



Citizens Coerced: A Legislative Fix for Workplace Political Intimidation *Post-Citizens United*

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ABSTRACT

This Essay examines the growing threat of workplace political coercion, such as when employers attempt to threaten or coerce their workers into supporting firm-favored issues, policies, or political candidates. We describe, for the first time, the prevalence of such coercion, and propose a relatively straightforward legislative fix that would protect private-sector workers from the risk of political intimidation from their employers.

This Essay responds to an earlier piece published by Professor Secunda in the YLJ Forum that described how the Supreme Court's decision in *Citizens United v. FEC* opened up the possibility for employers to hold mandatory "captive audience" meetings for workers, in which managers could endorse candidates for elected office. Managers, Secunda noted, could discipline workers who refused to participate in such firm-sponsored partisan activities. Accordingly, Secunda recommended federal legislation that would ban the use of mandatory political meetings in the private sector.

At the time that Secunda's Essay was published, however, we lacked any systematic evidence of the prevalence or characteristics of employer political coercion in the American workforce, and so his recommendations could not be tailored to the specifics of employer political recruitment. New survey research from an ongoing academic project from Mr. Hertel-Fernandez, however, has provided precisely that information, documenting the extent to which workers have experienced political coercion from their employers. Our present Essay summarizes that survey evidence, using the empirical data to craft a bipartisan policy proposal that would address employer political coercion in the private sector by adding political opinions and beliefs to the list of protected classes in Title VII of the Civil Rights Act of 1964. Lastly, we draw on survey research to describe why this proposal could attract bipartisan political support.

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INTRODUCTION

Six years ago, Professor Secunda wrote about the impact that *Citizens United*¹ could have on the ability of employers to hold political captive audience workplace meetings with their employees.² *Citizens United*'s robust conception of corporate political speech, coupled with minimal legal protections against firing private-sector employees on the basis of their political views, raised the concern that employers would be able to compel their employees to listen to political messages at firm-wide meetings on pain of termination. To prevent this form of political coercion, that piece urged Congress to pass a federal version of the Oregon Worker Freedom Act.³ The Oregon law prohibits terminating employees for refusing to attend mandatory political, labor, or religious meetings held by their employers. Not only has the Oregon law remained unenforced,⁴ but the proposed federal law has never seen the light of day. Further, another approach was put forward by a former Harvard University law student, who proposed extending protections against political coercion already in effect for corporate political action committees (PACs) to all political recruitment of workers by employers within a company.⁵ No legislative action has been taken on that proposal either.

One major obstacle to enacting either of these proposals has been the lack of systematic evidence of employer political coercion, aside from isolated media reports on particularly egregious episodes. Fortunately, we now have, thanks to the effort of Hertel-Fernandez, empirical data to demonstrate the extent to

1. *Citizens United v. FEC*, 558 U.S. 310 (2010).

2. See Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. ONLINE 17 (2010), <http://www.yalelawjournal.org/forum/addressing-political-captive-audience-workplace-meetings-in-the-post-citizens-united-environment> [https://perma.cc/62EM-93E7]. A captive audience workplace meeting is one at which "employees may be forced, at the risk of losing their jobs, to listen to their employer's perspective on the latest political . . . issues of the day." *Id.*

3. OR. REV. STAT. §§ 659.780, 659.785 (2010).

4. The only case, and it is unreported, concerning this law is *Associated Or. Indus. v. Avakian*, No. CV-09-1494-MO, 2010 WL 1838661 (D. Or. May 6, 2010) (finding plaintiffs lacked standing to bring First Amendment and labor preemption challenges to Oregon Workplace Freedom Law because claim was not ripe). See generally Paul M. Secunda, *Towards the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209 (2008) (discussing lawfulness of state captive audience laws like Oregon's).

5. Note, *Citizens United at Work: How the Landmark Decision Legalized Political Coercion in the Workplace*, 128 HARV. L. REV. 669, 682–84 (2014).

which employers are engaging their workers in politics and the degree to which such recruitment is coercive. Surveying workers and managers about various forms of political recruitment in the workplace,⁶ Hertel-Fernandez paints a problematic picture of such recruitment as we enter the contentious 2016 presidential election cycle.

