CONNECTICUT
LAW REVIEW

VOLUME 46 NOVEMBER 2013 NUMBER 1

Article

Public Employee Free Speech and the Privatization of the First Amendment

ADAM SHINAR

Constitutional protection of public employee speech has been declining for the past forty years, yet the reason for the decline has remained elusive. This Article puts forward a novel theory situating public employee speech in larger structural transformations in governmental organization. It identifies a "public/private convergence," the main feature of which is that public officials are increasingly viewed as private employees, resulting in a significant erosion of their free speech rights. This erosion is exacerbated by rising levels of privatization and civil service reforms exhibiting the same mode of thought: that public employees are no different from private employees. These trends have far reaching First Amendment implications that up until now have remained largely unexplored.

Against this background, this Article argues that the privatization of public employee speech doctrine should be reconsidered for three main reasons. First, it overlooks the ways in which the public sector does not operate like the market. Second, it risks eroding the unique norms and culture the civil service aims to foster. Finally, it undermines a system of internal checks on state power that are especially important given the reduction in external monitoring capacity. Accordingly, the Article proposes two directions for reform: a doctrinal framework that resolves the problems with the Court's current position, and a new governance framework that relies on internal regulatory channels to encourage public employee voice.

ARTICLE CONTENTS

Public Employee Speech and the Privatization of the First Amendment

ADAM SHINAR*

I. INTRODUCTION

The twentieth century saw an unprecedented rise in the constitutional protection of speech—a trajectory that has continued into the twenty-first century. The Supreme Court's recent decisions to strike down limits on corporate expenditures on political campaigns,[1] to revoke damages for emotional distress caused by speech,[2] to invalidate legislation regulating violent video games[3] and depictions of animal cruelty,[4] to expand the scope of commercial speech,[5] and, most recently, to protect knowingly false statements,[6] have positioned freedom of expression as the most protected, and perhaps most important, constitutional right.

Curiously, during the past forty years, as the Court expanded free speech protections for individuals it also consistently cut back on free speech protections for public sector employees. These employees have seen their speech rights dwindle close to their nineteenth-century level, when no constitutional protection was afforded.

Consider, for example, the recent case of Bryan Gonzalez. Gonzalez

---

* Assistant Professor, Radzyner School of Law, Interdisciplinary Center Herzliya. S.J.D. & LL.M., Harvard Law School; LL.B., Hebrew University of Jerusalem. I am grateful to Ori Aronson, David Barron, Faisal Bhabha, Caroline Corbin, Sam Erman, Claire Houston, Lisa Kelly, Heidi Kitrosser, Shay Lavie, Orly Lobel, Martha Minow, Helen Norton, David Pozen, Issi Rosen-Zvi, Ben Sachs, Paul Secunda, Roy Shapira, Jennifer Shkabatur, Anna Su, Mark Tushnet, Katie Young, and to participants at the Faculty Research Seminar at Osgoode Hall Law School, York University, the Loyola-Chicago Constitutional Law Colloquium, the Harvard Law School S.J.D. Colloquium, the Yale Law School Freedom of Expression Scholars conference, and participants at faculty workshops at Bar Ilan University, Hebrew University, Interdisciplinary Center Herzliya, Haifa University, and Tel Aviv University.

[1] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339, 341 (2010) (holding that the First Amendment prohibits limits on independent political expenditures by corporations and unions).

[2] Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (holding that speech on a public issue on a public sidewalk cannot give rise to tort liability of emotional distress).

[3] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741–42 (2011) (holding that video games are protected speech under the First Amendment).

[4] United States v. Stevens, 559 U.S. 460, 481–82 (2010) (invalidating a law that criminalized depictions of animal cruelty because it was overly broad under First Amendment doctrine).

[5] Sorrell v. IMS Health, 131 S. Ct. 2653, 2659 (2011) (invalidating a law that restricted the sale of data revealing doctors' prescription practices).

[6] United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (invalidating part of the Stolen Valor Act of 2005, which criminalized false claims of having received a military medal).

was a United States Border Patrol agent along the U.S.-Mexico border.[7] While at work, Gonzalez spoke to a fellow agent about the drug-related violence in Mexico and its effects on their job.[8] Gonzalez said that if marijuana was legalized, the cartel violence would stop.[9] The drug problems in America, he added, were attributable to an American demand for drugs.[10] Gonzalez also mentioned an organization—Law Enforcement Against Prohibition—made up of former law enforcement officials who are critical of the "war on drugs."[11] When Gonzalez's superiors soon learned of this conversation, they fired him.[12] The termination letter stated his personal views were "contrary to the core characteristics of Border Patrol Agents, which are patriotism, dedication, and esprit de corps."[13]

Gonzalez's case is interesting not only because he was fired, but because in all likelihood he could not have been fired for the same expression in 1968—when constitutional speech protections for public employees were at their height. This Article, therefore, starts with a basic question: Why has the Court, an otherwise aggressive defender of free speech rights, driven protections for public employees to the lowest ebb in more than a century? The decline in constitutional protection, I argue, cannot be understood by focusing exclusively on First Amendment doctrine. That doctrine tells us that public employees today enjoy less protection than their counterparts forty years ago, but fails to explain how particular social, economic, and philosophical commitments have shaped present free speech conceptions.

While the decline in constitutional protection for public employees has been noted by scholars, few have offered a convincing and comprehensive explanation for its occurrence.[14] This Article seeks to fill that gap by putting forward a novel explanation—the "public/private convergence thesis." I argue that it is no coincidence that the constitutional speech rights public employees have today are close to their nineteenth-century level, because back then public employees were not considered to be any different from private sector employees. Indeed, the Article argues that the decreasing speech protections for public employees result from a background understanding that views public employees as no different

---

[7] Gonzalez v. Manjarrez, No. EP-11-CV-29-KC, 2013 WL 152177, at *1 (W.D. Tex. Jan. 4, 2013).

[8] Complaint at 3, *Gonzalez*, 2013 WL 152177 (No. EP-11-CV-29-KC).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 4.

[12] *Id.* at 2, 4.

[13] *Id.* at 4.

[14] *But see* Paul M. Secunda, *Neoformalism and the Reemergence of the Rights-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 908 (2011) (asserting that "[t]he doctrine of unconstitutional conditions in public employment has figured most notably in First Amendment free speech"). For further discussion, see *infra* note 90.

from private employees and hence seeks to equalize their constitutional status. This equalization is done by leveling down the constitutional rights enjoyed by public employees to those of private sector employees who do not enjoy First Amendment protection at work because of the lack of state action. Although the convergence may not be intentional, it is nevertheless informed by a background understanding, one which maps onto larger transformations in government organization exhibiting the same mode of thought, that public employees are no different than private employees.

The public/private convergence is troubling because there *are* differences between the government and the private sector, and between private and public employees. These differences should be maintained rather than obscured. Accordingly, the Article identifies four difficulties that stem from the project of convergence. First, the importation of market logics into the government workplace as a primary metric confuses firms, which operate in a competitive for-profit environment, with government, which does not. Second, convergence misunderstands the task of government. Employment at will is the basic norm in private employment because it views the employer as "owning the job with the property right to control the job and the worker who fills it."[15] But the government's property is, in an important sense, our own. Thus, government is a trustee of the public interest in a way that private firms are not. Third, the marketization of the public workplace means losing sight of the importance of public service and its unique norms and culture. When public workers are conditioned to operate like market participants, the likelihood that they will espouse a public service ethic decreases, as does the likelihood that they will exercise speech in a beneficial way. Finally and most crucially, public employees are often in the best position to inform the government and the public about wrongdoing, abuse, mismanagement, and other problems that they encounter. Public employee speech thus serves to maintain a system of *internal* checks on government in addition to the external checks imposed by legislatures, courts, and the public.[16] This system of internal checks is even more crucial as traditional checks of executive power have grown weaker over time.[17] Robust protection of

---

[15] 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).

[16] *See infra* Part IV.C.

[17] *See, e.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 40–41 (2006) (describing the twentieth-century rise in power of the executive, affecting Congress's responsibility to check the executive and "respond to its ascendant rival"); Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL'Y 23, 25 (2011) ("Congress continues to grapple with the interrelated issues of how best to exert control over administrative agencies and counter the President's strengthened hand."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246, 2248 (2001) (acknowledging the power of the President in the "era of presidential administration").

public employee speech thus has the potential to compensate for the concomitant loss of monitoring by other branches and agents.

Part II surveys and critiques a century of public employee speech doctrine. I show that ever since the Court's 1968 high point in *Pickering v. Board of Education*,[18] public employees have seen their free speech rights dwindle, the lowest point being the Court's recent decision in *Garcetti v. Ceballos*.[19] *Garcetti*, I argue, has brought constitutional protection close to its nineteenth-century level, when public employees enjoyed no constitutional protection for their speech and were considered no different than private employees.

Taking a sweeping view of developments in government organization, Part III develops the public/private convergence thesis in three sections. First, I interpret the retrenchment in public employee speech rights as an undeclared attempt to equalize the speech rights of private employees with those of public employees. The underlying reason for this convergence—one which is rarely made explicit—is that despite lofty rhetoric, the Supreme Court now sees little difference between the two. The Article then seeks to understand the decline in public employee speech against the background of two larger transformations in government work: privatization and civil service reforms at the sub-national level. Privatization and outsourcing by government suggest not only that firms can perform tasks that were previously reserved for government, but that there is no difference between private and public employees. Civil service reforms at the sub-national level have either eliminated or eroded traditional protections for public employees. Thousands of employees have been converted to the status of employment at will, and several states now hire only at-will employees, the paradigm of private sector employment relations. Thus, whereas privatization is a movement from government to market, civil service reforms are a movement from market to government.

The Article connects these seemingly disparate phenomena and for the first time links them to the declining protection of public employee speech. It demonstrates how structural changes in government organization generate constitutional implications. Privatization and outsourcing by the government mean that the private sector is engaged in government work, yet private sector employees do not enjoy constitutional protection when they speak about their work. With fewer public employees performing these jobs, there is a net loss of valuable speech that can inform the public and government itself about the government. By stripping protections from public employees and converting them to at-will status, civil service

[18] 391 U.S. 563 (1968).
[19] 547 U.S. 410 (2006).

reforms create a chilling effect. Employees will be less likely to speak about government and express valuable dissent if their job is on the line.

Part IV therefore rejects the public/private convergence by mounting an argument in favor of public/private *divergence*. The importation of market norms into government work, the loss of public service ethic, and the erosion of a system of internal checks on government power overlook the unique role of the state vis-à-vis the market and the unique role of public employees, both in terms of their job duties and in terms of their role in a democratic society that values transparency, accountability, and dissent.

At times, the Court seems to be aware of the rationales privileging public employee speech. Yet there is a mismatch between the First Amendment values that support public employee speech, namely the contribution to democratic self-government, and the doctrinal rules that the Court has created to advance these values. Similarly, the Court misapprehends how government bureaucracies operate by overlooking social science research demonstrating that workplaces are already geared toward suppressing dissent. Dissent levels, as determined by the Court, are therefore suboptimal and bolster pre-existing silencing tendencies. Finally, whereas the Court's emphasis on disruption and efficiency as grounds to suppress speech is the most explicit importation of private sector logic, it overlooks how employers often overestimate the possibility of disruption when they perceive challenges to their authority. The Court, on its part, overestimates the possibility of being flooded with employee suits.

Protecting public employee speech also raises concerns. Such speech may not be sufficiently valuable to warrant constitutional protection. Some may argue that there are ample sources to acquire information about government, making employee speech redundant. Moreover, protecting such speech might cause disruptions in the government workplace and generate inefficiencies that, on balance, militate against protection. Even those who favor protection may believe that constitutional protection goes too far given extant whistleblower statutes and common law safeguards that purport to protect employee speech when it matters most. Others may be troubled by the prospect of excessive judicial intervention in the operation of the workplace. Part IV ends by discussing, and ultimately rejecting, these objections.

Responding to the normative concerns, Part V elaborates on the proposed project of public/private divergence. I offer two possible directions for reform. The first proposal seeks to resolve the problems with the Court's jurisprudence by offering specific doctrinal reforms, the main one being a return to the *Pickering* framework with several adjustments. The second proposal focuses on the public workplace and on the possibility of utilizing internal regulatory mechanisms to protect and encourage valuable speech. While the first proposal is possible, it is unlikely to be

realized in the near future given the Court's composition. The second proposal seeks to avoid costly and often inefficacious litigation, but it too comes at price; namely, the pitfalls of self-regulation and the lack of meaningful monitoring through judicial review. My main objective, however, is to uncover the larger forces that shape public employee speech doctrine and to embark on an alternative normative path.[20]

II. BACK TO THE PAST: A CENTURY OF PUBLIC EMPLOYEE SPEECH

A. *The Competing Values*

The First Amendment applies differently in the public workplace than it does in public discourse. Whereas our speech is largely free from government regulation as citizens, it is not unconstrained if we work for the government. Although government generally may not impose content and viewpoint based restrictions on speech, it can, as an employer, impose such restrictions that are viewed as necessary for the promotion of government's own speech.[21] The difficulty in public employment law stems from the fact that government is occupying different roles, each with corresponding rights and powers. As a sovereign it is significantly limited in its control of speech, but as an employer it can demand that employees perform their jobs, which includes control of their speech.[22]

But in controlling its employees' speech to further its own mission, government runs the risk of trampling on two expressive interests: those employees have as speakers, and those society and government have as listeners. The importance of public employee speech lies in its ability to advance First Amendment values that contribute to republican government. This speech increases government transparency by often revealing details about government work that are otherwise unavailable or difficult to obtain.[23] Such speech can expose government waste, fraud, abuse, or other illegalities, facilitating the public's ability to hold government politically

---

[20] At no point do I argue that current protections for *private* employee speech are optimal. Taking the status of private employees as given, my objective is to prevent the slide in public employee speech rights.

[21] This is the government speech doctrine, which is a defense against government infringement of free speech. *See infra* note 127 and accompanying text.

[22] *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) (arguing that "[w]ithin managerial domains, the state organizes its resources so as to achieve specified ends"); Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 120 (2008) ("The government as sovereign generally may not punish citizens for the content of their speech, but the government as employer may demand that employees do the job they were hired to do, and insofar as effective performance of that job requires saying some things and not others, it can control their speech.").

[23] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968) ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent.").

accountable.[24] Finally, public employee speech facilitates dissent from official policy. It introduces dissenting views of those who are part of the policymaking process, often as enforcers and implementers. This is the type of speech least likely to be heard inside and outside of government, despite providing crucial insights about the management of government programs and institutions. For employers, a climate where employees feel safe to speak out about government policy not only improves intra-government communication, but also informs government itself about problems with particular policies. On this view, public employee speech operates as a signaling mechanism for problems down the chain of command. This is doubly important in light of the difficulty of expressing opinions in hierarchical settings, which is the prevalent structure of government organizations.

Thus, the position advanced in this Article is not that public employee speech is valuable for autonomy, liberty, or marketplace of ideas rationales, though it can be tangentially related to those. It is most defensible when it can be justified on rationales of democratic self-government. The unique institutional location of public employees—their comparative advantage over ordinary citizens—makes them especially able to contribute toward that end. On this view, constitutional protection is justified both when the speech is expressed internally, in government, and externally, outside government.

At the same time, protecting public employee speech can disrupt the smooth operation of government. Employees may make false accusations, misunderstand particular policies, or raise grievances that have little constitutional value. Dissenting speech can undermine the government's ability to communicate a clear and coherent message and reduce the government's ability to control its institutions. The Court's public employee speech doctrine attempts to balance the conflicting interests. Indeed, the competing interests explain the differential protection for speech in work and non-work settings. They fail, however, to explain the shift in protection over the past century. This Part traces the development of public employee speech doctrine, arguing that the consistent decline in constitutional protection should be viewed not only as a de facto return to its nineteenth century level, when no protection was extended to such speech, but also as part of a larger theme of converging the speech rights of public employees with those of private employees.

B. *The Doctrinal Landscape: 1892−2012*

The origin of public employee speech doctrine dates back to Justice Holmes in 1892, when he was serving on the Supreme Judicial Court of

---

[24] *See infra* Part IV.C.

Massachusetts. In *McAuliffe v. Mayor of New Bedford*,[25] a policeman was fired for engaging in political canvassing.[26] Dismissing the policeman's suit, Holmes stated that "[the policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[27] By accepting public employment (much like private employment), the policeman waived his constitutional rights and the city was free to impose "any reasonable condition upon holding offices within its control."[28]

The Holmesian conception was premised on the decoupling of the government's power as a sovereign and as an employer. What the government could not do as a sovereign it could do as an employer.[29] Holmes assumed that employers, not courts, best know how to manage their organizations, and therefore, they should have discretion to control their employees' speech.[30] *McAuliffe* thus introduced the rights/privilege distinction; whatever constitutional rights individuals may have as citizens, public employment is a "privilege" and may be subject to restrictions that would otherwise be unconstitutional if applied to citizens generally.[31]

The rights/privilege distinction dominated into the 1960s,[32] until its repudiation in *Pickering v. Board of Education*, the high point of modern public employee speech doctrine. In *Pickering*, a public school teacher was fired after writing a letter to the editor of a local newspaper criticizing the local board of education for supporting a series of tax referenda.[33] Although the Court rejected the rights/privilege distinction,[34] it recognized that the state has important interests in regulating its employees' speech.[35] It therefore introduced a balancing test, balancing the interests of the public employee, as a citizen, in commenting upon matters of public concern, and

---

[25] 29 N.E. 517 (Mass. 1892).

[26] *Id.* at 517.

[27] *Id.*

[28] *Id.* at 518.

[29] *See id.* at 517 ("[T]here is nothing in the constitution or the statute to prevent the city from attaching obedience to [the rule at issue] as a condition to the office of policeman, and making it part of the good conduct required."). For a development of this point, see Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1029 (2005) (acknowledging that "the government as sovereign regulator of private conduct is limited by the First Amendment in its ability to restrict citizen speech, but when the government steps out of its role as sovereign and into its role as employer, it transcends these limitations").

[30] Kozel, *supra* note 29, at 1031–32.

[31] JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 23 (2004).

[32] The distinction began to unravel in *Adler v. Board of Education*, 342 U.S. 485 (1952). The dissent from Justice Douglas, who was joined by Justice Black, dismissed the utility of the employer/sovereign distinction, arguing that citizens should not forgo their constitutional rights in virtue of their public employment. *See id.* at 508 (Douglas, J., dissenting) ("I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression.").

[33] 391 U.S. 563, 566 (1968).

[34] *Id.* at 568–69.

[35] *Id.* at 568.

the interests of the state, as an employer, in promoting the effective delivery of public services.[36]

Pickering represented a marked shift: from no protection under the Holmesian regime, to the recognition that public employees play a valuable role in informing the public of government conduct and are best positioned to do so because of their access to governmental decision-making.[37] However, *Pickering* did not specify what counts as speech on a matter of public concern. In *Connick v. Myers*,[38] the Court explained that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[39] In *Connick*, an assistant district attorney, upon learning that she would be transferred to a different office, circulated a questionnaire to her colleagues asking about their experience with their job transfers, including whether any worker was pressured to work in a political campaign on behalf of a candidate supported by the office.[40] Upholding her dismissal, the Court reasoned that the questionnaire touched on matters of public concern in only a limited sense.[41] Even though no disruption was caused, the employer's belief that there would be, coupled with the absence of public concern, removed any possible constitutional protection.[42]

The result of these two cases was the *Connick/Pickering* analysis. First, the Court must determine if the speech relates to a matter of public concern. If the answer is yes, then the speech is balanced against the government's countervailing interest in efficiency and non-disruption. *Connick* thus made "public concern" a threshold issue,[43] while failing to define it.[44]

---

[36] *Id.*

[37] This was the formal end of the rights/privilege distinction, predicted by Professor William W. Van Alstyne in an article he published one month prior to the *Pickering* decision. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461–62 (1968).

[38] 461 U.S. 138 (1983).

