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INTRODUCTION

Consider that you are the owner of a popular hot dog eatery in Berkeley, California. One day in early August, after a long day of sausage sales, you return home and turn on the news, only to see the face of one of your employees participating in a white supremacist rally in Charlottesville, Virginia.¹ The next day, a popular Twitter account releases a photo of your employee, mentioning your restaurant, and calling on you to terminate the employee. You find yourself in a tough position. On one hand, you are in charge of a private entity (the hot dog restaurant), with a reputation and legitimate business interests that could suffer due to your continued employment of a known neo-Nazi. On the other hand, you are a steadfast supporter of free speech, and have serious doubts about allowing a Twitter account to dictate your employee's right to assert his or her sociopolitical views off the clock, while maintaining a job. After all, you know that if you were a government agency, firing this employee would probably be a violation of his or her First Amendment rights.² So what are private employers to do?

¹ This hypothetical is inspired by the effects of a Twitter account that became widely known for tweeting photos of people who attended the "Unite the Right" rally or Charlottesville rally in Charlottesville, Virginia. The Twitter account ultimately gained traction and led to the firing or resignation (this context is disputed) of a rally attendee named Cole White from Top Dog Restaurant in Berkeley, California. See James Wilkinson & Hannah Parry, *White Nationalist is 'Fired from his Job' as Twitter Names and Shames Far-Right Thugs at 'Unite the Right' Charlottesville Rally that Led to Protester's Death*, DAILY MAIL (Aug. 14, 2017, 2:21 AM EDT), <http://www.dailymail.co.uk/news/article-4786826/Nationalist-FIRED-Twitter-names-shames-protesters.html> [<https://perma.cc/MH2K-VYRZ>]; Veronica Rocha, *Cole White, Man Photographed at White Supremacist Rally, Is Out of a Job at Berkeley Hot Dog Eatery*, L. A. TIMES (Aug. 14, 2017, 3:45 PM), <http://www.latimes.com/local/lanow/la-me-ln-cole-white-berkeley-top-dog-job-20170814-story.html> [<https://perma.cc/3A2K-3AAA>]; @YesYoureRacist, TWITTER (Aug. 12, 2017, 1:28 PM), <https://twitter.com/YesYoureRacist/status/896423173914230784> [<https://perma.cc/3ZYX-BBZB>]; see also *infra* Section III.B.

² Steven J. Mulroy & Amy H. Moorman, *Raising the Floor of Company Conduct: Deriving Public Policy from the Constitution in an Employment-at-Will Arena*, 41 FLA. ST. U. L. REV. 945, 945 (2014); see also *Rutan v. Republican Party of Ill.*, 497 U.S.

The First Amendment's free speech provision applies only against government employers, and not against nongovernmental, or private, employers.³ While the Supreme Court has laid out the limits to political free speech for government employees,⁴ there is no such federal standard for the political speech of private employees.⁵ The actions taken by private employers are still subject to certain federal statutes, namely bans on discrimination based on race, sex, national origin, and others.⁶ In this regard, the federal government prohibits private employers from firing or retaliating against employees based on their membership in certain protected classes.⁷ Federal law does not, however, ban private employers from discriminating against employees on the basis of their political affiliation.⁸ Instead, the risk of private employees being fired or retaliated against based on their political views or activities is dependent on the statutory or common law of the state in which they are employed.⁹

A substantial minority of states have statutes that generally protect private employees from discrimination based on their political views.¹⁰ These prohibitive statutes vary greatly in language and application. For example, in California, employers are banned from discriminating based on "political activity," which includes "ideological advocacy generally and not just election-related [activities]."¹¹ This statute is similar to ones enacted in other states, including in West Virginia and South

62, 75 (1990) (holding that "[p]romotions, transfers, and recalls . . . based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees").

³ U.S. CONST. amend. I; Eugene Volokh, *Can Private Employers Fire Employees for Going to a White Supremacist Rally?*, WASH. POST: VOLOKH CONSPIRACY OPINION (Aug. 16, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/16/can-private-employers-fire-employees-for-going-to-a-white-supremacist-rally/?utm_term=.a33081c522f9 [https://perma.cc/EW59-9ENH] [hereinafter Volokh, *White Supremacist Rally*].

⁴ See, e.g. *Rutan*, 497 U.S. at 62; see also *Branti v. Finkel*, 445 U.S. 507, 517–19 (1980) (holding that public employment cannot be conditioned on an employee's political beliefs, except in certain circumstances where the "private political beliefs would interfere with the discharge of [the employee's] public duties").

⁵ Volokh, *White Supremacist Rally*, *supra* note 3.

⁶ *Id.*; see also e.g., Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (2012)).

⁷ See 42 U.S.C. § 2000e-2(a).

⁸ Volokh, *White Supremacist Rally*, *supra* note 3.

⁹ See Mark T. Carroll, Note, *Protecting Private Employees' Freedom of Political Speech*, 18 HARV. J. ON LEGIS. 35, 41 (1981); see also CAL. LAB. CODE § 1101 (West 2018).

¹⁰ Eugene Volokh, *Private Employee's Speech and Political Activity: Statutory Protection against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012) [hereinafter Volokh, *Statutory Protections*]; see also Mulroy & Moorman, *supra* note 2, at 986.

¹¹ Volokh, *White Supremacist Rally*, *supra* note 3; see also CAL. LAB. CODE § 1101 (West 2018).

Carolina.¹² In New York, on the other hand, employers are banned from firing employees based on “recreational activities” as well as “political activities.”¹³ Although most employment within the United States is “at-will,”¹⁴ statutes such as the ones in California, West Virginia, South Carolina, New York, as well as other states, have been put in place to prevent private employees from being fired based on political activity.¹⁵

These state statutes are especially relevant in recent times, as political and ideological activities are increasingly public.¹⁶ In the aftermath of the white nationalist march in Charlottesville, Virginia, civil rights advocates have taken to social media to spread photos and information about rally participants.¹⁷ In some cases, social media posts about participants’ information and employers have been revealed, leading to white nationalists being fired from their places of employment.¹⁸ When answering the question, “[c]an private employers fire employees for going to a white supremacist rally?”, Eugene Volokh of the Volokh Conspiracy says that it “depend[s] on the state [in which] the employee is employed.”¹⁹

This issue is also exemplified in the recent situation where Google fired a male software engineer, James Damore,

¹² See Volokh, *White Supremacist Rally*, *supra* note 3; see also W. VA. CODE ANN. § 3-8-11(b) (West 2018) (enacted 1915) (making it a misdemeanor for any employer or 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 view[s] or actions of the . . . employees”); S.C. CODE ANN. § 16-17-560 (2011) (enacted 1950) (making it “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”).

¹³ Volokh, *White Supremacist Rally*, *supra* note 3; N.Y. LAB. LAW § 201-d (McKinney 2018) (enacted 1992) (defining “recreational activities” as “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”).

¹⁴ Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 224–28 (2017) (“The at-will rule creates a presumption that the employee can be terminated without cause—or, as many courts have framed it, ‘for any reason, or no reason at all.’” (footnote omitted)); see also Section I.A.

¹⁵ Volokh, *White Supremacist Rally*, *supra* note 3.

¹⁶ See Bodie, *supra* note 14, at 266.

¹⁷ Stacey Rose Harris & Noor Chughtai, *Impact of the Charlottesville Protests on Virginia Employers*, 29 No. 8 VA. EMP. L. LETTER 1 (2017).

¹⁸ See Aaron Aupperlee, *Western Pa. Company Fires Man Who Attended Charlottesville Rally*, TRIB LIVE (Aug. 28, 2017, 5:33 PM), <http://triblive.com/local/allegheeny/12670026-74/western-pa-company-fires-man-who-attended-charlottesville-rally> [<https://perma.cc/L32A-SE44>].

¹⁹ Volokh, *White Supremacist Rally*, *supra* note 3. The Volokh Conspiracy is a part of the Washington Post, and is a blog written by law professors and legal scholars on various issues of law and public policy. Eugene Volokh, *Editorial Independence*, WASH. POST:VOLOKH CONSPIRACY (Jan. 14, 2014) https://www.washingtonpost.com/news/volokh-conspiracy/about/?utm_term=.7fd542199463 [<https://perma.cc/929W-Q7HM>].

who posted a memo challenging some of Google's diversity efforts, "such as mentoring programs open only to people of a certain race or gender."²⁰ The memo contained provocative statements about differences between men and women, citing studies that women are more prone to neuroticism, and that women on average show "a [higher] interest in people rather than [in] things," while men are the opposite.²¹ The memo challenges the design and focus of Google's diversity initiatives and calls on Google to recognize inherent differences between populations.²² Damore denounces Google's "politically correct monoculture."²³ Damore has hired civil rights attorney, Harmeet Dhillon, regarding a pending lawsuit against Google,²⁴ and Dhillon's website calls for employees to speak out about Google's "discriminat[ing] against employees on the basis of their political views."²⁵ Because California is a state in which employers are banned from punishing employees based on political speech,²⁶ could Google face liability for firing Damore?²⁷ These examples emphasize the need to create a uniform regulation across states; a regulation that has legitimacy and accountability sufficient to protect private employees' freedom of political speech against their employer's discrimination.

²⁰ Dan Eaton, *Why it May Be Illegal for Google to Punish that Engineer Over His Now Viral Anti-Diversity Memo*, CNBC (Aug. 7, 2017, 4:01 PM), <https://www.cnbc.com/2017/08/07/it-may-be-illegal-for-google-to-punish-engineer-over-anti-diversity-memo-commentary.html> [<https://perma.cc/PD3C-C2QW>]; see also Matt Young, *Republican Lawyer Harmeet Dhillon Hired by Google Engineer James Damore to Fight Discrimination Case*, NEWS.COM.AU (Aug. 30, 2017, 1:02 PM), <http://www.news.com.au/technology/online/censorship/republican-lawyer-harmeet-dhillon-hired-by-google-engineer-james-damore-to-fight-discrimination-case/news-story/dceaebf1172d097cd954b602e1da206d> [<https://perma.cc/DFJ8-MZAP>].

