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Pauline T. Kim

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## MARKET NORMS AND CONSTITUTIONAL VALUES IN THE GOVERNMENT WORKPLACE\*

PAULINE T. KIM\*\*

*The conventional wisdom that public employees enjoy greater rights by virtue of the Constitution may no longer hold true. In recent cases, the Supreme Court has analogized public and private employment, having the effect of eroding the speech and privacy rights of government employees. This Article critically examines this trend, arguing that reliance on an analogy to the private sector is mistaken because the arguments for giving private employers broad managerial discretion do not apply with the same force, or at all, to government employers. Rights-based arguments do not apply to government agencies, which are publicly funded to achieve publicly defined purposes and cannot assert independent rights to property or autonomy to avoid compliance with constitutional norms. Similarly, the claim that market pressures will control overreaching by private firms has little application. In the private sector, compensation structures and competition for corporate control help align the incentives of managers with the interests of the firm; however, those mechanisms are largely unavailable in the public sector. Instead, public accountability is key to ensuring that government managers act within the bounds set by the public's interest. Because public employees stand in a unique position to observe improper government conduct, their constitutional speech and privacy rights should be interpreted not by reference to market norms, but with an eye to protecting the mechanisms of public accountability.*

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\*\* Charles Nagel Chair of Constitutional Law and Political Science, Washington University School of Law, St. Louis, Missouri. I am grateful to Lauren Abbott, David Collier, and Matt Hoffman for their research assistance and to Sam Bagenstos, Scott Baker, Marion Crain, Greg Magarian, Heidi Kitrosser, Jon Michaels, Alison Morantz, Peggie Smith, Rip Verkerke, and Laura Weinrib for their comments on earlier drafts of this paper. I have also benefitted greatly from feedback from participants at faculty workshops at the University of Virginia Law School and Washington University Law School, at Wisconsin Law School's Conference on the Constitutionalization of Labor and Employment Law, and at the Seventh Annual Labor & Employment Law Colloquium in Chicago.

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### INTRODUCTION

In January 2009, as President-elect Barack Obama was preparing to take office, a group of employees at the Federal Drug Administration (“FDA”) sent a letter to John Podesta, head of the presidential transition team. The letter, signed by nine scientists working for the agency, raised concerns about the review process for medical devices at the FDA.<sup>1</sup> Specifically, it alleged that managers at the agency had ignored serious concerns about the safety and effectiveness of those devices and had ordered the physicians and scientists responsible for evaluating them to modify their expert evaluations, conclusions, and recommendations in order to facilitate approval and clear the devices for market.<sup>2</sup> The letter warned that these practices threatened the health and safety of the American public and urged the new administration to make reform of the FDA a top priority.<sup>3</sup> National news outlets reported on the letter and its allegations of misconduct and corruption at the agency.<sup>4</sup>

1. Letter from Physicians and Scientists, FDA, to John D. Podesta, Co-chairman, Presidential Transition Team (Jan. 7, 2009), <http://www.whistleblowers.org/storage/whistleblowers/documents/FDAwhistleblowers/letter2transitionteam.pdf> [http://perma.cc/L2BV-TW4N].

2. The letter cited as one example the agency’s approval of mammography computer-aided detection devices despite flawed testing and a lack of clinical evidence of their effectiveness. *Id.* at 3. Post approval, agency decision-makers ignored evidence suggesting the devices were ineffective and potentially harmful. *Id.*

3. *Id.*

4. See, e.g., Alicia Mundy & Jared A. Favole, *FDA Scientists Ask Obama To Restructure Drug Agency*, WALL ST. J. (Jan. 8, 2009, 10:50 AM), <http://www.wsj.com/articles/SB123142562104564381> [http://perma.cc/NRR5-P8RE (dark archive)].

After the news reports appeared, managers at the FDA began secret surveillance of the electronic communications and computer activities of the employees who had signed the letter.<sup>5</sup> Spyware installed on government-owned computers and networks used by the targeted employees allowed FDA officials to monitor all of their email communications, including emails sent and received through personal, password-protected services, such as Gmail, that were viewed on government equipment or otherwise passed through a government-owned network.<sup>6</sup> The software also took screen shots of the targeted employees' work computers, such that any information the employees viewed could be captured and retrieved later even if the employees themselves did not save the information.<sup>7</sup> Through use of this surveillance software, the government allegedly captured some 80,000 pages of computer documents over many months, including emails sent to or received from journalists, members of Congress and their staff, attorneys, and other agency scientists who shared similar concerns.<sup>8</sup> The scope of the monitoring was so pervasive that it also captured the employees' communications with family members, spouses, and partners, revealing personal medical and financial information.<sup>9</sup> Several of the employees were eventually terminated by the agency.<sup>10</sup> After the surveillance was publicly revealed, the targeted employees sued, alleging violations of their First and Fourth Amendment rights.<sup>11</sup>

Imagine a similar scenario unfolding in a private firm. Several employees get together to raise concerns about perceived mismanagement or corruption, and their superiors retaliate against

5. The allegations regarding the FDA's surveillance of the targeted employees are detailed in a complaint filed in federal court. *See* First Amended Complaint at 11, 16–17, *Hardy v. Hamburg*, 69 F. Supp. 3d 1 (D.D.C. 2014) (No. 1:11-cv-01739-RLW); *see also* *Halt Whistleblower Surveillance*, NAT'L WHISTLEBLOWERS CTR., [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=1345&Itemid=206](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1345&Itemid=206) [<http://perma.cc/37C4-2QX8>] (providing examples of the employees' electronic communications, which were monitored as part of the surveillance program).

6. Eric Lichtblau & Scott Shane, *Vast F.D.A. Effort Tracked E-Mails of Its Scientists*, N.Y. TIMES, July 15, 2012, at A1.

7. *Id.*

8. *Id.*

9. *See* First Amended Complaint, *supra* note 5, at 50.

10. Editorial, *The Spy Hunt for Whistle-Blowers*, N.Y. TIMES (July 22, 2012), <http://www.nytimes.com/2012/07/23/opinion/the-spy-hunt-for-whistle-blowers.html> [<http://perma.cc/3B73-929P> (dark archive)].

11. *See* First Amended Complaint, *supra* note 5, at 50–51. The suit was dismissed by the district court on September 23, 2014, for lack of jurisdiction. *See Hardy v. Hamburg*, 69 F. Supp. 3d 1, 26 (D.D.C. 2014).

them. One form of retaliation involves surreptitious surveillance of the employees' electronic communications. Some employees are fired as a result of their complaints. The employees might claim that their rights of speech and privacy had been violated, but because they are employed by a private firm they would not be able to invoke First and Fourth Amendment protections as the FDA employees did. Instead, the availability of legal protection would be contingent on such factors as the state jurisdiction in which they work, whether their speech reported a violation of a specific type of statute, and what policies the employer had previously announced. Certain types of speech—for example, employee participation in public debate—would likely not be protected at all. And if, like many private firms, the employer reserved the right to monitor employee communications, the employees would have a difficult time establishing that the surveillance violated their rights.

Should the fact that the controversy at the FDA involved a *government* rather than private workplace make any difference to the legal outcome? The conventional wisdom is that public sector employees enjoy greater rights of speech and privacy than workers in the private sector because the Constitution restrains government employers.<sup>12</sup> Public agencies cannot require their employees to swear loyalty oaths,<sup>13</sup> fire them because of their expression,<sup>14</sup> or subject their personal effects to intrusive searches unless those conditions are justified by the legitimate requirements of the job.<sup>15</sup> Although these

12. See, e.g., Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 179 (1995) ("Inasmuch as free expression is protected by the First Amendment, public employees have greater latitude in this area than do private employees."); Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1, 13, 19 (1991); Ian Holloway, *The Constitutionalization of Employment Rights: A Comparative View*, 14 BERKELEY J. EMP. & LAB. L. 113, 118 (1993); Tara J. Radin & Patricia H. Wehane, *The Public/Private Distinction and the Political Status of Employment*, 34 AM. BUS. L.J. 245, 247 (1996); Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 278 (2012); Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1453 (1982); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 691–92 (1986); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 828 (1998) ("[P]ublic-sector employees enjoy far greater privacy rights than do private-sector employees.").

13. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609–10 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).

14. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 392 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968).

15. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 721, 724–25 (1987); see also *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (finding unconstitutional a state statute requiring public

constitutional guarantees are far from absolute, they provide an important check on the government's power to condition public employment on the relinquishment of employees' constitutional rights. By contrast, constitutional restraints do not apply in the private sector,<sup>16</sup> where employment relationships are largely governed by contract. Market norms dominate there, and most private employers have a great deal of discretion in shaping the terms and conditions of employment, including placing restrictions on their workers' freedom to speak and requiring submission to searches or monitoring practices.<sup>17</sup>

However, this conventional wisdom—that public employees enjoy greater rights by virtue of the Constitution—may no longer hold true. In part, this is because the patchwork of statutory protections covering private employees is growing.<sup>18</sup> But significantly—and this is the central concern of this Article—constitutional protections for government employees' speech and privacy are eroding, a trend accompanied by explicit or implicit references to private sector norms. More specifically, the Supreme Court has increasingly relied on an analogy between public and private sector workers,<sup>19</sup> suggesting that private employment is an appropriate reference point for evaluating public employees' claims for constitutional protection. Because the market norms dominant in the private sector tend to reinforce broad managerial discretion, the effect of the analogy has been to put downward pressure on public employees' constitutional speech and privacy rights. These trends

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school teachers to disclose every organization to which they had belonged or contributed); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 559 (1956) (protecting public employees' exercise of their Fifth Amendment rights).

16. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982).

17. See, e.g., *Petrovski v. Fed. Express Corp.*, 210 F. Supp. 2d 943, 948 (N.D. Ohio 2002); *McGarvey v. Key Prop. Mgmt., LLC*, 211 P.3d 503, 508–09 (Wyo. 2009); *Edmonson v. Shearer Lumber Prods.*, 75 P.3d 733, 741 (Idaho 2003); *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 502 (Tex. App. 1989).

18. See *infra* notes 38–45. See generally MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 952–72 (4th ed. 2013) (surveying sources of legal protection for employee privacy); NANCY M. MODESITT, JANIE F. SCHULMAN & DANIEL P. WESTMAN, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* (3d ed. 2014) (collecting and describing protections for employee speech).

19. Although the focus of this Article is speech and privacy rights, the Court has made a similar move in other contexts. See, e.g., *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2505 (2011) (Petition Clause); *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 594 (2008) (invoking the broad discretion that typically characterizes the private employer-employee relationship in rejecting a “class-of-one” equal protection claim against a public employer).

have been noted critically by some scholars<sup>20</sup> and applauded by others.<sup>21</sup>

Ironically, the analogy was first pressed by employee advocates as a way of arguing for greater protections in the private sector.<sup>22</sup> They asserted that the threat to fundamental freedoms is much the same, whether the employer is public or private, and urged that constitutional values also be protected in the private workplace.<sup>23</sup> At the time, the analogy was intended to bolster the rights of private employees by leveraging the greater rights afforded public employees under the Constitution. These arguments were part of a larger literature critical of the state action doctrine, which applies constitutional restraints to government actions, but not the actions of private entities. Critics have argued that the doctrine is inconsistently applied<sup>24</sup> and conceptually incoherent,<sup>25</sup> and these concerns have sharpened with the growing privatization of government functions.<sup>26</sup>

20. See, e.g., Secunda, *supra* note 12, at 281 (arguing that the Supreme Court, by taking cues from the private sector, has reduced public employees' privacy rights); Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 4–6 (2013) (criticizing the trend toward reducing the First Amendment rights of public employees to the level of private employees). Although I agree with Secunda and Shinar that the overall trend of the Supreme Court's jurisprudence has been to reduce public employees' constitutional rights to privacy and speech, I believe that each of them overstates the degree of the decline. Secunda states that "post-*Quon*, public and private employees have been deemed to have the same level of workplace privacy rights," Secunda, *supra* note 12, at 302, while Shinar asserts that "*Garcetti* . . . has brought constitutional protection close to its nineteenth-century level . . ." Shinar, *supra*, at 6. In fact, in the lower federal courts, constitutional rights of privacy and speech continue to provide protection, albeit more limited in scope, for public sector employees. See, e.g., cases cited *infra* notes 113–19.

21. Scholars endorsing this trend have argued that the managerial prerogative of government employers justifies considerably narrowing, or even trumping, government employees' constitutional rights. See, e.g., Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797, 816 (2007); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 60–65 (2008).

