"YOU'RE FIRED!": RECOGNIZING A PUBLIC POLICY CLAIM FOR PRIVATE EMPLOYEES SUBJECTED TO POLITICAL DISCRIMINATION IN THE WORKPLACE

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Abstract

Private employers hold immense power within the employer-employee relationship. The at-will employment presumption provides employers with almost unrestricted discretion in determining whether to terminate employees. Although federal law provides private employees with some protections from unlawful termination, those protections do not extend to political expression, effectively allowing political discrimination in the workplace. A handful of states have enacted laws prohibiting political discrimination, but any protections created are very limited. The public policy exception is the appropriate tool to overcome the inconsistent application of political discrimination statutes and grant private employees greater protection from unjust termination. This Note calls for an expansion of the public policy exception to recognize political expression as a valid and well-established public policy that should be protected in all jurisdictions. With the proper limitations, courts can appropriately use the public policy exception to protect private employees from political discrimination in the workplace.

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INTRODUCTION

In recent years, it has become evident the political divide in the United States is deepening.[1] A tumultuous presidency, a wide-sweeping racial justice movement,[2] and a devastating pandemic have demonstrated Americans' willingness to speak their truth and express their political beliefs. The polarized nature of American politics and increased political activism among citizens begs the question: can private employers take adverse action against an employee in response to their political affiliation or political speech? Consider an individual who participated in the "Stop the Steal" political rally in Washington, D.C., on January 6, 2021,[3] but who left the event prior to the outbreak of any violent or unlawful behavior and yet was still fired.[4] Due to the broad scope of at-

1. *See generally* Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, TR., Winter 2021, at 38 (examining the polarization of American politics in the wake of the 2020 election and the COVID-19 pandemic).

2. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/Y8LE-B286].

3. "Stop the Steal" is a conservative advocacy organization that organized the "March to Save America" on January 5 and 6, 2021, after which protestors stormed the U.S. Capitol Building. *See Stop the Steal*, INFLUENCE WATCH, https://www.influencewatch.org/organization/stop-the-steal/ [https://perma.cc/X3J2-TDNW].

4. This hypothetical is inspired by numerous accounts of private employers across the country who took action against employees who breached the U.S. Capitol or attended the "Stop

will employment and the few statutory protections limiting political discrimination in the workplace, this individual would be unable to present a strong case for wrongful termination.

In the United States, although employer-employee relationships are presumed to be "at-will,"[5] state and federal laws have been enacted to protect employees from unlawful firing. Federal law prohibits employers from discriminating against employees based on certain protected characteristics including race, color, religion, sex, national origin, age, and disability.[6] However, no federal statute explicitly regulates political discrimination in the workplace. The First Amendment's freedom of speech provision,[7] which should prohibit censorship of one's political opinions, is limited in scope and only protects against infringement by the government and public employers.[8] Currently, the only remedies available to private employees for termination or retaliation based on political affiliation are the few state-specific laws governing this issue.[9] While many states only prohibit voting intimidation,[10] others, such as California, go much further in protecting private employees' political expression by prohibiting discrimination based on political engagement and affiliation.[11]

In light of the few existing statutory protections, the at-will employment doctrine gives private employers almost unrestricted discretion in determining whether to terminate an employee based on the employee's political affiliation or political speech. In effect, private employers have free reign to engage in political discrimination, a form of discrimination the law does not currently capture. Generally, the at-will presumption grants private employers the ability to fire an at-will

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the Steal" rally to protest the results of the 2020 presidential election. Following the protest, many employers fired employees who posted to social media about their attendance. *See* Alexia Elejalde-Ruiz, *Chicago-Area CEO Fired as Companies Grapple with How to Respond to Employee Participation in US Capitol Siege. 'This Is a Character-Forming Moment*,*'* CHI. TRIB. (Jan. 8, 2021, 8:45 PM), https://www.chicagotribune.com/business/ct-biz-trump-rally-employees-fired-20210109-k3f7oraburcnliptoyqpnwfxhy-story.html [https://perma.cc/QRM7-9BFJ].

5. The at-will employment presumption states that an employee can be terminated at any time for any reason, or no reason at all. *See* Rachel Arnow-Richman & J.H. Verkerke, *Deconstructing Employment Contract Law*, 76 FLA. L. REV. (forthcoming 2023), https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=2225&context=facultypub [https://perma.cc/3P7R-SSR3] (describing the at-will employment presumption in the United States).

6. *See, e.g.*, 42 U.S.C. § 2000e-2(a).

7. U.S. CONST. amend. I.

8. *E.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972).

9. *See* 10 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 171.08 (2022).

10. *See, e.g.*, N.H. REV. STAT. ANN. § 659:40(II) (Westlaw through Ch. 251 of 2022 Reg. Sess.); IND. CODE § 3-14-3-21.5 (2022).

11. CAL. LAB. CODE §§ 1101–02 (West, Westlaw through urgency legislation through Ch. 134 of 2022 Reg. Sess.).

employee at any time and for any reason.[12] However, some carve-outs do exist. Notably, the public policy exception protects private employees from an employer's adverse action if the act violates a recognized public interest.[13] Under this exception, some courts have interpreted the meaning of "public policy" to recognize the importance of permitting employees to engage in political activity.[14] Thus, there is potential applicability in extending political discrimination protections to private employees through the public policy exception of at-will employment.

This Note explores the inconsistencies among states in regulating political protections in the workplace to address the existing gap in the law effectively allowing political discrimination in the private sector. The historical legacy of democracy and politics in the United States indicates that the public highly values political engagement among constituents.[15] In Part I, this Note explores the various federal and state laws that have been enacted to protect political activity in the United States. Despite these statutes, Part II explains how courts often interpret the public policy exception to at-will employment narrowly, rendering most private employees across the country susceptible to political discrimination from their employers. Thus, in Part III, this Note calls for allocating private employees greater protection from political discrimination through the public policy exception by establishing a clear public policy that favors political engagement. This solution will retain the respected at-will doctrine, while also affording employees greater protections, minimizing the prospect that an employee could be terminated for engaging in lawful political activity outside of the workplace.

I. STATUTORY PROTECTIONS FOR EMPLOYEES' POLITICAL ACTIVITY

The law is limited in its ability to protect private employees from political discrimination in the workplace. No federal law prohibits private employers from terminating employees based on political affiliation or expression. Although some states have codified laws granting private employees clear protections, most states narrowly construe any statutes regulating political discrimination in the private sector.

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12. Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 63 (2008).

13. Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 86 TUL. L. REV. 1583, 1593 (1994).

