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Free Speech and Parity: A Theory of Public Employee Rights

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FREE SPEECH AND PARITY: A THEORY OF PUBLIC EMPLOYEE RIGHTS

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ABSTRACT

More than four decades have passed since the U.S. Supreme Court revolutionized the First Amendment rights of the public workforce. In the ensuing years the Court has embarked upon an ambitious quest to protect expressive liberties while facilitating orderly and efficient government. Yet it has never articulated an adequate theoretical framework to guide its jurisprudence.

This Article suggests a conceptual reorientation of the modern doctrine. The proposal flows naturally from the Court's rejection of its former view that one who accepts a government job has no constitutional right to complain about its conditions. As a result of that rejection, the bare fact of government employment is insufficient to undermine a citizen's right to free speech. The baseline norm is instead one of parity between government workers and other citizens. To justify a deviation from the default of parity, there must be a meaningful reason beyond the employment relationship itself for viewing government officials as situated differently from their peers among the general public.

In reframing the jurisprudence around the legitimate bases for differential treatment of public employees and other citizens, parity theory outfits the modern doctrine with a firmer conceptual grounding. The theory also provides a method for addressing flaws that plague the existing law in its practical application. Perhaps most importantly, parity theory highlights a critical factor that has played an unduly limited role in the cases to date: the institutional mission of government instrumentalities.

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INTRODUCTION

During the middle of the twentieth century, in the wake of impassioned debates over the conflicting threats posed by Communist ideology and governmental efforts to suppress it, the United States Supreme Court reset the First Amendment rights of the public workforce. The Court expressly abandoned its former position that because citizens lack any entitlement to public employment, they also lack grounds for challenging employment conditions as unconstitutional.[1] In so doing, it created space for a new theoretical framework to emerge.

The passage of time has made the treatment of public employee speech all the more significant. The vast scope of government within the modern American economy has magnified the impact of selecting one rule of decision over another.[2] And the technology-fueled melding of the personal and professional spheres has heightened both the stakes and the degree of difficulty.[3] All the while, the doctrine of public employee speech has remained stunted. The Supreme Court has fleshed out certain elements of its jurisprudence and amassed a growing body of case law,[4] but its project has been minimalist, nibbling around the conceptual margins. The Court has yet to resolve the single most important issue raised by its doctrinal overhaul: if it is incorrect to view public employees as relinquishing their First Amendment rights by virtue of their employment, what is the correct theoretical alternative?

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1. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

2. *Cf.* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461 (1968) ("Holmes' conclusion that there is 'no constitutional right to be a policeman' may have been influenced by the comparatively small economic role played by governmental units in 1892.").

3. *See, e.g.*, Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2163 ("In the age of the Internet and other electronic technologies, it is more common than ever before for employees to engage in non-work-related expression while they are technically on the job.... With the pervasive use of electronic technology, like cell phones and the Internet, employees often perform work-related functions while they are not at work."); Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Interpretations*, 47 U. LOUISVILLE L. REV. 679, 687 & n.45 (2009).

4. *See infra* Part I.

In rejecting the position that government workers possess no First Amendment rights against their employers—a position captured in Holmes' famous statement that a policeman has a right to "talk politics," but not to "be a policeman"[5]—the Court created a theoretical void. With the Holmesian model discarded, an acute need arose for a new framework to guide the doctrine's evolution. Rather than developing such a framework, however, the Court became enmeshed in a troublesome balancing test directed at the various costs and benefits of restricting speech.[6] More than forty years ago, the Court announced that the purpose of employee-speech law is to promote free expression while authorizing restrictions when efficiency so demands.[7] The ensuing decades have witnessed the construction of a multi-faceted doctrinal edifice around that refrain, with less attention paid to how the refrain itself coheres with First Amendment principles.[8]

This is not to suggest the Court has been silent about the doctrine's theoretical moorings. Most often, it has noted that when the government acts as an employer, interests such as operational efficiency carry added sway,[9] reflecting the overarching theme that First Amendment ideals must be imposed with regard for the "practical realities of government employment."[10] Notwithstanding their superficial appeal, statements like these require unpacking before their premises can be accepted. There must be some explanation of why the government's desire to operate efficiently can consistently trump the free-speech rights of a government employee but not the rights of her peers among the general citizenry. There also must be some justification for permitting the firing of a government employee based on the provocative nature of his speech, notwithstanding the bedrock principle that audience disapproval is not a legitimate basis for suppressing expression. More generally, the overarching question is why First Amendment ideals should bend to the practical realities of the government workplace rather than vice versa. In this respect, the complexity surrounding

5. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).
6. *See infra* Part I.
7. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
8. *See infra* Part I.
9. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion).
10. *Id.* at 672.

public-employee speech represents one facet of a larger jurisprudential difficulty created by the application of a sovereign-oriented Constitution to entities that frequently operate through nonsovereign means.

This Article suggests a conceptual reorientation aimed at addressing these issues. The proposal flows from the Court's emphatic rejection of the Holmesian approach to employee rights. As a result of that rejection, the bare fact of government employment is no longer sufficient to impair the exercise of a citizen's right to free speech. The baseline norm must instead be one of parity between government workers and other citizens. In order to deviate from the presumption of parity and impose a restriction on public employees that would be unlawful if applied to other citizens, the government may not rest on the mere existence of the employment relationship. That approach accompanied the Holmesian model to the ash heap. Nor may the government rely on operational disruption and audience reaction without providing a rational account of why those considerations—which are commonly trumped by the virtues of expressive liberty in the ordinary course of First Amendment adjudication—are infused with unique potency when applied to public workers. Overcoming the norm of parity requires a meaningful reason beyond the employment relationship itself for viewing public officials as situated differently than their peers.

In reframing the jurisprudence around the bases for differential treatment of those who do and do not work for the government, parity theory provides a method for addressing structural flaws in the existing law. Most notable is the Supreme Court's driving focus on operational efficiency and the disruptive consequences of employee speech. In the post-Holmesian world, it is improper to privilege efficiency interests at the expense of free speech simply because the institutional context has shifted from government-as-sovereign to government-as-employer. Likewise, the modern doctrine's implicit acceptance of a "heckler's veto"[11]—which withdraws constitutional protection from speech that is likely to provoke fervent opposition—is problematic as a matter of First Amendment principle. At the same time, the parity touchstone demonstrates the

11. *See infra* note 179 and accompanying text.

validity of certain elements of existing law, namely the treatment of speech made in the discharge of an employee's official duties.

Perhaps the most critical lesson of parity theory is the need to confront a factor that has played an unduly limited role in the cases to date: the institutional mission of government instrumentalities. Assessing employee speech through the lens of parity suggests that an employee is situated differently from his peers, and thus legitimately subject to restriction, when his speech contradicts his employer's institutional mission. In such cases, the employee's statement provides an evidentiary basis for doubting his ability or willingness to contribute to the employer's essential reason for existence. Equally important, the parity-based approach demonstrates that an employer should not have license to discipline employees for speech outside its institutional mission simply because that speech reflects controversial views or provokes a heated public response. By redirecting the analysis of employee speech from operational disruption and audience reaction to institutional mission and fitness for government employ, parity theory outfits the employee-speech doctrine with a firmer conceptual grounding.

This Article begins in Part I by analyzing the operation of the modern doctrine of employee speech before contending in Part II that the doctrine remains undertheorized. In Part III, the Article describes the parity-based theory of employee speech as the most natural successor to the Court's previous approach. Part IV then addresses the ramifications of parity theory for the modern doctrine, including an emphasis on institutional mission and the evidentiary value of speech.

One methodological point is in order. This Article does not engage the predicate question of whether the Court's rejection of the Holmesian approach was proper. It assumes *arguendo* that the Court was correct in determining that the acceptance of a government job does not foreclose one's First Amendment right to speak as a citizen. The Article's project is to explore the implications of the Court's conclusion for the theory and doctrine of employee speech.

I. THE EMPLOYEE-SPEECH CONTINUUM

Despite the complexities in their application, the general principles that shape the modern doctrine of employee speech can be identified with relative ease. What materializes is a continuum of discourse ranging from speech made pursuant to one's duties as a public employee, all the way to speech having nothing to do with one's job.

A. Speaking as an Employee

Among the clearest rules within the employee-speech canon is that when an employee's job duties require him to speak, his words are not protected from restriction or discipline. Expressions in discharge of official duties are treated as derivative of, and integral to, the speaker's professional obligations. In such cases, the sensitivities and trade-offs commonly associated with First Amendment disputes fall away, affording supervisors wide managerial discretion.

The Supreme Court announced this rule in *Garcetti v. Ceballos*, decided in 2006.[12] *Garcetti* involved a deputy district attorney who doubted the validity of a search warrant linked to a pending case.[13] He concluded that an affidavit used to obtain the warrant "contained serious misrepresentations."[14] The attorney informed his supervisors of his judgment through multiple means, including a memo recommending that the case be dismissed.[15] The supervisors rejected his recommendation and allegedly took retaliatory employment actions against him.[16]

The Court of Appeals determined that the attorney's "allegations of [police] wrongdoing ... constitute[d] protected speech under the First Amendment."[17] The Supreme Court reversed,[18] holding that

12. 547 U.S. 410, 421-22 (2006).
13. *Id.* at 413-14.
14. *Id.* at 414.
15. *Id.*
16. *Id.* at 415.
17. Ceballos v. Garcetti, 361 F.3d 1168, 1173 (9th Cir. 2004).
18. *Garcetti*, 547 U.S. at 426.

"when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[19] The attorney "did not act as a citizen when he went about conducting his daily professional activities,"[20] and the same analysis applied to his dismissal memo.[21] The Court concluded that its "precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job."[22]

Though *Garcetti* represented the Court's first direct engagement with expressions in discharge of official responsibilities, the majority pointed to several precedents as supporting its central distinction between speaking as a citizen and speaking as an employee.[23] Among them was *Pickering v. Board of Education*, decided in 1968.[24] The speaker in *Pickering* was a teacher who wrote to a local newspaper to comment on a proposed tax increase.[25] His letter criticized school administrators for their handling of prior revenue-raising proposals.[26] The letter ultimately led to the teacher's termination, and the case worked its way to the Supreme Court.[27]

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19. *Id.* at 421.

20. *Id.* at 422.

21. *Id.*

22. *Id.* at 426. For commentary criticizing *Garcetti*, see, for example, Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1474 (2007) ("The *Garcetti* ruling denigrates both the individual and the public interests in favor of public employers' interest in unfettered control over employees' job performance.... [P]ublic employers might game the system to the detriment of both employees and the public."); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 31 (2009) ("*Garcetti* fails to recognize that expression constitutes government speech exempt from First Amendment scrutiny only when it enhances listeners' ability to evaluate their government."). For a contrary view, see Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 38 (2008) ("[I]f the First Amendment were understood to require that all speech-related disputes between public employees and their superiors be referred to binding arbitration overseen by the judiciary, then politically accountable officials would be denied effective control over public institutions, a result that would seriously compromise the First Amendment's commitment to ensure that the functioning of public institutions be subject to effective political accountability.").

23. *See Garcetti*, 547 U.S. at 417.

24. 391 U.S. 563 (1968).

25. *Id.* at 564.

26. *See id.*

27. *See id.* at 564-65.

The Court in *Pickering* underscored its disapproval of the notion that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."[28] Yet the Court cautioned that, although some degree of First Amendment protection must remain even for those who accept employment with the government, "the State has interests as an employer ... that differ significantly from those it possesses in connection with ... the citizenry in general."[29] According to *Pickering*, the judicial task is to balance government employers' need for efficient operations against the value of protecting a public employee who speaks "as a citizen" on "matters of public concern."[30]

The Court resolved *Pickering* in favor of the speaker, concluding that, because "the fact of employment [was] only tangentially and insubstantially involved" in his letter, he must be treated akin to a "member of the general public."[31] As the Court would explain some fifteen years later, *Pickering*'s focus on the rights of employees to speak as citizens on matters of public concern "was not accidental."[32] One byproduct of the distinction between acting as a citizen and acting as an employee would eventually be formalized as the rule of decision in *Garcetti*: an employee who speaks in discharging his official duties is not expressing himself as a citizen for purposes of free-speech analysis, so he has no grounds for a First Amendment claim against his employer.[33]

B. Speaking as a Citizen

Garcetti established expressions in discharge of official duties as one endpoint on the employee-speech continuum. That endpoint is associated with no First Amendment protection against adverse

28. *Id.* at 568 (citing Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); and Wieman v. Updegraff, 344 U.S. 183 (1952)).