Most of the academic and popular attention directed at *Citizens United* has focused on its implication for unlimited corporate spending on political campaigns.⁷ Yet the survey results presented here suggest that employers may be taking advantage of new possibilities for politically engaging their workers. That sort of political recruitment has not been confined to captive audience meetings at the workplace, as Secunda initially envisioned. Rather, employer political recruitment now runs the gamut from rather benign—and perhaps even civically appealing—get-out-the-vote (GOTV) campaigns to flat-out coercion of workers, with employers threatening job loss, plant closures, or wage cuts, if workers do not support particular candidates, policies, or issues.⁸ Further, workplace technologies, which offer employers a way to track their employees' political preferences well before workers reach the secrecy of the ballot box, are exploding.⁹ These technologies afford managers the opportunity to monitor whether workers actually followed through on the requests that a company made, and then to discipline dissenting workers or reward those who comply. Record levels of partisan polarization and rancor surrounding national politics provide a final reason to insulate workers from potential political intimidation at work.¹⁰

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6. The original survey results reported in this essay include a nationally representative telephone survey of 1,032 non-self-employed workers (the “worker survey”), fielded in April, 2015 by SSRS, Inc. (margin of error: 3.6 percent), as well as online YouGov surveys of top corporate managers fielded in December 2014, to January 2015 (513 managers), 391 of which were re-contacted in September, 2015 (the “firm surveys”). For additional details, refer to Alexander Hertel-Fernandez, *How Employers Recruit Their Workers Into Politics—And Why Political Scientists Should Care* PERSP. ON POL. (forthcoming 2016).
 7. Chris Cillizza, *How Citizens United Changed Politics*, in *7 Charts*, WASH. POST (Jan. 22, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts> [https://perma.cc/ULS6-73MW].
 8. See *infra* notes 28–29 and accompanying text.
 9. See *infra* note 23 and accompanying text. Many Americans even doubt the secrecy of their vote as well. See Alan S. Gerber et al., *Is There a Secret Ballot? Ballot Secrecy Perceptions and Their Implications for Voting Behaviour*, 43 BRIT. J. POL. SCI. 77 (2012).
 10. See SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily ed., 2015); Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA, *supra*, at 15. Political polarization is apparent among both political elites and the mass public. Party affiliation has become an increasingly powerful predictor of legislative behavior in Congress, and the mass public has increasingly sorted itself into the two major parties by ideology.

To address the danger of political coercion in the post-*Citizens United* workplace, this Essay urges Congress to undertake immediate bipartisan action in the form of a straightforward legislative fix: Amend Title VII of the Civil Rights Act of 1964¹¹ to prohibit workplace discrimination on the basis of political belief or affiliation. A number of states already have such protections¹² as do other advanced industrial countries around the world.¹³ Although nonconfidential, non-policymaking public-sector employees largely already have these political protections under First Amendment doctrine,¹⁴ many private-sector employees are completely bereft of any political affiliation or belief protection in the workplace.

A legislative fix would require the addition of a mere five words—"or political affiliation or belief"—to Section 703(a)(1) of Title VII.¹⁵

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, ~~or~~ national origin, or political affiliation or belief.

Despite polarization in Congress, empirical evidence suggests that our approach has broad bipartisan support—indicating that it might be both realistic and politically tractable. Moreover, there is already an established enforcement mechanism in place for such a law through the Equal Employment Opportunity Commission (EEOC). Not only does the EEOC have the means and expertise

11. 42 U.S.C. §§ 2000e-1 to 2000e-17 (2012 & Supp. 2015).

12. See *infra* notes 49–50, 52–55 and accompanying text; see also Alina Tugend, *Speaking Freely About Politics Can Cost You Your Job*, N.Y. TIMES (Feb. 20, 2015), <http://www.nytimes.com/2015/02/21/your-money/speaking-about-politics-can-cost-you-your-job.html> [<https://perma.cc/TA7Y-N3SC>] (stating that some states and localities have acted to protect against discrimination based on political association, with California and New York laws being among the broadest).