14. *See* Ali v. L.A. Focus Publ'n, 5 Cal. Rptr. 3d 791, 798–99 (Ct. App. 2003), *disapproved of on other grounds by* Reid v. Google, Inc., 113 Cal. Rptr. 3d 327 (2010).

15. *See, e.g.*, *Political Engagement, Knowledge and the Midterms*, PEW RSCH. CTR. (Apr. 26, 2018), https://www.pewresearch.org/politics/2018/04/26/10-political-engagement-knowledge-and-the-midterms/ [https://perma.cc/9J5z-8MBF] (discussing how a large majority of Americans actively participate in politics).

A. *Federal Law*

When faced with political discrimination in the workplace, employees may consider the following federal statutes as possible means of protection.

First Amendment. The primary source of law most employees would turn to is the First Amendment's freedom of speech doctrine. The freedom of speech doctrine prevents the government from restricting individual expression due to the subject matter or content of the expression.[16] Although the First Amendment creates viable claims for public employees who suffer discrimination on the basis of political speech or affiliation,[17] the First Amendment's protections are not applicable in this situation because they do not extend to the private sector.[18]

NLRA. The National Labor Relations Act (NLRA) also provides employees with some form of political speech protection.[19] The NLRA gives employees the freedom to associate and self-organize for the purpose of negotiating the terms and conditions of their employment.[20] Although employees can use the freedom to associate as a form of political expression, courts have interpreted the purpose of the NLRA narrowly,[21] and thus, this federal law is unlikely to protect private employees from political discrimination in most situations.

Title VII. In cases of unlawful termination or retaliation by employers, employees will often turn to Title VII of the Civil Rights Act of 1964[22] to support their claims.[23] However, Title VII only prohibits discrimination against certain protected classes, namely, race, color,

16. *E.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

17. *See* Justin T. Hill & Grant B. Osborne, *Political Speech in the Workplace (And What—If Anything—To Do About It)*, NAT'L L. REV. (Oct. 21, 2020), https://www.natlawreview.com/article/political-speech-workplace-and-what-if-anything-to-do-about-it [https://perma.cc/QK6W-ZC2Z].

18. *See supra* note 8 and accompanying text.

19. Pub. L. No. 74-198, 49 Stat. 499 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

20. 29 U.S.C. § 157; *see also id.* § 151 (declaring Congress's policy of protecting workers' ability to exercise the "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"); Black Diamond S.S. Corp. v. NLRB, 94 F.2d 875, 878–79 (2d Cir. 1938).

21. *See, e.g.*, *Black Diamond*, 94 F.2d at 879 (limiting workers' right to full association to consist only of the ability to elect bargain representatives, to restrain unfair or discriminatory labor practices and restrain interference with the right to bargain, and to be reinstated if subjected to an unfair labor practice).

22. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6).

23. *See* 42 U.S.C. § 2000e-2(a).

religion, sex, and national origin.[24] It does not prohibit employers, either public or private, from discriminating based on political affiliation or activity.[25]

B. *State Law*

Most states have enacted some form of law regulating political discrimination in the workplace;[26] however, the strength and purpose of these laws vary. The statutory protections afforded to private employees are, in most cases, extremely narrow.[27] For example, many states have either enacted only voter protection laws[28] or laws that limit a private employer's ability to discriminate against employees for election-related speech.[29] On the other hand, some states have codified statutory laws that prohibit private employers from discriminating against employees for engaging in political activity.[30] These state laws, which prohibit discrimination based on political affiliation generally provide stronger protections for private employees.[31]

Due to the varying approaches states have taken toward regulating political discrimination in the private workplace, private employees residing in certain jurisdictions are afforded greater statutory protections than private employees living in other areas. For instance, private employees in California are regarded as having some of the strongest protections against political discrimination in the nation.[32] The California Labor Code states: "No employer shall . . . [f]orbid[] or prevent[] employees from engaging or participating in politics or . . . control or direct the political activities or affiliations of employees."[33] The Labor Code also prohibits an employer from "coerc[ing] or influenc[ing] his employees . . . to adopt or follow or refrain from adoption or following

24. *Id.*

25. *Id.*

26. *See* Gray I. Mateo-Harris, *Politics in the Workplace: A State-by-State Guide*, SHRM (Oct. 31, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/politics-at-work.aspx [https://perma.cc/57SZ-8N4M].

27. *See, e.g.*, OHIO REV. CODE ANN. § 3599.06 (LexisNexis, LEXIS through June 1, 2022) (prohibiting employers from interfering with employees on election day).

28. *See, e.g.*, FLA. STAT. § 104.081 (2022) (barring employers from firing employees for voting or not voting in any election).

29. *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 326–37 (2012); *see, e.g.*, 10 ILL. COMP. STAT. 5/29-4 (2022) (prohibiting employers from using threats or intimidation to prevent employees from supporting or opposing an individual running for public office).

30. *See* Volokh, *supra* note 29, at 313; *see, e.g.*, CAL. LAB. CODE §§ 1101–02 (West, Westlaw through urgency legislation through Ch. 134 of 2022 Reg. Sess.).

31. Volokh, *supra* note 29, at 313.

32. R. George Wright, *Political Discrimination by Private Employers*, 87 U. CIN. L. REV. 761, 764–65 (2019).

33. CAL. LAB. CODE § 1101 (West 2022).

any particular course or line of political action or political activity."[34] Although courts have limited these provisions to protect only those political activities in which employees have engaged outside of work,[35] generally, California courts have interpreted "political activity" in this context rather broadly.[36]

In *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*,[37] the California Supreme Court held that "political activity" within sections 1101 and 1102 of the California Labor Code was broad enough to encompass participation in social movements such as the gay rights movement.[38] In that case, a group of law students filed a class action on behalf of gay employees alleging employment discrimination on the basis of their sexual orientation.[39] The court emphasized that the Labor Code's provisions were adopted to protect "the fundamental right of employees in general to engage in political activity without interference by employers."[40] The court noted that the provisions cannot be "narrowly confined to partisan activity."[41] Instead, the court recognized the employees' claims of discrimination as valid despite the fact that the relevant "political activity" was unrelated to a particular political party or agenda.[42] The court articulated that the "struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."[43] By extending the meaning of "political activity" beyond the mere support of or opposition toward a political candidate or political party, California courts created strong protections for private employees who face potential political discrimination from their employers.

Consequently, the California Labor Code is one of the most expansive state laws governing political discrimination[44] since it applies to all political activity[45] that occurs outside of the workplace[46] and is not limited to protecting express partisan political actions, such as attending a presidential rally or speaking out in opposition against a particular

34. *Id*. § 1102.

