



## GOVERNMENT EMPLOYEE SPEECH AND FORUM ANALYSIS

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This Article analyzes the institution of government employment as a nonpublic forum. Forum analysis offers a framework for bringing the doctrine of government employee speech into alignment with broader First Amendment principles. It also sharpens the theoretical contours of employee speech law by underscoring the need for vigilance against ordained orthodoxy while acknowledging the necessity of managerial discretion over institutional operations. Characterizing government employment as a nonpublic forum circumvents problematic questions like whether employee speech has provoked an adverse reaction. The proper inquiry, in the employment context as in other nonpublic forums, is whether a speech restriction is reasonable and viewpoint neutral.

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#### INTRODUCTION

Over the past six decades, the U.S. Supreme Court has developed a customized doctrinal framework for resolving disputes over the expressive liberty of government employees. In doing so, it has sought to accommodate two competing interests. On the one hand, the government needs some discretion to manage its workforce. On the other hand, the American constitutional tradition forbids the government from using the allure of professional opportunities to suppress disfavored perspectives.<sup>1</sup> The difficulty is reconciling these considerations when they conflict, as they so often do.

In searching for solutions, the Supreme Court has taken an approach that is, within the world of free speech, exceptional. The constitutional rules covering managerial responses to employee speech bear little resemblance to the general principles of expressive liberty that apply in other contexts. This exceptionalism is understandable given the unique dynamics of the employment relationship. Nevertheless, it creates a risk that fundamental constitutional precepts, articulated and defended over the course of generations, will lose their resonance for government employees nationwide. Treating employee speech as exceptional may also contribute to a broader constitutional phenomenon: the acceptance of a fragmentary First

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<sup>1</sup> See *Heffernan v. City of Paterson*, 578 U.S. 266, 270 (2016) (noting that the First Amendment's opposition to government orthodoxy extends to the employment context, while recognizing that some restrictions on employee speech may be warranted); cf. David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841, 865 (2022) (citing *Heffernan* to underscore the Supreme Court's antipathy toward governmental attempts to suppress disfavored speech).

Amendment whose various rules of expressive liberty can seem remote from, and even discordant with, one another.

My hope in this Article is to recharacterize the law of employee speech as a particularized application of a general First Amendment device: the *nonpublic forum*. A nonpublic forum—that is, “[p]ublic property which is not by tradition or designation a forum for public communication”—is a familiar analytical construct for navigating the tension between expressive liberty and the government’s operational goals.<sup>2</sup> I aim to show that, as a conceptual matter, forum analysis captures the distinctive features of the employment relationship. Moreover, treating public employment as a nonpublic forum would bring the law of employee speech into alignment with overarching principles of First Amendment jurisprudence.<sup>3</sup> It would also offer a promising framework for resolving difficult questions about the conflict between managerial discretion and expressive liberty—questions that have become more salient in a technological environment that invites, records, and distributes countless statements by public employees on all manner of topic.

The Article begins in Part I with an overview of employee speech law, including its basic principles and underlying concepts as well as its most pronounced intricacies and difficulties. In Part II, I examine a variety of First Amendment frameworks and consider whether any of them is suitable for assimilating the law of employee speech.

Part III develops the argument for retheorizing government employment as a nonpublic forum and considers the implications of such a shift. In short, government employment serves as a “metaphysical”<sup>4</sup> analogue to nonpublic forums such as polling places and courthouses. When the government operates a nonpublic forum, it seeks outcomes unrelated to the free trade in ideas—albeit while recognizing that speech will occur incidentally within the structure it has created. The employment relationship works in much the same way. The government hires workers

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<sup>2</sup> *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983); *see also* *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (noting that “the government has much more flexibility to craft rules limiting speech” within a nonpublic forum than it does within a traditional public forum or designated public forum).

<sup>3</sup> This Article’s references to the First Amendment encompass its incorporation against the States via the Fourteenth Amendment. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>4</sup> *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (identifying a “metaphysical” limited public forum).

to achieve defined public objectives. It requires discretion to control the way in which those workers perform their official duties, even when their performance includes speaking and writing. At the same time, everyone understands that the employment relationship will lead to a great deal of incidental speech, from workplace conversations among colleagues to public statements that bear on professional tasks. In some cases, that speech can impair the operation of a government enterprise. It is only natural that the government may respond by imposing targeted restrictions. But restrictions on employee speech—like restrictions on speech in other nonpublic forums—must always be reasonable and viewpoint neutral.

## I. THE LAW AND THEORY OF GOVERNMENT EMPLOYEE SPEECH

### A. *Doctrinal Structure and Conceptual Foundations*

Summarizing the law of public employee speech begins as a straightforward matter. The doctrine revolves around three major inquiries that came into focus at different times over the past half century. With the benefit of hindsight, we can think of the respective inquiries as forming an analytical sequence:

- **Official Duties.** First, is the speech at issue a component of the employee’s official duties? If so, the employer may limit, regulate, or impose discipline based on the speech—all of which I describe in the pages that follow as ways of *restricting* speech (whether ex post or ex ante)—without running afoul of the First Amendment.<sup>5</sup>
- **Public Concern.** Second, does the speech bear on a “matter of public concern”?<sup>6</sup> If not, employment action based on the speech raises no constitutional problem.<sup>7</sup> Whether speech bears on a matter of public concern depends on its “content, form, and context.”<sup>8</sup>
- **Balancing.** Third and finally, for speech that bears on a matter of public concern and is outside the employee’s official duties, does the detrimental impact of the speech outweigh its value as assessed from the perspectives

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<sup>5</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). The employee faces the “threshold burden” to demonstrate that the relevant expressions “represented his own private speech” as opposed to speech in discharge of his official duties. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 (2022).

<sup>6</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>7</sup> See *id.*

<sup>8</sup> *Id.* at 147–48.

of both the speaker and the audience?<sup>9</sup> If not, the speech is insulated from restriction.<sup>10</sup>

Putting the inquiries together, there are three ways in which an employee's speech can be vulnerable to restriction: the speech arises out of the employee's job duties, addresses only matters of private concern, or has a detrimental impact that outweighs its value. If any of these conditions is met, restriction is constitutionally permissible.<sup>11</sup>

Underlying these rules are notions of consent and necessity. People can fairly be understood as sacrificing some degree of expressive autonomy by virtue of accepting government employment. And even when it is difficult to characterize speech restrictions as the product of bargained-for exchange between willing parties,<sup>12</sup> effective managerial oversight demands some curtailment of employees' expressive autonomy.

These conceptual bases for restricting employee speech also suggest the limits of government power. People don't "relinquish"<sup>13</sup> or "surrender"<sup>14</sup> the *entirety* of

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<sup>9</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (describing the balancing test); *Garcetti*, 547 U.S. at 419–20 (recognizing the role of employee speech in advancing public debate). The balancing test, like the public concern test, ultimately presents a question of law. See, e.g., *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 905 (9th Cir. 2021); cf. *Connick*, 483 U.S. at 150 (recognizing that "[a]lthough such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests").

<sup>10</sup> The government "bears a burden of justifying the discharge on legitimate grounds." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); see also *United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 466 (1995) ("If . . . [employee] speech does involve a matter of public concern, the government bears the burden of justifying its adverse employment action."); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 53 (1990) (arguing that "the *Pickering* test effectively placed the burden of proof where it belongs: on the government"). In addition, even if employee speech is protected, disciplinary action is permissible so long as the employer can demonstrate that it would have taken the same action "in the absence of the protected conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

<sup>11</sup> My focus here is the interpretation and application of the U.S. Constitution. I do not address speech protections that flow from other sources, such as statutes or state constitutions.

<sup>12</sup> See Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1042–43 (2005) (challenging contract-based arguments for the restriction of public employee speech).

<sup>13</sup> *Pickering*, 391 U.S. at 568.

<sup>14</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

their expressive liberty by accepting a government job. Nor does every employee possess the power to affect the government's operational interests in the same way. Whether there is a suitable justification for restriction depends on factors including the employee's rank and position, the scope of his duties, the topic and context of the speech at issue, and the speech's value as compared with its detrimental impact.

### ***B. Complexities, Common Ground, and the Fragmentary First Amendment***

With this doctrinal and conceptual foundation in mind, we can proceed to the nuances of public employee speech law, including its uneasy relationship with broader principles of free speech. The doctrine's tripartite structure remains a useful framework for analysis.

