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Michael Fischl
University of Connecticut School of Law

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COMMENTARY

LABOR, MANAGEMENT, AND THE FIRST AMENDMENT: WHOSE RIGHTS ARE THESE, ANYWAY?

Richard Michael Fischl*

While I was working as an attorney for the National Labor Relations Board, I once had to call an employer who had just fired his lawyer for losing his case before the agency. I needed to find out who would be representing him in the enforcement proceedings that would follow. The moment I reached him, I tried to give him his Miranda warnings ("I'm from the government, and I'm not here to help you"), but he was not going to pass up the opportunity to give me an earful, now that he had his oppressor on the phone. The Board had ordered him to reinstate an employee whom he had discharged for union organizing, and he strenuously objected that this was an illegitimate interference with his right to run his business the way he wanted. "If that's not unconstitutional," he said of the Board's decision, "I don't know what is. And I'm going to take this case to the court of appeals; I'll take it to the Supreme Court; why, I'll even take it to Sixty Minutes, if I have to."

In the circumstances, I was not surprised that this fellow thought that Sixty Minutes was a higher authority than the Supreme Court. But I did find it striking at the time that he put his objection to the Board's conduct in terms of the Constitution. Labor lawyers—especially Labor Board lawyers—tend to focus almost exclusively upon statutory and evidentiary issues; apart from an occasional due process claim, we are seldom required to confront the Constitution. (To most government lawyers, in any event, a due process claim is the last refuge of the guilty-as-hell.)

But the employer's ingenuous remark reminded me of a long-standing tradition in American culture: recall de Tocqueville's famous dictum that all political controversies eventually reassert themselves...

* Associate Professor, University of Miami School of Law. An earlier version of this paper was presented in December 1987 as part of the University of Miami School of Law Faculty Lecture Series, Bicentennial Reflections on the Constitution. Many thanks to Craig Becker, Ken Casebeer, Mary Coombs, Pat Gudridge, Dennis Lynch, Jeremy Paul, and Alan Swan, and especially to Richard Hyland, Jim Pope, and Steve Winter, for their thoughtful comments, and to Ana Gloria Rivas-Vazquez for her able research assistance.
as constitutional ones. You might call this the "Romance of American Constitutionalism." It is a romance to which Americans educated in the 1950s and 1960s are particularly given. For de Tocqueville's dictum was perhaps never truer than during the Warren Court era, when we were taking high school civics and United States History at the very same time that the Supreme Court was on a binge for social justice. To be sure, the 1960s came to an end a long time ago, but the romance remains very real. I suspect that many of us still instinctively react to every social injustice we see by secretly thinking, "that must be unconstitutional." And we still cheer loudly inside every time the Supreme Court vindicates that intuition, and wince or weep when it doesn't.

Today, it seems that even crusty labor lawyers are beginning to succumb to this constitutional romanticism. Indeed, here we are in the 1980s, with union membership at an all time low, and cynicism about the current efficacy of the National Labor Relations Act at an all time high. Taft-Hartley and fifty years of judicial erosion were bad enough; until very recently, anyway, the Labor Board seemed poised to finish off altogether what little was left of that noble document. In this context, it is perhaps not surprising that it has become something of a trend to cast a longing look to the Constitution as a basis for improving the legal lot of labor. Specifically, the hope seems to be to ground labor's right to picket, protest, and otherwise carry on its struggles with management within the protective ambit of the first amendment.

Each year, many of my labor students are startled when they learn that the first amendment does not already protect labor in this way. Of course it does to a certain extent: picketing and other protest activities enjoy at least some constitutional protection against government interference. But the rub is that your employer can fire you for engaging in the same conduct, and the first amendment will not do anything about that. This is the result of the so-called "state-action"

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1 See Union Membership Failed to Keep Up with Employment Growth in 1987, Daily Lab. Rep. (BNA), No. 15, at B-1 (Jan. 25, 1988) (reporting Census Bureau statistic that union membership has dropped to 17% of wage and salary workforce over the age of 16).
5 For a perceptive critique of the limits current jurisprudence places on such protection, see Pope, Labor and the Constitution: From Abolition to Deindustrialization, 65 Tex. L. Rev. 1071, 1082-96 (1987).
doctrine, which holds in essence that various constitutional guarantees, such as those under the first amendment, apply to actions of the state, but not to the private sector. Since most employers are private actors, their actions are not governed by the Constitution at all. Thus, private sector employers are perfectly free to restrict their employees' protest activities, unless their actions independently violate some statutory or common law norm.