35. *See* Ali v. L.A. Focus Publ'n, 5 Cal. Rptr. 3d 791, 799 (Ct. App. 2003), *disapproved of on other grounds by* Reid v. Google, Inc., 113 Cal. Rptr. 3d 327 (2010).

36. Wright, *supra* note 32, at 763; Volokh, *supra* note 29, at 313.

37. 595 P.2d 592 (Cal. 1979).

38. *Id.* at 610.

39. *Id.* at 595.

40. *Id.* at 610 (quoting Fort v. Civ. Serv. Comm'n, 392 P.2d 385, 387 (Cal. 1964)).

41. *Id.*

42. *See id.* at 610–11.

43. *Id.* at 610.

44. *See* Wright, *supra* note 32, at 763.

45. *See Gay L. Students Ass'n*, 595 P.2d at 610; Wright, *supra* note 32, at 763–64.

46. Ali v. L.A. Focus Publ'n, 5 Cal. Rptr. 3d 791, 798–99 (Ct. App. 2003), *disapproved of on other grounds by* Reid v. Google, Inc., 113 Cal. Rptr. 3d 327 (2010).

federal law. The Labor Code intends to prevent employer political suppression or coercion, and eliminate unlawful firings and retaliatory actions against private employees who engage in lawful political activity or express reasonable political beliefs.[47]

Other states, such as South Carolina, also have statutes that guard against discrimination based on political expression. In South Carolina, a person may be held criminally liable for "discharg[ing] a citizen from employment or occupation . . . 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 [South Carolina]."[48] South Carolina employees may also use this statute to support claims of wrongful termination against private employers.[49] By employing the broad phrases "political opinions" and "political rights," this statute seems to offer strong protections to private employees who engage in political activity from their employers; however, some South Carolina courts have limited the kinds of activities that are included within the scope of this statute.

In *Vanderhoff v. John Deere Consumer Products*,[50] an employee alleged he was wrongfully discharged after displaying a Confederate flag decal on his work toolbox.[51] The United States District Court for the District of South Carolina ruled that such an action does not constitute political opinion or the exercise of any political right or privilege that is protected under section 16-17-560 of the South Carolina Code of Laws.[52] Instead, the court elected to limit the meaning of political expression under this statute to mean only "matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote."[53] The court noted that use of the Confederate flag as a form of expression is often associated with political debate;[54] however, courts must limit political expression within the meaning of this statute to prevent its application "to an infinite number of social issues that fall within the ambit of public debate and, as a consequence, at times become issues in the political arena."[55]

In a factually similar case involving an employee who was also terminated for displaying a Confederate flag decal on his work toolbox, the United States Court of Appeals for the Fourth Circuit considered

47. *See* CAL. LAB. CODE § 1102 (West 2022).
48. S.C. CODE ANN. § 16-17-560 (2022).
49. *See* Owens v. Crabtree, 823 S.E.2d 224, 227–29 (S.C. Ct. App. 2019).
50. No. C.A. 02-0685-22, 2003 WL 23691107 (D.S.C. Mar. 13, 2003).
51. *Id.* at *1.
52. *Id.* at *2–3.
53. *Id.* at *2.
54. *Id.* at *3.
55. *Id.*

when political expressions involving Confederate flags would fall within the scope of the South Carolina statute.[56] In *Dixon v. Coburg Dairy, Inc.*,[57] the Fourth Circuit emphasized that because the terminated employee exercised his "general rights of free speech on property privately owned,"[58] the First Amendment did not protect his conduct, and thus the statute did not provide him any remedy.[59] Nevertheless, the court did provide guidance on circumstances that could trigger the statute's protections. Had the employee attended a pro-Confederate flag rally, the court would have considered his actions an exercise of a political right, namely that of free speech, and they would have satisfied the first element of a claim under section 16-17-560 of the South Carolina Code of Laws.[60] Thus, it would be unlawful for the employee's private employer to terminate him for attending the pro-Confederate flag rally.[61] In making this distinction, the court indicated that terminating a private employee for engaging in political activity outside of the workplace would be a case of unlawful discrimination.[62]

On the other hand, most states have chosen to limit private employees' statutory protections from political discrimination in the workplace by enacting comparatively narrower employment discrimination laws. In fact, in many states, the only source of law private employees can turn to when employers engage in political discrimination is voter protection laws; however, the narrow scope of these statutes limits their applicability.[63] For instance, in Florida, no laws expressly govern political discrimination in the workplace. Instead, statutes only prohibit a private employer from firing an employee for choosing to vote or not vote.[64] Specifically, "[i]t is unlawful for any person . . . to discharge or threaten to discharge any employee in his or her service for voting or not voting in any election, state, county, or municipal, for any candidate or measure submitted to a vote of the people."[65] Laws such as this Florida statute, which are limited to protecting employees from wrongful termination—or the threat thereof—based on their voting patterns are narrower in scope compared to the laws of California or South Carolina.

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56. Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 254–55, 261–64 (4th Cir. 2003), *rev'd en banc on other grounds*, 369 F.3d 811 (4th Cir. 2004).

57. 330 F.3d 250

58. *Id.* at 262 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972)).

59. *Id.* at 262–64.

60. *Id.* at 262.

61. *Id.*

62. *Id.* at 262–63.

63. *See, e.g.*, IND. CODE § 3-14-3-21.5 (2022) (prohibiting the intentional intimidation of an individual exercising their right to vote).

64. FLA. STAT. § 104.081 (2022).

65. *Id.*

Interestingly, one Florida county has gone further in protecting an employee's ability to freely participate in politics without fear of facing recourse from their employer. In Broward County, the Broward County Human Rights Act[66] protects all individuals from employment discrimination based on political affiliation.[67] Although Florida does offer some statutory recourse for private employees who have suffered discrimination,[68] the narrow scope of section 104.081 of the Florida Statutes and the jurisdictional limitation resulting from the Broward County Ordinance present challenges for private employees who wish to challenge an employer's adverse action toward them. As a result, few cases have arisen under these statutes. Even in states like California and South Carolina, which provide broader protections for private employees, there is still "an underwhelming amount of litigation" brought under these statutes, suggesting that the statutes are of limited use to private employees.[69]

Considering the U.S. Capitol was the site of the "Stop the Steal" political rally in January 2021,[70] it is appropriate to examine the local laws in Washington, D.C., as well. Section 2-1401.01 of the D.C. Code recognizes the importance of protecting against political discrimination in all situations.[71] The statute states: "It is the intent of the Council of the District of Columbia, in enacting this unit, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of . . . political affiliation . . . ."[72] The Code defines "[p]olitical affiliation" as "the state of belonging to or endorsing any political party."[73] The District of Columbia Court of Appeals refused to further expand this definition in *Blodgett v. University Club*[74] when it asserted that an allegation of wrongful termination for "political reasons" or

66. Broward County, Fla., Ordinance 2011-14 (Aug. 16, 2011) (codified as amended at BROWARD COUNTY, FLA., CODE OF ORDINANCES ch. 16½ (2023)).

67. BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-33 (2023) (prohibiting employment discrimination based on a "discriminatory classification"); *id.* § 16½-3(p) (including "political affiliation" as a type of "discriminatory classification"); *see* Allan H. Weitzman & Jurate Schwartz, *Florida Law Offers No Sure Answer About Politics in the Workplace*, ORLANDO BUS. J. (Oct. 25, 2004), https://www.bizjournals.com/orlando/stories/2004/10/25/smallb6.html [https://perma.cc/335M-CRUR].

68. *See, e.g.*, FLA. STAT. § 760.10 (2022) (prohibiting discrimination in employment based on "race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status").

69. Chloe M. Gordils, Note, *Google, Charlottesville, and the Need to Protect Private Employees' Political Speech*, 84 BROOK. L. REV. 189, 198 (2018).

70. *See supra* note 3.

71. D.C. CODE § 2-1401.01 (2023).

72. *Id.*; *see also id.* § 2–1402.11(a)(1)(A) (defining employment discrimination by an employer).

73. *Id.* § 2-1401.02(25).

74. 930 A.2d 210 (D.C. Cir. 2007).

"politics generally" does not state a viable claim.[75] The specific statutory interpretation in *Blodgett* illustrates the Washington, D.C. courts deliberate intention to limit the scope of the statute and prevent a surge in political discrimination allegations that are wholly unrelated to the legislative intent behind the D.C. statute.[76]

Although a few states have codified laws explicitly governing political discrimination in the workplace, even a brief overview of state law reveals that jurisdictions have taken very different approaches to this legal issue. The inconsistency with which courts apply such statutes creates a true dilemma, since many private employees across the country may be left unprotected from their employers' potential political discrimination towards them.

II. THE PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT

When an employee is terminated, he or she generally has no remedy because of the nature of at-will employment.[77] However, in certain cases, employees may rely on the common law public policy exception to bring a wrongful discharge claim.[78] Most courts acknowledge there are some public policies so valued by society that when an employee's dismissal would jeopardize that public policy, the employee is entitled to a remedy.[79] A few courts have gone a step further and recognized political expression as a public policy clear enough to support a claim under the public policy exception.

A. *The At-Will Presumption*

The at-will employment doctrine governs most private employer-employee relationships in the United States.[80] Since at-will employees have the ability to leave a job at any time and for any reason,[81] the at-will doctrine also allows employers to fire an employee at any time and for any reason, subject to any unlawful justifications for termination.[82] The

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75. *Id.* at 221

76. *See id.*

77. *See* Theodore A. Olsen, *The Public Policies Against Public Policy Wrongful Discharge Claims Premised on State and Federal Fair Employment Statutes*, 62 DENV. U. L. REV. 447, 447–49 (1985).

78. *See generally id.* at 449–53.

79. *Id.* at 449; *see, e.g.*, Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 281–82 (Iowa 2000).

80. *See At-Will Employment — Overview*, NCSL (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/RC52-A6VE] ("Employment relationships are presumed to be 'at-will' in all U.S. states except Montana."); *see also* Charles J. Muhl, *The Employment At-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 3 (2001).

81. Porter, *supra* note 12, at 63.

82. *See* Porter, *supra* note 12, at 63; Olsen, *supra* note 77, at 447.

at-will employment relationship is presumed in most contexts because both the employer and employee can modify the terms of employment by contract upon hiring.[83]

The U.S. Supreme Court first recognized the at-will employment doctrine in *Adair v. United States*.[84] In *Adair*, the Court considered a federal law that prohibited certain employers from discriminating against employees for joining labor unions.[85] The Court found that the federal statute violated the Fifth Amendment's Due Process Clause,[86] as it infringed upon the freedom of contract.[87] The Court's ruling articulated the importance of the liberty to contract, especially in the employment law context.[88] The Court emphasized that because no employee should be compelled to perform services for another against his will, employees must be able to resign at any point.[89] Further, because of this basic right employees have, employers also retain the right to prescribe conditions upon which they will accept an employee's service.[90] The Court's decision to embrace the freedom of contract in *Adair* is presumably in large part due to the commonly held belief that employers and employees were in positions of equal bargaining power when contracting terms of employment.[91]

Although freedom of contract, the principle underlying the at-will employment doctrine, was once widely embraced,[92] the unfettered support it had once received during the Lochner Era eventually began to waiver.[93] As the civil rights movement progressed in the United States throughout the mid-to-late twentieth century, reform swept through labor and employment laws as well.[94] During this time, federal legislation and

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83. Pennington, *supra* note 13, at 1586.

84. 208 U.S. 161 (1908).

85. *Id.* at 166–69.

86. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

87. *Adair*, 208 U.S. at 174–80.

88. *Id.* at 175 ("[T]he employer and the employee have equality of right [to contract], and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract . . . ."); *see also* Pennington, *supra* note 13, at 1587 ("The liberty to contract and the employment-at-will doctrine found constitutional legitimacy in the 1907 United States Supreme Court case of *Adair v. United States*.").

89. *See Adair*, 208 U.S. at 174–75.

90. *See id.*

91. *See* Samuel Bagenstos, *Lochner Lives On*, ECON. POL'Y INST. (Oct. 7, 2020), https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/ [https://perma.cc/S5E3-HGKK] (discussing how courts at this time viewed employers and employees as having "equal power in the labor market").

92. *See* Muhl, *supra* note 80, at 3.

93. *See generally* Bagenstos, *supra* note 91 (describing the Lochner Era and its decline).