[39] *Id.* at 147–48.

[40] *Id.* at 140–41.

[41] *Id.* at 154.

[42] *Id.*

[43] *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987) (making public concern a "threshold question"); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 8 (1990) (asserting that although "*Connick* might be seen as simply articulating what was implicit in *Pickering* . . . there is no doubt that *Connick* recast the *Pickering* balance").

[44] *See, e.g.*, Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 44 (1988) (examining decisions of the courts since *Connick* to predict when an employee's speech pertains to a public concern). This problem plagued lower court cases that invoked the public concern test to deny constitutional protection. *See, e.g.*, Toni M. Massaro,

Connick signaled a retreat from *Pickering*'s more expansive approach, but it was not an aberration. In *Mt. Healthy School District Board of Education v. Doyle*,[45] the Court held that the burden was on the public employee to prove that her speech was the motivating factor for retaliation.[46] To rebut the employee's claim, the employer had to show that the adverse action would have occurred regardless of the speech.[47] This made it easier for employers to retaliate against dissenting speech because of the ease in concocting reasons for adverse action.[48] Importantly, the "motivating factor" test was imported from the private sector of employment law litigation, where it was often applied in "mixed-motive" discrimination cases.[49] Then, in *Waters v. Churchill*,[50] the Court announced a broad rule of deference to the employer. In *Waters*, a nurse, in a private conversation, criticized hospital policy that she believed placed patient care at risk.[51] The Court held that it would defer to the employer when it made a sensible prediction about likely disruption, even on issues of public concern.[52]

Mt. Healthy and *Waters* reveal how the Court views public employees and the organizations in which they work. By granting public managers broad discretion to limit individual rights, as long as those limitations further government's pursuit of efficient management,[53] the Court expressed a view of government organizations that is close, if not identical, to private firms, where constitutional rights cannot be invoked because of the absence of state action. Despite acknowledging that "[g]overnment employees are often in the best position to know what ails the agencies for which they work,"[54] the Court privileged employer interests and the

---

Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. CAL. L. REV. 1, 20–21 n.95 (1987) (citing cases).

[45] 429 U.S. 274 (1977).

[46] *Id.* at 287.

[47] *Id.* at 285.

[48] *See*, *e.g.*, Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 1012 (2001) (noting that the *Mt. Healthy* test "creates the risk that the defendant will prevail whenever some other reason is sufficient to justify the adverse employment action").

[49] *See* TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 224–25 (2007) (noting that under Title VII, "discriminatory intent can be a 'motivating factor' . . . even if the trier of fact ultimately concludes that the employer would have made the 'same decision' even had it not been motivated by the prohibited consideration").

[50] 511 U.S. 661 (1994).

[51] *Id.* at 664–65. In an earlier case, the Court held that private conversations can also be constitutionally protected. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979) (reasoning that a teacher's private criticism to her principal regarding the school's desegregation policy was a matter of public concern).

[52] *Waters*, 511 U.S. at 673.

[53] Kermit Roosevelt, Note, *The Costs of Agencies:* Waters v. Churchill *and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1234 (1997).

[54] *Waters*, 511 U.S. at 674.

employer's perception of the employee's speech, even if the employer is mistaken about what the employee said.[55]

One consequence of *Waters* allowed managers to make ad hoc dismissals without employees violating any regulations, which was equivalent to the situation of private sector at-will employees.[56] A second consequence was the focus on disruption. When speech disrupts the workplace, it is not protected, yet the Court did not explain what counts as disruption and why it should be guarded against. In fact, the public employee speech cases are remarkable in that the Court consistently upholds employers' actions even when no disruption occurred. Presumably disruption is negatively associated with the delivery of public services, and is thus linked with efficiency. But rather than examine whether disruption occurred, or whether such disruption can be beneficial, the Court defers to what the employer believes *might* happen.[57] This resonates with the Holmesian model, which assumed that employers, not the court, best know how to manage their organizations, and it is in line with the private sector rule assigning the employer the financial risk for success of the business.

To be sure, public employees occasionally prevail, but in interesting ways—notably when the speech does not take place on the job and is not job-related. In *United States v. National Treasury Employees Union* (*NTEU*),[58] the Court struck down a provision that prohibited federal employees from accepting honoraria for speech-related activity such as public speaking or writing articles.[59] As the Court noted, the activity for which the employees had received payments concerned matters that were not related to the employees' official duties and were not paid by groups connected to employees' official responsibilities; hence, there was no disruption to government operations.[60] *NTEU* reveals, however, the gap between the Court's professed ideals and the doctrinal reality put in place to realize them. Although the Court insists that the raison d'être of public employee speech is providing information about government conduct,[61] it is most generous in First Amendment protection where employees are the

---

[55] As the Court reasoned, employers often rely on hearsay, which would make subjecting employees to a judicial-type scrutiny of the truth unreasonable. *Id.* at 676.

[56] For a discussion of private sector employee speech rights, see Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 117–18 (1995).

[57] The deference is often explained as a reluctance to interfere in the internal management of other institutions and is grounded in courts' institutional limitations and agencies' superior expertise. Gia B. Lee, *First Amendment in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1717–23 (2009).

[58] 513 U.S. 454 (1995).

[59] *See id.* at 457 (striking down part of the Ethics Reform Act of 1989).

[60] *Id.* at 472–73.

[61] *See* San Diego v. Roe, 543 U.S. 77, 82 (2004) ("Were [public employees] not able to speak on these matters, the community would be deprived of informed opinions on important public issues.").

most removed from their jobs and institutional locations.

Like other speech-protective cases, *NTEU*'s holding has come under pressure. In *San Diego v. Roe*, the Court upheld a dismissal for off duty speech (in this case, a police officer filming himself in sexual acts while wearing a generic police uniform) that exploited the government's image and thus "brought the mission of the employer and the professionalism of its officers into serious disrepute."[62] Roe's speech was harmful not because it compromised his ability to do his job, but because it reflected poorly on government as a whole. In other words, the Court narrowed the scope of protected speech when that speech could cause the government to be perceived as endorsing the employee's message because of its association with the employee.[63] Notice again, the resemblance to the private sector rule of at-will employment that would ordinarily not bar retaliatory action because of the employer's need to maintain a certain image and reputation.[64]

Despite this decline in protection, public employees still had speech rights when they spoke about issues of public concern, unless those were outweighed by disruption and efficiency considerations. That principle, however, received a serious blow in *Garcetti v. Ceballos*, where the Court held that speech made "pursuant to . . . official duties" receives no constitutional protection.[65] Ceballos, a deputy district attorney in Los Angeles County, responded to an inquiry by a defense attorney who planned to challenge a search warrant.[66] Upon investigating, Ceballos concluded that the affidavit submitted by the police to secure the warrant contained serious misrepresentations.[67] He recommended the case be dismissed, but his superiors decided to proceed.[68] Ceballos was subpoenaed to testify on behalf of the defense, and although the judge accepted his claims about misrepresentation, the case was allowed to proceed on other grounds.[69] Subsequently, Ceballos claimed that he was subject to a series of retaliatory measures.[70]

---

[62] *Id.* at 81.

[63] *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 16 (2009) ("[C]ourts increasingly hold that government may also control even its workers' off-duty speech to protect its own expressive interests.").

[64] *See, e.g.*, BRUCE BARRY, SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE 140–41 (2007) (describing a case of termination based on off-work, non-work-related speech).

[65] 547 U.S. 410, 421 (2006).

[66] *Id.* at 413–14.

[67] *Id.* at 414.

[68] *Id.*

[69] *Id.* at 414–15.

[70] *Id.* at 415. Those retaliatory measures "included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion." *Id.*

In a 5–4 decision authored by Justice Kennedy, the Court argued that the operative distinction was whether the employee was speaking *as a citizen* or *as an employee*.[71] *Pickering*, the Court said, only protected the right of the public employee to speak *as a citizen* on a matter of public concern,[72] but Ceballos spoke as an employee.[73] A person can speak either as an employee or as a citizen, but not both, no matter the seriousness or gravity of the issue or the intensity of the public's interest. Consequently, when public employees make statements "pursuant to their official duties" they are not speaking as citizens for First Amendment purposes, and are therefore not protected from employer discipline.[74]

Although the Court could have grounded its decision in concerns about political accountability, the heart of its reasoning was couched in economic terms that relied on private-sector logic. The Court reasoned that the speech does not belong to the employee and therefore the employer cannot infringe upon any liberties the employee would have enjoyed as a private citizen. The speech belongs to the government because it commissioned it from the employee, i.e., paid for it.[75]

Troubled by the elasticity of *Pickering*/*Connick* balancing, the Court created a bright-line rule that would preempt a wide range of statements from constitutional protection.[76] In the course of doing so, however, four problems emerged. First, the Court failed to define what counts as speaking "pursuant to official duties," making the term open to employer manipulation.[77] Indeed, lower courts are divided on what "official duties" means, putting to rest the Court's desire to end litigation and excessive judicial intervention.[78]

---

[71] *Id.* at 417–18.

[72] *Id.* at 418.

[73] *Id.* at 421–22.

[74] *Id.* at 421.

[75] *See id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

[76] *See, e.g.*, Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a "Jurisprudence of Labels,"* 2010 BYU L. REV. 2071, 2091 (explaining how the Court veered from the previous balancing of interests analysis); *see also* Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1203 & n.216 (2007) (noting Justice Kennedy's general objections to formalism and distaste for decisions where a "categorical bright-line rule prevail[s] over interest balancing").

[77] *See Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting) ("I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview."). In response, the Court said the examination would be a practical one and guard against self-serving definitions. *Id.* at 424–25 (majority opinion).

[78] *See, e.g.*, Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 EDUC. L. REP. 357, 358 (2011) ("[T]he scope of the *Garcetti*

Second, even if the interpretive question of official duties were resolved, *Garcetti* fails to protect employees whose job duties are to report on governmental wrongdoing. Indeed, the post-*Garcetti* landscape has enabled dismissals of many such employees.[79] This is a Catch-22. If employees fail to speak, they risk termination for not doing their job; but if they do their job and report wrongdoing, they risk termination for that very act.[80]

Third, speech on matters of public concern is no longer protected if it was made pursuant to official duties. *Garcetti* protects speech depending on the context in which it was made, whereas prior to the ruling the Court focused on whether the statement was on a matter of public concern.[81] For example, in *Vose v. Kliment*,[82] a police officer reported internally to his superiors on the misconduct of other officers and was eventually forced to resign.[83] Relying on *Garcetti*, the Seventh Circuit denied the officer's First Amendment claim, insinuating that had the officer spoken externally to the media, outside his "official duties," his statements may have been protected.[84]

---

exemption has apparently caused some confusion in the lower courts."); Christine Elzer, *The "Official Duties" Puzzle: Lower Courts' Struggle with First Amendment Protection for Public Employees After* Garcetti v. Ceballos, 69 U. PITT. L. REV. 367, 368 (2007) ("The lower courts' efforts to apply *Garcetti*'s categorical holding to various fact scenarios have resulted in some puzzling outcomes that seem to have raised more questions than *Garcetti* purported to settle.").

[79] *See, e.g.*, Carter v. Inc. Vill. of Ocean Beach, 415 F. App'x 290, 293 (2d Cir. 2011) (finding that reporting police officer misconduct up the chain of command is part of an official duty); Bonn v. City of Omaha, 623 F.3d 587, 588 (8th Cir. 2010) (upholding the dismissal of a public safety auditor who published a report that was critical of the police's interactions with the black community); Green v. Barrett, 226 F. App'x 883, 884, 886 (11th Cir. 2007) (upholding the dismissal of a jailer who testified that prison conditions were unsafe); Battle v. Bd. of Regents for Ga., 468 F.3d 755, 763 (11th Cir. 2006) (upholding the dismissal of a financial aid officer who reported on noncompliance with grants); DePrado v. City of Miami, 446 F. Supp. 2d 1344, 1346 (S.D. Fla. 2006) (finding that testifying at a grand jury is part of a police officer's official duties).

[80] The Supreme Court recently passed up opportunities to resolve this Catch-22 when it denied certiorari in *Jackler v. Byrne* and *Bowie v. Maddox*. *See* Jackler v. Byrne, 658 F.3d 225, 245 (2d Cir. 2011) (splitting on whether employees have First Amendment rights when refusing to file false reports ordered by their superiors), *cert. denied*, 132 S. Ct. 1634 (2012); Bowie v. Maddox, 642 F.3d 1122, 1133–34 (D.C. Cir. 2011) (declining to address the question of whether an employee had a First Amendment right to refuse to sign an allegedly false affidavit as ordered by his superior), *cert. denied*, 132 S. Ct. 1636 (2012).

[81] The *Garcetti* approach is the opposite of *Givhan v. Western Line Consolidated School Dist*., 439 U.S. 410 (1979), which held that public concern, not context, is controlling. *See id.* at 414 (stating that the rule to be derived from *Pickering* and *Mt. Healthy* is not dependent on those views being expressed publicly or privately).

[82] 506 F.3d 565 (7th Cir. 2007).

[83] *Id.* at 566–67.

[84] *Id.* at 569, 572. This is far from settled, however, since employees have been disciplined for speaking to the media, even if it was in their capacity as "citizens." Robert E. Drechsel, *The Declining First Amendment Rights of Government News Sources: How* Garcetti v. Ceballos *Threatens the Flow of Newsworthy Information*, 16 COMM. L. & POL'Y. 129, 147 (2011).

Although context matters for balancing,[85] the Court now treats it as outcome-determinative. The problem is that the internal/external distinction ignores workplace realities. Sometimes employees report internally and sometimes externally, for example where the superiors themselves are complicit in the wrongdoing or where they share the views of those the employee speaks against. The decision how to report is contextual and depends on the severity of the wrongdoing or disagreement, the fear of retaliation, the organizational culture, the employee's status, and a host of other factors not included in the Court's rigid formulation.[86] Ironically, going outside may create much more disruption than internal reporting, so the Court's desire to prevent disruption is undermined by its insistence that going outside is more likely to warrant the "citizen" label.[87]

Finally, *Garcetti* leads to situations where the same content is protected when made by an employee removed from the issue (since the speech will not be pursuant to an official duty), while not protected when made by an official who is acting pursuant to an official duty. Yet officials who are not acting pursuant to an official duty are less likely to know about the issue and are therefore less likely to speak in the first place. In effect, *Garcetti* can stifle dissent completely because it prevents the people who are most informed from speaking out. While employees who are not close to the issue may be able to speak "as citizens," the value of their speech will be lower. Therefore, there is a mismatch between the First Amendment values that support public employee speech and the doctrinal rules that the Court has created to advance these values.

C. *From Holmes to Holmes*

Where do we stand today? It turns out we stand close to Justice Holmes in *McAuliffe* in 1892. True, *Pickering* repudiated the idea that government employment is a privilege and therefore can be conditioned by terms that are otherwise unconstitutional. But *Pickering*, it turns out, *was* the aberration. In almost every case since, the Court has narrowed the constitutional protections it afforded public employees. Indeed, while

---

[85] *See* Connick v. Myers, 461 U.S. 138, 147–48 (1983) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

[86] *See, e.g.*, Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165, 166 (2008) (presenting findings of a study that focuses on whistleblowing and predicts "the conditions under which individuals confront illegalities they witness in their workplace"). The internal/external distinction builds on economist Albert Hirschman's work on voice and exit. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[87] *See* Davis v. McKinney, 518 F.3d 304, 313 (5th Cir. 2008) (raising concerns up the chain of command at the workplace about job duties constitutes speech undertaken in the course of performing an official duty).

Garcetti was subject to much scholarly criticism, that literature overlooked the fact that *Garcetti* simply confirmed a trend that was almost forty years in the making.[88]

To see the de-facto return to the Holmesian model, let us compare the speech rights public employees had during three different periods.[89]

TABLE 1

Public Employee Speech	**1892–1968** ***McAuliffe***	**1968–2004** ***Pickering, Connick, NTEU***	**2006–Present** ***San Diego v. Roe, Garcetti***
Off the job, non-job related speech	Not protected	Protected (*NTEU*)	Protected (*NTEU*), *unless* speech is negatively associated with public employer (*San Diego v. Roe*)
Off the job, job related speech	Undecided	*Pickering* balance	Not if part of official duties. Otherwise *Pickering* balance.
Off the job, speech on matters of public concern	Not protected	*Pickering* balance	Not if part of official duties. Otherwise *Pickering* balance.

[88] For criticisms of *Garcetti*, see Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 144–53; Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2008); Rhodes, *supra* note 76; Secunda, *supra* note 22; Julie A. Wenell, Note, Garcetti v. Ceballos*: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RTS. J. 623 (2007).

[89] Paul Secunda believes that the reemergence of the rights/privilege distinction is attributable to the Court's understanding of the unconstitutional conditions doctrine, viewing government employment similarly to the government choosing to fund one speech activity over another. Secunda, *supra* note 14, at 913–14. I agree with Secunda's interpretation, but this Article advances a broader argument for the reemergence of the distinction.

Public Employee Speech	**1892–1968** ***McAuliffe***	**1968–2004** ***Pickering, Connick, NTEU***	**2006–Present** ***San Diego v. Roe, Garcetti***
On the job, non-job related speech	Undecided; likely not protected	Not protected (*Connick*)	Not protected (*Connick*)
On the job, job-related speech not on matters of public concern	Not protected	Not protected (*Connick*)	Not protected (*Connick*)
On the job speech on matters of public concern	Not protected	*Pickering* balance	Not if part of official duties. Otherwise *Pickering* balance
Speech that is the job, regardless of where it was spoken	Undecided	Undecided	Not protected (*Garcetti*)

Today, public employees have no constitutional protection for speech pursuant to official duties.[90] Such speech can be interpreted broadly to encompass speech that otherwise would have benefited from a *Pickering* analysis—now precluded as a threshold matter. Lack of protection is exacerbated by cases such as *Mt. Healthy v. Doyle* and *Waters v. Churchill*, which stand for the proposition that courts should be deferential to employers' decisions even if the speech raises matters of public concern.[91]

The overall decline in constitutional protection raises four problems, three of which have already been identified. First, protection is granted based on whether the employee spoke as a "citizen" or as an "employee."[92]

---

[90] Garcetti v. Ceballos, 547 U.S 410, 421 (2006).

[91] United States v. NTEU, 513 U.S. 454, 492 (1995) (Rehnquist, C.J., dissenting) ("In conducting this balance, we consistently have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved was on a matter of public concern.").

[92] *Garcetti*, 547 U.S. at 418.

Despite past language recognizing the duality,[93] today's Court does not believe that the two can co-exist. Second, the Court has embraced the internal/external distinction, where speech outside the job is likely to warrant the "citizen" label and hence receive more protection.[94] This results in under-protection of valuable speech from the perspective of the First Amendment. Third, the Court understands disruption and efficiency in terms that ignore whether disruption actually occurred and whether efficiency was actually compromised.[95] Finally, even though each public employee case dealt with a different type of employee (teacher, nurse, police officer, prosecutor, etc.),[96] the Court assumes that all public employees are similarly situated, that each institution should be governed by the same rules, and implicitly, that each institution seeks the same goals. This doctrinal uniformity ignores government's institutional diversity. I return to these problems in Part V.

III. PUBLIC/PRIVATE CONVERGENCE

What accounts for the decline in public employee speech rights? This Part unfolds in three sections, maintaining that the decline should be viewed in light of the public/private convergence thesis. First, I argue that the Court has been scaling back constitutional protections because it has implicitly come to view public employees as private employees for purposes of speech. Second, I maintain that the erosion in employee speech rights is but one aspect of a general convergence between public sector employees and private sector employees. This convergence is driven by increased government privatization, outsourcing, and various state civil service reforms. The Court's public employee speech doctrine, while not explicitly a part of this convergence, nevertheless reflects the conception that government employees should be treated like private sector employees. Third, I show how these developments result in less speech and less protected speech. To be clear, I am not making a causal claim that because of privatization and civil service reforms the Court altered its public employee speech doctrine. My claim is that there is a correlation between these phenomena because they are driven by the same underlying

---

[93] *See* City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 176 n.11 (1976) (recognizing that teachers can speak both as citizens and employees).

