THE SUPREME COURT, THE FIRST AMENDMENT, AND THE EROSION OF PUBLIC EMPLOYER MANAGERIAL AUTHORITY

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ABSTRACT

For nearly two centuries, public sector employment in the United States was governed by the privilege doctrine, also known as the right-privilege distinction, which stripped public employees of their citizenship rights by denying them protection against adverse employment actions retaliating against their exercise of those rights. In 1967, in *Garrity v. New Jersey*, the U.S. Supreme Court reversed course and found, in the context of a government investigation of state police officers who allegedly fixed traffic tickets, that the state could not coerce those officers to waive their constitutional right to remain silent during the investigation by threatening to fire them if they did not answer questions posed to them. In *Garrity*'s aftermath, the Court developed its *Pickering–Connick–Garcetti* framework, which regulates the extent to which public employers may take adverse employment actions against public employees who engage in speech that disrupts the workplace or interferes with its efficient operation. Under the *Pickering–Connick–Garcetti* framework, the Court permits public employers to take adverse employment actions against their employees when the speech is not on a matter of public concern, per *Connick v. Myers*; the speech is made pursuant to their job duties, per *Garcetti v. Ceballos*; or the speech is on a matter of public concern but the employer's managerial interests outweigh the employees' constitutional rights, per *Pickering v. Board of Education*.

The *Pickering–Connick–Garcetti* framework was stable for about half a century until the Court once again disrupted that equilibrium in two cases decided in the past five years. In *Janus v. American Federation of State, County, and Municipal Employees Council 31*, the Court

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characterized union security clauses as unconstitutionally compelling speech from nonmember, union-represented public employees and therefore prohibited parties to public sector collective bargaining agreements from requiring those employees to pay any union dues. Then, in *Kennedy v. Bremerton School District*, the Court characterized a public high school football coach's post-game prayer on the fifty-yard line as expression protected under the Free Exercise and Free Speech Clauses of the First Amendment and concluded that the school district unconstitutionally disciplined that coach, ignoring the disruptive and potentially dangerous effect that his speech had on those attending the game.

This Article traces historical developments from our country's inception to the present with an eye toward understanding the Court's most recent jurisprudence and its effect on public employee speech. Our analysis draws the following five conclusions: first, recent cases have greatly narrowed the categorical exclusion from First Amendment protection for public employee speech expressed in the course of employees performing their job duties, thereby greatly narrowing *Garcetti*; second, *Janus* has exempted compelled speech claims from the *Pickering–Connick* analysis; third, *Kennedy* has also exempted religious exercise claims from the *Pickering–Connick* analysis; fourth, *Janus* and *Kennedy* have significantly expanded the category of speech that constitutes speech on a matter of public concern, thereby narrowing *Connick*; and fifth, as demonstrated in *Kennedy,* the Court has greatly reduced deference to public employers' managerial judgments in weighing employer interests in the efficient delivery of public services against constitutionally protected speech interests. This is true even in cases where those managerial judgments are intended to prevent physical harm, thereby undermining public employer managerial authority.

Having drawn those conclusions, we turn to the *Janus–Kennedy* framework to assess several hypotheticals set forth in this Article's introduction to show how these cases have shifted the analysis in favor of employee speech. Finally, we speculate whether this shift is toward strengthening employee free speech rights, in general, or more cynically, a shift toward speech that this particular Court favors—religious speech—and a shift away from speech that this Court disfavors—union speech.

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INTRODUCTION

Imagine that two secretaries for a municipal office claim they made a promise to God that they would wear anti-abortion buttons containing a picture of a twenty-week-old fetus until there is an end to abortion. The buttons disturb their coworkers. The city offers several solutions to accommodate the secretaries' religious practices, including allowing them to wear the buttons while working at their cubicles but not when moving around the office. They refuse and are fired. In a wrongful termination suit, what would be the likely result?[1] Just a few years ago, analysis of this hypothetical would have been relatively straightforward. The employer could lawfully discipline both secretaries for insubordination because the employer's interests in managing its workforce and maintaining office harmony would outweigh the secretaries' interests in protesting abortion while on the job, especially here where the employer offered several solutions accommodating the secretaries' religious beliefs.[2] However, after several recent Supreme Court decisions, the analysis is no longer so clear-cut.[3]

1. This hypothetical is based on *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995), discussed *infra* notes 317–35 and accompanying text.

2. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 154 (1983) ("The limited First Amendment interest involved here does not require that [the employer] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.").

3. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543–44 (2022) (finding that prayer is private speech and holding that a public school board unconstitutionally suspended a football coach who prayed on the field after a game).

As of October 2023, local governments employed 14,824,000 people, state governments employed 5,481,000 people, and the federal government employed 2,962,000 people.[4] When a government entity is the employer, employment decisions constitute state action and potentially trigger scrutiny under the Constitution.[5] But the government must also manage its workforce just as any private employer would.[6] There is, therefore, tension between the government's managerial interest in directing its workforce and public employees' interest in protecting themselves from the government taking or threatening adverse employment actions to coerce them, especially with respect to the exercise of their constitutional rights.[7] Over the past century, the Supreme Court's approach to resolving this tension has changed several times.[8] Traditionally, the Court regarded government employment as a privilege and concluded that adverse employment actions impeded only that privilege and did not infringe on the employee's constitutional rights, even where motivated by the employee's exercise of those rights.[9] In the 1960s, the Court recognized the value of public employee free speech to society as a whole and began balancing that value to society against the public employer's interests in managing its workforce.[10] Under this approach, employee speech that occurs in the course of performing the employee's job and employee speech that does not involve a matter of public concern receive no constitutional protection

4. *Economic News Release: Table B-1 Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail*, U.S. BUREAU OF LAB. STAT. (Jan. 5, 2024), https://www.bls.gov/news.release/empsit.t17.htm. (The seasonally adjusted numbers are: local government: 14,644,000; state government: 5,314,000; and federal government: 2,956,000).

5. Over sixty years ago, the Supreme Court expressly recognized that the government, acting as an employer, engages in state action. However, it has broader latitude when acting as an employer than when acting as the sovereign. *See* Cafeteria & Rest. Workers Union, Loc. 473 v. McElroy, 367 U.S. 886, 897–98 (1961) (citations omitted) ("[S]tate and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer."). Indeed, even some private action has constitutional limits where the government dominates that activity. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of government and, as a result, be subject to constitutional constraints.").

6. *See* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part) (explaining that to perform efficiently "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs").

7. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 410–11 (2006) ("[A] government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations.").

8. *See infra* Part I (discussing these changes through 2018); *see also infra* Parts II–III (discussing the most recent changes).

9. *See* Connick v. Myers, 461 U.S. 138, 143 (1983) ("For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."); Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2005 (2012) ("In modern times it has become insufficient to assert that, because an employee has no constitutional right to a government paycheck, his employment is a mere privilege . . . .").

10. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (balancing the interests of the public employee, a 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").

against adverse employment action.[11] Employee speech uttered as a citizen, rather than as an employee, that involves a matter of public concern may be protected against adverse employment action depending on the outcome of an ad hoc balancing of the citizen's speech rights against the employer's workforce management interests, favoring the citizen's speech rights.[12]

Most recently, however, in cases involving public employee freedom from compelled speech[13] and public employee religious speech,[14] the Court has significantly tilted the balance against employer interests in managing the workforce. In such cases, the Court has excluded those rights from the balancing analysis, instead requiring the employer to demonstrate a compelling state interest making the action necessary and that the action it took was the least restrictive action on the employee's rights available.[15] These cases also suggest that the Court has expanded the class of speech that involves matters of public concern[16] and severely curtailed deference to the judgment of employer's human resources department, even in cases where the employer anticipates significant disruption or harm.[17] To put this expansion into perspective, consider not only the opening hypothetical but also the following scenarios:

(1) Public school science teachers who, under protest, instruct students on scientific theories that conflict with their religious beliefs but during study hall tell students that these scientific theories are not fact and therefore should be carefully scrutinized;[18]

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11. *Garcetti*, 547 U.S. at 418; *Connick*, 461 U.S. at 147 (emphasizing that in such situations "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior").

12. *Pickering*, 391 U.S. at 568 (describing what has now been dubbed the *Pickering–Connick* balancing analysis as seeking "a balance between the interests of the [employee], 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").

13. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 884–86 (2018).

14. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514 (2022).

15. *See id.* at 543–44 (concluding that the Free Exercise and Free Speech Clauses protect religious expression, such as a public high school coach praying on the field after a game, from government interference because "[t]he Constitution neither mandates nor tolerates" government discrimination suppressing such religious observance).

16. *See Janus*, 585 U.S. at 907–08.

17. *See Kennedy*, 597 U.S. at 525. *But see id.* at 531 n.2 (leaving open the question of whether the Free Exercise Clause demands an analysis different from the *Pickering–Connick* framework).

18. *See* Edwards v. Aguillard, 482 U.S. 578, 581 (1987) (finding state law prohibiting public schools from teaching evolution unless supplemented with instruction in creation science to be in violation of the Establishment Clause); Epperson v. Arkansas, 393 U.S. 97, 98–99, 109 (1968) (finding state law making it a crime for state-funded school to teach human evolution to be a violation of the Establishment Clause); Scopes v. State, 289 S.W. 363, 363 (Tenn. 1927) (discussing the Scopes monkey trial in which a jury convicted John Scopes for teaching evolution in violation of Tennessee's anti-evolution law); Selman v. Cobb Cnty. Sch. Dist., 449 F.3d 1320, 1324 (11th Cir. 2006) (holding unconstitutional a school board's policy of attaching stickers to biology textbooks stating that "[t]his textbook contains material on evolution," describing "[e]volution [a]s a theory, not a fact, regarding the origin of living things," and encouraging students to approach "[t]his material . . . with an open

(2) A public school librarian who ignores the school district's order to pull LGBTQIA+ themed books from shelves (based on the claim that such content is offensive to common sense religious beliefs) because the librarian's religious denomination supports LGBTQIA+ causes;[19]

(3) Doctors in public hospitals who tell female patients that it is impossible to become pregnant if they are "legitimately raped";[20]

(4) Public hospital medical officials who refuse to be vaccinated based on their personal religious beliefs that vaccines are witchcraft;[21]

(5) Police officers who treat certain classes of people more aggressively than others based on the officers' religious beliefs, honed during their pastors' sermons, that certain races are inherently more prone to criminality than other races.[22]

Until recently, these cases presented relatively straightforward legal answers, which would permit the employer to discipline its employees. Legal answers are much less clear now, particularly after the Court's decisions in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*[23] and *Kennedy v. Bremerton School District*.[24]

In this Article, we examine this disturbing trend that threatens to significantly undermine public employers' ability to manage their workforces in potentially disruptive and even dangerous circumstances, ostensibly in

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mind, [to be] studied carefully, and critically considered"); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 522 (9th Cir. 1994) (per curiam) (upholding prohibition on science teachers talking about religion with students even if student-initiated); Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 708–09, 765 (M.D. Pa. 2005) (holding unconstitutional teaching intelligent design in public-school science classes).

19. *See Book Bans and Their Impact on Young People and Society*, ANTI-DEFAMATION LEAGUE (Jan. 12, 2022), https://www.adl.org/resources/tools-and-strategies/book-bans-and-their-impact-young-people-and-society; *see also Top 13 Most Challenged Books of 2022*, AM. LIBR. ASS'N: BANNED & CHALLENGED BOOKS, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 (last visited Mar. 10, 2024) (showing that seven of 2022's top thirteen banned books have LGBTQIA+ content).

20. *See* Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES (Aug. 20, 2012), https://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html ("It seems to be, first of all, from what I understand from doctors, it's really rare. If it's a legitimate rape, the female body has ways to try to shut the whole thing down." (quoting Republican Representative Todd Akin)).

21. *See* Emily McFarlan Miller, *Why 'Sorcery' Was the Fastest-Growing Search Term on Bible Gateway in 2021*, RELIGION NEWS SERV. (Dec. 2, 2021), https://religionnews.com/2021/12/02/why-sorcery-was-the-fastest-growing-search-term-on-bible-gateway-in-2021/ (discussing the connection between biblical passages and some personal religious beliefs among Christians that vaccines are the Devil's work).

22. *See* J.D. Durkin, *CNN Panel Explodes Over Claim That 'Black People Are Prone to Criminality,'* MEDIAITE (July 11, 2016, 12:25 PM), https://www.mediaite.com/online/cnn-panel-explodes-over-claim-that-black-people-are-prone-to-criminality/.

23. 585 U.S. 878 (2018).

24. 597 U.S. 507 (2022).

the name of constitutional freedom grounded in the Free Speech and Free Exercise Clauses of the First Amendment. Part I.A. of this Article traces the rise and fall of the privilege doctrine under which public employers could retaliate against employees speaking freely by firing them or taking a lesser adverse employment action. The Supreme Court's rejection of the privilege doctrine in the mid-twentieth century left open the question of whether public employers may discipline an employee for conduct that the Constitution normally protects. Part I.B. traces the half-century development of the Court's *Pickering–Connick–Garcetti* framework, which regulates the extent to which public employers may take adverse employment actions against public employees who engage in speech that disrupts the workplace or interferes with its efficient operation. Under the *Pickering–Connick–Garcetti* framework, the Court permits public employers to take adverse employment actions against their employees for speech that is not on a matter of public concern,[25] speech that is made pursuant to the employees' job duties,[26] or where the employer's managerial interests outweigh the employees' constitutional rights.[27] Unsurprisingly, lower courts' application of the *Pickering–Connick–Garcetti* framework showed broad deference to employer prerogatives, a thesis that is developed in Part I.C.[28]

In Part II, we analyze *Janus*, a 2018 opinion that Justice Alito authored, where the Court characterized union security clauses[29] as unconstitutionally compelling speech from nonmember, union-represented public employees and therefore prohibited the parties from requiring those employees to pay any union dues, even dues related to

25. *See* Connick v. Myers, 461 U.S. 138, 147 (1983) ("[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

26. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

27. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (explaining the analysis as "ariv[ing] at a balance between the interests of the [employee], 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").

28. We sometimes refer to the *Pickering–Connick* analysis as distinguished from the *Pickering–Connick—Garcetti* framework. The *Pickering–Connick* analysis refers to the balancing part of the framework, where the court balances the interests of the employee as citizen in commenting on matters of public concern with the managerial and operational interests of the State as employer. *See Connick*, 461 U.S. at 147; *Pickering*, 391 U.S. at 568. Under *Connick*, if an employee is speaking as an employee on matters of personal interest then the speech is not protected.

29. A union security clause is a contractional provision in a collective-bargaining agreement between an employer and a union that requires employees subject to that agreement to pay all or a portion of union dues. In the United States, these clauses cannot require union membership. *See* NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963) ("'Membership' as a condition of employment is whittled down to its financial core."). Union members must pay full union dues. *Id.* at 742–43. Until recently, nonmembers paid only a portion of the union dues, known as agency fees. In *Janus*, union-represented public employees who did not wish to pay even agency fees challenged these agency-shop arrangements as unconstitutional. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. at 887–90 (2018). The Supreme Court agreed and held that "public-sector agency-shop arrangements violate the First Amendment." *Id.* at 916.

collective-bargaining activities.[30] In Part III, we analyze *Kennedy*, a 2022 opinion that Justice Gorsuch authored, where the Court characterized a public high school football coach's postgame prayer on the fifty-yard line as expression protected under the Free Exercise and Free Speech Clauses of the First Amendment.[31] The Court then concluded that the school district unconstitutionally disciplined that coach, ignoring the disruptive and potentially dangerous effect that his speech had on those attending the game.[32] In both Parts II and III, we show how *Janus* and *Kennedy* stray from fifty years of Supreme Court precedent.

In Part IV, we draw five conclusions from our analyses in Parts II and III. First, the Court, in recent cases, has greatly narrowed the categorical exclusion from First Amendment protection for public employee speech expressed in the course of employees performing job duties. Second, the Court has exempted compelled speech claims from the *Pickering–Connick* analysis. Third, the Court has also exempted religious exercise claims from the *Pickering–Connick* analysis. Fourth, the Court has significantly expanded the category of speech that constitutes speech on a matter of public concern. Fifth, the Court has greatly reduced deference to public employers' managerial judgments in weighing employer interests in the efficient delivery of public services against constitutionally protected speech interests, even in cases where those managerial judgments are intended to prevent physical harm.

