

Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee

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I. Introduction

Take it from someone who works in government, public employers do not always welcome criticism from their employees. An employee's attack on her superior's competence is often thought to erode workplace discipline. Harsh criticism of a government office's performance by its employees can be a public relations nightmare. Nevertheless, public employers are bound by the First Amendment, which ordinarily precludes government from punishing persons for the content of their speech. Yet, few would argue that public employees have the same right to criticize government managers as the public at large. Indeed, in *Connick v. Myers*,¹ the United States Supreme Court held that the First Amendment did not protect Myers, a public employee who had solicited the views of her colleagues on how the office functioned, because her speech did not touch on matters of public concern.

At one time public employees could easily determine the protections the First Amendment offered them. As Justice Holmes opined when rejecting the right of a public employee to criticize his employer and keep his job: "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."² The Supreme Court, however, has rejected this formulation for nearly half a century, but at the same time has failed to come up with an alternative that is as pithy or as easy to administer.

The Court's last two forays into this area illustrate how unsatisfactory its efforts have been to accommodate the rights of public employees and the legitimate interests of their employers. In *Rankin v. McPherson*,³ for example, the Court sought to invalidate censorship by a public employer, while remaining faithful to the *Connick* rule that public employees have First Amendment protection only when they speak on a matter of "public concern." It protected a secretary's casual comment to a co-worker that she hoped someone would assassinate President Reagan, because it was a matter of "public concern,"⁴ as if the public cared about such an offhand comment. Hence, the

1. 461 U.S. 138 (1983).

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

3. 483 U.S. 378 (1987).

4. *Id.* at 386-87.

Court branded her employer's position, that a law enforcement agency risked losing the public's confidence if it kept persons who condone politically-motivated murder on its payroll, as constitutionally impermissible.⁵

Yet, in *Waters v. Churchill*,⁶ the Court granted a comment of seemingly greater concern no constitutional protection. In *Waters*, a nurse expressed her view that the policies of the obstetrics department (at a public hospital) were endangering the quality of care. The majority agreed that the nurse could be fired for expressing honestly held opinions about the department to a colleague seeking advice about whether to transfer to that department, even if hospital policy did not forbid nurses from offering each other advice. This holding provoked Justice Stevens, not usually one to indulge in overheated rhetoric, to begin his dissent by writing: "This is a free country."⁷

The evolution of the law in this area has been unsatisfactory for both employers and employees. The *Connick* public concern test allows judges to decide which topics are of proper public concern and which disputes should remain in the workplace. This test seemingly confers upon judges censorial power that the First Amendment ordinarily forbids: the power to discriminate against speech on the basis of its content. In all other areas of First Amendment jurisprudence, "the marketplace of ideas," not the courts' or government officials' views, determines what matters may engage the public's concern. Moreover, the indeterminacy of this public concern test creates a "chilling effect" on speech. Ordinarily courts invalidate vague and overbroad regulations of speech in order to address the "chilling effect" problem. The courts, however, not only permit employers to engage in ad hoc judgments about whether an employee's speech amounts to cause for discharge, but also allow them to impose discipline under an imprecise public concern test.

In the following discussion, I first summarize the rules regulating speech of public employees. Second, I explain why those rules create serious doctrinal and practical problems. Third, I explore the reasons why *Connick's* public concern test is likely to diminish in importance, even if the Court avoids its outright repudiation. Doctrines more firmly rooted in general First Amendment principles are likely to replace the public concern test. Indeed, *Connick* is an obstacle to clarity in this area. Restrictions on employee speech should be recognized

5. *See id.* at 390-92.

6. 511 U.S. 661 (1994).

7. *Id.* at 694 (Stevens, J., dissenting).

for what they are: efforts by management to ensure that what employees write or say do not prevent management from implementing its own policies at the workplace. Such regulations should be considered constitutionally unobjectionable when they require an employee to do her job consistent with office policies, rather than when they attempt to coerce her ideological conformity in the workforce. Finally, I discuss why these restrictions should be assessed under the test governing incidental restrictions on speech. In fact, the Court was headed in that direction before it took a wrong turn in *Connick*. Applying the doctrine governing incidental restrictions on speech will clarify this area of the law, and help make sense of many of the problems employers face in this area, such as how to regulate racist and sexist speech in the workplace without violating the First Amendment.

II. The Doctrine

Although the Supreme Court long ago rejected Justice Holmes' view that public employees can be penalized for exercising their First Amendment rights,⁸ the question whether public employees may engage in speech critical of management did not reach the Court until 1968, in *Pickering v. Board of Education*.⁹

A. Pickering and Its Progeny

Marvin Pickering, a schoolteacher, was fired from his job for a critical letter he had written to a local newspaper (just after a tax increase proposed by the school board had been defeated in a referen-

8. Justice Holmes' view was the law for many years. *See, e.g.,* *Adler v. Board of Educ.*, 342 U.S. 485 (1952); *Garner v. Los Angeles Bd. of Pub. Works*, 341 U.S. 716 (1951); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947); *United States v. Wurzbach*, 280 U.S. 396 (1930); *Ex parte Curtis*, 106 U.S. 371 (1882). The Court steadily eroded Justice Holmes' view with a series of decisions that held that public employment cannot be denied because of an applicant's previous political affiliations. *See, e.g.,* *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 902 (1961) (Brennan, J., dissenting); *Wieman v. Updegraff*, 344 U.S. 183, 221 (1952) (Frankfurter, J., concurring). In *Shelton v. Tucker*, 364 U.S. 479, 490 (1960), the Court went a step further by invalidating a requirement that public school teachers periodically disclose the organizations to which they belonged or had made a contribution. Finally, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court interred Holmes' view when it invalidated two statutes prohibiting hiring or retention of employees of educational institutions who belonged to identified "subversive" organizations or who make "treasonable or seditious" statements, *see id.* at 597-610. *See generally* Cynthia K. Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1112-15 (1988); Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1650-60 (1984).

9. 391 U.S. 563 (1968).

dum).¹⁰ Pickering's letter criticized the board for unwise spending of prior tax increases, misleading the public about the need for the increase, and attempting to prevent teachers from publicly opposing or criticizing the proposed tax increase.¹¹

The Supreme Court evaluated Pickering's dismissal under a balancing test, stating that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹² The Court saw no need to dismiss Pickering in order to preserve a harmonious work environment since Pickering's statements were "in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher."¹³ Furthermore, the Court rejected the board's argument that Pickering's disagreement with the board's views on school funding provided sufficient reason to discipline him. It declared that "the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive."¹⁴ It also noted that to the extent that Pickering's letter contained errors of fact, "[t]he Board could easily have rebutted [Pickering's] errors by publishing the accurate figures itself."¹⁵ The Court held that Pickering could not be discharged for making false statements unless he did so intentionally or with reckless disregard for the truth.¹⁶

In the cases following *Pickering*, the Court expanded the protections for public employees who criticized their employers. In *Perry v. Sindermann*,¹⁷ for example, the Court invalidated the termination, without a hearing, of an untenured junior college professor fired for publicly criticizing the policies of the college system that employed

10. *See id.* at 566-67.

11. *See id.* at 566.

12. *Id.* at 568.

13. *Id.* at 569-70.

14. *Id.* at 571.

15. *Id.* at 572.

16. *See id.* at 573-75. For this point, the Court relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Court held that the First Amendment limits the circumstances under which liability for defamation can be imposed.

17. 408 U.S. 593 (1972).

him.¹⁸ Similarly, in *Mt. Healthy City School District Board of Education v. Doyle*,¹⁹ the Court held that an untenured teacher could not be dismissed for having disclosed to a radio station the substance of a memorandum that his principal had sent teachers imposing a dress and appearance code. The Court stated that Doyle's rights had been violated since "[t]here is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public."²⁰

Moreover, in *Givhan v. Western Line Consolidated School District*,²¹ the Court expanded *Pickering* to reach even nonpublic statements made at the workplace of public employees. The Court held that a teacher could not be fired for having criticized some of the district's policies as racially discriminatory during a series of private meetings with her principal.²² The Court concluded that First Amendment rights are not "lost to the public employee who arrange[d] to communicate privately with his employer rather than to spread his views before the public."²³ Thus, from *Pickering* to *Givhan*, the Court consistently expanded the First Amendment rights of public employees without a single dissenting vote.

B. Connick's Public Concern Test

The Court's unanimity ended, however, with the 5-4 decision in *Connick v. Myers*.²⁴ Sheila Myers was an assistant district attorney, in New Orleans, for five and a half years.²⁵ Her superiors informed her that she was to be transferred to a new assignment.²⁶ Myers opposed

18. Sindermann testified before legislative committees and had made other statements advocating that the junior college at which he taught should become a four-year institution, a position that the regents running the system opposed. *See id.* at 594, 595. The regents eventually decided not to renew Sindermann's contract, allegedly on grounds of "insubordination." *See id.*

19. 429 U.S. 274 (1977).

20. *Id.* at 284. The Court remanded the case to determine whether the school district did not renew Doyle's contract because of his protected speech or for other reasons. The district court had ordered Doyle reinstated with backpay based on a finding that his protected speech had played a "substantial part" in the board's decision not to rehire him, and the court of appeals had affirmed on this basis. *See id.* at 283. The Supreme Court rejected this approach, concluding that the board was entitled to an opportunity to prove that it would not have rehired Doyle even absent his protected speech. *See id.* at 287.

21. 439 U.S. 410 (1979).

22. *See id.* at 412-13.

23. *Id.* at 415-16.

24. 461 U.S. 138 (1983).

25. *See id.* at 140.

26. *See id.*

the transfer.²⁷ She circulated a questionnaire soliciting the views of her colleagues “concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.”²⁸ The district attorney subsequently fired her for her actions.²⁹

Justice White, writing for the Court,³⁰ observed that an employee’s speech about “internal office matters” was not “upon a matter of ‘public concern,’ as the term was used in *Pickering*.”³¹ He reasoned that *Pickering* and cases following it were rooted in the “rights of public employees to participate in public affairs.”³² But “[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”³³

According to the Court, the question of whether Myers’ “speech addresses a matter of public concern must be determined by the content, form, and context of a given statement.”³⁴ Myers’ questions regarding workplace morale and policies failed this test because they did not seek to “inform the public that the District Attorney’s Office was not discharging its governmental responsibilities,” nor “bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others.”³⁵ One item on her questionnaire, however, whether employees “feel pressured to work in political campaigns on behalf of office supported candidates,” did satisfy the “public concern” test.³⁶ It raised issues about potential office violations of “fundamental constitutional rights” and implicated the public’s concern

27. *See id.* at 140-41.

28. *Id.* at 141 (footnote omitted).

29. District Attorney Connick informed Myers that he was terminating her because of her refusal to accept the transfer. *See id.* at 141. He also told he considered her distribution of the questionnaire an act of insubordination. *See id.* Connick particularly objected to the question which inquired whether employees “had confidence in and would rely on the word” of various superiors in the office, and to a question concerning pressure to work in political campaigns, which he felt would be damaging if discovered by the press. *Id.*

30. Chief Justice Burger and Justices Powell, Rehnquist, and O’Connor joined Justice White’s opinion. *Connick v. Myers*, 461 U.S. 138, 138 (1983).

31. *Id.* at 143.

32. *Id.* at 144-45.

33. *Id.* at 146.

34. *Id.* at 147-48.

35. *Id.* at 148.

36. *Id.* at 149.

about whether public offices require “meritorious performance rather than political service.”³⁷ Nevertheless, the Court concluded that the *Pickering* balancing test weighed against Myers because of the potentially disruptive effects of the questionnaire. According to the Court, an employer need not “allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”³⁸ The questionnaire distracted Myers and her colleagues from their duties. Although she “did not violate announced office policy, the fact that Myers, unlike Pickering, exercised her rights to speech *at the office* supports Connick’s fears that the functioning of his office was endangered.”³⁹

Justice Brennan’s dissent parted company with the majority at every turn.⁴⁰ First, Justice Brennan argued that the majority’s reliance on the fact that Myers’ questionnaire was distributed at the workplace was inconsistent with *Givhan*.⁴¹ Second, he maintained that Myers’s efforts to determine the state of morale at the district attorney’s office implicated matters of public concern.⁴² Finally, in light of the district court’s findings that Myers did not violate any office policy nor actually disrupt office-work, he believed that the *Pickering* balance favored upholding her First Amendment claim.⁴³

The difficulty of applying the *Connick* “public concern” test is made plain by *Rankin v. McPherson*.⁴⁴ Ardith McPherson, a 19-year-old clerical employee at a county constable’s office, heard a radio report during work hours of the attempted assassination of President Reagan. She remarked, to a co-worker, that she was not surprised at the attempt in light of the President’s policies, and added “if they go for him again, I hope they get him.”⁴⁵ Constable Rankin learned of the remark and subsequently fired her.⁴⁶

37. *Id.*

38. *Id.* at 151-52 (footnote omitted).

39. *Id.* at 153 (footnote omitted) (emphasis added). The Court observed that the questionnaire was written in the context of Myers’ proposed transfer. Thus, when an employee’s speech arises from, and regards a workplace dispute, “additional weight must be given to the supervisor’s view that the employee has threatened the authority of the employer to run the office.” *Id.*

40. Justices Marshall, Blackmun, and Stevens joined Justice Brennan’s dissent. *See id.* at 156 (Brennan, J., dissenting)

41. *See id.* at 159-60 (1983) (Brennan, J., dissenting).

42. *See id.* at 161-65 (Brennan, J., dissenting).

43. *See id.* at 166-69 (Brennan, J., dissenting).

44. 483 U.S. 378 (1987).

45. *Id.* at 381 (footnote omitted).

46. *See id.* at 381-82. McPherson had admitted to Constable Rankin that she had made the remark, but added that she “‘didn’t mean anything by it.’” *See id.* at 382.

The majority (the four dissenters in *Connick* and Justice Powell) first held that McPherson's comment was protected under the public concern test.⁴⁷ The Court reasoned that it did not amount to a threat to kill the President and was made in the context of expressing her view of the President's policies.⁴⁸ The Court, applying *Pickering*, then "balance[d] McPherson's interest in making her statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"⁴⁹ In the Court's view, the balance favored McPherson because there was "no evidence that [her comment] interfered with the efficient functioning of the office."⁵⁰ Moreover, because an employee with only clerical responsibilities made the comment privately, the constable's office was not discredited.⁵¹

In dissent, Justice Scalia claimed that the only reason the public would be "concerned" about McPherson's comment is because it amounted to a public employee's endorsement of assassination.⁵² Furthermore, he disagreed with the majority's balancing, stating that "[a]s a law enforcement officer, the Constable obviously has a strong

47. *See id.* at 386-87.

48. The Court reasoned:

The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree, that McPherson's statement did not amount to a threat punishable under 18 U.S.C. § 871(a) . . . or 18 U.S.C. § 2385 . . . or, indeed, that could properly be criminalized at all. . . . The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Id. (footnotes and citations omitted).

49. *Id.* at 388 (quoting *Pickering*, 391 U.S. at 568).

50. *Rankin v. McPherson*, 483 U.S. 378, 389 (1987). In his testimony, Constable Rankin conceded that "the possibility of interference with the functions of the Constable's office had *not* been a consideration . . . and that he did not even inquire whether the remark had disrupted the work of the office." *Id.* (footnote omitted).

51. *See id.* The Court added: "Where, as here, an employee serves no confidential, policy-making, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-91.