[94] The strongest evidence for this is *NTEU*, 513 U.S. at 454.

[95] Professor Kozel has argued that the disruption test constitutionalizes a "heckler's veto," since the speech right becomes "dependent on the likely reaction of co-workers and the public to the employee's speech." Kozel, *supra* note 29, at 1019; *see also* Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2019 (2012) ("Through its contemplation of scenarios in which the disruption caused by speech provides a lawful basis for discipline, the *Pickering* test can be understood as constitutionalizing a 'heckler's veto' for controversial expressions.").

[96] *See supra* Part II.B.

economic logic. This correlation is strengthened when we consider that: (a) the moves I describe happened around the same time; and (b) proponents of privatization and civil reforms often employ the same language that is used by the Court in its public employee decisions, namely the emphasis on efficiency, managerial flexibility and control, and office performance. These similarities suggest that the parallels between public employee doctrine and governmental organization are not accidental.

A. *The Equalization of Public and Private Employee Speech*

Because the Constitution only protects against state action,[97] private employees have no constitutional speech rights.[98] The background rule for employment relations in the private sector is employment at will. Briefly stated, employers have the right to fire their employees at will, with no notice, for good or bad reasons, or for no reasons at all.[99] Employment at will stresses employers' property interest in the workplace.[100] Employers assume risks that are entailed in a competitive market, and correlatively the law grants them discretion to manage their businesses as they see fit, albeit with some exceptions.[101] The rationale undergirding employment at will is that the employer owns the job along with the property right to control its conditions and the type of people who fill it. Although the employment at will rule has been eroded by statutes and common law exceptions that give employees greater protection from retaliation,[102] it is still the background rule and the prevailing ideological norm.[103] Common law and statutory deviations from the rule are the exceptions that are superimposed on the dominant at-will paradigm.

The public policy exception is a paradigmatic example. The exception prohibits adverse employer action that contradicts public policy. It mainly protects private employees who serve on juries, file claims about

---

[97] The Civil Rights Cases, 109 U.S. 3, 13 (1883).

[98] The Court did extend some First Amendment protections to independent contractors. *See infra* Part III.C.

[99] While the origins of the rule are contested, most courts usually cite *Payne v. Western & Atlantic Railroad Co.*, 81 Tenn. 507, 518 (1884). For various explanations, see generally Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733.

[100] It should be noted that a sizable minority of public sector employees are employed on an at-will basis. Estlund, *supra* note 56, at 130.

[101] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (2006) (prohibiting forms of employment discrimination).

[102] *See, e.g.*, Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000) (discussing statutes and common law exceptions that erode the employment at will rule); Gary E. Murg & Clifford Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329 (1982) (discussing exceptions to the employment at will rule).

[103] *See*, *e.g.*, RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 (Tentative Draft No. 2, 2009) (presenting the at-will rule as the default rule in employment relations).

workplace injuries, refuse to commit illegal acts, and report certain violations to public authorities.[104] The exception protects speech, though mostly speech resembling whistle-blowing rather than dissenting speech more generally. However, the exception has been stingily applied and circumscribed.[105] In most courts, the exception applies only where the public policy is clearly expressed in a statute or a constitutional provision, and sometimes even that is insufficient.[106] Some courts require that the policy be stated in the particular state's law instead of a federal statute.[107] Courts have tended to apply the exception to health and safety issues, so speech critical of workplace issues unrelated to health and safety tends not to receive protection.[108] For example, employees who reported potential embezzlement, theft, and false record keeping to their superiors have not received protection because the conduct complained of was confined to internal affairs, and thus did not affect public policy.[109]

Private sector unionization alleviates some of these concerns. Collective bargaining agreements guarantee just cause proceedings, including a hearing before a neutral arbiter. But these protections are underscored by the low number of unionized employees—currently around seven percent of the private workforce.[110] Notably, private employees who benefit from just cause proceedings are not immune from speech-related retaliatory actions. Collective bargaining agreements guarantee a fair procedure prior to termination, but they are likely to be unavailing when

---

[104] Summers, *supra* note 15, at 70–71.

[105] *See*, *e.g.*, Lauren Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 47 (1992) (introducing their findings that the perceived threat from wrongful discharge suits is much greater than the chances they will succeed); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657 (1996) (arguing that "the at-will presumption continues to operate within the realm of wrongful discharge protections . . . [and] continues to surround and undermine each of those protections").

[106] *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.02 (Tentative Draft No. 2, 2009) (stating that an employer is subject to liability for disciplining an employee when the employee engages in activity that directly furthers a substantial public policy). Although *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894, 900 (3d Cir. 1983), applied First Amendment norms to a private employment dispute, subsequent federal and state courts refused to follow its holding that constitutional norms govern a public policy exception without state action. RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 89–90 (2007).

[107] Summers, *supra* note 15, at 73.

[108] *See id.* at 73–74 (describing cases).

[109] *Id.* at 74 & n.49; *see also* Foley v. Interactive Data Corp., 765 P.2d 373, 380 (Cal. 1988) (finding that public policy did not prohibit an employer from discharging an employee who reported suspected embezzlement); Donahue v. Schwegman, Lundberg, Woessner & Kluth P.A., 586 N.W.2d 811, 815 (Minn. App. 1998) (finding that the constructive discharge of an employee who reported potentially illegal payroll deductions was not prohibited because "[a] law firm's payroll deduction practice did not raise public interest concerns"); Murphy v. Am. Home Prods. Corp. 448 N.E.2d 86, 89–90 (N.Y. 1983) (declining, as a matter of public policy, to create a cause of action for wrongful discharge where an employee reported the suspected falsification of financial records).

[110] *Union Members Summary*, BUREAU LAB. STAT. (Jan. 23, 2013), http://www.bls.gov/news.release/union2.nr0.htm.

there is no underlying substantive speech right or when the public policy exception has been narrowly construed. The same holds true for public sector employees who benefit from just cause proceedings that are likely to be unavailing when there is no underlying substantive right.

Most speech-related protections, however, are found in federal and state whistleblower statutes.[111] These protections improved the status of private employees, making them more like public employees. However, federal protections for whistleblowers depend on the existence of a statute that addresses a particular problem.[112] Problems of enforcement have plagued these provisions from being realized to their full extent.[113] For federal employees, there is the Whistleblower Protection Act,[114] whose enforcement has been partial and lacking.[115] Other speech-related claims fare no better. *Bush v. Lucas*[116] held that federal employees cannot bring a *Bivens* suit[117] for First Amendment violations since the federal statutory

---

[111] *See generally* STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW (2001) (describing state and federal protections).

[112] *See*, *e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2622(a) (2012) (protecting whistleblowers who participate in proceedings arising under the statute); National Labor Relations Act, 29 U.S.C. § 158(a)(4) (2006) (same); Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (2006) (same); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2006) (same); Federal Surface Mining Act, 30 U.S.C. § 1293(a) (2006) (same); Water Pollution Control Act, 33 U.S.C. § 1367(a) (2006) (same); Clean Air Act, 42 U.S.C. § 7622(a) (2006) (same).

[113] *See*, *e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-362, WHISTLEBLOWER PROTECTION: ACTIONS NEEDED TO IMPROVE DOD'S MILITARY WHISTLEBLOWER REPRISAL PROGRAM 13–23 (2012) (discussing weakness in the whistle blower reprisal program); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-722, WHISTLEBLOWER PROTECTION: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES 14–37 (2010) (discussing weaknesses that the office found in the whistleblower protection program); Estlund, *supra* note 105, at 1673 (discussing other difficulties of enforcement); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 982 (2008) (discussing the varied nuanced factors that contribute to the ineffectiveness of the various whistleblower protections); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 129, 150–52 (2007) [hereinafter *Unfulfilled Expectations*] (arguing that administrative decision makers strictly construe, and in some cases, misapply Sarbanes-Oxley's protections creating a significant disadvantage to employees).

[114] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C. (2012)).

[115] *See*, *e.g.*, Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1766 (2007) (noting that since 1984 only one out of one-hundred-twenty whistleblower appeals to the Federal Circuit has been successful); Jamie Sasser, *Silenced Citizens: The Post*-Garcetti *Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 790 (2007) ("From 1999 to 2005, only two out of thirty whistleblower claims prevailed before the Merit Systems Protection Board; from 1995 to 2005, only one out of ninety-six claims prevailed before the Federal Circuit.").

[116] 462 U.S. 367 (1983).

[117] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (creating a federal damages remedy vindicating violations of constitutional rights by federal officials).

remedial scheme is comprehensive.[118] However, an examination of this statutory remedial scheme, which also covers federal whistleblowers, reveals that no employee speech claim has succeeded in the Merit System Protection Board or the Federal Circuit—the bodies charged with addressing these claims.[119]

At the state level, speech protections are found in whistleblower statutes, which vary widely according to the type of whistleblower protected, the appropriate recipient of the report, the subject of protected whistle-blowing, the motive of the whistleblower, the quality of the evidence offered by the whistleblower, and the remedies offered.[120] It is important to note, however, that most states do not have comprehensive common law or statutory schemes to protect whistleblowers. Sixteen states and the District of Columbia offer no protection at all, for either public or private employees.[121]

To sum up, not only is there a lack of uniformity that results in uncertainty and inconsistencies across jurisdictions, but the speech-related protections are also narrowly construed—focusing mostly on speech related to gross misconduct, fraud, corruption, and illegality. Such protections do not cover private sector analogues of Myers or Ceballos, and they rarely cover critical and dissenting speech that does not amount to straightforward whistle-blowing. The private sector analog of Bryan Gonzalez would similarly not be protected under these statutory and common law arrangements.

This doctrinal reality places public and private employees on very similar footing. Indeed, as early as 1977, only nine years after the height of protection in *Pickering*, the Court suggested that "[t]he uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer."[122] As will be discussed below, this statement is problematic,[123] but given the decrease in speech rights in the public sector and the relative similarity to private employees, it is unclear that the Court even maintains the position that public employers are differently situated.

---

[118] *Bush*, 462 U.S. at 371, 388–90; *see also id.* at 385 n.25 (providing examples of legislation including the Civil Service Reform Act of 1978).

[119] Paul M. Secunda, *Whither the* Pickering *Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1131, 1142 (2008).

[120] BARRY, *supra* note 64, at 57; Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 107–08 (2000); *see also* Garcetti v. Ceballos, 547 U.S. 410, 440 (2006) (Souter, J., dissenting) (commenting on state whistleblower laws).

[121] *State Whistleblower Laws*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/issues-research/labor/state-whistleblower-laws.aspx (last visited Aug. 28, 2013).

[122] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977) (emphasis omitted) (quoting Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 670 (1975)).

[123] *See infra* Part IV.

Of course, public sector employment is not identical to private sector employment. Yet when it comes to speech, the Court has embraced a logic and rhetoric that makes it hard to distinguish the two. According to *Garcetti*, employees do not have speech rights in their job because the employer commissioned that speech.[124] The government has bought the speech, and without the government there would be no speech in the first place.[125] In other words, the government is claiming the speech of its employees as its own merely in virtue of the employment relationship. Although this is an iteration of the government speech doctrine, which holds that the government does not have to maintain viewpoint neutrality when it speaks to advance its views,[126] it is also no different from the accepted proposition that the private employer owns the employee's speech because she is paying her wages.

Similarly, public employee speech cases emphasize the need for office efficiency, but the Court understands efficiency in terms imported from the private sector. It equates efficiency with hierarchy and compliance with authority.[127] To be efficient is to do what the employer has demanded or commissioned, with as much or as little discretion as the employer desires. The counterpart to efficiency is the Court's elevation of non-disruption to a value worthy of judicial protection—just as in the private sector, a dissenting employee threatens office harmony and jeopardizes the employer's ability to conduct business in the way she desires. The trajectory of the public employee speech cases then mimics the conditions of private employment by giving public employers the same control held by private sector employers. The government workplace is construed as a "business" that, while not motivated by profit concerns, has come to reflect some of the same modes of thought.

As Professor Elizabeth Dale observed in her analysis of *Garcetti*, the Court has embraced the idea of "management rights," a familiar concept in private employment, where managers have the right to define office

---

[124] *Garcetti*, 547 U.S at 421–22.

[125] *See id.* ("Restricting speech that owes its existence to a public employee's professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created . . . . When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.").

[126] *See*, *e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) ("[C]ompelled funding of government speech does not alone raise First Amendment concerns."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

[127] *See* Massaro, *supra* note 44, at 51–52 (discussing how courts construe public employment in strictly Weberian terms); *see also* Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 424 (1990) ("Hierarchical management authority within an agency became identified closely with the vision of public service.").

missions and the means to accomplish these ends.[128] By incorporating the management rights approach, Dale notes that public agencies can now silence employees, yet she takes comfort in the extensive body of law that constrains managers by invoking past practices in the workplace, unionization, collective bargaining, and legislation.[129] But given the partial protection of legislation, the relatively small number of public employees who are unionized,[130] and the procedural rather than substantive protection of collective bargaining agreements, there may be little room for comfort. After leveling down public employee voice to that of private sector employees, the constraining mechanisms on managerial discretion are partial, at best.

The Court's decisions since *Pickering* have bolstered the inherent advantage public employers enjoy when it comes to controlling speech, essentially equating them to private employers. Public employees are increasingly punished for behavior on the grounds of efficiency, non-disruption, and protection of the employer's image—values that are readily invoked in the private sphere. Like the lack of protection in the private sphere, the Court views public officials as cogs in the service of the government machinery rather than agents who might serve a constitutional function.

None of this is to say that guarding from disruption and maintaining efficiency are not valuable goals in the public workplace.[131] It doesn't follow, however, that they should be similarly construed. The Court understands efficiency as rule following and compliance with superiors' orders, yet the Court also suggests that its decisions promote the efficient delivery of government services. The problem is that the two are not necessarily the same because compliance with orders will not always result in the optimal delivery of government services. A police officer who speaks about misconduct is in all likelihood contributing to the efficient delivery of government services, even if his behavior causes some disruption in the chain of command. The same goes for the value of non-disruption. A government office can be underperforming or managed poorly, but still be running smoothly, albeit incompetently. Speaking out against mismanagement or incompetence will inevitably cause disruption,

---

[128] Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMP. & LAB. L. 175, 213 (2008).

[129] *Id.* at 214.

[130] Union membership among public sector employees stood at 35.9% in 2012. *Union Members Summary*, *supra* note 110.

[131] The Civil Service Reform Act of 1978 provides that an agency may take adverse action against an employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a) (2012).

but such disruption would usually be valuable and welcome.[132] The Court is thus conflating deference to authority with efficiency. Not only does this equate efficiency with managerial discretion, it elevates a non-constitutional value to a level worthy of constitutional protection without examining the costs of equating the government to a private actor.

More importantly, although economic efficiency is undoubtedly crucial in a competitive market, it is less clear that it plays (or should play) a similar role in the governance of public institutions that do not operate in a for-profit competitive environment. The notion that government must be efficient is, after all, in tension with two basic themes of constitutional governance: (1) that government should operate fairly and equitably and consider all relevant viewpoints prior to making a decision;[133] and (2) that conflict results in more voice and more information, that extensive deliberation is a virtue, not a vice, and that the Constitution has purposefully put in place inefficient structures to realize these goals.[134] Sometimes it is a good idea to take time, encourage dissent, and take the long term view.[135] This too, can be "efficient" in its own way, because efficiency is defined relative to the goal we are interested in accomplishing. The goal in the public sphere is not necessarily the private sector analog of production or profit maximization, but rather public welfare, justice, and fairness.[136] If economic models of behavior determine the scope of First Amendment protection, then it is not surprising that distinctions such as private employment and public employment come to be viewed as anachronistic or artificial.

Finally, the Court may be conceding too much to efficiency

---

[132] This buttresses Professor Kozel's argument that the disruption prong constitutionalizes a "heckler's veto." *See supra* note 95 and accompanying text.

[133] For example, it may be economically "efficient" to decide on a zoning ordinance based on the opinion of experts, but public meetings and other deliberative and transparency-related processes that may be less "efficient" can be more legitimate.

[134] The classic reference is Federalist 51 in which James Madison argued that "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009); *see also* Elena Kagan, *supra* note 17, at 2342 (discussing Federalist 51). As Gary Wills notes, some argue that inefficiency is a safeguard against despotism. GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 318–19 (1999).

[135] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2344–45 (2006) (noting that efficiency is not the equivalent of wisdom, which requires "tradition-bound professionalism and the realization that future generations will feel the effects of earlier politicians' decisions").

[136] *See* Exec. Order No. 13,563, 3 C.F.R. 215, 215–16 (2011) (stating that cost and benefits are only one principle of regulation); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 317–18 (1989) (arguing that government efficiency needs to be tailored to the goal we are interested in meeting, such as accountability and fairness); *cf.* William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy*, 17 CAN. J.L. & JURISPRUDENCE 101, 126–27 (2004) (arguing that efficiency is primarily a demand imposed by markets, not democratic theory).

concerns.[137] While efficiency is important, it is hardly the only value that guides government. If efficiency was the paramount concern for government, we might dispense with warrants, transparency requirements, due process safeguards, affirmative action programs, and other constraints on government action that may impose inflated costs but enhance fairness, representation, and social welfare.

B. *The Double Privatization of Public Service*

The leveling down of speech protections for public employees stems from an ideology where public employment is not very different from private sector employment.[138] Yet the speech cases are part of an even larger trend that views public service itself as something that can be privatized. This section highlights the ways in which this trend matches the ideology underlying the public employee speech cases. The privatization of public service operates in two directions. First, many activities that were once performed by the government are now outsourced to the private sphere. This is a move from government outwards. Second, civil service reforms increasingly incorporate private sector models of management, especially employment at will. This is a move from the market into government, resulting in the marketization of the bureaucracy. Both these trends, I claim, permeate all levels of government, buttress the Court's public employee speech doctrine, and contribute to a loss of valuable speech.

1. *Privatization*[139]

Federal and state governments have increasingly privatized a significant portion of their work, ranging from the use of contractors for the war efforts in Iraq and Afghanistan and the development of weapons and technology, to disaster relief, education, the provision of welfare services, the management of prisons and border control, and the delivery of countless other services and key aspects of regulation and policymaking.[140] Although estimates are controversial, some estimate the number of private

---

[137] This too may stem from the penetration of private sphere logic into the public sphere. *See* JANICE GROSS STEIN, THE CULT OF EFFICIENCY 24–27 (2001) (examining the "marketization of our language in public life").

[138] Paul Secunda argues that the convergence tendencies extend to the Fourth Amendment context as well. Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 278–80 (2012).

[139] I use the words privatization, outsourcing, and contracting interchangeably to describe the tendency of policymakers to rely on the private sector to perform tasks that were previously thought to be distinctly public. *See* Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1 (Jody Freeman & Martha Minow eds., 2009) (using these terms in the same manner).

[140] *Id.* at 1–2, 13.

contractors at the federal level to be twelve times the number of government employees.[141] The reasons for privatization are manifold, but can be broadly attributed to two factors. The first is a culture of mistrust that is suspicious of any concentration of power for fear of abuse and corruption. On this view, it is not public power that is troubling, but its centralization and aggrandizement, making popular control difficult. Privatization relieves some of these pressures by diffusing power to multiple actors, with the concomitant effect of government as a monitor of power rather than its locus.[142] The second factor is couched in economic concerns that view privatization and deregulation as an engine of private sector innovation and improved performance, as well as a way to overcome bureaucratic ossification.[143] From this perspective the decision whether to privatize turns on which sector does the job more efficiently rather than whether the function should be performed, in principle, by the state. The focus on efficiency becomes a focus on cost minimization, while more idealistic notions of public service or non-instrumentalist constraints are jettisoned or deemphasized.[144]

Encompassing vast areas of our life, privatization often masks the political choices it entails and the legal outcomes it generates. Private employees doing governmental work are now directly responsible to their employers, and not to the people or the public interest.[145] Correlatively, when government steps out of the picture it becomes less familiar with the situation on the ground. When crucial elements of public policy are shared by non-governmental actors, each actor adds its own world of political economy that may produce programs that differ significantly from those that would result from direct government implementation.[146] Finally, by removing state action and having the service performed by a private entity, its actions are largely immune from judicial review and public law norms such as Freedom of Information Act (FOIA) requests, due process safeguards, open meeting laws, enforcement proceedings, and notice and

---

[141] Paul R. Verkuil, *Outsourcing and the Duty to Govern*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 139, at 310, 311.