²¹ Eaton, *supra* note 20; see also Kate Conger, *Exclusive: Here's The Full 10-Page Anti-Diversity Screeed Circulating Internally at Google*, GIZMODO (Aug. 6, 2017, 8:00 AM), <https://www.gizmodo.com.au/2017/08/exclusive-heres-the-full-10-page-anti-diversity-screed-circulating-internally-at-google/> [<https://perma.cc/7TK3-VPMT>].

²² See Eaton, *supra* note 20.

²³ Young, *supra* note 20.

²⁴ Julia Carrie Wong, *James Damore Sues Google, Alleging Intolerance of White Male Conservatives*, GUARDIAN (Jan. 8, 2018, 18:10 EST), <https://www.theguardian.com/technology/2018/jan/08/james-damore-sues-google-discrimination-white-male-conservatives> [<https://perma.cc/F5UP-PAGL>] ("The lawsuit claims that numerous Google managers maintained 'blacklists' of conservative employees with whom they refused to work . . . and that Google's firing[] of Damore . . . [was] discriminatory."); see also Young, *supra* note 20.

²⁵ *Have You Experienced Illegal Employment Practices at Google?*, DHILLON LAW GROUP, (Aug. 22, 2017) <https://www.dhillonlaw.com/blog/news/have-you-experienced-illegal-employment-practices-at-google/> [<https://perma.cc/8XTY-F6H2>] (asking that any Google employee who has been discriminated against for their political views or has "[b]een written up for 'un-Googly' conduct" come forward and join Damore's litigation).

²⁶ CAL. LAB. CODE § 1102 (West 2018) ("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.").

²⁷ See Eaton, *supra* note 20.

This note will therefore call for greater consistency among states regarding private employers' and employees' speech, which will take the form of a federal statute to be passed under Congress's commerce powers.²⁸ In Part I, this note examines federal and various state statutes that protect private employees' political speech, as well as consider practical problems with the statutes' scope and interpretation. Next, Part II of this note addresses arguments on both sides of the political speech debate. On one hand, the expansion of political speech protections for employees may put at risk private employers' legitimate interests in choosing what type of person to employ. Alternatively, deeply rooted democratic values may provide reasons to expand protections. Part III of this note considers two modern case studies that reflect the contentious aspects of this debate. Finally, Part IV considers some alternatives, and ultimately advocates for a federal statute that can be passed under Congress's regulatory interstate commerce powers. The statute will explicitly lay out the type of political speech that is protected, will allow employees to take civil action against discriminatory employers, and will also balance competing interests by containing exceptions and defenses available to certain employers.

I. STATUTORY PROTECTION OF PRIVATE EMPLOYEES' POLITICAL SPEECH

A. *The Trouble with "At-Will" Employment*

After considering the difficulties of a private employer who is being affected by the undesirable political views of an employee, now place yourself in the position of an employee, who is being affected by the political views of his or her private employer.²⁹ For example, think of an employer that mandates all employees to support a certain candidate by attending rallies and signing petitions in support.³⁰ If an employee did not want to perform these political activities, and in turn lost his or her job, what remedies could this employee seek? Again, "if the employer [here] were a government agency," the answer would be that the employer has "violate[d] the employees' free speech rights under the First Amendment."³¹ If the employer were a private entity, but in a state with statutory protections for employees' freedom of political speech, the law would afford the

²⁸ See U.S. CONST. art. I, § 8, cl. 3.

²⁹ See Mulroy & Moorman, *supra* note 2, at 945.

³⁰ *Id.*

³¹ *Id.*

employee some remedy.³² In most states, however, the private employee would be out of luck.³³

For over a century, the prevailing rule has been that private sector employment is “at-will,”³⁴ simply meaning that, unless a statute or contract provides otherwise, an employment relationship “can be terminated at any time for any reason.”³⁵ This can be thought of as a “mutuality of obligation,” since an employee retains the ability to quit at any point, and an employer is able to discharge at any point.³⁶ In the past, unions protected private employees from “speech-related terminations” by negotiating contracts that laid out specific, performance-related termination requirements.³⁷ Now that union membership has declined and “the vast majority of . . . workers . . . are ‘employ[ed] at-will,’” private employees have been left largely unprotected from speech-related firings.³⁸

As a common law rule, courts do not often stray from the rigidity of at-will employment.³⁹ Although courts have sometimes upheld suits by employees on the ground of public policy, it is more typical that courts refuse to recognize limits to the rule.⁴⁰ For example,

an employee who claimed he was discharged because he would neither vote for certain candidates in a city election nor coerce his family to do so was told by an appellate court that he was not entitled to damages even though the jury below had found he was wrongfully discharged.⁴¹

Courts often “rely on [the] lack of mutuality of obligation” present in at-will employment in their reasoning—emphasizing that because the employee was not contractually bound for a definitive time period, the employer also could not be bound, and was

³² *Id.* at 946.

³³ *Id.* For many private employees, the worry that they may be fired or warned for having political views that differ from their employers’ views is grounded in reality. A recent study released by Harvard University states that where workers received their employers’ political messages, 20 percent of those employers accompanied those messages with at least one warning of “job loss, plant closure, or changes in wages and hours.” Alexander Hertel-Fernandez, *How Employers Recruit Their Workers into Politics—And Why Political Scientists Should Care*, 14 PERSP. ON POL. 410, 414 (2016).

³⁴ Mulroy & Moorman, *supra* note 2, at 946.

³⁵ Carroll, *supra* note 9, at 39.

³⁶ Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484–85 (1976).

³⁷ Jeannette Cox, *A Chill Around the Water Cooler: First Amendment in the Workplace*, 15 No. 2 INSIGHTS ON L. & SOC’Y 12, 12–13 (2015).

³⁸ *Id.*

³⁹ Summers, *supra* note 36, at 487.

⁴⁰ *Id.*

⁴¹ *Id.* (citing *Bell v. Faulkner*, 75 S.W.2d 612 (Mo. Ct. App. 1934)).

therefore free to discharge the employee at any time.⁴² On the other hand, there are scholars that remain hopeful about the “public policy exceptions” to at-will employment that certain courts have articulated⁴³ because these exceptions could potentially be used to vindicate the constitutional right to free speech.⁴⁴ Such scholars have highlighted that private employers’ freedom of political speech is tied to the public conscience and must be protected, and therefore decide that courts should apply a common law “public policy exception” based on clear public policy.⁴⁵ Needless to say, those who question the bounds of at-will employment have considered both public-policy based and statutory limits.

B. Federal Protection for Private Employee Political Speech

When considering the current state of statutory limits to at-will employment, specifically the limits that hold private employers accountable for taking adverse action against employees based on their off-duty political activities, one could first turn to federal law. “No federal statute explicitly protects employees’ political speech from interference by private employers,” but a federal statute that could be interpreted as providing some protection to private employees’ speech is the National Labor Relations Act (NLRA).⁴⁶ While this statute protects certain types of employee speech, the federal law “does not apply to . . . employees [who are] not acting to secure a group benefit.”⁴⁷

Section 7 of the NLRA gives private employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in . . . concerted activities for

⁴² *Id.* at 489; *see also Bell*, 75 S.W.2d at 613.

⁴³ *See Nees v. Hocks*, 536 P.2d 512, 514–17 (Or. 1975) (awarding compensatory damages to an employee who was fired because of her jury duty service, and discussing instances “in which the employer’s reason or motive for discharging harms or interferes with an important interest of the community and, therefore, justifies compensation to the employee”); *Petermann v. Int’l Bhd. of Teamsters*, 344 P.2d 25, 27–28 (Cal. Dist. Ct. App. 1959) (finding that the firing of an employee because of his refusal to commit perjury was contrary to public policy, showed a lack of good faith on the part of the employer, and was thus wrongful); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E. 2d 425, 428 (Ind. 1973) (holding that a “[r]etaliatory discharge for filing a workmen’s compensation claim is a wrongful, unconscionable act and should be actionable in a court of law”).

⁴⁴ *Mulroy & Moorman*, *supra* note 2, at 946, 950.

⁴⁵ *Id.* at 988.

⁴⁶ National Labor Relations Act of 1935, 49 Stat. 499 (codified as amended at 29 U.S.C. §§ 151–169 (2012)); *Carroll*, *supra* note 9, at 48.

⁴⁷ Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L. J. 522, 526 (1982) [hereinafter *Yale, Free Speech*]; *see also Eastex, Inc. v. NLRB.*, 437 U.S. 556, 564–65 (1978) (the Act, in part, “was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own,” and it has long been “held that the ‘mutual aid or protection’ clause encompasses such activity”).

the purpose of . . . mutual aid or protection.”⁴⁸ “Mutual aid and protection” covers an employee’s ability to participate in strikes, protests, and also “advocacy unrelated to traditional union activity.”⁴⁹ The NLRA therefore offers private employees some First Amendment protections.⁵⁰ In interpreting this section, the Supreme Court has protected employee activity and held that the “mutual aid or protection” clause is not limited to specific disputes between an employee and the employer, but can also cover methods for improving employment conditions “through channels outside the immediate employer-employee relationship.”⁵¹ While the Court has sometimes broadly covered employee speech under Section 7, other decisions have narrowed this interpretation, requiring that political speech also bear a close relationship to the economic interests of employees in the scope of their employment.⁵² The Supreme Court in *Eastex Inc. v. NLRB*, for example, discussed limits to employee speech protections, stating that there could be instances in which the relationship between employee speech or activities is so attenuated that it “cannot fairly be deemed to come within the ‘mutual aid or protection’ clause.”⁵³ The Supreme Court did not elaborate further, leaving it to the National Labor Relations Board to “determine the outer boundaries of the clause’s coverage.”⁵⁴ As a whole, under Supreme Court precedent, these protections are relatively limited, as the NLRA only protects private employee political speech as far as it closely “relat[es] to the terms and conditions of employment.”⁵⁵ As it turns out, “the more political the [private employees’] speech . . . the less likely [federal] labor law is to protect it” in a comprehensive and inclusive way.⁵⁶

⁴⁸ National Labor Relations Act of 1935, ch. 372, § 7, 49 Stat. 452 (codified as amended at 29 U.S.C. § 157 (2012)).