Accordingly, we have begun to see a crop of thoughtful articles searching for ways to circumvent the state-action doctrine in the labor area. Clyde Summers, perhaps the most humane voice in American labor law scholarship, gently reminds us that the ideals embodied in the Constitution may be achieved by means other than constitutional adjudication; he therefore urges the courts to "give predominate weight to constitutional values" in interpreting congressional statutes—including the National Labor Relations Act—that do reach private sector labor relations. And in a wonderfully insightful and ambitious piece, James Gray Pope urges a theory of "labor liberty," attempting an end-run around the state-action problem through the use of the thirteenth amendment, which prohibits the institution of slavery and thus by its terms reaches private actors.

I greatly admire these articles and the trend they represent, and I wish the authors every success in their endeavors. But I hold little hope for this turn to the Constitution; I think it may well represent an instance of something looking far better from a distance than it does up close. Indeed, before we labor lawyers attempt to find a panacea in the Constitution, we would do well to see how it is working in contexts where it already applies. I will explore two such contexts here. The first is the case of public employers, such as fire and police departments and public schools. These are literally state actors, and they are therefore constrained by the first amendment in their dealings with their employees, even under current doctrine. A second context is private employers who are themselves clothed with first amendment protection—for instance the press and the church. The burden of my argument is this: When the rights available to employees working in these two contexts are fully explored, I am afraid we

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8 Pope, supra note 5, at 1096-112. For a similar argument, see Kupferberg, Political Strikes, Labor Law, and Democratic Rights, 71 Va. L. Rev. 685, 728-46 (1985).
10 U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom . . . of the press . . . ").
may be forced to conclude that labor is like Miami—the rules are
different here. For when constitutional norms confront the underly-
ing cultural and political assumptions of American labor relations, the
constitutional norms almost invariably give way.

I. EMPLOYERS GOVERNED BY THE FIRST AMENDMENT

A.

I start with the case of the public sector employer, who, as noted
above, is already constrained by the first amendment. I want to be-
gin the analysis by contrasting the stories of three hypothetical citi-
zens, so that we can better see how the public employee labor case
fares under the general rubric of first amendment law. In each of our
three hypotheticals, the citizen calls into question the actions of a
public official—the local district attorney ("DA")—and does so by
means of a questionnaire that she circulates to the DA's staff. For
these actions, she is punished by the state. But there the similarities
end.

Citizen A belongs to a citizens' action group, People for Better
Government, which vigorously advocates its view that government
employees should be evaluated and rewarded on the basis of merit
rather than political service. Upon hearing from a disgruntled assis-
tant DA ("ADA") that attorneys in the office are being pressured to
work for officially supported political candidates, she circulates a
questionnaire to the ADA's in an attempt to ascertain the extent of
this practice. For distributing this questionnaire, Citizen A is prose-
cuted by the state under a statute prohibiting criticism of public offi-
cials; she is convicted and given a prison term or fine for the violation.
Can there be any doubt that this would constitute an outrageous vio-
lation of the first amendment?

Citizen B is a retired person who spends most of her free time as
an amateur court watcher. She befriends various court personnel and
many lawyers, and thus is in on much of the courthouse gossip. She
becomes particularly close to an ADA, who expresses much dissatis-
faction with the DA's handling of internal office affairs. In particular,

11 By at least one scholar's reckoning, nearly a fifth of our working population is now
employed by public sector employers. Massaro, Significant Silences: Freedom of Speech in the

12 It would not, of course, be necessary to reach the constitutional question if we were to
conclude that the questionnaire at issue was not a "criticism" of the DA, but rather a mere
solicitation of the opinions of the ADA's. Let us assume for purposes of the analysis presented
in the text, however, that "[q]uestions, no less than forcefully stated opinions and facts, carry
messages . . . .," Connick v. Myers, 461 U.S. 138, 152 (1983), and can thus constitute the
conduct prohibited by the statute in question.
he complains about the quality of supervision for ADA’s, the lack of any grievance-resolution mechanism for the staff, and the practice of subjecting ADA’s to involuntary transfers between the various divisions in the criminal court. Sympathetic with her friend, Citizen B circulates a questionnaire attempting to determine the views of the rest of the ADA’s with respect to these practices and their effect on office morale generally. Like our “Better Government Advocate,” our “Amateur Court Watcher” is prosecuted under the statute prohibiting criticism of public officials. Once again, there is no doubt that such a prosecution would violate the first amendment.

