’s “involvement in a vigil for Matthew Shepard, the gay college student who was brutally murdered in Laramie, Wyoming,” Jennifer Gonnerman, *Avon Firing*, VILLAGE VOICE, Mar. 2, 1999).

74. *Kolb v. Camilleri*, No. 02-CV-0117A(Sr), 2008 WL 3049855, at \*13 (W.D.N.Y. Aug. 1, 2008) (“Plaintiff did not engage in picketing for his leisure, but as a form of protest. While the Court has found such protest worthy of constitutional protection, it should not engender simultaneous protection as a recreational activity akin to ‘sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.’”).

75. *E.g.*, *Hudson v. Goldman Sachs & Co.*, 283 A.D.2d 246 (N.Y. App. Div. 2001) (“romantic relationships are not protected ‘recreational activities’”); *State v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150 (N.Y. App. Div. 1995) (“dating is entirely distinct from . . . recreational activity”) (internal quotation marks omitted). *But see id.* at 153 (Yesawich, J., dissenting) (arguing that dating should be seen as covered).

76. *Delran v. Prada USA Corp.*, No. 101691/04, 2004 WL 5488006 (N.Y. Sup. Ct. Aug. 2, 2004).

77. N.Y. LAB. LAW § 201-d (McKinney 2011) (enacted 1992).

F. *Engaging in Political Activities—California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, West Virginia, Seattle (Washington), and Madison (Wisconsin)*

These states bar employers from retaliating against employees for engaging in political activities. “Political activities” is broader than just partisan or electoral activities, and courts interpreting the California statute have so held. “[P]olitical activities,” the California Supreme Court has stated, “cannot be narrowly confined to partisan activity,” but instead cover any activities involving the “espousal of a candidate or a cause,” including participating in broad social movements such as the gay rights movement.<sup>78</sup> And a federal district court, following the California Supreme Court decision, has likewise read “political activities” to cover the holding of certain views on drug and alcohol policy.<sup>79</sup>

A few federal district courts in South Carolina have taken a narrower view: The South Carolina statute’s protection of “political opinions” and “political rights and privileges guaranteed to every citizen by the Constitution,” they have held, is limited to “matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote.”<sup>80</sup> One district court held that the display of the Confederate flag is therefore not covered.<sup>81</sup> Another held the same about a statement that Muslims are disproportionately likely to be terrorists, and that terrorists are generally Muslims.<sup>82</sup>

This, though, seems inconsistent with the statutory language, which speaks of “political opinions” and “political rights and

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78. *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979).

79. *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at \*9 (N.D. Cal. Mar. 11, 1996).

80. *Vanderhoff v. John Deere Consumer Prods., Inc.*, No. C.A.3:02-0685-22, 2003 WL 23691107, at \*2 (D.S.C. Mar. 13, 2003).

81. *See Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250, 254 (4th Cir. 2003) (noting that the district court originally granted the employer’s motion for summary judgment on this ground), *rev’d en banc*, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state court).

82. *Powell v. Media Gen. Operations, Inc.*, 2011 WL 4501836 (D.S.C. Apr. 26, 2011) (Magistrate Judge’s report and recommendation), *approved by* 2011 WL 4501564 (D.S.C. Sept. 28, 2011), *settled while on appeal*, Order in *Powell v. Media Gen. Operations, Inc.*, No. 11-2204 (Dec. 1, 2011). The speech in *Powell* took place right after the Fort Hood mass murder, which was committed by a Muslim U.S. soldier. Plaintiff told a coworker (who apparently wasn’t a Muslim, Amended Complaint in *Powell* (filed Jan. 7, 2011)), “That’s a shocker that a Muslim would be a terrorist!” The coworker responded, “Not all Muslims are terrorists.” Plaintiff replied, “Well, that might be so, but it seems to me that all terrorists are Muslim.” This, the court said, was not the expression of “political opinions” because it was not “of or relating to government, a government, or the conduct of government.”

privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.”<sup>83</sup> Opining on broad current affairs topics has generally been seen as “political speech,” even when the speech does not directly connect to an election.<sup>84</sup> And California courts have interpreted the similar terms “engaging . . . in politics” and “political activities” as covering “espousal of . . . a cause” as well as of a candidate, and including, for instance, the act of declaring oneself to be gay or lesbian.<sup>85</sup> Likewise, a Fourth Circuit panel opinion, later reversed on procedural grounds, concluded that display of the Confederate flag could constitute the exercise of “political rights.”<sup>86</sup>

Even under the broad California view, though, some courts have held that activities aimed at improving labor conditions at the particular employer<sup>87</sup> and advocacy of forcible or violent conduct<sup>88</sup> do not qualify as “political” within the terms of the statute. Two related South Carolina federal district court cases have also held that testimony before a government agency, made in response to a request by that agency, does not qualify as “exercising a political right.”<sup>89</sup> And a third South Carolina federal district court case concluded that an employee’s “expressions of concern about his coworkers”—which consisted of statements that the coworker pharmacy technicians “lacked the necessary experience and competence to safely fill

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83. S.C. CODE ANN. § 16-17-560 (2011).

84. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (describing the wearing of anti-war armbands as “political speech,” even outside the context of an electoral campaign); *Virginia v. Black*, 538 U.S. 343, 365–66 (2003) (plurality opinion) (describing the burning of a cross as “a statement of ideology, a symbol of group solidarity” as “political speech”); *United States v. Eichman*, 496 U.S. 310, 315 n.4 (1990) (treating flag burning as “political speech”).

85. *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979).

86. *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250, 262 (4th Cir. 2003) (treating the “political rights” language of the South Carolina statute as referring to Free Speech Clause rights generally, and concluding that the display of a Confederate flag “at a time when South Carolinians were vigorously debating whether that flag should fly atop their state capitol” would be protected by the statute against employer reprisal, if done outside work), *rev’d en banc*, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state courts).

87. *Henry v. Intercontinental Radio, Inc.*, 155 Cal. App. 3d 707, 715 (1984) (suggesting that such speech might not be covered); *see also Keiser v. Lake County Super. Ct.*, No. C05-02310 MJJ, 2005 WL 3370006, at \*11 (N.D. Cal. Dec. 12, 2005) (organizing a nonprofit that “does not advocate a particular view or encourage support for a particular candidate” is not a “political activity” for Section 1101 purposes).

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

89. *Love v. Cherokee County Veterans Affairs Office*, C.A. No. 7:09-194-HMH, 2009 WL 2394369 (D.S.C. July 31, 2009); *Tucker v. Cherokee County Veterans Affairs Office*, C.A. No. 7:09-193-HMH, 2009 WL 2394374 (D.S.C. July 31, 2009).

customers' prescriptions"—“were not political in nature” and thus were not covered.<sup>90</sup>

**California:** No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.<sup>91</sup>

No employer shall . . . attempt to coerce or influence his employees through or by means of threat of discharge . . . to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.<sup>92</sup>

**Colorado:** It is [a misdemeanor] for any . . . employer . . . to make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics or from becoming a candidate for public office or being elected to and entering upon the duties of any public office.<sup>93</sup>

**Guam:** Every employer . . . is guilty of a misdemeanor who within ninety (90) days of any election . . . makes or communicates . . . threats, express or implied, intended or calculated to influence the political opinions or actions of the employees.<sup>94</sup>

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90. Redden v. Walgreen Co., C.A. No. 8:10-cv-025040-JMC, 2011 WL 3204693, at \*1, \*3 (D.S.C. July 27, 2011).

