

**ON THE ROAD TO *GARCETTI*:
'UNPICK'ERRING *PICKERING* AND ITS PROGENY**

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INTRODUCTION

In this Article, the author examines the foundational cases dealing with public employment-free speech rights and the evolution of the United States Supreme Court's public employment-free speech jurisprudence. It is essential to look at all the cases in the Court's public employment-free speech jurisprudence in order to fully understand the constitutional status of the free speech rights of public employees who whistleblow, as each case in the jurisprudence builds on the other. In each case since *Pickering v. Board of Education*¹—the seminal case on public employment-free speech jurisprudence—the Court has attempted to navigate and clarify the nuances of the *Pickering* balancing test—the balancing of the employee's free speech rights against the public employer's interests in operational efficiency.²

This Article reveals through comprehensive examination of these cases that the Court, in its interpretation of the *Pickering* balancing test established to protect employees, has steadily taken away *sub silentio* the protection of public employees' free speech rights to the pro-employer era that reigned mostly pre-*Pickering*. The Court has done this by chipping away at employee protections in the balancing test or gradually but incrementally giving greater weight in the balancing test to employers. This review also reveals that the Court's attempts to define protected public employee speech within the *Pickering* balancing test has obfuscated and made for a convoluted and congested public employment-free speech jurisprudence teeming with tests upon tests for different aspects of the *Pickering* balancing tests. As esteemed constitutional law scholar Gerald

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¹ 391 U.S. 563 (1968).

² *Id.* at 568.

Gunther notes, however, in interpreting and applying balancing tests, “the single most important trait for *responsible* balancing [is] the capacity to identify and evaluate separately each analytically distinct ingredient of the contending interests.”³

I. FOUNDATIONAL CASES—RECOGNIZING PUBLIC EMPLOYEES’ FREE SPEECH

Prior to 1952, the United States Supreme Court’s jurisprudence on the free speech rights of employees was firmly established: public employers could place any limitation, including constitutional limitations, on the conditions of employment of any employee, as public employment was a privilege and not a right.⁴

Justice Oliver Wendell Holmes’s now famous aphorism, aptly captures the Supreme Court’s pre-1952 public employment-free speech jurisprudence: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”⁵ Justice Holmes reasoned that in instances of public employment, an employee is bound by the implied terms of his contract of employment to suspend the right to free speech because he takes the employment solely on the employer’s terms.⁶ The ominous imperative to employees was simple: to retain the right of free speech, do not take a government job; any public employee who exercises the right of free speech as a public employee must be prepared for the consequences, including termination, without constitutional remedy. Constitutional scholars have referred to this as the “rights versus privileges” distinction.⁷ Under the “rights versus privileges”

³ Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 7 (1972) (emphasis added) (internal quotes omitted).

⁴ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892).

⁵ *Id.* at 517.

⁶ *Id.* at 517–18.

⁷ This “rights versus privileges” distinction has since been abandoned by constitutional scholars:

[T]he [United States Supreme] Court and most legal scholars have disregarded this theory, favoring the “unconstitutional conditions” doctrine instead. Within this framework, a citizen’s basic constitutional rights—including his First Amendment rights of freedom of speech, freedom of association, and free exercise—are not sacrificed when the citizen becomes an employee of the state.

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perspective, public employment was viewed as a privilege, not a right; a corollary this perspective held was that as a condition of holding the privilege to public employment, public employees waived their rights to free speech with respect to their employers.⁸

In fact, in what typified its absolute pro-employer position at the time, in *Adler v. Board of Education*,⁹ the Supreme Court stated: “It is . . . clear that [citizens] have no right to work for the State in the school system on their own terms.”¹⁰ The Court went on to state that citizens

may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to take their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech . . . ? We think not.¹¹

This aptly embodies the import of the “rights versus privileges” distinction.

In a case decided in the next Supreme Court term, *Wieman v. Updegraff*,¹² public employees got their first breakthrough in the Supreme Court’s public employment-free speech jurisprudence. For the first time, the Supreme Court restricted the power of public employers to limit, as a condition of employment, employees’ First Amendment rights. In that case, at issue was an Oklahoma statute which required public employees to swear loyalty oaths, within the statutorily permitted period, as a qualification for employment.¹³ In extending First Amendment protection to public employees, the Court held that “constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”¹⁴ While *Wieman’s* protection was

Brian Richards, Comment, *The Boundaries of Religious Speech in the Government Workplace*, 1 U. PA. J. LAB. & EMP. L. 745, 757–58 (1998). See also generally WILLIAM W. VAN ALSTYNE, *THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS* (3d ed. 2001).

⁸ Richards, *supra* note 7, at 757.

⁹ 342 U.S. 485 (1952).

¹⁰ *Id.* at 492.

¹¹ *Id.*

¹² 344 U.S. 183 (1952).

¹³ *Id.* at 185.

¹⁴ *Id.* at 192. Referring to its language, quoted above, in *Adler*, the Court stated:

To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the

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limited to patently arbitrary or discriminatory denials of employee rights, freedom of association cases such as *Wieman* became the first cases to recognize the free speech rights of public employees.

Even though *Wieman*, was purely a freedom-of-association case, in his concurring opinion, Justice Black expressed apprehension that loyalty oaths, like other tools of tyranny may be used not only to deny employees the freedom of association but also to suppress the right to free speech, shackling the minds of free people.¹⁵ This, along with Justice Frankfurter's concurrence, was a crucial recognition of the constitutional essence of free speech of public employees.¹⁶ Justice Black cautioned that even countries, such as the United States, dedicated to democratic government, are vulnerable to imposing extraordinary perils on the free speech rights of the citizenry.¹⁷ In support, he cited the early years of the Republic when there was callous "[e]nforcement of the Alien and Sedition Laws by zealous patriots who feared . . . it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic."¹⁸ Not to be forgotten is Justice Black's famous admonition in *Wieman*:

We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.

issue. . . . We need not pause [however] to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Id. at 191–92.

¹⁵ *Id.* at 193 (Black, J., concurring).

¹⁶ Justice Frankfurter, in his concurring opinion in *Wieman* emphasized the importance of guaranteeing teachers their free speech rights even while employed:

[I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights . . . inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity . . . by potential teachers.

Id. at 195 (Frankfurter, J., concurring).

¹⁷ *Id.* at 193–94 (Black, J., concurring).

¹⁸ *Id.* at 192–93.

And I cannot too often repeat my belief that the right to speak on matters of public concern must be *wholly* free or eventually be wholly lost.¹⁹

This was the strongest call so far for the recognition of First Amendment protection for speech of public employees. Justice Black's reference to "matter of public concern" is a progenitor of the same in the public employment-free speech jurisprudence.²⁰

In spite of its holding in *Wieman* recognizing some First Amendment protection for public employees, four years later the Supreme Court held that states have broad powers in selecting and terminating their employees.²¹ The Court also stated that public employees have no constitutional right to public employment.²²

Finally, in *Shelton v. Tucker*,²³ the Court heeded Justice Black's admonition in *Wieman*, recognizing freedom of speech as a right which, like the right of association, is vulnerable to much peril in the workplace. In *Shelton*, school teachers challenged the constitutionality of a state statute which required teachers to file, as a condition of employment, an annual affidavit listing all organizations to which they had belonged in the preceding five years.²⁴ The Court struck down the statute as unconstitutional, stating: "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."²⁵

Continuing in the emerging tenor of recognizing and enforcing public employees' rights of free speech, a year after *Shelton*, in *Cramp v. Board*

¹⁹ *Id.* at 193 (emphasis added).

²⁰ The language of the *Pickering* balancing test captures the "matter of public concern" requirement and provides: "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 employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (emphasis added).

²¹ *Slochower v. Bd. of Higher Educ. of N.Y. City*, 350 U.S. 551, 559 (1956).

²² *See generally id.*

²³ 364 U.S. 479 (1960).

²⁴ *Id.* at 480–84.

²⁵ *Id.* at 485–86. Furthermore, the Court noted that "interference with personal freedom [of speech] is *conspicuously* accented when the teacher serves at the absolute will of those to whom the disclosure must be made." *Id.* at 486 (emphasis added). The Court added that no forum requires greater safeguard of the freedom of speech than school. *Id.* at 487.

of *Public Instruction*,²⁶ the Court struck down a state statute which required public employees to sign an oath or face immediate discharge from public employment.²⁷ The oath required public employees to swear that they had never given aid, support, counsel, advice or influence to the Communist party.²⁸ Nine years into his employment, the school board discovered that Cramp, a public school teacher, had never executed the oath.²⁹ Refusing to sign the oath, he challenged the statute as unconstitutionally vague, seeking an injunction against his termination.³⁰ The Court found the statute so vague and indefinite as to be patently arbitrary, stating: “[i]t is enough for the present case to reaffirm that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”³¹

In the same year *Cramp* was decided, in *Torcaso v. Watkins*,³² the Supreme Court had to decide whether a Maryland statute violated the First Amendment rights of public employees.³³ The Maryland Constitution required public employees to declare their belief in God as a condition of employment.³⁴ Invalidating the statute, the Court stated that: “[t]he fact . . . that a person is not compelled to hold public office can not possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.”³⁵ Then in 1963, in *Sherbert v. Verner*,³⁶ a case addressing the First Amendment Free Exercise rights of public employees under a South Carolina unemployment compensation statute, the Court would intimate that the era of recognizing public employees’ free speech rights had been irreversibly born, emphasizing that “[i]t 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.”³⁷ One year later, in *Garrison v. State of Louisiana*,³⁸ the Court

²⁶ 368 U.S. 278 (1961).