#### **1. Official Duties**

The government possesses wide discretion to shape its own communications.<sup>15</sup> Withholding protection from speech that arises out of an employee's official duties represents the application of that general principle to the employment context. A contrary rule would deny government employers the ability to control what they have "commissioned or created."<sup>16</sup>

The implication of finding speech to be part of an employee's official duties is clear: the speech receives no protection from employer restriction.<sup>17</sup> The harder question is how to determine which speech falls into that category. In searching for an answer, the most important point is that defining the scope of an employee's duties entails a fact-intensive, practical investigation that goes beyond articulated job descriptions.<sup>18</sup> The analysis considers "both the substance of" the employee's speech and "the circumstances surrounding it."<sup>19</sup>

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<sup>15</sup> See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

<sup>16</sup> *Garcetti*, 547 U.S. at 422. For criticism of this position, see Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 20 (2009) (contending that the *Garcetti* rule "reflect[s] a distorted understanding of government speech that overstates government's communicative claims to its employees' on-duty speech while undermining the public interest in transparent governmental speech").

<sup>17</sup> See *Garcetti*, 547 U.S. at 426.

<sup>18</sup> See *id.* at 424–25.

<sup>19</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 (2022).

Whatever one thinks of the rule that speech in discharge of official duties is not protected from adverse employment action,<sup>20</sup> it is sensible to elevate function over form in defining the scope of those duties. If written job descriptions were dispositive, there would be an incentive for employers to craft capacious definitions of professional duties in hopes of enhancing managerial authority and diminishing the prospects of troublesome litigation. Moreover, the theory behind withholding protection from speech in discharge of employment duties is that such speech is effectively the expression of the government itself, as channeled through its agent.<sup>21</sup> This theory supports a functional approach, which reflects what an employee is actually paid to do rather than the official description on the books. Notwithstanding some uncertainty surrounding the classification of peripheral tasks,<sup>22</sup> a functional approach tracks the conceptual basis of the rule that withholds protection from speech arising out of official duties: the government's interest in overseeing such speech is relatively high, whereas the employee's countervailing interest in unfettered communication is relatively low.<sup>23</sup> Conversely, when an employee speaks outside the scope of her professional duties, her employer's interest in restriction diminishes, whereas the speaker's autonomy interest grows.

## 2. Public Concern

Even for employee speech outside the course of official duties, the prospect of constitutional protection fades if the speech deals with matters of purely private concern. Complaints about inefficient workplace policies, for example, generally aren't the stuff of First Amendment lawsuits.<sup>24</sup> They ought to be resolved internally, without enlisting the courts, to ensure that aggrieved employees can't turn "every

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<sup>20</sup> For a competing perspective, see Norton, *supra* note 16, at 34 (contending that "the First Amendment should be understood to permit government to claim as its own . . . only the speech of public employees that it has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to meaningful credibility and accountability checks by the public").

<sup>21</sup> See *Garcetti*, 547 U.S. at 421–22.

<sup>22</sup> See, e.g., *Kennedy*, 142 S. Ct. at 2425 (holding that a high school football coach's post-game prayers were not within the scope of his official duties even when he prayed on the field); *Lane v. Franks*, 573 U.S. 228, 238 n.4 (2014) (holding that the Constitution protects "truthful sworn testimony that is not part of an employee's ordinary job responsibilities").

<sup>23</sup> On "individual self-realization" as a justification for the protection of speech, see Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

<sup>24</sup> See *Connick v. Myers*, 461 U.S. 138, 147 (1983).

employment decision” into “a constitutional matter.”<sup>25</sup> Hence the public concern requirement, which offers a mechanism for separating run-of-the-mill workplace issues from topics of “political, social, or other concern to the community.”<sup>26</sup> Limiting constitutional protection to employee speech on matters of public concern is, in essence, a capacity control.

The public concern requirement is not unique to the domain of employee speech. It plays a role in other areas of First Amendment law, most prominently by informing the legal standard in tort claims for defamation or intentional infliction of emotional distress.<sup>27</sup> In those cases, the speaker allegedly has committed a discrete harm to another person. Courts use the public concern inquiry as a means of determining whether liability for personal harm can attach consistent with the First Amendment.

The dynamics are different in the employment context.<sup>28</sup> Even if an employee’s speech is not directed at any particular individual or group, and even if it causes no

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<sup>25</sup> *Id.* at 143.

<sup>26</sup> *Id.* at 146.

<sup>27</sup> See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (defamation); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281–83 (1964) (defamation); *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (intentional infliction of emotional distress). Justice Alito recently suggested that the public concern test may have a role to play in the educational context even when the speaker is a student. See *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2055 (2021) (Alito, J., concurring) (describing constitutional protection as robust for “student speech that,” among other things, “addresses matters of public concern, including sensitive subjects like politics, religion, and social relations”).

<sup>28</sup> See Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 28 (1987) (“In the public employee speech case . . . the individual interest in expression does not conflict with a private party’s interest in reputation or privacy . . .”).

In recent work, I have suggested using the public concern test as a sorting mechanism to determine when the government should face strict scrutiny for enacting laws that prohibit all discussion of a particular topic. See Randy J. Kozel, *Content Under Pressure*, 100 WASH. U. L. REV. 59, 96–97 (2022).



personal injuries, it provides a basis for official discipline if it addresses purely private matters.<sup>29</sup> This result is both distinctive and remarkable; after all, people generally retain the liberty to discuss private affairs and even mundanities.<sup>30</sup> By creating a threshold of topical importance that a government employee must meet before constitutional protection is on the table, the public concern requirement turns the employment context into a First Amendment anomaly.<sup>31</sup>

### 3. Balancing

Pursuant to the *Pickering* balancing test, the government may restrict employee speech on a matter of public concern if it can demonstrate that the balance of interests tips in its favor.<sup>32</sup> On the government's side of the scale, the key consideration is "the effective and efficient fulfillment of its responsibilities to the public."<sup>33</sup> Relevant factors include whether the speech "impeded [the employee's] ability to perform her responsibilities"; whether it "interfered with working relationships" or threatened to do so; and the "manner, time, and place" of the speech.<sup>34</sup>

The opposite side of the scale includes both the employee's interest in expression and the public's interest in hearing what the employee has to say—with recognition of the fact that government employees are uniquely qualified to speak on certain topics.<sup>35</sup> The "nature" of the employee's statement plays a significant role

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<sup>29</sup> See, e.g., *United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 466 (1995) ("[P]rivate speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer.").

<sup>30</sup> See, e.g., *United States v. Stevens*, 559 U.S. 460, 479 (2010) (observing that "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' . . . but it is still sheltered from government regulation").

<sup>31</sup> See Estlund, *supra* note 10, at 3 ("Until *Connick* there was no area of First Amendment doctrine in which judges were required to make a threshold determination of whether speech was or was not on a matter of public concern."); Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 308 ("A categorical pass for government employers to punish speech not of public concern could not be further removed from the doctrine that restricts government's power to punish speech when it acts as sovereign.").

<sup>32</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>33</sup> *Connick v. Myers*, 461 U.S. 138, 150 (1983).

<sup>34</sup> *Id.* at 151–52; see also *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

<sup>35</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (noting "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic

in the calculus, increasing the chances of protection for expression that is bound up with matters of import.<sup>36</sup> This latter point makes clear that the public concern determination is not simply an on/off switch. To qualify for protection, employee speech must address a matter of public concern. As the analysis proceeds, speech that barely clears the public concern hurdle is in a weaker position than speech that clears it by a mile.<sup>37</sup>

The *Pickering* analysis need not unfold in the same manner for every employee. For example, academics might conceivably enjoy greater-than-ordinary protection for activities such as the production of scholarship.<sup>38</sup> In addition, the role and function of certain employees can make party affiliation “an appropriate requirement for the effective performance of the public office involved.”<sup>39</sup> Though the First Amendment generally forbids disciplinary action based on politics,<sup>40</sup> some jobs

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discussion”); Heidi Kitrosser, *On Public Employees and Judicial Buck-Passing: The Respective Roles of Statutory and Constitutional Protections for Government Whistleblowers*, 94 NOTRE DAME L. REV. 1699, 1718 (2019) (describing the “unique value that employees can add to the speech marketplace by virtue of their expertise, their access to information about their workplaces and to special channels for conveying the same”).

<sup>36</sup> *Compare Rankin*, 483 U.S. at 392 (describing the nature of the employee’s speech, which addressed political issues, as a factor supporting its protection), *with Connick*, 461 U.S. at 154 (striking the balance against the employee due in part to the fact that the speech in question “touched upon matters of public concern in only a most limited sense”).