91. CAL. LAB. CODE § 1101 (West 2012) (enacted 1915).

92. *Id.* § 1102 (West 2012) (enacted 1915). California Labor Code sections 96(k) and 98.6(a) allow the Labor Commissioner to “take assignments of” any employee claims “for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises,” *id.* § 96(k), and bar employers from discriminating against “any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in [section 96(k)] and [section 1101].” But California courts have concluded that the statutes create no new protections, but instead merely let the Labor Commissioner take assignments of any claims already secured by existing law, such as section 1101 claims or right to privacy claims. *See Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72, 80–89 (Cal. Ct. App. 2004) (so holding as to both § 96(k) and § 98.6); *see also Hartt v. Sony Elecs. Broad. & Prof'l Co.*, 69 Fed. Appx. 889, 890 (9th Cir. 2003) (taking this view, but considering only § 96(k)); *Paloma v. City of Newark*, No. A098022, 2003 WL 122790, at \*12–13 (Cal. Ct. App. Jan. 10, 2003) (also taking this view but considering only § 96(k)); *Barbee v. Household Auto. Fin. Corp.*, 113 Cal. App. 4th 525, 533–36 (Cal. Ct. App. 2000) (likewise); 83 Ops. Cal. Atty. Gen. 226, 228, 230 (2000) (taking this view as to § 96(k)).

93. COLO. REV. STAT. ANN. § 8-2-108 (West 2012) (enacted 1929); *see also id.* § 8-2-102 (West 2012) (enacted 1897) (banning employers from discriminating or threatening to discriminate against employees for belonging to any “political party”).

94. 3 GUAM CODE ANN. § 14111 (2012).

**Louisiana:** Except as otherwise provided in R.S. 23:962, no employer having regularly in his employ twenty or more employees shall

[a] make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics, or from becoming a candidate for public office . . .

[b] adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, [or] . . .

[c] coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character . . . .<sup>95</sup>

23:962: Any planter, manager, overseer or other employer of laborers who, previous to the expiration of the term of service of any laborer in his employ or under his control, discharges such laborer on account of his political opinions, or attempts to control the suffrage or vote of such laborer by any contract or agreement whatever, shall be fined not less than one hundred dollars, nor more than five hundred dollars and imprisoned for not more than one year.<sup>96</sup>

**Minnesota:** [It shall be a gross misdemeanor for a]n individual or association . . . [to] engage in economic reprisals or threaten loss of employment or physical coercion against an individual or association because of that individual's or association's political contributions or political activity. This subdivision does not apply to compensation for employment or loss of employment if the political affiliation or viewpoint of the employee is a bona fide occupational qualification of the employment.<sup>97</sup>

**Missouri:** [It shall be a misdemeanor o]n the part of any employer [to] mak[e], enforce[e], or attempt[] to enforce any order, rule, or regulation or adopt[] any other device or method to prevent an employee from

[a] engaging in political activities,

[b] accepting candidacy for nomination to, election to, or the holding of, political office,

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95. LA. REV. STAT. ANN. § 23:961 (2011) (enacted 1938).

96. LA. REV. STAT. ANN. § 23:962 (2011) (derived from language used in An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64).

97. MINN. STAT. ANN. § 10A.36 (West 2012) (enacted 1974).

[c] holding a position as a member of a political committee,  
[d] soliciting or receiving funds for political purpose,  
[e] acting as chairman or participating in a political convention,  
[f] assuming the conduct of any political campaign,  
[g] signing, or subscribing his name to any initiative, referendum, or recall petition, or any other petition circulated pursuant to law . . . .<sup>98</sup>

[It shall be a misdemeanor and civilly actionable for any employer to:]

(1) . . . discriminate or threaten to discriminate against any employee . . . by reason of his political beliefs or opinions; or . . .

(5) [d]iscriminate or threaten to discriminate against any . . . employee in this state for contributing or refusing to contribute to any candidate, political committee or separate political fund . . . .<sup>99</sup>

**Nebraska:** Any person who . . . attempts to influence the political action of his or her employees by threatening to discharge them because of their political action . . . shall be guilty of a Class IV felony.<sup>100</sup>

**Nevada:** It shall be unlawful for any . . . [employer] to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state.<sup>101</sup>

**South Carolina:** It is unlawful for a person to . . . discharge a citizen from employment . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.<sup>102</sup>

**West Virginia:** [It is a misdemeanor for any employer or

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98. MO. ANN. STAT. § 115.637(6) (West 2012) (enacted 1939).

99. MO. ANN. STAT. § 130.028 (West 2012) (enacted 1897).

100. NEB. REV. STAT. ANN. § 32-1537 (West 2012) (enacted 1909).

101. NEV. REV. STAT. ANN. § 613.040 (West 2012) (enacted 1915). It is not clear whether this also bars employers from *requiring* employees to make political contributions. *Compare* Nevadans for Fairness v. Heller, No. A385931, A386493, 1998 WL 357316, at \*2 (Nev. Dist. Ct. June 10, 1998) (interpreting the statute as barring such requirements), *with* Spitzmesser v. Tate Snyder Kimsey Architects, Ltd., No. 210-CV-01700-KJD-LRL, 2011 WL 2552606, at \*3 (D. Nev. June 27, 2011) (reading the statute as not barring such requirements).

102. S.C. CODE ANN. § 16-17-560 (2011) (enacted 1950) (based on statute first enacted in 1868, *see* An Act Providing for the Next General Election and the Manner of Conducting the Same, 1868 S.C. Acts 135, 136 (special session)). *See, e.g.*, Culler v. Blue Ridge Elec. Coop., Inc., 422 S.E.2d 91, 93 (S.C. 1992) (reading the statute as covering an employee's refusal to make a campaign contribution).

agent of an employer to] give any notice or information to his employees, containing any threat, either express or implied, intended or calculated to influence the political views or actions of the . . . employees . . . .<sup>103</sup>

**Seattle (Washington):** Employer[s may not discriminate . . . by reason of . . . political ideology . . .] . . . with respect to any matter related to employment.<sup>104</sup> “Political ideology” means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with job performance.<sup>105</sup>

**Madison (Wisconsin):** [Employers may not] discriminate against any individual [in employment] . . . because of [such individual’s] protected class membership . . . [including “political beliefs,” defined as “one’s opinion, manifested in speech or association, concerning the social, economic and governmental structure of society and its institutions,” “cover[ing] all political beliefs, the consideration of which is not preempted by state or federal law”].<sup>106</sup>

The Colorado and Louisiana statutes also include clauses that effectively state, “Nothing in this section shall be construed to prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this section.”<sup>107</sup> This language, borrowed from the California statute, is the language that California courts have interpreted as providing for tort liability for violations of the prohibition.<sup>108</sup> For other Colorado and Louisiana statutes that provide some protection for speech or political activity, see Part II.B and Part

103. W. VA. CODE ANN. § 3-8-11(b) (West 2012) (enacted 1915). *See also id.* § 3-9-15 (West 2012) (enacted 1937) (making it a misdemeanor for any employer or agent of an employer to make any statement to “employees, containing any threat, notice or information that if any . . . candidate is elected or defeated, work in the establishment will cease, in whole or in part, or other threats expressed or implied, intended to influence the political opinions or votes of his employees.”).