94. *See* Muhl, *supra* note 80, at 3–4.

executive orders secured greater labor rights for American workers.[95] Both legislatures and courts recognized the importance of improving workplace conditions for the public.[96]

In 1964, Congress passed the Civil Rights Act, which prohibited private employers from terminating an employee because of the employee's membership in certain protected classes.[97] This law, along with others of its time,[98] reflected a change in how courts viewed the employer–employee relationship.[99] In contrast to the early twentieth century when courts embraced *Adair*, during the civil rights movement, courts began to acknowledge that employers and employees were not on equal footing when it came to bargaining power.[100] Rather, courts began to recognize that private employers often have advantages over employees in the employment contract drafting stage, making it easier for private employers to contract favorable employment policies for themselves.[101] Such an imbalance of bargaining power could thus contribute to an increasing number of unjust termination claims.[102] This progressive, wide-sweeping outlook on at-will employment and the employer-employee relationship led to the almost universal adoption of three exceptions to the at-will employment doctrine.[103]

B. *Interpreting "Public Policy"*

The common law public policy exception is one of three major exceptions to at-will employment.[104] The public policy exception, which forty-two of the fifty states, plus Washington, D.C., embrace, provides private employees with a cause of action for wrongful discharge when the termination violates some established notion of public policy.[105] In order to succeed on a public policy wrongful discharge claim, an employee must prove that (1) their employment was terminated, (2) "a clear and substantial public policy existed," (3) the employee's conduct

95. *See, e.g.*, 42 U.S.C. § 2000e-2; Exec. Order No. 10,988, 3 C.F.R. § 521 (1959–1963) (granting federal employees the right to engage in collective bargaining through labor organizations), *repealed by* Exec. Order No. 11,491, 3 C.F.R. § 861 (1966–1970).

96. *See* Muhl, *supra* note 80, at 3–4.

97. *See* § 2000e-2(a) (prohibiting discrimination based on "race, color, religion, sex, or national origin").

98. *See, e.g.*, The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

99. *See* Muhl, *supra* note 80, at 3–4.

100. *Id.*

101. *See id.* at 3.

102. *See id.* at 4.

103. *Id.*

104. *Id.* (discussing the three major exceptions to at-will employment: the public policy exception, the implied contract exception, and the implied covenant of good faith exception).

105. Pennington, *supra* note 13, at 1593.

"implicated that clear and substantial public policy," and (4) "the termination and conduct in furtherance of the public policy are causally connected."[106] Much like the varying definitions of "political affiliation" and "political activity" that states have established,[107] jurisdictions have interpreted the meaning of what constitutes a clear and substantial public policy within the public policy exception differently.[108]

A 1959 California case, *Petermann v. International Brotherhood of Teamsters*,[109] is one of the earliest to address the public policy exception. In this case, Petermann, an at-will employee, was subpoenaed to testify before the California legislature as part of an ongoing investigation of his employer, the Teamsters Union.[110] Soon after, Petermann's employer directed Petermann to make "false and untrue statements" during his testimony.[111] Instead of following his employer's instructions, Petermann provided the legislature with correct answers and truthful testimony.[112] Petermann was fired the following day.[113] In response to Petermann's allegations of wrongful termination, the California appellate court determined that firing an employee for refusing to commit perjury would be "obnoxious to the interests of the state and contrary to public policy and sound morality."[114] The court then considered the meaning of the phrase "public policy" and acknowledged that the term "is inherently not subject to precise definition."[115] In its discussion of this concept, the court noted that public policy aims to prevent acts that are "injurious to the public or against the public good" or that "contravene[] good morals or any established interests of society."[116] Although it is difficult to establish an exact definition of the meaning of the phrase "public policy," the *Petermann* decision established that violations of public policy are subject to judicial review and that private employees can turn to the public policy exception to protect themselves from alleged wrongful termination.[117]

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106. Rackley v. Fairview Care Ctrs., 23 P.3d 1022, 1026 (Utah 2001).

107. *See supra* Section I.B.

108. *See* TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 208–09 (4th ed. 2019); Pennington, *supra* note 13, at 1595.

109. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

110. *Id.* at 26; Muhl, *supra* note 80, at 5.

111. *Petermann*, 344 P.2d at 26.

112. *Id.*

113. *Id.*

114. *Id.* at 27.

115. *Id.* (emphasis omitted) (quoting Safeway Stores v. Retail Clerks Int'l, 261 P.2d 721, 726 (Cal. 1953)).

116. *Id.* (internal quotation marks and citations omitted).

117. *See* Editorial Note, *The Development of Exceptions to At-Will Employment: A Review of the Case Law from Management's Viewpoint*, 51 CIN. L. REV. 616, 618 (1982).

Since *Petermann*, many other courts have addressed the meaning of public policy in connection with wrongful discharge of private employees.[118] Consequently, we are left with various interpretations of what type of conduct constitutes "public policy."[119] Several courts have narrowly limited the public policy exception to situations that are clearly contrary to a state's constitution or statutory scheme.[120] For instance, in *Brockmeyer v. Dun & Bradstreet*,[121] the Wisconsin Supreme Court explicitly expressed that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law."[122]

On the other hand, some courts have interpreted the phrase more broadly and do not require a particular public policy to stem from a state constitutional or statutory provision.[123] In 1981, the Supreme Court of Illinois adopted a very broad definition of "public policy" in *Palmateer v. International Harvester Co.*[124] In that case, the court defended the right of private employees to sue their employer for wrongful termination after being fired for reporting a coworker's potential criminal acts to local law enforcement.[125] The court, addressing the underlying topic of unequal bargaining power between employers and employees, noted that "unchecked employer power" is a threat to public policy.[126] As a means of combatting this imbalance disfavoring employees, the court embraced the public policy exception and found that "a matter [of public policy] must strike at the heart of a citizen's social rights, duties, and responsibilities."[127] In its rationale, the court emphasized that although there was no Illinois state law expressly requiring citizens to report potential criminal activity, public policy "nevertheless favors citizen crime-fighters."[128] Therefore, it was against public policy for the employer to fire the employees for reporting the potential crime.[129] This decision extended the public policy exception beyond what was

118. Pennington, *supra* note 13, at 1594 ("*Petermann* was the first in a long and continuing line of cases addressing wrongful discharge in contravention of public policy.").

119. *See id.* at 1595; Muhl, *supra* note 80, at 5.

120. *See, e.g.*, Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 426–28 (Ind. 1973) (holding that an employee who was fired for filing a workers' compensation claim is protected under the public policy exception because the employee was discharged solely for exercising a statutorily conferred right).

121. 335 N.W.2d 834 (Wis. 1983).

122. *Id.* at 840; *see also id.* ("The public policy must be evinced by a constitutional or statutory provision.").

123. *See* Pennington, *supra* note 13, at 1619–22.

124. 421 N.E.2d 876 (Ill. 1981) (as modified on denial of rehearing).

125. *Id.* at 877, 879–80.

126. *Id.* at 878.

127. *Id.* at 878–79.

128. *Id.* at 880.