<sup>37</sup> *See Connick*, 461 U.S. at 152 (noting that a “stronger showing” by the employer of operational impact “may be necessary if the employee’s speech more substantially involved matters of public concern”); Massaro, *supra* note 28, at 28 (“[U]nder *Connick* the courts must assess the social utility of employee speech twice—first, in determining whether the speech falls within the [First A]mendment, and again in determining whether speech within the amendment can be restricted.”).

<sup>38</sup> *See Garcetti*, 547 U.S. at 425 (raising, but not addressing, the argument that considerations of academic freedom might affect the First Amendment protection of certain employees); *id.* at 438–39 (Souter, J., dissenting) (raising concerns about employment actions that restrict academic freedom); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“[Academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”); *cf. Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) (observing that “[i]f professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity”).

<sup>39</sup> *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990).

<sup>40</sup> *See, e.g., O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714 (1996) (“Government officials may not discharge public employees for refusing to support a political party or its

“cannot be performed effectively” by employees who reject their supervisors’ “political beliefs and party commitments.”<sup>41</sup> For employees who occupy those types of offices, managerial discretion—even to the extent of requiring political fidelity—may be necessary for the government to pursue its operational goals.

Beyond these issues of categorization, the *Pickering* analysis often depends on the disruptiveness of employee speech. Speech that leads to tumult, or plausibly threatens to do so, is subject to restriction.<sup>42</sup> Forcing managers to tolerate such speech means requiring them to endure operational inefficiency. The doctrine of employee speech makes clear that managers must live with *some* unwanted employee speech. But when extensive disruption is on the horizon, the balance between expression and operational effectiveness tips in the employer’s favor, removing barriers to restriction.

Focusing on disruption is comforting in some sense, for it abstracts away from the content and viewpoint of the speech at issue. A supervisor who takes disciplinary action based on an employee’s controversial speech can plausibly, and perhaps sincerely, explain that he is making no value judgment of his own, but simply reacting to the fact that the employee caused a stir. On this account, the presence or prospect of disruption effectively sanitizes the government’s action.

Fundamental First Amendment principles point the other way. There are few clearer elements of the law of free speech than the government’s inability to restrict expression based simply on its offensiveness.<sup>43</sup> Though important and influential

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candidates, unless political affiliation is a reasonably appropriate requirement for the job in question.”); *Rutan*, 497 U.S. at 74 (describing the general rule that “[a] government’s interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient”).

<sup>41</sup> *Branti*, 445 U.S. at 518; cf. SMOLLA & NIMMER ON FREEDOM OF SPEECH § 18:2 (Apr. 2022 Update) (noting that while “policy making and confidentiality” are not “dispositive inquiries,” they remain relevant to determining whether “the nature of the public agency and the nature of the position requires party loyalty”).

<sup>42</sup> See, e.g., *Connick v. Myers*, 461 U.S. 138, 152 (1983) (rejecting the notion that employers must “allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action”); *Duda v. Elder*, 7 F.4th 899, 913 (10th Cir. 2021) (recognizing the appropriateness of deferring to reasonable predictions of disruption); *Moser v. Las Vegas Metro. Police Dep’t*, 984 F.3d 900, 909 (9th Cir. 2021) (noting that the government may act based on reasonable predictions, but not “mere speculation”).

<sup>43</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (recognizing the First Amendment

speech often makes waves, that is a basis for protection rather than suppression.<sup>44</sup> To allow an unreceptive audience to generate lawful grounds for restriction would be to endorse a “heckler’s veto.”<sup>45</sup> Acceptance of such a veto can vest those who disagree with speech with the power to facilitate censorship. It can also furnish the government with legal cover to stifle unwelcome views. The resulting threat to expressive liberty is palpable, for constitutional protection that is contingent on listener reaction is too fragile to trust.<sup>46</sup> The Supreme Court is suitably skeptical of claims that audience reaction justifies the restriction of speech.<sup>47</sup>

Tethering constitutional protection to the disruptiveness of employee speech runs counter to this core principle of expressive liberty. Some courts have attempted to circumvent the problem by emphasizing the relevance of an employee’s speech to stakeholders with whom he interacts.<sup>48</sup> That point is sound in so far as it

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value of provocative speech); *id.* at 408 (rejecting the claim that restrictions on offensive speech are justified because “an audience that takes serious offense at particular expression is necessarily likely to disturb the peace”); *id.* at 409 (denying that “the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence”).

<sup>44</sup> See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (noting that free speech may “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”).

<sup>45</sup> See, e.g., BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the “heckler’s-veto doctrine” as “[t]he principle that a public entity may not suppress a speaker’s right of free speech solely because a crowd reacts negatively”); R. George Wright, *The Heckler’s Veto Today*, 68 CASE W. RES. L. REV. 159, 159 (2017) (“Roughly put, the heckler’s veto doctrine holds that opponents of a speaker should not be permitted to suppress the speech in question through their own threatened or actual violence.”).

<sup>46</sup> See, e.g., *Bennett v. Metro. Gov’t of Nashville & Davidson Cnty.*, 977 F.3d 530, 556 (6th Cir. 2020) (Murphy, J., concurring in the judgment) (asking why “pragmatic concerns about government operations” should “outweigh longstanding free-speech values (such as the prohibition on the heckler’s veto)” in the employment context).

<sup>47</sup> See, e.g., *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (rejecting offense to listeners as a basis for suppressing speech). Nor may supervisors ban all religious speech by public employees based solely on concerns about perceived endorsement. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (referring to such an approach as amounting to a “modified heckler’s veto” (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001))).

<sup>48</sup> See *Bennett*, 977 F.3d at 544 (majority op.) (challenging the extension of the heckler’s veto

goes, but it fails to alleviate the deeper concern: A heckler's veto is no less a veto because the heckler was right to be upset.

## II. EXPLORING ALTERNATIVE FRAMEWORKS

The previous Part summarized the law of employee speech and examined some of its most notable departures from general principles of First Amendment jurisprudence. This Part asks whether there are other doctrinal frameworks that might offer more promising, and less exceptional, means of resolving disputes over employee speech.

I begin by considering the doctrine of subsidized speech, which applies when the government uses incentives to encourage people or organizations to transmit a given message.<sup>49</sup> I then proceed to cases involving the government's creation of forums either to facilitate the exchange of ideas or to pursue other, non-speech-related goals.

### A. Government Employment as Subsidy

The First Amendment does not bar the government from having an opinion, or from expressing it. Sometimes public agents speak directly on the government's behalf, as when a high-ranking executive official describes the policy of the agency he leads. Other times, the government provides incentives to induce private speakers to carry its chosen message.<sup>50</sup> In both contexts, it would be impracticable to insist on governmental neutrality among topics and messages; no entity could accomplish its operational goals in the face of such a requirement.

Still, there are constitutional limits on what the government can do even when

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doctrine to the employment context); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475 (3d Cir. 2015) (defending the consideration of parents' and students' reactions to speech by public educators); *Dible v. City of Chandler*, 515 F.3d 918, 928–29 (9th Cir. 2008) (reasoning that concerns about a heckler's veto “do not directly relate to . . . employee activities that affect the public's view of a governmental agency in a negative fashion, and, thereby, affect the agency's mission”).

<sup>49</sup> See, e.g., Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152 (1996) (considering whether “subsidies should be characterized as government regulations imposed on persons or instead as a form of government participation in the marketplace of ideas”).

<sup>50</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (recognizing the government's authority to give financial support to preferred activities, including speech that conforms to specified standards).

it acts via inducement rather than compulsion.<sup>51</sup> Though the government may direct how private entities use public resources, it may not go further by dictating how those entities express themselves in their private pursuits. When the government reaches beyond the use of a public subsidy to control other speech, it exerts improper—and unconstitutional—“leverage” on the recipient.<sup>52</sup>

The Supreme Court’s decision in *Agency for International Development v. Alliance for Open Society International, Inc.* is illustrative.<sup>53</sup> The federal government made subsidies available to nongovernmental organizations engaged in fighting the spread of HIV and AIDS. Among the conditions for receiving federal money was a requirement that each recipient have a policy opposing prostitution and sex trafficking.<sup>54</sup> According to the government and the dissenting Justices, the policy requirement helped to ensure that those who received funds would use them in a manner consistent with the aims of the federal program.<sup>55</sup> But a majority of Justices disagreed. They saw the government as reaching beyond the use of public funds to control organizations’ statements of mission and belief.<sup>56</sup> Even if the government had no duty to provide subsidies in the first place, it was prohibited from awarding grants only to those who expressed “the affirmation of a belief” that spanned beyond the program in question.<sup>57</sup> *Agency for International Development* underscores that when it comes to government subsidies, leverage is the crucial concern. The government can control what happens to public funds. But it cannot use the allure of subsidization to influence, distort, or suppress other speech.

