Missouri Law Review

Volume 87 | Issue 2 Article 5

Spring 2022

Ending Political Discrimination in the Workplace

Craig R. Senn

Ending Political Discrimination in the Workplace

Craig R. Senn[*]

ABSTRACT

Currently, a significant disparity exists in workplace legal protections for an employee's political affiliation. On one hand, public sector (federal, state, or local government) employees enjoy a bevy of protections. For example, twenty million state and local government employees rely on the First Amendment (and 42 U.S.C. § 1983) to guard against workplace discrimination based on political affiliation. Over two million federal government civil service employees lean on the Civil Service Reform Act of 1978 (CSRA) to provide that same protection.

The story is far different for private sector employees – their protections are spotty at best. To begin, these First Amendment and CSRA protections do not apply to private sector employees, and our federal employment discrimination laws do not protect political affiliation as a characteristic. Indeed, state laws have some potential to protect these private sector employees. But about half of states lack such laws, and the half that have them offer varying degrees of political affiliation protection. Likewise, an obscure Reconstruction-era statute (42 U.S.C. § 1985 (Section 1985)) has some potential to guard against workplace discrimination based on political affiliation. But most jurisdictions severely limit application of Section 1985 in one or more ways.

To address this significant disparity in workplace legal protections, "political affiliation" should be added as a protected

---

[*]Janet Mary Riley Distinguished Professor of Law, Loyola University New Orleans College of Law; J.D., *with Honors*, University of North Carolina at Chapel Hill, 1995; B.A., *Summa Cum Laude*, University of Georgia, 1992. The author's e-mail address is csenn@loyno.edu. I would like to thank Dean Madeleine Landrieu & Loyola University New Orleans College of Law for supporting this project, Anna M. Hoiberg, Benjamin Landau-Beispiel, and Caitlion O'Neill for their valuable research and helpful input, and Sharon Senn & Sarah Senn for their support. For Scout.

characteristic under federal employment discrimination law – specifically, Title VII of the Civil Rights Act of 1964. This article offers new, compelling arguments for this addition. First, this proposal is consistent with Congress's "political affiliation protection" philosophy, which is clearly evidenced by the First Amendment, Section 1985's "support or advocacy" clauses, and the CSRA. Second, it rests on a First Amendment foundation that has long been a part of Title VII – Congress relied on this foundation to protect religion in 1964, and it can (and should) rely on it again to protect political affiliation as religion's "companion" or "sister" characteristic. Third, this proposal substantially reduces those harms (both to individual employees and U.S. democratic society) that are caused by political affiliation discrimination in the workplace.

TABLE OF CONTENTS

I. INTRODUCTION

You are an employee. And perhaps you are a Democrat. Affiliated with the Democratic Party, you supported and voted for Barack Obama in 2008 and 2012, Hillary Clinton in 2016, and/or Joseph Biden in 2020. Further, you supported and voted for Democratic Party candidates for U.S. Senate and House of Representatives, governor, and the local legislature.

Or perhaps you are a Republican. Affiliated with the Republican Party, you supported and voted for John McCain in 2008, Mitt Romney in 2012, and/or Donald Trump in 2016 and 2020. Further, you supported and voted for Republican Party candidates for U.S. Senate and House of Representatives, governor, and the local legislature.

Consider this simple question: Can your employer lawfully fire, suspend, demote, or take other adverse action against you because of your political affiliation? Currently, the answer depends on (1) whether you are a public sector (federal, state, or local government) versus private sector employee and (2) if the latter, the state where you live.

For *public sector* employees, federal protections exist. Twenty million state and local government workers (about twelve percent of the workforce)[1] rely on the First Amendment[2] (and 42 U.S.C. § 1983 ("Section 1983")) to guard against workplace discrimination based on political affiliation.[3] Over two million federal government civil service workers

---

[1] U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2020 1 (2021), https://www.census.gov/content/dam/Census/library/publications/2021/econ/2020_summary_brief.pdf [https://perma.cc/E3XK-CGL7] ("In March 2020, state and local governments employed 19.8 million people. . . ."); *see also* U.S. BUREAU OF LAB. STAT., EMPLOYMENT BY MAJOR INDUSTRY SECTOR Table 2.1 (2020), http://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm [https://perma.cc/G2CH-WMQF] (showing about 18.9 million state and local government employees for 2020). There are almost 154 million employees in the United States. *Id.* This twelve percent figure equals about nineteen million state and local government workers out of that 154 million number.

[2] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see infra* Part II.A.1.a (discussing Supreme Court precedent recognizing the First Amendment's right of political affiliation).

[3] 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."); *see infra* Part II.A.1.b (discussing Section 1983 actions by public sector employees).

(over one percent of the workforce)[4] lean on the Civil Service Reform Act of 1978 ("CSRA") to provide that same protection.[5]

For almost 140 million *private sector* employees (about eighty-six percent of the workforce),[6] the story is far different. First, those First Amendment and CSRA protections do not apply to private sector employees – no state action or civil service status exists.[7] What about federal employment discrimination laws? They protect a variety of characteristics, just not political affiliation.[8] For example, Title VII of the Civil Rights Act of 1967 ("Title VII")[9] prohibits workplace discrimination

---

[4] CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 1 (2021) ("According to the Office of Personnel Management (OPM), the federal workforce is composed of an estimated 2.1 million civilian workers."); *see also id.* at 6 (in Table 3, specifying over 2.1 million "Executive Branch Civilian" employees in all agencies except the Postal Service); There are almost 154 million employees in the United States. U.S. BUREAU OF LAB. STAT., *supra* note 1. This one-plus percent figure equals 2.1 million federal government workers out of that 154 million number. Generally, the federal government has over 4.2 million employees, which also includes about 570,000 Postal Service workers, 1.4 million military workers, 34,000 "Legislative Branch" workers, and 32,000 "Judicial Branch" workers. CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 1 (2021).

[5] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.); *see, e.g.*, 5 U.S.C. § 2302(b)(1)(E) (prohibiting workplace discrimination "on the basis of . . . political affiliation . . ."); *id.* § 2302(b)(3) (stating that one ". . . shall not . . . coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity"); *infra* Part II.A.2 (discussing the CSRA).

[6] There are almost 154 million employees in the United States. U.S. BUREAU OF LAB. STAT., *supra* note 1. This 132 million figure for private sector employees is the difference between that 163 million number and public sector (government) employees – specifically, twenty million state and local government workers plus over 4.2 million federal government workers. *See supra* notes 1, 4 and accompanying text (discussing these numbers). This eighty-six percent figure equals 132 million private sector workers out of that 154 million number. *See supra* notes 1, 4 and accompanying text (discussing these numbers).

[7] *See* MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 479 (4th ed. 2020) ("The First Amendment restrains state actors, prohibiting them from infringing on individual rights of speech and expression. . . . Except in narrowly defined circumstances, the Constitution does not apply to non-state actors."); *infra* Parts II.A.1-2 (discussing the applicability of the First Amendment and Section 1983 to state or local government employees and the CSRA to federal government employees).

[8] *See, e.g.*, Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1536 (2011) ("[Political affiliation] is left outside the scope of the employment discrimination statutes.").

[9] 42 U.S.C. §§ 2000e-2000e-17 (2012).

based on sex, race, color, national origin, and religion.[10] The Age Discrimination in Employment Act of 1967 ("ADEA")[11] bans this discrimination based on age (if forty years old or older).[12] The Americans with Disabilities Act of 1990 (ADA)[13] prohibits this discrimination based on disability.[14] What about state laws? They can fill the void; but about half of states lack such laws, and the half that have them offer varying degrees of political affiliation protection.[15]

The result? Private sector employees face a significant disparity in workplace legal protections for their political affiliation.[16] Further, this disparity is problematic in an era when political tension, division, and intolerance remain high[17] and when employers (and others) can readily ascertain a person's political affiliation via social media, the Internet, or otherwise.[18] In short, a storm for political affiliation discrimination looms

---

[10] *Id.* § 2000e-2(a)(1); *see also* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012) (amending Title VII to clarify that unlawful discrimination "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions").

[11] 29 U.S.C. §§ 621–634 (2012).

[12] *Id.* §§ 623(a), 631(a) (limiting the ADEA's scope to persons "at least 40 years of age").

[13] 42 U.S.C. §§ 12101–12212 (2012).

[14] *Id.* § 12112(a)-(b).

[15] *See infra* Part II.B.2 (discussing varying state statutory protections for political affiliation or activities).

[16] *See generally* R. George Wright, *Political Discrimination by Private Employers*, 87 U. CIN. L. REV. 761, 767 (2019).

[17] *See, e.g.*, *id.* at 773 ("It is widely thought that current levels of American political polarization are relatively high . . . ."); *id.* at 781 ("[G]roup contempt of the sort associated with increasing political polarization often involves sustained hostility."); David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 9 (1998) (listing "a surge in corporate social and political partisanship" as a concerning factor for private sector employees); Carley Thelen, Note, *Hate Speech as Protected Conduct: Reworking the Approach to Offensive Speech Under the NLRA*, 104 IOWA L. REV. 985, 986 (2019) ("Recent political and ideological division within the United States has renewed the debate about an employee's freedom to express political beliefs."); Chloe M. Gordils, Note, *Google, Charlottesville, and the Need to Protect Private Employees' Political Speech*, 84 BROOK. L. REV. 189, 205 (2018) ("A critical reason for this need [of federal protection for private employees] is that free speech, particularly political speech, is increasingly under attack in everyday life.").

[18] *See, e.g.*, CRAIN ET AL., *supra* note 7, at 487 n.4 ("The ubiquity of electronic communications and social media is creating challenges for employers and employees alike. Employees today are increasingly likely to use social media to express their opinions regarding matters ranging from the mundane to the geopolitical. Even when employees do not use social media to communicate, their words or actions away from the workplace may be recorded and posted online by others."); Marion Crain & Pauline T. Kim, *A Holistic Approach to Teaching Work Law*, 58 ST. LOUIS U. L. J. 7, 13–14 (2013) ("[T]he speech aspects of social media are another locus of tension in

on the horizon for private sector employees.[19] Recent surveys or polls indicate that many employees – regardless of political affiliation or demographic group – see, and even fear, that looming storm.[20] For example, according to one 2020 national survey, thirty-two percent of U.S. workers "personally are worried about missing out on career opportunities or losing their job if their political opinions became known."[21] This number remains roughly the same regardless of (1) political affiliation (twenty-eight percent of Democratic workers, thirty-one percent of independent workers, thirty-eight percent of Republican workers), (2) gender (thirty-five percent of men, twenty-seven percent of women), or (3) demographic group (thirty-eight percent of Hispanic workers, thirty-

---

the employment relationship."); Gordils, *supra* note 17, at 191 (noting that statutes to protect the political views of private employees "are especially relevant in recent times, as political and ideological activities are increasingly public" via "social media posts"); *id.* at 207 ("[T]he advancement and expansion of technology has resulted in greater exposure of off-duty speech that has the potential to impact a person's career or prospects. Given 'the phenomenon of "going viral,"' one slip of the tongue, caught on a camera or recorder' has the ability to cause serious damage to people's lives." (quoting Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J. L. & POL'Y 63, 72 (2016)); *id.* at 208 ("Scholars recognize that technological advances have directly impacted employment, by increasing the employer's ability to discover personal information about the beliefs and opinions of their employees."); Anne Carey, Comment, *Political Ideology as a Limited Protected Class Under Federal Title VII Antidiscrimination Law*, 26 J. L. & POL'Y 637, 653–54 (2018) ("Social media has enabled the quick, easy, and transparent sharing of public political sentiments. . . .").

[19] *See, e.g.*, Crain & Kim, *supra* note 18, at 14 ("[N]umerous instances of workers losing their jobs because of their online activities outside the workplace have been reported."); Wright, *supra* note 16, at 781 ("But there is certainly enough evidence of the adverse consequences of some forms of political discrimination by private employers to raise serious concerns."); Hoffman, *supra* note 8, at 1537 ("In an environment of political divisiveness and discord, it is entirely possible that employers will take adverse action against workers because of their political viewpoints or allegiances."); Yamada, *supra* note 17, at 9 (discussing "a disturbing confluence of factors [that] provides ample cause for concern about the ability and willingness of private employers to limit expression by their employees"); Carey, *supra* note 18, at 637 ("As the political climate in the United States becomes increasingly divided, more and more employees are fired for their off-duty political speech."); *id.* at 643–44 ("[I]n the extremely divided and hostile political climate today, private employees are being terminated from their places of employment or threatened with termination for their political speech."); *id.* at 653–54 ("As a result of these events and the hostile political climate, voters on both sides of the political spectrum are more likely to be concerned or afraid of being fired for their political speech . . . .").

[20] Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, CATO INSTITUTE: SURVEY REPORTS 5 (July 22, 2020) (discussing a 2020 Cato Institute and YouGov national survey), https://ssrn.com/abstract=3659953 [https://perma.cc/5VW8-28D2].

[21] *Id.*

one percent of white workers, twenty-two percent of African-American workers).[22]

The time has come. This article proposes that "political affiliation"[23] be added as a protected characteristic under federal employment discrimination law – specifically, Title VII of the Civil Rights Act of 1964. Part II of this article explores current legal protections for political affiliation in the workplace. First, this part discusses existing protections for public sector employees: (1) the First Amendment for state and local government workers[24] and (2) the CSRA for federal government civil service workers.[25] Second, this part discusses (potential) protections for private sector employees: (1) the Reconstruction-era 42 U.S.C. § 1985 ("Section 1985"),[26] which (in part) prohibits conspiracy-based "force, intimidation, or threat" due to a person's "support or advocacy . . . toward or in favor of the election" of any person for federal office,[27] and (2) state laws.[28]

Part III then defends the addition of political affiliation as a protected characteristic under Title VII. Naturally, this addition would create significantly greater symmetry and uniformity in political affiliation protection, thus eliminating current legal preferences for employees who work in the public sector or live in the "right" states.[29] Importantly, though, this proposal is warranted for three other reasons: (1) it is consistent with Congress's "political affiliation protection" philosophy, which is clearly evidenced by the First Amendment, Section 1985, and the CSRA;[30] (2) it rests on a First Amendment foundation that has long been a part of Title VII – Congress relied on this foundation to protect *religion* in 1964, and it can (and should) rely on it again to protect political affiliation as religion's "companion" or "sister" characteristic;[31] and (3) it substantially reduces those harms (both to individual employees and U.S. democratic society) that are caused by political affiliation discrimination in the workplace.[32]

---

[22] *Id.*

[23] *See infra* Part III (discussing this term and defining it as "association with and/or support of a political party (including any of its candidates for public office)").

[24] *See infra* Part II.A.1 (discussing this First Amendment protection).

[25] *See infra* Part II.A.2 (discussing this CSRA protection).

[26] 42 U.S.C. § 1985 (2012).

[27] *Id*. at § 1985(3); *see infra* Part II.B.1 (discussing Section 1985's "support or advocacy" clauses).

[28] *See infra* Part II.B.2 (discussing these state laws or constitutional provisions).

[29] *See infra* notes 243-61 and accompanying text (discussing this symmetry and uniformity).

[30] *See infra* Part III.A (discussing this philosophy).

[31] *See infra* Part III.B (discussing this foundation).

[32] *See infra* Part III.C (discussing this policy).

II. CURRENT LEGAL PROTECTIONS FOR POLITICAL AFFILIATION IN THE WORKPLACE

This part explores current legal protections for political affiliation in the workplace: First, for public sector employees, and second, for private sector employees.

A. Protections for Public Sector Employees

This subpart discusses federal protections for public sector employees: (1) the First Amendment (coupled with the Section 1983 civil action vehicle) for state and local government workers and (2) the CSRA for federal government civil service workers.

1. First Amendment (and Section 1983)

For state and local government employees, the First Amendment (and Section 1983) provide federal protection against discrimination based on political affiliation. This subsection will discuss (1) the history and scope of the First Amendment and (2) applicable Supreme Court precedent regarding First Amendment-based political affiliation claims by public sector employees.

i. First Amendment History and Scope

After the American Revolutionary War, the Constitutional (Federal) Convention met in Philadelphia and drafted the U.S. Constitution.[33] By March 1789, the states had ratified this founding document.[34] Later that year, the first elected Congress assumed office[35] and drafted the Bill of Rights.[36] By December 1791, the states had ratified those constitutional amendments.[37]

Congress drafted the First Amendment with an understanding of "[t]he exigencies of the colonial period and the efforts to secure freedom

---

[33] *See, e.g.*, ROBERT J. ALLISON, AMERICAN ERAS: DEVELOPMENT OF A NATION, 1783-1815 204 (Robert J. Allison et al. eds., 1997); Steven G. Calabresi, *The Global Rise of Judicial Review Since 1945*, 69 CATH. U. L. REV. 401, 405 (2020); George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L. J. 631, 654 (1992).

[34] Calabresi, *supra* note 33, at 405; Anastaplo, *supra* note 33, at 654.

[35] LEONARD W. LEVY, *The Continental Congress*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 493 (Leonard W. Levy et. al. eds., 1986).

[36] ALLISON, *supra* note 33, at 208; Anastaplo, *supra* note 33, at 664.

[37] ALLISON, *supra* note 33, at 208; Calabresi, *supra* note 33, at 405; Anastaplo, *supra* note 33, at 664.

from oppressive administration . . . ."[38] For almost a century before the revolution, the British government had engaged in "a persistent effort . . . to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light . . . the agencies and operations of the government."[39]

Consequently, "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," which includes discussions of "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."[40] Consistent with that purpose, Congress specifically crafted the First Amendment to prohibit (in part) federal laws "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[41]

Based on the "close nexus" between and among the freedoms of speech, the press, and assembly,[42] the U.S. Supreme Court has consistently observed that a person's political affiliation falls under the First Amendment umbrella.[43] For example, in its decision in *Kusper v. Pontikes*, the Court (in a constitutional challenge to an Illinois primary voting law) explained:

---

[38] Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940); *see also* Whitney v. California, 274 U.S. 357, 376 (1927) ("Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

[39] Grosjean v. American Press Co., 297 U.S. 233, 245 (1936) ("The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing.").

[40] Mills, 384 U.S. at 218–19; *see also* Roth v. United States, 354 U.S. 476, 484 (1957) (noting that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

[41] U.S. CONST. amend. I.

[42] *See, e.g.*, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces the freedom of speech."); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967) ("These rights [to "assemble peaceably and to petition for a redress of grievances"], moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.'" (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[43] Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973).

> There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.[44]

Similarly, in its decision in *Williams v. Rhodes*, the Court (in a constitutional challenge to an Ohio election law) observed: "[T]he right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment."[45]

Likewise, in its decision in *Sweezy v. New Hampshire*, the Court (in a constitutional challenge to a New Hampshire legislative investigation into a state employee's political activities) stated:

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations.[46]

ii. Section 1983 Claims by State and Local Government Employees

In the public sector workplace, the First Amendment's protection of political affiliation is similarly well-established.[47] If a state or local government discriminates due to political affiliation, the harmed employee

[44] 414 U.S. 51, 56–57 (1973) (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).

[45] 393 U.S. 23, 24–26, 30 (1968) (discussing the election law challenge).

[46] 354 U.S. 234, 250 (1957) (plurality opinion); *see id.* at 235–36 (discussing the legislative investigation challenge); *see also* United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 222–23 (1967) ("We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. . . . [T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political."); NAACP v. Button, 371 U.S. 415, 430 (1963); NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 461 ("Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ").