In Part V, we apply the conclusions we draw from *Janus* and *Kennedy* to the five hypotheticals set forth in this introduction to show how these cases have shifted the analysis in favor of employee speech. In the conclusion, we speculate whether this is a shift toward strengthening employee free speech rights in general, or, more cynically, a shift toward speech that this particular Court favors—religious speech—and a shift away from speech that this Court disfavors—union speech.

I. FROM RIGHT-PRIVILEGE TO *PICKERING–CONNICK–GARCETTI*

We start our analysis in this Part I by tracing the evolution of government work from privileged public service to public employment, and the changing nature of government worker status from public servants who possess no right to exercise constitutional rights at work to public employees who retain their citizen rights at work limited by the government employer's managerial interests.

A. The Right-Privilege Distinction

In Section A.1., we explain the late nineteenth-century origins of the right-privilege distinction (later known as the privilege doctrine) as a runaround to citizen public workers' constitutional rights to be free from state

30. *Janus*, 585 U.S. at 929.
31. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514 (2022).
32. *Id.* at 541–44.

coercion, and why the privilege part of the distinction is mislabeled. We credit Professor Arch Dotson for tracing the five sources resulting in the legal and political justifications for the distinction: the law of office and rules of tenure, political neutrality, association, collective bargaining, and loyalty. In Section A.2., we review three late 1960s Supreme Court cases—*Garrity v. New Jersey*,[33] *Uniformed Sanitation Men Association v. Commissioner of Sanitation of New York*,[34] and *Keyishian v. Board of Regents*[35]—that broke the distinction and recognized that citizens do not lose their constitutional rights upon taking a job with the government.

1. Origins of the Right-Privilege Distinction

The United States Constitution protects individuals from arbitrary government action.[36] However, what constitutes state action has often been narrowly circumscribed.[37] While it may seem trite today to claim that public employers—such as federal, state, or local governments—are engaged in state action within the meaning of the United States Constitution when they take adverse employment actions against their employees,[38] the state action doctrine has not always applied to the public-employer–public-employee relationship.[39] Even today, at a time when the state action question is settled, public employees remain more vulnerable to adverse

33. 385 U.S. 493 (1967).

34. 392 U.S. 280 (1968).

35. 385 U.S. 589 (1967).

36. Shortly after ratification of the Reconstruction Amendments, the Supreme Court declared that "The provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals." Virginia v. Rives, 100 U.S. 313, 318 (1879). In *Rives*, the Court observed, in the context of a murder trial of a white man allegedly committed by two African American teenaged boys, that "[i]t *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color." *Id.* at 322–23. The Thirteenth Amendment contains the only exception to this doctrine—it is never a defense to maintaining servants against their will that the defendant is a private actor. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1367 (2008) ("Private forms of 'involuntary servitude' violate the self-executing provisions of the Amendment, and private attempts to perpetuate the 'badges and incidents of slavery' can be prohibited by Congress in legislation to enforce the Amendment.").

37. The Civil Rights Cases created the distinction between private and state action when it held unconstitutional the Civil Rights Act of 1875, 18 Stat. 355, which prohibited private citizens from excluding persons of color from places of public accommodation such as inns, public transportation, and places of amusement. *See* C.R. Cases, 109 U.S. 3, 13 (1883). The Court explained that prohibitions against racial discrimination were limited to "State laws and acts done under State authority." *Id.* To answer the question—what are "acts done under State authority?"—the courts needed to draw a law between private and state action. The Court initially drew that line in a way that narrowly defined state action. For an in-depth review of this question, see generally Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960). For a defense of a narrow vision of state action, see generally Lillian BeVier and John Harrison, *The State Action Principle and its Critics*, 96 VA. L. REV. 1767 (2010). For the most famous scholarly critique of state action, see generally Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967). For an in-depth discussion of mid-twentieth-century judicial changes to the doctrine, see Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 L. & SOC. INQUIRY 273 (2010).

38. *See* U.S. CONST. amends. V, XIV. The Fifth Amendment applies to federal government action and the Fourteenth Amendment applies to state and local government action.

39. *See generally* Arch Dotson, *The Emerging Doctrine of Privilege in Public Employment*, 15 PUBLIC ADMIN. REV. 77 (1955).

employment actions for exercising their constitutional rights than citizens generally are vulnerable to governmental action.[40]

Sidestepping the state action problem, courts developed the privilege-right distinction and applied it to public employment.[41] The privilege-right distinction is typically traced to a late-nineteenth-century statement by Justice Oliver Wendell Holmes writing for the Massachusetts Supreme Judicial Court in *McAuliffe v. Mayor of New Bedford*[42]: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[43] In *McAuliffe*, the mayor of New Bedford removed a police officer after a hearing, finding the officer guilty of violating a police regulation that forbade officers from soliciting money for political purposes.[44] In this context, the court baldly asserted, "There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech" or "idleness by the implied terms of his contract."[45] In one fell swoop, the court equated the employee's duty to work (not be idle) with an agreement to surrender at least some of that worker's constitutional rights.

When understood this way, it becomes apparent that the right-privilege doctrine is mislabeled. Although scholars and courts began to think of public employment in terms of the privilege of public service, in effect, the court paved the way for removing public employees' constitutional rights. As one scholar noted, this analysis is much more akin to Professor Wesley Newcombe Hohfeld's rigorous concept of "no-right"—meaning

40. *See* Garcetti v. Ceballos, 547 U.S. 410, 418, 421 (2006) (maintaining that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations" and holding that a district attorney's memorandum to his supervisors about the accuracy of an affidavit used to obtain a critical search warrant that caused him to suffer adverse employment actions was not protected speech); Connick v. Myers, 461 U.S. 138, 147–48 (1983) (finding that an assistant district attorney's termination after she circulated a questionnaire to fellow employees asking their opinions about the office's transfer policy, office morale, confidence in supervisors, and other related topics did not offend the First Amendment because the questions were about internal office policies and her employer did not have to tolerate such disruptive actions); Pickering v. Bd. of Educ., 391 U.S. 563, 568, 573–75 (1968) (holding that a public school teacher, who worked for and lived in the school district he was criticizing, had a constitutional right to speak out against how the school district was allocating its funds because the subjects at issue were matters of public importance; however, his constitutional rights were to be balanced against, the school's interests in operational efficiency). *But see* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 529–32 (2022) (holding that a public high school violated its football coach's constitutional rights when it suspended him for praying in the middle of the football field after a game under either a *Pickering–Connick* free speech analysis or the more exacting Free Exercise Clause analysis).

41. *See* Philip L. Martin, *Return to the Privilege-Right Doctrine in Public Employment*, 28 LAB. L.J. 361, 361 (1977) (providing a brief explanation of the doctrine); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439–45 (1968) (providing a brief history of the right-privilege doctrine); Dotson, *supra* note 39, at 83 n.20 (explaining the privilege doctrine and how it developed from colonial times to the mid-twentieth century); *see also* Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 910–15, 935–38 (2011) (explaining how the right-privilege doctrine operated in the context of employment cases).

42. 29 N.E. 517 (Mass. 1892).

43. *Id.* at 517.

44. *Id.*

45. *Id.* at 517–18.

that the public employee holds no constitutional rights and, therefore, cannot claim that the government refrain from interfering with that purported, but nonexistent right—than to a "privilege"—meaning that the public employee would be free to exercise the employee's constitutional rights although the government employer would have no particular duty to enforce those constitutional rights.[46]

In the mid-twentieth century, Professor Arch Dotson traced the doctrinal roots of the right-privilege distinction. In his view, there are five sources for what he coined the privilege doctrine, which "[i]n its matured form, . . . defines effectively the employment relationship between the state and the citizen."[47] These sources are the law of office and rules of tenure, political neutrality, association, collective bargaining, and loyalty.[48]

Dotson explained that, as an initial matter, the law of office limited the constitutional reach of the Contracts and Takings Clauses[49] as applied to public service.[50] In contrast with colonial law, the early United States viewed public office as "a duty imposed by law to act in the execution of law" and to which the private law of contract between employer and employee did not apply.[51] By avoiding labeling the relationship between public workers and employers as a contract between the citizen and government, constitutional prohibitions against the impairment of contracts did not apply.[52] By extension, state courts similarly declared that public office could not be property[53] and, therefore, lay outside the Fifth Amendment's Takings Clause.[54]

Thereafter, the rules of tenure and political neutrality developed in parallel with the spoils system.[55] Tenure rules meant that removal from public office was "at the will and discretion of some department of the government, and subject to removal at pleasure" unless the Constitution or a limiting law fixed the tenure of office.[56] Opponents of the spoils system used the principle of political neutrality to dampen the effects of the

46. *See* Dotson, *supra* note 39, at 83 n.20.
47. *See id.* at 77–81.
48. *See id.* at 77–80.
49. U.S. CONST. art. I, § 10, cl. 1 (Contracts Clause); U.S. CONST. amend. V (Takings Clause).
50. *See* Dotson, *supra* note 39, at 77–78.
51. *See id.* at 77.
52. *See id.*
53. *See id.* at 78 n.4 (noting North Carolina between 1833 and 1903 as the one exception).
54. The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
55. The spoils system is the practice whereby the elected official would give public office to supporters of that official's political party. Historians credit Andrew Jackson with the development of this practice. *See, e.g.*, Harry L. Watson, *Andrew Jackson's Populism*, 76 TENN. HIST. Q. 218, 236 (2017) (quoting the Jacksonian slogan regarding political patronage: "to the victors go the spoils"); Albert Somit, *Andrew Jackson as Administrator*, 8 PUB. ADMIN. REV. 188, 188 (1948). By the 1890s, reformers came to view the practice as corrupt political favoritism and strove to substitute it with a merit-based civil service. *See, e.g.*, RICHARD D. WHITE, JR., ROOSEVELT THE REFORMER: THEODORE ROOSEVELT AS CIVIL SERVICE COMMISSIONER, 1889–1895, at 3, 11 (2003).
56. *See* Dotson, *supra* note 39, at 78 n.5 (quoting *In re* Hennen, 38 U.S. 230, 259 (1839)).

spoils system with early cases aimed at political contributions and salary assessments.[57] This principle eventually matured into the Hatch Act.[58]

The privilege doctrine is also rooted in labor law itself via the law of association and collective bargaining as influenced by the rise of trade unions in the early twentieth century, with respect in particular to organizational and strike activities.[59] As Dotson pointed out, "[I]t was early established that civil servants ha[d] no fundamental right to combine or to associate for any purpose,"[60] and the rule governing public employees' right to strike was even "more absolute."[61] Dotson bolstered this claim with an early case, *People ex rel. Fursman v. City of Chicago*,[62] explaining that "[n]o person has a right to demand that he or she shall be employed as a teacher."[63] In *Fursman*, the Illinois Supreme Court explained that there was:

> no infringement upon the constitutional rights of any one for the board [of education] to decline to employ [anyone] as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant . . . is or is not a member of a trades union.[64]

The court concluded that aggrieved parties had no constitutional or statutory cause of action "which the courts will recognize simply because the board of education refuses to" hire a teacher for that reason.[65]

The Illinois decision was typical. Courts generally enforced "yellow dog contracts," which obligated employees to refrain from joining labor unions.[66] As recently as 1963, the Michigan Supreme Court upheld the

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57. *See id.* at 78 n.6 (citing CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE (1904)); *id.* at 78–79 n.7 (citing *Ex parte* Curtis, 106 U.S. 371, 373 (1882) (observing that this case presented "the first time the constitutionality" of legislation prohibiting political activity had "ever been presented for judicial determination")).

58. An Act to Prevent Pernicious Political Activities (Hatch Act), Pub. L. 76–252, 53 Stat. 1147 (1939) (codified at 5 U.S.C. §§ 1501–1508, 7321–7326 (2006)). The Supreme Court has twice upheld the Hatch Act's constitutionality. *See* United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 93 (1947) (upholding Section 9's prohibition on Executive Branch employees from engaging in political management or political campaigns); U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (reaffirming *Mitchell*).

59. *See* Dotson, *supra* note 39, at 79.

60. *See id.*

61. *See id.* at 80.

62. 116 N.E. 158 (Ill. 1917).

63. *Id.* at 160.

64. *Id.*

65. *Id.*

66. *See* Joseph E. Slater, *The Court Does Not Know "What a Labor Union Is": How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981, 991 (2000) ("The constitutional 'freedom of contract' that *Coppage v. Kansas* and other cases used to strike down statutes outlawing yellow dog contracts . . . was imported into public sector cases simply as a matter of policy. The actual holdings of the private sector rulings were not precedent on point, because no statutory bans on yellow dog contracts in the public sector ever existed.").

constitutionality of a municipal police chief's prohibition on officers' membership in any labor union.[67]

A final source of the privilege doctrine comes from the law of loyalty, the underlying principles of which were heightened in the aftermath of World War II.[68] For example, the Supreme Court affirmed the principle that the Fifth Amendment's due process requirements did not apply to the termination of public employment from the federal government.[69]

2. Demise of the Privilege Doctrine in Public Employment: *Garrity's* Promise that Public Employment May No Longer Be Conditioned on Surrendering Employees' Constitutional Rights

As Dotson pointed out, the privilege doctrine relegated public employees to a "legal homunculus,"[70] stripping them of their citizenship rights, in part by removing their constitutional rights to, among other things, free speech, political expression, and free association. But within a generation, this would change.

In 1967, in *Garrity*, the Supreme Court reviewed a case where state officials, during an investigation of state police officers for allegedly fixing traffic tickets, instructed those officers with two warnings.[71] First, they warned the officers that anything they said during the interrogation could be held against them in a state criminal proceeding.[72] Second, they warned the officers that they had a privilege to refuse to answer any question that would tend to incriminate them, but that a refusal to answer would subject them to removal from office under state statute.[73] The State convicted the officers based on their answers during the investigation, and the state appellate courts upheld those convictions, rejecting the officers' contention that those answers were coerced.[74] The Supreme Court reversed, concluding that the officers' "statements were infected by the coercion inherent in this scheme of questioning," and therefore those statements were not "voluntary" within the meaning of the Court's prior precedent that "[c]oercion . . . vitiates a confession."[75] The Court also rejected the argument that the officers waived their constitutional rights, explaining that "[w]here the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other" and observing that "[i]t always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress.

67. Loc. No. 201, Am. Fed'n of State, Cnty., & Mun. Emps. v. City of Muskegon, 120 N.W.2d 197, 203 (Mich. 1963).
68. *See* Dotson, *supra* note 39, at 80.
69. *See id.* at 80–81 (citing Washington v. McGrath, 341 U.S. 923 (1951)).
70. *See* Dotson, *supra* note 39, at 88.
71. *See* Garrity v. New Jersey, 385 U.S. 493, 494 (1967).
72. *Id.*
73. *Id.* at 494 n.1.
74. *Id.* at 495.
75. *See id.* at 496–98.

It is the characteristic of duress properly so called."[76] In so holding, the Court further and famously "conclude[d] that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."[77]

The Court's decision in *Garrity* became a watershed moment for public employees. Since the establishment of this country as a sovereign nation, state law had typically viewed public employees as public servants who were not entitled to their jobs and whom the state could fire for any reason—even for exercising their constitutional rights.[78] The Court's decision now flew in the face of that view.

