NOTES

Concern with Public Concern: Toward a Better Definition of the *Pickering/Connick* Threshold Test

I. INTRODUCTION: THE DOUBLE PARADOX OF PUBLIC EMPLOYER AND PUBLIC EMPLOYEE

The term "public employer" is something of a legal oxymoron. Although the law has established a jurisprudence for the employer, consisting of a network of state and federal statutory requirements,[1] and a jurisprudence for the governmental body, governed by the Constitution, the public employer belongs to neither of these. It is an entity that functions as a private business, charged with maintaining an efficient and productive workplace.[2] It is constantly under pressure to improve performance, and it is just as concerned with discipline, morale, and efficiency as any private employer. Yet it is also part of the sovereign and therefore considered a potential tyrant.

By the same token, the public employee has a split personality. As a citizen of the United States, the public employee is entitled to constitutional protections, including the right to free speech under the First Amendment. Yet as an employee of the government, the public employee is often under the control of her employer and may be ex-

1. For an excellent overview of employment law, see Mark A. Rothstein, Andria S. Knapp, and Lance Liebman, *Cases and Materials on Employment Law* (Foundation Press, 2nd ed. 1991).

2. For an introduction to the restraints placed on the government employer, see the Code of Federal Regulations (1996). For particular efficiency requirements, see the Index to the Code of Federal Regulations (1995) under any of the following headings: Cost Effectiveness, Cost Accounting, Cost Estimates, Improvement Costs, Maintenance Costs, or Operating Costs.

pected to compromise those rights in order to contribute to the efficient functioning of the employer.

These dual roles create a conundrum for the courts. The issue of public employee free speech highlights the problem. A private employer may fire an at-will employee on the basis of her speech with no fear of legal repercussions.[3] Yet a governmental entity is subject to the strictures of the First Amendment.[4] When a government official fires an at-will employee because of speech, that official is arguably abridging that employee's freedom of speech. Public employment therefore necessitates a first amendment analysis that takes these paradoxes into account.

The Supreme Court originally considered the public employer's role as employer and the public employee's role as employee preeminent. The Court therefore altogether denied public employees' free speech rights in the context of employers' firing decisions.[5] During the 1970s, however, the Court recognized the public employer's second identity as a state actor and provided a right of action for public employees fired on the basis of their speech.[6] To establish the boundaries of that right, the Court had to balance the

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3. A private employer may fire an at-will employee for any reason at all. See Rothstein, Knapp, and Liebman, *Employment Law* at 839 (cited in note 1). The private employer is not regulated by the First Amendment. At least one scholar, however, has suggested that the "public policy exception" to the at-will employment doctrine, see id. at 846, should include violations of the First Amendment, see id. at 536 (citing Note, *Protecting Private Employees' Freedom of Political Speech*, 18 Harv. J. Legis. 35, 85-89 (1981) (arguing for an expansion of common-law public policy exceptions to include the First Amendment)). See also *Norosel v. Nationwide Insurance*, 721 F.2d 894, 900 (3d Cir. 1983) (finding that under Pennsylvania law, a violation of the employee's first amendment rights is sufficient to invoke the public policy exception).

4. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const., Amend. I. Although the First Amendment literally applies only to the legislature, the Court has interpreted the Free Speech Clause to provide protection against individual employment decisions. See note 6 and accompanying text. Because a governmental official often cites a rule or regulation governing the workplace to support the firing decision, that rule or regulation could be considered the "law" abridging the speech. However, the Court often does not explicitly make this connection in its public employee free speech cases. Instead, the particular firing decision itself is the focal point for first amendment analysis. See, for example, *Pickering v. Board of Educ.*, 391 U.S. 563, 565 (1967).

5. See notes 12-19 and accompanying text.

6. This right of action provides the public employee with only indirect protection: an employee first must be fired for his or her speech before invoking the First Amendment to protect that speech. Charles Hemingway labels such first amendment protection *ex post* regulation of speech, as opposed to the normal *ex ante* analysis the Court uses to evaluate a statute or regulation. Charles W. Hemingway, *A Closer Look at* Waters v. Churchill *and* United States v. National Treasury Employees Union*: Constitutional Tensions Between the Government as Employer and the Citizen as Federal Employee*, 44 Am. U. L. Rev. 2231, 2233 n.5 (1995).

interest of the public employer as a private entity against the dangers of governmental censorship posed by the public employer as sovereign that the First Amendment was designed to prevent.[7]

The Supreme Court has developed a two-step analysis that attempts such a balance.[8] First, the Court determines whether the speech at issue is "of public concern," for only such speech merits protection under this framework.[9] To the great consternation of lower courts and scholars alike, however, the Court has failed to provide a clear definition for "public concern." If the Court determines that the speech is of public concern, it moves to the second step of the analysis and weighs the employee's interest in speaking freely against the employer's interest in maintaining efficiency.[10] This assessment balances the "value" of the speech against the potential for disruption to the workplace.

This Note argues that the first prong of the public employment free speech test is flawed. Under the current "public concern" threshold test, the Court evaluates both the content of the speech in question and the context in which it was uttered: the where, when, and to whom of the speech.[11] Analyzing the content of the speech, however, creates serious doctrinal problems within first amendment jurisprudence. This Note urges the Court to take a closer look at "public concern" and define it without reference to the content of the speech at issue. The Court should define "public concern" speech not as speech concerning an issue of public importance, but as speech to the public. To this end, the Note proposes that the Court redefine "public concern" as speech spoken outside the scope of the speaker's employment. The scope of employment test ensures that the public

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7. The tension in public employee free speech can be defined as the difficulty in balancing the employee's right to free speech against the government's concern with maintaining an efficient workplace. This characterization, however, fails to strike at the heart of the problem: the dual nature of the government employer itself. The difficulty is not so much how to balance an individual's right against the government's interest; that balancing act pervades all of constitutional law. Instead, the complication confronted in this area of law is that the governmental body at issue has multiple personalities, each of which demands a particular standard of conduct.

8. See Part II.B.2 (describing the Court's formulation of the test in *Connick v. Myers*, 461 U.S. 138 (1983)).

9. See notes 52-53 and accompanying text.

10. Scholars have often complained that governmental efficiency should not counterbalance individual rights. The Court, however, has stated that in the context of the public workplace, efficiency gains weight in the first amendment balance and become an important consideration when analyzing infringements on freedom of speech. See *Waters v. Churchill*, 511 U.S. 661, 675 (1994) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.").

11. See notes 80-87 and accompanying text.

employer infringes upon a public employee's right to free speech only within the context of the public employee's role as employee—the role that necessitated the infringement.

Part II of this Note explores the history behind the public employee free speech framework. Part III suggests that the Court's current analysis is unworkable. Part IV proposes both a redefinition of "public concern" and a shift in the effect of the public concern prong.

II. LEGAL BACKGROUND

A. The Destruction of the Rights/Privilege Distinction: Once a Citizen, Always a Citizen

The Supreme Court's analysis of a public employee's right to free speech has gone through two stages:[12] the rights/privilege approach and what this Note labels the public concern doctrine.[13]

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12. Several critics have identified more than two stages. See, for example, *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1739 (1984) (delineating three stages: pre-1950s (no protection), 1950s through 1960s (recognition of limitations imposed by the Constitution), and post 1960s (an increasing emphasis on the public's interests when determining protection)); 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 (1988) (identifying three stages). However, both of these "multiple-stage" analyses describe two mega-stages of rights/privilege (no protection) and post-rights/privilege. During the latter stage, the Court has used the public concern test to determine what speech is protected.

13. This development parallels the development of the public forum doctrine, another area of first amendment law. Public forum doctrine governs free speech on government-owned property. There appear to be at least three important connections between public forums and public workplaces. First, in both public forum and public employment law, the government plays a dual role of sovereign and citizen. In public forum law, the court must deal with the practicalities of the government's role as landowner, and in public employment law, it must confront the government as employer. Though the Constitution forbids the government from abridging any citizen's freedom of speech, it is impractical not to allow some sort of regulation of speech on government property or in the workplace. Efficiency demands regulation. Second, federal courts have considered a public employee's use of a public forum to air her speech a valid factor in evaluating whether that speech is on a matter of public concern. Third, the public workplace is itself a subset of the public forum: the government acts as proprietor of the workplace. These connections support an interpretation of public employee free speech that takes the principles of public forum jurisprudence into account. Although the employment relationship itself prevents the analogy from being perfect, the principles of public forum law certainly could bear on any discussion of public employment law. Strangely, however, the Court has not chosen to use those principles, a fact which may well explain some of the present confusion over public employment law.

