CURTAILING VOTER INTIMIDATION BY EMPLOYERS AFTER *CITIZENS UNITED*

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> *I hope you make it very clear to your employees what you believe is in the best interest of your enterprise and therefore their job and their future in the upcoming elections [. . . .] Nothing illegal about you talking to your employees about what you believe is best for the business, because I think that will figure into their election decision, [and] their voting decision . . . .*
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> —2012 Presidential Candidate, Governor Willard "Mitt" Romney, speaking to a group of small business owners on a conference call hosted by the National Federation of Independent Businesses (NFIB)[1]

I. INTRODUCTION

Did Mitt Romney give bad advice to the employers participating in the NFIB conference call? If so, it was because he overlooked a potential source of employee protection that has long been underappreciated: state and federal statutes prohibiting the intimidation or coercion of voters. This contribution to the *Stetson Law Review* symposium on the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*[2]

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1. K.K. Duvivier, *E-Legislating*, 92 Or. L. Rev. 9, 73 n. 302 (2013) (typeface altered) (citing Josh Voorhees, *Romney Wants Small Business Owners to Tell Their Employees How They Should Vote*, Slate, http://www.slate.com/blogs/the_slatest/2012/10/18/romney_s_nfib_call_gop_hopeful_tells_employers_ to_tell_employees_who_to.html (Oct. 18, 2012, 10:40 a.m.) (citing Mitt Romney, Presidential Town Hall, *Small Business Town Hall with NFIB* at 26:45–27:20 (June 6, 2012) (audio recording available at http://www.nfib.com/article/?cmsid=58241))).

2. 558 U.S. 310 (2010).

focuses on expanding protections for employees using voter intimidation statutes and civil tort claims based on those statutes.

Statutes protecting voters from intimidation or coercion have been in force in many jurisdictions for decades,[3] but will likely prove increasingly important in post-*Citizens United* elections. An underappreciated aspect of *Citizens United* is that it loosened restrictions on corporate employers' ability to directly communicate political views to their rank-and-file employees.[4] *Citizens United* has, by many accounts, emboldened employers to take ever more aggressive steps to persuade their employees to vote for particular candidates or ballot propositions.[5] This trend

3. Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection against Employer Retaliation*, 16 Tex. Rev. L. & Pol. 295, 298–301 (2012) [hereinafter Volokh, *Private Employees*].

4. Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post*-Citizens United *Environment*, 120 Yale L.J. Online 17, 17 (2010) (available at http://scholarship.law.marquette.edu/facpub/570/). Before *Citizens United*, the Federal Election Campaign Act (FECA) limited certain corporate "contribution[s] or expenditure[s]." 2 U.S.C. § 441b(a) (2006). The statute defined "contribution or expenditure" to include, among other things, "any services" or "anything of value" to a "candidate, campaign committee, or political party or organization," but specifically excluded from the definition "communications by a corporation to its stockholders and executive or administrative personnel and their families." *Id.* at § 441b(b)(2); Secunda, 120 Yale L.J. Online at 18. The statute notably did *not* exclude from the definition of "contribution or expenditure" communications by a corporation to its rank-and-file employees. Secunda, 120 Yale L.J. Online at 18. The statute permitted the corporate solicitation of rank-and-file employees for contributions to a "segregated fund," or Political Action Committee (PAC), only two times per year, in writing, by mail addressed to employees at their residence, and with certain restrictions on the ability of the soliciting corporation to determine who makes a contribution as a result of the solicitation. 2 U.S.C. § 441b(b)(4)(B); Secunda, 120 Yale L.J. Online at 18. When *Citizens United* held Section 441b's corporate independent expenditure limits unconstitutional, 558 U.S. at 365, it also "permitted corporations to freely use their treasury funds to advocate for candidates and political parties to their rank-and-file employees." Secunda, 120 Yale L.J. Online at 19.

5. *See e.g.* Bruce Ackerman & Ian Ayres, *Election Bosses: How to Stop Employers from Telling Workers Whom to Vote for*, Slate, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/how_congress_can_stop_employers_from_telling_workers_how_to_vote.html (Nov. 2, 2012, 6:31 p.m.) (predicting that employers may soon offer "special workers deals that will pay off only if the employer-favored candidates win"); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225, 254 (2013) ("If anything, as the first presidential election after the Supreme Court loosened restrictions on corporate political speech in *Citizens United v. FEC*, the 2012 election seemed to mark a newly aggressive approach by employers." (footnote omitted)); Steven Greenhouse, *Here's a Memo from the Boss: Vote This Way*, N.Y. Times A1 (Oct. 26, 2012) (available at http://www.nytimes.com/2012/10/27/us/politics/bosses-offering-timely-advice-how-to-vote.html?pagewanted=all&_r=0) (reporting on a number of companies that sent their employees suggestions and recommendations on which candidate to choose in the 2012 election); Secunda, *supra* n. 4, at 17 (predicting that "employers may now be able to compel their employees to listen to their political views . . . on pain of termination"); Amanda Terkel, *Voter Intimidation at McDonald's: Employees Told That, Unless*

has led to scholarly calls for legislatures to enact, expand, or strengthen statutes that protect employees from intimidation or coercion by their employers.[6] A recent decision by a federal court in Ohio, *Kunkle v. Q-Mark, Inc.*,[7] may also signal a new willingness by courts to rely on voter intimidation statutes as the basis for civil tort claims by employees.[8]

Any expansion of statutory voter protections from employer intimidation or coercion will necessarily raise a complex question: are these voter intimidation laws, as applied against employers, consistent with corporations' First Amendment political speech rights recognized in *Citizens United*? Scholars have noted the potential tension between voter intimidation statutes and the holding in *Citizens United*, but have thus far sketched only basic outlines of how this tension might be resolved.[9] One approach advanced by some scholars would borrow the standard for limitations on employer speech in union representation elections under the National Labor Relations Act (NLRA) to guide the First Amendment analysis in limiting employer speech in political elections.[10] But there are significant differences between repre-

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Republicans Win, They Won't Get Raises or Benefits, Huffington Post, http://www.huffingtonpost.com/2010/10/29/voter-intimidation-mcdonalds-republican_n_776187.html (updated May 25, 2011, 7:10 p.m. ET) (reporting on a handbill that a McDonald's franchise owner distributed to his employees with their paychecks).

6. *See* Ackerman & Ayres, *supra* n. 5 (urging statutory bans on "coercive employer threats to workers' political independence" at the federal and state level). Professors Bruce Ackerman and Ian Ayres have written extensively on other proposals for campaign finance reform, including Bruce Ackerman & Ian Ayres, *The Secret Refund Booth*, 73 U. Chi. L. Rev. 1107 (2006); Bruce Ackerman & Ian Ayres, *The New Paradigm Revisited*, 91 Cal. L. Rev. 743 (2003); and Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (Yale 2002).

7. 2013 WL 3288398 (S.D. Ohio June 28, 2013).

8. *Id.* at *3 (relying on Ohio's voter intimidation statute, Ohio Revised Code Section 3599.06, as well as the federal statute prohibiting voter intimidation, Title 18 U.S.C. Section 594, to find a public policy tort claim).

9. *See* Ackerman & Ayres, *supra* n. 5 (arguing that voter intimidation laws should survive constitutional scrutiny because "worker autonomy should trump the employer's free speech rights"); Matthew W. Finkin, *Captive Audition, Human Dignity, and Federalism: Ruminations on an Oregon Law*, 15 Employee Rights & Empl. Policy J. 355, 370–371, 370 n. 89 (2011) (discussing state laws that limit an employer's distribution of political messages and noting that the "vitality of some aspects of these laws under the [F]irst [A]mendment in light of [*Citizens United*] remains to be seen"); *see also* Bagenstos, *supra* n. 5, at 259–261 (considering First Amendment concerns presented in the related context of laws that prohibit private employers from controlling their employees' political speech).

10. *See* Ackerman & Ayres, *supra* n. 5 ("The National Labor Relations Act provides the right model for reform."); Eugene Volokh, The Volokh Conspiracy Blog, *Employers' Urging Employees to Vote a Particular Way, and Warning of Dangers If a Particular*

sentation elections and ordinary political elections that might justify, or even require, differential treatment. Courts have previously rejected similar arguments that First Amendment protections for employer speech should be equivalent in representation elections and political elections.[11] This complex First Amendment question, combined with insufficient penalties and other enforcement and remedies limitations, may discourage criminal prosecutions under voter intimidation statutes and thwart the purposes of the statutes. If so, voter intimidation statutes may remain a relatively impotent tool for preventing employer intimidation in political elections.

This Article explores a different, and perhaps more promising, path for the expansion of employee voter protections in political elections—civil tort actions against employers for taking adverse employment actions in violation of public policy, grounded in the voter intimidation statutes. This approach, exemplified by the *Kunkle v. Q-Mark* case, would avoid some of the enforcement and remedies issues posed by criminal prosecutions under voter intimidation statutes. Further, courts considering public policy claims may be able to avoid difficult First Amendment questions concerning the precise dividing line between unprotected threats or coercion and protected employer speech. Of course, the civil tort avenue has its own weaknesses, including the possibility that pre-election intimidation will remain insufficiently deterred. Nonetheless, this Article contends that courts should embrace the public policy tort recognized in *Kunkle*. A widespread acceptance of this civil tort could provide some additional deterrence of improper, unprotected employer intimidation, and could also help to educate employees about their statutory right to vote for the candidate of their choice, free from employer intimidation or coercion.

Candidate Is Elected, http://www.volokh.com/2012/10/29/employers-urging-employees-to-vote-a-particular-way-and-warning-of-dangers-if-a-particular-candidate-is-elected/ (Oct. 29, 2012, 1:47 p.m.) [hereinafter Volokh, *Employers' Urging*] ("There is a good deal of caselaw on this question from the union election context, and I suspect it would equally apply to the political context.").

11. *See Bausch & Lomb Inc. v. NLRB*, 451 F.2d 873, 879 (2d Cir. 1971) ("We are not concerned here with 'debate on public issues' which commands extra 'breathing space' under the [F]irst [A]mendment. The analogy of public elections to labor representation elections falls short of compelling similarity." (citations omitted)).

This Article proceeds in four Parts. Part II briefly surveys current federal and state voter intimidation laws. Part III introduces the union representation election model for evaluating limits on employer speech. Part IV highlights several critical differences between union representation elections and political elections that could lead to judicial rejection of the union representation model and that may also undermine enforcement of voter intimidation statutes in the political election context. Part V introduces a civil tort approach to expanding employees' protection from voter intimidation by employers, using the *Kunkle* case as the starting point for developing a more comprehensive civil litigation strategy.

II. VOTER INTIMIDATION STATUTES

Voter protection statutes in the United States date back to the 1700s.[12] Although voter protection statutes vary across jurisdictions, today every state in the United States has a statute that would appear to prevent an employer from firing an employee based on how he or she voted or threatening to fire an employee based on how he or she votes.[13] Some state statutes are specific to employers, while others contain more general prohibitions. Many impose criminal sanctions,[14] but only a few contain civil remedies.[15]

12. *See* Volokh, *Private Employees*, *supra* n. 3, at 297–298 (noting that parts of the country had protections in place for voters in the 1700s).