Garrity was not *sui generis*. Indeed, one year after the Court decided *Garrity*, the Court issued its decision in *Uniformed Sanitation Men Association*.[79] There, New York City discharged fifteen sanitation workers as part of an investigation into whether those workers were diverting municipal fees for personal purposes.[80] The City terminated twelve workers for refusing to testify and three workers, who had previously answered questions denying the allegations, for refusing to waive immunity before a Grand Jury.[81] As the Court pointed out, all fifteen sanitation workers were discharged "for invoking and refusing to waive their constitutional right against self-incrimination" and "for refus[ing] to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege."[82] The Court thus reversed the Second Circuit's decision which had denied the workers' request for injunctive relief.[83]

The Court also rejected the privilege argument in *Keyishian*.[84] There, the Court concluded that New York violated the First Amendment rights of state employees when it dismissed three State University of New York faculty members who refused to sign certificates that they were not Communists and one nonfaculty librarian who refused to "answer in writing under oath" a question that essentially boiled down to whether she had "ever advised or taught or [was] . . . ever a member of [the Communist Party]."[85] The Court acknowledged both the State's legitimate "interest in protecting its education system from subversion,"[86] and the country's "deep[] commit[ment] to safeguarding academic freedom, which is of

76. *Id.* at 498.
77. *Id.* at 500.
78. *See* Connick v. Myers, 461 U.S.138, 143 (1983) ("For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.").
79. Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of N.Y., 392 U.S. 280 (1968).
80. *Id.* at 281.
81. *Id.* at 281–83.
82. *Id.* at 283.
83. *Id.* at 281, 285.
84. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).
85. *Id.* at 591–92.
86. *Id.* at 602.

transcendent value to all [Americans]."[87] Applying strict scrutiny, the Court struck down several sections of New York's education and civil service laws as "broadly stifl[ing] fundamental personal libert[y]"[88] and academic freedom, as embodied in the First Amendment's Free Speech Clause.[89] In striking down a section of the Feinberg Law, another New York statute that generally banned individuals who advocated for the violent overthrow of the United States government from the teaching profession, the Court expressly rejected the contention that "public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable."[90] Citing prior precedent, the Court significantly observed: "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."[91]

Having examined the rise and demise of the right-privilege distinction along with juridical recognition that citizens do not relinquish their constitutional rights merely by accepting a job with the government, we now turn to the post-privilege legal aftermath in the public employment context. As discussed below in Part II.B., the Supreme Court developed a three-part test for determining the extent to which the First Amendment protects public employees' free speech. The Court, over nearly forty years between 1968 and 2006, decided three seminal cases—*Pickering v. Board of Education*,[92] *Connick v. Myers*,[93] and *Garcetti v. Ceballos*[94]—which together form the legal rules for protecting public employees from adverse employment actions for exercising their free speech rights. That doctrine established two categorical exceptions from protected speech—speech on topics not deemed to be of public concern and speech within the context of an employees' job duties. Moreover, speech on matters of public concern that is not related to job duties is protected and the public employee who uttered the speech is thereby protected against adverse employment action if, on balance, the public employee's interest as a citizen to comment on matters of public concern outweighs the public employer's managerial interests. In Part II.C., we examine how the lower courts have interpreted and applied the *Pickering–Connick–Garcetti* framework. We show that the lower courts tended to exclude speech from protection where it touched upon workplace issues, even where it comprised matters of public concern. We then show that even if the speech passed the two threshold hurdles, the lower courts have typically deferred to the employer's

87. *Id.* at 603.

88. *Id.* at 602.

89. *Id.* at 602 (citing De Jonge v. State of Oregon, 229 U.S. 353, 365 (1937) (declaring that "[t]he greater the importance of safeguarding the community from incitements . . . the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly")).

90. *Id.* at 605–06 (internal quotation marks omitted).

91. *Id.* at 606 (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963), *overruled on other grounds by* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990)).

92. 391 U.S. 563 (1968).

93. 461 U.S. 138 (1983).

94. 547 U.S. 410 (2006).

managerial authority when balancing the parties' interests. We end Part II with a brief discussion of *Lane v. Franks*,[95] a Supreme Court case that arguably narrowed the exclusion from protection; we show, however, that the lower courts continued to defer to employers in these types of cases.

B. Post-Privilege Aftermath: The Rise of Pickering–Connick–Garcetti*'s Balancing of Public Employee's First Amendment Rights Against the Government's Interest in the Efficient Delivery of Public Services*

The Court's rejection of the privilege doctrine raised an interesting question: may a public employer discipline an employee, including terminating the employment relationship, for conduct that normally has some constitutional protection? To express the question in labor law terms: to what extent does constitutionally protected conduct lose its protection where the protected conduct inhibits the government's mission of providing efficient and adequate public services? This question has been raised several times since *Garrity*, *Uniformed Sanitation Men Association*, and *Keyishian*. In the nearly forty years between 1968 and 2006, the Court developed the *Pickering–Connick–Garcetti* framework to determine when a government-employer may discipline a public employee without running afoul of the First Amendment.[96]

In *Pickering*, the Court reviewed the case of a public school teacher, Marvin Pickering.[97] The Board of Education terminated Mr. Pickering's employment because, in the context of a proposed tax increase, he had sent a letter to the local newspaper criticizing the way the Board of Education and Superintendent of the School District had handled a previous proposal for raising school revenue.[98] There was no issue of procedural deficiency. In fact, the Board made its determination only after a full hearing, finding the letter "detrimental to the efficient operation and administration of the schools of the district" and therefore determined dismissal was in the school's best interests.[99] The reviewing courts, including the Supreme Court of Illinois, rejected Pickering's First Amendment defense and upheld his dismissal on the grounds that substantial evidence supported the Board's findings.[100]

The Supreme Court reversed.[101] As an initial matter, the Court "unequivocally" clarified that public school teachers may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in

95. 573 U.S. 228 (2014) (holding that the dismissal of a state employee, Edward Lane, in retaliation for testifying in court against a state representative—who was fraudulently on the payroll where Lane worked—violated Lane's free speech rights).

96. *See* discussion *infra* Section I.B.

97. Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).

98. *Id.*

99. *Id.* at 564–65 (citing ILL. REV. STAT., c. 122, § 10-22.4 (1963)).

100. *Id.* at 564–65 (citing Pickering v. Bd. of Educ., 225 N.E.2d 1 (1967)).

101. *Id.* at 575.

connection with the operation of the public schools in which they work."[102] Nevertheless, the Court acknowledged, as it did previously, that the government as employer has an interest in disciplining its employees for legitimate reasons to further the government's mission:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[103]

With these interests in mind, the Court reversed the Illinois Supreme Court's decision enforcing Pickering's termination.[104] The Court held that the state may not discharge a public school teacher for making true, or even negligently false, statements of public importance critical of a school board because such statements are protected by the First Amendment.[105] The Court concluded that the content of the statements at issue—the allocation of school funds between academic and athletic expenses and the transparency of public-school spending—were indeed issues of public importance.[106] The Court reasoned that such speech must be protected because the public has an "interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment."[107]

Pickering's main contribution is to impose a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[108] On the teacher-interest side of the scale, the Court focused on the employee's right to engage as a citizen in political debates of public importance and the public's interest in hearing the teacher's contributions to the debate.[109] On the government-interest side, the Court acknowledged the State's interest in managing its workforce.[110] However, it rejected the employer's

102. *Id.* at 568 (citing Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)) (explaining that the Court has repeatedly and unequivocally rejected the contention that public schoolteachers can be compelled to relinquish First Amendment rights).
103. *Id.* at 568.
104. *Id.* at 574–75.
105. *See id.* at 568–71.
106. *Id.* at 571.
107. *Id.* at 573.
108. *Id.* at 568.
109. *Id.* at 568.
110. *Id.* at 570.

common call that employees should be uncritically loyal to the employer's mission.[111]

Pickering's balancing test stood as the sole Supreme Court law in this area for the next fifteen years, until the Court had occasion to review its jurisprudence in *Connick*.[112] There, New Orleans District Attorney Harry Connick fired Assistant District Attorney Sheila Myers for circulating a questionnaire among her coworkers.[113] One of the questions asked other assistant district attorneys whether they felt pressured to work in political campaigns on behalf of the office-supported candidate.[114] Other questions asked about the office transfer policy and recent transfers within the office, the presence of a rumor mill and office morale, the methods used to communicate changes to staff, and whether a grievance procedure should be established.[115] The district court found that Myers's discharge violated her free speech rights protected by the First Amendment, and the Fifth Circuit affirmed.[116] The Supreme Court reversed.[117]

The Court emphasized the government's role as an employer and its need to manage its workforce to provide for the efficient delivery of public services.[118] Consequently, the Court held, public employee speech that was not on a matter of public concern was entitled to no constitutional protection against adverse employment action, even though the same speech would be protected against other government restraints.[119] In such instances, the Court concluded, "government officials should enjoy wide latitude in managing their offices[] without intrusive oversight by the judiciary in the name of the First Amendment."[120] In other words, the government needed the flexibility to manage its workforce just as any other employer would.[121] Accordingly, the First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state."[122]

The Court found that all of Myers's questions, except for the one about pressure to work on political campaigns, did not relate to matters of public concern and were, therefore, not constitutionally protected against retaliatory adverse employment action.[123] After finding that the question about pressure to work in political campaigns was speech on a matter of

111. *See id.* at 568–70.
112. Connick v. Myers, 461 U.S. 138 (1983).
113. *Id.* at 141.
114. *Id.*
115. *Id.*
116. *Id.* at 141–42 (citing Myers v. Connick, 507 F. Supp. 752 (E.D. La. 1981)).
117. *Id.* at 154.
118. *Id.* at 150.
119. *Id.* at 147.
120. *Id.* at 146.
121. *Id.* at 151 (citing Arnett v. Kennedy, 416 U.S. 134, 168 (1974) ("To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.")).
122. *Id.* at 147.
123. *Id.* at 149, 154.

public concern, the Court proceeded to balance Myers's First Amendment interests against Connick's interests as an employer in controlling the workforce.[124] The Court concluded that "Connick's judgment . . . was that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[125]

The Court seemed particularly concerned that Myers's questionnaire, in addition to asking about pressure to work in political campaigns, also asked coworkers if they had confidence in several specifically named supervisors.[126] The Court was willing to infer from that question that Myers's intent in distributing the questionnaire was to bring about a vote of no confidence in Connick and his supervisors.[127] The Court ultimately concluded that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[128]

In addition to establishing a categorical exclusion from protection against adverse employment action for public employee speech on matters not deemed to be of public concern in *Connick*, the Court established a second categorical exclusion for speech by public employees in the course of performing their job duties.[129] Ceballos was a calendar deputy in the Los Angeles District Attorney's office.[130] Upon inquiry by defense counsel in a particular case, he investigated an affidavit used to obtain a search warrant and found that it contained serious misrepresentations.[131] He prepared a disposition memorandum to his superiors that stated his concerns and recommended dismissing the case.[132] His supervisor disagreed and proceeded with the prosecution.[133] Ceballos claimed that the Los Angeles District Attorney's Office retaliated against him because of the memorandum.[134]

The Supreme Court held that the First Amendment did not protect Ceballos's memorandum against retaliatory adverse employment action because he wrote the memorandum in the course of performing his job

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124. *Id.* at 149–54.
125. *Id.* at 151–52.
126. *Id.* at 153.
127. *Id.* at 152. The Court noted that one of Myers's supervisors characterized her survey as inciting a "mini-insurrection." *Id.* at 151.
128. *Id.* at 154.
129. Garcetti v. Ceballos, 547 U.S. 410, 410 (2006).
130. *Id.* at 413.
131. *Id.*
132. *Id.* at 414.
133. *Id.* at 414.
134. *Id.* at 415 (noting that the retaliatory adverse employment actions included "reassignment from [Ceballos'] calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion").

responsibilities.[135] The Court explained that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[136]

After *Garcetti*, the Supreme Court's framework for analyzing public employees' claims of free speech violations in the workplace appeared stable and consisted of a three-part test. First, the court must ask whether the public employee is speaking as a citizen or pursuant to their official duties.[137] If they are speaking pursuant to their official duties, the inquiry stops, and the speech is not protected against an adverse employment action.[138] Second, the court asks whether the speech is a matter of public concern.[139] If not, the inquiry stops, and the speech is not protected.[140] Third, the court must determine whether the government-employer's interest in government efficiency outweighs the employee's interest in speech.[141] In applying this three-part test, the lower courts have shown great deference to employer managerial decisions.[142]

C. Lower Court Applications of the Pickering–Connick–Garcetti *Framework Show Broad Deference to Employer Managerial Interests*

As discussed above, the Court's concern that public employers not be hamstrung from managing their workforces led it to categorically exclude employee speech that did not involve a matter of public concern or was made in the course of performing the employee's duties from protection against adverse employment action, and to give significant deference to managerial judgments when balancing employer interests in workforce management against employee interests in speaking even on matters of public concern.[143] With respect to determining whether employee speech involved matters of public concern, lower courts tended to exclude speech focused on the workplace from protection.

For example, in *Murray v. Gardner*,[144] the Federal Bureau of Investigation (FBI) suspended a special agent after he criticized an FBI plan to implement a furlough by lottery, whereby agents' names would be picked out of a hat to decide who would be furloughed.[145] At an all-employees conference, the agent urged that consideration of seniority and veterans' preference would be a more rational approach and characterized the lottery plan as "arbitrary and capricious."[146] The agent argued that his speech

135. *Id.* at 421.
136. *Id.*
137. *Id.* at 419 (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).
138. *Id.* at 421.
139. *Id.* at 418.
140. *Id.*
141. *Id.* (citing *Connick*, 461 U.S. at 143).
142. *See Connick*, 461 U.S. at 151–52.
143. *See id.* at 147.
144. 741 F.2d 434 (D.C. Cir. 1984).
145. *Id.* at 435–37.
146. *Id.* at 435–36.

involved "the disposition of public funds and the quality of the federal work force," which he claimed was clearly a matter of public concern.[147] The court disagreed, characterizing the agent's speech as:

> an example of the quintessential employee beef: management has acted incompetently. Perhaps it did—the furlough plan seems less than Solomonic. But the furlough plan was purely a labor relations matter, an arrangement of employees under which some would win and some would lose. Its connection to the matters of public concern *Connick* envisioned does not even qualify as remote.[148]

Similarly, in *Dwyer v. Smith*,[149] a municipal police officer alleged that her department discharged her in retaliation for writing a memorandum expressing concern with the lack of safety equipment at the firing range, the lack of adequate practice time and ammunition, the denial of the use of shoulder pads, the refusal of training assistance, and the refusal to consider instinctive shotgun shooting.[150] The officer also protested having "to qualify with shotguns in a manner potentially more injurious to women."[151] The Fourth Circuit held her speech unprotected against adverse employment action because, although conditions at the firing range were arguably matters of public interest, the officer's communications were concerned with her personal grievances over shotgun qualification and therefore not a matter of public concern.[152]

To similar effect is the Second Circuit's decision in *Ezekwo v. New York City Health & Hospitals Corp.*[153] There, Dr. Ifeoma Ezekwo, a medical doctor, alleged that her employer–hospital denied promoting her to chief resident in retaliation for her criticisms of the residency program's operation.[154] The court held her speech unprotected against adverse employment action because:

> Her complaints were personal in nature and generally related to her own situation within the HHC residency program. Our review of her prolific writings convinces us that Ezekwo was not on a mission to protect the public welfare. Rather, her primary aim was to protect her own reputation and individual development as a doctor.[155]

Relatedly, several courts held unprotected employee speech as categorically not a matter of public concern because the speech was motivated

147. *Id.* at 437–38.
148. *Id.* at 438.
149. 867 F.2d 184 (4th Cir. 1989).
150. *Id.* at 193.
151. *Id.* at 187.
152. *Id.* at 193–94.
153. 940 F.2d 775 (2d Cir. 1991).
154. *Id.* at 778.
155. *Id.* at 781; *see also* Rahn v. Drake Ctr., Inc., 31 F.3d 407, 412–15 (6th Cir. 1994) (holding unprotected speech of a nurse, made in her capacity as chair of a citizens' organization focused on the hospital, which criticized the hospital administration because the speech was related primarily to work rules with which the nurse disagreed and was therefore not speech that was a matter of public concern).

by the employee's own workplace grievances, even where the issues were matters of public concern.[156]

Notwithstanding these cases, there have been a few situations where speech concerning working conditions has not been an absolute bar to a finding that it is speech on a matter of public concern. Just as in *Connick*, where Myers's questions about feeling pressured to work on political campaigns was found to be speech on a matter of public concern, courts held that a prison guard's speech complaining of unremedied inmate sexual harassment of guards undermining prison security[157] and a firefighter's speech concerning firefighter mental health[158] were matters of public concern. But, on balance, courts have tended to find employee speech about working conditions not to involve matters of public concern and therefore excluded from constitutional protection against adverse employment action.[159]

Establishing that an employee's speech was on a matter of public concern triggers the *Pickering–Connick* framework, balancing the interests of the employee's speech against the employer's interests in managing its workforce to provide public services effectively and efficiently. In *Waters v. Churchill*,[160] the Supreme Court concluded that, in evaluating the constitutionality of an adverse employment action, courts should consider the facts as the employer reasonably understood them even if they later turn out to be inaccurate.[161] The Court's lead plurality opinion observed:

> [W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the

156. *See, e.g.*, Moore v. Mississippi Valley St. Univ., 871 F.2d 545, 551 (5th Cir. 1989) (holding that four daycare center employees who complained about a coworker being allowed to bring a gun to the center and administering corporal punishment were not speaking on a matter of public concern because they raised the issues in the context of an overall complaint about favoritism in treatment of employees); Smith v. Cleburne Cnty. Hosp., 870 F.2d 1375, 1382 (8th Cir. 1989) (characterizing a doctor's criticism of public hospital officials and board of governors as "vindictive and personal, and as such, are not a matter of public concern"); Berg v. Hunter, 854 F.2d 238, 242 (7th Cir. 1988) ("although matters of sexual harassment, the misappropriation of college property, and the allocation of specific duties within the college may relate to CLC's efficient performance, Berg's charges clearly sought vindication of his many disagreements with Matthews and his personal dissatisfaction with Hunter's performance as the President of CLC. His speech does not implicate broader issues of public-school administration unrelated to his personal disputes."); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985) ("The test requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"); *see also* Meade v. Moraine Valley Cmty. Coll., 770 F.3d 680, 684 (7th Cir. 2014) ("If, however, Meade's overall point in writing the letter was to express a purely personal grievance, then the First Amendment will not help her.").