When the government offers money and professional benefits to an employee in exchange for transmitting preferred messages and pursuing specified objectives, the situation is structurally similar to the government’s tender of a grant to a willing recipient.<sup>58</sup> Just as officials may direct the use of public subsidies, managers may restrict employee speech in discharge of professional duties. In either scenario, the

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<sup>51</sup> For an overview, see generally Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109 (2021).

<sup>52</sup> *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013).

<sup>53</sup> *See id.*

<sup>54</sup> *See id.* at 208.

<sup>55</sup> *See id.* at 221 (Scalia, J., dissenting) (describing the policy requirement as a criterion for identifying suitable organizations to carry out the government’s policy).

<sup>56</sup> *See id.* at 218 (majority op.).

<sup>57</sup> *Id.* at 221.

<sup>58</sup> *See Kozel, supra* note 51, at 132.

government is controlling what it paid for.<sup>59</sup> The analysis becomes more complicated when the government restricts an employee's speech as a private citizen.<sup>60</sup> Citizen speech on matters of public concern is subject to restriction only if it raises legitimate concerns about operational efficiency or effectiveness.<sup>61</sup> Under existing law, it is unavailing to assert, as Holmes once did, that a public employee "cannot complain" about speech restrictions because "he takes the employment on the terms which are offered him."<sup>62</sup> Judicial scrutiny seeks to ensure that managers do not use professional benefits to restrict speech that has little bearing on the employer's operations.<sup>63</sup>

Despite this common ground, reimagining the employment cases as subsidy cases would be a bridge too far. The difficulty is with speech that occurs at the workplace or is otherwise work-related, but that does not constitute part of the employee's official duties. If such speech is analogous to expression *within* a government program, the government should have discretion to control it.<sup>64</sup> Following the subsidy cases further, if the speech is analogous to expression *outside* a government program, it ought to be fully protected.<sup>65</sup> Neither of these positions is tenable.

To treat all workplace speech or work-related speech as within a supervisor's absolute control would transfer an immense amount of power—including the power to ordain orthodoxy via the punishment of disfavored views—to the government. There is good reason why that approach has no currency at the Supreme Court.<sup>66</sup> It exposes individuals to serious deprivations of their expressive liberty,

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<sup>59</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) ("The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.").

<sup>60</sup> See *id.* at 419.

<sup>61</sup> See *id.*

<sup>62</sup> *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 518 (Mass. 1892).

<sup>63</sup> Cf. Kozel, *supra* note 51, at 134 ("Even when the government wields a checkbook rather than a sword, it has no power to diminish rights that are disconnected from its operational objectives.").

<sup>64</sup> See *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

<sup>65</sup> See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–15 (2013).

<sup>66</sup> See, e.g., *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (explaining that the Court's precedents "have long since rejected Justice Holmes'" statement suggesting that government employees possess no constitutional protection against employment actions based on their speech).

and it empowers the government to circumvent limitations on its authority through the simple expedient of writing checks instead of issuing fines.<sup>67</sup>

The pendulum would swing too far in the other direction if employees received unyielding protection against restriction or discipline for every statement outside the scope of their official duties. A government employee who spends fifteen minutes hurling vicious insults at his coworkers cannot take refuge in the First Amendment because he happened to be on break. The same goes for the employee who reveals professional confidences online, or intentionally distracts colleagues and patrons, or makes statements indicating his incompetence to perform the tasks assigned to him. There are many ways in which employees can impair their employer's operations through speech beyond their official duties. Some of that speech might end up deserving constitutional protection despite its costs, but the situation is too complex to find its resolution in the world of absolutes.

The subsidy cases remain useful at a general level in illuminating some of the costs and benefits of governance via inducement.<sup>68</sup> Yet the cases' core distinction between speech inside a government program and speech outside that program is too rigid to handle the nuance of disputes over employee speech.

### ***B. Government Employment as Limited Public Forum***

The Supreme Court's subsidy cases become relevant whenever the government deploys public resources to enlist private actors in pursuing an official objective. Sometimes the government uses funds in a different way: to invite "a diversity of views from private speakers."<sup>69</sup> For First Amendment purposes, this type of government action creates a *limited public forum*. Examples include opening a public building for community meetings or exhibitions<sup>70</sup> and paying printing costs for

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<sup>67</sup> Cf. PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 156 (2021) ("[C]onstitutional rights are not merely personal claims; more broadly, they are legal limits on government.").

<sup>68</sup> See Kozel, *supra* note 51, at 132–34 (noting the connection between government employment and other forms of public benefits); cf. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1002–04 (1995) (drawing on examples including public employment in explaining the ubiquity of "questions of degree" in determining whether conditions on public benefits are lawful).

<sup>69</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

<sup>70</sup> Cf. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993) (treating



publications by university students.<sup>71</sup>

The government possesses authority to determine who may participate in a limited public forum and which topics are up for discussion. That authority, though, is constrained; any restrictions the government imposes must be reasonable and viewpoint neutral.<sup>72</sup> The immense discretion the government exercises over its own messages does not extend to programs designed to facilitate private expression, even private expression supported by public resources. When the government speaks for itself, it may endorse certain views and criticize others.<sup>73</sup> When private speech is at issue, viewpoint neutrality remains the cornerstone of expressive liberty.<sup>74</sup>

In seeking alternative frameworks for resolving disputes over employee speech, we might be inclined to dismiss the limited public forum doctrine out of hand. By definition and design, limited public forums encourage expressive activity. Government workplaces, of course, are different. Managers devote themselves to goals other than fostering expression, and their facilitation of expressive activity is often incidental to their primary purpose.

Notwithstanding this distinction, the theory behind forum analysis can inform efforts to define the expressive liberty of public employees. Forum analysis reflects the recognition that when the government devotes public resources to a particular

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as a limited public forum the opening of a public building for purposes such as meetings and exhibitions, provided that the building is not made available for “indiscriminate public use for communicative purposes”).

<sup>71</sup> See *Rosenberger*, 515 U.S. at 829–30.

<sup>72</sup> See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 (2010).

<sup>73</sup> See, e.g., *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1587 (2022) (“[W]hen the government speaks for itself, the First Amendment does not demand airtime for all views.”); *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (“When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.”).

<sup>74</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); Kozel, *supra* note 28 (describing viewpoint neutrality, rather than content neutrality, as central to free speech jurisprudence).

cause—when, that is, the government “regulat[es] property in its charge”<sup>75</sup>—it necessarily possesses some oversight authority. As a general matter, the First Amendment counsels skepticism of restrictions that depend on the identity of the speaker or the perceived value of the ideas expressed.<sup>76</sup> Yet some restrictions are unavoidable if the government is to design forums for the discussion of particular issues or the accomplishment of particular goals.<sup>77</sup>

One might respond that if the government is not willing to tolerate all speech, it should not create a forum in the first place. On that logic, the government may establish a *designated public forum* in which all speech receives robust protection, but not a limited public forum tailored to narrower purposes.<sup>78</sup> Yet this argument runs counter to central principles of forum analysis, which validate the concept of a limited public forum based on the government’s legitimate prerogative to pursue specified ends—subject to the constraints of reasonableness and viewpoint neutrality.<sup>79</sup>

Underlying these principles is recognition that the government’s creation of a limited public forum does not foreclose any expressive opportunities that exist outside the forum. Moreover, because their rules must remain viewpoint neutral, limited public forums do not threaten the imposition of orthodoxy through strategic

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<sup>75</sup> *Martinez*, 561 U.S. at 679.

<sup>76</sup> See *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010); *id.* at 340 (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects of viewpoints.”).

<sup>77</sup> In an intriguing student note, Darryn Cathryn Beckstrom argued for the application of forum analysis to speech by academics, on the theory that universities are designed to encourage “the dissemination of various messages” by their faculty. Darryn Cathryn Beckstrom, Note, *Reconciling the Public Employee Speech Doctrine and Academic Speech After Garcetti v. Ceballos*, 94 MINN. L. REV. 1202, 1232 (2010). More recently, Wayne Batchis has addressed the relationship between government speech and forum analysis in contexts including public employment, with particular attention to academic freedom. See generally Wayne Batchis, *The Government Speech-Forum Continuum: A New First Amendment Paradigm and Its Application to Academic Freedom*, 75 N.Y.U. ANN. SURV. AM. L. 33 (2019).

<sup>78</sup> See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (describing designated public forums).