[47] *See, e.g.*, Heffernan v. Paterson, 578 U.S. 266, 268, 270 (2016) ("The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity. . . . With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate."); *see infra* Part. II.A.1 (discussing other applicable precedent).

may use Section 1983 as the civil action vehicle to sue based on the state-actor's deprivation of First Amendment rights or privileges.[48]

In a trio of decisions from 1976 through 1990, the Supreme Court addressed Section 1983 claims against state and local governments for political affiliation discrimination.[49] These decisions (two involving Republican employees, one involving Democratic employees) provide helpful insight into the scope of First Amendment protection, the harms caused by political affiliation discrimination, and exceptional situations that may permit such discrimination.

The first decision was the 1976 case of *Elrod v. Burns*.[50] There, a newly elected Democratic sheriff in Cook County, Illinois fired several employees, including a bailiff, process server, and office worker.[51] The alleged reason? They were Republicans who "did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders."[52] These decisions stemmed from a "political patronage" practice of "dismissing employees on a partisan basis."[53] Consequently, the Republican employees filed a Section 1983

[48] *See* 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."); *Heffernan*, 578 U.S. at 273 (in a Section 1983 political affiliation claim by a police officer against his city employer, stating that "[w]hen an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983"); *id*. at 276 (Thomas, J., dissenting) ("For [the plaintiff] to prevail on his § 1983 claim, then, a state actor must have deprived him of a constitutional right."); *see infra* Part II.A.1 (discussing other applicable precedent).

[49] Rutan v. Republican Party of Ill., 497 U.S. 62, 64–65 (1990) (Section 1983 political affiliation claims by several employees against their state employer); Branti v. Finkel, 445 U.S. 507, 508 (1980) (Section 1983 political affiliation claims by several assistant public defenders against their county employer); Elrod v. Burns, 427 U.S. 347, 349–50 (1976) (plurality opinion) (Section 1983 political affiliation claims by several sheriff office employees against their county employer).

[50] 427 U.S. 347 (1976).

[51] *Id*. at 350.

[52] *Id.* at 351; *see also id.* at 355 ("In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives.").

[53] *Id.* (plurality opinion) ("It has been the practice of the Sheriff of Cook County, when he assumes office from a Sheriff of a different political party, to replace non-civil-service employees of the Sheriff's Office with members of his own party when

action against the county, alleging violation of their First Amendment right of political affiliation.[54] The case reached the Supreme Court after the district court had dismissed the employees' complaint for failure to state a claim.[55]

The Court (via a three-Justice plurality and two-Justice concurrence) disagreed and remanded the case, concluding that the employees had stated a viable Section 1983 claim for political affiliation discrimination.[56] In reaching this conclusion, the plurality (and concurrence) addressed three important points, all of which would inform and guide the Court's later decisions in this area.[57]

First, the plurality observed that the First Amendment protects a public sector employee's political affiliation.[58] For example, it emphasized that "political belief and association constitute the core of those activities protected by the First Amendment."[59] Similarly, the plurality concluded that "the practice of [political] patronage dismissals clearly infringes First Amendment interests . . . ."[60]

Second, the plurality addressed policy concerns, recognizing that political affiliation discrimination causes several harms.[61] Initially, it stressed the obvious harm to the *individual employee* and his or her First Amendment freedoms:

---

the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party *id.* at 353 (plurality opinion) ("The Cook County Sheriff's practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage."); *id.* at 359 (plurality opinion) ("Under that [patronage] practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party.").

[54] *Id.* at 350 (plurality opinion) ("Their complaint alleged that they were discharged or threatened with discharge solely for the reason that they were not affiliated with or sponsored by the Democratic Party.").

[55] *Id*. at 350 (plurality opinion).

[56] *Id.* at 373 (plurality opinion) ("We hold, therefore, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments, and that respondents thus stated a valid claim for relief."). Justices Brennan, Marshall, and White comprised the plurality. *See also id.* at 374–75 (Stewart, J., concurring) ("The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job . . . upon the sole ground of his political beliefs. I agree with the plurality that he cannot."). Justice Blackmun joined Justice Stewart's concurring opinion. *Id.* at 374.

[57] *See infra* notes 73-111 and accompanying text (discussing these later decisions).

[58] *Elrod*, 427 U.S. at 355–56, 360 (plurality opinion).

[59] *Id*. at 356 (plurality opinion).

[60] *Id*. at 360 (plurality opinion).

[61] *Id.* at 355–57, 369–70 (plurality opinion).

> The costs of the practice of patronage is the restraint it places on freedoms of belief and association. . . . Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk.[62]

The plurality also highlighted the less direct – but equally important – harm to *U.S. society* and its "system of government" and "electoral process":

> The free functioning of the electoral process also suffers. . . .
>
> These [First Amendment political affiliation] protections reflect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," a principle itself reflective of the fundamental understanding that "(c)ompetition in ideas and governmental policies is at the core of our electoral process . . . ." Patronage, therefore to the extent it compels or restrains belief and association[,] is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment."[63]

In fact, later in its opinion, the plurality again stressed this harm to "democratic government" and the "elective process":

> [P]atronage dismissals clearly also retard that [democratic] process. Patronage can result in the entrenchment of one of a few parties to the exclusion of others. And most indisputably, as we recognized at the outset, patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.[64]

Third, the plurality (and concurrence) considered exceptional situations in which public sector employers *could lawfully* discriminate

---

[62] *Id.* at 355 (plurality opinion); *see also id.* at 359 (plurality opinion) ("The threat of dismissal for failure to provide that [patronage] support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise."); *id.* at 372 (plurality opinion) ("We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well.").

[63] *Id.* at 357 (plurality opinion) (quoting, respectively, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), Williams v. Rhodes, 393 U.S. 23, 32 (1968), and Illinois State Employees Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972)).

[64] *Id.* at 369–70 (plurality opinion).

based on political affiliation.[65] The plurality initially noted that First Amendment protections are "not an absolute,"[66] with restraints "permitted for appropriate reasons."[67] Then turning to typical strict scrutiny analysis, the plurality explained that a political patronage policy must "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end."[68]

As the first step, the plurality identified the vital "end" – namely, that "a representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate."[69] But, as the second step, the plurality observed that a "wholesale" or blanket political patronage policy for *all public sector jobs* was an overbroad means to achieve this end.[70] According to the plurality, the more tailored and least restrictive means would be to "[l]imit[] patronage dismissals to policymaking positions"[71] because "[n]onpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party."[72]

---

[65] *Id*. at 360–67, 372 (plurality opinion); *see id*. at 375 (Stewart, J., concurring).

[66] *Id*. at 360 (plurality opinion).

[67] *Id*. (plurality opinion).

[68] *Id*. at 363 (plurality opinion); *see also id*. at 362 (plurality opinion) ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' The interest advanced must be paramount, one of vital importance, . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. . . . [T]he government must 'emplo(y) means closely drawn to avoid unnecessary abridgement . . .'" (quoting, respectively, Buckley v. Valeo, 424 U.S. 1, 64–65 (1976); Kusper v. Pontikes, 414 U.S. 51, 58 (1973); *Buckley*, 424 U.S. at 94; Sherbert v. Verner, 374 U.S. 398, 406 (1963); *Buckley*, 424 U.S. at 25.

[69] *Id.* at 367 (plurality opinion); *see also id*. at 372 (plurality opinion) ("There is also a need to insure that policies which the electorate has sanctioned are effectively implemented.").

[70] *Id.* at 367 (plurality opinion) ("The justification [of policy implementation versus obstruction] . . . is nevertheless inadequate to validate patronage wholesale.").

[71] *Id*. at 372 (plurality opinion).

[72] *Id*. at 367 (plurality opinion); *see also id.* at 367–68 (plurality opinion) ("No clear line can be drawn between policymaking and nonpolicymaking positions. . . . An employee with responsibilities that are not well-defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration would also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals."); *id.* at 375 (Stewart, J., concurring) (agreeing that "a nonpolicymaking, nonconfidential government employee" cannot be fired "upon the sole ground of his political beliefs").

The second decision in the trio was the 1980 case of *Branti v. Finkel*.[73] There, a newly appointed Democratic public defender in Rockland County, New York fired two experienced assistant public defenders.[74] The alleged reason? Another political patronage practice – the employees were Republicans and "did not have the necessary Democratic sponsors . . . ."[75] In contrast, the nine retained (or newly appointed) assistant public defenders were Democrats and "were all selected by Democratic legislators or Democratic town chairmen on a basis that had been determined by the Democratic caucus."[76] Consequently, the Republican employees filed a Section 1983 action against the county, alleging violation of their First Amendment right of political affiliation.[77] The district court and Second Circuit Court of Appeals ruled in favor of the employees.[78]

The Court agreed, heavily relying on its *Elrod* decision to conclude that "the continued employment of an assistant public defender cannot be properly conditioned upon his allegiance to the political party in control of the county government."[79] As in *Elrod*, the Court addressed three important points.[80]

First, the Court reiterated that the First Amendment protects a public sector employee's political affiliation.[81] After extensively quoting from the *Elrod* plurality opinion, the Court observed that "[i]f the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes."[82]

Second, like the *Elrod* plurality, the Court noted how political affiliation discrimination causes several harms.[83] It primarily highlighted the harm to the *individual employee* and his or her First Amendment freedoms via "the coercion of belief that necessarily flows from the

---

[73] 445 U.S. 507 (1980).

[74] *Id*. at 509.

[75] *Id*. at 510 (noting the district court's findings).

[76] *Id*. at 509–10.

[77] *Id*. at 508 n.1 (noting Section 1983 as the jurisdictional basis), 508–09.

[78] *Id*. at 508–09.

[79] *Id*. at 519.

[80] *Id.* at 513, 517.

[81] *Id*. at 513–15.

[82] *Id*. at 515; *see also id.* at 508 ("The question is whether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs."); *id*. at 517 ("To prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged 'solely for the reason that they were not affiliated with or sponsored by the Democratic Party.'" (quoting Elrod v. Burns, 427 U.S. 347, 350 (1976)).

[83] *Id*. at 516.

knowledge that one must have a sponsor in the dominant party to retain one's job."[84]

Third, the Court revisited whether "policymaking positions" (per the *Elrod* decision) accurately captured the exceptional situations in which public sector employers *could lawfully* discriminate based on political affiliation.[85] The Court answered no, concluding that a political patronage policy limited to "policymaking positions" was still an overbroad means to achieve the government's end of efficient and effective policy administration.[86] The Court reasoned that political affiliation (1) is "not necessarily relevant" to all "policymaking or confidential positions" (giving an example of a state university's football coach)[87] and (2) yet can be relevant to some *non*-policymaking or *non*-confidential jobs (giving examples of "various assistants who help [a Governor] write speeches, explain his views to the press, or communicate with the legislature").[88]

Instead, the Court concluded that the more tailored and least restrictive means would be to limit a political patronage policy to situations in which political affiliation is an "appropriate requirement" for "effective performance of the public office involved."[89] Using the prior *Elrod* case as an example, the Court explained that the bailiff, process server, and office worker positions "were not of that character . . . ."[90] Similarly, turning to the *Branti* facts, the Court concluded that the assistant public defender positions – with client-focused responsibilities – did not require a set political affiliation for "effective performance of the public office involved."[91]

---

[84] *Id*. at 517.

[85] *Id*.

[86] *Id.* at 518–20.

[87] *Id.* at 518.

[88] *Id.* ("Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. . . . In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; . . .").

[89] *Id*.; *see also id.* at 517 ("Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.").

[90] *Id*. at 517.

[91] *Id.* at 519–20 ("The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State. . . . Thus, whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns. Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party.").

The final decision in the trio was in the 1990 case of *Rutan v. Republican Party of Illinois*.[92] There, a Republican governor in Illinois denied promotions and transfers to, refused to hire, and failed to recall from layoff several state employees, including a rehabilitation counselor, equipment operator, prison guard, garage worker, and dietary manager.[93] The alleged reason? Yet another political patronage practice – the employees were Democrats and had not supported, voted for, or otherwise been supported by the local Republican Party.[94] Consequently, the Democratic employees filed a Section 1983 action against the state, alleging violation of their First Amendment right of political affiliation.[95] The case reached the Supreme Court after the district court had dismissed the employees' complaint for failure to state a claim.[96]

The Court disagreed and remanded the case, concluding that the employees – while experiencing only non-termination actions (e.g., promotion or transfer denial, refusal to hire, failure to recall from layoff) – still stated a viable Section 1983 claim for political affiliation discrimination.[97] Like in *Elrod* and *Branti*, the Court addressed three important points.[98]

First, the Court again highlighted that the First Amendment protects a public sector employee's political affiliation.[99] For example, it noted that "[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate."[100] Similarly, the Court concluded that "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of employees."[101]

---

[92] 497 U.S. 62, 64–65 (1990).

[93] *Id.* at 66–67.

[94] *Id.* at 66.

[95] *Id.* at 66–67, 76 (noting Section 1983 as the jurisdictional basis).

[96] *Id.* at 67.

[97] *Id.* at 65 ("Today, we are asked to decide the constitutionality of several related political patronage practices – whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not."); *id.* at 79 ("We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support . . . .").

[98] *Id.* at 69, 76, 78.

[99] *Id.* at 75–76.

[100] *Id.* at 76.

[101] *Id.* at 75; *see also id.* at 74 ("Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms."); *id.* at 78 ("Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital

Second, the Court again recognized that political affiliation discrimination causes several harms.[102] As in the *Elrod* plurality opinion and its *Branti* decision, the Court highlighted the harm to the *individual employee* and his or her First Amendment freedoms. Specifically, it observed that a political patronage policy "press[es]" employees to "conform their beliefs and associations to some state-selected orthodoxy"[103] and to "discontinue the free exercise of their First Amendment rights."[104] Expanding on this harm to the individual employee, the Court gave numerous examples of these pressures:

> Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.
>
> . . . Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment.[105]

In addition, Justice Stevens (in his concurring opinion) echoed the *Elrod* plurality's concern about the equally important harm to *U.S. society* and its electoral process: "By impairing individuals' freedoms of belief and association, unfettered patronage practices undermine the 'free functioning of the electoral process.'"[106] To bolster this point, Justice Stevens quoted from a 1972 opinion that he had written while a judge for the Seventh Circuit Court of Appeals:

---

interest in doing so."); *id.* at 79 ("If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated.").

[102] *Id*. at 75, 79.

[103] *Id*. at 75.

[104] *Id*. at 79.

[105] *Id*. at 73–74 (emphasis in original).

[106] *Id*. at 91 (Stevens, J., concurring) (quoting Elrod v. Burns, 427 U.S. 347, 356 (1976)).

> "[I]t is appropriate . . . to consider . . . the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."[107]

Third, the Court briefly addressed the exceptional situations in which public sector employers *could lawfully* discriminate based on political affiliation.[108] Specifically, the Court restated the *Branti* decision's limitation to situations in which political affiliation was an "appropriate requirement" for "effective performance of the public office involved."[109] It also added that these situations would typically involve "high-level" (versus "low-level") employees.[110] Stopping there, the Court noted that "[t]he scope of this exception does not concern us here" because the state had conceded that the five employees were "not within it."[111]

Since the 1990 *Rutan* decision, the Supreme Court and lower federal courts have continued to highlight the three above-referenced points: (1) the First Amendment clearly protects a public sector employee's political

---

[107] *Id*. at 91–92 (Stevens, J., concurring) (quoting Ill. State Emp. Union, Council 34 v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972)).

[108] *Id*. at 71 n.5.

[109] *Id*.; *see also id.* at 64–65 (noting that its *Branti* decision prohibited the firing of a public sector employee "unless party affiliation is an appropriate requirement for the position involved"); *id*. at 90 (Stevens, J., concurring) ("[T]here are many jobs for which political affiliation is relevant to the employee's ability to function effectively as part of a given administration. In those cases – in other words, cases in which 'the efficiency of the public service' would be advanced by hiring workers who are loyal to the Governor's party— such hiring is permissible under the holdings in *Elrod* and *Branti*."). The Court properly noted that its *Branti* decision had "refined the exception" created in *Elrod*, in which "we suggested that policymaking and confidential employees probably could be dismissed on the basis of their political views." *Id.* at 71 n.5.; *see also* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 718–19 (1996) (also noting that the *Branti* decision had "modified the ["policymaking position"] standard, announced in the two opinions supporting the *Elrod* judgment, for assessing when party affiliation, consistent with the First Amendment, may be an acceptable basis for terminating a public employee").

[110] *Id.* at 65 ("Today we are asked to decide the constitutionality of several related political patronage practices – whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support."); *id.* at 74 ("A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.").

[111] *Id.* at 71 n.5; *see also id*. at 90 (Stevens, J., concurring) ("These cases, however, concern jobs in which . . . political affiliation . . . [is] entirely irrelevant to the public service to be performed.").

affiliation,[112] (2) political affiliation discrimination causes several individual and societal harms,[113] and (3) such discrimination is warranted only if political affiliation is an "appropriate requirement" for "effective

[112] *See, e.g.*, Heffernan v. City of Paterson, N.J., 578 U.S. 266, 268 (2016) ("The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity."); *id.* at 270 ("With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. The basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" (quoting West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 714 (1996) ("Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question."); *id.* at 719 ("*Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question. There is an advantage in so confining the inquiry where political affiliation alone is concerned, for one's beliefs and allegiances ought not be subject to probing or testing by the government."); *id.* at 720 ("There is no doubt that if Gratzianna had been a public employee whose job was to perform two truck operations, the city could not have discharged him for refusing to contribute to Paxson's campaign or for supporting his opponent."); *id.* at 721 ("Our cases make clear that the government may not coerce [political] support in this manner, unless it has some justification beyond dislike of the individual's political association."); Bd. of Cnty. Comm'rs, Wabaunsee City v. Umbehr, 518 U.S. 668, 674–75 (1996) ("We have held that government workers are constitutionally protected from dismissal . . . , except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party."); *id.* at 680 ("The First Amendment permits neither the firing of janitors nor the discriminatory pricing of state lottery tickets based on the government's disagreement with certain political expression."); Wagner v. Jones, 664 F.3d 259, 270 (8th Cir. 2011) ("The parties do not dispute that Wagner's political affiliation with the Republican Party and her work on behalf of socially conservative organizations is protected by the First Amendment."); *id.* at 273 ("[T]he First Amendment prohibits a state from basing hiring decisions on political beliefs or associations with limited exceptions for policymaking and confidential positions. The state can neither directly nor indirectly interfere with an employee's or potential employee's rights to [political] association and belief.").

[113] *See, e.g.*, *Heffernan*, 578 U.S. at 273–74 ("The constitutional harm at issue in the ordinary case [of political affiliation discrimination under the First Amendment] consists in large part of discouraging employees – both the employee discharged (or demoted) and his or her colleagues – from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. . . . Neither, for that matter, is that harm diminished where an employer announces a policy of demoting those who, say, help a particular candidate in the mayoral race, and all employees (including Heffernan), fearful of demotion, refrain from providing any such help.").

performance of the public office."[114] Thus, for state and local government employees, the First Amendment provides significant protection for political affiliation.

2. Civil Service Reform Act

For federal government civil service employees, the CSRA provides federal protection for political affiliation. This subsection will discuss (1) the history of the civil service and CSRA and (2) the CSRA's political affiliation-related protections.

i. History of the Civil Service and CSRA

Enacted in 1978, the CSRA provides "the modern framework governing the rights of most federal workers . . . ."[115] Generally, federal civil service employees "are in the competitive service," which typically "covers all civil service positions within the executive branch . . . ."[116]

The origin of the federal government's civil service dates to 1883. Until that time, the federal government used a so-called "patronage system" (or "spoils system") that prioritized political contributions or support – over competence – in filling applicable jobs.[117] Naturally, that system created "strong discontent with the corruption and inefficiency" of the federal government.[118]

In response, Congress passed the Pendleton Act of 1883[119] as a reform that "protest[ed] against the 19th century spoils system . . . [and] promised a work force in which employees were selected and advanced

---

[114] *Id.* at 270 (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)); *O'Hare Truck Serv., Inc.*, 518 U.S. at 718–19.