⁴⁹ Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 922 (1992).

⁵⁰ *Id.*

⁵¹ Carroll, *supra* note 9, at 50 (citing *Eastex*, 437 U.S. at 565).

⁵² *Id.* at 51–52.

⁵³ *Eastex*, 437 U.S. at 567–68.

⁵⁴ Rachel Simon, Comment, *Workers on the March: Work Stoppages, Public Rallies, and the National Labor Relations Act*, 56 CATH. U. L. REV. 1273, 1287 (2007) (citing *Eastex*, 437 U.S. at 568).

⁵⁵ Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815, 842 (1996) (footnote omitted).

⁵⁶ *Id.*

C. State Protection for Private Employee Political Speech

About half of the country's population lives in states that generally prohibit employers from punishing employees based on their political speech or activities.⁵⁷ While some of these jurisdictions have statutes that more generally protect employee free speech, others more specifically protect employee speech on political matters.⁵⁸ Further, some of these political free speech jurisdictions protect only certain types of political activities, "such as endorsing or campaigning for a party, signing an initiative or referendum petition, or giving a political contribution."⁵⁹ So, while ranging from general to specific in their definitions of "political speech," these statutes are meant to shield private employees from being fired or retaliated against based on certain political viewpoints and activities.⁶⁰ Similar to a protected trait in the federal or state civil rights laws, these state statutes protect certain characteristics (employees' political opinions), and the activities that go along with them.⁶¹

Legal scholars have pointed out various practical problems with these types of statutes.⁶² Firstly, statutory challenges rarely ever lead to a "final decision[] in court."⁶³ One reason for this is that, "since the statutes give no civil remedies to employees, the most interested parties in such cases have no recourse in the courts, and provide no source of litigated cases."⁶⁴ Almost all of the statutory protections allow for only criminal sanctions, which consist of small fines or imprisonment of the employer's agents.⁶⁵ Although courts generally treat the criminal sanctions as also generating a civil tort action,⁶⁶ "the imposition of a small fine" on employers alone does not sufficiently remedy the employees who are retaliated against.⁶⁷ Further, "prosecutors generally seem to lack enthusiasm for initiating cases under the statutes: there are few reported prosecutions of

⁵⁷ Volokh, *Statutory Protections*, *supra* note 10, at 297.

⁵⁸ *Id.*

⁵⁹ *Id.* For example, statutes in California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, West Virginia, Seattle (Washington), and Madison (Wisconsin) "bar employers from retaliating against employees for engaging in political activities." *Id.* at 313–18.

⁶⁰ Carroll, *supra* note 9, at 58.

⁶¹ *Id.*

⁶² *See id.* at 59; Summers, *supra* note 36, at 495.

⁶³ Carroll, *supra* note 9, at 59.

⁶⁴ *Id.* (citing Summers, *supra* note 36, at 495).

⁶⁵ *Id.* (citing *Kelsay v. Motorola*, 384 N.E.2d 353, 359 (Ill. 1978)).

⁶⁶ Volokh, *Statutory Protections*, *supra* note 10, at 302.

⁶⁷ Carroll, *supra* note 9, at 59 (quoting *Kelsay v. Motorola*, 384 N.E.2d 353, 359 (Ill. 1978)).

employers for coercing their employees,” or otherwise interfering with employee political speech.⁶⁸

Even in states such as California and Louisiana, that do offer civil remedies for employees whose employers have interfered with their political opinions, there is still an underwhelming amount of litigation brought under the statutes:⁶⁹

The lack of litigation and the accompanying lack of court decisions under the statutes seriously inhibit the statutes’ usefulness to employees: without litigation and the resulting judicial clarifications of the statutes, employees do not know what statutory protections they can assert, what defenses are open to employers, or what level of coercive intent on the part of employers is necessary for an employee to recover damages.⁷⁰

The second practical problem within this area of law is that even in states with broadly worded statutes, under which many activities could constitute political speech, state courts have failed to specifically apply the statutes in ways that provide effective protection for private employees.⁷¹ For example, although states such as Louisiana and South Carolina have statutes that prevent private employees from being fired or retaliated against based on their political opinions,⁷² some district courts have chosen to narrowly define what constitutes “political speech.” In South Carolina, the statute’s protection is limited to matters that are “directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote.”⁷³ In a narrowing of the statute’s application, the United States District Court for the District of South Carolina held that an employee’s display of a Confederate flag was not considered “political speech,” although the United States Court of Appeals for the Fourth Circuit later opined that the display could constitute an exercise of political rights.⁷⁴ Courts in Louisiana have also continuously denied relief under their political speech protection statute, often asserting that the plaintiff and

⁶⁸ *Id.* (citing *Vulcan Last Co. v. State*, 217 N.W. 412 (Wis. 1928)).

⁶⁹ *Id.* at 60. Colorado, Delaware, and Puerto Rico also “statutorily provide civil remedies for politically coerced employees.” *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 62.

⁷² LA. REV. STAT. ANN. § 23:961 (2011) (enacted 1938); S.C. CODE ANN. § 16-17-560 (2011) (enacted 1950).

⁷³ Volokh, *Statutory Protections*, *supra* note 10, at 313, (quoting *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) (internal quotation marks omitted)).

⁷⁴ *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250, 254, 262–63 (4th Cir. 2003), *rev’d on other grounds*, 369 F.3d 811 (4th Cir. 2004) (en banc).

defendant did not meet the requisite “employment relationship” under the statute, given that the plaintiff was an uncontracted “deputy” or “appointee” of the defendant, rather than an employee.⁷⁵ Even in a case in which an employee was able to recover from his employer after being discharged for his political views, the United States District Court for the Middle District of Louisiana relied primarily on other grounds, noting their reluctance to apply the Louisiana employee political speech protection statute, in part because “no court has apparently ever cited or construed it since its passage in 1938.”⁷⁶

Virginia, the site of the recent Unite the Right Rally in Charlottesville,⁷⁷ currently has no such statute. Virginia instead “strongly adheres to the doctrine of at-will employment.”⁷⁸ Virginia’s legislative history, however, reveals that around the time of the passage of both Louisiana and South Carolina’s political speech laws, a similar law was proposed in Virginia.⁷⁹ The discussion of these statutes in the Reconstruction-era South was brought on by a “Republican concern that southern employers were pressuring their employees to vote against the Republicans.”⁸⁰ On December 9, 1867, framers of the Constitution of the State of Virginia passionately discussed the “suffering condition” of many Virginia employees, who reported that they were fired because of exercising their right to vote for the Republican Party.⁸¹ The language used throughout the heated debate aligns with common arguments for and against protecting private employees’ political speech, stating:

Here are hundreds and thousands of men in the State who say they are willing to work, who are ready to work, who are begging for work, and there is work to be done. But, in consequence of political prejudices . . . these men are turned out of employment. Yet the very men who need the labor . . . who have the capital to bestow for labor,

⁷⁵ *Boyer v. St. Amant*, 364 So. 2d 1338, 1340 (La. Ct. App.), *writ denied*, 365 So. 2d 1108 (La. 1978); *Finkelstein v. Barthelemy*, 565 So. 2d 1098, 1099 (La. Ct. App. 1990). Although these cases involved public employees, they exemplify the stringent standard of recovery under the Louisiana statute.

⁷⁶ *McCormick v. Edwards*, 479 F. Supp. 295, 302 (M.D. La. 1979), *rev'd*, 646 F.2d 173 (5th Cir. 1981) (involving a public employee alleging that he was fired from his job for purely political reasons).

⁷⁷ Richard Fausset & Alan Feuer, *Far-Right Groups Surge Into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html> [https://perma.cc/Z6ZN-ND3E].

⁷⁸ Harris & Chughtai, *supra* note 17.

⁷⁹ Volokh, *Statutory Protections*, *supra* note 10, at 301 n.19., (citing DAVID LLOYD PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 134 (1901)).

⁸⁰ *Id.* at 300.

⁸¹ THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 33, 43 (Richmond, New Nation 1868).

those are the men who, in consequence of political prejudices, have turned these poor people out . . .⁸²

Proponents of a resolution therefore argued that it be made a misdemeanor for any employer to discharge an employee on the basis of his political opinion.⁸³ Those who opposed the proposition argued that it would result in despotism, which would “break up and destroy all transactions and business relations existing between man and man—to strike at the very cornerstone of society itself.”⁸⁴ Despite the supporters’ continued arguments that it is “harsh[] and vindictive[]” for employers to fire employees because they do not vote a certain way,⁸⁵ the proposal was defeated and no such statute was enacted.⁸⁶

Taken together, private employees across the United States are either left unprotected against their employers’ potential political speech discrimination or are subject to varied and inconsistent forms of state protection. California, for example, has a broad statute, which defines “political activities” as meaning “[more] than just partisan or electoral activities.”⁸⁷ California’s statute for employees’ freedom of political speech states, “[n]o 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.”⁸⁸ California’s Supreme Court has articulated that political activities cover more than just party matters, and instead cover any speech or “activities involving the ‘espousal of a candidate or cause,’” which therefore includes employees’ “participa[tion] in . . . social movements such as the gay rights movement.”⁸⁹ Following this decision, a federal district court similarly construed “‘political activities’ to cover the holding of certain views on drug and alcohol policy.”⁹⁰

While these decisions seem to widen the interpretation of California’s statute, they are a departure from previous

⁸² *Id.* at 44.

⁸³ *Id.* at 46.

⁸⁴ *Id.*

⁸⁵ *Id.* at 44.

⁸⁶ Volokh, *Statutory Protections*, *supra* note 10, at 301 n.19., (citing DAVID LLOYD PULLIAM, *supra* note 79, at 134).