29. *Id.*

30. *Id.*

31. *Id.* at 574.

32. Connick v. Myers, 461 U.S. 138, 143 (1983).

33. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); *see also id.* at 422 ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.").

employment actions.[34] The Supreme Court's cases also teach that when a speaker expresses himself as a citizen rather than an employee, the possibility of constitutional protection exists. Protection may even extend to utterances made inside the workplace, so long as they reflect the speaker's own expressive impulses rather than an employment-related mandate. Though the "manner, time, and place" of the expressions play a role in the analysis,[35] a public employee does not necessarily "forfeit[ ] his protection" simply because he "decides to express his views privately rather than publicly."[36] The dividing line between speaking as a citizen and speaking as an employee depends not on physical setting, but on the speaker's reasons for expressing himself.

Once it is determined that an employee spoke in his capacity as citizen,[37] the inquiry turns to two additional factors: whether the speech addressed a matter of "public concern"[38] and whether the value of the speech outweighs the employer's interest in regulating it.[39]

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34. Throughout this Article, my references to First Amendment protection relate only to protection from restriction or discipline by a government employer. Speech may provide a permissible basis for employer discipline while nevertheless constituting "protected speech" in the broader sense of the term. *See, e.g.*, *Connick*, 461 U.S. at 147 ("We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.").

35. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415 n.4 (1979) ("When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.").

36. *Id.* at 414; *see also* Rankin v. McPherson, 483 U.S. 378, 388-89, 391-92 (1987) (affording protection for comments made at the workplace). *But see Connick*, 461 U.S. at 153 ("[T]he fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered.").

37. For guidance on how to make this finding, see *Garcetti*, 547 U.S. at 424-25 ("The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.").

38. *E.g.*, *Connick*, 461 U.S. at 146 ("*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.").

39. There is also some uncertainty in the case law as to whether the conventional analysis applies to speech that is completely unrelated to the speaker's employment. That issue is

1. The Public Concern Requirement

The Supreme Court briefly noted the relevance of an employee's commenting on matters of public concern in *Pickering*,[40] but the issue did not assume its current form until fifteen years later in *Connick v. Myers*.[41] The dispute in *Connick* involved an Assistant District Attorney who had recently been informed of an impending transfer.[42] After expressing her opposition to the move, the attorney drafted a questionnaire addressing issues that ranged from office morale to "whether employees felt pressured to work in political campaigns."[43] She circulated the questionnaire among her colleagues, and the District Attorney terminated her employment shortly thereafter.[44]

In concluding that the firing was lawful, the Supreme Court staked out a distinction between workplace disputes and the broader public dialogue.[45] Embracing the "common-sense realization that government offices could not function if every employment decision became a constitutional matter,"[46] the Court found that most of the items on the questionnaire did not "fall under the rubric of matters of 'public concern.'"[47] Topics such as office morale and confidence in supervisors were simply "extensions of [the attorney's] dispute over her transfer."[48] As a result, those issues did not warrant any First Amendment protection.[49] The Court contrasted the

addressed below. *See infra* Part IV.D.

40. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (referring to the importance of protecting commentary "upon matters of public concern").

41. 461 U.S. 138 (1983); *see* 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) ("*Pickering* need not be read, and was not generally read, as prescribing a threshold public concern test. To the contrary, under *Pickering*, the extent to which the employee's speech implicated important public issues was only one element in the equation.").

42. *Connick*, 461 U.S. at 140.

43. *Id.* at 141.

44. *Id.*

45. *Id.* at 143.

46. *Id.*

47. *Id.* at 148.

48. *Id.*

49. *Id.* at 149; *see, e.g.*, Paul M. Secunda, *Whither the* Pickering *Rights of Federal Employees*, 79 U. COLO. L. REV. 1101, 1109 (2008) ("If the court determines that the speech merely involved purely private interests, like an employment dispute with one's supervisors, then there is no First Amendment protection for the speech, because it does not implicate the

attorney's workplace complaints against her question about perceived pressure to participate in political campaigning, which did rise to the level of public concern: "[O]fficial pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights."[50] The questionnaire's inquiry into that issue accordingly laid the groundwork for a First Amendment claim.[51]

By expanding the "public concern" language of *Pickering* into a full-fledged, independent requirement for constitutional protection,[52] *Connick* raised serious theoretical questions. One item of particular interest is how to justify cordoning off such a large category of expression from the First Amendment's ambit—especially given that nonemployees commonly enjoy protection for speech that is narrowly cabined to their private interests rather than directed toward the greater pursuit of societal understanding.[53] This anomaly foreshadows the value of parity theory as a tool for analyzing and refining the existing doctrine.[54] But we must defer that discussion to consider a more immediate task inherent in the *Connick* formulation: structuring the process by which reviewing courts—not

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core concerns of the First Amendment.").

50. *Connick*, 461 U.S. at 149; *see also id.* ("In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service.").

51. The Court recently clarified that the public concern requirement also applies to employee-speech disputes that are framed as involving the First Amendment's Petition Clause, which protects "the right of the people ... to petition the Government for a redress of grievances." U.S. CONST. amend. I; *see* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2497 (2011) ("Employees should not be able to evade the rule articulated in the *Connick* case by wrapping their speech in the mantle of the Petition Clause.").

52. *See* Estlund, *supra* note 41, at 8; Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence*: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 100 (2006) ("The 1983 case of *Connick v. Myers* ... gave the *Pickering* balancing test an important, and ambiguous, gloss.").

53. *Cf. Borough of Duryea*, 131 S. Ct. at 2498 ("Outside the public employment context, constitutional protection for petitions does not necessarily turn on whether those petitions relate to a matter of public concern.").

54. *See infra* Part IV.

to mention employees and supervisors[55]—are expected to distinguish public concern speech from other expressions.[56]

Connick indicates, and subsequent cases reaffirm, a comprehensive approach to the public concern inquiry. There must be a fact-intensive exploration of "the content, form, and context of a given statement, as revealed by the whole record."[57] Recognizing the formidable scope of this mandate,[58] the Court has offered some guiding principles. It has characterized topics of public concern as "relating to any matter of political, social, or other concern to the community."[59] It has also explained that "public concern is something that is a subject of legitimate news interest; that is, a subject

55. *See* Estlund, *supra* note 41, at 49 ("Ultimately, in the few fully litigated cases, the decisionmaker may be a judge. But the potential public-employee speaker must be equally, if not more, concerned with the decision made by her employer and her employer's counsel whether to fire her."); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1027 (2005) ("Which speech is of public concern is difficult to guess ex ante.... How was [the speaker in *Rankin v. McPherson*, 483 U.S. 378 (1987),] to know whether her speech was of public concern before she spoke? And how was her employer to determine whether her statement, or the context of her discussion, or some combination of the statement and context brought her statement to the level of public concern?"); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 557 (1998) (stating with respect to the public concern test that "[s]tandardless regulation of speech creates an impermissible risk that the government will use its discretion as a pretext to engage in otherwise forbidden content or viewpoint discrimination").

56. *See* Estlund, *supra* note 41, at 23 ("*Connick* thrust the federal courts into the business of deciding on a case-by-case basis which messages implicated matters of public concern and which did not.").

57. Connick v. Myers, 461 U.S. 138, 147-48 (1983); *cf.* Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) ("In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.").

58. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam) (acknowledging that "the boundaries of the public concern test are not well defined"); *see also Snyder*, 131 S. Ct. at 1216 (confirming that *City of San Diego*'s statement regarding doctrinal uncertainty "remains true today"); Waters v. Churchill, 511 U.S. 661, 692 (1994) (Scalia, J., concurring in the judgment) (noting the "difficulties courts already encounter ... in determining whether speech pertains to a matter of public concern"). For other criticisms of the public concern test, see, for example, Estlund, *supra* note 41, at 3 ("The public concern test will generate, by the inexorable operation of stare decisis, a judicially approved catalogue of legitimate subjects of public discussion. That prospect alone should condemn the entire undertaking, for the Constitution empowers the people, not any branch of the government, to define the public agenda."); Rosenthal, *supra* note 55, at 531 ("The evolution of the law in this area has been unsatisfactory for both employers and employees.").

59. *Connick*, 461 U.S. at 146.

of general interest and of value and concern to the public at the time of publication."[60] The Court has also drawn on another doctrine in which public concern assessments play a role, namely the common law tort for invasion of privacy.[61] And it has emphasized that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[62]

Whatever its precise contours, the public concern requirement garners its force from drawing content-based distinctions between different types of speech.[63] Public concern speech is contrasted, first, with employment grievances. The Court has emphasized that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."[64] By separating employment disputes from other expressions, the cases teach that, when it comes to job-related grievances, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[65]

Another content-based distinction encompassed within the public concern requirement involves speech of little or no societal value. An

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60. *City of San Diego*, 543 U.S. at 83-84.

61. *See id.* at 83 ("[T]he standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present." (citing *Connick*, 461 U.S. at 143 n.5)).

62. Rankin v. McPherson, 483 U.S. 378, 387 (1987); *cf. Snyder*, 131 S. Ct. at 1217 ("While [the expressions at issue] may fall short of refined social or political commentary, the issues they highlight ... are matters of public import.").

63. *Cf.* Rosenthal, *supra* note 55, at 531 ("The *Connick* public concern test allows judges to decide which topics are of proper public concern and which disputes should remain in the workplace. This test seemingly confers upon judges censorial power that the First Amendment ordinarily forbids: the power to discriminate against speech on the basis of its content."). *Contra, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

64. *Connick*, 461 U.S. at 149; *see also* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2493 (2011) ("If an employee does not speak as a citizen, or does not address a matter of public concern, 'a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.'" (quoting *Connick*, 461 U.S. at 147)).

65. *Connick*, 461 U.S. at 146; *cf. Borough of Duryea*, 131 S. Ct. at 2496 ("Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations.... Every government action in response could present a potential federal constitutional issue" in a world of "[u]nrestrained application of the Petition Clause.").

opinion from 2004 is illustrative. In *City of San Diego v. Roe*, the Court considered whether a police officer was entitled to constitutional protection for sexually explicit videos he distributed over the Internet that referenced his field of employment.[66] The Court had "little difficulty in concluding that the City was not barred from terminating" the officer.[67] The videos did "nothing to inform the public about" the speaker's employer and bore no resemblance to comments about "political news" previously deemed to address matters of public concern.[68] It followed that the videos could not qualify for potential First Amendment protection "under any view of the public concern test."[69]

City of San Diego illustrates how sharply the public concern requirement can deviate from general First Amendment principles regarding the valuation of speech.[70] In examining "the content, form, and context of a given statement, as revealed by the whole record,"[71] a reviewing court must determine whether the statement appeals to the "general interest" and provides public value.[72] This consideration is irreducibly normative, and it ventures well beyond any attempt to separate speech that is related to employment from speech that is not. Of course, the valuation of speech in cases like *City of San Diego* might seem unobjectionable due to the particular expressions at issue. But the Court's rationale cannot be reliably cabined to speech that most of us would agree has little or no worth.[73]

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66. 543 U.S. at 78-79.

67. *Id.* at 80.

68. *Id.* at 84.

69. *Id.*

70. *Cf.* Estlund, *supra* note 41, at 37 ("[T]he *Connick* version of the public concern test explicitly discounts the importance, and undermines the claim to constitutional status, of speech grounded in the real, everyday experience of ordinary people.").

71. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

72. *City of San Diego*, 543 U.S. at 84.

73. For a justification of the public concern test grounded in public-choice theory, see Daniel A. Farber, Commentary, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 575 (1991) ("If ... the employees' speech does not concern some matters of public significance, the information conveyed by the speech has little spillover effect outside the office and hence has scant claim to protection.").

2. The Pickering *Balance*

For expressions that satisfy the public concern standard, the issue of First Amendment protection is resolved through the balancing approach articulated in *Pickering*.[74] A reviewing court will undertake the challenging task[75] of weighing the employer's need to exert managerial control against the virtues of affording protection to employee speech.[76] On the employer's side of the scale, the *Pickering* balance is notable for its focus on operational efficiency.[77] *Pickering* described the key governmental interest as "promoting the efficiency of the public services it performs through its employees,"[78] and the Court's subsequent opinions evince a similar emphasis.[79] As discussed in Part III, this willingness to compromise free expression for the sake of governmental efficiency is striking; in the ordinary course, it would be unusual to accord so much weight to convenience and smooth operations at the expense of speech.[80] One might

74. Pickering v. Bd. of Educ., 391 U.S. 563 (1968); *see also, e.g.*, Secunda, *supra* note 49, at 1109 ("[I]f the speech relates to a matter of public concern not connected to a public employee's official duties, a court then undertakes a *Pickering* balance of interests test.").

