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## Market Norms and Constitutional Values in the Government Workplace

Pauline Kim

*Washington University in St. Louis School of Law, kim@wustl.edu*

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# Market Norms and Constitutional Values in the Government Workplace

(forthcoming *North Carolina Law Review*)

Pauline T. Kim<sup>\*</sup>

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

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

## I. Introduction

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

After the news reports appeared, managers at the FDA began secret surveillance of the electronic communications and computer activities of the employees who had signed the letter.<sup>3</sup> Spyware was installed on government-owned computers and networks used by the targeted employees, allowing FDA officials to monitor all of their email communications, including emails sent and received through personal, password-protected services such as Gmail that were viewed on government equipment or passed through a government-owned network. The software also took “screen shots” of the targeted employee’s work computers, such that any information they viewed could be captured and retrieved later, even if the employees themselves did not save the information. Through use of this surveillance software, the government allegedly captured some 80,000 pages of computer documents over many months, including emails sent to or received from journalists, members of Congress and their staff, attorneys, and other agency scientists who shared similar concerns.<sup>4</sup> The scope of the monitoring was so pervasive that it also captured the employees’

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<sup>1</sup> The letter is available at:

<http://www.whistleblowers.org/storage/whistleblowers/documents/FDAwhistleblowers/letter2transitionteam.pdf>

<sup>2</sup> See, e.g., Alicia Mundy & Jared A. Favole, *FDA Scientists Ask Obama to Restructure Drug Agency*, WALL STREET JOURNAL (Jan. 8, 2009).

<sup>3</sup> The allegations regarding the FDA’s surveillance of the targeted employees is detailed in a complaint filed federal court, available at [http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=1345&Itemid=206](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1345&Itemid=206). This website, maintained by the lawyers in the case, also includes examples of the employees’ electronic communications which were monitored as part of the surveillance program.

<sup>4</sup> Eric Lichtblau & Scott Shane, *Vast F.D.A. Effort Tracked E-Mails of Its Scientists*, N.Y. TIMES (July 14, 2012).

communications with family members, spouses and partners, revealing personal medical and financial information. Several of the employees were eventually terminated by the agency. After the surveillance was publicly revealed, the targeted employees sued, alleging violations of their First and Fourth Amendment rights.

Imagine a similar scenario unfolding in a private firm. Several employees get together to raise concerns about perceived mismanagement or corruption, and their superiors retaliate against them. One form of retaliation involves surreptitious surveillance of their electronic communications. Some employees are fired as a result of their complaints. The employees might claim that their rights of speech and privacy had been violated, but because they are employed by a private firm, they would not be able to invoke First and Fourth Amendment protections as the FDA employees did. Instead, the availability of legal protection would be highly contingent, depending upon such questions as what state they worked in, whether their speech reported a violation of a specific type of statute, and what policies the employer had previously announced. Certain types of speech—for example, employee participation in public debate—would be unlikely to be protected at all. And if, like many private firms, the employer reserved the right to monitor employee communications, the employees would have a difficult time establishing that the surveillance violated their rights.

Should the fact that the controversy at the FDA involved a *government* rather than private workplace make any difference to the legal outcome? The conventional wisdom is that public sector employees enjoy greater rights of speech and privacy than workers in the private sector because the Constitution restrains government employers.<sup>5</sup> Public agencies cannot require their employees to swear loyalty oaths, fire them because of their expression, or subject their personal effects to intrusive searches unless

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<sup>5</sup> See, e.g., Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 179 (1995) (“Inasmuch as free expression is protected by the First Amendment, public employees have greater latitude in this area than do private employees.”); Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1 (1991); Ian Holloway, *The Constitutionalization of Employment Rights: A Comparative View*, 14 BERKELEY J. EMP. & LAB. L. 113 (1993); Tara J. Radin & Patricia H. Wehane, *The Public/Private Distinction and the Political Status of Employment*, 34 AM. BUS. L.J. 245 (1996); Paul Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277 (2012); Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1450; Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 691-92 (1986); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 828 (1997-98) (“public-sector employees enjoy far greater privacy rights than do private-sector employees”).

those conditions are justified by the legitimate requirements of the job.<sup>6</sup> Although these Constitutional guarantees are far from absolute, they provide an important check on the government's power to condition public employment on the relinquishment of employees' constitutional rights. By contrast, constitutional restraints do not apply in the private sector,<sup>7</sup> where employment relationships are largely governed by contract. Market norms dominate there, and most private employers have a great deal of discretion in shaping the terms and conditions of employment, including placing restrictions on their workers' freedom to speak and requiring submission to searches or monitoring practices.<sup>8</sup>

However, the conventional wisdom—that public employees enjoy greater rights by virtue of the Constitution—may no longer hold true. In part, this is because the patchwork of statutory protections covering private employees has been growing. But significantly—and this is the central concern of this essay—constitutional protections for government employees' speech and privacy are eroding, a trend accompanied by explicit or implicit references to private sector norms. More specifically, the Supreme Court has increasingly relied on an analogy between public and private sector workers,<sup>9</sup> suggesting that private employment is an appropriate reference point for evaluating public employees' claims for constitutional protection. Because the market norms dominant in the private sector tend to reinforce broad managerial discretion, the effect of the analogy has been to put downward pressure on public employees' constitutional speech and privacy rights.<sup>10</sup>

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<sup>6</sup> See, e.g., Rankin v. McPherson, 483 U.S. 378 (1987); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952); O'Connor v. Ortega, 480 U.S. 709 (1987); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

<sup>7</sup> See Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

<sup>8</sup> See, e.g. McGarvey v. Key Prop. Mgmt., LLC, 211 P.3d 503 (Wyo. 2009); Edmonson v. Shearer Lumber Prods., 75 P.3d 733 (Idaho 2003); Petrovski v. Fed. Express Corp., 210 F.Supp.2d 943 (N.D. Ohio 2002); Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497 (Tex. Ct. App. 1989).

<sup>9</sup> Although the focus of this essay is speech and privacy rights, the Court has made a similar move in other contexts as well. See, e.g., Borough of Duryea, Pa. v. Guarnieri, 131 S. Ct. 2488 (2011) (Petition Clause); Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008) (invoking the broad discretion that typically characterizes the employer-employee relationship in rejecting a "class of one" equal protection claim against a public employer).

<sup>10</sup> Several scholars have endorsed this trend, arguing that the managerial prerogative of government employers justifies considerably narrowing, or even trumping, their employees' constitutional rights. See, e.g., Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797, 816 (2007); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 60-65 (2008).

Ironically, the analogy was first pressed by employee advocates, as a way of arguing for greater protections in the private sector.<sup>11</sup> They asserted that the threat to fundamental freedoms is much the same, whether the employer is public or private, and urged that constitutional values also be protected in the private workplace.<sup>12</sup> At the time, the analogy was intended to bolster the rights of private employees, by leveraging the greater rights afforded public employees under the Constitution. These arguments were part of a larger literature critical of the state action doctrine, which limits the Constitution's reach to government actors only. Critics have argued that the doctrine is inconsistently applied<sup>13</sup> and conceptually incoherent,<sup>14</sup> and these concerns have sharpened with the growing privatization of government functions.<sup>15</sup>

While debates over the state action doctrine ask whether constitutional norms should be extended to restrain ostensibly private actors, this essay focuses on the converse phenomenon. It highlights—and critiques—a trend toward referencing private sector norms to interpret public employees' constitutional rights of speech and privacy—an example of what Jon Michaels calls “the marketization of the bureaucracy.” He points out that in recent years public employees have confronted attacks on their collective bargaining rights, wage and benefit levels perceived to be “above-market”, and job-security protections, such that the public workplace “increasingly is

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<sup>11</sup> See, e.g., Grodin, *supra* note 5; Summers, *supra* note 5; Wilborn, *supra* note 5; Holloway, *supra* note 5; Radin & Wehane, *supra* note 5.

<sup>12</sup> See, e.g., Grodin, *supra* note 5; Summers, *supra* note 5, at 689.

<sup>13</sup> See, e.g., Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Debate*, 73 GEO. WASH. L. REV. 101, 129 (2004) (describing state action cases “a bewildering series of unpredictable results” that seemingly turn on small factual differences); Charles L. Black, Jr., “*State Action, Equal Protection, and California’s Proposition 14*,” 81 HARV. L. REV. 69, 95 (1967) (“The whole thing has the flavor of a torchless search for a way out of a damp echoing cave.”)

<sup>14</sup> See, e.g., Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1956-57) (“whenever, and however, a state gives legal consequences to transactions between private persons there is a ‘state action’”); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1353- 57 (1982); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985) (arguing that non-state actors may pose as great a threat to fundamental rights as the government); Robert T. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946) (same); Magarian, *supra* note 13 (same).

<sup>15</sup> See, e.g., Symposium, *Public Values in an Era of Privatization*, 116 Harv. L. Rev. 1212 (2003); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000); Sharon Dolovich, *State Punishment and Private Persons*, 55 DUKE L.J. 437 (2005); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367; Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023 (2013); JODY FREEMAN & MARTHA MINOW, *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (Harv. Univ. Press 2009); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

made to resemble what we'd encounter in the private sector.”<sup>16</sup> The phenomenon I analyze here—the reliance on analogies to private sector workplaces in the constitutional cases—can be understood as one aspect of this broader trend of bringing market norms to bear on the government workplace.<sup>17</sup> And to the extent that I criticize that reliance here, my argument suggests some reasons for resisting the wholesale embrace of market norms in the public sector workplace.

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

To be clear, my argument that government employment is distinctive does not equate to an argument against all regulation of private sector employment. It may well be the case that concerns about market failures, non-commodification or social equality justify intervention to protect some employee speech and privacy rights in the private sector workplace.<sup>18</sup> However, the purpose of this essay is to explain why the speech and privacy rights of public sector employees should be protected as a matter of constitutional guarantee. The appropriate degree of protection should be determined by the particular threats posed by the government's exercise of its power as employer, not defined by reference to practices or norms in the

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<sup>16</sup> Michaels, *supra* note 15, at 21.

<sup>17</sup> Adam Shinar similarly argues that public employees are increasingly viewed as being just like private employees, and that the effect is to erode the free speech rights of government employees. See Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1 (2013).