13. See *infra* notes 41–47 and accompanying text.

14. See, e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75–76 (1990); *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980) (“[U]nless the government can demonstrate ‘an overriding interest,’ ‘of vital importance,’ requiring that a person’s private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.” (citation omitted)). See JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 75 (2d ed. 2013) (“Political association cases in the public employment context . . . deal mostly with the so-called ‘spoils system’ or political patronage, which rewards public employment based on loyalty to a given political party or candidate.”).

15. 42 U.S.C. § 2000e-2(a)(1).

to handle such claims, but it could also provide additional regulations to further clarify the rules of ensnaring an employee in the employer's political web; for instance, by exempting lobbyists or campaign workers whose main job involves politics. Finally, our approach is also appealing in that it permits employers to continue discussing important political issues with their workers and encouraging greater political participation—aspects of employer political recruitment that offer civically appealing benefits for American politics. All that changes in our proposal is that employers are barred from taking adverse employment action against workers on the basis of their political opinions.

I. A BRIEF HISTORY OF POLITICAL COERCION IN THE WORKPLACE PRE- AND POST-*CITIZENS UNITED*

Before *Citizens United*,¹⁶ the Federal Election Campaign Act (FECA)¹⁷ allowed corporate PACs unlimited opportunities to communicate with their shareholders and executives (the corporation's restricted class) about politics, while restricting PAC communications to rank-and-file employees to semianual mailings. Further, solicitations from a corporate PAC to rank-and-file workers had to run through a system in which the employee remained anonymous to the corporation.¹⁸ Most importantly, employers were completely prevented from engaging in any form of partisan political communication with their employees outside of the corporate PAC.¹⁹

Since *Citizens United*, however, employees are fair game for partisan advocacy by employers—even outside of the corporate PAC.²⁰ In the absence of the FECA prohibition, no other federal law exists that prevents corporations from requiring, even on pain of termination, that employees attend one-sided partisan speeches, rallies, or other events that advocate the election of specific candidates or parties. Nor is there any law that prohibits corporations from

16. *Citizens United v. FEC*, 558 U.S. 310 (2010).

17. 2 U.S.C. §§ 431–42 (2012).

18. *Id.* § 441b(b)(2)(A).

19. *See id.* § 441b(b)(2) (“(2) For purposes of this section . . . , the term ‘contribution or expenditure’ includes a contribution or expenditure and . . . includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication . . .”).

20. *Citizens United*, 558 U.S. at 365 (“We return to the principle . . . that the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”). The authors believe this is a fundamentally flawed constitutional pronouncement, but cabin their commentary here to a legislative fix that will free employees from coercive political conduct by their employers.

requiring supervisors to engage employees in political conversations on work time, or from requiring employees to participate in such conversations. Although federal voting law still prevents employers from issuing explicit or implicit threats against employees who vote for the so-called wrong candidate,²¹ nothing prohibits employers from requiring employees to participate in political events that are counter to their own political beliefs or affiliations.

To be sure, political communications from employers to workers outside of partisan elections were always permitted by federal law, and there is evidence to suggest that companies were engaging in such issue-based outreach long before *Citizens United*.²² But *Citizens United* has undoubtedly expanded the rights employers possess in this area, and it has also emboldened employers to do more, knowing that the U.S. Supreme Court granted their activities full legal cover.

Technology has vastly added to the scope of the problem, as well. Improved communications technology, even since the Court decided *Citizens United* in 2010, has expanded an employer's ability to track its employees' political beliefs and activities through political recruitment software.²³ Moreover, employers can also monitor employees' participation on social media sites like Twitter, Facebook, and LinkedIn, as well as Internet browsing histories, which could all reveal employees' political leanings and behaviors. Moreover, when an employer sends an email inviting employees to a political event, the employer is able to see whether the employee has read the email, clicked through to the invitation, and whether they have RSVP'd to the event.

The same empirical research conducted by Hertel-Fernandez established that 68 percent of firms that contacted their workers about politics used software packages to deliver their messages to employees that they had either designed themselves, or licensed from business associations, such as the Business-Industry Political Action Committee.²⁴ Larger firms were much more likely than smaller firms to engage in this type of message delivery. Whereas only slightly more than half of firms (56 percent) with one hundred or fewer

21. 18 U.S.C. § 594 (2006).