75. *See, e.g.*, United States v. Nat'l Treasury Emps. Union (NTEU), 513 U.S. 454, 482 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("Balancing is difficult to undertake unless one side of the scale is relatively insubstantial."); *Connick*, 461 U.S. at 150 ("Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.").

76. *Pickering*, 391 U.S. at 568. The burden rests with the government. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987) ("The State bears a burden of justifying the discharge on legitimate grounds.").

77. *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2494 (2011) ("The government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise."); *NTEU*, 513 U.S. at 455 ("[O]perational efficiency is undoubtedly a vital governmental interest."); *Rankin*, 483 U.S. at 388 ("[T]he state interest element of the [*Pickering* balancing] test focuses on the effective functioning of the public employer's enterprise.").

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

79. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."); *Connick*, 461 U.S. at 150 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."); Branti v. Finkel, 445 U.S. 507, 517 (1980) ("[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.").

80. *See infra* Part III.A.

respond by contending that the employment context represents a specialized "niche" within First Amendment doctrine that requires exceptional treatment, including the privileging of efficiency interests over certain liberties.[81] But that is simply a way of restating the question of what about the employment context justifies a different set of rules than customarily apply.[82]

The other side of the scale, relating to the value of protecting employee expression, initially seems more consistent with established norms of First Amendment doctrine. Along with the employee's own interest in speaking freely without reprisal, the Court has noted the importance of a robust marketplace of ideas[83] in promoting the public good.[84] In practical application, however, the *Pickering* balance departs from conventional First Amendment principles by embracing an overtly content-based approach to

81. *See, e.g.*, Estlund, *supra* note 22, at 1464 ("First Amendment doctrine is often institutionally blind—surprisingly oblivious to institutional differences that seem to matter in the world. But the workplace is an obvious and longstanding counterexample; it is undoubtedly a distinct 'constitutional niche.'" (footnote omitted)); *cf.* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1768 (1987) [hereinafter Post, *Between Governance and Management*] (noting that common situations like a government official's instruction to her subordinate regarding an upcoming presentation would be viewed as creating "a first amendment nightmare" outside the confines of the workplace); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 317 (1991) [hereinafter Post, *Racist Speech*] ("If public discourse is bounded on one side by the necessary structures of community life, it is bounded on the other by the need of the state to create organizations to achieve explicit public objectives. These organizations, which are nonpublic forums, regulate speech in ways that are fundamentally incompatible with the requirements of public discourse.").

82. *Cf. Waters*, 511 U.S. at 671 (plurality opinion) ("What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?").

83. *Cf.* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (describing the "theory of our Constitution" as providing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" and stating that "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas").

84. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."); City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam) ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."); United States v. Nat'l Treasury Emps. Union (NTEU), 513 U.S. 454, 470 (1995) ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.").

protection. In the Court's words, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."[85] Valuation can even entail resuscitating the public concern test in a modified form: "a stronger showing may be necessary [to justify a governmental restriction] if the employee's speech more substantially involved matters of public concern."[86]

Once the comparative assessment of costs and benefits has been conducted, the core analysis of First Amendment protection is complete.[87] If the balance is struck in favor of the speaker, he will be permitted to express himself with full insulation from retaliation.[88] If the employer wins out, the subject expressions may be restricted even if they rise to the level of citizen-speech on matters of public concern.[89] *Connick* provides a useful illustration. Though the Court found that one of the items on the speaker's questionnaire addressed an issue of public concern,[90] it nevertheless concluded that "[t]he limited First Amendment interest involved here does not require that [the supervisor] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and

85. Connick v. Myers, 461 U.S. 138, 150 (1983); *cf.* Jonathan C. Medow, *The First Amendment and the Secrecy State:* Snepp v. United States, 130 U. PA. L. REV. 775, 816 (1982) ("Implicit in *Pickering* seems to be a determination that 'reasonableness' is the standard by which to judge the conditioning of public sector employment on a relinquishment of some measure of first amendment rights.").

86. *Connick*, 461 U.S. at 152. For an interesting take on the Court's "stronger showing" language, see Post, *Between Governance and Management*, *supra* note 81, at 1814 n.351 ("I think the most plausible interpretation of *Connick* is that [when employee speech directly implicates matters of public concern] the government cannot depend upon judicial deference to managerial anticipation of harm to institutional culture, but must instead bring sufficient evidence before a court to convince it that the government's restriction of speech is in fact necessary for the attainment of institutional goals.").

87. There also remain important questions of causation and proof. *See* Secunda, *supra* note 49, at 1107-10.

88. *See* Rankin v. McPherson, 483 U.S. 378, 399 (1987) (Scalia, J., dissenting) ("We are asked to determine whether ... McPherson had a *right* to say what she did—so that she could not only not be fired for it, but could not be formally reprimanded for it, or even prevented from repeating it endlessly into the future.").

89. *See, e.g.*, Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) ("[E]ven termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong."); *cf.* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2500 (2011) ("When a public employee petitions as a citizen on a matter of public concern .... [i]f the interference with the government's operations is such that the balance favors the employer, the employee's First Amendment claim will fail.").

90. *See Connick*, 461 U.S. at 149.

destroy close working relationships."[91] *Connick* demonstrates that regardless of whether employee speech is of legitimate interest to the public, it can be restricted if it poses too great a threat to governmental efficiency. This risk provides further evidence of the difference in kind between the Supreme Court's particularized vision of the government workplace and its conventional ideal of an uninhibited public discourse[92] in which the provocative impact of speech is, in all but the rarest situations,[93] insufficient to warrant suppression.[94]

C. Synthesis

As the foregoing overview suggests, the Supreme Court's existing doctrine essentially divides employee-speech cases into two broad categories. When an employee speaks as a citizen on matters of public concern and his speech does not impair his employer's oper-

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91. *Id.* at 154.

92. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); Roth v. United States, 354 U.S. 476, 484 (1957) (describing the First Amendment as "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2363 (2000) ("The theory of the marketplace of ideas focuses on 'the truth-seeking function' of the First Amendment. It extends the shelter of constitutional protection to speech so that we can better understand the world in which we live." (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988))); Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1639 (2010) ("Left to themselves, free markets may generate efficient outcomes by processes that economists say they understand. And analogously, it is said (though without any analogous explanation), in the long run the free marketplace of ideas will generate truth or the acceptance of truth if it is left to its own devices.").

93. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (recognizing an exception to constitutional protection for incitement of imminent lawless action); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (recognizing an exception to constitutional protection for "fighting" words).

94. *See, e.g.*, *Snyder*, 131 S. Ct. at 1220 ("As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

ations to an extent that overshadows the value of his speech, he will enjoy constitutional protection.[95] By contrast, if the employee speaks pursuant to his employment obligations, addresses private grievances or matters of limited societal interest, or makes statements that are more disruptive than valuable, the First Amendment will not shield him from adverse action.[96]

Given this rather formidable assemblage of blackletter nuance, one might assume that the conceptual underpinnings of the employee-speech doctrine are similarly detailed. In reality, the Court's engagement in deeper theoretical analysis has not kept pace with its issuance of doctrinal guidelines. This phenomenon is examined below in Part II. Part III then proceeds to offer a theoretical framework to guide the revision and evolution of employee-speech jurisprudence.

II. THE HOLMESIAN REJECTION AND THE NEED FOR AN ALTERNATIVE FRAMEWORK

An "unchallenged dogma" of the early twentieth century was that public employees had no constitutional basis for challenging speech restrictions imposed as conditions of their employment.[97] The rationale, epitomized by Holmes's aphorism, was that although a policeman "may have a constitutional right to talk politics ... he has no constitutional right to be a policeman."[98] It was not until the 1950s that the Supreme Court departed from this paradigm, prompted by prevalent efforts "to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated."[99] By striking down employment conditions in those cases, the Court demonstrated its suspicion

95. *See supra* Part I.B.

96. *See supra* Part I.A. The Court has taken a distinct approach to employment actions made on the basis of political party affiliation. *See infra* note 228.

97. Connick v. Myers, 461 U.S. 138, 143 (1983).

98. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); *see also, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) ("It is clear that [government employees] have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms." (citation omitted)).

99. *Connick*, 461 U.S. at 144.

of attempts "to suppress the rights of public employees to participate in public affairs."[100]

The Court's abandonment of the Holmesian view runs parallel to a transition in its broader thinking about the constitutional dimensions of "privileges" as compared to "rights."[101] In modern times it has become insufficient to assert that, because an employee has no constitutional right to a government paycheck, his employment is a mere privilege whose various conditions are beyond the First Amendment's purview. Similarly out of favor is the "greater includes the lesser" theory that the government's power to rescind a benefit implies unchecked power to subject the benefit to conditions.[102] As applied to the employment context, theories like these would suggest that the power to fire an employee for no reason implies the power to fire for any reason, even one that impairs the freedom of speech. Such arguments are now disapproved.[103] Nor does a public employee's consent to the terms of a government job completely neutralize the Constitution's guarantees. As the Court

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100. *Id.* at 144-45.

101. *See* Van Alstyne, *supra* note 2, at 1442 ("While the concept of 'privilege' underlying Holmes' epigram remains nominally intact, its implications for positive law have been gradually eroded."); *see also* Rutan v. Republican Party of Ill., 497 U.S. 62, 72 (1990) ("[W]e find the assertion here that the employee petitioners and cross-respondents had no legal entitlement to promotion, transfer, or recall beside the point."); Speiser v. Randall, 357 U.S. 513, 518 (1958) ("The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."); Estlund, *supra* note 41, at 16 ("[T]he hoary 'rights-privileges' distinction shielded from constitutional scrutiny loyalty oaths and other requirements of political orthodoxy demanded as a condition for employment and other valuable government benefits.").

102. *See, e.g.*, Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 245 ("As long as one concedes that some conditions are unconstitutional, and there is unanimous agreement as to that, though huge disagreement as to why and which ones, then the greater does not always include the lesser."); Secunda, *supra* note 52, at 96 ("Although most jurists once believed that government benefits, including public employment, were mere privileges that could be withheld or limited on any condition, the Supreme Court now emphatically rejects 'the greater includes the lesser' premise." (footnote omitted)).

103. *See* Rankin v. McPherson, 483 U.S. 378, 383-84 (1987) ("Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression."); Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (quoting Keyishian v. Bd. of Regents, 345 F.2d 236, 239 (2d Cir. 1965))).

recently noted, "[t]here are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment."[104] Freedom of speech is near the top of the list.[105]

Though the shift in the Court's approach to employee speech was pronounced, we should take care not to overstate it. It has never been true that government employees and other citizens must be treated identically in all respects.[106] The employment context thus continues to afford some additional measure of authority to restrict speech, based on both "the unique nature of the government's interest" and "the consensual nature of the employment relationship."[107] The resulting tension links public employee speech to the doctrine of unconstitutional conditions, a body of law dealing with governmental authority to impose "conditions on the receipt of funds."[108] The unconstitutional conditions doctrine prohibits the denial of benefits on grounds that improperly infringe constitutional rights such as the freedom of speech.[109] The central analytical task

104. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2493 (2011).

105. For an argument that the Court has tacitly reinvigorated the right-privilege distinction through its recent employee-speech cases, see Paul M. Secunda, *Neoformalism and the Reemergence of the Rights-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 909-10 (2011).

106. *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 599 (2008) ("[W]e have often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large."); Secunda, *supra* note 105, at 936-37 ("[I]mportant distinctions do remain between when the government acts as employer as opposed to when it acts in its sovereign capacity.").

107. *Borough of Duryea*, 131 S. Ct. at 2494; *see also, e.g.*, Estlund, *supra* note 22, at 1472 ("[T]he government's power to regulate employee speech that detracts from its public mission is built into the employment contracts implicitly agreed to by public employees in accepting employment.").

108. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59 (2006); *see also* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1419 (1989) ("The central challenge for a theory of unconstitutional conditions is to explain *why* conditions on government benefits that 'indirectly' pressure preferred liberties should be as suspect as 'direct' burdens on those same rights, such as the threat of criminal punishment."); *id.* at 1490 ("Government freedom to redistribute power over presumptively autonomous decisions from the citizenry to itself through the leverage of permissible spending or regulation would jeopardize ... [a] realm of autonomy that should remain free from governmental encroachment.").

109. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)); Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that

is the same one presented by employee-speech cases:[110] drawing the line between lawful governmental influence and improper governmental overreaching.[111]

Situating debates about employee speech within this broader context is helpful in two respects. First, it demonstrates that employee-speech disputes represent one facet of a larger jurisprudential difficulty created by the application of a sovereign-oriented Constitution to entities that frequently operate through nonsovereign means. Second, the context helps illustrate that the Court's abandonment of the Holmes-approved, "no constitutional right to be a policeman" approach is only part of the story.[112] The rejection of the Holmesian view revealed that a given theory of constitutional meaning had been rejected. But it also prompted the question of what alternative theory should be utilized going forward. The Court has yet to provide a complete answer.

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guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."); Van Alstyne, *supra* note 2, at 1445-46 ("Essentially, this doctrine declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly.... The net effect is to enable an individual to challenge certain conditions imposed upon his public employment without disturbing the presupposition that he has no 'right' to that employment.").

110. Although the Court often treats employee speech as a stand-alone doctrine, it occasionally highlights the connection with unconstitutional conditions jurisprudence. *See Umbehr*, 518 U.S. at 674; *Perry*, 408 U.S. at 597 ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.... We have applied this general principle to denials of tax exemptions, unemployment benefits, and welfare payments. But, most often, we have applied the principle to denials of public employment." (citations omitted)).

111. Numerous commentators have grappled with the slippery nature of unconstitutional conditions doctrine. For a sampling, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) ("[C]onditional offers are sometimes constitutionally permissible and sometimes not. Indeed, correctly understood, that is all the famed and contentious unconstitutional conditions doctrine holds."); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Farber, *supra* note 73, at 572 (referring to the doctrine as "a notorious conceptual quagmire"); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995); Secunda, *supra* note 52, at 94 ("Although what the unconstitutional conditions doctrine holds is generally uncontested, specifying the 'certain circumstances' under which the doctrine is thought to apply is a completely different story."); Sullivan, *supra* note 108.

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

To illustrate, recall *Pickering*.[113] The case could hardly have been clearer about the rationale it was dismissing: the anachronistic idea that "teachers may constitutionally be compelled to relinquish" their free-speech rights by virtue of their employment.[114] Quoting an opinion issued the year prior, *Pickering* disavowed the "theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable."[115] Yet the Court stopped short of formulating a satisfactory alternative. Instead, it reaffirmed the government's unique interests as employer and left the tension to be sorted out by balancing the costs and benefits of restricting speech in individual cases.[116]

Pickering thus prescribed a wide-ranging balancing test without furnishing an adequate theoretical grounding. Other than the sentiments that speech rights and governmental efficiency are both important, one searches in vain for a conceptual core. If anything, the opinion is remarkable for its dissonance. As elaborated below,[117] the Court described teachers as "the members of a community most likely to have informed and definite opinions" on matters related to the school system, making First Amendment protection "essential."[118] But it also emphasized that protection was warranted because the speaker's role as a teacher was "only tangentially and insubstantially involved in the subject matter" of his speech.[119] In other words, the speaker's expressions were protected because his employment gave him a special degree of interest and expertise, *and* because his employment was only tangentially involved in his expressions.

Although employee-speech doctrine has evolved substantially in the decades since *Pickering*, the opinion's theoretical implications have received insufficient attention in the case law. The most notable exception is *Waters v. Churchill*, in which a plurality led by Justice O'Connor set out to examine what gives government "a freer hand in regulating the speech of its employees than it has in regu-

113. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
114. *Id.* at 568.
115. *Id.* (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967)).
116. *Id.*
117. *See infra* Part IV.D.
118. *Pickering*, 391 U.S. at 572.
119. *Id.* at 574.

lating the speech of the public at large."[120] The plurality hinted at a deeper exploration of the issue through its recognition that the added discretion "comes from the nature of the government's mission as employer."[121] Ultimately, though, the plurality ended its inquiry prematurely, concluding that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."[122] As for why the government's efficiency interest becomes capable of trumping First Amendment rights in the employment context, the plurality essentially took the point as given, noting the importance of public services and "the practical realities of government employment."[123] It also made a curious appeal to conventional wisdom by invoking "the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech."[124] Such statements are not answers so much as reformulations of the underlying question. Even accepting that the efficient provision of public services is a societal and democratic good, we must consider when and why the First Amendment's protections—which so often are interpreted as promoting uninhibited expression even at the expense of orderly operations—should yield.

III. A PARITY-BASED THEORY OF EMPLOYEE SPEECH

A. The Parity Touchstone

When the Supreme Court abandoned the Holmesian model and the attendant premise that government workers have no First Amendment rights against their employers,[125] it dramatically

120. 511 U.S. 661, 671 (1994) (plurality opinion).

121. *Id.* at 674.

122. *Id.* at 675.

123. *Id.* at 672; *see also* Kermit Roosevelt, *The Costs of Agencies:* Waters v. Churchill *and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1239 (1997) (noting that the Court's analysis is "tantalizingly elliptical" in failing to "explain what it is about the employer-employee relationship that changes the ordinary First Amendment analysis").

124. *Waters*, 511 U.S. at 672 (plurality opinion).

125. *See* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally

altered the constitutional relevance of the employment relationship. Under the Holmesian approach, that relationship had been paramount. From the principle that government workers have no entitlement to their jobs, it followed that the workers had no constitutional grounds for complaint about any speech restrictions their employers saw fit to impose.[126]

Once the Court abandoned the Holmesian approach, the fact of employment necessarily took on a different complexion. The employment relationship itself was no longer sufficient to dispose of First Amendment claims. But uncertainty remained as to the role it would now play in the constitutional calculus. One possibility is that the Court implicitly moved to something like a middle ground between the Holmesian approach and full First Amendment protection: though it is incorrect to say that public workers possess no expressive liberties enforceable against their employers, the workers nevertheless have relinquished some of their rights by virtue of their employment. This understanding, though, is problematic. If the bare fact of employment is insufficient to discharge the entirety of a government worker's First Amendment rights, it is difficult to see how the same fact could be viewed as discharging some unspecified subset of those rights. To be sure, there may be situations in which the performance of professional duties entails deviation from ordinary principles of free speech. But those deviations are not justified by reference to the employment relationship itself. Rather, and as discussed below, they stem from particular circumstances that may or may not be applicable to any given employee working for any given public institution.

The second possibility for understanding the theoretical fallout of the Supreme Court's shift is more defensible, and it forms the basis

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or intentionally, the liberties employees enjoy in their capacities as private citizens."); City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (per curiam) ("A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment."); *Waters*, 511 U.S. at 674 (plurality opinion) ("[A] government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters."); Connick v. Myers, 461 U.S. 138, 140 (1983) ("[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."); *id.* at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

126. *See supra* notes 97-100 and accompanying text.

for this Article's central claim. By rejecting the Holmesian view and its singular focus on the existence of an employment relationship, the Court rendered that fact irrelevant to the constitutional calculus. No longer is it sufficient to answer the question, "Why do I have weaker First Amendment rights than my peers?" with the response, "Because you work for the government." The default norm of differential constitutional status for government employees as compared to other citizens has given way. What emerged instead is a default of parity: employees and other citizens are presumed to be similarly situated for purposes of the First Amendment. This presumption is a natural corollary of repudiating the theory that government employment itself provides a legitimate justification for imposing restrictions on the freedom of speech.[127]

It does not follow that employees' and nonemployees' First Amendment rights must be identical. There are valid reasons why employees must tolerate certain restrictions that would be unlawful if applied to other citizens.[128] But those reasons are derived from sources other than the mere fact of employment—sources with the explanatory power to justify bending the First Amendment rules that normally apply. Parity theory thus suggests that the doctrine of employee speech should be reoriented around a single inquiry: Is there a valid reason for permitting the government to treat the employee differently from her peers in the citizenry at large?

The contours of this parity-based model can be further defined by contrasting it with the branch of unconstitutional conditions jurisprudence that deals with a condition's "germaneness" or "relatedness" to the government's zone of lawful discretion. In *Nollan v. California Coastal Commission*, for example, the Supreme Court disapproved a condition that required two homeowners to grant a

127. *Pickering* contains one passage that nicely captures the importance of thinking in terms of parity: "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Pickering*, 391 U.S. at 573.

128. Kermit Roosevelt, for example, has explored several ways in which government employees are situated differently from nonemployees that might arguably be relevant to First Amendment doctrine. *See* Roosevelt, *supra* note 123, at 1239-41. Professor Roosevelt's focus on identifying meaningful bases for distinction strikes me as exactly right, though his theory appears less skeptical than mine of governmental arguments based on considerations such as intraoffice harmony.

public easement across their property in exchange for a development permit.[129] The Court noted that if the government could deny the permit without violating the Takings Clause,[130] it could also impose a "permit condition that serves the same legitimate police-power purpose."[131] But it could not insist on a condition that "utterly fail[ed]" to support the rationale for denying a permit outright.[132] That latter sort of condition would resemble a law that "forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury."[133] The constitutional distinction, the Court explained, turned on the closeness of connection between the condition imposed and the government's legitimate discretion.[134]

Parity theory suggests that such an approach should not extend to the domain of public employee speech. In the employment context, there often will be reason to believe that an employee's speech has a plausible likelihood of affecting his employer through avenues including impairment of intraoffice harmony and impact on public perception.[135] *Pickering* and *Connick* provide ready examples, as do

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129. 483 U.S. 825, 827-39 (1987).

130. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

131. *Nollan*, 483 U.S. at 836.

132. *Id.* at 837.

133. *Id.*

134. *Id.*; *see also, e.g.*, Renee Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 775 (2007) ("In a number of U.S. Supreme Court cases dealing with unconstitutional conditions, the Court has examined the nexus between the condition and the government's purpose in making the expenditure, known as germaneness. If the nexus is attenuated or nonexistent, the Court has held that the condition is improper."); Sullivan, *supra* note 108, at 1457 (describing the germaneness inquiry as focusing on "the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether"). Another useful illustration of the relatedness/germaneness inquiry comes from *South Dakota v. Dole*, 483 U.S. 203 (1987). *Compare id.* at 208 ("[T]he condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel."), *with id.* at 215 (O'Connor, J., dissenting) ("When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist ... that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety.").

135. *Cf.* Epstein, *supra* note 111, at 67-68 ("[T]oday unconstitutional conditions issues tend to be raised with respect to restrictions relatively germane to the work at hand: the terms and conditions of individual employment contracts. The very statement of the doctrine suggests that most cases in this area satisfy the 'relatedness' requirement that Justice Scalia spelled

a host of other Supreme Court cases.[136] Yet speech by nonemployees regularly creates significant consequences for governments, and still the First Amendment remains steadfast. The inquiry that parity theory proposes is whether there is a meaningful basis, apart from the fact of employment, for treating a government employee differently from his peers among the general citizenry.[137] Germaneness analysis is a mechanism for ensuring that the government does not overreach in its use of conditions;[138] parity theory recognizes that even a restriction that is reasonably related to the employer's functions may be unlawful absent an adequate basis for singling out government employees.

B. Parity in the Modern Law

Parity-based thinking is not entirely foreign to the existing law of employee speech.[139] Speech made in discharge of an employee's official responsibilities currently receives no constitutional protection from employer control.[140] Such speech is said to "owe[] its existence" to the speaker's employment.[141] If the speaker were not employed by the government, or if he were not tasked with certain

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out in *Nollan*.").

136. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006); City of San Diego v. Roe, 543 U.S. 77 (2004) (per curiam); Rankin v. McPherson, 483 U.S. 378 (1987); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979).

137. For other discussions emphasizing the closeness of connection between speech restrictions and employer needs, see, for example, *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) ("The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."); Van Alstyne, *supra* note 2, at 1462 (describing a theory under which "an employee's job interest" would be protected against "unreasonable regulation," meaning regulation lacking "a sufficient connection with an adequately compelling public interest").

138. *See, e.g.*, *Dole*, 483 U.S. at 218 (O'Connor, J., dissenting) ("[A] condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction.... Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor.").

139. *See Garcetti*, 547 U.S. at 418 ("The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.").

140. *See id.* at 421-22; *supra* Part I.A.

141. *Garcetti*, 547 U.S. at 421.

communications as part of his official duties, his expressions would not have come into existence in the first place.