<sup>18</sup> Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 710-20 (1996) (describing market imperfections that may lead to under-protection of employee privacy); Samuel Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013).

private sector. Once that constitutional minimum is established, policy considerations might lead to the development of additional protections for public employees, or for private employees, by appropriate legislative or judicial action. Differing policy judgments will mean that, depending upon the context, private sector employees may sometimes have similar, sometimes greater, and sometimes lesser protections than public employees. But the point of constitutional protections is to ensure a minimum level of protection for public employees against government action that is not vulnerable to shifting legislative judgments.

This essay proceeds as follows. Part II explores the contrasting assumptions that frame employees' speech and privacy claims. Constitutional guarantees establish the backdrop against which employment conditions are measured in the public workplace, while market norms dominate in the private sector. Part III examines more closely the Court's public employee cases, first describing how constitutional doctrine has accommodated the public agency's dual role as both sovereign and employer, then highlighting how the Court has come to emphasize its managerial role by analogizing public employment to the private sector. In Part IV, I contend that relying on an analogy between public and private sector employment when interpreting public employees' constitutional rights is a mistake. As I explain, the public employer differs in its origin, its relation to the market and the mechanisms for holding it accountable, and therefore, the usual rights-based and prudential arguments invoked by private firms to resist employment regulation do not apply. Part V concludes.

One further clarifying note is warranted before proceeding. Even though public employees have other rights that they might claim under the Constitution,<sup>19</sup> this essay focuses on employee speech and privacy because of their connection to concerns about public accountability. Employee speech is often an important means of drawing public attention to abuses of government power. And although transparency plays an important role in ensuring accountability, privacy may also be necessary to nurture valuable

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<sup>19</sup> For example, public employees might claim a right to due process before discharge, the right to be free from invidious discrimination, or the right to associate with other workers to address common concerns. Rights of association are closely related to speech and privacy, and to that extent, the analysis developed here might extend to those rights as well. However, the nature and constitutional source of individuals' associational rights are contested, *see, e.g.*, JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (Yale Univ. Press 2012); Symposium, *Engaging Liberty's Refuge*, 89 WASH. U. L. REV. 1435 (2012), and their significance in the workplace context is further complicated by the salience of employee association for the purpose of collective bargaining. For these reasons, consideration of public employees' associational rights are too complex for consideration here and I put them aside and focus more narrowly on individual speech and privacy rights.



employee speech.<sup>20</sup> As the experience of the FDA employees illustrates, privacy violations—because they entail an exercise of power over another and impose dignitary harms—can be a form of retaliation for disfavored speech. Extensive monitoring and surveillance practices in turn can chill further speech.<sup>21</sup> The relationship between employee speech and privacy is thus close and complex, and the argument developed here is specific to those rights because of the particular role they play in limiting government power.

## II. Private Sector Norms, Public Sector Values

When considering employee speech and privacy rights, public and private sector workplaces operate in distinct legal spheres. For public employees, the starting assumption is that their employer, as a government actor, is constrained by the Constitution. Although accommodations are made for the government's interests as employer, constitutional rights provide the relevant background against which individual disputes are decided. By contrast, in the private sector, market norms predominate. Because the state action doctrine limits constitutional restraints to government actors, constitutional protections for speech and privacy have little direct application to private employers.<sup>22</sup> The terms and conditions of employment are determined through bargaining and mutual agreement between the parties, with the law presuming that employment lasts only so long as both parties desire it to continue.<sup>23</sup> Although the freedom to terminate employment is mutually available in theory, in practice it means that private sector employers have significant discretion not only over the duration of employment, but also over its terms and conditions. Thus, to the extent that private sector employees' speech and privacy rights are protected, those protections represent affirmative interventions against a background norm of private contracting.

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<sup>20</sup> Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV. 901, 920-22 (2012).

<sup>21</sup> See, e.g., Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008).

<sup>22</sup> Exceptions exist where the challenged action can be attributed to the government, as when a private employer's actions are required by a government regulation, see, e.g., *NASA v. Nelson*, 131 S. Ct. 746 (2011); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989), or when the government is entwined in its management or control. See, e.g., *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 178 (6th Cir. 2008).

<sup>23</sup> The law traditionally presumed employment to be at will, leaving the employer free to dismiss its employees "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884). Although recent common law and statutory developments have significantly eroded the employer's unfettered ability to discharge employees for reasons that violate public policy, the general presumption of at-will employment remains in place for every American jurisdiction except Montana.

Employees in the private sector today do receive some legal protection for speech and privacy interests. Statutory interventions at both the federal and state level protect against retaliation for certain types of speech, such as speech asserting employment rights,<sup>24</sup> opposing or reporting employer wrong-doing,<sup>25</sup> or raising collective concerns about workplace conditions.<sup>26</sup> However, because most protections are narrowly defined, vast swaths of speech by private employees remain unprotected. Significantly, the law provides hardly any protection to private employees for the type of speech falling at the core of First Amendment concerns—namely, speech on public issues.<sup>27</sup> When private sector employees participate in public discourse, that speech usually falls between the islands of protection offered under laws protecting specific types of speech, leaving their employers free to discipline or discharge them in response.

Employees in the private sector look to a similar patchwork of laws to protect their interests in privacy. Most interventions address a narrowly defined interest and protections vary considerably from state to state.<sup>28</sup>

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<sup>24</sup> For example, Title VII not only prohibits discrimination in employment, it also forbids employers from retaliating against employees who file a claim or object to practices made illegal under the statute. 42 U.S.C. § 2000e-3(a) (2006). Similar anti-retaliation provisions are found in most protective employment legislation. *See, e.g.*, 29 U.S.C. § 660(c) (2006); 29 U.S.C. § 215(a)(3) (2006).

<sup>25</sup> Common law doctrine and whistleblower statutes sometimes protect private employees discharged for reporting certain illegal or unethical employer activities, but are often quite narrow in their reach. *See* MODESITT & WESTMAN, *supra* note 16, at App. B (table listing examples of private whistleblower statutes). The whistleblower provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act, 29 U.S.C. § 78u-6(h)(1)(A), are also limited, applying only to employees of publicly-traded companies and only when they reported specifically-listed types of fraud or violations of securities regulations. *See* Richard E. Moberly, *Sarbanes-Oxley's Whistleblower Provisions—Ten Years Later*, 64 S.C. L. REV. 1 (2012); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007).

<sup>26</sup> Section 7 of the Act guarantees the right of workers to engage in “concerted activities for . . . mutual aid or protection.” N.L.R.A. § 7, 29 U.S.C. § 157 (1935).

<sup>27</sup> *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L & POL. 295, 309-33 (2012) (reviewing different state statutes). Only one state, Connecticut, grants to private employees a generalized right to speech, forbidding employers from disciplining or discharging an employee “on account of the exercise by such employee of rights guaranteed by the First Amendment. . . .” *See* CONN. GEN. STAT. §31-51q. *See also* Cotto v. United Techs. Corp., 738 A.2d 623 (Conn. 1999) (holding that § 31-51q applies to private employers). A handful of others more narrowly protect employees' rights to engage in political activities or voting, *see* Volokh, *supra* at 328-30, although it is often unclear how far such provisions will extend to protect speech. *Compare* Gay Law Students Assoc., 595 P.2d 592, 610 (Cal. 1979) (holding that the “struggles of the homosexual community for equal rights . . . must be recognized as a political activity”), *with* Vanderhoff v. John Deere Consumer Prods., Inc., No. 3:02-0685-22, 2003 WL 23691107, at \*2 (D.S.C. Mar. 13, 2003) (holding that display of a confederate flag decal is not a political activity).

<sup>28</sup> To illustrate, six states restrict employers' ability to engage in video surveillance at the workplace; four prohibit employers from implanting microchips in employees' bodies;

Broad guarantees of employee privacy are rare and often uncertain in scope.<sup>29</sup> Only in California does the state constitution directly protect privacy from intrusions by private actors, including employers.<sup>30</sup> And while the common law tort of invasion of privacy has sometimes been applied to limit searches of employees' personal effects and private locations,<sup>31</sup> the requirement that any actionable intrusion be "highly offensive to a reasonable person" appears to render the common law far less protective than the Fourth Amendment's "reasonableness" standard.<sup>32</sup> Thus, to the extent that the law protects private sector employees' speech and privacy rights, it does so by carving out exceptions against a background norm of employer prerogative.

In contrast, constitutional values rather than market norms, frame questions about employee speech and privacy in the public sector. Initially, market norms also dominated in the public sector, and public employees were presumed to accept their employment on the terms set by the government. As Oliver Wendell Holmes famously pronounced, "[a person] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>33</sup> However, in a series of cases beginning in the

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twelve require advance notice or consent for electronic monitoring, and ten prohibit employers from requesting that applicants or employees turn over passwords to their social media accounts. See MATTHEW FINKIN, *PRIVACY IN EMPLOYMENT LAW* 959-71 (4<sup>th</sup> Ed. 2013).

<sup>29</sup> For example, the Electronic Communications Privacy Act prohibits the interception of electronic communications and unauthorized access to stored communications, but the statute's exceptions often render its protections inapplicable in the employment context. See, e.g., *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003); *Sporer v. UAL Corp.*, No. C 08-02835 JSW, 2009 WL 2761329 (N.D. Cal. Aug. 27, 2009); *Bohach v. City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996). Employees have had more success under the ECPA in challenging employer access to password protected accounts maintained outside the workplace. See e.g., *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002); *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009); *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914 (W.D. Wis. 2002).

<sup>30</sup> See *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1 (Cal. 1994) (extending the privacy protections of the California Constitution to private actors); *TBG Ins. Servs. Corp. v. Super. Ct.*, 96 Cal. App. 4th 443 (Cal. Ct. App. 2009) (applying *Hill* analysis to private employer, but finding no violation). In Alaska, the constitutional privacy provision does not apply directly to private actors, but may serve as a source of public policy, limiting an employer's ability to condition employment on intrusions into its employees' personal lives. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P. 2d 1123 (Alaska 1989).

<sup>31</sup> See, e.g., *Wal-Mart Stores v. Lee*, 74 S.W.3d 634, 648-49 (Ark. 2002) (search of employee's home); *Johnson v. Allen*, 613 S.E.2d 657 (Ga. App. 2005) (video camera in women's restroom); *Sowards v. Norbar, Inc.*, 605 N.E.2d 468, 474-75 (Ohio Ct. App. 1992) (search of employee's motel room).