22. See Jeffrey H. Birnbaum, *Businesses Point Workers Toward Ballot Boxes*, WASH. POST (Mar. 21, 2004), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/19/AR2005121900858.html> [<https://perma.cc/MK2H-5SJK>].

23. ALEXANDER HERTEL-FERNANDEZ, *NEW AMERICA, WHO OWNS YOUR POLITICS? THE EMERGENCE OF EMPLOYEE MOBILIZATION AS A SOURCE OF CORPORATE POLITICAL INFLUENCE* 12–13 (2015); see also *supra* note 6.

24. ALEXANDER HERTEL-FERNANDEZ, *POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS—AND WHY AMERICANS SHOULD CARE* (forthcoming 2017) (on file with author).

workers reported using software to deliver political messages, 94 percent of firms with over five hundred workers reported using such platforms.²⁵ Further, employers can use software to target which employees receive their political messages. Indeed, three out of four companies that contacted their workers about politics used such a software feature.²⁶ Targeted mobilization permits managers to tailor messages to specific subsets of workers, including targeting workers by their rank in the company, the location of workers' offices or plants, or workers' past records of voting or participation in firm events.

II. THE EMPIRICAL EVIDENCE OF COERCIVE EMPLOYER POLITICAL MOBILIZATION

In addition to the empirical data gleaned from surveys of managers about the use of technology for political purposes, for the first time, we now have empirical data that establishes how far employers will go to sway their employees' political beliefs, and what actions they may take if employees do not conform their behavior and their beliefs to their employers' desires.²⁷ Rather than focus on captive audience meetings to persuade their employees to support a favored political party, candidate, or cause, this type of behavior can be better viewed as varying degrees of "employer mobilization."²⁸ Some of these mobilization techniques are wholly unobjectionable—and perhaps even beneficial for civic participation—such as when firms help workers to register and turn out to vote, or discuss the implications of important bills pending in Congress or state legislatures. On the other hand, there is both anecdotal and survey evidence that suggest that other employers deploy threats of job loss, wage cuts, or plant closures to motivate workers to support particular issues, candidates, or policies.²⁹ It is this type of employer mobilization that we find most concerning, as workers might feel undue pressure to support employer positions with which they otherwise disagree, such as changing their mind on a political issue, in order to

25. *Id.*

26. *Id.*

27. See generally HERTEL-FERNANDEZ, *supra* note 23.

28. By "employer mobilization," we mean that American employers have the legal right and technological capacity to recruit their workers into politics. See Alexander Hertel-Fernandez, *Employer Political Coercion: A Growing Threat*, AM. PROSPECT (Nov. 23, 2015), <http://prospect.org/article/employer-political-coercion-growing-threat> [https://perma.cc/75KX-4NYN] ("Thanks to the Supreme Court's decision in *Citizens United*, employers now have broad legal rights to campaign for political candidates inside their firms as well as in the public arena. And thanks to new technology, they have the means to track their employees' political opinions and activities."); see also *supra* notes 6, 23, and 24.

29. *Id.*

keep their jobs or prevent wage loss. Such pressure amounts to a violation of workers' rights to free speech. According to the 2015 survey of Americans workers, 20 percent of employees who were contacted by their managers about politics—equivalent to roughly seven million American employees—reported that their employers had issued at least one warning about economic consequences—such as job loss, wage and benefit cuts, or plant closures—if workers did not support employer-favored issues, candidates, or policies.³⁰

Two examples of mobilization from the previous presidential election cycle provide a sense of what these economic threats look like in practice. Executives at Cintas, a major provider of workplace supplies, and Georgia-Pacific, the ubiquitous paper and wood product manufacturer, both sent messages to their respective employees during the 2012 election. Those messages expressed a clear partisan stance, and warned that employees might suffer economic consequences if the firms' preferred candidates were not elected.³¹

Workers who received warnings such as those from Cintas or Georgia-Pacific were about three times as likely to indicate that they were uncomfortable with employer messages as workers who did not receive such warnings, according to the results from Hertel-Fernandez's survey.³² These warnings were also apparently effective at changing workers' political behaviors and attitudes: A worker who received at least one such warning about potential economic losses was about twice as likely to report responding to their employers' political requests compared to workers who received no such warnings.