That causal origination overcomes the presumption of parity, authorizing the government to treat the speaker differently than a nonemployee.[142] Speech required by an employee's official duties has "no relevant analogue to speech by citizens who are not government employees."[143] The same analysis would apply, for example, to a public employee's rude or vulgar speech to customers.[144] Though citizens have the right to speak coarsely and even offensively in conducting their private lives, an employee's professional interactions with patrons are derivative of and unique to the employment context.[145] Government employers may legitimately exert control over the shape of those exchanges without violating the norm of parity.[146] The converse is that when employees "make public statements outside the course of performing their official duties," the prospect of First Amendment protection arises because "that is the kind of activity engaged in by citizens who do not work for the government."[147]

IV. PARITY AND DOCTRINAL REFORM

Notwithstanding the foregoing example of overlap between parity theory and the modern doctrine, more prevalent are the points of divergence. In this Part, I examine the areas of employee-speech law in which a parity-based approach suggests the need for revision and elaboration.

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142. *See id.* at 422-23 ("Official communications have official consequences creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.").

143. *Id.* at 424.

144. *See* Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion) ("[S]urely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large.").

145. *See id.* at 672.

146. *See id.* ("[W]e have never expressed doubt that a government employer may bar its employees from using [an] offensive utterance to members of the public or to the people with whom they work.").

147. *Garcetti*, 547 U.S. at 423.

A. Rethinking Public Concern

The language of "public concern" has come a long way from its usage in *Pickering*.[148] The concept of public concern was prominent in that case,[149] though an argument could be made that it was primarily a descriptor underscoring the interests of government employees in contributing to the public discourse and of society in receiving those contributions.[150] Regardless, *Connick v. Myers* erased any doubt regarding the importance of public concern, treating it as an additional requirement for First Amendment protection.[151] The Court's more recent cases have continued to mine the concept for meaning, even finding a license for evaluating employee speech against a backdrop of judicially determined legitimacy: "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[152]

Reassessed through the lens of parity, the public concern test is problematic. *Connick* defined public concern speech in contradistinction to "matters only of personal interest."[153] It is by no means unprecedented for the Court to depict certain speech as so vital to

148. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

149. *See id.* ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); *id.* at 570 ("[T]o the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct ... may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it."); *id.* at 571 ("[T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive."); *id.* at 574 ("This Court has also indicated ... that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.").

150. *See, e.g.*, Estlund, *supra* note 41, at 8.

151. 461 U.S. 138, 146 (1983) ("*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."); *see also* Estlund, *supra* note 41, at 8 ("[W]hat was, in *Pickering* the announced purpose for protecting public employee speech became the minimum threshold for gaining protection in *Connick*.").

152. City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004) (per curiam).

153. *Connick*, 461 U.S. at 147.

self-government[154] that it ought to be viewed as occupying the "highest rung of the hierarchy of First Amendment values"[155] and "entitled to special protection."[156] But in the employee-speech context, the public concern test entails that such expressions are the only ones that may receive protection.[157] The operation of the First Amendment depends on whether the expressions at issue can "be fairly considered as relating to any matter of political, social, or other concern to the community."[158]

Parity theory highlights the need for a reason beyond the bare fact of employment to justify differential treatment of employees as opposed to other citizens, and no such rationale is available to explain why employees should be left without protection for expressions of personal interest. Though "speech concerning public affairs" may indeed be "the essence of self-government,"[159] the Court has never suggested that all other expressions are subject to suppression.[160] The same should be presumptively true of employee speech and its susceptibility to adverse state action.[161]

The Court has defended the public concern requirement on grounds of practical necessity, invoking "the common-sense realization that government offices could not function if every employ-

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154. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

155. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

156. *Connick*, 461 U.S. at 145.

157. *See* Estlund, *supra* note 41, at 22 ("*Connick* represents the debut of explicit stratification at the upper reaches of the First Amendment.").

158. *Connick*, 461 U.S. at 146.

159. *Garrison*, 379 U.S. at 74-75.

160. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("Private citizens cannot be punished for speech of merely private concern."); *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge.").

161. *Cf. Connick*, 461 U.S. at 157 (Brennan, J., dissenting) ("When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights are ... no different from those of the general public."); Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting) ("I cannot ... 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. The Constitution guarantees freedom of thought and expression to everyone in our society.").

ment decision became a constitutional matter."[162] Along similar lines is the Court's statement that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."[163] Yet citizens who do not work for the government may speak (and complain) about the internal operations of public instrumentalities with full First Amendment protection.[164] There would not seem to be any meaningful basis of distinction between those citizens and their peers who work for the government. Of course, an employee who sought to promote a work-related grievance while he was supposed to be performing his official duties would be subject to discipline pursuant to the Supreme Court's ruling in *Garcetti*.[165] Likewise, and as explained below,[166] even speech outside an employee's official duties could trigger a legitimate employment action if it revealed confidential information[167] or otherwise cast doubt upon the employee's fitness for his job.[168] Apart from those situations, there is no warrant for categorically denying protection to work-related speech based purely on the speaker's status as a government employee. The parity-based approach suggests the merits of moving away from the public concern requirement and toward a focus on more meaningful bases of distinction between employees and other citizens.

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162. *Connick*, 461 U.S. at 143; *see also id.* at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark ... would plant the seed of a constitutional case.").

163. *Id.* at 149.

164. *See* Waters v. Churchill, 511 U.S. 661, 672 (1994) (plurality opinion) ("[A] private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program.").

165. Nonconstitutional measures may be available to protect some such speech. *See* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (referencing "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing").

166. *See infra* Part IV.B-C.

167. *Cf.* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("[T]his Court's cases make clear that ... the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." (citations omitted)).

168. *See* Wales v. Bd. of Educ., 120 F.3d 82, 84 (7th Cir. 1997).

B. Balancing, Disruption, and Listener Reaction

Within the universe of the First Amendment, listener disapproval seldom provides a valid basis for restricting speech.[169] This "bedrock principle"[170] extends to speech that is uncivil, upsetting, and offensive.[171] Even if a speaker's words furnish a reasonable and morally justifiable basis for criticism, that fact is an insufficient reason for the government to punish him.[172] A "necessary cost of freedom," the Supreme Court recently reminded us, is that "[m]any ... must endure speech they do not like."[173] Indeed, protecting speech that provokes vehement opposition is sometimes described as the highest purpose of the First Amendment.[174] The individual's right to express himself in his own terms provides part of the rationale for this view,[175] as does the potential value of even extreme or troubling

169. *See, e.g.*, Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." (citations omitted)); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (plurality opinion) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."). The most notable exception is the doctrine of "fighting words." *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

170. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

171. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (noting that restricting speech requires a justification "far above public inconvenience, annoyance, or unrest"); Rosenthal, *supra* note 22, at 71 ("First Amendment doctrine has never treated speech as unprotected because others find it offensive or harassing."); *cf.* Rankin v. McPherson, 483 U.S. 378, 387 (1987) ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.").

172. *Cf.* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 85 (1998) ("Much of the very idea of free speech depends on ignoring what might otherwise appear to be politically and morally relevant features of speakers and speeches.").

173. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2669 (2011).

174. *See, e.g.*, *Terminiello*, 337 U.S. at 4 ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

175. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) ("[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995) ("[T]he fundamental rule

viewpoints in contributing to the marketplace of ideas.[176] In the words of Robert Post, speech that causes a "visceral shock" may serve a "constructive purpose" by leading listeners "to acknowledge the claims of others from radically different cultural backgrounds."[177] For better or worse, well-established First Amendment norms require that the government—and the rest of us—bear the costs of extreme and disruptive speech as a means of achieving these perceived benefits.

The balancing test set forth in *Pickering*[178] assumes a markedly different posture. 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.[179] Speech that generates strong criticism from listeners is disruptive by definition, and avoiding disruption is a leading reason that *Pickering* and its progeny offer for permitting the restriction of employee speech.[180] By accepting the legal relevance of audience reaction, the modern doctrine also ensures, albeit implicitly, that no employee speech is truly protected.[181] Consider the Supreme Court's 1995 opinion in *United States v. National Treasury Employees Union* (*NTEU*), dealing with a law prohibiting federal employees from accepting compensation for various speeches and writings.[182] In the course of declaring the

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of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.").

176. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 418 (1989) ("The First Amendment does not guarantee that ... concepts virtually sacred to our Nation as a whole ... will go unquestioned in the marketplace of ideas.").

177. Post, *Racist Speech*, *supra* note 81, at 304; *see also* Farber, *supra* note 73, at 580 ("Society must tolerate a certain amount of rhetoric about revolution and a good deal of general 'foaming at the mouth' to get the other benefits of radicals' activities. If the market provided adequate incentives for sane, sensible people to dedicate their lives to the production of criticisms of society, we could dispense with the contribution of the fanatics and crackpots. As it is, we must tolerate them—which means in practice that the courts must force people to put up with a lot of violent rhetoric and nasty talk." (footnotes omitted)).

178. *See supra* Part I.B.2.

179. *See* Kozel, *supra* note 55, at 1019 ("The core of the employee's free speech right is entirely dependent on the likely reaction of co-workers and the public to the employee's speech.").

180. *See id.* at 1018.

181. *See id.* at 1021-22 ("By allowing disruption to justify employer restrictions on speech, the *Pickering* test fails to afford employee speech any real protection.").

182. 513 U.S. 454, 457 (1995).

law unconstitutional as applied to the parties before it, the Court denied the charge that the doctrinal focus on disruption creates a bias against disfavored and provocative speech.[183] Invoking a hypothetical based on *Pickering*, the Court explained that a teacher's letters supporting his school board would be treated identically to letters criticizing the board; the driver of protection is not the viewpoint expressed, but whether disruption is likely to result.[184] Even if one accepts this (unconvincing, in my view) claim of viewpoint neutrality,[185] it is cold comfort. The Court's statement implies that every utterance made by a government employee, no matter how important or valuable, can provide a lawful basis for retaliation so long as it threatens to create a sufficient stir.

The Court has shown itself more willing to acknowledge a related anomaly inherent in the *Pickering* test, one dealing with the paramount focus on operational efficiency. The plurality in *Waters v. Churchill* acknowledged that "[t]he government cannot restrict the speech of the public at large just in the name of efficiency."[186] As we have seen, however, *Waters* was unable to offer a convincing rationale for perpetuating the inconsistency in the employment contxt,[187] and the remainder of the Court's jurisprudence does little better. This rhetorical deficiency reflects a deeper, structural problem. The general concept of disruptiveness is not a meaningful basis for distinguishing between employees and other citizens. Nonemployee speakers can and do create serious disruptions and inefficiencies for governments.[188] The First Amendment's customary response is that the government must tolerate these consequences in promoting

183. *Id.* at 467 n.11.

184. *Id.*

185. *See id.* at 500 n.6 (Rehnquist, C.J., dissenting) (addressing "the Court's fanciful example of an employer terminating an employee because of the disruptive effect of the employee's expression even where the employer agrees with the expression").

186. Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion); *see also id.* at 674 ("[R]estrictions [on employee speech] are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it."); *cf.* Roosevelt, *supra* note 123, at 1237 ("By the standards of ordinary First Amendment praxis, the *Waters* rule is clearly unconstitutional.... [A]pprehensions of disruption and reduced governmental efficiency cannot outweigh the fundamental rights protected by the First Amendment.").

187. *See supra* text accompanying notes 120-24.

188. *See Waters*, 511 U.S. at 673-74 (plurality opinion).

individual liberty and a climate of robust discourse.[189] The same approach presumptively should extend to expressions by public employees.

The analysis might be different if public employees possessed some systematically greater ability to create disruptions than their nonemployee peers. I see little reason to suspect this is the case as a universal matter. A public school teacher's letter to the local newspaper expressing his views about school funding and tax policy might have ramifications for his employer by inviting public scrutiny, but the same could be said of letters from other concerned citizens who do not work for the government. And a clerical worker's critical statements about the President might sow discord within the workplace and exact a toll on institutional efficiency, but costs also arise when the government must strive to maintain order during a public speech by a controversial figure.[190] Disruption is an unavoidable—and, some would say, vital—byproduct of the First Amendment. A mere preference for smooth operations should be no more capable of trumping free speech in the employment context than it is in society at large.

The better option is to resist the prevailing notion that governmental efficiency is elevated to the level of paramount interest within the employment context.[191] Instead, the problem should be viewed through the lens of parity. The reason why the government may, for example, take actions such as controlling its employees' use of confidential information is that government workers receive access to sensitive data that is not disseminated to nonemployees. Prohibiting the public release of such data does not infringe any right that nonemployees could possess, so it takes nothing away from employees by virtue of their employment alone. Framed in terms of parity theory, the prohibition tracks a meaningful basis of

189. *See* Roosevelt, *supra* note 123, at 1238 ("The government's greater freedom does not stem simply from the importance of governmental efficiency. If this were the sole justification, the government would have no more power to suppress employee speech than it does to silence private individuals.").