157. *See* Freitag v. Ayers, 468 F.3d 528, 545–46 (9th Cir. 2006).

158. *See* Sprague v. Spokane Valley Fire Dept., 409 P.3d 160, 174–76 (Wash. 2018).

159. *See* Theo A. Lesczynski, *Redefining Workplace Speech After* Janus, 113 NW. U. L. REV. 885, 903 (observing that "courts [applying *Pickering* and *Connick*] reached an equilibrium, routinely classifying most speech about traditional employee-management issues as internal to the workplace and therefore not protected").

160. 511 U.S. 661 (1994).

161. *Id.* at 677.

> public at large. . . . [W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.[162]

Most lower courts have generally not required a showing of actual disruption to the employer's mission to justify an adverse employment action.[163] In *Lewis v. Cowen*,[164] the executive director of the State Lottery Unit of the Connecticut Division of Special Revenue terminated J. Blaine Lewis from his position as Chief of the Lottery Unit because he refused to advocate before the state's Gambling Policy Board for a proposal made by an outside contractor to increase the numbers from which players would choose, thereby decreasing the odds of winning but purportedly increasing the size of the jackpots.[165] Lewis believed that the proposal would result in reduced sales and reduced revenue.[166] A jury returned a verdict for Lewis, finding that the termination violated his rights under the First Amendment, but the Second Circuit reversed.[167] The court found that Lewis's speech, or more precisely his refusal to speak, focused on the lottery's viability and the generation of public revenue and, consequently, was speech on a matter of public concern.[168] But in finding that the balance favored the employer as a matter of law, the court did not require the defense to produce evidence of actual disruption.[169] Instead, the court held that the State's "predictions of disruption were not unreasonable," because the plain "effect of such disruption on Division operations could be substantial":[170]

> The manner, time, and place of Lewis's refusal to speak weigh heavily on the side of the defendants. Lewis refused a direct order from his employer—issued both verbally and in writing—to present the proposed Lotto change to the Board in a "positive" manner and to serve as project manager for the change. Thus, Lewis's refusal to speak to the Board was directed squarely at his superiors Hickey and Drakeley. Furthermore, the communications between Hickey and Lewis all took place during the workday and at the Division's offices. Finally, Lewis's refusal meant that the office would be deprived of its principal spokesperson on a matter of public policy at a public meeting before the Board. These facts support Hickey's view that Lewis's actions

162. *Id.* at 673.
163. *See, e.g.*, Gillis v. Miller, 845 F.3d 677, 685 (6th Cir. 2017).
164. 165 F.3d 154 (2d Cir. 1999).
165. *Id.* at 159–60.
166. *Id.* at 159.
167. *Id.* at 158, 167.
168. *Id.* at 164.
169. *Id.*
170. *Id.*

> constituted insubordination and threatened to undermine the effective functioning of the office and the success of the proposed change.[171]

Similarly, in *Weicherding v. Riegel*,[172] the Seventh Circuit upheld a prison warden's discharge of a corrections sergeant for participating in a Ku Klux Klan rally.[173] The terminated officer argued that there was no evidence of any breakdown in prison security or order, but the court found such a showing unnecessary, stating that the warden "need not wait until a riot breaks out before acting to quell a dangerous situation. The Supreme Court has 'consistently given greater deference to government predictions of harm' when the government acts as an employer instead of as a sovereign."[174] To like effect is *Locurto v. Giuliani*,[175] where the Second Circuit upheld the discharge of police officers and firefighters for participating in a parade where they appeared in blackface and mocked stereotyped views of Black individuals.[176] The court considered reasonable the city's concern that the discharged employees' actions would convey to residents that the police and fire departments were racist.[177]

Of course, where there is a showing of actual disruption, an employer's interests receive even greater weight in the balancing process.[178] And where an employee's speech is deemed useful to the public, the employer may not rely on fear of disruption where no actual disruption has occurred.[179]

Many lower courts also interpreted *Garcetti* to give employers a wide berth in managing their workforces. For example, the Second Circuit required public employees contesting adverse employment actions on First Amendment grounds to show that their speech had a citizen analogue,[180] or otherwise it would be speech as an employee and not protected under *Garcetti*.[181] In *Weintraub v. Board of Education*,[182] teacher David

171. *Id.* at 164–65.
172. 160 F.3d 1139 (7th Cir. 1998).
173. *Id.* at 1144.
174. *Id.* at 1143 (quoting Waters v. Churchill, 511 U.S. 661, 673 (1994)).
175. 447 F.3d 159 (2d Cir. 2006).
176. *Id.* at 164.
177. *Id.* at 183.
178. *See, e.g.*, Munroe v. Central Bucks Sch. Dist., 805 F.3d 454, 472 (3d Cir. 2015).
179. *See, e.g.*, Durham v. Jones, 737 F.3d 291, 301–03 (4th Cir. 2013) (holding that absent a showing of actual disruption, balance favored protecting the employee's disclosure of corruption and misconduct including that he was forced to submit a false report concerning the use of force against a fleeing suspect); Rodgers v. Banks, 344 F.3d 587, 601–02 (6th Cir. 2003) (holding protected an employee's criticism of mental hospital's conversion of patient areas to doctors' offices as decreasing patient privacy in a manner that could threaten the hospital's accreditation where there was no evidence that the speech was disruptive or inflammatory).
180. The term "citizen analogue" comes from *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203 (2d Cir. 2010). The court uses the term in the context of analyzing whether speech uttered by an employee is speech uttered as a citizen or pursuant to his job duties as an employee. *See id.* (explaining that "[o]ur conclusion that Weintraub spoke pursuant to his job duties is supported by the fact that his speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue").
181. Weintraub v. Bd. of Educ., 593 F.3d 196, 203–04 (2d Cir. 2010).
182. 593 F.3d 196 (2d Cir. 2010).

Weintraub alleged that he was terminated in retaliation for filing a grievance over his employer's failure to discipline a student who twice threw a book at him in the classroom.[183] The court held his speech unprotected under *Garcetti* in part because, even though filing the grievance was not required by his job description or requested by his employer,[184] Weintraub's grievance had no citizen analog.[185] The court observed:

> The lodging of a union grievance is not a form or channel of discourse available to non-employee citizens, as would be a letter to the editor or a complaint to an elected representative . . . . Weintraub could only speak in the manner that he did by filing a grievance with his teacher's union as a public employee.[186]

In some cases, even where there appeared to be clear citizen analogs, courts applied *Garcetti* to hold that the employee was speaking as an employee rather than as a citizen and was therefore excluded from First Amendment protection. In one case, a federal district court in Louisiana held that an employee giving a speech at a Toastmasters Club was speaking as an employee rather than as a citizen because obtaining a Competent Toast Master designation was a requirement to be considered for promotion.[187] In Chicago, any citizen could complain to the Chicago Police Internal Affairs Department and the Independent Police Review Authority, but when a Chicago police officer complained to those bodies about fellow officers illegally targeting and mistreating his two sons, the Seventh Circuit held that he was speaking as an employee because "a police officer's duty to report official police misconduct is a basic part of the job."[188]

The Supreme Court reined in broad readings of *Garcetti* to a degree in *Lane v. Franks*.[189] There, Edward Lane, the director of a youth training program at an Alabama community college discovered that a state representative was on the program's payroll even though she was not

183. *Id.* at 198–99.
184. *Id.* at 203.
185. *Id.*
186. *Id.* at 204. The court has since distinguished *Weintraub* but declined to overrule it. *See* Montero v. City of Yonkers, 890 F.3d 386, 393–94, 396 (2d Cir. 2018) (holding that a union officer's criticism at union meetings of management decisions was speech as a citizen but declining to adopt a per se rule that speech as a union official is speech as a citizen); Jackler v. Byrne, 658 F.3d 225, 241–42 (2d Cir. 2011) (holding that a police officer's refusal to retract a report he made to an independent state agency supporting a civilian complaint of excessive force by a fellow officer had a citizen analog in that both officers and citizens have a duty to refrain from materially false statements to government agencies). *Contra* Lett v. City of Chicago, 946 F.3d 398, 400–01 (7th Cir. 2020) (police investigator acted as employee and was not entitled to First Amendment protection when he refused to alter a report to show that police officer under investigation had planted a gun on a shooting victim). Other courts have held that speech as a union representative is not speech as an employee and falls outside the *Garcetti* categorical exclusion. *See, e.g.*, Boulton v. Swanson, 795 F.3d 526, 534 (6th Cir. 2015); Olendzki v. Rossi, 765 F.3d 742, 747–48 (7th Cir. 2014).
187. Levy v. Off. of the Legis. Auditor, 459 F. Supp. 2d 494, 497–99 (M.D. La. 2006).
188. Forgue v. City of Chicago, 873 F.3d 962, 967 (7th Cir. 2017) (internal quotation marks and citations omitted). For further discussion of the broad scope given *Garcetti* by lower courts in law enforcement cases, see Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 1, 15, 17–18 (2018).
189. 573 U.S. 228 (2014).

performing any services.[190] Lane fired the individual after she refused to meet with him and after she insisted on continuing on the payroll.[191] The individual was indicted for mail fraud and theft and, after one hung jury, was convicted in a retrial.[192] Lane testified under subpoena in both trials and was subsequently terminated.[193] Lane alleged that he was terminated in retaliation for this testimony in violation of the First Amendment.[194] The district court granted the defendants' motion for summary judgment, and the Eleventh Circuit affirmed, holding that Lane spoke as an employee rather than a citizen because he testified about his performance of his official duties investigating and terminating the state representative.[195]

The Supreme Court unanimously reversed.[196] It reasoned, "Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."[197] That Lane's testimony concerned the performance of his job responsibilities did not change the result: "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech."[198] Accordingly, "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[199]

At least one court read *Lane* as narrowing what it previously understood to be the scope of the *Garcetti* exclusion.[200] But the Court's opinion in *Lane* left many questions unanswered,[201] giving lower courts leeway to continue to apply *Garcetti* broadly. Indeed, the Seventh Circuit's decision in *Forgue v. City of Chicago*,[202] holding that a police officer's report of police misconduct directed at the reporting officers' sons was unprotected speech even though the officer used reporting mechanisms that were available to any citizen, came three years after *Lane*.[203]

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190. *Id.* at 231–32.
191. *Id.* at 232.
192. *Id.* at 232–33.
193. *Id.* at 233.
194. *Id.* at 234.
195. *Id.* at 235.
196. *Id.* at 241 ("We hold, then, that Lane's truthful sworn testimony at Schmitz's criminal trials is speech as a citizen on a matter of public concern.").
197. *Id.* at 238 (citations omitted).
198. *Id.* at 240.
199. *Id.*
200. *See* Boulton v. Swanson, 795 F.3d 526, 533–34 (6th Cir. 2015).
201. *See* John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in* Lane v. Franks, 34 HOFSTRA LAB. & EMP. L.J. 243, 246–47 (2017).
202. 873 F.3d 962 (7th Cir. 2017).
203. Forgue v. City of Chicago, 873 F.3d 962, 967 (7th Cir. 2017).

II. *JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31*: EROSION OF EMPLOYER MANAGERIAL AUTHORITY?

In Part I above, we showed that the constitutional rights of citizens who work for the government were initially vitiated by their government employment. We showed how the Court resurrected at least some of those rights, in particular, the free speech rights *of* public employees. We further showed that the Court kept those rights narrowly circumscribed by excluding from protection two types of speech—speech not on topics of public concern and speech related to job duties. The Court also kept those rights in check by deferring to the public employer's managerial interests when balancing those rights against the government's interests.

In Parts II and III below, we review two recent Supreme Court cases—*Janus* and *Kennedy*. Both cases involve public employee speech. *Janus* concerns a public employee's payment of union dues, which the Court characterizes as compelled speech. *Kennedy* involves a public school football coach's prayer on the fifty-yard line immediately after a school football game. In both cases, the public employee wins their respective case. In these sections, we analyze the Court's decisions to determine how these cases distinguish the *Pickering–Connick–Garcetti* line of cases.

In *Janus*, the Supreme Court overruled *Abood v. Detroit Board of Education*[204] and held that a public sector collective bargaining agreement that required nonmember, union-represented employees to pay a fee representing their pro rata share of the union's costs of representing the bargaining unit violated the nonmembers' First Amendment right of free speech.[205] *Abood* had already prohibited the parties from requiring nonmember union-represented employees to pay that portion of union dues that was used for political and ideological purposes not germane to collective bargaining.[206] *Janus* went further and prohibited the parties from requiring nonmember union-represented employees to pay even those dues related to collective-bargaining activities.[207] Justice Kagan's dissent, in the context of critically explaining the far-reaching consequences that *Janus* will have on unions, characterized *Abood* as having "struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper."[208]

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204. 431 U.S. 209 (1977). In *Abood*, the Court held that public employees had a constitutional right under the First Amendment not to be compelled, as a condition of employment, to financially subsidize political speech with which they disagreed. Accordingly, union security clauses could not require dues payments for "ideological activities unrelated to collective bargaining" although such clauses could require dues payments for "collective-bargaining activities." *Id.* at 236.

205. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. at 929–30.

206. *Abood*, 431 U.S. at 234–36.

207. *Janus*, 585 U.S. at 929–30.

208. *Id.* at 931 (Kagan, J., dissenting).

The balance between public employees' First Amendment rights and the government-employer's managerial interests is the same type of balance that the Court struck in its *Pickering–Connick–Garcetti* line of authority. This line of authority, which affords the government greater leeway when dealing with its employees than it has when dealing with citizens generally, applies only to government employer action that is adverse to the employee's status as an employee.[209] It does not apply to adverse action that might be taken against any citizen generally.[210] For example, it applies to discipline or discharge of a public employee but would not apply to a defamation lawsuit brought against that employee.[211] Thus, when a collective bargaining agreement requires the employer to deduct the nonmember's share of the costs of representation with respect to wages, hours, and working conditions, the employer deducts that fee from the nonmember's pay; the deduction is, therefore, an adverse action with respect to the nonmember's status as an employee. It is more analogous to discipline or discharge than to a defamation lawsuit.

Recall that, under *Garcetti*, an employee receives no constitutional protection against an adverse employment action when the employee speaks in the course of performing the employee's job responsibilities.[212] In the *Garcetti* Court's view, this power is necessary to enable employers to manage their workforces.[213] Employers must be free to evaluate employee job performance even though that performance involves speech that would otherwise be constitutionally protected.[214] Employers must also be able to reward or take corrective action based on employee job performance, including what would otherwise be protected speech.[215] Nonmembers are compelled to pay their share of the costs of representation in their capacity as employees. The compulsion does not touch their status as citizens. Arguably, under *Garcetti*, nonmembers are thus entitled to no constitutional protection against compelled payment of agency fees.