13. Eugene Volokh, The Volokh Conspiracy Blog, *Firing (or Threatening to Fire) Employee Based on His Vote*, http://www.volokh.com/2012/10/29/firing-or-threatening-to-fire-employee-based-on-his-vote/ (Oct. 29, 2012, 12:04 p.m.) [hereinafter Volokh, *Threatening*] ("[A]ll states have laws that ban this sort of conduct as to state elections, and the federal government has a law that bans this sort of conduct as to federal elections."); *see* Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 Temp. Political & Civ. Rights L. Rev. 401, 425, 479–499 (2002) (cataloguing voter interference statutes); *but see* Gilda R. Daniels, *Voter Deception*, 43 Ind. L. Rev. 343, 369–370 (2010) (counting only thirty-nine states with laws that "bar some form of voter intimidation, deceptive practices, or both").

14. *See* Weinberg & Utrecht, *supra* n. 13, at 425 ("While penalties for violations of most voter intimidation statutes are misdemeanors under state laws, some are felonies.").

15. *See e.g.* Del. Code Ann. tit. 15, § 5162 (2014) (providing an aggrieved voter with a private right of action to recover $500 from the offending person or corporation); Mont. Code Ann. § 13-35-226 (2013) (providing civil remedy to be enforced by a commissioner of political practices or a county attorney, but no private right of action for the victim). In rare circumstances, voter intimidation or similar misconduct may lead courts to invalidate election results. *See e.g. Stewart v. Rose*, 72 S.W. 271, 272 (Ky. App. 1903) ("But where the illegal voting—the bribery or fraud or intimidation—has prevailed so that its effect upon

For example, Florida has an employer-specific criminal statute that reads:

> It is unlawful for any person having one or more persons in his or her service as employees to discharge or threaten to discharge any employee in his or her service for voting or not voting in any election, state, county, or municipal, for any candidate or measure submitted to a vote of the people. Any person who violates the provisions of this section is guilty of a felony of the third degree . . . .[16]

By contrast, Illinois' voter intimidation statute is not specific to employers:

> Prevention of voting or candidate support. Any person who, by force, intimidation, threat, deception or forgery, knowingly prevents any other person from (a) registering to vote, or (b) lawfully voting, supporting or opposing the nomination or election of any person for public office or any public question voted upon at any election, shall be guilty of a Class 4 felony.[17]

In addition to the various state statutes, the United States Code includes several voter protection laws, some providing for civil injunctions and others providing for criminal penalties.[18] The federal statute relied upon in the *Kunkle* case, Title 18 U.S.C. Section 594, governs only particular elections, is not employer-specific, and provides for criminal penalties:

> Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote

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the result is such that no degree of certainty exists as to the fairly expressed will of the electors, the election should be declared void."); *Forbes v. Bell*, 816 S.W.2d 716, 724 (Tenn. 1991) ("[O]ur case law recognizes that statutory violations alone may be sufficient to invalidate an election, especially where they thwart those statutory provisions 'designed to . . . prevent undue influence or intimidation.'"). However, this is very rare. *See* James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. Louisville L. Rev. 253, 272 n. 161 (2011) ("Less than ten contested elections have resulted in an invalidation or reversal of a federal or state election.").

16. Fla. Stat. § 104.081 (2013).

17. 10 Ill. Comp. Stat. 5/29-4 (2014).

18. *See* Woodruff, *supra* n. 15, at 254 (citing 42 U.S.C. § 1973gg-10(1) (2006)) ("Congress has passed several voter protection laws over the years. Some [federal] voter intimidation statutes allow for civil injunctions, while others provide criminal penalties.").

> for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate. shall be fined under this title or imprisoned not more than one year, or both.[19]

Similarly general language is found in Title 42 U.S.C. Section 1971(b), enacted as part of the Civil Rights Act of 1957.[20] Rather than criminal penalties for violations, Section 1971 provides for enforcement by the United States Attorney General, who may seek injunctive or other preventive relief.[21] Like most state voter intimidation laws, Section 1971 provides no private right of action for the individual intimidated voter.[22]

The efficacy of these voter intimidation statutes can be, and has been, questioned.[23] One problem that has historically plagued the enforcement of voter intimidation statutes is the difficulty of proving subtle forms of intimidation or coercion, such as economic coercion.[24] This is especially true in the employment context, where voter intimidation often takes the form of predictions of job loss, wage or benefit cuts, or other negative effects on the terms

19. 18 U.S.C. § 594 (2012).

20. Woodruff, *supra* n. 15, at 254–255.

21. 42 U.S.C. § 1971(c) (2006); Woodruff, *supra* n. 15, at 255.

22. *See* 42 U.S.C. § 1971(c) (failing to list a private right of action for an individual intimidated voter); Woodruff, *supra* n. 15, at 255 (reiterating same); *see also* Mont. Code Ann. § 13-35-226 (providing civil remedy to be enforced by a commissioner of political practices or a county attorney, but no private right of action for the victim).

23. *See e.g.* Daniels, *supra* n. 13, at 361 (observing that, since the passage of the Voting Rights Act in 1965, "the federal government has rarely used [Section 1971(b)] to pursue voter intimidation and attempts to use it as a means to prevent and deter voter intimidation have been largely unsuccessful"); Job Serebrov & Tova Wang, *Voting Fraud and Voter Intimidation Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations*, 6 Election L.J. 330, 346–347 (2007) (recommending the exploration of civil law remedies for voter intimidation, including a private right of action for intimidated voters); Woodruff, *supra* n. 15, at 285 ("The lack of federal prosecutions alone speaks volumes about the effectiveness of federal laws covering voter intimidation.").

24. *See* Christopher Indelicato & Naomi Pames, *Election Law Violations*, 49 Am. Crim. L. Rev. 523, 550 (2012) (quoting Craig C. Donsanto & Nancy L. Simmons, *Federal Prosecution of Election Offenses* 54 (7th ed., Dep't of Just. 2007) (available at http://permanent.access.gpo.gov/lps92922/electbook-0507.pdf)) ("Evidence of this type of offense is not easy to obtain, as voter intimidation is 'likely to be both subtle and [executed] without witnesses.'").

and conditions of employment in the event of a particular election outcome.[25]

Concern with the ineffectiveness of current voter intimidation protections has led to various calls for reform.[26] After *Citizens United*, stories of employers using aggressive tactics to urge employees to vote in a particular way have only increased this concern.[27] Two prominent legal scholars, Bruce Ackerman and Ian Ayres, have gone so far as to characterize the post-*Citizens United* electoral landscape as a "second gilded age," and predict that we will soon see employers offering "special workers deals that will pay off only if the employer-favored candidates win."[28]

Ackerman and Ayres bring their own recommendation for reform: a federal statute "banning coercive employer threats to workers' political independence."[29] Ackerman and Ayres envision a ban on employer coercion that is expressly modeled on the rules governing union representation elections under the NLRA.[30] Should Congress fail to take this step, Ackerman and Ayres urge the states to "take the lead" by enacting such laws and "us[ing] the principles provided by the [C]ourt's labor rulings" in union representation election cases.[31] The next two Parts will explore the union representation election model in detail and consider several unique characteristics of labor election rules that could

25. *See supra* n. 5 and accompanying text (listing a series of incidents in which employers attempted to influence their employees to vote a particular way in a political election).

26. *See* Serebrov & Wang, *supra* n. 23, at 346–347 (suggesting a private cause of action); Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 Temp. Political & Civ. Rights L. Rev. 359, 378 (2002) (urging the creation of a private right of action to enforce federal voter intimidation laws); Woodruff, *supra* n. 15, at 272–285 (considering an array of reforms targeted at reducing intimidation at polling places, but recommending against the creation of a private cause of action).

27. *See supra* n. 5 and accompanying text (describing an increase in voter intimidation among employers). Professor Bagenstos details a number of examples from the 2012 presidential elections. Bagenstos, *supra* n. 5, at 254–255.

28. Ackerman & Ayres, *supra* n. 5.

29. *Id.*

30. *Id.* ("The National Labor Relations Act provides the right model for reform."). Professor Volokh also seems to believe that the NLRA union representation election model can guide limitations on employer speech in the political election context. *See* Volokh, *Employers' Urging*, *supra* n. 10 (suggesting that caselaw on union election interference would also apply to political election interference).

31. Ackerman & Ayres, *supra* n. 5.

undermine that model's usefulness as a template for crafting limitations on employer speech in political elections.

III. THE UNION REPRESENTATION MODEL

A. The NLRA's Statutory Framework

Ackerman and Ayres' model for controlling employer intimidation was developed under the NLRA[32] in the context of union representation elections. Section 7 of the NLRA[33] guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[34] To implement these rights, the NLRA sets out procedures for holding union representation elections, during which employees cast ballots to determine whether or not to appoint a bargaining representative that will bargain collectively on their behalf with the employer over various terms and conditions of employment.[35] The NLRA further defines a series of "unfair labor practices," many of which are intended to ensure a fair representation election process.[36]

At issue for purposes of this Article are two subsections of the NLRA. The first is Section 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" of the NLRA.[37] Prior to the Taft-Hartley Amendments, the National Labor Relations Board (NLRB or the Board) had enforced this provision in a manner that essentially required the employer to remain neutral in any "statements made to employees during the campaign."[38] In two cases decided in the

32. *Id.* (referring to the NLRA, codified at 29 U.S.C. §§ 151–169 (2012), and the Labor Management Relations Act (LMRA), codified at 29 U.S.C. §§ 141–197). The LMRA was also known as the Taft-Hartley Act, and it amended the NLRA. Beth Z. Margulies, NLRB v. Gissel Packing Co.: *A Standard without a Following (the Need for Reappraisal of Employer Free Speech Rights in the Organizing Campaign)*, 22 Willamette L. Rev. 459, 460 (1986).

33. 29 U.S.C. § 157.

34. *Id.*

35. 29 U.S.C. § 159.

36. 29 U.S.C. § 158.

37. 29 U.S.C. § 158(a)(1).

38. Margulies, *supra* n. 32, at 461–462.

early 1940s, the Supreme Court made clear that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty."[39]

Congress, concerned that the Board had used Section 8(a)(1) to excessively restrict employer speech and seeking to codify the First Amendment protections for employers recently recognized by the Supreme Court, enacted Section 8(c) as part of the Taft-Hartley Amendments to the NLRA in 1947.[40] Section 8(c) provides:

> (c) Expression of views without threat of reprisal or force or promise of benefit
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> > The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.[41]

Considering Section 8(a)(1) and Section 8(c) together, the key question for employer speech in a union representation campaign is whether the speech is lawful persuasion or advocacy, permitted by Section 8(c) and protected by the First Amendment, or unlawful coercion or threats of retaliation, barred by Section 8(a)(1) and unprotected by the First Amendment.[42] In 1969, the Supreme Court handed down the opinion that still serves as the analytical blueprint for drawing this distinction between protected speech and unlawful coercion in the context of union representation elections: *NLRB v. Gissel Packing Co.*[43] The *Gissel Packing* standard is the centerpiece of the union representation

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39. *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (citing *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941)); *see also* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 Berkeley J. Empl. & Lab. L. 356, 373–378 (1995) (explaining the two court cases).