104. SEATTLE, WASH. MUN. CODE. § 14.04.040 (2011) (enacted 1973).

105. *Id.* § 14.04.030(R).

106. MADISON, WIS. MUN. CODE §§ 39.03(1), (2)(cc), (8)(c), (8)(d)(1) (2010) (enacted 1975).

107. COLO. REV. STAT. ANN. § 8-2-108 (West 2012); *see* LA. REV. STAT. ANN. § 23:961 (2011) (“Nothing herein contained shall in any way be construed to prevent the injured employee from recovering damages from the employer as a result of . . . the employer’s violations of this Section.”).

108. *Lockheed Aircraft Corp. v. Superior Court*, 171 P.2d 21, 25 (Cal. 1946).



II.L, respectively.

A 1983 Third Circuit case, *Novosel v. Nationwide Ins. Co.*,<sup>109</sup> suggested that Pennsylvania would follow a similar rule as a common-law matter: The court held that, under Pennsylvania law, private employers could not fire an employee for “political expression and association” unless the employee’s activities substantially interfere with the employee’s job.<sup>110</sup> But more recent Pennsylvania state court decisions suggest that *Novosel* is no longer good law.<sup>111</sup>

*G. Holding or Expressing Political Ideas or Beliefs—New Mexico and (to Some Extent) Montana*

New Mexico bars discrimination based on “political opinions.”<sup>112</sup> This could be read broadly, to include discrimination based on speech expressing political views, or narrowly to include only discrimination motivated by disapproval of an employee’s beliefs and to exclude discrimination motivated by worry that the employee’s speech expressing those beliefs is disruptive to the business.

**New Mexico:** [It is a felony for any employer of an employee] entitled to vote at any election, [to] directly or indirectly discharg[e] or threaten[] to discharge such employee because of the employee’s political opinions or belief[s] or because of such employee’s intention to vote or refrain from voting for any candidate, party, proposition, question, or constitutional amendment.<sup>113</sup>

[It is a felony for any employer of an employee] entitled to vote at any [municipal] election [to] directly or indirectly discharg[e] or penaliz[e] or threaten[] to discharge or penalize such employee because of the employee’s opinions or beliefs or because of such employee’s intention to vote or to refrain from voting for any candidate or for or against any question.<sup>114</sup>

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109. 721 F.2d 894, 900 (3d Cir. 1983).

110. See CONN. GEN. STAT. § 31-51q (2012) for a similar rule.

111. See *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 122–23 (3d Cir. 2003) (noting that Pennsylvania courts have not endorsed *Novosel*, and concluding that “[a]s a result, we have essentially limited *Novosel* to its facts—a firing based on forced political speech”); *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 843–44 (Pa. Super. Ct. 1986) (seemingly reaching the opposite result from *Novosel*, but not expressly discussing *Novosel*).

112. N.M. STAT. ANN. § 1-20-13 (West 2012) (enacted 1912).

113. *Id.*

114. N.M. STAT. ANN. § 3-8-78(A) (West 2012) (enacted 1912).

Montana also imposes a similar rule for government contractors, and for health care facilities (including private facilities<sup>115</sup>); the language seems broad enough to bar both discrimination against patrons and discrimination against employees or applicants for employment:

**Montana:** Every state or local contract or subcontract for construction of public buildings or for other public work or for goods or services must contain a provision that all hiring must be on the basis of merit and qualifications and a provision that there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract.<sup>116</sup>

All phases of the operation of a health care facility must be without discrimination against anyone on the basis of race, creed, religion, color, national origin, sex, age, marital status, physical or mental disability, or political ideas.<sup>117</sup>

The Montana Constitution provides that “Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas,”<sup>118</sup> but it’s not clear whether the ban on discrimination “in the exercise of . . . civil . . . rights” include discrimination in employment.<sup>119</sup>

#### H. *Supporting or Advocating for a Federal Candidate—Federal Law (Probably, in Some Circuits)*

The Civil Rights Act of 1871 may prohibit some kinds of employer retaliation based on an employee’s speech supporting or advocating for a federal candidate. Section 2 of the Act, now codified at 42 U.S.C. § 1985, provides in relevant part, that it is civilly actionable for “two or more persons” to “conspire” (and to act pursuant to the conspiracy):

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115. MONT. CODE ANN. § 50-5-101(23)(a) (2011).

116. MONT. CODE ANN. § 49-3-207 (2011) (enacted 1975).

117. MONT. CODE ANN. § 50-5-105 (2011).

118. MONT. CONST. art. 2, § 4.

119. *Compare* Foster v. Albertsons, Inc., 835 P.2d 720, 723 (Mont. 1992) (noting that the trial court had quoted the constitutional provision in the jury instructions in a private employment sex discrimination case), *with* MONT. DEPT OF LAB. & INDUS., HUMAN RIGHTS BUREAU, <http://erd.dli.mt.gov/human-rights-bureau.html> (last visited Feb. 19, 2012) (stating that Montana law bans discrimination based on political beliefs or ideas only in “governmental services and employment”).

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, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy . . . .<sup>120</sup>

In interpreting a closely analogous portion of the same statute, the Court has held that “injur[ing] any citizen in person or property” includes getting the person fired from his job,<sup>121</sup> 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].”<sup>122</sup> It thus follows that it is civilly actionable (and likely criminal<sup>123</sup>) for two or more managers to have an employee fired for supporting or advocating for the election of a federal candidate.

In several circuits, this conclusion may usually be blocked 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) who are conspiring to have the corporation perform an action, such as firing someone.<sup>124</sup> But in the Third and the Tenth Circuits,<sup>125</sup> and possibly also in the D.C., First, and Ninth Circuits,<sup>126</sup> this doctrine doesn’t apply to § 1985 claims, so

120. 42 U.S.C. § 1985(3) (2006).

121. *Haddle v. Garrison*, 525 U.S. 121, 126 (1998). The conclusion in *Gill v. Farm Bureau Life Ins. Co.*, 906 F.2d 1265, 1269 (8th Cir. 1990), that § 1985 applies only to serious violence and not just cancellation of an insurance agent’s contract by his insurance company, is thus no longer good law after *Haddle*. (Note that *Haddle*’s logic applies not just to employment contracts but to other valuable contracts as well.)

122. *Haddle*, 525 U.S. at 123.

123. 18 U.S.C. § 241(2006); see *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 275 (1993) (noting that 18 U.S.C. § 241 is “the criminal counterpart of § 1985(3)”; *Ex parte Yarbrough*, 110 U.S. 651 (1884) (discussing a prosecution under the criminal counterpart of what is now § 1985(3)); *United States v. Goldman*, 25 F. Cas. 1350 (C.C. D. La. 1878) (two-judge court) (same); *United States v. Butler*, 25 F. Cas. 213 (C.C. D. S.C. 1877) (Waite, C.J., riding circuit and writing for a two-judge court) (same).

124. *Grider v. City of Auburn*, 618 F.3d 1240, 1261–62 (11th Cir. 2010); *Hartline v. Gallo*, 546 F.3d 95, 99 n.3 (2d Cir. 2008); *Amadasu v. Christ Hosp.*, 514 F.3d 504, 507 (6th Cir. 2008); *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998); *Hartman v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 4 F.3d 465, 469–71 (7th Cir. 1993); *Richmond v. Bd. of Regents of Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992); *Buschi v. Kirven*, 775 F.2d 1240, 1252–53 (4th Cir. 1985).