Let us move on to the case of Citizen C. She too circulates a questionnaire among the DA’s staff. But Citizen C is not just a citizen; she is, in addition, an employee of the DA. She is also a real person: Sheila Myers, until October 1980 an ADA in the New Orleans DA’s office. While still employed by that office, Myers was advised by her superiors that she would be transferred from one to another division of the local criminal court. She resisted, in part because she was concerned that the transfer would create a conflict of interest by forcing her to prosecute individuals on probation with whom she had previously worked in a counseling program. Moved by the refusal of her superiors to reconsider the transfer, but concerned as well about a number of other issues affecting ADA’s in the office, she circulated a questionnaire that addressed both the various internal office affairs issues raised by our Amateur Court Watcher and the nonpartisan professionalism issue raised by our Better Government Advocate. The DA, upon hearing from one of his supervising attor-

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14 The questionnaire contained the following questions:

1. How long have you been in the Office?
2. Were you moved as a result of the recent transfers?
3. Were the transfers as they [a]ffected you discussed with you by any superior prior to the notice of them being posted?
4. Do you think[,] as a matter of policy, they should have been?
5. From your experience, do you feel office procedure regarding transfers has been fair?
6. Do you believe there is a rumor mill active in the office?
7. If so, how do you think it [a]ffects overall working performance of A.D.A. personnel?
8. If so, how do you think it [a]ffects office morale?
9. Do you generally first learn of office changes and developments through rumor?
10. Do you have confidence in and would you rely on the word of [the supervisors in the DA’s office]?
11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?
neys that Myers was thus fomenting a "mini-insurrection" in the office, fired her for "insubordination."

Does the first amendment prohibit the government from punishing Myers for circulating her questionnaire, as it prevented the government from punishing Citizens A and B?\(^{15}\) In Connick v. Myers,\(^{16}\) the Supreme Court answered that question with a resounding "it depends." According to Connick, the first amendment does protect Myers as a citizen: she would clearly be immune from criminal or civil prosecution for circulating the offending questionnaire. But the protection from government punishment afforded her in her status as an employee—that is, with respect to the prospect of discharge or other workplace discipline—is different. According to the Court, it depends upon whether the speech at issue can be characterized as addressing an issue of "public concern," or merely a matter of "personal interest."

To the extent that Myers "speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," she has no constitutional remedy against retaliatory discipline at the hands of her governmental employer.\(^{18}\) Thus, the Court reasoned, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."\(^{19}\) Conversely, if her speech does "touch upon a matter of public concern," she may be entitled to pro-

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12. Do you feel a grievance committee would be a worthwhile addition to the office structure?
13. How would you rate office morale?
14. Please feel free to express any comments or feelings you have.

461 U.S. at 155-56 (appendix to Court's opinion).

\(^{15}\) It might be objected that the "punishment" to which Myers was subjected—discharge from her job—differs in kind from the prison term or fine imposed upon our Better Government Advocate and Amateur Court Watcher. Discharge, however, is "the industrial world's 'capital punishment,'" see Pope, supra note 5, at 1108, and it is hardly clear that its effect upon an individual would be any less devastating than the penal alternatives. See id. at 1007-08 & nn. 232-35. Indeed, modern constitutional law has for the most part recognized that fact. See Connick, 461 U.S. at 143-45 (describing historical development of first amendment protection in public employment); Massaro, supra note 11, at 8-17 (same). In any event, the point of this essay is that "labor is different," and our initial instinct that employee discipline is somehow not "punishment"—at least not in a "legal" sense—is itself a striking illustration of this phenomenon.

\(^{16}\) 461 U.S. 138.

\(^{17}\) Id. at 147.

\(^{18}\) Id.

\(^{19}\) Id. at 146.
tection—but only if her first amendment interests are not “balanced” away under a test first articulated by the Court in *Pickering v. Board of Education*. Under *Pickering*, the question of protection *vel non* is analyzed by striking “a balance between the interest 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.”