40. Michael J. Bennett, Student Author, *Excessive Restriction on Employers' Predictions during Union Representation Campaigns*, 66 Marq. L. Rev. 785, 788–789 (1983); Margulies, *supra* n. 32, at 462–463; Story, *supra* n. 39, at 378–379.

41. 29 U.S.C. § 158(c).

42. *See generally NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1367 (7th Cir. 1983) (citing Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 151–156 (West Group 1976)) (noting that "it is often difficult in practice to distinguish between lawful advocacy and threats of retaliation").

43. 395 U.S. 575 (1969).

model advanced by Ackerman and Ayres, and it is this standard that they would import into statutory voter intimidation laws governing political elections.[44]

B. The *Gissel Packing* Standard

Gissel Packing involved the review of Board decisions in four consolidated cases: three on appeal from separate decisions by the Fourth Circuit, and one on appeal from a decision by the First Circuit.[45] The case most relevant for present purposes is the Court's review of the First Circuit decision in *NLRB v. Sinclair Co.*[46] There, a union began a campaign seeking to represent certain of Sinclair's employees and later petitioned for an election that was eventually set for December 9, 1965.[47] During the union's drive, Sinclair's president spoke with employees and attempted to dissuade them from joining the union.[48] The president spoke to the employees about the results of a long strike several years earlier which "he claimed 'almost put our company out of business.'"[49] He further told the employees that the company was on "'thin ice'" and that a union strike "'could lead to the closing of the plant,'" because the parent company could easily move manufacturing to other facilities.[50]

During the weeks leading up to the election, the president distributed to the employees a pamphlet captioned, "'Do you want another 13-week strike?'"[51] The pamphlet stated, "'We have no doubt that the Teamsters Union can again close . . . the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike. . . . The Teamsters Union is a strike happy outfit.'"[52] Sinclair sent out other similar pamphlets, including one distributed two days before the election that focused on other similar companies in the area that Sinclair alleged had shut down because of union demands.[53] On the day

44. Ackerman & Ayres, *supra* n. 5.
45. *Gissel Packing*, 395 U.S. at 579–580.
46. 397 F.2d 157 (1st Cir. 1968), *aff'd*, *Gissel Packing*, 395 U.S. 575.
47. *Gissel Packing*, 395 U.S. at 587.
48. *Id.* at 587–588.
49. *Id.*
50. *Id.* at 588.
51. *Id.*
52. *Id.*
53. *Id.*

before the representation election, the president again spoke to the employees.[54] "He repeated that the Company's financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education would make re-employment difficult."[55] The employees rejected the union by a vote of seven to six.[56]

The NLRB, considering the "'totality of the circumstances,'" found that Sinclair had committed an unfair labor practice by violating Section 8(a)(1) of the NLRA.[57] The Board set aside the election, entered a cease-and-desist order against Sinclair, and (because it also found that Sinclair should have recognized the union based on authorization cards it had obtained from a majority of the employees submitted before the election) ordered Sinclair to bargain with the union upon request.[58] The First Circuit affirmed the Board and enforced its order.[59]

Sinclair argued that the Board's order violated its First Amendment speech rights.[60] Importantly, the Supreme Court first distinguished employer *conduct*—such as "discharge, surveillance, and coercive interrogation"—from employer speech.[61] The Court noted that employers should be able to readily distinguish between conduct constituting unfair labor practices and lawful conduct.[62] As to "speech alone," however, the Court noted that the difficulty of distinguishing between unfair labor practices and speech protected by the First Amendment is "not so easily resolved."[63] The Court noted that an employer's First Amendment "free speech right to communicate [its] views to [its] employees is firmly established," and that the addition of Section

54. *Id.* at 588–589.
55. *Id.* at 589.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 589–590.
60. *Id.* at 616.
61. *Id.* at 616–617; *see also* Margulies, *supra* n. 32, at 460 n. 7 (citing *Gissel Packing*, 395 U.S. at 616–617) ("Such conduct is not given the same protection.").
62. *Gissel Packing*, 395 U.S. at 616–617 ("As to conduct generally, the above-noted gradations of unfair labor practices, with their varying consequences, create certain hazards for employers when they seek to estimate or resist unionization efforts. But so long as the differences involve conduct easily avoided, such as discharge, surveillance, and coercive interrogation, we do not think that employers can complain that the distinctions are unreasonably difficult to follow.").
63. *Id.* at 617.

8(c) to the NLRA "merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of [Section] 8(a)(1)."[64]

The Court then explained, in the opinion's critical passage for purposes of the representation election model, how an employer's protected speech is to be distinguished from an unprotected "'threat of reprisal or force or promise of benefit'":

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition."[65]

The Court approved the Board's finding that Sinclair's statements and pamphlets "were not cast as a prediction of demonstrable economic consequences, but rather as a threat of

64. *Id.*

65. *Id.* at 618–619 (citations omitted) (first alteration added, second alteration in original).

retaliatory action."[66] The Court further approved of the Board's finding that Sinclair intended the statements to be taken as a threat to terminate the employees upon unionization "regardless of the economic realities."[67] The Court noted that Sinclair "had no support for its basic assumption" that the union would certainly strike (the union had not yet made any demands), and approved the Board's finding that employees, given their sensitivity to plant closings, are likely to "take such hints as coercive threats rather than honest forecasts."[68]

Finally, the Court rejected Sinclair's contention that this standard for sorting between protected employer speech and unprotected threats was "too vague to stand up under traditional First Amendment analysis."[69] The Court reasoned that employers control the relationship, and they can "easily make [their] views known without engaging in '"brinkmanship"' when it becomes all too easy to 'overstep and tumble [over] the brink.'"[70]

Drawing the line between protected predictions grounded in fact and unprotected threats in the context of union representation elections has proven somewhat difficult in practice for lower courts applying the *Gissel Packing* standard.[71] Courts generally

66. *Id.* at 619 (citation and internal quotations omitted).

67. *Id.*

68. *Id.* at 619–620.

69. *Id.* at 620.

70. *Id.* (first alteration added, second alteration in original).

71. *See e.g. Village IX*, 723 F.2d at 1367 (citing Gorman, *supra* n. 42, at 151–156) (noting that "it is often difficult in practice to distinguish between lawful advocacy and threats of retaliation"); Bennett, *supra* n. 40, at 794 ("Although the language of the [*Gissel Packing*] rule seems clear, its application has rendered inconsistent results in cases with similar fact situations."); Matthew T. Bodie, *Information and the Market for Union Representation*, 94 Va. L. Rev. 1, 11 (2008) ("Ultimately, there is no clear line between impermissible threats and permissible campaign rhetoric."); Sylvia G. Eaves, *Employer Free Speech during Representation Elections*, 35 S.C. L. Rev. 617, 625 (1984) (stating that courts have had difficulty applying the objective fact standard of the *Gissel Packing* analysis, which has resulted in several different answers); Margulies, *supra* n. 32, at 460–461 (explaining that the confusion over whether employer statements violate the NLRA and the First Amendment is not clarified by the *Gissel Packing* decision, which has led to a number of inconsistent decisions from lower courts); *see also* Story, *supra* n. 39, at 422–432 (criticizing *Gissel Packing*'s "threat vs. prediction distinction" as too formalistic and too readily skirted by "management word smiths" who carefully craft anti-union communications as protected predictions); Volokh, *Employers' Urging*, *supra* n. 10 ("Since *Gissel*, federal courts have indeed tried to apply these distinctions, and have sometimes held employer speech to be protected and sometimes not, depending on exactly what was said."); *but see* Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 Am. Bus. L.J. 779, 830 (2013) (contending that *Gissel*

focus on "two primary factors" when applying *Gissel Packing*: (1) "'the extent to which the prediction is based on demonstrable probabilities;'" and (2) "'the extent to which the adverse consequences warned of are within the employer's control.'"[72]

Judge Posner, in *NLRB v. Village IX*,[73] described the distinction between an employer's protected predictions and unprotected threats as "difficult in practice," but nonetheless claimed that "[a]nalytically . . . the line is clear."[74] He summarized the *Gissel Packing* standard as follows:

> To predict a consequence that will occur no matter how well disposed the company is toward unions is not to threaten retaliation; to predict a consequence that will occur because the company wants to punish the workers for voting for the union—a consequence desired and freely chosen by the company rather than compelled by economic forces over which it has no control—is.[75]

In predicting the negative consequences of unionization, Judge Posner found that even the employer's "extremely informal analysis" was sufficient—at least in the circumstances of that case, which involved a small restaurant business.[76] Judge Posner rather wryly observed that the employer did not need to support its prediction with "detailed advance substantiation in the manner of the Federal Trade Commission" nor "hire a high-powered consultant to make an econometric forecast of the probable consequences of unionization on the restaurant business."[77] For Judge Posner, the employer's predictions based on "common sense

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Packing established a legal standard "that lower courts are fully capable of operationalizing" and noting that the Board and the lower courts "routinely apply this test").

72. *See* Bennett, *supra* n. 40, at 794 (quoting *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 938 (3d Cir. 1980)). Bennett further posits that the Board has increasingly and severely limited employer speech communicating the negative consequences of unionization, and that courts have generally "been reluctant to interfere with the Board's determinations." *Id.* at 795.

73. 723 F.2d 1360.

74. *Id.* at 1367.

75. *Id.*

76. *See id.* The employer pointed to the general competitiveness of "the restaurant business and to the fact that only one restaurant in [the city] was unionized and it was doing badly." *Id.* at 1368.