22. See, e.g., Grodin, *supra* note 12, at 3–4, 14–15; Radin & Wehane, *supra* note 12, at 247–49; Summers, *supra* note 12, at 691; Wilborn, *supra* note 12, at 828.

23. See, e.g., Grodin, *supra* note 12, at 3; Summers, *supra* note 12, at 689–92.

24. See, e.g., Charles L. Black, Jr., "State Action," *Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) ("The whole thing has the flavor of a torchless search for a way out of a damp echoing cave."); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 129 (2004) (describing state action cases as "a bewildering series of unpredictable results" that seemingly turn on small factual differences).

25. See Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957) ("[W]hen, and however, a state gives legal consequences to transactions between private persons there is a 'state

While debates over the state action doctrine ask whether constitutional norms should be extended to restrain ostensibly private actors, this Article focuses on the converse phenomenon. It highlights—and critiques—a trend toward referencing private sector norms to interpret public employees' constitutional rights of speech and privacy.<sup>27</sup> This trend is part of a larger phenomenon—what Jon Michaels calls “the marketization of the bureaucracy.”<sup>28</sup> He points out that in recent years public employees have confronted attacks on their collective bargaining rights, wages and benefit levels perceived to be “above-market,” and job-security protections, such that the public workplace “increasingly is made to resemble what we’d encounter in the private sector.”<sup>29</sup> The phenomenon I analyze here—the reliance on analogies to private sector workplaces in the constitutional cases—can be understood as one aspect of this broader trend of bringing market norms to bear on the government workplace.<sup>30</sup> And to the extent I criticize that reliance here, my argument suggests some reasons for resisting the wholesale embrace of market norms in the public sector workplace.

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action.’”); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1353–57 (1982); see also Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) (arguing that nonstate actors may pose as great a threat to fundamental rights as the government); Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 627–28 (1946) (same); Magarian, *supra* note 24, at 129–30 (same).

26. See, e.g., JODY FREEMAN & MARTHA MINOW, *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 1–22 (2009); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1185–87 (2000); Sharon Dolovich, *State Punishment and Private Persons*, 55 DUKE L.J. 437, 480 (2005); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1367 (2003); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1042–43 (2013); Mark H. Moore, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212, 1212 (2003); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1165 (1999).

27. Other scholars have similarly begun to question the validity of a facile analogy between the public and private sectors. See Victoria Schwartz, *Overcoming the Public-Private Divide in Privacy Analogies*, 67 HASTINGS L.J. 143, 148–50 (2015) (examining use of public/private analogies in determining whether an individual has a “reasonable expectation of privacy”); Shinar, *supra* note 20, at 1 (arguing that public employees are different from private employees such that they should have stronger First Amendment protections).

28. Michaels, *supra* note 26, at 1042.

29. *Id.* at 1043; see also Shinar, *supra* note 20, at 20–34 (asserting that there has been a convergence between public and private sector workplaces reflected in trends in the privatization of government functions, outsourcing, and civil service reforms).

30. Adam Shinar similarly argues that public employees are increasingly viewed as being just like private employees and that the effect is to erode the free speech rights of government employees. See Shinar, *supra* note 20, at 8–9.



Relying on an analogy to private employment to interpret public employees' constitutional rights is a mistake. The analogy is a false one, because the arguments typically made for giving private employers broad managerial discretion do not apply with the same force, or at all, to government employers. The rights-based arguments that employers often invoke have no application to public entities. Because they are publicly funded to achieve publicly defined purposes, government employers cannot assert independent rights to property or autonomy in the same way that private firms do to avoid compliance with constitutional norms. Similarly, the claim that market pressures will tend to control overreaching by the private firm has little application to government employers, which are publicly funded and therefore largely insulated from market competition. In the private sector, compensation structures and competition for corporate control help to align the incentives of managers with the interests of the firm; however, those mechanisms are largely unavailable in the public sector. Instead, public accountability is key to ensuring that government managers act within the bounds set by the public's interest, and government employees' speech and privacy rights play a crucial role in ensuring that accountability.

To be clear, my argument that government employment is distinctive does not equate to an argument against all regulation of private sector employment. It may well be the case that concerns about market failures, noncommodification, or social equality justify intervention to protect some employee speech and privacy rights in the private sector workplace.<sup>31</sup> However, the purpose of this Article is to explain why the speech and privacy rights of public sector employees should be protected as a matter of constitutional guarantee. The appropriate degree of protection should be determined by the particular threats posed by the government's exercise of its power as employer, not defined by reference to practices or norms in the private sector. Once that constitutional minimum is established, policy considerations might lead to the development of additional protections for public employees, or for private employees, by appropriate legislative or judicial action. Differing policy judgments will mean that, depending upon the

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31. See, e.g., Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 225 (2013) (arguing that individual employment protections, including employee speech and privacy rights, are necessary to avoid the entrenchment of social status hierarchies); Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 710–20 (1996) (describing market imperfections that may lead to the underprotection of employee privacy).

context, private sector employees may sometimes have similar, sometimes greater, and sometimes lesser protections than public employees. But the point of constitutional protections is to ensure a minimum level of protection for public employees against government action that is not vulnerable to shifting legislative judgments.

This Article focuses on employee speech and privacy, even though public employees have other rights that they might claim under the Constitution.<sup>32</sup> Speech and privacy have a critical connection to concerns about public accountability. Employee speech is often an important means of drawing public attention to abuses of government power. And although transparency plays an important role in ensuring accountability, privacy may also be necessary to nurture valuable employee speech.<sup>33</sup> As the experience of the FDA employees illustrates,<sup>34</sup> privacy violations—because they entail an exercise of power over another and impose dignitary harms—can be a form of retaliation for disfavored speech. Extensive monitoring and surveillance practices in turn can chill further speech.<sup>35</sup> The relationship between employee speech and privacy is thus close and complex, and the argument developed here is specific to those rights because of the particular role they play in limiting government power.

This Article proceeds as follows. Part I explores the contrasting assumptions that frame employees' speech and privacy claims. Constitutional guarantees establish the backdrop against which employment conditions are measured in the public workplace, while market norms dominate in the private sector. Part II examines more closely the Supreme Court's public employee cases, first describing how constitutional doctrine has accommodated public agencies' dual

32. For example, public employees might claim the right to due process before discharge, the right to be free from invidious discrimination, or the right to associate with other workers to address common concerns. Rights of association are closely related to speech and privacy, *NAACP v. Alabama*, 357 U.S. 449, 460–62 (1958), and to that extent, the analysis developed here might extend to those rights as well. However, the nature and constitutional source of individuals' associational rights are contested. *See, e.g.*, JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 2 (2012). Their significance in the workplace context is further complicated by the salience of employee association for the purpose of collective bargaining. For these reasons, consideration of public employees' associational rights are too complex for consideration here, and I put them aside to focus more narrowly on individual speech and privacy rights.

33. Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV. 901, 920–22 (2012).

34. *See supra* notes 1–11 and accompanying text.

35. *See, e.g.*, Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1425 (2000); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 401 (2008).

roles as both sovereign and employer, then highlighting how the Court has come to emphasize their managerial role by analogizing public employment to the private sector. In Part III, I contend that relying on an analogy between public and private sector employment when interpreting public employees' constitutional rights is a mistake. As I explain, the public employer differs in its origin, its relation to the market, and the mechanisms for holding it accountable, and therefore, the usual rights-based and prudential arguments invoked by private firms to resist employment regulation do not apply.

#### I. PRIVATE SECTOR NORMS, PUBLIC SECTOR VALUES

When considering employee speech and privacy rights, public and private sector workplaces operate in distinct legal spheres. For public employees, the starting assumption is that their employer, as a government actor, is constrained by the Constitution. Although accommodations are made for the government's interests as employer, constitutional rights provide the relevant background against which individual disputes are decided. By contrast, in the private sector, market norms predominate. Because the state action doctrine limits constitutional restraints to government actors, constitutional protections for speech and privacy have little direct application to private employers.<sup>36</sup> The terms and conditions of employment are determined through bargaining and mutual agreement between the parties, with the law presuming that employment lasts only so long as both parties desire it to continue.<sup>37</sup> Although the freedom to terminate employment is mutually available in theory, in practice it means that private sector employers have significant discretion not only over the duration of employment, but also over its terms and conditions. Thus, to the extent that private sector employees' speech and privacy rights are protected, those

36. Exceptions exist where the challenged action can be attributed to the government, as when a private employer's actions are required by a government regulation. *See, e.g.*, *NASA v. Nelson*, 562 U.S. 134, 138 (2011); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989). Exceptions also exist when the government is entwined in the management or control of a private employer. *See, e.g.*, *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 178 (6th Cir. 2008).

37. The law traditionally presumed employment to be at will, leaving the employer free to dismiss its employees "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884). Although recent common law and statutory developments have significantly eroded the employer's unfettered ability to discharge employees for reasons that violate public policy, the general presumption of at-will employment remains in every American jurisdiction except Montana. *See* MONT. CODE ANN. §§ 39-2-901 to -915 (2015).

protections represent affirmative interventions against a background norm of private contracting.

Employees in the private sector today do receive some legal protection for speech and privacy interests. Statutory interventions at both the federal and state level protect against retaliation for certain types of speech, such as speech asserting employment rights,<sup>38</sup> opposing or reporting employer wrongdoing,<sup>39</sup> or raising collective concerns about workplace conditions.<sup>40</sup> However, because most protections are narrowly defined, vast swaths of speech by private employees remain unprotected. Significantly, the law provides hardly any protection to private employees for the type of speech falling at the core of First Amendment concerns—namely, speech on public issues.<sup>41</sup> When private sector employees participate in public

38. For example, Title VII not only prohibits discrimination in employment, it also forbids employers from retaliating against employees who file a claim or object to practices made illegal under the statute. 42 U.S.C. § 2000e-3(a) (2006). Similar antiretaliation provisions are found in most protective employment legislation. *See, e.g.*, 29 U.S.C. § 660(c) (2006) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (2006) (Fair Labor Standards Act).

39. Common law doctrine and whistleblower statutes sometimes protect private employees discharged for reporting certain illegal or unethical employer activities, but they are often quite narrow in their reach. *See* MODESITT ET AL., *supra* note 18, at app. B (listing statutes protecting private employee whistleblowers). The whistleblower provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act, 18 U.S.C. § 1514A (2012) and 29 U.S.C. § 78u-6(h)(1)(A) (2012), respectively, are also limited, applying only to employees of publicly traded companies or their contractors or agents, and only when they report specifically listed types of fraud or violations of securities regulations. *See* Richard E. Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 10–12 (2012); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 65 (2007).

40. Section 7 of the National Labor Relations Act guarantees the right of workers to engage in “concerted activities for . . . mutual aid or protection.” National Labor Relations Act of 1935, Pub. L. No. 74-198, § 7, 49 Stat. 449, 452 (codified at 29 U.S.C. § 157 (2012)).

41. *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 309–33 (2012) (reviewing different state statutes). Only one state, Connecticut, grants to private employees a generalized right to speech, forbidding employers from disciplining or discharging an employee “on account of the exercise by such employee of rights guaranteed by the First Amendment . . .” *See* CONN. GEN. STAT. § 31-51q (West, Westlaw through June 2015 Spec. Sess.); *see also* Cotto v. United Techs. Corp., 738 A.2d 623, 634 (Conn. 1999) (holding that section 31-51q applies to private employers). A handful of other states more narrowly protect employees' rights to engage in political activities or voting, *see* Volokh, *supra*, at 328–30, although it is often unclear how far such provisions will extend to protect speech. *Compare* Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979) (holding that the “struggle of the homosexual community for equal rights . . . must be recognized as a political activity”), *with* Vanderhoff v. John Deere Consumer Prods., Inc., No. 3:02-0685-22, 2003 WL 23691107, at \*2–3 (D.S.C. Mar. 13, 2003) (holding that display of a Confederate flag decal is not a political activity).

discourse, that speech usually falls between the islands of protection offered under laws protecting specific types of speech, leaving their employers free to discipline or discharge them in response.

A similar patchwork of laws protects private sector employees' privacy interests. Most legal interventions address a narrowly defined interest, and protections vary considerably from state to state.<sup>42</sup> Broad guarantees of employee privacy are rare and often uncertain in scope.<sup>43</sup> Only in California does the State Constitution directly protect privacy from intrusions by private actors, including employers.<sup>44</sup> And while the common law tort of invasion of privacy has sometimes been applied to limit searches of employees' personal effects and private locations,<sup>45</sup> the requirement that any actionable intrusion be "highly offensive to a reasonable person"<sup>46</sup> renders the common law far less protective than the Fourth Amendment's "reasonableness" standard.<sup>47</sup> Thus, to the extent that the law protects

42. To illustrate, six states restrict employers' ability to engage in video surveillance at the workplace; four prohibit employers from implanting microchips in employees' bodies; twelve require advance notice or consent for electronic monitoring; and ten prohibit employers from requesting that applicants or employees turn over passwords to their social media accounts. *See FINKIN, supra* note 18, at 1067–89.