How do these typologies apply to the facts of Myers’s case? The *Connick* Court found that the transfer policy and the other “internal office affairs” issues addressed in her questionnaire were designed to “gather ammunition for another round of controversy with her superiors,” and were thus merely “matters of personal interest.” Accordingly, the Court determined that Myers had no constitutional remedy against government retaliation in this respect. The Court conceded that the “non-partisan professionalism” issue did, by contrast, “touch upon a matter of public concern.” But it concluded that the *Pickering* balancing test deprived Myers of first amendment protection with respect to this aspect of her questionnaire as well. Thus, the Court found that the DA’s interests “as an employer” in punishing “disruptive” employee conduct predominated over Myers’s interests “as a citizen” in expressing her views. Of particular significance to the Court was the fact that Myers’s speech took place “at the office,” rather than elsewhere, and that it “followed upon the heels” of “an

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20 Id. at 149.
22 Id. at 568, quoted in *Connick*, 461 U.S. at 142.
23 461 U.S. at 148-49. The Court’s cynical characterization of Myers’s motivation should not go unremarked. The facts recounted in the Court’s opinion suggest that she was moved by a public-spirited consideration as well: her concern that her recent transfer would create a conflict of interest in performing her professional duties as a public prosecutor. See supra text accompanying notes 13-14. Perhaps the Court has become so accustomed to requiring self-interest as a prerequisite to legal protection for employee protests that it can no longer see beyond this motive in evaluating human action. See Fischl, Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act, 89 Colum. L. Rev. (forthcoming 1989).
24 461 U.S. at 148-49.
25 Id. at 149 (citations omitted):
   We have recently noted that official pressure upon employees to work for political candidates not of the worker’s own choice constitutes a coercion of belief in violation of fundamental constitutional rights. . . . In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service. . . . Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.
26 Id. at 150-54.
employment dispute concerning the very application of the transfer policy to the speaker,” and thus “threatened the authority” of her superiors to run the DA’s office.27

All of this, of course, comes in striking contrast to the first amendment’s treatment of our Better Government Advocate and our Amateur Court Watcher. In the first place, it makes no difference to the question of constitutional protection for them whether their speech can be characterized as relating to a matter of “public concern.” Thus, it may well be the case that our Amateur Court Watcher—in circulating the questionnaire addressing the various “internal office affairs” issues—might seem to us to be nothing more than an officious intermeddler, motivated solely by her “personal interest” in the welfare of her friend in the DA’s office. But surely we would not conclude that the government could therefore punish her for speaking her piece. As the Supreme Court has often reminded us, “[g]reat secular causes, with small ones”—the political as well as the picky—are equally guarded against government repression.28 Nor would we permit the judiciary to balance away the first amendment rights of our Better Government Advocate—whose “nonpartisan professionalism” questionnaire would admittedly “touch on a matter of public concern”—on the ground that her speech might “disrupt” the DA’s office. The invocation of such a governmental interest as a justification for punishing the speaker would rightly be met with a derisive judicial cackle.29 For engaging in essentially the same conduct as Sheila Myers, then, Citizens A and B would receive the full protection of the first amendment. Yet, under Connick, Myers can be punished without remedy, simply because she is an employee.

B.

If Connick thus seems a little odd as a piece of first amendment doctrine, perhaps we can understand it as labor law. To begin, take the purported distinction between matters of “public concern” and issues of “personal interest.” At first blush, this would appear to be a somewhat difficult distinction for the courts to make. On the facts of Connick, for example, it is not at all clear that the DA’s handling of “internal office affairs” is less a matter affecting the public interest than the “nonpartisan professionalism” issue, since the way the DA “runs his office” may have a substantial effect upon the nature and quality of service to the public that he provides. Indeed, as the dissent

27 Id. at 153.
29 See L. Tribe, supra note 6, § 12-12, at 861-72.
in Connick points out, "[i]t is hornbook law . . . that speech about 'the manner in which government is operated or should be operated' is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment."\(^{30}\) And, as most decisions respecting "the manner in which government is operated" will to some extent affect those who are called upon to do the "operating," such matters will almost invariably have both a "public concern" and a "personal interest" component.\(^{31}\)

It is therefore not surprising that there is some confusion evident in the case law in this area. Protesting race discrimination, to cite one example, has been held to be a matter of "public concern," whereas protesting sexual harassment has not.\(^{32}\) Nevertheless, my sense is that the courts have begun to develop a coherent approach to these essentially overlapping categories. In a nutshell, they are reading Connick—plausibly, I think—to provide a de facto labor exemption from first amendment protection. "Matters of personal interest" means issues that involve the employment relationship between government and public employee. The more it seems that the employee protest relates to such a topic, the more likely it is that protection for the speech will be denied; and this will be the case even though the protest may also arguably "touch on a matter of public concern."\(^{33}\)

This labor exclusion seems to operate even when the courts are forced to conclude that public employee speech does relate to "a matter of public concern." Recall that the Court in Connick agreed that the "nonpartisan professionalism" component of Myers's questionnaire fell within this category, but nevertheless held the speech to be unprotected under the Pickering balance. The Court's analysis here is revealing: It saw as highly significant the fact that Myers spoke out

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\(^{30}\) 461 U.S. at 156 (Brennan, J., dissenting) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

\(^{31}\) Accord Terrell v. University of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986) ("almost anything that occurs within a public agency could be of concern to the public" (emphasis in original)), cert. denied, 479 U.S. 1064 (1987).