125. *Breuer v. Rockwell Int’l Corp.*, 40 F.3d 1119, 1127 (10th Cir. 1994); *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1256-59 & n.121 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979).

126. *Bowie v. Maddox*, 642 F.3d 1122, 1131 (D.C. Cir. 2011) (declining to decide the question); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1181 (9th Cir. 1998) (same). I know of no case on the subject in the First Circuit.

when two or more managers conspire to get an employee fired based on his support or advocacy of a federal candidate, § 1985 offers a remedy.

Now a bit more detail. Section 1985 prohibits five different forms of conspiracies:

- (a) “to prevent, by force, intimidation, or threat, any person from accepting or holding [or exercising] any office . . . under the United States,” or “to injure him in his person or property on account of his lawful discharge of the duties of his office”;<sup>127</sup>
- (b) “to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, . . . or to injure such party or witness in his person or property on account of his having so attended or testified”;<sup>128</sup>
- (c) “[to] imped[e], hinder[], obstruct[], or defeat[] . . . the due course of justice in any State . . . , with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws”;<sup>129</sup>
- (d) “[to] depriv[e], either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws”;<sup>130</sup> or
- (e) “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, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy.”<sup>131</sup>

All these provisions apply to private actors and not just to government officials.<sup>132</sup> But, as the Court recognized in *Kush v. Rutledge*, these five kinds of conspiracy belong to two families. Provisions (c) and (d) “contain[] language requiring that the

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127. 42 U.S.C. § 1985(1) (2006).

128. 42 U.S.C. § 1985(2) (2006).

129. *Id.*

130. 42 U.S.C. § 1985(3) (2006).

131. *Id.*

132. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971).

conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws,"<sup>133</sup> and at the same time deal with activity that "is not institutionally linked to federal interests and . . . is usually of primary state concern." Because of this, the Court did not want the provisions to be read as "creat[ing] an open-ended federal tort law applicable 'to all tortious, conspiratorial interferences with the rights of others,'" and therefore required a showing of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."<sup>134</sup>

On the other hand, provisions (a), (b), and (e) do not mention "equal protection," and do not require either state action or a class-based animus. These provisions "relate to institutions and processes of the Federal Government—federal officers, [(a)]; federal judicial proceedings, [(b)]; and federal elections, [(e)]. The statutory provisions dealing with these categories of conspiratorial activity contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws."<sup>135</sup>

In *Kush*, the Court therefore expressly held that § 1985 provides a cause of action for "an alleged conspiracy to intimidate potential witnesses in a federal lawsuit," a provision (b) claim, without any state action or class-based animus.<sup>136</sup> And the Court's reasoning applies as much to provision (e) claims, which involve retaliation for supporting a federal candidate, as it does to provision (b) claims, which involve retaliation for being a witness in a federal case.

Likewise, the Court's holding in *Haddle v. Garrison*, which held that two managers conspiring to get an employee fired because he was a witness in a federal case was actionable under 42 U.S.C. § 1985, would apply equally to provision (e) and provision (b) claims. "[L]oss of at-will employment," the Court held, may be treated as "injur[ing]" a person "in his person or property," even though at-will employment isn't technically a "constitutionally protected property interest" for many purposes.<sup>137</sup>

The only court to seriously consider the argument in this subsection, the Eighth Circuit, has (twice) rejected the

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133. *Id.* at 725.

134. *Kush*, 460 U.S. at 725–26 (quoting *Griffin*, 403 U.S. at 101, 102).

135. *Id.* at 725.

136. *Id.* at 720, 726–27.

137. *Haddle v. Garrison*, 525 U.S. 121, 122–23, 125–26 (1998).

argument. The provision (e) retaliation-for-support-or-advocacy claim, the court reasoned, is limited to situations involving “State Action,” because only state action can violate a person’s First Amendment right.<sup>138</sup>

But this is a misreading of § 1985: The provision (e) “support or advocacy” claim—which covers actions “injur[ing] any citizen in person or property on account of . . . support or advocacy [toward or in favor of the election of any federal candidate]”—is not limited to violations of the First Amendment. It does not require, for instance, depriving someone of “equal privileges and immunities under the laws” (a provision (c) claim). It does not require governmental interference with “support or advocacy.”<sup>139</sup> It is justified by the federal Elections Clause power, aimed at protecting federal elections, and not by any Fourteenth Amendment Enforcement Clause power.<sup>140</sup> Nor does it extend as far as the First Amendment does: It is limited to support or advocacy of the election of federal candidates, not speech on other matters.

Rather, the provision (e) claim, like the provision (b) claim involved in *Haddle*, is a free-standing federal statutory protection against conspiracies—whether private or governmental—aimed at retaliating against a person for a certain kind of conduct. In provision (b), that conduct is being a witness in a federal case. In provision (e), that conduct is giving “support or advocacy in a legal manner” “in favor of the election” of a federal candidate. Under *Haddle*, such conspiracies to retaliate include conspiracies to get someone fired (though if the conspiracies are purely within one corporation, they may not be actionable in those circuits that adhere to the intracorporate conspiracy doctrine).

I. *Belonging to, Endorsing, or Affiliating With a Political Party—  
District of Columbia, Iowa, Louisiana, Puerto Rico, Virgin Islands,  
Broward County (Florida), Urbana (Illinois)*

These laws bar employers from discriminating against employees based on party membership. Most of them also bar

138. *Federer v. Gephardt*, 363 F.3d 754, 758–59 (8th Cir. 2004); *Gill v. Farm Bureau Life Ins. Co.*, 906 F.2d 1265, 1270–71 (8th Cir. 1990).

139. See, e.g., *Ex parte Yarbrough*, 110 U.S. 651, 655, 665–66 (1884) (stressing that what is now the “support or advocacy” clause of § 1985 is not limited “to acts done under State authority”); *United States v. Goldman*, 25 F. Cas. 1350 (C.C. D. La. 1878) (two-judge court) (applying the statute to private action); *United States v. Butler*, 25 F. Cas. 213 (C.C. D. S.C. 1877) (Waite, C.J., riding circuit and writing for a two-judge court) (same).

140. *Yarbrough*, 110 U.S. at 655, 660–62, 665–66; *Goldman*, 25 F. Cas. at 1354.

discrimination based on the party that the employees “endorse” (D.C., Broward, Urbana) or “affiliate” with (Puerto Rico, Virgin Islands), which seems to cover speech expressing support for the party.

**District of Columbia:** [No employer may discriminate against employees or prospective employees] based upon the actual or perceived . . . political affiliation [defined as “the state of belonging to or endorsing any political party”] of any individual . . .<sup>141</sup>

**Iowa:** A person commits the crime of election misconduct in the first degree if the person willfully [i]ntimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, a person . . . [t]o exercise [or not exercise] a right under chapters 39 through 53 [including declaring party affiliation, IOWA CODE ANN. §§ 43.41-.42].<sup>142</sup>

**Louisiana:** No person shall knowingly, willfully, or intentionally: [i]ntimidate . . . , directly or indirectly, any voter or prospective voter in . . . any matter concerning the voluntary affiliation or nonaffiliation of a voter with any political party.<sup>143</sup>

**Puerto Rico:** Any employer who performs any act of prejudicial discrimination against [an employee because he is] . . . affiliated with a certain political party, shall be guilty . . . of a misdemeanor . . .<sup>144</sup>

**Virgin Islands:** It shall be an unlawful discriminatory practice . . . [f]or an employer, because of . . . [the] political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.<sup>145</sup>

**Broward County (Florida):** It is a discriminatory practice for an employer: . . . [t]o fail or refuse to hire, to discharge, or to otherwise discriminate against an individual, with respect to compensation or the terms, conditions, or privileges of

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141. D.C. CODE §§ 2-1401.02(25), 2-1402.11(a) (2001) (enacted 1973); *see* *Blodgett v. Univ. Club*, 930 A.2d 210, 221–22 (D.C. 2007) (holding that § 2-1402.11(a) is indeed limited to discrimination based on political party membership, and not based on political opinions or affiliations generally).