43. For example, the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, prohibits the interception of electronic communications and unauthorized access to stored communications, but the statute's exceptions often render its protections inapplicable in the employment context. *See, e.g., Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114–15 (3d Cir. 2003); *Sporer v. UAL Corp.*, No. C 08-02835 JSW, 2009 WL 2761329, at \*5–6 (N.D. Cal. Aug. 27, 2009); *Bohach v. City of Reno*, 932 F. Supp. 1232, 1236–37 (D. Nev. 1996). Employees have had more success under the ECPA in challenging employer access to password-protected accounts maintained outside the workplace. *See, e.g., Konop v. Hawaiian Airlines*, 302 F.3d 868, 880 (9th Cir. 2002); *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2009 WL 3128420, at \*2–3 (D.N.J. Sept. 25, 2009); *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914, 928 (W.D. Wis. 2002).

44. *See Hill v. NCAA*, 865 P.2d 633, 641 (Cal. 1994) (extending the privacy protections of the California Constitution to private actors); *TBG Ins. Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 449 (Cal. Ct. App. 2009) (applying the *Hill* analysis to a private employer, but finding no violation). In Alaska, the constitutional privacy provision does not apply directly to private actors but may serve as a source of public policy, limiting an employer's ability to condition employment on employees permitting intrusions into their personal lives. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1131–33 (Alaska 1989).

45. *See, e.g., Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634, 648–49 (Ark. 2002) (finding a search of an employee's home by his employer to be an invasion of privacy); *Johnson v. Allen*, 613 S.E.2d 657, 660–61 (Ga. Ct. App. 2005) (holding that a video camera in a women's restroom was an invasion of privacy); *Sowards v. Norbar, Inc.*, 605 N.E.2d 468, 474–75 (Ohio Ct. App. 1992) (deeming a search of an employee's motel room an invasion of privacy).

46. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

47. *See Clifford S. Fishman, Electronic Privacy in the Government Workplace and City of Ontario, California v. Quon: The Supreme Court Brought Forth a Mouse*, 81 MISS. L.J.

private sector employees' speech and privacy rights, it does so by carving out exceptions against a background norm of employer prerogative.

In contrast, constitutional values, rather than market norms, frame questions about employee speech and privacy in the public sector. Initially, market norms also dominated in the public sector, and public employees were presumed to accept their employment on the terms set by the government. As Oliver Wendell Holmes famously pronounced, "[a person] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>48</sup> However, in a series of cases beginning in the mid-twentieth century, the Supreme Court rejected this approach, holding that government could not condition employment on the relinquishment of constitutional rights.<sup>49</sup> By 1967, it was clear that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."<sup>50</sup> As the Court explained in *Perry v. Sindermann*,<sup>51</sup> "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ."<sup>52</sup>

Government employment is thus one of the classic situations in which the doctrine of unconstitutional conditions has been applied.<sup>53</sup>

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1359, 1415–17 (2012); Secunda, *supra* note 12, at 301; see also Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 225–29 (1996) (arguing that the common law provides very limited protection of employees' privacy interests).

48. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

49. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 373–74 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961); *Shelton v. Tucker*, 364 U.S. 479, 485–87 (1960); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557–58 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).

50. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967) (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

51. 408 U.S. 593 (1972), *overruled on other grounds by* *Rust v. Sullivan*, 500 U.S. 173 (1991).

52. *Id.* at 597.

53. As Kathleen Sullivan explains,

[u]nconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference. . . . The imposition of the condition on the benefit poses a dilemma: allocation of the benefit would normally be subject to deferential review, while imposition of a

While government need not offer certain benefits, when it does so, it may not impose conditions that “produce a result which [it] could not command directly.”<sup>54</sup> Courts and scholars have struggled to articulate a clear test for *when* government-imposed conditions on receipt of a benefit should trigger close constitutional scrutiny,<sup>55</sup> but government employment presents a clear case for its application. Because the threat of dismissal is a “potent means” of penalizing and inhibiting the exercise of individual rights,<sup>56</sup> courts have regularly scrutinized government attempts to condition employment on the relinquishment of fundamental rights.<sup>57</sup>

For employees in the public sector, then, constitutional values provide the background against which their claims to speech and privacy are made. As explored in greater detail in the next Part, those constitutional claims have always been subject to limitations to accommodate the government’s interests as an employer.<sup>58</sup> Nevertheless, constitutional doctrine is clear: public employees may not be compelled to relinquish “the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.”<sup>59</sup> Similarly, when a government employer undertakes a search or seizure of the property of its employees, the restraints of the Fourth Amendment apply.<sup>60</sup>

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burden on the constitutional right would normally be strictly scrutinized. Which sort of review should apply?

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1177–78 (1996).

54. *Perry*, 408 U.S. at 597 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see also* *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (raising constitutional concerns when conditions “pass the point at which ‘pressure turns into compulsion’” (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937))).

55. *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 4–5 (2001); Dorf, *supra* note 53, at 1177–78; Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 26–28 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1326–27 (1984); Sullivan, *supra* note 53, at 1421–22; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1449–51 (1968).

56. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

57. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 379–80, 392 (1987); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion); *Pickering*, 391 U.S. at 574; *see also* *Rutan v. Republican Party*, 497 U.S. 62, 79 (1990); *Branti v. Finkel*, 445 U.S. 507, 519–20 (1980).

58. *See infra* Section II.A.

59. *Pickering*, 391 U.S. at 568.

60. Although the Justices in *O’Connor v. Ortega* splintered over the analytic framework to be applied in the case, all nine agreed that the Fourth Amendment applies

Of course, public employees' speech and privacy interests are not protected solely, or even primarily, by the Constitution. Civil service provisions often require good cause in order to discharge a public employee, and these protections significantly limit public employers' ability to act arbitrarily, including in ways that burden their employees' constitutional rights.<sup>61</sup> In addition, statutes, such as whistleblower protection laws or information privacy laws, protect certain specific types of speech or privacy interests.<sup>62</sup> Although these statutes may impose initial restrictions on the government employer, the Constitution provides "a residual protection"<sup>63</sup> of employees' speech and privacy interests. Because of the significant gaps in statutory coverage, however, that residual protection is important, establishing a "constitutional floor that catches the most egregious cases of government abuse."<sup>64</sup>

Although a great deal of variation exists in the details, the public and private sectors differ markedly in the overall structure of legal protection. For public employees, constitutional restraints establish background norms regarding employer interference with speech and privacy interests. Congress or state legislatures may choose to define those rights more precisely, expand them, or provide particular procedures for vindicating them. But this legislative activity occurs against a backdrop of the constitutional guarantees safeguarding certain fundamental values. By contrast, in the private sector, the starting assumption is one of managerial prerogative, not constitutional restraint. The background norm assumes that employers should be given wide discretion to manage their businesses as they see fit. If they manage poorly, any consequences will be felt privately, and their employees remain free to seek better options elsewhere. Legal protections for employees in the private sector are carve-outs from the background norm—exceptions created when intervention is deemed necessary to advance important public purposes. When or whether employee interests deserve such protection is thus a matter of shifting political judgments. And, unlike

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to the actions of a government employer. 480 U.S. 709, 717 (1987) (plurality opinion); *see also id.* at 731 (Scalia, J., concurring); *id.* at 732 (Blackmun, J., dissenting).

61. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 124–29 (1995); Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1477–78 (2007); George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 139 (2008).

62. *See, e.g.,* MODESITT ET AL., *supra* note 18, at app. A, C (listing state and federal statutes protecting public sector employees' speech).

63. Rutherglen, *supra* note 61, at 140.

64. *Id.* at 142.



in the public sector, there is no constitutional floor guaranteeing a minimum level of protection.

## II. CONSTITUTIONAL LIMITS ON THE GOVERNMENT EMPLOYER

Although public employees' speech and privacy rights have long been protected by the Constitution, those protections have always been significantly qualified in the employment context to accommodate the government employer's dual role as both employer *and* sovereign. The law accommodates the tension inherent in that dual role by imposing less demanding standards on government conduct, even as it protects the employee's rights. In recent cases, however, the Court has relied on an analogy to the private sector workplace in a manner that emphasizes the government's role as *employer*.<sup>65</sup> In doing so, the Court implicitly invokes the market norms dominant in the private sector, while obscuring the government employer's simultaneous status as sovereign and the constitutional norms that serve to restrain it in that capacity.

### A. A Dual Role

When the Supreme Court held that public employment may not be conditioned on individuals relinquishing their constitutional rights, it did not simply apply existing constitutional doctrine to the employment context.<sup>66</sup> Rather, it recognized that when a public employer acts against its employees, it inhabits dual roles—it is both sovereign *and* employer. Because of its status as sovereign, it must be restrained from using its power in a manner that burdens fundamental rights of speech and privacy. And because it is an

65. The public sector employee cases have long been influenced by understandings of employment in the private sector. As Ken Matheny and Marion Crain have argued, "the Court's public employee speech cases are deeply influenced by a 'private-sector profit maximization model,' the traditional master-servant image of the employment relation borrowed from the common law, in which management is entitled to demand loyalty from its employees." Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1735 (2004) (citing Marvin F. Hill, Jr. & James A. Wright, "Riding with the Cops and Cheering for the Robbers": Employee Speech, Doctrinal Cubbyholes, and the Duty of Loyalty, 25 PEPP. L. REV. 721, 780–81 (1998)). In the years since they wrote, this influence has become more pronounced. *See infra* Section II.B; *see also* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

66. *See* NASA v. Nelson, 562 U.S. 134, 148 (2011) ("[T]he Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" (quoting Engquist v. Or. Dep't of Agric., 553 U.S. 591, 599 (2008))).

employer as well, constitutional doctrine was crafted in a manner that accommodates the legitimate managerial interests of the employer. Thus, although the Court applied constitutional restrictions in the public sector workplace, it was far more deferential to the government's interests than in other situations in which the government acted purely as sovereign.

### *Speech*

The Supreme Court's public employee speech cases clearly recognize this dual role of the government employer. In *Pickering v. Board of Education*,<sup>67</sup> the Court addressed a public school teacher's claim that his First Amendment rights were violated when he was fired because he wrote a letter to a local newspaper criticizing the school board.<sup>68</sup> The Court affirmed the public benefit of "free and unhindered debate on matters of public importance" as well as Pickering's interest in participating in that debate.<sup>69</sup> And it recognized that his dismissal from employment significantly burdened the exercise of his right to speak.<sup>70</sup> Ordinarily, when the state exercises power directly in response to citizen speech, its actions are subject to strict scrutiny.<sup>71</sup> In *Pickering*, however, the Court acknowledged that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."<sup>72</sup> As a result, rather than strictly scrutinizing government actions that burdened employee speech rights, the Court balanced the interests of the employee in speaking against the government's interests "in promoting the efficiency of the public services it performs through its employees."<sup>73</sup>

The Court suggested that factors such as maintaining discipline by supervisors or preserving harmony among coworkers weigh in favor of the government.<sup>74</sup> At the same time, it also recognized that public employees' speech may be particularly well informed and

67. 391 U.S. 563 (1968).

68. *Id.* at 564–65.

69. *Id.* at 573.

70. *Id.* at 574–75.

71. *See, e.g.,* *Turner Broad., Inc. v. FCC*, 512 U.S. 622, 658 (1994) ("[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.").

72. *Pickering*, 391 U.S. at 568.

73. *Id.*

74. *Id.* at 570.

likely to contribute to debate over important public issues.<sup>75</sup> Weighing the circumstances in *Pickering*'s case, the Court concluded that because the letter he had written did not interfere with his teaching duties or the normal operation of the school generally, the school board could not constitutionally fire him for his speech.<sup>76</sup> By doing so, the Court extended First Amendment protection to public employee speech but in a form far more deferential to the government's interests than when the government acts purely as sovereign.