<sup>32</sup> See Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221 (1996); Clifford S. Fishman, *Electronic Privacy in the Government Workplace and City of Ontario, California v. Quon: the Supreme Court Brought Forth a Mouse*, 81 MISS. L.J. 1359 (2012); Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277 (2012).

<sup>33</sup> *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

mid-twentieth century, the Supreme Court rejected this approach, holding that government could not condition employment on a relinquishment of constitutional rights.<sup>34</sup> By 1967, it was clear that “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”<sup>35</sup> As the Court explained in *Perry v Sindermann*, “even though a person has no ‘right’ to a valuable government benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.”<sup>36</sup>

Government employment is thus one of the classic situations in which the doctrine of unconstitutional conditions has been applied.<sup>37</sup> While government need not offer certain benefits, when it does so, it may not impose conditions that “produce a result which [it] could not command directly.”<sup>38</sup> Courts and scholars have struggled to articulate a clear test for when government imposed conditions on receipt of a benefit should trigger close constitutional scrutiny,<sup>39</sup> but government employment seems a clear case for its application. Because the threat of dismissal is a “potent means” of penalizing and inhibiting the exercise of individual rights,<sup>40</sup> courts have

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<sup>34</sup> See, e.g., *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>35</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967) (citing *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

<sup>36</sup> 408 U.S. 593, 597 (1972).

<sup>37</sup> As Kathleen Sullivan explains, “[u]nconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference. . . . The imposition of the condition on the benefit poses a dilemma: allocation of the benefit would normally be subject to deferential review, while imposition of a burden on the constitutional right would normally be strictly scrutinized. Which sort of review should apply?” Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421-22 (1989). See also Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1177-78 (1996).

<sup>38</sup> *Perry*, 408 U.S. at 597 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). See also *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (raising constitutional concerns when conditions “pass the point at which ‘pressure turns into compulsion’”).

<sup>39</sup> See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); Dorf, *supra* note 37; Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Sullivan, *supra* note 37; William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

<sup>40</sup> *Pickering v Board of Educ.*, 391 U.S. 563, 574 (1968).

regularly scrutinized government attempts to condition employment on the relinquishment of fundamental rights.<sup>41</sup>

For employees in the public sector, then, constitutional values provide the backdrop against which their claims to speech and privacy are made. As explored in greater detail in the next section, those constitutional claims have always been subject to limitations to accommodate the government's interests as an employer. Nevertheless, constitutional doctrine is clear: public employees may not be compelled to relinquish "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."<sup>42</sup> Similarly, when a government employer undertakes a search or seizure of the property of its employees, the restraints of the Fourth Amendment apply.<sup>43</sup>

Of course, public employees' speech and privacy interests are not protected solely, or even primarily, by the Constitution. Civil service provisions that require good cause for discharging covered employees significantly limit the ability of public employers to act arbitrarily, including in ways that burden their employees' constitutional rights.<sup>44</sup> In addition, statutes, such as whistleblower protection laws or information privacy laws, protect certain specific types of speech or privacy interests. Although these statutes may provide initial restrictions on the government employer, the Constitution provides "a residual protection"<sup>45</sup> of employees' speech and privacy interests. Given the significant gaps in statutory coverage, however, that residual protection is important, establishing a "constitutional floor that catches the most egregious cases of government abuse."<sup>46</sup>

Although a great deal of variation exists in the details, the public and private sectors differ markedly in the overall structure of legal protection. For public employees, constitutional restraints establish background norms regarding employer interference with speech and privacy interests. Congress or state legislatures may choose to define those rights more

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<sup>41</sup> See, e.g., *id.*; *Rankin v. McPherson*, 483 U.S. 378 (1987); *Elrod v. Burns*, 427 U.S. 347, 355 (1976). See also *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party*, 497 U.S. 62 (1990).

<sup>42</sup> *Pickering*, 391 U.S. at 568.

<sup>43</sup> Although the justices in *O'Connor v. Ortega* splintered over the analytic framework to be applied in the case, all nine agreed that the Fourth Amendment applies to the actions of a government employer. 480 U.S. 709, 717 (plurality opinion), 731 (Scalia, J., concurring), 732 (Blackmun, J., dissenting).

<sup>44</sup> Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1477-78 (2007); Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 124-29 (1995); George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 139 (2008).

<sup>45</sup> Rutherglen, *supra* note 44, at 140.

<sup>46</sup> *Id.* at 142.

precisely, expand them, or provide particular procedures for vindicating them. But this legislative activity occurs against a backdrop of the constitutional guarantees safeguarding certain fundamental values. By contrast, in the private sector, the starting assumption is one of managerial prerogative, not constitutional restraint. The background norm assumes that employers should be given wide discretion to manage their businesses as they see fit. If they manage poorly, any consequences will be felt privately, and their employees remain free to seek better options elsewhere. Legal protections for employees in the private sector are carve-outs from the background norm—exceptions created when intervention is deemed necessary to advance important public purposes. When or whether employee interests deserve such protection is thus a matter of shifting political judgments. And, unlike in the public sector, there is no constitutional floor guaranteeing a minimum level of protection.

### III. Constitutional Limits on the Government Employer

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

#### A. A Dual Role

When the Supreme Court held that public employment may not be conditioned on individuals relinquishing their constitutional rights, it did not simply apply existing constitutional doctrine to the employment context. Rather, it recognized that when a public employer acts against its employees, it inhabits dual roles—it is both sovereign *and* employer. Because of its status as sovereign, it must be restrained from using its power in a manner that burdens fundamental rights of speech and privacy. And because it is an employer as well, constitutional doctrine was crafted in a manner that accommodates the legitimate managerial interests of the employer. Thus, although it applied Constitutional restrictions in the public sector workplace, the Court was far more deferential to the government's interests than in other situations in which the government acted purely as sovereign.

The Supreme Court’s public employee speech cases clearly recognize this dual role of the government employer. In *Pickering v. Board of Education*, the Court addressed a public school teacher’s claim that his First Amendment rights were violated when he was fired because he wrote a letter to a local newspaper critical of the school board.<sup>47</sup> The Court affirmed the public benefit of “free and unhindered debate on matters of public importance” as well as Pickering’s interest in participating in that debate.<sup>48</sup> And it recognized that his dismissal from employment significantly burdened the exercise of his right to speak.<sup>49</sup> Ordinarily, when the state exercises power directly in response to citizen speech, its actions are subject to strict scrutiny.<sup>50</sup> In *Pickering*, however, the Court acknowledged that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”<sup>51</sup> As a result, rather than strictly scrutinizing government actions that burdened its employees’ speech rights, the Court balanced the interests of the employee in speaking against the government’s interests “in promoting the efficiency of the public services it performs through its employees.”<sup>52</sup> It thus extended First Amendment protection to public employee speech, but in a form far more deferential to the government’s interests than when the government acts purely as sovereign.

In *Rankin v. McPherson*, the Court explained that the *Pickering* balancing test is “necessary in order to accommodate the dual role of the public employer.”<sup>53</sup> It wrote:

On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, ‘the threat of dismissal from public employment is . . . a potent means of inhibiting speech.’ Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.<sup>54</sup>

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<sup>47</sup> 391 U.S. 563 (1968).

<sup>48</sup> *Id.* at 573 (1968).

<sup>49</sup> *Id.* at 574-75.

<sup>50</sup> *See, e.g., Turner Broad., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (“[L]aws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.”).

<sup>51</sup> *Pickering*, 391 U.S. at 568.

<sup>52</sup> *Id.*

<sup>53</sup> *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

<sup>54</sup> *Id.* (quoting *Pickering*, 391 U.S. at 574).

This dual role means that although the employment context weighs into the analysis, giving the government as employer a freer hand, the fact that the employer is also the government means that the Constitution restrains its actions.<sup>55</sup>

The Supreme Court has acknowledged numerous ways in which public employees' speech rights depart from ordinary First Amendment principles. As it wrote in *Waters v. Churchill*, "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."<sup>56</sup> The usual constitutional tolerance of offensive utterances<sup>57</sup> and false statements<sup>58</sup> does not prevent the government employer from insisting on professional language and accurate statements when its employees deal with the public.<sup>59</sup> Moreover, courts afford greater deference to employer predictions of harm than in other situations when the government seeks to restrict citizen speech.<sup>60</sup> And by suggesting that the maintenance of "discipline by immediate superiors or harmony among coworkers"<sup>61</sup> is a relevant factor in the balancing analysis, *Pickering* appears to be "constitutionalizing a 'heckler's veto'" in the employment setting.<sup>62</sup> Despite the general principle that listener reactions

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<sup>55</sup> See, e.g., *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465-66 (1995); *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994). See also *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (explaining that the *Pickering* balancing test reconciles the employees' right to engage in speech with the employer's legitimate interests in performing its mission).

<sup>56</sup> 511 U.S. 661, 672 (1994).

<sup>57</sup> See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

<sup>58</sup> See e.g., *Gertz v. Welch*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>59</sup> See *Waters*, 511 U.S. at 672. *But see Pickering*, 391 U.S. at 574-75 (holding that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment" unless the statements were knowingly or recklessly false.).

<sup>60</sup> See *Waters*, 511 U.S. at 673. See also *Connick v. Myers*, 461 U.S. at 153-54 (giving additional weight to supervisor's view that employee's speech would disrupt office).

<sup>61</sup> *Pickering*, 391 U.S. at 570.

<sup>62</sup> Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1019 (2005).



cannot justify regulating speech,<sup>63</sup> public employee speech may be unprotected precisely because it causes a stir.<sup>64</sup>

The emphasis on operational efficiency also presents a striking contrast to other First Amendment contexts where concerns of government efficiency are given far less weight.<sup>65</sup> Although the government generally “cannot restrict the speech of the public at large just in the name of efficiency,”<sup>66</sup> governmental efficiency is explicitly a part of the *Pickering* balancing test, and government officials “enjoy wide latitude in managing their offices.”<sup>67</sup> The reason, the Court explained in *Waters*, “comes from the nature of the government’s mission as employer” which elevates its interests in achieving that mission “as effectively and efficiently as possible.”<sup>68</sup> Still, efficiency concerns do not operate as a trump. The First Amendment has a significant limiting role to play because of the strong public benefit of hearing from government employees. As the Court acknowledged, “[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”<sup>69</sup> In addition, individual employees have “a strong, legitimate interest in speaking out on public matters.”<sup>70</sup> The government’s interest as employer is thus accommodated, *not* by trumping its employees’ First Amendment rights, but by allowing its interests to weigh more heavily than in cases involving government restraint of non-employee citizen speech.