[115] JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 1 (2017); *see also id.* at 6 ("[T]he CSRA functions as the 'comprehensive' legal framework governing certain types of actions taken by agencies against employees."); United States v. Fausto, 484 U.S. 439, 455 (1988) (noting that the CSRA "established a comprehensive system for reviewing personnel action taken against federal employees").

[116] JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 7 (2017); *see also* 5 U.S.C. § 2102(a)(1) (stating that, subject to certain exceptions, "[t]he 'competitive service' consists of . . . all civil service positions in the executive branch"). Civil service" excludes the uniformed services. *Id.* § 2101 (defining "uniformed services" to include the "armed forces," specifically the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard).

[117] JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 1 (2017).

[118] Elrod v. Burns, 427 U.S. 347, 354 (1976).

[119] Pendleton Civil Service Act, ch. 27, 22 Stat. 403 (1883).

on the basis of competence rather than political or personal favoritism."[120] In this way, the Pendleton Act "served as the 'foundation of [the] modern civil service' and required that federal employees within the civil service be hired based on merit."[121]

By the 1970s, however, Congress began to recognize that "frequent attempts to circumvent" the civil service system had occurred.[122] Concluding that "[t]he public is ill served by the existing civil service system,"[123] Congress passed the CSRA as "the most comprehensive reform of the federal work force since passage of the Pendleton Act in 1883."[124] As Congress observed at the time, "[a] manager has no right to hire political bed fellows,"[125] and "[i]t is the public which suffers from a system which neither permits managers to manage nor which provides assurance against political abuse."[126]

ii. Political Affiliation-Related Protections

The CSRA provides "a variety of legal protections for federal employees."[127] One example of these protections is the CSRA's set of "merit systems principles" applicable to civil service employment in an "Executive agency" (such as the Department of Justice or Department of Labor).[128]

Two of these principles specifically address political affiliation. The first principle states: "All employees and applicants for employment should receive fair and equitable treatment in all respects of personnel management without regard to political affiliation, race, color, religion,

---

[120] S. REP. NO. 95-969, at 2–3 (1978); *see also* Major John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 205 (1995) ("The Pendleton Act of 1883 created the [Civil Service Commission] to implement a merit system for hiring federal civil servants, and to eliminate the political spoils system.").

[121] JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 1 (2017) (quoting *Elrod*, 427 U.S. at 354).

[122] S. REP. NO. 95-969, at 3 (1978) ("The civil service system is an outdated patchwork of statutes and rules built up over almost a century.").

[123] *Id*.

[124] *Id*. at 1, *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2723.

[125] *Id*. at 4, *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2726.

[126] *Id*. at 3, *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2725.

[127] JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 2 (2017); *see also* Stimson, *supra* note 120, at 165 ("Career federal civil servants enjoy a wide range of job protections.").

[128] 5 U.S.C. § 2301(a)-(b). Specifically, "Executive agency" is defined to include fifteen "Executive departments," such as the Departments of State, Defense, Justice, Commerce, Labor, Transportation, Education, or Homeland Security. *Id*. §§ 101, 105 (respectively, defining "Executive department" and "Executive agency").

national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights."[129] Similarly, the second principle notes: "Employees should be . . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes . . . ."[130] In support of these (and other) merit principles, Congress observed that they "are designed to protect career employees against improper political influences or personal favoritism in the recruiting, hiring, promotion, or dismissal processes . . . [and] to assure that personnel management is conducted without discrimination."[131]

Another example of the CSRA's protections is its list of "prohibited personnel practices" involving employees or applicants for any "covered position" in an Executive agency.[132] Again, two practices relate to political affiliation (or related activity). The first prohibited practice is "any personnel actions" that "discriminate for or against any employee or applicant for employment . . . on the basis of marital status or political affiliation . . . ."[133] Similarly, the second prohibited practice is to "coerce

---

[129] *Id.* § 2301(b)(2).

[130] *Id.* § 2301(b)(8)(A).

[131] S. REP. NO. 95-969, at 18 (1978); *see also* Stimson, *supra* note 120, at 1 ("Career federal civil servants . . . obtain their jobs based on merit rather than political patronage.").

[132] 5 U.S.C. §§ 2302(a)(2)(A)–(C); 5 C.F.R. § 5.2. A "covered position" includes "any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service . . . .". 5 U.S.C. § 2302(a)(2)(B); *see also id.* § 2102(a)(1) (generally defining "competitive service" to include "all civil service positions in the executive branch"); *id.* § 2103(a) (generally defining "excepted service" to include "those civil service positions which are not in the competitive service or the Senior Executive Service").

[133] *Id.* § 2302(b)(1)(E); *see also* 5 C.F.R. § 4.2 ("No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, political affiliation, or religious beliefs . . . ."). These regulations are issued by the Office of Personnel Management (OPM), which is the federal agency that manages the civil service of the federal government. CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 3 (June 2021) ("OPM is an independent agency that functions as the central human resources department of the executive branch."). This subsection of the CSRA also prohibits discriminatory "personnel actions" based on race, color, religion, sex, or national origin per Title VII, 5 U.S.C. § 2302(b)(1)(A), age per the ADEA, *id.* § 2302(b)(1)(B), and "handicapping condition" per the Rehabilitation Act of 1973, *id.* § 2302(b)(1)(D); *see also* 29 U.S.C. § 633 (a) (ADEA's provision that prohibits age discrimination against enumerated civil service workers); 29 U.S.C. § 794(a) (the Rehabilitation Act's provision that prohibits disability-based discrimination against enumerated civil service workers); 42 U.S.C. § 2000e-16 (Title VII's provision that prohibits such discrimination against enumerated civil service workers); CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 559 (9th ed. 2017) ("While neither Title VII nor the ADEA originally included the federal government,

the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity . . . ."[134]

As a final point, the Federal Circuit Court of Appeals, which has jurisdiction over civil service employee appeals under the CSRA,[135] has noted that "political affiliation" (or "partisan political reasons")[136] simply means "affiliation with any political party or candidate."[137]

---

amendments to both statutes extended their reach to most federal workers. However, rather than merely adding federal employment to the statutes' coverage, Congress added a separate provision to each law . . . . The Americans with Disabilities Act does not generally reach federal employees, but these employees receive comparable protection under the Rehabilitation Act . . . .").

[134] 5 U.S.C. § 2302(b)(3); *see also* S. REP. NO. 95-969, at 21(1978) ("Paragraph (3) summarizes the Hatch Act prohibitions. Essentially, it prohibits the use of official authority to coerce political activity or to obligate any political contribution or political service. It also prohibits any reprisal against an individual who refuses to engage in political activities.").

[135] 5 U.S.C. § 7703(a)(1), (b)(1)(a); *see also* Stimson, *supra* note 120, at 174 ("The appellant may appeal a final decision [of the Merit Systems Protection Board (MSPB)] to the United States Court of Appeals for the Federal Circuit."); JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 2 (2017).

Under the CSRA, a civil service employee must file an initial appeal with the MSPB, which "has appellate jurisdiction over a broad range of employment disputes arising from personnel actions that employing agencies already have taken." Stimson, *supra* note 120, at 173; *see also* 5 U.S.C. §§ 7513(d), 7701 (discussing appeals to the MSPB); Stimson, *supra* note 120, at 169 ("The MSPB is the designated guardian of merit"); JARED P. COLE, CONG. RSCH. SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 2 (2017); *id.* at 9 ("After the agency has reached its decision, covered employees may appeal to the MSPB, which is empowered to review the case.").

[136] *See* 5 C.F.R. § 315.806(b) (discussing a probationary civil service employee's right to appeal (to the MSPB) any termination "based on partisan political reasons or marital status").

[137] *See, e.g.*, McCall-Scovens v. Merit Sys. Prot. Bd., 174 Fed. App'x 569, 570-71 (Fed. Cir. 2006) ("[T]he partisan political reprisals she alleges were actions of co-workers and superiors that were unrelated to her political affiliation as that term is used in the regulations – affiliation with a political party or candidate. . . . Required are allegations . . . showing the discrimination was based on the probationary employee's affiliation with a political party or candidate."); Staggs v. Dep't of Navy, 106 Fed. App'x 24, 25 (Fed. Cir. 2004) ("Noting that the phrase 'partisan political reasons' is limited to 'discrimination based on affiliation with any political party or candidate,' the Board properly concluded that it lacked jurisdiction to consider the claim as based on partisan political reasons." (citing Mastriano v. F.A.A., 714 F.2d 1152, 1155-56 (Fed. Cir. 1983)); (citing Mastriano v. F.A.A., 714 F.2d 1152, 1155–56 (Fed. Cir. 1983)); Bante v. Merit Sys. Prot. Bd., 966 F.2d 647, 649 (Fed. Cir. 1992) ("Bante did not allege a viable claim of partisan political discrimination on the face of

In sum, for federal government civil service employees, the CSRA provides significant federal protection for political affiliation.[138]

B. Protections for Private Sector Employees

This subpart discusses potential protections for private sector employees: (1) the "support or advocacy" clauses of the Reconstruction-era Section 1985 and (2) state laws.

1. Section 1985's "Support or Advocacy" Clauses

For private sector employees, the "support or advocacy" clauses of Section 1985(3) may provide federal protection against discrimination based on political affiliation. This subsection will discuss (1) the history and scope of Section 1985(3)'s "support or advocacy" clauses and (2) their potential relevance to private sector employees.

i. Section 1985(3) History and Scope

The roots of Section 1985 reach back to Reconstruction after the Civil War. In 1870, the states ratified the Fifteenth Amendment to the U.S. Constitution, which provided that a citizen's right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude . . . ."[139] Despite this voting protection, the Ku Klux Klan and other private actors "conducted a campaign of political terrorism" that involved threats or other intimidation tactics against voters who were "members of the Republican Party, particularly Black individuals."[140]

---

his complaint. His allegation is clearly not within the definition of partisan political discrimination enunciated by this court [in *Mastriano*].").

[138] *See, e.g.*, Hoffman, *supra* note 8, at 1537 ("Congress has already acknowledged the potential for harm and included 'political affiliation' among the protected categories for federal employees in the Civil Service Reform Act of 1978."); Kerstin Miller, *Engquist v. Oregon Department of Agriculture: No Harm Meant? The Vanquished Requirement of Ill-Will in Class-of-One Equal Protections Claims and the Erosion of Public Employees' Constitutional Rights*, 68 MD. L. REV. 915, 948 (2009) ("Public employees are protected from discriminatory treatment through a variety of statutes, including the Civil Service Reform Act of 1978 ("CSRA"). The CSRA prohibits the federal government from discriminating against employees on the basis of . . . political affiliation.").

[139] U.S. CONST. amend. XV, §1.

[140] *The Support or Advocacy Clause of § 1985(3)*, HARV. L. REV. 1382, 1389 (2020); *see also* Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 FORDHAM L. REV. 145, 151-52 (2020) (discussing the post-Civil War "problem posed by white Southerners who used organized violence to perpetuate white supremacy in the South during Reconstruction. . . . The Ku Klux Klan

In response, Congress passed the Civil Rights Act of 1871, also known as the Ku Klux Klan Act,[141] to "increase[] protection for Americans in the South who wanted to promote political agendas that the Klan opposed."[142] This Act had two primary sections: (1) Section 1 created civil liability for deprivations of federal constitutional rights, privileges, or immunities by state actors[143] and (2) Section 2 created civil (and criminal) liability for private conspiracies that interfered with federal governance,

functioned as a paramilitary organization with a mission of, among other things, preventing African Americans and their white Republican allies from gaining political power in the South."); *id.* at 161 ("The worry was that pro-Reconstruction activists, in particular, Republican party activists, both Black and White, were being threatened by local actors and mostly by nonstate actors like the Klan."); *id.* (discussing "citizens who, in 1872, were beaten by Klansmen for advocating the election of Republicans").

[141] Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 and in scattered sections of 18 U.S.C.).

[142] Primus & Kistler, *supra* note 140, at 160 ("Congress enacted the support-or-advocacy clauses in 1871 as part of a statute intended to fight the Ku Klux Klan's campaign to maintain white supremacy and impede federal governance."); *see also* Gill v. Farm Bureau Life Ins. Co. of Missouri, 906 F.2d 1265, 1269 (8th Cir. 1990) (noting that the Ku Klux Klan Act's "origin . . . [was] a reaction against the 'murders, whippings, and beatings committed by rogues in white sheets in the postbellum South . . . .") (quoting Mark Fockely, Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U. OF CHICAGO L. REV. 402, 402 (1979)); Nat'l Coal. on Black Civic Participation v. Wohl, 498 F.Supp. 3d 457, 464 (S.D.N.Y. 2020) ("In 1871, Congress, in a measure designed to safeguard the right to vote constitutionally guaranteed to all eligible United States citizens, enacted the Ku Klux Klan Act. Historically, that statute derived from the harm experienced by newly emancipated and enfranchised former slaves. Seeking to cast their votes in federal and state elections, they encountered, at home and at the polls, blatant intimidation carried out by open threats, economic coercion, and even physical violence inflicted to prevent their participation in the nation's electoral process."); Primus & Kistler, *supra* note 140, at 148 ("The Reconstruction Congress originally enacted the [support or advocacy] clauses in an attempt to protect democratic elections from white supremacist violence in the post-Civil War South."); *id.* at 151 ("Congress passed the Klan Act to try to address the problem posted by white Southerners who used organized violence to perpetuate white supremacy in the South during Reconstruction."); Benjamin Lin, *Conspiracy! Section 1985(3) Political-Patronage Discrimination and the Quest for Purpose*, 9 J. L. IN SOC'Y 211, 215 (2008) ("As a general matter, the [Ku Klux Klan] Act was enacted in response to Klan abuses being perpetrated against Black Americans in the South following the War."); *The Support or Advocacy Clause of § 1985(3), supra* note 140, at 1388 ("[T]he [support or advocacy] clause was created, at least in part, to address threats to voters by private actors, such as the Ku Klux Klan (KKK).").

[143] Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983 and in scattered sections of 18 U.S.C.).

officials, property, or activities.[144] Section 1 now exists as Section 1983.[145] Section 2 now exists as Section 1985.[146]

Today, Section 1985 (entitled "Conspiracy to interfere with civil rights") affords "an action for the recovery of damages" if a person is harmed by such conspiracies.[147] For example, Section 1985(1) addresses conspiracies to prevent a person from accepting, holding, or performing the duties of federal office.[148] Section 1985(2) deals with conspiracies to obstruct justice or intimidate parties, witnesses, or jurors in a U.S. federal court.[149]

---

[144] Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1985 and in scattered sections of 18 U.S.C.)

[145] *Compare* Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1983 and in scattered sections of 18 U.S.C.) *with* 42 U.S.C. § 1983; *see also* Primus & Kistler, *supra* note 140, at 152("Section 1 of the Klan Act . . . survives today, with amendments, as 42 U.S.C. § 1983."); *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1382 ("The [Ku Klux Klan] Act created the precursor to the well-known civil rights statute 42 U.S.C. § 1983 . . . ."); *id.* at 1389 ("Section 1 of the bill provided a model for the later 42 U.S.C. § 1983.").

[146] *Compare* Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1985 and in scattered sections of 18 U.S.C.) *with* 42 U.S.C. § 1985; *see also* Primus & Kistler, *supra* note 140, at 151 ("The statutory language that now constitutes the support-or-advocacy clauses of § 1985(3) was originally enacted as part of the Klan Act."); *id.* at 152 ("Several clauses of the civil liability portion of section 2, including the equal protection clauses and the support-or-advocacy clauses, are now codified at 42 U.S.C. § 1985."); *id.* at 155–56 ("All of the clauses of § 1985 originally appeared somewhere in the Klan Act's section 2. And, as was true of section 2, § 1985 mostly addresses conspiracies to interfere with the processes of federal governance."); *id.* at 157 ("Like everything else in § 1985, those equal protection clauses are taken from section 2 of the Klan Act."); Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 321 (2012) (noting that Section 2 of the Civil Rights Act of 1871 is "now codified at 42 U.S.C. § 1985"); *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1389 ("Section 2, the precursor to § 1985(3), imposed civil and criminal punishment for more than ten types of intrastate conspiracies.").

[147] 42 U.S.C. § 1985(3); *see* Primus & Kistler, *supra* note 140, at 155 ("Section 1985 has . . . , like the Klan Act's original section 2, a single liability clause applicable to all of the covered conspiracies . . . .").

[148] 42 U.S.C. § 1985(1); *see* Primus & Kistler, *supra* note 140, at 156 ("Section 1985(1) covers conspiracies to interfere with federal officers."); *id.* at 158 ("[Section] 1985(1) creates a cause of action against people who conspire to prevent people from holding federal office.").

[149] 42 U.S.C. § 1985(2); *see* Primus & Kistler, *supra* note 140, at 156 ("Section 1985(2) covers conspiracies to interfere with federal judicial proceedings."); *id.* at 158 ("[S]ection 1985(2) creates a cause of action against people who conspire to deter witnesses from testifying in federal court.").

Going even further, Section 1985(3) broadly addresses conspiracies to "depriv[e] persons of rights or privileges"[150] and includes two sets of clauses: (1) the "equal protection of the laws" clauses and (2) the "support or advocacy" clauses.[151] The former deals with conspiracies to deprive a person of equal protection or "equal privileges and immunities" under the laws.[152] The latter – relevant to this article – covers conspiracies to intimidate, threaten, or injure a person based on his or her "support or advocacy" for a federal electoral candidate:

> . . . two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy . . . .[153]

Consequently, the Reconstruction-era "support or advocacy" clauses of Section 1985(3) "aim to protect the integrity of federal elections" and "create causes of action for people who are victimized by conspiracies to prevent citizens from supporting federal political candidates or to injure citizens on account of their political advocacy."[154]

ii. Relevance to Private Sector Employees (and Limitations)

Unfortunately, "very few cases have been brought" under Section 1985(3)'s "support or advocacy" clauses,[155] as legal scholars have noted that the clauses are "obscure,"[156] "often-neglected,"[157] "mostly

---

[150] 42 U.S.C. § 1985(3).

[151] *Id.*; *see* Primus & Kistler, *supra* note 140, at 156-57 ("The third and fourth substantive clauses [of Section 1985(3)] . . . are, of course, the support-or-advocacy clauses. The first and second clauses are § 1985(3)'s equal protection clauses.").

[152] 42 U.S.C. § 1985(3) ("If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . .").

[153] *Id.*; *see* Primus & Kistler, *supra* note 140, at 156 ("[Section] 1985(3), in the support-or-advocacy clauses, covers conspiracies to interfere with federal elections.").

[154] Primus & Kistler, *supra* note 140, at 146.

[155] *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1383.

[156] Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 186 (2015).