[142] William J. Novak, *Public-Private Governance: A Historical Introduction*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 139, at 23, 32–33.

[143] Sharon Dolovich has named this "comparative efficiency." Sharon Dolovich, *How Privatization Thinks*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 139, at 128, 128 [hereinafter Dolovich, *How Privatization Thinks*]; Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 441 (2005).

[144] Thus, privatization recasts the public/private distinction as a difference between organizational forms. *See* Dolovich, *How Privatization Thinks*, supra note 143, at 145.

[145] *See generally* Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005) (describing how privatizing military activities can lead to a lack of transparency, accountability, and oversight).

[146] Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, *in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1, 2 (Lester M. Salamon ed., 2002).

comment procedures.[147] Even the decision to privatize is sometimes only known to public officials, preventing public participation.[148] The decision to privatize public service is thus not only a political decision portrayed as an efficiency-based apolitical choice, but one that has legal implications for the purpose of accountability and oversight.[149]

Privatization reflects and shapes the way we conceive of government, public employees, and public service. Under privatization, the public sector is viewed primarily as a site of exchange where citizens seek to maximize the return on their investments; the logic of privatization is that it makes no difference who provides the service because government is already viewed as an agent of service rather than a site of deliberation, participation, and public regarding activity.[150] True, the governmental decision-making process can be deliberative and participatory even if the execution of the decision is done by a private party. Similarly, a private contractor may be required to act in a public-regarding manner. Yet, one consequence of increased privatization is the transfer of discretion and policy-making power to the private sector, the blurring of the policymaking/implementation spheres, and the concomitant decline in the ability for effective monitoring.[151]

Like the public employee speech cases, the economic logic of privatization has come to be reflected in constitutional law, with the state action doctrine being the paradigmatic example. Initially, the Court was receptive to the application of constitutional law to private actors. In

---

[147] *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 734–35, 745 (2010) (describing how private workarounds allow the executive to exercise greater discretion that is more difficult for legislatures or courts to review); *see also* David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. PUB. ADMIN. 103, 104–05 (2005) (describing how constitutional and administrative law restraints on government agencies are not applicable to private entities performing public work). *See generally* Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 640 (2013) (describing how outsourcing governmental activities allows public officials to evade judicial scrutiny). Although private actors are occasionally treated as state actors, the Court has embraced a narrow view of when a private act constitutes state action. *See* Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1172 (1995) (stating the Supreme Court will treat private actions as state actions only in special circumstances).

[148] *See* Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 136 (2005) (noting that the contracting and bidding process is usually kept secret).

[149] For attempts to apply administrative law norms to private actors engaged in the delivery of public services, see, e.g., Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 529–34 (2011); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 574–92 (2000).

[150] Dolovich, *How Privatization Thinks*, *supra* note 143, at 143–45.

[151] *See, e.g.*, Ellen Dannin, *To Market, to Market: Legislating on Privatization and Subcontracting*, 60 MD. L. REV. 249, 254 (2001) (arguing that most states lack regularized oversight of contracting).

Marsh v. Alabama,[152] the Court created the "public function" doctrine, reversing a trespass conviction of a woman who distributed religious leaflets in a "company town," thus rendering actions by a privately owned town as state action.[153] The same year that *Pickering* was decided, *Marsh* was expanded in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[154] to cover picketing in privately held shopping centers.[155] But similar to *Pickering*'s legacy, the Court soon narrowed the scope of the public function doctrine.[156] Indeed, its curtailment happened around the same time that public employees began to see their speech rights dwindle. Beginning in the 1970s, the Court first overruled *Logan Valley Plaza* by denying First Amendment application to shopping centers.[157] It then held that the public function doctrine was limited to activities "traditionally the exclusive prerogative of the state" or "traditionally associated with sovereignty."[158] This formulation served to remove state action status from, among others, employees who spoke in government financed schools, nursing homes, prisons, public utility companies, and government-endowed monopolies.[159] Those who were affected by these decisions were thus unable to assert constitutional claims, leaving them vulnerable to vagaries of the market[160]

2. *Civil Service Reforms*

Although the privatization debate has mostly focused on the functions transferred to the private sphere, privatization's effects on public employees and public service are less explored. As a result of privatization, the public workforce has become smaller.[161] In an attempt to become more efficient, many public employees have lost civil service protections; many have been converted to employees at will. Public sector unions, along with collective bargaining rights, are under attack.[162] The status of public employment itself has, in some cases, been privatized.

---

[152] 326 U.S. 501 (1946).

[153] *Id.* at 507–10.

[154] 391 U.S. 308 (1968).

[155] *Id.* at 309.

[156] Barak-Erez, *supra* note 147, at 1186.

[157] Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 520 (1976).

[158] Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 155 (1978); Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974).

[159] *See* Barak-Erez, *supra* note 147, at 1177–80, 1185 (discussing cases in these settings where state action status was rejected).

[160] A plausible argument is that given increased privatization, some private sector employees who work in privatized services should also enjoy First Amendment rights. While I do not develop the point further, it is consistent with my overarching argument.

[161] *See* Michaels, *supra* note 147, at 752 (discussing legislative caps restricting the number of employees government can hire).

[162] *See* Monica Davey & Steven Greenhouse, *Big Budget Cuts Add Up to Rage in Wisconsin*, N.Y. TIMES, Feb. 17, 2011, at A1 (describing efforts to decrease union benefits in Wisconsin).

Below I briefly explore the changing world of public sector employment and then discuss its implications for public employee speech.

Public sector employment has undergone three major phases. In the first phase, the executive was in charge of appointing most bureaucrats, mostly through a system of spoils and political patronage, thus ensuring responsiveness to and conformity with political pressures. The Pendleton Act, passed in 1883,[163] sought to replace this system, which many viewed as corrupt,[164] with a system based on merit and greater separation between politics and administration.[165] The merit system, however, generated concerns of administrative inefficiency and ossification.[166] Bureaucrats were seen as detached, resistant to political pressures, and largely following their own agenda, thus undermining democratic accountability. The idea that government was the problem, not the solution, marshaled most notably by President Reagan, impacted the structure of public service and correlated with the rise of the New Public Management movement, which advocated the importation of private sector management models into the public sector.[167] This was reflected in the third phase of deregulation, privatization, and civil service reforms, where we find ourselves today.[168]

Although the picture at the federal level has remained relatively constant in the past few decades, there has been greater transformation at the sub-national level, amounting to nothing short of an attack on civil service workers.[169] Many states have started to experiment with converting their employees to at-will status, believing that this will guarantee greater responsiveness to managers—who will have an easier time dismissing nonperforming employees. The move to an at-will model also affected

---

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

[164] Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1391 (2010).

[165] *Id.* at 1390–91.

[166] For additional sources discussing the proposition of bureaucratic non-responsiveness to political will, see generally Richard C. Kearney & Chandan Sinha, *Professionalism and Bureaucratic Responsiveness: Conflict or Compatibility?*, 48 PUB. ADMIN. REV. 571 (1988); James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 PUB. ADMIN REV. 57 (1987).

[167] *See* Christopher Hood, *A Public Management for All Seasons?*, 69 PUB. ADMIN. 3, 3–4 (1991) (discussing "New Public Management," which includes a reversal of government growth and a shift towards privatization).

[168] *See generally* Donald E. Klinger, *Societal Values and Civil Service Systems in the United States*, *in* CIVIL SERVICE REFORM IN THE STATES: PERSONNEL POLICY AND POLITICS AT THE SUBNATIONAL LEVEL 11 (J. Edward Kellough & Lloyd G. Nigro eds., 2006) (describing the changes in the civil service system in the past quarter century).

[169] *See*, *e.g.*, James S. Bowman & Jonathan P. West, *Removing Employee Protections: A 'See No Evil' Approach to Civil Service Reform*, *in* ETHICS AND INTEGRITY OF GOVERNANCE: PERSPECTIVES ACROSS FRONTIERS 181, 184 (Leo W.J.C. Huberts et al. eds., 2008) (discussing civil service reform at the federal level); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1042–50 (discussing the marketization of bureaucracy).

other due process rights, grievance procedures, disciplinary appeals, and termination notices, some of which were scrapped.

For example, the Texas civil service has been completely declassified.[170] All public sector employees are now employees at will who have been stripped of due process protections and job security. Similar efforts are underway in about twenty-eight states that have experimented with at-will employment for some of its public sector employees.[171] In Kansas, every top level job that becomes vacant is automatically converted to an at-will position.[172] In South Carolina, the state personnel system was decentralized and eliminated career protections from hundreds of high-level employees, before abolishing its merit system altogether in favor of employment at will.[173] In Arkansas, managers are given especially wide latitude over employment matters.[174] In Alaska, reclassifying employees as at-will is subject to managerial discretion, even if union contracts stipulate the opposite.[175] In Nebraska and Utah, "legitimate business needs" are grounds for dismissal.[176] In West Virginia, the burden is on the employee when she grieves about reclassification or certain other adverse actions, and in Oklahoma, most of the employee grievance system was dismantled due to the "pressing need for business development."[177] Although in many states the number of public at-will employees is still relatively small, the number is quite large in some states.[178]

Driving these trends in the public sector is the desire to increase executive control of bureaucracy, improve productivity and flexibility, and enhance performance. Yet there is an uncritical acceptance that private sector arrangements (such as employment at will) will work just as well in the public sector,[179] despite research showing that job security, not insecurity, is the best predictor of public sector performance because it strengthens employee commitment to the organization.[180] Indeed, as states

---

[170] Steven W. Hays & Jessica E. Sowa, *A Broader Look at the "Accountability" Movement: Some Grim Realities in State Civil Service Systems*, 26 REV. PUB. PERSONNEL ADMIN. 102, 108 (2006).

[171] *Id.* at 107–08.

[172] *Id.* at 109.

[173] *Id.*

[174] *See id.* at 111 (noting that Arkansas has given managers "absolute authority over all [human resource management] issues short of discrimination and retaliation").

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *See id.* at 113 (listing the percentage of at-will public employees as follows: Texas 100%; Georgia 72%; Idaho 48%; Kansas 40%; Colorado 35%; Oklahoma 33%; West Virginia 30%; and Illinois, Washington, and Ohio 20%).

[179] Jerrell D. Coggburn, *At-Will Employment in Government: Insights from the State of Texas*, 26 REV. PUB. PERSONNEL ADMIN. 158, 159 (2006).

[180] *Id.* at 167–68. Similarly, employees tend to value organizations that have due process protections. *See*, *e.g.*, Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional*

gain more experience operating under at-will arrangements, they become either less enthusiastic or more realistic about its promise of greater efficiency.[181]

State civil service reform efforts are couched in a language of efficiency and strengthening managerial authority, the same terms used by the Court in *Waters*, *Connick*, and *Garcetti* to scale back speech protections.[182] Indeed, the emphasis on managerial prerogative in the free speech cases runs parallel to the same impulse when reforming civil service systems: a preference for private sector models of productivity and management. In the civil service context, this move is illustrated by the drive to privatization and outsourcing, accompanied by the erosion of traditional civil service protections.[183] In the speech context, we see the move in references to management prerogatives, non-disruption, and client service. Yet, it is the same line of thought producing and informing these outcomes.

C. *Connecting the Dots: The Triple Loss of Public Employee Speech*

Privatization and civil service reforms are viewed either through the lens of diminished accountability and oversight or through a labor/employment law focus on the erosion of civil service protections. How these structural changes affect the exercise of public employee speech is often overlooked. First, privatization and outsourcing mean that there are fewer public employees.[184] Thus there is simply less (quantitatively) speech available since potential speech goes "private" where it is controlled by the employer. Second, privatization means severing the link between the state and the employee. Private employees do what used to be government work, but unlike public employees, they will rarely possess

---

Approaches, 20 ACAD. MGMT. REV. 571, 580 (1995) (defining procedural legitimacy for an organization, and noting that organizations garner moral acceptance by employing socially accepted procedural safeguards); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 380, 383 (2006) (noting that employees' views of the legitimacy of organizational rules affects their decisions to follow those rules).

[181] *See* Jerrell D. Coggburn et al., *State Government Human Resource Professionals' Commitment to Employment At Will*, 40 AM. REV. PUB. ADMIN. 189, 201–02 (2010) (describing a study wherein human resource professionals who worked in the private sector tended to have less strong feelings about producing desirable results for the government); Stephen E. Condrey & R. Paul Battaglio, Jr., *A Return to Spoils? Revisiting Radical Civil Service Reform in the United States*, 67 PUB. ADMIN. REV. 425, 427 (2007) (finding that there is no good evidence suggesting that civil service reforms improved service delivery).

[182] Garcetti v. Ceballos, 547 U.S. 410, 425–26 (2006); Waters v. Churchill, 511 U.S. 661, 674–75 (1994); Connick v. Myers, 461 U.S. 138, 156–57 (1983).

[183] Condrey & Battaglio, *supra* note 181, at 425.

[184] This joins the current political antipathy toward public sector employees. *See* Stephen F. Befort, *Public-Sector Employment Under Siege*, 87 IND. L.J. 231, 232 (2012) (recognizing that public employers have resorted to "layoffs, hiring freezes, wage freezes, and employee furloughs").

constitutional speech rights. Those rights, even though they have been restricted over the years, could have provided at least some (though minimal) protection had the services remained within the public sector.[185] Expanding the state action doctrine could have served a useful corrective, but the Court rejected that path. Third, civil service reforms, the conversion to at-will status, and the erosion of traditional due process protections are in themselves a type of chilling effect. By changing the employment paradigm, the remaining public employees are less free to speak about their agencies and are more likely to silence themselves on the fear that they will lose their job. Thus, there is less protection for the speech that does remain "public." The effects of privatization and civil service reforms join the declining protection of public employee speech that was detailed in Part II, thus making for a triple loss of speech.

By changing the workplace governance structure and relying on firms to deliver government services, the government has become dependent on the services of particular providers while encountering substantial difficulties in monitoring the various activities it outsources.[186] Similarly, the public's monitoring capacity also declines when its relationship to the public good becomes triangular instead of bilateral. This should increase the value of public employee speech, for public employees sit at the triangular intersection as monitors of public markets and can thus mitigate the concomitant loss in monitoring ability. But rather than counter the state's privatizing tendencies, public employee speech doctrine reflects them.

On its own, each trend—the de facto convergence of public and private employee speech, privatization, and state civil service reforms—raises challenges for governance and accountability. Examined together, they interact to form a significant but overlooked transformation in the speech rights of public employees. When government is run like a business, either by exporting services and functions to the private sector, or by importing private sector management models, it is not surprising that these logics permeate all levels of government, including the Supreme Court.

Evidence of this can be found in a case where the Court addressed the relationship between government outsourcing and speech. In *Board of County Commissioners v. Umbehr*,[187] a waste removal contractor had his contract terminated after criticizing county officials.[188] The Court held that

---

[185] In research that focused on civil service reforms in Texas, twenty percent of personnel managers believe that at-will employment discourages employees from freely voicing objections to management directives and from blowing the whistle on illegal activities. Coggburn, *supra* note 179, at 171.

[186] *See*, *e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (bemoaning the inadequacy of the state action doctrine as a tool to constrain privatization).

[187] 518 U.S. 668 (1996).

[188] *Id.* at 671.

the First Amendment may protect speech made by independent contractors, and that the *Pickering* test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of that protection.[189]

While the decision may seem to be pro-speech since it expands the circle of who counts as a government employee for the purpose of the First Amendment, it ignores the reality of the workplace. True, contractors now enjoy some speech rights when performing government contracts, but those rights do not extend to the contractors' employees.[190] *Umbehr* actually supports a restrictive view of the First Amendment. In *Umbehr* it was the contractor himself who spoke.[191] A private employee, working for a contractor who performs an outsourced job, is not likely to speak because (a) she wants to keep her job, and (b) her employer would like to retain the government contract. Thus, the outsourcing adds another layer between the employee and the government. If the Court wanted to equalize the rights of public employees and those performing government contracts, the correct reference point would have been individual employees and not the employer (contractor). This is so because the idea (and value) of public employee speech is that it is the employee who will often be in the best position to detect and inform others of wrongdoing, illegality, waste, fraud, abuse, and other problems that the public or the employers need to know about. Extending speech protections only to the contractor is tantamount to giving speech rights only to government agency heads who are often not interested in exposing intra-organizational problems. *Umbehr* is therefore a further entrenchment of the managerial rights prerogative that is prevalent in the private sector.

***

The public/private convergence in public employee speech has occurred in three sites:

(1) The de facto equalization of public and private employees speech, placing both on relatively equal footing. This convergence stems from a more general free market orientation that, in its extreme, does not distinguish the two types of employees.

(2) Increased privatization, outsourcing, and government contracting. These moves delegate important government functions to private actors who, for the

---

[189] *Id.* at 678–79.

[190] That relationship is still governed by the rules of employment at will that present few obstacles to dismissal.

[191] *Umbehr*, 518 U.S. at 671.

most part, do not enjoy constitutional free speech protections.

(3) State civil service reforms that import market models of personnel administration, most prominently at-will employment, and eliminate or erode traditional civil service protections, which make dissenting speech less likely.

Examined together, these sites combine to produce a significant and overlooked loss in public employee speech.

IV. AGAINST CONVERGENCE: AN ARGUMENT FOR INTERNAL CHECKS

Identifying a convergence between the public and private sectors is not tantamount to its normative rejection. Maybe government should be run like a business.[192] Maybe public and private employees should enjoy a similar set of speech rights. In this Part, I argue that the move toward public/private convergence should be reconsidered. My argument unfolds in three moves. First, taking private employment as a given baseline,[193] I argue that public employment should not be similarly treated. Second, I focus on public employee speech and elaborate on its unique contribution to democratic ends. Third, I address possible objections to granting constitutional protection to public employee speech.

A. *The Public Sector Is Not the Private Sector*

The easiest answer to why public employment is not like private employment is that the Constitution distinguishes these two spheres and imposes more obligations on government. The Constitution generally applies to state action, not private action. While this distinction may be conceptually incoherent, normatively undesirable, or difficult to apply with principle,[194] it is nevertheless the one that is in place, and it rides on the intuition that there is something special about government. The

---

[192] *See*, *e.g.*, Julia Beckett, *The "Government Should Run like a Business" Mantra*, 30 AM. REV. PUB. ADMIN. 185, 186 (2000) (describing the meaning of the mantra, "government should be run like a business"); Richard C. Box, *Running Government Like a Business: Implications for Public Administration Theory and Practice*, 29 AM. REV. PUB. ADMIN. 19, 20 (1999) (warning against viewing the government like a business); Robert B. Denhardt & Janet Vinzant Denhardt, *The New Public Service: Serving Rather than Steering*, 60 PUB. ADMIN. REV. 549, 550 (2000) (discussing the calls for a market conception of government).

[193] To be sure, current protections for *private* employee speech are suboptimal. My objective is to prevent the slide that seeks to equalize the rights of public employees with those of private employees.

[194] *See*, *e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–04 (1985) ("There still are no clear principles for determining whether state action exists."); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 176–89 (2000) (discussing the difficulty of applying this doctrine).

Constitution is concerned with the abuse of public power and its interference with individual action.[195] The rule of law is concerned with constraining government action; the government is the organ that must justify its decisions to the citizenry.

The textual explanation, however, although anchored in the Constitution and thus inescapable, possesses limited normative force. There are at least four additional substantive reasons for treating the public sector differently than the private sector. Such reasons are found both in the special power that government exerts and its unique location vis-à-vis the market.