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<sup>63</sup> See, e.g., *Forsyth Co., Ga. v. Nat’l Movement*, 505 U.S. 123, 134-35 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”). *But see* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (finding restraint of broadcast speech constitutional because it is uniquely pervasive and available to children); *Chaplinsky v. N.H.*, 315 U.S. 568, 573 (1942) (finding statute constitutional because it restrained fighting words likely to cause a breach of peace).

<sup>64</sup> As Ken Metheny and Marion Crain have argued, “the Court’s public employee speech cases are deeply influenced by a ‘private-sector market maximization model,’ the traditional master-servant image of the employment relation borrowed from the common law, in which management is entitled to demand loyalty from its employees.” Ken Metheny & Marion Crain, *Disloyal Workers and the “Un-American” Labor Law*, 82 N.C.L. REV. 1705, 1735 (2004).

<sup>65</sup> See Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 1987-91 (2012).

<sup>66</sup> *Waters*, 511 U.S. at 675.

<sup>67</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>68</sup> *Id.* at 674-75. *Cf.* *Board of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (noting that government need “to improve the efficiency, efficacy, and responsiveness of service to the public” applies equally to independent contractors).

<sup>69</sup> *Waters*, 511 U.S. at 674.

<sup>70</sup> *Id.*

Just as in the First Amendment context, public employees' privacy rights differ significantly from the protections typically provided by the Fourth Amendment in order to accommodate the government's interests as the employer. In *O'Connor v. Ortega*, the Supreme Court held that the Fourth Amendment applies to searches and seizures of an employee's personal effects by a government employer.<sup>71</sup> *Ortega* involved the claim of a physician employed by a state hospital that his Fourth Amendment rights were violated when hospital administrators searched his office, desk and file cabinets and seized several personal items. Although the Justices agreed that the challenged searches infringed the plaintiff's reasonable expectations of privacy,<sup>72</sup> the plurality noted that the "operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable."<sup>73</sup> Where an employee's office is frequently accessed by supervisors, fellow employees, or the public, an expectation of privacy on the part of the employee may be unreasonable. Similarly, employer policies regulating personal effects in the workplace may undermine a claim of privacy. Thus, according to the plurality, the public employee's expectation of privacy "must be assessed in the context of the employment relationship."<sup>74</sup>

Even if the employee has a reasonable expectation of privacy in light of workplace practices, the protection afforded public employees is markedly different from that typically provided by the Fourth Amendment. Ordinarily, government searches that infringe a legitimate expectation of privacy are considered reasonable only when authorized by a warrant issued on probable cause.<sup>75</sup> The Supreme Court, however, has recognized that a warrant is not required in those situations "in which special needs, beyond the normal need for law enforcement" make the requirement "impracticable,"<sup>76</sup> such as when school officials conduct searches necessary to maintain discipline, or an agency conducts regulatory compliance

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<sup>71</sup> *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>72</sup> All nine justices agreed that *Ortega* had a reasonable expectation of privacy in his desk and files. *See id.* at 728-29 (O'Connor, J., concurring); 731 (Scalia, J., concurring); 732-33 (Blackmun, J., dissenting). Scalia and the four dissenting justices also held that he had a reasonable expectation of privacy in his office. *See id.* at 731 (Scalia, J., concurring); 732 (Blackmun, J., dissenting).

<sup>73</sup> *Id.* at 717.

<sup>74</sup> *Id.* at 717.

<sup>75</sup> *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177 (1990) (ordinary requirement of a warrant); *Mancusi v. DeForte*, 392 U.S. 364, 370 (1968) ("except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant"); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) ("one governing principle . . . has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.").

<sup>76</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring).

inspections.<sup>77</sup> Similarly, the plurality in *O'Connor* reasoned that when a search is undertaken in the government's capacity as an *employer*, its "need for supervision, control and the efficient operation of the workplace" must be balanced against the employees' legitimate privacy interests.<sup>78</sup> Under this standard, instead of the usual requirement of a warrant issued on probable cause, workplace searches need only satisfy a lesser standard of "reasonableness under all the circumstances."<sup>79</sup> As discussed in the next section, Justice Scalia proposed a different test, one which measures searches against practices in the private sector.<sup>80</sup> The plurality, however, accommodated the government's dual roles of sovereign and employer by applying Fourth Amendment constraints, but imposing a less stringent standard of reasonableness.<sup>81</sup>

First and Fourth Amendment protections are thus significantly less demanding in the workplace than in other contexts in order to accommodate the government's interest as employer. Even these less demanding standards, however, offer significant protections for public employees. Utilizing the *Pickering* balancing test, the Supreme Court protected a teacher's complaints to her principal about a school's racially discriminatory practices,<sup>82</sup> and a clerical employee's comments expressing

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<sup>77</sup> T.L.O., 469 U.S. at 337; *Camera v. Municipal Court*, 387 U.S. 523 (1967)

<sup>78</sup> *O'Connor*, 480 U.S. at 719-20.

<sup>79</sup> *Id.* at 725-26. In order to satisfy the demands of the Fourth Amendment, a search must be both "justified at its inception" and reasonable in scope. *Id.* at 726 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The Court wrote: "Ordinarily, a search . . . will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985)). A search will be "permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the suspected misconduct. *Id.*

<sup>80</sup> Scalia would hold that the offices, drawers and files of government employees are covered by Fourth Amendment protections, but that "government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." 480 U.S. at 732 (Scalia, J., concurring).

<sup>81</sup> The Court reaffirmed its basic approach to public employees' Fourth Amendment claims in two subsequent cases challenging drug testing programs. *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602 (1989). In those cases, the Court first asked whether the drug tests intruded on employees' legitimate expectations of privacy, then weighed the government's interest in the testing protocol against the employees' privacy interests. Although scholars have criticized the *O'Connor* plurality's "reasonable expectation of privacy" plus balancing test as providing only anemic protection of public employees' privacy rights, *see, e.g., Don Mayer, Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 AM. BUS. L.J. 625 (1992), it does provide a framework for scrutinizing some public employer intrusions.

<sup>82</sup> *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

hostility toward President Reagan because of his welfare policies.<sup>83</sup> In a similar vein, the Supreme Court invalidated a statute that prohibited federal government employees from receiving honoraria for giving speeches or writing articles as a violation of their First Amendment rights.<sup>84</sup> Other courts have applied the First Amendment to shield a broad range of employee speech, such as an internal memo raising concerns about patient privacy at a state psychiatric hospital,<sup>85</sup> comments to the local media criticizing staff shortages at a fire department,<sup>86</sup> and a publicly-posted flyer critical of a town council's management.<sup>87</sup> Similarly, the deferential Fourth Amendment standard applied to government employers nevertheless offers some protection for employee privacy. Lower federal courts have found public employers to have infringed legitimate expectations of privacy when they recorded employees' personal phone calls,<sup>88</sup> seized and searched the contents of a government-issued laptop,<sup>89</sup> and conducted video surveillance of a locker-break room.<sup>90</sup> And under the framework laid out in the *O'Connor* plurality, they have scrutinized government employer searches to ensure that they are justified and no more intrusive in scope than necessary.<sup>91</sup>

## B. The Analogy to Private Employment

Although the doctrine governing public employees' First and Fourth Amendment rights has always significantly accommodated the government employer's interests, recent cases reveal a more pronounced emphasis on the government's managerial role. The Supreme Court has repeatedly invoked private sector employment as a reference point for analyzing the constitutional rights of public employees. In doing so, it has moved away

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<sup>83</sup> Rankin v. McPherson, 483 U.S. 378 (1987).

<sup>84</sup> United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995).

<sup>85</sup> Rodgers v. Banks, 344 F.3d 587 (6th Cir. 2003).

<sup>86</sup> Moore v. City of Kilgore, Tex., 877 F.2d 364 (5th Cir. 1989).

<sup>87</sup> Gazarkiewicz v. Town of Kingsford Heights, Ind., 359 F.3d 933 (7th Cir. 2004).

<sup>88</sup> Narducci v. Moore, 572 F.3d 313 (7th Cir. 2009).

<sup>89</sup> Maes v. Folberg, 504 F. Supp. 2d 339 (N.D. Ill. 2007).

<sup>90</sup> Rosario v. United States, 538 F. Supp. 2d 480 (D.P.R. 2008).

<sup>91</sup> See, e.g., Narducci, 572 F.3d at 321 (affirming denial of summary judgment because plaintiff presented significant evidence that recording of every phone call for a six-year period was unreasonable in scope); Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1336 (9th Cir. 1987) (remanding to district court to determine whether search of employee's desk and credenza and seizure of materials was relevant to his job and reasonable in scope).

In addition to the privacy protections afforded by the Fourth Amendment, a few lower federal courts have found public employees' interests in avoiding disclosure of personal information protected under the Fourteenth Amendment. See, e.g., Denius v. Dunlap, 209 F.3d 944 (7th Cir. 2000); Nat'l Treasury Emps. Union v. U.S. Dep't of Labor, 838 F. Supp. 631 (D.D.C. 1993); Am. Fed'n of Gov't Emps. v. U.S. R.R. Ret. Bd., 742 F. Supp. 450 (N.D. Ill. 1990).

from its understanding of the public employer as occupying dual roles and instead focused predominantly on its role as manager.