<sup>79</sup> See, e.g., *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 (2010) (noting that the “[Supreme] Court has permitted restrictions on access to a limited public forum”).

resource allocation.<sup>80</sup> Similar themes animate the law of public employee speech. A government employee who bristles at restrictions on his speech in discharge of official duties continues to enjoy constitutional protection for an immense amount of speech outside the course of those duties. In this way, the employee is situated similarly to a citizen who is excluded from a limited public forum and responds by expressing himself on a nearby sidewalk. Alternative avenues remain for those who wish to speak their minds.

Still, the respective purposes of the limited public forum and the employment relationship remain leagues apart. The creation of a limited public forum is ultimately about promoting speech, whereas the operation of a government workplace is geared toward the achievement of other goals.<sup>81</sup> Forum analysis offers a useful framework for illuminating the constitutional implications of resource allocation decisions that affect private discourse. But the prospect of treating government employment as a limited public forum ultimately fails due to the fundamental difference in objectives between the two domains.

### C. Government Employment as Nonpublic Forum

As we have seen, government employment does not fit the mold of a limited public forum. Still, there is another strand of forum analysis that shows more promise for reorienting the law of employee speech.

First, a bit of terminology. Though there continues to be considerable uncertainty in the case law surrounding the relationship between various kinds of forums,<sup>82</sup> I submit that the limited public forum is best understood as a type of *non-public forum*, in which the government sets aside property for purposes other than

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<sup>80</sup> Theoretically, concerns about orthodoxy might arise if the government were to deploy subsidies in such a way as to overwhelm the marketplace of ideas with the government's own preferred perspective.

<sup>81</sup> This is true even with respect to jobs that are awash in speech and expression, such as that of a teacher or professor. Employee speech is essential to those pursuits, but it is incidental to other governmental objectives. *Contra* Batchis, *supra* note 77, at 35 (characterizing "most state faculty expression" as a limited public forum).

<sup>82</sup> On the confusion surrounding the relationship between limited public forums and nonpublic forums, see *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 196 n.13 (4th Cir. 2022).

the indiscriminate facilitation of speech.<sup>83</sup> In a limited public forum, the government's objective is speech-related but constrained in scope; only speech by certain speakers or on certain topics is permitted.<sup>84</sup> In other types of nonpublic forums, the objective is not speech-related at all. For example, the government might create a polling place for recording votes in an election, or it might open a courthouse for adjudicating disputes.<sup>85</sup>

From the standpoint of the First Amendment, the common thread among nonpublic forums is the government's restriction of speech in order to promote a given forum's goals. When the government's aim is to encourage private expression, the resulting structure is a limited public forum.<sup>86</sup> When the government pursues other goals, we might think of the structure that emerges as a *nonexpressive* nonpublic forum. For the sake of brevity, in referring to the latter I will simply use the term *nonpublic forum*, on the understanding that limited public forums are an expressive version of the broader category of nonpublic forum.

My proposal, though, does not depend on characterizing the nonpublic forum as a genus of which the limited public forum is a species. The analysis would proceed the same way if, for example, limited public forums and nonpublic forums were viewed as entirely distinct. The crucial point is not the nomenclature, but rather the recognition that when the government hires employees, it pursues goals other than the pure facilitation of speech. If it is to have any chance of achieving those goals, it must exercise some "managerial authority," including authority to limit expression in service of operational pursuits.<sup>87</sup> Still, concerns remain about restrictions that go too far. The challenge, which is common to the employment relationship and to nonpublic forums, is ensuring that burdens on expression are

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<sup>83</sup> See *Mansky*, 138 S. Ct. at 1885.

<sup>84</sup> See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

<sup>85</sup> See *Mansky*, 138 S. Ct. at 1886 (polling place); *Hodge v. Talkin*, 799 F.3d 1145, 1150 (D.C. Cir. 2015) (referring to the Supreme Court building as a nonpublic forum—that is, "an area not traditionally kept open for expressive activity by the public").

<sup>86</sup> See, e.g., *Rosenberger*, 515 U.S. at 834 (distinguishing a university's transmission of its own preferred message from its expenditure of "funds to encourage a diversity of views from private speakers").

<sup>87</sup> ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 266 (1995).

justified by operational needs.

Developing the analogy, we might characterize government employment as a nonpublic forum in its own right. The employment relationship is the “metaphysical” equivalent of a polling place or courthouse: a government enterprise devoted to the accomplishment of specified ends.<sup>88</sup> Further, an employee’s official speech is akin to the statements that the government itself makes when operating a forum. Supervisors accordingly may restrict employee speech in discharge of professional duties, just as the government may decide what it does and doesn’t wish to say when it manages public property; irrespective of the setting within which it emerges, government speech is “not a forum at all.”<sup>89</sup>

In contrast to statements in discharge of official duties, much speech by public employees is entirely unrelated to the employment relationship. That speech arises outside the employment forum, leaving the government powerless to impose restrictions by virtue of its managerial prerogative.

Between these two poles is employee speech that (a) is not part of the employee’s official duties, but that (b) is related to the employee’s job. Such speech resembles chatter between people in line at the polling place or shouting by protesters in a courthouse hallway. Forum analysis has shown itself well suited to resolving disputes over these types of expression, and the strength of the analogy suggests a similar capacity as applied to speech by government employees.

As these comparisons illustrate, the constitutional problems that emerge in the employment relationship bear striking similarities to the problems that emerge in nonpublic forums. Recognizing this conceptual overlap is especially valuable because, at present, the law of employee speech is a doctrinal island, governed by its own distinctive rules and disconnected from the doctrines that shape the law of expressive liberty in other spheres.<sup>90</sup> The isolated status of employee speech law typifies a more widespread fragmentation of First Amendment jurisprudence, whose array of analytical frameworks can seem disjointed and even incompatible.<sup>91</sup>

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<sup>88</sup> *Rosenberger*, 515 U.S. at 830.

<sup>89</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

<sup>90</sup> *See Batchis*, *supra* note 77, at 66.

<sup>91</sup> The world of free speech law is home to discrete rules for commercial speech, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980), defamatory speech, *see N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), obscene speech, *see Miller v. California*, 413 U.S. 15 (1973), incitement, *see Brandenburg v. Ohio*, 395 U.S. 444 (1969), and beyond. Even with respect

A convergence of employee speech law with forum analysis would signal a refusal to accept fragmentation as the order of the day. It would also invite a fresh look at the existing law to determine whether its anomalous elements are justified—and, if not, whether the invocation of forum analysis could lead to a body of rules more closely aligned with the First Amendment’s core commitments.

### III. APPLYING FORUM ANALYSIS TO GOVERNMENT EMPLOYEE SPEECH

Reframing the doctrine of employee speech as an application of forum analysis would leave some elements of the existing law intact. As for the revisions that would occur, they are likely to be constructive, both for the resolution of disputes over employees’ expressive liberty and for the coherence of First Amendment jurisprudence more broadly.

For starters, the government always exercises control over its own speech, which encompasses the speech of its agents in discharging their professional obligations.<sup>92</sup> Government speech is not a forum in itself, regardless of the setting in which it arises.<sup>93</sup> Consider the words of a bailiff who calls a courtroom to order, or the signs around a polling place that tell voters where to report. When the government shapes those statements, it does not trigger the same First Amendment scrutiny as when it restricts the speech of private citizens who are present on public property. In explaining the difference, we might think of the government as retaining authority to craft its own communications within a nonpublic forum. The same principle extends to the employment relationship, establishing managerial authority to restrict employee speech in discharge of professional duties.

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to fully protected speech, either intermediate scrutiny or strict scrutiny may apply depending on the nature of the restriction. *Compare* *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (applying strict scrutiny), *with* *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (applying intermediate scrutiny). There are still other rules for domains such as public schools. *See* *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969). And some issues remain up for grabs, like the interplay between free speech and antidiscrimination law. *See* *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1723 (2018) (finding it unnecessary to resolve the “difficult” question whether a baker’s freedom of speech is violated by a state law that prohibits the baker from refusing to bake a cake celebrating a same-sex wedding).

<sup>92</sup> *Cf.* Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 S. CT. REV. 265, 278 (“[N]either the federal government nor the states have a mouth with which to speak nor the fingers with which to wield a pen or tap a keyboard.”).

<sup>93</sup> *See* *Ark. Educ. Television Comm’n*, 523 U.S. at 678.