First, private firms operate in a competitive environment geared toward profit.[196] From the consumerist perspective, people believe they are getting the best deal possible because a truly competitive environment will maximize efficiencies that will reduce costs, thus giving the consumer a cheaper and better product. Presumably, private firms can provide a better product because competition forces them to deploy a host of devices that mitigate agency costs and discipline managers.[197] Consider, for example, that publicly held corporations face mandatory disclosure requirements, companies can be taken over, shareholders have exit rights, and consumers can switch products.[198]

Government, however, does not operate in a similar profit-driven competitive environment. The devices which mitigate agency costs in the private sector are largely absent from the public sector,[199] making the importance of public employee speech greater. In the public sector citizens will often face problems acquiring information;[200] compensation is not linked to performance, which is difficult to measure.[201] Moreover, there are no similar exit rights and no direct control over the vast majority of

---

[195] *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 588 (2000) (arguing that "[e]ven in an era marked by the rise of multinational corporations . . . the claim that public power is more menacing than private power remains unmovable as a pivot point in American public law").

[196] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 32.

[197] Roosevelt, *supra* note 53, at 1245; Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1425 (2003).

[198] Roosevelt, *supra* note 53, at 1246–47.

[199] *See* Trebilcock & Iacobucci, *supra* note 197, at 1439 (arguing that "agency costs often afflict governments more severely than private enterprise").

[200] Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 88 (2012).

[201] For criticism of pay-for-performance measures in the public sector, see generally Patricia W. Ingraham, *Of Pigs in Pokes and Policy Diffusion: Another Look at Pay-for-Performance*, 53 PUB. ADMIN. REV. 348 (1993). *See also* James R. Thompson, *The Federal Civil Service: The Demise of an Institution*, 66 PUB. ADMIN. REV. 496, 498 (2006).

public officials.[202]

Second, the government is often the sole source of a particular service. Even when it competes with the private sector, different norms apply to its actions.[203] Most of the government's "products," such as a criminal and civil justice system, national defense, environmental protection, police, and welfare services, are public goods that are not widely available on the market, if at all. When they are available, we become wary of non-government provision: certain services or commodities are too important to be left to the market; market provision creates negative externalities; and market provision infringes on the core essence of the product, insofar as it debases it, corrupts it, or perverts its social meaning, or because government provision creates collective solidarity and stakeholders in ways that private provision seldom can.[204] While efficiency is undoubtedly a factor in government provision, it is rarely the government's exclusive objective.[205] We are not usually troubled with private actors and firms maximizing their profits (to a degree), though we would be skeptical of public servants being conditioned to think of themselves as self-interested utility maximizers.[206] Even if public officials were interested in the maximization of their immediate supervisor's utility, we would still want them to have potentially diverging public-regarding interests. This explains why the privatization of certain services is viewed with suspicion: Giving a job from government to the private sector means transferring a task from a world where efficiency is a value to be balanced against equity and fairness to a world where economic efficiency is the predominant and paramount consideration.

Third, government can use power in a way the private sector cannot. It is often the only source of legitimate violence,[207] and its status as provider of public goods requires an element of coercion and authority that is not found in the market. Moreover, government's actions bind all of us. Its power over the people under its jurisdiction is ubiquitous and

---

[202] One could argue that elections are a way to exercise exit rights, but this argument fails. *See infra* Part IV.C.

[203] *See* CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 146 (1977) (noting that polyarchy places power into the hands of elected officials who pursue a kind of public interest while a market system gives power to businessmen who have no such responsibility).

[204] For a recent statement along similar lines, see generally MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012).

[205] *See*, *e.g.*, Craig v. Boren, 429 U.S. 190, 198 (1976) (rejecting administrative ease and convenience as sufficiently important reasons to justify gender-based classifications).

[206] Donald P. Moynihan, *The Normative Model in Decline? Public Service Motivation in the Age of Governance*, *in* MOTIVATION IN PUBLIC MANAGEMENT: THE CALL OF PUBLIC SERVICE 247, 252 (James L. Perry & Annie Hondeghem eds., 2008).

[207] Max Weber, *The Profession and Vocation of Politics*, *in* POLITICAL WRITINGS 309, 310 (Peter Lassman & Ronald Speirs eds., 1994).

omnipresent.[208] Crucially, we are the source of that power. Its actions are, in an important sense, our own, done for and on our behalf. When public officials exercise power, they exercise power that we have given them.[209] Unless we are shareholders in a private firm, we have a weaker claim to control the behavior of private employers.[210] We are thus arguably complicit in state action, even if in an attenuated way, from which we are never free. Moving to a different country (or state) is difficult, and will simply substitute one omnipresent ubiquitous political rule for another. It is this power that gives rise to unique state obligations such as transparency and accountability. These obligations apply in the private sector too, but they are a priori limited because of the prevailing background understanding that private firms are not like the government and are thus not subject to similar stringent demands. Moreover, such obligations are almost always viewed as external constraints on firms, whereas they are intrinsic to government work. This is why, for example, government bureaucracies are more "bureaucratic" than their private sector analogues. We the people insist that they be more constrained, that there be more red tape.[211]

Finally, because of their dependence on elected officials for resources and funding, government institutions, unlike private firms, are more vulnerable to the risk of being used for improper political purposes.[212] This dependence can include, for example, attempts to restrict speech as a means of consolidating political power over public institutions, even without a legitimate governmental objective.[213] The unique control that elected politicians can exercise over governmental institutions (agendas, budget, and appointments) raises concerns that are less salient in the private sector.[214]

The central task of government, then, is to promote "liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for

---

[208] Paul Secunda argues that public employers also exercise more power over their employees than private employees, justifying a higher level of privacy protection. Secunda, *supra* note 138, at 277–78.

[209] *See* Richard Michael Fischl, *"Running the Government Like a Business": Wisconsin and the Assault on Workplace Democracy*, 121 YALE L.J. ONLINE 39, 64–65 (2011) ("The employer is the whole people, who speak by means of laws enacted by their representatives in Congress . . . . Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities." (quoting Letter from President Franklin D. Roosevelt to Luther C. Steward, President, Nat'l Fed'n of Fed. Emps. (Aug. 16, 1937))).

[210] Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 644–45 (2012).

[211] WILSON, *supra* note 136, at 133.

[212] Lee, *supra* note 57, at 1744.

[213] *Id.*

[214] *Id.* at 1744–45.

social conduct,"[215] and maintain accountability, transparency, and fairness—principles that hold less sway in the private context.[216] Government has to answer to multiple constituencies, whose interests overlap and conflict, as part of its role as the guardian of the public interest, while firms answer to fewer constituencies—shareholders, consumers, suppliers, boards, regulators, and sometimes employees—albeit in a focused way.[217] The public sector is therefore not just another sector. The "public" is precisely the locus that democratic societies have devised in order to facilitate communicative activities.[218] Restricting speech in the public sector is therefore profoundly at odds with a basic understanding of democracy.

B. *Public Employees and Private Employees Are Not Similarly Situated*

Even if all the devices to mitigate agency costs were available in the public sector, there are still good reasons why public employment should be conceptualized differently than private employment. Turning the public workplace into a market means losing sight of the importance of public service and its unique norms and culture. When public workers are incentivized to operate like market participants, the likelihood that they will espouse a public service ethic decreases,[219] as does the likelihood that they will exercise speech rights in a way that benefits all of us. This is partly because the public interest aspect of government work is often (though not always) not shared by the private sector. Much of private employment works on an incentive-based pay for performance, which has the potential to crowd out intrinsic motivations—such as commitment to public service.[220]

---

[215] Adickes v. S. H. Kress & Co., 398 U.S. 144, 190 (1970) (Brennan, J., concurring in part and dissenting in part).

[216] Fairness norms operate in the private context, but the burden on government is still higher and qualitatively different.

[217] John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, *in* GOVERNMENT BY CONTRACT, *supra* note 139, at 41, 44.

[218] For the unique contribution of the public sphere to democracy, see generally JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Burger trans., MIT Press 10th ed. 1999) (1991).

[219] *See* Moynihan, *supra* note 206, at 255 (noting that public servants that begin to identify as "market actors" may start to feel that "market control systems allow them less discretion to exercise moral judgment, and indeed may force them to act in a way they consider to be at odds with public good").

[220] *See id.* at 248 (explaining that the "market model" in which "pay and tenure are tied to measured performance" is damaging to a public service work ethic "through an incentive effect, by crowding out intrinsic motivations"). On the relationship between crowding out and motivation, see Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1178–79 (2010) ("[T]he crowding-out literature suggests that when people attribute their behavior to external rewards, they discount any moral incentives for their behavior, thereby lowering the perceived effect of intrinsic

There are three reasons why systems that reward self interest crowd out intrinsic motivations. First, when actors believe their work is valued by extrinsic rewards they view the "locus of control for their actions as being external, reducing their sense of self determination and motivation."[221] Second, ethical behavior requires autonomy and discretion. In extrinsic rewards systems, actors feel they lose discretion, causing them to lose their ability to consider how their decisions affect the public interest.[222] Finally, actors are more likely to internalize the market model and behave in desirable ways when financial rewards are present; their behavior itself becomes a commodity responsive to extrinsic rewards.[223] Thus, the risk is that public service motivation will decrease because of the type of people it will attract and because the private sector culture will minimize public interest incentives.

To be sure, the private sector is not monolithic, and workers generally have a need for autonomy, self-mastery, and purpose. Recognition by peers, professional prestige, meaningful work, and leadership opportunities also affect motivation.[224] Yet it is the introduction of financial incentives into public employment in the form of pay-for-performance that risks crowding out other motivational mechanisms, with the attendant risk of money's corrosive influence.[225] Moving to a market model in public employment increases the moral hazard inherent in opportunistic behavior, which can manifest in goal displacement, neglecting unmeasured aspects of performance, ignoring due process, emphasizing the bottom line, marginalizing equity and fairness, and stressing short term gains while

---

motivation. As applied to the regulatory incentives, crowding-out theory predicts that external incentives that utilize monetary rewards or punishments may undermine intrinsic motivations.").

[221] Moynihan, *supra* note 206, at 251.

[222] Thompson, *supra* note 201, at 498 (discussing the "cascading mechanism" of human capital management within public agencies in which employees feel an ethical responsibility to align their goals and performance with "the public interest").

[223] *See* Moynihan, *supra* note 206, at 225 (discussing identification of public workers as market actors). *See generally* Donald P. Moynihan, *A Workforce of Cynics?: The Effects of Contemporary Reforms on Public Service Motivation*, 13 INT'L PUB. MGMT. J. 24 (2010) (discussing how the move to a market model increases the opportunities for moral hazard and the likelihood of crowding out intrinsic values essential for maintaining the ethos of public service).

[224] *See* DANIEL H. PINK, DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US 80–81 (2009) (noting that behavior that emphasizes the "three nutrients" of autonomy, mastery, and purpose is "devoted to becoming better and better at something that matters" while "connect[ing] that quest for excellence to a larger purpose" and has become "critical for professional, personal, and organizational success of any kind").

[225] *See* Edward L. Deci et al., *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOL. BULL. 627, 632 (1999) (arguing that financial rewards have a negative effect on intrinsic motivation); *see also* James B. Rebitzer & Lowell J. Taylor, *Extrinsic Rewards and Intrinsic Motives: Standard and Behavioral Approaches to Agency and Labor Markets*, 77–78 (Inst. Study Labor, IZA Discussion Paper No. 5058, 2010), *available at* http://ftp.iza.org/dp5058.pdf (finding that extrinsic rewards have a corrosive effect in public-regarding organizations).

focusing on competition—all of which stand in opposition to the professed goals of public service and public employment.[226] Unlike many private sector jobs (though by no means all), public agencies often have to perform complex tasks that cannot be adequately measured like those taken on by market actors. "Many activities are in the public sector precisely because of measurement problems."[227] The cultivation of a public service ethic, then, is crucial for the performance of government work, and its emphasis distinguishes it from private sector employment.

C. *Internal Checks, Access to Information, and Public Employee Speech*

Public employee speech is an internal check on government power.[228] Checks on government are usually conceptualized as external: one branch checks another, the media and the public check government, and other actors such as inspectors general check executive performance. Public employee speech, however, is an internal check because it is done by employees who are otherwise subordinate to their supervisors.[229] In addition, such speech has a temporal advantage over other conventional checking mechanisms because it is done in real time. The problem with public employee speech, however, is that it can also frustrate legitimate policy implementation and democratic accountability. As Professor Lawrence Rosenthal has argued, allowing employers to discipline their employees for speech that is part of their official duty is justified because it holds officials accountable for the conduct of their offices.[230] If managers cannot discipline and remove officials who are unwilling or unable to execute their duties as those policymakers wish, then they "cannot be fairly held politically accountable for the performance of their offices, and they cannot obtain full and effective control over the performance of public

---

[226] *See* Moynihan, *supra* note 206, at 257 (noting that within the market model, and specifically with regard to "incomplete contracts," public servants are permitted to "engage in opportunistic behavior at the expense of the principal's goals"); *see also* Dannin, *supra* note 148, at 127–28 (noting that the incentive within private-sector employment to behave opportunistically and "cut[] corners" when dealing with government employers is in fact one reason why public-sector employment must not move toward a market model).

[227] Henry Mintzberg, *Managing Government, Governing Management*, HARV. BUS. REV., May 1996, at 75, 79.

[228] A different justification focuses on the employee's liberty interests and the republican value of cultivating a civic-minded community. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 29 (1990). I, however, focus on listener-based arguments.

[229] For a discussion on the checking function of bureaucracy, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2376 (2006).

[230] *See* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 46 (2008) ("[I]f the elected officeholder is to be politically accountable for the manner in which the office discharges its duties, the officeholder must have the prerogative to control the manner in which those duties are discharged, including speech-related duties.").

offices even after enjoying electoral success."[231]

This line of argument suffers from two problems. First, Rosenthal has in mind a vision of an executive office where control is exercised by the office's head. Government institutions do not operate in such a way. Inside government there are multiple veto points in the form of inspectors general and legal counsel, and outside government there are media outlets, NGOs, and other institutions that shape governmental policy by bringing their pressure to bear. This organizational flattening makes identifying the locus of accountability difficult when things go wrong, irrespective of public employee speech.[232]

Second, for government to be legitimate it has to pursue the goals that people want. Yet there is little reason to assume that the people are good at monitoring government, that they know what they're getting, or that the current level of oversight is optimal. Rosenthal assumes that elections take care of that problem, since people will vote unresponsive officials out of office.[233] But given how elections are run and the level of voter information, this argument is dubious. Indeed, one could argue that public employee speech is desirable precisely because it complements the democratic process. Whereas Rosenthal extols democratic accountability through elections, the problems with elections are that they often do not translate voter preferences into public policy. Voter ignorance, information asymmetries, and agency problems between politicians and voters give rise to numerous problems, so much so that officials can act in ways that systemically diverge from voter preferences with little or no sanction.[234] As public choice theory demonstrates, there are many reasons to be suspicious of results generated by the political process, including

---

[231] *Id.* at 48; *see also* Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1472 (2007) ("It is all well and good for voters to elect officials and express policy preferences, but those democratic processes do not amount to much unless those elected and appointed officials can implement those policies. And most policies can only be implemented through the words and actions of public employees.").

[232] *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 208 (2012) (discussing how recent changes in communication and collaboration technologies had a "flattening effect" on the executive branch which increased "connections" among actors, both within and without, and thus resulting in decreased precision as to who in particular should be held accountable for institutional incompetence or malfeasance).

[233] *See* Rosenthal, *supra* note 230, at 111 ("The last say on the exercise of managerial prerogative is had by the voters.").

[234] Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1391 (2008); *see also* Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, *in* PUBLIC ACCOUNTABILITY: DESIGN, DILEMMAS AND EXPERIENCES 52, 70 (Michael W. Dowdle ed., 2006) ("Most voters . . . are not perfectly informed about the issues, and the evidence suggests that they often suffer from apocalyptic levels of ignorance."); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 881 (2007) (arguing that elections will never create "perfect preference alignment" between the President and the public); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (arguing that elected officials will almost always deviate from majoritarian preferences).

elections.[235]

Because elections are rarely about one issue, voters must aggregate issues and thus cannot do a good job of punishing or rewarding an official for one thing. This problem is exacerbated because much of government work is invisible to citizens,[236] so even if citizens are useful overseers, employees still play a unique role. At the same time, monitoring costs are simply too high for external oversight mechanisms to be completely effective.[237] Congress and courts are increasingly unable to check executive behavior because they too suffer from information asymmetries, lack of expertise and political will, and collective action problems.[238] Thus to expect voters and other government institutions to police government effectively is unrealistic, especially given the increased complexity of the administrative state. Moreover, elections can only mitigate some agency costs because often the relational distance between an elected official and a bureaucrat will be tenuous. Even if elections responded to accountability concerns, as Rosenthal suggests, they are often unavailing when it comes to the operation of administrative agencies, especially independent agencies that are entrusted with a wide range of public responsibilities or agencies that are largely independent of political controls.[239]

Another comparison with the private sector is outputs and inputs. The private sector is controlled by outputs. A firm produces a product that it needs to sell in order to survive. The market disciplines the firm by deciding whether it wants the product, i.e., the output, which is reflected in

---

[235] Berry & Gersen, *supra* note 234, at 1391; *see also* Trebilcock & Iacobucci, *supra* note 197, at 1440 (noting that, under a public choice theory framework, policy makers are less concerned with "some universally recognized set of public interest goals," and more concerned with advancing their self-interests).

[236] *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 177 (1982) ("Every government has an interest in concealment . . . . Concealment insulates administrators from criticism and interference; it allows them to correct mistakes and to reverse direction without costly, often embarrassing explanations; and it permits them to cut corners with no questions being asked."); *see also* Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Regulations*, 63 ADMIN. L. REV. 99, 112, 114 (2011) (describing the lack of public oversight in the rule pre-proposal and post-proposal stages as a result of various interest groups' opportunities to engage agency staff "free of . . . transparency requirements" and negotiate in secret). The public either does not know what the government does, lacks the tools to acquire information because it doesn't know what to ask, or is not involved because of high participation costs.

[237] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–166, 176 (1984) (arguing that congressional oversight is best described not as a centralized policing model, but as a "fire alarm" model that depends on "alerts" by constituents and groups).

[238] Posner & Vermeule, *supra* note 234, at 885–891; *see* Katyal, *supra* note 135, at 2320–21, 2348 (identifying specific obstacles to checking executive power that Congress and the courts may face); *see also* Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1028–29 (2013) (remarking that Congress often lacks the proper information and incentives to check the executive power on matters of national security).

[239] *See*, *e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (limiting the President's ability to remove quasi-legislative and quasi-adjudicative officials).

the company's stock price. In contrast, the public exercises control of government largely by deciding on the inputs (elections). There is very little control over outputs, since the products of government are difficult to quantify and the responsibilities of officials are largely indeterminate.[240] A common argument in democratic theory, popularized by Edmund Burke, is that officials should not be subservient to the public because "government and legislation are matters of reason and judgment, and . . . what sort of reason is that . . . where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?"[241] Burke was skeptical of democracy, but he was right to note the problem of limited public control over officials that results from the relational distance between voters and politicians.

If officials make decisions that the public and monitoring branches have limited knowledge of and little control over, public employee speech is useful insofar as it counteracts the problems inherent in external oversight of the political and administrative process. The institutional location of public employees mitigates problems of information asymmetries and expertise, partially resolving problems with public, legislative, and judicial monitoring. Relatedly, many of the issues employees bring up are those that, for various reasons, do not receive voter attention. Even if government is "transparent," many of its actions cannot be made salient without public employee speech. In the private sector, because money is at stake, there is a natural incentive to find out about corporations, and there are firms that specialize in acquiring and selling this data.[242] Firms are thus disciplined by the market, whereas public actors are often not. Put differently, the market for corporate control does not exist in the public sector.[243]

Unfortunately, courts are not sensitive to this reality, as there are very few instances where they would be willing to overrule managerial discretion. Because the natural inclination of managers is not to be monitored, and since superiors often overstate the potential for disruption given the risk to their authority, opting for managerial discretion in public employee speech results in a conflict of interests. The private sector remedy is regulation and forced disclosure, but there is no public analogue because there are few things the government must disclose on its own

---

[240] LINDBLOM, *supra* note 203, at 146–48. Because of the problem of output quantification, the public sector emphasizes just procedures.