The Court's opinion in *Garcetti v. Ceballos*<sup>92</sup> illustrates this shift in emphasis. The plaintiff Richard Ceballos, a state prosecutor, objected to what he believed to be serious deficiencies in a search warrant obtained by the sheriff's office. He raised his concerns verbally and followed up with a disposition memorandum recommending dismissal,<sup>93</sup> but his supervisors nevertheless decided to proceed with the case. Believing that he was obligated to so under *Brady v. Maryland*,<sup>94</sup> Ceballos turned over his memorandum as exculpatory evidence to defense counsel, and later disagreed with his supervisor regarding his testimony at a suppression hearing.<sup>95</sup> He alleged that he was retaliated against after the hearing, in violation of his First Amendment rights. The Court rejected his claim, holding that because his speech constituted part of his "official duties", he was not "speaking as [a] citizen[] for First Amendment purposes" and therefore, his employer's actions are not subject to constitutional scrutiny.<sup>96</sup>

While continuing to pay lip service to the interests of the individual employee speaker and of the public in hearing that speech, the majority opinion emphasized the importance of "managerial discretion" and "managerial discipline."<sup>97</sup> The Court pointed out that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."<sup>98</sup> Expressing concerns about the "displacement of managerial discretion,"<sup>99</sup> the Court concluded that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."<sup>100</sup> Thus, in the Court's view, the First Amendment has no application at all when it comes to speech that is a part of the employee's job duties.<sup>101</sup>

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<sup>92</sup> 547 U.S. 410 (2006).

<sup>93</sup> *Id.* at 414-15.

<sup>94</sup> 373 U.S. 83 (1963).

<sup>95</sup> 547 U.S. at 442 (Souter, J., dissenting).

<sup>96</sup> *Id.* at 421.

<sup>97</sup> *Id.* at 422-25.

<sup>98</sup> *Id.* at 418 (emphasis added).

<sup>99</sup> *Id.* at 423.

<sup>100</sup> *Id.* at 424.

<sup>101</sup> The *Garcetti* decision has sparked considerable scholarly commentary, much of it critical. Scholars have criticized the decision for, among other things, relying on a false distinction between citizen speech and employee speech. See e.g., Erwin Chemerinsky, *The Rookie Year of the Roberts Court & A Look Ahead*, 34 PEPP. L. REV. 535, 538 (2007); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008). They have also argued that it fails to adequately protect speech necessary to inform the public of government wrong-doing, see, e.g., Chemerinsky, *supra*; Nahmod, *supra*; Helen

The analogy between the government and private employer does a great deal of rhetorical work in *Garcetti*. As discussed above, the Court’s earlier precedents had emphasized the “dual role” of the public employer<sup>102</sup> and the need to balance the competing interests at stake. Applying those precedents, the Ninth Circuit easily concluded that Ceballos’s speech—raising concerns about alleged government misconduct—was on a matter of public concern, and proceeded to engage in the *Pickering* balancing analysis.<sup>103</sup> By invoking norms in the private sector workplace, the Court pretermitted this analysis. Just as in the private sector, the Court suggested, speech made pursuant to an employee’s job duties is simply part of what the employee has contracted to perform and not a matter of constitutional concern. Removing “official duty speech” from First Amendment protection thus made it irrelevant that Ceballos was speaking on a matter of public concern and avoided the need to scrutinize the government’s actions at all.

In concluding that Ceballos was “not speaking as [a] citizen[.]”,<sup>104</sup> the Court drew a sharp line between the citizen-government relationship and the employee-employer relationship, implicitly assuming that a categorical distinction exists between the two and that public employee speech can be neatly sorted into one category or the other. Extrapolating from this analysis, some scholars have drawn the inference that public employees’ speech rights should mirror that of private sector employees.<sup>105</sup> For example, Patrick M. Garry praised the *Garcetti* decision for drawing a “fundamental distinction” between the relations of individual speaker-government and government employee-employer.<sup>106</sup> In the latter situation, Garry argues, no constitutional protection should come into play, because “[p]ublic employees should not gain additional rights [through the Constitution] that private employees do not have.”<sup>107</sup> In a similar vein, Lawrence Rosenthal applauds the emergence of what he calls a “First Amendment law of managerial prerogative.”<sup>108</sup>

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Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75 (2008); Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117 (2008); and that it allows government to evade scrutiny of its actions by broadly defining employees’ job duties. See, e.g., Nahmod, *supra*.

<sup>102</sup> See, e.g., Rankin, 483 U.S. at 384.

<sup>103</sup> *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2003).

<sup>104</sup> *Garcetti*, 547 U.S. at 421.

<sup>105</sup> See, e.g., Garry, *supra* note 10; Robert Roberts, *The Supreme Court and the Deconstitutionalization of the Freedom of Speech Rights of Public Employees*, 27 REV. OF PUB. PERSONNEL ADMIN. 171 (2010); Kermit Roosevelt III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631 (2012); Rosenthal, *supra* note 10.

<sup>106</sup> Garry, *supra* note 10, at 813.

<sup>107</sup> *Id.* at 816.

<sup>108</sup> Rosenthal, *supra* note 10, at 39. According to Rosenthal, managerial prerogative means that “management necessarily enjoys the prerogative to evaluate [an employee’s

Others have been highly critical of the assumption that citizen speech is entirely distinct from government employees' official duty speech. Justice Souter's dissenting opinion, for example, criticized the majority for ignoring the possibility that an employee speaking pursuant to her job duties may also be speaking as a citizen.<sup>109</sup> He argued that the public employee may still "wear a citizen's hat"<sup>110</sup> even or perhaps *especially* when speaking on matters within his job duties. Similarly, the public's interest in hearing the speech is not diminished merely because it falls within the speakers' job duties.<sup>111</sup> Yet, by characterizing Ceballos' objections to the search warrant as solely employee speech, the *Garcetti* majority removes it entirely from constitutional protection and makes the denial of Ceballos' claim seem inevitable. As Cynthia Estlund puts it, "the majority chooses to empower the public employer by adopting the analogy of private sector employment at will."<sup>112</sup>

The comparison between public and private workplaces also shapes the analysis in cases analyzing public sector employees' privacy rights. As discussed above, the plurality in *O'Connor v. Ortega* emphasized the employment context in determining whether a reasonable expectation of privacy exists and in setting the standard of reasonableness that should apply. Justice Scalia's concurring opinion proposed a different test that takes the analogy to the private sector even further. The government, he argued, "like any other employer, needs frequent and convenient access to its desks, offices and file cabinets for work-related purposes."<sup>113</sup> Looking to practices in the private sector as an appropriate standard, he asserted that "searches of the sort that are regarded as reasonable and normal in the private-employer context [] do not violate the Fourth Amendment."<sup>114</sup>

In the years following the *O'Connor* decision, most courts and litigants operated under the assumption that the plurality opinion governed, and they

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duty related] speech . . . [and] to take whatever remedial action it deems warranted." *Id.* at 43. He acknowledges that "in the private sector, managerial prerogative includes essentially unfettered power to regulate employee speech within applicable statutory and contractual parameters," *id.* at 65, but sees one exception in the public sector context—government may not discriminate on the basis of partisan affiliation unless it is a bona fide qualification for the position. *Id.* at 65-66.

<sup>109</sup> 547 U.S. at 430-33 (Souter, J., dissenting). See also Chemerinsky, *supra* note 101; Corbin, *supra* note 101; Nahmod, *supra* note 101.

<sup>110</sup> *Garcetti*, 547 U.S. at 430.

<sup>111</sup> *Id.* at 433.

<sup>112</sup> Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115 (2007). Estlund further notes that the Court "tells us precisely nothing about *why* the majority chooses that analogy in this case but not in others." *Id.*

<sup>113</sup> 480 U.S. at 732 (Scalia, J., concurring).

<sup>114</sup> *Id.*

rarely analyzed or even mentioned Scalia’s alternative test.<sup>115</sup> However, the Supreme Court’s decision in *City of Ontario v. Quon*<sup>116</sup> focused renewed attention on Scalia’s concurrence by highlighting the disagreement between him and the plurality in *O’Connor*. It concluded, however, that it “is not necessary to resolve” which test is the controlling precedent, because either would lead to the same result under the facts in *Quon*.<sup>117</sup>

Scalia’s proposed standard—that “searches of the sort that are regarded as reasonable and normal in the private-employer context” satisfy the Fourth Amendment—is highly indeterminate. The test might be interpreted in several different ways. It could mean that if a practice is *legal* for private employers to engage in, a public employer does not violate constitutional standards when it does the same thing.<sup>118</sup> Alternatively, the test could mean that if a given practice is *commonly observed* in the private sector, it satisfies constitutional standards. Or, putting emphasis on the word “reasonable”, the test might be asking whether the practice is one that reasonably should be permitted in the private sector in light of societal norms. Each of these interpretations raises considerable difficulties in determining exactly what should be considered “reasonable and normal” in the private sector workplace.

There is another possible interpretation of Scalia’s “reasonable and normal in the private employer context” test—namely, that public sector employees have no greater rights to privacy than what private employees

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<sup>115</sup> See, e.g., *Narducci v. Moore*, 572 F.3d 313 (7th Cir. 2009); *Biby v. Bd. of Regents*, 419 F.3d 845 (8th Cir. 2005); *Leventhal v. Knapek*, 266 F.3d 64 (2nd Cir. 2001). In the small handful of cases in which a lower court analyzed Scalia’s concurrence separately, it usually concluded that the plurality opinion controlled. See, e.g., *United States v. Gonzalez*, 300 F.3d 1048, 1053 (9th Cir. 2002) (reading *O’Connor* as establishing the test set out in the plurality opinion); *Shields v. Burge*, 874 F.2d 1201, 1203-4 (7th Cir. 1989) (concluding that the *O’Connor* plurality’s reasonableness test governs because Justice Scalia did not articulate a different standard, but if he did, the plurality’s test is the Court’s least-common-denominator holding); *Schowengerdt v. Gen. Dynamics Copr.*, 823 F.2d 1328, 1335 (9th Cir. 1987) (citing Scalia concurrence in *O’Connor* as supporting plurality’s reasonableness test).

<sup>116</sup> 130 S. Ct. 2619 (2010).

<sup>117</sup> 130 S. Ct. at 2628-29.