77. *Id. See also Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 780 (D.C. Cir. 1993) ("A small manufacturer is competent to recognize that if a plant is barely turning a profit on its product, any wage increase threatens its profitability and ultimately its survivability.").

and general experience" were sufficiently grounded in objective fact.[78]

Other courts appear to require more. In *Indiana Cal-Pro, Inc. v. NLRB*,[79] for example, the Sixth Circuit upheld the Board's finding that a plant superintendent's multiple statements to employees were unprotected coercion.[80] The superintendent's statements included telling an employee, "'I know one thing for sure, if that union gets in, the company will close the doors,'" and other similar statements.[81] The Sixth Circuit distinguished *Village IX* on the ground that, in this case, "no objective evidence was presented by the Company supporting a statement that unionization would result or even could result in an objectively required economic closing of the plant."[82]

Likewise, the Second Circuit enforced the Board's order in *NLRB v. Taber Instruments, Inc.*,[83] finding that the statements of management were unprotected coercion in violation of Section 8(a)(1).[84] The statements included: "'[T]he men don't realize what they could lose in this election. If [the Company] chooses to, they could phase out these operations throughout their other plants,'" and "'there was a possibility that in the event that the Union was successful that the Company, if they thought it in their best interest, could move some of the departments into other plants of the [Company].'"[85]

These cases demonstrate that the line *Gissel Packing* drew between protected employer speech and unprotected coercion is indeed a "fine one."[86] As a normative matter, whether this fine line has been drawn correctly remains the subject of ongoing debate.[87] Whether *Gissel Packing*'s fine distinction can or should be imported into the political election context is a separate ques-

78. *Village IX*, 723 F.2d at 1368.
79. 863 F.2d 1292 (6th Cir. 1988).
80. *Id.* at 1299.
81. *Id.* at 1295.
82. *Id.* at 1298–1299.
83. 421 F.2d 642 (2d Cir. 1970).
84. *Id.* at 644.
85. *Id.* at 643 (first alteration in original, second and third alterations added). For a number of other examples of Board orders and circuit court decisions finding employer speech unprotected coercion, see Bennett, *supra* n. 40, at 795–804.
86. *Village IX*, 723 F.2d at 1368.
87. *Compare* Bennett, *supra* n. 40, at 795–796 (as applied, the *Gissel Packing* test is too restrictive of employer speech) *with* Story, *supra* n. 39, at 423–424 (the *Gissel Packing* test is too readily manipulated by management to ensure that speech is protected).

tion. The next Part considers some reservations about that strategy as a means of expanding voter protections for employees in political elections.

IV. RESERVATIONS ABOUT THE UNION REPRESENTATION MODEL

In this Part, I consider two separate categories of reservations about the strategy of importing the *Gissel Packing* standard into the context of political elections. The first Subpart examines several reasons why courts or legislators might (perhaps justifiably) reject the idea of using the *Gissel Packing* standard to sort protected employer speech from unlawful intimidation or coercion in political elections. If advocates of the NLRA's union representation model are unable to persuade courts or legislators to import that model into political elections, then it is worth at least considering other potential strategies for expanding employees' voter protections. The second Subpart explores a separate category of concerns centering on the enforcement of voter intimidation laws and the remedies that would be available if the union representation model were imported into political elections. This Part concludes that these reservations and concerns make it worthwhile to consider alternative means of reducing employer intimidation.

A. Doubts about the Adoption of the Union Representation Model

The *Gissel Packing* opinion itself contains seeds of doubt about its potential applicability to political elections. First, the Court stated that the unique dynamics of labor union representation elections must be considered when evaluating the NLRA's limits on employer speech rights.[88] The Court stated that, in balancing employers' speech rights against employees' NLRA rights in representation elections, courts must "take into account the economic dependence of the employees on their employers," and further must recognize the "tendency of [employees], because

88. *Gissel Packing*, 395 U.S. at 617 ("Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1) and the proviso to [Section] 8(c).").

of that relationship, to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear."[89] The Court then went on to specifically distinguish union representation elections from political elections:

> Stating these obvious principles is but another way of recognizing that what is basically at stake [in a representation election] is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.[90]

This language alone suggests that the *Gissel Packing* Court did not envision that limitations on employer speech deemed acceptable intrusions on free speech in the NLRA context would be applicable to employer speech in the context of political elections. The consequences of a union representation election are more limited than a political election, in the sense that the appointment of a bargaining agent "confers *no* unilateral authority on unions; they must seek employers' consent in collective bargaining to any alteration of the law of the shop."[91]

There are other compelling reasons for differential treatment of employer speech in these two contexts. First, the application of the "demonstrably probable" prong of *Gissel Packing* would be considerably more problematic in political elections than it is in representation elections. In *Village IX*, Judge Posner found that no formal econometric analysis was required to connect unionization to predicted negative economic consequences.[92] However

89. *Id.*

90. *Id.* at 617–618.

91. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 501, 581 (1993) (emphasis in original) (arguing that key procedural and functional differences between representation elections and political elections justify removing employers entirely from any "legally sanctioned role in union elections"). Becker identifies a number of other holes in the analogy of representation elections to political elections, including that political elections are held at set times, political elections do not generally have a "none" option, and political elections have a pre-existing representation structure, whereas union elections inaugurate a representation system. *Id.* at 578–585.

92. *Village IX*, 723 F.2d at 1368; *supra* nn. 77–78 and accompanying text.

informal and unconvincing the evidence was in *Village IX*, the employer *did* at least point to some minimally specific information—the general competitiveness of the restaurant business and the economic troubles facing the only unionized restaurant in the area.[93] Employers speaking to their employees about the predicted consequences of political elections on their businesses may have difficulty pointing to any evidence that has even this minimal level of specificity. Specific evidence would be especially difficult to generate in elections for national office. For example, imagine if each of the small business owners participating in the NFIB conference call with Mitt Romney were required, in speaking with their respective employees, to point to some "demonstrably probable" negative consequences specific to their individual small businesses in the event of a win by Barack Obama. It seems unlikely that, at least for national elections, employers would be able to point to evidence that is both industry- and region-specific, as was the informal evidence in *Village IX*.[94]

Perhaps more generalized evidence should be sufficient in the political election context. For example, perhaps the NFIB small business employers should only be required, when speaking to their employees, to point to some general evidence that Mitt Romney's preferred policies would be better for small businesses as a whole. Perhaps a *Gissel Packing* standard in the political context would not require region-specific evidence or industry-specific evidence. If it required neither, then the "demonstrably probable" prong of *Gissel Packing* would be eviscerated entirely in the political election context. Given the sharp disagreement, even among leading economists, about approaches to federal legislation and executive enforcement (across a huge span of issues, including tax policy, labor law, environmental protection, healthcare, and other social welfare systems) that create the best economic environment for small businesses to thrive, the

93. *Village IX*, 723 F.2d at 1367; *supra* n. 76 and accompanying text.

94. Of course, some would argue that even the evidence in *Village IX* should not have been found sufficient to meet the *Gissel Packing* "demonstrably probable" hurdle. *See e.g.* Leonard Bierman, *Judge Posner and the NLRB: Implications for Labor Law Reform*, 69 Minn. L. Rev. 881, 887–892 (1985) (noting that a "major factor in Judge Posner's decision" appeared to be his belief that the employer's statements about the effects of unionization were "plausibly based on objective fact"); Ian Shapiro, *Richard Posner's Praxis*, 48 Ohio St. L.J. 999, 1034–1036 (1987) (criticizing Judge Posner's decision as an example of "*post hoc* redeciding of factual questions").

"demonstrably probable" prong would become meaningless. Any employer could easily point to informal, generalized evidence that the election of any particular candidate for national office would have negative economic consequences.

Further, an employer's economic interests are likely much more directly at stake in union elections than in political elections. The outcome of a representation election, while it will not change the "law of the shop" by itself, is nonetheless hugely important to the employer.[95] If the union wins, the employer must recognize the union as the collective bargaining agent for the employees; if the union loses, "the employer avoids the union 'problem' entirely."[96] The consequences of a political election for employers will likely be much more indirect—through the eventual passage of legislation that may have an effect on the business, or through executive enforcement activities under a particular administration.

Recognizing the stakes for employers, and concerned about employer overreach or overstatement when campaigning against unionization, the Board adopted the "laboratory conditions" standard for union representation elections.[97] Although the Board has vacillated somewhat on the "laboratory conditions" rhetoric,[98] the Board has repeatedly stated that unionization elections must be "more pristine" than ordinary political elections.[99]

The Second Circuit expressly rejected an argument that First Amendment standards for representation elections should be equivalent to those governing speech pertaining to political elec-

95. *See* Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 Duq. L. Rev. 779, 848 (1992) ("Since the Act bestows no substantial rights or powers on a union that *loses* an election, an employer's stake in an election is, from management's point of view, enormous." (emphasis in original)).

96. *Id.*; *see also Bausch & Lomb Inc.*, 451 F.2d at 879 ("Representation elections involve a more intimate relationship between the 'candidates'—union and employer—and the 'electorate'—employees.").

97. *See In re Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (U.S. NLRB 1948) (stating that the Board's function is to use "laboratory conditions" to learn the employees' "uninhibited desires").

98. *See NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 520 (7th Cir. 1997) (citing *Overnite Transp. Co. v. NLRB*, 104 F.3d 109, 112–113 (7th Cir. 1997)) (pointing out that "laboratory conditions" may be unattainable).

99. *Id.*; *see Cross Pointe Paper Corp. v. NLRB*, 89 F.3d 447, 451–452 (7th Cir. 1996) (noting that "voting in Board cases must be free of any impropriety" and that even activities that could be seen as improper are prohibited).

tions.[100] In *Bausch & Lomb Inc. v. NLRB*,[101] the Second Circuit considered an employer's argument that the Board had violated its First Amendment rights by ordering a second election on the basis of a letter sent to the employees containing a "half-truth and misstatement" about concessions the union had made when representing a different group of employees.[102] The employer argued that the Board's ruling, based on the laboratory conditions standard, violated the employer's First Amendment speech rights.[103] The Second Circuit noted that "misstatements or omissions which have the effect of misstatements . . . are not constitutionally protected."[104] The court acknowledged the existence of limitations on state punishment of speech where the punishment "'chills' constitutionally protected speech."[105] Nonetheless, the court found that the "minimal chilling effect" that may result from application of the Board's laboratory conditions standard is justified in the context of representation elections.[106] The court reasoned that "the incidental effects of regulation on the rights of employer and union must be weighed against the interest of employees and the public at large in free, fair and informed representation elections."[107] Flatly rejecting an analogy to political elections, the court continued:

> We are not concerned here with "debate on public issues" which commands extra "breathing space" under the [F]irst [A]mendment. The analogy of public elections to labor representation elections falls short of compelling similarity. Representation elections involve a more intimate relationship between the "candidates"—union and employer—and the "electorate"—employees. In the highly charged atmosphere which

100. *See Bausch & Lomb Inc.*, 451 F.2d at 879 ("We are not concerned here with 'debate on public issues' which commands extra 'breathing space' under the [F]irst [A]mendment. The analogy of public elections to labor representation elections falls short of compelling similarity." (citations omitted)).

101. 451 F.2d 873.

102. *See id.* at 875–876 (discussing the Board's finding that the employer's statement was a misrepresentation).

103. *Id.* at 877.

104. *Id.* at 878.

105. *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–265 (1964)).

106. *Id.* at 879.