190. *See, e.g.*, Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 150 (2010) ("Whether the speaker hands out leaflets or engages in public demonstration, the public is obliged to pick up the costs of cleaning litter from leaflets thrown on the ground or providing a police cordon to protect the speaker from a violent response by onlookers.").

191. *See, e.g.*, *Waters*, 511 U.S. at 675 (plurality opinion).

distinction between employees and other citizens, which is the proper determinant of constitutional protection.

C. Institutional Mission and Expression as Evidence

Up until now, this Article has advanced the claim that the presumption of parity supports a doctrine of employee speech organized around the ways in which public employees are situated differently than other citizens. The Article has discussed instances in which distinguishing between employees and nonemployees is warranted, such as when an employee speaks in discharging official responsibilities.[192] It has also addressed factors that are insufficient to justify differential treatment, such as a hostile audience reaction.[193] The following pages introduce another aspect of the employee-speech analysis: the relevance of an employer's institutional mission. Examining the role of mission is necessary to identify the circumstances in which employees are meaningfully distinct from nonemployees, and to ensure that an employer's pursuit of institutional objectives is not allowed to cast too wide a shadow over expressive rights.

Institutional mission has played a superficial role in the Supreme Court's employee-speech cases to date. A notable example is *Waters*, in which the plurality stated that "the extra power the government has in [the employment] area comes from the nature of the government's mission as employer."[194] But *Waters* went astray in collapsing this insight into a preoccupation with operational disruption.[195] Parity theory requires a more thorough examination to determine whether and when an employer's commitment to pursuing its

192. *See supra* Part III.B.

193. *See supra* Part IV.B.

194. *Waters*, 511 U.S. at 674 (plurality opinion).

195. *See id.* at 675 ("Agencies hire employees to do [the agencies'] tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."); *supra* text accompanying notes 120-24; *cf.* Roosevelt, *supra* note 123, at 1234 (arguing that properly understood, "governmental efficiency comprehends not only the narrow instrumental interest recognized by the Court [in *Waters*] but also a broader societal interest in self-governance, both of which are served by employee speech").

mission can justify restrictions on employee speech that would be invalid if applied to the public at large.

The government is empowered to espouse certain viewpoints in its role as sovereign, but it cannot compel private citizens to join in support of its preferred ideology.[196] However ardently the government might embrace a particular ideal, it cannot force citizens to say they agree, nor can it punish them for saying otherwise. Government employers, by comparison, generally are designed to involve citizens in pursuing missions[197]—missions embossed with a democratic imprimatur.[198] The very existence of these institutions implies the license for a certain amount of control over employee expression. If a public elementary school is to educate its students, it must be able to reprimand a teacher who, harboring a sincere belief that state-run education is an example of illegitimate governmental overreaching, sits silently at his desk in a showing of somber protest. Less fancifully, the same school must have the ability to oversee the teacher's presentation of curricular materials, even at the expense of his expressive liberty. A teacher retains the right to talk politics in his personal life, but he can be forbidden from doing so when he is supposed to be instructing his students

196. *See, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *id.* at 641 ("There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."); Helen Norton, *Campaign Speech Law with a Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209 (2011) (describing *Wooley v. Maynard*, 430 U.S. 705 (1977), as an illustration of the "proposition that the government retains the power to express its own views and values, so long as it does not force others to join or share those views"); Post, *Racist Speech*, *supra* note 81, at 284 ("[T]he state undermines the *raison d'être* of its own enterprise to the extent that it itself coercively forms the 'autonomous wills' that democracy seeks to reconcile into public opinion.").

197. *See* Roosevelt, *supra* note 123, at 1242 ("[G]overnmental agencies are charged by law with specific tasks.").

198. *See* Estlund, *supra* note 22, at 1472 ("In a sense, democracy itself depends on public officials being empowered to direct and evaluate how employees perform their jobs. 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."); *cf.* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) ("Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon.").

about long division.[199] A school's insistence that its teachers present specified scholastic materials does not represent the sort of demand for "ideological conformity"[200] or suppression of "dangerous ideas"[201] from which the First Amendment recoils. It simply reflects an employer's effort to exert control over its institutional domain in pursuit of organizational objectives.[202]

The examples in the previous paragraph serve as useful starting points for exploring the relevance of mission. Yet they are best understood as involving the discharge of official responsibilities, and we have already seen that such speech is subject to managerial discretion under a parity-based approach.[203] The more difficult question is whether promotion of institutional mission can authorize an employer to restrict speech made in an employee's capacity as citizen.

It seems to me that the answer is yes. The explanation owes to the evidentiary value of speech. An employee who makes a statement contravening his employer's mission does more than introduce an expressive utterance into the world of ideas. He also provides evidence that may reveal something about his likely workplace performance.[204] The government ordinarily has no occasion to draw performance-related inferences from the speech of its citizens. But

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199. *See* Feldman v. Ho, 171 F.3d 494, 496 (7th Cir. 1999) ("[A] public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels."); *cf.* Frederick Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 244 ("Regardless of whether a modern-day McAuliffe might have the right to talk politics on his own time, it is clear that he could be legitimately dismissed for delivering a political oration when he was supposed to be directing traffic." (footnote omitted)).

200. *Cf.* Rosenthal, *supra* note 55, at 531-32 (arguing that employee-speech restrictions "should be considered constitutionally unobjectionable when they require an employee to do her job consistent with office policies, rather than when they attempt to coerce her ideological conformity in the workforce").

201. *E.g.*, Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("This is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope.").

202. *See* Post, *supra* note 198, at 164 ("Within managerial domains, the state organizes its resources so as to achieve specified ends.").

203. *See supra* Part III.B.

204. *See* Kozel, *supra* note 55, at 1024 ("An employee such as McPherson might well give her employer useful information about her value to the office by 'cheer[ing] for the robbers' when she is supposed to be 'rid[ing] with the cops,' even when there is no acute and demonstrable operational disruption resulting from her speech." (quoting Rankin v. McPherson, 483 U.S. 378, 394 (1987) (Scalia, J., dissenting))).

when the speaker is a government worker, his employer should be allowed to react to statements that cast doubt upon his fitness for duty—just as the employer is free to react to other indicators of performance, such as workplace productivity. The Constitution does not require that an employee's speech be disregarded for purposes of evaluating his suitability and aptitude.

Some inferences about fitness for employment will be relatively uniform across different institutions. For example, it is well accepted that a government employer may react to employee speech that demonstrates functional incompetence to perform assigned tasks.[205] As Judge Easterbrook has put it, the government "as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door."[206] We might imagine a similar line of analysis for speech that suggests a tendency toward detrimental workplace conduct. When an employee states that "[e]veryone in this office is underpaid and entitled to steal what he

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205. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990) ("A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient."); Wales v. Bd. of Educ., 120 F.3d 82, 84 (7th Cir. 1997) (noting that speech can provide "a sound reason for an employer to act" when "it reveals information relevant to performance on the job"); *id.* at 85 ("What people say reflects or presages what they do, and employers (public and private alike) therefore may properly consider job-related speech when making decisions."); Papandrea, *supra* note 3, at 2166 ("Although an employee's off-duty, non-work-related speech should be entitled to a strong presumption of constitutional protection, the government employer must be given the authority to suppress or punish that speech when the speech reveals that the employee is unfit to perform his job duties."); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1185 (2007) ("[I]f the employee's speech indicated his incompetence or unfitness for the assigned work responsibilities, the government employer's interest in efficiently providing services to the public routinely outweighed the expressive rights at issue."); Schauer, *supra* note 199, at 229 (noting that under *Pickering*, employee speech "is covered, but it is not protected ... if it can be shown to call into question the teacher's competence as a scholar or teacher"); *id.* at 243 ("I have the right to believe that the world is flat or that astrology tells us more than the theories of Newton and Einstein. I also have the right to express these views to anyone foolish enough to listen. But if I am the head of the physics department at a major state research university, I can hardly deny that such public utterances might validly cause my superiors to wonder if perhaps I am in the wrong line of work and to take appropriate action.").

206. Feldman v. Ho, 171 F.3d 494, 496 (7th Cir. 1999); *cf.* Schauer, *supra* note 111, at 995 ("[P]ublic endorsement of astrology might be thought relevant to hiring or retaining a physics teacher.").

can,"[207] his employer should be permitted to infer that the employee is unfit for government work without waiting for corroborating evidence in the form of actual theft. Perhaps the inference is misguided, and the employee is actually a dedicated and successful worker who was blowing off steam after a grueling day. But making that determination should be committed to the discretion of the employer, who is better positioned than the courts to determine the appropriate conclusion to be drawn from the employee's statement. For First Amendment purposes, the salient point is that the employee's statement meaningfully sets him apart from his fellow citizens, who owe no support to his employer's institutional mission.

It is important to recognize that this rationale for permitting the restriction of employee speech operates independently of any hostile reaction among the listening audience.[208] The proper referent is not the impact of the speech qua speech, but the information the speech provides about its speaker.[209] The government-as-sovereign is neither required nor permitted to assess the suitability of its

207. *Wales*, 120 F.3d at 85 (internal quotation marks omitted).

208. Several commentators have noted the potential impact that a government employee's speech might have on his interactions with the public, often invoking the example of law enforcement officers. *See* David E. Bernstein, *The Red Menace, Revisited*, 100 NW. U. L. REV. 1295, 1321 (2006) ("Few would argue with the proposition that it is important that African American victims of crimes and criminal suspects think that police officers treat them fairly."); Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 OHIO N.U. L. REV. 17, 21 (1996) ("[E]mployees who take controversial positions on certain topics ... (i.e. white supremacy, sexism, anti-semitism) may find that their ability to interact with the public and to perform their job is adversely affected by their speech."); Norton, *supra* note 22, at 60-61 ("Police officers' racist speech that undermines confidence in the agency's declared commitment to evenhanded enforcement may be especially threatening in light of such agencies' equal protection obligations along with historic and continuing concerns about the role of race in the administration of justice."); Rosenthal, *supra* note 55, at 582 ("A police officer who is an avowed racist, for example, creates special problems if he is sent on patrol."). I would suggest that arguments like these be reformulated in terms of the evidence speech provides about the employee's fitness and performance rather than audience reaction.

209. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 573 n.5 (1968) ("We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal."). Jed Rubenfeld has drawn a distinction along related lines between consequences imposed "for speaking" versus consequences imposed "as a result of" speaking. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 777 (2001) ("Whether a person is being punished *for* speaking, rather than as *a result of* it, depends on the kind of wrong or harm that the state seeks to prevent.").

citizens against some ideological baseline. But the government-as-employer must constantly evaluate its employees' performance and aptitude if it has any hope of achieving its institutional objectives. Employee speech will sometimes furnish evidence that supplements the evaluative process. When it does, parity theory does not require employers to look the other way.

Raising the prospect of discipline based on employees' intrinsic qualities and beliefs makes it imperative to identify effective constraints on managerial discretion. Too capacious a conception of the institutional mission could lead to undue interference with employees' "freedom to believe and associate."[210] In the worst-case scenario, the result would be a world in which "the organizational role of employee [was] defined so pervasively as to destroy the constitutional role of citizen,"[211] enabling governments to mold their extensive workforces "into a common intellectual pattern."[212] The recognition that public institutions are vital for the achievement of democratic objectives does not assuage these concerns.[213] There remains the challenging task of determining how the scope of institutional objectives should be identified, articulated, and appropriately cabined.

Parity theory provides a framework for fashioning a solution to this problem. A government employer may prefer that its employees always refrain, even when off the clock, from criticizing the President, commenting on divisive social issues, or using foul language. But the government does not receive so broad a mandate simply by virtue of assuming its employer role. What makes the

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210. *Rutan*, 497 U.S. at 76 ("The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate."); *cf.* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2495 (2011) ("[T]he right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs."); Post, *Racist Speech*, *supra* note 81, at 285 ("[B]ecause public discourse is understood as the communicative medium through which the democratic 'self' is itself constituted, public discourse must in important respects remain exempt from democratic regulation.").