52. *Id.* at 396-98 (Scalia, J., dissenting). Justice Scalia endorsed the "public concern" test, *See id.* at 395. Much of his dissent, however, criticized its application. *See, e.g., id.* at 398 (Scalia, J., dissenting) (opining that "[t]he public would be 'concerned' about a statement threatening to blow up the local federal building or demanding a \$1 million extortion payment, yet that kind of 'public concern' does not entitle such a statement to any First Amendment protection at all.").

interest in preventing statements by any of his employees approving, or expressing a desire for, serious, violent crimes.”⁵³

More recently, the Court revisited the public concern and balancing tests in *Waters v. Churchill*.⁵⁴ Cheryl Churchill worked as a nurse in the obstetrics department of a public hospital.⁵⁵ During a dinner break, she shared her negative views of the staffing policies in that department with a colleague who was considering transferring to obstetrics.⁵⁶ Churchill’s recollection of the conversation differed from that of her colleague. While her colleague thought that Churchill had said “unkind and inappropriate things” about her supervisor, Churchill claimed that she had said only that departmental policies were “impeding nursing care.”⁵⁷ The Seventh Circuit had held that a trial was required to determine what Churchill had actually said and whether it was constitutionally protected.⁵⁸

Justice O’Connor, writing for a four-justice plurality,⁵⁹ saw her task as deciding what procedures employers must use when applying the “substantive First Amendment standards” enunciated in *Connick*.⁶⁰ She concluded that the public concern and balancing tests that the Court had applied in *Connick* were justified by the legitimate interest in securing an “agency’s effective operation.”⁶¹ A rule permitting juries to decide whether an employee has said something that is likely to impair workplace efficiency would give insufficient weight to that interest. Juries, bound by the rules of evidence, can only consider particular types of information, whereas employers are entitled to “rely on hearsay, on past similar conduct, on their personal knowledge of people’s credibility, and on other factors that the judicial process ignores.”⁶² Nevertheless, Justice O’Connor concluded that courts may not “apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer’s

53. *Id.* at 399 (Scalia, J., dissenting).

54. 511 U.S. 661 (1994).

55. *See id.* at 664.

56. *See id.* at 664-66.

57. *Id.* at 665-66. Three other witnesses had overheard the conversation; two agreed with Churchill’s recounting and the third with her colleague’s. *See id.*

58. *See id.* at 667-68.

59. Chief Justice Rehnquist, and Justices Souter and Ginsburg joined Justice O’Connor’s opinion. *Id.* at 664.

60. *See id.* at 669. In support of her view that the First Amendment imposed procedural and well as substantive limitations on the freedom of public employers to terminate employees for their speech, Justice O’Connor noted that the Court had frequently imposed special procedural rules for “proceedings that may penalize protected speech.” *Id.*

61. *Id.* at 675.

62. *Id.* at 675-76.

conclusions.”⁶³ At least when “an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected,” public employers are constitutionally required to perform a reasonable investigation before taking action against an employee.⁶⁴

According to Justice Scalia’s concurrence, however, the First Amendment only precludes employer “hostility” to protected speech, not mere employer “negligence” in investigating reports about unprotected conduct.⁶⁵ Justice Stevens’ dissent rejected the plurality’s conclusion that an employee must prove the employer’s bad faith or negligence to establish that she had been punished for protected speech. He argued that Churchill’s evidence that her speech was protected entitled her to trial on her First Amendment claim.⁶⁶ In Justice Stevens’s view, “before firing a public employee for her speech, management [should] get its facts straight.”⁶⁷

III. The Problem

Connick instructed the courts to evaluate “the content, form, and context of a given statement.”⁶⁸ *Connick* created categories of employee speech, each defined by reference to content, and afforded each varying levels of protection.⁶⁹ First, speech “upon matters only of personal interest” is, “absent the most unusual circumstances,” unprotected.⁷⁰ Second, speech that “touch[es] upon matters of public

63. *Id.* at 677.

64. *Id.* Justice O’Connor also concluded that the investigation had been reasonable because the hospital’s president met with Churchill and had all witnesses interviewed before deciding to terminate Churchill. *See id.* at 679-80. Justice O’Connor added that Churchill’s employer could reasonably conclude that her comments about the obstetrics department were unprotected. *Id.* at 667. Without deciding whether these comments were “speech on matters of public concern,” Justice O’Connor wrote that “the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had.” *Id.* at 680. Justice O’Connor nevertheless thought that remand was necessary, because Churchill had adduced evidence that the actual motivation for her dismissal was her criticisms of hospital policy. *See id.* at 681-82.

65. *See id.* at 688-89. Justice Kennedy and Justice Thomas joined Justice Scalia’s opinion. *Id.* at 686.

66. *See id.* at 695-98 (Stevens, J., dissenting). Justice Blackmun joined Justice Stevens’ dissent. *Id.* at 694.

67. *Id.* at 699 (Stevens, J., dissenting).

68. 461 U.S. at 147-48. *See also* Rankin v. McPherson, 483 U.S. 378, 384-85 (1987).

69. *See* Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597, 642-48 (1986).

70. 461 U.S. at 147.

concern in only a most limited sense” and is “accurately characterized as an employee grievance concerning internal office policy” is unprotected when an employer “reasonably believe[s]” that it will disrupt the workplace.⁷¹ Third, if the public employer seeks to regulate an employee’s speech that “more substantially involve[s] matters of public concern,” then the employee must make a stronger showing of actual disruption in the workplace.⁷² Finally, an employee who “speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute,” acquires the same constitutional protection as a member of the public.⁷³ Evaluating workplace grievances under this categorical approach, without requiring employers to establish some legitimate interest for penalizing the speech at issue, is troubling for a number of reasons.

A. The Public Concern Test and the Problem of Content Discrimination

Ironically, the public concern test requires courts to do something that the First Amendment is ordinarily thought to forbid: discriminate between protected and unprotected speech on the basis of content. The Court consistently explains in other types of First Amendment cases how content-based regulation is particularly suspect because it allows the government to censor disfavored speech or ideas. Therefore, such regulation, absent at least a compelling governmental interest and a narrowly tailored means to achieve that end, is ordinarily forbidden.⁷⁴ But *Connick* does not require either a compel-

71. *Id.* at 154. No evidence of actual disruption in the workplace is required when the speech falls into the second category. *Id.* at 151-52.

72. *See id.* at 152.

73. *See id.* at 148 n.8. The example that the Court gave was “Givhan’s right to protest racial discrimination.” *Id.* One would think that *Rankin v. McPherson* would fall into this category of speech as well, but no member of the Court, with the possible exception of Justice Powell, seemed to have treated the case that way. 483 U.S. at 393 (Powell, J., concurring).

74. *See, e.g.,* *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 828 (1995); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975); *Police Dep’t v. Mosley*, 408 U.S. 92, 95-96 (1972). *See generally* 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 20.47(a) (1992); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-3, 12-8 (2d ed. 1988); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46

ling governmental interest or a narrow means to achieve the desired end.

Obviously, as the Court explained in *R.A.V. v. City of St. Paul*, “the prohibition against content discrimination . . . is not absolute.”⁷⁵ In fact, the Court has tolerated a number of forms of content discrimination without applying strict scrutiny.⁷⁶ Even the particular form of content discrimination embraced in *Connick* is not unique to the speech of public employees. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁷⁷ the Court held that the First Amendment permits awards of presumed or punitive damages in defamation actions absent a showing of actual malice when the plaintiff is not a public figure and the false statement involves no matter of “public concern.”⁷⁸ The case for tolerating at least some content discrimination in public employment seems particularly strong. Consider, for example, insubordinate speech, which even the dissenters in *Connick* thought lacked First Amendment protection.⁷⁹ There is, of course, no way to evaluate whether speech is insubordinate without considering its content.⁸⁰

(1987); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

75. 505 U.S. 377, 387 (1992).

76. See, e.g., LAURENCE H. TRIBE, *supra* note ___, § 12-18; Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1304-11 (1993).

77. 472 U.S. 749 (1985).

78. See *id.* at 757-61 (plurality opinion); see *id.* at 764 (Burger, C.J., concurring in the judgment); see *id.* at 774 (White, J., concurring in the judgment). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986).

79. 461 U.S. at 163 n.3 (Brennan, J., dissenting).

80. Professor Robert Post has made just this point:

[W]ithin government institutions the distinction between permissible and impermissible speech routinely and necessarily turns on content. School boards, for example, characteristically instruct teachers that they are to use one curriculum rather than another; superiors characteristically instruct subordinates that they are to support at staff meetings one position rather than another; . . . generals characteristically instruct colonels that they are to formulate one kind of defensive plan rather than another. The management of speech within government institutions is thus an exception to the Court's often stated principle that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject, or its content.”

Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 197-98 (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)). See also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA. L. REV. 1713, 1771-73 (1987).

Connick's public concern test, however, authorizes what is ordinarily thought to be a particularly odious type of content discrimination: viewpoint discrimination. Absent the most compelling circumstances, discrimination against disfavored ideas or viewpoints is almost never tolerated under the First Amendment.⁸¹ The public concern test, however, singles out the expression of public employee's views about workplace grievances for disfavored treatment, even if their views are expressed discreetly, politely, and consistently with legitimate managerial prerogatives.⁸² *Connick's* public concern test allows public employers to prevent workers opposed to management's workplace policies from speaking their minds, even if the workers do so in a non-disruptive manner. Under *Connick*, if the speech relates only to a workplace grievance, a court will not even consider the disruptiveness of speech under the *Pickering* balancing test. In fact, under that balancing test, a workplace grievance that implicates matters of public concern is unprotected as long as the employer reasonably believes that it will be disruptive. That is both content and viewpoint discrimination. *Connick* clearly disfavors the expression of employee views about workplace grievances.

The public concern test the Court adopted in *Dun & Bradstreet* provides a useful contrast to how it applied that same test to public employees. In *Dun & Bradstreet*, the Court disadvantaged only speech directed at a business audience that contained errors of fact about the financial condition of a business.⁸³ *Dun & Bradstreet* placed no identifiable viewpoint at a disadvantage, at least not in any obvious way; rather it raised the costs to those who compile factual information for business audiences by exposing them to punitive damages for negligent mistakes of fact.⁸⁴ Under *Connick*, however, the views of those likely to disapprove of the way public institutions are run receive significantly truncated constitutional protection.

81. See, e.g., *Rosenberger*, 515 U.S. at 828-29; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *R.A.V.*, 505 U.S. at 391; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

82. 461 U.S. at 148-49.

83. 472 U.S. at 761-63.

84. Thus far, the Court has not expanded *Dun & Bradstreet's* limitation on the scope of First Amendment protection for defamatory speech beyond the context of factual errors about a business in speech directed at those seeking accurate information about the state of that business. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

The argument that could reconcile a prohibition on workplace grievances with the ordinary rules governing content and viewpoint discrimination is tortured at best. It goes something like this: expression of workplace grievances are punished not because of the idea or viewpoint they express, but rather because they threaten a breakdown in workplace discipline and order. But if a comment is not of public concern, it is unprotected regardless of its potential to disrupt the workplace.

Moreover, the Court's reliance on the effects of workplace grievances on workplace efficiency cannot in the end square its proscription with the rule against content discrimination. The Court has announced that the listener's reaction to speech is not considered a content-neutral basis for regulation.⁸⁵ Thus, governmental fear of its employees' reaction to speech is not an appropriate basis for that speech's proscription. This rule, therefore, proscribes reliance on the effects of workplace grievances as a basis for their regulation. If the ordinary rules of content discrimination are applied to public employees, then, a supervisor's outrage at insubordinate language (even with a justified fear that other employees will be influenced by an office rebel) would not qualify as a content-neutral basis for regulation.

What is more, the Court seems to think that the rule about content discrimination does apply to public employers. In *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*,⁸⁶ for example, the Court held that the First Amendment protected a teacher's comments at a school board meeting about a "fair share" agreement that his union had proposed requiring all teachers to pay union dues.⁸⁷ The state labor board had concluded that the school board had committed an unfair labor practice by permitting the teacher to address it on a subject committed to the collective bargaining process, but the Court invalidated the state labor board's decision as impermissible content discrimination against those views that opposed the fair share agreement.⁸⁸ In light of this

85. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2342-43 (1997); *R.A.V.*, 505 U.S. at 394; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos v. Barry*, 485 U.S. at 321-22.

86. 429 U.S. 167 (1976).

87. *Id.* at 175-76.

88. The Court wrote:

To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to

decision, *Connick's* authorization of content-discrimination in the public workforce is especially puzzling.

B. The Troubling Constitutional Status of Workplace Grievances

Even if one is persuaded that some measure of content, and even viewpoint, discrimination is necessary in the public workplace, why use a public concern test that renders workplace grievances automatically unprotected? Speech about conditions in a private employer's workplace, for example, has long been considered constitutionally protected.⁸⁹ *Connick* itself acknowledged that workplace grievances amount to "speech" within the ambit of the First Amendment; thus, the Court expressly recognized that workplace grievances were not a category of speech "totally beyond the protection of the First Amendment . . . such as obscenity."⁹⁰ Perhaps an employee's workplace gripes can be considered "low-value," like indecent speech. Even regulation of indecent speech, however, requires heightened judicial scrutiny because of the risk that it reflects governmental hostility to particular ideas or viewpoints.⁹¹ Under *Connick*, speech that fails the public concern test receives no judicial protection at all, even if the employer's reaction is motivated by hostility to the ideas or viewpoints expressed rather than by any reasonable fear of workplace disruption.

There are two reasons why the Court might treat workplace grievances as per se unprotected: managerial prerogatives and burdens of litigation. Both rationales, however, are quite problematic.

1. *The Public Concern Test and Managerial Prerogatives.*

The *Connick* court held workplace grievances was unprotected speech because it found a sufficiently powerful governmental interest in "enjoy[ing] wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."⁹² The Court reiterated this point in *Rankin*: "public employers are *em-*

discriminate between speakers on the basis of their employment, or the content of their speech.

Id. (footnote omitted). See generally Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 29-30 (1987).

89. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). See also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 230 (1977).

90. 461 U.S. at 147.

91. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 755-60 (1996); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

92. 461 U.S. at 146.

ployers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions.”⁹³ In contrast to the *Pickering* balancing test, *Connick’s* public concern test did not discriminate between protected and unprotected speech based on the speech’s potential to interfere with a public employer’s management of government workplaces. If an employee’s speech did not implicate a matter of public concern, the Court left it unprotected even if it had no potential to disrupt the workplace or impinge upon managerial prerogatives.

Consider, for example, an employee who respectfully and discreetly asks her supervisor to permit her to move her desk farther away from a noisy copying machine. The supervisor refuses, and the employee acquiesces. Under *Connick*, her supervisor is apparently free to fire her for having made this request, even though it never threatened managerial prerogatives or office efficiency, merely because this is “an employee grievance concerning internal office policy.”⁹⁴ Consider, also, *Smith v. Fruin*,⁹⁵ a case that I argued and won on behalf of the defendants, but surely would have lost under *Connick*. John Smith, a Chicago police officer, alleged that he had received a punitive assignment for complaining to his superiors that other police officers were violating an ordinance prohibiting smoking in public buildings outside of designated areas at the police station to which he had been assigned.⁹⁶ With no evidence that Officer Smith had been disruptive or violated any department policy, the court nevertheless held his complaints to be unprotected because he expressed them in terms of his personal discomfort.⁹⁷

There is surely no reason to believe that the public concern test best identifies the type of speech likely to infringe managerial prerogatives or disrupt the workplace. It is the *Pickering* balancing test that screens out disruptive speech from constitutional protection. *Connick*, unlike *Pickering*, authorizes content discrimination based not on disruption, but on a lack of “public concern” with an employee’s

93. 483 U.S. 378, 384 (1987). See also *Waters*, 511 U.S. at 675 (explaining that “[t]he government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer”).