In *Rankin v. McPherson*,<sup>77</sup> the Court explained that the *Pickering* balancing test is "necessary in order to accommodate the dual role of the public employer."<sup>78</sup> It wrote:

On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.<sup>79</sup>

This dual role means that although the employment context weighs into the analysis, giving the government as employer a freer hand, the fact that the employer is also the government means that the Constitution still restrains its actions.<sup>80</sup>

The Supreme Court has acknowledged numerous ways in which public employees' speech rights depart from ordinary First Amendment principles. As the Court wrote in *Waters v. Churchill*,<sup>81</sup> "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."<sup>82</sup> For example, the usual constitutional tolerance of

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75. *Id.* at 571–72.

76. *Id.* at 572–73.

77. 483 U.S. 378 (1987).

78. *Id.* at 384.

79. *Id.* (quoting *Pickering*, 391 U.S. at 574).

80. See, e.g., *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465–66 (1995); *Waters v. Churchill*, 511 U.S. 661, 671–72 (1994); see also *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (explaining that the *Pickering* balancing test reconciles the employees' right to engage in speech with the employer's legitimate interests in performing its mission).

81. 511 U.S. 661 (1994).

82. *Id.* at 672.

offensive utterances<sup>83</sup> and false statements<sup>84</sup> does not prevent the government employer from insisting on professional language and accurate statements when its employees deal with the public.<sup>85</sup> Moreover, courts afford greater deference to employer predictions of harm than in other situations when the government seeks to restrict citizen speech.<sup>86</sup> And by suggesting that the maintenance of “discipline by immediate superiors or harmony among coworkers”<sup>87</sup> is a relevant factor in the balancing analysis, *Pickering* appears to “constitutionaliz[e] . . . a heckler’s veto” in the employment setting.<sup>88</sup> Despite the general principle that listener reactions cannot justify regulating speech,<sup>89</sup> public employee speech may be unprotected precisely because it causes a stir.

The emphasis on operational efficiency also presents a striking contrast to other First Amendment contexts where concerns of government efficiency are given far less weight.<sup>90</sup> Although the government generally “cannot restrict the speech of the public at large just in the name of efficiency,”<sup>91</sup> the *Pickering* balancing test

83. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971).

84. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967) (requiring actual malice for liability for invasion of privacy based on false statement regarding a matter of public interest); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment requires that a public official prove “actual malice” in order to recover for defamation). But see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (declining to extend *New York Times* standard to defamatory statements about a private individual).

85. See *Waters*, 511 U.S. at 672. But see *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968) (holding that “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment” unless the statements were made with knowing or reckless falsity).

86. See *Waters*, 511 U.S. at 673; see also *Connick v. Myers*, 461 U.S. 138, 153–54 (1983) (giving additional weight to supervisor’s view that employee’s speech would disrupt an office).

87. *Pickering*, 391 U.S. at 570.

88. Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1019 (2005).

89. See, e.g., *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992), *overruled on other grounds by City of Littleton v. Z.J. Gifts D4, LLC*, 541 U.S. 774 (2004) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”). But see *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (finding restraint of broadcast speech constitutional because it is uniquely pervasive and available to children); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (finding statute constitutional because it restrained fighting words likely to cause a breach of peace).

90. See Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 1987–91 (2012).

91. *Waters*, 511 U.S. at 675.

explicitly weighs efficiency concerns, and government officials “enjoy wide latitude in managing their offices.”<sup>92</sup> The reason for such accommodation, the Court explained in *Waters*, “comes from the nature of the government’s mission as employer[,]”<sup>93</sup> which elevates its interests in achieving that mission “as effectively and efficiently as possible.”<sup>94</sup> Still, efficiency concerns do not operate as a trump. The First Amendment has a significant limiting role to play because of the strong public benefit of hearing from government employees. As the Court acknowledged, “[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”<sup>95</sup> In addition, individual employees have “a strong, legitimate interest in speaking out on public matters.”<sup>96</sup> The government’s interest as employer is thus accommodated *not* by trumping its employees’ First Amendment rights, but by allowing its interests to weigh more heavily than in cases involving government restraint of nonemployee citizen speech.

### *Privacy*

Just as in the First Amendment context, public employees’ privacy rights differ significantly from the protections typically provided by the Fourth Amendment in order to accommodate the government’s interests as employer. In *O’Connor v. Ortega*,<sup>97</sup> the Supreme Court held that the Fourth Amendment applies to searches and seizures of an employee’s personal effects by a government employer.<sup>98</sup> *O’Connor* involved the claim of a state-employed physician that his Fourth Amendment rights were violated when hospital administrators searched his office, desk, and file cabinets and seized several personal items.<sup>99</sup> Although the Justices agreed that the challenged searches infringed the plaintiff’s reasonable expectations of privacy,<sup>100</sup> the plurality noted that the “operational realities of the

92. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

93. *Waters*, 511 U.S. at 674.

94. *Id.* at 675; *cf.* *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (noting that the government need “to improve the efficiency, efficacy, and responsiveness of service to the public” applies equally to independent contractors).

95. *Waters*, 511 U.S. at 674.

96. *Id.*

97. 480 U.S. 709 (1987).

98. *Id.* at 714.

99. *Id.* at 712–14.

100. All nine Justices agreed that Ortega had a reasonable expectation of privacy in his desk and files. *See id.* at 718–19 (O’Connor, J., plurality); *id.* at 731 (Scalia, J., concurring); *id.* at 732–33 (Blackmun, J., dissenting). Scalia and the four dissenting Justices concluded

workplace . . . may make *some* employees' expectations of privacy unreasonable."<sup>101</sup> Where an employee's office is frequently accessed by supervisors, fellow employees, or the public, an expectation of privacy on the part of the employee may be reduced. Similarly, employer policies regulating personal effects in the workplace may undermine a claim of privacy. Thus, according to the plurality, the public employee's expectation of privacy "must be assessed in the context of the employment relationship."<sup>102</sup>

Even if the employee has a reasonable expectation of privacy in light of workplace practices, the protection afforded public employees is markedly different from that typically provided by the Fourth Amendment. Ordinarily, government searches that infringe a legitimate expectation of privacy are considered reasonable only when authorized by a warrant issued on probable cause.<sup>103</sup> The Supreme Court, however, has recognized that a warrant is not required in those situations "in which special needs, beyond the normal need for law enforcement" make the requirement "impracticable,"<sup>104</sup> such as when school officials conduct searches necessary to maintain discipline,<sup>105</sup> or when an agency conducts regulatory compliance inspections.<sup>106</sup> Similarly, the plurality in *O'Connor* reasoned that when a search is undertaken in the government's capacity as an *employer*, its "need for supervision, control, and the efficient operation of the workplace" must be balanced against the employees' legitimate privacy interests.<sup>107</sup> Under this standard, instead of the usual requirement of a warrant issued on probable cause, workplace searches need only satisfy a lesser

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that Ortega had a reasonable expectation of privacy in his office. *See id.* at 731 (Scalia, J., concurring); *id.* at 732 (Blackmun, J., dissenting).

101. *Id.* at 717.

102. *Id.*

103. *See, e.g.,* Illinois v. Rodriguez, 497 U.S. 177, 191–92 (1990) (Marshall, J., dissenting) (describing the ordinary requirements to obtain a warrant); Mancusi v. DeForte, 392 U.S. 364, 370 (1968) ("Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." (quoting Camara v. Mun. Court, 387 U.S. 523, 528–29 (1967))); Camara v. Mun. Court, 387 U.S. 523, 528–29 (1967) ("One governing principle . . . has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.").

104. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

105. *See id.* at 337–40 (plurality opinion).

106. *See Camara*, 387 U.S. at 528.

107. *O'Connor*, 480 U.S. at 719–20.

standard of “reasonableness under all the circumstances.”<sup>108</sup> The plurality thus accommodated the government’s dual roles of sovereign and employer by applying Fourth Amendment constraints, but imposing a less stringent standard of reasonableness.<sup>109</sup>

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First and Fourth Amendment protections are thus significantly less demanding in the government workplace than in other contexts in order to accommodate the government’s interest as employer. Even these less demanding standards, however, offer significant protections for public employees. Applying the *Pickering* balancing test, the Supreme Court protected a teacher’s complaints to her principal about a school’s racially discriminatory practices<sup>110</sup> and a clerical employee’s comments expressing hostility toward President Reagan because of his welfare policies.<sup>111</sup> In a similar vein, the Supreme Court invalidated as a violation of First Amendment rights a statute that prohibited federal government employees from receiving

108. *Id.* at 725–26. In order to satisfy the demands of the Fourth Amendment, a search must be both “justified at its inception” and reasonable in scope. *Id.* at 726 (quoting *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968)). The Court wrote: “Ordinarily, a search . . . will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file.” *Id.* A search will be “permissible in its scope when ‘the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of’ ” the suspected misconduct. *Id.* (citing *T.L.O.*, 469 U.S. at 342).

109. As discussed in the next Section, Justice Scalia proposed a different test, namely that “government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.” *O’Connor*, 480 U.S. at 732 (Scalia, J., concurring). As discussed in Section II.B, *infra*, Justice Scalia’s test relies more heavily on outcomes and practices in the private sector for determining the scope of public employees’ Fourth Amendment rights. But, after *O’Connor*, the Court reaffirmed the basic approach taken by the plurality in two subsequent cases challenging drug testing programs. *See Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 678–79 (1989); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 633–34 (1989). In those cases, the Court first asked whether the drug tests intruded on employees’ legitimate expectations of privacy, then weighed the government’s interest in the testing protocol against the employees’ privacy interests. Although scholars have criticized the *O’Connor* plurality’s “reasonable expectation of privacy” balancing test as providing only anemic protection of public employees’ privacy rights, *see, e.g.*, Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 AM. BUS. L.J. 625, 630–32, 658–59 (1992), it does provide a framework for scrutinizing public-employer intrusions and has provided some public employees with a measure of protection. *See, e.g.*, cases cited *infra* notes 116–19.

110. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414–17 (1979).

111. *Rankin v. McPherson*, 483 U.S. 378, 388–90 (1987).

honoraria for giving speeches or writing articles.<sup>112</sup> Other courts have applied the First Amendment to shield a broad range of employee speech, such as an internal memo raising concerns about patient privacy at a state psychiatric hospital,<sup>113</sup> comments to the local media criticizing staff shortages at a fire department,<sup>114</sup> and a publicly posted flyer critical of a town council's management.<sup>115</sup>

Similarly, although the Fourth Amendment standard applied to government employers is deferential it nevertheless offers some protection for employee privacy. Lower federal courts have found public employers to have infringed upon legitimate expectations of privacy when they recorded employees' personal phone calls,<sup>116</sup> seized and searched the contents of a government-issued laptop,<sup>117</sup> and conducted video surveillance of a locker-break room.<sup>118</sup> And under the framework laid out in the *O'Connor* plurality, they have scrutinized government employer searches to ensure that they are justified and no more intrusive in scope than necessary.<sup>119</sup> Thus, although the constitutional limits on the public employer are less demanding because the government is acting in the dual roles of employer and sovereign, the limits nevertheless provide significant protections to public employees, particularly when compared with the private sector and its background rule of at-will employment.

### B. *The Analogy to Private Employment*

While the doctrine governing public employees' First and Fourth Amendment rights has always significantly accommodated the

112. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465, 470, 474, 480 (1995).

113. *See* *Rodgers v. Banks*, 344 F.3d 587, 591, 603 (6th Cir. 2003).

114. *Moore v. City of Kilgore*, 877 F.2d 364, 366 (5th Cir. 1989) (per curiam).

115. *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 943–44, 949–50 (7th Cir. 2004).

116. *Narducci v. Moore*, 572 F.3d 313, 316, 319, 321 (7th Cir. 2009).

117. *Maes v. Folberg*, 504 F. Supp. 2d 339, 347 (N.D. Ill. 2007).

118. *Rosario v. United States*, 538 F. Supp. 2d 480, 498–99 (D.P.R. 2008).

119. *See, e.g., Narducci*, 572 F.3d at 321 (affirming denial of summary judgment because plaintiff presented significant evidence that recording of every phone call for a six-year period was unreasonable in scope); *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987) (remanding to district court to determine whether search of employee's desk and credenza and seizure of materials was relevant to his job and reasonable in scope). In addition to the privacy protections afforded by the Fourth Amendment, a few lower federal courts have found public employees' interests in avoiding disclosure of personal information to be protected by the Constitution. *See, e.g., Denius v. Dunlap*, 209 F.3d 944, 954–57 (7th Cir. 2000); *Nat'l Treasury Emps. Union v. U.S. Dep't of Labor*, 838 F. Supp. 631, 636–39 (D.D.C. 1993); *Am. Fed'n of Gov't Emps. v. U.S. R.R. Ret. Bd.*, 742 F. Supp. 450, 453–55 (N.D. Ill. 1990).



government employer's interests, recent cases reveal a more pronounced emphasis on the government's managerial role. The Supreme Court has repeatedly invoked private sector employment as a reference point for analyzing the constitutional rights of public employees. In doing so, it has moved away from its understanding of the public employer as occupying dual roles and instead focused predominantly on its role as manager.