Public forum jurisprudence evolved from the same rights/privilege distinction as did public concern jurisprudence. The Court originally reasoned that if the government could control

Under the rights/privilege approach, the Court afforded a public employee no greater protection as a speaker than that afforded a private employee.[14] The public employee's *status* as an employee meant that he or she was subject to the will of the employer. The Court reasoned that since public employment is a privilege granted by the government and not a right itself, the public employee could not, during that employment, claim absolute rights otherwise guaranteed a private citizen.[15] Therefore, freedom of speech, though established as a universal right in the Constitution,[16] did not apply as such for those labeled "employees." Justice Holmes summed up this philosophy in a famous comment on disciplining a police officer for his speech: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[17] Justice Holmes's analysis seems to suggest that by accepting a job as a public employee, a person waives her constitutional rights.[18] The

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access to its property, it could regulate the conduct—and thus the speech—of those to whom it granted such access. See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1722-23 (1987) (describing the Court's original rights/privilege approach); *Davis v. Massachusetts*, 167 U.S. 43, 47-48 (1897) (stating that the government as proprietor can absolutely limit speech on its premises just as a private person may limit speech within his residence). In both areas of jurisprudence, however, the Supreme Court soon abandoned the rights/privilege distinction, recognizing that even though the government may have a quasi-private interest as part of its dual role in certain situations, citizens may not be stripped of their rights even though they may take on the second role of public invitee or public employee. For public forum cases upholding this principle, see *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 514-16 (1939) (rejecting implication in *Davis* that citizens' rights under the Constitution disappear within a public forum); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) ("[O]ne who is rightfully on a [public street] carries with him there as elsewhere the constitutional right to express his views in an orderly fashion."). For the seminal public employment case upholding this principle, see *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (holding unconstitutional a statute abridging public teachers' freedom of speech). The First Amendment is still potent even within the confines of a government-regulated workplace and even on government property.

14. Private employers are not bound by the First Amendment. See note 3.

15. The leading case on the rights/privilege distinction is *Adler v. Board of Educ. of New York City*, 342 U.S. 485 (1952), overruled in part by *Keyishian*, 385 U.S. at 595. In *Adler*, the Court essentially nullified a teacher's right to free association by virtue of her employment with the state. Id. at 491-93.

16. The protection is "universal," in that the amendment does not itself provide for distinctions based on employment or status as a public employee. U.S. Const., Amend. I ("Congress shall make no law . . . ."). For a view that the First Amendment is truly "absolute" and cannot be infringed, see Alexander Meiklejohn's works: Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 S. Ct. Rev. 245; Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford U., 1965). Even if the First Amendment does not guarantee absolute freedom of speech in all situations, see, for example, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971), there does not appear to be any credible evidence that it was not intended to apply equally to all citizens of the United States.

17. *McAuliffe v. City of New Bedford*, 155 Mass. 216, 29 N.E. 517, 517-18 (1892).

18. See id. at 220 ("There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . by the implied terms of his

Court, however, never required the employer to obtain a waiver of free speech rights from the employee. Instead, the Court seemed to recognize the act of becoming a public employee of the government as sufficient to eliminate the right to freedom of speech.[19]

The rights/privilege distinction made little sense because it ignored the fact that public employees are not only employees but also citizens. By denying an individual her constitutional rights as soon as she became an "employee," the Court essentially was saying that the individual ceases to be a citizen of the United States when she works for the government, (or alternatively, that the government ceases to be a state actor when it acts as an employer[20]). Nothing in the Constitution supports this abrogation of an individual's freedom; indeed, such an interpretation is an anathema to the Bill of Rights.[21] The Court soon recognized this contradiction and concluded that the public employee does not "shed[ ] his or her first amendment freedom at the portal of work or school."[22]

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contract."). Of course, this analysis does not include those employees who are not under contract. See generally William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968) (evaluating Holmes's pronouncement in terms of waiver under the unconstitutional conditions doctrine).

19. Charles Hemingway argues that a citizen's change in status from non-employee to employee still undergirds all of public employee free speech jurisprudence. Hemingway, 44 Am. U. L. Rev. at 2239-41 (cited in note 6). Mr. Hemingway appears to equate becoming a federal appointee with becoming part of the government itself: the federal employee must accept closer control over her personal speech because she is now subject to the strictures of the government itself. Id. at 2241-42. This Note disagrees and argues that any distinct treatment of public employee free speech should be based on the employment relationship rather than on the public employee's status as "employee." See notes 135-38 and accompanying text.

20. See Post, 34 UCLA L. Rev. at 1763 (cited in note 13). Professor Post addresses a parallel problem in public forum jurisprudence. He argues that

> the fact that the government is acting as an employer or a proprietor will not exempt it from the distinct requirements of the equal protection clause, or the due process clause, or the commerce clause, or the privileges and immunities clause of article IV. And . . . there is no good reason why that fact should exempt the government from the requirements of the first amendment.

Id. (footnotes omitted).

21. The first ten amendments to the United States Constitution specifically protect rights of citizens or persons of the United States. These rights are not predicated on any factor other than the individual rightholder's identity as a citizen or a person. See, for example, U.S. Const., Amend. II ("[T]he right of the *people* to keep and bear Arms, *shall not be infringed*." (emphasis added)). See generally Meiklejohn, *Political Freedom* at 8-28 (cited in note 16).

22. Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. Cal. L. Rev. 1, 33 (1987) (paraphrasing *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.")). Notably, this statement characterizes the rights/privilege distinction as one based on the *workplace* rather than on the identity of the public employee as an employee. It defines the Court's approach as based upon *where* the First Amendment applies (outside the workplace)

In *Keyishian v Board of Regents*,[23] the Court abandoned the rights/privilege doctrine altogether.[24] In *Keyishian*, a number of employees of the New York state university system brought suit under the First Amendment.[25] The university had discharged them or declined to renew their contracts because the employees refused to sign a document stating that they were not affiliated with certain organizations.[26] The *Keyishian* Court held the terminations invalid because requiring the signed document as a condition of employment violated the employees' first amendment rights.[27] In so doing, the Court rejected the trial court's rights/privilege holding that the teachers had not been denied their freedom of speech or assembly, but only one of a full range of choices regarding where to work.[28]

The *Keyishian* court reversed the trial court's holding but it offered no new mode of analysis. It thus created a void in public employment jurisprudence. It eliminated the rights/privilege distinction as a valid approach to public employees' rights, but did not offer a replacement. The tension between public employer efficiency and individual rights continued.

B. Recognition of the Value of Public Employee Free Speech: The Supreme Court Becomes Publicly Concerned

A handful of Supreme Court cases decided over the last three decades define the second, modern stage of public employee free speech.[29] These cases champion an approach antithetical to the

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rather than based upon *to whom* it applies (non-employees). This implies that the Court originally meant to define public employee rights with reference to the employment relationship. See notes 135-38 and accompanying text (arguing that the employment relationship is both the genesis and the limit on the public employer's ability to infringe upon an employee's free speech).

23. 385 U.S. 589 (1967).

24. Id. at 605-06 ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (adopting language of the lower court)); id. at 606 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963))).

25. Id. at 591-92.

26. Id. at 592.

27. Id. at 609.

28. Id. at 605-06.

29. This is another area where scholars disagree over the taxonomy of public employee free speech doctrine. See note 12. Critics sometimes identify an intermediate stage characterized by limited recognition of individual rights in the public workplace. See, for example, Lee, 76 Cal. L. Rev. at 1112 (cited in note 12). However, the case that began the next stage, *Pickering*, see Part II.B.1, followed so closely on *Keyishian*'s heels that there was little time to develop a new doctrine in the interim.

rights/privilege distinction. The public employer's identity as a governmental entity gains meaning and competes with its identity as an employer. The public employee's concurrent identity as a citizen also surfaces. The new approach appeared to be an enlightened view of public employment. However, it soon caused problems of its own.

1. *Pickering v. Board of Education*

Public concern doctrine[30] began in 1968 with *Pickering v. Board of Education*.[31] In *Pickering*, the Court evaluated the discharge of a public high school teacher who was fired because of a letter he submitted to the local paper.[32] The teacher accused the Board of Education of forcing faculty to support a tax proposal at the expense of the teachers' own views.[33] Several of the statements proved to be false, but by and large the letter was true, and very critical of both the Board and the superintendent.[34] In response to Pickering's letter, the Board determined by a full hearing that the letter disrupted the efficiency of the school system[35] and therefore terminated the teacher.[36] Pickering brought an action in federal court claiming that his termination violated the First Amendment.[37] Under the rights/privilege approach, the action would have failed, but the Court now crafted a new analysis to evaluate Pickering's case.

The Supreme Court held that the termination violated Pickering's first amendment right to free speech.[38] It engaged in a balancing test, weighing the employee's rights against the employer's. The Court stated that a balance must be struck "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."[39] Thus public concern doctrine was born.

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30. The first prong of the text has attracted the most attention and thus bears the banner for the entire test.
31. 391 U.S. 563 (1968).
32. Id. at 564.
33. Id. at 565-66, 570, 575-78.
34. Id. at 573, 575-78.
35. Id. at 564-65 (describing the Board's finding that the letter was "detrimental to the efficient operation and administration of the schools of the district").
36. Id.
37. Id.
38. Id. at 574-75.
39. Id. at 568 (emphasis added).

In crafting its new first amendment analysis, the Court drew on past cases like *Keyishian* to support its decision not to bow blindly to the public employer's interests.[40] The public employer's identity as an employer would no longer outweigh the public employee's identity as a citizen entitled to first amendment rights. To develop the new approach, the Court drew analogies to libel law, citing references to defamatory statements against public officials and claims for invasion of privacy based on matters of public interest.[41] The Court apparently drew a connection to defamation jurisprudence because of its emphasis on valuing speech according to its content. In defamation law, "untrue" speech is considered of lesser value than "true" speech;[42] in the Court's new assessment of public employee free speech, "non-public concern" speech would be of lesser value than "public concern" speech.

Unfortunately, the *Pickering* Court did not define its new concept of "public concern." The Court gave no examples of public concern speech other than the one at hand. Instead, it provided a few clues as to when speech may *not* be protected. These examples all focused on speech between certain categories of speakers and listeners whose relationships the Court felt were necessary to the public workplace.[43]

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40. Id.