\(^{33}\) See Connick, 461 U.S. at 148 n.8 (suggesting that first amendment protection is available only "where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute" (emphasis added)). To the same effect, see Terrell, 792 F.2d at 1362; Ferrara v. Mills, 781 F.2d 1508, 1516 (11th Cir. 1986); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985); Jurgensen v. Fairfax County, 745 F.2d 868, 879-80 (4th Cir. 1984).
“at the office” and that the resulting discord with her superiors arose not out of a conflict between citizen and public official over the direction of public policy, but “from an employment dispute concerning the very application of that policy to the speaker.” This application of the Pickering balance thus seems simply to reproduce the substantive effect of Connick’s “public concern/personal interest” distinction by rendering unprotected speech the content of which is too clearly “public” to be plausibly characterized as an issue of “personal concern,” but whose deployment arises out of an employment dispute and in an employment context, rather than in the setting of a more disinterested conflict over public policy.

So why this labor exclusion, if a labor exclusion it is? The Court offered two rationales for its holdings in Connick. First, the Court worried that providing a constitutional remedy for “personal interest” speech “would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.” Second, the Court was concerned that even “public interest” speech might unduly “disrup[t]” the work of public officials. We might, however, ask ourselves how convincing we find such arguments in this context. With respect to the first concern—that protecting “personal interest” speech would open the floodgates of litigation—it is fair to ask whether Connick’s “public concern/personal interest” distinction (especially given the substantial overlap between the supposedly dichotomous categories) and Pickering’s case-by-case ad hoc balance will make this situation better or worse. Moreover, we do not seem to mind protecting “every remark” made by nonemployee citizens respecting the acts of public officials; again, the law is clear that the first amendment extends to all matters great and small. Yet despite that protection, citizen speech cases do not flood our courts, though I have noticed no shortage of protests. There is a reason for that: Citizens by and large do not get punished for the things they say about public officials, and we would think it outrageous if the government tried to do so. It is therefore not so much the decision to extend first amendment protection to public employee grievances that might raise a “floodgates” concern. Rather, it is that public employers punish their employees for their speech; that is what makes a “federal case” out of a “mere” personnel matter.

Similarly, the Court’s concern with the prospect of office “disruption” is not entirely convincing: Our Amateur Court Watcher and

34 461 U.S. at 153 (emphasis added).
35 Id. at 149.
36 Id. at 151-54.
Better Government Advocate could, with impunity, circulate the same questionnaires as Sheila Myers, suggesting that it is not "disruption" that is problematic. Indeed, apparently Sheila Myers would herself have enjoyed constitutional protection had she gone public with her concerns—surely a more disruptive course—rather than expressing them privately in the office.37

My sense is that the key to understanding the Court's decision lies instead in its frank assertion that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."38 Of course, the first amendment does require that government be run "as a roundtable" for citizen complaints about its modes of operation; "the censorial power is in the people over the Government, and not in the Government over the people."39 Why was the Court so quick to reject that metaphor for the government in relation to its employees? Perhaps because the term "roundtable" expresses an image of equal partners engaged in self-governance, an apparently unthinkable concept in an employment relation.40

Recall too the language of the Pickering balancing test: "The problem in any case is to arrive 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."41 Notice that the only interests thought to be implicated on the employee's side of the balance are those she has "as a citizen"; she is free to participate in politics—in the discourse of collective self-governance—without constraint. But she is thought to have no recognizable interest in participating in self-governance discourse as an employee. By its very terms, the Pickering balance suggests that only the state has a legally protected interest in the employment aspect of the government/public employee relationship.

It is in this light that we can also begin to make sense out of the otherwise seemingly anomalous holding in Connick that the government's interest in repressing Myers's speech was increased because

37 See id. at 148, 153 (suggesting that Myers would be protected if she had "s[ought] to inform the public" of her concerns respecting internal office affairs); see also Massaro, supra note 11, at 22-23 & nn. 100-01 (collecting cases to same effect).
38 461 U.S. at 149.
Myers spoke "at the office," rather than taking her dispute to the public. The point seems to be that it is not the government's interest "in promoting the efficiency of the public services it performs" that matters, for surely that interest would have been threatened even more—if we are to believe that it was threatened at all—had Myers gone public. Rather, the government interest that is protected against "disruption" is its control over the employment relationship; that, I take it, is the reason for Connick's emphasis on "the authority of the employer to run the office." In sum, then, when the employee "does politics," she can be viewed as a citizen legitimately involved in collective self-governance, and the government cannot silence her through the use of her vulnerability as an employee. But when the citizen speaks out about work, we view her as a mere employee, and she ceases to have any self-governance interest at all.