94. 461 U.S. at 154.

95. 28 F.3d 646 (7th Cir. 1994), cert. denied, 513 U.S. 1083 (1995).

96. See *id.* at 645-47.

97. See *id.* at 651-52.

grievances. Thus, the rule and its stated rationale simply do not line up.

2. *The Public Concern Test and the Burdens of Litigation.*

Another plausible rationale suggested by the Court's opinion in *Connick* is that the test is a means to screen out swearing contests between supervisors and supervisees, which burden public employers to defend and courts to decide. The fact that recognition of First Amendment rights will require public entities to expend resources defending themselves, and judges to expend resources deciding those cases, however, has rarely been thought dispositive. Recently, for example, the Court rather indignantly rejected the suggestion that it should not afford public contractors a First Amendment right not to be discharged because of their political beliefs and affiliations just because it would burden public bodies to defend the ensuing litigation.⁹⁸ Moreover, there is little reason to believe that those allegations that satisfy the public concern test are any less burdensome and intrusive to defend than those that do not.

Perhaps, however, the *Connick* court did not use the public concern test as a means to identify particularly intrusive claims. Maybe the Court recognized that *all* litigation over employee discipline is burdensome and intrusive; therefore, such cases must implicate a core First Amendment value before they are heard. If that is what the Court meant, it had a point. Most people, even those who advocate expansive employer liability when some offsetting value justifies it, are likely to agree that there is something uniquely intrusive about having to explain personnel decisions to the satisfaction of a court. Thus, the Court was onto something in *Connick* if it believed that the burdens of litigating infringes managerial autonomy to such an extent that it justifies limiting the speech rights of public employees whose speech is not at the core of the First Amendment.⁹⁹ Obviously, when an employee's statements urge the public to hold government accountable

98. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 724 (1996); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 681 (1996).

99. *Connick's* language suggests that something similar concerned the Court: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 461 U.S. at 146. Speech on public affairs, rather than issues of primarily personal or private interest, is generally considered to be at the heart of the First Amendment. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (plurality opinion); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978).

for its alleged misdeeds, the chance that an employer has illicit motives for imposing discipline may well be greatest since that type of speech is likely to be particularly politically sensitive. Even so, the public concern test is not a good means to filter out that kind of case from those that most clearly threaten public employers legitimate prerogatives because it is such a difficult test to administer.

C. The Administrability of the Public Concern Test

A court deciding whether speech addresses a matter of public concern, can employ one of two methodologies. The first is an empirical test based on whether the public at large actually cares about the subject matter raised. This approach is appealing if only because when a speaker succeeds in capturing public attention, few could argue that the speaker has not raised a matter of public concern. This approach is problematic, however, because it hinges First Amendment protection on the employee's abilities as a publicist, and the public's reaction to the particular matter that she raises. Normally, First Amendment protection does not turn on whether the speaker is able to convert people to her position,¹⁰⁰ but that is the consequence of an empirical approach.¹⁰¹ Even worse, public employees risk losing their jobs when raising new issues with which the public is not yet familiar. Therefore, any acceptable approach to a public concern test must

100. To the contrary, the Court is fond of writing that the First Amendment protects unpopular ideas and viewpoints. See, e.g., *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (1994); *Forsyth County*, 505 U.S. at 133-35.

101. Indeed, once in a while, courts face such problems directly and consider whether speech can satisfy the public concern test even if there is no likelihood that the public actually will care about the issue raised. In *Fox v. District of Columbia*, 83 F.3d 1491 (D.C. Cir. 1996), for example, the district court denied protection to an employee's report that \$500 in public funds was missing from an unlocked safe, concluding that there was no evidence that the public would be interested in a petty theft. The court of appeals reversed, reasoning that First Amendment protection is not reserved to cases inspiring front-page coverage. Fox's report may not have been exciting—indeed, he did not name names or make the sort of sweeping allegations that might tend to raise the public's eyebrows if known—but it did involve the theft of funds from a public agency, evidently made possible by a striking neglect, a matter that, unless the public is hopelessly jaded, would bear on its appraisal of the agency's performance. See *id.* at 1494. See also *Brown v. Disciplinary Comm.*, 97 F.3d 969, 973-74 (7th Cir. 1996) (reversing the district court's determination that volunteer firefighter's complaint about changing name of "Edgerton Fire Department" to "Edgerton Fire Protection District" did not involve a matter of public concern because of limited public interest in the issue, reasoning that "[t]he First Amendment would be severely compromised if we required ideas to pass a popularity threshold before they won protection.").

leave room where speakers can raise issues of unproven public interest and concern without risking retaliation from their employers.¹⁰²

Second, a court can take the normative approach. Courts could develop a theory about what the public should care about and what the public should merely regard as “employee complaints over internal office affairs.”¹⁰³ That approach does not seem consistent with the First Amendment. It allows judges, rather than the public, to decide which issues merit public concern. We generally take as sacrosanct that “governments must not be allowed to choose ‘which issues are worth discussing or debating.’”¹⁰⁴ Thus, a normative approach to the public concern test looks like the type of censorial power that the First Amendment is ordinarily thought to deny to government institutions, including the courts. Under a normative test courts assume the power to decide which ideas enter the public debate, and which a public employer can legitimately seek to prevent from being disseminated outside the workplace.

Nor is any workable normative theory immediately apparent. Practically any employee grievance can be fairly characterized as relevant to the public’s assessment of what kind of job a public body is doing on its behalf. There is no readily identifiable category of workplace grievances that is plainly irrelevant to the public’s ability to inform itself about public institutions and hence hold them accountable for their performance. A supervisor’s failure to improve workplace efficiency by moving employees away from noisy copiers, for example, could easily be of public concern. Of course the productivity (or lack thereof) of public offices is often a staple of public debate about the performance of government. Similarly, a police department’s failure to enforce a prohibition on smoking indoors, as in *Smith v. Fruin*, could reflect on that department’s efficiency, as well as its commitment to enforce a law of considerable public concern.

Also, there is a question about the judiciary’s competence to make judgments about what type of information the public will find

102. See, e.g., Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 58 (1990); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 673 (1990); R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 34-37 (1987).

103. *Connick*, 461 U.S. at 149.

104. *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 537-38 (1980) (quoting *Police Dep’t v. Moesly*, 408 U.S. 92, 96 (1972)).

helpful in its evaluation of public institutions.¹⁰⁵ Unlike elected officials, federal judges ordinarily are not expected to have a finger on the public pulse. There is no reason to believe that unelected and life-tenured judges have any particular ability to understand the public's concerns or what information the public needs in order to hold officials accountable. What may first seem like office gossip may ultimately serve to inform the public about the public institutions' management.¹⁰⁶ What we call sexual harassment today probably many people once considered mere office gossip; certainly many did in the milieu that ordinarily produces judges. Perhaps unsurprisingly, there are a distressing number of cases holding that allegations of sexual harassment, or other forms of sex discrimination, do not involve matters of public concern and hence finding that the plaintiff's complaint receives no First Amendment protection.¹⁰⁷ Anyone, however, who bothers to ask the public whether it is concerned with managers who use their government positions to harass or discriminate is likely to get an affirmative response. Thus, there is little reason to believe that judges can act as gatekeepers of the marketplace of ideas.

105. Indeed the Court once believed that this very point counseled against the use of a public concern test to determine First Amendment protection. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court refused to adopt a test asking whether alleged defamatory speech involved a question of "general or public interest" before granting it First Amendment protection against liability absent proof of malice since the Court doubted "the wisdom of committing . . . to the conscience of judges" the question "what information is relevant to self-government." *Id.* at 346 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)). Then, in *Connick*, and again in *Dun & Bradstreet* (although the main opinion in that case was authored by Justice Powell, who wrote the opinion of the Court in *Gertz*), the Court, without explanation, embraced the public concern test it had earlier scorned. Consistency, however, is reputedly the hobgoblin of small minds.

106. See generally, e.g., Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30-32 (1990); Robert C. Post, *supra* note 102, at 672.

107. See, e.g., *David v. City of Denver*, 101 F.3d 1344, 1354-57 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 157 (1997); *Workman v. Jordan*, 32 F.3d 475, 482-83 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1357 (1995); *Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir. 1993) (*per curiam*), *cert. denied*, 114 S. Ct. 2708 (1994); *Hartman v. Board of Trustees*, 4 F.3d 465, 471-72 (7th Cir. 1993); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994); *Stewart v. Parish of Jefferson*, 951 F.2d 681 (5th Cir. 1992), *cert. denied*, 506 U.S. 820 (1992); *Rice v. Ohio Dep't of Transp.*, 887 F.2d 716, 719-21 (6th Cir. 1989), *vacated on other grounds*, 479 U.S. 1001 (1990); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987); *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 419-20 (7th Cir. 1988). See also *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530 (11th Cir. 1997) (holding that singular allegation of disability discrimination did not raise a matter of public concern); *Watkins v. Bowden*, 105 F.3d 1344, 1352-54 (11th Cir. 1997) (holding that employee complaint of racially hostile working environment did not raise a matter of public concern).

Finally, fealty to any normative approach to questions of public concern becomes difficult when confronted with evidence that the public actually cares about an issue.¹⁰⁸ In fact, the tide is turning in the sexual harassment and discrimination cases because courts are responding to heightened public concern to these issues.¹⁰⁹ If no public concern test can succeed, however, without permitting the parties to adduce evidence about whether the public actually cares about an issue, we are back to the empirical test with which we started. In other words, First Amendment protection would turn on whether the speaker can convince others to be concerned with an issue.

Only twice, in *Connick* and *Rankin*, has the Supreme Court discussed how to approach questions of public concern in the workplace. These two cases, however, point in different directions. *Rankin* seems to take a normative approach. Surely the Court did not mean to suggest that the public was debating whether the President should be assassinated, or, more generally, cared about what Ardith McPherson thought of President Reagan.¹¹⁰ To the contrary, the Court seems to

108. An example is provided by *Lewis v. Harrison School District No. 1*, 805 F.2d 310 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987), a case that would seem to flunk the public concern test except for the public's actual interest in the dispute. The court held in *Lewis* that a school principal's presentation to the school board on behalf of his wife, a teacher in the system who was to be transferred to another school, raised a matter of public concern, relying primarily on the fact that there was a large turnout at the board meeting and newspaper coverage of his remarks. *Id.* at 314-15. The opposite approach is illustrated by *Rahn v. Drake Center, Inc.*, 31 F.3d 407 (6th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995). The court in *Rahn* denied protection to a press release and television interview by a nurse as chair of a committee opposing a plan to privatize much of the service provided by a public hospital. *Id.* at 414. The court reasoned that even though the plaintiff had claimed that the plan would lead to an unwise use of public funds, this much could be said of virtually anything at a public workplace with which an employee disagreed. *See id.* at 412-13. That may be true, but it put the court in the position of claiming that speech actually deemed newsworthy, and relating to the manner in which public institutions discharge their functions, was not of public concern. Nevertheless, the court was surely correct to observe that if all allegations relating to the manner in which public funds are spent are deemed of public concern, then virtually any workplace grievance will satisfy that test.

109. *See, e.g.*, *Azzaro v. County of Allegheny*, 110 F.3d 968, 978-80 (3d Cir. 1997); *Voigt v. Savell*, 70 F.3d 1552, 1560 (9th Cir. 1995), *cert. denied*, 517 U.S. 1209 (1996); *Davis v. Ector County*, 40 F.3d 777, 781-83 (5th Cir. 1994); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269-70 (5th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993); *Patrick v. Miller*, 953 F.2d 1240, 1246-47 (10th Cir. 1992); *Matulin v. Village of Lodi*, 862 F.2d 609, 612-13 (6th Cir. 1988); *Rode v. Dellarciprete*, 845 F.2d 1195, 1200-02 (3d Cir. 1988); *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). *See also* *Tao v. Freeh*, 27 F.3d 635, 639-40 (D.C. Cir. 1994) (holding that alleged pattern of discrimination raises matter of public concern); *Auriemma v. Rice*, 910 F.2d 1449, 1459-61 (7th Cir. 1990) (*en banc*) (holding that alleged racial bias in promotions raises a matter of public concern), *cert. denied*, 501 U.S. 1204 (1991).

110. At best, the public might have been interested in the fact that a public employee has seemingly advocated the assassination of the President, but Justice Scalia was undoubt-

have held that Ardith McPherson was entitled to express her own view of the President in her own way, regardless of the reaction of others. In *Connick*, however, the Court seems to have taken an empirical approach. The dissenters, rather sensibly, argued that the public should be concerned with the state of morale and discipline at a prosecutor's office.¹¹¹ The majority did not disagree, but concluded that the public would not have found Myers' questionnaire useful to its evaluation of the district attorney's office. They noted that "the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo."¹¹² The Court also took an empirical approach when it considered the one question (whether employees felt pressure to work in political campaigns) that touched on a matter of public concern. It observed that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service."¹¹³

Lacking clear guidance from the Supreme Court, the circuits have struggled to develop a coherent approach as to what constitutes a matter of public concern.¹¹⁴ In some areas the law is just in disarray (for example when public employees allege discrimination or harassment in the workplace). More often the circuits avoid square conflicts by making their decisions intensely fact-driven, thus employing what has become a highly evolved form of content discrimination. Courts parse

edly correct to argue that the fact that the public might be outraged by a statement does not for that reason make the statement constitutionally protected on the ground that it addresses a matter of public concern. *See Rankin* 483 U.S. 378, 396-98 (1987) (Scalia, J., dissenting).

111. *See Connick* 461 U.S. at 163 (Brennan, J., dissenting).

112. *Id.* at 148.

113. *Id.* at 149.