129. *Id.*

enumerated in the state's constitution and statutes, allowing for judicially created public policy.[130]

Palmateer demonstrates that the public policy exception may be expanded to grant private employees greater protections from their employers. This decision exemplifies how some courts have recognized that society values certain principles so highly that the law should protect private employees from employer retaliation when engaging in acts related to those principles.[131]

C. *Political Expression as Public Policy*

The freedom of political expression is a constitutional principle that is deeply ingrained in this nation's history and one that U.S. citizens continue to highly respect.[132] If American society truly values political expression and civic engagement, should private employers, as a matter of public policy, be able to terminate private employees based on political activity outside of the workplace? Courts often fall into two categories when addressing this question. Most courts worry an expansive public policy exception will erode the at-will presumption and will only recognize political expression as public policy if a state statute or constitutional provision explicitly enumerates that public policy.[133] And as previously discussed, few states have expansive-enough statutes to serve as a proper statutory hook to apply the public policy exception to prevent political discrimination.[134] Thus, only a minority of courts may be willing to recognize political expression generally as an established public policy when a codified statute does not exist.

New Mexico is one state that has recognized political expression as an established public policy but only because a state statute defined such a public policy. In *Chavez v. Manville Products Corp.*,[135] the New Mexico Supreme Court expressed its support of the right to freedom of political expression and demonstrated its belief that the law should protect private employees from retaliation based on an employer's political agenda.[136] In *Chavez*, an employer sought to involve its employees with lobbying efforts in support of federal asbestos liability

130. *See id.* at 878, 880.

131. *See id.*

132. *See* Daniel Riffe & Kyla P. Garrett Wagner, *Freedom of Expression: Another Look at How Much the Public Will Endorse*, 26 COMM. L. & POL'Y 161, 161 (2021) (describing national surveys revealing citizens' agreement that freedom of political expression is a principal and basic right).

133. *See* Pennington, *supra* note 13, at 1600; *see also supra* notes 120–122 and accompanying text.

134. *See supra* Section I.B.

135. 777 P.2d 371 (N.M. 1989).

136. *See id.* at 372, 377–78.

legislation.[137] Although Chavez, an employee, declined to participate, his employer sent a letter urging one of the New Mexico Senators to support the asbestos legislation and included Chavez's name in the signature.[138] Chavez expressed his disapproval of the situation to his supervisor, and within a month, he was terminated.[139] After analyzing Chavez's retaliation claim, the court declared that the right to freedom of political expression is a vital aspect of New Mexico's public policy and thus is a limit on the at-will employment presumption.[140] The court's recognition of this public policy stemmed from the New Mexico statute prohibiting the coercion of employees.[141] This statute provides that employers may not fire or threaten to fire any employee "because of the employee's political opinions or belief or because of such employee's intention to vote or refrain from voting for any candidate, party, proposition, question or constitutional amendment."[142] In this situation, the court viewed section 1-20-13 of the New Mexico Statutes as conferring employees the right to express their political opinions without consequence.[143] From this, the court applied the public policy exception to grant Chavez a remedy.[144]

In a few instances, courts have used the public policy exception to protect private employees' political expression without direct derivation from a state constitutional provision or statute. For example, in *Novosel v. Nationwide Insurance*,[145] the United States Court of Appeals for the Third Circuit held that a private employer may be held liable under Pennsylvania law for terminating an employee who refused to participate in the employer's lobbying effort and privately voiced his opposition to the employer's political stance.[146] In this case, Novosel, a private sector employee, alleged he was terminated from his job after refusing to lobby to the Pennsylvania state legislature on his employer's behalf.[147] Despite the fact there was no Pennsylvania law prohibiting an employer from terminating an employee on the basis of political opinion or lobbying efforts,[148] the Third Circuit recognized "the importance of the political and associational freedoms of the federal and state Constitutions" and determined that the public policy exception was well-equipped to serve

137. *Id.* at 372.
138. *Id.*
139. *Id.*
140. *Id.* at 377.
141. N.M. STAT. ANN. § 1-20-13 (2022).
142. *Id.*
143. *See Chavez*, 777 P.2d. at 377.
144. *Id.*
145. 721 F.2d 894 (3d Cir. 1983).
146. *Id.* at 896, 900.
147. *Id.* at 896.
148. *Id.* at 898–99.

as a remedy to the employee in this situation.[149] The lack of a "statutory declaration of public policy" did not bar a wrongful discharge claim.[150] The Third Circuit compared political expression to the fulfillment of jury service and the filing of workers' compensation claims—two commonly accepted examples of conduct sanctioned as public policy[151]—and expressed that political expression has no less of a compelling societal interest than the other two activities.[152] The *Novosel* court reasoned that certain constitutional rights, particularly the First Amendment right to free speech, are such critical principles of public policy that private employees should be protected from termination based on exercising those rights.[153] The court emphasized that political freedom is so significant that it does not matter whether the threat stems from a public or private governing body.[154] In fact, the Third Circuit expressly stated "an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities."[155] Ultimately, the *Novosel* decision demonstrated that political expression must be protected in both the public and private sectors.[156]

The *Novosel* decision is not the only source of law that extends First Amendment protections to the private sector. Some states, such as Connecticut, have passed laws expressly extending free speech protections to private actors. Section 31-51q of the General Statutes of Connecticut provides that any employer, either public or private, who disciplines or discharges any employee "on account of the exercise by such employee of rights guaranteed by the first amendment to the [U.S.] Constitution" is liable for wrongful discharge, so long as the employee's conduct "does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer."[157] This statute extends the First Amendment's protections to individuals working for private actors, indicating that state legislators understood and supported the highly valued nature of free speech, including the freedom of political expression. By passing this law, the Connecticut legislature demonstrated

149. *Id.* at 899.
150. *Id.*
151. *See* Pennington, *supra* note 13, at 1599–1600, 1602.
152. *Novosel*, 721 F.2d at 899.
153. *See id.* at 899–900.
154. *Id.* at 900.
155. *Id.*
156. *Id.*
157. CONN. GEN. STAT. § 31-51q (2022).

that freedom of political expression and speech is a matter of state public policy and should be protected.[158]

Although some jurisdictions may interpret the public policy exception broadly enough to recognize political expression as a compelling public policy, the majority does not. As such, a solution is necessary to bring the states in line with each other and establish consistent legal protections for private employees from political discrimination.

III. COMBATTING POLITICAL DISCRIMINATION WITH PUBLIC POLICY

The state-by-state analysis of statutory regulation of political discrimination in the private sector reveals most private employees lack legal protection in this area. The simple way to address this problem would be for all states to adopt statutes that mirror sections 1101 and 1102 of the California Labor Code. In reality, this quick fix would not produce a feasible solution since slow-moving and partisan legislators averse to working together would prevent these statutes from coming to fruition. The irony of the situation is that a solution to this legal inconsistency is necessary because of the polarized ideological nature of society, yet that polarization is what prevents legislatures from passing any useful laws. Thus, an expansion of the public policy exception is the most practical way to both address political discrimination in the private sector and start granting private employees greater protections sooner rather than later.