⁸⁷ *Id.* at 313.

⁸⁸ CAL. LAB. CODE § 1101 (2018).

⁸⁹ Volokh, *Statutory Protections*, *supra* note 10, at 313 (citing Gay Law Students Ass’n. v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979)).

⁹⁰ *Id.*, (citing *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at *9 (N.D. Cal. Mar. 11, 1996)).

applications.⁹¹ For example, the California Supreme Court previously narrowly construed “political speech,” finding that an employee could be legally fired “simply for being a Communist.”⁹² Though the broad language of the California law arguably comes closest to protecting employees’ political speech, it is unclear whether this broad interpretation will continue, or whether California courts will revert to previous interpretations of political speech.⁹³ The unpredictability and inconsistency of these state protections, or lack thereof, point to the need for a uniform regulation across the United States—so that private employees are not subjected to varying degrees of free speech restrictions across state lines.

II. ARGUMENTS FOR AND AGAINST THE EXPANSION OF POLITICAL SPEECH PROTECTIONS

There are certainly valid arguments that employers should be free to dissociate from employees whose views they find objectionable. Employers have legitimate business interests to prioritize, and their business’s success should not be at the whim of an employee with radical or distasteful political opinions. In the same vein, Volokh states in his summary of the employee-protective state statutes, “[p]erhaps 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.”⁹⁴ On the other hand, the most basic reasons to strengthen the freedom of political speech become more and more relevant:

For tens of millions of persons who are genuinely dependent on private employers—dependent in the sense that they simply cannot afford to lose their current jobs—freedom of political speech can be exercised only subject to the forbearance of their employers. As economic power becomes increasingly concentrated in the hands of large corporations, citizens’ dependence on private employers grows and so does the insecurity of free political speech.⁹⁵

There are strong public policy interests in protecting political free speech for private employees. Many Americans “spend about one-third of their lives” at work, and communication between coworkers in the workplace is considered vital to both democratic

⁹¹ Carroll, *supra* note 9, at 60–62.

⁹² *Id.* at 62; *see also* Lockheed Aircraft Corp. v. Superior Court of Los Angeles Cty., 171 P.2d 21, 24 (1946).

⁹³ Carroll, *supra* note 9, at 62.

⁹⁴ Volokh, *Statutory Protections*, *supra* note 10, at 301.

⁹⁵ Carroll, *supra* note 9, at 36.

society and “individual self-fulfillment.”⁹⁶ This self-expression argument is powerful given the value that the United States places on being a country of diverse populations and ideas.⁹⁷ Of course, there are imposed limits on free speech that are integral to a functional society, and protecting this sort of employee speech might place too heavy a burden on the employer.⁹⁸ The question remains whether to continue imposing these limits on free speech in the private workplace, even though the speech in question is political and carries meaningful weight in a democratic system.

A. *Arguments Against the Expansion of Employee Political Speech Protections*

The most compelling argument against the expansion of political speech protection in the private workplace involves the employer’s freedom of expression and First Amendment rights.⁹⁹ The government may encroach on First Amendment rights when it “forces a party to tolerate [statements or activities] which a reasonable listener would attribute to her.”¹⁰⁰ In short, employers do have the right to dissociate “from unwanted attribution to them of ideological messages.”¹⁰¹ This attribution, however, is only likely to happen in cases that involve the speech of high-ranking employees and other employees who are thought of as spokespersons of the entity, during both work hours and while outside of work.¹⁰² Although the employees in question here would not necessarily be thought of as “spokespeople” for Google or a California hot dog eatery, it is possible that social media and the publicity of the employees’ speech has caused some level of attribution to their private employers, such that these entities sought to release themselves from the appearance of attribution by firing the employees.¹⁰³

⁹⁶ Mulroy & Moorman, *supra* note 2, at 989.

⁹⁷ Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 225, 236 (2013) (arguing that employment law is justified in protecting employees’ privacy and political speech, in the interests of social equality, “even if it imposes meaningful costs on employers”).

⁹⁸ Yale, *Free Speech*, *supra* note 47, at 538.

⁹⁹ *Id.* at 537.

¹⁰⁰ *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 713 (1977); *West Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943)).

¹⁰¹ *Id.*

¹⁰² *Id.*; *see also* *Mitchell v. King*, 537 F.2d 385, 391 (10th Cir. 1976) (finding that the First Amendment did not prevent a public employee who held a policymaking office from being fired based on expressions made against the policy goals of the governor); *cf.* *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 578 (7th Cir. 1972) (where the First Amendment prevented a non-policymaking state official from being fired solely for his refusal to transfer his political allegiance from one party to another).

¹⁰³ *See* discussion *infra* Part III.

Beyond ordinary attribution, if the employer itself is a “representative organization,” then its free speech rights are thought of as “proxies for the expressive and associational rights of its members.”¹⁰⁴ For example, “[a]n eco-friendly energy company should be able to decide to hire only ‘green’ employees and to terminate the employee who denies the existence of human-induced climate change.”¹⁰⁵ The private institutions to be discussed in this note, however, cannot be thought of as political or ideological associations, because they “exist[] primarily for economic purposes.”¹⁰⁶ These entities do not exist solely “to disseminate an ideological message.”¹⁰⁷ They will therefore not endure substantial harm to their associational rights as a result of expanded protections of employee speech.¹⁰⁸

Another argument against the expansion of political speech protection in the private workplace involves the employer’s property interests.¹⁰⁹ These property interests revolve around the employer’s right to protect and maintain their own businesses and not be subject to the government’s impairment of their financial success.¹¹⁰ Under the Supreme Court’s precedent, such property protection interests not only apply to individual or smaller-scale employers but also extend equally to corporations.¹¹¹ An employer’s financial success could be put in danger if the employer is forced to retain an employee who reduces sales or harms the business’s reputation in some way.¹¹² The Fifth and Fourteenth Amendments of the Constitution forbid the government from taking private property for public use “without just compensation.”¹¹³ If the federal government were to protect employee speech at work, it could be interfering with the employer’s interest in determining how

¹⁰⁴ Yale, *Free Speech*, *supra* note 47, at 538 (footnote omitted); *see also* NAACP v. State of Alabama *ex rel.* Patterson, 357 U.S. 449, 458–62 (1958) (discussing that in certain associational groups, members have such a “nexus” that allows them to act as representatives of the organization) (“Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”).

¹⁰⁵ Mulroy & Moorman, *supra* note 2, at 980.

¹⁰⁶ Yale, *Free Speech*, *supra* note 47, at 538.

¹⁰⁷ *Id.* at 539.

¹⁰⁸ *Id.* at 538.

¹⁰⁹ *See id.* at 533.

¹¹⁰ *See id.* at 534.

¹¹¹ *See* Charles R. O’Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 67 GEO. L. J. 1347, 1362 (1979).

¹¹² Yale, *Free Speech*, *supra* note 47, at 535.

¹¹³ U.S. CONST. amends. V, XIV; *see also* Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 239 (1897) (where the takings clause of the Fifth Amendment was applied to states through the Fourteenth Amendment).

the employer's property is being used, the employer's ability to exclude others from his or her property, and the employer's interest in the value of the property.¹¹⁴ If these "[t]hree . . . 'sticks' [in] the 'bundle'" of interests were "substantially impair[ed]", then protecting employee speech could arguably create an unlawful taking.¹¹⁵

Whether an unconstitutional taking has occurred depends on the aggregate effect of government action, so any statute that seeks to protect employee speech should take into "consider[ation] any loss of property value to the employer resulting from the speech."¹¹⁶ The loss in value, or expected loss, to a private entity as a result of the imposed speech protections alone would not likely constitute a takings claim.¹¹⁷ Even considering that the employee protection could constitute a taking, the protection would clearly satisfy the takings clause requirement that the government taking be for a public purpose or public good.¹¹⁸ Here, that public good is freedom of political speech, directly relating to the public welfare and society as a whole.¹¹⁹ It is unclear in what way employers could be justly compensated for such a taking under the Fifth Amendment,¹²⁰ as employers would likely need to allege financial impairment, and thus recover their monetary loss based on the market value of their businesses at the time the taking took effect.¹²¹

The final argument against the expansion of employee political speech protections stems from the previously mentioned associational right—the employer's right to privacy and freedom from governmental intrusion.¹²² For employers that

¹¹⁴ Yale, *Free Speech*, *supra* note 47, at 533–34.

¹¹⁵ *Id.* at 533–34; *see also* *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (The examination of whether such speech could constitute a taking "entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (holding that the government's attempt to create a public right of access to a private pond interfered with the pond owner's reasonable investment-back expectations. "[T]he Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking. . . .").

¹¹⁶ Yale, *Free Speech*, *supra* note 47, at 534–35.

¹¹⁷ *See* L. L. Fuller & William R. Perdue, Jr., *Reliance Interest in Contract Damages*, 46 *YALE L. J.* 52, 59–60 (1936); *see also* *Pruneyard Shopping Ctr.*, 447 U.S. at 83 (finding no support for the contention that the government's allowance of petitioners on shopping center property would "unreasonably impair the value or use of their property as a shopping center").

¹¹⁸ Yale, *Free Speech*, *supra* note 47, at 535; *see also* U.S. CONST. amend. V.

¹¹⁹ *Id.*

¹²⁰ U.S. CONST. amend. V.

¹²¹ *See* *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2432 (2015).