114. In fact, there is something of a consensus among the commentators that the difficulties in developing any principled approach to the public concern test render it essentially standardless. *See, e.g.,* Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 *IND. L.J.* 43 (1988); Cynthia L. Estlund, *supra* note 106, at 43-51; Arlen W. Langvardt, *Public Concern Revisited: A New Role For An Old Constitutional Doctrine in the Constitutional Law of Defamation*, 21 *VAL. U.L. REV.* 241, 259-70 (1987); Toni M. Massaro, *supra* note 88, at 27-33; Robert C. Post, *supra* note 102, at 667-74; Rodney A. Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation, 75 *GEO. L.J.* 1519, 1540-45 (1987); Peter C. McCabe III, Note, *Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees*, 60 *IND. L.J.* 339, 358-59 (1985); D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 *U. CHI. L. REV.* 249, 258-62 (1990); Nadine Renee Dahm, Note, *Protecting Public Employees and Defamation Defendants: A Two-Tiered Analysis at What Constitutes "A Matter of Public Concern"*, 23 *VAL. U.L. REV.* 587, 594-605 (1988-89).

employees' statements as finely as tax lawyers parse revenue rulings, and then decide whether the employee's speech focused more on her own working conditions as opposed to some broader issue. In cases where the employee alleges that her employer is not adequately serving the public, for example, her statements are frequently held to raise matters of public concern because she alleges that the public body is not properly discharging its responsibilities.¹¹⁵ A different result is reached though when the public employee focuses too much on her working conditions.¹¹⁶ In contrast, if the employee makes allegations of corruption or misconduct she also seems to satisfy the public con-

115. See, e.g., *Campbell v. Towse*, 99 F.3d 820, 827-28 (7th Cir. 1996) (holding that officer's criticism of community-oriented policing program raised a matter of public concern), *cert. denied*, 117 S. Ct. 1254 (1997); *Shands v. City of Kennett*, 993 F.2d 1337, 1343-45 (8th Cir. 1993) (holding that claim that fire department lacks sufficient resources raised a matter of public concern), *cert. denied*, 510 U.S. 1072 (1994); *Schalk v. Gallemore*, 906 F.2d 491, 495-96 (10th Cir. 1990) (per curiam) (holding that charge of waste and inefficiency at hospital raised a matter of public concern); *Johnsen v. Independent Sch. Dist. No. 3*, 891 F.2d 1485, 1490 (10th Cir. 1989) (holding that criticism of hospital's medication policy raised a matter of public concern); *Moore v. City of Kilgore*, 877 F.2d 364, 370-71 (5th Cir. 1989) (holding that firefighters' claim that department lacked adequate staffing raised a matter of public concern), *cert. denied*, 493 U.S. 1003 (1989); *Frazier v. King*, 873 F.2d 820, 825-26 (5th Cir. 1989) (holding that criticisms of quality of nursing care raised a matter of public concern), *cert. denied*, 493 U.S. 977 (1989); *Hamer v. Brown*, 831 F.2d 1398, 1402-03 (8th Cir. 1987) (holding that criticisms of firefighter training raised a matter of public concern); *Ohse v. Hughes*, 816 F.2d 1144, 1150-53 (7th Cir. 1987) (holding that attack on competence of probation supervisors raised a matter of public concern), *cert. denied*, 484 U.S. 1025 (1988); *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 46-47 (2d Cir. 1983) (holding that charge of waste and inefficiency at hospital raised a matter of public concern).

116. See, e.g., *Roe v. City of San Francisco*, 109 F.3d 578, 585-86 (9th Cir. 1997) (holding that police officer's memorandum disagreeing with prosecutor's decision not to file charges in case handled by officer because of prosecutor's view on legality of search did not raise a matter of public concern); *Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274, 1278-79 (11th Cir. 1992) (holding that nurse's criticisms of cleaning of operating room did not raise a matter of public concern); *Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir. 1989) (holding that doctor's attacks on quality of patient care did not raise a matter of public concern), *cert. denied*, 493 U.S. 847 (1989); *Brown v. City of Trenton*, 867 F.2d 318, 321-22 (6th Cir. 1989) (holding that police officers' complaints about chief's lack of support for emergency response team did not raise a matter of public concern); *Mings v. Department of Justice*, 813 F.2d 384, 387-88 (Fed. Cir. 1987) (holding that INS employee's letter to superior criticizing INS forms did not raise a matter of public concern); *Gomez v. Texas Dep't of Mental Health & Mental Retardation*, 794 F.2d 1018, 1023 (5th Cir. 1986) (holding that employee complaints about patients' length of stay at mental health facility did not raise a matter of public concern); *Zaky v. United States Veterans Admin.*, 793 F.2d 832, 839 (7th Cir. 1986) (holding that cardiologist's criticism of hospital's policies and personnel did not raise a matter of public concern), *cert. denied*, 479 U.S. 937 (1986); *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (holding that police chief's opinion that village manager was incompetent did not raise a matter of public concern); *Davis v. West Community Hosp.*, 755 F.2d 455, 460-61 (5th Cir. 1985) (holding that doctor's complaints about competence of other staff did not raise a matter of public concern).

cern test,¹¹⁷ but not when her statements are about her own job.¹¹⁸ An employee can satisfy the public concern test when she criticizes her employer's personnel policies if she makes it sound like the policies interfere with her employer's ability to serve the public,¹¹⁹ but not

117. *See, e.g.,* Hulbert v. Wilhelm, 120 F.3d 648, 653-54 (7th Cir. 1997) (holding that allegations of improper billing and department's responsibility for a fire raised a matter of public concern); Fox v. District of Columbia, 83 F.3d 1491, 1494 (D.C. Cir. 1996) (holding that theft of cash from unlocked safe raised a matter of public concern); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996) (holding that officer's report of misconduct by colleague raised a matter of public concern); Kincade v. City of Blue Springs, 64 F.3d 389, 396 (8th Cir. 1995) (holding that waste and incompetence alleged in construction project raised a matter of public concern), *cert. denied*, 517 U.S. 1166 (1996); Feldman v. Philadelphia Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994) (holding that auditor's reports critical of authority's management raised a matter of public concern); Marshall v. Porter County Plan Comm'n, 32 F.3d 1215, 1219-20 (7th Cir. 1994) (holding that allegations of inspector's false billings and nonfeasance raised a matter of public concern), *cert. denied*, 513 U.S. 1155 (1995); Casey v. City of Cabool, 12 F.3d 799, 802-03 (8th Cir. 1993) (holding that officials' misuse of city resources raised a matter of public concern), *cert. denied*, 513 U.S. 932 (1994); Glass v. Dachel, 2 F.3d 733, 740-42 (7th Cir. 1993) (holding that deputy sheriff's comment that superior may have stolen property raised a matter of public concern); Patrick v. Miller, 953 F.2d 1240, 1247-48 (10th Cir. 1992) (holding that alleged improper budgeting practices raised a matter of public concern); Biggs v. Village of Dupo, 892 F.2d 1298, 1301-02 (7th Cir. 1990) (holding that police officer's charge of political interference with police department raised a matter of public concern); Gillette v. Delmore, 886 F.2d 1194, 1197-98 (9th Cir. 1989) (holding that firefighter allegation that person in need of medical care was mistreated raised a matter of public concern); Wulf v. City of Wichita, 883 F.2d 842, 856-60 (10th Cir. 1989) (holding that police officer's allegations of misconduct by superiors raised a matter of public concern); Starrett v. Wadley, 876 F.2d 808, 816-17 (10th Cir. 1989) (holding that allegation of supervisor's drinking raised a matter of public concern); O'Donnell v. Yanchulis, 875 F.2d 1059, 1061-62 (3d Cir. 1989) (holding that political favoritism alleged in police department raised a matter of public concern); Brawner v. City of Richardson, 855 F.2d 187, 191-92 (5th Cir. 1988) (holding that police officer alleged favoritism during investigation of another officer raised a matter of public concern); Conaway v. Smith, 853 F.2d 789, 795-96 (10th Cir. 1988) (holding that alleged misconduct of colleagues reported to superior raised a matter of public concern); Solomon v. Royal Oak Township, 842 F.2d 862, 865 (6th Cir. 1988) (police officer alleged that superior impeded investigation raised a matter of public concern); Marohnic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986) (holding that complaints about false billing raised a matter of public concern); Czurlanis v. Albanese, 721 F.2d 98, 106-07 (3d Cir. 1983) (holding that speech attacking county garage as wasteful raised a matter of public concern).

118. *See, e.g.,* Smith v. Fruin, 28 F.3d at 651-53 (holding that officer's allegation that indoor smoking ordinance was not enforced by his superiors did not raise a matter of public concern); Thomson v. Scheid, 977 F.2d 1017, 1020-21 (6th Cir. 1992) (holding that fraud investigator's allegations of misconduct did not raise a matter of public concern), *cert. denied*, 508 U.S. 910 (1993); McMurphy v. City of Flushing, 802 F.2d 191, 197-98 (6th Cir. 1986) (holding that police officer's allegations of superior's misconduct did not raise a matter of public concern).

119. *See, e.g.,* Watters v. City of Philadelphia, 55 F.3d 886, 892-95 (3d Cir. 1995) (holding that program manager's criticisms of police department's employee assistance program raised a matter of public concern); Piesco v. City of New York, 933 F.2d 1149, 1157 (2d Cir.) (holding that testimony that police exams were worthless raised a matter of public concern), *cert. denied*, 502 U.S. 921 (1991); Hamer v. Brown, 831 F.2d 1398, 1402 (8th Cir.

when appearing to ensure her self-interest.¹²⁰ In the case of a teacher's statements about the quality of education, for example, criticisms of public schools are generally considered of public concern,¹²¹ unless the teacher sounds too concerned with her own classroom.¹²²

1987) (holding that claim to investigating committee that employer was underfunding programs and indiscriminately firing employees raised a matter of public concern); *Brockell v. Norton*, 732 F.2d 664, 667 (8th Cir. 1984) (holding that claim that police supervisors had improperly obtained copy of certification test raised a matter of public concern).

120. *See, e.g.*, *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530 (11th Cir. 1997) (employee's complaint about employer's failure to accommodate his disability); *Colburn v. Trustees*, 973 F.2d 581 (7th Cir. 1992) (criticisms of peer evaluation in sociology department); *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393 (3d Cir. 1992) (teacher's statements about low morale); *Ezekwo v. NYC Health & Hosp. Corp.*, 940 F.2d 775 (2d Cir.) (doctor's criticisms of hospital's residency program), *cert. denied*, 502 U.S. 1013 (1991); *Mussey v. Gardner*, 741 F.2d 434, 438-39 (D.C. Cir. 1984) (FBI agent's criticism of furlough policy), *cert. denied*, 470 U.S. 1050 (1985).

121. *See, e.g.*, *Bernheim v. Litt*, 79 F.3d 318, 324-25 (2d Cir. 1996) (holding that teacher's statements regarding principal's alleged misrepresentations of student achievement test scores satisfy public concern test); *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 192-93 (4th Cir. 1994) (holding that teacher's claim that school mismanaged budget satisfies public concern test); *Schiller v. Moore*, 30 F.3d 1281, 1284 (10th Cir. 1994) (holding that principal's criticism of school reorganization plan might pass public concern test); *Tompkins v. Vickers*, 26 F.3d 603, 606-07 (5th Cir. 1994) (holding that teacher's complaints about canceling an art program satisfy public concern test); *Powell v. Gallentine*, 992 F.2d 1088, 1090-91 (10th Cir. 1993) (holding that professor's claim that school mismanaged budget satisfies public concern test); *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 156-58 (4th Cir. 1992) (holding that teacher's complaint of school's mismanaged budget satisfies public concern test); *Maples v. Martin*, 858 F.2d 1546, 1552-53 (11th Cir. 1988) (holding that criticisms of curriculum in mechanical engineering department satisfy public concern test); *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1080-82 (4th Cir. 1987) (holding that teacher's support for principal satisfies public concern test), *cert. denied*, 487 U.S. 1206 (1988); *Honore v. Douglas*, 833 F.2d 565, 569 (5th Cir. 1987) (holding that professor's criticism of the dean satisfies public concern test); *Southside Pub. Sch. v. Hill*, 827 F.2d 270, 274 (8th Cir. 1987) (holding that criticism of special education satisfies public concern test); *Cox v. Dardenelle Pub. Sch. Dist.*, 790 F.2d 668, 672 (8th Cir. 1986) (holding that teacher's criticism of principal's policies satisfies public concern test); *Johnson v. Lincoln Univ.*, 776 F.2d 443, 450 (3d Cir. 1985) (holding that criticism of quality of chemistry department satisfies public concern test); *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640, 644 (8th Cir. 1983) (holding that assistant coach's criticism of head coach's use of corporal punishment satisfies public concern test).

122. *See, e.g.*, *Khuans v. Sch. Dist. 110*, 123 F.3d 1010, 1016-17 (7th Cir. 1997) (holding that school psychologist's complaints about supervisor's performance constitute private concerns); *Wales v. Board of Educ. of Sch. Dist. 300*, 120 F.3d 82, 85 (7th Cir. 1997) (explaining that teacher's complaints about lack of discipline constitute private concerns); *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1183 (11th Cir. 1997) (explaining that teacher's complaints, privately made to supervisor, were private concerns); *Gardetto v. Mason*, 100 F.3d 803, 812-15 (10th Cir. 1996) (holding that teacher's criticism of internal administration and personal grievances did not directly affect public's perception of quality of education); *Cliff v. Board of Sch. Comm'rs*, 42 F.3d 403, 409-11 (7th Cir. 1994) (explaining that teacher's complaints of large class size and its affects on her ability to control the students did not rise to level of public concern); *Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986) (finding that a teacher's complaint regarding late arrival of remedial reading

Courts make a similarly elaborate inquiry when an employee is disciplined for helping a colleague assert legal rights,¹²³ or even when an employee is disciplined for appearing in blackface, as has happened at least twice and which led to different (and barely reconcilable) outcomes.¹²⁴ Although some readers might harmonize these holdings, the public concern test has raised arbitrary content and viewpoint discrimination to new and unparalleled heights.

D. The Manipulability of the Public Concern Test

All this illustrates both why we can have limited confidence in the ability of courts to identify which employee grievances merit constitutional protection, and how easily an employee can manipulate the public concern test. Sheila Myers lost her case only because the bulk of her questionnaire “did not seek to inform the public that the District Attorney’s Office was not discharging its governmental responsibilities” or “seek to bring to light actual or potential wrongdoing or breach of public trust.”¹²⁵ If she had affirmatively expressed the view, however, that the office’s transfer policies were depriving it of experienced prosecutors in key positions, and thus detracting from its effec-

materials did not imply discrimination, corruption, nor waste, and therefore did not constitute public concern); *Saye v. St. Vrain Valley Sch. Dist.* RE-1J, 785 F.2d 862, 866 (10th Cir. 1986) (holding that the presumption falls in favor of the employer when employee speech concerning office policy arises from employment dispute concerning the very application of that policy to the employee); *Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986) (explaining that teacher’s complaints about the teacher assignment policy’s effect on his position and student collegiate registration’s effect on his ability to control his students did not constitute matters of public concern).

123. *Compare* *Barnes v. Small*, 840 F.2d 972, 982-83 (D.C. Cir. 1988) (holding that speech of an employee representing other union members was unprotected where it did not relate to general matters of public concern), *with* *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993) (protecting the speech of an employee who assisted others in prosecution of a discrimination complaint), *and* *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1576-78 (5th Cir. 1989) (declaring employee’s testimony at discrimination hearing protected), *cert. denied*, 493 U.S. 1019 (1990). *See also* *Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 886-87 (3d Cir. 1997) (finding that employee’s appearance at colleague’s bail hearing was protected); *Pro v. Donatucci*, 81 F.3d 1283, 1288 (3d Cir. 1996) (holding that an employee testifying pursuant to subpoena at supervisor’s divorce proceeding satisfies the public concern test); *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1177-78 (5th Cir. 1992) (holding that a group of employees asserting their rights under Fair Labor Standards Act were not protected by the First Amendment).

124. *Compare* *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir. 1985) (holding off-duty performance in blackface protected), *cert. denied*, 476 U.S. 1159 (1986), *with* *Tindle v. Caudell*, 56 F.3d 966, 69 (8th Cir. 1995) (holding officer’s appearance at party in blackface unprotected).

125. 461 U.S. 138, 148 (1983).

tiveness, she would have satisfied the test.¹²⁶ She would have, however, just as clearly been infringing on managerial prerogatives.