²⁷ *Id.* at 288.

²⁸ *Id.* at 279–80.

²⁹ *Id.* at 280.

³⁰ *Id.*

³¹ *Id.* at 288 (internal quotes omitted).

³² 367 U.S. 488 (1961).

³³ *Id.* at 496.

³⁴ *Id.* at 489.

³⁵ *Id.* at 495–96.

³⁶ 374 U.S. 398 (1963).

³⁷ *Id.* at 404 (emphasis added) (footnote omitted).

³⁸ 379 U.S. 64 (1964).

extended First Amendment protection to employee speech directed at persons who are merely nominal or quasi-employers of the speaking employee.³⁹

Subsequently, in 1967, in *Keyishian v. Board of Regents*,⁴⁰ the Supreme Court struck down a New York statute which obligated public employees to sign, as a condition of employment, a certificate averring that they were not Communists; and that if they had ever been communists, this had been disclosed to their employer.⁴¹ After some faculty members of the State University of New York refused to sign the certificate, they were informed that their employment would be terminated.⁴² The employees filed suit challenging the constitutionality of the statute.⁴³ Reaffirming the constitutional rights of public employees, the Court stated: “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”⁴⁴ Declaring the statute unconstitutional, the Court stated that even when public employers have legitimate purposes, they cannot pursue those purposes using means that broadly stifle fundamental rights, such as the right to free speech, when more narrowly tailored means are available.⁴⁵

These freedom-of-association cases heralded the recognition and protection of the free speech rights of public employees. A common thread running through these cases was the Supreme Court’s emphasis that public employment is not a license for *carte blanche* restrictions by public employers of the First Amendment rights of employees. Gone it seems were the days when public employees had to relinquish their First Amendment rights as a condition of employment. While these cases began to focus the judiciary on the importance of protecting the free speech rights of public employees, they failed to set forth a uniform test for determining when employers could constitutionally constrain those rights; in other words, the scope of public employees’ free speech rights remained

³⁹ *Id.* at 76. See also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

⁴⁰ 385 U.S. 589 (1967).

⁴¹ *Id.* at 609–20.

⁴² *Id.* at 592.

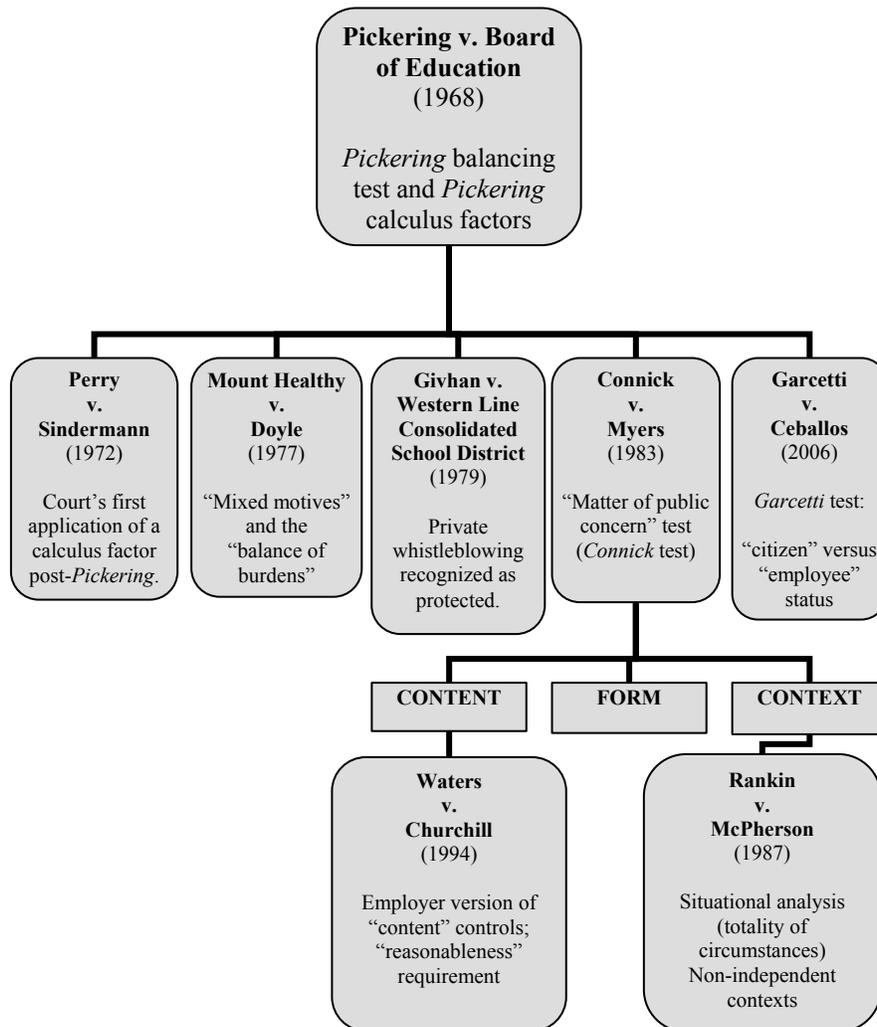
⁴³ *Id.*

⁴⁴ *Id.* at 605–06 (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (N.Y. 1965)). Also, in *Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967) the United States Supreme Court held that the First Amendment is one of the “rights of constitutional stature whose exercise the State may not condition by the exaction of a price.”

⁴⁵ See *Keyishian*, 385 U.S. at 602 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

undefined. In 1968, in *Pickering v. Board of Education*,⁴⁶ the Court would begin the journey, which continues today, of attempting to define the scope of public employees' free speech rights.

Figure 1: Evolution of the United States Supreme Court's Public Employment-Free Speech Jurisprudence Since *Pickering*:



⁴⁶ 391 U.S. 563 (1968). A diagrammatic representation of the evolution of the public employment-free speech jurisprudence can be found in Figure 1, *infra*.

II. *PICKERING V. BOARD OF EDUCATION*

Pickering has become the principal case in defining the scope of public employees' free speech.⁴⁷ In that case, Pickering, a public school teacher was terminated by the school board for a letter he wrote in a local newspaper criticizing his employers.⁴⁸ After the school board put proposals on the ballot to raise funds for the school district, a number of articles, ostensibly by the teachers' union, were published in the local paper, pleading with voters to support the proposal in order to avoid a deterioration of education in the district;⁴⁹ a similar letter by the superintendent was also published.⁵⁰

Wanting to be heard, Pickering wrote a letter to the newspaper, critiquing, *inter alia*, the board and the superintendent for their handling of various proposals to raise revenues for the schools and the allocation of school finances to athletics over education.⁵¹ In the letter, he also accused the superintendent of making efforts to silence teacher opposition to the funding initiative.⁵² The board terminated him, citing his writing and publication of the letter.⁵³ Additionally, at the due process hearing, the board gave the following as justifications for the termination: many statements in the letter were false;⁵⁴ publication of the letter unjustifiably questioned the board's motives, veracity and competence;⁵⁵ the statements would disrupt discipline, stir up "controversy, conflict and dissension among teachers, administrators, the Board of Education, and the residents of the district";⁵⁶ and the letter marred the reputations of board members and other school administrators.⁵⁷

Pickering challenged his termination as a violation of his First Amendment right to free speech.⁵⁸ The Illinois state courts rejected his

⁴⁷ Anne Gasperini DeMarco, Note, *The Qualified Immunity Quagmire in Public Employees' Section 1983 Free Speech Cases*, 25 REV. LITIG. 349, 354 (2006).

⁴⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

⁴⁹ *Id.* at 566.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 566–67.

⁵⁶ *Id.* at 567 (internal quotes omitted).

⁵⁷ *Id.*

⁵⁸ *Id.*

free speech claim holding that, even though as a citizen he would have the right of free speech, as a public school teacher he was obligated not to speak out about the operation of his school.⁵⁹ The United States Supreme Court, however, agreed with Pickering;⁶⁰ specifically, the Court held that the Constitution does not allow public school teachers to be coerced into giving up free speech rights they are entitled to *as citizens* to speak out on matters of public interest involving the operation of the schools where they work.⁶¹ Nevertheless, the Court stated that the status of a public employer as an employer (as opposed to its status as sovereign when dealing with the general citizenry) made it imperative that public employers have some control over their employees' speech.⁶²

The Supreme Court then laid out what has since become known as the *Pickering* balancing test for adjudicating public employee claims that their termination violates their free speech rights. As stated by the Supreme Court, the *Pickering* balancing test provides: "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 employer, in promoting the efficiency of the public services it performs through its employees."⁶³

The Court refused to establish a bright-line standard against which all statements of public employees would be judged due to "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal";⁶⁴ rather, a *balance* had to be struck between the employer's and employees' concerns within the operational confines of the *Pickering* balancing test.⁶⁵ The Court then identified certain general factors—the *Pickering* calculus factors—for consideration in application of the test. Some of the factors tilt in favor of the employer, while others tilt in favor of the employee. The factors that could be deemed relatively more pro-employer in the *Pickering* balancing test include: (a) whether the speech would impact "harmony among coworkers" or the employee's immediate superior's

⁵⁹ *Id.*

⁶⁰ *Id.* at 568. *See also id.* at 574–75.

⁶¹ *Id.* at 568.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 569.

⁶⁵ *Id.* at 568.

ability to maintain discipline;⁶⁶ (b) whether the speech is directed toward someone with whom the employee would typically be in contact during his daily work⁶⁷ (known as the “close working relationship” factor); and (c) whether the nature of the employment relationship between the employee and the person toward whom the speech is directed is so close “that personal loyalty and confidence are necessary to their proper functioning”⁶⁸ (known as the “confidentiality” factor).⁶⁹ These are the determinants or variables considered in assessing the impact of the employee’s speech on the operational efficiency of the employer.