[241] Edmund Burke, Member of Parliament for the City of Bristol, Speech to the Electors of Bristol: Speech at the Conclusion of the Poll (Nov. 3, 1774), *in* THE POLITICAL TRACTS AND SPEECHES OF EDMUND BURKE, ESQ. 345, 353 (W. Whitestone et al. eds., 1777).

[242] *See* Emily Steel, *Companies in Scramble for Consumer Data*, FIN. TIMES (June 12, 2013), http://www.ft.com/cms/s/0/f0b6edc0-d342-11e2-b3ff-00144feab7de.html#axzz2d7RGnfW6 (noting the number of companies now dedicated to amassing and selling corporate and consumer data).

[243] Trebilcock & Iacobucci, *supra* note 197, at 1427.

initiative.[244] Giving managers complete discretion regarding which speech to censor means reducing the oversight that can be performed by public employees.

Finally, many public employees—though not all—have access to information that neither the public nor their supervisors possess. Thus, they are uniquely positioned to know what ails their agency. Because of the hierarchical structure of public organizations, managers have relatively little control over workers,[245] resulting in frontline employees having discretion and autonomy.[246] For example, individual police officers still make basic decisions regarding whom to stop without supervision and welfare workers decide which infractions to report and which to overlook. Most fundamentally, the limited resources mean that public employees are the ones who prioritize between citizens and ultimately decide who gets what.[247] Their practices are the policies that are delivered.[248]

As an illustration of the above argument, consider *Houchins v. KQED, Inc.*[249] Following a prisoner suicide at a county jail where the conditions were said to be exceedingly harsh, members of the media wanted to enter the premises and take pictures.[250] Rejecting their requests, the Court held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[251] However, the Court added that although access to government information is to be determined by the political process, journalists are able to speak to prison officials.[252]

Houchins was decided in 1978, when public employees enjoyed more robust speech rights and when fewer prisons were privatized.[253] The *Houchins* Court was correct in assuming that reporters could speak to

---

[244] *See* Shkabatur, *supra* note 200, at 14 ("[FOIA] is fully 'requester driven'—agencies are not obliged to generate information or proactively disseminate it."); Roosevelt, *supra* note 53, at 1249 (contrasting the disclosure requirements for corporations from the "great latitude" afforded public employers).

[245] *See* William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1226–33 (1983) (describing a variety of problems with a hierarchical "Weberian" model, including issues of communication and supervision).

[246] *See, e.g.*, MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13 (1980) (noting the significant discretion exercised by street-level bureaucrats); JEFFREY MANDITCH PROTTAS, PEOPLE-PROCESSING: THE STREET-LEVEL BUREAUCRAT IN PUBLIC SERVICE BUREAUCRACIES 113 (1979) (discussing the value of autonomy and resource preservation).

[247] MICHAEL K. BROWN, WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM 303 (1981); Steven Maynard-Moody & Shannon Portillo, *Street-Level Bureaucracy Theory*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 252, 258–60 (Robert F. Durant ed., 2010).

[248] LIPSKY, *supra* note 246, at 84.

[249] 438 U.S. 1 (1978) (plurality opinion).

[250] *Id.* at 3.

[251] *Id.* at 15.

[252] *Id.* at 12, 15.

[253] *See id.* at 3 (noting that the petitioner was a public county jail).

jailers. Today, however, prison employees who speak about prisoner abuse, either to their supervisors or the media, risk discipline or termination. *Houchins* assumed that journalists could rely on public employees to expose prison wrongdoing, yet the subsequent curtailment of public employee speech undermines that assumption, while shedding light on the critical role this speech could serve. With media out of the prisons an important element of accountability is lost. With the decline in public employee speech rights there is one less countervailing lever to check official discretion from within.

D. *Anticipating Objections to Protecting Public Employee Speech*

Thus far I advanced a three-stage argument for protecting public employee speech. Before elaborating upon my normative proposals in Part V, I anticipate and reply to objections that question the utility of constitutionally protecting public employee speech.

1. *Public Employee Speech Is Not Sufficiently Valuable to Warrant Constitutional Protection*

Public employees have a unique institutional location and therefore possess information that is unlikely to be available from other sources. This is doubly important because people increasingly rely on government for information, which often comes with greater dependence. When government's role in people's lives becomes more central, people are less inclined to find out additional and contrary perspectives. New research demonstrates that lack of knowledge about sociopolitical issues does not motivate an increased search for information. Instead, it leads to dependence on government, fostering system justification tendencies. This tendency decreases people's capacity to monitor their government effectively. Public employee speech by people who are knowledgeable about government work can serve as a corrective, even if a minor one, to government speech.[254]

Recently, Professor Kermit Roosevelt suggested that the "First Amendment is not intended to increase government efficiency. It is intended to facilitate public oversight of government, and that purpose is not served by intra-governmental speech. The line between talking frankly to superiors and voicing concerns publicly marks a real distinction from the First Amendment perspective."[255] In other words, Professor Roosevelt

---

[254] Concerns with the powerful role of government expression are a mainstay of government speech scholarship. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 92–93 (1983) (critiquing governmental "referee[ing]" and over-participation in communication); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 570–71 (1980) (describing the questions raised in contemplating government-based expression).

[255] Roosevelt, *supra* note 210, at 654.

argues that public employee speech is not valuable from the perspective of the First Amendment.

This argument, I think, embodies a crabbed vision of the First Amendment. There are good doctrinal and normative reasons to reject it. Doctrinally, the Court has protected public employee speech even when it was made privately to superiors without any public knowledge. In *Givhan v. Western Line Consolidated School District*,[256] the Court protected a teacher whose contract was not renewed after she expressed concerns to the principal about racially discriminatory policies.[257] The Court stated that "[n]either the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[258] Although *Givhan* is difficult to reconcile with *Garcetti*, it was not explicitly overruled.[259] Normatively, why should we adopt the position that oversight of government can only be achieved by the public? The point of public employee speech is to provide a check on government *from within*. Given the invisibility of much governmental work, there is a broad public interest in having public employees voice workplace issues, whether or not that voice makes its way out, because such speech can foster a more accountable government.[260] And that is an end the First Amendment is designed to advance.

Finally, a possible argument is that public sector unions, not individual employees, are the best vehicles for raising employee concerns. This is a weak argument. Only thirty-six percent of the public workforce is unionized.[261] At the very least, there should be speech rights for the remaining sixty-four percent. More importantly, the argument conflates union voice with employee voice. Unions have their own interests to promote. Their speech is valuable, but it should not be assumed that it subsumes employee speech. At the federal level, for example, union speech is protected under the Federal Labor Relations Act and covers the right to "form, join, or assist any labor organization" and the right to "engage in collective bargaining with respect to conditions of employment

---

[256] 439 U.S. 410 (1979).

[257] *Id.* at 415–16.

[258] *Id.*

[259] The difficulty stems from the fact that the teacher might have been speaking pursuant to official duties and was not speaking "as a citizen." *Compare id.* (noting that the First Amendment protects confidential communications), *with* Garcetti v. Ceballos, 547 U.S. 410, 426 (2005) (holding the opposite).

[260] Trebilcock & Iacobucci, *supra* note 197, at 1450.

[261] Dave Jamieson, *Union Membership Rate for U.S. Workers Tumbles to New Low*, HUFFINGTON POST (Jan. 23, 2013), http://www.huffingtonpost.com/2013/01/23/union-membership-rate_n_2535063.html?view=print&comm_ref=false.

through representatives chosen by employees."[262] This includes protection for speech related to joining or assisting a union.[263] The interests protected are organizational in nature and do not address the matters covered by the public employee speech cases. Because societal, employee, and union interests often diverge, we should not assume that union speech subsumes employee speech.

There are clearly downsides to employee speech. Employees can magnify little problems, be wrong about the problems they report, and disrupt the workplace.[264] The potential for disruption will be addressed below. As for the downsides to speech, given that some employee speech is undoubtedly valuable, the question cannot be whether it should be protected, but how much should be protected. This will be addressed in Part V.

2. *Public Employee Speech Is Disruptive and Generates Inefficiencies*

A central argument against robust protection of employee speech is that it can cause disruption and inefficiencies, making policy implementation difficult. This argument is often made in a casual way that obscures its complexity. There are at least two problems with the argument: doctrinal and conceptual.

Doctrinally, although the Court insists it is protecting against disruption, in reality it protects the employer's predictions of likely disruption. Curiously in all the public employee speech cases where the Court upheld the employer's action, there was no actual disruption.[265] Thus, the fear of potential disruption is so great that the Court does not even wait for it to happen before upholding the disciplining of employees. So even if anti-disruption is a worthy goal, the Court's deference to employers errs by excessively protecting expectations without requiring any proof of actual disruption.[266] Ironically, the Court may be contributing

---

[262] 5 U.S.C. § 7102 (2012). State and local employees are governed by labor relations laws that vary from state to state.

[263] *See, e.g.*, Old Dominion Branch No. 496, Nat'l Ass'n Letter Carriers v. Austin, 418 U.S. 264, 283 (1974) (protecting speech that labeled the plaintiffs as "scabs" because they did not join a union).

[264] It should be noted that in a survey of federal employees, seventy-four percent explained that before reporting they wanted to ensure that they had the facts and the evidence to back them up. *See* U.S. MERIT SYS. PROT. BD., BLOWING THE WHISTLE: BARRIERS TO FEDERAL EMPLOYEES MAKING DISCLOSURES 17 fig.3 (2011), *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475&application=ACROBAT (suggesting a high level of concern among whistleblowers that they needed to have enough factual evidence).

[265] *See* Christie S. Totten, Note, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under* Garcetti v. Ceballos, 12 LEWIS & CLARK L. REV. 233, 237–45 (2008) (discussing a variety of pre-*Garcetti* cases and noting a repeated lack of disruption found by courts).

[266] *But see* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 574 (1970) ("There must be specific proof that the expression has demonstrated incompetence to perform the job, violation of legitimate orders, or creation of serious organizational disruption.").

to workplace disruption. Recall that *Garcetti* is more protective of employees when they speak "*as citizens*," that is, when they go to the public with their concerns.[267] Going outside and behind supervisors, however, tends to create more disruption for the organization that now has to defend its policies publicly.[268]

When courts protect against disruption they are acting to enforce a particular view—the employer's. Yet employers often overestimate the threat caused by dissenting speech. Employers are concerned with preserving their authority, making them more likely to view dissenting speech as undermining that authority, even when the potential for disruption is low. For example, researchers have found that managers and superiors are less open to criticism and that an elevated sense of power decreases their ability to monitor and censor themselves.[269] Not only are supervisors prone to the same types of cognitive biases that make it difficult for individuals to hear challenges to their opinions, they are more susceptible to these biases precisely because they are leaders (because of the position they hold or in virtue of the qualities that made them leaders).[270] Whereas the Court's deference to the government is justified in grounds of operational efficiency, it may give rise to personnel decisions that are rooted in bias.

The conceptual problem goes deeper, for it challenges the position that disruption is inherently problematic. Disruption may be harmful to the operation of government, but it can also trigger positive change. Disrupting a poorly run organization is valuable. Informing superiors about a harmful policy can improve the organization. Speaking to the public about mismanagement, waste, or abuse is desirable even if it causes disruption. Excessively guarding against disruption means promoting caution, stifling initiative, and risk taking. The disruption rationale should be thus viewed with skepticism especially when speech is expressed in a hierarchical setting. Suppressing such speech means that First Amendment values have little valence in the institutions that matter most: those that dominate our everyday life. Protecting against disruption, therefore, is too abstract a goal. On its own it is not sufficient to deny First Amendment protection.

---

[267] Garcetti v. Ceballos, 547 U.S. 410, 421 (2005) (emphasis added).

[268] Similarly, external whistleblowing is more likely to suffer retaliation than internal reporting. Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 J. MGMT. 507, 509 (1996).

[269] Elizabeth Wolfe Morrison & Naomi B. Rothman, *Silence and the Dynamics of Power*, *in* VOICE AND SILENCE IN ORGANIZATIONS 111, 113 (Jerald Greenberg & Marissa S. Edwards eds., 2009).

[270] Susan J. Ashford et al., *Speaking Up and Speaking Out: The Leadership Dynamics of Voice in Organizations*, *in* VOICE AND SILENCE IN ORGANIZATIONS *supra* note 269, at 175, 188.

3. *There Is Enough Information About Government*

According to this argument, employee speech overlaps with similar information that exists or can be obtained through other means. Notwithstanding that public employees have unique information that is unlikely to be available from other sources, the argument ignores the silencing mechanisms that operate in the workplace. The social dynamics that are prevalent in any organization, especially a hierarchical one, tend to suppress much employee voice. Sometimes this is the result of explicit preferences of superiors. More often it is the result of self-imposed censorship due to the difficulty of expressing opinions in hierarchical settings. By encouraging public employees to speak out, or at the very least not penalizing them when they do, we will be taking a step toward overcoming these tendencies and bringing forward unique information.

The Court rightly conceptualizes the government workplace in hierarchical terms, but it fails to acknowledge the pathologies these hierarchies generate. When people interact they have a pervasive desire to have the good opinions of others. The natural inclination is conformity, not dissent. As Cass Sunstein notes, this can lead people to fail to disclose "what they know and believe."[271] If this is true for general society, these tendencies are stronger in the public workplace where the same people interact over a long period of time and institutions are less open to challenges.[272] Potential dissenters often have little reason to speak out because they fear retaliation by their superiors or colleagues, either in the form of formal sanctions or other social sanctions, such as isolation or exclusion from important functions.[273] Indeed, the "unpleasantness of standing alone makes the majority opinion more appealing than one's own beliefs."[274] The pressure to conform often leads to anticipatory compliance—employees conform to the behavior that is expected of them without overt pressures. This may result in excessive concurrence seeking, one of the hallmarks of groupthink.[275] Speaking up is also difficult when the group has already converged on a position, since it is more likely to

---

[271] CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 9 (2003). For an early example of a study regarding conformity, see Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956).

[272] Marcia P. Miceli & Janet P. Near, *The Incidence of Wrongdoing, Whistle-Blowing, and Retaliation: Results of a Naturally Occurring Field Experiment*, 2 EMP. RESPS. & RTS. J. 91, 94 (1989).

[273] *See* ELISABETH NOELLE-NEUMANN, THE SPIRAL OF SILENCE: PUBLIC OPINION—OUR SOCIAL SKIN 203–04 (2d ed. 1993) (recounting experiments that explored human subjects' responses to threats of isolation).

[274] Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 245 (2005).

[275] PAUL 'T HART, GROUPTHINK IN GOVERNMENT: A STUDY OF SMALL GROUPS AND POLICY FAILURE 6 (1990). For one of the seminal works regarding groupthink, see generally IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (2d ed. 1982).

reject deviates. This is known as "uniformity pressures," where the group focuses on information all members share and tends to exclude unique information possessed by some of the members.[276] This tendency is stronger in hierarchical organizations that have a centralized decision-making process.[277]

Of course, not every government organization suffers from these problems. But the phenomenon of organizational silence exists in most large organizations. As Professors Elizabeth Wolfe Morrison and Naomi Rothman found, silence results from power imbalances between managers and subordinates, who deem voice to be futile or risky.[278] Leaders are consequently deprived of necessary information and organizational performance can be undermined.[279] As Leon Festinger demonstrated, introducing a hierarchical structure impedes bottom-up communication[280] because relationships of power mean an asymmetrical control of resources, opportunities, and outcomes. Subordinates are dependent upon leaders for their job, security, and material conditions.[281] This produces conflict avoiding behavior so as not to jeopardize the relationship, resulting in supervisors not being aware of problems that need addressing.[282]

Exercising pro-social voice depends on the speaker's ability to anticipate the outcome of the speech.[283] If employees see that people are dismissed, relocated, demoted, or harmed as a result of their speech, this will produce an environment where they are less likely to speak up and dissent in the future. If voice has high initiation costs, it will be less heard. Thus the view that there is already a lot of information about the government is mistaken. It fails to consider the potential speech that is

---

[276] *See* ARIE W. KRUGLANSKI, THE PSYCHOLOGY OF CLOSED MINDEDNESS 117–22 (2004) (discussing the rejection of opinion deviates and a study group's focus on shared information).

[277] *See id.* at 124 ("Uniformity may [be] obtain[ed] more readily where one (or only a few) opinion(s) govern the discussion . . . .").

[278] Morrison & Rothman, *supra* note 269, at 113.

[279] *Id.*

[280] Leon Festinger, *Informal Social Communication*, 57 PSYCHOL. REV. 271, 280 (1950).

[281] James R. Detert & Linda K. Treviño, *Speaking Up to Higher-Ups: How Supervisors and Skip-Level Leaders Influence Employee Voice*, 21 ORG. SCI. 249, 250 (2010). For an early statement, see ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 189 (1915).

[282] Frances J. Milliken et al., *An Exploratory Study of Employee Silence: Issues That Employees Don't Communicate Upward and Why*, 40 J. MGMT. STUD. 1453, 1454 (2003); *see* Sidney Rosen & Abraham Tesser, *On Reluctance to Communicate Undesirable Information: The MUM Effect*, 33 SOCIOMETRY 253, 261 (1970) (remarking that individuals are less likely to communicate negative information or information that would have negative consequences for the communicator).

[283] Marissa S. Edwards, Neal M. Ashkanasy & John Gardner, *Deciding to Speak Up or to Remain Silent Following Observed Wrongdoing: The Role of Discrete Emotions and Climate of Silence*, *in* VOICE AND SILENCE IN ORGANIZATIONS, *supra* note 269, at 83, 89; *see also* Brian S. Klaas, Julie B. Olson-Buchanan & Anna-Katherine Ward, *The Determinants of Alternative Forms of Workplace Voice: An Integrative Perspective*, 38 J. MGMT. 314, 319 (2012) (noting that an anticipated positive outcome for the whistleblower increases likelihood of whistle-blowing).

suppressed as a result of the workplace environment. Constitutionally protecting employee speech is a possible way to ameliorate this deficiency or at the very least protect those who manage to overcome these psychological tendencies. If employees know they are protected, they will be more likely to exercise dissenting and critical speech.

4. *Whistleblower Statutes Make Constitutional Protection Unnecessary*

A common refrain is that constitutional protection for public employee speech is redundant. Since federal and state governments protect whistleblowers who report on government misconduct, constitutional protection would replicate extant statutes.[284] This argument rests on a mistaken perception of the protection these statutes afford and misunderstands the nature of constitutional protection for speech.

Whistleblower statutes, as explained above, are not uniform. Sixteen states and the District of Columbia do not even grant statutory protection to public sector whistleblowers.[285] Some of the states that grant protection to state employees deny similar protections to employees of local governments and other subdivisions.[286] Many of the statutes impose demands that may hinder speech. For example, some statutes require the employee to warn her superior, whereas others prohibit supervisors from requiring warning.[287] Yet the decision how to speak has little to do with the value of the speech. Because the decision how to speak is contextual, statutes that impose only one avenue can create a chilling effect. I develop this point more fully below.[288]

At the federal level, experience with the Whistleblower Protection Act has not been encouraging.[289] One reason for this lack of success is a high burden of proof imposed by the Federal Circuit, the appellate court that hears federal employee claims,[290] and excessive deference to decisions made by "hearing examiners" employed by the Merit Systems Protection

---

[284] This was the Court's opinion in *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

[285] *State Whistleblower Laws*, *supra* note 121.