¹²² *See id.* at 540; *cf.* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *GEO. L.J.* 1, 63–65 (2000) ("The limits that freedom of association places on the antidiscrimination principle are understood to represent a judgment about the function of intimate and expressive associations in a diverse and

operate as small family businesses and the like, placing protections on employees' speech could "intrude upon the constitutionally protected privacy of the individual, the home, and the family."¹²³ Legal scholars have noted the difficulty in determining which spaces are suitable forums to allow for freedom of speech, versus which spaces are too private for the government to regulate.¹²⁴ Consider, for example, a situation in which the owners of a small shop are Holocaust survivors, or the children of Holocaust survivors. If the family were to find out that one of their cashiers wrote editorial articles in favor of the Nazi agenda, the employers should not be subject to the government's protection of this employee's job.¹²⁵ Nevertheless, "[a]s a business begins to acquire more characteristics of a corporate bureaucracy and fewer of a family enterprise . . . the employer's interest in privacy diminishes proportionally."¹²⁶ Given these factors, the constitutional rights of employers, particularly the employers who will be most greatly affected by such employee speech protections, should be taken into consideration in any proposed statute.

B. *Arguments in Favor of the Expansion of Political Speech Protections*

Given the constitutional arguments against expanding political speech protections to private employees, compelling arguments must be made in order to explain the need for federal protection. A critical reason for this need is that free speech, particularly political speech, is increasingly under attack in everyday life.¹²⁷ First Amendment law professor, Joel Gora, points to the "instantaneous condemnation and punishment of fraternity members for singing racially offensive lyrics at a social event, the

democratic society. But the denial of associational freedom and the validation of the antidiscrimination principle in other institutions, particularly the workplace, effectively assigns to those institutions, and to the relations that form there, another sort of function that is equally important in a diverse democratic society.").

¹²³ Yale, *Free Speech*, *supra* note 47, at 540; *see also* *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

¹²⁴ *See* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1567 (1998).

¹²⁵ In-Person Conversation with Joel Gora, Professor of Law, Brooklyn Law School, in Brooklyn, N.Y. (Nov. 2, 2017).

¹²⁶ Yale, *Free Speech*, *supra* note 47, at 540; *see also* Mulroy & Moorman, *supra* note 2, at 980 ("At least, in a small business setting, such an employer may have a free association interest in choosing the persons with whom he spends forty hours a week.").

¹²⁷ Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 72 (2016).

brazen murder of journalists for producing anti-Muslim cartoons and commentary, or the cancelling of celebrity contracts for making offensive remarks or expressing unpopular views” as modern examples of suppressing or silencing free speech.¹²⁸ This suppression is problematic because free speech holds an integral place in democratic societies.¹²⁹ It goes towards members of society participating in decision-making, individual self-expression, and the overall pursuit of intellectual progress and change.¹³⁰

Many have recognized the intrinsic importance of free speech, not only for government entities and employees, but also for private employees.¹³¹ In cases where employee political speech is restricted, the employer has economic power over the employee, and wields that economic power in order to enhance his or her control over the political sphere.¹³² The fact that employers hold this economic power over employees is especially meaningful given the proliferation of at-will employment.¹³³ In light of the decline of union membership, many employees lack the ability to bargain with their employers for protective termination requirements.¹³⁴ On a fundamental level, this is threatening to the idea of social equality, the dynamics of which have political implications:¹³⁵ “Workers, fearful of losing their jobs, will suppress their own political views or express views with which they do not agree. The result will be a skewed political discourse, in which employers’ voices are amplified and workers’ are squelched.”¹³⁶

As a result, the political discourse may lack the viewpoints of employees that could be “particularly distinctive and important.”¹³⁷ Philosophers have stressed the importance of citizens seeing each other as political equals, and the importance

¹²⁸ *Id.* at 72–73.

¹²⁹ Yale, *Free Speech*, *supra* note 47, at 529; *see also* Nadine Strossen, *Freedom of Speech and Equality: Do We Have to Choose?*, 25 J.L. & POL’Y 185, 188 (2016) (noting that the “safe spaces” on college campuses “where students are shielded from ideas they consider offensive or hateful” are “opposite . . . the outlook” and responsibilities reflected in the First Amendment).

¹³⁰ Yale, *Free Speech*, *supra* note 47, at 529.

¹³¹ *See generally* Yale, *Free Speech*, *supra* note 47 (arguing for greater federal protection of private employees’ freedom of speech); Mulroy & Moorman, *supra* note 2 (recommending that courts use a “public policy exception” to protect private employees’ freedom of speech); Carroll, *supra* note 9 (advocating for a modal statute or common-law rules that would protect private employees from “politically motivated firings”); Bagenstos, *supra* note 97 (using social equality theory to argue for government regulation of the private employment relationship).

¹³² Bagenstos, *supra* note 97, at 256.

¹³³ *See discussion supra* notes 37–38.

¹³⁴ *See discussion supra* notes 37–38.

¹³⁵ Bagenstos, *supra* note 97, at 264.

¹³⁶ *Id.* at 256.

¹³⁷ *Id.*

of citizens aggregating their opinions when participating in politics, and in the epistemic search for a common good.¹³⁸ Strengthening these elements of the democratic system works to maintain the government's authority and legitimacy.¹³⁹

In addition to losing out on the range of ideas that make up a complete political landscape, there are also serious concerns relating to employees as individuals¹⁴⁰:

We protect free speech not merely as a means of promoting discussion and participation in democratic government, and not merely to further the discovery of truth through “the marketplace of ideas,” but also because individual self-expression is good for its own sake. It leads to happier, more fulfilled lives: a better quality of life for the individuals doing the expressing, and because these individuals are more fulfilled, a more pleasant environment for the friends and coworkers around them.¹⁴¹

In other words, not only does the suppression of employee political speech diminish the collective search for truth that is vital to a functional democracy, but it also has negative implications for the personal and social interactions that employees experience in their everyday lives.¹⁴² It is for these reasons that we must remember that private employees are also members of a democratic society—a society that benefits from the expression of conflicting ideas.

Furthermore, the advancement and expansion of technology has resulted in greater exposure of off-duty speech that has the potential to impact a person's career or prospects.¹⁴³ Given “the phenomenon of ‘going viral,’ one slip of the tongue, caught on camera or recorder” has the ability to cause serious damage to people's lives.¹⁴⁴ This technology, among other forms

¹³⁸ See DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 108 (Princeton U. Press ed., 2008) (advancing the idea of “epistemic proceduralism,” which expresses that democratic authority and legitimacy is rooted in people's belief that the majority's outcome was determined through a collective search for the truth, and further expresses that this epistemic quality gives individuals moral reasons to follow laws with which they disagree); see also JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT & DISCOURSES*, pt. 1 (E.P. Dutton & Co. ed., 1913) (“Born a citizen of a free state and member of the sovereign people, however feeble the influence of my voice in public affairs, the right to vote upon them imposes upon me the duty of instructing myself. Whenever I meditate upon governments I am happy to find in my investigations new reasons for loving that of my own country.”).

¹³⁹ ESTLUND, *supra* note 138, at 108. (“The structure [of democratic theory] is similar to what we might naturally say about the authority of a jury's verdict in a criminal trial: the jury system is designed with great attention to its epistemic value (among other things). When a jury reaches a verdict, its legitimacy and authority do not depend on its correctness, but they do depend on the epistemic value of the procedure.”).

¹⁴⁰ Mulroy & Moorman, *supra* note 2, at 989.

¹⁴¹ *Id.* (footnotes omitted).

¹⁴² See *id.*

¹⁴³ See Gora, *supra* note 127, at 72.

¹⁴⁴ *Id.*

of surveillance, can lead to the alarming effect of “suppress[ing] criticism of [the] government.”¹⁴⁵ Scholars recognize that technological advances have directly impacted employment, by increasing the employer’s ability to discover personal information about the beliefs and opinions of their employees.¹⁴⁶ In modern employment, employees’ personal reputations are increasingly public and “more easily [linked] to their employers, such that a drunken Friday night tirade or an offensive tweet can bring down the weight of thousands or even millions of social-media participants onto the person and their employer.”¹⁴⁷ Therefore, employers are now amply armed with the “ability to coerce large numbers of employees’ beliefs and opinions.”¹⁴⁸ Finally, it is not enough to say that employees who do not like their employer’s free speech restrictions can find another job, perhaps in a different state.¹⁴⁹ “For most of these people, the prospect of losing their jobs is a significant hardship, and has a formidable chilling effect on their speech.”¹⁵⁰ Therefore, because of the employer’s ability to coerce, and because of the value of freedom of political speech as a core ideal, there is a need to protect employee speech on the federal level.

III. MODERN EXAMPLES OF PRIVATE EMPLOYEES AND CONTENTIOUS POLITICAL SPEECH

A. *Google and James Damore’s Diversity Memo*

Analyzing various modern contexts in which this problem has emerged will shed light on both sides of the employee political speech argument and demonstrate the need for consistency in free speech protections. As previously mentioned, former Google employee, James Damore, was recently fired for posting a memo challenging Google’s diversity efforts.¹⁵¹ The ten-page memo, entitled “Google’s Ideological Echo Chamber,” “argues that women are underrepresented in [the] tech [industry] not because [of] . . . bias, but [instead] because of inherent . . . differences between men and women.”¹⁵² Damore

¹⁴⁵ *Id.* at 72–73.

¹⁴⁶ Yale, *Free Speech*, *supra* note 47, at 528–29.

¹⁴⁷ Bodie, *supra* note 14, at 266.

¹⁴⁸ Yale, *Free Speech*, *supra* note 47, at 529.

¹⁴⁹ Mulroy & Moorman, *supra* note 2, at 989.

¹⁵⁰ *Id.*

¹⁵¹ See discussion *supra* notes 20–27.

¹⁵² Conger, *supra* note 21.

posted the memo to one of Google's internal message boards in August of 2017, and it subsequently went viral.¹⁵³

In the memo, Damore expresses his goal to "have an honest discussion" about "Google's political bias," which he asserts has resulted in the "silencing" of ideological differences.¹⁵⁴ The memo goes on to discuss studies that detail the biological and personality differences between men and women, which result in women being less represented in the tech industry and in top leadership positions.¹⁵⁵ He accuses Google of adhering to "several discriminatory practices," in order "to achieve equal gender and race representation."¹⁵⁶ Damore lastly offers measures that Google could take in order to improve the company's culture, which include de-moralizing diversity, stopping the alienation of conservatives, as well as reconsidering and limiting Google's mandatory unconscious bias trainings.¹⁵⁷

Google later fired Damore for crossing the line by perpetuating gender stereotypes, which Google states "is contrary to [its] basic values," as well as its Code of Conduct.¹⁵⁸ While Damore's memo includes problematic generalizations, it is worth noting that he also seems to be voicing concerns about a modern trend towards the suppression of speech.¹⁵⁹ Thus, as the former employee has begun exploring legal remedies, it is interesting to consider whether Damore's expression of ideological speech might be protected under either federal or state law.