142. IOWA CODE ANN. § 39A.2(c)(4) (West 2012) (enacted 1994). For an explanation of why this statute, which generally bans threats, likely also applies to threats of loss of employment, *see* Part II.A.8.

143. LA. REV. STAT. ANN. § 18:1461.4(A)(1) (2011) (enacted 2010).

144. P.R. LAWS ANN. tit. 29, § 140 (2011) (enacted 1942); *see* *Santiago v. People*, 154 F.2d 811, 813 (1st Cir. 1946) (applying § 140 as written).

145. V.I. CODE ANN. tit. 10, § 64-1(a) (2011) (enacted 1974).

employment, because of a discriminatory classification<sup>146</sup> [including “political affiliation,” defined as “belonging to or endorsing any political party”<sup>147</sup>] . . . [except] where these qualifications are bona fide occupational qualifications reasonably necessary to the normal operation of that particular business or enterprise.”<sup>148</sup>

**Urbana (Illinois):** It shall be an unlawful practice for an employer . . . [to discriminate against any employee or applicant] based wholly or partially on<sup>149</sup> [an employee’s belonging to or endorsing any political party or organization or taking part in any activities of a political nature<sup>150</sup>] . . . [except] where such factors are bona fide occupational qualifications necessary for such employment.<sup>151</sup>

Louisiana law also provides many employees protection against dismissal for political activities and not just for party membership.<sup>152</sup>

J. *Engaging in Electoral Activities—Illinois, New York, Washington*

New York and Washington expressly bar employers from discriminating against employees for their election-related speech and political activities.<sup>153</sup> Illinois law would likely be interpreted the same way, given the likelihood that threats of dismissal from employment would qualify as “intimidation” or “threat” (see Part II.A.8).

**Illinois:** Any person who, by force, intimidation, threat, deception or forgery, knowingly prevents any other person from (a) registering to vote, or (b) lawfully voting, supporting or opposing the nomination or election of any person for public office or any public question voted upon at any election, shall be guilty of a . . . felony<sup>154</sup> [and shall be subject to civil

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146. BROWARD COUNTY, FLA. ORDINANCE NO. 2011-19 § 16½-33(a)(1) (enacted 1978).

147. *Id.* § 16½-3(qq).

148. *Id.* § 16½-33.1(a)(3).

149. URBANA, ILL. CODE OF ORDINANCES § 12-62(a) (2011) (enacted 1975).

150. *Id.* § 12-39.

151. *Id.* § 12-62(f)(2).

152. *See supra* Part II.F.

153. *Richardson v. City of Saratoga Springs*, 246 A.D.2d 900, 902 (N.Y. App. Div. 1998); *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1127 (Wash. 1997).

154. 10 ILL. COMP. STAT. ANN. § 5/29-4 (West 2012) (enacted 1973). Use of intimidation and threats to *try* to prevent a person from speaking out on candidates or ballot measures would thus also be criminal attempt to violate the statute, even if the person refuses to be prevented from speaking. 720 ILL. COMP. STAT. ANN. § 5/8-4(a) (West 2012).



liability<sup>155</sup>].

**New York:** (1) (a) “Political activities” shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group . . . .

(2)(a) [No employer may discriminate against an employee or prospective employee because of] an individual’s [legal] political activities outside of working hours, off of the employer’s premises and without use of the employer’s equipment or other property [except when the employee is a professional journalist, or a government employee who is partly funded with federal money and thus covered by federal statutory bans on politicking by government employees] . . . .<sup>156</sup>

(3)(a) [This section shall not be deemed to protect activity which] creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest . . . .

(4) [A]n employer shall not be in violation of this section where the employer takes action based on the belief . . . that: . . . (iii) the individual’s actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.<sup>157</sup>

**Washington:** No employer . . . may discriminate against an . . . employee . . . for . . . in any way supporting or opposing [or not supporting or opposing] a candidate, ballot proposition, political party, or political committee.<sup>158</sup>

*K. Signing Initiative, Referendum, Recall, or Candidate Petitions—  
Arizona, D.C., Georgia, Iowa, Minnesota, Missouri, Ohio, Oregon,  
Washington*

These laws are narrow, but have become especially relevant given the recent debates about retaliation against people who signed anti-same-sex marriage initiative petitions. For an explanation of why the laws that ban threats and intimidation, without mentioning employment, likely apply to threats of dismissal for employment, see Part II.A.8 above.

**Arizona:** A person who . . . threatens any other person to the

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155. 10 ILL. COMP. STAT. ANN. § 5/29-17 (West 2012) (enacted 1973).

156. See *Richardson*, 246 A.D.2d at 902 (applying this to cover expressions of support for a political candidate).

157. N.Y. LAB. LAW § 201-d (McKinney 2012) (enacted 1992).

158. WASH. REV. CODE ANN. § 42.17A.495(2) (West 2012) (enacted 1993).

effect that the other person will or may be injured in his business, or discharged from employment, or that he will not be employed, to sign or subscribe, or to refrain from signing or subscribing, his name to an initiative or referendum petition [or recall] . . . is guilty of a . . . misdemeanor.<sup>159</sup>

**District of Columbia:** Any person who . . . by threats or intimidation, interferes with, or attempts to interfere with, the right of any qualified registered elector to sign or not to sign any initiative, referendum, or recall petition, or to vote for or against, or to abstain from voting on any initiative, referendum, or recall measure . . . shall be [guilty of a misdemeanor].<sup>160</sup>

**Georgia:** A person who, by menace or threat either directly or indirectly, induces or compels or attempts to induce or compel any other person to sign or subscribe or to refrain from signing or subscribing that person's name to a recall application or petition . . . shall be guilty of a misdemeanor.<sup>161</sup>

**Iowa:** A person commits the crime of election misconduct in the first degree if the person willfully . . . [i]ntimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, a person . . . [t]o sign [or refrain from signing] a petition nominating a candidate for public office or a petition requesting an election for which a petition may legally be submitted.<sup>162</sup>

**Louisiana:** No person shall knowingly, willfully, or intentionally . . . [i]ntimidate . . . directly or indirectly, any voter or prospective voter in matters concerning voting or nonvoting or voter registration or nonregistration, or the signing or not signing of a petition, including but not limited to any matter concerning the voluntary affiliation or nonaffiliation of a voter with any political party.<sup>163</sup>

**Minnesota:** A person may not use threat, intimidation, coercion, or other corrupt means to interfere or attempt to interfere with the right of any eligible voter to sign or not to sign a recall petition of their own free will.<sup>164</sup>

**Missouri:** [It shall be a misdemeanor o]n the part of any employer [to] mak[e], enforc[e], or attempt[] to enforce any order, rule, or regulation or adopt[] any other device or