41. Id. at 573. The Court cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Time, Inc. v. Hill*, 385 U.S. 374 (1967), among others. *Pickering*, 391 U.S. at 573. The analogy to libel law was logical because several of Pickering's statements were untrue. In later cases, however, the Court did not continue to examine defamation jurisprudence. Instead, it formulated an entirely new test for what it apparently perceived as a "new" area of first amendment analysis. This was an unfortunate decision; if the Court had continued its attention to defamation law, it might have avoided the "public concern" test altogether. See notes 94-98 and accompanying text.

42. See Gerald Gunther, *Constitutional Law* 1081-83 (Foundation Press, 12th ed. 1991); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

43. *Pickering*, 391 U.S. at 569-70 & n.3. The Court in *Pickering* identified statements uttered in "the kind of close working relationships . . . [wherein] personal loyalty and confidence are necessary to their proper functioning," id. at 570, statements "directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher," id. at 569-70, statements by employees in "positions . . . in which the need for confidentiality is . . . great," id. at 570 n.3, and statements by employees in "positions . . . in which the relationship between superior and subordinate is of such a personal and intimate nature that . . . public criticism of the superior by the subordinate would seriously undermine . . . the working relationship," id. Such statements raise questions different from those raised by *Pickering* itself, and the results they necessitate may even be antithetical to the *Pickering* holding.

Turning to the relationship at hand, the Court explained:

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. . . . Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can

2. *Connick v. Myers*

In *Connick v. Myers*,[44] the Court expanded the *Pickering* analysis into a full-fledged test.[45] Sheila Myers, an Assistant District Attorney, circulated a questionnaire to her fellow employees. She distributed the questionnaire within the District Attorney's offices during the workday[46] she did so right after she refused her superior's request to transfer to another office.[47] The questionnaire solicited coworkers' views on their superiors and on morale in the office. One question asked whether the employees felt any pressure to work on political campaigns because of their public positions—pressure that would have been unconstitutional.[48] The District Attorney's Office promptly fired Myers, stating that her questionnaire had the potential to cause a serious decrease in morale at the office.[49] The Office also stated that it viewed the questionnaire as a direct attack on the capabilities of the Myers's superiors.[50] Myers brought suit under the First Amendment, alleging violation of her right to free speech.

The *Connick* Court ruled for the government,[51] and in so doing it streamlined the *Pickering* factors into a two-part test for evaluating public employee free speech. First, the Court stated, the speech in

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persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 569-70.

44. 461 U.S. 138 (1983).

45. Three cases that dealt with this issue intervened between *Pickering* and *Connick*, but none of these elaborated on the definition of "public concern." In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court reversed summary judgment where plaintiff the teacher claimed his employer violated his first amendment rights by refusing to rehire him in retaliation for unfavorable testimony before public agencies. Id. at 598. The *Perry* Court characterized *Pickering* as holding that "a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment." Id. See also *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (holding that the plaintiff has the burden of proving that his protected speech was a substantial reason for discipline imposed and that the employer must then show it would have fired the employee without consideration of the protected speech); *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 415-16 (1979) (holding that a public teacher's speech could not be denied protection under *Pickering* based only on the fact that it was uttered in private to a superior).

46. *Connick*, 461 U.S. at 141.

47. Id. at 140-42

48. See id. at 155-56.

49. Id. at 141.

50. Id.

51. Id. at 154. This is the only time the Supreme Court has ruled for the defendant employer when evaluating an *ex post* restriction on public employee free speech.

Pickering Court seemed more concerned with efficiency at a very circumscribed level—between the speaker and the subject of the speech.[60]

3. *Waters v. Churchill*

The Court's latest pronouncement in a *Connick*-type case[61] came in 1994 with *Waters v. Churchill*.[62] In *Waters*, Cheryl Churchill, an obstetrics nurse at a public hospital, engaged in a private discussion with a fellow employee. The conversation took place at the workplace during a dinner break.[63] Apparently,[64] Churchill warned the other worker that the obstetrics department was a bad place to work.[65] The hospital discharged Churchill because of her conversation, and she brought suit under the First Amendment.[66]

The *Waters* Court engaged in a detailed analysis of the history of public employee free speech.[67] When it reached the actual application of the *Pickering/Connick* test, however, it passed the threshold public concern prong in a blur. The Court simply stated that "if Churchill's criticism . . . was speech on a matter of public concern—*something we need not decide*—the potential disruptiveness of the speech as reported was enough to outweigh whatever first

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60. Id. This concern is akin to the personal loyalty concerns the Court has addressed in political patronage cases. Political patronage cases are cases in which the employer fires, hires, or otherwise acts in response to its employees political activities. See *Elrod v. Burns*, 427 U.S. 347, 353-55 (1976) (describing the patronage system). For example, an elected Republican sheriff, upon entering office, will fire her deputies who are Democrats. In patronage cases, the Court has allowed the additional interest of political loyalty to outweigh the employees' first amendment interests in certain circumstances. See id. at 367-73. See also *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980) (finding infringement upon first amendment rights of expression and association to be justified when political loyalty is a work requirement such that an employee's political sympathies will cause inefficiencies in the workplace).

61. A "*Connick*-type case" addresses an *ex post* regulation of public employee speech. See note 6. A 1995 Supreme Court case, *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995) ("*NTEU*"), also addressed public employee free speech and imported most of the *Connick* analysis. However, *NTEU* was an *ex ante* case. Id. at 1008 (describing a challenge to statute, rather than a single employment decision). It is unclear whether *NTEU* signals that the Court intends to develop one doctrine to cover all *ex ante* and *ex post* cases.

62. 511 U.S. 661 (1994).

63. Id. at 664.

64. The actual content of the speech was a major point of contention. For a summary of the different versions of the facts and an explanation of the Court's treatment of the issue, see notes 69-70 and accompanying text.

65. *Waters*, 511 U.S. at 665.

66. Id. at 666-67.

67. Id. at 668-75.

amendment value it might have had."[68] This "skip" to the second prong evidences the weakness of the threshold test as a protection for the employee's speech. If the Court need not evaluate the content of the speech, the first prong becomes only an exclusionary rule—an easy way to eliminate an employee's first amendment claim. The content of the speech can never shield the employee from employer action.

Though *Waters* did nothing to clarify the *Pickering/Connick* test, it did add something important to public employee free speech jurisprudence: a procedural requirement. Central to the *Waters* dispute was the question of what Churchill had actually said to the other nurse.[69] To solve what could be a recurring problem in this type of case, the *Waters* Court established a framework for determining the true content of the speech to be evaluated. The Court stated that it would take as correct the content of the speech as determined by the *employer's* "reasonable investigation."[70]

Some commentators have heralded this new development as a boon to employees because it sets up the first procedural safeguard for an employee's right to free speech.[71] Before *Waters*, an employee could challenge an employment decision based on speech only indirectly, by marshaling the necessary resources to sue the employer after the fact. *Waters* assists the employee by mandating an internal evaluation of the speech-based employment decision before that decision becomes final. This should allow the employee to vindicate her free speech

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68. Id. at 680 (emphasis added).

69. Id. at 664. The employer claimed that Churchill had badmouthed her immediate supervisor, Waters, and that she had warned the other nurse not to work in obstetrics. Id. at 665-66. Churchill claimed she had criticized staffing policies of another supervisor, but that she had actually defended Waters and encouraged the other nurse to transfer into obstetrics. Id. at 666.

70. Id. at 667-68.

71. D. Keith Fortner, Note, *Public Employers Must Conduct a Reasonable Investigation to Determine if an Employee's Speech Is Protected Before Discharging the Employee Based Upon the Speech*, 18 U. Ark. Little Rock L. J. 463, 487-88 (1996) (expressing cautious optimism regarding *Waters*'s procedural rights); Keith L. Sachs, Comment, Waters v. Churchill*: Personal Grievance or Protected Speech, Only a Reasonable Investigation Can Tell—The Termination of At-Will Government Employees*, 30 New Eng. L. Rev. 779, 781 (1996) (describing *Waters*'s "safeguard"). The *Waters* Court itself suggested this interpretation: "A speaker is more protected if she has two opportunities to be vindicated—first by the employer's investigation and then by the jury—than just one." *Waters*, 511 U.S. at 670. But see Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 Ind. L. J. 101, 128 (1995) ("*Waters v. Churchill* adds little or nothing to the First Amendment protection of at-will public employees."); Kermit Roosevelt, *The Costs of Agencies:* Waters v. Churchill *and the First Amendment in the Administrative State*, 106 Yale L. J. 1233, 1233 (1997) (citing criticisms of *Waters* and noting that "[c]ertainly it is true that after *Waters*, government employers enjoy greater freedom in terminating employees based on speech").

rights without having to suffer a wrongful discharge and all its attendant handicaps.[72]

Such praise is misplaced for several reasons. First, the procedure established in *Waters* only preserves the content of the speech in question for later evaluation by the Court. It does not restrict the public employer's employment decision. In addition, the employee may face an additional obstacle in court because of *Waters*: the Court will now evaluate the employee's rights based on the employer's account of what the employee said.[73]

The *Waters* Court also imposed no penalty on an employer who fails to conduct an investigation into the content of the speech. Thus, even if the procedure does benefit employees, it is an illusory benefit easily avoided by the employer. The employer may want to avoid creating a paper trail or identifying witnesses who could later injure its chances in a lawsuit. The employer may therefore "take its chances" on first proving the content of the employee's speech in court rather than in an internal investigation.