These patterns are hardly surprising given that employer threats shaped workers' feelings of job security. As the United States Supreme Court long ago recognized "the economic dependence of the employees on their employers" implies that the former will "pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."³³

30. HERTEL-FERNANDEZ, *supra* note 24.

31. *Id.* The message from Georgia Pacific mentioned that "While we are typically told before each Presidential election that it is important and historic, I believe the upcoming election will determine what kind of America future generations will inherit. . . . If we elect candidates who want to spend hundreds of billions in borrowed money on costly new subsidies for a few favored cronies, put unprecedented regulatory burdens on businesses, prevent or delay important new construction projects, and excessively hinder free trade, then many of our more than 50,000 U.S. employees and contractors may suffer the consequences, including higher gasoline prices, runaway inflation, and other ills." Mike Elk, *Koch Sends Pro-Romney Mailing to 45,000 Employees While Stifling Workplace Political Speech (Update)*, IN THESE TIMES (Oct. 14, 2012), http://inthesetimes.com/article/14017/koch_industries_sends_45000_employees_pro_romney_mailing [<https://perma.cc/V5GU-2AUC>]. The letter also included a list of candidates the firm had endorsed, who were all Republican.

32. HERTEL-FERNANDEZ, *supra* note 24.

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

Who are the likely winners and losers in this “Brave New World” of workplace political mobilization?³⁴ Companies are likely to be the winners, as these new forms of employer mobilization offer managers “an opportunity to shape public policy using a resource already at their disposal—their workforce.”³⁵ Similarly, employees who either already agree with their employers’ political preferences—or who feel compelled to conform to them—will be winners as they become their employers’ political champions and might be rewarded accordingly by managers.³⁶ The political parties, candidates, and policy issues favored by businesses will also gain grassroots support and visibility as firms rally their workers to those causes.³⁷

Of course, the clear losers here are the employees who either wish to keep their political beliefs and affiliations unknown to their employers, or who choose stances at odds with their bosses. In an employment-at-will world, where most private-sector employees have little to no job security and can be fired at their employer’s whim,³⁸ employees on the wrong side of this equation may well face retribution, retaliation, and ostracism, not to mention more direct harms like job loss, failure to be promoted, and unfavorable transfers and demotions.³⁹ Again, anecdotal evidence suggests that such winner and loser outcomes already exist. On the political side of the equation, the losers will likely be more progressive electoral candidates and issues typically opposed by employers.⁴⁰

34. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

35. Hertel-Fernandez, *supra* note 28, at 12.

36. HERTEL-FERNANDEZ, *supra* note 23, at 12–13.

37. *See id.* at 5 (“Given that employer mobilization is most frequently in service of specific policies or issues that improve a firm’s bottom line, it makes sense that workers identify the messages as being ideologically conservative.”); *see also* Engquist v. Or. Dep’t of Agric., 553 U.S. 591, 606 (2008) (describing American model of employment-at-will as a default rule in public and private sector employment).

38. *See* HIRSCH ET AL., *supra* note 14, at 80 (“[T]he current state of the law is that unless private sector workers have statutory or contractual protections . . . they remain without workplace protection for their political affiliations or beliefs.”).

39. *Cf.* Stop This Insanity, Inc. v. FEC, 902 F. Supp. 2d 23, 48 (D.C. Cir. 2012) (“Providing corporations with an unlimited political voice may bring more and louder voices to the national political dialogue as the *Citizens United* majority repeatedly emphasized and lauded, but allowing unlimited amplification of corporate political speech will also inevitably chill the political speech of corporate employees whose views diverge from their corporate employers.”); *see also* Secunda, *supra* note 2, at 24 (“[T]he inherent potential for coercion in employer-employee relationships . . . cannot simply be undone by prohibiting explicit or implicit threats or discrimination. [Rather,] it is in the best interest of all involved to keep political discussions and partisanship out of the public and private workplace.”).