An employee blessed with a modicum of imagination, or legal advice, can state virtually any criticism of a public employer in terms that will satisfy the public concern test. Consider once again the case of Officer Smith. If he had received legal advice before he complained about second-hand smoke at his workplace, he would have framed his complaint differently. Doubtless he would have said that the Chicago Police Department's failure to enforce Chicago's Clean Indoor Air Ordinance at his workplace reflected the department's disturbing failure to seriously consider its responsibility to enforce the law and to treat the Chicago City Council's duly enacted directives with the requisite seriousness. Furthermore, he would have added, second-hand smoke endangers the health of everyone who visits the police station where he worked. Indeed virtually any time an employee frames her grievance in terms of a public employer's waste, inefficiency, or wrongdoing, she has a pretty good chance of satisfying the public concern test.¹²⁷

Thus, the public concern test, at least as it operates in practice, is little more than a trap for the unwary; hence, those who do not know the ritual incantation necessary before they speak (or at least before they are deposed) lose. A test does little to protect legitimate managerial prerogatives if it depends so heavily on the fortuity of how an employee frames his grievance, and on the paucity of legal advice available to many public employees. Indeed, this is a triumph of form over substance.

The end of the road for the public concern test as a means to weed out mere workplace disputes may well be foreshadowed by *Waters v. Churchill*. *Waters* seems like a classic garden variety case about a disagreement between an employee and her supervisor on workplace management, yet no Justice said that Cheryl Churchill's complaints about the obstetrics department failed to raise a matter of

126. In fact, in *Zabori v. Stamler*, 847 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988), the plaintiff did just that. The court held that an employee's criticism of the personnel policies of the prosecutor's office were framed in such a way as to raise a matter of public concern. *See id.* at 77-78.

127. *See* cases cited *supra* notes 105, 107, 109 and 111. An especially compelling example of just this problem is provided by *Withiam v. Baptist Health Care Hosp. of Oklahoma, Inc.*, 98 F.3d 581 (10th Cir. 1996). The court held that Withiam's public endorsement of the incumbent management of the hospital that employed her did not raise a matter of public concern, even though made in the form of a formal resolution submitted to the board of trustees, because the resolution did not contain sufficient reasoning to inform the public about the issue in any meaningful way. *See id.* at 583.

public concern. If Churchill satisfied the public concern test, how many other workplace grievances cannot be formulated in similar terms in order to satisfy that test?

E. The Problem of Overbreadth

One other aspect of the public concern test merits concern: it does not require an employer to have any policy or standards for the types of comments for which it disciplines employees. In *Connick* and *Waters*, the Court upheld dismissals even though the employee had violated no office policy or established practice. In both cases the Court validated the right of management to make ad hoc and standardless terminations based on the public employee's speech.

In all other areas of First Amendment jurisprudence, when the government imposes ad hoc and standardless regulation of speech, the Court quickly invalidates such restrictions as unconstitutional, even if the plaintiff's own conduct is not constitutionally protected. Standardless regulation of speech creates an impermissible risk that the government will use its discretion as a pretext to engage in otherwise forbidden content or viewpoint discrimination.¹²⁸ This rationale surely applies to employee discipline; which is more likely to be used against the partisan opponents of incumbent management than its supporters. Ad hoc discipline, even though permitted by *Connick*, is justified only if one can tolerate a serious risk of content and viewpoint discrimination brought about by the absence of heightened judicial review.

Even if one disregards the risk of viewpoint discrimination, there is another objection to standardless regulation of a public employee's speech. When proscriptions on speech are at issue the First Amendment generally requires more precision and predictability to avoid problems of overbreadth than an ad hoc approach can provide. Thus, standardless regulation is ordinarily vulnerable to attack, even if plaintiff's own speech is unprotected.

The overbreadth doctrine permits a plaintiff to attack the facial validity of a regulation if the regulation proscribes a substantial quantum of protected speech, even if the plaintiff's own speech is unprotected.¹²⁹ Courts invalidate overbroad enactments on their face

128. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-33 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990) (plurality opinion); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-68 (1986).

129. See, e.g., *Boos v. Barry*, 485 U.S. 312, 329 (1988); *Board of Airport Comm'rs v. Jews For Jesus, Inc.*, 482 U.S. 569, 574 (1987); *City of Houston v. Hill*, 482 U.S. 451, 458-59

because such restrictions have an unacceptable “chilling effect” on protected speech.¹³⁰ Hence, Sheila Myers, Cheryl Churchill and other employees whose speech is unprotected under *Connick* should have been able to mount an overbreadth attack on the facial validity of the restriction at issue in their cases.

When a public employer fires an employee for based on her speech, in the absence of an articulated and facially valid policy, the problem of overbreadth is quite real. Even an employee who wishes to speak out on matters of public concern in a non-disruptive manner will pause if she is not sure whether it will cost her her job.¹³¹ Regardless of what one may think as an empirical matter of the likelihood that overly broad statutes or regulations chill protected speech,¹³² the “chilling effect” problem is surely quite real in the workplace. Anyone who doubts the existence of a “chilling effect” should visit an office after a known dissident has been fired. Once the message gets out that those who speak up in defiance of the boss will get sacked, the result is predictable. After all, few of us like to gamble with our jobs. Without clear directives on what type of speech is impermissible, an employee who speaks out risks termination and faces unemployment and years of litigation even if she is confident that a court will rule in her favor. Even an employee who files a declaratory judgment action to test his right to speak out must worry about retaliation.

In *Connick* and *Waters*, public employers made ad hoc decisions to fire employees based on no announced or articulated policy, other than that the employer thought that it had “cause” to discharge because it felt the employee’s statements likely would adversely effect the workplace. Such a policy would be broad enough to sweep up plenty of protected speech, including the statements at issue in *Pickering*, *Perry*, *Mt. Healthy* and *Rankin*. Under these cases, the First

(1987); *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1981).

130. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 111 & n.8 (1990); *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (plurality opinion); *id.* at 586 (Scalia, J., concurring in judgment in part and dissenting in part); *Board of Airport Comm’rs*, 482 U.S. at 574; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789, 798-801 (1984); *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 216-17 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972).

131. See Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 142-55 (1988-89).

132. See generally, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205-09 (1985); Martin H. Redish, *The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031, 1040-41 (1984).

Amendment bars an employer from discharging an employee merely because she criticizes management's performance.¹³³ The *Connick* line of cases, however, grants broad discretion on the part of employers to chill the exercise of First Amendment rights. The question thus arises whether *Connick* and *Waters* would have come out differently if the plaintiffs had made overbreadth arguments?

A public employer faced with an overbreadth claim by an employee can make three arguments. First, the employer can argue that the overbreadth doctrine is only applicable to enactments, statutes, or regulations, but not to individual employment decisions. This argument elevates form over substance: if a statute or regulation can be attacked as overbroad, why not a de facto policy with the same inhibitory effect on protected speech?¹³⁴ In any event, a discharged public employee can readily frame an overbreadth attack on her dismissal as a challenge to an enactment. Public employers derive their power to hire and fire from some type of statute, ordinance, or similar grant of authority, and overbreadth challenges are permitted when an enactment "delegates overly broad discretion to the decisionmaker."¹³⁵ Thus, if an enactment is required to mount an overbreadth challenge, the employee need identify only the statute, ordinance, or regulation that grants the employer broad discretion to discharge for "cause" or otherwise.

Second, the public employer can argue against the application of the overbreadth doctrine to its hiring and firing decisions because permitting such attacks on its employment decisions would be too great an infringement of its managerial prerogatives. There is nothing, however, in the case law that would support this argument. Public employees have been permitted to challenge enactments governing the terms and conditions of their employment on grounds of overbreadth

133. See, e.g., LAURENCE H. TRIBE, *supra* note 74, § 12-29 at 1031; Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 918-20 (1986).

134. If anything, the absence of a generally applicable enactment ought to call for stricter rather than relaxed judicial review. In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1995), the Court refused to afford a content-neutral injunction against protest activities outside of abortion clinics the degree of deference that it affords statutes and ordinances, since injunctions "carry greater risks of censorship or discriminatory application than do general ordinances." *Id.* at 764. See also *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). That point would apply with even greater force to an individual decision to terminate a public employee because she has said something with which her employer disagrees.

135. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). *Accord*, e.g., *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1986); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

for decades.¹³⁶ The two seminal cases for contemporary overbreadth doctrine are *Broadrick v. Oklahoma*¹³⁷ and *United States Civil Service Commission v. National Association of Letter Carriers*.¹³⁸ Both cases challenged restrictions on the political activities of public employees. Furthermore, in both cases the Court allowed public employees to mount overbreadth challenges to statutes regulating the terms and conditions of public employment, although it rejected those challenges on their merits. The Court has even acknowledged that public employment presents a clear example when overbroad regulation of speech could have a “chilling effect” on those who wish to engage in protected speech. The Court recognized this problem in *Pickering*, when it wrote “the threat of dismissal from public employment is . . . a potent means of inhibiting speech.”¹³⁹ Therefore, courts should apply the overbreadth doctrine with full force and vigor to public employment. Policies and practices governing employee speech should be defined clearly so that no impermissible “chill” would result.¹⁴⁰ As the Court recognized in *Rankin*: “[v]igilance 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.”¹⁴¹ One would think that the required “vigilance” would include overbreadth review.

Third, the employer can argue that its policy governing employee discipline is not fatally overbroad. That argument should prevail for those employers with clearly articulated policies that on their face comport with the First Amendment. When an employee, however, has not violated some preexisting and facially valid policy, as in *Con-*

136. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

137. 413 U.S. 601 (1973).

138. 413 U.S. 548 (1973).

139. 391 U.S. 563, 574 (1968). *Accord* *Board of County Comm’rs v. Umbehr*, 518 U.S. 668, 675 (1996).

140. The only context in which the Court has refused to apply overbreadth is commercial speech. The Court reasons that the profit motive provides commercial speakers with a sufficiently powerful incentive and that those whose own speech is protected are unlikely to be deterred by the existence of overbroad regulations, but instead are likely to challenge those regulations as applied to their own conduct. See, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 481-83 (1989); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 536 n.15 (1987); *Bates v. State Bar*, 433 U.S. 350, 380-81 (1977). That reasoning, if anything, supports application of the overbreadth doctrine to the speech of public employees, whose own financial interests will tend to deter them from engaging in speech that courts discipline.

141. 483 U.S. 378, 384 (1987).

nick and *Waters*, the employer will not be able to mount this defense. In such cases, the employer can not point to any policy that on its face reaches at most an insubstantial quantum of protected speech. Yet no one should assume too quickly that an overbreadth argument would have carried the day for Sheila Myers or Cheryl Churchill. On questions of overbreadth, as in other areas where the speech of public employees is at stake, the rules seem different.

Consider *Arnett v. Kennedy*.¹⁴² The Chicago office of the Office of Economic Opportunity fired Wayne Kennedy, a field representative, after its regional director concluded that Kennedy had recklessly and falsely accused him of trying to bribe a community organization.¹⁴³ In an action challenging the termination, Kennedy argued, among other things, that the provision of the Lloyd-La Follette Act which authorized dismissal of federal employees “for such cause as will promote the efficiency of the service”¹⁴⁴ was unconstitutionally vague and overbroad.¹⁴⁵

The plurality opinion (which seemed to represent the view of a majority of the Court on this point)¹⁴⁶ initially concluded that the term “cause” was not fatally vague “[b]ecause of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal.”¹⁴⁷ The plurality then decided that the Act should be construed consistent with First Amendment standards governing the rights of public employees, since Congress “obviously did not intend to authorize discharge under the Act’s removal standard for speech that is constitutionally protected.”¹⁴⁸ Relying on *Pickering*, the plurality next concluded that the statute was not invalid as applied to Kennedy, since defamatory statements, recklessly made, are not constitutionally protected.¹⁴⁹ That left Kennedy’s overbreadth claim, which the plurality described as:

the assertion that although no constitutionally protected conduct of his own was the basis for his discharge . . . the statutory

142. 416 U.S. 134 (1974).

143. *See id.* at 137.

144. 5 U.S.C. § 7501 (1970).

145. 416 U.S. at 158 (plurality opinion).

146. Although the plurality opinion, written by then-Justice Rehnquist, was joined only by Chief Justice Burger and Justice Stewart, on the First Amendment issue three other Justices, while not joining the opinion, indicated their agreement with it. *See id.* at 164 (Powell, J., joined by Blackmun, J., concurring in the judgment); *see id.* at 177 (White, J., concurring in the judgment in part and dissenting in part).

147. *Id.* at 161.

148. *Id.* at 162.

149. 416 U.S. 134, 162-63 (1974).

language must be declared inoperative, and a set of more particularized regulations substituted for it, because the generality of its language might result in marginal situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so.¹⁵⁰

The plurality rejected that claim: “[b]ut we have already held that Congress in establishing a standard of ‘cause’ for discharge did not intend to include within that term any constitutionally protected conduct.”¹⁵¹

Perhaps *Arnett v. Kennedy* is correctly decided if limited to an employee knowingly making reckless falsehoods. Although the plurality did not articulate how the statute could be construed to eliminate overbreadth problems, it applied the rule to Kennedy’s case that recklessly false accusations against a superior are grounds for termination. *Pickering* blessed that rule. Overbreadth problems will not develop because the reckless falsity requirement is unlikely to chill those employees whose speech is protected.¹⁵² But what if the “cause” for an employee’s termination has nothing to do with intentional or reckless misconduct, and instead is that a an employee has said something that the supervisor thinks will do harm in the workplace? Such a rule has ample potential to reach protected conduct.

Moreover, *Arnett* predates *Connick’s* public concern test, which adds a new potential for chilling effect on speech. After *Connick*, an employee, who is deciding whether to speak out in a manner that is likely to anger management, must assess whether her speech will satisfy both the public concern and the *Pickering* balancing tests. These questions are sufficiently difficult such that the Supreme Court has divided 5-4 on them in the two cases that brought these issues before it.¹⁵³ Had Sheila Myers or Ardith McPherson been able to hire a Supreme Court Justice for advice on whether they could lose their job for what they intended to write and say there is a nearly even chance that each would have gotten the wrong answer. The Seventh Circuit, for that matter, would have given Cheryl Churchill bad advice as well.¹⁵⁴ Problems of overbreadth ought to be taken seriously when

150. *Id.* at 163.

151. *Id.*

152. Indeed, that much was likely settled by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), where the Court held that defamation liability would not impermissibly chill protected speech if predicated on intentional or reckless falsehood.

153. I refer of course to *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*, 483 U.S. 378 (1987).

154. See *Churchill v. Waters*, 977 F.2d 1114 (7th Cir. 1992), *vacated and remanded*, 511 U.S. 661 (1994). A statute with a “core of easily identifiable and constitutionally proscrib-

there is that much imprecision about whether public employees can speak without fear of retaliation.

Outside its facts, *Arnett's* approach to overbreadth is impossible to defend because it is utterly at odds with the purpose of the overbreadth doctrine.¹⁵⁵ Even if the Court properly imposed a limiting construction on the Lloyd-La Follette Act (not fairly suggested by its text) in order to save it, it merely read the statute as if it permitted discharge "except in contravention of the First Amendment." The First Amendment, however, implicitly limits all statutes; if that were all that was necessary to save a statute, none would be invalidated for overbreadth. As Professor Tribe has written:

[t]he premise underlying any instance of facial invalidation for overbreadth must be that the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct, and that a law whose reach into protected spheres limited only by the background assurance that unconstitutional applications will eventually be set aside is a law that will deter too much that is in fact protected.¹⁵⁶

Aside from *Arnett*, that seems to be the Court's view as well. The Court has consistently held that overbroad laws are facially invalid, even if case-by-case adjudication could narrow their scope, since such broad proscriptions will have a chilling effect while as-applied litigation is conducted.¹⁵⁷

able conduct" is unlikely to be overbroad, *see e.g.*, *Ohio v. Osborne*, 495 U.S. 103, 111 (1990); *City of Houston v. Hill*, 482 U.S. 451, 468-69 (1987); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984); *New York v. Ferber*, 458 U.S. 747, 770 n.25 (1982), but that does not describe a statute authorizing termination for "cause" like the Lloyd-La Follette Act, especially after the complications of *Connick* are added to the mix.