Finally, the most detrimental aspect of the *Waters* requirement is its oft-overlooked delegation of first amendment analysis to the employer. The *Waters* Court required that the employer conduct a "reasonable investigation" only if the employer thinks there is a "*substantial likelihood*" that the employee's speech is protected in the first place.[74] This caveat is apparently meant to reduce the new

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72. Cynthia Estlund details the obstacles faced by a discharged employee who wishes to vindicate her first amendment rights:

> Consider the hurdles that face an at-will public employee who has publicly criticized her superiors' performance of their public duties, and who is subsequently fired. She may be given no reason, or she may be told that her performance has been unsatisfactory. She has no right to notice or documentation of the alleged inadequacies, or an opportunity to refute the charges. If the employee believes that she was fired because of protected speech, and if she can find a lawyer to represent her, she can file a lawsuit in which she may attempt to prove—largely through the employer's documents and witnesses still employed by the employer—that her speech was on a matter of public concern, that her discharge was actually motivated by her speech, and that the speech was not unduly disruptive. In the meantime the employee may be unemployed under circumstances that may handicap her in getting another job.

Estlund, 71 Ind. L. J. at 127 (cited in note 71) (footnote omitted).

73. Although this "reasonableness" requirement may help some employees, there is no evidence that before *Waters*, the employee's version of the speech in question was disfavored; therefore, imposing a "reasonableness" requirement on the employer is no real gain for the employee.

74. *Waters*, 511 U.S. at 677 ("If 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, the manager must tread with a certain amount of

procedural requirement's burden on the employer. In light of the vagueness and unpredictability of the *Pickering/Connick* test, however, it seems fantastic that the Court would give the employer, an inherently biased party, the power to make an initial determination of the test's result.[75] It is also unclear whether, if the employer does not find such a "substantial likelihood" of protection, the Court will review the subsequent employment decision. If the answer to this last question is no, *Waters* effectively renders the employer the final arbiter of the employee's first amendment rights.

C. Finishing the Job: The Definition of Public Concern

1. Uncertainty Reigns Supreme

Though the Supreme Court in *Pickering* and *Connick* established a new first amendment test to cover public employee free speech, it failed to define a key element of that test: public concern. This has led to great confusion among the lower courts.[76] In seeking to apply the *Pickering/Connick* test, the lower courts engage in convoluted factor analysis schemes to determine what speech is of "public concern." These analyses often yield contradictory results[77] that strip the public concern prong of all predictability and leave both public employers and public employees uncertain of their rights. The uncertainty is exacerbated by the *ex post* nature of the Court's protection[78] and can lead to a "chilling" effect on protected speech.[79]

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care."). The dissent addressed this strange requirement, pointing out that the Court provided no boundaries for the initial burden on the employer. Id. at 688-89 (Scalia, J., dissenting)

75. This framework may also raise separation-of-powers concerns. If this initial assessment of the value of the speech in question can be considered a determination of the scope of protection of the First Amendment, delegating that assessment to a member of the executive or legislative branch could at least seemingly usurp the judiciary's power as the final arbiter of the Constitution.

76. Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind. L. J. 43, 75 (1988) (lamenting that lower courts have been "anything but consistent" in determining the scope of protection under *Connick* because of the "unbridled discretion" the *Connick* Court authorized).

77. Id. ("Although broad categories of cases can be identified, there exist contradictions within every category . . . ."). Compare, for example, *Johnson v. Lincoln University of the Commonwealth System of Higher Educ.*, 776 F.2d 443, 454 (3d Cir. 1985) (holding an academic's criticism of his university's president "public concern" speech), with *Landrum v. Eastern Kentucky University*, 578 F. Supp. 241, 246-47 (E.D. Ky. 1984) (holding an academic's criticism of his dean not to be "public concern" speech). Both cases are described in Allred, 64 Ind. L. J. at 65-66 (cited in note 76).

78. See note 6 and accompanying text. The employee must suffer termination because of her speech before establishing her right to speak. Further, the remedy for an unconstitutional termination may simply be reinstatement, a remedy that often proves remarkably unsuccessful.

After *Waters*, predictability may be at an even higher premium. If *Waters* delegates the initial responsibility for evaluating first amendment protection to the employer itself, the Court must provide the employer with a crystal-clear threshold test to determine when speech is of "public concern" and therefore possibly protected. The employer is certainly not equipped to evaluate the lower courts' complicated factor-analysis schemes.

2. Defining the Problem: Double-Stranded Analysis

Clearing up the *Connick* confusion requires a close look at the clues the Court has provided regarding the definition of the public concern threshold test. Piecing together the Court's dicta on "public concern" reveals two types of analysis occurring simultaneously during the *Pickering/Connick* threshold test: a content-based analysis and a context-based analysis.[80] The former concentrates on *what* was said, while the latter concerns *where*, *when*, and *to whom* the speech was uttered. A quick revisitation of the main public employee free speech cases establishes the simultaneous existence of both evaluations.

See Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* 85-87 (Harvard U., 1990) (asserting that reinstatement causes severe difficulties between the reinstated employee and the successfully-sued employer). See also id. at 86 (quoting the "success rate"—the percentage of employees who continue in their employment for any length of time after reinstatement—for private, non-organized employees at only 10%).

79. See generally Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. Rev. 685 (1978) (describing the importance of such a chilling effect in the Court's free speech jurisprudence). The government has actually documented this effect in analyzing the efficacy of existing whistleblowing statutes. See U.S. Merit Systems Protection Board, *Whistleblowing in the Federal Government: An Update* (U.S. G.P.O., 1993), discussed in Estlund, 71 Ind. L. J. at 119-21 (cited in note 71). If employees are afraid to speak even when protected by federal regulations preventing their discharge for certain types of speech, they will be even less willing to speak when only protected by an unpredictable, undefined, *ex post* judicial analysis.

80. This content/context distinction may be causing confusion in other areas of first amendment jurisprudence as well. See Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 Colum. L. Rev. 1527 (1993) (arguing that the Court's "fighting words" jurisprudence may confuse content with context).

a. Pickering

The *Pickering* Court spent much of its opinion evaluating the content of the plaintiff employee's speech.[81] In basing its holding on "[t]he public interest in having free and unhindered debate on matters of public importance,"[82] the Court evaluated the truthfulness of Pickering's accusations and their value to the public. Thus the content of the speech was a primary concern for the Court.

Pickering, however, also provides support for a context-based test because of its emphasis on the speaker's rights as a citizen. The Court, when striking a balance between employee and employer, stated that the relevant interests of the speaker were those implicated when the employer was speaking "*as a citizen*, in commenting upon matters of public concern."[83] Thus it seems that public concern, even if intended as a subject matter test, originally had to be coupled with an evaluation of whether the speaker was speaking as a citizen. The identity of the speaker feasibly cannot change according to the content of her speech, but it is plausible that the identity of the speaker "changes" based on where and when the speaker is speaking. When a teacher speaks within the workplace, during the workday, she speaks as a teacher and thus her identity as "employee" dominates. When she speaks outside that scope, however, she speaks as a citizen.

The *Pickering* Court provided additional support for a context-based analysis by describing the case before it as one "in which a teacher has made erroneous *public statements* upon issues then currently the subject of public attention."[84] This statement, though clearly dicta, shows that the Court considered where the speaker was speaking to be an important part of its analysis. Because of this implied emphasis on the context of the speech, it seems appropriate to label the *Pickering* Court's analysis of public concern a purely content-based analysis.

b. Clues Since Pickering

In *Connick*, the Court explicitly incorporated both a content-based and a context-based analysis of public concern, stating that "*content*, form, and *context* of a given statement, as revealed by the

81. 391 U.S. at 570-72.
82. Id. at 573.
83. Id. at 568.
84. Id. at 572 (emphasis added).

whole record"[85] determine whether the speech in question will be protected. In determining that Myers's speech was not of public concern, the Court emphasized the fact that Myers did not attempt to inform the public of issues concerning the District Attorney's activities of investigation and prosecution or of the office's miscarriage of official duties.[86] The Court also stated that "[e]mployee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring[s] different factors into the *Pickering* calculus, and might lead to a different conclusion."[87] Thus, the Court was concerned with the context of the speech as well as its content; if the speech had been aimed at the public, outside the workplace and in a traditional public forum, it would have come closer to being public concern speech.

Waters gives strong support to a content-based analysis of public concern: the entire case concentrates on defining the content of the speech in question as a prerequisite to applying the *Pickering/Connick* test. In fact, *Waters* could be read as a mandate to apply a pure content-based analysis under the public concern prong. Despite *Waters*, however, the content/context confusion seems to have survived. The Court's latest word in *United States v. National Treasury Employees Union* ("*NTEU*")[88] again mixes content-based and context-based concerns. The *NTEU* Court stated that the speech at issue was public concern speech because it was "addressed to a public audience, [was] made outside the workplace, and involved content largely unrelated to [the plaintiffs'] employment."[89]

Thus, analysis of Supreme Court precedent provides evidence of two strands of public concern analysis: content-based and context-based. This Note suggests that the content-based strand of public concern analysis is fatally flawed. A content-based analysis creates doctrinal problems within first amendment jurisprudence and fails to draw the correct line between protected versus non-protected speech. The Court should thus refocus on the context-based strand and use that strand alone to clearly define "public concern."