159. ARIZ. REV. STAT. ANN. §§ 19-116, -206 (2012) (enacted 1970 and 1973 respectively).

160. D.C. CODE § 1-1001.14(b)(3) (2012) (enacted 1978).

161. GA. CODE ANN. § 21-4-20(b) (West 2011) (enacted 1979).

162. IOWA CODE ANN. § 39A.2 (West 2012) (enacted 1994).

163. LA. REV. STAT. ANN. § 18:1461.4(A)(1) (2011) (enacted 2010).

164. MINN. STAT. ANN. § 211C.09 (West 2012) (enacted 1996).

method to prevent an employee from . . . signing, or subscribing his name to any initiative, referendum, or recall petition, or any other petition circulated pursuant to law . . .<sup>165</sup>

**Ohio:** No person shall, directly or indirectly, by intimidation or threats, influence or seek to influence any person to sign or abstain from signing, or to solicit signatures to or abstain from soliciting signatures to an initiative or referendum petition.<sup>166</sup>

**Oregon:** [No person may] directly or indirectly subject any person to undue influence [defined to include “loss of employment or other loss or the threat of it”] with the intent to induce any person to . . . [s]ign or refrain from signing a prospective petition or an initiative, referendum, recall or candidate nominating petition.<sup>167</sup>

**Washington:** Every person is guilty of a gross misdemeanor who . . . [i]nterferes with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum [or recall] petition or with the right to vote for or against an initiative or referendum measure [or recall] by threats, intimidation, or any other corrupt means or practice . . .<sup>168</sup>

#### L. *Giving Campaign Contributions—Louisiana, Massachusetts, and Oregon*

These statutes are limited to discrimination based on making a contribution. (More states ban discrimination based on a refusal to make a contribution.<sup>169</sup>)

**Louisiana:** No person based on an individual’s contribution, promise to make a contribution, or failure to make a contribution to influence the nomination or election of a person to [any political office] shall directly or indirectly affect an individual’s employment by means of [discrimination in favor or against the person in employment, or threat of such discrimination].<sup>170</sup>

**Massachusetts:** No person shall, by threatening to [discriminate against or in favor of an employee] . . . attempt

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165. MO. ANN. STAT. § 115.637(6) (West 2012) (enacted 1939).

166. OHIO REV. CODE ANN. § 731.40 (West 2011) (based on statute originally enacted in 1929); *see also id.* § 305.41 (same, though limited to referenda).

167. OR. REV. STAT. ANN. §§ 260.665(1)–(2) (West 2012) (enacted 2009).

168. WASH. REV. CODE §§ 29A.84.250(4), .220(5) (2012) (enacted 1913).

169. *See infra* note 197.

170. LA. REV. STAT. §§ 18:1461.1(A)(2) (federal offices), :1483, :1505.2 (other offices) (2011) (enacted 1997).

to influence a voter to give or to withhold his vote or political contribution. No person shall, because of the giving or withholding of a vote or a political contribution, [discriminate against or in favor of an employee].<sup>171</sup>

**Oregon:** [No person may] directly or indirectly subject any person to undue influence [defined to include loss of employment or other loss or the threat of it] with the intent to induce any person to . . . [c]ontribute or refrain from contributing to any candidate, political party or political committee.<sup>172</sup>

Louisiana also has a more general protection for political activity, discussed in Part II.F, which would likely include campaign contributions.

*M. Exercising the “Elective Franchise” or “Suffrage,” Which Might Include Signing Referendum or Initiative Petitions—Hawaii, Idaho, Kentucky, Tennessee, West Virginia, Wyoming, and Guam*

Some jurisdictions ban retaliation or threat of retaliation related to the “free exercise of the elective franchise” or to “suffrage.” This might just mean with regard to voting,<sup>173</sup> a prohibition that would rarely be triggered because voting is now generally secret.

But it could also be read as extending to the signing of referendum or initiative petitions, and perhaps to other forms of political activity. Thus, for instance, the Wyoming Supreme Court has described—albeit in a slightly different context—the signing of initiative and referendum petitions as “relat[ing] to the elective franchise.”<sup>174</sup> Maryland’s highest court likewise concluded that “the right to have one’s signature counted on a nominating petition [for a candidate] is integral to that political

171. MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2012) (enacted 1994).

172. OR. REV. STAT. ANN. §§ 260.665(1)–(2) (West 2012) (enacted 1971).

173. See, e.g., BLACK’S LAW DICTIONARY 1571 (9th ed. 2009) (defining “suffrage” as “[t]he right or privilege of casting a vote at a public election”); see also *Guveiyian v. Keefe*, No. 97-CV-5210, 1998 WL 273015, at \*3 (E.D.N.Y. Jan. 12, 1998) (concluding that “suffrage” is limited to the “privilege of voting,” and does not include “the right to support, approve and campaign on behalf of political candidates and to participate in the election of candidates to political office”).

174. *Thomson v. Wyo. In-Stream Flow Comm.*, 651 P.2d 778, 790 (Wyo. 1982) (concluding that the state constitutional provision that “[t]he legislature shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise” authorizes the legislature to require that initiative and referendum petitions be signed by “qualified registered voters” and not just qualified voters, because “[i]nitiative and referendum relates to the elective franchise”).

party member's right of suffrage[.]”<sup>175</sup> which suggests that signing a referendum petition is also included within the right of suffrage. An Oregon Attorney General's opinion took the same view as to the signing of recall petitions,<sup>176</sup> as did an Ohio court decision (though with regard to the phrase “exercising [the] elective franchise”).<sup>177</sup>

The Idaho Supreme Court concluded that “[t]he right of citizens to organize, and give expression and effect to their political aspirations through political parties is inherent in, and a part of, the right of suffrage.”<sup>178</sup> The Nebraska Supreme Court held that “the right of persons to combine according to their political beliefs and to possess and freely use all the machinery for increasing the power of numbers by acting as a unit to effect a desired political end” is “[i]nherent[.]” in the right to “exercise of the elective franchise.”<sup>179</sup> And several cases have generally endorsed the proposition that “[t]he right of suffrage includes the right to form political parties.”<sup>180</sup>

For an explanation of why the statutes that generally ban threats also likely apply to threats of loss of employment, see Part II.A.8.

**Hawaii:** Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction, distress, or any device or contrivance impedes, prevents, or otherwise

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175. *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 228 (Md. 2003); *see also* *Nader for President 2004 v. Md. State Bd. of Elections*, 926 A.2d 199, 211 (Md. 2007) (following *Md. Green Party*).

176. 24 Or. Op. Att’y Gen. 313 (1949) (treating “sign[ing] a recall petition” as “merely exercising [one’s] constitutional right of suffrage”).

177. *State ex rel. Barrett v. Leonard*, 6 Ohio Supp. 345, 347 (1941) (“Now, what is meant by the expression ‘exercising his elective franchise’? One of the ways in which a person may exercise his elective franchise is to sign nominating petitions.”).

178. *Am. Indep. Party in Idaho, Inc. v. Cenarrusa*, 442 P.2d 766, 768 (Idaho 1968).

179. *State ex rel. Baldwin v. Strain*, 42 N.W.2d 796, 799 (Neb. 1950).