Factors that could be deemed relatively more pro-employee in the balancing test include: (a) the employee’s interest in commenting on matters of public concern and “[t]he public[’s] interest in having free and unhindered debate on matters of public importance”;⁷⁰ (b) the fact that public employees are more likely than the general citizenry “to have informed and definite opinions” about the matter in question;⁷¹ (c) the ease with which the employer could rebut the content of the employee’s statement, albeit false⁷² (known as the “ease of rebuttal” factor); and (d) whether there is evidence that the speech actually had an adverse impact on the employer’s proper functioning.⁷³

Turning to the case under review, the Supreme Court found the statements in Pickering’s letter to be critical of the school board and the

⁶⁶ *Id.* at 570.

⁶⁷ *Id.* at 569–70.

⁶⁸ *Id.* at 570.

⁶⁹ Though “confidentiality” was not a factor applicable to the case, the Supreme Court gave examples of situations where the “confidentiality” factor could come into play in the *Pickering* balancing test:

[P]ositions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions . . . in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them

Id. at 570 n.3.

⁷⁰ *Id.* at 572–73.

⁷¹ *Id.* at 572.

⁷² *Id.*

⁷³ See generally *id.* at 569–71 (various references to “no evidence” affirming that mere speculation was not adequate).

superintendent.⁷⁴ However, none of the statements were targeted toward anyone with whom Pickering would typically be in contact with during his daily work.⁷⁵ In addition, the Court observed the absence of evidence in the record suggesting that the speech impaired the ability to maintain discipline or harmony among coworkers.⁷⁶ Furthermore, the employment relationship between Pickering and the school board (to include the superintendent) was not so close as to require confidentiality for proper functioning.⁷⁷

Ruling on the assertions that Pickering's speech had marred administrators' reputations and would result in controversy and dissension, the Court emphasized that public employers could not rely on speculations or conjectures about the impact of the employee's speech,⁷⁸ rather evidence of actual impact must be produced.⁷⁹ The Court also distinguished between the interests of school board members and those of the school, noting that speech could validly anger the board members, yet not be a detriment to the school itself.⁸⁰ In other words, evidence that speech harmed the employee's superior(s) is not sufficient in itself to find that the public employer entity was actually harmed. Furthermore, the Court held that the critical tone of a letter alone is not adequate grounds to deny a teacher the right to speak out on matters of public interest, when those statements are substantially correct.⁸¹

Even though some of Pickering's statements turned out to be false, such as his accusation that too much funding was devoted to athletics at the expense of education, the Court characterized his ostensibly false statements as a mere "difference of opinion" about the best way to operate the school district.⁸² "[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from

⁷⁴ *Id.* at 572.

⁷⁵ *Id.* at 569–70.

⁷⁶ *Id.* at 570.

⁷⁷ *Id.* In interpreting the applicability of the "confidentiality factor" to teachers, in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1054 (6th Cir. 2001), the court stated: "a public school teacher, we believe, is hardly the type of confidential employee the court [United States Supreme Court] had in mind."

⁷⁸ See generally *Pickering*, 391 U.S. at 569–71.

⁷⁹ *Id.*

⁸⁰ *Id.* at 571.

⁸¹ *Id.* at 570–71.

⁸² *Id.* at 571.

public employment.”⁸³ Additionally, the Court held that the board could have easily rebutted Pickering’s statements by sending a letter to the same or any other newspaper;⁸⁴ Pickering had no greater access to the accurate information than did the board.⁸⁵ The Court assumed without explaining that the funding of the school district was an issue of public interest and consequentially an issue entitled to free and open debate in order to ensure informed decision-making by the citizenry.⁸⁶

To shed some light on when the public employee transitions from employee to citizen when speaking out on matters of public interest, the Court stated:

[I]n a case such as the present one, in which the fact of employment is only *tangentially and insubstantially* involved in the subject matter of the public communication made by the teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.⁸⁷

This was the Court’s first attempt to clarify, for purposes of its public employment-free speech jurisprudence, the distinction between a public employee’s status as “citizen” and as “employee.”

III. *PERRY V. SINDERMANN*

The *Pickering* test would remain without further clarification of its nuances and its application until *Perry v. Sindermann*.⁸⁸ Sindermann, an untenured college professor testified before various committees of the Texas Legislature without the permission of his employers⁸⁹ and advocated change, opposed by the board, of the college from a two-year to a four-year institution;⁹⁰ he also publicly disagreed with policies of the board.⁹¹ When his contract for the year ran out, the Board decided not to offer him a

⁸³ *Id.* at 574.

⁸⁴ *Id.* at 572.

⁸⁵ *Id.*

⁸⁶ *Id.* at 571.

⁸⁷ *Id.* at 574 (emphasis added).

⁸⁸ 408 U.S. 593 (1972).

⁸⁹ *Id.* at 594.

⁹⁰ *Id.* at 595.

⁹¹ *Id.* at 594–95. For example, a newspaper advertisement featured over Sindermann’s name criticized the board.

renewal.⁹² Sindermann challenged the board's decision not to offer him a new contract as a retaliatory employment practice in violation of his right of free speech.⁹³

Given that Sindermann was untenured, the Court's first step was to determine whether a freedom-of-speech constitutional challenge to an employment retaliation claim fails solely due to the public employee's lack of contractual or tenure right to the employment.⁹⁴ Answering this in the negative, the Court noted that a contra-holding, would judicially commission the public employer to indirectly achieve an end it could not directly.⁹⁵

The Court agreed with Sindermann that a bona fide constitutional claim exists against employers who retaliate against employees who publicly criticize them.⁹⁶ Specifically, the Court stated: "this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment."⁹⁷ In so stating, the Court made constitutionally inviolate and significant a pro-employee factor from the *Pickering* balancing test: the employee's interest in commenting on matters of public concern and the concomitant interest of the public in free and unhindered debate on matters of public importance.

It is important to recognize that in *Perry*, the Court relied on only one of the pro-employee factors mentioned above: the employee's interest in

⁹² *Id.* at 595. The board's justifications for not renewing Sindermann's contract included: insubordination; and the attendance of legislative committee meetings even after his superiors had refused him permission to attend. *Id.* at 595 n.1.

⁹³ *Id.*

⁹⁴ *Id.* at 596. In support of its holding that lack of tenure does not preclude First Amendment protection of speech, the Court reasoned:

For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Id. at 597 (internal quotes omitted).

⁹⁵ *Id.* at 597.

⁹⁶ *Id.* at 598.

⁹⁷ *Id.*

commenting on matters of public concern and the public's interest in free and unhindered debate on matters of public importance.⁹⁸ Since the Court did not apply all the factors in the *Pickering* calculus, the Court left to puzzle whether the *Pickering* test requires consideration of all the factors in every case; if not, what kind of case would trigger which factor; or if there is judicial discretion to base a ruling solely on the consideration of any one factor a court so chooses. These questions were unanswered in the *Perry* decision and remain unanswered to date.

IV. *MADISON JOINT SCHOOL DISTRICT NO. 8 V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION*

The next opportunity the Court had to shed more light on the application and nuances of the *Pickering* balancing test was *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*.⁹⁹ In that case, the United States Supreme Court had to determine: “whether a State may constitutionally require that an elected board of education prohibit teachers, other than union representatives, to speak at open meetings, at which public participation is permitted, if such speech is addressed to the subject of pending collective-bargaining negotiations.”¹⁰⁰

As the Madison Board of Education and the Madison Teachers, Inc. (MTI), the teachers' union, began negotiations for renewal of their collective bargaining agreement, the MTI submitted several proposals, including one for a “fair share clause”;¹⁰¹ the school board opposed the proposal.¹⁰² The “fair share” clause would make it mandatory for all teachers, irrespective of membership in MTI to pay union dues to assist with the costs of collective bargaining.¹⁰³ During the ensuing impasse, two teachers, Holmquist and Reed, both members of the bargaining unit but not of the union, sent letters to all teachers in the district articulating their opposition to the “fair share” proposal and soliciting comments from the teachers.¹⁰⁴ Most of the teachers who responded supported Holmquist and Reed's opposition to the proposal, prompting both teachers to follow up with a petition to all teachers and consequently to the school board asking

⁹⁸ See generally *Perry*, 408 U.S. 593.

⁹⁹ 429 U.S. 167 (1976).

¹⁰⁰ *Id.* at 169.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 169–70.

for implementation of the proposal to be deferred for a year so that an impartial committee could scrutinize it further.¹⁰⁵

During the part of a school board meeting set aside for the public to express opinions on issues before the board, Holmquist read his petition to the board;¹⁰⁶ he also informed the board that 53% of the teachers in 31 schools had signed the petition.¹⁰⁷ Prior to reading the petition, Holmquist told the board that he represented “an informal committee of 72 teachers in 49 schools.”¹⁰⁸ Afterwards, in executive session, the board voted in favor of all the union’s proposals, except the “fair clause” proposal; MTI and the board subsequently signed the contract.¹⁰⁹

MTI filed an unfair labor practice charge against the board with the Wisconsin Employment Relations Commission (WERC) claiming that, by allowing Holmquist to speak at the board meeting, the board was negotiating with an entity other than the exclusive collective bargaining representative (MTI), in violation of Wisconsin law.¹¹⁰ WERC agreed and ordered the board to “immediately cease and desist from permitting employees, other than representatives of Madison Teachers, Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers, Inc.”¹¹¹

On appeal, the Supreme Court of Wisconsin held that freedom of speech rights may be constitutionally abridged when there is “a clear and present danger that [the speech] will bring about the substantive evils that [the legislature] has a right to prevent.”¹¹² Having concluded that Holmquist’s speech to the board constituted “negotiation” with the board, the Wisconsin Supreme Court held that “clear and present danger” exists in allowing such “negotiation” as it would weaken MTI’s exclusive bargaining status,¹¹³ therefore, Holmquist’s right to free speech could be abridged due to “the necessity to avoid the dangers attendant upon relative

¹⁰⁵ *Id.* at 170.