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85. *Connick*, 461 U.S. at 147-48 (emphasis added).
86. Id. at 148.
87. Id. at 153 n.13.
88. 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995).
89. 115 S. Ct. at 1013.

III. PROBLEMS WITH A CONTENT-BASED ANALYSIS OF "PUBLIC CONCERN"

A. Problems of Application: Learnability

Categorical first amendment tests create many dangers of misapplication.[90] One measure of the projected efficacy of first amendment categorizations is "learnability":[91] whether the judiciary can be successfully "taught" how to determine whether speech falls inside or outside an established category.[92] If a category is not learnable, it will result in unfathomable analysis, which leads to unpredictable opinions and uncertain rights.[93]

The Supreme Court itself expressed doubt as to the learnability of a content-based public concern category by establishing and then overruling a content-based public concern test for defamation cases in the 1970s.[94] In 1971, in *Rosenbloom v. Metromedia, Inc.*,[95] a three-member plurality of the Court extended protection for media defendants to "all discussion and communication involving matters of public or general concern."[96] The Court proceeded to define public concern based solely on the content of the speech in question.[97] Only three years later, however, a full majority explicitly rejected the *Rosenbloom* standard and overruled the decision, stating that the public concern test "would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."[98] Thus, the Court was concerned with the learnability of a content-based public concern test.

The Court later reinjected content-based public concern analysis into its defamation jurisprudence based on *Connick* and in

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90. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 265-66 (1981).

91. Id. at 305.

92. Id. at 305-07.

93. Id.

94. See Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 4-13 (1990) (describing the Court's first foray into categorization of public concern).

95. 403 U.S. 29 (1971).

96. Id. at 44.

97. Id.

98. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (quoting *Rosenbloom*, 403 U.S. at 79).

apparent disregard for its own proclamation.[99] The Court's self-criticism, however, must still hold true. A judge cannot feasibly "learn" what is of public concern if the category is defined by the actual content of the speech; there is nowhere to turn for a definition of which issues concern the public. The Court could perhaps look to the media's newsworthiness determinations[100] as a guide to public concern issues. Yet basing public concern on media proclamations strips the actual "public" of the power to determine what speech is of concern and delegates that power to an entity whose concerns do not necessarily reflect those of the *whole* public.[101] It also creates an ever-changing definition of public concern—what is news today may not be news tomorrow, nor may it be news somewhere else—that further decreases the predictability of the public concern test.[102]

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99. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (quoting the Court's determination in *Connick*, 461 U.S. at 147-48, that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record").

100. The *Gertz* Court would, of course, disagree with this approach since the Court's concern was that the judiciary could not determine which of a media defendant's publications addressed issues of public concern. See notes 94-99 and accompanying text.

Several lower courts have considered newsworthiness a proper factor in evaluating the first prong of the *Pickering/Connick* test. For brief opinions on whether newsworthiness is a proper measure of public concern, compare Christine M. Arden, Note, *Public Employees and the First Amendment:* Connick v. Myers, 15 Loyola U. Chi. L. J. 293, 307 (1984) (yes), with Robert M. Cover, *The Supreme Court, 1982 Term*—Nomos *and Narrative*, 97 Harv. L. Rev. 4, 172 n.65 (1983) (no).

101. Several critics have furthered the view that the mass media has distinct political leanings itself and ultimately may be hostile to certain viewpoints. See, for example, Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 Ind. L. J. 689, 694-713 (1994) (arguing that the media as a commercial entity is inherently biased towards a conservative, pro-status quo viewpoint to the detriment of "liberal" concerns); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. Colo. L. Rev. 935 (1993) (examining the politics of the media). The media may also be an imperfect vehicle for change. See Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 979 (1978) ("Only in changing people's existing conceptions—the normal goal of the critics of the status quo—does the media falter."). If so, it cannot serve as an indicator of the "most important" viewpoints: those that can correct existing problems or bring about possible improvements. For the view that the First Amendment places a premium on the ability to change our government and social structure, see notes 104-06 and accompanying text.

102. The Court seems to have succumbed to this phenomenon at least in part. In *Rankin v. McPherson*, 483 U.S. 378 (1987), an employee, in response to the assassination attempt on President Reagan, said "[i]f they go for him again, I hope they get him." Id. at 380. The Court found the employee's speech was of public concern, reasoning that "[t]he 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." Id. at 386. The latter phrase disturbingly implies that the fact that the President's life was in a brighter spotlight that day may have been an important factor in determining the amount of protection to afford under the First Amendment.

The problem of learnability is exacerbated by *Waters*. After *Waters*, the employer must make an initial determination of the value of the employee's speech, a determination that may never be reviewed by the courts.[103] If the Court is not equipped to determine what issues are of "public concern," certainly the employer, an interested party, is at an even greater disadvantage.

B. Doctrinal Problems with "Public Concern" as Conceived by the Pickering *and* Connick *Courts*

Besides the practical problems of predictability and learnability, which impact primarily on the individual plaintiff, a content-based public concern analysis poses theoretical problems for first amendment jurisprudence as a whole. Most scholars agree that the First Amendment functions primarily to inform the public, which can in turn check abuses of power and move our government ever closer to an ideal system.[104] This function is even more important in the public employment context because employees are an important conduit of information for the public about the public workplace.[105] Moving the government towards a more efficient and normatively better state necessarily requires change from time to time. Thus, the First Amendment should allow and even promote change in the government workplace.[106]

If public concern is a content-based test, however, protecting "public concern" speech will not promote change. In *Pickering*, the Court stated that the teacher's protected comments were "public statements upon issues *then currently the subject of public atten-*

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103. See Part II.B.3. See also Edward J. Velazquez, Comment, Waters v. Churchill: *Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 Brooklyn L. Rev. 1005, 1058 (1995) (warning that "*Waters* indicated the Court has abandoned a genuine judicial review" of public employee free speech cases).

104. Free speech ensures that the electorate is informed and therefore able to shape our government properly. See, for example, Meiklejohn, *Political Freedom* at 26 (cited in note 16); id. at 42 (asserting that the First Amendment "offers defense to men who plan and advocate and incite toward corporate action for the common good"); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement. It offers itself for belief and if believed it is acted on . . . ."). See also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar Found. Res. J. 523, 524 (1977) (stating that first amendment claims in the 1960s and 1970s were often claims about the power to "unleash latent social forces" for change).

105. See notes 115-19 and accompanying text.

106. See, for example, *Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social *changes* desired by the people." (emphasis added)).

tion."[107] This definition of "public concern" speech suggests that only speech that reflects issues already spoken about and debated deserves protection. The language in *Pickering* implies that only "redundant" speech is to be recognized. Therefore, speech that first grabs "the public attention," and thereby begins to effect a change, is of lesser value because it occurs before that attention is focused. This result is in tension with the change-forcing function of the First Amendment.

Further, it is unclear how much of the "public" needs to be interested before the speech becomes public concern speech under a content-based analysis. All speech is the subject of attention for at least one member of the public—the employee speaker. Yet the employee's interest is obviously not enough to ensure protection.[108] By ignoring this concern in favor of the "larger" public, a content-based public concern analysis threatens to inject majoritarian values into first amendment jurisprudence.[109] Such an intrusion is inimical to the countermajoritarian function of the Bill of Rights.[110]

And finally, if speech is only of public concern when it concerns a large, ongoing debate, there seems to be an inherent contradiction with the second prong of the public employee free speech test. Such speech, if it relates to the workplace, may be inherently disruptive.[111]

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107. 391 U.S. at 572 (emphasis added).

108. For thoughts on why this is problematic, see Estlund, 59 Geo. Wash. L. Rev. at 31 (cited in note 94). Professor Estlund notes that most so-called "public" issues at the forefront of our consciousness today—AIDS, drug abuse, etc.—began as purely private issues concerning those individuals personally grappling with such issues. Id.

109. See Massaro, 61 S. Cal. L. Rev. at 31 (cited in note 22) ("To infuse majoritarian values into the Bill of Rights and conclude that protected employee speech must involve matters that are already of interest to a significant segment of the public seems a very wrong reading of the first amendment.").

110. Judge Bork has argued that our government is based on a Madisonian model of majoritarian democracy, but with some areas—those designated in the Bill of Rights—reserved for countermajoritarian individual freedoms. In these areas, including first amendment jurisprudence, "coercion by the majority . . . is tyranny." Bork, 47 Ind. L. J. at 2-3. (cited in note 16). See also Massaro, 61 S. Cal. L. Rev. at 31 (cited in note 22). This is logical in light of the First Amendment's core value of promoting informed participation in government to enable the electorate to bring about needed change. See notes 104-06 and accompanying text. Further, minority views are necessary to provide an alternative to the status quo. See Meiklejohn, *Political Freedom* at 42 (cited in note 16) (contending that free speech ensures that beliefs are offered for consideration by the majority); *Roth*, 354 U.S. at 484 (stating that the First Amendment protects "even ideas hateful to the prevailing climate of opinion"). See also *Ginzburg v. United States*, 383 U.S. 463, 489-90 (1966) (Douglas, J., dissenting) (criticizing the Court's designation of the "social value" of speech as a majority value, ignoring minority concerns).