A. *Political Expression as Compelling Public Policy*

Customarily, courts have applied the public policy exception to at-will employment in limited circumstances.[159] Most, if not all, courts have recognized that exercising a statutory right or privilege,[160] fulfilling a statutory obligation,[161] and fulfilling an important public obligation[162] are clear examples of conduct supporting established public policies that can save a private employee from being terminated.[163] When considering the policy arguments behind establishing political expression as a public

158. Because Connecticut is one of the many states recognizing the public policy exception to at-will employment, *see* Muhl, *supra* note 80, at 4, political expression would be protected under the exception as it is public policy clearly enunciated in Connecticut statutory law.

159. *See* Pennington, *supra* note 13, at 1596–1606 (discussing the common circumstances when the public policy exception is applied, including refusing to commit an unlawful act, exercising a statutory right or privilege, performing a statutory obligation, and performing an important public obligation).

160. *E.g.*, Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427–28 (Ind. 1973) (finding that an employee cannot be lawfully discharged for exercising their statutory right to file a workers' compensation claim).

161. *E.g.*, Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (jury duty).

162. *See* Pennington, *supra* note 13, at 1604 (describing "whistleblowing" cases as falling into this category).

163. *Id.* at 1596–1606

policy and the inconsistent nature with which state legislatures and judiciaries have treated the concept of political expression in drafting and interpreting law, a strong argument for adopting freedom of political expression as a basis for a clear and substantial public policy exists.

The fundamental nature of the right to engage in political activity or expression should prompt courts to consider this right as a form of public obligation. Performing an important public obligation is commonly cited as conduct in furtherance of public policy.[164] A politically active and engaged citizenry is one of the cornerstones of American history.[165] In fact, many scholars view civic engagement and political participation as the foundation of a prospering democratic society.[166] From a young age, children are taught that as citizens, it is their duty to vote in political elections.[167] They are also warned of the impact the decisions of the three branches of government can have on their daily lives and on the lives of those around them, only reinforcing the importance that society places on politics.[168] Over the last few years, the rise of social media and easy access to information has resulted in a call for society, particularly younger individuals, to educate themselves and get involved in political matters that resonate with them.[169] There are many advantages to becoming more involved in politics; studies have shown that strong levels of civic engagement have positive benefits for both individual citizens and society as a whole.[170] This movement toward creating more politically active and engaged citizenry emphasizes the high value placed

164. *See, e.g.*, Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 388–89 (Conn. 1980) (holding that a private employee may bring a wrongful discharge action against his employer for being fired after reporting food products had been falsely and misleadingly labeled in violation of state law).

165. *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 5 (2012) ("[A]lmost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity.").

166. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 1 (2000); Laura McNabb, *Civic Outreach Programs: Common Models, Shared Challenges, and Strategic Recommendations*, 90 DENV. U. L. REV. 871, 872 (2013); Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 57 (2014).

167. *See* Lisa Blomgren Amsler & Elise Boruvka, *Teaching Democracy Through Practice: Collaborative Governance on Campus*, 2019 J. DISP. RESOL. 73, 93 (discussing civic education from kindergarten through twelfth grade and the merit in teaching civic values).

168. *See id.*

169. *See generally* Stacey B. Steinberg, *#Advocacy: Social Media Activism's Power to Transform Law*, 105 KY. L.J. 413 (2017) (discussing the ease in which social media allows individuals to engage in activism and further social movements such as the Black Lives Matter movement).

170. *See* McNabb, *supra* note 166, at 880–83 (discussing benefits of being civically active such as psychological fulfillment, career skills, economic resilience, and healthy democratic government).

on political expression. It reinforces the importance of the deeply held constitutional principle of free speech and arguably creates a public or societal obligation for individuals to engage in political activity and political expression.[171]

The inconsistent way state legislatures and courts have regulated politics in the workplace supports the expansion of the public policy exception to combat political discrimination more effectively in the private sector. At this point, many states have codified laws governing politics in the workplace, but some state statutes grant private employees broad protections,[172] whereas others grant exceedingly narrow protections. Various state laws regulate a private employer's ability to coerce,[173] intimidate,[174] or discharge[175] employees; however, many of these statutes relate only to matters of voting in elections,[176] leaving most employees who engage in general political activity or political expression unprotected. Establishing a public policy protecting political expression is necessary to grant private employees stronger and more equally balanced protections across jurisdictional lines. Despite the limited protections many statutes offer and the variation in the statutes' wording and intent, the underlying principle establishing some degree of freedom of political expression is discernable, and courts and lawmakers can use it to support an expansion of the public policy exception.[177]

B. *Overcoming Obstacles*

Although there is compelling reason to expand the public policy exception to allow for protection of political expression generally, there are some valid reasons why courts have not always ruled in this way. In upholding the political rights of private employees, it is important to consider that an employer's right to freedom of expression may be at risk as well. Developing a public policy exception that is too expansive or

171. *See* 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, 988 (2014) (discussing the high value society places on free speech and advocating for an expansion of the public policy doctrine to include claims based on certain constitutional principles).

172. *See supra* notes 32–47.

173. *See, e.g.*, ALA. CODE § 17-17-45 (Westlaw through Act 2022-442 of the 2022 Reg. and First Spec. Sess.) (prohibiting employers from coercing employees to attempt to influence how they votes in elections).

174. *See, e.g.*, IND. CODE § 3-14-3-21.5 (2022).

175. *See, e.g.*, FLA. STAT. § 104.081 (2022).

176. *See, e.g.*, *id.*

177. *See generally* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2337–42 (2021) (discussing legislative intent behind various state laws prohibiting employers from firing, not hiring, disciplining, or coercing employees because of political expression).

overreaching may ultimately infringe upon the rights of the employers.[178] Employers should be able to express their political opinions just as much as employees. This principle also relates to a managerial concern employers may raise. Private employers retain the discretion to hire or fire employees based on whether they share the same values or mission as the company.[179] For example, a small-town employer may have a valid reason for terminating an outspoken, liberal employee if the employee's political activities offend the employer's conservative clientele, putting the employer's profit margins at risk. Further, a staunch pro-life advocate is unlikely to be an appropriate match as a grief counselor at an abortion clinic; their values are clearly not aligned. However, this same individual should not fear any consequence if employed as a counselor at a substance abuse treatment center. Although it is fair for an employer to compose a certain image for a company and market itself toward certain customers or consumers, lawmakers must strike an appropriate balance between preserving the rights of both the employee and employer.