C.

From a labor lawyer's perspective, what is perhaps most fascinating about Connick, at first blush anyway, is that the case seems to turn the labor law of the private sector on its head. Thus, while public employees enjoy constitutional protection against employer retaliation for their "public/political" but not their "personal/employment" protests, note that the situation for private sector employees is virtually the reverse: Under the National Labor Relations Act, they enjoy statutory protection for their protests on employment issues, but are denied the coverage of the Act for purely political protests.

But if we take a closer look, the two doctrinal areas seem to spring from a common commitment to the same set of images: the separation of our economic life from the political, of the private from the public. Thus, we enjoy our public life as citizens of the state, and our right to participate in political discourse is guaranteed by the first amendment. But this is not a right belonging to us as employees, for private sector employment law denies it altogether, and public sector

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42 Connick, 461 U.S. at 150-53.


law grants it not to employees as employees, but only to employees as citizens.

In the end, however, my principal point is that labor is different—that it seems to enjoy a special exemption from the constitutional protection available to other citizens because of assumptions we share about what it means to be an employee. My fear is that it will thus be hard to locate in this jurisprudence much hope for labor's emancipation.

II. EMPLOYERS PROTECTED BY THE FIRST AMENDMENT

Let us turn to the private sector and look at a second context in which the first amendment already applies—private institutions clothed with first amendment protection, most notably the press and the church. Of course, the first amendment applies in a different way here than it does in the public sector employment context: not to constrain the conduct of the employing institution, but to protect these institutions themselves against governmental intrusion. At the same time, the National Labor Relations Act gives private sector employees two related rights: the right to organize a union free from employer retaliation, and the right to bargain collectively over terms and conditions of employment. What happens when employees attempt to assert their Labor Act rights against their employer, but the boss hap-

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45 Ironically, the Court has recently adopted a similar exemption for expressive activities by high school students; it thus now appears to be literally the case that the decision in *Connick* treats employees as if they were children. See Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 569-71 (1988).

46 Arguments to the contrary frequently focus upon NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), and, more recently, Edward DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392 (1988). To be sure, those cases do represent a salutary trend in constitutional doctrine toward extending to boycott activities the same first amendment protections that are afforded other forms of protest. See *Claiborne Hardware*, 458 U.S. at 888-89, 907-91 (extending first amendment protection to boycott of white merchants by black citizens and civil rights organizations protesting local civil rights policies); *DeBartolo*, 108 S. Ct. at 1394-95, 1397 (avoiding “serious [first amendment] questions” by interpreting Labor Act provision prohibiting secondary boycotts narrowly, so as not to reach union’s peaceful distribution of handbills in shopping mall asking customers to boycott mall shops until mall owner agreed not to hire construction contractors who paid substandard wages). Such cases do not, however, seem to me to reflect a departure from the phenomena described in the text, for they involve the use of the first amendment to prevent what is generally understood to be governmental—not employer—interference with protest activities. Indeed, the opinion in each case goes out of its way to characterize the protest at issue in traditional “state vs. citizen over issues of public concern” terms. See *Claiborne Hardware*, 458 U.S. at 913-14; *DeBartolo*, 108 S. Ct. at 1398.

pens to be the church or the press, and thus protected by the first amendment against governmental interference with its mission?

Once again, let us begin with a couple of stories. Employee A is a lay teacher in a parochial school, and she and her fellow teachers decide to unionize. The bishop refuses to recognize or bargain with their union, contending that the application of the Labor Act would raise serious first amendment questions. In the *Catholic Bishop* case, the Supreme Court sustained the bishop's position. The Court seemed to be worried, in particular, about two situations that might arise if it construed the Labor Act to cover parochial schools. The first was the prospect of having to adjudicate a so-called mixed-motive discharge or discipline case. Assume that our lay teacher were, in the course of a single working day, to pass out union cards to her colleagues and to advocate to her students the use of birth control in developing countries. Assume further that the bishop were to fire her at the end of that day. There can be no doubt what the respective positions of the parties would be before the Labor Board: the teacher would claim that she was fired for union organizing (which would, of course, be protected under the Labor Act), and the bishop would contend that she was fired for controverting church doctrine on birth control (which, conversely, would not). The Board's decision assessing the bona fides of the bishop's religion-based explanation for his conduct might, the Court feared, "impinge on rights guaranteed by the Religion Clauses." Moreover, the "very process of inquiry" into the bishop's motives would raise first amendment entanglement concerns.