40. *See* HERTEL-FERNANDEZ, *supra* note 23, at 5. (“Employer political messages are generally perceived to be ideologically conservative by workers.”).

What is to be done about this potentially coercive, unfair, and politically charged workplace? The evidence points to a solution on which broad swaths of Americans agree, and which could be modelled on well-established legislation in other countries and in a number of American states.

III. A BIPARTISAN LEGISLATIVE FIX: BANNING POLITICAL DISCRIMINATION

The United States is largely alone among advanced industrial countries in not providing federal and national legal protections against political discrimination in the workplace. For instance, in Australia, Section 351 of the Fair Work Act of 2009 prohibits discrimination in the workplace based on political opinion.⁴¹ The European Court of Human Rights (ECHR) has held in *Redfearn v. United Kingdom*⁴² that the then lack of workplace political discrimination protection under United Kingdom law was incompatible with the freedom of association under Article 11 of the European Convention on Human Rights.⁴³ This led to the United Kingdom amending its law in 2013 to protect against political discrimination in the workplace.⁴⁴ Other countries such as

41. *Fair Work Act 2009* (Cth) s 351 (Austl.), http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114 [https://perma.cc/C62S-YU78] (“An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, *political opinion*, national extraction or social origin.” (emphasis added)). This approach is based on the *C111—Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, INT’L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 [https://perma.cc/WQ5J-8LGF] (last visited Apr. 11, 2016) (“For the purpose of this Convention the term *discrimination* includes—(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”).

42. *Redfearn v. United Kingdom*, 2012 Eur. Ct. H.R. 1878 (2006).

43. See generally Hugh Collins & Virginia Mantouvalou, *Redfearn v. UK: Political Association and Dismissal*, 76 MOD. L. REV. 909 (2013), <http://ssrn.com/abstract=2239315> [https://perma.cc/X5SM-ECT6]. After the *Redfearn* decision, the United Kingdom complied with the European Convention on Human Rights by enacting an amendment to the Employment Rights Act 1996, which exempts claimants who allege that their dismissal was on the grounds of political opinion or association from the two year qualifying period for claiming unfair dismissal. Interestingly, reconceptualization of the judicial approach in the United Kingdom seemed to be necessary because case law had permitted employers to coercively influence employees’ political outlooks through reprimands and discipline. See Paul Wragg, *Free Speech at Work: Resolving the Differences Between Practice and Liberal Principle*, 44 INDUS. L.J. 1, 15–16 (2015).

44. See Enterprise and Regulatory Reform Act 2013, c. 24, § 13 (UK), http://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpga_20130024_en.pdf [https://perma.cc/5RKf-H2QT]. Through this legislation, the UK complied with *Redfearn* by making an amendment to the Employment Rights Act 1996.

Canada,⁴⁵ Germany,⁴⁶ and Japan,⁴⁷ have similar workplace protections against political coercion.

Closer to home, there are a number of American states that have parallel provisions protecting citizens' freedom of political belief and opinion once they arrive in the workplace. The Wisconsin Fair Employment Act⁴⁸ has a rather narrow protection against discrimination based on political activity in the workplace, which seems to limit the protection to meetings or direct communications. There, employment discrimination is prohibited where employees "declin[e] to attend a meeting or participate in any communication about religious or political matters."⁴⁹ Oregon's Worker Freedom law is similar,