But the *Janus* Court would have none of this. Justice Alito opined that *Garcetti* applies only where the employee is speaking as a representative of the government.[216] To Justice Alito, the employer's need to manage the workforce and evaluate employee performance did not seem to be relevant.[217] What was relevant was that when an employee speaks in the course of performing the employee's job responsibilities, "the employee's words are really the words of the employer. The employee is effectively

209. *See supra* Section I.C.
210. *See id.*
211. Connick v. Myers, 461 U.S. 138, 147 (1983).
212. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); *see also supra* Section I.B (discussing Garcetti in further detail).
213. *Garcetti*, 547 U.S. at 422.
214. *Id.* at 422–23.
215. *Id.*
216. *See Janus*, 585 U.S. at 910.
217. *See id.* at 907–09 (explaining all the reasons that the *Pickering–Connick–Garcetti* framework is a poor fit for the union dues cases even though the Court characterizes the dues as speech).

the employer's spokesperson."[218] Viewed this way, the nonmember is not subsidizing government speech—quite the contrary, the nonmember is subsidizing union speech aimed at the government.[219]

Once an employee clears the *Garcetti* job-duties hurdle, the employee must confront the *Connick* hurdle. Under *Connick*, employee speech is protected against adverse employment action only when it is on a matter of public concern.[220] The speech that Janus was compelled to subsidize concerned wages, hours, and other terms and conditions of employment,[221] matters that, prior to *Janus*, courts routinely held were matters of private concern and not protected against adverse employment action.[222] In *Connick*, Myers's questionnaire concerning the office transfer policy, coworker morale, need for a grievance procedure, and confidence in supervisors was held unprotected on this ground.[223] Under the *Connick* holding, Janus's complaint about being compelled to subsidize such private concern speech would appear to be meritless.

In *Janus*, however, Justice Alito would again have none of this. The Court questioned whether *Connick* applied at all to compelled public employee speech, as opposed to restrictions on public employee speech.[224] The Court characterized its holding in *Connick* as finding that Myers's "complaints about the supervisors in her office were, for the most part, matters of only private concern."[225] Consequently, they were not protected against retaliatory adverse employment action, even though they may have been protected against other governmental restraints.[226] The exclusion of speech on matters not of public concern from constitutional protection against adverse employment action recognized the public employer's need for deference in managing its workforce. But not so, according to the *Janus* Court, when it came to compelled speech:

> When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. . . . [S]uppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed?

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218. *Id.* at 910.
219. *See id.*
220. Connick v. Myers, 461 U.S. 138, 146 (1983) (explaining "*Pickering*, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge"); *see also supra* Section I.B.
221. *Janus*, 585 U.S. at 886–87.
222. *See supra* note 5 and accompanying text.
223. *Connick*, 461 U.S. at 148.
224. *Janus*, 585 U.S. at 908.
225. *Id.*
226. *Id.*

> If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.[227]

Applying this analysis to the speech nonmembers were compelled to subsidize through dues, the *Janus* Court greatly expanded what it considered to be matters of public concern.[228] In previous decisions, where the Court and the lower courts had generally regarded employee speech on workplace conditions to be private matters not entitled to constitutional protection from adverse employment action, the courts gave public employers a wide berth to manage their workforces.[229] But in *Janus*, the Court opined that employee wages and their impact on the employer's budget,[230] public employee pensions,[231] pay based on length of service or some measure of merit,[232] transfer policies (a subject of Myers's questionnaire),[233] and job security were all matters of public concern.

The *Janus* Court sought to distinguish the case before it from *Connick* and its progeny based on the scale of the speech involved.[234] Indeed, the Solicitor General argued that a line should be drawn between chargeable and non-chargeable union expenditures based on scale.[235] He distinguished charging nonmembers for the costs of negotiating the collective bargaining agreement, which he maintained were unconstitutional, and charging nonmembers for the costs of grievance administration, which he saw as different and not necessary to the resolution of the case.[236] Justice Alito did not accept the Solicitor General's suggestion but did adopt his analysis based on scale.[237] He elaborated on this point in *Janus*:

> Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is

227. *Id.*

228. *See id.* at 907–10 (showing that Justice Alito would likely disagree with our characterization here by suggesting that *Pickering* is simply a poor fit, thereby sidestepping the analysis altogether. Our point is that these conclusions are the logical implications of the Court's analysis).

229. *See supra* Section I.C.

230. *Janus*, 585 U.S. at 907–08.

231. *Id.* at 911–12.

232. *Id.* at 913.

233. *Id.*

234. *See id.* at 907–08 (contrasting a single employee's demand for a 5% wage increase with a union's demand for an across-the-board 5% wage increase).

235. Transcript of Oral Argument at 48, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018) (No. 16-1466).

236. *See id.* at 52–56.

237. *Janus*, 585 U.S. at 907–08.

> greatly enlarged, and the category of speech that is of only private concern is substantially shrunk.[238]

Justice Alito's attempt to distinguish prior cases based on scale ignored the facts of those cases. Myers's questionnaire in *Connick* may have been motivated by her disappointment over her transfer but the information it solicited went to transfer policy, office morale, office grievance procedures, and worker confidence in supervision generally.[239] Indeed, Justice Brennan, in his dissent, argued that Myers's speech was on a matter of public concern: "Myers' questionnaire addressed matters of public concern . . . that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney, an elected official charged with managing a vital government agency, discharges his responsibilities."[240] Justice Alito would appear to have agreed with Justice Brennan's dissent, and *Janus* would appear to have significantly expanded the scope of speech considered to be on a matter of public concern, thereby eroding public employer managerial authority over the workforce.

But getting past *Connick*'s categorical exclusion from protection of speech not on a matter of public concern merely gets an employee into the *Pickering–Connick* balancing test, and here courts have given considerable deference to the employer's managerial judgment that the restriction on employee speech was necessary for efficient management of the workforce. In *Connick*, the Court observed:

> Connick's judgment . . . was that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.[241]

In *Janus*, however, the Court gave no deference at all to the employer's managerial judgment that requiring nonmembers to pay their pro rata share of the costs of representation furthers positive labor relations.[242]

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238. *Id.*
239. *See* Connick v. Myers, 461 U.S. 138, 141 (1983).
240. *Id.* at 163 (Brennan, J., dissenting).
241. *Id.* at 151–52 ("caution[ing] that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." But the Court did not indicate what matters of public concern would be more substantial than pressure by an elected official on employees to work on a political campaign).
242. *See Janus*, 585 U.S. at 896–902.

Instead, it subjected that judgment to exacting scrutiny,[243] and concluded that the employer's judgment failed the test.[244]

Janus has already been extended to distinguish the *Pickering–Connick–Garcetti* framework to protect dissenters. For example, in *Meriwether v. Hartop*,[245] the Sixth Circuit declined to extend *Garcetti* to Nicholas Meriwether, a philosophy professor at Shawnee State University, a public college in Ohio.[246] There, University issued a policy requiring all faculty to refer to students using their preferred pronouns and prohibited discrimination because of gender identity.[247] The University also had an existing policy prohibiting discrimination because of gender identity.[248] Professor Meriwether, a devout Christian, did not wish "to use a pronoun that reflects a student's self-asserted gender identity" because that would conflict with his moral or religious views.[249] Meriwether asked the University to accommodate his religious beliefs by allowing him to use surnames for transgender individuals in his classes.[250] The University's Title IX Office investigated and concluded that Meriwether had engaged in prohibited discrimination and "created a hostile environment" when Meriwether "refuse[d] to recognize' [the female] identity [of a trans student] by using female pronouns."[251] Ultimately, the University placed a written warning in Professor Meriwether's personnel file "direct[ing] him to change the way he addresses transgender students to 'avoid further corrective actions,'" including "[s]uspension without pay and termination."[252]

The court concluded that *Garcetti* does not bar Professor Meriwether's free speech claim.[253] The court instead applied *Janus*'s "cardinal constitutional command"[254] that the government "may not compel affirmance of a belief with which the speaker disagrees."[255] Here, the compelled speech is the University's order that Meriwether use students' preferred pronouns including those based on gender identity. The court then applied the *Pickering–Connick* analysis. The court found that Meriwether's desire to use sex-based pronouns rather than gender-identity-based pronouns was intended to send a message on an issue of public concern.[256] On balance, the court concluded that Meriwether's strong interest

243. The Court's analysis is significantly flawed. *See* Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821, 1827–33 (2019).
244. *Janus*, 585 U.S. at 897–902.
245. 992 F.3d 492 (6th Cir. 2021).
246. *Id.* at 498.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 499.
251. *Id.* at 501.
252. *Id.*
253. *Id.* at 504. The court instead found that the academic freedom exception applied to Professor Meriwether's use of pronouns in the college classroom. *Id.* at 504–07.
254. *Id.* at 503 (quoting *Janus*, 585 U.S. at 892).
255. *Id.* at 503 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).
256. *Id.* at 506.

in speaking on this matter coupled with the damage that accompanies compelled speech outweighed the university's limited interest in regulating the targeted speech.[257]

While the court's analysis is not always clear—for example, by conflating the *Pickering–Connick–Garcetti* framework with the compelled speech doctrine—it does show how easy it is to flip free speech and compelled speech analyses.

III. *KENNEDY V. BREMERTON SCHOOL DISTRICT*: FURTHER EROSION OF MANAGERIAL AUTHORITY?

In Part II we showed that the Supreme Court in *Janus* characterized the payment of union dues by nonmembers as compelled speech. We also show that, taken to its logical conclusion, *Janus* stands for the proposition that workplace matters may very well constitute matters of public concern, contrary to most of the *Pickering–Connick–Garcetti* case progeny. Finally, the Court gave no concern to management's interests here, namely fostering positive labor relations. We now turn to an analysis of *Kennedy*, where the Court refused to defer to managerial judgments that a football coach's prayer on the fifty-yard line immediately after a high school game was coercive to students and potentially dangerous to students, fans, and others.

The high level of deference that the *Connick* Court showed to public employer managerial authority is in contrast to the Court's approach in *Kennedy*. Kennedy was an assistant football coach at Bremerton High School, whose "sincerely-held [religious] beliefs required him to 'give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be a part of their lives through the game of football.'"[258] Initially, he prayed alone, but players started joining him, and eventually a majority of the team joined him.[259] His postgame prayer expanded to inspirational talks with religious references, and he participated in pregame and postgame locker room prayers.[260]

The school district first learned of Kennedy's activities in September 2015, and following a game on September 11, the athletic director expressed to Kennedy his disapproval of these activities.[261] Kennedy responded by posting "on Facebook that he might get fired for praying."[262] On September 17, the school district instructed Kennedy that his religious activities must be non-demonstrative ("not outwardly discernable as religious activity") if students were present or conducted at times when

257. *Id.* at 509–12.
258. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *rev'd*, 597 U.S. 507 (2022), and *vacated and remanded*, 43 F.4th 1020 (9th Cir. 2022).
259. *Id.* at 1228.
260. *Id.*
261. *Id.* at 1229.
262. *Id.*

students were not engaged in religious activity.[263] Kennedy indicated that he was not happy but that he would comply.[264] At a game on September 18, he refrained from locker room prayers and religious references in inspirational talks and, according to the district court, "prayed on the field only after the stadium had emptied."[265]

But Kennedy escalated his dispute with his employer.[266] His attorney wrote to the district arguing that Kennedy's prayers occurred after his coaching responsibilities had ceased and were private speech in which he had a right to engage.[267] Kennedy's counsel stated that Kennedy would resume his prayers at the fifty-yard line after the homecoming game on October 16.[268] Kennedy also made media appearances publicizing his intent to pray at the fifty-yard line at the conclusion of the homecoming game.[269] When Kennedy defied his employer's instructions and knelt to pray at the fifty-yard line at the conclusion of the game, a large group rushed onto the field to join him, in some instances knocking over band members and cheerleaders.[270]

The district reacted by increasing security and making robocalls to parents advising them that there was no public access to the field.[271] It also advised Kennedy that his conduct on October 16 did not comply with the district's instructions and that his duties continued until the players were released to their parents.[272] The district also suggested options to accommodate Kennedy's desire to pray, such as a private prayer location at the field, and invited Kennedy to participate in an interactive process to find acceptable accommodations.[273] Kennedy did not accept the invitation but continued to defy his employer's instructions and to pray publicly at the fifty-yard line at the conclusion of games on October 23 and 26.[274] As a result, the district placed him on paid administrative leave and reiterated its invitation for Kennedy to engage in dialogue to find acceptable accommodations.[275] Kennedy continued to snub his employer's invitations.[276] Kennedy's 2015 performance evaluation criticized his lack of cooperation

263. *Id.*
264. *Id.*
265. *Id. But see* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 516–17 (2022) (contrasting the district court's description of Kennedy's conduct. The Supreme Court stated that "[d]riving home after a game . . . Mr. Kennedy felt upset that he had 'broken [his] commitment to God,' by not offering his own prayer so he turned his car around and returned to the field . . . and he walked to the 50 yard line and knelt to say a brief prayer of thanks." (second alteration in original)).
266. *Kennedy*, 443 F. Supp. at 1230.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* The Supreme Court majority opinion omits any mention of Kennedy's media appearances prior to the October 16 game or the rush of others to join him, knocking over band members and cheerleaders. *See Kennedy*, 597 U.S. at 516–19 (2022).
271. *Kennedy*, 443 F. Supp. 3d at 1230.
272. *Id.*
273. *Id.* at 1230–31.
274. *Id.* at 1231.
275. *Id.*
276. *Id.*

for not participating in the invited interactive process.[277] When his contract expired at the end of the 2015 season, Kennedy did not ask for renewal.[278] Instead, he sued, seeking, among other things, reinstatement as an assistant coach and an order that his employer accommodate his desire to pray at the fifty-yard line after the games.[279] The district court granted the school district's motion for summary judgment, and the Ninth Circuit affirmed.[280] The Supreme Court reversed.[281]

Myers's "insubordination" in *Connick*, which her supervisors characterized as a "mini-insurrection,"[282] was quite mild compared to Kennedy's conduct. Kennedy directly defied specific directives from his employer on multiple occasions and snubbed his employer's effort to reach out to him to find workable compromises. And Kennedy's defiance fueled by his media campaign led to a physical—and potentially dangerous—commotion that caused the crowd to knock over band members and cheerleaders. Nevertheless, the Supreme Court found violations of Kennedy's rights under the Free Exercise Clause and to the Free Speech Clause.[283]

Previously, the Court had extended the *Connick* framework developed in the context of free speech rights to public employees' right to petition the government.[284] But the Court did not apply this framework to Kennedy's free exercise claim. Instead the Court found that the school district discriminated against Kennedy's postgame activity by forbidding it because it was religious, while allowing other coaches to briefly visit friends in the stands and take personal phone calls.[285] That the Court would equate a public religious display at the fifty-yard line of the football field, a display transformed into a public spectacle by the employee's media campaign, with a private chat with a friend in the stands or checking phone or email messages is itself disturbing. Even more disturbing, however, is that the Court afforded absolutely no deference to the employer's managerial judgment distinguishing between those activities, a deference that the Court expressly called for in *Connick* when the government acts as an employer.[286] As a result, the Court placed on the school district the burden

277. *Id.*

278. *Id.* The Supreme Court majority never even mentioned the district's overtures for an interactive process or Kennedy's snubs of such overtures. It also did not mention that Kennedy chose not to seek contract renewal. Instead, it misleadingly, simply stated, "Mr. Kennedy did not return for the next season." Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 520 (2022).

279. *Kennedy*, 443 F. Supp. 3d at 1231–32.

280. Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1014, 1023 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022), and *rev'd*, 597 U.S. 507 (2022).

281. *Kennedy*, 597 U.S. at 543–44.

282. Connick v. Myers, 461 U.S. 138, 151 (1983).

283. *Kennedy*, 597 U.S. at 543–44.

284. *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 386, 393, 398 (2011).

285. *Kennedy*, 597 U.S. at 530–31; *see also id.* at 513 ("Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters."). Note, however, that there was no evidence that the coaches engaged in other personal matters. Rather, this finding is based on a hypothetical.