107. *Id.*

> surrounds representation elections, election-eve lies can have a devastating effect.[108]

The D.C. Circuit has likewise suggested that the limitations on employer speech permitted in representation elections exceed the speech limitations that would be tolerated in political elections.[109]

Prior Board decisions, prior decisions of the courts of appeals, and critical functional differences between political elections and union representation elections all reinforce *Gissel Packing*'s own suggestion that employer speech can be subjected to more intrusive limitations in the labor context, without running afoul of the First Amendment, than it can be in the context of ordinary political elections.[110] There appears to be little reason for optimism that courts or legislatures will ignore this distinction and import the union representation election model to limit employer speech in political elections. Nonetheless, some courts or legislatures may eventually choose to borrow the rather malleable *Gissel Packing* standard for use in distinguishing between protected employer speech and unprotected threats in the context of political elections. If they do, a related set of concerns about the enforcement of such laws and the remedies available under them will be presented. The next Subpart considers these problems.

B. Enforcement and Remedies Problems

Even assuming that some courts or legislatures are open to the possibility of importing the union representation model into their voter intimidation protections for political elections, enforcement and remedies issues may thwart the model's effectiveness as a means for expanding protections for employee voters. This Subpart will briefly highlight only a sampling of the most obvious of such concerns.

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108. *Id.* (citation omitted).

109. *See Conair Corp. v. NLRB*, 721 F.2d 1355, 1398 (D.C. Cir. 1983) ("These limitations on employer conduct during organizational campaigns are more severe than we would tolerate in the political process, but they are acceptable in the labor context precisely because of the inherent potential for economic coercion of employees by the employer.").

110. *See generally Gissel Packing*, 395 U.S. at 617–618 (discussing the difference between a representation election and a political election).

The enforcement mechanisms for violations of the NLRA are quite different from the enforcement mechanisms under state voter intimidation statutes. In a union representation election, an employee subjected to intimidation or a union seeking to be recognized in the election may file an unfair labor practices charge with the NLRB for investigation and possible prosecution by the NLRB General Counsel.[111] The NLRB investigates all such charges, and if the General Counsel determines that there is "reasonable cause to believe" a violation has occurred, then it may issue a complaint and notice of hearing.[112] Following the General Counsel's complaint and an answer by respondent, a hearing is held before an Administrative Law Judge (ALJ).[113] Based on the evidence offered at the hearing, the ALJ issues his or her decision and recommended order, which becomes the Board's ruling if no party files an exception.[114] If an exception is filed, then the ALJ's ruling is reviewed by the Board, which issues its final decision and order.[115] Following the Board's determination, an aggrieved party may petition for review in the United States Circuit Courts and ultimately seek review by the United States Supreme Court.[116] Alternatively, if the aggrieved party neither complies with Board's order nor petitions for court review, the Board may "apply to a court of appeals to enforce its [decision and order]."[117]

In contrast, violation of most political election voter intimidation statutes (at least those lacking civil remedies) must be prosecuted by the appropriate criminal prosecutor.[118] Prosecutorial discretion, combined with problems of proof and the practical difficulties of sorting protected speech from unlawful intimidation, may prevent the zealous enforcement of the voter intimida-

111. *See* Ann Marie Lofaso, *NLRB Primer and the Boeing Complaint* 5–6, http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/field-content-file/pdf/Anne%20Lofaso/NLRB-Primer-Boeing-07-15-11.pdf (July 15, 2011) (discussing the procedures that take place when a charge is filed with the NLRB).

112. *Id.* at 5.

113. *Id.*

114. *Id.*

115. *Id.* at 5–6.

116. *Id.* at 6.

117. *Id.*

118. Some states' statutes do expressly establish a civil remedy. *See supra* n. 15 and accompanying text (providing examples of statutes with civil remedies). In some states, complaints of voter intimidation are first investigated and reviewed by an administrative agency, then referred to prosecutors. *Infra* n. 123 (discussing the Ohio Elections Commission's authority to investigate complaints and pass on findings to prosecutors).

tion laws. Indeed, voter intimidation statutes generally do not appear to be widely enforced today.[119] The subtlety of voter intimidation, along with concerns about a lack of "'concrete evidence,'" has limited the number of prosecutions under voter intimidation statutes.[120] If accepted, the Ackerman and Ayres proposal to import a union election model would not solve these problems. If anything, it would introduce a new, thin (some would say imperceptible) line between protected, fact-bound predictions and unprotected intimidation with which prosecutors will be forced to struggle.

The governing standards of proof for establishing statutory violations also differ. In the NLRA context, the General Counsel must demonstrate, by a preponderance of the evidence, that the employer's speech or conduct constituted an unfair labor practice in violation of Section 8(a)(1) of the NLRA.[121] The General Counsel need not prove that the employer actually *intended* to intimidate employees.[122] By contrast, under state penal voter intimidation statutes (without civil remedies), the prosecutor must establish a defendant's violation of the statute beyond a reasonable doubt.[123] Further, prosecutors may be required to meet

119. *See* Woodruff, *supra* n. 15, at 267 (speaking specifically about the lack of prosecution under federal statutes, but noting that "[t]his lack of prosecution appears to be common among election-related offenses").

120. *Id.* at 266–267 (quoting Donsanto & Simmons, *supra* n. 24, at 54).

121. *See* 29 U.S.C. § 160(c) (the Board's findings and orders to be based upon "the preponderance of the testimony taken"); *see also Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003) (recognizing that the burden of proof lies with the General Counsel); *Roper Corp. v. NLRB*, 712 F.2d 306, 310 (7th Cir. 1983) ("The General Counsel bears the burden of proving by a preponderance of the evidence that [the petitioner] committed an unfair labor practice."); *NLRB v. Silver Spur Casino*, 623 F.2d 571, 577 (9th Cir. 1980) (noting that the burden of proof in unfair labor practice cases is the preponderance of the evidence standard); 48A Am. Jur. 2d *Labor and Labor Relations* § 2053 (2005) (discussing the burden required to establish an unfair labor practice).

122. *See NLRB v. Ky. Tenn. Clay Co.*, 179 Fed. Appx. 153, 159 n. 6 (4th Cir. 2006) (quoting *Medeco Sec. Locks v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998)) ("[U]nlike violations of [Section] 8(a)(3), an employer's antiunion motivation is not a required element of [Section] 8(a)(1)."); *see also Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) (discriminatory motive not required). The relevant standard under Section 8(a)(1) of the NLRA is whether the employer's speech or acts "may reasonably tend to coerce or intimidate employees." *E. Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999).

123. *See State ex rel. Cohen v. Manchin*, 336 S.E.2d 171, 185 (W. Va. 1984) (violations of election law penal statutes require proof beyond a reasonable doubt). Some states appoint executive agencies to investigate potential election law violations, with varying administrative procedures. In Ohio, for example, the Ohio Elections Commission has authority to investigate complaints of election law violations. *See Dewine v. Ohio Elections*

a higher *mens rea* standard under voter intimidation statutes; in federal cases under Section 594, the government must prove that "'the actor intended to force voters to act against their will by placing them in fear of losing something of value.'"[124] If the *Gissel Packing* standard is imported into state penal voter intimidation statutes, prosecutors may be hesitant to prosecute under these standards. The line between unlawful coercion or threats and protected speech is a fine one, even in union elections.[125] In the political context, proving that an employer's predictive statement about negative consequences was not "demonstrably probable" and that the employer actually intended to force the employees to vote against their will—*beyond a reasonable doubt*—may be so daunting a task as to deter prosecutors from proceeding.

Finally, the remedies are drastically different. In the union election context, a finding that the employer unlawfully threatened or coerced employees typically results in a cease-and-desist order and an order for affirmative relief (such as notice posting or recitation).[126] In more egregious cases, the Board may enter an order setting aside the election and ordering a new election.[127] In less severe cases, the Board will simply enter a cease-and-desist order against the employer or order the

Comm'n, 399 N.E.2d 99, 104 (Ohio App. 10th Dist. 1978) (explaining that the Ohio Elections Commission must make a determination first before prosecution can begin). Upon a finding that the election statute has been violated, the Ohio Elections Commission then transmits its findings and evidence to the appropriate prosecutor. *Id.* at 104 (citing Ohio Rev. Code § 3599.091(C) (renumbered §§ 3517.21 and 3517.22)). For its finding, the Ohio Elections Commission acts like a grand jury and need not find a violation beyond a reasonable doubt. *Id.* at 105.

124. Henry Brewster, Grant Dubler & Peter Klym, *Election Law Violations*, 50 Am. Crim. L. Rev. 765, 795 (2013) (quoting Donsanto & Simmons, *supra* n. 24, at 57).

125. *See supra* pt. III(B) (discussing cases that demonstrate the fine line drawn by *Gissel Packing*).

126. *See* Terry A. Bethel & Catherine Melfi, *The Failure of* Gissel *Bargaining Orders*, 14 Hofstra Lab. & Empl. L.J. 423, 425 (1997) (recognizing that other remedies could include reimbursement of wages, promises that the conduct will not be repeated, and reinstatement of terminated employees).

127. *See id.* at 426 (noting that employer success rate is higher in rerun elections). Alternatively, in even more egregious circumstances, the Board may enter a "bargaining order" that requires the employer to recognize the union as the bargaining representative of the bargaining unit, if the employer has committed unfair labor practices making a new, fair election unlikely. *Gissel Packing*, 395 U.S. at 610–613; Bethel & Melfi, *supra* n. 126, at 426 (noting that other remedial measures are not always effective, and the bargaining order is the Board's most significant remedy); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 Fordham L. Rev. 2617, 2627 n. 57 (2011).

employer to mail corrective notices to the employees.[128] In the political election context, elections will not commonly be set aside or rerun.[129] Instead, a criminal penalty will be imposed. In most states, the violation of a voter intimidation statute constitutes a misdemeanor; in some, a felony.[130] In the few states that provide a civil remedy, the employer may be held civilly liable for a relatively modest amount.[131]

Given the difficult standards of proof and modest (if not wholly inadequate) criminal and civil remedies outlined above, the importation of *Gissel Packing* into voter intimidation statutes is unlikely to be a panacea for employer intimidation of employee voters. Even if some courts or legislators decide—contrary to *Gissel Packing*'s own suggestion—to experiment with the representation election model in the political election context, practical enforcement and remedies problems will likely prevent the model from becoming an effective tool for combatting employer intimidation. In light of all the foregoing reservations, legal scholars, courts, and legislators should continue the search for an alternative approach to expanding voter protections for employees, while preserving employers' First Amendment speech rights. The next Part considers whether *Kunkle v. Q-Mark*[132] can serve as an effective model for an alternative civil litigation strategy.

128. *See* Bethel & Melfi, *supra* n. 126, at 425 (noting that the typical remedy for threatening conduct is a cease-and-desist order).

129. *See* Woodruff, *supra* n. 15, at 272 ("Even if the prosecutor wins his or her case, courts are unlikely to overturn an election."); *see also Burson v. Freeman*, 504 U.S. 191, 209 (1992) ("Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout."); *but see Forbes*, 816 S.W.2d at 724 (allowing invalidation of an election upon some violations of statutes meant to curtail voter intimidation); 26 Am. Jur. 2d *Elections* § 342 (2013) (noting that courts generally will not set aside election results "unless the evidence establishes that the result was contrary to the will of the electorate," but providing examples of cases where elections have been overturned or set aside).