The second problematic situation to the Court was that the very bargaining obligation at issue might itself raise first amendment questions. For, although the employer's duty to bargain is limited under the Labor Act to "terms and conditions of employment," the Court expressed the concern that "nearly everything that goes on in the schools affects teachers, and therefore is arguably a 'condition of employment.'" Under such a construction of the bargaining obliga-

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49 See supra note 47.
50 See National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (permitting discharge of employee "for cause" unrelated to activity protected by the Labor Act).
51 *Catholic Bishop*, 440 U.S. at 502.
52 Id. On the burdens of proof for mixed-motive cases under the Labor Act, see NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).
53 National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (requiring employers and unions to "confer in good faith with respect to wages, hours, and other terms and conditions of employment").
54 *Catholic Bishop*, 440 U.S. at 503 (citation omitted).
tion, the bishop might thus be required to bargain over the scope and direction of a parochial school's religious educational mission—a prospect, in the Court's view, that would be inconsistent with the first amendment. Accordingly, the Court decided that the Labor Board had no jurisdiction to compel the bishop to bargain with the lay teachers' union. 55

Employee B is a columnist for a newspaper, the Passaic Daily News, and he and his fellow reporters also attempt to unionize. In retaliation, his publisher decides that he will no longer run Employee B's column. The columnist brings unfair labor practice charges, and the Labor Board holds that the publisher unlawfully pulled the column in retaliation for the columnist's union activities. 56 In the typical discrimination case under the Labor Act, the remedy for a prevailing victim of discrimination is the restoration of the status quo ante, 57 but that policy presents an unusual problem in the context of this case. Thus, if the columnist had been fired, the Board would have ordered his reinstatement; but since it was his column that had in effect been "fired," the Board ordered it reinstated. 58 On review in the District of Columbia Circuit, the court of appeals upheld the Board's findings that the publisher had acted for anti-union reasons and that its conduct was therefore a violation of the Labor Act. 59 But the court also concluded that the first amendment barred any order forcing the publisher to reinstate the column, citing Miami Herald v. Tornillo 60 for the proposition that the government may not "compe[l] [the press] to publish that which it chose to withhold." 61

What is the point of the stories of Employees A and B? I have no quarrel with the general proposition that the government should not be allowed to dictate what ought to be taught in the parochial schools, or what ought to be printed by the press. But my question here is this: Why are the first amendment rights involved in these cases understood to belong only to the employer, and not to the employees? That is, in the Catholic Bishop case, why do we worry about the bishop's first amendment freedom, and not the teacher's right to express her views with respect to religious doctrine? And in Passaic Daily News, why is it that the publisher's first amendment interests are protected, and the columnist's right to publish his column ig-

55 Id. at 502-04.
57 See National Labor Relations Act § 10(c), 29 U.S.C. § 160(c).
58 266 N.L.R.B. at 906.
61 736 F.2d at 1557.
nored? In each case, the employer is permitted to punish his employee for what would otherwise constitute pro-union activity protected by the Labor Act, and in each case this is held to be permissible because of—rather than in spite of—the first amendment.

As it turns out, the key question in determining whose speech or religion interests will receive first amendment protection is not, under current jurisprudence, really a question of constitutional law at all; rather, it is a question of who owns the employing enterprise. Thus, we protect the publisher (but not the columnist) because it is “his” press, and the bishop (but not the teacher) because it is “his” school. And these “his’s” come not from the first amendment, but rather from the distribution of entitlements between employer and employee in the labor contract at common law. Under this distribution, the publisher and the bishop own the enterprise and, accordingly, are treated as “citizens,” entitled to enjoy the first amendment right against the state. The employee’s relationship to the enterprise is, by contrast, limited to the wage she gets in return for her work—an interest insufficient, apparently, to trigger any constitutional protection.62

Once again, then, we see the importance of the separation of the “private” from the “public”—and the “citizen” from the “employee”—in excluding labor from the protection of the first amendment. In the materials covered in the previous section, that distinction is employed to insulate political life from economic life and permit the denial of self-governance in the public employment workplace. Here, while the public (constitutional) law embraces first amendment values of freedom of conscience and expression, the private (common) law regime gives this bundle of rights to the boss, and deals labor out of the hand altogether.