[286] *Garcetti*, 547 U.S. at 440 (Souter, J., dissenting).

[287] *Id.*; *see also* Ruben J. Garcia, *Against Legislation:* Garcetti v. Ceballos *and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22, 34 (2008) (noting flaws in alternative statutes under which the *Ceballos* case could have been brought).

[288] *See infra* Part V.A.

[289] *See* Sasser, *supra* note 115, at 790 (noting that only 3 out of a 126 claims raised under the WPA have been successful). Importantly, national security whistleblowers are excluded from the coverage of the Act and from the Whistleblower Protection Enhancement. *See id.* (noting that national security employees may lose their security clearance as a consequence of speaking out).

[290] *See Garcetti*, 547 U.S. at 441 (Souter, J., dissenting) (explaining that the availability of statutory protection depends on the interpretations by federal courts).

Board who do not enjoy judicial independence like Article III judges.[291] Further, the Federal Circuit has held that statements made in connection with normal employment duties will not receive protection.[292] As Justice Souter pointed out in his *Garcetti* dissent, this is exactly the speech that the Court has excluded from protection on the theory that whistleblower statutes will provide protection. In a partial response to the Federal Circuit and *Garcetti*, Congress enacted the Whistleblower Protection Enhancement Act of 2012, which protects statements made in the normal course of duties. The Act, however, covers only federal employees, and excludes important agencies from its coverage, such as employees in sensitive agencies including the CIA, FBI, and NSA, to name a few.[293] Thus its scope is quite limited.

The redundancy argument also fails because the First Amendment does not necessarily overlap with statutory and common law protections.[294] Whistleblowing is a particular type of speech reporting on illegality, fraud, waste, or abuse. Constitutional protection for speech purports to cover a much larger swath of expressive activity. For example, dissenting and critical speech like the one made by Bryan Gonzalez would not be covered by any state or federal statute. The teacher in *Givhan* who spoke in private about racial discrimination would not have received statutory protection.[295] Right now, only the Constitution can potentially protect such dissenting

---

[291] *See* Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL'Y REV. 184, 205–10 (2012) (arguing that the Office of Special Counsel and the Merit Systems Protection Board have nullified the Whistleblower Protection Act).

[292] Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1352 (Fed. Cir. 2001).

[293] *See* McCarthy, *supra* note 291, at 188 (arguing that a vast majority of whistleblowers have been "left adrift in the wind"). In four statutes enacted after *Garcetti*, Congress has protected whistleblowers who report misconduct related to their job duties and also provided them with enhanced remedies. Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 15 (2012); *see* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (codified as amended in scattered sections of 5 U.S.C. (2012)) (protecting disclosures made in the normal course of duty, but excluding important agencies from its coverage). The statute states:

> If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

5 U.S.C. § 2302(f)(2) (2012). The Act's application remains to be seen. *See* Moberly, *supra*, at 52 (describing possible applications of the Act).

[294] Even if there is overlap, constitutional rights are an independent source of rights whose existence and enforcement does not depend on statutes or common law. *See Garcetti*, 547 U.S. at 439 (Souter, J., dissenting) ("[T]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law." (quoting Bd. of Comm'rs, Wabaunsee Cnty. v. Umbehr, 518 U.S. 668, 680 (1996) (internal quotation marks omitted))).

[295] *See State Whistleblower Laws*, *supra* note 121 (detailing state whistleblower statutes and demonstrating that private discussions are not covered by any of said statutes).

speech, guaranteeing the rights of all public employees—local, state, and federal—who are otherwise subject to the contingencies of the political process.

5. *Regulating Employee Speech Will Result in Excessive Judicial Interference*

A lingering concern expressed by courts is that "[g]overnment offices could not function if every employment decision became a constitutional matter."[296] But will this happen? I offer three possible replies.

First, it is a leap to assume that judicial review generates *excessive* judicial interference. As suggested above, workplace dynamics indicate that the number of lawsuits may be suboptimal because of the reluctance to exercise voice in the workplace. If the mechanisms undergirding employee silence are psychological, we are unlikely to see a spike in lawsuits. Instead, protecting public employee speech is likely to help those who manage to overcome the difficulties associated with speaking up.

Second, the Court has been reviewing employers' decisions restricting employees' First Amendment rights for decades and yet the concern with flooding expressed in cases like *Connick*, *Waters*, and *Garcetti* has failed to materialize. The irony of *Garcetti* is that by curtailing speech protections, it has invited litigation over what counts as "official duties" pursuant to which employees are not protected.[297] *Garcetti*'s hope of ending litigation thus failed on its own terms. Moreover, experience in the Ninth Circuit suggests that concern about judicial micromanagement is overstated. Prior to *Garcetti*, the Ninth Circuit applied its own precedent, *Roth v. Veteran's Administration*.[298] *Roth* extended First Amendment protections to speech that was part of official job responsibilities[299]—a protection the Supreme Court would later deny in *Garcetti*. Experience with *Roth*, decided in 1988, showed that federal courts in the Ninth Circuit were not deluged with cases.[300] The Court's concern with flooding thus belies the empirical reality.[301]

Finally, concerns with excessive intervention conflate the existence of judicial review with the standard it adopts. For example, courts routinely review agency action, but for the most part they adopt a deferential

---

[296] *Garcetti*, 547 U.S. at 418–19 (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)).

[297] *See* Totten, *supra* note 265, at 260 (noting that the Fifth Circuit had to address the question of "official duties" due to *Garcetti* not providing a definition).

[298] Roth v. Veteran's Admin., 856 F.2d 1401 (9th Cir. 1988), *overruled in part by Garcetti*, 547 U.S. at 417.

[299] *Id.* at 1403.

[300] This point was raised by Justice Souter in the oral arguments. Transcript of Oral Argument at 5, Garcetti v. Ceballos, 547 U.S. 410 (2006) (No. 04-473), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-473.pdf.

[301] *See* Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 135–38 (2010).

standard of review.[302] Similarly, concerns about judicial intervention cannot be understood as a plea to eliminate judicial review from the employee speech context. Instead, attention should be given to the particular scope of that review. It is this question to which I now turn.

V. TOWARD PUBLIC/PRIVATE DIVERGENCE: TWO PROPOSALS

The decline in constitutional protection for public employee speech is attributable to larger transformations in the public sector that are driven by a free market ideology, the manifestation of which is that public employees are no different than private employees. This explains why public and private employees find themselves on a similar, though not exact, footing when it comes to free speech; why privatization and outsourcing are largely viewed as desirable; and why civil service reforms that strip public employees of traditional protections are on the rise. These trends combine to generate a loss of public employee speech that has been overlooked by the scholarly literature.

Proposing particular prescriptions, however, turns out to be more complicated. The Court did not just "get it wrong." It turned to this direction because of its tendency to doctrinally reflect the extant economic logic. To change course the Court must detach its First Amendment doctrine from the government's privatized logic. Put differently, the Court must counter the privatizing tendencies through its free speech doctrine. This is more of an attitudinal shift than a doctrinal one.

Whether or not such a shift is likely depends on a variety of factors, the analysis of which goes beyond the scope of this Article. Below, I confine myself to two proposals that address the specific problem of public employee speech. The first seeks to undo the Court's jurisprudence that was discussed in Part II. The second focuses on the public workplace and on the possibility of utilizing internal regulatory mechanisms to protect and encourage valuable speech. While the first proposal is possible, it is unlikely to be realized in the near future given the Court's composition. The second proposal bypasses this problem by looking at non-judicial regulation of speech. It thus seeks to avoid costly and often inefficacious litigation; yet it too comes at a price, namely, the pitfalls of self-regulation and the lack of potentially meaningful monitoring through judicial review.

A. *Judicial Review: Doctrinal Revisions and the Restoration of* Pickering

The increasing complexity entailed in determining whether public employee speech receives constitutional protection is counterproductive,

---

[302] Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984); *see* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 143–44 (2010) (observing that the highly deferential *Chevron* standard is the one most frequently applied in judicial review of agency action).

under-protects valuable speech, and creates a chilling effect for workplace voice. The solution, I argue, requires a return to the *Pickering* framework, taking into account all relevant factors for the speech situation instead of eliminating some speech as a threshold matter.

Recall the four problems identified above[303]: First, prima-facie constitutional protection turns on whether the employee spoke as a "citizen" or as an "employee." A person speaks as an "employee" when he speaks "pursuant to official duties." Second, much of the Court's case law is driven by the internal/external distinction, according to which in order to qualify as a "citizen" for First Amendment purposes, speech outside the job is likely to receive more protection, even if it relates to the job. Third, the Court understands disruption and efficiency in terms that ignore whether disruption actually occurred and whether efficiency was actually compromised. Fourth, the Court's doctrinal uniformity ignores the institutional diversity of government.

These problems are interrelated. Distinguishing between employee and citizen is an arbitrary distinction that tries to get at the essence of what warrants protection. It has turned out to be unhelpful, partly because the reason public employee speech is deemed valuable is we think employees have important things to say about the government workplace, and specifically as it relates to their job—the one area in which their expertise is the greatest. Unsurprisingly, some of that speech is derived from their official duties and made in the course of exercising them. By adopting a formalistic distinction, the Court fails to recognize that employees can act as citizens when they perform their job duties. Therefore the Court should not consider speech "pursuant to official duty" as categorically unprotected speech. Of course, there may be situations where the Court might want to give less protection to speech that is part of the work product, but this can be part of the *Pickering* balance and it leaves the door open, in principle, for constitutional protection.

Similarly, that speech should receive more protection if it occurs outside the job is a misconceived attempt to subordinate complex workplace realities to bright line rules. The Court assumes that when an employee goes outside the chain of command, there is a higher likelihood of her speaking "as a citizen." This assumption contradicts research demonstrating that the decision *how* to speak, and not simply *whether* to speak, depends on contextual circumstances.[304] Sometimes employees speak to their supervisors or their supervisors' supervisors; sometimes they will choose to go beyond the chain of command and speak to the media or

---

[303] *See supra* Part II.C (presenting four problems raised by the decline in constitutional protection of speech).

[304] For detailed case studies, see ROSEMARY O'LEARY, THE ETHICS OF DISSENT: MANAGING GUERRILLA GOVERNMENT 26–89 (2006).

a different government agency. The decision how to speak, however, has little to do with the value of the speech. For example, employees are likely to speak inside the job when they believe that there is a good chance that superiors will take them seriously and work to remedy problems. But when the superiors themselves are complicit in the wrongdoing or when they share the views of those the employee speaks against, the employee may wish to speak outside the job.[305]

The decision to speak internally or externally is contextual and depends on the severity of the wrongdoing or disagreement, the fear of retaliation, the organizational culture, the employee's status, the importance of the practice to the organization, and a host of other factors that do not make their way into the Court's rigid formula.[306]

As a result, there are good reasons to reverse the Court's approach. Instead of encouraging employees to go outside to receive protection, the Court should extend protection to internal speech while at the same time being open to protecting external speech when internal speech is unlikely to be effective.[307] Privileging internal speech, together with protection of external speech in the appropriate circumstances, means that there is no good reason to exclude ex ante a particular speech strategy when that strategy bears little or no relation to the value of the speech and depends on contextual factors that are not currently embodied in the Court's doctrinal tests. Similar to the employee/citizen distinction, considerations of why an employee chose the forum that she did and why she decided to speak internally or externally should inform the *Pickering* balance rather than preempt it.

Restoring the *Pickering* balance does not mean that all employee speech is protected. *Pickering* still limited employee speech when the value of the speech was outweighed by the government's interest in non-disruption and the efficient delivery of public services.[308] But, as the foregoing analysis demonstrated, courts have been overly deferential to employer perceptions of disruption and efficiency, so much so that courts regularly uphold adverse employer actions even when no evidence of disruption and harms to efficiency are offered. In fact, in many of the

---

[305] Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 165 (1994).

[306] *See, e.g.*, *id.* (arguing that the decision with whom to speak is derived from situational and organizational factors); Feldman & Lobel, *supra* note 86, at 181–82 (concluding that the globality of illegality within an organization, the emphasis on internal compliance systems, and demographics of those involved impacts the likelihood of reporting illegal behavior); Feldman & Lobel, *supra* note 220, at 1155 (demonstrating that reporting illegalities at the workplace depends on the type of reporting structure and the underlying violation and other situational factors).

[307] For a position favoring "sequencing" (reporting internally and then externally in specific circumstances), see Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 462 (2009).

[308] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

cases referenced throughout this Article, employers often concede that the plaintiff-employee's performance is positive.[309]

What is needed, then, is not an abandonment of the disruption and efficiency prongs, but a retooling of how those terms are construed. Specifically, judges should adjust the burden of proof for showing that disruption has occurred or that efficiency has been compromised, or that there are strong reasons to believe that such consequences are likely. Absent such a showing, the justification for adverse employer action is significantly reduced.[310] The evidentiary requirement also goes some way toward mitigating employer biases resulting from employee speech that is perceived as challenging the authority of the system. As discussed above,[311] employers often overestimate the threat employee speech poses, especially when that speech dissents from office policy. Deferring to employer perceptions buttresses rather than counteracts these biases. Moreover, it facilitates a conflict of interest whereby those most threatened by the speech are the ones who decide on its outcomes.

Courts are rightfully worried about overstepping their boundaries and intervening in areas traditionally left to other institutions, namely the management of the government workforce. But this does not mean that courts have no role to play. Judicial intervention is more justified in areas that are prone to conflicts of interest and biases. Just as courts developed the "hard look doctrine" to determine whether agencies took a "hard look" at the underlying questions of fact and policy,[312] so too can they adopt this standard when examining employer actions that limit public employee speech. Correlatively, employers will be more likely to take public employee speech seriously if they know their actions will be subjected to closer judicial scrutiny.[313]

One main objection to this expanded conception remains. Protecting public employee speech may harm the government's ability to convey its own message or fill positions that require a high level of loyalty. Imagine

---

[309] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 443 n.15 (2006) (Souter, J., dissenting) (stating that prior to being denied a promotion, the employee received a "stellar review"); Waters v. Churchill, 511 U.S. 661, 665 (1994) (quoting the employer as stating that, aside from an incident precipitating a dispute, the employee's "work was otherwise satisfactory"); Vose v. Kliment, 506 F.3d 565, 566 (7th Cir. 2007) (noting that the employee had been with the employer for twenty-six years and was in a supervisory position at the time of incident). This correlates with empirical research showing that those who speak up tend to be more public regarding their motivations.

[310] But it is not eliminated. Other reasons can justify the restriction, such as when dealing with classified information.

[311] *See supra* text accompanying note 270 (discussing cognitive biases of supervisors).

[312] The hard look review originated in *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 43 (1983).

[313] *See* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 818–26 (arguing that hard look review encourages democratic deliberation and ensures consideration of competing interests).

a press secretary who, instead of delivering her supervisor's' message, uses her position to present her own views; a prosecutor who, in closing arguments, speaks favorably about the defendant's actions; or a teacher who is hired to teach evolution and insists on teaching intelligent design. In these cases and others, if public employees were constitutionally protected the government would encounter substantial difficulties in doing its job.

This is a valid objection, but on closer examination it applies only to a subset of speech and to a subset of public employees. Many public employees are not hired to deliver the government's viewpoint, and even those who are hired for this purpose, do so only part of the time.[314] Moreover, most government employees do not staff positions that require dealing with particularly sensitive information or high levels of loyalty. This suggests a deeper problem with the Court's view of public officials. The doctrinal framework does not distinguish one employee from another or one government institution from another. A public school teacher, a scientist working for the EPA, a police officer, and a press secretary are all treated alike, regardless of their role and institutional affiliation.

This problem is fixable by incorporating two limiting principles. All public employees should enjoy the First Amendment protections delineated in *Pickering*. However, the government should be able to control the speech of the employees it specifically hires to deliver its viewpoint when those employees engage in that role. Further, the government should be able to limit protections for particularly unique positions requiring special levels of loyalty and trust.[315] Thus there is a difference—one the First Amendment should be sensitive to—between employees who speak *about* the government and employees who speak *for* the government[316] as well as a difference between ordinary workers and those who are placed in positions requiring significantly higher levels of trust and loyalty. Government employs many people for different purposes, but only some of them are hired for these specific purposes. An institutionally-driven examination of the employee's role and its relation to the institutional mission would reveal whether the employee is subverting the message she was hired to disseminate or creating confusion between her position and

---

[314] *See Garcetti*, 547 U.S. at 437 (Souter, J., dissenting) ("Some public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.").

[315] Similarly, the Civil Service Reform Act excludes from coverage any jobs that have "confidential, policy-determining, policy-making, or policy-advocating character." 5 U.S.C. § 2302(a)(2)(B)(i) (2012).

[316] For a similar position, see Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 80–82 (2008), arguing that expressions of the government's viewpoint must be clearly identified as such, so that "voters can more accurately assess the message's credibility and hold the government accountable for that viewpoint if they so desire."

the government's. Likewise, it would reveal whether she occupies a unique position requiring high levels of loyalty, or whether she is speaking *about* the government in a way which does not lead others to believe she is speaking *for* the government.[317]

This formulation improves on current doctrine in two ways. First, it protects a larger universe of speech. Under *Garcetti* all speech pursuant to "official duties" is categorically unprotected.[318] Indeed, Ceballos was found to be acting within official duties when contesting the validity of the search warrant.[319] But Ceballos did not speak against the warrant in the course of prosecuting the case. He spoke about it to his superiors and to the police.[320] True, a prosecutor is hired to deliver the government's message when he speaks *as* the government, but this does not extend to every facet of his work. By focusing on the employee's particular function and role at the time of the speech we not only protect more speech, but we better protect speech that is at the core of the rationale for protecting public employee speech—providing an internal check on government conduct.

Second, discarding the ambiguity entailed in the "official duties" test simplifies the remedial stage. Obtaining damages in § 1983 suits is difficult because public officials enjoy qualified immunity, the conditions of which are easy to satisfy.[321] Officials are entitled to immunity as long as the right violated was not "clearly established."[322] Since the "official duties" test has generated confusion, there will be more instances in which the speech right was not clearly established. Thus, even if a court determines that an employee was not speaking pursuant to an official duty, the government can claim that the employer reasonably believed that the right in that particular speech situation was not clearly established, increasing the scope of qualified immunity and making recovery more difficult.

To sum up, the doctrinal changes recommended here would simplify

---

[317] Although the Court has refused to consider institutional roles as a relevant criterion for First Amendment protection, a one-size-fits-all First Amendment is unsuitable in a world of institutional diversity where officials do many different things. *See* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 9 (2013) ("[T]he categories with which we carve up the world of the First Amendment . . . . should be based on the richly complex world of free speech rather than the simplified legal picture of 'speaker' and 'state.'"); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 86 (1998) ("[I]t is increasingly clear that the refusal to draw doctrinal distinctions among culturally distinct institutions is simply unworkable in the context of the vast and increasing domain of free speech claims about government land, government funds, and government employees.").

[318] *Garcetti*, 547 U.S. at 421.

[319] *Id*. at 421–22.

[320] *Id*. at 414.

[321] *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 26–27 (1989) (noting that qualified immunity applies if the official's conduct was "objectively reasonable").

[322] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

current analysis by doing four things:

(1) Abandoning the employee/citizen distinction by subordinating the "official duties test" to the *Pickering* balance;

(2) Reversing the internal/external distinction, privileging internal speech while also protecting external speech when internal speech is unlikely to be effective;

(3) Engaging in closer judicial scrutiny of employer claims about efficiency and disruption; and

(4) Denying constitutional protection to employees who are hired to deliver a particular government viewpoint when they speak specifically in that role and limit protection of employees who, in virtue of their position, have undertaken significantly higher levels of loyalty.

B. *Self-Regulation at the Public Workplace*

Revising the doctrinal standards provides additional protection to public employee speech in the spirit of public/private divergence. Litigation, however, introduces other problems relating to cost, time, and additional stress, because litigating parties will often have to continue working with one another as litigation proceeds.[323] Moreover, it creates uncertainty about how the standards will be applied while hurdles such as qualified immunity will frequently prevent full remediation.[324] Thus, litigation itself can create a chilling effect by discouraging employees from speaking.