[157] Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 551 n.78 (1985).

forgotten,"[158] and "mostly unfamiliar, even to people who work in civil rights and election law."[159]

This reality is especially true for *employment* cases, perhaps because many might view these clauses as only applying to direct efforts to "prevent" or obstruct voting in a federal election – actual conduct that would indeed be rare for an employer.[160] Nonetheless, as Professor Eugene Volokh has observed, the Supreme Court's decision in the 1998 case of *Haddle v. Garrison* – while involving a claim under *Section 1985(2)*[161] – provides insight regarding a private sector employee's potential claim under Section 1985(3)'s "support or advocacy" clauses.[162]

In *Haddle*, three corporate officers of a private sector healthcare business arranged to fire an at-will employee.[163] The alleged reason? The employee (1) had cooperated with federal investigators regarding alleged medical fraud by the business, (2) had later received a subpoena to testify before a grand jury and appeared for the purpose of doing so, and (3) was later slated to testify in the criminal trial.[164] Consequently, the employee filed a *Section 1985(2)* action against his employer's officers, alleging a conspiracy involving witness intimidation in a U.S. federal court.[165] The case reached the Supreme Court after the district court had dismissed the employee's complaint for failure to state a claim, finding that termination of mere at-will employment was insufficient "injury" under Section 1985(2).[166]

The Court disagreed and remanded the case, holding that "the sort of harm alleged by petitioner here – essentially third-party interference with at-will employment relationships – states a claim for relief under § 1985(2)."[167] In reaching this conclusion, the Court reasoned that such interference is "merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations."[168]

---

[158] Primus & Kistler, *supra* note 140, at 146.

[159] *Id*. at 149.

[160] *See generally* Volokh, *supra* note 146, at 321–25.

[161] Haddle v. Garrison, 525 U.S. 121, 122–23 (1998).

[162] Volokh, *supra* note 146, at 321.

[163] *Haddle*, 525 U.S. at 122–23.

[164] *Id.*

[165] *Id*. at 123.

[166] *Id.*

[167] *Id*. at 126; *see also id.* at 125 ("The gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings"); *id*. at 127 ("[W]e find ample support for our holding that the harm occasioned by the conspiracy here may give rise to a claim for damages under § 1985(2).").

[168] *Id.* at 126 ("Such harm has long been a compensable injury under tort law, and we see no reason to ignore this tradition in this case."); *see also id.* at 127 ("This

Given *Haddle*'s "closely analogous" context of an employer firing an employee for Section 1985(2)-protected conduct, Professor Volokh reasonably suggests that "[i]t thus follows that it is civilly actionable . . . for two or more managers to have a[] [private sector] employee fired for supporting or advocating for the election of a federal candidate."[169] At the same time, however, Professor Volokh and other scholars have observed that the applicability of Section 1985(3)'s "support or advocacy" clauses to private sector employees can be substantially limited, or even erased, in certain jurisdictions and by certain principles.[170]

First, some federal courts have concluded (in non-employment contexts) that "state action" is necessary for claims under Section 1985(3)'s "support or advocacy" clauses.[171] Others (also in non-

protection against third-party interference with at-will employment relations is still afforded by state law today.").

[169] Volokh, *supra* note 146, at 320 ("The Civil Rights Act of 1871 may prohibit some kinds of [private sector] employer retaliation based on an employee's speech supporting or advocating for a federal candidate."); *see also id.* at 297 ("[F]ederal law [Section 1985(3)'s "support or advocacy" clauses] may often protect private employees who speak out in favor of a federal candidate."); *id.* at 322 (observing circumstances in which "§ 1985 offers a remedy" when "two or more managers conspire to get an employee fired based on his support or advocacy of a federal candidate"); *id.* at 323 ("[T]he Court's holding in *Haddle v. Garrison*, which held that two managers conspiring to get an employee fired because he was a witness in a federal case was actionable under 42 U.S.C. § 1985, would apply equally to provision (e) . . . claims [under Section 1985(3)'s "support or advocacy" clauses]."); *id.* at 324 ("[T]he provision (e) claim [under Section 1985(3)'s "support or advocacy" clauses], like the provision (b) claim [under Section 1985(2)'s witness intimidation provision] involved in *Haddle*, is a free-standing federal statutory protection against conspiracies – whether private or governmental – aimed at retaliating against a person for a certain kind of conduct. In provision (b), that conduct is being a witness in a federal case. In provision (e), that conduct is giving 'support or advocacy in a legal manner' 'in favor of the election' of a federal candidate. Under *Haddle*, such conspiracies to retaliate include conspiracies to get someone fired . . . .").

[170] *Id.* at 322–23; *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1385 ("Plaintiffs seeking relief under the Support or Advocacy Clause face their fair share of hurdles.").

[171] *See, e.g.*, Federer v. Gephardt, 363 F.2d 754, 760 (8th Cir. 2004) ("[B]ecause the substantive federal right that Federer wishes to vindicate is a First Amendment right [namely, "rights of freedom of association and freedom of expression"], state action is required. . . . [U]nder our circuit's case law, Federer cannot proceed with his claim without showing state or government action. Because Federer's complaint is based upon a First Amendment claim, and no state or federal action is properly alleged, Federer's claim based on the support and advocacy provision of § 1985(3) was properly dismissed."); Gill v. Farm Bureau Life Ins. Co. of Mo., 906 F.2d 1265, 1270-71 (8th Cir. 1990) ("For the essence of Gill's federal claim [under Section 1985(3)'s "support or advocacy" clauses] is the assertion of a First Amendment type right vindicating advocacy and association, and grounded upon economic coercion or conflict (with no possibility of invoking State Action). The basic thrust of Gill's complaint is the assertion of such an unmaintainable First Amendment claim. . . . Even

employment contexts) have disagreed and not required state action.[172] Legal scholars have sided with the latter group, persuasively arguing that the former group mistakenly conflates Section 1985(3)'s "equal

---

the right to spend one's own money to support a candidacy is based upon First Amendment consideration (and hence requires State involvement)."); Cockrum v. Donald J. Trump for President, Inc., 365 F. Supp. 3d 652, 665 (E.D. Va. 2019) ("So viewed, Plaintiffs' failed to plead sufficient facts to support their § 1985(3) claim [under the "support or advocacy" clauses] because the First Amendment requires state action. Plaintiffs plainly acknowledge in the Amended Complaint that the Campaign is a private entity. . . . Taking this fact to its logical conclusion, the Campaign is incapable of state action because it is a private entity. The Court therefore agrees with the Campaign's assertion that Plaintiffs' failure to plead state action is fatal to Count I . . . ."); *id.* at 661-63 ("Generally, because a § 1985(3) claim [under the "support or advocacy" clauses] protects a substantive constitution right, a litigant's § 1985(3) claim is often constrained by the need to plead state action. . . . The Court agrees with the Campaign that Plaintiffs' claim under Count I must be dismissed based on the absence of state action – a necessary component of Plaintiffs' § 1985(3) claim.").These decisions were in non-employment contexts. *See Federer*, 363 F.3d at 757 (a Democratic Party congressional representative allegedly broke into his Republican Party opponent's campaign headquarters, home, and family's real estate and law offices and then damaged or stole property); *Gill*, 906 F.2d at 1266 (a private insurance company allegedly terminated an insurance agent-producer's relationship due to his support and fundraising for a certain congressional candidate); *Cockrum*, 365 F. Supp. 3d at 654–55 (a U.S. presidential election campaign allegedly aided in the unauthorized publication of Democratic Party supporters' e-mails and other personal information).

[172] *See, e.g.*, Nat'l Coal. on Black Civic Participation v. Wohl, 498 F.Supp. 3d 457, 486–88 (S.D.N.Y. 2020) (omitting state action as a required element for a claim under Section 1985(3)'s "support or advocacy" clauses and concluding that plaintiffs had shown a substantial likelihood of prevailing on that claim against private actors); League of United Latin Am. Citizens (LULAC) v. Pub. Int. Legal Found., No. 18-CV-00423, 2018 WL 3848404, at * 4–5 (E.D. Va. Aug. 13, 2018) (rejecting the defendants' argument that "state action in violation of an independent right" was a required element of a claim under Section 1985(3)'s "support or advocacy" clauses); Arizona Democratic Party v. Arizona Republican Party, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at * 5 n.4 (D. Ariz. Nov. 4, 2016) ("ARP and the Trump Campaign argue that . . . the 'support and advocacy clause' . . . cannot be applied against a non-state actor. . . . [T]he plain language of the statute does not require either of the elements proposed by ARP and the Trump Campaign. For the purpose of resolving Plaintiff's motion, the Court presumes application of the 'support and advocacy' clause' . . . to ARP and the Trump Campaign as non-state actors."). These decisions were in non-employment contexts. *See Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 463–64 (defendants allegedly sent robocalls containing false or misleading information about voting by mail before an upcoming presidential election); *LULAC*, 2018 WL 3848404, at * 1 (defendants allegedly published reports regarding Virginia voting- and voter-related felonies, including certain identifying information of Latino voters); *Arizona Democratic Party*, 2016 WL 8669978, at * 5 (a U.S. presidential election campaign and affiliates allegedly urged supporters to observe, follow, interrogate, and photograph voters at polling places and to record their license plates or other activities).

protection" and "support or advocacy" clauses.[173] Regardless, where applied, the "state action" requirement would foreclose a private sector employee's claim under Section 1985(3)'s "support or advocacy" clauses to the extent the claim merely involved private actors and action.[174]

Second, some federal courts have concluded that Section 1985(3)'s "support or advocacy" clauses are remedial only and that a violation of an independent, substantive federal right (e.g., one under the First Amendment) is necessary for these claims.[175] Again, others have

---

[173] *See, e.g.*, Volokh, *supra* note 146, at 323–25 (stating that Section 1985(3)'s "support or advocacy" clauses (a) "do not mention 'equal protection' and do not require . . . state action," (b) do "not require governmental interference with 'support or advocacy,'" and (c) represent "a free- standing federal statutory protection against conspiracies – whether private or governmental – aimed at retaliating against a person for a certain kind of conduct"); *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1403 ("Much of the confusion can and must be clarified by distinguishing, as the Supreme Court has, between the equal protection provision and the Support or Advocacy Clause of § 1985(3). The history and early adjudication of the clause indicate that it . . . permits action against purely private actors. Subsequent judicial opinions on other portions of § 1985(3) do not change this analysis; instead, they suggest that the Support or Advocacy Clause ought to be understood as distinct from the equal protection provision of the statute. The clause was created to protect voters from private intimidation and can still be used for that purpose today."); *see also LULAC*, 2018 WL 3848404, at *5–6 (discussing Section 1985(3) precedent and stating that "Plaintiffs persuasively argue that their claim arising under the 'support and advocacy' clause of Section 1985(3) is subject to a different standard than that which courts have applied to claims arising under Section 1985(3)'s equal protection clauses").

[174] *See, e.g.*, *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1388 ("In Support or Advocacy Clause cases, some courts have assumed the substantive right at issue is the First Amendment, which regulates only state action. These assumptions limit the applicability of the Support or Advocacy Clause by making it useful only against voter intimidation involving state actors. . . . The [Support or Advocacy Clause] would provide a viable cause of action against private voter intimidation if the courts were to find that the provision . . . regulates private action.").

[175] *See, e.g., Federer*, 363 F.2d at 760 (observing that "the substantive federal right that Federer wishes to vindicate is a First Amendment right [namely, "rights of freedom of association and freedom of expression"]"); *Gill*, 906 F.2d at 1270–71 ("For the essence of Gill's federal claim is the assertion of a First Amendment type right vindicating advocacy and association . . . . What he complains of is not wrongful conduct unless the First Amendment can be invoked. There is no recognized constitutional right to be a fund-raiser free from governmental regulation or private pressure. Even the right to spend one's own money to support a candidacy is based upon First Amendment considerations . . . ."); *Cockrum*, 365 F. Supp. 3d at 660–61 ("Plaintiffs theorize that § 1985(3)'s "support or advocacy clauses," create an independent, substantive cause of action that does not require a litigant to plead the violation of a substantive constitutional right. . . . [A] claim brought under § 1985(3) must be tied to the violation of a substantive constitutional right."); *id.* at 664–65 ("[T]his Court will . . . conclude that § 1985(3) is purely remedial. Therefore, in order

disagreed and not required violation of an independent right.[176] Legal scholars have sided with the latter group, still arguing that the former group erroneously confuses Section 1985(3)'s "equal protection" and "support or advocacy" clauses.[177] Nonetheless, where applied, the

to plead a viable claim under Count I [Section 1985(3)'s "support or advocacy" clauses], Plaintiffs must allege the violation of a substantive constitutional right coupled with state action. . . . [T]he first step in evaluating a § 1985(3) claim is determining the constitutional right that a litigant seeks to vindicate. Contrary to Plaintiff's reasoning, the U.S. Constitution does not specifically protect a person's 'support and advocacy . . . [for] a candidate for President.' However, the First Amendment does protect the freedom of speech and the freedom to peacefully assemble from government intrusion. Based on the rights they seek to protect, Plaintiffs' claim will therefore be construed as alleging violations of the First Amendment.").

[176] *See, e.g.*, *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 486–88 (omitting violation of an independent, substantive federal right as a required element for a claim under Section 1985(3)'s "support or advocacy" clauses and merely requiring applicable conspiracy-based conduct against "an individual legally entitled to vote who is engaging in lawful activity related to voting in federal elections"); *LULAC*, 2018 WL 3848404, at * 4–5 (E.D. Va. Aug. 13, 2018) (rejecting the defendants' argument that "state action in violation of an independent right" (or "a violation of a separate constitutional right (and . . . state action)") were required elements of a claim under Section 1985(3)'s "support or advocacy" clauses and concluding that "a claim under the 'support and advocacy' clause of Section 1985(3), . . . unlike the equal protection part of Section 1985(3)[,] does not require allegations of a . . . violation of a separate substantive right").

[177] *See, e.g.*, Volokh, *supra* note 146, at 323–25 (stating that a claim under Section 1985(3)'s "support or advocacy" clauses (a) "is not limited to violations of the First Amendment," (b) "does not require, for instance, depriving someone of 'equal privileges and immunities under the laws,'" and (c) is "a free-standing federal statutory protection against conspiracies – whether private or governmental – aimed at retaliating against a person for a certain kind of conduct"); Primus & Kistler, *supra* note 140, at 157 ("The problem of legal interpretation . . . arises mostly from some later courts' failure to appreciate this difference between most of § 1985's clauses, which protect federal governance functions, and § 1985's equal protection clauses, which address a different concern. The equal protection clauses are remedial legislation – they act as vehicles for the assertion of rights specified elsewhere. In contrast, the clauses that protect federal governance – including the support-or-advocacy clauses – are independently substantive. That was true of the support-or-advocacy clauses as originally enacted in section 2 of the Klan Act . . . . It remains true under § 1985(3)."); *id.* at 151 ("The equal protection clauses [of Section 1985(3)] are one thing, and the support-or-advocacy clauses are another. And although the equal protection clauses are remedial, the support-or-advocacy clauses are substantive."); *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1403 ("Much of the confusion can and must be clarified by distinguishing, as the Supreme Court has, between the equal protection provision and the Support or Advocacy Clause of § 1985(3). The history and early adjudication of the clause indicate that it . . . confers a substantive right to be free of injury caused by conspiratorial threat, coercion, or intimidation due to one's support or advocacy of a federal candidate . . . . Subsequent judicial opinions on other portions of § 1985(3) do not change this

"violation of an independent, substantive federal right" requirement would often foreclose a private sector employee's claim under Section 1985(3)'s "support or advocacy" clauses.[178]

Third, most federal appellate circuit courts recognize the so-called "intra-corporate conspiracy" doctrine as a potential bar to Section 1985's conspiracy-based claims.[179] Under that doctrine, "an agreement between

---

analysis; instead, they suggest that the Support or Advocacy Clause ought to be understood as distinct from the equal protection provision of the statute. The clause was created to protect voters from private intimidation and can still be used for that purpose today."); *see also LULAC*, 2018 WL 3848404, at * 5–6 (stating that "Plaintiffs persuasively argue that their claim arising under the 'support and advocacy' clause of Section 1985(3) is subject to a different standard than that which courts have applied to claims arising under Section 1985(3)'s equal protection clauses").

[178] *See, e.g.*, Primus & Kistler, *supra* note 140, at 147 ("On that view [of requiring violation of an independent, substantive right], no plaintiff can maintain a suit under the support-or-advocacy clauses without showing that the conspiracy of which she complains violated some right created by a different source of federal law – like a First Amendment speech right or a right to vote under the Fifteenth Amendment."); *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1388 ("The [Support or Advocacy Clause] would provide a viable cause of action against private voter intimidation if the courts were to find that the provision . . . confers a substantive right . . . .").

[179] The Supreme Court, while not reaching a conclusion on this issue, has recognized the federal circuit split. Ziglar v. Abbasi, 137 S. Ct. 1843, 1868 (2017) ("To be sure, this Court has not given its approval to this [intra-corporate conspiracy] doctrine in the specific context of § 1985(3). There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies. Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation."). Seven federal circuit courts of appeal (the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits) have recognized and applied the intra-corporate conspiracy doctrine in Section 1985 claims. *See, e.g.*, Hogan v. City of Fort Walton Beach, 817 Fed. App'x 717, 723–24 (11th Cir. 2020); Barrow v. City of Hillview, 775 Fed. App'x 801, 807 (6th Cir. 2019); Kelly v. City of Omaha, 813 F.3d 1070, 1078–79 (8th Cir. 2016); Murphy v. City of Stamford, 634 Fed. App'x 804, 805 (2nd Cir. 2015); Painter's Mill Grille, LLC v. Brown, 716 F.3d 342, 352–53 (4th Cir. 2013); Benningfield v. City of Houston, 157 F.2d 369, 378 (5th Cir. 1998); Hartman v. Bd. of Tr. of Cmty. Coll. Dist. No. 508, 4 F.3d 465, 469–71 (7th Cir. 1993).

Four federal circuits courts of appeal (the First, Third, Ninth, and Tenth) have refused to recognize (or have very narrowly construed) the doctrine in Section 1985 claims. *See, e.g.*, Fazaga v. Fed. Bureau of Investigation, 965 F.3d 1015, 1060 (9th Cir. 2020); Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1127 (10th Cir. 1994); Stathos v. Bowden, 728 F.2d 15, 20–21 (1st Cir. 1984); Novtony v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1256–59 & n.121 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366 (1979).

The D.C. Circuit Court of Appeals has not reached a conclusion on this issue in Section 1985 claims. *See, e.g.*, K.O. v. U.S. Immigr. and Customs Enf't, 468 F. Supp.

or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy."[180] Where applied, this doctrine would foreclose a private sector employee's claim under Section 1985(3)'s "support or advocacy" clauses if it merely involved two or more employees or agents of a single business,[181] rather than employees or agents of two different entities.

In sum, for private sector employees, Section 1985(3)'s "support or advocacy" clauses provide potential federal protection for political affiliation in applicable conspiracy-based situations.[182] Yet, that protection may be substantially limited, or even erased, in many jurisdictions, whether by (1) judicial requirements of "state action" or "violation of an independent, substantive federal right" or (2) the intra-corporate conspiracy doctrine.[183]

2. State Laws

For private sector employees, state laws (and constitutional provisions) may provide jurisdiction-specific protection for political affiliation.[184]

According to Professor Volokh's recent survey of applicable state laws, about half of states lack laws that provide any form of protection – workplace-related or otherwise – for a person's political affiliation or related activities.[185] Thus, about half of U.S. workers live in the "right"

3d 350, 368–70 (D.C. Cir. 2020); Bowie v. Maddox, 642 F.3d 1122, 1131 (D.C. Cir. 2011).