This principle already animates the law of employee speech. Speech in discharge of professional duties receives no First Amendment protection, both because the government needs flexibility to manage official communications and because employees have other options for conveying their personal opinions.<sup>94</sup> Applying forum analysis to the employment relationship yields the same result. Expression that is part of the forum’s operation—which is to say, speech in discharge of official duties—is subject to the government’s control.<sup>95</sup> The explanation for this rule is the same one that justifies government control over its communications in other nonpublic forums: Ensuring managerial discretion to oversee the allocation of public resources is integral to the achievement of operational objectives.

In contrast to the withholding of protection from speech in discharge of professional duties, other elements of employee speech law do not line up as neatly with forum analysis. Within a nonpublic forum, restrictions on speech must be viewpoint neutral, and they must be reasonable in light of the forum’s purposes.<sup>96</sup> Those rules do not find obvious counterparts in the law of employee speech. Upon closer inspection, however, there turns out to be considerable overlap between the underlying theories of forum analysis and employee speech law. Where divergence does exist, the latter has something to learn from the former.

### A. *In with the New*

#### 1. Viewpoint Neutrality

As a threshold matter, restrictions on speech within a nonpublic forum must be viewpoint neutral.<sup>97</sup> Of course, the government needs discretion to set up institutions to accomplish public goals. It is free to use public resources to promote a preferred view,<sup>98</sup> but it cannot stifle speech within a nonpublic forum to establish

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<sup>94</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 422–23 (2006).

<sup>95</sup> Cf. Norton, *supra* note 16, at 22 (“Political accountability, rather than the Free Speech Clause, provides the recourse for those unhappy with their government’s expressive choices.”); Schauer, *supra* note 92, at 278 (discussing the connection between government speech and employee speech).

<sup>96</sup> See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018).

<sup>97</sup> See *id.*; cf. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (describing a “core postulate of free speech law” that “[t]he government may not discriminate against speech based on the ideas or opinions it conveys”).

<sup>98</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”).

an orthodoxy unrelated to operational needs.<sup>99</sup>

This neutrality principle translates easily to the context of employee speech. As noted above, neutrality is not required in the oversight of employee speech in discharge of official duties, because that speech represents the government's use of public resources to accomplish specified ends.<sup>100</sup> With respect to speech beyond what the government has commissioned, the First Amendment tolerates viewpoint discrimination only for the small category of (often high-ranking) employees whose professional performance is inextricably linked with political allegiance.<sup>101</sup> Beyond that narrow exception, the law of employee speech reflects a powerful commitment to viewpoint neutrality.<sup>102</sup> Presumptive protection attaches to teachers' criticism of schools' fiscal decisions<sup>103</sup> or discriminatory policies,<sup>104</sup> to prosecutors' allegations of political pressure in the workplace,<sup>105</sup> and even to clerical employees' defense of an assassination attempt against the President of the United States.<sup>106</sup> In none of these cases is the employee's articulation of a disfavored viewpoint sufficient to justify adverse employment action. To the contrary, speech is presumptively protected so long as it bears on matters of public concern, leaving it to the

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<sup>99</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) (“The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination.”); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion of Alito, J.) (observing that viewpoint discrimination is prohibited even when “a unit of government creates a limited public forum for private speech”).

<sup>100</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

<sup>101</sup> See *Branti v. Finkel*, 445 U.S. 507, 517 (1980) (recognizing that “if an employee’s private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield”).

<sup>102</sup> See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (“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.”); *Kitrosser*, *supra* note 31, at 313 (arguing that “*Pickering*’s most direct ancestors were . . . rooted partly in fears that government will leverage its power as an employer to enforce a culture of political orthodoxy”).

<sup>103</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

<sup>104</sup> See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979).

<sup>105</sup> See *Connick v. Myers*, 461 U.S. 138, 149 (1983).

<sup>106</sup> See *Rankin*, 483 U.S. at 392.



government to show some actual or potential interference with operations. Viewpoint neutrality thus plays a meaningful role in the law of employee speech. Making that neutrality requirement explicit would clarify the doctrine's normative commitments while incorporating a First Amendment tradition that recognizes the imposition of orthodoxy as a central constitutional concern.

Adding viewpoint neutrality as a formal doctrinal component carries another benefit as well, one that requires revision of the law of employee speech as it currently stands. A commitment to viewpoint neutrality, as understood in light of modern First Amendment jurisprudence, entails rejection of the idea that audience reaction to speech is a legitimate basis for suppression. Carried over to the employment context, this principle means that the disruptiveness of speech should not determine an employee's degree of constitutional protection from workplace discipline.

This position may seem controversial, and perhaps counterintuitive. Why, we might ask, should the government be prevented from responding to disruption by addressing its cause? The answer is grounded in the recognition that, when it comes to constitutional protection, the disruptive consequences of speech are intertwined with the nature of the speech that triggered them. That creates a persistent possibility of viewpoint-based considerations being filtered through the lens of listener reaction. I say "filtered," rather than using a pejorative term like "laundered," because this phenomenon need not be nefarious. It can arise from good-faith efforts at sound management. If an employee's speech is causing a stir among coworkers or other stakeholders, it is natural that his manager might consider imposing a restriction. The manager's response might well have nothing to do with the viewpoint expressed, instead reflecting the fact that disruptions can be costly irrespective of their genesis.

Sympathetic though we may be toward managers who wish to calm the waters following an employee's splashy comments, ascribing doctrinal import to those inclinations is another matter. Linking constitutional protection with listener reaction raises the specter of "government hostility and intervention in a different guise."<sup>107</sup> That risk follows all speakers, even those who happen to be government employees. Consider the example of a teacher who makes offensive statements on

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<sup>107</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 1766 ("The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience.").

his private social media account. There is an argument that the teacher who posts offensive matter thereby risks his job, given what his expression reveals about his suitability for his official role—an issue we will turn to shortly.<sup>108</sup> There is a counterargument, which we will also address, that the teacher is insulated from adverse action so long as his performance remains satisfactory. Whichever of the foregoing positions one accepts, it is precarious to contend that the employee is protected from discipline *unless and until* other people have reacted negatively to his comments, or *unless and until* his superiors perceive a high enough probability of such a response. The notion that listener disapproval can override expressive liberty is untenable as a First Amendment principle. There is no reason to think it any less problematic in the realm of employee speech.

Using listener reaction to justify restrictions on employee speech was fraught from the beginning. The attendant concerns have become more salient in the internet age. Innovative communication technologies and the modern social media environment make it remarkably easy and inexpensive to cultivate disapproval in an instant. In our hyperconnected electronic environment, unsympathetic listeners can render countless statements disruptive with a few keystrokes. Against this backdrop, withholding constitutional protection from disruptive speech effectively vests private actors with the authority to determine which speech is exposed to official discipline. Public officials, in turn, receive broad discretion to make viewpoint-based decisions about which speech to tolerate and which to punish. Regardless of whether the practice of restricting speech based on its disruptiveness ever had a legitimate place in the First Amendment ecosystem, it has no such place today. The specter of push-button disruption demands a constitutional reorientation, and public forum analysis offers a promising path forward.

Under a forum-based approach, managers retain discretion to draw inferences based on employee speech. It seems plain enough that speech which reflects, say, lack of knowledge about one's job may warrant disciplinary action, even if the relevant statements could be cast as reflecting a particular viewpoint. Such cases do not entail viewpoint discrimination, but rather a managerial determination that an employee is unfit for government work.<sup>109</sup> Of course, a manager may not treat every

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<sup>108</sup> See *infra* Part III.A.2.

<sup>109</sup> Cf. *Rankin*, 483 U.S. at 389 (noting that the termination in question was not based on determinations about the speaker's fitness for her position); *Dible v. City of Chandler*, 515 F.3d 918, 929 (9th Cir. 2008) (noting the "unique and sensitive position of a police department and its necessary

expression of a disfavored perspective as evidence of unsuitability. That approach would undermine the very notion of employee speech as presumptively protected.

To justify restriction, an employee's speech must give rise to legitimate doubts about his ability to perform his job adequately. There assuredly will be disputes over whether that requirement is satisfied. The proper rubric for grappling with these issues is not viewpoint neutrality, but rather reasonableness—to which we now turn.

## 2. Reasonableness

Maintaining viewpoint neutrality is one aspect of the government's constitutional duty in operating a nonpublic forum. Its other obligation is to impose only those speech restrictions that are reasonable in light of the forum's purposes.<sup>110</sup> The reasonableness standard is "forgiving" as compared to strict scrutiny,<sup>111</sup> though it demands more than a rational basis for restriction.<sup>112</sup> The government has the burden of justifying its rules with a showing that goes beyond mere conjecture.<sup>113</sup> It must point to "objective, workable standards" that channel official discretion and reduce the danger of arbitrary or discriminatory enforcement.<sup>114</sup>

The reasonableness requirement would place some obvious limits on how far managers could go in restricting employee speech.<sup>115</sup> A government office that pro-

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and constant interactions with the public"); Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2025 (2012) (defending the authority of employers "to react to statements that cast doubt upon [the speaker's] fitness for duty—just as the employer is free to react to other indicators of performance, such as workplace productivity").