211. Post, *Between Governance and Management*, *supra* note 81, at 1815.

212. Adler v. Bd. of Educ., 342 U.S. 485, 497 (1952) (Black, J., dissenting).

213. *Cf.* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828 (2011) ("[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign.").

government-as-employer different from the government-as-sovereign is the former's authorization to enlist citizens in pursuit of specific institutional objectives.[214] Only when an employee's speech casts doubt on his willingness or ability to promote those objectives is the presumption of parity overcome. In the post-Holmesian era, government employers are foreclosed from using the allure of public employment to create a perfectly docile and like-minded workforce.[215] Yet an employer retains a distinctive license to ensure that its workforce is contributing to the ends it was assembled to achieve.

To illustrate the bounds of institutional mission, consider *Givhan v. Western Line Consolidated School District*.[216] In that case, a teacher was disciplined after raising concerns about the racial impact of various practices within her school.[217] Under a parity-based approach, the teacher's statements did not provide a valid basis for inferring that she was unfit for her job. Whatever the precise contours of the mission of the public schools—an issue we will revisit shortly—they do not include a demand for silence in the face of policies one views as racially discriminatory. Much the same is true of the teacher in *Pickering*.[218] A school board might prefer that its teachers refrain from criticizing its budgetary decisions, even in their off-the-clock expressions. But such criticism does not provide any basis for inferring that the speaker lacks suitability for or dedication to the public schools' legitimate mission.[219]

For another example, let us build from Justice Scalia's dissent in *Rankin v. McPherson* by imagining an attorney at the Equal Employment Opportunity Commission (EEOC) who, on his own time and using his own website, espouses the personal conviction

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214. *See supra* text accompanying notes 197-207.

215. *See* Rankin v. McPherson, 483 U.S. 378, 385 (1987) ("Vigilance is necessary to ensure public employers do not use authority over employees to silence discourse.").

216. 439 U.S. 410 (1979).

217. Brief for Petitioner, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979) (No. 77-1051), 1978 WL 206674, at *4-6 (detailing the teacher's complaints); *see* Schauer, *supra* note 199, at 219 ("On frequent occasions during the 1970-71 school year Givhan objected to various practices within the school. Primarily, she contended that racial segregation existed in the appointment and assignment of nonprofessional employees such as administrative and clerical staff and lunchroom workers.").

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

219. *See id.* at 568, 572 (discussing the rights of teachers to speak out on matters of public discourse).

that private business owners should have the economic liberty to hire whomever they wish, even if they use race as a criterion.[220] Given the EEOC's mission of combating racial discrimination in employment, the agency should be permitted to infer from this statement that the employee is not suitable for his job. Even if his periodic performance reviews do not indicate any workplace problems, his speech provides an independent source of evidence about his dedication and likely conduct in pursuit of the EEOC's organizational objectives. The analysis changes if we alter the hypothetical to make the employee a file clerk at the Treasury Department. In the revised scenario, there is a much stronger argument that the employee's statement does not provide a lawful basis for discipline. Unlike the EEOC, the Treasury Department is not charged with enforcing laws against racial discrimination in employment. Although the Treasury Department might prefer employees who personally oppose any use of race in hiring—just as the government-as-sovereign might prefer a similar mindset among all citizens—the contrary belief does not necessarily conflict with the institutional mission of the Treasury Department.

Concerns about viewpoint discrimination and ideological coercion are pervasive in the law of free speech, and they must be taken seriously.[221] So, too, must the related principle that citizens

220. 483 U.S. 378, 400-01 (1987) (Scalia, J., dissenting).

221. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (framing the question as whether "the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate"); Speiser v. Randall, 357 U.S. 513, 530 (1958) (Black, J., concurring) ("We should never forget that the freedoms secured by [the First] Amendment ... are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) ("It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 112 (1980) ("If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate."); *id.* at 114 ("[M]uch valuable free speech, speech that has awakened the public to outrages it had previously been taking for granted, very likely was of a sort that many would have found offensive."); Rosenthal, *supra* note 55, at 542 ("Absent the most compelling

generally should not be punished for thoughts and beliefs that are not manifested in unlawful action.[222] One might draw on these considerations to argue that even an employee whose off-the-clock speech contradicts his employer's mission should be protected from discipline unless there is some other evidence to cast doubt upon his fitness. As noted, however, a government employee is situated differently from other citizens on matters of institutional mission.[223] Implicit in the existence of goal-driven government institutions is the authority to ensure satisfactory employee performance in pursuit of legitimate institutional objectives.[224] The managerial assessments necessary to evaluate professional performance may encompass an employee's words as well as his acts; both provide relevant evidence of his likely contribution to the employer's pursuits.[225] When an employee's expressions suggest a lack of commitment to the mission he was hired to assist in promoting, his employer should not be forced to search for additional evidence of a performance problem whose existence it can already reasonably infer.

Though concerns about viewpoint discrimination do not undermine the relevance of institutional mission, they serve as a useful reminder of the need for sensitivity. Resolving disputes over employee speech will often require exploring the unique mission of a

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circumstances, discrimination against disfavored ideas or viewpoints is almost never tolerated under the First Amendment."); Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 35-36 (Michael Ignatieff ed., 2005) ("If government may not under the First Amendment distinguish between Republicans and Communists ... then the government may not, so American First Amendment doctrine insists, distinguish between espousals of racial equality and espousals of racial hatred.").

222. *Cf.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (noting the "danger" that "the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription"); *Speiser*, 357 U.S. at 536-37 (Douglas, J., concurring) ("Advocacy which is in no way brigaded with action should always be protected by the First Amendment. That protection should extend even to the ideas we despise.... It is time for government—state or federal—to become concerned with the citizen's advocacy when ideas and beliefs move into the realm of action."); Post, *Racist Speech*, *supra* note 81, at 291 ("In a democracy, as Piaget notes, 'there are no more crimes of opinion, but only breaches of procedure. All opinions are tolerated so long as their protagonists urge their acceptance by legal methods.'" (quoting JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 57 (M. Gabain trans., 1948))).

223. *See supra* notes 128, 192 and accompanying text.

224. *See supra* text accompanying note 124.

225. *See* Rosenthal, *supra* note 22, at 46-47 (discussing the need to evaluate employees' speech to determine whether it contributes to achieving work place objectives).

particular government institution rather than relying on global, across-the-board assessments.[226] Those explorations must occur despite the Supreme Court's reluctance, which commentators including Fred Schauer have noted,[227] to focus on institutional distinctions in the course of articulating and applying First Amendment principles.[228]

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226. As Lawrence Rosenthal has put it, there must be "an examination of the objectives of the institution at issue to assess whether the type of content or viewpoint discrimination at issue is a proper incident to institutional objectives." *Id.* at 90; *cf.* Post, *Racist Speech*, *supra* note 81, at 325 ("[T]he constitutionality of restraints on racist speech within public universities will depend to a very great extent upon the educational purposes that we constitutionally attribute to public institutions of higher learning, and upon the various modalities through which such institutions are understood to pursue those purposes.").

227. *See, e.g.*, Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1755 (2007) ("Throughout First Amendment doctrine, it is the speech and not the speaker that generally matters, and, accordingly, obvious institutional differences among types of speakers are routinely ignored, including those institutional differences whose recognition might well serve important First Amendment values and purposes."); Schauer, *supra* note 172, at 116 ("[G]iving certain institutions special First Amendment status ... would require the Court to inquire much more deeply into the specific character of the institution, and the functions it serves, than it has been willing to do." (footnote omitted)).

228. The Supreme Court has begun exploring the relevance to government employment of one type of belief: political ideology, especially as reflected through party affiliation. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990); Branti v. Finkel, 445 U.S. 507, 508 (1980); Elrod v. Burns, 427 U.S. 347, 349 (1976). It has instructed that party affiliation is a permissible basis for employment actions only with respect to "certain high-level employees" who tend to hold—but need not always hold—confidential or policymaking roles. *Rutan*, 497 U.S. at 74; *accord Branti*, 445 U.S. at 518 ("[I]t is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character.... It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position." (citation omitted)). The ambiguity of this standard has led to sharp criticism. *See, e.g.*, *Rutan*, 497 U.S. at 92 (Scalia, J., dissenting) ("Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an 'appropriate requirement.'"). The Court's recognition that party affiliation provides a lawful criterion for at least some employment actions, combined with the unique history of patronage practices going back to the country's founding, leads me to think the patronage cases are best understood as presenting a one-off problem whose solution is informed by, but not necessarily dictated by, the general framework for determining the First Amendment protection of government-employee speech. *See, e.g.*, *id.* at 96 ("[P]atronage was, without any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic until *Elrod*."); *Elrod*, 427 U.S. at 353 ("Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of Thomas Jefferson, although its popularization and legitimation primarily occurred later, in the Presidency of Andrew Jackson." (footnotes omitted)); *id.* at 376 (Powell, J., dissenting) (describing patronage as "a

Few institutions will pose a greater challenge than the public schools.[229] As illustrated by cases like *Pickering* and *Givhan*, the judiciary is regularly called upon to define the expressive rights of educators.[230] Parity theory demonstrates that resolving these cases will often require an antecedent discussion about schools' legitimate institutional missions,[231] including the recognition that schools at different educational levels may themselves have missions that vary in significant respects.[232] The crux of the problem is the extent to which schools may endorse and transmit preferred normative values,[233] as opposed to presenting themselves as receptive to all ideological viewpoints. Note that even this latter approach is not truly "neutral." A school's decision to tolerate expressions it perceives as wrong or harmful may reflect, for example, a vision of

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practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics"). For present purposes, I set aside those cases, as well as *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), which dealt with political campaigning by federal employees, to focus on employee speech more broadly.

229. *Cf.*, *e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952) ("A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public education officials shall compel youth to unite in embracing.").

230. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); *see also, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); *Adler*, 342 U.S. 485; Wales v. Bd. of Educ., 120 F.3d 82 (7th Cir. 1997).

231. *See* Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 47 (2008) ("Perhaps the most intriguing question posed by the litigation, decision, and opinions in [*Morse v. Frederick*, 551 U.S. 393 (2007),] is one that the various Justices who wrote in the case never squarely addressed: What *is* the 'mission'—i.e., the 'basic educational mission'—of public schools?" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986))); *id.* at 56-57 ("It is precisely because education is really, in the end, the process and craft of soul-making, and is as much about transmitting values and loyalties to our children as it is about outfitting them with useful data and 'skill sets,' that we care, argue, and even fight so much about it.").

232. *See* Post, *Racist Speech*, *supra* note 81, at 323-24 (describing a vision of public education at the university level whose "telos ... lies in the pursuit of truth" through "unfettered freedom of ideas" along with "honesty, fidelity to reason, and respect for method and procedures"); Schauer, *supra* note 172, at 117 ("[A] wide sociological, cultural, and functional gulf exists between the primary or secondary school and the research university.").

233. *See* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 122 (4th ed. 2002) ("[I]f the transmission of knowledge cannot be disentangled from socialization to values, who may or must be allowed to shape the content and methods of the education effort, and what sort of limitations, if any, are imposed by our laws and Constitution?").

public education as geared toward "the creation of autonomous citizens, capable of fully participating in the rough and tumble world of public discourse."[234] By comparison, an approach that treats certain viewpoints as improper and unwelcome may suggest the belief that public education is "a process of cultural reproduction, whereby community values are authoritatively handed down to the young."[235]

The parity-based model of employee speech requires candid engagement with these fundamental tensions. In reviewing the imposition of employment discipline resulting from a teacher's public remarks, the question should not be whether the statements provoked disapproval from the listening public. Rather, a court should consider whether the statements contradicted the school's legitimate institutional mission. If the answer is yes, the teacher has provided a valid basis for doubting his fitness and performance. If the answer is no, the teacher's speech should be protected from discipline, regardless of whether it caused a stir. In the latter scenario there is no meaningful basis for treating the teacher differently than his peers in the general citizenry, who often create disruptions that the government is required to tolerate.

Disagreements over the proper role of public schools, as well as the intersection of public education and individual expression, are longstanding and multifaceted. The aim of this Article is not to wade into them by advocating one approach over another. My contention is that the mission of the schools should *matter* in resolving disputes over teachers' speech. In other words, teachers' First Amendment rights are necessarily derivative. A court cannot determine the bounds of individual teachers' expressive liberties on issues such as politics, race, and sexuality until it understands the appropriate role of the public schools in addressing such topics. The same is true for employees of other governmental institutions.

It is fair to ask whether this sort of inquiry into the scope of institutional mission is an undertaking properly committed to the

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234. Post, *Racist Speech*, *supra* note 81, at 321; *cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

235. Post, *Racist Speech*, *supra* note 81, at 319; *see also id.* ("The validity of those values is largely taken for granted, and there is a strong tendency to use them as a basis for the regulation of speech in the manner of the traditional common law.").

judiciary. For the reasons expressed, I view the assessment of mission as an unavoidable element of adjudicating employee-speech claims. As suggested by the examples above, relevant factors will include the employer's day-to-day operations, functional goals, origins, and history.