[180] *Ziglar*, 137 S. Ct. at 1867 ("The rule is derived from the nature of the conspiracy prohibition. Conspiracy requires an agreement – in particular an agreement to do an unlawful act – between or among two or more separate persons. When two agents of the same legal entity make an agreement in the course of their official duties, however, as a practical and legal matter their acts are attributed to their principal. And it then follows that there has not been an agreement between two or more separate people.").

[181] *See, e.g.*, Volokh, *supra* note 146, at 321–22 ("In several circuits, this conclusion [regarding the viability of a private sector employee's claim under Section 1985(3)'s "support or advocacy" clauses] may usually be blocked by the 'intra-corporate conspiracy' doctrine . . . . But in [federal circuits where this doctrine does not apply and] . . . two or more managers conspire to get an employee fired based on his support or advocacy of a federal candidate, § 1985 offers a remedy.").

[182] *Id.*

[183] *See supra* notes 170-81 and accompanying text (discussing these limitations).

[184] *See, e.g.*, Volokh, *supra* note 146, at 321–22.

[185] *Id.* at 297 ("About half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation."); Gordils, *supra* note 17, at 190 ("A substantial minority of states have statutes that generally protect private employees from discrimination based on their political views.").

states that provide at least some protection; the other half live in the "wrong" states that do not provide any.[186]

Importantly, even in the "right" states, this protection can vary substantially based on the applicable law's scope, context, and exceptions.[187] For example, as to *scope*, some laws protect "only employee speech on political topics,"[188] while others protect "only particular electoral activities such as endorsing or campaigning for a party . . . or giving a political contribution."[189] Also, some laws "expressly cover all employer decisions,"[190] while others are limited to "discharge or discipline of current employees,"[191] "policies on restricting speech,"[192] or threats to influence employee actions.[193]

Next, as to *context*, "[s]ome of the statutes expressly provide for civil liability, some for criminal liability, and some for both."[194] Finally, as to *exceptions*, some laws "categorically cover speech without any express accommodation of employer interests,"[195] while others allow employer restrictions where the "political activity . . . sufficiently undermines employer interests."[196]

Regardless, based on Professor Volokh's recent state-by-state survey, the non-exhaustive lists below include twenty-four different states with *some form* of state law (or constitutional provision) protecting a person's political affiliation or related activities.[197] These lists are organized

---

[186] *See, e.g.*, Hoffman, *supra* note 8, at 1537 ("[T]he vast majority of American workers still face the possibility of adverse employment decisions due to their political viewpoints."); Volokh, *supra* note 146, at 297 ("About half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation.").

[187] *See, e.g.*, *id.* at 302–08 (discussing these variations); Gordils, *supra* note 17, at 190 ("These prohibitive statutes vary greatly in language and application."); CRAIN ET AL., *supra* note 7, at 489 ("Some of these statutory enactments are quite narrow, protecting employees only when the engage in certain specified types of speech, while others offer broader coverage.").

[188] Volokh, *supra* note 146, at 297.

[189] *Id.*

[190] *Id.* at 302, 303.

[191] *Id.* at 302.

[192] *Id.* at 303 ("The question is whether the statutes that ban speech-restrictive 'polic[ies]' should also apply to individual incidents of discrimination, animated by an employer's concerns at that moment rather than by some coherent general plan.").

[193] *Id.*

[194] *Id.* at 302 ("[C]ourts generally treat these sorts of criminal statutes as also generating a private right of action, either as a matter of statutory interpretation or as an application of the 'wrongful discharge in violation of public policy' tort."); *see infra* note 201 (discussing wrongful discharge against public policy claims).

[195] Volokh, *supra* note 146, at 304.

[196] *Id.*

[197] *Id.* at 306–07.

according to *scope* of the protection – whether it extends to a person's (1) specific exercise of "First Amendment" or U.S. "Constitution" rights (two states), (2) actual political affiliation (or activities involving a political party or candidate, such as signing a petition, making a contribution, or casting a vote) (twenty-one states), or (3) political beliefs or opinions (seven states, six of which have concurrent protection under (1) or (2)):

> Specific exercise of "First-Amendment" or U.S. "Constitution" Rights: Connecticut and South Carolina[198]
>
> Actual Political Affiliation (or Activities Involving a Political Party or Candidate): Arizona, California, Colorado, Georgia, Hawaii, Idaho, Iowa, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New Mexico, Nevada, New York, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wyoming[199]

---

[198] Volokh, *supra* note 146, at 309, 315–19, 325–30, 332–33. Examples of specific state statutory or constitutional provisions are:

Connecticut: CONN. GEN. STAT. § 31-51q (2012) ("the exercise . . . of rights guaranteed by the First Amendment").

South Carolina: S.C. CODE ANN. § 16-17-560 (2011) ("the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States").

[199] Examples of specific state statutory or constitutional provisions are:

Arizona: ARIZ. REV. STAT. ANN. § 19-116, 19-206 (2012) ("to sign or subscribe, or to refrain from signing or subscribing, his name to a recall petition").

California: CAL. LAB. CODE § 1101 (West 2012) ("engaging or participating in politics or . . . becoming candidates for public office" and "political activities or affiliations"); CAL. LAB. CODE § 1101 ("adopting or following any particular course or line of political action or political activity").

Colorado: COLO. REV. STAT. § 8-2-102 (2012) ("forming, joining, or belonging to any lawful . . . political party" and "connection with such lawful . . . political party"); COLO. REV. STAT. § 8-2-108 ("engaging or participating in politics," "becoming a candidate for public office," or "being elected to and entering upon the duties of any public office").

Georgia: GA. CODE ANN. § 21-4-20(b) (2011) ("sign or subscribe or . . . refrain from signing or subscribing that person's name to a recall application or petition").

Hawaii: HAW. REV. STAT. § 19-3 (2011) ("to vote or refrain from voting for any particular person or party . . . at any election," and "voted or refrained from voting for any particular person or party").

Iowa: IOWA CODE § 39A.2(1)(c) (2012) ("sign a petition nominating a candidate for public office," "exercise a right under chapters 39 through 53," which includes chapter 43 rights to "change or declare a political party affiliation" before the primary election or at the polls (per IOWA CODE §§ 43.41, 43.42)).

Illinois: 10 ILL. COMP. STAT. § 5/29-4 (2012) ("lawfully voting, supporting or opposing the nomination or election of any person for public office").

Kentucky: KY. REV. STAT. ANN. § 121.310(1) (West 2011) ("vote for any political party or candidate for nomination or election to any office in this state," and "votes for any candidate").

Louisiana: LA. STAT. ANN. § 18.1461.1(A)(1)-(2) (2011) ("contribution, promise to make a contribution, or failure to make a contribution to influence the nomination or election of a person" to "the office of president or vice president of the United States, presidential elector, delegate to a political party convention, United States senator, United States congressman, or political party office"); LA. STAT. ANN. § 18.1461.4(A)(1) (2011) ("matters concerning voting or nonvoting or voter registration or nonregistration, . . . including but not limited to any matter concerning the voluntary affiliation or nonaffiliation . . . with any political party"); LA. STAT. ANN. § 23:961 ("engaging or participating in politics, or . . . becoming a candidate for public office," "political activities or affiliations," and "support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character").

Massachusetts: MASS. GEN. LAWS ch. 56, § 33 (2012) ("to give or to withhold his vote or political contribution" and "giving or withholding of a vote or a political contribution").

Minnesota: MINN. STAT. § 10A.36 (2012) ("the exercise of political contributions or political activity" and "political affiliation"); MINN. STAT. § 211C.09 ("to sign or not to sign a recall petition of their own free will").

Missouri: MO. REV. STAT. § 115.637(6) (2012) ("engaging in political activities, accepting candidacy for nomination to, election to, or the holding of, political office, holding a position as a member of a political committee, soliciting or receiving funds for political purpose, acting as a chairman or participating in a political convention, [or] assuming the conduct of any political campaign, signing, or subscribing his or her name to any . . . recall petition"); MO. REV. STAT. § 130.028 ("contributing or refusing to contribute to any candidate, political committee or separate political fund").

Nebraska: NEB. REV. STAT. § 32-1537 (2012) ("political action").

Nevada: Nev. Rev. Stat. § 613.040 (2012) ("engaging in politics or becoming a candidate for any public office in this state").

New Mexico: N.M. STAT. ANN. § 1-20-13 (2012) ("intention to vote or refrain from voting for any candidate . . . [or] party"); N.M. STAT. ANN. § 3-8-78(A) ("intention to vote or to refrain from voting for any candidate").

New York: N.Y. LAB. LAW §§ 201-d(1)(a), (2)(a) (McKinney 2012) ("political activities," defined as "running for public office," "campaigning for a candidate for public office," "participating in fund-raising activities for the benefit of a candidate, political party, or political advocacy group").

Oregon: OR. REV. STAT. §§ 260.665(1)–(2) (2012) ("be or refrain from or cease being a candidate," "[c]ontribute or refrain from contributing to any candidate, political party, or political committee," "render or refrain from rendering services to any candidate, political party or political committee," and "sign or refrain from signing a . . . recall or candidate nominating petition").

Pennsylvania: 25 PA. CONS. STAT. § 3547 (2012) ("give or refrain from giving his vote for or against any particular person at any election").

Tennessee: TENN. CODE ANN. § 2-19-134(b) (2012) ("to vote or not to vote for any candidate").

Washington: WASH. REV. CODE. § 29A.84.220(5) (2012) ("to sign or not to sign any recall petition or to vote for or against any recall"); WASH. REV. CODE. §

Political Beliefs or Opinions: Louisiana, Minnesota, Missouri, Montana, New Mexico, South Carolina, and West Virginia[200]

In sum, for private sector employees, about half of states lack laws that protect political affiliation in the workplace, and the half that have them offer varying degrees of protection.[201]

42.17A.495(2) ("supporting or opposing a candidate, . . . political party, or political committee").

West Virginia: W. VA. CODE § 3-8-11(a) (2012) ("vote or refrain from voting for or against any particular candidate"); *id*. § 3-8-11(b) ("political . . . actions"); W. VA. CODE § 3-9-15 ("political action").

In addition, several states have statutory or constitutional provisions that provide protection for a person's basic right to vote, its free exercise, registering to vote, or the "elective franchise." *See, e.g.*, HAW. REV. STAT. § 19-3 (2011) ("to vote or refrain from voting" and "having voted or refrained from voting"); IDAHO CODE § 18-2305 (2012) ("giving his vote" and "free exercise of the right of suffrage"); 10 ILL. COMP. STAT. § 5/29-4 (2012) ("registering to vote"); IOWA CODE § 39A.2(1)(c) (2012) ("register to vote, . . . vote, or . . . attempt to vote,"); KY. REV. STAT. ANN. § 121.310(1) (West 2011) ("exercise of suffrage"); LA. STAT. ANN. § 23:962 (2011) ("the suffrage or vote"); OR. REV. STAT. §§ 260.665(1)-(2) (2012) ("register or vote," "refrain from registering or voting," "register or vote in any particular manner," "challenge or refrain from challenging a person offering to vote," and "apply or refrain from applying for a ballot as an absent elector,"); 25 PA. CONS. STAT. § 3547 (2012) ("the free exercise of the elective franchise by any voter"); TENN. CODE ANN. § 2-19-134(b) (2012) ("exercise or failure to exercise the suffrage"); W. VA. CODE § 3-8-11(a) (2012) ("vote or refrain from voting, . . . having voted or refrained from voting, at any election," and "the free exercise of the suffrage by any elector"); WYO. STAT. ANN. § 22-26-111 (2011) ("the free exercise of his elective franchise"). These provisions are excluded from the above list because they do not necessarily involve actual political affiliation (or activities involving a political party or candidate).

[200] Volokh, *supra* note 146, at 313–14, 316–19, 320, 328, 333. Examples of specific state statutory or constitutional provisions are:

Louisiana: LA. STAT. ANN. § 23:962 (2011) ("political opinions").

Minnesota: MINN. STAT. § 10A.36 (2012) ("political . . . viewpoint").

Missouri: MO. REV. STAT. § 130.028 (2012) ("political beliefs or opinions").

Montana: MONT. CODE ANN. § 49-3-207 (2011) ("political ideas"); MONT. CODE ANN. § 50-5-105 (same); MONT. CONST. art. 2, § 4 ("political . . . ideas").

New Mexico: N.M. STAT. ANN. § 1-20-13 (2012) ("political opinions or belief"); N.M. STAT. ANN. § 3-8-78(A) (same).

South Carolina: S.C. CODE ANN. § 16-17-560 (2011) ("political opinions").

West Virginia: W. VA. CODE. § 3-8-11(b) (2012) ("political view"); W. VA. CODE. § 3-9-15 ("political opinions or votes").

[201] Most states recognize a "wrongful discharge against public policy" tort. CRAIN ET AL., *supra* note 7, at 176 n.3 ("An overwhelming majority of American jurisdictions have recognized a public policy exception to the at-will rule . . . ."). While private sector employees may argue that adverse job action due to exercise of First Amendment rights (e.g., political affiliation) violates the public policy of a given state, "most courts . . . [have] held that constitutional guarantees of free speech do not restrict the actions of non-governmental entities." *Id*. at 485 n.1; *see also* Edmondson

III. THE ARGUMENT FOR PROTECTING POLITICAL AFFILIATION UNDER TITLE VII

This article proposes that "political affiliation" should be added as a protected characteristic under federal employment discrimination law – specifically, Title VII. For purposes of this proposal, the term "political affiliation" is defined as "association with and/or support of a political party (including any of its candidates for public office)." Aside from its simplicity, this definition draws strong support from several relevant sources.

First, for the definition's "association" aspect, the Supreme Court, Congress, the Federal Circuit Court of Appeals, and several states have used identical or comparable language in relevant contexts.[202] For example, the Supreme Court has repeatedly used the following terminology when discussing First Amendment protections: "political . . . association,"[203] "the right to associate with the political party of one's choice,"[204] "the right . . . to associate for the advancement of political beliefs,"[205] "freedom to . . . associate,"[206] and simply "party affiliation."[207] In addition, Congress used this comparable "political affiliation" terminology in the CSRA's protections for civil service employees,[208] while the Federal Circuit Court of Appeals has consistently referred to

v. Shearer Lumber Prods., 75 P.3d 733, 738 (Idaho 2003) ("The prevailing view among those courts addressing the issue in the private sector is that state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims."); CRAIN ET AL., *supra* note 7, at 486 n.2 ("Most courts that reject the First Amendment as a source of public policy do so on the grounds that the Constitution only applies to state action."); *compare Edmondson*, 75 P.3d at 739 ("Accordingly, we hold that an employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee's constitutional right of free speech.") *with* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983) ("[T]aking into consideration the importance of the political and associational freedoms of the federal and state Constitutions, . . . a cognizable expression of public policy may be derived in this case from either the First Amendment of the United States Constitution or Article 1, Section 7 of the Pennsylvania Constitution.").

[202] *See infra* notes 203-10 and accompanying text (discussing applicable authorities).

[203] Rutan v. Republican Party of Ill., 497 U.S. 62, 78 (1990); Elrod v. Burns, 427 U.S. 347, 356 (1976) (plurality opinion).

[204] Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (similarly noting "freedom to associate with others for the common advancement of political beliefs").

[205] Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[206] *Rutan*, 497 U.S. at 76.

[207] *Id*. at 65, 68, 75, 79; *see also* Branti v. Finkel, 445 U.S. 507, 517 (1980) ("affiliated with"); *Elrod*, 427 U.S. at 350 (same).

[208] 5 U.S.C. §§ 2301(b)(2), 2302(b)(1)(E) (2021).

"affiliation with any political party or candidate" when evaluating those protections.[209] Finally, several states (such as California, Iowa, Louisiana, and Minnesota) have used the comparable political (or political party) "affiliation" in their statutory protections.[210]

Second, for the definition's "support" aspect, the Supreme Court, Congress, and several states have also used that exact term in relevant contexts.[211] For example, the Supreme Court has referred to political "party . . . support" when discussing applicable First Amendment protections.[212] Next, Congress used that express term in Section 1985(3)'s "support or advocacy" clauses, which protect "giving . . . support . . . in a legal manner, toward or in favor of the election of any lawfully qualified person" for federal office.[213] Finally, several states (such as Illinois, Louisiana, and Washington) have added such political (or political party) "support" language into their statutory protections.[214]

Turning to the broader defense, this proposal is warranted for three reasons: (1) it is consistent with Congress's "political affiliation protection" philosophy, which is clearly evidenced by the First Amendment, Section 1985, and the CSRA; (2) it rests on a First Amendment foundation that has long been a part of Title VII – Congress relied on this foundation to protect *religion* in 1964, and it can (and should) rely on it again to protect political affiliation as religion's "companion" or "sister" characteristic; and (3) it substantially reduces those harms (both to individual employees and U.S. democratic society) that are caused by political affiliation discrimination in the workplace.

---

[209] *See supra* notes 135-37 and accompanying text (discussing applicable precedent).

[210] *See supra* note 199 and accompanying text (discussing these statutory provisions).

[211] *See infra* notes 212-14 and accompanying text (discussing applicable authorities).

[212] Rutan v. Republican Party of Ill., 497 U.S. 62, 65, 75, 79 (1990).

[213] 42 U.S.C. § 1985(3).

[214] *See supra* note 199 and accompanying text (discussing these statutory provisions). Of course, this simple definition of "political affiliation" serves as an umbrella that can reasonably cover various political party-specific (or candidate-specific) activities. Examples would include: (1) voting for a particular candidate or party (as already protected by state laws in Hawaii, Illinois, Kentucky, New Mexico, Pennsylvania, Tennessee, and West Virginia); (2) signing a candidate's nominating petition (as already protected by state laws in Iowa and Oregon); and (3) fund-raising or giving a contribution to a person's political election campaign (as already protected by state laws in Louisiana, Massachusetts, Minnesota, Missouri, New York, and Oregon). *See supra* note 199 and accompanying text (discussing these statutory provisions).

A. Congress's "Political Affiliation Protection" Philosophy

First, the proposal is consistent with Congress's "political affiliation protection" philosophy. This philosophy is simple: federal legal protection of a person's political affiliation should be prioritized, not minimized.

For about 250 years now, Congress has evidenced this philosophy by its multiple *choices* to protect political affiliation – each choice has reflected a specific prophylactic *purpose* and has come at a significant *moment or juncture* in the United States. This section discusses (1) these choices (namely, the First Amendment, Section 1985(3)'s "support and advocacy" clauses, and the CSRA) and (2) the proposal's consistency with this "political affiliation protection" philosophy.

1. Evidence of the Philosophy: The First Amendment, Section 1985(3), and CSRA

The first example of Congress's political affiliation protection philosophy is the First Amendment, which was drafted in 1789.[215] As to its *choice*, Congress crafted the First Amendment's set of rights and freedoms in a way that, as the Supreme Court has consistently recognized, clearly protects a person's political affiliation.[216] For example, in its 1976 decision in *Elrod v. Burns*, the Court described political affiliation as "the core of those activities protected by the First Amendment."[217] In its decision in *Kusper v. Pontikes*, the Court labeled political affiliation as "an integral part" of "basic constitutional freedom[s]."[218] And in its decision in *Williams v. Rhodes*, the Court ranked political affiliation "among our most precious freedoms."[219] Thus, Congress clearly chose to protect political affiliation – a "core," "integral," "basic," and "most precious" right and freedom – via the First Amendment.

As to the prophylactic *purpose* for this choice, Congress drafted the First Amendment "to protect the free discussion of governmental affairs," ranging from "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."[220]

---

[215] *See* U.S. CONST. amend. I; *America's Founding Documents*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights-transcript [https://perma.cc/D3AQ-FK3C] (last visited Jan. 24, 2022).