<sup>110</sup> See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018).

<sup>111</sup> *Id.* at 1888; see also *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985) (noting that a limitation on "access to a nonpublic forum need only be *reasonable*," rather than "the most reasonable or the only reasonable limitation").

<sup>112</sup> See *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 438 (3d Cir. 2019).

<sup>113</sup> See *Pomicter v. Luzerne Cnty. Convention Ctr. Auth.*, 939 F.3d 534, 543 (3d Cir. 2019) ("If the restrictions are reasonably explained, accord with the evidence or commonsense, and are connected to the purpose of the forum, we are constrained to be lenient in our review.").

<sup>114</sup> *Mansky*, 138 S. Ct. at 1891; see also *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1240 (11th Cir. 2019) (noting that the authority to restrict speech within a nonpublic forum "cannot be exercised in an arbitrary and haphazard manner").

<sup>115</sup> For a discussion of reasonableness analysis within the context of employee speech law, see

hibited its employees from engaging in any non-work-related speech during working hours would not be discriminating against anyone based on viewpoint. But it is difficult to describe such a draconian policy as reasonable, despite the deference that is due to managerial judgments. Under the existing framework for evaluating restrictions on employee speech, the policy presumably would fail the *Pickering* balancing test due to its excessive costs.<sup>116</sup> It seems more natural and intuitive to declare the policy unreasonable in its breadth.

A focus on reasonableness explains other elements of employee speech jurisprudence, too. A telling example is the analysis of political activities by government employees.<sup>117</sup> The Supreme Court has recognized significant governmental authority to restrict employees' expressive activities related to political campaigns.<sup>118</sup> It would be a stretch to depict the Court's approach as the product of a *Pickering*-style weighing of costs and benefits. The better explanation is that the Court is willing to uphold rules that are reasonable in light of the operational objectives of public employment and the corollary that "meritorious performance rather than political service" is the coin of the realm.<sup>119</sup> Facts matter, and it is possible to imagine rules that extend beyond the government's legitimate justification for restricting political activity. It might be, for example, that forbidding all public employees "to express [their] opinions on political subjects and candidates" in any fashion would go too far.<sup>120</sup> The dispositive question is the same one that courts ask outside the employment context: How closely does the restriction track the purposes of the forum?<sup>121</sup>

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O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 719 (1996) (addressing the reasonableness of governmental action based on employee speech and political affiliation).

<sup>116</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>117</sup> See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 78–82 (1947); *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 550 (1973).

<sup>118</sup> See *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 556 (discussing activities such as "organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; . . . [and] becoming a partisan candidate for, or campaigning for, an elective public office").

<sup>119</sup> *Id.* at 557.

<sup>120</sup> *Id.* at 575–76 (noting that the statute at issue did not prohibit employees from expressing their opinions).

<sup>121</sup> See, e.g., *Mansky*, 138 S. Ct. at 1888 ("Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.").

Reasonableness is also a useful rubric for engaging with one of the most vexing, and important, questions in employee speech law: When is speech actionable because it reveals the speaker's unsuitability for his job? A government engineer can be expected to know something about engineering—and to face termination after making statements indicating a lack of requisite knowledge. Termination in that case would represent a sensible managerial response to the emergence of relevant evidence about the speaker's capacity to perform. Similarly, a high school civics teacher can be required to know something about civics, and to face consequences for statements indicating that Lincoln was president immediately after Washington or that Hamilton and Jefferson saw eye-to-eye on federalism. Discipline could be justified even for some statements made outside the course of the employee's duties. When an employee's speech calls his qualifications into question, his supervisor need not ignore what was said just because it happened off the clock.<sup>122</sup> Speech that indicates incompetence suggests that the government's operational objectives may be in jeopardy.

Other speech restrictions relate to demeanor, professionalism, and dedication rather than knowledge and qualifications. Return to our civics teacher and imagine that he makes statements online indicating that members of a certain religion are morally inferior. Such statements are subject to discipline; they give rise to a reasonable inference that the teacher might not adequately perform his job, which demands fairness to all students regardless of religious beliefs. The same would be true if the statements had disparaged members of a particular race, or of a particular political party. Effective teaching demands support and engagement, and a principal might reasonably conclude that a teacher who denigrates categories of students will not perform well in the classroom.

It is important to note that these conclusions do not depend on audience reaction. Rather, they reflect the common-sense recognition that a person's speech may shed light on his ability or willingness to do his job. The constitutional analysis is the same whether the employee's comments are met with a collective roar or a collective yawn.

The tone of an employee's speech can also inform the analysis. A teacher's

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<sup>122</sup> See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 485 (1960) ("There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools."); *but see id.* at 487–88, 490 (concluding that a State may not "ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period").

statement (away from school) that “anyone who supports the President is shameful” is markedly different from his statement that “the President is shameful.” In the former scenario, the statement suggests (or least gives rise to a reasonable supervisory inference) that the teacher might not be fair in his dealings with students and parents who hold political beliefs at odds with his own. The latter statement casts less doubt on the teacher’s ability to perform his job fairly and effectively, staying closer to the realm of personal political commentary that is a degree removed from professional activities.

The two statements share a common theme, and one might wonder why the phrasing should matter to the protection afforded. Yet a statement’s framing can reveal important information about its speaker. The choice to criticize the President, but not to insult his supporters, reflects a degree of restraint that is missing from the disparagement of the President and his supporters alike. The two scenarios give rise to different inferences about the speaker’s ability to do his job. It is true that a teacher’s strident criticism of the President, even if it occurs away from school, might itself raise concerns about professional fairness. The reasonableness inquiry, though, is inevitably a matter of degree. A teacher’s criticism of certain students and parents on ideological grounds generates more doubt about his impartiality than does his criticism of a particular elected official or an abstract political idea.

As the foregoing examples illustrate, the reasonableness of a speech restriction is the product of the statement at issue and the speaker’s position. Recognizing the confluence of those factors helps to explain why officials at the highest levels of government receive weaker constitutional protection than other public employees.<sup>123</sup> Even if a teacher’s statement (again, away from school) that “the President is shameful” is compatible with his pursuit of excellence in the performance of his employment duties, the same statement carries different implications when uttered by, say, the White House Press Secretary. The Press Secretary is closely associated with the President, works intimately with the President, and needs the President’s full confidence in order to be maximally effective. The President must be able to demand loyalty and respond to statements indicating lack thereof.<sup>124</sup>

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<sup>123</sup> See *supra* Part I.B.3.

<sup>124</sup> See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (“A government’s interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.”).

The Press Secretary thus epitomizes the high-ranking official of whom ideological fidelity can reasonably be demanded.<sup>125</sup> For other public employees, the same inquiry into reasonableness leads to the opposite conclusion when it comes to demands for political loyalty: supervisors must manage their offices “by discharging, demoting, or transferring staff members whose work is deficient” rather than insisting upon ideological conformity—precisely because ideological conformity is unnecessary for operational success.<sup>126</sup>

### B. *Out with the Old*

The previous Section explained how redefining government employment as a nonpublic forum would draw attention to the viewpoint neutrality and reasonableness of speech restrictions. In this Section, I examine the doctrinal factors that those considerations would replace: the public concern requirement and the *Pickering* balancing test.

#### 1. Public Concern

Under existing law, if an employee’s speech does not bear on a matter of public concern, the constitutional inquiry is at its end, with the employee lacking protection from discipline.<sup>127</sup> There is no comparable requirement within the world of forum analysis. Speech restrictions that are unreasonable or viewpoint based are unlawful, irrespective of whether the regulated speech addresses a matter of public concern.

Yet we can expect some overlap between the reasonableness analysis and the public concern test. The Supreme Court has described public concerns as “subject[s] of legitimate news interest,”<sup>128</sup> even while acknowledging that “the boundaries of the . . . test are not well defined.”<sup>129</sup> Personal complaints about workplace

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<sup>125</sup> Cf. Norton, *supra* note 16, at 50 (considering the argument that “certain positions trigger such high public expectations that those employees could never escape their governmental role to speak purely as private citizens even when off the job”).

<sup>126</sup> Rutan, 497 U.S. at 74.

<sup>127</sup> See *supra* Part I.A.