286. *See Connick*, 461 U.S. at 151–52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

of justifying its restrictions on Kennedy's religious display with a compelling government interest, a burden it could not meet because the Court disagreed with the school district's view that allowing Kennedy to go forward with his public display would cause the district to violate the Establishment Clause of the First Amendment.[287]

Turning to Kennedy's free speech claim, the Court rejected the school district's analogy to *Garcetti*, characterizing Ceballos's memorandum as "government speech,"[288] which the Court observed Kennedy's prayers clearly were not.[289] The Court declined to say whether the *Connick* balancing framework or the strict scrutiny compelling state interest test applied; however, the Court determined that whichever test applied, the school district could not meet it.[290] In so stating, the Court turned the *Connick* framework with its respect for a public employer's need to manage its workforce completely on its head. In *Connick*, the lower courts had held Myers's rights infringed because Connick could not prove that Myers's questionnaire had been disruptive.[291] The Supreme Court disagreed.[292] It agreed with the lower courts that "there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities."[293] But the Court deferred to management's judgment that Myers's speech "was an act of insubordination which interfered with working relationships."[294] The Court cautioned that an employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relations is manifest before taking action."[295]

In contrast, the Supreme Court in *Kennedy* afforded no deference to the school district's judgment that allowing Kennedy to conduct a public display of his prayer of thanksgiving at the center of the football field could coerce players into similar activity.[296] The Court reached this

287. *See Kennedy*, 597 U.S. at 521–26.
288. *Id.* at 528–30.
289. *Id.*
290. *Id.* at 531–33.
291. Myers v. Connick, 507 F. Supp. 752, 758–59 (E.D. La. 1981), *aff'd*, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 461 U.S. 138 (1983).
292. *Connick*, 461 U.S. at 154.
293. *Id.* at 151.
294. *Id.*
295. *Id.* at 152.
296. As the dissenting opinion explains:

> The Court claims that the [School] District "never raised coercion concerns" simply because the District conceded that there was "no evidence that students [were] *directly* coerced to pray with Kennedy." The Court's suggestion that coercion must be "direc[t]" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory.

Kennedy v. Bremerton Sch. Dist., 597 U.S. 502, 574–75 (2022) (Sotomayor, J., dissenting) (alterations in original) (internal citations omitted) (criticizing the majority for insisting on evidence of direct coercion).

conclusion despite evidence that parents had expressed concern that their children went along with Kennedy's prayers to be able to feel a part of the team or out of concern that they might not get as much playing time if they did not participate.[297] Instead, the Court picked apart the school district's evidence, labeling it as hearsay and speculating that those feelings might have been engendered by the since-stopped locker room prayers or motivational speeches with religious references.[298] Thus, the judicial respect for managerial judgments that the *Connick* Court found vital to enable public employers to manage their workforces appears to have been obliterated by the Court's analysis in *Kennedy*.

But what if Coach Kennedy were Islamic, or Jewish, or some other minority or politically marginalized religion? Would the Court have rejected the lower courts' findings that the coach's prayer sessions at the fifty-yard line were disruptive? Would the Court have found that a football coach who asked his majority Christian students to join him in an Islamic or Jewish prayer said in Arabic or Hebrew was not coercive? Taken at face-value, this case should treat all prayer and religious beliefs the same. But the theory is unlikely to match reality especially in a post-October 7 world[299] where Islamophobia[300] and antisemitism[301] has increased significantly. The rise of hate crimes against these minority religions means that the chance for disruption during prayer is heightened. While the Supreme Court—unlike the lower courts—chose to ignore the disruptive, dangerous, and coercive aspects of Coach Kennedy's prayer, courts are unlikely to ignore those aspects of minority-religious prayer.

IV. PUBLIC EMPLOYER MANAGERIAL AUTHORITY AFTER *JANUS* AND *KENNEDY*

As discussed in Part I, in the post-right-privilege legal world, the Court struck a balance between First Amendment rights and public employers' need to manage their workforces. Thereafter, as discussed in Parts

297. *See* Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1229 (W.D. Wash. 2020).

298. *Kennedy*, 597 U.S. at 538–40.

299. October 7th refers to the date on which Hamas launched a surprise attack on Israel, resulting in over 1,000 deaths, and then took 240 hostages, resulting in a protracted Israel–Hamas conflict in which over 20,000 Palestinians have been killed to date. *See* Patrick Kingsley & Isabel Kershner, *Here Is What to Know About the Surprise Attack on Israel*, N.Y. TIMES (Oct. 7, 2023), https://www.nytimes.com/2023/10/07/world/middleeast/israel-gaza-attack.html; *see also* Shira Rubin & Loveday Morris, *How Hamas Broke Through Israel's Border Defenses During Oct. 7 Attack*, WASH. POST, (Oct. 27, 2023, 12:19 PM), https://www.washingtonpost.com/world/2023/10/27/hamas-attack-israel-october-7-hostages/.

300. *See* COUNCIL ON AMERICAN-ISLAMIC RELATIONS, 2024 CIVIL RIGHTS REPORT: FATAL: THE RESURGENCE OF ANTI-MUSLIM HATE (2024), https://islamophobia.org/civil-rights-reports/2024-civil-rights-report-fatal-the-resurgence-of-anti-muslim-hate/.

301. *See Antisemitism Soars After October 7th*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/stand-with-israel (last visited Apr. 23, 2024); *US Antisemitism Up 337% Since October 7 in All-Time Record, ADL Says*, THE TIMES OF ISRAEL (Dec. 12, 2023), https://www.timesofisrael.com/us-antisemitism-up-337-since-october-7-in-all-time-record-adl-says/; Krystina Shveda, *Antisemitic Incidents in the US Are at the Highest Level Recorded Since the 1970s*, CNN (Mar. 23, 2023), https://www.cnn.com/2023/03/23/us/antisemitism-report-unprecedented-rise-dg/index.html.

II and III, the Court, in *Janus* and *Kennedy*, has significantly modified that balance in the following ways:

(1) Taking the Court at its word,[302] it has greatly narrowed the categorical exclusion from First Amendment protection for speech as an employee, effectively confining *Garcetti* to its facts;

(2) The Court has excepted from the *Pickering–Connick* analysis claims of freedom from compelled speech;

(3) The Court has excepted from the *Pickering–Connick* analysis claims under the First Amendment's Free Exercise of Religion Clause;

(4) The Court has significantly expanded the category of speech that constitutes a matter of public concern; and

(5) The Court has greatly reduced the deference to public employers' managerial judgments in weighing employer interests in the efficient delivery of public services.

We examine each in turn.

(1) Narrowing Categorical Exclusions from Constitutional Protection

Prior to *Janus* and *Kennedy*, many lower courts classified employee speech as either citizen speech or employee speech.[303] These courts defined the latter category broadly, resulting in large-scale categorical exclusions from constitutional protection against adverse employment action.[304]

Janus and *Kennedy* make clear that the *Garcetti* exclusion from constitutional protection of employee speech is significantly narrower.[305] It applies only when employee speech is required to fulfill employee job responsibilities, because, in the Court's view, it is only in those circumstances that the employee speaks as a government representative.[306] In other words, it is in those circumstances that the employee's speech is the speech of the government employer.[307]

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302. As we discuss, particularly in the conclusion, we may not be able to take the Court at its word. It is possible that the Court is merely creating different analyses for speech it likes, e.g., religious speech, and speech it does not like, e.g., labor union speech.

303. *See supra* Section I.C.

304. *See supra* Section I.C.

305. *See supra* Parts II & III.

306. *See Kennedy*, 597 U.S. at 530 ("We find it unlikely that Mr. Kennedy was fulfilling a [job] responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech.").

307. *See id.* ("Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach.").

When Ceballos, the plaintiff in *Garcetti*, wrote his disposition memorandum recommending that a criminal case be dismissed because of false information contained in the affidavit used to obtain the search warrant, he was fulfilling his job responsibilities as a calendar deputy in the Los Angeles District Attorney's Office.[308] According to the Court, Garcetti, as Ceballos's ultimate supervisor, had to be free to evaluate Ceballos's speech to be able to evaluate Ceballos's job performance.[309] Garcetti had to be free to reward good job performance and to take action to correct poor job performance.[310] Consequently, a categorical exclusion from constitutional protection against adverse employment action in such circumstances is entirely appropriate and remains available after *Janus* and *Kennedy*.

What is no longer available is the broad reading some lower courts gave to the *Garcetti* exclusion, categorically excluding from constitutional protection any employee speech that concerned their jobs or touched on their job responsibilities.[311] The requirement that an employee establish a citizen speech analog to qualify for potential protection simply does not survive. Narrowing the *Garcetti* exclusion should not impede public employers' ability to manage their workforces. It leaves public employers free to evaluate employee job performance where the job requires employees to speak on their employers' behalf. To the extent that other employee speech must be considered in workforce management, the employer's interests should be protected if the *Pickering–Connick* balancing analysis is applied appropriately. However, *Janus* and *Kennedy* have made significant alterations to that line of analysis that significantly erode public employer managerial authority. We turn to those in the next Sections.

(2) Exempting Compelled Speech from the *Pickering–Connick* Analysis

Janus considered the requirement that nonmember, union-represented employees pay their pro rata share of the costs of their representation as a case of compelled speech.[312] The Court subjected the requirement to an exacting scrutiny standard and held that it failed to meet that standard.[313] The Court also made clear that the traditional *Pickering–Connick* analysis did not apply to cases of compelled speech.[314]

Cases of public employers compelling their employees to speak are not common. But, when they do arise, the Court's exclusion of such cases

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308. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

309. *See id.* at 422–23 ("Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.").

310. *See id.* at 423 ("If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.").

311. *See supra* Parts II & III.

312. *Janus*, 585 U.S. at 914–17.

313. *Id.*

314. *Id.* at 907–10.

from the *Pickering–Connick* analysis represents a significant erosion of public employers' authority to manage their workforces.

Illustrative is *Lewis v. Cowen*, the case involving the chief of the Connecticut Lottery Unit discussed earlier. The employer fired Lewis because he refused to present to the State's Gambling Policy Board and advocate for changes to the Lotto game that an outside contractor had recommended.[315] In rejecting Lewis's First Amendment claim, the court deferred to his superiors' managerial judgment that Lewis's refusal to speak was disruptive, observing that their "predictions of disruption were not unreasonable."[316] This was an appropriate application of the *Pickering–Connick* balancing analysis which at the time deferred to management's reasonable judgments.

Under *Janus*, however, it is likely that management's judgment would be disregarded, and Lewis would win. That is because this is a case of compelled speech; therefore, the discharge would be subject to exacting scrutiny, and it is unlikely that the state could meet that standard.[317] Indeed, the state would have to make a strong showing that no other individual could present the proposals to the Board and advocate for them effectively.

The erosion of employer managerial authority resulting from *Janus*'s exclusion of resistance to compelled speech from the *Pickering–Connick* framework should be limited by *Garcetti*. For example, elementary and high school teachers who refuse to teach part of a required curriculum should still have no constitutional recourse against adverse employment actions because the speech compelled is part of their required job duties and their speech is effectively government speech. Their employer, although a state actor, must still be able to evaluate their job performance and act accordingly. Failure to teach the entire required curriculum is poor job performance regardless of whether it results from ideological or religious objection, or poor classroom management and allocation of time.[318]

But is this really where the Court is headed? Imagine a high school that teaches Advanced Placement (AP) Biology, which has a unit on genetics and sex determination. That unit skirts the question of whether sex is binary or nonbinary by using the following language: XX-paired chromosomes create ovum producers whereas XY-paired chromosomes create sperm producers. The curriculum further describes anything that does not fall into the XX-XY paradigm, such as Klinefelter's syndrome or Turner

315. Lewis v. Cowen, 165 F.3d 154, 157 (2d Cir. 1999).

316. *Id.* at 164.

317. Having said that, scholars have disagreed about the nature of constitutional scrutiny. *See, e.g.*, Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 345 (2022).

318. *But see* Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705 (Va. 2023) (holding that a school district violated a high school teacher's state constitutional rights to free speech and free exercise of religion when it fired him for refusing to use a student's preferred pronouns in addressing that student where the use of those pronouns violated the teacher's religious beliefs and the teacher proposed an alternative practice that did not interfere with the teacher's job duties—referring to all students using their full names and not using pronouns at all.)

syndrome, as a sex development disorder.[319] The school has two biology teachers. One teaches the students that biological sex is binary. The other teaches that sex is nonbinary. Both claim that their beliefs are grounded in science. Moreover, the one who believes that sex is binary also personally believes that God made only two sexes—males and females. The district tells the teachers that they may not discuss the question whether sex is binary or nonbinary but must instead talk in terms of sperm and ovum producers and sex development disorders. Both disobey. Both classes have dissenting students who are mildly disruptive in declaring their opposition to the teachers' views. Can the school discipline either or both teachers?

The teachers argue that under *Janus*, they have a right to be free from compelled speech. They reinforce that argument by citing *303 Creative, LLC v. Elenis*,[320] where the Court doubled down on its compelled speech doctrine and, for the first time "grant[ed] a business open to the public a constitutional right to refuse to serve members of a protected class."[321] 303 Creative and its sole owner sought to expand its website design business to offer services creating wedding websites but wanted to restrict that business to opposite-sex couples.[322] Under Colorado law, the business was a public accommodation and its restriction of its wedding website business to opposite-sex couples illegally discriminated on the basis of sexual orientation.[323] The Court, in an opinion by Justice Gorsuch, held that the Colorado law unconstitutionally "compelled [them] to create speech [they do] not believe."[324]

The teachers' argument should fail: under *Pickering–Connick–Garcetti*, the school district could likely discipline the teachers. Although the speech is a matter of public concern, thereby overcoming the *Connick* hurdle, the speech is expressed pursuant to the teachers' job duties. *Janus* did not hold that *Garcetti* does not apply in cases of compelled speech. Although *Janus* limited *Garcetti* to cases where the employee is serving as the voice of the employer, a teacher's delivery of required curriculum is a striking example of an employee serving as the employer's voice.[325]

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319. Klinefelter syndrome is a genetic condition whereby a person assigned male at birth has XXY chromosomes. Such a person often produces less testosterone than those with XY chromosomes and therefore may have smaller testes, smaller penis, lower sperm production, breast growth, increased fat around the belly, and infertility. *See What Are Common Symptoms of Klinefelter Syndrome (KS)?*, NIH, EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH AND HUM. DEV., https://www.nichd.nih.gov/health/topics/klinefelter/conditioninfo/symptoms (last visited Jan. 24, 2023). Turner syndrome is a genetic condition whereby a person assigned female at birth has a single X chromosome. *See Turner Syndrome*, NIH, EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH AND HUM. DEV., https://www.nichd.nih.gov/health/topics/turner (last visited Jan. 24, 2023).

320. 143 S. Ct. 2298 (2023).

321. *Id.* at 2322 (Sotomayor, J., dissenting).

322. *Id.* at 2308 (majority opinion).

323. *Id.* at 2308−10.

324. *Id.* at 2307−08, 2321−22.

325. But even if the teachers could overcome the *Garcetti* hurdle, courts would likely weigh more heavily the school district's managerial interests in maintaining order and controlling curriculum than what would have been perceived as the teacher's relatively weak constitutional speech rights to

But consider a police department where several officers have been recalled to the Army Reserves and deployed. The police chief orders all other officers to wear American flag pins in the lapels of their uniforms as a show of solidarity with their deployed colleagues. The chief distributes the pins to the force at roll call and instructs them to wear them every day while on duty until their colleagues return from their deployments. Under *Janus* and *303 Creative*, this is a clear case of compelled speech. The question under *Garcetti*, as interpreted in *Lane*, *Janus*, and *Kennedy*, is whether the compelled speech is part of the officer's employment duties. It likely is not as it has nothing to do with the officer's job responsibilities. The First Amendment would appear to preclude the police chief from commandeering the bodies of all police officers to trumpet a message that the chief wishes to convey.

Next, consider a police officer who covers up the department logo, "We Serve and Protect," on the officer's squad car because the officer believes it conveys a distortion of current reality. Such a case would fall squarely in the middle between the teacher's compelled delivery of curriculum and the officer's compelled wearing of the lapel pin. To the officer, the city is compelling the use of the officer's squad car as a "mobile billboard" for an ideological message with which the officer disagrees.[326] To the city, however, the message is designed to foster citizen appreciation of, respect for, and cooperation with law enforcement, and fostering positive relationships with the citizenry is an important part of an officer's job. Consequently, when the officer drives the squad car with the motto easily seen, the officer is speaking as the city and not as an individual. One cannot predict with confidence how the courts would resolve the competing claims.[327]

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express dissent. *See, e.g.*, Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1066, 1074 (3d Cir. 1990) (*Bradley II*) (explaining that "teachers have no constitutional right to use Learnball [classroom management technique] in the classroom, but do have a First Amendment right to advocate the method and to criticize school officials") (citing *Bradley I*); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) (*Bradley I*) (explaining that "no court has found that [public-school] teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates").