[216] *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 356 (1976); Kusper v. Pontikes, 414 U.S. 51, 57 (1973); Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[217] 427 U.S. 347, 356 (1976) (plurality opinion).

[218] 414 U.S. 51, 57 (1973).

[219] 393 U.S. 23, 30 (1968).

[220] Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

As to the significant *moment or juncture* of this choice, Congress crafted the First Amendment's rights and freedoms at a time when "free discussion" had been suppressed during the "exigencies of the colonial period."[221] Specifically, the British government had engaged in "oppressive administration"[222] and "persistent effort . . . to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light . . . the agencies and operations of the government."[223]

Thus, in the late 1700's, Congress confronted an important *political activity-related question* at a significant time in the United States: During formation of a country, how should Congress address a government's interference with (and control and oppression of) a person's political affiliation and related fundamental rights and freedoms? In response, Congress made a clear choice with a clear purpose – to prioritize federal protection of political affiliation. The First Amendment is the first example of Congress's political affiliation protection philosophy.

The second example of this philosophy is Section 1985(3)'s "support or advocacy" clauses, which were passed in 1871 (about 100 years after the First Amendment's adoption).[224] As to its *choice*, Congress fashioned these clauses with explicit language that protected people for their "support or advocacy . . . toward or in favor of the election" of a federal candidate for "President or Vice-President, or as a Member of Congress of the United States."[225] As a result, Congress clearly chose to protect (1) political affiliation (specifically, political activities of candidate-based "support" and "advocacy") at (2) political events ("election[s]") involving (3) political, federal offices via Section 1985(3)'s "support or advocacy" clauses.

As to the prophylactic *purpose* for that choice, the Reconstruction Congress passed these clauses (1) to "increase[] protection for Americans in the South who wanted to promote political agendas that the Klan opposed" and thus (2) to "protect the integrity of federal elections."[226]

As to the significant *moment or juncture* of that choice, Congress fashioned the "support or advocacy" clauses' language at a time when political agendas and election integrity had been compromised after the Civil War.[227] Specifically, the Ku Klux Klan and other private actors had

---

[221] Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).

[222] *Id*. at 102.

[223] Grosjean v. Am. Press Co., 297 U.S. 233, 245 (1936).

[224] *See generally* 42 U.S.C. § 1985(3).

[225] *Id.*

[226] Primus & Kistler, *supra* note 140, at 146, 160; *see supra* notes 142, 154 and accompanying text (discussing these purposes).

[227] *The Support or Advocacy Clause of § 1985(3)*, *supra* note 140, at 1388–89.

"conducted a campaign of political terrorism" to threaten and intimidate African-American and other voters in the South.[228]

In sum, in the late 1800's, Congress confronted another important *political activity-related question* at a significant time in the United States: After the Civil War and during Reconstruction, how should Congress address private actors' interference with a person's political support for federal candidates in the South? In response, Congress again made the same clear choice with the same clear purpose – to prioritize federal protection of political affiliation. Section 1985(3)'s "support or advocacy" clauses are another good example of Congress's political affiliation protection philosophy.[229]

Finally, the third example of this philosophy is the CSRA, which was passed in 1978 (about 100 years after Section 1985's "support or advocacy" clauses).[230] As to its *choice*, Congress crafted the CSRA with explicit language that protected civil service employees' political affiliation. For example, the CSRA's "merit systems principles" call for "fair and equitable treatment . . . without regard to political affiliation"[231] and "protect[ion] against . . . coercion for partisan political purposes . . . ."[232] Further, its "prohibited personnel practices" include workplace discrimination "on the basis of . . . political affiliation,"[233] coercion of "the political activity of any person (including the providing of any political contribution or service),"[234] and retaliation due to a person's "refusal . . . to engage in such political activity."[235] As a result, Congress clearly chose to protect "political affiliation" (and "political activity" such as "political contribution or services") via the CSRA.

As to the prophylactic *purpose* for this choice, Congress passed the CSRA to "protect career employees against improper political influences" in the federal government's civil service system.[236]

As to the significant *moment or juncture* of this choice, Congress crafted the CSRA at a time when the U.S. public was being "ill-served" by its existing civil service system.[237] Specifically, this system had failed to "provide[] assurance against political abuse"[238] and was the target of

---

[228] *Id*.; *see supra* note 140 and accompany text (discussing these events).

[229] 42 U.S.C. § 1985(3).

[230] *See generally* 5 U.S.C. § 2301(b)(2).

[231] *Id.*

[232] *Id*. § 2301(b)(8)(A).

[233] *Id*. § 2302(b)(1)(E).

[234] *Id*. § 2302(b)(3).

[235] *Id*.

[236] S. REP. NO. 95-969, at 18 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2740.

[237] *Id*. at 3, *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2725.

[238] *Id*.

"frequent attempts to circumvent" (and "other assaults on") merit-based principles.[239]

Thus, in the late 1970's, Congress confronted still another important *political affiliation-related question* at a significant time in the United States: With the public's eroding confidence and trust in the federal government's civil service system, how should Congress address the political cronyism and corruption that had invaded it? In response, Congress again made an identical clear choice with an identical clear purpose – to prioritize federal protection of political affiliation. The CSRA is a third good example of Congress's political affiliation protection philosophy.

2. The Proposal & Congress's Philosophy

The proposed addition of political affiliation to Title VII is consistent with Congress's political affiliation protection philosophy. This addition simply represents another *choice* to protect political affiliation – it also has a specific prophylactic *purpose* and comes at yet another significant *moment or juncture* in the United States.

Choice. First, the proposal reflects the same *choice* that Congress has made via the First Amendment, Section 1985(3)'s "support or advocacy" clauses, and the CSRA – namely, to provide clear protection for a person's "political affiliation."[240] As discussed above, the First Amendment unequivocally protects political affiliation or association; Section 1985(3) *per se* protects the political affiliation-related activities of "support or advocacy" for federal office candidates; and the CSRA *per se* protects "political affiliation" and related "political activity."[241] The proposal makes the same choice that Congress has made for about 250 years now – to *per se* protect "political affiliation."

Purpose. Next, as to the prophylactic *purpose* for this choice, the proposal aims to bring greater symmetry and uniformity in political affiliation protection, thereby remedying the significant disparity in workplace legal protections that currently exists.

As discussed above, public sector (federal, state, or local government) employees enjoy a bevy of political affiliation protections.[242] For the twenty million state and local government employees (about twelve percent of the workforce),[243] such protection exists under the First

[239] *Id.*

[240] *See supra* Part III.A.1 (discussing these protections).

[241] *Id.*

[242] *See supra* Part II.A (discussing these protections).

[243] *See supra* note 1 and accompanying text (discussing this data).

Amendment (and Section 1983).[244] Similarly, for the over two million federal government civil service employees (over one percent of the workforce),[245] such protection exists under the CSRA.[246] In these ways, public sector employees hold a legally "superior" or "preferred" status – they have political affiliation-based rights and resulting legal claims when those rights are violated.

For almost 140 million private sector employees (about eighty-six percent of the workforce),[247] the story is far different. First, these First Amendment and CSRA protections do not apply to private sector employees, and federal employment discrimination laws do not protect political affiliation as a characteristic.[248]

Indeed, Section 1985(3)'s "support or advocacy" clauses may, in theory, hold some promise for these employees, as those clauses could prohibit *some forms* of political affiliation discrimination – namely, when *at least two managers or decision-making agents conspire* to take adverse action against a person due to his or her "support or advocacy" for a federal candidate.[249] But this promise seems more illusory in practice. For example, these Section 1985(3) clauses *cannot* apply where there is *only one such manager or decision-making agent* – the requisite "conspiracy" cannot exist.[250] Further, even if multiple managers or decision-making agents exist, the "support or advocacy" clauses may be substantially limited, or even erased, in many jurisdictions, whether by (1) judicial requirements of "state action" or "violation of an independent, substantive federal right" or (2) the intra-corporate conspiracy doctrine.[251]

Thus, under Section 1985(3), only private sector employees who experience the "right" type of discrimination (by multiple managers or decision-making agents) in the "right" jurisdiction (one that does not apply any of the above-referenced limitations to Section 1985(3) claims) hold a legally "superior" or "preferred" status. Those employees have political affiliation-based rights and resulting legal claims when those rights are violated. But employees who experience the "wrong" type of discrimination or otherwise live in the "wrong" jurisdiction hold a legally

---

[244] *See supra* Part II.A.1 (discussing the First Amendment's protection of political affiliation).

[245] *See supra* note 4 and accompanying text (discussing this data).

[246] *See supra* Part II.A.2 (discussing the CSRA's protection of political affiliation).

[247] *See supra* note 6 and accompanying text (discussing this data).

[248] *See supra* notes 7-14 and accompanying text (discussing the inapplicability of these provisions and statutes).

[249] *See supra* Part II.B.1 (discussing Section 1985(3)'s "support or advocacy" clauses).

[250] *See supra* notes 179–81 and accompanying text (generally discussing the need for multiple agents in a conspiracy claim).

[251] *See supra* notes 170-81 and accompanying text (discussing these limitations).

"inferior" or "non-preferred" status. These employees have neither political affiliation-based rights nor resulting legal claims.

Finally, state laws may also offer a source of political affiliation protection for these employees.[252] Yet about half of states lack such laws.[253] And the half that have them offer varying degrees of political affiliation protection based on their scope, context, and exceptions – broad versus narrow protected status or activities; broad versus narrow prohibited employer actions; civil versus criminal liability; and available versus unavailable employer defenses or exceptions.[254]

As a result, under these state laws, only private sector employees who live in the "right" states (with the "right" laws) hold a legally "superior" or "preferred" status – they have political affiliation-based rights and resulting legal claims when those rights are violated. But those employees who live in the "wrong" states (with no laws or the "wrong" ones) hold a legally "inferior" or "non-preferred" status – they have neither political affiliation-based rights nor resulting legal claims.

By adding political affiliation to Title VII, the proposal creates significantly greater symmetry and uniformity in the legal protections available to public and private sector employees.[255] Private sector employees would now have political affiliation-based rights and resulting legal claims when those rights are violated. Under Title VII, these typical claims would include (1) intent-based discrimination (disparate

---

[252] *See supra* Part II.B.2 (discussing these state laws).

[253] *See supra* Part II.B.2 (discussing these state laws).

[254] *See supra* notes 187-96 and accompanying text (discussing these variations based on scope, context, and exceptions).

[255] *See* Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1113 (2017) ("[S]ymmetry may be seen as a targeted means of maintaining goodwill . . . . [T]he fact that all groups are protected may facilitate more goodwill than under an asymmetric measure, through a sense that the law is fair and even-handed."); *id.* at 1114 ("Universal solutions have been thought to avoid backlash on the theory that the measure will be less polarizing and stigmatizing to the recipients."); William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. LAW 683, 690–91 (2010) ("A high degree of symmetry among the various laws and covered characteristics may also be desirable, as this could improve simplicity. . . . One reason for valuing symmetry is that it enhances simplicity and understanding. The law is simpler if employers and employees, litigants, lawyers, and jurors can apply common principles under the different discrimination laws. . . . A second reason to favor symmetry among employment discrimination laws is that the laws should be perceived by the public to be sensible and fair.").

treatment),[256] (2) effect-based discrimination (disparate impact),[257] (3) harassment (hostile work environment),[258] and (4) retaliation.[259] As a result, the proposal would end the above-referenced "caste" or "class" system where (1) some employees hold a "superior" or "preferred" status and (2) other employees hold an "inferior" or "non-preferred" status.[260]

---

[256] *See, e.g.*, Int'l Bhd. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in most situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

[257] *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A) ("An unlawful employment practice based on disparate impact is established under this title [Title VII] only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . . ."); *Int'l Bhd. Teamsters*, 431 U.S. at 335 n.15 ("Claims of . . . 'disparate impact[]' . . . involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory.").

[258] *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) ("[I]n order to be actionable under the statute [Title VII], . . . [the] objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and on that the victim in fact did perceive to be so."); CRAIN ET AL., *supra* note 7, at 607 ("In summary fashion, to establish a claim of hostile work environment the plaintiff must show that the conduct was 'unwelcome,' and that it was sufficiently severe and pervasive so as to constitute a hostile working environment.").

[259] *See, e.g.*, 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."); CRAIN ET AL., *supra* note 7, at 577 ("[A]n employee must also establish a causal link between the adverse action and the employee's protected activity.").

[260] *Cf.* Craig R. Senn, *Accommodating Good-Faith Employers in Title VII Disparate Impact Cases*, 94 TUL. L. REV. 639, 705 (2020) (arguing that the varying employer defenses to disparate impact claims under Title VII versus the ADEA/ADA "create a 'caste' or 'class' system within federal employment discrimination law"); Craig R. Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV.187, 244 (2012) (arguing that the different remedial models of Title VII/ADA versus the ADEA "can and often do create a 'caste' or 'class' system within federal employment discrimination law"); Craig R. Senn, *Fixing Inconsistent Paternalism Under Federal Employment Discrimination Law*, 58 UCLA L. REV. 947, 1012 (2011) (arguing that the ADEA's direct threat defense and the Title VII/ADEA bona fide occupational qualification defense "create[] a caste or class system within federal employment discrimination law"); Craig R. Senn, *Perception Over Reality: Extending the ADA's Concept of "Regarded As" Protection Under Federal Employment Discrimination*

Instead, employees (whether public or private sector, and regardless of the state(s) in which they live) would share an "equivalent" or "comparable" status.[261]

Moment or Juncture. Finally, as to the significant *moment or juncture* of this choice, the proposal comes at a time when private sector employees continue to face a looming storm of political affiliation discrimination. After all, these employees confront the above-referenced disparity in applicable workplace legal protections, all in an era of continued high political tension and division while working for employers who can readily ascertain a worker's political affiliation via social media, the Internet, or otherwise.[262] Indeed, recent surveys or polls indicate that many employees – regardless of political affiliation or demographic group – see and fear this storm.[263] For example, according to one 2020 national survey, thirty-two percent of U.S. workers "personally are worried about missing out on career opportunities or losing their job if their political opinions became known."[264] This number remains roughly the same regardless of political affiliation, gender, or demographic group.[265]

In sum, Congress now confronts another important *political activity-related question* at a significant time in the United States: With private sector employees facing this looming storm for political affiliation discrimination, how should Congress address this significant disparity in workplace legal protections? As it did in the late 1700's (with the First Amendment), the late 1800's (with Section 1985(3)'s "support or advocacy" clauses), and late 1970's (with the CSRA), Congress should make the same clear choice with the same clear purpose in the 2020's – to prioritize federal protection of political affiliation.

Law, 36 FLA. ST. U. L. REV. 827, 859 (2009) (arguing that the unavailability of an ADA-like regarded-as protection under Title VII and the ADEA "elevate[s] only the ADA to the 'superior' or 'preferred' position and (2) relegate[s] Title VII and the ADEA to the 'inferior' or 'non-preferred' position").

[261] By its terms, Title VII only applies to employers with fifteen (15) or more employees. 42 U.S.C. § 2000e(b). So, under the proposal, private sector employees would remain unprotected if they (1) work for an employer below this threshold, (2) do not live in the "right" jurisdiction with a state law prohibiting political affiliation discrimination, and (3) are not otherwise protected by Section 1985(3)'s "support or advocacy" clauses.

[262] *See supra* notes 16–19 and accompanying text (discussing this looming storm and its factors).

[263] Ekins, *supra* note 20, at 5.

[264] *Id*.

[265] *Id*. *See supra* note 22 and accompanying text (discussing this data).

B. Title VII's First Amendment Foundation

Second, the proposal rests on a First Amendment foundation that has long been a part of Title VII – Congress relied on this foundation to protect *religion* in 1964, and it can (and should) rely on it again to protect political affiliation as religion's "companion" or "sister" characteristic.[266]

This subsection will discuss (1) the history of the First Amendment's religion clauses, (2) Congress's reliance on a First Amendment foundation to protect religion in Title VII, and (3) the proposal's reliance on this same foundation to protect political affiliation in Title VII.

1. History of the First Amendment's Religion Clauses

Congress drafted the First Amendment in 1787[267] with an understanding of the English monarchy's deep involvement in the Church of England and colonial religious establishments.[268] For example, in England, enactments in the 1500's and 1600's had "tightened further the government's grip on the exercise of religion,"[269] such as by making the English monarch "the supreme head of the Church" with authority to "appoint the Church's high officials."[270]

In response, many Puritans fled to New England "seeking to escape the control of the national church" and hoping to "elect their own ministers and establish their own modes of worship."[271] Yet, the colonies (and colonists) continued to face comparable "controversies over the selection of ministers" and "chafed at the control exercised by the Crown and its representatives over religious offices."[272]

Consequently, when Congress drafted the First Amendment, it "sought to foreclose the possibility of a national church" and "ensure[] that the new Federal Government – unlike the English Crown – would have no role in filling ecclesiastical offices."[273] Consistent with that purpose, the First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[274]

---

[266] Hoffman, *supra* note 8, at 1536–37.

[267] ALLISON, *supra* note 33, at 208; Anastaplo, *supra* note 33, at 664, 678.

[268] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 182–83 (2012).

[269] *Id*. at 182.

[270] *Id*.

[271] *Id*.

[272] *Id*. at 183.

[273] *Id*. at 183–84.

[274] U.S. CONST. amend. I.

2. Title VII's First Amendment Foundation

Moving forward almost 200 years, Congress relied on this First Amendment foundation to protect religion under Title VII, which was enacted in 1964 and later amended in 1972.[275] The text and legislative history for *four* different religion-based provisions (adopted or rejected) evidence this foundation.[276]

First, Title VII explicitly prohibits workplace discrimination based on (among other characteristics) a person's "religion."[277] The Equal Employment Opportunity Commission (as the federal administrative agency that enforces Title VII) has recognized the First Amendment basis for this explicit Title VII protection:

> The freedom to believe and practice one's own religion was one of the primary factors that motivated people to travel to colonial America[] and continues to motivate similar journeys today. Consequently, it is not surprising that discrimination based on religion is one of the specific kinds of employment discrimination prohibited by Title VII of the Civil Rights Act of 1964.[278]

Legal scholars have similarly observed Congress's reliance on a First Amendment foundation to protect religion in Title VII: "Title VII's prohibition of religious discrimination may appear natural because it reinforces the value of religious freedom, rooted in the First Amendment."[279] Thus, Congress relied on a First Amendment foundation to protect "religion" as a characteristic in Title VII.

Second, Title VII contains an explicit *exemption* from its prohibition of religious discrimination by employers – namely, one that *permits* such discrimination by an employer that is an appropriate *religious* "school, college, university, or other education institution or institution of

---

[275] Sarah L. Silbiger, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Transworld Airlines v. Hardison, 53 FORDHAM L. REV. 839 (1985).

[276] *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(e)(2); 2000e(j); U.S. EQUAL EMP. OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964 2806 (1964); *infra* notes 277-97 and accompanying text (discussing these provisions).

[277] 42 U.S.C. § 2000e-2(a)(1).

[278] U.S. EQUAL EMP. OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE VII) OF THE CIVIL RIGHTS ACT OF 1964 3 (2002).