III. A Common Thread: The Problematic Status of Professional Employees

It is no coincidence that the individuals in the cases we have considered thus far are each professional employees. In Connick, the discharged public employee was an attorney; in Catholic Bishop, the

62 Cf. Bishop v. Wood, 426 U.S. 341, 344 (1976) (whether state employee has sufficient entitlement in job to trigger right to procedural due process in dismissal proceedings “must be decided by reference to state law”); L. Tribe, supra note 6, § 10-10, at 694-701. On the underlying legal separation of ownership from employment, the “common law of labor relations,” if you will, see Casebeer, Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited, 6 Cardozo L. Rev. 765, 794 (1985) (describing and criticizing the manner in which various legal doctrines “maintain and enforce the separation of invested resources’ allocation and exchange relations eliciting labor time”).
organizing rights at stake belonged to teachers; and, in *Passaic Daily News*, the organizing rights belonged to a columnist. My point is that the professional nature of the duties of these employees may also have much to do with the way that the law treats them—again, not because of first amendment concerns, but because of the law’s assumptions about labor.

In a series of doctrinal areas, Labor Act jurisprudence draws a sharp distinction between the conception of work, which is understood to be the prerogative of capital, and its execution, which is left to labor.\(^{63}\) I offer two representative doctrinal examples. Take, first, the treatment accorded managerial employees, who are excluded from the Labor Act because of their participation in the formulation and determination of management policy.\(^{64}\) Consider as well the rule that an employer’s decision to close a plant is not a mandatory subject of bargaining—despite its evident impact upon “wages, hours, and other terms and conditions of employment”\(^{65}\)—because a plant closure decision “involves a change in the scope and direction of the enterprise.”\(^{66}\) Taken together, these doctrines reflect the principle that the Labor Act will not intrude upon the employer’s exclusive control over the conception of work. Thus, if an employee participates in entrepreneurial policy-making, the Labor Act excludes him as a managerial employee. And if the employees’ union attempts to bargain about such policy-making, the Act removes the issue from the employer’s bargaining obligation.

What does this all have to do with the treatment of labor in first amendment jurisprudence? In each of the cases we have considered, we were dealing with employees whose work, because of its professional nature, was deeply implicated in the conception of her employer’s enterprise. In *Catholic Bishop* and *Passaic Daily News*, nothing less was at stake than the employer’s exclusive control over what was to be taught in the parochial school classroom, or to be printed in the press. Similarly, the very issue that triggered the dispute in *Connick* was whether the district attorney or Sheila Myers had the right to determine whether her transfer to another division of

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\(^{63}\) On the importance of this distinction in American labor relations, see H. Braverman, Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century 59-236 (1974); on its effect on labor law, see Fischl, Which Side Are You On? The Hierarchical and Boundary Exclusions of Employees from the National Labor Relations Act (Oct. 2, 1988) (unpublished manuscript available from the author).


\(^{65}\) See supra note 53.

the criminal court would compromise the integrity of the public service provided by the district attorney’s office. In each case, we saw that the result was to sacrifice first amendment values at the altar of managerial control and employer authority. Again, then, the claim is that these results are easier to understand for what they reveal about the law’s treatment of labor than about the first amendment.

CONCLUSION

I close with a favorite quote from Mason Williams, something I think he said during the riots at the 1968 Democratic Convention in Chicago: “I’d call the police, but they’re already here.” That is my advice to those who are seeking a better lot for labor in first amendment jurisprudence. They have “called” the Constitution, but it is already here. And its current potential is, I am afraid, somewhat bleak. The task then must be to struggle with our own conceptions of labor, for it is these conceptions that imprison us—locking out the rich emancipatory kernels of free expression, self-governance, and democracy embodied in our constitutional tradition.

67 See supra text accompanying notes 13-14. Connick is not a sport case in this respect; subsequent decisions have generally been less favorable to employees in policy-making positions than to the rank-and-file. Massaro, supra note 11, at 22 & n.97; see also Rankin v. McPherson, 483 U.S. 378 (1987) (identifying extent of employee’s authority and involvement in policy-making as basis for diminished protection under Connick).

68 Cf. Yeshiva Univ., 444 U.S. 672 (excluding full-time university faculty from protection of Labor Act on basis of their policy-making function, notwithstanding their status as “professional employees,” who are literally covered by the Act).