155. The only case the plurality cited in *Arnett* to support its approach was *Colten v. Kentucky*, 407 U.S. 104 (1972), in which the Court rejected vagueness and overbreadth attacks on a disorderly conduct statute. 416 U.S. at 163. In *Colten*, however, the statute required disobedience of a police officer's order to disperse with intent to cause inconvenience, annoyance or alarm, thereby giving persons sufficient notice to avoid fatal vagueness, 407 U.S. at 110, and the statute had been construed to apply only where the order to disperse is supported by "a particular public interest in preventing that expression or conduct at that time and place." *Id.* at 111. The Lloyd-La Follette Act, in contrast, did not require an employee to have any type of evil intent to be terminated, nor did it require disobedience of a supervisor's directive. Thus the Act had potential application to employees who do not do anything they knew or should have known was prohibited.

156. LAURENCE H. TRIBE, *supra* note 74, § 12-29 at 1031 (emphasis deleted). *See also* Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 903-07 (1991).

157. *See, e.g.*, *Board of Airport Comm'rs v. Jews For Jesus, Inc.*, 482 U.S. 569, 575-76 (1987); *City of Houston*, 482 U.S. at 465-66; *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 758-59 (1986). There is at least one prominent dissenter from this view of the overbreadth doctrine. That is Professor Monaghan, who has written that the doctrine is not a distinct principle of First Amendment law, but merely embodies the principle that a litigant has a right to have a constitutionally permissible rule applied to his own case, and

In *Board of Airport Commissioners v. Jews For Jesus, Inc.*,¹⁵⁸ for example, the Board of Commissioners adopted a resolution prohibiting “First Amendment activities” at the Los Angeles International Airport.¹⁵⁹ The Court invalidated the regulation as overbroad despite the Board’s insistence that it would construe the resolution to reach only that conduct that it could permissibly regulate. The Court reasoned that “it is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make case-by-case adjudication intolerable.”¹⁶⁰ The same is true, however, of the Lloyd-La Follette Act at issue in *Arnett*. Such a statute might be valid if supplemented by office policies or even admonitions to employees about what types of speech are forbidden, but a standard of “cause,” without more, grants employers the very type of discretion that the overbreadth doctrine is ordinarily thought to forbid.¹⁶¹

hence does not limit the ability of courts to construe statutes narrowly in order to ensure that the rule applied in each case is valid. See Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1. Whatever that view’s merit as an original matter, it is not the course the doctrine has taken. First, the Court continues to insist that enactments not have an impermissible chilling effect even if they could be narrowed by construction. See, e.g., LAURENCE H. TRIBE, *supra* note 74, § 12-29; Richard H. Fallon, *supra* note 156, at 872-74. Second, the Court continues to believe that the overbreadth doctrine is unique to the First Amendment. See, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987).

158. 482 U.S. 569 (1987).

159. *Id.* at 570-71.

160. *Id.* at 575-76.

161. The facial validity of statutes should be considered in light of any authoritative regulations, limiting constructions, or settled administrative practices. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989); *Boos v. Barry*, 485 U.S. 312, 329 (1988). Moreover, an employer should be able to supplement general policies with specific admonitions to employees, and defend overbreadth attacks with a showing that she was warned that an employee was violating office policy and failed to desist. That was the approach taken in *Colten v. Kentucky*, the only case cited by the *Arnett* plurality in support of its overbreadth holding. See *supra* note 155. Colten had been convicted of disorderly conduct because he had persisted in arguing with a police officer that had issued a traffic ticket to another person, and ignored the officer’s order to him to leave. See *Colten*, 407 U.S. at 106-08. The Court rejected Colten’s vagueness and overbreadth challenges to the disorderly conduct statute, relying in part on the fact that individuals who choose to argue with the police while they are performing their duties have ample notice that they are subject to arrest if they disobey an order to move one. See *id.* at 110-11. There is no reason why the *Arnett* plurality could not properly apply this approach to public employment—the “chilling effect” of overbroad enactments is mitigated if people cannot be penalized until they are warned to desist from what would otherwise be unprotected conduct. But in *Arnett*, unlike *Colten*, the statute at issue did not require issuance of a warning prior to the imposition of sanctions.

The Court took a different approach to the facial validity of a statute governing the public employees' speech in *United States v. National Treasury Employees Union* ("NTEU").¹⁶² In *NTEU*, the Court struck down a statutory prohibition on federal employees' acceptance of compensation for making speeches, appearances, or for their writings. The Court focused on the *Pickering* balancing test since parties did not dispute that the plaintiffs intended to write on matters of public concern.¹⁶³ The Court concluded that the honoraria ban had a substantial impact on employees, both because of its "widespread impact" and because it "chills potential speech before it happens."¹⁶⁴ On the government's side of the balance, the only evidence of abuse it produced to support the ban involved members of Congress or high-ranking executive officials. The Court did not think that evidence justified a prohibition reaching "an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles."¹⁶⁵ Accordingly, the Court invalidated the statute and refused as well to modify the lower court's judgment so that it would not reach employees to whom the Solicitor General's thought the prohibition could validly apply. The Court preferred facial invalidation because it found it unclear how Congress would have written the statute had a broad ban been unavailable, and because deciding to whom the ban could validly be applied "would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case."¹⁶⁶

Although *NTEU* does not use the term "overbreadth," it takes a different approach than did *Arnett* to the facial validity of a statute that could be applied both validly and invalidly.¹⁶⁷ If the employee can demonstrate a statute's broad chilling effect on speech, that statute should be facially invalidated under *NTEU* (even if public em-

162. 513 U.S. 454 (1995).

163. *See id.* at 466.

164. *Id.* at 468.

165. *Id.* at 473.

166. *Id.* at 479. As for *Arnett*, the Court thought that the plurality's opinion merely "support[ed] a general statute's *post hoc* application to a single employee's arguably unprotected speech." *Id.* at 467 n.12.

167. There can be little doubt that *NTEU* is about overbreadth even though the Court did not use the term. When a statute is invalidated on its face even though it is not invalid in all its applications, it is because of overbreadth, as the author of the *NTEU* opinion has elsewhere explained when writing for the Court. *See Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789, 796-99 (1984) (summarizing past cases that found statutes facially invalid due to overbreadth).

ployers can validly apply it in at least some cases to speech).¹⁶⁸ It is likely, with that much established, that public employees will increasingly escape the problems that *Connick* poses for them by mounting overbreadth challenges.¹⁶⁹

A sign of the future in this area is *Cohen v. San Bernardino Valley College*.¹⁷⁰ In *Cohen*, a college disciplined a tenured professor for violating its sexual harassment policy as a result of a variety of vulgar and sexually oriented comments that he had made in class.¹⁷¹ The court invalidated the policy, but did not decide whether Cohen's own comments were protected. It held that the policy's prohibition on conduct that has the "effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment" was likely to reach protected speech and hence was overbroad.¹⁷² Thus, the question of whether an employee's own speech is protected under *Connick* becomes irrelevant if the regulation is overbroad because the employer has in place no facially valid policy governing employees' speech.

Ultimately, for a variety of reasons, I do not see a happy future for *Connick* and its public concern test. Putting aside its doctrinal soundness, the test is too difficult to administer and too easy for a public employee to evade. In the long run, the overbreadth doctrine is likely to allow public employees to litigate the validity of underlying employment policies without establishing that their own conduct is protected. Even though the Court may never formally abandon *Connick*, its importance is bound to diminish.

168. See generally Charles W. Hemingway, *A Closer Look At Waters v. Churchill and United States v. National Treasury Employees Union: The Constitutional Tensions Between the Government as Employer and the Citizen as Federal Employee*, 44 AM. U.L. REV. 2231, 2267-86 (1995). For an early indication of the impact that *NTEU* is likely to have on facial challenges to restrictions on workplace speech, see *Tucker v. California Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996); *Harmon v. City of New York*, 945 F. Supp. 750 (S.D.N.Y. 1996).

169. The precedential value of *Arnett* is further eroded by the fact that the concurring Justices declined to join the plurality opinion or explain their reasons for not doing so. See generally *Seminole Tribe v. Florida*, 517 U.S. 44, 65-67 (1996) (noting that Court did not need to strictly adhere to stare decisis value of previous plurality opinion); *Nichols v. United States*, 511 U.S. 738, 743-45 (1994) (complaining that previous fractured plurality opinion confused lower courts)

170. 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997).

171. See *id.* at 970-72.

172. See *id.* at 972. See also *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995); *San Bernadino Pub. Employees Ass'n v. Stout*, 946 F. Supp. 790, 799-801 (C.D. Cal. 1996); *UMW Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989).

IV. A Solution

The virtue of the *Connick* public concern test is that it gives both courts and litigants a doctrinal starting point, a threshold test that protects managerial prerogatives from inappropriate judicial oversight. Without the public concern test, the only doctrinal guidance that remains is the free form balancing of *Pickering* and *NTEU*. The unpredictability of this balancing should concern public employers and employees. Additionally, like most balancing tests, it hardly insulates public employers against overbreadth challenges. If the public concern test is abandoned, or loses practical importance because plaintiffs are able to circumvent it through overbreadth attack or satisfy it by altering their own speech, what doctrinal guidance, besides ad hoc balancing, is available to take its place?

In answering the question, the first step is to identify the types of legitimate managerial interests in restricting employee speech. The Court has asked, from *Pickering* forward, whether an employee's speech threatens any legitimate managerial prerogative, but has not announced any governing principle to limit the scope of those prerogatives. We know that Constable Rankin could not legitimately insist that employees spend their time at work discussing only work-related matters, even though a proscription on such conversations might well increase office efficiency. We also know that public employees can sometimes attack their superiors publicly (as in *Mt. Healthy*) or privately (as in *Givhan*) even though this may have an adverse effect on the employee and supervisor's future working relationships. In contrast, Sheila Myers cannot spend her time at the office distributing questionnaires about office policies, and Cheryl Churchill cannot attack the work of the obstetrics department, even if both satisfactorily perform all their assigned duties. Although we may intuit a distinction between the types of managerial prerogatives at stake in these two lines of cases, there is little in the Court's opinions to explain the distinction. If employers and employees could identify with reasonable precision the reach of the managerial prerogatives that employers may permissibly assert, it would make the law more stable and predictable in this area.

A. Managerial Prerogatives Over the Content of Employee Speech

I begin with a proposition that the Court has yet to expressly acknowledge, much less incorporate into its jurisprudence in this area: content discrimination, and even viewpoint discrimination, is permissi-

ble in public employment.¹⁷³ I acknowledge this proposition as truth for two reasons. First, the rationale for strict scrutiny of content and viewpoint discrimination is inapplicable to the public workplace. Second, strict scrutiny of public employers' management of the content and viewpoints of speech in the workplace is inconsistent with the very managerial prerogatives that courts aim to preserve.

1. *The Scope of Managerial Authority Over Employee Speech.*

A central concept in First Amendment jurisprudence is that when government disapproves of an idea or viewpoint it may not regulate to inhibit its advocacy; instead, it must allow the marketplace of ideas to answer offensive viewpoints and ideas with counterspeech.¹⁷⁴ Judicial hostility to content and viewpoint discrimination is a consequence of this First Amendment imperative. As the Court explained in *R.A.V.*: “[t]he rationale of the general prohibition, after all, is that content discrimination ‘raises the specter that the Government may drive certain ideas or viewpoints from the marketplace of ideas.’”¹⁷⁵ It is for this reason as well that the government is not permitted to regulate speech because of the effects of ideas or viewpoints on listeners. The answer to offensive speech is thought to be counter-speech rather than regulation.¹⁷⁶

173. The Court continues to struggle to deny that this is the case. In *NTEU*, for example, the Court argued that the line of cases beginning with *Pickering* do not tolerate viewpoint discrimination:

Our *Pickering* cases only permit the Government to take adverse action based on employee speech that has adverse effects on the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees. That certain messages may be more likely than others to have such adverse effects does not render *Pickering*'s restriction on speech viewpoint based. Even a teacher's persistent advocacy *in favor of* the actions of the school board, or an employee's exhortation *against* an attempt on the President's life, could provide proper grounds for adverse action if the Government could demonstrate that such expression disrupted workplace efficiency.

513 U.S. 454, 467 n.11 (1995) (emphasis in original). See also *id.* at 500 (Rehnquist, C.J., dissenting). Whatever the merit of this argument as applied to the *Pickering* balancing test, it plainly does not explain how *Connick*'s public concern test could be deemed content- and viewpoint-neutral.

174. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-52 (1987); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-79 (1964).

175. 505 U.S. at 387 (1992) (quoting *Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

176. See, e.g., *R.A.V.*, 505 U.S. at 394; *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Boos v. Barry*, 485 U.S. 312, 322 (1987); *Hustler Magazine*, 485 U.S. at 55-56. In fact this has likely been settled since at least *Murdock v. Pennsylvania*, 319 U.S. 104 (1943), in which the Court held that the “provocative, abusive, and ill-man-

These axioms should have no application to the workplace. Government need not rely on counterspeech to deal with an employee who disagrees with management. A public employee, for example, may properly prohibit its employees from being "rude to customers."¹⁷⁷ This is an instance in which a public employer's right to manage its workforce, in order to achieve substantive governmental objectives, necessarily includes the power to manage employees' speech. Management need not rely on its powers of persuasion in order to implement a rule against rudeness; it is entitled to insist on the point.

While a prohibition on speech may be content and viewpoint-neutral, other restrictions on a public employee's speech are not, yet no one thinks them unconstitutional. In order to maintain the public's confidence in the evenhandedness of the police, for example, a police department may insist that officers not use racist or sexist language on the job. In fact, police departments routinely insist upon this rule even though it is neither content- nor viewpoint-neutral. Indeed, in *Rankin*, the Court was careful to note that McPherson held only a clerical job and had not publicly advocated the President's assassination. This surely reflects the Court's recognition that the public expression of some views is inconsistent with the objectives of a police department and may be proscribed for just that reason.¹⁷⁸ Similarly, the President of course can insist that his cabinet members support his administration's policies and fire those who do not, without running afoul of the First Amendment.

These examples illustrate, of course, that it is frequently a legitimate managerial prerogative to control employees' speech, including

nered" character of the literature that the petitioners had distributed did not justify its regulation. *See id.* at 115-16. *See also* *Terminiello v. Chicago*, 337 U.S. 1 (1949).

177. *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion). *See also* *NTEU*, 513 U.S. at 481 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part).

178. The Court wrote:

While McPherson's statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office In fact, Constable Rankin testified that the possibility of interference with the functioning of the Constable's office had *not* been a consideration in his discharge of respondent and that he did not even inquire whether the remark had disrupted the work of the office.

Nor was there any danger that McPherson had discredited the office by making her statement in public. McPherson's speech took place in an area of work to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's statement.