To ensure that a public policy protecting political expression is not too expansive, some limits must be identified. For example, it is essential to restrict protected conduct to lawful actions. It would be inappropriate to protect political activity that is violent or likely to incite violence, since this type of behavior may be unlawful.[180] Putting this restriction into effect would filter out conduct unworthy of protection, as these acts would presumably be harmful to society. For example, this limitation would not immunize the hundreds of individuals who stormed the U.S. Capitol on January 6, 2021, as their actions, albeit stemming from very strong political opinions, were illegal.[181] Recognizing this caveat is an important step in forming a public policy that protects political expression generally without becoming overly expansive.

In addition, courts may draw a distinction between political activity that occurs at work and political activity that occurs outside of work.[182] This distinction is important because, arguably, a private employer should have less authority over an employee's personal activities outside

178. *See* Mulroy & Moorman, *supra* note 171, at 980.

179. *See id.*

180. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (ruling that there is no First Amendment protection for speech that is "directed to inciting or producing imminent lawless action and is likely to produce such action").

181. Following the January 6, 2021 insurrection, over 900 people were charged with crimes including entering and remaining in a restricted building, civil disorder, and conspiracy. *The Capitol Siege: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Dec. 16, 2022, 5:58 PM), https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories [https://perma.cc/Y2MH-J3M4].

182. *See supra* notes 35, 46 and accompanying text.

of the workplace.[183] Limiting the application of the public policy exception to "off-duty" political activity would serve as an appropriate check to ensure the at-will employment model is not completely eroded, since an employee's political activity that occurs outside of work may be less likely to impact the daily business operations of the company. In *Novosel*, the Third Circuit addressed this consideration when it proposed a useful four-part inquiry that could be adopted when determining the novelty of a wrongful discharge action.[184] The court suggested consideration of the following:

> 1. Whether, because of the speech, the employer is prevented from efficiently carrying out its responsibilities; 2. Whether the speech impairs the employee's ability to carry out his own responsibilities; 3. Whether the speech interferes with essential and close working relationships; 4. Whether the manner, time and place in which the speech occurs interferes with business operations.[185]

These four questions, adopted from First Amendment jurisprudence, focus the analysis on whether the at-issue speech ultimately hinders the day-to-day business operations and responsibilities of employers and employees, suggesting speech that does not affect these considerations does not support termination. This inquiry, which courts can apply to political conduct as well, is quite practical, and courts *should* apply it to determine whether a particular political act is worthy of protection under the public policy exception. If an employee's political activity—for example, campaigning for a particular Senator after work—does not interfere with business operations or essential working relationships and does not prevent the employer or employee from carrying out their responsibilities, should that employee's superior be able to terminate the employee simply for exercising his constitutional right to staying politically active in the community? Many courts would say termination is quite permissible if there are no statutory provisions backing the employee's argument,[186] but this Note argues this is a situation fitting for the application of a general public policy recognizing the importance of political expression.

The lack of a statutory hook is the major legal obstacle that must be overcome when attempting to expand the public policy exception. The Third Circuit illustrated this in *Borse v. Piece Goods Shop*,[187] where it

183. *Cf.* Porter, *supra* note 12, at 92 (discussing the emerging trend among states to prohibit employers from interfering with an employee's right to engage in any lawful conduct outside of work).

184. Novosel v. Nationwide Ins., 721 F.2d 894, 901 (3d Cir. 1983).

185. *Id.*

186. *See also supra* notes 120–122 and accompanying text.

187. 963 F.2d 611 (3d Cir. 1992).

declined to extend the *Novosel* decision that recognized certain constitutional provisions as sources of public policy in wrongful discharge actions.[188] Although the Third Circuit declined to extend *Novosel*, the court disagreed that a constitutional provision may never serve as a source of public policy in wrongful discharge actions.[189] Despite this, many courts do show concern for allowing constitutional sources to serve as starting points for a public policy analysis.[190] Even though *Novosel* received criticism for recognizing constitutional sources as starting points for a public policy analysis,[191] some states either explicitly or implicitly draw upon constitutional sources, particularly the First Amendment, when applying the public policy exception in employment cases.[192] Furthermore, other cases like *Palmateer* demonstrate that public policy does not have to be based in statute to be recognized.[193] In fact, *Palmateer* demonstrates that judicially created public policy can be a permissible source for private employees to turn to when developing a claim under the public policy exception.[194] Even though the majority of states resist recognizing public policy where no relevant statute exists, it is necessary to treat certain principles, such as the freedom of political expression, as compelling sources of public policy in cases of wrongful discharge.

So long as courts establish proper limiting principles to protect employers' rights and guide courts' analyses, an expansion of the public policy exception to protect private employees from political discrimination would increase employees' rights without threatening at-will employment. To illustrate this, consider again the hypothetical private employee who attended the "Stop the Steal" rally and was later terminated. If this individual rushed the Capitol and entered the Senate chambers, he or she would be unable to claim a public policy exception since this conduct likely amounted to violent insurrection, or at the very least, civil disorder and trespassing. If this individual peacefully attended the rally, but openly supported the insurrection while at work, courts should note this as political activity occurring in the workplace and consider whether this speech affected employee and employee-client relations before applying the public policy exception. These examples show that the proposed limiting principles sufficiently respond to objections while ultimately striking an appropriate balance between

188. *Id.* at 618–20.
189. *Id.* at 618–19.
190. *See* Mulroy & Moorman, *supra* note 171, at 948, 948–49 n.21 (listing cases).
191. *See Borse*, 963 F.2d at 618–20.
192. *See* Mulroy & Moorman, *supra* note 171, at 948, 948 n.19 (listing cases).
193. *See* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878, 880 (Ill. 1981).
194. *See id.* at 878.

affording private employees greater protections from political discrimination and maintaining the at-will presumption.

CONCLUSION

The public policy exception to at-will employment has developed to protect private employees from discipline for conduct that furthers established interests of society. Although some states protect against some forms of political discrimination, the expansion of the public policy exception to offer private sector employees more protection from political discrimination in the workplace is necessary. The freedom to engage in political activity and political expression is a constitutional right that American society highly values and respects. Like other commonly recognized public policies, courts and lawmakers can recognize political expression as a right or even a public obligation. Understandably, there is worry that expanding the public policy exception would erode the at-will employment doctrine by giving employees additional grounds for suing employers. However, by adopting the proposed prudent limitations, courts can meet the proper balance to ensure one's right to political expression is not stifled out of fear of being terminated from work.