326. *Cf.* Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977) (holding that New Hampshire may not constitutionally prevent citizens from covering up the state motto, "Live Free or Die," on license plates on their car). *Wooley* does not completely control our hypothetical as in *Wooley* the state was commanding the use of the Maynard's private property, their car, to disseminate its message whereas in the hypothetical, the city owns the squad car.

327. Another way the Court could resolve this case might be to decide that no one could possibly believe that the message on the police car was the officers' speech; they would instead view it as the police department's speech. *See id.* at 705, 713, 717 (the state cannot constitutionally compel an individual "to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public" and holding that the state could not punish an individual for covering the state motto "Live Free or Die" on his license plate). On the other hand, the Virginia Supreme Court in *Vlaming* held that the school district could not constitutionally require a high school French teacher to use a student's preferred pronouns in addressing that student where the use of those pronouns violated the teacher's religious beliefs and the teacher proposed an alternative of referring to all students using their full names and not using pronouns at all. *See Vlaming*, 895 S.E.2d.

Along these lines, consider an assistant football coach at Beaverton High School in Beaverton, Oregon, where Nike is headquartered. Assume that Nike, as part of its community involvement initiatives, has provided significant financial support to the high school and, in particular, its athletic programs. All coaches are furnished with jerseys and hats containing the Nike swoosh emblem and are required to wear them during games. The assistant coach, however, covers the swoosh with tape, condemning Nike as a "woke" corporation.[328] The coach contends that forcing staff to wear the swoosh is compelled speech in violation of the First Amendment. Unlike the patrol car, the swoosh is Nike's logo, not the employer's motto. Wearing it would seem to have nothing to do with performance as an assistant football coach. But unlike the flag lapel pin, coaches are required to display the swoosh not to convey a personal message of the head manager (police chief or athletic director) but to foster positive relations with a very significant donor.

These hypotheticals demonstrate that the Court's most recent cases protecting compelled speech have significantly complicated the *Pickering–Connick–Garcetti* line of cases. In one sense, this complication seems to broaden speech protection. But at what cost? The clash appears to be at the world-view level. Absolute protection of compelled speech over union solidarity values the individual over the collective regardless of the equities. Union dues are unpopular so maybe that problem is not so clear in *Janus*. But love and marriage are fundamental and popular. The Court's latest jurisprudence allows individual voices, including voices of hate, not simply to dissent[329] but to harm and divide communities. If the framework now allows teachers with competing personal or religious objections to decide whether to teach sex or gender as binary or nonbinary—regardless of state educational standards—students become the educational losers. Disputes such as these, which we agree are exceedingly important, are much better fought at the democratic legislative or regulatory level rather than allowing one individual's preferences to veto curriculum. Moreover, the Court's compelled speech doctrine under *Janus* and *303 Creative* fails to consider the nuances of context that the *Pickering* balance test allows.

(3) Excepting Free Exercise of Religion Claims from the *Pickering–Connick* Analysis

The Court's exemption of religious freedom claims from the *Pickering–Connick* analysis creates a threat to public employer managerial authority that is far greater than the threat from the Court's exemption of

328. *See* Brendan Kuty, *Yankees Legend David Wells Slams 'Woke' Culture in Rant Against Nike, Bud Light, MLB*, THE ATHLETIC (Sept. 9, 2023), https://theathletic.com/4847490/2023/09/09/yankees-david-wells-nike-mlb-rant/.

329. Dissent is an important First Amendment value and one which the authors whole-heartedly embrace. For an interpretation of the First Amendment as primarily a tool for protecting unpopular or dissenting speech, see STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 91 (1999).

compelled speech claims. The *Kennedy* decision itself illustrates the severity of the threat to managerial authority. Kennedy's defiance of his employer's directives on several occasions were acts of gross insubordination.[330] Kennedy aggravated that insubordination when he made a public spectacle of his defiance—causing the spectators to rush the field to join him in prayer, knocking over band members and cheerleaders—and when he refused his employer's invitation to engage in an interactive process to find ways to accommodate his religious beliefs with maintaining order at football games.[331] But the Court majority, which ignored the physical disruptions that resulted from his postgame public prayer, ostensibly held that the Free Exercise Clause privileged Kennedy's gross insubordination. It therefore effectively gutted the school district's authority to manage its personnel or prevent a dangerous situation from escalating.[332]

Does this mean that a teacher with religious objections to evolution may refuse to teach it in science class?[333] Probably not, because in delivering curriculum the teacher is speaking as the government's agent, and *Garcetti* should still control. But what about a group of high school teachers who decide to offer after-school voluntary preparation classes for the SATs and ACTs? They do this without additional compensation and on their own initiative, but the school administration allows them to use classrooms for the classes. One of the teachers begins each class with a prayer for success on the upcoming exams. That teacher tells students that they

330. "Insubordination applies to employees or their actions and means that they are in opposition to and in defiance of established authority. It involves such relatively simple things as a direct refusal to obey an order to the highly complex incidents of abusive language, violence, and health and safety." Stanley J. Schwartz, *Insubordination: A Cardinal Sin in the Workplace*, 44 LAB. L.J. 765, 766–67 (1993). "The firmly established principle of the right of management to direct the workforce is clear and makes insubordinate employees subject to drastic disciplinary action if they violate the rules established to effectuate this principle." *Id.* at 768. Here, we characterize Kennedy's insubordination as gross or aggravated. Not only did he disobey an instruction to refrain from creating a dangerous situation for the players, the coaches, the students, and the fans, but he also snubbed his employer's invitation to engage in an interactive process to find a mutually acceptable accommodation of his religious practices.

331. *See* Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1230–31 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *rev'd*, 597 U.S. 507 (2022), and *vacated and remanded*, 43 F.4th 1020 (9th Cir. 2022).

332. To get around this problem, the Court finds alternative facts not supported by the record. While this could mitigate the potentially broad holding of *Kennedy*—religious speech privileges insubordination even in the face of dangerous disruption to the workplace—it creates a different problem. The Court's flagrant disregard for the lower court's factual findings suggests that reviewing courts can ignore facts to obtain the desired result. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 545−47 (2022) (Sotomayor, J., dissenting).

333. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 580−82 (1987) (holding that Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in the Public School Instruction Act, which prohibits "teaching . . . evolution in public schools unless accompanied by instruction in 'creation science,'" facially violates the Establishment Clause and is therefore unconstitutional). Significantly, the Court in *Edwards* struck down Louisiana's Creationism Act under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a case which the Court has now overruled. *See Kennedy*, 597 U.S. at 534 (explaining that "this Court long ago abandoned *Lemon* and its endorsement test offshoot," and "instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings'") (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081−82 (2019)) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)). An analysis of how *Edwards* might come out today is beyond the reach of this paper, but it does demonstrate the view that *Kennedy* may very well be far reaching.

may participate in the prayer or not at their election and that they are free to attend a different teacher's class instead. May the school administration direct the teacher to cease this activity or confine it to silent prayer not shared with the students?[334]

In light of *Kennedy*, there is a good chance that a court would find that the administrative directive violated the teacher's free exercise rights. The case for finding a violation is arguably stronger than in *Kennedy*, where Kennedy's prayer occurred while he was still on duty, although during a period of time when coaches could address small personal matters such as checking their phones or visiting with people in the stands. Here, the prayer occurs on the teacher's own time—in other words, the teacher is not on the clock. School administration concerns that the teacher's prayer may pressure students to join are likely to meet judicial hostility similar to the *Kennedy* Court's hostility to the Bremerton School District's similar argument, i.e., it would be rejected as unsupported speculation that cannot justify infringing the teacher's Free Exercise rights. Similar school administration concerns that the teacher's prayers at the start of the sessions may undermine the teacher's performance in the classroom because some parents may be concerned that the teacher will be biased against students who do not share the teacher's religious beliefs will likely meet a similar fate. After *Kennedy*, there is not likely to be any judicial deference shown to reasonable judgments made by management. An even closer case—a public school teacher holds prayer immediately before or immediately after the bell rings for the next period—would plausibly be permitted under *Kennedy* as well, notwithstanding reasonable administrative and parental concerns about coercion.

Next, consider a school district that allows teachers to decorate their desks with personal items. Teachers commonly display family pictures and mementos from vacation trips, but one teacher displays a picture of Jesus Christ with a quote from the Bible. Over the course of the day, many students interact with the teacher at the teacher's desk.[335] Just as the *Kennedy* Court found that the school district's directive to Kennedy not to pray at the fifty-yard line was motivated by hostility towards religion by comparing it to the district's allowance of coaches to check their phones and visit with friends in the stands, so too it is likely that a court will find a directive to the teacher to remove or relocate the Jesus picture and Bible quote motivated by hostility toward religion by comparing it to the district's allowing pictures of family and mementos from vacation trips. The employer's reasonable judgment that a religious display in a location that students frequent could impair the district's educational mission is likely to receive no deference by a court following *Kennedy*.

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334. This problem is based on a similar hypothetical found in Nicki Bazer & Jenny Lee, *Praying at the 50-Yard Line: How Will* Kennedy v. Bremerton *Impact Public Schools?*, 39 ILL. PUB. EMP. RELS. REP., Fall 2022, at 1, 17.

335. This scenario is also drawn from Bazer & Lee, *supra* note 334.

But the erosion of managerial authority is not confined to public education. Consider *Wilson v. U.S. West Communications*,[336] the case on which we based our opening hypothetical. Christine Wilson worked at a U.S. West facility that had no dress code.[337] She claimed that she had made a promise to God that until there was an end to abortion, she would be a living witness by wearing a particular anti-abortion button that contained a picture of an eighteen-to-twenty-week old fetus.[338] Coworkers found the button's picture upsetting and U.S. West offered Wilson several accommodations of her religious practice: to wear the button only when in her cubicle but not when moving around the office; to cover the button while at work; or to wear a different anti-abortion button that did not have such a provocative picture.[339] U.S. West told Wilson that she would be sent home as long as she wore anything depicting a fetus.[340] When Wilson persisted in wearing the button, U.S. West sent her home, and after three such days discharged her for three consecutive unexcused absences.[341]

Wilson argued that U.S. West violated Title VII of the 1964 Civil Rights Act by not reasonably accommodating her religious beliefs and practices.[342] Wilson argued that U.S. West should have accommodated her beliefs by instructing her coworkers to ignore her button and perform their jobs.[343] The court rejected the argument and held that Wilson had no Title VII claim.[344]

Because U.S. West was not a state actor, the Free Exercise Clause did not apply to it. But what if Wilson worked in the office of a public employer?[345] Under the *Pickering–Connick* analysis, courts generally defer to an employer's judgment that an employee's speech poses an unacceptable risk of causing disruption in the workplace.[346] But *Kennedy* exempted

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336. 58 F.3d 1337 (8th Cir. 1995).
337. *Id.* at 1339.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* at 1340.
342. *Id.* at 1338, 1340.
343. *Id.* at 1340.
344. *Id.* at 1342. The Supreme Court's recent decision in *Groff v. DeJoy* may call into question the Eighth Circuit's holding that Wilson had no Title VII claim. There, the Court held that Title VII requires the United States Postal Service to accommodate a postal worker's request to forgo Sunday shifts, even if those shifts create additional and uneven burdens for other workers unless the employer can show on remand that "granting [the] accommodation would result in substantial increased costs in relation to the conduct of its particular business"—a burden that is not likely to be met. *See* Groff v. DeJoy, 600 U.S. 447, 455, 470, 473 (2023).
345. *Cf.* Berry v. Dep't of Soc. Servs., 447 F.3d 642, 646, 650–51 (9th Cir. 2006) (applying the *Pickering* balancing test to find that the agency could reasonably prohibit an employee from discussing his religious beliefs with customers even though the employee's religious beliefs require him to share those beliefs broadly with others). This case is called into doubt after *Kennedy*.
346. *See supra* Section I.B. and accompanying text; *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968) (speech protected where the employer could not show that the speech impaired the teacher's classroom performance or otherwise interfered with the school's regular operations); Connick v. Myers, 461 U.S. 138, 151–52 (1983) (explaining that "a wide degree of deference to the employer's judgment is appropriate" where "close working relationships are essential to fulfilling

Free Exercise claims from the *Pickering–Connick* analysis, and the employer's judgment that wearing a button with a picture of a fetus on it is likely to disrupt the workplace is not likely to get any deference from courts post-*Kennedy*. When it comes to employee Free Exercise claims, the *Kennedy* decision significantly undermines public employer personnel management authority.

(4) The Expansion of Speech Considered To Be on a Matter of Public Concern

Under *Connick*, most lower courts held most public employee speech concerning wages and working conditions not to be speech on a matter of public concern and categorically excluded that speech from First Amendment protection against adverse employment action.[347] But in *Janus*, the Court regarded a broad range of terms and conditions of employment as being matters of public concern.[348] It is difficult to see how *Connick*'s exclusion of most of Myers's questionnaire from constitutional protection can survive *Janus*, particularly her question about transfer policy, a subject that the *Janus* Court specifically mentioned as being a matter of public concern.[349] Similarly, it is difficult to see how the District of Columbia Circuit Court's decision in *Murray v. Gardner*,[350] which held unprotected as not involving a matter of public concern an FBI special agent's speech concerning how agents to be furloughed would be selected, could survive *Janus*.[351] The *Janus* Court specifically identified questions of public employee job security as matters of public concern, and after *Janus*, only speech related to the specific working conditions of a specific employee, as opposed to personnel policies generally, remain outside the scope of speech on a matter of public concern.[352]

An expanded scope of what constitutes speech on a matter of public concern should not, in and of itself, pose a threat to public employer managerial authority.[353] A finding that an employee spoke on a matter of public concern does not guarantee employee victory. It merely moves the issue along to the balancing of the employee's free speech interests against the employer's interests in managing its workforce to enable it to deliver public services effectively and efficiently. As explored in the next Section,

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public responsibilities" and that it is unnecessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action").

347. *See supra* Section I.B. and accompanying text; *see also Connick*, 461 U.S. at 138. *See generally* Lesczynski, *supra* note 159 and accompanying text.

348. *See Janus*, 585 U.S. at 914–15 ("Even union speech in the handling of grievances may be of substantial public importance and may be directed at the 'public square' . . . In short, the union speech at issue in this case is overwhelmingly of substantial public concern.").

349. *Id.* at 908.

350. *See supra* Part. I.C. and accompanying text.

351. Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984).

352. *See supra* notes 226−31, 235−36 and accompanying text.

353. It may, however, make it more difficult for public employers to obtain summary judgment in constitutional litigation.

after *Kennedy* the balance has shifted dramatically toward the employee with little concern for the employer's managerial authority.

(5) Reduced Deference to Employer Managerial Judgments

In *Connick*, the lower courts had held that Myers's questionnaire was protected because Connick failed to show that the questionnaire had any adverse effects on workplace discipline.[354] The Supreme Court disagreed, opining that management need not wait for negative effects to actually occur and that its reasonable judgments as to the potential for those negative effects were entitled to broad deference.[355] In contrast, in *Kennedy*, the Court struck the balance in favor of Kennedy's free speech interests, even though his speech was actually disruptive in a potentially dangerous way.[356] The *Kennedy* Court's analysis significantly undermines public employer managerial authority in several ways: (1) it sanctions blatant employee insubordination; (2) it disrespects employer judgment that the employee speech may impede the effective delivery of public services; (3) it places a nearly impossible burden on the employer to prove the validity of its judgment; and (4) it ignores facts that vindicate that judgment and treats other facts antagonistically.

Kennedy's defiance of his employer's directive to confine his religious activities to non-demonstrative acts when students were present was blatant. It was also aggravated by his public media campaign which turned his fifty-yard line prayer into a public spectacle that resulted in a crowd overrunning cheerleaders and band members.[357] It was also aggravated by his snubbing of his employer's invitation to engage in an interactive process concerning accommodation of his religious beliefs and practices.[358] But the Court privileged his insubordination on the ground that the directives that Kennedy defied unconstitutionally infringed his free exercise rights.[359] In doing so, the Court ignored a basic principle of employment relations: employees are expected to obey employer directives even when they believe such directives to be improper.[360] The common phrasing of this principle is "obey now and grieve later."[361] This principle recognizes the importance of obedience to the maintenance of workplace order.[362] It has a very narrow exception where compliance would pose a serious risk to health or safety, but absent such a threat, employee obedience is

354. *See* Connick v. Myers, 461 U.S. 138, 141−42 (1983).