483 U.S. at 389 (emphasis in original) (footnote omitted).

its content or viewpoint. That leads to the larger point. “[M]any of the most fundamental maxims of our First Amendment cannot reasonably be applied to speech by government employees”¹⁷⁹ because the public workplace is not a marketplace of ideas. As Justice O’Connor explained in *Waters*, “[w]hen an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counter-speech.”¹⁸⁰ Thus, public employers may prohibit their employees from expressing ideas or views at the workplace when their expression will interfere with management’s implementation of workplace policies. Ultimately, management may require employees to implement its policies without further complaint, even when those policies govern what employees write or say.

The observation that “marketplace of ideas” jurisprudence is not applicable to the workplace explains the outcome in *Connick*. Sheila Myers’ supervisors were constitutionally entitled to direct her to spend her time at the office working on those cases to which she was assigned, rather than debate management’s methods of distributing assignments. That may well be content and viewpoint based regulation of speech; doubtless Myers would not have been fired for spending a few minutes at the office on a crossword puzzle rather than her questionnaire. Even so, the district attorney, in running the office as he sees fit, is entitled to view efforts to provoke dissension at the office more seriously than other types of infractions. Accordingly, public employers may instruct their subordinates to do or to say what is necessary to accomplish those tasks, even if it involves managing the content of or viewpoints expressed in their employees’ speech.¹⁸¹

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

180. *Id.*

181. This notion of legitimate managerial prerogatives may well underlay the Court’s decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), to uphold a prohibition on the use of federal family planning funds to provide abortion counseling—plainly a content- and viewpoint-based restriction, as the Court acknowledged. *Id.* at 192. Yet the Court held that this was a type of “value judgment” that the government may make when it offers public subsidies. *See id.* at 192-93. The Court already had held that government may permissibly encourage childbirth rather than abortion by subsidizing only the former, *see Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977), and thus imposing restrictions on what recipients of federal subsidies could say could be characterized as a legitimate governmental prerogative—“to ensure that the limits of the federal program are observed.” 500 U.S. at 193. Thus, *Rust* seems to rest on a form of managerial prerogative—when government may offer selective subsidies, it may regulate what those who dispense these subsidies say as well as what they do in order to ensure that its policy choice is respected. *See generally* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 168-71 (1996).

2. *The Necessity for Judicial Deference to Managerial Prerogatives Over Employee Speech.*

Judicial deference to public employers' management of the content and viewpoint of speech is accordingly necessary in order to preserve managerial prerogatives. Strict scrutiny of the type ordinarily used to judge content-based regulation would inevitably infringe the managerial prerogatives of public employers. Allowing employees, for example, to litigate disputes about how to achieve workplace efficiency would permit courts to determine what policies are best for public employers, effectively nullifying managerial prerogatives. Government management of employees' speech, like its power to manage the other things that employees do during their workday, is thus neither constitutionally controversial nor inherently suspect, unless one believes courts have greater managerial acumen a those who have been granted managerial authority over public employees.¹⁸²

B. The Patronage Cases as a Limitation on Managerial Prerogatives

Of course, if management's power to regulate employees' speech were absolute Marvin Pickering would have lost his case. There was nothing irrational about his employer's judgment that if teachers worked to support the board's tax proposals, the public schools would ultimately be improved. Indeed, in none of the cases in which employees prevailed could the employer's fear that workplace harmony and efficiency would be undermined by the employee's speech be fairly characterized as irrational. These cases instead rest on a recognition that there is a brand of workplace "harmony" that employers are not permitted to insist upon under the First Amendment. The political patronage cases helpfully explain just this point.

In its patronage cases,¹⁸³ the Court has made clear that public employers may not penalize employees for their partisan affiliations or beliefs, "unless the employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the

182. See generally THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 567-74 (1970); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 69-70 (1988); Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 CARDOZO L. REV. 729, 739-40 (1989); Robert C. Post, *supra* note 80, at 197-201; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1503-04 (1989).

183. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *Rutan v. Republican Party*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980).

public office involved.”¹⁸⁴ Thus, unless an employee holds a position for which partisan loyalty is an appropriate qualification, “government may not make public employment subject to the express condition of political beliefs or prescribed expression.”¹⁸⁵ A member of the President’s cabinet, where partisan loyalty is required, may, for this reason, be fired for expressing a view not to the President’s liking. Public employees such as Marvin Pickering (schoolteacher) and Ardith McPherson (secretary), however, could not be terminated for ideological disloyalty. Hence, they had no duty to mold their beliefs to those preferred by their employers. Marvin Pickering was free to vote as he pleased in the tax referendum and to tell people why. Ardith McPherson was free to detest President Reagan and even to “ride with the cops and cheer for the robbers.”¹⁸⁶ Neither of them disobeyed any order of a superior or any managerial directive about how work was to be performed. The patronage cases illustrate that where partisan loyalty is not a prerequisite for one’s job, the employee is protected “from discharge based on what he believes.”¹⁸⁷

Unlike the public concern test, the patronage cases provide a better rationale for judicial intervention into the management of the public workplace.¹⁸⁸ Furthermore, they far more persuasively explain, far better than does the public concern test, why the scope of managerial prerogatives should not be left entirely to the political process. It is not evident that the political process will not secure the right of public employees to speak on matters of public concern. The electorate frequently will stand up for whistle-blowers who expose government fraud and abuse. Also, public employees can seek rights of political

184. *Branti*, 445 U.S. at 518. See *O’Hare Truck Serv.*, 518 U.S. at 717; *Umbehr*, 518 U.S. at 675; *Rutan*, 497 U.S. at 73-75.

185. *O’Hare Truck Serv.*, 518 U.S. at 717.

186. *Rankin*, 483 U.S. at 384 (Scalia, J., dissenting).

187. *Branti*, 445 U.S. at 515 (footnote omitted). *Accord*, e.g., *O’Hare Truck Serv.*, 518 U.S. at 717; *Rutan*, 497 U.S. at 73-75.

188. Indeed, in *Pickering* the Court anticipated the rationale of the patronage cases when it concluded that it could not require Pickering to be loyal to its views on questions of educational finance. 391 U.S. at 571-72. The *Pickering* opinion used the concept of “public concern” in order to explain why commanding loyalty to its revenue policies was not among the legitimate managerial prerogatives of the school board. See *id.* at 571 (“the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive”). More recently, the Court has remarked on the relationship between the patronage cases and *Pickering*, and suggested that the distinction between denying employment on the basis of political affiliation and on the basis of speech may be more apparent than real. See *O’Hare Truck Serv.*, 518 U.S. at 717-18. See also *Board of County Comm’rs*, 518 U.S. at 675-76.

expression through collective bargaining. The political process and collective bargaining alone, however, are far less likely to protect the right of the ideological nonconformist to remain in government service. That right is secured by the patronage cases.¹⁸⁹

C. The O'Brien Test Applied to Employee Speech

Accordingly, the scope of legitimate managerial prerogatives should allow public employers to regulate the speech of public employees if the regulations are reasonably calculated to further a managerial objective that is itself within the constitutional power of the government. Regulation, therefore, must be unrelated to the suppression of those employee's beliefs from whom the government cannot command partisan loyalty. If that test sounds familiar, it should; it is in essence the well-known test for "incidental limitations on First Amendment freedoms" articulated in *United States v. O'Brien*.¹⁹⁰ There, the Court wrote that an incidental restriction

is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.¹⁹¹

Although the final prong of the *O'Brien* test suggests something approaching strict scrutiny, subsequent cases make clear that this prong does not require use of a least restrictive alternative test. Instead, it requires courts to uphold restrictions when they promote a substantial government interest that would be achieved less effectively absent the regulation and do not proscribe substantially more speech than necessary to serve that interest.¹⁹²

189. In fact, the patronage cases rely upon, and descend from, the cases where the Court first rejected Justice Holmes' view of the First Amendment rights of public employees. These cases held that public employment could not be conditioned on the employee confining his political affiliations to those the government finds acceptable. See *O'Hare Truck Serv.*, 518 U.S. 712, 717 (1996); *Board of Comm'rs*, 518 U.S. 668, 675 (1996).

190. 391 U.S. 367, 376 (1968).

191. *Id.* at 377.

192. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *United States v. Albertini*, 472 U.S. 675, 689 (1985); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984). *Turner Broadcasting*, *Rock Against Racism*, and *Community for Creative Non-Violence* actually judged regulations of the time, place or manner of speech. See e.g., *Rock Against Racism*, 491 U.S. at 798. The Court made clear, however, that "the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions' when applied to the relationship between the regulation of speech and the govern-

While the *O'Brien* test was formulated to address incidental restrictions on speech, it seems equally appropriate for restrictions on public employees' speech, where the issue is what restrictions a public employer may permissibly impose as an "incident" of public employment. If persons who engage in conduct as a necessary part of speech subject themselves to the government's regulatory powers under the *O'Brien* test, there is no reason why public employees, who have subjected themselves to the government's managerial powers should have their right to free speech judged by different standards.¹⁹³

The *O'Brien* test also provides an intelligible answer to problems of overbreadth. It will tolerate the necessary imprecision in most employment policies because it condemns restrictions on speech only when they are substantially overbroad. A policy prohibiting employees from being "rude to customers" should be upheld because it is not intended to suppress ideas but rather to implement a legitimate managerial objective. In addition, it is sufficiently tailored given the unlikelihood that it prohibits substantially more speech than necessary and the difficulty of promulgating more precise rules. Moreover, if an employer complies with *O'Brien* by utilizing policies that do not inhibit substantially more speech than necessary to achieve a legitimate managerial objective, then, by definition, its policy is not substantially overbroad. When, however, as in *NTEU*, a prohibition is substantially broader than the evil it is designed to address, it will be struck down on its face.¹⁹⁴ In fact, the Court appears to have used the *O'Brien* test in *NTEU*; its holding that an employer not restrict substantially more

ment's justification for the regulation. See *id.* (quoting *Community for Creative Non-Violence*, 468 U.S. at 293).

193. I recognize that some commentators have criticized the *O'Brien* test as affording too much deference to the government. See generally Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993); David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MINN. L. REV. 491 (1988); David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195 (1987); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200-10 (1996); Robert A. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260-70 (1995). After *Turner Broadcasting*, this criticism may well have less force because the *Turner Broadcasting* Court seemed to require greater justification of a restriction on speech than *O'Brien* had previously. 512 U.S. at 664-68. See also *id.* at 682-83 (O'Connor, J., concurring in part and dissenting in part). Indeed Justice Stevens complained about just that in his separate opinion. See *id.* at 670-74 (Stevens, J., concurring in part and concurring in the judgment). I do not wish to defend any particular version of the test for restrictions on speech that can be imposed when the speech implicates legitimate regulatory interests of the government. Rather, I want the test for incidental restrictions applied to public employee's speech in the same manner as it used in other situations.

194. 513 U.S. at 472-79.

speech than necessary to achieve its legitimate objective comes from *O'Brien*, not *Pickering*. Perhaps an unintended consequence of *NTEU* may be a movement of the law in this area toward *O'Brien*.

There is, of course, a difference between the usual application of the *O'Brien* test and its application to public employment. The *O'Brien* test is ordinarily applied to content-neutral restrictions on speech,¹⁹⁵ yet that content-neutrality is not required in the public workplace. Even in the patronage cases, which limit managerial prerogatives, content-neutrality is not a requirement. Under the patronage cases, employers can manage what their employees say at work as an incident of their power to execute the legitimate functions of their office, but they may not attempt to coerce ideological conformity in their workforce. The rationale for strict judicial scrutiny is absent because there is nothing inherently suspect about content-based regulation of employee speech that is not part of an effort to coerce ideological conformity. Although using *O'Brien* to evaluate content-based regulation of speech may seem a radical modification of the *O'Brien* test, that is precisely the direction in which the Court was headed before it took a misstep in *Connick*. Two cases from the October 1979 term demonstrate just that. In these two cases, the Court took its first steps towards setting an outer boundary on employees' First Amendment rights by using an approach based on *O'Brien*.

In the first case, *Brown v. Glines*,¹⁹⁶ the Court upheld Air Force regulations which required members of the service to obtain approval from their commanders before circulating petitions on Air Force bases. The Court primarily relied on *Procunier v. Martinez*,¹⁹⁷ a case on the authority to censor prison mail, which had utilized the *O'Brien* test.¹⁹⁸ Applying that test in *Brown*, the Court concluded that the regulations "protect[ed] a substantial government interest unrelated to the suppression of free expression."¹⁹⁹ The Court identified that interest as the objective of ensuring that petitions are not circulated containing material that would interfere with good order and discipline or create possible disruption among troops.²⁰⁰ Thus, the Court upheld a

195. See, e.g., *Turner Broad. Sys.*, 512 U.S. at 662.

196. 444 U.S. 348 (1980).

197. 416 U.S. 396 (1974).

198. See *id.* at 410-12.

199. 444 U.S. at 354.

200. See *id.* at 354-58. On this point the Court relied primarily on *Greer v. Spock*, 424 U.S. 828 (1976), which upheld a similar regulation prohibiting distribution of unreviewed literature on an army base, although that case involved the right of a civilian to obtain access to the base. In that case, the Court concluded that the potential for unreviewed literature to disrupt military discipline justified the regulation. See *id.* at 840.

content-based restriction on speech not to suppress ideas, but instead to preserve legitimate managerial prerogatives. Moreover, the Court justified restriction by reference to the potentially harmful effects of the petitions itself, which ordinarily is not considered a content-neutral justification for restrictions on speech.²⁰¹

The Court's willingness in *Brown* to uphold a content-based restriction on speech surely had something to do with the point that I made above about the rationale for the prohibition on content discrimination. A military base did not likely strike the Court as a "marketplace of ideas." Thus, if legitimate managerial prerogatives can justify content-based restrictions on speech in prisons and military bases, the same should hold true in public employment, without need of elaborate public concern and balancing tests.²⁰²

Less than a month later the Court decided *Snepp v. United States*.²⁰³ In *Snepp*, the government sued Frank Snepp for breach of his employment agreement with the Central Intelligence Agency ("CIA").²⁰⁴ The agreement restricted him from disclosing classified information and required him to submit any future writings about the CIA to the agency for prepublication review.²⁰⁵ Snepp argued that since his book contained no classified material, he had breached no duty of confidentiality. The Court, however, observed that the publication of unreviewed material always creates a risk that classified material or vital national interests will be compromised.²⁰⁶ The Court concluded "a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's

201. See discussion *infra*.

202. I do not mean to suggest that I find the court's analysis in *Brown v. Gilnes* unsatisfactory. On the whole I thought the dissent's arguments, finding the military's regulations unnecessary to maintain good order and discipline, were rather persuasive. 444 U.S. at 368-71 (Brennan, J., dissenting). Even Justice Brennan, however, thought that the appropriate inquiry was whether the regulations were sufficiently tailored to address the military's legitimate concerns. See *id.* That is the correct inquiry, in my judgment, and not whether Captain Glines' petitions involved a matter of public concern.

203. 444 U.S. 507 (1980) (per curiam).

204. See *id.* at 508.

205. See *id.* at 507-08.

206. The Court wrote:

Both the District Court and the Court of Appeals found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental to vital national interests even if the published material is unclassified. When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful.