If Damore seeks to recover under section 7 of the NLRA, he would need to show that the distribution of his memo was a form of "concerted activity" that closely relates to his employment.¹⁶⁰ Although "there is no evidence that Damore . . . was trying to organize a union[,] . . . he could argue that . . . [his call] for the inclusion of more diverse ideological viewpoints at Google[] amounted to 'concerted activities' protected under the law."¹⁶¹ In fact, Damore told the *New York*

¹⁵³ Christine Emba, *The Google Memo Isn't the Interesting Part of the Story*, WASH. POST (Aug. 11, 2017), https://www.washingtonpost.com/opinions/the-google-memo-isnt-the-interesting-part-of-the-story/2017/08/11/de3f8876-7ecb-11e7-9d08-b79f191668ed_story.html?utm_term=.c15acccc195a [<https://perma.cc/SGC7-S8SA>].

¹⁵⁴ Conger, *supra* note 21.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Young, *supra* note 20.

¹⁵⁹ See discussion *supra* Section II.B.

¹⁶⁰ National Labor Relations Act of 1935, ch. 372, § 7, 49 Stat. 452 (codified as amended at 29 U.S.C. § 157 (2012)); see also Becker, *supra* note 55 at 842.

¹⁶¹ Jeff John Roberts, *Fired Google Employee Wants to Sue—and He May Have a Case*, FORTUNE (Aug. 8, 2017), <http://fortune.com/2017/08/08/google-memo-legal/> [<https://perma.cc/U69K-KVZD>].

Times that he has “a legal right to express [his] concerns about the terms and conditions of [his] working environment . . . which is what [his] document does.”¹⁶² Still, “Damore would [also] have to show that his memo was more than” simply his own commentary, and that he was calling on others to participate in a conversation about Google’s policies.¹⁶³ Overall, Google seems to have fired Damore due to his controversial views about gender differences, and not due to his complaints about the company’s policies.¹⁶⁴ Because those particular controversial comments seem to have an insufficient relationship to the terms and conditions of his employment, it seems that Damore’s federal law claim is not likely to succeed.

Damore might have better luck pursuing recovery under California’s state statute.¹⁶⁵ Under the broad reading of this statute, Damore’s views might constitute an “espousal of a . . . cause,” which includes an employee’s participation in social movements.¹⁶⁶ The memo encourages ending a “politically correct monoculture that maintains its hold by shaming dissenters into silence.”¹⁶⁷ Damore speaks directly to social structure and cultural change, thereby constituting the type of ideological advocacy California’s statute seeks to protect.¹⁶⁸ While Damore’s memo proved to be controversial, the former employee would likely be able to make a showing that Google’s adverse action against him was in conflict with his state’s protection of political speech. On the other hand, one writer for the *Washington Post* called Damore a “hostile-workplace complaint waiting to happen,” because of his use of “insulting rhetoric and disregard for institutional norms.”¹⁶⁹ Because of this, she says, Damore is “a business liability,” one that the private company was within their rights to fire.¹⁷⁰ Nevertheless, if Damore was in fact fired for his views—even if they were a departure from institutional norms—then Google has taken

¹⁶² Daisuke Wakabayashi, *Google Fires Engineer Who Wrote Memo Questioning Women in Tech*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/business/google-women-engineer-fired-memo.html> [<https://perma.cc/QM4Q-RAPT>].

¹⁶³ Jack Greiner, *Greiner: “OK, Google, Search Free Speech at Work,”* CINCINNATI.COM (Aug. 30, 2017), <https://www.cincinnati.com/story/money/2017/08/30/greiner-ok-google-search-free-speech-work/597911001/> [<https://perma.cc/MJ8E-MD9V>].

¹⁶⁴ See Young, *supra* note 20.

¹⁶⁵ CAL. LAB. CODE § 1101; see also discussion *supra* Section I.C. (discussing the court’s widening interpretation of the California statute).

¹⁶⁶ Volokh, *Statutory Protections*, *supra* note 10, at 313 (quoting *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979)).

¹⁶⁷ Conger, *supra* note 21.

¹⁶⁸ See Volokh, *White Supremacist Rally*, *supra* note 3.

¹⁶⁹ Emba, *supra* note 153.

¹⁷⁰ *Id.*

illegal adverse action against this employee on the basis of political speech, speech which the state of California voted to protect.

B. Private Employers and Charlottesville Rally Participants

On August 11, 2017, white supremacists and neo-Nazis assembled in Charlottesville, Virginia, to rally against the removal of a statue of Confederate General Robert E. Lee.¹⁷¹ Protestors “invoked Ku Klux Klan imagery and [reportedly] shouted, ‘Jews will not replace us’ and ‘white lives matter.’”¹⁷² In the chaos of white supremacists clashing with counter protestors, there were many injuries, and a woman was run over and killed by a car driven by a white supremacist rally participant.¹⁷³ Following the violence, people have taken to social media to urge employers to take action against white supremacists who attended the rally:

Indeed, a Twitter account with the handle @yesyoureracist has sought help in identifying those who participated with the white nationalists in Charlottesville. With the assistance of its followers, @yesyoureracist has successfully pressured some employers—including a restaurant in Berkeley, California—to fire employees based on their actions in Charlottesville, and it’s likely that other employers will come under similar public pressure.¹⁷⁴

An article published in the Virginia Employment Law Letter about the Charlottesville rally, or the “Unite the Right” rally,¹⁷⁵ points out that “Virginia strongly adheres to the doctrine of at-will employment,” and that private employers are within their rights to fire employees for their participation in political protests.¹⁷⁶ The article also suggests, however, that if employers are “truly interested in taking a moral stan[ce] against racism,” “a more productive response [might] be to reinforce in [the] workplace” the uniting values of tolerance and inclusion.¹⁷⁷ This, it is argued, will bring us closer to achieving the “American ideal that all people are created equal.”¹⁷⁸ It goes without saying that

¹⁷¹ Harris & Chughtai, *supra* note 17.

¹⁷² Caleb Pershan, *Top Dog Employee Who Participated in Charlottesville White Supremacist Rally Resigns*, SAN FRANCISCO EATER (Aug. 14, 2017, 10:31 AM PDT), <https://sf.eater.com/2017/8/14/16144078/top-dog-cole-white-charlottesville-berkeley> [https://perma.cc/MYW3-TK5F].

¹⁷³ Harris & Chughtai, *supra* note 17.

¹⁷⁴ *Id.*

¹⁷⁵ Fausset & Feuer, *supra* note 77.

¹⁷⁶ Harris & Chughtai, *supra* note 17.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

white supremacist and neo-Nazi speech is both hateful and morally repugnant, but it is important to recognize that protecting even abhorrent political speech would serve to protect American democratic ideals.

Although Virginia employees who attended the Charlottesville rally are left relatively unprotected, there is still the question of the employee from Berkeley, California, who was fired after his employer responded to tweets that identified him at the rally.¹⁷⁹ The Twitter account posted a photo of the employee, Cole White, with a caption that notes his place of employment as Top Dog restaurant in Berkeley.¹⁸⁰ A later post by the same account includes a message from Top Dog, in which they relay the news that they will no longer be employing Cole White.¹⁸¹ Cole White's political activity, like that of James Damore, is arguably the type of ideological advocacy and participation in a social movement that the California state statute protects.¹⁸² Although Cole White may have a statutory claim against Top Dog, the impact of protecting political speech should also be taken into account here, where the company is a smaller employer. Revisiting this situation, specifically against the backdrop of arguments opposing the expansion of employee speech protection,¹⁸³ will illuminate and resolve some real-world concerns.

First, to address the issue of attribution,¹⁸⁴ the political action of an employee was ultimately the reason for Top Dog's overwhelming exposure into the Twitterverse.¹⁸⁵ Proof that Top Dog felt the need to dissociate their restaurant from the ideological messages of Cole White came in the form of a sign on the restaurant's door stating, "[e]ffective Saturday 12th August, Cole White no longer works at Top Dog. The actions of those in Charlottesville are not supported by Top Dog. We believe in individual freedom and voluntary association for everyone."¹⁸⁶ In short, Top Dog's concerns about being closely associated with a

¹⁷⁹ See Wilkinson & Parry, *supra* note 1. Reports are conflicting as to whether Cole White was fired or if he voluntarily resigned from Top Dog. See Rocha, *supra* note 1; see also Ashley Dejean, *The Case for Naming and Shaming White Supremacists*, MOTHER JONES (Aug. 17, 2017, 4:09 PM), <http://www.motherjones.com/politics/2017/08/the-case-for-naming-and-shaming-white-supremacists/> [<https://perma.cc/XUE8-KH23>]. For the purposes of this discussion, I will consider possible repercussions to the employer if the restaurant is accused of wrongfully terminating the employee.

¹⁸⁰ @YesYoureRacist, *supra* note 1.

¹⁸¹ @YesYoureRacist, TWITTER (Aug. 13, 2017, 8:42 AM), <https://twitter.com/YesYoureRacist/status/896713553666871296> [<https://perma.cc/7JT8-SU2K>].

¹⁸² See discussion *supra* Section III.A. & Section I.C.

¹⁸³ See discussion *supra* Section II.A.

¹⁸⁴ *Id.*

¹⁸⁵ *Twitterverse*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/twitterverse> [<https://perma.cc/YCK7-TY3Q>].