<sup>118</sup> Some commentators appear to interpret Scalia’s proposed test in the first way. For example, Clifford S. Fishman reads Scalia’s concurrence in *O’Connor* as arguing that government employees “should enjoy no greater (and no lesser) right to privacy than an employee of a non-governmental entity.” Fishman, *supra* note 32, at 1410 (describing Justice Scalia’s test as holding that “a government employee’s constitutional right to privacy in the workplace should be the same as the legal privacy rights of employees in the private workplace”). Similarly, Paul Secunda describes Scalia’s test as asserting that privacy rights in the public workplace should be the same as in the private workplace. Secunda, *supra* note 32, at 281. On this assumption, Fishman and Secunda each analyze the common law invasion of privacy tort as applied in the private employment setting to determine what rights public employees would have under Scalia’s test. Fishman, *supra* note 32, at 1383; Secunda, *supra* note 32, at 294.



receive *under the federal Constitution*. And because employees in the private sector receive *no* protection from the Fourth Amendment against searches by their employers, the implication is that public sector employees shouldn't either. Employees of private firms have Fourth Amendment rights against the government when it acts purely in its sovereign capacity—as when the police search for evidence of criminal wrongdoing in a suspect's office—and so, too, does the government employee. When, however, an employee complains of intrusive searches by her employer, the Fourth Amendment would provide no protection at all to either the public or private sector employee. If this interpretation is correct—and it is arguably most consistent with language elsewhere in Scalia's concurrence—it represents an implicit repudiation of the doctrine, repeated in numerous cases over decades, that government employment cannot be conditioned on the relinquishment of constitutional rights.<sup>119</sup>

Most recently, the Supreme Court relied on a comparison with private sector employment in *NASA v. Nelson*,<sup>120</sup> which challenged the intrusiveness of government-required background investigations. The plaintiffs, employees of a federal contractor, argued that questions seeking information about treatment or counseling for illegal drug use and open-ended inquiries calling for any type of adverse information from third parties violated their constitutional right to informational privacy.<sup>121</sup> The Court “assume[d], without deciding” that the Constitution protects a “privacy ‘interest in avoiding disclosure of personal matters,’”<sup>122</sup> but nevertheless rejected plaintiffs’ claims. Emphasizing that this case involved the Government’s role as “proprietor” and “manager,” rather than regulator, the Court stressed the “‘wide latitude’ granted the Government in its dealings with employees.”<sup>123</sup> It noted that the types of inquiries that the plaintiffs objected to are “part of a standard employment background check of the sort used by millions of private employers”<sup>124</sup> and concluded that the reasonableness of such questions “is illustrated by their pervasiveness in the

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<sup>119</sup> See, e.g., *O’Hare*, 518 U.S. at 717 (“A State may not condition public employment on an employee’s exercise of his or her First Amendment rights.”); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (observing that government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech” and noting the frequent application of this principle in the public employment context); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967) (rejecting premise “that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action”).

<sup>120</sup> 131 S. Ct. 746 (2011).

<sup>121</sup> See *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

<sup>122</sup> *Nelson*, 131 S. Ct. at 751 (citing *Whalen*, 429 U.S. at 599-600).

<sup>123</sup> *Id.* at 761.

<sup>124</sup> *Id.* at 758.

public and private sectors.”<sup>125</sup> The analogy to the private sector thus allowed the Court to dismiss the plaintiffs’ claims without actually deciding whether a right of information privacy exists and if so, when it restrains the government employer. Instead, the Court presumed that even if such a right exists, the prevalence of similar investigative practices in the private sector would negate the constitutional claim.

References to the private sector workplace are increasingly common in cases addressing public employees’ constitutional rights, and yet the Court has not clearly spelled out why the analogy is relevant or what role it should play in shaping constitutional standards. Instead, the comparison with private sector employment serves a rhetorical function. It suggests that the employment context is the most important factor for the constitutional analysis. By doing so, it renders the government employer’s managerial needs far more salient, while obscuring the fact that it is also, still, the government. Attention is directed away from the values underlying constitutional guarantees of speech and privacy and focused instead on the market norms that prevail in the private sector. As a result, the government’s dual role—as employer and sovereign—disappears from view. Using private employment as a reference point thus shifts the frame of reference in way that tends to emphasize market norms at the expense of constitutional values.

#### IV. A Mistaken Analogy

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

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<sup>125</sup> *Id.* at 761. Although the Court’s opinion did not expressly equate constitutional standards with practices in the private sector, an exchange during oral argument suggests the reasoning behind the analogy. Chief Justice Roberts asked Neal Katyal, the Acting Solicitor General, during oral argument: “Do you think the Government’s right to inquire in the employment context is exactly as broad as a private employer’s right?” Oral Argument at 14:7-9, *NASA v. Nelson*, 131 S.Ct. 746 (No. 09-530), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-530.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-530.pdf). Katyal responded: “[T]he private employers are a good template. If the Government is simply mirroring what private employers do, as Justice Scalia said in *O’Connor v. Ortega*, that’s a good suggestion that what it’s doing is reasonable.” *Id.* at 14:11-15.

between public and private employment overlooks important differences between the two sectors.

Scholars who argue for greater protection of the rights of private employees to match those of public employees focus on the similarities in workers' interests across the two sectors. Joseph Grodin, for example, argues that "an employee's interest in expressing his views, in protecting his privacy against intrusion, or in being treated fairly is the same whether his employer is a governmental entity or a private corporation."<sup>126</sup> Although acknowledging that different considerations come into play when the government is the employer, he asserts that the availability of constitutional rights to protect public employees "provides strong support for a claim by private employees that they are entitled to equal respect."<sup>127</sup>

Scholars who defend the Court's move toward a more managerial approach to interpreting public employees' constitutional claims also emphasize the similarities in the situation of public and private sector employees. Kermit Roosevelt, for example, suggests that public employees are not threatened with any greater coercive threat to their liberty than private employees, because the government employer, like the private firm, cannot put its employees in jail if it disapproves of their speech.<sup>128</sup> Others have argued that when threatened with job loss government employees can exercise the same option available to any employee—namely, seeking alternative employment, either elsewhere in the public sector or at a private firm.<sup>129</sup> Focusing on whether employer demands feel coercive makes the situation of public and private sector employees look similar. An employee who fears losing her job if her speech displeases her employer and therefore stays silent has experienced much the same type of compulsion whether she works for a firm or a government agency.

Although things might look similar from the employee's perspective, looking at the employer's side of the equation suggests some real differences. The objections typically raised against regulating private

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<sup>126</sup> Grodin, *supra* note 5, at 14.

<sup>127</sup> *Id.* at 15.

<sup>128</sup> Roosevelt, *supra* note 105, at 639-40. Of course, the government's threatened use of force is not necessary to find a constitutional violation. The Supreme Court has repeatedly and in a wide variety of contexts held the Constitution to restrain government activity, even when the use of force was not in the offing. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1318 (1984) ("[I]t is hard to imagine any modern constitutional theorist taking the position that only a direct threat of violence would violate constitutional rights."). Thus, the Court has found that the Constitution constrains government when, for example, it assesses property for taxing purposes, *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336 (1989); puts conditions on the provision of public services, *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); establishes zoning regulations, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and acts in a variety of other regulatory capacities.

<sup>129</sup> Garry, *supra* note 13, at 816; Kozol, *supra* note 71.

employers turn out not to apply or to lose force when the government is the employer. In this Part, I examine two types of claims—rights-based and prudential—which are commonly made to oppose employment regulation in the private sector. Rights-based arguments claim that employers themselves have rights against the state, which may be infringed by workplace regulation. Arguments based on prudential considerations assert that regulating the terms and conditions of employment is unnecessary or even counter-productive given that firms are subject to the discipline of market forces. Both these types of arguments are highly contested even when asserted by private firms. However, whether or not they are persuasive in the context of private sector employment, they have little application to government employment. Because the government employer stands in a different relationship to the public and to the market, it is a mistake to rely on an analogy to the private workplace to interpret public employees’ rights.

#### A. Rights-Based Arguments

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

When employees seek protection of their speech and privacy interests, private employers typically invoke their own property rights. As owner and manager of the enterprise, the firm asserts the right to control the conditions of employment. On this view, the job is the property of the employer, who is entitled to set its terms as it sees fit. More generally, regulation of the employment relationship is resisted as an interference with economic liberty. Although freedom of contract has long since lost its status as a constitutional trump card, advocates and scholars continue to insist that the “basic principle of autonomy” requires that any regulatory interference with private employment contracts “bear[s] a heavy burden of justification.”<sup>130</sup>

Of course, these rights are not absolute. “Property” and “contract” are not natural categories that pre-exist social arrangements, but are themselves constituted by law. Claims of property and autonomy have often yielded to important public purposes. And yet, in our current constitutional order, rights invoked by private parties against the government have some heft because protection is thought necessary to create “centers of choice independent of the government.”<sup>131</sup> Allowing space for choice not only

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<sup>130</sup> Richard Epstein, *In Defense of the Contract at Will*, 51 U.CHI. L. REV. 947, 954 (1984).

<sup>131</sup> Kreimer, *supra* note 44, at 1322.

enhances individual autonomy, it also promotes overall social welfare. Property rights are thought to achieve the latter function precisely because individuals will use those rights to pursue purely private ends.

By contrast, the government employer acts pursuant to a publicly granted power for the pursuit of collectively defined ends. As Seth Kreimer writes,

No public enterprise, however proprietary, can claim the same genealogy as a private enterprise. Somewhere along the line it rests on the sovereign taxing power, and it cannot plausibly claim to be the unsullied product of freely adopted private choices.<sup>132</sup>

Thus, the argument for respecting private property as the outcome of private choices does not apply to “aggregations of capital formed through government’s power to tax and appropriate funds.”<sup>133</sup> Because public property stems from a different source, no autonomy interests weigh on the public employer’s side of the balance as they might for the private employer resisting an employee’s claim of constitutional rights.

The power of the government agency not only arises from a different source, it is also granted for a different purpose. Property and liberty interests are defended as welfare-enhancing because they permit outcomes to be determined by the unfettered interaction of individual market choices. Unlike private rights, which are intended to encourage the pursuit of private ends, power is granted to government agencies for the purpose of achieving collective goals arrived at through a process of public deliberation. Government agencies are expected to use that power to advance those publicly-defined goals, not to exercise their individual autonomy or pursue their private ends. They may require some measure of freedom in order to effectively achieve those public purposes, but that freedom is subordinate to the overall public goals they were created to pursue. The government employer thus has no independent property or autonomy rights to invoke on its side as a private employer might.