Id. at 511-12.

ability to perform its statutory duties.”²⁰⁷ This was also the predicate for the Court’s rejection of Snepp’s First Amendment claim, since the Court found that the CIA had a legitimate interest “ensur[ing], *in advance*, and by proper procedures, that information detrimental to national interest is not published.”²⁰⁸

Snepp is criticized for its failure to explain how its holding can be reconciled with First Amendment jurisprudence.²⁰⁹ The Court identified, however, an interest unrelated to the suppression of ideas: improving the CIA’s ability to ensure that information potentially damaging to national security not be disclosed until reviewed by the courts. That is a content-based and probably viewpoint-based restriction, but it directly advances a legitimate governmental interest. Had the case gone the other way, the agency would have had to invest greater resources in security measures designed to ensure that agents would not improperly disclose information.²¹⁰ Surely there is a legitimate governmental interest in avoiding that kind of inefficiency that is not related to the suppression of ideas as *O’Brien* uses that concept.²¹¹

Brown and *Snepp* make clear that content-based restrictions are permissible if justified by legitimate managerial prerogatives. This approach reconciles the patronage cases with the legitimate managerial

207. *Id.* at 512.

208. *Id.* at 513 n.8 (emphasis in original).

209. See, e.g., Howard C. Anawalt, *A Critical Appraisal of Snepp v. United States: Are There Alternatives To Governmental Censorship?*, 21 SANTA CLARA L. REV. 697 (1981); Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access To Government Information*, 69 CORNELL L. REV. 690 (1984); Ronald Dworkin, *Is the Press Losing the First Amendment?*, N.Y. REV. OF BOOKS, Dec. 4, 1980, at 49; Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORN. L. REV. 816, 845-53 (1984); Jonathan C. Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775 (1982); Comment, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662 (1981).

210. See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 341-42; Richard A. Epstein, *supra* note 182, at 68-69.

211. Indeed the Court took this same approach the following term in *Haig v. Agee*, 453 U.S. 280 (1981), in which it upheld the revocation of a former CIA agent’s passport on the ground that he had previously disclosed classified information and violated his preclearance agreement, thereby prejudicing national security. The Court recognized that the revocation of Agee’s passport “rest[ed] in part on the content of his speech” yet held that Agee’s purpose of “obstructing intelligence operations and recruiting of intelligence personnel” was unprotected. *Id.* at 308-09. Hence, the government interest in inhibiting measures that make intelligence operations more difficult and costly was within the constitutional power of government and unrelated to the suppression of ideas. Therefore, the Court concluded that this interest was an appropriate basis for acting against Agee even based on the content of his speech. See *id.*

prerogatives that the Court acknowledged in *Connick*. Content-based restrictions on speech are not only permissible, but also ubiquitous in the workplace. The central question is not whether the public employer is trying to restrict the content of its employees' speech, but whether the employer is trying to control how an employee performs his job, instead of what the employee believes about his job. Public employers cannot insist that employees (except for the highest-ranking ones for whom partisan loyalty is an appropriate job qualification) agree with its views on how government should be run and who should run it. They can insist, however, that employees' views not affect the public employer's ability to implement its own management policies in the workplace.

It is difficult to know why the Court, in *Connick*, took such a different approach. Perhaps *Brown* and *Snepp* appeared easily distinguishable. *Brown*, for example, is generally thought of as a case about deference to the unique needs of the military, and *Snepp* is ordinarily thought of as a case about the unique needs of the intelligence community. Nevertheless, both cases address the scope of government's power to manage the speech of its employees. Although managerial prerogatives are unusually expansive in the military and intelligence establishments, that is only a difference of degree from other public employers. Like the CIA, a police department or a prosecutor's office is also entitled to insist that its employees respect the confidentiality of the enormously sensitive information that their employees handle. A public hospital is equally entitled to insist that employees not make public statements about patient care that may alarm the public and deter persons from seeking necessary treatment. Whatever the scope of legitimate managerial prerogatives at a public workplace, there is no reason why those prerogatives should be judged by a different standard than that used in *Brown* and *Snepp*.²¹²

Returning the *O'Brien* "incidental" test would provide a more focused inquiry that is easier to administer than the more indeterminate approaches used in *Connick* and *Pickering*. The question in every case is whether the employer is simply seeking ideological conformity from employees, or if there is some substantial managerial interest in controlling employees' performance that the restriction

212. And indeed courts have been willing to take this approach outside the context of the military and intelligence establishments. See *Weaver v. United States Info. Agency*, 87 F.3d 1429, 1439-43 (D.C. Cir. 1996) (upholding prepublication review of speeches and writings on matters of "official concern" by USIA employees); *Zook v. Brown*, 865 F.2d 887, 891-92 (7th Cir. 1989) (upholding prior approval requirement for commercial endorsements by police officers).

reasonably advances. Also, such an inquiry, as opposed to *Connick* and *Pickering*, more helpfully explains the outcomes in the decided cases.

From *Pickering* to *Givhan*, the employee had performed the employer's directives; the employees' only sin was ideological disloyalty. The problem was not with the employees' work performance, but rather that the employees held and expressed beliefs contrary to those approved by their employers. None of these employees held jobs for which ideological loyalty was a prerequisite as outlined under the patronage cases. The government had no right to require either Bessie Givhan to agree with the school's desegregation policies or Marvin Pickering to support its referendum. These employees could only be required to implement these policies while on the job. An employee's disagreement with management's policies might justify management's fear of dissension and disruption in the workplace. Under the patronage cases, however, public employees are entitled to disagree with, and even help defeat, the policies of incumbent management, as long as they do not do so by insubordination.²¹³

In *Rankin* as well, the employee was fired for her ideology. The holding in that case, however, demonstrates an important point that the *O'Brien* approach captures much better than either *Connick* or *Pickering*. The Court suggested, as I explain above, that McPherson could have been fired had she made her remarks in public in a manner that could have brought discredit on the constable's office.²¹⁴ That suggests that the real problem was that the constable overreacted. Had he merely warned her to behave discreetly he would not have run afoul of the First Amendment. *O'Brien* asks whether the degree of discipline is reasonably tailored to the managerial interest at stake, and to that extent, explains the Court's approach quite nicely.

The approach of focusing on whether employee discipline is a sufficiently tailored effort to implement some legitimate managerial prerogative also makes *Connick* an easy case, although a much different one from the cases that came before it. The threshold question should have been whether Sheila Myers held a job for which partisan loyalty was an appropriate criterion; if so, she could be fired for disloyalty alone.²¹⁵ Even if Myers were entitled to First Amendment protection

213. See *supra* Part II.B.

214. See *supra* note 178.

215. The circuits that have decided that question thus far have held that an elected prosecutor's staff can properly be required to display partisan loyalty. See *Monks v. Marlinga* 923 F.2d 423, 425-26 (6th Cir. 1991) (per curiam); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983) (per curiam); *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (per curiam).

from dismissal for disloyalty, her case was no better (putting aside overbreadth problems she had no fair notice that her questionnaire could have gotten her fired). As I suggested above, Myers was trying to resist her new assignment and District Attorney Connick had a legitimate interest in assigning her to whatever task he saw fit, an interest unrelated to the suppression of her views on the point. Myers' efforts to foment opposition to management's personnel policies among her colleagues threatened even more directly management's legitimate interest in being able to implement those policies. Myers' distribution of her questionnaire not only was an improper use of her workday, but one that posed a special threat to managerial prerogatives.

The *O'Brien* approach also sheds light on the question of what kind of investigation an employer must perform before disciplining an employee for her speech (the question decided in *Waters v. Churchill*). Justice Scalia powerfully criticized the plurality for identifying little doctrinal support for imposing procedural rules on public employers. He correctly observed that prior cases had imposed liability on public employers only when they had retaliated against an employee on the basis of her protected speech, not merely because an employer had made an error about what an employee had in fact said.²¹⁶ Hence, he rejected the plurality's conclusion that, in the absence of intent to retaliate, management's negligence in investigating an employee's comments could give rise to a First Amendment violation.²¹⁷ *O'Brien* and the overbreadth doctrine supply the doctrinal footing for that conclusion.

An employer that conducts no investigation, or a negligent one, should lose on overbreadth grounds regardless of whether the employee's speech was protected. A failure to investigate non-negligently creates a large risk of error, which is likely to penalize a substantial quantity of protected speech and to create a potent chilling effect.²¹⁸ On the other hand, *O'Brien* also answers Justice Stevens' argument that the plurality's rule of reasonableness does not satisfy the First Amendment. *O'Brien* does not require an employer to undertake what is in effect the least restrictive alternative, which would be to conduct an error-free investigation in order to avoid dismissing

216. 511 U.S. at 686-88 (Scalia, J., concurring in the judgment).

217. See *id.* at 686-89 (Scalia, J., concurring in the judgment).

218. The plurality did observe that an employer who does no investigation at all into what an employee has actually said creates an unduly large risk or error, although it did not put that concern in terms of overbreadth. See *id.* at 677-78 (plurality opinion); *id.* at 683-84 (Souter, J., concurring).

anyone for what turns out to be protected speech. *O'Brien*, however, permits leeway when the government is not proscribing substantially more speech than necessary given its own legitimate interests, including its interest in efficient government operations. Investigations should be reasonable in scope and duration, but need not be perfect. A reasonable investigation is not likely to restrict substantially more speech than is necessary to impose discipline on employees with reasonable efficiency; thus it satisfies *O'Brien*. Justice Stevens' insistence that "management get its facts straight"²¹⁹ requires the employer to conduct a perfect investigation; and *O'Brien* simply does not go that far.

O'Brien also aids in addressing cases like *Cohen v. San Bernardino Valley College*, where public employers seek to regulate what they believe to be racist, sexist, or otherwise offensive and inappropriate speech by their employees, an issue that sharply divides the commentators.²²⁰ If *O'Brien* is understood as permitting content-based regulation when legitimate managerial prerogatives are at issue, and the government does not seek enforced ideological conformity, then it effectively answers one of the chief objections to regulations aimed at ensuring that schools and workplaces do not become hostile working or learning environments. A governmental objective of maintaining a harmonious and efficient workplace is legitimate and unrelated to the

219. *Id.* at 699 (Stevens, J., dissenting).

220. For the most part, the commentators have not even addressed the special constitutional problems that public employers face when disciplining employees for what they have said. See generally, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to a Content Neutral Hostile Environment Theory*, 1996 UTAH L. REV. 227; Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1; Jules R. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1007 (1993); Amy Horton, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundations of Free Expression*, 40 UCLA L. REV. 103 (1992); Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Hostile Environment Claims*, 47 BAYLOR L. REV. 789 (1995); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Comment, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637 (1995); Note, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Claims and Free Speech Defenses*, 80 MINN. L. REV. 979 (1996); Note, *Hostile Environment and the First Amendment: What Now After Harris and St. Paul*, 46 S.C. L. REV. 471 (1995).

suppression of the employees' ideology. Harassing speech that affects office morale can be proscribed in service of that objective. Nor is it an illegitimate objective to ensure that public officials not make public statements that detract from their ability to perform their duties. Some officials, of course, hold jobs that cannot be performed satisfactorily if they make certain types of public statements. A police officer who is an avowed racist, for example, creates special problems if he is sent on patrol.²²¹ The requirement of reasonable tailoring will still leave ample room for litigation. Doubtless some employer's policies will sweep so broadly that they will merit invalidation on their face or as applied, especially when they require no culpable mental state for discipline to be applied. Notwithstanding, at least this approach gives employers and employees guidance for regulation of this type of speech.

Finally, what of my friend Officer Smith? There was no claim that he had violated an articulated managerial prerogative. He did not, for example, go outside of the chain of command or disclose any confidential information in order to make his allegations. His complaints about second-hand smoke may not have been couched in terms that satisfied the public concern test, but the police department had no managerial interest in retaliating against him (other than to silence him and others who wished to complain about second-hand smoke). That interest surely does not pass muster under *O'Brien*.

Thus, the difference between *Connick* and *O'Brien* is more than academic. By requiring an interest unrelated to suppressing an employee's beliefs about management, *O'Brien* is sensitive to managerial prerogatives as well as the lessons of the patronage cases. *Connick*, however, uses public concern as a rough proxy for managerial prerogatives and tolerates results quite inconsistent with both the patronage cases and the overbreadth doctrine. *O'Brien* also accommodates the necessary imprecision in workplace rules perhaps more clearly than does the *Pickering* balancing test, while requiring employers to identify the legitimate managerial prerogative that the employee's speech has threatened.

221. An interesting example of just this problem is provided by *Lumpkin v. Brown*, 109 F.3d 1498 (9th Cir.), cert. denied, 118 S. Ct. 558 (1997), in which the court upheld the termination of a human rights commissioner because of his outspoken opposition to homosexuality, reasoning that the commissioner's statements created justifiable apprehension that he would be unable to enforce the human rights ordinance effectively. See *id.* at 1500-01.

V. Conclusion

When the state of the law is unsatisfactory for plaintiffs and defendants alike, something is seriously wrong. Yet that is the point we have reached. Regulation of public employees' speech is governed by imprecise public concern and balancing tests that would not be tolerated in any other area of First Amendment jurisprudence, if for no other reason than their very imprecision would be thought to impermissibly chill the exercise of First Amendment rights. At the same time, the overbreadth doctrine threatens to make those tests entirely irrelevant, while providing little guidance about what should take their place.

Rules of law are always more satisfactory when they acknowledge the problems that those who are subject to them actually face. The *Connick* public concern test, however, does not address any of the real reasons why public employers have a legitimate basis to manage the speech of their employees. The *Pickering* balancing test does take those reasons into account, but like most balancing tests, it is so imprecise that it serves neither employers' nor employees' quite legitimate interest in having clear and predictable rules. Indeed, the public concern test was presumably developed in *Connick* because the Court was understandably unhappy about leaving this entire area of the law to a free-form balancing test. But that test is not the answer either; it is too difficult to apply, too easily circumvented, and ultimately impossible to reconcile with overbreadth jurisprudence.

The *O'Brien* test, in contrast, captures the interests of both employers and employees. It recognizes that coerced ideological conformity is what the First Amendment truly forbids in public employment - - not content or viewpoint discrimination - - and that government is entitled to insist that its employees not behave in ways that prevent management from running the workplace as it sees fit. It recognizes that regulation of speech has to be reasonably tailored so that protected speech is not unduly chilled. At the same time, though, *O'Brien* acknowledges that government cannot perfectly tailor a regulation since the government cannot anticipate every situation where it will have a legitimate reason to regulate the speech of its employees. The government must simply do what it can to put employees on fair notice of what it expects from them. In a case like *Cohen v. San Bernardino Valley College*, for example, perhaps the court was correct that a public university cannot employ rules so broad that they could proscribe everything that a student might find offensive. A public employer, however, surely cannot be expected to do much more than put

teachers on notice that if they fail to take reasonable care to avoid inflicting needless distress on their students, they will be subject to discipline.

The First Amendment issues that inhere in public employment illustrate all too well how the problems of the real world inevitably intrude on constitutional law. Elegant arguments can be made that a prohibition on content or viewpoint discrimination is at the heart of the First Amendment, but these arguments are not even remotely plausible when applied to the public workplace. The courts cannot possibly develop acceptable doctrine in this area without focusing on the very real problems for both the employee and the employer. The employee can speak out only by gambling with her job when the scope of her protection is unclear. The employer cannot possibly anticipate every situation in which what its employees say may have repercussions on the ability of people to get their work done as it sees fit. As this area of the law illustrates all too well, constitutional doctrine simply does not work unless those who make it are engaged with the problems of the real world. That is probably worth remembering the next time the Senate holds a confirmation hearing.