[279] Hoffman, *supra* note 8, at 1536; *see also* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1085–86 (1996) ("The Free Exercise Clause was meant, in part, to protect religious minorities from discrimination.").

learning."[280] Representative Graham B. Purcell, Jr., a Democrat from Texas, proposed this exemption as an original amendment to Title VII in 1964.[281] Congress then adopted the Purcell amendment by a voice vote.[282] Not surprisingly, the First Amendment played a prominent role in the comments of the amendment's supporters.[283] For example, Representative Donald H. Clausen, a Republican from California, highlighted the First Amendment foundation for the proposed amendment:

> In my judgment, it is one of the most important amendments yet introduced. I vigorously support this amendment and urge my colleagues to do likewise because it penetrates to the heart of the church-state issue. The fact that this bill, if enacted into law, without the Purcell amendment could set the stage for regulation or possible subversion of any religion, under the guise of discrimination is, in my opinion, in direct conflict with the first amendment to the Constitution. As stipulated, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; the language is precise and very clear.
>
> Unless the amendment is accepted, the civil rights bill in its entirety will be in jeopardy for final passage and rightly so because one of the most important and fundamental rights of mankind is that of religious liberty. . . . It is our duty to use every lawful and honorable means to prevent the enactment of legislation which tends to unite church and state, and to oppose every movement toward such union, so that all may enjoy the continuing and inestimable blessings of religious liberty.[284]

---

[280] 42 U.S.C. § 2000e-2(e)(2) ("[I]t shall not be an unlawful practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."). *See also* 42 U.S.C. § 2000e-1(a) ("This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); SULLIVAN & ZIMMER, *supra* note 133, at 381, 383 (discussing this exemption).

[281] U.S. EQUAL EMP. OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964 3197 (1964).

[282] *Id.*

[283] *See, e.g.*, *id.* at 2806, 3101, 3202, 3207, 3211.

[284] *Id.* at 3207.

Similarly, Representative Frank L. Chelf, a Democrat from Kentucky, recognized the First Amendment basis for the proposed exemption:

> I have many splendid Catholic colleges, schools and orders. Why I have the famous and God-fearing order of the Trappist Monks, Baptist colleges, Presbyterian colleges, even some fine Mormons. All of these good people have the right under the first amendment to follow the religion of their own choice. My colleagues — insomuch as there is much doubt in the hearts and minds of many of us — let us vote for the Purcell amendment. We absolutely cannot take any chances— there is far too much at stake.[285]

Consequently, Congress relied on a First Amendment foundation to exempt religious institutions from Title VII's prohibition of religious discrimination.

Third, a proposed "atheism" exception to Title VII – which would have *allowed* religious discrimination against atheists – was rejected.[286] Again, the First Amendment and U.S. Constitution played a key role in the comments of the exception's opponents.[287] For example, Senator Everett Dirksen, a Republican from Illinois, observed the First Amendment basis for rejecting the exception:

> The first words of the first amendment to the Constitution deal with freedom of religion and the cases decided under this section make it clear that the freedom of conscience enjoyed by Americans with respect to their religious beliefs ought not be interfered with by the Congress.

---

[285] *Id*. at 3202, 3210–11 (comments of Representative Horace R. Kornegay, a Democrat from North Carolina: "In my district and State there are many religious and church-related colleges, orphanages, and other charitable institutions. They are Baptist, Methodist, Quaker, Catholic, Presbyterian, Christian, Masonic Order, and others. I do not know what their employment practices are. It is none of my business and none of the business of the Federal Government. I feel very strongly, Mr. Chairman, that the Government should never have the authority to dictate or meddle into the affairs of our religious and charitable institutions. . . . [T]his is a fundamental and constitutional right which must never be violated . . . .").

[286] *Id.* at 2806. Specifically, the exception stated that "it shall not be an unlawful employment practice for an employer to refuse to hire and employ any person because of said person's atheistic practices and beliefs." *Id*. at 3101. Senator John M. Ashbrook, a Republican from Ohio, proposed the atheism exception. *Id.* at 3101 ("That is what my amendment would endeavor to do; that is, to say the employer could discriminate because of the atheistic practices or beliefs of an applicant for a job. . . . It seems incredible that we would even seriously consider forcing an employer to hire an atheist.").

[287] *See, e.g.*, *id.* at 3005, 3014, 3095, 3267.

> The nature and extent of a man's beliefs with respect to his Creator are, and ought to be, sacred and exempt from testing as a condition of employment.
>
> I can think of nothing so ill[-]suited to a civil rights bill, designed to protected the rights of all persons to be free from discrimination[,] as this section, the deletion of which I now propose.[288]

Similarly, Senator Clifford P. Case, a Republican from New Jersey, clearly alluded to the First Amendment when he highlighted that the atheist exception was "patently unconstitutional."[289] Likewise, Senator Hubert Humphrey, a Democrat from Minnesota, recognized that the exception was of "doubtful constitutionality,"[290] and Senator Joseph F. Clark, Jr., a Democrat from Pennsylvania, observed that the atheist carve-out "appears to be unconstitutional."[291] Thus, Congress relied on a First Amendment foundation to reject an atheism exception to Title VII's prohibition of religious discrimination.

Fourth, Title VII's definition of "religion" includes "all aspects of religious observance and practice, as well as belief . . . ."[292] In 1972, Congress amended Title VII to include this definition.[293] Senator Jennings Randolph, a Democrat from West Virginia, proposed the amendment,[294] which was designed to "protect sabbath observers whose employers fail to adjust work schedules to fit their needs."[295] Once again, the First Amendment played a prominent role in the comments of the definition's supporters.[296] For example, Senator Randolph highlighted the First Amendment foundation for the definition:

---

[288] *Id.* at 3267 ("To leave [the atheism exception] in would only provide a vehicle for the first legal assault on this bill, which in view of recent court decisions would probably be successful."); *see also id.* at 3009, 3014 ("This [atheist exception] language was added to the bill in the House of Representatives and would, if passed, be in my opinion the subject of review by the Supreme Court. I have some doubt . . . that this section would be sustained.").

[289] *Id.* at 3095 ("Mr. President, considerable attention has also been given to the exemption of atheists inserted into the bill on the House floor. This provisions – section 704, subsection (f) – seems to me patently unconstitutional, and I have no doubt it will be so held by the courts if we do not delete it.").

[290] *Id*. at 2806, 3005 ("Section 704(f) of the House bill, providing that it should not be an unlawful employment practice for an employer to discriminate against atheists, has been deleted, largely because of its doubtful constitutionality.").

[291] *Id*. at 3014 ("The atheist proviso appears to be unconstitutional.").

[292] 42 U.S.C. § 2000e(j) (but excluding an observance or practice that an employer cannot reasonably accommodate "without undue hardship on the conduct of the employer's business").

[293] Silbiger, *supra* note 275, at 840–41.

[294] 118 CONG. REC. 705–06 (1972) (statement of Sen. Randolph).

[295] Silbiger, *supra* note 275, at 842.

[296] *See, e.g.*, 118 CONG. REC. 705–06 (1972).

> [F]reedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States.
>
> . . .
>
> The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment — not merely belief, but also conduct; the freedom to believe, and also the freedom to act.
>
> I think in the [1964] Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. . . .
>
> . . . I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended.[297]

Thus, Congress relied on a First Amendment foundation to include a broader definition of religion in Title VII. As evidenced by these Title VII provisions and the accompanying legislative history, Congress relied on a clear First Amendment foundation to protect religion in 1964 (and 1972).

3. The Proposal's Same First Amendment Foundation (and "Companion" or "Sister" Characteristics)

The proposal rests on the same First Amendment foundation that has been a part of Title VII since the 1960s. This shared foundation is evidenced by three similarities between the "companion" or "sister" characteristics of (1) political affiliation and (2) religion: Both derive from the same source, arose out of the same historical context, and share the same congressional purpose.

First, the proposed protected characteristic of political affiliation derives from the *same source* as the Title VII-protected characteristic of religion – the text of the First Amendment itself. As discussed above, the Supreme Court has consistently observed that political affiliation falls within the First Amendment umbrella of rights and freedoms.[298] Similarly, Congress specifically mentioned religion in the First Amendment's religion clauses.[299] In other words, both the proposal and Title VII directly consult the First Amendment as the source for their relevant

---

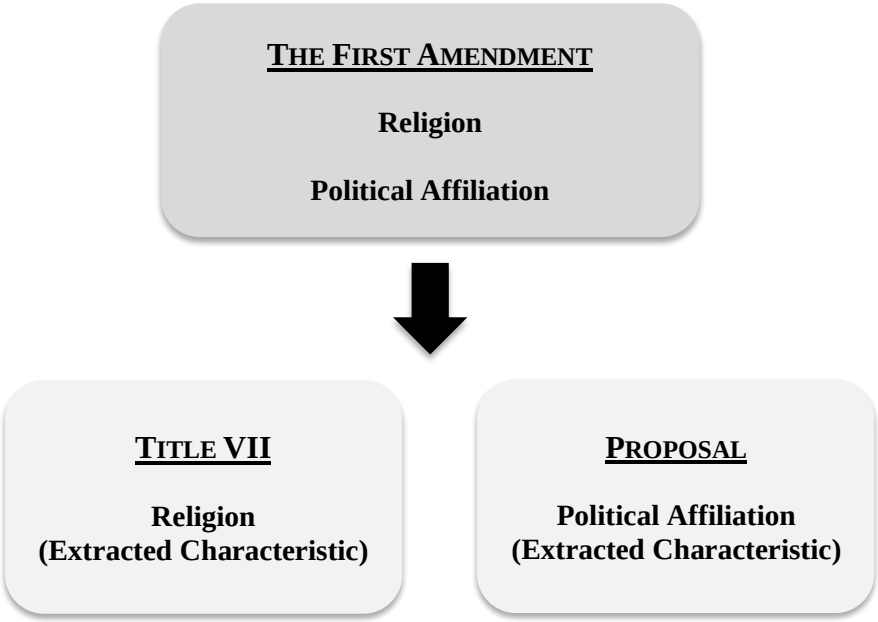
[297] 118 CONG. REC. 705–06 (1972) (statement of Sen. Randolph).

[298] *See supra* notes 43-46 and accompanying text (discussing applicable precedent).

[299] U.S. CONST. amend. I.

characteristics, and they then comparably extract them for protection. The following diagram illustrates the same source point:

THE FIRST AMENDMENT:
SAME SOURCE FOR EXTRACTED CHARACTERISTICS



Thus, the First Amendment serves as the source for political affiliation and religion protected characteristics – clear evidence of (1) their "companion" or "sister" status and (2) the proposal and Title VII's shared First Amendment foundation.

Second, the proposed protected characteristic of political affiliation arose from the *same historical context* as the Title VII-protected characteristic of religion. Specifically, that context was the English government's interference, control, and oppression.[300] As to political affiliation, Congress was working in the context of the "exigencies of the colonial period,"[301] which included the British government's "oppressive administration"[302] and "persistent effort . . . to prevent or abridge the free

[300] Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).
[301] *Id.*
[302] *Id.*

expression of any opinion which seemed to criticize or exhibit in an unfavorable light . . . the agencies and operations of the government."[303]

Similarly, as to religion, that same Congress was working in the context of the English monarch's (and government's) "grip on the exercise of religion,"[304] the Puritans' efforts to "escape the control of the national church,"[305] and colonial "chaf[ing] at the control exercised by the Crown and its representatives over religious offices . . . ."[306] As a result, the same historical context served as the backdrop for Congress's inclusion of political affiliation and religion in the First Amendment – further strong evidence of (1) the "companion" or "sister" status of these characteristics and (2) the proposal and Title VII's shared First Amendment foundation.

Third, the proposed protected characteristic of political affiliation shares the *same congressional purpose* as the Title VII-protected characteristic of religion.[307] Specifically, this purpose was to prioritize and protect each characteristic from interference, control, and oppression by the English government.[308] As to political affiliation, Congress drafted the First Amendment to "protect the free discussion of governmental affairs," ranging from "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."[309]

Similarly, as to religion, that same Congress drafted the First Amendment to "foreclose the possibility of a national church" and "ensure[] that the new Federal Government – unlike the English Crown – would have no role in filling ecclesiastical offices."[310] Thus, the same congressional purpose motivated Congress to include political affiliation and religion in the First Amendment – further clear evidence of (1) the "companion" or "sister" status of these characteristics and (2) the proposal and Title VII's shared First Amendment foundation.

In sum, the proposal rests on the same First Amendment foundation that has been a part of Title VII for almost fifty years. The proposed protected characteristic of political affiliation has the same (1) First Amendment source, (2) historical context, and (3) congressional purpose as Title VII's protected characteristic of religion. Congress relied on this First Amendment foundation to protect religion in 1964; it can – and

---

[303] Grosjean v. Am. Press Co., 297 U.S. 233, 245 (1936).

[304] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 182 (2012).

[305] *Id*.

[306] *Id*. at 183.

[307] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

[308] Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).

[309] *Mills*, 384 U.S. at 218–19.

[310] *Hosanna-Tabor*, 565 U.S. at 183–84.

should – rely on it to protect political affiliation as religion's "companion" or "sister" characteristic.[311]

C. Harms of Political Affiliation Discrimination

From a policy perspective, the proposed addition of political affiliation would substantially reduce those harms caused by political affiliation discrimination in the workplace. This section will discuss (1) these harms to individual employees and U.S. democratic society and (2) how the proposal would substantially reduce them.

1. Harms to Individual Employees and Democratic Society

Political affiliation discrimination causes harms not only to individual employees but also to U.S. democratic society.

First, as to *individual employees*, such discrimination naturally causes significant negative impacts upon their freedoms and financial security. For example, in the Supreme Court's 1976 *Elrod* decision, the plurality stressed how such discrimination places "restraint . . . on [a person's] freedoms of belief and association" and creates "the risk of losing" a job.[312] Similarly, in its 1980 *Branti* decision, the Court highlighted that such discrimination triggers "coercion of [a person's] belief."[313] Moreover, in its 1990 *Rutan* decision, the Court emphasized several of these same harms, including (1) pressuring employees to "conform their beliefs and associations"[314] or to "discontinue the free exercise of their First Amendment rights"[315] (or otherwise "refrain from acting on the political views they actually hold"),[316] (2) compelling them to "engage in whatever political activity is necessary" to regain pay and positions,[317] and (3) creating the risk of "los[ing] the considerable increases in pay and job satisfaction attendant to promotions."[318] Thus, as other legal scholars have noted, political affiliation (or related)

---

[311] *Cf*. Hoffman, *supra* note 8, at 1536–37 ("For some people, political affiliation is as personally defining as religion (if not more so) . . . . Title VII's prohibition of religious discrimination may appear natural because it reinforces the value of religious freedom, rooted in the First Amendment. However, the Supreme Court has recognized a similar link between political affiliation and freedom of assembly, also guaranteed by the First Amendment.").

[312] Elrod v. Burns, 427 U.S. 347, 355 (1976) (plurality opinion).

[313] Branti v. Finkel, 445 U.S. 507, 516 (1980).

[314] Rutan v. Republican Party of Ill., 497 U.S. 62, 75 (1990).

[315] *Id*. at 79.

[316] *Id*. at 73.

[317] *Id*.

[318] *Id*. at 74.

discrimination causes multiple negative impacts on individual employees.[319]

Second, as to *U.S. democratic society*, political affiliation discrimination in the workplace causes less direct, but still substantial, harms – namely, to the political "marketplace of ideas" and the voting electorate. For example, in the Supreme Court's 1976 *Elrod* decision, the plurality extensively highlighted these negative democratic society impacts:

> The free functioning of the electoral process also suffers. . . .
>
> . . . .
>
> These [First Amendment political affiliation] protections reflect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," a principle itself reflective of the fundamental understanding that "(c)ompetition in ideas and governmental policies is at the core of our electoral process . . . ." Patronage, therefore to the extent it compels or restrains belief and association[,] is inimical to the process which undergirds our

[319] *See, e.g.*, Matthew T. Bodie, *The Best Way Out is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 226 (2017) ("No employee goes into the employment relationship expecting that the employer will use that relationship to pressure the employee into changing her personal life. A carve-out for employee decisions, beliefs, and activities that take place outside the workplace—which I label as 'personal autonomy' [defined to include 'political affiliations, religious observance, and recreational activities']—puts the at-will rule on more solid footing, both doctrinally and empirically."); *id.* at 240 ("[T]he argument against this [employer] interference [with an employee's 'personal autonomy'] is fairly straightforward – it is wrong for the employer to leverage its power over the employment relationship to change employee behavior that is unrelated to the relationship. This is taking power in one realm and using it to distort behavior in another."); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 256 (2013) ("Workers, fearful of losing their jobs, will suppress their own political views or express views with which they do not agree. The result will be a skewed political discourse, in which employers' voices are amplified and workers' are squelched."); Jason Bosch, Note, *None of Your Business (Interest): The Argument for Protecting All Employee Behavior with No Business Impact*, 76 S. CAL. L. REV. 639, 644 (2003) ("In essence, strict at-will employment allows employers to use economic influence to gain social, moral, and even political influence over their employees."). *See also* Restatement of Employment Law § 7.08(a)(2)-(3) (Am. Law Inst. 2020) ("Employees have protected interests in personal autonomy outside of the employment relationship. Such interests include: . . . (2) adhering to political, moral, ethical, religious, or other personal beliefs or expressing such beliefs . . . ; or (3) belonging to or participating in lawful associations . . . .").

> system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment."[320]

The *Elrod* plurality also stressed similar points later in its opinion, observing that political affiliation discrimination "clearly . . . retard[s] that [democratic] process" and is "a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government."[321]

Likewise, in his concurring opinion in the 1990 *Rutan* decision, Justice Stevens observed that political affiliation discrimination "undermine[s] the 'free functioning of the electoral process'"[322] and creates a "'paternalistic impact on the political process [that] is actually at war with the deeper traditions of democracy embodied in the First Amendment.'"[323] Similarly, other legal scholars have noted that political affiliation (or related) discrimination causes multiple negative impacts on U.S. democratic society.[324]

---

[320] Elrod v. Burns, 427 U.S. 347, 356–57 (1976) (plurality opinion) (first quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); then quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968); and then quoting Ill. State Emp. Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972)).

[321] *Id*. at 369–70 (plurality opinion).

[322] *Rutan*, 497 U.S. at 91 (Stevens, J., concurring) (quoting *Elrod*, 427 U.S. at 356).

[323] *Id*. at 91–92 (Stevens, J., concurring) (quoting *Ill. State Emp. Union*, 473 F.2d at 576); *see also id.* at 91 ("[I]t is appropriate . . . to consider . . . the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits.") (Stevens, J., concurring).

[324] *See, e.g.*, Carey, *supra* note 18, at 649 ("Because speech, in particular political speech, is essential to our democracy and has many societal benefits, private employees should not fear discharge or discipline from their employer for engaging in political discourse on their own time."); *id*. at 675 ("The rising number of employees fired for their off-duty political speech poses a threat to the functioning of our democratic country. Private employees on all points of the political spectrum are left to choose between adding to the political discourse by speaking out on political issues they feel strongly about or risking discharge by their employers, thus losing their livelihoods. The members of a democracy should not have to choose between participating in the democracy and providing for themselves of their families."); Gordils, *supra* note 17, at 206 ("This suppression [or silencing of free speech] is problematic because free speech holds an integral place in democratic societies. It goes towards members of society participating in decision-making, individual self-expression, and the overall pursuit of intellectual progress and change."); *id*. at 207 ("[T]he suppression of employee political speech diminish[es] the collective search for truth that is vital to a functional democracy . . . . [W]e must remember that private employees are also members of a democratic society – a society that benefits from the expression of conflicting ideas.").

2. The Proposal's Reduction of Harms

The proposal's addition of political affiliation to Title VII would substantially reduce these significant harms to individual employees and U.S. democratic society.