One objection could be that government agencies do not in fact pursue public purposes. The public choice literature asserts that government policy more often reflects the interest of well-organized interest groups rather than truly majoritarian preferences. Even if the public choice theorists are right, however, that would hardly strengthen the rights-based claims of a government employer. Private interests may assert property and autonomy rights when utilizing private resources, but the fact that they may sometimes

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<sup>132</sup> *Id.* at 1320.

<sup>133</sup> *Id.* at 1320, n.84.

succeed in capturing government agencies should not entitle them to claim those rights on behalf of the captured agency. Thus, whether pursuing truly public interests or well-organized private interests, government agencies cannot rely on the rights-based claims invoked by private firms.

In the case of public employee speech rights, another objection might be that the government can claim an interest in promoting its own message. Several Supreme Court cases have noted that when the government is the speaker, it is permitted to control the content of its expression, as well as to “ensure that its message is neither garbled nor distorted.”<sup>134</sup> This “latitude” is afforded the government as speaker because the state is ultimately “accountable to the electorate and the political process for its advocacy.”<sup>135</sup> While government speech is “inevitable,” it is generally agreed that government has no First Amendment right to speak.<sup>136</sup> Rather, when its actions burden private speech, the government may invoke the government speech doctrine as a defense.<sup>137</sup>

To begin with, it is unclear whether the government speech doctrine applies at all when the First Amendment claimant is a public employee. No Supreme Court case has ever applied the government speech doctrine to deny a public employee’s First Amendment claim,<sup>138</sup> although some commentators have suggested it did so in *Garcetti*. In fact, the doctrine fits poorly with the facts in *Garcetti*. As the dissenting justices argued, Ceballos was not hired to “broadcast[] a particular message set by the government . . . .”<sup>139</sup> Even though his official job duties include speaking, he was not hired as a mouthpiece, but to speak as a professional—as a lawyer exercising independent judgment and bound by the ethical responsibilities of the profession.<sup>140</sup> Even the majority opinion in *Garcetti* mentions only one of the Court’s earlier cases on government speech—*Rosenberger*—in a “*Cf.*” reference.<sup>141</sup> Its reasoning does not track that of a

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<sup>134</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

<sup>135</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

<sup>136</sup> *See, e.g.*, Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 708 (2011); Norton, *supra* note 163, at 24, n.91 (listing authorities).

<sup>137</sup> *See, e.g.*, *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005); *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>138</sup> None of the cases typically cited as authority for the government speech doctrine involved the claims of public employees. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) (asserting speech rights of religious organization seeking to install monument in public park); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (private agricultural marketing association); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (grantees of federal funds); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 528 U.S. 217 (public university students); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (same); *Rust*, 500 U.S. 173 (recipients of federal funding).

<sup>139</sup> *Garcetti*, 547 U.S. at 437 (Souter, J., dissenting).

<sup>140</sup> *Id.* at 446 (Breyer, J., dissenting).

<sup>141</sup> *Cf.* is used when the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.” THE BLUEBOOK: A UNIFORM

government speech defense by identifying a particular message that the government intended to convey. Instead, it characterizes the discipline taken against Ceballos for his speech as “simply . . . the exercise of employer control over what the employer itself has commissioned or created”<sup>142</sup>—invoking something closer to a property claim than a speech interest. According to the Court majority, Ceballos’ speech was unprotected because he spoke while on the job,<sup>143</sup> not because government control of his speech was necessary to convey its own message. Thus, *Garcetti* is not a government speech case.

If the government speech doctrine is relevant at all to public employees’ First Amendment claims, it should apply only in a narrow set of circumstances. As Helen Norton has argued, the value of government speech depends on its transparency. Only when it is clear that it is the government speaking can listeners evaluate its credibility and hold the government accountable if they object.<sup>144</sup> Thus, the government speech doctrine should apply only when a public employee is “specifically hired to deliver a particular viewpoint that is transparently governmental in origin . . . .”<sup>145</sup> Norton offers as examples the press secretary or lobbyist hired to promote a school board’s anti-voucher position, the health department employee hired to lead an anti-smoking campaign, and the pro-abstinence counselor hired by a school.<sup>146</sup> To the extent it applies at all, it would affect a “much smaller slice of public employee speech than does *Garcetti*’s ‘pursuant to official duties’ test.”<sup>147</sup> Apart from these types of situations, the government’s own speech interest does not have much force independent of the Court’s oft-repeated observation that the government has an interest in managing its employees to advance the goals of the agency. In the public employment context, then, the government speech doctrine adds little heft to the public employers’ side of the balance.

## B. Market Control and Political Accountability

In addition to rights-based claims, private employers also resist legal protection of employee interests by arguing that such regulation is unnecessary or counter-productive given the discipline imposed by well-

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SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

<sup>142</sup> *Garcetti*, 547 U.S. at 422.

<sup>143</sup> *Id.*

<sup>144</sup> Norton, *supra* note 163, at 27.

<sup>145</sup> *Id.* at 30.

<sup>146</sup> *Id.* at 30-31 (Other examples include an agriculture department hiring a beef promoter, or a mayor commissioning artists to paint murals for holidays such as the Fourth of July or Dr. Martin Luther King, Jr., Day.).

<sup>147</sup> *Id.* at 31.

functioning markets.<sup>148</sup> Once again, however, whether or not this argument is persuasive when pressed by private firms, it loses force when applied to government employers. As discussed in this section, public agencies are funded by the public fisc and are therefore far more insulated from market competition than the typical private firm. In addition, government agencies exist to achieve certain public purposes rather than to pursue purely private gain. As a result, the mechanisms of control and accountability differ between the two sectors, such that the effects of infringing employee speech and privacy rights also differ.

Efficiency-based arguments assert that interventions to protect workers' speech and privacy interests are unnecessary given the discipline imposed by competitive markets. If employees truly value the ability to speak freely or to protect personal privacy, any employer that invades those rights will be imposing a cost on workers. With the package of wages and working conditions now appearing less desirable, employees will seek work elsewhere, thereby simultaneously escaping the burdensome conditions and raising labor costs for the offending employer.<sup>149</sup> In order to retain the best workers, the employer will either have to modify its requirements or raise wages. Thus, according to Todd Henderson, because firms face "relentless and finely tuned labor markets," they will be "constrain[ed] from imposing restrictions on employee conduct that are excessive or out of relation to the costs that conduct imposes on the firm's owners."<sup>150</sup>

Comparisons between public and private workplaces rest on the assumption that labor markets operate in the same way in both sectors. For example, commenters defending the use of private sector norms to determine employees' constitutional rights argue that the public employee who loses her job for exercising her rights is free to get another job elsewhere, including in the private sector.<sup>151</sup> While it may be true that public employers rarely hold monopsony power, private sector jobs are not always fungible with public sector jobs. For some types of jobs, the government is the only relevant employer. Workers with a particular skill set may be able to substitute a private sector job for a public sector job, but this substitution will often entail a loss to the employee. For example, a lawyer who wishes to serve as a prosecutor could get a job at a private firm, and a law enforcement officer could work as a private security guard, but the alternative job in the private sector may not provide the same type of experience or sense of purpose and meaning, even if the material rewards are comparable. In addition, public sector employment often entails forms of compensation such as civil service protections or pension benefits tied to

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<sup>148</sup> See, e.g., Epstein, *supra* note 154; M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517 (2009).

<sup>149</sup> *Id.*, at 1583-84.

<sup>150</sup> *Id.* at 1553.

<sup>151</sup> See, e.g., Garry, *supra* note 10; Kozel, *supra* note 65; Rosenthal, *supra* note 10.



seniority that are not easily replaced, meaning that a private sector job is not fungible with a public sector job for the employee threatened with discharge. All of this is not to argue that public employers face no constraints, but to point out that there is likely to be some stickiness making it improbable that they operate in a “relentless and finely tuned labor market” as it is asserted that private employers do. And to that extent, the government employer will have greater leverage to impose conditions infringing on basic rights.

Whether or not the government agency faces different labor market conditions, its relationships to consumption and capital markets are radically different. Private firms must compete not only for labor, but for customers and capital as well, and these markets also have a disciplining effect on managerial overreaching. Slack demand or low-cost competitors pressure private firms to eliminate inefficient management practices. Similarly, an effective market for corporate control will reward good managers and force out bad ones. Gratuitously intrusive or inefficiently burdensome restrictions on its employees will affect a firm’s bottom line and thus managers, who face “high-powered incentives to maximize firm value,” will be constrained from adopting those practices.<sup>152</sup> Public agencies, on the other hand, are funded by the public fisc rather than through sales of its product in a competitive market, and public officials are subject to replacement through political rather than market processes. This insulation from market pressures means that they do not have the same disciplining effect on the public employer. Thus, even if market efficiency justifies deregulation of the private employment relationship, the same rationale does not apply to government agencies.

The assumption to this point has been that employer-imposed burdens on employee speech and privacy rights are efficiency-enhancing. Because permitting employee speech or respecting employee privacy imposes costs on the employer’s productive process, so the argument goes, employers will infringe these interests only when the efficiency gains in doing so outweighs the costs imposed when unhappy workers seek higher wages or alternative employment. Court opinions considering the speech and privacy rights of public employees make a similar assumption that rights-infringing practices are efficient and that giving the government a freer hand will allow it to more effectively accomplish its purposes. For example, the *Pickering-Connick* balancing test weighs the employees’ interest in speaking against the smooth operation of the public workplace. Similarly, in *Garcetti*, the Court warns that without “a significant degree of control over their employees’ words . . . there would be little chance for the efficient provision of public services.”<sup>153</sup> The same assumption underlies

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<sup>152</sup> Henderson, *supra* note 171, at 1561, 1572.