180. *Hoskins v. Howard*, 59 So. 2d 263, 270 (Miss. 1952); *Cooper v. Cartwright*, 195 P.2d 290, 293 (Okla. 1948); *Ex parte Wilson*, 125 P. 739, 740 (Okla. Crim. App. 1912); *State ex rel. McGrael v. Phelps*, 128 N.W. 1041, 1041 (Wis. 1910) (syllabus by the Court); *see also* *State ex rel. Ekern v. Dammann*, 254 N.W. 759, 761 (Wis. 1934) (quoting *McGrael*, 182 N.W. at 1041).

interferes with the free exercise of the elective franchise [shall be deemed guilty of a crime].<sup>181</sup>

**Idaho:** Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever, to awe, restrain, hinder or disturb any elector in the free exercise of the right of suffrage . . . is guilty of a misdemeanor.<sup>182</sup>

**Kentucky:** No person shall coerce or direct any employee to vote for any political party or candidate for nomination or election to any office in this state, or threaten to discharge any employee if he votes for any candidate, or discharge any employee on account of his exercise of suffrage . . . .<sup>183</sup>

**Pennsylvania:** Any person or corporation who, directly or indirectly . . . by abduction, duress or coercion, or any forcible or fraudulent device or contrivance, whatever, impedes, prevents, or otherwise interferes with the free exercise of the elective franchise by any voter, or compels, induces, or prevails upon any voter to give or refrain from giving his vote for or against any particular person at any election . . . shall be guilty of a misdemeanor . . . .<sup>184</sup>

**Tennessee:** It is unlawful to discharge any employee on account of such employee's exercise or failure to exercise the suffrage, or to give out or circulate any statement or report calculated to intimidate or coerce any employee to vote or not to vote for any candidate or measure.<sup>185</sup>

**West Virginia:** Any person who shall, directly or indirectly, by himself, or by any other person on his behalf, make use of, or threaten to make use of, any force, violence or restraint, or inflict, or threaten to inflict, any damage, harm or loss, upon or against any person, or by any other means attempt to intimidate or exert any undue influence, in order to induce such person to vote or refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who shall, by abduction, duress or any fraudulent device or contrivance, impede or prevent the free exercise of

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181. HAW. REV. STAT. § 19-3 (West 2011) (first enacted before the annexation of Hawaii, in 1894).

182. IDAHO CODE ANN. § 18-2305 (West 2012) (enacted 1972).

183. KY. REV. STAT. ANN. § 121.310(1) (West 2011) (enacted 1942) (based on statute originally enacted 1900). A different portion of this section was held unconstitutional by *Ky. Registry of Election Fin. v. Blevins*, 57 S.W.3d 289 (Ky. 2001), but that decision did not discuss the portion quoted in the text.

184. 25 PA. CONS. STAT. ANN. § 3547 (West 2012) (enacted 1937).

185. TENN. CODE ANN. § 2-19-134(b) (West 2012) (enacted 1972).

the suffrage by any elector, or shall thereby compel, induce or prevail upon any elector either to vote or refrain from voting for or against any particular candidate or measure . . . [i]s guilty of a misdemeanor.<sup>186</sup>

**Wyoming:** [Criminal intimidation] consists of [i]nducing, or attempting to induce, fear in an . . . elector by use of threats of force, violence, harm or loss, or any form of economic retaliation, for the purpose of impeding or preventing the free exercise of the elective franchise . . . .<sup>187</sup>

**Guam:** Every person is guilty of a felony who, by force, threats, menace, bribery or any corrupt means, either directly or indirectly, attempts to influence any voter in giving his vote, or to deter him from giving it, or attempts by any means whatever to threaten, restrain, hinder, or disturb any voter in the exercise of the right of suffrage.<sup>188</sup>

### III. FEDERAL LIMITS ON THESE STATUTES

Some federal rules may allow some employers to limit employees' speech or political activities, notwithstanding contrary state statutes.

A. Unions have the federal statutory right to fire union employees who openly disagree with the union's political activities.<sup>189</sup>

B. State law claims for firing caused by union-related political activity are preempted by federal labor law.<sup>190</sup>

C. Newspapers may have the First Amendment right to bar their reporters from engaging in any political activity.<sup>191</sup> Likewise, other organizations that create speech products may be free to refuse to include speakers whose outside speech

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186. W. VA. CODE ANN. § 3-8-11 (West 2012) (enacted 1995).

187. WYO. STAT. ANN. § 22-26-111 (West 2011) (enacted 1973).

188. 3 GUAM CODE ANN. § 14107 (2012).

189. *Hubins v. Operating Engineers Local Union No. 3*, 2004 WL 2203555, at \*8 (N.D. Cal. Sept. 29, 2004); *Thunderburk v. United Food & Commercial Workers' Union*, 92 Cal. App. 4th 1332, 1343-46 (2001).

190. *Bimler v. Stop & Shop Supermarket Co.*, 965 F.Supp. 292, 298-99 (D. Conn. 1997); *Rodriguez v. Yellow Cab Coop., Inc.*, 206 Cal. App. 3d 668, 673-80 (1988); *Henry v. Intercontinental Radio, Inc.*, 155 Cal. App. 3d 707, 713-15 (1984).

191. *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1127 (Wash. 1997); *see also Cotto v. United Techs. Corp.*, 738 A.2d 623, 627 n.5 (Conn. 1999) (acknowledging that in some circumstances, the statute "may conflict with the employer's own free expression rights"). *But see Ali v. L.A. Focus Publ'n*, 112 Cal. App. 4th 1477, 1488 (2003) (rejecting the claim that a newspaper "has the unfettered right to terminate an employee for any [outside-the-newspaper] speech or conduct that is inconsistent with the newspaper's editorial policies.").

undermines the organization's message.<sup>192</sup>

#### IV. OTHER KINDS OF PROTECTIONS

I list here some narrower protections, which I thought were too narrow to discuss in detail:

A. Illinois and Michigan bar employers from “gather[ing] or keep[ing] a record of an employee’s associations, political activities, publications, communications or nonemployment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information.” An exception exists for “activities that occur on the employer’s premises or during the employee’s working hours with that employer which interfere with the performance of the employee’s duties or the duties of other employees or activities, regardless of when and where occurring, which constitute criminal conduct or may reasonably be expected to harm the employer’s property, operations or business, or could by the employee’s action cause the employer financial liability.”<sup>193</sup>

B. Illinois, Montana, Nevada, North Carolina, and Wisconsin ban employers from restricting employees’ off-duty use of lawful products,<sup>194</sup> a category that is broad enough to cover blogging software, Twitter, political signs, and other products used to speak. But even if the statutes apply to such products, they likely apply only in situations where the employer punishes an employee for (say) blogging as such, and not the much more common situations where an employer punishes an employee for communicating—through whatever medium—certain messages that the employer disapproves of.<sup>195</sup>

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192. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 892, 904–06 (1st Cir. 1988) (suggesting that symphony might well have a First Amendment right to refuse to let plaintiff narrate a performance, even if the reason for the refusal stemmed from plaintiff’s past speech and would therefore presumptively violate the Massachusetts Civil Rights Act); *Gombossy v. Hartford Courant Co.*, 2010 WL 3025512, \*4 (Conn. Super. Ct. June 29, 2010) (concluding that the First Amendment allowed a newspaper to fire someone based on his past articles for the newspaper); *Epworth v. Journal Register Co.*, 12 Conn. L. Rptr. 585 (1994) (likewise).

193. 820 ILL. COMP. STAT. ANN. 40/9 (West 2012); see MICH. COMP. LAWS ANN. § 423.508(8) (West 2012) (containing substantially similar language).