130. *See* Weinberg & Utrecht, *supra* n. 13, at 425 n. 85 (citing examples).

131. *See* Del. Code Ann. tit. 15 § 5162 (private right of action to recover $500); Mont. Code Ann. §§ 13-35-226(5), 13-37-128(2) (civil remedy enforced by commissioner of political practices or a county attorney, up to $500).

132. 2013 WL 3288398.

V. AN ALTERNATIVE STRATEGY: THE PUBLIC POLICY TORT

Can a civil litigation strategy based on the tort of wrongful discharge in violation of public policy curtail employer intimidation of employee voters? The recent federal district court decision in *Kunkle* could be a promising starting point. This Part argues that the theoretical underpinnings of the public policy exception to at-will employment are more than adequate to support a public policy tort based on voter intimidation laws. Although a public policy tort will not prevent all (or even most) instances of pre-election intimidation, the widespread adoption of the public policy tort could ultimately have a deterrent effect on employer intimidation, while not imposing unconstitutional limitations on employers' First Amendment speech rights. This Part begins with a brief description of the classic public policy torts, then proceeds to consider the normative justifications for extending the tort to reach voter intimidation by employers, as the district court did in *Kunkle*. Finally, this Part will consider whether a public policy tort litigation strategy could be effective in combatting employer intimidation, while acknowledging some probable shortcomings of the strategy.

A. The Classic Public Policy Torts

The starting point for most private sector employees under state law is at-will employment. All states other than Montana begin with the general default rule that employment relationships are at-will, unless otherwise agreed by the parties.[133] Generally speaking, employers in these forty-nine states can terminate their employees for any reason, or for no reason at all, except for particular reasons prohibited by federal, state, or local

133. *See* Mont. Code Ann. §§ 39-2-901 to 39-2-915 (establishing and outlining Montana's wrongful discharge laws, including a statutory default six-month probationary period, after which employees may only be terminated for good cause); *see also* Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. Pitt. L. Rev. 295, 343 n. 222 (2005) (referencing Montana's categorical denial of at-will employment); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 Mich. L. Rev. 8, 8–9 (1993) ("[O]nly Montana . . . has a statute requiring employers to have good cause before firing a worker." (footnote omitted)).

statutes.[134] From this general rule, state and local legislatures have carved some statutory exceptions, and courts have carved some common law exceptions based on contract and tort doctrine. In general, courts have drawn a fairly narrow tort exception for employment terminations in violation of public policy. The classic, paradigmatic examples of situations where most states will find a wrongful discharge claim based on public policy include:

(1) the employer terminates (or otherwise takes adverse action against) an employee for refusing to commit an unlawful act, such as perjuring herself at the request of her employer;

(2) the employer takes adverse action against an employee for fulfilling a public obligation, such as serving on a jury; and

(3) the employer takes adverse action against an employee in retaliation for the employee's exercise of a legal right, such as filing a workers' compensation claim.[135]

Professor Stewart Schwab persuasively argues that the common thread in most classic public policy tort cases is that the employer's action in terminating the employee has harmful

134. *See e.g. Payne v. W. & A. R.R. Co.*, 81 Tenn. 507, 519–520 (1884) (Employers "may dismiss their employe[e]s at will . . . for good cause, for no cause[,] or even for cause morally wrong, without being thereby guilty of legal wrong."). Examples of reasons prohibited by statute include termination "because of such individual's race, color, religion, sex, or national origin," which is prohibited by Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2.

135. *See* Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 Ohio St. L.J. 671, 722 (1996) (listing the three widely recognized scenarios in which the public policy exception is applied); Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law 1, 6–8 (1984) (discussing the public policy exceptions to the at-will doctrine, including discharge in retaliation for whistleblowing); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 Tex. L. Rev. 1943, 1954 (1996) (observing that this list of categories "is becoming hornbook law"); *see also* Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 Va. L. Rev. 205, 215 (2001) (noting that the key component to the public policy exceptions of at-will employment is the effect on third-party interests). Some commentators add a fourth category covering terminated whistleblowers. *See* James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. Colo. L. Rev. 91, 95–96 (1989) (including retaliation for whistleblowing among public policy wrongful discharge claims).

effects on third parties other than the employer and employee.[136] For example, an employer's termination of an employee for refusing to commit a crime harms the potential victims of the crime. Society would not enforce an express contract between an employer and employee that required the employee to commit crimes in exchange for higher wages, because the criminal behavior would have a negative impact on people not party to the contract.[137] So, the reasoning goes, it should permit an exception to at-will employment where the employer terminates the employee for refusing to engage in the criminal behavior. Otherwise, an employee would be coerced into choosing between committing the crime and keeping his or her job. The employee's economic interests in retaining the job may be sufficient to tip the scales in favor of committing the crime.[138] A public policy tort can give the employee some "backbone" to resist the employer's demand.[139]

A few courts have used quite broad language to define the scope of the public policy exception to at-will employment. The most famous of the broad statements was issued by the Illinois Supreme Court: "In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions."[140] Other courts, concerned about the potentially amorphous nature of the public policy exception, have hewn more closely to the precise language of the state statutes or constitution, rejecting appeals to the spirit of the law and insisting that

136. *See* Schwab, *supra* n. 135, at 1945, 1954–1957 (analyzing the third-party effects of each of the listed categories, except for whistleblowing). Professor Schwab notes that cases in the first and second category easily meet the third-party effects test—criminal laws generally protect third parties and an employee's fulfillment of public obligations typically operates to the benefit of third parties. *Id.* at 1954. Locating third-party effects in the third category can be somewhat more difficult, depending on the right exercised. For example, in filing a workers' compensation claim, only the injured employee's interest in recovering some compensation for an on-the-job injury and the employer's interest in keeping experience-rated workers' compensation insurance premiums to a minimum appear to be implicated. *Id.* at 1954–1955.

137. *Id.* at 1952.

138. *Id.* at 1952–1953.

139. *Id.* at 1953.

140. *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981); *see* Schwab, *supra* n. 135, at 1957 (acknowledging the "broad nature of public policy").

the tort exception be "carefully tethered" to the policies evidenced by the constitution or statutes.[141]

Regardless of whether public policy torts are best thought of as a court's search for the third-party effects of an employment action or as claims that are "closely tethered" to the violation of a specific constitutional provision or statute, the justifications for the public policy tort easily cover situations where employers take adverse employment actions against employees for voting for a particular candidate in a political action, as the next Subpart expounds.[142]

B. Recognizing a Public Policy Tort for Voter Intimidation

1. Kunkle *and the Contours of the Tort*

Mounting concern over expanding corporate influence and potential corruption in the United States electoral system following *Citizens United* may spur courts to expressly recognize a public policy tort claim where an employee alleges that he or she suffered an adverse employment action following his or her vote, and the employer had previously made a threatening or coercive statement in violation of state voter intimidation laws. To borrow Professor Schwab's terminology, courts could readily find that such action fits into the third category "pigeonhole"[143] of public policy—an adverse action in retaliation for the employee's exercise of a legal right. The justifications for the paradigmatic

141. *See* Schwab, *supra* n. 135, at 1957–59 (providing cases from multiple jurisdictions in which courts sought to pin public policy tort claims to statutory or constitutional foundations); *see e.g. Gantt v. Sentry Ins.*, 824 P.2d 680, 687–688 (Cal. 1992) ("A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public."). Professor Schwab is critical of courts' "misguided demand" that a plaintiff point to a specific statute or regulation that has been violated, contending that it appears to be serving as a proxy for locating third-party effects. *See* Schwab, *supra* n. 135, at 1956–1960 ("Yet many courts apparently use a violation of a statute as a proxy for finding a third-party effect.").

142. Volokh, *Threatening*, *supra* n. 13 ("Some of the statutes impose civil liability, others provide for criminal punishment, and others specifically provide for both. But given recent caselaw on the 'wrongful discharge in violation of public policy' tort, it seems likely that most state courts would impose civil liability for violation of the criminal statutes as well.").

143. *See* Schwab, *supra* n. 135, at 1954 (introducing the concept of "pigeonholes" for public policy torts).

public policy exceptions to at-will employment would also support recognition of this public policy tort.

The third-party effects of such action are relatively easy to discern. An election result tainted by unlawful coercion or intimidation of voters can negatively affect the constituents of the elected representative. Further, the claim is closely tied to violation of the state voter intimidation statute, which reflects the public policy of the state.[144] In addition to the state statutes, some states would also consider the federal voter intimidation statutes as a proper source of public policy for purposes of an employee's tort claim.[145]

The *Kunkle* case illustrates the recognition of this public policy tort. In *Kunkle*, a district judge in the United States District Court for the Southern District of Ohio predicted that Ohio would find a public policy exception to the at-will employment rule where an employer terminated an employee "based upon the employee's refusal to vote as the employer *demand[ed]* via threats or intimidation."[146] In *Kunkle*, the plaintiff, Patricia Kunkle, was an employee of defendant, Q-Mark, Inc. (Q-Mark).[147] Following her termination, Kunkle brought suit against Q-Mark and its sole shareholder and highest-ranking officer, Roberta Gentile, alleging wrongful discharge in violation of Ohio's public policy.[148]

Kunkle alleged that before the 2012 presidential election, "Gentile threatened Q-Mark employees with termination if President Obama was re-elected."[149] Kunkle alleged that Gentile told the employees "that Obama supporters would be the first employees terminated if President Obama was re-elected."[150]

144. *See supra* pt. II (discussing voter intimidation statutes throughout the United States).

145. *See* Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. Pa. J. Lab. & Empl. L. 623, 637–644 (2006) (summarizing the range of state law on the question of whether (and when) federal law can serve as the source of a state's public policy for purposes of a wrongful discharge claim); *see also Kunkle*, 2013 WL 3288398 at *2 (noting that one of the elements of wrongful discharge in violation of public policy included the manifestation of public policy in state or federal law).

146. *Kunkle*, 2013 WL 3288398 at *3 (emphasis in original) (relying, in part, on Ohio Revised Code Section 3599.06).

147. *Id.* at *1.

148. *Id.*; Defs.' Mot. for Partial Judgm. on the Pldgs. at 2 n. 1, *Kunkle v. Q-Mark, Inc.*, 2013 WL 3288398 (S.D. Ohio, June 28, 2013) (No. 3:13-cv-00082) [hereinafter *Kunkle* Motion].

149. *Kunkle*, 2013 WL 3288398 at *1.