¹⁰⁶ *Id.* at 171.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The union objected to this statement by Holmquist as an indication that the school district was involved with an unfair labor practice with a bargaining unit other than the MTI. *Id.* at 172.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 173 (internal quotes omitted).

¹¹² *Id.* (citing *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 231 N.W.2d 206, 212 (Wis. 1975)).

¹¹³ *Id.*

chaos in labor-management relations.”¹¹⁴ The United States Supreme Court disagreed, concluding that

Holmquist did not seek to bargain or offer to bargain with the board Although his views were not consistent with those of MTI, communicating such views to the employer could not change the fact that MTI alone was authorized to negotiate and to enter into a contract with the board.¹¹⁵

The Court went on to hold that when school boards conduct public meetings, the First Amendment prohibits discrimination against speakers on the basis of the content of speech or the fact that the person is a government employee.¹¹⁶

In *Pickering*, the Supreme Court held that the First Amendment protects only whistleblowing employees who speak as citizens, and not those who speak as employees, on matters of public concern.¹¹⁷ Yet, in *Madison Joint School District No. 8*, the Court blurred the line between “citizen” status and “employee” status under the *Pickering* balancing test. Specifically, the Court stated: “It is not the case that Holmquist was

¹¹⁴ *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 231 N.W.2d 206, 213 (Wis. 1975).

¹¹⁵ *Madison Joint Sch. Dist. No. 8*, 429 U.S. at 174.

¹¹⁶ *Id.* at 176. Additionally, the Court found WERC’s order to be an unconstitutional prior restraint on speech of teachers with the school board. The Court reasoned:

By prohibiting the school board from permitting employees to appear and speak at meetings of the Board of Education the order constitutes an indirect, but effective, prohibition on persons such as Holmquist from communicating with their government. The order would have a substantial impact upon virtually all communication between teachers and the school board. The order prohibits speech by teachers on matters subject to collective bargaining. As the dissenting opinion below noted, however, there is virtually no subject concerning the operation of the school system that could not also be characterized as a potential subject of collective bargaining. Teachers not only constitute the overwhelming bulk of employees of the school system, but they are the very core of that system; restraining teachers’ expressions to the board on matters involving the operation of the schools would seriously impair the board’s ability to govern the district.

Id. at 176–77 (internal quotes omitted).

¹¹⁷ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

speaking simply as a member of the community. On the contrary . . . Holmquist opened his remarks to the board by stating that he represented an informal committee of 72 teachers in 49 schools. “Thus, he appeared and spoke *both* as an employee *and* a citizen exercising First Amendment rights.”¹¹⁸ In addition, the Court stated: “He addressed the school board not merely as one of its *employees* but also as a concerned *citizen*, seeking to express his views on an important decision of his government”¹¹⁹ and is entitled to First Amendment protection.¹²⁰ In essence, the Court acknowledged Holmquist was speaking both as an employee and as a citizen, yet the Court found his speech protected. Even though *Pickering* says only employee speech “as citizen” is protected, in *Madison Joint School District No. 8*, the Court suggests that when an employee simultaneously speaks as citizen and employee the speech is protected; in other words, “hybrid employee-citizen status” speech is protected. This contradiction with the *Pickering* balancing test is not resolved by the Court in *Madison Joint School District No. 8* and remains unresolved to date. The Court also fails to set forth parameters for determining when an employee speaks solely as a citizen, solely as an employee, or simultaneously as citizen and employee. Recognition of constitutional protection for employees when they speak concurrently as citizen and as employee represents an expansion of the free speech rights of public employees.¹²¹

The Supreme Court further strengthened the constitutional rights of teachers, and other public employees, to speak when it stated “that teachers may not be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.”¹²² Further, noting that the board meeting at which Holmquist spoke was an open board meeting, the Court added: “Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers;”¹²³ moreover, “any *citizen* could have presented

¹¹⁸ *Madison Joint Sch. Dist. No. 8*, 429 U.S. at 177 n.11 (emphasis added) (internal quotes omitted).

¹¹⁹ *Id.* at 174–75 (emphasis added).

¹²⁰ *Id.*

¹²¹ *Id.* at 174–75. *Madison Joint Sch. Dist. No. 8* expanded the constitutional protection provided for in *Pickering* which limited protection to public employees who were speaking only as citizens.

¹²² *Madison Joint Sch. Dist. No. 8*, 429 U.S. at 175 (internal quotes omitted).

¹²³ *Id.*

precisely the same points and provided the board with the same information as did Holmquist.”¹²⁴ Furthermore, “participation in public discussion of public business cannot be confined to one category of interested individuals.”¹²⁵ The Court gave an additional boost to public employees’ rights of free speech when it stated that

permit[ting] one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers *on the basis of their employment* or the content of their speech.”¹²⁶

Madison Joint School District No. 8 represented a breakthrough in greater recognition and protection of employee rights, as is evident in the Court’s holdings discussed above. Continuing in this trend of expansive free speech rights for public employees, the Court stated:

Surely no one would question the absolute right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands.¹²⁷

V. *MOUNT HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION*
V. DOYLE

One year after *Madison Joint School District No. 8*, in *Mount Healthy City School District Board of Education v. Doyle*,¹²⁸ the Supreme Court attempted to further define the niceties of the *Pickering* balancing test, but

¹²⁴ *Id.* (emphasis added).

¹²⁵ *Id.*

¹²⁶ *Id.* at 174–75 (emphasis added).

¹²⁷ *Id.* at 176 n.10.

¹²⁸ 429 U.S. 274 (1977).

without discussing the distinctions between the rights and status of employees under the Court's public employment-free speech jurisprudence when they speak solely as citizens, solely as employees or simultaneously as citizen and employees.

In this case, Doyle, an untenured teacher employed by the Mount Healthy City School District Board of Education, called a radio station to disclose the contents of a memorandum his principal circulated to teachers about a new mandatory dress code for teachers.¹²⁹ The administration adopted the dress code because of the belief that teacher appearance was related to public support for bond issues.¹³⁰ After the radio station's broadcast of the adoption of the dress code, the board decided not to rehire Doyle, citing incidents in his background in justification.¹³¹ Doyle's background at the school prior to the radio-station incident included an altercation with a colleague,¹³² an argument with cafeteria employees over the quantity of spaghetti he was served,¹³³ swearing at students in relation to a disciplinary complaint,¹³⁴ and making obscene gestures to female students who failed to obey him.¹³⁵ Until the radio-station incident, he was not dismissed for any of these incidents.¹³⁶ Doyle challenged the Board's decision not to rehire him as a violation of his constitutional rights to free speech.¹³⁷

Since, as in *Perry*, this case involved an untenured public employee, the Supreme Court began its analysis by iterating that the absence of tenure rights does not defeat a teacher's free speech claim under the First and Fourteenth Amendments.¹³⁸ In addition, an untenured public employee "may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."¹³⁹

¹²⁹ *Id.* at 282.

¹³⁰ *Id.*

¹³¹ *Id.* at 281–82.

¹³² *Id.* at 281.

¹³³ *Id.*

¹³⁴ *Id.* at 281–82.

¹³⁵ *Id.* at 282.

¹³⁶ See generally *Mount Healthy*, 429 U.S. 274.

¹³⁷ See *id.* at 276.

¹³⁸ See *id.* at 283.

¹³⁹ *Id.* at 283–84 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)).

Mount Healthy was the first case in which the Supreme Court addressed the role of “mixed motives” in the *Pickering* balancing test.¹⁴⁰ “Mixed motives” arise in cases in which a public employer terminates an employee ostensibly for the employee’s speech, yet other justifications exist concomitantly for terminating the employee.¹⁴¹ In such cases, courts then have to sort out actual motives of the employer from the pretentious.¹⁴² Essentially, “mixed motives” analysis involves an attempt to determine cause and effect: what was the actual cause of the employee’s termination? In this case, Doyle’s background coupled with his communication to the radio station provided ample mixed motives for his termination.¹⁴³ Moreover, as a non-tenured teacher, Doyle could be terminated without cause or reason, unless the termination stemmed from the exercise of his free speech rights, of course.¹⁴⁴

¹⁴⁰ In *Hudson v. Craven*, 403 F.3d 691, 695 (9th Cir. 2005), the court explained that an employer must “demonstrate either that, under the balancing test established by *Pickering*, the employer’s legitimate administrative interests outweigh the employee’s First Amendment rights or that, under the mixed motive analysis established by *Mount Healthy*, the employer would have reached the same decision even in the absence of the employee’s protected conduct.” (alterations in original omitted).

See also *Mt. Healthy*, 429 U.S. at 286 (“In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused [i.e., “mixed motives”]. We think those are instructive in formulating the test to be applied here.”) (emphasis added).