111. See Massaro, 61 S. Cal. L. Rev. at 23-24 (cited in note 22) ("[T]he decisions encourage workers to carry their grievances to outside fora—to newspaper, public meetings, television, or other similar avenues—even though publicity could fan into flames an ember that might have been doused quickly and quietly within the workplace."). Professor Estlund notes that

Thus, if speech passes the threshold test of public concern, it may automatically fail the disruption prong.[112]

C. The Paradox of Content Analysis in the Public Employment Setting

By focusing on content to identify public concern speech, the Court recently ensnared itself in a paradox. In *NTEU*, the Court stated that the speech in question was public concern speech because (in addition to context-based reasons), the speech "involved content largely *unrelated* to [the plaintiffs'] government employment."[113] This conclusion echoes many lower courts' evaluations of the strength of the nexus between the subject of the speech and the workplace; speech that relates less directly to employment duties is more likely to be of public concern.[114] This nexus, however, undermines a major rationale behind protection of employees' speech: the public's need for information about the workplace.

The *Pickering* Court recognized that public employee free speech furthers public interests as well as employee concerns.[115] The public benefits from employee speech because the public employee is in the best position to inform the public of potential problems within

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whistleblower statutes" have created a similar paradox in the private workplace. The government needs whistleblowers to enforce workplace regulations, but whistleblowing speech is inherently disruptive. Therefore, the government has passed legislation to protect the employee from repercussions for this speech. Estlund, 71 Ind. L. Rev. at 116 (cited in note 29) (discussing federal and state statutes that provide extra-constitutional protection to private employee speech on certain subjects). Some whistleblowing statutes regulate public workplaces as well. See, for example, 5 U.S.C. § 2302(b)(8) (1994 ed.) (prohibiting federal employers under certain circumstances from basing employment decisions on an employee's or applicant's disclosure of the employer's illegal or inappropriate activities). However, government employees arguably are even more valuable than their private counterparts as sources of information about all aspects of the government workplace—not only those covered by current regulations—are of interest to the voting public. Thus, government employees should enjoy protection for more of their speech than is covered by whistleblower statutes.

112. See Massaro, 61 S. Cal. L. Rev. at 23-24 (cited in note 22) (describing the "disconcerting" paradox confronting an employee who must "stir things up" to satisfy the public concern requirement but who then risks failing the disruption prong).

113. 115 S. Ct. at 1013.

114. See Allred, 64 Ind. L. J. at 72-75 & n.209 (cited in note 76) (labeling such matters "of purely personal interest").

115. *Pickering*, 391 U.S. at 572 (noting that public school teachers are "most likely to have informed and definite opinions" regarding the tax issue that Pickering's letter addressed and that therefore "it is essential that [teachers] be able to speak out freely" to inform community debate). See also *Developments*, 97 Harv. L. Rev. at 1739 (cited in note 12) (stating that free speech jurisprudence in the 1960s was characterized by an increasing emphasis on the public's concerns). This recognition is problematic; it bypasses the original emphasis on the First Amendment as an entirely personal right in favor of protection for the effects of the exercise of that right. Such a shift transforms an individual right into a societal right, and it could eventually render individual rights completely relative, affected by changes in the societal milieu.

the workplace.[116] Indeed, such public-informing speech furthers the goal of efficiency, which is the primary counterbalance to the First Amendment within the workplace.[117] Because the public employer must remain efficient not for itself by way of profit, but for the public, the danger always exists that the employer will lose incentive to maintain efficiency. It must therefore be constantly monitored by the real "boss"—the public. Though statutes like the Freedom of Information Act[118] have increased the public's ability to obtain information about internal workings of government, public employees remain the best and quickest source of information: the employee informs the public, which in turn pushes for more efficient administration of the workplace.[119] Thus, speech relating directly to employment is more "valuable" to society as a whole than speech with no relation to public employment.

Because of the employee's vital function as information gatherer, any test that protects speech to a lesser degree because it concerns the workplace has no place in public employment free speech doctrine. If anything, the stronger the relationship between the content of the employee's speech and the public employment, the greater should be the protection for the speech. A content-based public concern analysis like that implied in *NTEU* negates the public's interest in public employee speech about the workplace.

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116. See Blasi, 1977 Am. Bar Found. Res. J. at 527 (cited in note 104) (describing the evolution of free speech theory to include a central "checking value": the individual can check the abuse of power by public officials by her speech).

117. See Patricia C. Camvel, Note, Waters v. Churchill: *The Denial of Public Employees' First Amendment Rights*, 4 Widener J. Pub. L. 581, 609-15 (1995) (arguing that *Waters* and its predecessors impose inefficiencies on the workplace because of their chilling effect).

118. Freedom of Information Act, 5 U.S.C. § 552 (1994 ed.) (requiring agencies to release records upon public inquiry).

119. The government itself relies on this effect to enforce regulations within the private workplace. See Weiler, *Governing the Workplace* at 157-58 (cited in note 78) (noting the important role employees play in bringing regulatory violations to light). The employee's function as information-gatherer has become increasingly important because appointed officials and executive agencies are becoming more influential in setting government policies. See Gerald E. Fung, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. Pa. L. Rev. 942, 943 (1976) (noting the trend to make "government the pivotal force in the development of American society" over twenty years ago); Cornelius N. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* (CQ Press, 1994). Now the public employee is a source of information regarding not only economic inefficiencies, but also improper policymaking.

D. Larger Repercussions: The Specter of an Impotent First Amendment

A content-based public concern test may even pose real dangers to the First Amendment itself. Professor Cynthia Estlund has warned that a content-based definition of public concern speech turns first amendment jurisprudence on its head.[120] She points out that public concern speech has always been at the heart of first amendment protection.[121] Even scholars who disagree with Alexander Meiklejohn's vehement argument that "the First Amendment is an absolute"[122] admit that the phrase applies to speech about public matters.[123] As noted above,[124] in the past the Court has *always* provided protection to speech on matters of "public concern," carving out narrow exceptions.[125] Instead of again prescribing *exceptions* to the general rule of protection, the Court in *Connick* switched the presumption from protection to non-protection.[126] Thus, the doctrine forces the speaker to prove that he or she should be protected rather than making the government prove that it should be allowed to infringe upon the speech. The First Amendment becomes a license to abridge freedom of speech unless the speaker can prove his or her speech is of public concern.

This switch is more sinister than a simple shifting of burdens. Without a default of absolute protection for speech, the First Amendment dwindles to nothing more than a reminder for the Court to consider the value of speech when weighing competing concerns of the individual and the state. The Free Speech Clause ceases to hold a central place in our constitutional value scheme[127] and becomes just

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120. Estlund, 59 Geo. Wash. L. Rev. at 48 (cited in note 94) ("The creation of a category of speech on matters of public concern—a core category within the sphere of protected speech, which alone is entitled to certain protections—turns [established first amendment jurisprudence] inside out.").

121. Id. at 2-3. In all areas of first amendment jurisprudence, Professor Estlund equates "public concern" speech with what other scholars call political speech.

122. See Meiklejohn, 1961 S. Ct. Rev. at 245 (cited in note 16).

123. See, for example, Bork, 47 Ind. L. J. at 20 (cited in note 16) (asserting that *only* political speech—which Professor Estlund equates with public concern speech—deserves protection under the First Amendment).

124. See note 102 and accompanying text.

125. Estlund, 59 Geo. Wash. L. Rev. at 47-49 (cited in note 94) (describing the Court's perpetual scheme of protection for the "core category" of "public concern" speech under the First Amendment).

126. See notes 52-53 and accompanying text.

127. See Laurent B. Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424, 1442-43 (1962). This Author subscribes to Professor Schauer's view that free speech should be treated as one of the highest ranking "principles" in our governmental scheme, along with

another "factor" in balancing the rights of the individual against the power of the government. Such an approach could eventually weaken the force of the First Amendment in other areas as well.[128]

IV. A NEW PROPOSAL FOR PUBLIC EMPLOYEE FREE SPEECH

Concern over public concern doctrine is not new. Since the Court's initial definition in *Pickering*, scholars have struggled to define "public concern," suggesting interpretations of the test that fit the Court's rationales and existing first amendment jurisprudence.[129] These redefinitions, however, have all preserved a content-based strand of public concern.

This Note proposes eliminating that strand in favor of a pure context-based analysis. If the Court insists on preserving the threshold public concern test,[130] it should recast the test to focus on the

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equality, liberty, democracy, and public interest. See Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge U., 1982).

128. See Estlund, 59 Geo. Wash. L. Rev. at 48-50 (cited in note 94) (worrying that the Court will export the public concern test to other areas of the First Amendment).

As discussed above, the Court has already bootstrapped the "public concern" inquiry back into defamation jurisprudence, from which it was previously explicitly rejected. See notes 94-99 and accompanying text. For an example of its exportability to freedom of association cases, see Mark Strauss, Note, *Public Employees' Freedom of Association: Should* Connick v. Myers' *Speech-Based Public-Concern Rule Apply?*, 61 Fordham L. Rev. 473 (1992). Mr. Strauss agrees with Professor Estlund that there is danger that the public concern doctrine will bleed into all areas of first amendment doctrine. Id. at 493. He divides freedom of association cases into two subcategories—expressive association and intimate association—and argues that applying *Connick* to the freedom of expressive association is already a *mandatory* corollary to *Connick*. Id. at 493. Mr. Strauss believes that *Connick* should not be applied to cases involving freedom of intimate association, but he provides no assurances that *Connick* will not eventually enter that realm as well. Id. at 488-89. See also Estlund, 59 Geo. Wash. L. Rev. at 27 (cited in note 94) (waring that public forum doctrine is "vulnerable to the allure of the public concern test").