### *Speech*

The Court's opinion in *Garcetti v. Ceballos*<sup>120</sup> illustrates this shift in emphasis. The plaintiff, Richard Ceballos, a state prosecutor, objected to what he believed to be serious deficiencies in a search warrant obtained by the sheriff's office.<sup>121</sup> He raised his concerns with his supervisors and followed up with a disposition memorandum recommending dismissal,<sup>122</sup> but his supervisors nevertheless decided to proceed with the case. Believing that he was obligated to do so under *Brady v. Maryland*,<sup>123</sup> Ceballos turned over his memorandum as exculpatory evidence to defense counsel, and later disagreed with his supervisor regarding his testimony at a suppression hearing.<sup>124</sup> He alleged that his supervisor retaliated against him after the hearing, in violation of his First Amendment rights.<sup>125</sup> The Court rejected his claim, holding that because his speech constituted part of his "official duties," he was not "speaking as [a] citizen[]" for First Amendment purposes" and therefore, his employer's actions were not subject to constitutional scrutiny.<sup>126</sup>

While continuing to pay lip service to the interests of the individual employee speaker and of the public in hearing that speech, the majority opinion emphasized the importance of "managerial discretion" and "managerial discipline."<sup>127</sup> The Court pointed out that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."<sup>128</sup> Expressing concerns about the "displacement of

120. 547 U.S. 410 (2006).

121. *Id.* at 413–14.

122. *Id.* at 414–15.

123. 373 U.S. 83 (1963).

124. *Garcetti*, 547 U.S. at 442 (Souter, J., dissenting).

125. *Id.* at 415 (majority opinion).

126. *Id.* at 421.

127. *See id.* at 422–25.

128. *Id.* at 418 (emphasis added).

managerial discretion,”<sup>129</sup> the Court concluded that “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.”<sup>130</sup> Thus, in the Court’s view, the First Amendment does not apply at all when it comes to speech that is a part of the employee’s job duties.<sup>131</sup>

The analogy between the government and private employer does a great deal of rhetorical work in *Garcetti*. As discussed above, the Court’s earlier precedents had emphasized the “dual role” of the public employer<sup>132</sup> and the need to balance the competing interests at stake. Applying those precedents, the Ninth Circuit easily concluded that Ceballos’s speech—raising concerns about alleged government misconduct—was on a matter of public concern and proceeded to engage in the *Pickering* balancing analysis.<sup>133</sup> By invoking norms in the private sector workplace, the Supreme Court pretermitted this analysis. Just as in the private sector, the Court suggested, speech made pursuant to an employee’s job duties is simply part of what the employee has contracted to perform and not a matter of constitutional concern.<sup>134</sup> Removing “official duty speech” from First Amendment protection thus made it irrelevant that Ceballos was speaking on a matter of public concern and avoided the need to scrutinize the government’s actions at all.<sup>135</sup>

129. *Id.* at 423.

130. *Id.* at 424.

131. The *Garcetti* decision has sparked considerable scholarly commentary, much of it critical. Scholars have criticized the decision for, among other things, relying on a false distinction between citizen speech and employee speech. *See, e.g.*, Symposium, *The Rookie Year of the Roberts Court & a Look Ahead*, Erwin Chemerinsky, *Civil Rights*, 34 PEPP. L. REV. 536, 538–39 (2007); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 670, 683 (2008) (criticizing the Court’s failure to recognize the memorandum as mixed speech); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 575 (2008). Scholars have also argued that it fails to adequately protect speech necessary to inform the public of government wrongdoing. *See, e.g.*, Chemerinsky, *supra*, at 539; Nahmod, *supra*, at 581; Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech To Protect Its Own Expression*, 59 DUKE L.J. 1, 4, 13–14 (2009); Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 118 (2008). Finally, critics contend that the *Garcetti* decision allows government to evade scrutiny of its actions by broadly defining employees’ job duties. *See, e.g.*, Nahmod, *supra*, at 580–81.

132. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 384 (1986).

133. *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2003).

134. *Garcetti*, 547 U.S. at 421–22.

135. *Id.*

In concluding that Ceballos was “not speaking as [a] citizen[.]”<sup>136</sup> the Court drew a sharp line between the citizen-government relationship and the employee-employer relationship, implicitly assuming that a categorical distinction exists between the two and that public employee speech can be neatly sorted into one category or the other. Extrapolating from this analysis, some scholars have drawn the inference that public employees’ speech rights should mirror that of private sector employees.<sup>137</sup> For example, Patrick M. Garry praised the *Garcetti* decision for drawing a “fundamental distinction” between the relations of individual speaker-government and government employee-employer.<sup>138</sup> In the latter situation, Garry argues, no constitutional protection should come into play, because “[p]ublic employees should not gain additional rights [through the Constitution] that private employees do not have.”<sup>139</sup> In a similar vein, Lawrence Rosenthal applauds the emergence of what he calls a “First Amendment law of managerial prerogative.”<sup>140</sup>

Others have been highly critical of the assumption that citizen speech is entirely distinct from government employees’ official duty speech. Justice Souter’s dissenting opinion, for example, criticized the majority for ignoring the possibility that an employee speaking pursuant to her job duties may also be speaking as a citizen.<sup>141</sup> He argued that the public employee may still “wear a citizen’s hat”<sup>142</sup> even, or perhaps *especially*, when speaking on matters within his job duties. Similarly, the public’s interest in hearing the speech is not diminished merely because it falls within the speaker’s job duties.<sup>143</sup>

136. *Id.* at 421.

137. See, e.g., Garry, *supra* note 21, at 814; Robert Roberts, *The Supreme Court and the Deconstitutionalization of the Freedom of Speech Rights of Public Employees*, 27 REV. PUB. PERSONNEL ADMIN. 171, 182–83 (2010); Kermit Roosevelt III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 642 (2012); Rosenthal, *supra* note 21, at 39, 43, 65–66.

138. Garry, *supra* note 21, at 813.

139. *Id.* at 816.

140. Rosenthal, *supra* note 21, at 39. According to Rosenthal, managerial prerogative means that “management necessarily enjoys the prerogative to evaluate [an employee’s duty-related] speech . . . [and] to take whatever remedial action it deems warranted.” *Id.* at 43. He acknowledges that “in the private sector, managerial prerogative includes essentially unfettered power to regulate employee speech within applicable statutory and contractual parameters,” *id.* at 65, but sees one exception in the public sector context—government may not discriminate on the basis of partisan affiliation unless it is a bona fide qualification for the position. *Id.* at 65–66.

141. *Garcetti*, 547 U.S. at 430–33 (Souter, J., dissenting); see also Chemerinsky, *supra* note 131, at 538; Corbin, *supra* note 131, at 605, 607; Nahmod, *supra* note 131, at 575–76.

142. *Garcetti*, 547 U.S. at 430.

143. *Id.* at 433.

Yet, by characterizing Ceballos's objections to the search warrant as solely employee speech, the *Garcetti* majority removes it entirely from constitutional protection and makes the denial of Ceballos's claim seem inevitable. As Cynthia Estlund puts it, "the majority chooses to empower the public employer by adopting the analogy of private sector employment at will."<sup>144</sup>

### *Privacy*

The comparison between public and private workplaces also shapes the analysis in cases analyzing public sector employees' privacy rights. As discussed above, the plurality in *O'Connor v. Ortega* emphasized the employment context in determining whether a reasonable expectation of privacy exists and in setting the standard of reasonableness that should apply.<sup>145</sup> And it briefly referenced the private sector in considering when public employees' expectations of privacy might be reduced as a result of workplace practices.<sup>146</sup> Justice Scalia's concurring opinion proposed a different test that takes the analogy to the private sector even further. The government, he argued, "like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes."<sup>147</sup> Looking to practices in the private sector as setting an appropriate standard, he asserted that "searches of the sort that are regarded as reasonable and normal in the private-employer context . . . do not violate the Fourth Amendment."<sup>148</sup>

In the years following the *O'Connor* decision, most courts and litigants operated under the assumption that the plurality opinion governed, and they rarely analyzed or even mentioned Scalia's alternative test.<sup>149</sup> However, the Supreme Court's decision in *City of*

144. Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 149 (2007). Estlund further notes that the Court "tells us precisely nothing about *why* the majority chooses that analogy in this case but not in others." *Id.*

145. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion).

146. *Id.* ("Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.").

147. *Id.* at 732 (Scalia, J., concurring).

148. *Id.*

149. See, e.g., *Narducci v. Moore*, 572 F.3d 313, 319 (7th Cir. 2009); *Biby v. Bd. of Regents*, 419 F.3d 845, 850–51 (8th Cir. 2005); *Leventhal v. Knapek*, 266 F.3d 64, 73–74 (2d Cir. 2001). In the small handful of cases in which a lower court analyzed Scalia's concurrence separately, it usually concluded that the plurality opinion controlled. See, e.g., *United States v. Gonzalez*, 300 F.3d 1048, 1053 (9th Cir. 2002) (reading *O'Connor* as establishing the test set out in the plurality opinion); *Shields v. Burge*, 874 F.2d 1201, 1203–04 (7th Cir. 1989) (concluding that the *O'Connor* plurality's reasonableness test governs

*Ontario v. Quon*<sup>150</sup> focused renewed attention on Scalia's concurrence by highlighting the disagreement between him and the plurality in *O'Connor*.<sup>151</sup> The *Quon* Court concluded, however, that it "is not necessary to resolve" which test is the controlling precedent, because either would lead to the same result under the facts of the case.<sup>152</sup>

Justice Scalia's proposed standard—that "searches of the sort that are regarded as reasonable and normal in the private-employer context" satisfy the Fourth Amendment<sup>153</sup>—is highly indeterminate. The test could mean that if a practice is *legal* for private employers to engage in, a public employer does not violate constitutional standards when it does the same thing.<sup>154</sup> Alternatively, the test could mean that if a given practice is *commonly observed* in the private sector, it satisfies constitutional standards.<sup>155</sup> Or, putting emphasis on the word "reasonable," the test might be asking whether the practice is one that reasonably should be permitted in the private sector in light of

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because Justice Scalia did not articulate a different standard, and even if he did, the plurality's test is the Court's least-common-denominator holding).

150. 560 U.S. 746 (2010).

151. *Id.* at 756–57.

152. *Id.*

153. *O'Connor*, 480 U.S. at 732 (Scalia, J., concurring).

154. Some commentators appear to interpret Scalia's proposed test in this way. For example, Clifford S. Fishman reads Scalia's concurrence in *O'Connor* as arguing that government employees "should enjoy no greater (and no lesser) right to privacy than an employee of a non-governmental entity." Fishman, *supra* note 47, at 1383, 1410 (describing Justice Scalia's test as articulating that "a government employee's constitutional right to privacy in the workplace should be the same as the legal privacy rights of employees in the private workplace"). Similarly, Paul Secunda describes Scalia's test as requiring that privacy rights in the public workplace should be the same as in the private workplace under the common law tort. Secunda, *supra* note 12, at 281. On this assumption, Fishman and Secunda each analyze the common law invasion of privacy tort as applied in the private employment setting to determine what rights public employees would have under Scalia's test. Fishman, *supra* note 47, at 1383; Secunda, *supra* note 12, at 294. Given considerable state law variations in the common law tort and in statutory protections of employee privacy interests, this approach would mean that the scope of Fourth Amendment rights would depend upon the state in which the Fourth Amendment was applied. The Supreme Court expressly rejected the notion "that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment." *California v. Greenwood*, 486 U.S. 35, 44 (1988).

155. This interpretation is similarly contingent, depending on an empirical inquiry which in turn requires choosing which regions, industries, or employment sectors provide an appropriate reference pool. The Supreme Court has suggested in another context that resting constitutional rights on this type of market inquiry is inappropriate. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 723 (1996) ("If results were to turn on these sorts of distinctions, courts would have to inquire into the extent to which the government dominates various job markets as employer or as contractor. We have been, and we remain, unwilling to send courts down that path.").

societal norms.<sup>156</sup> Each of these interpretations raises considerable difficulties in determining exactly what should be considered “reasonable and normal” in the private sector workplace.