¹⁸⁶ Rocha, *supra* note 1.

neo-Nazi may be legitimate, since social media users had successfully made the restaurant widely known as the employer of a person with undesirable political ideas.¹⁸⁷ The fact remains, however, that Cole White's actions were taken during off-work hours, off the premises of the restaurant, and in a different state.¹⁸⁸ Despite the social media "naming and shaming,"¹⁸⁹ it is unreasonable to think that an employee of a small hot dog restaurant acts as a spokesperson for the company whether on or off the job.¹⁹⁰

Although this social media attack on Cole White may be viewed as the unnecessary airing of his dirty laundry, others may view the exposing of Cole White as a warranted safety measure, necessary to protect the general public from neo-Nazi hate speech, which can be harmful and traumatic.¹⁹¹ The definition of "hate speech" differs in other countries, and in some countries Cole White's participation in the neo-Nazi rally would be punishable by law.¹⁹² The United States Supreme Court, however, has a history of protecting even hateful forms of speech, denying First Amendment "shortcut[s]" and creating safeguards against the suppression of core political expression.¹⁹³ And whereas hate speech is a protected form of speech under First Amendment jurisprudence, the Supreme Court has not protected "fighting words"¹⁹⁴ that incite "imminent lawless action"¹⁹⁵ or words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁹⁶ While much of the speech at the Charlottesville rally would likely fall under protected First Amendment speech, some argue that participants may have crossed into fighting words "when they began chanting racist

¹⁸⁷ See Dejean, *supra* note 179.

¹⁸⁸ Rocha, *supra* note 1.

¹⁸⁹ Dejean, *supra* note 179.

¹⁹⁰ See Yale, *Free Speech*, *supra* note 47, at 537.

¹⁹¹ See Dejean, *supra* note 179.

¹⁹² See Frederick Schauer, *When Speech Meets Hate*, U. VA. MAG. (2017), http://uvamagazine.org/articles/when_speech_meets_hate [https://perma.cc/6VEN-AP4V].

¹⁹³ *Virginia v. Black*, 538 U.S. 343, 366–67 (2003) (holding that the First Amendment does not allow the state to take the "shortcut" of banning all cross burnings, without distinguishing whether the speech at hand is done with the intent to threaten or intimidate); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding that the First Amendment does not allow the state to ban cross burnings based on "hostility—or favoritism—towards the underlying message" contained in such expression); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

¹⁹⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

¹⁹⁵ *Brandenburg*, 395 U.S. at 447–49 (1969).

¹⁹⁶ *Chaplinsky*, 315 U.S. at 572.

and homophobic slurs to specific people on the streets.”¹⁹⁷ Given the unfortunate violence that ensued, there is an argument to be made that some participants were partaking in impermissible and unprotected incitement.¹⁹⁸ Nevertheless, the facts made public about Cole White do no more than portray him as a participant in the Unite the Right Rally, and for the purposes of free speech analysis, it is useful to assume that he was there to voice his vile opinions, but likely not to cause violence.

Still, to address another concern of those opposing the expansion of private employees’ free speech protections, any protection of an employee such as Cole White must also be balanced against the negative effect on the employers’ property interests, namely in maintaining their business. In considering this issue of an unlawful taking, it is notable that “complaints of lost potential profits . . . have [often] constituted weak takings claims.”¹⁹⁹ Instead, “[t]he aggregate effect of a substantial loss of value, together with a partial loss of the right to exclude,” are the factors that could result in an unlawful taking.²⁰⁰ Without speculating as to the exact loss to Top Dog if they were to be statutorily compelled to continue employing Cole White, it is entirely possible that the result would be a substantial loss and an unreasonable burden on this small-sized restaurant. While the political speech that Cole White took part in is the type of speech that the federal government should protect, it is also important for any solution to this issue to take into consideration and to adjust for any substantial burden on the smaller, less “Googly”²⁰¹ employers.

IV. SOLUTION: THE NEED FOR FEDERAL PROTECTION

To regulate protection for private employees, Congress should enact a statute to be passed under its broad interstate commerce powers.²⁰² The statute’s substance should reflect the

¹⁹⁷ Alexia Fernández Campbell, *The Limits of Free Speech for White Supremacists Marching at Unite the Right 2, Explained*, VOX (Aug. 12, 2018, 1:51 PM EDT) <https://www.vox.com/policy-and-politics/2018/8/10/17670554/unite-the-right-dc-free-speech-first-amendment> [<https://perma.cc/KB6J-GT77>].

¹⁹⁸ *See id.*

¹⁹⁹ Yale, *Free Speech*, *supra* note 47, at 534; *see also* *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (“[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.”); *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 303 (1920) (dismissing a takings claim where “there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.”).

²⁰⁰ Yale, *Free Speech*, *supra* note 47, at 534.

²⁰¹ *Have You Experienced Illegal Employment Practices at Google?*, *supra* note 25.

²⁰² *See* U.S. CONST. art. I, § 8, cl. 3.

idea that employers should be prevented from taking adverse action against employees on the basis of their political affiliations or actions, which they express while off-duty, while allowing “exceptions for particularly small companies, the highest-level managers, and a confined class of individuals hired specifically to engage in political speech on behalf of the employer.”²⁰³ The type of speech, employees’ remedies, and employers’ defenses and exceptions should be laid out in a way that echoes this main purpose and accounts for a balancing of interests.²⁰⁴

Before discussing the statute’s content, it is worth addressing why the state statutory scheme is insufficient to stand up to the realities of a modern and integrated society. Consider two different employees at a political event in New York over a weekend. One, a California employee, cannot be fired for their speech because of a state statute.²⁰⁵ The other, a Virginia employee, can be fired for the same conduct, and has no statutory protection. Although these people stood at the same event, holding the same signs and chanting the same words, they experience different results that have real and tangible impacts on their lives. Despite where one falls on the political spectrum, it is of the utmost importance to recognize the value of political participation by members of all states and of ending the suppression of political speech in our everyday lives.²⁰⁶ Ending the suppression begins with imposing a consistent and effective federal statute that prohibits employers from taking adverse action against employees on the basis of their political views.

A. *The Type of Speech to be Protected*

Under the case of *NLRB v. Jones & Laughlin Steel Corp.*,²⁰⁷ the Supreme Court upheld the passage of the NLRA because of Congress’s power to reach activities that place burdens on interstate activity.²⁰⁸ Under this decision, Congress has the power to regulate “the organized activities of private employees [in order to] promote industrial peace and . . . protect interstate commerce.”²⁰⁹ There, the Court found that recognizing

²⁰³ Bagenstos, *supra* note 97, at 254.

²⁰⁴ See Carroll, *supra* note 9, at 78–80. My proposed statute is inspired largely by the one proposed in Carroll’s article, but departs from Carroll’s proposed statute by providing more stringent requirements as to which employers are subject to the statute.

²⁰⁵ See CAL. LAB. CODE §§ 1101–1102 (West 2018).

²⁰⁶ See Gora, *supra* note 127, at 72–73.

²⁰⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

²⁰⁸ See Carroll, *supra* note 9, at 82–83, (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. at 36–37).

²⁰⁹ *Id.* at 83 (citing *Jones & Laughlin Steel Corp.*, 301 U.S. at 41–43).

the right of employees to self-organize would be “an essential condition of industrial peace,” as it would reduce labor disturbances and refusals by employers and employees to confer and negotiate.²¹⁰ In *Jones & Laughlin Steel Corp.*, the Court decided that Congress’s protections under this clause did not need to be exclusively in the realm of transactions that were in the “flow of interstate . . . commerce.”²¹¹ Instead, the “[b]urdens and obstructions [that Congress regulates] may be due to injurious action springing from other sources.”²¹² Here, the protection of private employees’ freedom of political speech could remedy state law inconsistencies, and prevent employees from relocating to different states due to a lack of protection by their state laws, or due to their need to find a new place of employment after their employers take action against them. As modern technology brings about the increased exposure of private employees’ off-work political speech, there may be a similar increase in the amount of people moving from one state to another, and potentially disrupting the commercial landscape. Further, Google, and other tech-giants of the country²¹³ have impacts far beyond the states in which they are headquartered, and thus their policies have the potential to manipulate labor trends across the country, by favoring employees whose speech is “acceptable,” and silencing factions of dissenting employees.

The proposed statute would therefore be close in function to section 7 of the NLRA, as it would prohibit employers from taking adverse action against employees on the basis of certain protected speech.²¹⁴ Instead of the NLRA’s protection of employee speech that relates to concerted activities and the terms and conditions of employment, this statute would protect employee speech that involves their “political views, expressions, affiliations, or activities.”²¹⁵ The statute makes it illegal to threaten, terminate, suspend, or discipline an employee when that action is taken in order to coerce or retaliate against an employee on the basis of this political speech.²¹⁶ Here, political speech should be cast in a light similar to the interpretation under California law. Political views should encompass not only party politics, but also ideological advocacy, along with the

²¹⁰ *Jones & Laughlin Steel Corp.*, 301 U.S. at 42.

²¹¹ *Id.* at 36 (internal quotation marks omitted).

²¹² *Id.*

²¹³ Farhad Manjoo, *The Upside of Being Ruled by the Five Tech Giants*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/technology/five-tech-giants-upside.html> [https://perma.cc/R567-N2B8].

²¹⁴ See discussion *supra* Section I.B.

²¹⁵ Carroll, *supra* note 9, at 78.

²¹⁶ *Id.*

“espousal of a candidate or a cause.”²¹⁷ To ensure that the courts are not left to such discretionary interpretation, what constitutes “political” speech should be explicitly defined in the statute, as “having to do with issues, ideas, arguments, ideologies, or positions that deal with broad social policy choices, the organization, conduct, and powers of government, and similar matters of concern to the general public.”²¹⁸ Both James Damore’s memo and Cole White’s rally attendance would satisfy this definition of political speech.²¹⁹

B. *The Available Remedies*

The current state statutes that protect employee speech do not provide adequate civil remedies for employees.²²⁰ Therefore, the proposed statute would allow for employees to take civil action against their employers.²²¹ Under the statute, the employee could recover both actual damages and punitive damages, and if the employee prefers, he or she could “seek reinstatement with back pay in lieu of punitive damages.”²²² The possibility for employees to seek recourse would adequately hold employers accountable, and serve to remedy employees for any adverse employment action taken against them on the basis of their political speech.