In the event that one perceives such matters as beyond the competence of the courts, intermediate options are available. On the one hand, courts might afford some degree of deference to an institution's own good-faith description of its mission.[236] On the other hand, courts might take a "least common denominator" approach by confining the institutional mission to its absolute core: for a school, the presentation of curricular materials but not the transmission of any normative values; for a police department, the evenhanded enforcement of the laws but not the promotion of societal beliefs about the qualities of law enforcement officers; and so on. Neither of these alternatives is perfect. The former risks allowing too much employer control over speech while the latter raises the opposite concern. But either approach would enhance the doctrine's theoretical coherence relative to the status quo by preserving the essential link between institutional mission and the scope of permissible restriction.

Along with this institutional focus, parity theory requires evaluation of the individual speaker's status within an organization. Though a teacher of political science may evince unsuitability for his job through statements displaying a misunderstanding of "the political philosophy of James Madison,"[237] the calculus would be different if the speaker were a math teacher or clerical employee at the same school. The legitimate evidentiary bearing of a speaker's expressions on his fitness for employment will depend in part on the speaker's particular job. As the Supreme Court noted in *Rankin v. McPherson*, in assessing the effects of employee speech on the employer's mission, "some attention must be paid to the responsibilities of the employee within the agency."[238] There are many respects

236. In a forthcoming book, Paul Horwitz discusses the prospect of deference to various institutional actors in advancing his theory of an institution-centric First Amendment. *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (forthcoming 2012).

237. Feldman v. Ho, 171 F.3d 494, 496 (7th Cir. 1999).

238. 483 U.S. 378, 390 (1987); *see also id.* ("The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails."); *id.* at 391 ("We cannot believe that every

in which a government institution's mission will have common application to all of its employees; the example above of an employee announcing his entitlement to steal would put him at odds with his employer's mission no matter his specific role.[239] In other cases, however, gauging the evidentiary relevance of employee speech will require inquiry into the individual speaker's position and scope of responsibilities.

D. Extra-Employment Speech

The utility of parity theory extends to one final question of employee speech doctrine: how to treat speech that is made off the clock and does not address work-related topics. For ease of reference, I refer to such expressions as extra-employment speech, with the term indicating both physical and conceptual distance between the expressions and the workplace.

Under existing law, off-the-clock speech that pertains to the speaker's employment is evaluated under the rubric set forth in *Pickering*.[240] The same analysis applies to speech that is unrelated to the speaker's employment but is uttered within the workplace.[241] What is not entirely clear is how the First Amendment treats speech that bears no connection, physical or conceptual, to the speaker's employment.[242] As discussed above,[243] in *United States v. National Treasury Employees Union* (*NTEU*), the Supreme Court noted the constitutional infirmities in a wide-ranging law that prohibited federal employees from accepting compensation for speaking or

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employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency."). *But cf. id.* at 391 n.18 ("This is not to say that clerical employees are insulated from discharge where their speech, taking the acknowledged factors into account, truly injures the public interest in the effective functioning of the public employer.").

239. *See supra* text accompanying note 207.

240. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

241. *See, e.g.*, *Rankin*, 483 U.S. at 381-83.

242. *See* Papandrea, *supra* note 3, at 2119 ("It is hardly clear from the Court's own jurisprudence that [the conventional framework] applies—or should apply—in cases involving off-duty expression, especially when the expression is not work related."); *id.* at 2139 ("The lower courts disagree about whether and how to apply the public concern inquiry to off-duty expressive activities as well as how to conduct the *Pickering* balancing test.").

243. *See supra* notes 182-85 and accompanying text.

writing.[244] The Court emphasized that the prohibition extended even to expressions having no "connection with the employee's official duties,"[245] such as a mail handler's "lectures on the Quaker religion."[246] This creep into nonemployment matters implicated expressions "within the protected category of citizen comment on matters of public concern."[247]

The Court addressed a related issue ten years later in *City of San Diego v. Roe*, which arose from a police officer's creation and distribution of sexually explicit videos.[248] The Court of Appeals ruled that the videos implicated a matter of public concern.[249] In so holding, it emphasized that the videos were unrelated to the employee's workplace.[250] The Supreme Court reversed, reasoning that "[f]ar from confining his activities to speech unrelated to his employment," the officer took "deliberate steps to link his videos and other wares to his police work."[251]

The language of *NTEU* and *City of San Diego* arguably suggests that when expressions are truly removed from the speaker's employment, the conventional employee-speech calculus is altered through the elimination of the public concern requirement.[252] Some

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244. 513 U.S. 454, 457 (1995).

245. *Id.*

246. *Id.* at 461.

247. *Id.* at 466; *see also id.* at 466-70; *cf. id.* at 464-65 ("Federal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas. They include literary giants like Nathaniel Hawthorne and Herman Melville, who were employed by the Customs Service; Walt Whitman, who worked for the Departments of Justice and Interior; and Bret Harte, an employee of the Mint.").

248. 543 U.S. 77, 78, 80-81 (2004) (per curiam); *see also* Part I.B.1.

249. *See* Roe v. City of San Diego, 356 F.3d 1108, 1113 (9th Cir. 2004).

250. *Id.* at 1119-20.

251. *City of San Diego*, 543 U.S. at 81.

252. For further statements suggesting that extra-employment speech calls for its own distinctive approach, see United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 480 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("In contrast to some of our prior decisions, this case presents no threshold question whether the speech is of public, or merely private, concern. Respondents challenge the ban as it applies to off-hour speech bearing no nexus to Government employment—speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee." (quoting Connick v. Myers, 461 U.S. 138, 149 (1983))); *id.* at 485 ("We do not decide the question—a far harder case for [the speakers], in my view—whether it is constitutional to apply the honoraria ban to speech by this class that bears a relationship to Government employment."); *Connick*, 461 U.S. at 153 n.13 ("Employee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring [sic] different factors into the *Pickering* calculus, and

commentators have gone further by suggesting that extra-employment speech is treated akin to speech by nonemployees.[253] In any event, the question has not been definitively resolved. More importantly for present purposes, examining the issue reveals a theoretical difficulty within the existing jurisprudence.

The problem begins with *Pickering*[254] and what we might think of as the *Pickering* paradox. In explaining its rationale for protecting the teacher from retaliation based on his letter to the local newspaper—which occurred outside the classroom but dealt with school-related topics—the Court emphasized that government workers possess unique expertise in matters related to their employ: "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."[255] That expertise carries special power to advance the public debate, creating a strong societal interest in ensuring that teachers' expressions are protected.[256] At the same time, the *Pickering* Court highlighted the remoteness of the teacher's statements from his employment, noting that "the fact of employment [was] only tangentially and insubstantially involved in the subject matter" of his letter.[257] Thus, the fact that the teacher's employment was only "tangentially" connected to

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might lead to a different conclusion.").

253. *See* Estlund, *supra* note 22, at 1468 ("[A]t some point along the spectrum of work-relatedness, the public employee apparently escapes the *Connick-Pickering* niche and recovers her freedom as a citizen vis-à-vis the government."); Secunda, *supra* note 3, at 688 ("Off-duty public employee speech that has no relation to work (anti-*Garcetti* speech) does not come under the *Pickering* framework and is protected much like normal citizen speech."); *see also id.* at 692 ("Given the complexity of the *Pickering* analysis, public employees may only expect real constitutional protection when blogging if they blog on their personal computers outside of work and in no way related to their work."). *But see* Rosenthal, *supra* note 22, at 65 ("Public employees who occupy a position of public trust can undermine that trust through off-duty conduct that raises sufficiently serious doubts about their integrity or judgment.... In such circumstances, managerial prerogative includes the right to control even off-duty speech that could undermine the employee's on-duty effectiveness.").

254. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

255. *Id.* at 572; *see also id.* at 568 (framing the central issue in the case as whether teachers may be denied the right "to comment on matters of public interest in connection with the operation of the public schools in which they work").

256. *See id.* at 571-72; *see also* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2500 (2011) ("Just as the public has a right to hear the views of public employees, the public has a right to the benefit of those employees' participation in petitioning activity.").

257. *Pickering*, 391 U.S. at 574.

his expressions supported his appeal for constitutional protection.[258] But so did his unique interest and expertise in the school system, which he developed by being a teacher.[259] It appears from *Pickering* that increasing the conceptual distance between a speaker's employment and his expressions both strengthens and weakens his claim to First Amendment protection.

The question becomes which of these dueling propositions ought to be embraced. Parity theory provides an answer, indicating that constitutional protection should track the elements of similarity between employees and other citizens. On the facts of a case like *Pickering*, the critical feature is the disconnect between the teacher's speech and his employment duties. That disconnect left him situated similarly to his nonemployee peers. Thus, notwithstanding the tension within *Pickering*, parity theory reinforces the view that an employee's strongest claim to constitutional protection arises when he most resembles his nonemployee peers.

To be sure, extra-employment speech that is controversial or incendiary might sometimes generate costs even when it has no bearing on an employee's professional fitness as assessed in light of his employer's institutional mission. It does not follow that extra-employment speech is automatically exempt from employer discipline. Recast in terms of parity theory, the issue is whether an employee's statements provide a meaningful basis for treating him differently than members of the general public. Expressions that evince a speaker's unfitness for employment satisfy this test,[260] regardless of whether they are deemed to be related, unrelated, or tangentially related to the speaker's job. Questions inevitably will arise as to how the bounds of the employer's institutional mission should be defined.[261] That inquiry is a significant one, but it maintains the same dimensions regardless of whether the expressions in question bear a superficial connection to the workplace. If speech provides a valid basis for inferring that an employee is unsuitable for his job,[262] it should not be shielded simply because it occurred off-

258. *Id.*

259. *Id.* at 572.

260. For a more extensive discussion of the relevance of institutional mission, see *supra* Part IV.C.

261. *See supra* Part IV.C.

262. *See supra* Part IV.C.

the-clock and dealt with topics unrelated to his official duties.[263] As a result, distinguishing between extra-employment speech and other expressions is unnecessary within a parity-based model. The analytical focus remains the legitimate scope of the employer's institutional mission.[264]

In a thoughtful article, Helen Norton recently contemplated whether certain public officials, such as police officers and school teachers, are "so closely identified with their government employer" that their personal views can never "be dissociated from those of the government."[265] Building from that intuition, we might imagine situations in which statements by government officials would create detrimental effects for popular confidence in the public workforce despite the lack of any connection between the statements and the employers' operational missions. By prohibiting disciplinary actions in such circumstances, the parity-based approach admittedly would require government entities, as well as society at large, to endure certain costs. That consequence is unfortunate, but it is unremarkable once employee-speech doctrine is situated within general First Amendment principles, which commonly treat the harms resulting from speech as the price of expressive liberty. Public reproach for speech that is outside the scope of the employer's mission provides an insufficient basis for restriction, just as public reproach is inadequate to justify governmental suppression in the ordinary course of First Amendment law.

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263. Thus, a parity-based approach would permit termination in a case like *Melzer v. Board of Education*, in which a teacher engaged in off-the-clock speech in support of child molestation. 336 F.3d 185, 188-89 (2d Cir. 2003). Regardless of whether such speech is properly described as related to a teacher's official duties, it would provide a reasonable basis for managerial concerns abut ensuring student welfare, which is part of the institutional mission of the public schools.

264. *See supra* Part IV.C.

265. Norton, *supra* note 22, at 54. Professor Norton ultimately advocates a more contextual approach to the regulation of off-duty speech. *See id.* at 57 ("[A]n employee's off-duty speech that does not explicitly associate itself with the government employer should generally be protected except in unusual circumstances" where the speech "actually undermined [the employer's] own ability to communicate its views effectively.").

CONCLUSION

This Article has introduced a parity-based theory of employee speech founded on the presumption that government employees should be treated similarly to other citizens absent a meaningful ground of distinction beyond the bare fact of employment. The norm of parity stands as the most natural successor to the once-dominant Holmesian approach, which treated the employment relationship as dispositive of First Amendment claims.

Applying the parity lens suggests that central elements of the existing jurisprudence, including the public concern requirement and the *Pickering* balance, are misguided. It also emphasizes the need to confront two vital issues that have been neglected in the Supreme Court's case law: the relevance of institutional mission, and the evidentiary value of expression.