355. *See supra* note 346 and accompanying text.

356. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543–44 (2022).

357. *See* Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1230 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *rev'd*, 597 U.S. 507 (2022), and *vacated and remanded*, 43 F.4th 1020 (9th Cir. 2022).

358. *Id.* at 1231.

359. *Kennedy*, 597 U.S. at 542–44.

360. *See* Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1242–43 (7th Cir. 1997) (noting the "time-honored principle of industrial relations that—with few exceptions—an employee must 'obey now and grieve later.'").

361. *Id.* at 1242; *see also* Schwartz, *supra* note 330, at 767.

362. *See Crider*, 130 F.3d at 1242.

expected—and legitimately so.[363] The Supreme Court itself has applied this principle outside the employment context, requiring individuals to obey court orders even though the orders may be constitutionally suspect.[364] The Court's disregard for this principle in *Kennedy* greatly undermines public employers' ability to maintain employee discipline—especially and ironically when such speech has the potential to cause harm.

Prior to *Kennedy*, courts tended to defer to reasonable employer judgments that employee speech posed unacceptable risks to workplace order and the ability to deliver public services effectively and efficiently. The *Kennedy* Court shredded such deference. Bremerton School District argued that its directives to Kennedy were necessary to prevent Kennedy from pressuring students to join his prayers.[365] The Court gave no deference to this facially reasonable managerial judgment, even though it was backed by complaints from parents that their children were joining Kennedy's prayers because they felt it necessary to be a part of the team and feared loss of playing time if they did not join.[366] The Court dismissed the complaints as hearsay and as resulting from Kennedy's since-ceased practice of locker room prayers and religiously inspired speeches rather than his prayers at the fifty-yard line.[367]

Additionally, the *Kennedy* majority failed to even mention the crowd rush to the field that ran over band members and cheerleaders. It similarly failed to mention Kennedy's snubbing the school district's invitation to Kennedy to engage in an interactive process to accommodate his religious beliefs.[368] The *Kennedy* decision thus invites courts to ignore facts that support the employer's judgment.

In light of the *Kennedy* Court's analysis, earlier decisions upholding reasonable public employer managerial judgments appear untenable. Recall *Weicherding v. Riegal*, where the Seventh Circuit upheld the discharge of a white corrections officer for attending and promoting at work a Ku Klux Klan rally and for chanting "weiss macht" (meaning "white power" in German) at that rally.[369] The officer's speech certainly involved matters of public concern, i.e. race relations. The officer argued that there was no evidence of any breakdown in prison security, but the court held such a showing unnecessary and deferred to the employer's reasonable judgment that the officer's speech posed an unacceptable risk to prison security where over 60% of the prisoners were Black or Hispanic and

363. *See, e.g.*, ELKOURI & ELKOURI, HOW ARBITRATION WORKS 16–35 (Kenneth May ed., 8th ed. 2016).

364. *See* Walker v. Birmingham, 388 U.S. 307, 320–21 (1967) (upholding the conviction of citizens for contempt of court when they defied an injunction even though the injunction and the ordinance that the injunction enforced may have been constitutionally suspect).

365. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 536 (2022).

366. Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1229 (W.D. Wash. 2020).

367. *See Kennedy*, 597 U.S. at 541.

368. Despite their omission from the Supreme Court opinion, these are all facts that are included in the district court decision. *See Kennedy*, 443 F. Supp. 3d at 1230–31.

369. Weicherding v. Riegel, 160 F.3d 1139, 1141, 1144 (7th Cir. 1998).

approximately 60% were convicted of violent crimes.[370] *Kennedy*, however, has rendered this approach untenable. To be consistent with the approach in *Kennedy*, a court will have to be skeptical, if not downright hostile, toward the employer's judgment, dismissing it as speculative and not supported by record evidence. Even if the employer is able to show increases in inmate misbehavior since the rally, to be consistent with *Kennedy*, a court will have to insist on precise evidence linking the increase to the officer's participation in the rally rather than myriad other factors that can lead to increases in inmate misbehavior. *Kennedy* has saddled the employer with a burden that is almost impossible to meet to sustain its reasonable commonsense managerial judgment.

A post-*Kennedy* decision further illustrates the erosion of public employer managerial authority. In *Dodge v. Evergreen School District*,[371] Dodge wore a "Make America Great Again" (MAGA) hat to teachers' in-service training sessions.[372] At the training, he took the hat off and rested it in plain view on his table.[373] A few other teachers complained and the principal directed him not to bring the hat to further trainings, implying that if he did, he would be subject to discipline.[374] The Ninth Circuit held that his First Amendment free speech claim survived the defendants' motion for summary judgment.[375] The court, in applying the *Pickering–Connick* balancing analysis found that there was no evidence that Dodge's display of the hat caused actual substantial disruption of school operations.[376]

There was substantial evidence in *Dodge* that the principal's directive was motivated by Dodge's political message and that the principal engaged in viewpoint discrimination.[377] But what if, instead, she would have barred all political and ideological paraphernalia from the training sessions? In light of the current high level of political polarization, such action would appear to be a reasonable management judgment to protect the training sessions from disruption. But under the approach in *Kennedy*, such action would be met with a high level of judicial skepticism. A court would likely demand evidence of actual disruption linked specifically to the presence of political paraphernalia at the training sessions.

The movement away from deference to employers' reasonable management judgments is aggravated by *Janus's* expansion of the scope of what constitutes speech on a matter of public concern. That expansion ensures that employer managerial judgments will be called into question in a wider range of cases. The next time a corrections officer attends a Ku

370. *Id.* at 1141, 1143–44.
371. 56 F.4th 767 (9th Cir. 2022).
372. *Id.* at 772–73.
373. *Id.* at 773.
374. *Id.* at 773–74.
375. *Id.* at 781.
376. *Id.* at 782–83.
377. *See id.* at 786–87.

Klux Klan rally, the warden may have to wait for a riot to break out before acting.

V. EASY CASES BECOME HARD CASES AFTER *JANUS* AND *KENNEDY*

Recall the original five hypotheticals.[378] We stated that in each case, the employer could likely discipline the public employee before the Court issued the *Janus*, *Kennedy*, and *303 Creative* decisions. Let's now review how analysis of the original five hypotheticals may differ from a world where those cases do not exist.

> (1) Public school science teachers instruct, under protest, students on scientific theories that conflict with their religious beliefs but during study hall tell students that these scientific theories are not fact and therefore should be carefully scrutinized.[379]

Before *Janus* and *Kennedy*, this hypothetical presented a straightforward analysis. Unlike university professors, public school teachers do not possess academic freedom.[380] Therefore, those teachers must obey the orders of their supervisors and the school board regarding how to conduct educational instruction.[381] After *Janus*, public school teachers could argue that, even if they had to teach to curriculum, they could not be compelled to refrain from giving their opinion during study hall. Moreover, after *Kennedy*, public school teachers could argue that the state is suppressing

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378. *See supra* Introduction, notes 18–22, & accompanying text.

379. *See, e.g.*, Selman v. Cobb Cnty. Sch. Dist., 449 F.3d 1320, 1320, 1324 (11th Cir. 2006) (holding the school board's policy of attaching stickers to biology textbooks unconstitutional, stating that "[t]his textbook contains material on evolution," describing "[e]volution [a]s a theory, not a fact, regarding the origin of living things," and encouraging students to approach "[t]his material . . . with an open mind, studied carefully, and critically considered"); Edwards v. Aguillard, 482 U.S. 578, 581–82 (1987) (holding that the state law—prohibiting public schools from teaching evolution unless supplemented with instruction in creation science—violated the Establishment Clause); Epperson v. Arkansas, 393 U.S. 97, 98–99 (1968) (determining that the state law—making it a crime for a state-funded school to teach human evolution—was unconstitutional); Scopes v. State, 289 S.W. 363, 363–64 (Tenn. 1927) (discussing the Scopes monkey trial in which a jury convicted John Scopes for teaching evolution in violation of Tennessee's anti-evolution law).

380. *But see* Brown v. Armenti, 247 F.3d 69, 74–75 (3d Cir. 2001) (explaining—in the context of a professor's refusal to change a grade—that "a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures" and further explaining that "the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught" because "grading is pedagogic"); Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) (explaining that the "First Amendment does not place restrictions on a public university's ability to control its curriculum," which "is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker"). This analysis appears to be at odds with what the Court says in *Kennedy*.

381. *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007) ("[T]he school system does not 'regulate' teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high-school teacher hired to explicate *Moby–Dick* in a literature class can't use *Cry, The Beloved Country* instead, even if Paton's book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.").

religious expression, which requires the school to defend under the more exacting standard of review.

> (2) A public school librarian who ignores the school district's order to pull LGBTQIA+ themed books from shelves (based on the claim that such content is offensive to common sense religious beliefs) because the librarian's religious denomination supports LGBTQIA+ causes.[382]

Under a traditional *Pickering–Connick* analysis, this is a clear case of unprotected insubordination.[383] In the post-*Janus*, post-*Kennedy* world, this too becomes a close call. Librarians may argue that compelling them to pull books may constitute compelled speech. Moreover, insubordination is no longer a sufficient reason to discharge an employee where the insubordination is based on the employees' sincerely held religious beliefs.

> (3) Doctors in public hospitals who tell female patients that it is impossible to become pregnant if they are "legitimately raped."[384]

This case might prove a bit easier to defend for the public hospital, but the doctors still have strong arguments. Here, the doctors could argue that requiring doctors to refrain from giving such advice to their patients unconstitutionally suppresses their speech. The hospital, in turn, would have a hard time defending that case, especially if that advice is grounded in religious belief. This is similar to cases where doctors tell their patients that certain types of birth control, such as intrauterine devices (IUDs), are abortifacients and therefore using them is tantamount to murder based on their sincere religious belief that life begins at conception.[385]

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382. *See Book Bans and Their Impact on Young People and Society*, ANTI-DEFAMATION LEAGUE: TOOLS & STRATEGIES (Jan. 12, 2022), https://www.adl.org/resources/tools-and-strategies/book-bans-and-their-impact-young-people-and-society; *see also Top 13 Most Challenged Books of 2022*, AM. LIBR. ASS'N: BANNED BOOKS, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 (last visited Mar. 13, 2024) (explaining that seven of 2022's top thirteen banned books have LGBTQIA+ content).

383. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (explaining that "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.").

384. *See* Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES (Aug. 20, 2012), https://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html (quoting Republican Rep. Todd Akin) ("It seems to be, first of all, from what I understand from doctors, it's really rare. If it's a legitimate rape, the female body has ways to try to shut the whole thing down.").

385. *See* Olga Khazan, *Here's Why Hobby Lobby Thinks IUDs Are Like Abortions*, THE ATL. (Mar. 12, 2014), https://www.theatlantic.com/health/archive/2014/03/heres-why-hobby-lobby-thinks-iuds-are-like-abortions/284382/.

(4) Public hospital medical officials who refuse to be vaccinated based on their personal religious beliefs that vaccines are witchcraft.[386]

This hypothetical is a variant on the previous two hypotheticals, but the hospital might have a more compelling interest—to ensure public health, particularly the health of its patients. But, after *Kennedy*, a court may scrutinize that rationale strictly rather than defer to the hospital's reasonable judgment. A court might ask whether the officials have any significant patient contact and, if they do, whether that contact could be restricted. A court might also ask whether there are less restrictive means available to ensure patient health, such as frequent testing and requiring the unvaccinated officials to wear masks.

(5) Police officers who treat certain classes of people more aggressively than others based on the officers' religious beliefs, honed during their pastors' sermons, that certain races are inherently more prone to criminality than other races.[387]

This might still be an easy case, even after *Janus* and *Kennedy*. Sincerely held religious beliefs that allow the state to treat one race differently than another would likely run afoul of the Equal Protection Clause. This sets up a conflict between the First Amendment rights of the police officers and the Fourteenth Amendment rights of the victims. This conflict could dissipate if the police department were to punish the officers not for their speech but for their conduct.

CONCLUSION

In this Article, we have shown that the privilege doctrine unfairly eliminated constitutional rights from any person who served in government. We have further suggested that the late-twentieth-century ad hoc balancing of public employee speech against public employer managerial interests had a promising start in *Pickering*, but employee protection was significantly watered down by categorical exclusions for speech not on matters of public concern and speech uttered as an employee rather than as a citizen, particularly as lower courts interpreted these exclusions expansively. But the Court's latest attempt to work out the appropriate approach to constitutional rights in the public workplace has resulted in privileging religious speech even at the expense of safety and suppressing

386. *See* Emily McFarlan Miller, *Why 'Sorcery' Was the Fastest-Growing Search Term on Bible Gateway in 2021*, RELIGION NEWS SERV. (Dec. 2, 2021), https://religionnews.com/2021/12/02/why-sorcery-was-the-fastest-growing-search-term-on-bible-gateway-in-2021/ (discussing the connection between biblical passages and some personal religious beliefs among Christians that vaccines are the Devil's work).

387. *See* J.D. Durkin, *CNN Panel Explodes Over Claim That 'Black People Are Prone to Criminality*,*'* MEDIAITE (July 11, 2016, 12:25 PM), https://www.mediaite.com/online/cnn-panel-explodes-over-claim-that-black-people-are-prone-to-criminality/.

labor speech by characterizing it—at least in the context of union dues—as compelled speech unworthy of constitutional protection.

Notwithstanding our analysis that the Court's recent cases significantly weaken public employers' managerial authority, it is possible that if and when the Court's analysis is legally tested, the Court will carve out an exception for hybrid claims—those involving expression that is protected under both the Free Speech and Free Exercise Clauses—and continue to find ways to suppress disfavored speech, such as labor speech.[388] Given that speech can often be characterized as free expression, this approach would allow public employees to ignore public-employer managerial orders and trample on other constitutional rights in the name of religious freedom. We have already seen what this Court has done in its two most recent religion cases. In *303 Creative*, the Court, reminiscent of *Janus*, held that the First Amendment prohibits states from compelling a wedding website designer to create website content adverse to her beliefs—in this case "her belief that marriage should be reserved to unions between one man and one woman."[389]

These latest constitutional cases—*Janus*, *Kennedy*, and *303 Creative*—show that this Court is not tethered to stare decisis in cases where it disagrees with prior case law. What we do not know is whether this recent jurisprudence is strictly result-oriented, elevating speech to which the justices are favorably disposed (e.g., religious speech) while suppressing speech they dislike (e.g., union speech) or whether they will apply more generally to curtail employer managerial authority further. Either way, the Court has significantly undermined the authority of public employers to

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388. The idea of hybrid rights claims was first raised by Justice Scalia in Emp. Div. v. Smith, 494 U.S. 872, 882 (1990) (noting that hybrid claims involve cases that present free exercise claims in conjunction with another constitutional claim such as under the Free Speech Clause). This aspect of Smith has been highly criticized. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121–22, 1143 n.147 & 150 (1990) (criticizing Smith's hybrid analysis and explaining that a legal realist would say that "the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously" because it is incoherent). Consider that constitutional claims can often be turned into a free exercise claim—"my religion does not permit me to do X." Yet Justice Gorsuch appears to echo this theory when he said: "That the First Amendment doubly protects religious speech is no accident." Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523 (2022). Justice Gorsuch then doubles down on this concept in his conclusion:

> Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims.

Id. at 543–44. The dissent picks up on Justice Gorsuch's characterization stating that the "narrative noticeably (and improperly) sets the Establishment Clause to the side." *Id.* at 567 (Sotomayor, J., dissenting). The dissent provides a different and more nuanced conception of the First Amendment whereby the various clauses protect rights in divergent ways that do not allow the government to single out religious speech. *Id.* at 567–68.

389. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 580, 588–89 (2023).

manage their workforces, often at the expense of the rights of other workers or members of the workplace community.[390]

390. *See generally* Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 836, 858–59 (2020); Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1388–89 (2020).