There is another possible interpretation of Justice Scalia’s “reasonable and normal in the private-employer context”<sup>157</sup> test—namely, that public sector employees have no greater rights to privacy than what private employees receive *under the federal Constitution*. And because employees in the private sector receive *no* protection from the Fourth Amendment against searches by their employers, the implication is that public sector employees should not either. Employees of private firms have Fourth Amendment rights against the government when it acts purely in its sovereign capacity—as when the police search for evidence of criminal wrongdoing in a suspect’s office—and so, too, does the government employee. When, however, an employee complains of intrusive searches by her employer, the Fourth Amendment would provide no protection at all to either the public or private sector employee. If this interpretation is correct—and it is arguably most consistent with language elsewhere in Justice Scalia’s concurrence—it represents an implicit repudiation of the doctrine, repeated in numerous cases over decades, that government employment cannot be conditioned on the relinquishment of constitutional rights.<sup>158</sup>

Most recently, the Supreme Court relied on a comparison with private sector employment in *NASA v. Nelson*,<sup>159</sup> which challenged the intrusiveness of government-required background investigations.<sup>160</sup> The plaintiffs, employees of a federal contractor, argued that questions seeking information about treatment or counseling for illegal drug use and open-ended inquiries calling for any type of adverse information from third parties violated their

156. This approach raises the question of how to determine what is reasonable in the private sector.

157. *O’Connor*, 480 U.S. at 732 (Scalia, J., concurring).

158. See, e.g., *O’Hare*, 518 U.S. at 717 (“A State may not condition public employment on an employee’s exercise of his or her First Amendment rights.”); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (observing that government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech” and noting the frequent application of this principle in the public employment context); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967) (rejecting the premise “that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action”).

159. 131 S. Ct. 746 (2011).

160. *Id.* at 751.

“constitutional right to informational privacy.”<sup>161</sup> The Court “assume[d], without deciding” that the Constitution protects a “privacy ‘interest in avoiding disclosure of personal matters,’ ”<sup>162</sup> but nevertheless rejected the plaintiffs’ claims. Emphasizing that this case involved the Government’s role as “proprietor” and “manager,” rather than regulator, the Court stressed the “‘wide latitude’ granted the Government in its dealings with employees.”<sup>163</sup> It noted that the types of inquiries the plaintiffs objected to are “part of a standard employment background check of the sort used by millions of private employers”<sup>164</sup> and concluded that the reasonableness of such questions “is illustrated by their pervasiveness in the public and private sectors.”<sup>165</sup> The analogy to the private sector thus allowed the Court to dismiss the plaintiffs’ claims without actually deciding whether a right of information privacy exists and if so, when it restrains the government employer. Instead, the Court presumed that even were such a right to exist, the prevalence of similar investigative practices in the private sector would negate the constitutional claim.

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References to the private sector workplace are increasingly common in cases addressing public employees’ constitutional rights, and yet the Court has not clearly spelled out why the analogy is relevant or what role it should play in shaping constitutional standards. Instead, the comparison with private sector employment serves a rhetorical function. It suggests that the employment context is the most important factor for the constitutional analysis. By doing so, it renders the government employer’s managerial needs far more salient, while obscuring the fact that it is also, still, the government. Attention is diverted away from the values underlying constitutional

161. *Id.* at 754.

162. *Id.* at 751 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

163. *Id.* at 761.

164. *Id.* at 758.

165. *Id.* at 761. Although the Court’s opinion did not expressly equate constitutional standards with practices in the private sector, an exchange during oral argument suggests the reasoning behind the analogy. Chief Justice Roberts asked Neal Katyal, the acting Solicitor General, during oral argument: “Do you think the Government’s right to inquire in the employment context is exactly as broad as a private employer’s right?” Transcript of Oral Argument at 14, *NASA v. Nelson*, 131 S. Ct. 746 (2011) (No. 09-530), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-530.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-530.pdf) [<http://perma.cc/7GNE-DRRW> (dark archive)]. Katyal responded: “[T]he private employers are a good template. If the Government is simply mirroring what private employers do, as Justice Scalia said in *O’Connor v. Ortega*, that’s a good suggestion that what it’s doing is reasonable.” *Id.*

guarantees of speech and privacy and focused instead on the market norms that prevail in the private sector. As a result, the government's dual role—as employer and sovereign—disappears from view. Using private employment as a reference point thus shifts the frame of reference in a way that tends to emphasize market norms at the expense of constitutional values.

### III. A MISTAKEN ANALOGY

The Supreme Court's repeated comparison of public and private workplaces raises the following question: *should* the speech and privacy rights of government employees be measured against norms and practices in the private sector? Put differently, is there anything wrong with the Court's recent emphasis on market norms when interpreting public employees' speech and privacy claims? A close analogy between public and private workplaces may at first seem obvious. Both settings present the same challenge of managing individual efforts to achieve organizational goals. In both, the law must navigate a tension between the employer's interest in efficiency and the employee's interest in maintaining a certain measure of personal autonomy. And yet, as I argue below, the reliance on the analogy between public and private employment overlooks important differences between the two sectors.

Scholars who argue that the rights of private employees should match those of public employees focus on the similarities in workers' interests across the two sectors. Joseph Grodin, for example, argues that “[a]n employee’s interest in expressing his views, in protecting his privacy against intrusion, or in being treated fairly is the same whether his employer is a governmental entity or a private corporation.”<sup>166</sup> Although acknowledging that different considerations come into play when the government is the employer, he asserts that the availability of constitutional rights to protect public employees “provides strong support for a claim by private employees that they are entitled to equal respect.”<sup>167</sup>

Scholars who defend the Court's move toward a more managerial approach to interpreting public employees' constitutional claims also emphasize the similarities in the situation of public and

166. Grodin, *supra* note 12, at 14; *see also, e.g.*, Summers, *supra* note 12, at 692 (arguing that employees' personal freedoms are threatened not only by the state, but also by private employers with the power to deprive them of their livelihoods); Wilborn, *supra* note 12, at 830 (arguing that invasions of privacy by private employers are just as harmful as government intrusions).

167. Grodin, *supra* note 12, at 15.



private sector employees. Kermit Roosevelt, for example, suggests that public employees are not threatened with any greater coercive peril to their liberty than private employees because the government employer, like the private firm, cannot put its employees in jail if it disapproves of their speech.<sup>168</sup> Others have argued that when threatened with job loss government employees can exercise the same option available to any employee—namely, seeking alternative employment, either elsewhere in the public sector or at a private firm.<sup>169</sup> Focusing on whether employer demands feel coercive makes the situation of public and private sector employees look similar. An employee who fears losing her job if her speech displeases her employer and, therefore, stays silent has experienced much the same type of compulsion whether she works for a firm or a government agency.

Although things might look similar from the employee's perspective, looking at the employer's side of the equation reveals some real differences. The objections typically raised against regulating private employers either do not apply or lose force when the government is the employer. In this Part, I examine two types of claims—rights-based and prudential—which are commonly made to oppose employment regulation in the private sector.<sup>170</sup> Rights-based arguments claim that employers themselves have rights against the state that may be infringed by workplace regulation. Arguments based on prudential considerations assert that regulating the terms and conditions of employment is unnecessary or even counter-productive given that firms are subject to the discipline of market forces. Both these types of arguments are highly contested even when asserted by private firms. However, whether or not they are

168. Roosevelt, *supra* note 137, at 639–40. Of course, the government's threatened use of force is not necessary to find a constitutional violation. The Supreme Court has repeatedly and in a wide variety of contexts held the Constitution to restrain government activity, even when the use of force was not at issue. See Kreimer, *supra* note 55, at 1318 (“[I]t is hard to imagine any modern constitutional theorist taking the position that only a direct threat of violence would violate constitutional rights.”). Thus, the Court has found that the Constitution constrains government when, for example, it puts conditions on the provision of public services, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); assesses property for taxing purposes, *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n*, 488 U.S. 336, 338 (1989); or establishes zoning regulations, *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

169. Garry, *supra* note 21, at 816; Kozel, *supra* note 88, at 1030–31.

170. Of course, there are arguments that apply in both sectors—for example, the need for some managerial discretion in order to accomplish the purposes of the employment. However, these considerations are already taken into account in First and Fourth Amendment doctrines that are less demanding of the government when acting as an employer rather than purely as sovereign. See discussion *supra* Section II.A.

persuasive in the context of private sector employment, they have little application to government employment. Because the government employer stands in a different relationship to the public and to the market, it is a mistake to rely on an analogy to the private workplace to interpret public employees' rights.

#### A. *Rights-Based Arguments*

Private employers resist regulation by invoking their own status as rights-holders. The government employer, however, differs fundamentally in the source of its power to act, putting its claims to resist employees' speech and privacy rights on a different footing. Thus, whatever force rights-based arguments have when deployed by private firms, they have little application to the government employer.

When employees seek protection of their speech and privacy interests, private employers typically invoke their own property rights.<sup>171</sup> As owner and manager of the enterprise, the firm asserts the right to control the conditions of employment.<sup>172</sup> On this view, the job is the property of the employer, who is entitled to set the terms of employment as it sees fit.<sup>173</sup> More generally, regulation of the employment relationship is resisted as an interference with economic

171. See Summers, *supra* note 12, at 693–94.

172. The classic expression of this position is found in *Payne v. Western & Atlantic Railroad Co.*, 81 Tenn. 507, 517–18 (1884), *overruled in part* by *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915). In holding that an employer could condition employment on obeying its restrictions, the court wrote:

Is it unlawful . . . to threaten to discharge employe[e]s if they trade with a certain merchant? . . . May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them? . . . [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.

*Id.*

173. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000) (“The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee . . .”); see also JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 8–9 (1983) (arguing that assumptions that the workplace is the property of the employer underlie labor law doctrines granting rights of control to management).

liberty.<sup>174</sup> Although freedom of contract has long since lost its status as a constitutional trump card, advocates and scholars continue to insist that the “basic principle of autonomy” requires that any regulatory interference with private employment contracts “bear a heavy burden of justification . . . .”<sup>175</sup>

Of course, these rights are not absolute. “Property” and “contract” are not natural categories that antedate social arrangements, but are themselves constituted by law. Claims of property and autonomy have often yielded to important public purposes. And yet, in our current constitutional order, rights invoked by private parties against the government have some heft because protection is thought necessary to create “centers of choice independent of the government.”<sup>176</sup> Allowing space for choice not only enhances individual autonomy, it also promotes overall social welfare. Property rights are thought to achieve the latter function precisely because individuals will use those rights to pursue purely private ends.<sup>177</sup> By contrast, the government employer acts pursuant to a publicly granted power for the pursuit of collectively defined ends. As Seth Kreimer writes, “[n]o public enterprise, however proprietary, can claim the same genealogy as a private enterprise. Somewhere along the line it rests on the sovereign taxing power, and it cannot plausibly claim to be the unsullied product of freely adopted private choices.”<sup>178</sup>

Thus, the argument for respecting private property as the outcome of private choices does not apply to “aggregations of capital formed through government’s power to tax and appropriate funds.”<sup>179</sup> Because public property stems from a different source, no autonomy interests weigh on the public employer’s side of the balance as they might for the private employer resisting an employee’s claim of constitutional rights.

The power of the government agency not only arises from a different source, it is also granted for a different purpose. Property and liberty interests are defended as welfare enhancing because they

174. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953–55 (1984).

175. *Id.* at 954.

176. Kreimer, *supra* note 55, at 1322.

177. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477–78 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776) (arguing that individuals pursuing their own private interests will have the effect of promoting the public interest, even though the individuals do not intend it).

178. Kreimer, *supra* note 55, at 1320.

179. *Id.* at 1320 n.84.

permit outcomes to be determined by the unfettered interaction of individual market choices.<sup>180</sup> Unlike private rights, which are intended to encourage the pursuit of private ends, power is granted to government agencies for the purpose of achieving collective goals arrived at through a process of public deliberation. Government agencies are expected to use that power to advance those publicly defined goals, not to exercise their individual autonomy or pursue their private ends. They may require some measure of freedom in order to effectively achieve those public purposes, but that freedom is subordinate to the overall public goals they were created to pursue. The government employer thus has no independent property or autonomy rights to invoke as a private employer might.

One might object to the argument that government is different because it pursues public goals on the grounds that government agencies do not in fact pursue public purposes. The public choice literature asserts that government policy more often reflects the interests of well-organized interest groups rather than truly majoritarian preferences.<sup>181</sup> Even if public choice theorists are right, however, that would hardly strengthen the rights-based claims of a government employer. Private interests may assert property and autonomy rights when utilizing private resources, but the fact that they may sometimes succeed in capturing government agencies should not entitle them to claim those rights on behalf of the captured agency. Thus, whether pursuing truly public interests or well-organized private interests, government agencies cannot rely on the rights-based claims invoked by private firms.