150. *Id.*

Kunkle also alleged that Gentile "'engaged Q-Mark employees, including Kunkle, in conversation aimed at discovering the employees' political affiliations.'"[151] Kunkle further alleged that on November 7, 2012, the day after the election, she "'stated at work that she had voted a "straight [Democratic] ticket."'"[152] Kunkle alleged that Gentile "either knew or believed that" Kunkle had voted for Obama, and that on November 9 (three days after the election), Kunkle was terminated for that reason.[153]

Defendants Q-Mark and Gentile moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that Kunkle had failed to allege a wrongful discharge in violation of public policy under Ohio law.[154] The district court denied the defendants' motion, predicting that Ohio would recognize a public policy exception to at-will employment under the facts alleged.[155] As sources for the public policy it recognized, the court looked to the Ohio election law statutes, including Ohio Revised Code, Section 3599.06, which provides, in relevant part, that:

> No employer, his officer or agent, shall discharge or threaten to discharge an elector for taking a reasonable amount of time to vote on election day; . . . or threaten to inflict any injury, harm, or loss; or in any other manner practice intimidation in order to induce or compel such person to vote or refrain from voting for or against any person or question or issue submitted to the voters.[156]

The court also found that federal law could be a source of the state's public policy, including Title 18 U.S.C. Section 594, discussed above.[157]

Next, the court rejected defendants' argument that the voter intimidation statutes are only directed to pre-election conduct and do not specifically criminalize an employer's termination of

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at *3.
156. *Id.* at *2 (quoting Ohio Rev. Code § 3599.06).
157. *Id.*; *see supra* n. 19 and accompanying text (discussing the underlying federal statute relied on in *Kunkle*).

an employee on the basis of the employee's vote.[158] Even though the statutes may not have expressly criminalized the employer's termination of Kunkle based on her vote, the Ohio statutes at issue clearly evinced the public policy of the state.[159] The court held:

> In order to more fully effectuate the public policy clearly set forth in Ohio [Revised Code Sections] 3599.01, 3599.05 and 3599.06, *i.e.*, prohibiting threats and intimidation of voters in an effort to influence their vote, an employer's common-law right to discharge employees [at will] must be limited to prevent circumstances where an employee is terminated based upon the employee's refusal to vote as the employer *demands* via threats or intimidation. Accordingly, the Court concludes that the averments in the Complaint allege a violation of clear Ohio public policy.[160]

The defendants also argued that the remedies provided by the Ohio criminal statutes provided "sufficient penalties for violations of those sections to protect the public interest involved."[161] Unmoved, the court noted that the Ohio voter intimidation statutes provided no private civil remedies.[162] Even though criminal penalties may provide some deterrence, simply through the threat of criminal prosecution, the civil remedy of a public policy tort, as an exception to at-will employment, is necessary to "'more fully effectuate the state's declared policy.'"[163] The *Kunkle* case settled out of court in late 2013.[164]

2. Avoiding Complex First Amendment Questions

The *Kunkle* defendants mentioned the possibility of First Amendment issues in their motion for judgment on the pleadings, but they did not seriously press the First Amendment as a basis

158. *Kunkle*, 2013 WL 3288398 at *3.

159. *See id.* (lack of criminalization of defendants' conduct "does not mean that Ohio has failed to sufficiently express public policy against such conduct by enacting" the statutes at issue).

160. *Id.* (emphasis in original).

161. *Id.*

162. *Id.* at *4.

163. *Id.* (quoting *Collins v. Rizkana*, 652 N.E.2d 653, 668 (Ohio 1995)).

164. Mark Gokavi, *Company Settles with Fired Obama Voter*, Columbus Dispatch, http://www.dispatch.com/content/stories/local/2013/12/23/company-settles-with-fired-voter-for-obama.html (Dec. 23, 2013, 5:22 a.m.).

for rejecting Kunkle's public policy theory.[165] The district court did not address the potential applicability of the First Amendment as a limit on the public policy tort.[166] Unlike the *Gissel Packing* approach advocated by Ackerman and Ayres, which will unquestionably raise deeply complex First Amendment questions about limiting employer speech,[167] the public policy tort approach should allow courts to sidestep those concerns. Where an employer has actually taken an adverse action against an employee—following through on its threat—the employer has not simply engaged in pure speech, but instead has engaged in either unprotected conduct or less-protected "speech plus conduct."[168]

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165. *See Kunkle*, 2013 WL 3288398 (failing to mention either the words "First Amendment" or the words "free speech" at any point in the opinion); *Kunkle* Motion, *supra* n. 148, at 10, 11 n. 8 (including a footnote contending, in passing and without analysis, that certain provisions of one Ohio statute, Ohio Revised Code Section 3599.05, might be questioned on First Amendment grounds). As mentioned above, *Citizens United* may have introduced some questions about the constitutionality of some provisions of the voter intimidation statutes themselves. *See supra* n. 9 and accompanying text (addressing the potential impact of voter intimidation statutes on First Amendment rights).

166. *See Kunkle*, 2013 WL 3288398 (failing to discuss the First Amendment at all).

167. *See supra* pt. IV(A) (discussing the First Amendment implications of the *Gissel Packing* standard and the applicability of the union representation model to political elections).

168. *Cf. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–579 (1988) (interpreting NLRA Section 8(b)(4) as not reaching handbilling that is not combined with picketing, patrolling, or other coercive nonspeech conduct); *Int'l Bhd. of Teamsters, Loc. 695 v. Vogt, Inc.*, 354 U.S. 284, 294–295 (1957) (permitting restrictions on picketing); Timothy F. Ryan & Kathryn M. Davis, *Banners, Rats, and Other Inflatable Toys: Do They Constitute Picket Activity? Do They Violate Section 8(b)(4)?* 20 Lab. Law. 137, 140–141 (2004) (discussing the *DeBartolo* decision and the subsequent rule that handbilling, without any other intimidating conduct, does not violate Section 8(b)(4)). For the proposition that speech plus conduct is less protected, see, for example, *R. A. V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[A] particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."); Ann Kordas, *Losing My Religion: Controlling Gang Violence through Limitations on Freedom of Expression*, 80 B.U. L. Rev. 1451, 1460 (2000) ("'Speech[ ]plus[ ]conduct' involves a speech act combined with a conduct element, such as picketing. 'Speech[ ]plus[ ]conduct' receives less First Amendment protection than does 'pure speech' . . . ."); *but see* Peter Caldwell, *Hostile Environment Sexual Harassment & First Amendment Content-Neutrality: Putting the Supreme Court on the Right Path*, 23 Hofstra Lab. & Empl. L.J. 373, 379–389 (2006) (pointing out weaknesses in the concept of a "'conduct[ ]not[ ]speech' exemption" from heightened First Amendment scrutiny); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 S. Ct. Rev. 1, 14–16 (1994) (discussing, and rejecting, the idea that free speech may be regulated more stringently if it incidentally falls within a general statutory prohibition aimed at conduct, rather than speech). To the extent that the "speech plus conduct" rule has been eroded by more recent cases finding protection for flag burning, nude dancing, cross burning, or other types of "expressive conduct," such erosions should not be thought to encompass adverse employment actions taken by employers—at least not while labor picketing

An employer's termination of an employee in retaliation for the employee's refusal to vote in a particular way should be viewed as conduct not protected by the First Amendment. The Court has repeatedly held that discrimination in the terms or conditions of contracts is unprotected conduct, not speech.[169] The public policy tort proscribes the conduct of taking an adverse employment action, and any effect the tort has on employer speech is incidental to the regulation of the employer's conduct.

Even if the tort involved here is considered regulation of "speech plus conduct," that category is still less protected than pure speech, and the tort should be upheld under the applicable level of scrutiny. The Court has held that where speech and nonspeech elements are combined in the same course of conduct, government may regulate speech where the regulation is within its constitutional power; it furthers an "important government interest . . . 'unrelated to the suppression of free expression;'" and where "the restriction of First Amendment freedoms is no greater than is essential to that interest."[170]

Recognizing a public policy tort would satisfy these requirements. The state courts have the power to identify the public policy of the state and recognize a common law civil tort action to effectuate that public policy.[171] The recognition of the tort furthers the important government interest of effectuating the public policy embodied in the voter intimidation statutes—

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remains less protected. *See generally* William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 Ohio St. L.J. 1115, 1154–1155 (2011) ("Only labor picketing goes unprotected, even where statutory prohibitions require no proof of intent to intimidate or actual intimidation and none is shown.").

169. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (noting that the compelled speech at issue was simply incidental to the regulation of conduct, and not a First Amendment violation); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 Fordham L. Rev. 33, 73–74, 73 nn. 151–154 (2008) (collecting cases). The Supreme Court has suggested that violations of Title VII would be unprotected conduct, even though sometimes taking the form of speech, because the regulation is directed at conduct. *See R. A. V.*, 505 U.S. at 389–390 (discussing Title VII's prohibition against discrimination and noting that the First Amendment permits "laws directed not against speech but against conduct," and further that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy").

170. Kordas, *supra* n. 168, at 1460 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)); *see also Edwards v. Dist. of Columbia*, 943 F. Supp. 2d 109, 117 (D.D.C. 2013) (discussing the incidental limitations that may occur on First Amendment freedoms when speech and nonspeech elements are combined in the same conduct).

171. *Supra* pt. V(A).

namely, to prevent the unlawful coercion or intimidation of voters, thus ensuring a free and fair political election. That interest is unrelated to the suppression of the employer's lawful political speech. And the recognition of the public policy tort does not impose any prior restraint, content-based restraint, or other restriction that would be greater than necessary to further the government's interest in preventing unlawful voter intimidation. The public policy tort recognized in *Kunkle* would be aimed at an employer's *conduct* in violation of state's public policy—an adverse employment action taken against the employee because the employee refused to comply with the employer's demand to vote a certain way. This tort would only incidentally restrict employer speech, and therefore would not run afoul of the more limited First Amendment protections for conduct involving both speech and nonspeech elements.

C. Deterring Voter Intimidation

The *Kunkle* court emphasized the need to recognize public policy torts to "more fully effectuate" the state's declared public policy, even where a state statute imposes criminal penalties for violation of the statute.[172] One question about the public policy tort strategy is whether recognition of the public policy tort will actually have a significant effect in deterring employer intimidation of employees. After all, an employer will only be liable under this tort theory if it actually takes an adverse action against an employee. Unfulfilled threats, coercion, or intimidation may constitute a violation of the applicable state voter intimidation law, but they would not be sufficient to trigger the civil tort remedy for employees in the absence of an adverse employment action.

There is some force to this criticism of the public policy tort strategy. Eugene Volokh posits that actual retaliation against an employee, taken on the employer's own volition, for the employee's vote is probably rare.[173] For one thing, the secret ballot makes actual retaliation in the form of adverse employment

172. *Kunkle*, 2013 WL 3288398 at *4 (quotation omitted).

173. *See* Volokh, *Employers' Urging*, *supra* n. 10 ("But it is the rare employer, I think, that would in a fit of pique close or cut back its business just because management is upset at how the nation at large has voted in a Presidential election.").

action somewhat less likely. Unless employees tell their employers how they voted, employers can never be certain. But this point can easily be overstated. Employers can glean information about which way an employee likely voted in an election based on a number of bits of information that could be available to the employer, including car bumper stickers, yard signs, and discussion of hot-button political issues in the workplace. Indeed, in *Kunkle*, the plaintiff alleged that defendant Gentile specifically engaged employees in discussion designed to reveal the employee's political leanings.[174] At the very least, recognition of a public policy tort may cut down on such management efforts to try to figure out which way an employee is likely to vote in an upcoming election or is likely to have voted in a recent election.[175]

That the employer might be incorrect in its educated guess about the employee's vote ought to be irrelevant. If the reason for the adverse employment action was retaliation for the employee's vote, then the public policy concern reflected in the voter intimidations statute is implicated—whether the employer was mistaken or not.[176] To fully effectuate the purposes of the voter

174. *See supra* n. 151 and accompanying text.