<sup>153</sup> 547 U.S. at 418.

the Court's analysis of employee privacy rights. As the plurality in *O'Connor* wrote, employees' Fourth Amendment interests must be balanced "against the government's need for supervision, control, and the efficient operation of the workplace."<sup>154</sup>

While it is certainly true that employee assertions of speech and privacy rights disrupt managerial *control* over the workplace, not all exercises of managerial discretion are necessarily efficiency-enhancing. Suppressing employee speech may avoid disruptions and help the workplace operate more smoothly; it may also reduce morale and block expression that would inform management and improve workplace operations.<sup>155</sup> The public sector manager may punish employees for their speech in order to enforce legitimate workplace rules, or simply because she finds their expression distasteful or unwelcome. Intrusive searches or surveillance may effectively detect and discourage employee misconduct, or they may entail a diversion of resources or deter valuable employee speech without any commensurate benefit to the agency or the public. Thus, not all employee claims of speech and privacy rights inevitably interfere with effective government operations. In at least some instances, employers' rights-infringing practices may harm rather than enhance the efficiency of the agency. Once again, however, the government employer's insulation from the market means that competitive pressures are far less likely to drive out these types of inefficient rights-infringing practices in the public sector.

More importantly, protecting public employee rights promotes important interests even or especially when it would be more efficient from the government's perspective to override them. In particular, public employee speech which reveals ineptitude or wrong-doing may interfere with "the efficient provision of public services," but is valuable precisely because it is disruptive.<sup>156</sup> Protecting this speech is crucial because it plays an important function in ensuring accountability of public agencies. Here again, the contrast with the private firm is a sharp one. While the firm primarily seeks financial gain for its owners, the public employer exists to provide services or pursue policies agreed upon through some process of public deliberation. Both shareholders and the public face agency problems in ensuring that managers pursue the goals for which they were hired.

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<sup>154</sup> 480 U.S. at 720.

<sup>155</sup> Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: the First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 3 (1987).

<sup>156</sup> Cf. *Stanley v. Illinois*, 405 U.S. 645, 656 ("the Constitution recognizes higher values than speech and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.")

However, because the firm is organized for private gain, the owners of the firm can evaluate executive performance based on financial outcomes, and have the ability to structure compensation in a way that tends to align managers' incentives with their own. By contrast, in the public agency, there is no economic surplus created that can be used to measure the effectiveness of public sector managers or to align their incentives with the interests of the public.<sup>157</sup> Instead, the performance of government agencies is monitored through public examination and discussion, and agency officials are called to account through the political process.

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

The Supreme Court has repeatedly acknowledged that public employees are particularly well-situated to contribute to public debate about the agencies for which they work. In *Pickering*, it wrote that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" about the funding and operation of schools.<sup>158</sup> Similarly, it recognized in *Waters v. Churchill* that "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."<sup>159</sup> Precisely because of their role as government employees, they have access to more and different kinds of information about the operation of government and the policies it is pursuing. Their speech does not merely add another voice to the debate; rather, it provides information that is uniquely important to informing the public and ensuring political accountability.

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<sup>157</sup> See, e.g., Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 763 (1984).

<sup>158</sup> *Pickering*, 391 U.S. at 572.

<sup>159</sup> *Waters*, 511 U.S. at 674. See also *Roe v. San Diego*, 543 U.S. at 82 ("[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues."); *Garcetti*, 547 U.S. at 421 (noting that *Pickering* recognized that teachers are more likely to have informed opinions about school operations, and commenting: "The same is true of many other categories of public employees.").

Most scholarly commentary has endorsed the Supreme Court’s observation that public employee speech is valuable because of its contribution to public debate.<sup>160</sup> Lawrence Rosenthal, however, has drawn starkly different implications from the importance of political accountability. He argues that political accountability requires that public employees have less rather than more First Amendment protection because officials must be given “full and effective control” over their employees’ performance, including on-the-job speech, so that they can fairly be held to account for the operation of those offices.<sup>161</sup> If public sector managers overreach, he asserts, the public will respond by voting them out of office. Thus, he defends the holding in *Garcetti* as “leav[ing] judgments about the soundness of managerial philosophy—on the management of employee speech as with all other matters within the scope of managerial prerogative—to the political process.”<sup>162</sup>

Rosenthal’s argument for granting government employers full managerial control rests on his belief that the market for political control will effectively constrain public employers. In order for a government agency to be held accountable for achieving its goals, however, the public must have sufficient information about its operations to assess its performance. It is for this reason that numerous scholars have criticized the *Garcetti* decision. By exempting from First Amendment protection employees’ speech made pursuant to their job duties, “[i]t allows elected officials to suppress whistleblowing and other on-the-job communications that would otherwise facilitate the public’s ability to engage in political accountability measures.”<sup>163</sup> Rosenthal disagrees, implicitly assuming that dissenting employee speech is unnecessary to bring to light instances of government ineptitude or over-reaching. In fact, in the years following *Garcetti*, the lower federal courts denied protection to numerous government employees who objected to their employers’ illegal practices, health and safety violations and financial improprieties.<sup>164</sup> The cumulative effect of these rulings is likely to reduce significantly the production of information about questionable agency practices in the future.

The political market for control is also far less likely to be effective in holding agencies accountable for their “managerial philosophy”—including how they treat their employees. Long before *Garcetti* denied protection to

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<sup>160</sup> See, e.g., Secunda, *supra* note 32; Nahmod, *supra* note 101; Roosevelt, *supra* note 105.

<sup>161</sup> See Rosenthal, *supra* note 10, at 48.

<sup>162</sup> Rosenthal, *supra* note 10, at 51-52.

<sup>163</sup> Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 36 (2009).

<sup>164</sup> See, e.g., *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007); *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007); *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755 (11th Cir. 2006); Norton, *supra* note 163, at 14-15, n. 48-52 (citing cases denying protection to government whistleblowers under *Garcetti*).

employees’ “official duty” speech, the Court in *Connick* held that the First Amendment does not afford a “grant of immunity to employee grievances.”<sup>165</sup> Even if these grievances are aired, questions about an agency’s “managerial philosophy” will rarely be salient enough to attract voter attention, let alone to drive electoral outcomes in a manner that would have a disciplining effect. Moreover, many public officials with managerial authority are appointed rather than elected. Apart from a handful of high profile political appointments, most of these public officials will be largely insulated from electoral control over how they run their offices.

The political market for control is likely to be ineffective in protecting valuable public employee speech from government retaliation for another reason as well. Even though public employee speech may provide important information about how government is doing its job, the voting public may not always appreciate the individual who plays this role. Public employee speech is likely to be disruptive, particularly when it highlights wrongdoing or challenges widely accepted orthodoxies, and in such situations, a majority of the public may see its interests as more closely aligned with the government official than the employee. In such a situation, electoral politics may well reward rather than constrain the overreaching official. To use the facts of *Garcetti* as an example, a public that prioritizes high conviction rates is unlikely to hold a prosecutor’s office accountable for suppressing the speech of individual prosecutors that disrupts the smooth path to a conviction. Particularly when the speech raises concerns about the impact of government action on an unpopular minority, such as criminal defendants, electoral pressure is unlikely to provide an effective check on government burdening employees’ fundamental rights.

*Garcetti* does leave intact First Amendment protections for employees who blow the whistle outside the workplace by reporting wrong-doing to enforcement agencies or the media, and Rosenthal suggests that these protections are sufficient to insure political accountability.<sup>166</sup> As Justice Stevens argued in his dissent, excluding “official duty” speech from First Amendment protection while protecting external whistleblowing creates a “perverse” rule that gives employees “an incentive to voice their concerns publicly before talking frankly to their superiors.”<sup>167</sup> Contrary to Rosenthal’s claim, this incentive structure undermines managerial control and reduces political accountability by preventing government officials from receiving important information about the workings of their own agencies, and denying them the opportunity to address problems internally in the first instance.

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<sup>165</sup> *Connick*, 461 U.S. at 147.

<sup>166</sup> Rosenthal, *supra* note 10, at 55.

<sup>167</sup> *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

In any case, political control over agency behavior is not solely about voting officials out of office. In Rosenthal's model, voters simply observe the outcome of agency activities over a period of time and then respond periodically by voting their approval or disapproval. The First Amendment vision of democratic deliberation is richer than that. The purposes of government and the way it conducts its affairs should be a matter of ongoing public discussion, not merely passive observation. Marvin Pickering's speech would not have informed the electorate how to vote—the bond issue he wrote critically about had already been defeated.<sup>168</sup> Rather, his speech was valuable because it raised important questions about what the funding priorities of the public schools were and should be. Reaction to and debate over particular government actions thus engage citizens in defining the priorities and purposes of government and allow public officials to respond to these publicly-expressed priorities on an ongoing basis.

The connection with political accountability is more complex in the case of employee privacy than employee speech. On the one hand, the need for political accountability may reduce the public employee's claims to privacy to the extent that some degree of transparency in government operations—including the communications and activities of government employees—is necessary to ensure accountability. This rationale may justify particular types of intrusions, limiting, for example, public employees' expectations of privacy in communications made while carrying out public functions. On the other hand, the need for political accountability does not necessarily negate other distinct privacy interests which may be unrelated to agency operations. Depending upon their job responsibilities, employees' claims to certain types of privacy, such as in their off-duty activities, purely personal communications or medical information, do not necessarily conflict with the need for transparency to ensure political accountability.<sup>169</sup>

At the same time, employee privacy is closely connected with employees' speech rights.<sup>170</sup> As privacy law scholars have explained, certain forms of privacy are essential to nurturing speech.<sup>171</sup> Surveillance of an individual's activities and communications will tend to chill the exploration of new ideas or the expression of unconventional or unpopular ideas. In the workplace context, speech that is most valuable is often oppositional. Such expression contributes to public debate despite or perhaps because the public employer does not approve of it. At the same time, increased surveillance and violation of privacy norms may themselves

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<sup>168</sup> Pickering, 391 U.S. at 566.

<sup>169</sup> See, e.g., Schill v. Wisconsin Rapids Sch. Dist., 786 N.W.2d 177 (Wisc. 2010).

<sup>170</sup> See, e.g., Kim, *supra* note 15.

<sup>171</sup> See, e.g., Cohen, *supra* note 16; Richards, *supra* note 16.

be retaliatory responses directed against whistleblowers.<sup>172</sup> Thus, to the extent that political accountability argues for protecting public employee speech, it also supports protecting some aspects of employee privacy.

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

## V. Conclusion

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

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<sup>172</sup> See, e.g., Eric Lichtblau & Scott Shane, *Vast F.D.A. Effort Tracked E-Mails of Its Scientists*, N.Y. TIMES, July 14, 2012., at A1.