¹⁴¹ Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace neither Murdered McDonnell Douglas nor Transformed All Employment Discrimination Cases to Mixed Motives*, 36 ST. MARY’S L.J. 395, 406 (2005) (“[M]ixed-motives cases arise when an employment decision is based on a mixture of legitimate and illegitimate motives.”) (quoting *Rachid v. Jack in the Box*, 376 F.3d 305, 309–10 (5th Cir. 2004)); Jennifer L. Thompson, *Civil Rights—Employment Discrimination: The Standard of Review in State-Based Employment Discrimination Claims: The North Dakota Supreme Court Redefines the Standard of Review in Employment Discrimination Claims*, 72 N.D. L. REV. 411, 417 (1996) (“Mixed-motives cases arise when an employer proffers both a legitimate and a discriminatory reason for its employment decision.”) (citing *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448 (8th Cir. 1993)).

¹⁴² John W. Sheffield & Brian R. Bostick, *A Practitioner’s Guide to the Alabama Age Discrimination Act of 1997*, 59 ALA. LAW. 108, 112 (1998) (“The ‘mixed motives’ defense arises when both legitimate and illegitimate considerations play a role in an adverse employment decision.”).

¹⁴³ *Mount Healthy*, 429 U.S. at 281–82.

¹⁴⁴ *Id.* at 283. This of course assumes that there is no other constitutional, statutory or contract right in play that would preclude termination without cause.

While agreeing with Doyle that his communication to the radio station was constitutionally protected, the Supreme Court refused to order his reinstatement, consequent to its “mixed motives” analysis.¹⁴⁵ The lower court had applied a rule of causation that stated in essence: even when constitutionally permissible grounds for terminating an employee exist, if the employee’s speech played a “substantial part” in the termination decision, the employee must be reinstated.¹⁴⁶ The Supreme Court rejected this causation rule as solely dispositive in “mixed motives” cases, concerned it would impede public employer control over crucial personnel decisions, forcing them to retain employees who would have been terminated even if the employee had not spoken out.¹⁴⁷ *Mount Healthy* was a setback for public employees because it “effectively eliminated the public employer’s perceived jeopardy when action is taken against the ‘bold employee’ and shifted the advantage back to the employer.”¹⁴⁸ Additionally, the Court expressed concern that the rule might make the employee better off than he would have been had he not spoken out.¹⁴⁹ For example, the lower court’s findings of fact indicated that a decision reinstating Doyle would automatically give him tenure.¹⁵⁰ Expressing unease with the employer’s plight in such a situation, the Court stated:

The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it *considered* constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove . . . that quite apart from such conduct Doyle’s record was such that he would not have been rehired in any event.¹⁵¹

The Supreme Court’s struggles with balancing the interests of the employer against the free speech rights of the employee, in the “mixed motives” analysis for the *Pickering* balancing test, are apparent in the opinion. Laboring to ensure employer personnel control concomitant with

¹⁴⁵ *Id.* at 284, 287.

¹⁴⁶ *Id.* at 283.

¹⁴⁷ *Id.* at 285–86.

¹⁴⁸ Dennis H. Milbrath, *The Free Speech Rights of Public Employees: Balancing with the Home Field Advantage*, 20 IDAHO L. REV. 703, 711 (1984).

¹⁴⁹ *Id.* at 285–86.

¹⁵⁰ *Id.* at 286.

¹⁵¹ *Id.*

protection of employee's free speech right without an attendant windfall to the employee, the Court stated that an employee's free speech rights are adequately vindicated if the remedy in the case does not make the employee worse off (as opposed to better off) than he would have been had he not spoken out.¹⁵²

In its effort to work through the intricacies of the "mixed motives" aspect of the *Pickering* balancing test analysis, the Supreme Court decided that a burden-of-proof allocation between the parties in public employment-free speech cases would provide greater clarity for the judiciary when faced with such cases.¹⁵³ The framework of the burden-of-proof allocation follows:

1. The initial burden of proof in public employment-free speech cases is on the employee¹⁵⁴ to show that: (a) his or her conduct is protected by the First and Fourteenth Amendment,¹⁵⁵ and (b) the conduct was "a substantial factor" or a "motivating factor" in the employer's decision to terminate or not rehire him or her;¹⁵⁶ the "substantial factor" or "motivating factor" language represents the Court's causation test in "mixed motives" analysis.¹⁵⁷ If the employee is unable to carry this burden, the constitutional question is to be resolved in favor of the employer.¹⁵⁸
2. After the employee successfully carries the burden of proof, the employer must then show by a preponderance of the evidence that it

¹⁵² *Id.* at 285–86. Evidently, struggling with the balancing, the Court noted:

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 286.

¹⁵³ *Id.* at 287.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* Requiring "substantial" factor seems to convey a relatively heavy burden on public employees seeking to vindicate their free speech rights, as opposed to merely requiring a factor.

¹⁵⁸ *Id.*

would have reached the same decision about the employee's termination or nonrenewal had the employee not engaged in the protected speech.¹⁵⁹ This is the "same decision anyway" defense (also known as the *Mount Healthy* defense) in the burden-of-proof allocation in "mixed motives" analysis, an affirmative defense for employers. This gives further boost to employers' interests in the *Pickering* calculus.¹⁶⁰

The problem with sanctioning "mixed motives" and the "same decision anyway" affirmative defense is that it empowers employers to concoct *post-hoc*, multiple motives other than the employee's free speech as justification for a termination, recasting what is actually a "single motive" case as a pretextual "mixed motives" case. Thus, *Mount Healthy* effectively strengthened the interests of public employers, relative to that of employees, in the *Pickering* calculus.

VI. *GIVHAN V. WESTERN LINE CONSOLIDATED SCHOOL DISTRICT*

Of note in all the public employment-free speech cases from *Pickering* to *Mount Healthy* is the fact that all of them addressed employee speech in public forums. In *Pickering*, the employee speech was a letter sent to a local newspaper;¹⁶¹ in *Perry*, it was testimony before a legislative committee;¹⁶² in *Madison Joint School District No. 8*, it was speech at a public meeting of a school board;¹⁶³ and in *Mount Healthy*, it was communication with a radio station.¹⁶⁴ While the Supreme Court in *Pickering* had included the employee's interest in commenting on "matters of public concern" as one of the ostensibly pro-employee factors for the *Pickering* balancing test,¹⁶⁵ the Court had never defined the term or the extent of its role in the balancing test.

¹⁵⁹ *Id.*

¹⁶⁰ The entire *Mount Healthy* "mixed motives" framework is referred to it as the "balance of burdens" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 (1989); *Cromley v. Board of Educ. of Lockport Township High Sch. Dist. 205*, 17 F.3d 1059, 1068 (7th Cir. 1994)). *Mount Healthy* thus produced the Court's first "mixed motives" analysis in a public employment-free speech case, and for the first time defined the allocation of the burden of proof in such cases.

¹⁶¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

¹⁶² *Perry v. Sindermann*, 408 U.S. 593, 594 (1972).

¹⁶³ *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 169–72 (1976).

¹⁶⁴ *Mount Healthy*, 429 U.S. at 282.

¹⁶⁵ See Section II, *supra*.

Moreover, the Supreme Court had never indicated if private communications between employers and employees or employer-employee communications in private forum were entitled to First Amendment protection. The Court would finally have occasion to determine this two years after *Mount Healthy*, in *Givhan v. Western Line Consolidated School District*.¹⁶⁶ In this case, Givhan, a public school teacher was terminated after she privately complained to her principal about policies and practices of the school district which she perceived to be discriminatory in purpose and effect.¹⁶⁷ At the time of her termination, the school district was under a desegregation order.¹⁶⁸ Givhan intervened in the desegregation action, challenging her termination as a violation of her First Amendment free speech rights.¹⁶⁹

Defending Givhan's termination, her principal characterized her complaints as "petty and unreasonable demands" conveyed in insulting, arrogant, hostile and loud manners.¹⁷⁰ In addition, the school district, in what appeared to be the "same decision anyway" defense, alleged that it terminated Givhan for reasons other than her speech: her refusal to administer standardized tests to students;¹⁷¹ her announced intent not to cooperate with the administration;¹⁷² a hostile attitude toward the administration;¹⁷³ downgrading papers of her white students;¹⁷⁴ walking out of a desegregation meeting and attempting to disrupt it;¹⁷⁵ threatening, in concert with other teachers, not to return to work after her school reopened as unitary;¹⁷⁶ and helping a student conceal a knife during a weapons shakedown at her school.¹⁷⁷ Misconceiving the "same decision anyway" defense, the school district contended that it would have been justified in terminating Givhan, even if she had not spoken out;¹⁷⁸ the Supreme Court, however, emphasized that evidence that a termination

¹⁶⁶ 439 U.S. 410 (1979).

¹⁶⁷ *Id.* at 412-13.

¹⁶⁸ *Id.* at 411.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* n. 1

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 412 n.2

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 416.

would have been justified had the termination occurred prior to the speech, is not tantamount to proof that the termination would have actually occurred absent the speech—the requirement of the “same decision anyway” defense.¹⁷⁹ In this regard, *Givhan* was a further clarification of the “same decision anyway” defense.