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45. The following provincial laws provide for political discrimination in the workplace protection: Human Rights Code, R.S.B.C. 1996, c 210 (Can.) (providing that person must not discriminate based on political belief); The Human Rights Code, C.C.S.M. 2015, c H175 (Can.) (prohibiting discrimination based on political belief, association, and activity); Human Rights Act, R.S.N.B. 2011, c 171 (Can.) (stating "all persons are equal in dignity and human rights without regard to . . . political belief or activity"); Human Rights Act, 2010, R.S.N.L. 2010, c H-13.1 (Can.); Human Rights Act, R.S.N.W.T. 2002, c 18 (Can.) (prohibiting discrimination based on political belief and association); Human Rights Act, R.S.N.S. 1989, c 214 (Can.); Human Rights Act, R.S.P.E.I. 1988, c H-12 (Can.) (prohibiting discrimination based on "political belief," meaning "belief in the tenets of a political party that is at the relevant time registered under section 24 of the Election Act R.S.P.E.I. 1988, Cap. E-1 as evidenced by (i) membership of or contribution to that party, or (ii) open and active participation in the affairs of that party."); Charter of Human Rights and Freedoms, C.Q.L.R. c C-12 (Can.) (providing every person "full and equal recognition and expression" of "political convictions"); Human Rights Act, R.S.Y. 2002, c 116 (Can.) (prohibiting discrimination on the grounds of "political belief, association, or activity"); *see also* DAVID DOOREY, *THE LAW OF WORK: COMMON LAW AND THE REGULATION OF WORK* 356 (2016) (collecting Canadian provincial approaches to political discrimination in workplace).
46. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [BASIC LAW], art. 3(3) (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [<https://perma.cc/B5QR-K3NK>] ("No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability."); *see* German Federal Labor Court—Bundesarbeitsgericht, June 20, 2013, 8 AZR 482/12. By way of the German Constitution, political discrimination is essentially prohibited in employment law, though the right of the employee always has to be balanced with the fundamental rights of the employer, which in extremely rare cases could lead to action against an employee for political activities. *See* Manfred Weiss, *The Interface Between Constitution and Labor Law in Germany*, 26 COMP. LAB. L. & POL'Y J. 181, 192–97 (2005) ("In finding out whether the expression of a specific opinion by an employee may constitute a justification of an extraordinary or an ordinary dismissal, the Courts have to counterbalance the fundamental right of free expression of opinion with the employee's duties.").
47. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, para. 1 (Japan) ("All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin"); Rōdō Kijun Kōi [Labor Standards Act], Law No. 42 of 2012, art. 3 (Japan) ("Employers shall not use the nationality, creed or social status of any Workers as a basis for engaging in discriminatory treatment with respect to Wages, working hours or other working conditions.").
48. WIS. STAT. §§ 111.31–111.395 (2010).
49. *Id.* § 111.321.

though perhaps even narrower in scope. Although Oregon's law prohibits adverse action against an employee who refuses to attend a meeting where the primary purpose "is to communicate the opinion of the employer about religious or political matters," it still allows for political communication directed toward employees by employers and their agents.⁵⁰

While the Wisconsin and Oregon laws are laudable in their effort to protect workers from political discrimination by their employers, those measures restrict their focus to specific modes of employer communication, thereby failing to keep pace with the realities of employer mobilization. Political meetings and direct communications account for only a minority of the cases of employer mobilization reported by workers.⁵¹

A better model for addressing political coercion can be found in Montana, Washington, D.C., and California, which all explicitly ban discrimination by employers on the basis of political affiliation, beliefs, or ideas. In Montana, "[m]embership in a protected class" means "belonging to a group of persons who are afforded protection against discrimination because of . . . political beliefs or ideas."⁵² In Washington, D.C., the D.C. Human Relations Act (DCHRA)⁵³ prohibits employment discrimination for any reason other than that of individual merit. More specifically, the Act prohibits employers from discriminating against employees, applicants, and interns on the basis of actual or perceived political affiliation. For its part, California provides that, "[n]o employer shall make, adopt, or enforce any rule, regulation, or policy . . . (b) [c]ontrolling or directing, or tending to control or direct the political activities or affiliations of employees,"⁵⁴ and "[n]o employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."⁵⁵ Needless to say, California's approach is the most comprehensive and protective of employees.

Rather than arguing for the broader and perhaps more controversial regulation taken by California, and to be more consistent with the simple phrasing of the prohibitions already set out in Section 703 of Title VII of the Civil

50. OR. REV. STAT. § 659.785 (2010). This is the same Worker Freedom Law discussed in detail in Secunda, *supra* note 2 (defining "constituent group" and "political matters" in Oregon Statute section 659.780 to include joining or assisting a labor organization (union)).