In the case of public employee speech rights, another objection might be that the government can claim an interest in promoting its own message. Several Supreme Court cases have noted that when the government is the speaker, it is permitted to control the content of its expression as well as to “ensure that its message is neither garbled nor distorted . . . .”<sup>182</sup> This “latitude” is afforded the government as speaker because the state is ultimately “accountable to the electorate and the political process for its advocacy.”<sup>183</sup> While government speech is inevitable, it is generally agreed that government has no

180. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 177–78 (1974) (describing various considerations favoring private property rights).

181. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–37 (1991) (surveying literature on how private interest groups influence the political process).

182. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

183. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 234–35 (2000).

First Amendment right to speak.<sup>184</sup> Rather, the government speech doctrine has been invoked as a defense, permitting actions alleged to burden private speech when necessary to disseminate the government's message.<sup>185</sup>

To begin with, it is unclear whether the government speech doctrine applies when the First Amendment claimant is a public employee. No Supreme Court case has ever directly applied the government speech doctrine to deny a public employee's First Amendment claim,<sup>186</sup> although the majority opinion in *Garcetti* appears to have been influenced by it.<sup>187</sup> That opinion, however, mentions only one of the Court's earlier cases on government speech—*Rosenberger v. Rector & Visitors of University of Virginia*<sup>188</sup>—in a “*cf.*” reference,<sup>189</sup> and its reasoning does not track that of a government speech defense's identification of a particular message that the government intended to convey. Instead, it characterizes the discipline taken against the employee, Ceballos, for his speech as “simply . . . the exercise of employer control over what the employer itself has commissioned or created”<sup>190</sup>—invoking something closer to a property claim than a speech interest. According to the Court majority, Ceballos's speech was unprotected because he spoke while on the job,<sup>191</sup> not because government control of his speech was necessary to convey its own message. In fact, the government speech doctrine fits poorly with the facts in *Garcetti*.<sup>192</sup> As the dissenting Justices argued, Ceballos was not hired to “broadcast[]

184. See, e.g., Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 708 (2011); Norton, *supra* note 131, at 24 & n.91 (listing authorities).

185. See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005); *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

186. None of the cases typically cited as authority for the government speech doctrine involved the claims of public employees. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 464–65 (2009) (asserting speech rights of religious organization seeking to install monument in public park); *Johanns*, 544 U.S. at 553 (private agricultural marketing association); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536 (2001) (grantees of federal funds); *Southworth*, 528 U.S. at 234–35 (public university students); *Rosenberger*, 515 U.S. at 845–46 (public university student organization); *Rust*, 500 U.S. at 177–78 (recipients of federal funding).

187. 547 U.S. 410, 412–26 (2006).

188. 515 U.S. 819 (1995).

189. *Garcetti*, 547 U.S. at 422. *Cf.* is used when the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 59 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

190. *Garcetti*, 547 U.S. at 422.

191. *Id.*

192. See Roosevelt, *supra* note 137, at 635.

a particular message set by the government . . . .”<sup>193</sup> Even though his official job duties included speaking, he was not hired as a mouthpiece, but to speak as a professional—as a lawyer exercising independent judgment and bound by the ethical responsibilities of the profession.<sup>194</sup> Thus, the *Garcetti* holding arguably should not be understood as an application of the government speech doctrine.<sup>195</sup>

If the government speech doctrine is relevant at all to public employees’ First Amendment claims, it should apply only in a narrow set of circumstances. As Helen Norton has argued, the value of government speech depends on its transparency.<sup>196</sup> Only when it is clear that it is the government speaking can listeners evaluate its credibility and hold the government accountable if they object.<sup>197</sup> Thus, the government speech doctrine should apply only when a public employee is “specifically hired to deliver a particular viewpoint that is transparently governmental in origin . . . .”<sup>198</sup> Norton’s examples include the press secretary or lobbyist hired to promote a school board’s antivoucher position, the health department employee hired to lead an antismoking campaign, and the pro-abstinence counselor hired by a school.<sup>199</sup> To the extent it applies at all, it would affect a “much smaller slice of public employee speech than does *Garcetti*’s ‘pursuant to official duties’ test.”<sup>200</sup> Apart from these types of situations, the government’s own speech interest does not have much force independent of the Court’s oft-repeated observation that

193. *Garcetti*, 547 U.S. at 437 (Souter, J., dissenting). Justice Souter criticized the majority for citing *Rosenberger*, a government speech case, arguing that it was inapposite. *Id.* at 436–37.

194. *Id.* at 446 (Breyer, J., dissenting).

195. The majority opinion does not explicitly refer to “government speech” nor does it track the reasoning of the doctrine, as discussed earlier. *See supra* notes 186–94 and accompanying text. Nevertheless, some commentators have assumed—wrongly in my view—that *Garcetti* is an example of the government speech doctrine. *See, e.g.,* Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing To Say?*, 95 IOWA L. REV. 1259, 1285–89 (2010) (“Although the Court treats [*Garcetti*] as a simple employment dispute and does not specifically rely on the government speech doctrine, the case does, in fact, fit the Court’s model for government speech because the government was communicating to a court.”); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1771 (2007) (referring throughout to the “*Garcetti* government speech doctrine”).

196. *See* Norton, *supra* note 131, at 30.

197. *Id.* at 27.

198. *Id.* at 30.

199. *Id.* at 30–31. Other examples include an agriculture department hiring a beef promoter or a mayor commissioning artists to paint murals for holidays such as the Fourth of July or Dr. Martin Luther King, Jr. Day. *Id.*

200. *Id.* at 31.

the government has an interest in managing its employees to advance the goals of the agency. In the public employment context, then, the government speech doctrine adds little heft to the public employers' side of the balance.

*B. Market Discipline and Political Accountability*

In addition to rights-based claims, private employers also resist legal protection of employee interests by arguing that such regulation is unnecessary or counterproductive given the discipline imposed by well-functioning markets.<sup>201</sup> Once again, however, whether or not this argument is persuasive when pressed by private firms, it loses force when applied to government employers. As discussed in this Section, public agencies are funded by the public fisc and are therefore far more insulated from market competition than the typical private firm. In addition, government agencies exist to achieve certain public purposes rather than to pursue purely private gain. As a result, the mechanisms of control and accountability differ between the two sectors, such that the significance of infringing upon employee speech and privacy rights also differs.

Efficiency-based arguments assert that interventions to protect workers' speech and privacy interests are unnecessary given the discipline imposed by competitive markets. If employees truly value the ability to speak freely or to protect personal privacy, any employer that invades those rights will be imposing a cost on workers. With the package of wages and working conditions now appearing less desirable, employees will seek work elsewhere, thereby simultaneously escaping the burdensome conditions and raising labor costs for the offending employer.<sup>202</sup> In order to retain the best workers, the employer will either have to modify its requirements or raise wages. Thus, according to Todd Henderson, because firms face "relentless and finely tuned labor markets," they will be "constrain[ed] . . . from imposing restrictions on employee conduct that are excessive or out of relation to the costs that conduct imposes on the firm's owners."<sup>203</sup>

Comparisons between public and private workplaces rest on the assumption that labor markets operate in the same way in both sectors. For example, commenters defending the use of private sector

201. See, e.g., Epstein, *supra* note 174, at 947–48; M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1552–53 (2009).

202. See Henderson, *supra* note 201, at 1583–84.

203. *Id.* at 1553.

norms to determine the scope of employees' constitutional rights argue that the public employee who loses her job for exercising her rights is free to get another job elsewhere, including in the private sector.<sup>204</sup> While it may be true that public employers rarely hold monopsony power, private sector jobs are not always fungible with public sector jobs. For some types of jobs, the government is the only relevant employer. Workers with a particular skill set may be able to substitute a private sector job for a public sector job, but this substitution will often entail a loss to the employee.<sup>205</sup> For example, a lawyer who wishes to serve as a prosecutor could get a job at a private firm, and a law enforcement officer could work as a private security guard, but the alternative job in the private sector may not provide the same type of experience or sense of purpose and meaning, even if the material rewards are comparable. Of course, this will not always be the case. Sometimes, the focus of the job is utilizing a particular skill set, regardless of the context,<sup>206</sup> and in other cases, alternative jobs may exist within the public sector, as when an attorney moves from a state to a federal prosecutor's office. Public sector employment, however, often entails forms of compensation such as civil service protections or pension benefits tied to seniority that are not easily replaced, meaning that alternative jobs may not be fungible, particularly for a public employee with long tenure. All of this is not to argue that public employers face no constraints, but to point out that there is likely to be some stickiness making it improbable that they operate in a "relentless and finely tuned labor market" as it is asserted that private employers do.<sup>207</sup> And to that extent, the government employer will have greater leverage to impose conditions infringing on basic rights.

Whether or not the government agency faces different labor market conditions than private employers, its relationships to consumption and capital markets are radically different. Private firms must compete not only for labor, but for customers and capital as

204. See, e.g., Garry, *supra* note 21, at 816; Kozel, *supra* note 88, at 1030–31.

205. See, e.g., James L. Perry, *Measuring Public Service Motivation: An Assessment of Construct Reliability and Validity*, 6 J. PUB. ADMIN. RES. & THEORY 5, 5–7 (1996) (suggesting that public employees are motivated by public service aspects of the job and developing a construct for measuring this attitude).

206. See, e.g., Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 96 (2013) (arguing that because "sometimes an accountant is an accountant, an engineer is an engineer, and a lawyer is a lawyer[.]" public employees are "linked to a larger labor market," making government constraints on public employees much less troubling).

207. Henderson, *supra* note 201, at 1553.



well, and these markets also have a disciplining effect on managerial overreaching. Slack demand or low-cost competitors pressure private firms to eliminate inefficient management practices. Similarly, an effective market for corporate control will reward good managers and force out bad ones. Gratuitously intrusive or inefficiently burdensome restrictions on its employees will affect a firm's bottom line and thus managers, who face "high-powered incentives to maximize firm value," will be constrained from adopting those practices.<sup>208</sup> Public agencies, on the other hand, are funded by the public fisc rather than through sales of their products in a competitive market, and public officials are subject to replacement through political rather than market processes. This insulation from market pressures means that these pressures do not have the same disciplining effect on the public employer. Thus, even if market efficiency justifies deregulation of the private employment relationship, the same rationale does not apply to government agencies.

The assumption to this point has been that employer-imposed burdens on employee speech and privacy rights are efficiency enhancing. Because permitting employee speech or respecting employee privacy imposes costs on the employer's productive process, the argument goes, employers will infringe these interests only when the efficiency gains in doing so outweigh the costs imposed when unhappy workers seek higher wages or alternative employment. Court opinions considering the speech and privacy rights of public employees make a similar assumption that rights-infringing practices are efficient and that giving the government a freer hand will allow it to more effectively accomplish its purposes. For example, the *Pickering-Connick* balancing test weighs the employees' interests in speaking against the smooth operation of the public workplace. Similarly, in *Garcetti* the Court warns that without "a significant degree of control over their employees' words . . . there would be little chance for the efficient provision of public services."<sup>209</sup> The same assumption underlies the Court's analysis of employee privacy rights. As the plurality in *O'Connor* wrote, employees' Fourth Amendment interests must be balanced "against the government's need for supervision, control, and the efficient operation of the workplace."<sup>210</sup>

While it is certainly true that employee assertions of speech and privacy rights disrupt managerial *control* over the workplace, not all

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208. *Id.* at 1571–72.

209. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

210. *O'Connor v. Ortega*, 480 U.S. 707, 720 (1987) (plurality opinion).

exercises of managerial discretion are necessarily efficiency enhancing. Suppressing employee speech may avoid disruptions and help the workplace operate more smoothly; it may also reduce morale and block expression that would inform management and improve workplace operations.<sup>211</sup> The public sector manager may punish employees for their speech in order to enforce legitimate workplace rules, or simply because she finds their expression distasteful or unwelcome. Intrusive searches or surveillance may effectively detect and discourage employee misconduct, or they may entail a diversion of resources or deter valuable employee speech without any commensurate benefit to the agency or the public. Thus, not all employee claims of speech and privacy rights inevitably interfere with effective government operations. In at least some instances, employers' rights-infringing practices may harm rather than enhance the efficiency of the agency. Once again, however, the government employer's insulation from the market means that competitive pressures are far less likely to drive out these types of inefficient, rights-infringing practices in the public sector.