194. 820 ILL. COMP. STAT. ANN. 55/5 (West 2012); MONT. CODE ANN. §§ 39-2-313(2), -313(3) (2011); NEV. REV. STAT. ANN. § 613.333(1)(b) (West 2011); N.C. GEN. STAT. ANN. § 95-28.2(b) (West 2011); WIS. STAT. ANN. §§ 111.321, 111.35(2) (West 2011).

195. *McGillen v. Plum Creek Timber Co.*, 964 P.2d 18, 23–24 (Mont. 1998), held that placing a fictitious newspaper ad as a prank was not covered, but was ambiguous as to the reason. The Montana Supreme Court wrote that the lower court “noted that ‘lawful product,’ as defined in § 39-2-313, MCA, means a product that is legally consumed, and includes food, beverages, and tobacco,” and “found that the placing of a newspaper ad



C. New Jersey, Oregon, Wisconsin, and the Virgin Islands bar employers from “requir[ing] . . . employees to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer’s opinion about religious or political matters.” These statutes generally define “political matters” to “include political party affiliation and decisions to join or not join or participate in any lawful political, social, or community organization or activity.”<sup>196</sup>

D. Several states bar employers from discriminating against employees who refuse to give campaign contributions.<sup>197</sup>

E. Some states bar employers from retaliating against employees for becoming political candidates or officeholders, or for their votes as elected or appointed officials.<sup>198</sup>

F. Sixteen states bar written threats that are displayed in the workplace—but not oral or individualized threats—that are “intended or calculated to influence the political opinions or actions of his employees.” Often, these statutes expressly cover

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did not fall within the definition.” The Supreme Court also “agree[d] with the District Court that it could not rule as a matter of law that . . . placing a fictitious ad in his supervisor’s name was a legitimate use of a lawful product that would preclude [the employer] from firing him. The purpose of § 39-2-903(5), MCA, is to protect an employee from discharge for the use of a legal product, such as alcohol or tobacco, off the employer’s premises.”

It is not clear, though, whether the matter would be different when the conduct involves “us[ing]” (the Montana statute says “consumed, used, or enjoyed” [emphasis added]) a blogging software product, rather than just submitting an ad to a newspaper, which does not involve the use of such a product. Nor is it clear whether the matter would be different if the conduct did not involve a falsehood, and was thus more likely to be seen as “a legitimate use” of the blogging software product.

196. N.J. STAT. ANN. §§ 34:19-9 to -11 (West 2012); OR. REV. STAT. ANN. § 659.785 (West 2012); V.I. CODE ANN. tit.24, § 620 (2010); WIS. STAT. ANN. §§ 111.32, 111.321 (West 2011).

197. ALA. CODE §§ 10A-21-1.01(b)(1), -(b)(3), 17-5-17 (2012); IDAHO CODE ANN. § 67-6605 (West 2012); LA. REV. STAT. ANN. §§ 18:1461.1(A)(2), :1483, :1505.2 (2011); MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2012); MO. ANN. STAT. §§ 130.028.1(2)–(3) (West 1997); N.H. REV. STAT. ANN. § 664:4-a(II) (2012); S.C. CODE ANN. § 8-13-1332(2) (2011); TEX. ELEC. CODE ANN. § 253.102 (West 2011); WASH. REV. CODE ANN. § 42.17A.495(2)(a) (West 2011); WIS. STAT. ANN. § 12.07(4) (West 2011); WYO. STAT. ANN. § 22-26-111(a)(ii) (West 2011); *see also* KY. REV. STAT. ANN. § 121.045 (West 2011) (prohibiting employees from accepting employment with the understanding that they will contribute to candidates); N.C. GEN. STAT. ANN. § 163-278.19(b) (West 2011) (same as Virginia, as to corporate segregated funds); VA. CODE ANN. § 24.2-949.1 (West 2011) (prohibiting political action committees from contributing of spending money received through the threat of job discrimination).

198. CONN. GEN. STAT. ANN. § 2-3a (West 2012); N.D. CENT. CODE ANN. § 12.1-14-02 (West 2011); OR. REV. STAT. ANN. § 260.665(2) (West 2012); WYO. STAT. ANN. §§ 22-26-116, -118 (West 2011); *see also* Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. Ct. App. 1985) (adopting this as a common law rule).

statements such as “If Candidate X is elected, we will close this plant,” but they also seem to cover threats that people who engage in certain “political . . . actions” will be fired. Some of these states limit the prohibition to statements within 90 days before an election.<sup>199</sup>

G. As the Introduction mentioned, many states ban employers from discriminating against employees based on the employees’ votes, or threatening such discrimination.<sup>200</sup> North Carolina goes so far as to bar “discharg[ing] or threaten[ing] to discharge from employment . . . any legally qualified voter on account of any vote such voter may cast or consider or intend to cast,”<sup>201</sup> which might extend to discrimination for expressing support for a candidate.

H. Many states have statutes that protect employees from retaliation for complaints to government officials about illegal conduct.<sup>202</sup>

## V. CONCLUSION

I leave to others the evaluation of whether the laws I described above are wise—and, if so, which of the many models cataloged in this Article should be followed by other states. For now, I have simply tried to provide a listing of the various options that have so far been implemented, and a brief summary of what some of their ambiguous terms might mean.

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199. ARIZ. REV. STAT. ANN. § 16-1012 (West 2012); CAL. ELEC. CODE § 18542 (West 2012); COLO. REV. STAT. ANN. § 1-13-719 (West 2012); IND. CODE ANN. § 3-14-3-21 (West 2012); MD. CODE ANN., ELEC. LAW § 13-602(a)(8) (West 2011); MONT. CODE ANN. §§ 13-35-226(1)–(2) (2011); N.J. STAT. ANN. § 19:34-30 (West 2011); N.Y. ELEC. LAW § 17-150 (McKinney 2011); OHIO REV. CODE ANN. § 3599.05 (West 2011); 25 PA. CONS. STAT. ANN. § 3547 (West 2011); R.I. GEN. LAWS ANN. § 17-23-6 (West 2011); S.D. CODIFIED LAWS § 12-26-13 (2011); TENN. CODE ANN. § 2-19-135 (West 2011); UTAH CODE ANN. § 20A-3-502 (West 2011); W. VA. CODE ANN. § 3-9-15 (West 2011); WIS. STAT. ANN. § 12.07 (West 2011).

200. See, e.g., ALA. CODE § 17-17-44 (2012); FLA. STAT. ANN. § 104.081 (West 2012); IDAHO CODE ANN. § 18-2319 (2012); MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2011); MICH. COMP. LAWS § 168.931 (2012); MINN. STAT. § 211B.07 (2012); MISS. CODE ANN. § 97-13-37 (West 2011); TENN. CODE ANN. § 2-19-134 (West 2012); TEX. ELEC. CODE ANN. § 276.001(a)(2) (West 2012); *Vulcan Last Co. v. State*, 217 N.W. 412 (Minn. 1928).

201. N.C. GEN. STAT. ANN. § 163-274(a)(6) (West 2011).

202. See Claudia G. Catalano, Annotation, *What Constitutes Activity of Private-Sector Employee Protected Under State Whistleblower Protection Statute Covering Employee’s “Report,” “Disclosure,” “Notification,” or the Like of Wrongdoing—Nature of Activity Reported*, 36 A.L.R. 6TH 203 (2008).