The Court of Appeals for the Fifth Circuit, in ruling on the case, stated that the recognition of a constitutional right for public employees in private communications critical of their employer’s policies “would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions.”¹⁸⁰ Additionally, the Court of Appeals inferred from the *Pickering* balancing test and from the *Mount Healthy* case the absence of constitutional protection for public employees’ private communications.¹⁸¹ The Supreme Court rejected this reading of *Pickering*, stating that free speech rights are not relinquished by an employee’s decision to communicate privately rather than publicly.¹⁸² While conceding that the *Pickering*, *Perry* and *Mount Healthy* cases all involved public speech, the Court nonetheless made it clear that the public nature of the speeches in all three cases was merely coincidental and largely inconsequential to its holdings in the various cases.¹⁸³ The Court held that

[t]he First Amendment forbids abridgement of the “freedom of speech.” Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.¹⁸⁴

Recall, the Supreme Court set forth certain factors to be considered when applying in the balancing test established in *Pickering*.¹⁸⁵ In *Givhan*, the Supreme Court acknowledged that factors other than those used in cases involving public speech might be required in order to apply the *Pickering* balancing test to public employee-private communication

¹⁷⁹ *Id.* at 416–17.

¹⁸⁰ *Ayers v. W. Lines Consol. Sch. Dist.*, 555 F.2d 1309, 1319 (5th Cir. 1977).

¹⁸¹ *Id.* at 1317–18.

¹⁸² *Givhan*, 439 U.S. at 414.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 415–16.

¹⁸⁵ See Section II, *supra*, discussing the *Pickering* calculus factors.

cases.¹⁸⁶ However, what remains unclear is whether by this the Court was suggesting that an *entirely different* set of factors than it set forth in the *Pickering* case might be required in cases involving private communication; or that factors *in addition to* those it laid out in the *Pickering* case would be required.¹⁸⁷ The confusion lies in the fact that in the same breath, the Court uses the phrases “different considerations” and “additional factors” in describing the requirements for a public employment-private communication *Pickering* balancing test analysis. In addition, the Court did not clarify whether by “considerations” it was referring to “factors,” as that term was used in the *Pickering* case. The Court also gave no guidance as to which cases the “different considerations” or “additional factors” would apply under a *Pickering* balancing test analysis and did not state what would trigger their application.¹⁸⁸ One thing clear from the Court’s analysis, however, is that

¹⁸⁶ *Givhan*, 439 U.S. at 414–15 n.4 (“Although the First Amendment’s protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations.” In a trice after this, the Court declared that “[p]rivate expression, however, may in some situations bring additional factors to the *Pickering* calculus.”).

¹⁸⁷ “Additional factors” suggests the Court is adding to already existing factors; the already existing factors, in essence, remain part of the analysis but other factors have to be added to those currently used factors. Entirely different factors suggests that the Court is not adding to already existing factors, but rather replacing those already existing factors entirely with a total new set of factors; this replacement could also be conveyed by the Court’s use of the phrase “*different* considerations” as opposed to *additional* considerations or factors.

¹⁸⁸ This confusion created by the Court’s attempts to discrepate factors for a *Pickering* balancing test analysis in a public employment-private communication case is captured in the following excerpt from the Court’s opinion:

Although the First Amendment’s protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each *context* may require different considerations. When a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they in any way either impeded the teacher’s proper performance of his daily duties, in the classroom or . . . interfered with the regular operation of the schools generally . . . Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency’s institutional efficiency may be threatened not only by the content of the

(continued)

the “time, place and manner” of the speech are some of the “additional” factors to which the Court was referring.¹⁸⁹ *Givhan* thus established that employees who whistleblow to their employers (as opposed to persons or entities other than their employers) as well as those who whistleblow in a private forum are entitled to First Amendment protection; how much protection, however, is dependent on a *Pickering* balancing test analysis in the pertinent case.¹⁹⁰ *Givhan* also further developed the causation test the Court laid out in *Mount Healthy* as part of the burden-of-proof allocation: the Court indicated that even when the primary motive for an employee’s termination is the employee’s speech, the employee bears the burden of showing that “but for” the speech, he would not have been terminated.¹⁹¹

From 1968 when *Pickering* was decided until 1983, the Court gave relatively greater expanse to the free speech rights of public employees than had existed prior to *Pickering*. Employer rights post-*Pickering* did not diminish substantially, however, given the importance the Court attached to the operational efficiency of the government and the essence of personnel control. While *Pickering* laid out a balancing test, its progeny of cases failed to adequately clarify its nuances. The only cases in which the Court had *applied* any of the factors mentioned in *Pickering*, other than *Pickering* itself, were *Perry* and *Madison Joint School District No. 8*, leaving still unanswered questions such as: whether the factors were merely guidelines that could be ignored altogether or mandatory factors to be weighed in the *Pickering* calculus. If mandatory, clearly the Court violated its own holding since it failed to consider all the factors in *Pickering* and the cases subsequent. In addition, the factors had not been played out in the context of an actual case to provide adequate guidance to lower courts, public employers and public employees.

One thing *Givhan* did introduce into the *Pickering* calculus was context of employee speech. *Givhan* held the *context* of public employee speech crucial in two respects: (i) in determining how the *Pickering*

employee’s message but also by the *manner, time and place* in which it is delivered.

Givhan, 439 U.S. at 415 n.4 (emphasis added) (internal quotes omitted).

¹⁸⁹ *Id.* See also J. Kendall Rathburn, Note, *McBee v. Jim Hogg County: On Balance a Risky Business*, 45 LA. L. REV. 1095, 1098 (1985) (“Additional factors to be considered in a private setting were the time, manner, and place of the confrontation between the employee and the superior.”).

¹⁹⁰ *Givhan*, 439 U.S. at 414–15.

¹⁹¹ *Id.* at 417.

balancing test would play out in cases of private versus public communication;¹⁹² and (ii) in the operational efficiency portion of the *Pickering* balancing test;¹⁹³ that is, the portion that considers the interests of the public employer in the efficiency of the public services it performs.

While *Givhan* held that whistleblowing in a private forum is as protected as in a public forum, one of the factors in *Pickering* indicated that constitutional protection applies only to matters of public concern.¹⁹⁴ As discussed earlier, like the other factors, this factor had never been defined, though it received consequential mention in *Perry*¹⁹⁵ and *Madison Joint School District No. 8*,¹⁹⁶ and nominal mention in *Mount Healthy*¹⁹⁷ as well as *Givhan*¹⁹⁸ as part of the general statement of the *Pickering* balancing test. However, an examination of *Pickering* and its progeny of cases reveals that they all involved what one could consider matters of concern or interest to the public, in other words, “matters of public concern”: *Pickering* involved speech about the allocation of funding at a school;¹⁹⁹ *Perry* involved speech about a college’s status as a two-year versus four-year institution;²⁰⁰ *Madison Joint School District No. 8* involved speech on a subject of collective bargaining when the floor was open to the general public to comment about collective bargaining negotiations;²⁰¹ *Mount Healthy* involved speech about a school administration’s beliefs that teacher dress code influenced votes on bond issues;²⁰² and *Givhan* involved speech about the perceived discriminatory nature of an employer’s policies and practices.²⁰³ In addition, other than *Madison Joint School District No. 8*, each of these cases involved whistleblowing by employees, specifically public school teachers, either publicly or privately, about policies or practices of their employers.²⁰⁴

¹⁹² *Id.* at 414–15.

¹⁹³ *Id.* at 414.

¹⁹⁴ See Section II, *supra*.

¹⁹⁵ See *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

¹⁹⁶ See *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 175 (1976).

¹⁹⁷ See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977).

¹⁹⁸ See *Givhan*, 439 U.S. at 414.

¹⁹⁹ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 566 (1968).

²⁰⁰ *Perry*, 408 U.S. at 594–95.

²⁰¹ *Madison Joint Sch. Dist. No. 8*, 429 U.S. at 169.

²⁰² *Mount Healthy*, 429 U.S. at 282.

²⁰³ *Givhan*, 439 U.S. at 412–13.

²⁰⁴ See Sections II, III, V and VI, *supra*.

VII. *CONNICK v. MYERS*

In 1983, in *Connick v. Myers*,²⁰⁵ the Court would finally attempt to give substance to the “matter of public concern” portion of the *Pickering* balancing test. *Connick* was the first case in which the United States Supreme Court applied the *Pickering* balancing test to public employees other than teachers.²⁰⁶ In *Connick*, Sheila Myers, an Assistant District Attorney in New Orleans was terminated after she prepared and distributed to her coworkers a questionnaire soliciting their opinions about office morale, the need for a grievance committee, the office transfer policy, their level of confidence in supervisors and pressures to work in political campaigns.²⁰⁷ At the time of her termination, Myers had been an at-will employee for several years, during which her proficiency was not in question.²⁰⁸

After Myers was advised that she was being transferred to another section of the criminal court, she expressed objections, which went unheeded, to her supervisors, including Connick, the District Attorney, who implored her to accept the transfer.²⁰⁹ Her discussions with a first assistant district attorney, who told her that concerns she expressed about certain office matters were not supported by other employees in the office, prompted Myers to develop the questionnaire.²¹⁰ Once the first assistant attorney general learned of Myers’ distribution of the questionnaires, he informed Connick that she was stirring up a “mini-insurrection” in the office.²¹¹ Shortly thereafter, Connick terminated Myers, citing as grounds her refusal to accept the transfer and insubordination in distributing the questionnaire.²¹² Connick expressed his concerns and disapproval of various portions of the questionnaire.²¹³ Myers challenged her termination as a violation of her First Amendment freedom of speech rights.²¹⁴

²⁰⁵ 461 U.S. 138 (1983).

²⁰⁶ *Id.* at 145–46. See also Elizabeth A. Riley, Note, *Waters v. Churchill: The Procedural Due Process Disguise of Public Employee Free Speech Rights*, 24 CAP. U. L. REV. 893, 898–901 (1995) (discussing the first series of Supreme Court cases to apply *Pickering* and how each involved a teacher until *Connick*).

²⁰⁷ *Connick*, 461 U.S. at 140–41.