C. *Employer Exceptions and Defenses*

The passage of a statute as far-reaching as this could be subject to constitutional scrutiny by the courts, and therefore certain exceptions must be made in order to withstand judicial scrutiny and protect the interests of smaller companies.²²³ In order for Congress to use their regulatory commerce powers, the regulated activity must be shown to harm interstate commerce.²²⁴ Here, “politically coercive or politically motivated actions by employers against employees could be shown” to be the relevant harm to interstate commerce.²²⁵ For some private entities like Google, it is clear that any of the company’s

²¹⁷ Volokh, *Statutory Protections*, *supra* note 10, at 313 (citing *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979)).

²¹⁸ Carroll, *supra* note 9, at 79.

²¹⁹ See discussion *supra* Part III.

²²⁰ See discussion *supra* Section I.C.

²²¹ Carroll, *supra* note 9, at 80–81.

²²² *Id.* at 78.

²²³ See *id.* at 83.

²²⁴ *Id.*

²²⁵ *Id.*

“objectionable employment practices”²²⁶ would have effects on interstate commerce that are well within Congress’s authority. Companies like Google, Apple, and Facebook are “tech giants,” whose power over society’s interactions is “closer to that of governments than of mere corporations.”²²⁷ It is not as clear, however, to see the effects that smaller, private entities have on interstate commerce—and for those entities, it is not as clear whether Congress has the authority to regulate them.

In order to avoid this constitutional scrutiny, and to simultaneously avoid substantially impairing the interests of smaller entities,²²⁸ the statute will allow for a “floor,” that dictates the types of businesses that are subject to the statute.²²⁹ The floor will be determined by the entity’s gross income, the number of employees the entity employs, and any other financial considerations that Congress deems appropriate. The goal of the floor will be to exempt private entities that are smaller, more intimately connected in the workplace, and less like larger “corporate bureaucrac[ies].”²³⁰ If the business is small and falls below the floor set in place, then it is exempt. This scheme is similar to the Mrs. Murphy exemption to the Fair Housing Act, under which landlords who own “dwellings intended to be occupied by four or fewer families” are exempted from certain housing discrimination prohibitions.²³¹ In the case of Mrs. Murphy, the exemption arguably “guards her First Amendment right not to associate.”²³² Here, those same associational rights are secured for the exempted small businesses, who are free to fire employees on any basis. This quells the worries brought up in the earlier hypothetical about the possible responsibilities of a small shop owned by Holocaust survivors or their children.²³³

Despite overcoming these worries, the exemption allows people like Mrs. Murphy to discriminate, and therefore allows for the infringement of the other party’s right to be free from

²²⁶ *Id.*

²²⁷ See Manjoo, *supra* note 213.

²²⁸ Yale, *Free Speech*, *supra* note 47, at 534.

²²⁹ In-Person Conversation with Joel Gora, Professor of Law, Brooklyn Law School, in Brooklyn, N.Y. (Nov. 2, 2017) (discussing the idea for this statutory “floor,” and balancing the divergent interests of employees and employers).

²³⁰ Yale, *Free Speech*, *supra* note 47, at 540 (citing T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 682 (1970)).

²³¹ James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 (1999); 42 U.S.C. § 2000a(b)(1) (2012).

²³² Walsh, *supra* note 231, at 606 (citing *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 234 (1977)).

²³³ See discussion *supra* Section II.A.

discrimination.²³⁴ Here too, the statutory floor does allow for some private employees to be discharged or disciplined due to their political speech, and for some employers to take what would be otherwise prohibited action. This is a conflict of rights that is inevitable given the complexities of the rights at stake. By allowing exemptions for smaller businesses, the statute safeguards certain private entities against substantial impairment to the value of their businesses and substantial interference to their associational rights. Furthermore, the statutory floor also addresses the attribution problem, since the smaller the business, the more likely the speech of employees will be attributed to the employer.

In the interest of further safeguarding against the substantial impairment to the value of businesses, to which even larger businesses are susceptible, the statute would also provide a substantial injury defense to employers.²³⁵ The defense would allow employers to claim that the employee's political speech "(a) substantially injured the employer's ability to produce his goods or services, or (b) caused the loss of a substantial amount of business from customers or suppliers, or (c) created a reasonable likelihood of the immediate occurrence of the events specified in the sub-paragraphs (a) and (b) of this section."²³⁶ If the employer proves "any . . . of these defenses by a preponderance of the evidence," then the employer is released of liability and the adverse employment action is justified.²³⁷ While it would likely be difficult for a tech giant like Google²³⁸ to meet the requirements of the substantial injury defense, it might be reasonable for a restaurant chain like Top Dog to assert this defense, especially given the social media traction and publicity of their employees' speech.²³⁹ Ultimately, the statute's exceptions and defenses serve to avoid any constitutional problems that could arise from placing too heavy a burden on the employer.

D. Proposed Legislation

This note proposes that Congress pass a federal statute, aimed at protecting private employees from being harmed because of their political beliefs and activities. The legislation should be

²³⁴ Walsh, *supra* note 231, at 606.

²³⁵ Carroll, *supra* note 9, at 78–79.

²³⁶ *Id.* at 78–79.

²³⁷ *Id.* at 79.

²³⁸ Manjoo, *supra* note 213.

²³⁹ Wilkinson & Parry, *supra* note 1.

titled “The Statutory Protection of Every Employee from Constitutional Harm (SPEECH) Act,” and will read as follows:

The Statutory Protection of Every Employee from
Constitutional Harm (SPEECH) Act

*SECTION 1. PREVENTING ADVERSE ACTION AGAINST EMPLOYEES
DUE TO THEIR POLITICAL ACTIVITIES*

In the interest of employment uniformity, interstate commerce, and industrial peace, no employer shall . . .

(a) make, adopt, or enforce any rule, regulation, or policy forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office,

(b) adopt or enforce any rule, regulation, or policy which will control or direct the political activities or affiliations of employees,

(c) or coerce or influence, or attempt to coerce or influence employees through or by means of threat or discharge to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

SECTION 2. DEFINING “POLITICAL ACTIVITIES”

“Political activities” in Section 1 shall include . . .

(a) speech that involves employees’ political views, expressions, affiliations, or activities,

(b) the espousal of a candidate or cause,

(c) or any speech having to do with issues, ideas, arguments, ideologies, or positions that deal with broad social policy choices, the organization, conduct, and powers of government, and similar matters of concern to the general public.

SECTION 3. CIVIL ACTION AGAINST EMPLOYERS

The employee can recover actual damages and, if he or she has been dismissed, can additionally seek to receive either punitive damages or reinstatement.

SECTION 4. EMPLOYER EXCEPTIONS AND DEFENSES

Nothing in Sections 1, 2, or 3 of this statute shall apply to employers

(a) who employ less than [a prescribed number of] employees [to be determined by Congress],

(b) whose business's gross income is less than [a prescribed dollar amount, to be determined by Congress],

(c) whose business otherwise indicates an intimately connected workplace, such that an employer proves by a preponderance of the evidence that his or her associational interests would be unreasonably impaired by the employment of an individual with such political views,

(d) whose business has been or will be substantially injured by the employee's political speech, such that the employer proves by a preponderance of the evidence that the employee has caused or that there is a reasonable likelihood that the employee will cause a loss of a substantial amount of business from customers or suppliers,

(e) whose business is a representative, political, or ideological organization, in which the employee holds a representative role, and whose speech, if attributed to the business, would directly threaten the business's dissemination of an ideological message,²⁴⁰

(f) who wish to take action against their business's highest-level managers, or an otherwise restricted subset of employees hired with the express purpose of representing their employer's political positions.²⁴¹

SECTION 5. CRIMINALLY IMPERMISSIBLE SPEECH

Notwithstanding the above sections, employers may still choose to inquire into and take action against employees based on speech that is found to be criminally or otherwise impermissible.

* * *

Providing for exceptions that factor in employer interests, and leaving certain technical figures to Congress's discretion, the SPEECH Act offers a balanced approach to protecting private employees' freedom of political speech in a meaningful and necessary way.

CONCLUSION

"Indeed, unpopular speech is the type most in need of protection."²⁴² Even when the political speech is contrary to

²⁴⁰ See Carroll, *supra* note 9, at 78–80 (putting forth a similarly structured statute).

²⁴¹ See Bagenstos, *supra* note 97, at 254.

²⁴² Yale, *Free Speech*, *supra* note 47, at 549.

commonly held ideological views, the benefits of protecting private employees' speech is in the best interest of both self-expression and American ideals of a participatory democracy. Although this note ultimately recognizes the need for federal protection, the arguments against this protection are not without merit and constitute compelling reasons to insert some balancing of interests into a statutory proposal. While James Damore's former employer might be subject to liability under current California law, the result might be different in a state without such employee speech protections, one that adheres to the doctrine of at-will employment even in cases of political discrimination. Many of the private employee attendees of the Unite the Right Rally in Charlottesville, Virginia, for example, may be fired simply because of their political activity outside of work. The modern examples of particularly contentious political speech by private employees, and the possible remedies and consequences of their employers' actions, highlight the need for a comprehensive, uniform statute protecting employees' political speech.

It is clear that the current system of political speech protections for private employees falls short of what is necessary to consistently protect the modern employee. As individuals experience the everyday realities of the "war on free speech,"²⁴³ there is a greater need on the part of the government to step in and uplift political speech protections on the federal level. By doing so, the government would promote and strengthen free speech, and dismiss the idea that the type or amount of political speech private employees partake in while off-duty is conditioned on the approval of their employers. It is time to end the war on free speech in the workplace and protect American democracy.

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²⁴³ Gora, *supra* note 127, at 72.

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