More importantly, protecting public employee rights promotes important interests even—and especially—when it would be more efficient from the government's perspective to override them. In particular, public employee speech that reveals ineptitude or wrongdoing may interfere with “the efficient provision of public services,”<sup>212</sup> but is valuable precisely because it is disruptive.<sup>213</sup> Protecting this speech is crucial because it plays an important function in ensuring accountability of public agencies. Here again, the contrast with the private firm is a sharp one. While the firm primarily seeks financial gain for its owners, the public employer exists to provide services or pursue policies agreed upon through some process of public deliberation. Both shareholders and the public face agency problems in ensuring that managers pursue the goals for which they were hired. However, because the firm is organized for private gain,

211. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 54, 59 (1990); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 33 (1987).

212. *Garcetti*, 547 U.S. at 418.

213. *Cf. Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”).

the owners of the firm can evaluate executive performance based on financial outcomes and have the ability to structure compensation in a way that tends to align managers' incentives with their own. By contrast, in the public agency, there is no economic surplus created that can be used to measure the effectiveness of public sector managers or to align their incentives with the interests of the public.<sup>214</sup> Instead, the performance of government agencies is monitored through public examination and discussion, and agency officials are called to account through the political process.

Because political accountability is the primary means by which the public seeks to ensure that public managers are pursuing public goals, speech by public employees plays a particularly important role in self-governance. First Amendment theory has long recognized that speech rights protect not only the speakers' autonomy interests, but also a public interest in hearing what the speaker has to say.<sup>215</sup> Citizen speech in general contributes to the "marketplace of ideas"<sup>216</sup> necessary for informed self-government, but the public particularly benefits from hearing from public sector employees; their knowledge can help shape public understanding of how government operates and inform assessments of its effectiveness.<sup>217</sup>

The Supreme Court has repeatedly acknowledged that public employees are particularly well situated to contribute to public debate about the agencies for which they work. In *Pickering*, the Court wrote that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" about the funding and operation of schools.<sup>218</sup> Similarly, it recognized in *Waters v. Churchill* that "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."<sup>219</sup> Precisely because of their role

214. See, e.g., Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 763 (1984).

215. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26–27 (1960) (articulating theory that the First Amendment protects the speech necessary for effective self-government).

216. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (utilizing the metaphor of a market that tests the truth of competing ideas as a way of arguing for the value of free speech).

217. See *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) ("[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public.").

218. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

219. *Waters v. Churchill*, 511 U.S. 661, 674 (1994); see also *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (noting that *Pickering* recognized that teachers are more likely to

as government employees, they have access to more and different kinds of information about the operation of government and the policies it is pursuing. Their speech does not merely add another voice to the debate; rather, it provides information that is uniquely important to informing the public and ensuring political accountability.

Most scholarly commentary has endorsed the Supreme Court's observation that public employee speech is valuable because of its contribution to public debate.<sup>220</sup> Lawrence Rosenthal, however, has drawn starkly different implications from the importance of political accountability. He argues that political accountability requires that public employees have less rather than more First Amendment protection because officials must be given "full and effective control" over their employees' performance, including on-the-job speech, so that public officials can fairly be held to account for the operation of their offices.<sup>221</sup> If public sector managers overreach, he asserts, the public will respond by voting them out of office.<sup>222</sup> Thus, he defends the holding in *Garcetti* as "leav[ing] judgments about the soundness of managerial philosophy—on the management of employee speech as with all other matters within the scope of managerial prerogative—to the political process."<sup>223</sup>

Rosenthal's argument for granting government employers full managerial control rests on his belief that the market for political control will effectively constrain public employers. In order for a government agency to be held accountable for achieving its goals, however, the public must have sufficient information about its operations to assess its performance. It is for this reason that numerous scholars have criticized the *Garcetti* decision.<sup>224</sup> By exempting from First Amendment protection public employees' speech made pursuant to their job duties, "[i]t allows elected officials to suppress whistleblowing and other on-the-job communications that

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have informed opinions about school operations, and that "[t]he same is true of many other categories of public employees"); *City of San Diego*, 543 U.S. at 82 ("[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.").

220. See, e.g., Nahmod, *supra* note 131, at 594, 596; Roosevelt, *supra* note 137, at 634, 636; Secunda, *supra* note 131, at 118.

221. See Rosenthal, *supra* note 21, at 48.

222. *Id.* at 51, 111.

223. *Id.* at 51–52.

224. See, e.g., Nahmod, *supra* note 131, at 594; Norton, *supra* note 131, at 4; Secunda, *supra* note 131, at 117–18.

would otherwise facilitate the public's ability to engage in political accountability measures...."<sup>225</sup> Rosenthal disagrees, implicitly assuming that dissenting employee speech is unnecessary to bring to light instances of government ineptitude or overreaching.<sup>226</sup> In fact, in the years following *Garcetti*, the lower federal courts denied protection to numerous government employees who objected to their employers' illegal practices, health and safety violations, and financial improprieties.<sup>227</sup> The cumulative effect of these rulings is likely to significantly reduce the production of information about questionable agency practices in the future.

The political market for control is also far less likely to be effective in holding agencies accountable for their "managerial philosophy"—including how they treat their employees. Long before *Garcetti* denied protection to employees' "official duty" speech, the Court in *Connick v. Myers*<sup>228</sup> held that the First Amendment generally does not protect government employees when they raise grievances about their workplace,<sup>229</sup> thereby making it less likely that these issues will be raised publicly. Even if employee grievances are aired, questions about an agency's "managerial philosophy" will rarely be salient enough to attract voter attention, let alone to drive electoral outcomes in a manner that would have a disciplining effect. Moreover, many public officials with managerial authority are appointed rather than elected. Apart from a handful of high profile political appointments, most of these public officials will be largely insulated from electoral control over how they run their offices.

The political market for control is likely to be ineffective in protecting valuable public employee speech from government retaliation for another reason as well. Even though public employee speech may provide important information about how government is doing its job, the voting public may not always appreciate the individual who plays this role. Public employee speech is likely to be disruptive, particularly when it highlights wrongdoing or challenges widely accepted orthodoxies, and in such situations, a majority of the public may see its interests as more closely aligned with the government manager than with the employee. In such a situation,

225. Norton, *supra* note 131, at 36.

226. See Rosenthal, *supra* note 21, at 50–51, 111.

227. See, e.g., *Spiegla v. Hull*, 481 F.3d 961, 962 (7th Cir. 2007), *cert. denied*, 552 U.S. 975 (2007); *Battle v. Bd. of Regents*, 468 F.3d 755, 761–62 (11th Cir. 2006); Norton, *supra* note 131, at 14–15, nn.48–52 (citing cases denying protection to government whistleblowers under *Garcetti*).

228. 461 U.S. 138 (1983).

229. *Id.* at 147–48.

electoral politics may well reward rather than constrain the overreaching official. To use the facts of *Garcetti* as an example,<sup>230</sup> a public that prioritizes high conviction rates is unlikely to hold a prosecutor's office accountable for suppressing the speech of individual prosecutors that disrupts the smooth path to a conviction. Particularly when the speech raises concerns about the impact of government action on an unpopular minority, such as criminal defendants, electoral pressure is unlikely to provide an effective check on government burdening employees' fundamental rights.

*Garcetti* does leave intact First Amendment protections for employees who blow the whistle outside the workplace by reporting wrongdoing to enforcement agencies or the media, and Rosenthal suggests that these protections are sufficient to ensure political accountability.<sup>231</sup> As Justice Stevens argued in his *Garcetti* dissent, excluding official-duty speech from First Amendment protection while protecting external whistleblowing creates a "perverse" rule that gives employees "an incentive to voice their concerns publicly before talking frankly to their superiors."<sup>232</sup> Contrary to Rosenthal's claim, this incentive structure undermines managerial control and reduces political accountability by preventing government officials from receiving important information about the workings of their own agencies and denying them the opportunity to address problems internally in the first instance.

In any case, political control over agency behavior is not solely about voting officials out of office. In Rosenthal's model, voters simply observe the outcome of agency activities over a period of time and then respond periodically by voting their approval or disapproval.<sup>233</sup> The First Amendment vision of democratic deliberation is richer than that. The purposes of government and the way it conducts its affairs should be a matter of ongoing public discussion, not merely passive observation. For example, Marvin Pickering's speech would not have informed the electorate how to vote. The bond issue he wrote critically about had already been defeated.<sup>234</sup> Rather, his speech was valuable because it raised important questions about what the funding priorities of the public schools were and should be. Reaction to and debate over particular government actions thus engage citizens in defining the priorities and

230. *Garcetti v. Ceballos*, 547 U.S. 410, 413–15 (2006).

231. Rosenthal, *supra* note 21, at 55.

232. *Garcetti*, 547 U.S. at 426–27 (Stevens, J., dissenting).

233. See Rosenthal, *supra* note 21, at 51–52.

234. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 566 (1968).

purposes of government and allow public officials to respond to these publicly expressed priorities on an ongoing basis.

The connection to political accountability is more complex in the case of employee privacy than employee speech. On the one hand, the need for political accountability may reduce the public employee's claims to privacy to the extent that some degree of transparency in government operations—including the communications and activities of government employees—is necessary to ensure accountability. This rationale may justify particular types of intrusions, limiting, for example, public employees' expectations of privacy in communications made while carrying out public functions. On the other hand, the need for political accountability does not necessarily negate other distinct privacy interests that may be unrelated to agency operations. Depending upon their job responsibilities, employees' claims to certain types of privacy, such as in their off-duty activities, purely personal communications, or sensitive information—such as medical or financial information—do not necessarily conflict with the need for transparency to ensure political accountability.<sup>235</sup>

At the same time, employee privacy is closely connected with employee speech rights.<sup>236</sup> As privacy law scholars have explained, certain forms of privacy are essential to nurturing speech.<sup>237</sup> Surveillance of an individual's activities and communications tends to chill the exploration of new ideas or the expression of unconventional or unpopular ideas.<sup>238</sup> In the workplace context, speech that is most valuable is often oppositional, and therefore, some measure of privacy may be necessary before employees are willing to speak out in these ways.<sup>239</sup> Such expression contributes to public debate despite or perhaps because of the fact that the public employer does not approve of it. At the same time, increased surveillance and violation of privacy norms may themselves be retaliatory responses directed against whistleblowers.<sup>240</sup> Thus, to the extent that political accountability argues for protecting public employee speech, it also supports protecting some aspects of employee privacy.

235. See, e.g., *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 183 (Wis. 2010).

236. See, e.g., Kim, *supra* note 33, at 901–02, 919.

237. See, e.g., Cohen, *supra* note 35, at 1425–26; Richards, *supra* note 35, at 401, 406, 419.

238. See, e.g., Cohen, *supra* note 35, at 1425–26; Richards, *supra* note 35, at 401, 406, 419.

239. See, e.g., Kim, *supra* note 33, at 920–25, 928–31.

240. See, e.g., Eric Lichtblau & Scott Shane, *Vast F.D.A. Effort Tracked E-Mails of Its Scientists*, N.Y. TIMES, July 15, 2012, at A1.

The fact that the government is not just employer but also sovereign thus matters because public and private employers are subject to different control mechanisms. Private firms are exposed to market forces to a much greater extent, and those forces will often work to curb managerial abuses. In contrast, public employers are insulated from market pressures, but subject to political control. In order for mechanisms of political accountability to effectively rein in public officials, some protection of employee speech and privacy rights is required. Practices in the private sector, where market forces are more dominant, should not define what that constitutional minimum should be in the government workplace.

#### CONCLUSION

The conventional wisdom that public employees enjoy greater speech and privacy protections than workers in the private sector is in the process of being turned on its head. In a series of recent cases, the Supreme Court has increasingly relied on an analogy to private workplaces when interpreting public employees' constitutional speech and privacy rights, and in doing so, has narrowed the scope of those rights. By relying on this analogy, the Court is implicitly importing into constitutional doctrine a presumption in favor of managerial prerogative. However, the arguments that might justify such a presumption in the private sector do not apply to the public employer. Because it is funded by the public to achieve publicly defined purposes, the government employer, unlike the private firm, cannot assert its own rights to property or autonomy to avoid compliance with constitutional norms. Similarly, the government agency cannot point to the existence of market mechanisms for controlling overreaching by the public manager, given the absence of the incentive structures used in the private sector to align managers' interests with those of the firm. The importance of employee speech and privacy in ensuring the efficacy of mechanisms of public accountability thus justify a constitutionally guaranteed floor of protection for public employees' speech and privacy, even though private sector employees may not enjoy a similar guarantee.