²⁰⁸ *Id.* at 140.

²⁰⁹ *Id.* at 140–41.

²¹⁰ *Id.* at 141.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* While Connick took issue with various parts of the questionnaire, he was particularly displeased about the question inquiring about pressure to work on political
(continued)

The challenge for the Supreme Court was to distinguish mere employment disputes not entitled to First Amendment from “matters of public concern” to which the *Pickering* balancing test applies.²¹⁵ The Court established that as a threshold issue, before the *Pickering* balancing test is applied in any case, it must be determined whether the matter that is the subject of the speech is merely an employment dispute or a matter of public concern.²¹⁶ If the matter is merely an employment dispute, deference is given to the employer’s termination decision, unless some other statutory or constitutional ground, other than the First Amendment, is presented.²¹⁷ If, however, the speech is a matter of public concern, then and only then is the *Pickering* test triggered.²¹⁸

There are three levels of matter of public concern: (i) matter of public concern;²¹⁹ (ii) substantial matter of public concern;²²⁰ and (iii) inherent matter of public concern.²²¹ The difference between matter of public concern and substantial matter of public concern lies in the fact that “a stronger showing may be necessary if the employee’s speech more substantially involved matters of public concern.”²²² With respect to inherent matters of public concern, the Supreme Court has only recognized thus far employee speech about racially discriminatory purpose and effect of employer policy within this level of matter of public concern.²²³

In *Connick*, the Supreme Court revealed the test for determining whether public employee speech constitutes speech on a matter of public

campaigns, a question he believed would create problems if the press heard about it; and the question asking about employee confidence in superiors. *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 140–41, 147–49.

²¹⁶ *Id.* at 146–47.

²¹⁷ *Id.*; see also *id.* at 151.

²¹⁸ *Id.* at 146–47.

²¹⁹ See, e.g., *Connick*, 461 U.S. 138.

²²⁰ See, e.g., *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983). For discussion of the differences between the three levels of matter of public concern, see Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008).

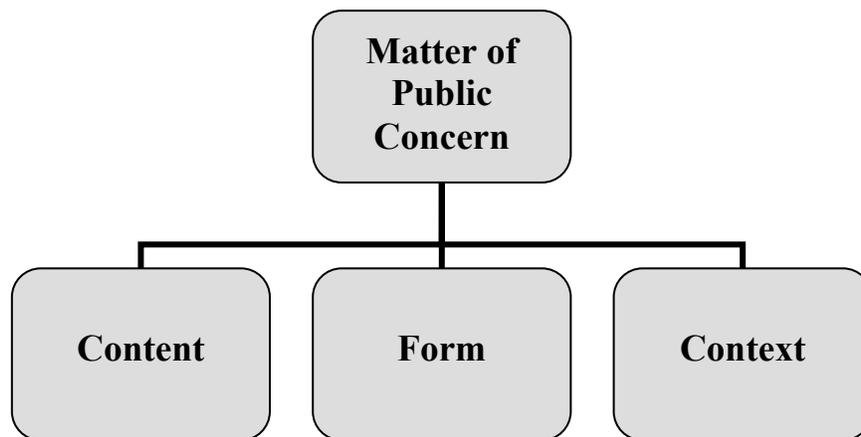
²²¹ See, e.g., *Givhan*, 439 U.S. 410. Accord *Connick*, 461 U.S. at 148 n.8.

²²² *Connick*, 461 U.S. at 152.

²²³ *Givhan*, 439 U.S. 410. See also *O’Connor v. Steeves*, 994 F.2d 905, 913 (1st Cir. 1993) (indicating that speech that is inherently a matter of public concern usually enjoys *per se* protection).

concern: “Whether an employee’s speech addresses a matter of public concern must be determined by the *content, form, and context* of a given statement.”²²⁴ The content, form and context of the statement must be examined to determine whether the employee speech “relat[es] to *any matter of political, social, or other concern to the community*.”²²⁵ This test (also known as the *Connick* test) is *Connick*’s fundamental contribution to the development of the Court’s public employment-free speech jurisprudence. However, the Court failed to define the parameters of content, form or context.

Figure 2: The Elements of the Test for the “Matter of Public Concern” Requirement:



With respect to speech that does not constitute a matter of public concern pursuant to the test above, the Supreme Court stated: “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.”²²⁶ The First Amendment does not require the judiciary to grant immunity to public employees for “employee grievances not afforded by the First Amendment to those who do not work for the State.”²²⁷ In addition, “[w]hile as a

²²⁴ *Connick*, 461 U.S. at 147–48 (emphasis added). A diagrammatic representation of the three elements of the test for “matter of public concern” can be found in Figure 2, *infra*.

²²⁵ *Id.* at 146 (emphasis added).

²²⁶ *Id.* at 147.

²²⁷ *Id.*

matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.”²²⁸

Addressing the facts of the case without distinctly and individually looking at content, form and context, the Supreme Court found only one of Myers’ questions to her coworkers to constitute a matter of public concern: the question about pressure to work on political campaigns.²²⁹ Its reasoning, maybe indicative of a “form” analysis, relied on the fact that speech about political pressure to work in campaigns might reveal unconstitutional official coercion of belief and embodies the historical value this country places on government employment being a function of meritorious rather than public service;²³⁰ these, the Court noted, made the speech a matter of public concern.²³¹

The Supreme Court found the other questions to be *mere extensions of Myers’ employment dispute or grievance with her employer*;²³² these questions were not designed in a bid to create public awareness of her employer’s failure to perform its duties, its wrongdoing (actual or potential) or its breach of public trust.²³³ By this the Court suggested that if public employees create questions or other speech, even if as extensions of employment disputes, in an effort to inform the public that their employer is engaged in dereliction of duties, *actual or potential* wrongdoing, or violation of public trust, the speech might constitute a matter of public concern. It is not clear if this is *per se* the case or whether the “content, form and context” test must additionally be applied. It is possible that the Court’s reasoning in this respect, though not illuminated, is that speech designed to inform the public about employer dereliction of duties, *actual or potential* wrongdoing, or violation of public trust already necessarily satisfies the “content, form and context” test.

The opinion also fails to clarify why and how the speech about pressure to work in political campaigns, which arises in the same single employment dispute, is distinguishable from the other speech and not like the others, a mere extension of an employment dispute; after all, they all arose from the “same single transaction or occurrence” or in essence,

²²⁸ *Id.* at 149.

²²⁹ *Id.* at 147–49.

²³⁰ *Id.* at 149.

²³¹ *Id.*

²³² *Id.* at 148–49.

²³³ *Id.* at 148.

context. Therein also lay the conceptual challenges posed by the Court's failure to expound on the "content, form and context" test. The Court's only justification for distinguishing the speech on political campaigns from the other speech in this case was its asserted public interest in basing government employment on merit rather than politics.²³⁴ Left unreconciled is how communication about dress code is protected according to *Mount Healthy*, while communication about office morale and discipline is not.

In addition, as in *Givhan*, the employee speech was at work in *Connick*, so it is unclear why one speech is protected speech while the other is not. In an attempt to clarify the distinction between the two cases the Court stated in *Connick* that the *subject matter* of the speech in *Givhan*—racial discrimination—was "a matter *inherently* of public concern."²³⁵ Instead of clarifying the distinction, however, the Court obfuscated the "matter of public concern" analysis by introducing the concept of "matter inherently of public concern" to an increasingly saturated *Pickering* balancing test. While we now know that speech about racial discrimination is inherently a matter of public concern (because the Supreme Court said so in *Connick*), the Court gave no guidance as to how to determine what subject matter of speech—other than racial discrimination—should qualify as being "inherently of public concern." Was the Supreme Court's labeling of speech about racial discrimination as inherently of public concern based on the recognized history of racial discrimination in the nation, or on the fact that racial discrimination attracts strict scrutiny review from the Court, or on some other basis? These are just a few of the questions the Court's introduction of this new concept raises. Commentators have described *Connick* as inherently uncertain, very restrictive of employee free speech rights and undoubtedly in consequence a chill on employees' criticism of employers.²³⁶ Stevan Dittman notes that the effect of *Connick* is "to generate even greater uncertainty with respect to the scope of a public employee's first amendment rights."²³⁷

²³⁴ *Id.* at 147–49.

²³⁵ *Id.* at 148 n.8 (emphasis added).

²³⁶ See, e.g., Peter C. McCabe III, *Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339 (1985) and Stevan C. Dittman, Note, *Constitutional Law—Supreme Court Restricts First Amendment Rights of Public Employees—Connick v. Myers*, 58 TUL. L. REV. 831 (1985).

²³⁷ Dittman, *supra* note 236, at 848. See also Jonathan Alen Marks, Comment, *Connick v. Myers: Narrowing the Scope of Protected Speech for Public Employees*, 5 U. BRIDGEPORT L. REV. 337 (1984).

In *Givhan*, using the word “context” to distinguish private from public communications, the Court stated that the context of speech should not determine whether it is protected by the First Amendment.²³⁸ In fact, the Court emphasized that the public forum context of speech in *Pickering*, *Perry* and *Mount Healthy* were coincidental to its decisions in those cases.²³⁹ Nonetheless, the Court held in *Connick*, that context is crucial to a determination of whether speech involves a matter of public concern.²⁴⁰ In addition, in *Givhan*, the Court held that context was important not only to the determination of how the *Pickering* balancing test would apply to private versus public communication, but also to the determination of the operational efficiency component of the *Pickering* balancing test.²⁴¹ Contexts the Court deems applicable in this respect include whether the statement hampers discipline by superiors, harmony among coworkers, and the employee’s work performance.²⁴² The Court’s failure to define the term “context” as used in *Connick*, leaves much to puzzle, complicating an intricacy of its public employment-free speech jurisprudence.