129. See Massaro, 61 S. Cal. L. Rev. at 1 (cited in note 22). Professor Massaro suggests eliminating the distinction between public and private concern speech altogether in favor of a "street discourse" test: if the speech is permissible street corner discourse, the government should not be allowed to regulate it. Id. at 67. This suggestion does not, however, confine itself to the public workplace, and thus its broad-brush categorization might have serious and possibly detrimental impacts on other areas of first amendment jurisprudence. See also Lee, 76 Cal. L. Rev. at 1136-46 (cited in note 12) (proposing a reversal of the *Pickering/Connick* prongs that would afford primary importance to disruption in the workplace and suggesting several factors that would shield a disruptive speaker from regulations, all of which help distinguish a "citizen" speaker from a noncitizen); Allred, 64 Ind. L. J. at 75-81 (cited in note 76) (evaluating three approaches within the existing framework of public concern analysis).

130. This Note proposes to redefine the public concern test. There is an equally strong argument, however, for eliminating the threshold evaluation altogether. Because the Court has decreased its emphasis on the first prong since *Connick*, see note 68 and accompanying text, and because the original concern of the Court regarding public employee speech was its disruptive effect, the public concern prong seems unnecessary.

distinction between workplace speech and speech outside the working environment. This distinction can be best described by analogy to the "scope of employment" test currently used in both agency and employment law.

Further, the burden for meeting the threshold test should be reversed and the effect of the finding of public concern should be modified. If the speech is of public concern, it deserves full and absolute protection. If it is not of public concern, it should still be evaluated under the second prong of the *Pickering/Connick* test: the Court should weigh the speech's "value" against its potential for disruption. Speech outside the scope of employment should thereby receive full protection, while speech within the scope of employment may be subjected to the balancing test currently embodied in the second prong of the *Pickering/Connick* test.

A. The "Scope of Employment" Test

The common-law agency test for "scope of employment" involves three determinations: whether the conduct in question is within the type of duties the employer authorized the employee to perform; whether the conduct was carried out within the time and space limits the employer authorized; and whether the conduct derived, at least in part, from an intent to serve the employer.[131] Under the common-law test, if the answer to both the first and the second inquiries is yes, an inference arises that the conduct in question was actuated, at least in part, by the intent or purpose to serve the employer.[132]

This test would translate easily to the public employee free speech setting. The "conduct" evaluated under the test would be not the speech in question, but the employee's conduct when she uttered the speech. This would avoid further content/context confusion.[133] The employer would first have to show that the employee spoke while carrying out conduct authorized by the employer, and that she was speaking on the employer's time within the confines of the workplace. This would create an inference that the employee spoke within her

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131. See Restatement (Second) of Agency § 228 (1958). See also Robert A. Kreiss, *Scope of Employment and Being an Employee Under the Work-Made-for-Hire Provision of the Copyright Law: Applying the Common-Law Agency Tests*, 40 U. Kan. L. Rev. 119, 128 (1991) (restating the test as the courts have applied it).

132. Kreiss, 40 U. Kan. L. Rev. at 128-29 (cited in note 131).

133. Because an employer does not usually hire an employee to speak in certain ways, there appears to be no theoretical problem with preserving the literal meaning of "conduct" as the acts of the employee rather than the content of her speech.

scope of employment and that her speech was thus regulable. The employee would then shoulder the burden of proving that her conduct at the time she spoke was not designed to aid the employer.[134]

Defining protection for public employee free speech according to the scope of employment test focuses the inquiry on the relationship between the employee and the employer rather than on the speech and the employer. This relationship has always been the key to public employee free speech jurisprudence.[135] Recall that originally, the public employee's identity as an employee deprived her of all constitutional rights.[136] After the demise of the rights/privilege doctrine, a public employee was no longer deprived of her rights simply because of her *status* as "employee."[137] Although her rights could still be infringed in some instances, those instances were based on the *capacity* within which she was acting—on whether she was acting as an employee. Thus, the public employer's ability to regulate employee speech should relate to the relationship that exists when the employee speaks. When an employee speaks within the employment relationship, her role within that relationship as "employee" subjects her to the amount of control necessary for the government, in its *role* as "employer," to maintain efficiency. Outside the employment relationship, however, the employee has no *role* as "employee"; therefore, she cannot be subject to the control of any "employer." The employment relationship is both the genesis of and the limitation on the government's ability to control the public employee's speech. A test that allows for regulation only within the employment relationship best maintains the employee's separate

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134. At this point, a problem not normally encountered during the shifting of burdens may arise. The third prong of the common-law test is a subjective one, necessitating evaluation of the employee's motives in acting. Professor Kreiss points out that normally, the scope of employment test is applied to determine whether the employer is responsible for acts of the employee. A third party seeking to hold the employer liable for the acts of its employee will invoke the scope of employment text. Because in this situation the employee also has a stake in showing she was acting within the scope of employment to avoid personal liability, she will normally testify that she was acting to aid the employer. This willingness to fulfill the test alleviates the subjective nature of the third prong. Kreiss, 40 Kan. L. Rev. 119, 129-30 (cited in note 131). Under the proposed test in the public employee free speech context, the employee will have an interest in proving she acted *outside* the scope of employment in order to gain full protection for her speech. An employee confronting the inferences raised by her *employer* under the first two prongs of the test will seek to rebut that inference. This may reduce the test's efficacy by creating difficult conflicts of proof.

135. See note 43 and accompanying text.

136. See notes 12-21 and accompanying text.

137. See notes 22-28 and accompanying text.

identity as a citizen of the United States who is entitled to her constitutional rights.

The *Pickering* Court specifically recognized this difference between regulation based on status and regulation based on the capacity or *role* in which the employee is acting at the time of her speech. By stating that an employee "as a citizen" is entitled to certain rights that may not be present otherwise, the *Pickering* Court implied that the public employee is entitled to her full first amendment rights whenever she is not actually speaking within the bounds of the employment relationship.[138]

The scope of employment test neatly defines the boundaries of the employment relationship.[139] Further, the scope of employment test was designed to define when an employee is under the control of the employer and therefore answerable to the employer.[140] Application of the test to public employee free speech cases ensures that the government employer will only have speech control over the employee to the extent that the employee is answerable to her employer for other aspects of the employment relationship. When the employer is liable for the employee's actions, it can also regulate the employee's speech.

In the public employee free speech context, the difference between the proposed scope of employment test and the public concern analysis is best shown by an example. Imagine that the Court is confronted with the following case: an employee stated "my boss is driving me crazy, I can't stand working for her anymore." The employee was speaking to an old high school friend after hours at a mall, and happened to be within earshot of a coworker. The employer learned of the offensive statement and fired the employee. Under the current content- and context-based public concern analysis, the Court would first evaluate whether speech was of public concern. Even if the test took into account the fact that the speech was uttered outside the workplace, on the employee's own time, and to a person uninvolved in the employment relationship, the employee's statement would likely fail to pass the public concern threshold because it concerns a personal grievance, a type of speech the Court has long refused to afford protection.[141] The Court reasons that no one other

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

139. Restatement (Second) of Agency § 228, cmt. a.

140. See Kreiss, 40 U. Kan. L. Rev. at 133-34 (cited in note 131).

141. See Allred, 64 Ind. L. J. at 73-74 (cited in note 76) (describing personal grievance cases and stating that "[p]erhaps the most frequent reason cited by the courts for finding speech outside the ambit of *Connick* is that the speech arose as part of a grievance").

than the employee is concerned about the employee's personal opinion regarding his boss. Thus, the Court would likely find the speech not of public concern because of its content.

Under a scope of employment test, however, the outcome would be completely different. A court would most likely find that the speech was (1) spoken during conduct that was not authorized by the employer (a private meeting with a friend), and (2) spoken outside of authorized time and space (after hours at the mall). A court also would most likely find that the employee did not intend to aid the employer by meeting with a friend at the mall after hours. The speech would therefore be outside the scope of employment and fully protected as public concern speech.

The suggested change regarding the effect of the public concern test is illustrated by a slightly different example. Suppose the employee utters the same phrase ("my boss is driving me crazy . . ."), but now she speaks during the workday to a coworker while standing in the employees' locker room. Under the current content-based public concern analysis, the speech is, of course, not of public concern and, therefore, still completely unprotected. Under the scope of employment test, the speech is most likely not of public concern as well. However, the employee is not automatically denied relief if she is discharged because of her comment. Instead, she has the chance to prove that her offhand remark could cause no actual disruption of her workplace. Such a showing would make no difference whatsoever under the current free speech framework.

B. Reasons to Prefer the New Proposal Over the Current Approach

The proposed redefinition of the public concern test gives much greater protection to public employee speech than the current application of *Pickering/Connick* public concern analysis. As demonstrated by the previous examples, the threshold test is dispositive for the employee rather than for the employer. This difference affects the parties mainly at the summary judgment stage. Under the current definition, if the speech is *not* of public concern, the court must decide the case for the employer. Under the new proposal, however, if the speech is not of public concern, the Court may decide the case for the employee. The redefinition creates a decidedly different initial balance of power that provides a counterbalance to the inherent resource advantages of the public employer during litigation. This hopefully would deter employers from firing employees on the basis of

questionable speech and thus reduce chilling by encouraging the employer to give the employee the "benefit of the doubt."