51. HERTEL-FERNANDEZ, *supra* note 23.

52. MONT. ADMIN. R. 24.9.602 (2015).

53. D.C. CODE ANN. § 2-1401.01 (West 2011).

54. CAL. LAB. CODE § 1101(b) (West 2011).

55. *Id.* § 1102.

Rights Act of 1964, we urge Congress to make a much more succinct legislative addition. By adding the language—“or political belief or affiliation”—Congress can indicate that private-sector employees should receive the same types of political protections that their public-sector counterparts enjoy under First Amendment doctrine.⁵⁶ To the extent that further elucidation of these words is required, Congress could delegate development of the underlying law to the EEOC, which has considerable experience in defining the meaning of similar employment discrimination prohibitions in the workplace.⁵⁷ The EEOC could, for instance, exclude these protections for workers whose main job involves politics or public affairs, like lobbyists or campaign managers. Of course, these protections would only be effective to the extent that workers were cognizant of their new rights. One possible method to educate employees of their new political belief and affiliation rights under Title VII would be to require a disclaimer on all employer political communications sent to employees, spelling out that no coercion or retaliation is permissible under federal law. Employers could also add the political belief and affiliation protected class to existing disclaimers on employment-related materials distributed to workers and job candidates.

Aside from the strong legal precedent for our proposed change from other states and countries, we believe that our proposal could garner support from a wide array of Americans. Liberals could support the proposal on the grounds that it provides an important check on corporate power and helps bolster workers’ rights while conservatives, and especially libertarians, could identify with the desire to promote individual autonomy and freedom. More generally, the protection of free speech is a value with which both sides of the political spectrum can agree. Survey evidence backs up this perspective. At least nine out of ten conservatives, moderates, and liberals reported that protecting the right of free speech was either “crucial” or “very important” in a 2003 Gallup survey.⁵⁸

More pertinent to the proposal at hand, Hertel-Fernandez has found that large majorities of liberals, moderates, and conservatives alike support restrictions on the ability of employers to campaign for political candidates in the workplace.⁵⁹ And in an older survey from 1990, well over half (58 percent) of

56. See *supra* note 14 and accompanying text.

57. For recent examples of Equal Employment Opportunity Commission regulations further defining meaning of statutory language, see, for example, Amendments to Regulations Under the Americans With Disabilities Act, 80 Fed. Reg. 21,659, at 21,670 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 1630).

58. Darren K. Carlson, *Does Freedom Ring in the Homeland Security Age?*, GALLUP (Jan. 13, 2004), <http://www.gallup.com/poll/10300/does-freedom-ring-homeland-security-age.aspx> [<https://perma.cc/SMK8-EG8S>].

59. HERTEL-FERNANDEZ, *supra* note 23, at 17–18.

respondents said they thought that an employee's rights should "be protected by law" when the employee "differs publicly with his or her boss about political issues."⁶⁰ Support for this specific measure might well be higher in an era of even sharper political divisions.

A final advantage to pursuing a political antidiscrimination provision is that it would still permit employers to engage their workers in politics in ways that are mutually beneficial for firms and workers, and for society as a whole. Employers could still help their workers register and turn out to vote, discuss the implications of pending policy proposals, and bring in political candidates and lawmakers to hold town hall forums in plants and offices. These activities are well within employers' free speech rights, and also help workers to become more interested and involved in politics. The difference is that employers could not directly or indirectly threaten to layoff or discipline workers based on their political opinions, beliefs, or activities.

CONCLUSION

As the country enters into a highly-contested and polarizing presidential election cycle, it is imperative that Congress act quickly to end political coercion in the workplace. Consistent with longstanding principles of freedom of speech, expression, association, and political affiliation, private-sector employees, just as much as their public-sector counterparts, have the right to engage (or not engage) in political activities without fear of retribution or disadvantage from their employer. It is one thing to provide corporations with expanded free speech rights in the electoral process. It is quite another to permit companies to coerce workers in their political expression. We should not tolerate the latter encroachment on worker autonomy.

60. See ROBERT O. WYATT, *FREE EXPRESSION AND THE AMERICAN PUBLIC: A SURVEY COMMEMORATING THE 200TH ANNIVERSARY OF THE FIRST AMENDMENT* 156 (1991).