Against this background, an alternative to judicial review is internal workplace regulation.[325] This can consist in workplace speech policies,

---

[323] *See* Estlund, *supra* note 231, at 1475–76 (describing the strains of litigation on the workplace); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 332–33 (2005) (recognizing that employees are often wary of suing their employers, given "the cost of litigation and the difficulty of proving the requisite unlawful motive" and the fact that they will be recast within the business as "victims seeking redress for past wrongs").

[324] *See* George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 142 (2008) (noting the differences with the *Pickering* balancing test and how an employer can often use qualified immunity to defeat an employee's claim that survives the balancing test); Wells, *supra* note 48, at 959 (describing the remedial process as "obstacle-laden").

[325] For representative overviews of government regulation, see IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 3 (1992). *See also* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 82–83 (2010) ("[I]nternal accommodations to the rise of employee rights began as what we might call 'managing under the shadow of the law,' but they have evolved toward forms of regulated self-regulation in which the law explicitly encourages and rewards employers' self-regulatory efforts."); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) ("The new governance model . . . . promises a

dissent channels, and internal enforcement. Because courts only provide the constitutional floor, government offices can go beyond current levels of protection and design arrangements that give employees more coverage and certainty when they decide whether to speak.[326] Because courts are reluctant to intervene in employment relationships, government institutions might be better suited to devise more protective speech policies.

Yet if organizations prefer less monitoring, why would they adopt internal forms of self-regulation when those result in additional monitoring?[327] The answer can be found in both external and internal factors. Externally, pressure from the public or from other branches, when the issue is sufficiently salient, may drive organizations to adopt more expansive speech policies. An example from the private sector can be found in the enhanced whistleblower protections included in the Dodd-Frank Act following the 2008 financial crisis.[328] Internally, organizations themselves may have such incentives if they come to believe that speech protections might avert disaster, or that particular disasters could have been averted had self-regulation been in place. The promise of decreased judicial review may also affect organizations' willingness to adopt more expansive policies. Finally, increased public service motivation, typically found in public organizations,[329] may also motivate public-regarding actions such as increased speech protections. These factors create incentives for a self-regulatory framework that, in exchange for its adoption, would limit judicial intervention. From the perspective of employees, the turn to self-regulation might be more promising in light of the near consensus that private enforcement through litigation often fails to vindicate common law and statutory employment claims.[330] In addition,

---

renewed dialogue between those who champion centralized top-down regulation and those who advocate devolution, deregulation, and privatization.").

[326] *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1250–53 (1978) (arguing that limited judicial competence and legitimacy does not prevent (and sometimes obligates) other branches to provide more constitutional protection). Recall also that providing a safe environment for speech encourages pro-social voice. *See supra* text accompanying note 283.

[327] *See* Posner & Vermeule, *supra* note 234, at 898 (criticizing self regulation on the grounds that an ill motivated executive is unlikely to adopt or respect such reforms).

[328] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010) (codified as amended at 15 U.S.C. § 78u-6 (2012)).

[329] *See infra* note 334.

[330] On the general failure of private enforcement, see Timothy P. Glynn, *Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations*, 32 BERKELEY J. EMP. & LAB. L. 279, 289–95 (2012). *See also* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103–04 (2009) (showing that the number of employment discrimination suits continued to decline, and arguing that "results in the federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts"); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) (noting that

effective self-regulation will also divert employees from speaking externally, thus minimizing disruption.[331]

To be sure, self-regulation is far from perfect.[332] In the private sector employment context its success has been mixed, mostly because employer noncompliance is often the result of the need to reduce costs to maintain profit margins. When the ultimate goal is profit maximization, coupled with minimal legal sanctions and overextended regulatory agencies, self-regulation is unlikely to work and may result in window dressing or cosmetic compliance.[333] But as I argued above, such considerations may count for less in the public sector where profit considerations should not claim a central hold on policymaking and where a public service ethos is more dominant.[334] Because the experience with self-regulation in the

---

employment discrimination plaintiffs go to trial often, win a low percentage of cases, and have a large percentage of winning cases appealed); Moberly, *Unfulfilled Expectations*, *supra* note 113, at 67 (noting the failure of the vast majority of whistleblower retaliation claims filed under Sarbanes-Oxley). *But see* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 376 (2010) ("In each of five recent cases involving statutory-based employee retaliation claims, the Supreme Court has upheld the employee's claim and expanded protections against employer retaliation.").

[331] Elletta Sangrey Callahan & John W. Collins, *Employee Attitudes Toward Whistleblowing: Management and Public Policy Implications*, 11 J. BUS. ETHICS 939, 946 (1992) (noting that employees prefer internal disclosure to external disclosure). This joins empirical findings demonstrating that employees care about fair processes. Procedural justice itself often bestows legitimacy, even if the substantive claims are rejected. *See* Tyler, *supra* note 180, at 382 ("Recent research suggests that . . . the willingness of people to defer to the decisions of authorities and to the rules created by institutions is [determined by] the fairness of the procedures through which institutions and authorities exercise authority.").

[332] *See, e.g.*, Paul M. Secunda, *The Wagner Model of Labour Law Is Dead—Long Live Labour Law!*, 38 QUEEN'S L.J. (CAN.) 545, 570 (2013) (arguing that "the power dynamic in the workplace is suffused with employer control over the employee's job" making effective self-regulation unlikely). It is an open question whether those pathologies will be reproduced in the public sector.

[333] *See, e.g.*, Glynn, *supra* note 330, at 305–07 ("[C]laims that . . . forms of self-regulation can fill regulatory gaps now seem dubious, given the colossal failures of self-governance that contributed to the financial meltdown of 2008."); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 487 (2003) ("[I]nternal compliance structures do not deter prohibited conduct within firms and may largely serve a window-dressing . . . ."); Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 572 (2005) ("[A]n internal compliance-based liability system encourages the implementation of largely cosmetic internal compliance structures that reduce legal liability without reducing the incidence of organizational misconduct.").

[334] The higher levels of public service motivation and public regarding ethos in the public sector have been substantiated in decades of research and demonstrate that public employees are less susceptible to monetary incentives than private employees. *See, e.g.*, Gene A. Brewer, *Building Social Capital: Civic Attitudes and Behavior of Public Servants*, 13 J. PUB. ADMIN. RES. & THEORY 5, 20 (2003) ("[P]ublic employees are more civic minded than are other citizens, and they are more likely to participate in civic affairs."); Gene A. Brewer & Sally Coleman Selden, *Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethic*, 8 J. PUB. ADMIN. RES. & THEORY 413, 429 (1998) (finding that public employees are relatively unmotivated by financial rewards, regardless of whether they are involved in whistleblowing); Moynihan, *supra* note 206, at 247–48, 263–64 (arguing that the material rewards that work well in ensuring compliance in private institutions, when applied to

public employee speech context is limited, what follows is tentative.[335]

Compared with judicial review, self-regulation has the advantage of tailoring the level of protection to the particular institutional mission and the relationship of the employee to that mission. As discussed above, one deficiency of judicial review is that it treats all public employees alike, regardless of their role and institutional location.[336] While judges may be reluctant to make such distinctions given their limited knowledge of particular institutions and their preference for bright-line rules, non-judicial institutions are not similarly constrained. Public employers and employees are intimately familiar with the working of their institutions and can thus make calibrated judgments about the desired level of protection.

Self-regulation also has the potential advantage of being deliberative and participatory. This can be achieved in two ways. From the employee side, the public union can represent the employees in negotiations over the content of such policies. In workplaces that are not unionized, individual employees, selected by the larger employee body, can participate in such negotiations. From the public side, the general public and organizations that are interested in good governance will have the opportunity to provide input on the precise wording of such arrangements, such as through notice and comment procedures. Consequently, these policies are likely to be more speech-protective if they are determined jointly by employees and employers along with public input. Such a process also enhances accountability on several levels. The public will be informed about the management of government as it pertains to speech restrictions, which will facilitate public criticism and closer scrutiny of government. The transparency of speech policies is also likely to result in more speech-protective arrangements.[337] From the employee side, speech policies will provide greater specificity, which will presumably place employees on firmer ground when they decide to speak. On its own, this can have the salutary effect of facilitating employee voice, since valuable speech is

---

public and nonprofit institutions, can crowd out participants who are more likely to be motivated by intrinsic factors, such as public service norms); Hal G. Rainey, *Reward Preferences Among Public and Private Managers: In Search of the Service Ethic*, 16 AM. REV. PUB. ADMIN. 288, 297 (1982) ("[T]here are many public sector employees who do not place overriding value on monetary incentives."); Esther E. Solomon, *Private and Public Sector Managers: An Empirical Investigation of Job Characteristics and Organizational Climate*, 71 J. APPLIED PSYCHOL. 247, 253 (1986) (discussing a study showing financial rewards to be a stronger motivator for private managers than for public managers).

[335] The writing on self-regulation, even in the context of employee speech, focuses on the private sector and its interaction with the regulator (usually as a monitor of self-regulation). *See, e.g.*, ESTLUND, *supra* note 325, at 83–84 (describing how private entities have created internal mechanisms for handling claims of violations); Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1246 (2009) (arguing that internal reporting encourages an environment of trust and minimizes disruptive speech).

[336] *See supra* Part V.A.

[337] For a discussion of the utility of speech policies, see Lee, *supra* note 57, at 1746–49.

more likely to happen in a supportive and safe environment.

Courts, on their part, will be more deferential to employer actions. This is an incentive for both employers and employees who want to avoid litigation. There will still be judicial review, but it will focus on the administrative processes leading to the adoption of the policies, such as making sure that the policy was clear, that it was open for public comment, and that employees participated in its framing. Courts might be especially deferential if the policy goes beyond the constitutional floor. In appropriate cases, courts should also be able to go beyond the inquiry into process and examine whether, in fact, a good faith effort was made to address the employee's concern.

There is nothing radical in such a process. Self-regulation in the private sector often operates along these lines.[338] For example, the United States Sentencing Commission's Organizational Sentencing Guidelines allow for a reduction in criminal sentences where the organization has engaged in an "effective compliance and ethics program" and "promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[339] This has led many firms to enact such programs, to various degrees of effectiveness, and it has been adopted in other areas, such as environmental law, healthcare law, and occupational safety and health law.[340] A similar pattern exists in the employment discrimination context. The *Ellerth/Faragher* defense to workplace sexual harassment allows employers to avoid vicarious liability for sexual harassment committed by supervisory employees if the employer exercised reasonable care to prevent and correct sexually harassing behavior and if the employee failed to take advantage of any preventative or corrective opportunities provided by the employer.[341] As scholars have observed, both employers and employees can invoke the existence of internal compliance structures as circumstantial evidence for proving discriminatory intent.[342]

The experience with such regimes is mixed, for two main reasons.[343] Private firms operate in a competitive environment where they naturally

---

[338] *See* Lobel, *supra* note 325, at 344–45 (describing the move from command and control to new governance regimes).

[339] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2010).

[340] ESTLUND, *supra* note 325, at 78.

[341] *E.g.*, Pa. State Police v. Suders, 542 U.S. 129, 134 (2004); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545–46 (1999) (allowing an affirmative defense to Title VII suits for punitive damages if the employer promulgated anti-discrimination policies and provided anti-discrimination education).

[342] *E.g.*, Glynn, *supra* note 330, at 311 n.167.

[343] *See, e.g.*, Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691, 724–25 (2003) (concluding that the empirical record is mixed).

seek to reduce compliance costs. Self-regulation is often costly, making these arrangements less robust than they could have been. In addition, information asymmetries between firms and regulators can lead firms to adopt internal compliance structures that look good on paper but which fail to address the underlying wrong.[344]

While this mixed track record casts some doubt on the likely success of governmental self-regulation of speech, the differences between the two sectors also suggest that these problems are less likely to be replicated. The lack of market competition and the general mindfulness of constitutional rights in the public workplace, coupled with a deliberative and participatory framework at the front end, militate in favor of an assumption, however tentative, that such arrangements may be successful.

In addition to providing certainty over what speech will receive protection, workplace speech policies can also be designed to *encourage* employee voice. One common instrument that has been instituted in both the public and private sector is internal grievance procedures. These procedures are sometimes created in order to comply with legal requirements or to mitigate future liability. Initially these procedures did not insulate firms from liability, but as their usage increased, courts have come to be more deferential.[345] Indeed, private firms determining what counts as compliance is one risk with self-regulation,[346] as is the risk that such processes will be co-opted and distorted by interested parties like lawyers and personnel managers[347] or that grievance procedures will be subsumed under a managerial interests conception that will undermine individual rights.[348]

Internal grievance procedures may succeed if they are construed more broadly as general dissent channels that allow employees to challenge,

---

[344] Kimberly D. Krawiec, *The Return of the Rogue*, 51 ARIZ. L. REV. 127, 146 (2009).

[345] *See* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 408 (1999) ("[O]rganizational ideologies of rationality *induce the judiciary* to incorporate grievance procedures into legal constructions of compliance with EEO law.").

[346] *See, e.g.*, Lauren B. Edelman & Shauhin A. Talesh, *To Comply or Not to Comply—That Isn't the Question: How Organizations Construct the Meaning of Compliance*, *in* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 103, 105 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011) ("[N]otions of rational and fair compliance that evolve within organizations and diffuse throughout organizational fields can easily come to influence . . . the rulings of judges."); Shauhin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 L. & SOC'Y. REV. 527, 528–29 (2009) ("Private organizations' expanding role even includes using internal and alternative dispute resolution structures to adjudicate civil and consumer rights and remedies created by legislatures.").

[347] *See, e.g.*, Edelman, *supra* note 105, at 48–49 ("[T]he legal and personnel professions act as 'filters': they construct not only the meaning of law but also the magnitude of the threat posed by law and the litigiousness of the legal environment.").

[348] *See* Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497, 529–30 (1993) (arguing that alternative dispute resolution methods "may undermine legal rights by changing the way in which disputes are framed").

criticize, and dissent from official government policy while shielding them from retaliation. One example is the State Department's "Dissent Channel,"[349] established in 1971 following the fallout from the Vietnam War.[350] The Dissent Channel allows officials to bring forward dissenting views to the attention of the Department's top officials in complete confidentiality and without any fear of reprisals.[351] The value of dissent is also expressed in the "Dissent Awards" given out by the American Foreign Service Association to officials who "exhibited extraordinary accomplishment involving initiative, integrity, intellectual courage and constructive dissent."[352] The award recognizes members who "challenge the system from within, to question the status quo and take a stand, no matter the sensitivity of the issue or the consequences of their actions."[353]

Some observers, such as Professor Neal Katyal, extol the virtues of the Dissent Channel and call for its adoption in other government agencies. Yet, Katyal overlooks the fact that the Dissent Channel has had little impact on U.S. foreign policy.[354] Not only is it rarely used,[355] it is still resented by superiors who are in a position to block promotions.[356] The Dissent Channel is successful, however, in internalizing dissent and keeping it in-house. This may be good for State Department management, which goes on the record as formally encouraging dissent, but it has transparency costs for the general public, as the channel may result in dissent remaining inside the State Department bureaucracy and likely buried without being meaningfully addressed.

Dissent can be valuable because, among other things, it raises the political costs of taking action.[357] The State Department's Dissent Channel

---

[349] *See* 2 FOREIGN AFFAIRS MANUAL § 071 (2011) ("The Dissent Channel was created to allow its users the opportunity to bring dissenting or alternative views on substantive foreign policy issues . . . to the attention of the Secretary of State . . . ."); Katyal, *supra* note 135, at 2328–29 (discussing the Dissent Channel).

[350] Hannah Gurman, *The Other Plumbers Unit: The Dissent Channel of the U.S. State Department*, 35 DIP. HIST. 321, 323 (2011).

[351] 2 FOREIGN AFFAIRS MANUAL, *supra* note 349, at §§ 071.1(c), 075.1 (prohibiting any adverse action stemming from the use of the Dissent Channel). As a result of these provisions, most officials do not speak anonymously.

[352] *Dissent Awards*, AM. FOREIGN SERV. ASS'N, www.afsa.org/dissent (last visited Sept. 5, 2013).

[353] *Id.*

[354] Gurman, *supra* note 350, at 323.

[355] No current figures are available, but this seems to be the consensus. In a 1984 Senate hearing, it was reported that the channel had been used one hundred and twenty-five times in the past thirteen years. Robert C. Taylor, *Improving Management in the Federal Government: 1984 Senate Hearings*, 45 PUB. ADMIN. REV. 262, 264 (1985).

[356] Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistleblowing*, 38 CASE W. RES. J. INT'L L. 567, 570 n.7 (2007). Although the Manual prohibits reprisals, it will usually be possible to provide "legitimate" reasons for adverse employment decisions. *See* Gurman, *supra* note 350, at 331–33 (discussing one instance in which a Dissent Channel message generated attention).

[357] Of course, there will be times where we would not want the political costs to be prohibitive. There are times when quick decisive action is necessary.

reduces these costs because dissent is protected only if it is internal. Indeed, the channel was developed at a time when the prevention of leaks was paramount.[358] True, employees can dissent by leaking information to the press, but leaks have costs. The Obama Administration, for example, has been particularly aggressive in filing criminal charges against those who leaked sensitive information.[359] Leakers are protected only if their identity remains secret.

The mere replication of the Dissent Channel in other government offices, a move that Katyal endorses, is therefore unlikely to make a big difference. What is needed is a political commitment to dissent and an ecology that supports employee voice. The cultural commitment may even be more important than the procedural mechanisms put in place to realize these values.[360] The lessons from the State Department's Dissent Channel demonstrate that employee voice is likely to be taken more seriously if there is a chance the speech will not remain strictly within the department. Self-regulation, then, should provide some avenues for going outside the bureaucracy, though not necessarily to the public. For example, in national security matters, Professor Richard Moberly has suggested protecting employee communication to Congress.[361] Such procedures would obviously vary depending on the context and the particular institutional mission, but the point is that the internal/external distinction—the one that should undergo doctrinal reform—applies to self-regulation as well.

VI. CONCLUSION

Constitutional protection of public employee speech has been declining for the past forty years, but the reason for this decline has remained elusive. This Article puts forward a novel explanation that situates public employee speech in larger transformations in the public sector and identified what I termed as "public/private convergence." The main feature of the convergence thesis is that public officials are increasingly viewed as private employees. This move has far reaching implications in

---

[358] Gurman, *supra* note 350, at 328.

[359] *See* Charlie Savage, *Ex-C.I.A. Officer Charged in Information Leak*, N.Y. TIMES, Jan. 24, 2012, at A1 (noting that the number of criminal cases brought against leakers of classified information under the Obama administration totaled more "than all previous presidents combined"); Glenn Greenwald, *Rules of American Justice: A Tale of Three Cases*, SALON (Jan. 24, 2012), http://www.salon.com/2012/01/24/rules_of_american_justice_a_tale_of_three_cases/singleton/ (mentioning the sixth prosecution of a leaker); Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER (May 23, 2011), http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer?currentPage=all (discussing the case against Thomas Drake, a former senior executive at the National Security Agency).

[360] Recent literature demonstrates that culture, more than particular policies, influences employees to speak out. Moberly, *supra* note 293, at 44 & n.303.

[361] Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL'Y J. 51, 140–41 (2012).

terms of speech rights that up until now have remained largely unexplored.

The project of convergence results in under-protection of valuable speech. The path the Court has taken fails to acknowledge the role of public officials in our constitutional system by eroding the checking function that is uniquely suited to government employees who are often in the best position to inform the public and their superiors about government work. To counteract the public/private convergence, this Article has advanced a vision of public/private divergence insofar as it pertains to constitutional speech rights for public sector employees. A democratic society has an interest in receiving information from its public servants, and government itself should be open to dissenting views. But dissent cannot take place in a legal climate that is geared toward suppression and silencing. Convergence brings us closer to that climate. Divergence, I have argued, should be the way forward.