First, as to *individual employees*, they would have political affiliation-based rights in the private sector workplace with resulting legal claims and damages against employers when those rights are violated.[325] As a result, the proposal would make it less likely that these private sector workers experience political affiliation discrimination in the first place, thereby avoiding the many harms highlighted in the Supreme Court's *Elrod*, *Branti*, and *Rutan* decisions.[326] Specifically, these employees would now likely avoid (1) "restraint . . . on [their] freedoms of belief and association," (2) "risk of losing" their jobs, (3) "coercion of [their] beliefs," (4) pressure to "conform their beliefs and associations" or "discontinue the free exercise of their First Amendment rights" (or otherwise "refrain from acting on the political views they actually hold"), (5) compulsion to "engage in whatever political activity is necessary" to regain pay and positions, and (6) risk of "los[ing] the considerable increases in pay and job satisfaction attendant to promotions."[327] In other words, the harms highlighted in the *Elrod*, *Branti*, and *Rutan* decisions would, presumably, be substantially reduced under the proposal.

Second, as to *U.S. democratic society*, private sector workplaces would likely be safer spaces for employees – political affiliations could be known, and opinions could be shared in the political "marketplace of ideas" without "self-censorship" or "walking on eggshells" due to the

---

[325] For example, if intent-based discrimination (disparate treatment), harassment (hostile work environment), or retaliation occurred, the prevailing employee generally could receive: (1) "equitable" relief (e.g., back pay or wages; hire or reinstatement), 42 U.S.C. § 2000e-5(g)(1); (2) compensatory damages and punitive damages, subject to an applicable $50,000 to $300,000 cap based on the number of the employer's employees, 42 U.S.C. § 1981a(b)(1), (b)(3); and (3) reasonable attorney's fees and costs, 42 U.S.C. § 2000e-5(k). Generally, back pay equals the "income lost due to the employer's discrimination." SULLIVAN & ZIMMER, *supra* note 133, at 572. Compensatory damages represent the plaintiff's "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." 42 U.S.C. § 1981a(b)(3). Punitive damages are limited to a subset of disparate treatment cases in which the employer "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights" of the plaintiff. 42 U.S.C. § 1981a(b)(1). *See generally* Senn, *Ending Discriminatory Damages*, *supra* note 260, at 193–97 (discussing Title VII damages).

[326] Elrod v. Burns, 427 U.S. 347, 349 (1976); Branti v. Finkel, 445 U.S. 507, 508 (1980); *Rutan*, 497 U.S. at 62.

[327] *See supra* notes 61-62, 83-84, 102-05 and accompanying text (discussing these harms to individual employees).

"political climate these days."[328] As Professor Cynthia L. Estlund has observed, a safe or protected space status for workplaces is important because – today – that is *exactly* where U.S. discourse and deliberation occur:

> [O]ne would have to conclude that the workplace is a leading site of public discourse. . . . At least if we are concerned about the participation of ordinary citizens, and especially value face-to-face discussions that reach across the boundaries of family and neighborhood, we should regard the workplace as a significant deliberative forum. For it is clear that citizens deliberate with each other at work far more than in the fabled public square, and far more than in voluntary civic organizations.[329]

By working in these safe(r) spaces and participating in more robust political "marketplace[s] of ideas," private sector employees would now likely "form political opinions and preferences that are more informed by and take greater account of the interests and experiences of others."[330]

As a result of these likely benefits, the proposal, in turn, would simultaneously reduce the likelihood that U.S. society would incur those harms highlighted by the *Elrod* plurality and Justice Stevens in his *Rutan* concurring opinion.[331] Specifically, U.S. society would now likely avoid (1) harm to "the free functioning of the electoral process," (2) restriction of "uninhibited, robust, and wide-open" debate that "undergirds our system of government," (3) hindrance of "the associational and speech freedoms which are essential to a meaningful system of democratic government," and (4) creation of a "war with the deeper traditions of democracy embodied in the First Amendment."[332] These harms

---

[328] Ekins, *supra* note 20, at 5 (discussing a 2020 Cato Institute and YouGov national survey); *infra* notes 333-34 and accompanying text (further discussing these concepts).

[329] Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 52–53 (2000).

[330] *Id.* at 54; *see also id.* at 55 ("[C]ertain features of workplace discourse give it a distinctive role in the process of preference and opinion formation in a diverse democratic society. First, . . . [b]ecause people neither choose nor grow up among their coworkers, the norms of workplace discourse may be closer to the norms of public discourse than are the norms of discourse among family and close friends. . . . Second, and relatedly, conversations among coworkers are more likely to cross the lines of social division, such as racial, ethnic, or cultural identity, than are conversations with family or nonwork friends."); *id.* at 96 ("[T]he workplace . . . is a locus of associational life and of human connections without which a diverse democratic society cannot flourish.").

[331] *Elrod*, 427 U.S. at 356 (plurality opinion); *Rutan*, 497 U.S. at 80.

[332] *See supra* notes 63-64, 106-07 and accompanying text (discussing these harms to U.S. society).

highlighted by the *Elrod* plurality and Justice Stevens's *Rutan* concurrence would substantially disappear under the proposal.

Of course, one could try to label these harms to U.S. democratic society as "theoretical" or "academic." But they are real. For example, consider one 2020 national survey in which a whopping sixty-two percent of people agreed that "the political climate these days prevents [them] from saying things [they] believe because others might find them offensive."[333] Given that data, "[s]elf-censorship is widespread," and many people "feel they are walking on eggshells."[334] Importantly, this percentage of self-censoring people remains high regardless of (1) political affiliation (seventy-seven percent of Republicans, fifty-nine percent of independents, and fifty-two percent of Democrats), (2) gender (sixty-five percent of men, fifty-nine percent of women), or (3) demographic group (sixty-five percent of Hispanic people and sixty-four percent of white people).[335] Under the proposal, this "self-censorship" likely would substantially disappear, and employees would not necessarily have to "walk[] on eggshells" regarding their political affiliation.

As a final point on this broader, societal policy, one should consider the relative sizes of the public sector versus private sector workforces. As discussed above, almost 140 million private sector employees represent about eighty-six percent of the workforce.[336] In contrast, twenty million state and local government employees represent about twelve percent,[337] and over two million federal government civil service employees represent over one percent.[338]

Now, recall that the *Elrod* plurality and Justice Stevens's *Rutan* concurrence highlighted the above-referenced harms to U.S. society *in cases that involved only state and local government employees* (now, a mere twelve percent sliver of the U.S. workforce). If potential political affiliation discrimination in only twelve percent of the workforce (and its resulting harms to U.S. society) is a cause for concern, then certainly such discrimination in eighty-six percent of the workforce (and its resulting harms to U.S. society) is cause for exponentially greater alarm. In fact, if we attach a value of "x" to represent the "harms to U.S. society" when political affiliation discrimination occurs in state or local government, then a value of "7x" may reasonably represent the "harms to U.S. society" when such discrimination occurs in the private sector.

---

[333] Ekins, *supra* note 20, at 5 (discussing a 2020 Cato Institute and YouGov national survey).

[334] *Id.*

[335] *Id.* *See supra* note 22 and accompanying text (discussing this data).

[336] *See supra* note 6 and accompanying text (discussing this data).

[337] *See supra* note 1 and accompanying text (discussing this data).

[338] *See supra* note 4 and accompanying text (discussing this data).

In sum, the proposed addition of political affiliation to Title VII would substantially reduce those harms – to individual employees and U.S. democratic society alike – caused by political affiliation discrimination in the workplace.

* * * * *

One could argue that the proposal ignores an employer's legitimate interests in maintaining an effective, efficient, and productive workplace (and workers), which would be jeopardized by division or dissension among employees who are politically diverse.[339] While reasonable, this argument lacks merit for two key reasons.

First, this argument rests on an inaccurate assumption – namely, that employees of different political affiliations will (likely) be ineffective, inefficient, and unproductive.[340] In fact, the Supreme Court has rejected that very assumption.[341] For example, in the Court's 1976 *Elrod* decision, the plurality addressed a similar argument by the Cook County sheriff's department – specifically, that its political patronage policy was somehow justified by "the need to insure effective government and the efficiency of public employees" and the fact that "employees of political persuasions not the same as that of the party in control of public office will not have the incentive to work effectively . . . ."[342] Responding with an abrupt "[w]e are not persuaded,"[343] the plurality explicitly balked at the county's assumptions:

> More fundamentally, however, the argument does not succeed because it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used as a basis for imputing such behavior. . . . At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be

[339] *See, e.g.*, Wright, *supra* note 16, at 784–85 ("For . . . [a 'politically militant corporate'] employer, it will be possible to argue that any conspicuous political dissenter is disrupting the subtle, informal operation of the workplace, and thus imposing costs in sheer workplace productivity and efficiency."); Volokh, *supra* note 146, at 301 ("I am not sure such [political affiliation] restrictions are a good idea. . . . [E]mployees are hired to advance the employer's interests, not to undermine it. When an employee's speech or political activity sufficiently alienates coworkers, customers, or political figures, an employer may reasonably claim a right to sever his connection to the employee."); Estlund, *supra* note 329, at 96 (discussing "legitimate considerations of efficiency and productivity that are inescapable in discussions of workplace governance").

[340] Elrod v. Burns, 427 U.S. 347, 364 (1976) (plurality opinion).

[341] *Id.*

[342] *Id.*

[343] *Id.*

> discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.[344]

Likewise, in its 1990 *Rutan* decision, the Court used comparable reasons to reject the state of Illinois's offered justification for its political patronage policy: "A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient."[345]

Second, this argument fails to appreciate Title VII's two existing employer affirmative defenses, which can (and do) accommodate an employer's interest in maintaining an effective, efficient, and productive workplace.[346] Specifically, Title VII includes a "same action" defense in a mixed-motive disparate treatment case,[347] whereby the employer must demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor . . . ."[348] Title VII also includes a bona fide occupational qualification ("BFOQ") defense, which is applicable "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[349] For this latter defense, the employer must show that being a particular "religion, sex or national origin" represents a "job qualification" that is "reasonably necessary" to

---

[344] *Id.* at 365–66; *see also id*. at 366 (noting "the lack of any justification for patronage dismissals as a means of furthering government effectiveness and efficiency").

[345] Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990).

[346] *Elrod*, 427 U.S. at 364.

[347] A "mixed-motive" case involves "no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003) (defining a "mixed motive" case as one "where both legitimate and illegitimate reasons motivated the decision").

[348] 42 U.S.C. § 2000e-5(g)(2)(B). The "same action" defense is a significant partial (not complete) defense, as it (1) allows the court to award attorney's fees and costs but (2) forecloses any monetary "damages" (e.g., equitable, compensatory, and/or punitive) or any other equitable relief (e.g., reinstatement or hire). 42 U.S.C. § 2000e-5(g)(2)(B); *see also supra* note 325 and accompanying text (discussing Title VII damages).

[349] 42 U.S.C. § 2000e-2(e)(1). Congress purposefully excluded the Title VII-protected characteristics of race and color from the BFOQ defense. *Id.* (omitting these characteristics from the BFOQ defense); Knight v. Nassau Cnty. Civ. Serv. Comm'n, 649 F.2d 157, 162 (2d Cir. 1981) (noting that "Congress specifically excluded race from the list of permissible bona fide occupational qualifications" under Title VII); Patrolmen's Benevolent Ass'n of N.Y. v. City of New York, 74 F. Supp. 2d 321, 337 (S.D.N.Y. 1999) (stating that the "BFOQ exception . . . does not apply to discrimination based on race or color" and noting that "[t]he legislative history of Title VII indicates that this exclusion of race was not an oversight, but an intentional prohibition").

the "'essence' or . . . 'central mission' of the employer's business" (or "central purpose of the enterprise").[350]

Taken together, these two existing Title VII defenses adequately accommodate an employer's interests in maintaining an effective, efficient, and productive workplace. For example, suppose a large retail employer fires Employee A for two reasons (i.e., a mixed-motive case): (1) his or her political affiliation with the Democratic Party and (2) poor work performance. Title VII's same action defense would accommodate that employer's interests in worker (and workplace) effectiveness, efficiency, and productivity. Under the defense, this employer need only demonstrate that Employee A would have still been fired for poor work performance if he or she had affiliated with a different political party (e.g., the Republican Party).

Or suppose a political lobbying employer – which works to sway legislators only on causes or initiatives supported by the Republican Party – fires Employee B because of his or her political affiliation with the Democratic Party. Title VII's BFOQ defense would accommodate that employer's interests in worker (and workplace) effectiveness, efficiency, and productivity.[351] Under this defense, this employer need only show that a certain political affiliation was "reasonably necessary" to the "essence," "central mission," or "central purpose" of its lobbying enterprise, which seems very likely given the enterprise's exclusive focus on Republican causes or initiatives.[352]

As a final point on the BFOQ defense, its viability in these political affiliation situations is further bolstered by (1) certain state laws and (2) the Supreme Court's *Branti* and *Rutan* decisions. First, several states already include – as part of their laws providing some form of protection for political affiliation or related activities – an actual BFOQ (or BFOQ-like) employer defense.[353] So, under the proposal, employers would

---

[350] *See, e.g.*, Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201, 203 (1991) (citing Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)); *see also* Senn, *Fixing Inconsistent Paternalism*, *supra* note 260, at 953–69 (discussing Title VII's BFOQ defense).

[351] *See* 42 U.S.C. § 2000e-2(e)(1).

[352] *See id.*

[353] Examples of specific state statutory provisions are:

Connecticut: CONN. GEN. STAT. § 31-51q (2012) (protecting an employee's exercise of First Amendment rights "provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer").

Minnesota: MINN. STAT. § 10A.36 (2012) (protecting an employee's political contributions or political activity unless "the political affiliation of viewpoint of the employee is a bona fide occupational qualification of the employment").

New York: N.Y. LAB. LAW §§ 201-d(1)(a), (3)(a) (McKinney 2012) (protecting an employee's "political activities" unless they create "a material conflict of interest

simply have access to a BFOQ defense (via Title VII) just like employers in the above-referenced states.

Similarly, in its *Branti* and *Rutan* decisions, the Court addressed the exceptional situations in which public sector employers *could lawfully* discriminate based on First Amendment-protected political affiliation.[354] According to the Court, these situations occur when a person's political affiliation is an "appropriate requirement" for "effective performance of the public office involved."[355] Title VII's BFOQ defense is comparable to these *Branti* and *Rutan* exceptional situations – both are designed to evaluate the relationship between the protected characteristic and the job, thereby accommodating an employer's interests in worker (and workplace) effectiveness, efficiency, and productivity.[356]

Next, one could also argue that private sector employers have their own First Amendment-based affiliation (or association) rights, which would be compromised by a Title VII provision that prohibits discrimination based on political affiliation.[357] While understandable, this argument overlooks applicable Supreme Court precedent.

For example, recall the Supreme Court's 1976 decision in *Elrod*. There, a newly-elected Democrat sheriff used a "political patronage" practice to fire several Republican employees in Cook County, Illinois.[358] In support of the Court's conclusion that these employees had stated a viable Section 1983 claim,[359] the plurality discussed in detail the relative First Amendment rights and interests of (1) the county-employer versus (2) the employees.[360] The plurality concluded that the county-employer's political affiliation interests were subservient to those of the employees, largely due to the importance of our "democratic system":

---

related to the employer's trade secrets, proprietary information or other proprietary or business interest").

[354] Rutan v. Republican Party of Ill., 497 U.S. 62, 71 n.5 (1990); Branti v. Finkel, 445 U.S. 507, 517–18 (1980).

[355] *Rutan*, 497 U.S. at 71 n.5; *Branti*, 445 U.S. at 517–18; *see supra* notes 85-91, 108-11 and accompanying text (discussing these decisions on this issue).

[356] *See* 42 U.S.C. § 2000e-2(e)(1); *see supra* notes 85-91, 108-11 and accompanying text (discussing these decisions on this issue).

[357] *See, e.g.*, Volokh, *supra* note 146, at 301 ("I am not sure such [political affiliation] restrictions are a good idea. First, employers may have a legitimate interest in not associating themselves with people whose views they despite.").

[358] Elrod v. Burns, 427 U.S. 347, 350–51 (1976) (plurality opinion).

[359] *Id*. at 373 ("We hold, therefore, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments, and that respondents thus stated a valid claim for relief.").

[360] *Id*. at 370–73.

> Today, we hold that subordination of other First Amendment activity, that is, patronage dismissals, not only is permissible, but also is mandated by the First Amendment. . . .
>
> It is apparent that at bottom we are required to engage in the resolution of conflicting interests under the First Amendment. . . . The illuminating source to which we turn in performing the task is the system of government the First Amendment was intended protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern. Our decision in obedience to the guidance of that source does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue. We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well.[361]

Similarly, consider the Supreme Court's 1984 decision in *Roberts v. U.S. Jaycees*.[362] There, a large private organization – the Jaycees – had excluded women from full membership, and the State of Minnesota subsequently concluded that the organization had violated the sex-based discrimination prohibition of the Minnesota Human Rights Act.[363] While the organization offered a "constitutional freedom of association" argument,[364] the Court rejected it:

> As a general matter, only relationships with these sorts of qualities [e.g., "deep attachments and commitments," "a special community of thoughts, experiences, and beliefs," and/or "distinctively personal aspects of one's life"] are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities – such as a large business enterprise – seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.[365]

Given the *Elrod* and *Roberts* decisions, legal scholars have similarly recognized the general plight of First Amendment-based affiliation or

---

[361] *Id.* at 371–72 (also noting that the First Amendment placed "individual belief and association above political campaigning and management").

[362] 468 U.S. 609 (1984).

[363] *Id.* at 612–14.

[364] *Id.* at 612.

[365] *Id.* at 619–20.

association arguments by institutions.[366] This plight is especially warranted in the workplace context; otherwise, an employer could use that argument to create discriminatory workforces based on (1) race, color, national origin, sex, or religion (thus undercutting Title VII), (2) age of forty years old or older (thus undercutting the ADEA), and/or (3) disability (thus undercutting the ADA).[367]

IV. CONCLUSION

Currently, many employees face a looming storm for political affiliation discrimination in the workplace. This storm has formed due to three factors: (1) a significant disparity in relevant legal protections for public versus private sector workers *plus* (2) high political tension, division, and intolerance *plus* (3) the ability of employers (and others) to ascertain a person's political affiliation via social media, the Internet, or otherwise. The time has come for Congress to act, and the proposed addition of political affiliation to Title VII offers the path forward.

This addition is consistent with Congress's "political affiliation protection" philosophy (clearly evidenced by the First Amendment, Section 1985's "support or advocacy" clauses, and the CSRA), and it rests on the same First Amendment foundation that has long been a part of Title VII for the "companion" or "sister" characteristic of religion.

Further, this addition would deliver numerous benefits to U.S. workers and society alike. Naturally, it would fix the above-referenced disparity in workplace legal protections for political affiliation, thereby eliminating current legal preferences for employees who work in the public sector or live in the "right" states. This addition would also substantially reduce (or eliminate) political affiliation discrimination's significant harms to (1) individual employees' freedom and financial security and (2) U.S. democratic society and its political marketplace of ideas.

---

[366] *See, e.g.*, SULLIVAN AND ZIMMER, *supra* note 133, at 274 ("A number of efforts have been made to limit the reach of antidiscrimination laws by invoking various constitutional provisions. . . . More general attempts to invoke the Constitution to immunize certain activities from attack have mostly failed. Freedom of association claims . . . were rejected in *Roberts v. U. S. Jaycees* . . . .").

[367] *See supra* notes 9–14 and accompanying text (discussing these protected characteristics under Title VII, the ADEA, and the ADA).