175. Employers commonly avoid asking questions of job applicants or employees that could undermine an ignorance defense in potential discrimination litigation. Thus, employers generally avoid asking job applicants questions about protected categories, such as the applicant's religion, national origin, or history of disabilities. *See e.g.* Megan Whitehill, Student Author, *Better Safe than Subjective: The Problematic Intersection of Prehire Social Networking Checks and Title VII Employment Discrimination*, 85 Temp. L. Rev. 229, 252–253 (2012) (noting that asking about such topics in interviews can be used against an employer later to show discriminatory intent).

176. Courts have found valid public policy tort claims and statutory retaliation claims even where the employer terminated an employee in the mistaken belief that the employee made a report to an enforcement agency. *See Brock v. Richardson*, 812 F.2d 121, 124–125 (3d Cir. 1987) (Fair Labor Standards Act retaliation claim where employee was protected even though employer was mistaken); *Saffels v. Rice*, 40 F.3d 1546, 1547–1550 (8th Cir. 1994) (employer's mistaken belief that employee made report to the Occupational Health and Safety Administration (OSHA) and to the Department of Labor Wage and Hour Division supported Missouri public policy tort claim and Fair Labor Standards Act retaliation claim). Under the Americans with Disabilities Act (ADA), individuals erroneously "regarded as" disabled by their employer are expressly protected by the statute. 42 U.S.C. § 12102(1)(C). Although some courts have held that such "regarded as" liability does not attach in the Title VII context, there seems little normative justification for this distinction. *See* D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. Mich. J.L. Reform 87, 114–117 (2013) (explaining that the ADA expressly includes "regarded as" language while Title VII does not, but that this distinction by the court is without merit and ignores the long-shared philosophies behind the two laws); *see generally* Craig Robert

intimidation statutes, liability in *Kunkle*-type cases should attach regardless of which way the employee actually voted.

Even where employers know or have reason to know how an employee voted, actual retaliation against the employee for the vote may still be rare. On this point, empirical evidence is lacking. But even if cases like *Kunkle* are in fact rare, they do exist.[177] And the existence of just a few meritorious cases of actual retaliation in response to an employee's vote (especially if widely reported) would add to the overall deterrence of voter intimidation by employers. Finally, the retaliation ought not be required to rise to the level of termination. Wrongful demotions, wrongful denials of promotions, or other adverse actions that have a significant effect on the terms and conditions of employment, such that a reasonable employee would likely be deterred from voting as he or she wishes based on the adverse action, should also be sufficient to support a *Kunkle*-type public policy claim.[178]

Voter intimidation has characteristics that make it particularly well-suited to the recognition of a public policy tort to accompany statutory criminal penalties. The criminal statutes appear to be under-enforced. Although additional study of the enforcement of state voter intimidation statutes is warranted, there are very few reported decisions citing these statutes. The

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Senn, *Perception over Reality: Extending the ADA's Concept of "Regarded As" Protection under Federal Employment Discrimination Law*, 36 Fla. St. U. L. Rev. 827 (2009) (addressing the erroneous distinction that exists between the ADA and other federal anti-discrimination law and the need for uniform application of "regarded as" language).

177. *E.g.* Jillian Berman & Zach Carter, *Obamacare Layoffs: Georgia Businessman Claims He Fired Workers because Obama Won*, Huffington Post, http://www.huffingtonpost.com/2012/11/08/obamacare-layoffs-georgia-obama_n_2095162.html (updated Nov. 9, 2012, 12:09 p.m. EST).

178. *See Brigham v. Dillon Cos.*, 935 P.2d 1054, 1059–1060 (Kan. 1997) (retaliatory demotion); *Trosper v. Bag 'N Save*, 734 N.W.2d 704, 711 (Neb. 2007) (retaliatory demotion for filing a worker's compensation claim); *Powers v. Springfield City Schs.*, 1998 WL 336782 at **5–6 (Ohio App. 2d Dist. June 26, 1998) (wrongful denial of promotion); Charles A. Sullivan, Workplace Prof Blog, *Goodbye Wrongful Demotion?* http://lawprofessors.typepad.com/laborprof_blog/2014/01/goodbye-wrongful-demotion.html (Jan. 15, 2014) (analyzing the status of wrongful discharge as a public policy tort). Several other jurisdictions have rejected public policy or retaliatory discharge torts where the employee suffered an adverse action short of termination. *See e.g. Zimmerman v. Buchheit of Sparta, Inc.*, 645 N.E.2d 877, 882 (Ill. 1994) (declining to adopt a retaliatory demotion doctrine for fear that it "would replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept"); *see also* Michael D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending the Public Policy Exception beyond the Wrongful Discharge Context*, 13 Lab. Law. 371, 372 (1997) (noting that the public policy exception has rarely been applied to scenarios other than discharge).

federal statutes are rarely enforced for several reasons, including the subtlety of coercion, difficulties of obtaining concrete proof, and the high burden of proof placed on prosecutors.[179] As a result of under-enforcement, the pre-election intimidation of voters may be under-deterred. Mitt Romney's statement during the NFIB conference call imploring small business owners to "make it very clear" to employees what is "in the best interest of . . . their job[s]," as well as other examples of aggressive tactics by employers during recent elections suggest that employers are not living in fear of prosecution for voter intimidation violations.[180]

The public policy civil tort approach has several advantages that can improve deterrence. First, the applicable standard of proof in a civil tort case is the preponderance standard, rather than a reasonable doubt standard.[181] Second, a public policy tort claim holds the potential for punitive damages, which courts have allowed where "an extra measure of deterrence" is needed "in light of petty compensatory remedies or criminal sanctions."[182] Third, public policy claims have the effect of creating an "atmosphere of caution."[183] Employers may be more careful not to intentionally question employees on their voting behavior, and may be somewhat more cautious in their political speech to employees, in

179. *See supra* nn. 23–25 and accompanying text (addressing the historical difficulties of enforcing the federal statutes).

180. Duvivier, *supra* n. 1; *see supra* nn. 5, 27, and accompanying text (assessing the repercussions of the Court's decision in the *Citizens United* case).

181. Hubbell, *supra* n. 135, at 115. It should be noted that Hubbell advises caution in the recognition of public policy or retaliatory discharge torts, and contends that the lower preponderance standard of proof poses a danger, in that the civil tort claim may "circumvent the checks on expansive or doubtful applications of [the predicate criminal statutes] by removing the prudential constraints that a reasonable doubt standard and the exercise of prosecutorial discretion might otherwise provide." *Id.* Hubbell's concern is error and over-deterrence where the contours of underlying violations are not clear; while Hubbell cogently states the case for caution and error avoidance, it appears that voter intimidation statutes may be so difficult to enforce through criminal prosecution that a public policy tort is an appropriate vehicle to move deterrence closer to optimal levels. *Cf. id.* at 123 ("[N]arrowly defined and properly applied, the benefits of the retaliatory discharge action generally outweigh its costs as a tool for enforcing the law. From the employer's standpoint, by increasing the chances of successful prosecution of unlawful actions, as well as the magnitude of sanctions that may be imposed for them, it furthers compliance with the law.").

182. *See* Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 Wm. & Mary L. Rev. 449, 480 (1985) (describing public policy tort cases approving punitive damages).

183. Hubbell, *supra* n. 135, at 124.

an effort to avoid crossing the admittedly fine line between lawful persuasion and unlawful coercion or intimidation.

Finally, public policy claims may play a role in educating employees about their right to vote how they want, free from fear that their employer can fire them simply on the basis of how they choose to vote. Professor Schwab noted that recognition of public policy claims can give employees the "backbone" to choose a course of action free from coercion.[184] As employees learn of successful public policy claims by employees like Kunkle—which will likely be high-profile if they involve large damage awards[185]—employees may develop the fortitude needed to resist an employer's threat to terminate them based on the way they vote.

VI. CONCLUSION

After *Citizens United*, employers will have an opportunity to combine political speech with economic leverage to pressure their employees to vote as the employers would prefer in political elections. The 2012 presidential election saw employer conduct that may well have crossed the line into unlawful coercion. If, as many observers suspect, this trend continues in future elections, the application of state and federal voter intimidation laws will become increasingly important.

The question of how best to respond to this trend and protect employees from voter intimidation is a delicate one. Expanding statutory protections for employees would raise complex First Amendment questions that test the boundaries of valid state limitations on employer political speech rights. While some have suggested that these First Amendment concerns can be resolved by borrowing the *Gissel Packing* model from the union represen-

184. Schwab, *supra* n. 133, at 1953.

185. That Kunkle even made such a claim and survived a motion for judgment on the pleadings was reported in the national media. *E.g.* Associated Press, *Ohio Woman Reportedly Claims She Was Fired for Obama Vote*, Politico, http://www.politico.com/story/2013/02/ohio-woman-patricia-kunkle-claims-she-was-fired-for-obama-vote-87848.html (Feb. 20, 2013, 9:45 a.m. EST); Jillian Berman, *Patricia Kunkle Claims She Was Fired from Q-Mark Inc. for Voting for Obama*, Huffington Post, http://www.huffingtonpost.com/2013/02/20/patricia-kunkle-obama_n_2725173.html (Feb. 20, 2013, 11:29 a.m. EST); Steve Frank, *Ohio Woman Claims in Lawsuit She Was Fired for Voting for Obama*, http://www.msnbc.com/the-ed-show/ohio-woman-claims-lawsuit-she-was-fired-fo (updated Sept. 13, 2013, 8:47 a.m.).

tation election context, it seems doubtful that legislatures or courts will accept this invitation. Important and long-recognized differences between union representation elections and political elections may suggest the need for differential treatment. Further, even if implemented, enforcement and remedies issues could undermine the effectiveness of a *Gissel Packing* model in the political election context.

This Article has urged an alternative source of protection from voter intimidation by employers—the express recognition of a public policy civil tort remedy, grounded in state or federal voter intimidation statutes. This approach can improve deterrence of voter intimidation by reducing the applicable burden of proof, avoiding the effect of prosecutorial discretion in criminal cases, and providing more significant remedies, including punitive damages where appropriate. The approach also has the benefit of avoiding the most difficult First Amendment issues presented by the *Gissel Packing* model. Although no constitutional solution is likely to provide optimal deterrence levels or completely eliminate voter intimidation by employers, the express recognition of a public policy tort holds the potential to enhance the deterrence of unlawful intimidation, without running afoul of the First Amendment protections recognized in *Citizens United*.