<sup>128</sup> City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam).

<sup>129</sup> *Id.* at 83.

transfers or pay raises generally are not issues of public concern.<sup>130</sup> Neither are pornographic videos.<sup>131</sup> By contrast, sharing one's opinion of the President with a colleague qualifies as public concern speech, despite hardly being front-page material.<sup>132</sup> Statements about political pressure or racial discrimination within the office likewise qualify, even if expressed at the workplace.<sup>133</sup>

An analysis that revolves around the reasonableness of speech restrictions would follow the same pattern. Limitations on employees' ability to overwhelm the office with mundane grievances might well be reasonable in light of the interest in workplace efficiency. At the same time, the reasonableness test will disfavor restrictions on political and social commentary unless there is interference with the government's operational objectives or a demonstration of unsuitability for employment.

Though they are likely to reach similar results in many situations, reasonableness analysis and the public concern test entail different adjudicative approaches. The public concern test is focused on a single determination, while reasonableness analysis entails the weighing of competing values. To be sure, deciding whether speech bears on a matter of public concern presents challenges of its own; judges must consider the "content, form, and context of a given statement, as revealed by the whole record."<sup>134</sup> Nevertheless, it is at least possible that a shift from the public concern test to an analysis of reasonableness could sacrifice some degree of efficiency and predictability.

Even if we accept this assumption, the game is worth the candle, for the focus on reasonableness would put the doctrine of employee speech on firmer ground—and bring it into closer alignment with core First Amendment principles. When the public concern test became part of employee speech law, it arrived without much conceptual elaboration. The justification behind the requirement was deeply prac-

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<sup>130</sup> See *Connick v. Myers*, 461 U.S. 138, 154 (1983); *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472–73 (2018).

<sup>131</sup> See *City of San Diego*, 543 U.S. at 84.

<sup>132</sup> See *Rankin v. McPherson*, 483 U.S. 378, 386–87 (1987).

<sup>133</sup> See *Connick*, 461 U.S. at 149; *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

<sup>134</sup> *Connick*, 461 U.S. at 147–48.



tical, driven by concerns about turning the workplace into a “roundtable for employee complaints over internal office affairs.”<sup>135</sup> Yet some such complaints undoubtedly have widespread significance, calling the rationale into doubt from the very beginning.<sup>136</sup>

It is also worth recalling that the public concern test emerged as a component of employee speech law before the Supreme Court made clear that no protection attaches to speech in discharge of professional duties.<sup>137</sup> Following the emergence of the latter rule, the public concern test became irrelevant to speech that employees make in the course of performing their jobs—which, one might contend, makes the test far less important as a capacity control.

Finally, focusing on reasonableness (and viewpoint neutrality) rather than public concern is consistent with the Supreme Court’s efforts to preserve expressive liberty within the workplace. The Court has underscored the importance of protecting an employee’s right to speak as a citizen in so far as possible. Citizens address matters of purely private interest all the time.<sup>138</sup> When the same type of speech comes from a public employee and causes meaningful operational problems, a manager may have a reasonable basis for imposing restrictions. But when operational consequences are negligible, there is good reason to protect the speaker regardless of whether his speech related to a matter of public concern, lest the doctrine of employee speech become enmeshed in generating “a judicially approved catalogue of legitimate subjects of public discussion.”<sup>139</sup>

## 2. Balancing

Just as the adoption of forum analysis would dispense with the public concern

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<sup>135</sup> *Id.* at 149.

<sup>136</sup> *Id.* at 161–63 (Brennan, J., dissenting) (discussing the importance of speech about the workings of government).

<sup>137</sup> *Connick* was decided in 1983. *Garcetti* was decided in 2006.

<sup>138</sup> *Cf.* *United States v. Stevens*, 559 U.S. 460, 479 (2010) (remarking upon the lack of widespread public significance that attends most speech); Estlund, *supra* note 10, at 37 (“Notwithstanding *Connick*, in other contexts the Court has recognized that people arrive at their political beliefs and are moved to political and social action largely through their personal experiences, often as workers or consumers.”).

<sup>139</sup> Estlund, *supra* note 10, at 3; *see also id.* (criticizing the public concern test for “describ[ing] the outer limits of First Amendment protection in the same inescapably imprecise terms that traditionally have been summoned to characterize speech at the heart of the realm of free speech”).

requirement, so, too, would it shed the *Pickering* balancing test. Again, the effects on case outcomes likely would be less dramatic than they might initially seem. The balancing test weighs the employee's interest in speaking, as well as listeners' interest in hearing what the employee has to say,<sup>140</sup> against the government's interest "in promoting the efficiency of the public services it performs through its employees."<sup>141</sup> Relevant factors include the "manner, time, and place" of the statement, as well as its "context."<sup>142</sup> A reviewing court considers whether the speech "impairs discipline" or workplace "harmony," whether it harms "close working relationships," and whether it "impedes" the speaker's performance or "interferes with the regular operation of the enterprise."<sup>143</sup>

These considerations are natural components of a reasonableness inquiry as applied to speech restrictions within a nonpublic forum. Reasonableness, the Supreme Court has explained, depends on "all the surrounding circumstances."<sup>144</sup> Employee speech that impairs workplace operations might well provide a reasonable basis for restriction.<sup>145</sup> Even if the government technically could endure such speech, forum analysis rejects any requirement of "strict incompatibility" between the speech being restricted and the purposes of the forum.<sup>146</sup> Forum providers needn't resign themselves to the subversion of operational goals in the name of "the free exchange of ideas,"<sup>147</sup> but something more than a bare managerial desire to avoid "controversy" is required in order to prohibit or punish expression. Limiting restrictions to what is reasonable accordingly bears resemblance to protecting employee speech when the balance of interests so instructs.

It is not just the legal standard that matters, but the rigor with which judges apply it. Courts and commentators have described the reasonableness standard in

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<sup>140</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

<sup>141</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>142</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

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

<sup>144</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985).

<sup>145</sup> *Garcetti*, 547 U.S. at 418 ("A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.").

<sup>146</sup> *Cornelius*, 473 U.S. at 808.

<sup>147</sup> *Id.* at 811.

forum analysis as relatively lax.<sup>148</sup> That characterization suggests a high degree of deference to forum providers—and, according to the analogy I have proposed, to the managers of government workplaces. Even so, there must be precision in defining the managerial determinations to which courts defer. Judges should respect supervisors' determinations about the impact of speech on the employment environment. They likewise should respect supervisors' judgments about whether speech casts doubt upon an employee's ability to perform, for example by demonstrating lack of professional knowledge. These sorts of decisions are within the competence of those who manage government workplaces.

The judicial focus ought to be trained elsewhere: on demanding viewpoint neutrality, on rejecting listener reaction as a basis for restriction, and on ensuring that speech restrictions do not venture beyond what is necessary for operational success. As the Supreme Court recently observed in applying forum analysis, while deference to neutral restrictions is appropriate, the government's approach must be "sensible," "discernible," and "capable of reasoned application."<sup>149</sup> The same principles should guide judicial inquiries into the reasonableness of restrictions on employee speech.

#### CONCLUSION

I began this Article with a brief overview of the governing principles of public employee speech law. I then made the case for a doctrinal reorientation that would treat government employment as a nonpublic forum. Here, I summarize the implications of such a move:

- Restrictions on employee speech must be viewpoint neutral. As the Supreme Court has recognized in other contexts, listener reaction is *not* a viewpoint-neutral basis for restriction.
- Restrictions on employee speech must be reasonable in light of the purposes of the forum, with deference given to managerial determinations about the operational impacts of speech and the extent to which speech casts doubt upon an employee's ability to perform his job.
- Speech in discharge of employment duties should remain unprotected, re-

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<sup>148</sup> See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018); Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1989–90 (2011).

<sup>149</sup> *Mansky*, 138 S. Ct. at 1888, 1891–92.

flecting the government's authority to allocate public resources—including the labor of people whom it hires—to accomplish public goals.

- Courts should dispense with asking whether employee speech bears on a matter of public concern or whether its costs outweigh its benefits, focusing instead on viewpoint neutrality and reasonableness.

Difficult questions would continue to arise even after the transition to a forum-based approach. Among the most pressing would be how to define the universe of situations in which managers may treat an employee's speech as casting doubt on his ability to perform his job. Nevertheless, characterizing government employment as a nonpublic forum would yield a useful framework for accommodating the competing aims of expressive liberty and operational efficiency. More broadly, it would take a step toward jurisprudential coherence by bringing the law of employee speech into touch with the First Amendment's core commitments.