The primary attraction of the scope of employment test as a definition for public concern speech is its high degree of learnability. Courts have had decades of experience in applying the test to determine employer liability for employee torts. The test is easy for employers to apply as well because it is based primarily on identifiable, objective factors. Thus, any problems *Waters* created with its suggestion that the employer initially evaluate the employee's speech are alleviated.[142]

A scope of employment test also returns the determination of what is of public concern to those who should evaluate such matters: the public. Instead of letting the court or the employer decide the question of what is or should be foremost in the public's mind, any speech aired to the public will be protected so that the public can decide whether it is worth placing in the forefront of its own mind.[143] The inherent paternalism of the *Pickering/Connick* public concern test disappears.

C. Responses to Foreseeable Objections

Practical objections would likely arise to this proposed redefinition of public concern. The scope of employment test appears to provide abundant opportunity for strategic behavior by employees. What if the employee takes advantage of protection under the test to air a personal grievance? What if the employee insults her supervisor's wife while off duty—should such speech be protected? What if a group of employees gets together and plots to disrupt the public employer's workplace? Detractors may fear that the scope of employment test allows employees too much room for manipulation or that such a test does not properly preserve the employer's interest in

142. A scope of employment test in fact would eliminate the need for the *Waters* procedural framework altogether, as the content of the speech would no longer be important.

143. This proposal also fits well with the established jurisprudence in the private sphere. The courts have long recognized a "public policy exception" to at-will discharge from private employment. This exception forbids retaliatory discharge (though as of yet it has not been expanded to other forms of discipline) of an employee who reveals to the public practices of her employer that negatively affect the public's perception of the employer. The policy, however, does not extend to the employee who reveals practices which only affect the internal workings of the employer. William J. Holloway and Michael J. Leech, *Employment Termination: Rights and Remedies* 180-82 (Bureau of National Affairs, 2d ed. 1993) (citing cases). See, for example, *Littman v. Firestone Tire & Rubber Co.*, 715 F. Supp. 90, 93-94 (S.D.N.Y. 1989) (upholding a discharge when in retaliation for reporting fraud on the employer to the employer).

protecting against disruption. There are at least four possible answers to these objections.

1. The First Amendment Is an Absolute

The simplest answer is that the First Amendment brooks no exceptions to its dictates. The scope of employment test allows the public employer to abridge freedom of speech only within the narrow relationship that necessitated a departure from the First Amendment: the public employment relationship. Outside the scope of employment, the public employee is acting in her capacity as a citizen and the public employer cannot control her. Therefore, any incidental effects of her speech must be treated like the effects of any citizen's speech. The state may not abridge her speech.

2. The Personal Grievance Problem Is a Mirage

Further, some foreseeable difficulties with the proposed test do not loom so large when evaluated in practical terms. For instance, under the current test for public concern, personal grievances have merited no protection whatsoever.[144] Personal grievances are presumably without protection because they hold a high potential for disruption and an extremely low public concern value as defined by the content of the speech. Upon closer examination, however, the disruption potential of such a grievance is mitigated by its very nature as a "personal" grievance.

Personal grievances, because they do not concern others, are unlikely to have a ready audience with anyone other than the aggrieved. Therefore, if an employee seeks to take advantage of a test affording full protection to speech aired outside the workplace, will probably not be able to gain an ear for her grievance. The speech will cause no disruption, and discipline in the workplace will not be affected. In other words, there is no need to regulate such speech; it is self-regulating.

Further, the current content-based approach to public concern speech causes special problems when applied to grievances. By protecting any speech that consists of matters currently the subject of

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144. Allred, 64 Ind. L. J. at 72 (cited in note 76); *Connick*, 461 U.S. at 147, 154 (stating that the First Amendment "does not require a grant of immunity for employer grievances" and should not be "confused with an attempt to constitutionalize the employee grievance that we see presented here.") Lower courts shun grievances as well. See note 141 and accompanying text.

public debate, the doctrine favors those who can turn their personal grievances into public ones.[145] Thus, public concern doctrine as it stands does not guard against the grievance, it simply discriminates against employees who lack the power to promote their grievances as public debates. At the same time, the doctrine denies those without such power the means to turn their grievances into public concerns.[146]

3. The Scope of Employment Analysis Itself Eliminates Some Concerns

The scope of employment test itself may prove flexible enough to eliminate some projected concerns over its application. Because the test depends on the particular employment relationship in question, it responds on its own to the employer's concerns over disruption.

Some public employees have a greater potential to disrupt the workplace because of their job descriptions. When the public employer's function is intimately connected with its public appearance, as with certain public officials, any comment by an immediate subordinate that disparages the employer may seriously undermine the employer's position. In such cases, critics may argue, the speech of such subordinates—the staff of a United States Senator's office, for example—should be controlled to a greater extent than that of the "average" public employee.

This concern, however, is easily addressed by defining public concern speech by the scope of employment test. The first prong of the test, "authorized conduct," will depend on the type of job the public employee holds. A member of a Senator's staff will be authorized to engage in certain conduct, speaking to the media, for example, that would not be authorized for other employees. Thus the Senator's staff member is acting within the scope of her employment when she is uttering the disruptive speech the Senator fears, and the Senator may discharge her if her speech disrupts her work environment.

4. Let Established First Amendment Jurisprudence Do Its Job

Finally, much of the "dangerous" speech that critics might fear would be protected under a scope of employment test is already outside the realm of protection under general first amendment doctrine. For instance, an employee's personal slur concerning her

145. Estlund, 59 Geo. Wash. L. Rev. at 38-39 (cited in note 94).
146. Id.

employer may be defamatory. The defamed employer is free to sue the defaming worker. There is also scholarship suggesting that personal insults are unprotected under the First Amendment.[147] Thus, an employee's purely personal attack on a supervisor might be actionable even if non-defamatory.

In addition, the Supreme Court, along with several lower courts, has recognized discipline for "insubordination" to be distinct from discipline for speech.[148] Though this may seem a purely semantic line to draw, employers who depend on the close personal loyalty of their immediate subordinates have a strong argument that disloyalty equals insubordination.[149] Further, the Court in *NTEU* suggested that such an appearance of impropriety is not a concern that should easily outweigh the First Amendment.[150] Thus, insubordination by speech may not deserve great attention as a "problem" under the proposed test.

Comments outside the scope of employment are not unreachable under the First Amendment. They are only unreachable under the public employee exception to freedom speech.

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147. This suggestion arises from the Court's use of the phrase "personal insult" when evaluating fighting words under current first amendment jurisprudence. See *Cohen v. California*, 403 U.S. 15, 20 (1971) (holding that the words "Fuck the Draft" printed on the back of a jacket cannot reasonably be considered a "personal insult" and that therefore the phrase cannot be considered fighting words and is protected under the First Amendment); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (holding that epithets hurled during a public meeting were not "personal insults" because they were not directed at any particular person or group and therefore were not regulable as fighting words). Many commentators have used the *Cohen* Court's apparent focus on the words themselves rather than their effect on the listener to argue that even without such an effect (imminent violence), insults fall outside the protection of the First Amendment. See Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests*, 16 J. Coll. & Univ. L. 573, 583-84 (1990) (describing the University of Wisconsin's interpretation of the aforementioned cases to provide an exception for purely personal insults); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 175-79 (1982) (examining racial insults under the First Amendment and concluding that they serve no valid first amendment purpose).

148. See Rothstein, Knapp, and Liebman, *Employment Law* at ch. 11 (cited in note 1).

149. See also Henry V. Nickel, *The First Amendment and Public Employees—An Emerging Constitutional Right to Be a Policeman?*, 37 Geo. Wash. L. Rev. 410, 424 (1968) (arguing that dismissal can be justified if "[t]he government in such a case is not imposing a sanction upon the employee's speech but, rather, is sanctioning his inability to perform the function the government is paying him to perform").

150. *NTEU*, 115 S. Ct. at 1017.

V. CONCLUSION

Waters makes it more imperative than ever to arrive at a clear definition of public concern speech. By placing the initial power to evaluate public concern with the employer,[151] *Waters* creates a nightmare for employees. If only a "substantial likelihood"[152] of protection will trigger an employer evaluation of the speech before discipline, the employee's chances of gaining protection are lessened in direct relation to the ambiguity of the public concern test. The public concern test must therefore be a clear test easily applied in everyday situations.

It is also imperative that the Court not lose sight of the purpose behind the First Amendment. Our freedom of speech ensures that we are at all times in control of our government and not vice versa. It enables us to bring about change and identify problems in their infancy. That freedom should not be unduly restricted solely in the name of "efficiency."

The Court's current definition of public concern cannot satisfy either of these goals. The Court's application of a content-based analysis is inappropriate and causes several doctrinal problems. The Court should redefine public concern along purely context-based lines by importing the common-law agency doctrine of scope of employment. Such a definition would result in a more even playing field for the employee and protect the public employee's ability to identify problems in the workplace and bring them to the attention of the general public. The employer would still be able to regulate speech within the scope of employment, but its control would not extend to censorship of speech outside the relationship that necessitated infringement of the First Amendment in the first place. This redefinition would uphold the dictates of the First Amendment and ensure that an employee does not forfeit her rights upon entering the public workplace.

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151. See notes 74-75 and accompanying text.

152. *Waters*, 511 U.S. at 677.

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