In a move that seems to nudge public employment-free speech jurisprudence back to the pre-*Pickering* pro-employer era, the Supreme Court, in its discourse on the *Pickering* balancing test, held variously that public employers must retain: wide discretion and control over personnel matters and the prerogative to terminate, with dispatch, employees hindering efficiency.²⁴³ Additionally, the Court stated: “When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor’s view that the employee has threatened the authority of the employer to run the office.”²⁴⁴

In what is ostensibly a back-pedaling on one of the factors in the *Pickering* balancing test, the Court stated, “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.”²⁴⁵ In *Pickering*, that factor required public employers to

²³⁸ *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

²³⁹ *Id.*

²⁴⁰ *Connick*, 461 U.S. at 147, 153.

²⁴¹ See Section VI, *supra*.

²⁴² See generally notes 1, 166, 205; and Section II, *supra*, identifying these factors as part of the *Pickering* calculus.

²⁴³ See generally *Connick*, 461 U.S. 138.

²⁴⁴ *Id.* at 153.

²⁴⁵ *Id.* at 152.

provide evidence demonstrating that the employee's speech actually had an adverse impact on the employer's proper functioning; the Court stated in *Pickering* that conjecture was deemed not to suffice.²⁴⁶ In *Connick*, however, the Court indicates in the quote above that employers could rely on speculations about disruptiveness of speech to terminate employees; actual evidence of adverse impact no longer seems a requirement.

Turning to the "close working relationship" factor of the *Pickering* balancing test, the Court held that the nature of Myers' employment required a close working relationship with her superiors, which would be disrupted and ineffective if Myers was not terminated.²⁴⁷ The Court only cited in support of this conclusion the first assistant and Connick's judgment that Myers was inciting a "mini-insurrection" and insubordinate by distributing the questionnaire;²⁴⁸ in essence, the Court deferred to the *judgment* of the employer,²⁴⁹ tilting a factor in the *Pickering* calculus—the "close working relationship" factor—in favor of employers. As part of the general trend of deference to employers in its holdings in *Connick*, the Court stated: "When close working relationships are essential to fulfilling public responsibilities, a *wide* degree of deference to the employer's judgment is appropriate";²⁵⁰ how wide, the Court failed to specify. However, it almost bespeaks unfettered discretion for employers. This in essence makes it more difficult for employees with close working relationships with their employers to bring First Amendment challenges to employment retaliation practices of their employers.

The Court also made clear that its reference in *Givhan* to the time, place and manner of employee speech as additional factors in the *Pickering* balancing test, was to ensure that institutional efficiency is not threatened in cases involving employee speech in private communications with their superiors.²⁵¹ Therefore, the time, place and manner of the speech were intended to further protect public employers, not employees, in the *Pickering* calculus.²⁵²

²⁴⁶ See Section II, *supra*.

²⁴⁷ *Connick*, 461 U.S. at 151–52.

²⁴⁸ *Id.*

²⁴⁹ *Id.* The Court's practice of canting the *Pickering* calculus in favor of employers is evident throughout the Court's public employment-free speech jurisprudence since *Pickering*, as discussed in Section II, *supra*.

²⁵⁰ *Id.* at 151–52 (emphasis added).

²⁵¹ *Id.* at 159.

²⁵² *Id.*

While the Supreme Court essentially applied all the factors of the *Pickering* balancing test in *Connick*, the Court still did not make clear whether all the factors were mandatory components of a *Pickering* balancing test or mere discretionary guidelines. *Connick*, however, added to the hurdles public employees have to overcome in order to present a valid First Amendment case against employment retaliation practices of their employers.

VIII. *RANKIN V. MCPHERSON*

Four years after *Connick*, in *Rankin v. McPherson*,²⁵³ the Supreme Court was presented with another opportunity to further develop and clarify the *Pickering* balancing test, particularly the context component of the “content, form and context” test for matters of public concern. In *Rankin*, McPherson, a deputy in the office of Constable Rankin of Harris County, Texas, was terminated for her speech.²⁵⁴ At the time of her termination, she was a probationary employee.²⁵⁵ As with all of Rankin’s employees, McPherson’s job title was “deputy constable,” even though she only performed clerical duties,²⁵⁶ she was not a commissioned peace officer.²⁵⁷ Her workstation was not accessible to the public and had no telephone²⁵⁸—in other words, it was not a public forum.

After hearing on an office radio that someone had tried to assassinate the President of the United States, McPherson, according to her undisputed testimony, stated in conversation with Lawrence Jackson, her boyfriend and coworker, “shoot, if they go for him again, I hope they get him.”²⁵⁹ Another deputy constable, whom McPherson was unaware heard her, informed Rankin of McPherson’s statement.²⁶⁰ While acknowledging the statement, McPherson insisted she meant nothing by it.²⁶¹ Rankin, nonetheless, terminated her, leading to McPherson challenging her termination as a violation of her right to freedom of speech.²⁶²

²⁵³ 483 U.S. 378 (1987).

²⁵⁴ *Id.* at 380–82.

²⁵⁵ *Id.* at 380.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 381.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 382.

²⁶² *Id.*

Reaffirming its holding in *Mount Healthy*, the Court declared that probationary employees might be entitled to reinstatement if their First Amendment right to free speech was the basis for their termination.²⁶³ In what might be encouraging to public employees, the Court added: “Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”²⁶⁴

In deciding the threshold issue of the *Pickering* balancing test—whether McPherson’s speech is a matter of public concern—the Supreme Court reiterated the importance of the content, form and context of the statement to this threshold determination.²⁶⁵ The Court took a clearer step than it had taken in *Connick* to demonstrate the application of context. Specifically, it defined the context of McPherson’s speech as “the course of a conversation addressing the policies of the President’s administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President.”²⁶⁶

Furthermore, the Court distinguished the context of a statement when first made by the employee from the context of the same statement made by the employee at the employer’s request: “A public employer may not divorce a statement made by an employee from its context by requiring the employee to repeat the statement, and use that statement standing alone as the basis for the discharge.”²⁶⁷ To allow the employer to employ this “tactic could in some cases merely give the employee the choice of being fired for failing to follow orders or for making a statement which, out of context, may not warrant the same level of First Amendment protection it merited when originally made.”²⁶⁸ In line with this, the Court held that even though McPherson made the statement twice, once to Lawrence in the context of a conversation about the President’s policies, and secondly in response to Rankin’s query about what she said, the second context is not a context independent of the first.²⁶⁹ This was a favorable ruling for public employees.

²⁶³ *Id.* at 383–84.

²⁶⁴ *Id.* at 384.

²⁶⁵ *Id.* at 384–85.

²⁶⁶ *Id.* at 386.

²⁶⁷ *Id.* at 386 n.10.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

Further strengthening the position of public employees, the Supreme Court held that vehement, caustic and even sharp criticisms of the government must not be excluded from debate on public issues.²⁷⁰ Likewise,

[t]he inappropriate or controversial character of a [public employee's] statement is irrelevant to the question whether it deals with a matter of public concern Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.²⁷¹

Besides, the Court noted that “a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee.”²⁷²

Once it had determined that McPherson's speech was a matter of public concern, the Supreme Court observed that time, place and manner as well as context of the speech are relevant considerations to the application of the *Pickering* balancing test.²⁷³ With respect to these considerations, the Court noted that while McPherson's speech had occurred in the workplace, the employer failed to provide evidence showing that operational efficiency, McPherson's work performance, employee harmony and discipline had in any way been impaired.²⁷⁴ With respect to place, acknowledging the speech occurred in the office, the Court stated that McPherson's workstation was not accessible to the public;²⁷⁵ moreover, no evidence was presented that any member of the public was actually present or heard the speech;²⁷⁶ and the manner of speech was a private conversation with a coworker.²⁷⁷

Rankin gave a boost to employee rights, as discussed above. The Supreme Court struck the balance in the *Pickering* test in favor of McPherson.²⁷⁸ The Court further noted that the *Pickering* balancing test

²⁷⁰ *Id.* at 387.

²⁷¹ *Id.* (quoting *Bond v. Floyd*, 385 U.S. 116, 136 (1966)).

²⁷² *Id.* at 388 n.13.

²⁷³ *Id.* at 388.

²⁷⁴ *Id.* at 388–89.

²⁷⁵ *Id.* at 389.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 392.

requires that “some attention *must* be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails.”²⁷⁹ Elucidating, the Court stated that the private speech of employees who have no (a) confidential, (b) policymaking, or (c) public contact role poses very minimal danger to their employers.²⁸⁰

IX. *WATERS V. CHURCHILL*

The pro-employee leaning in *Rankin* would be short-lived. Seven years after *Rankin*, in *Waters v. Churchill*,²⁸¹ the Court would decide whether the content component of the matter of public concern should be from the government employer’s perspective or from the trier of fact’s perspective.²⁸² The decision would dial back on the protection of speech rights of public employees. The case was also an opportunity for the Court to further define the parameters of *content*, in the *Connick* test. Churchill, a nurse employed in the obstetrics department at a government-operated hospital, was terminated for her speech.²⁸³ She challenged her termination as a violation of her First Amendment rights.²⁸⁴

While Churchill was engaged in a conversation with Perkins-Graham, a nurse contemplating transfer to the obstetrics department, another nurse who overheard the conversation reported Churchill to Waters, her supervisor.²⁸⁵ The nurse twice claimed that during the conversation,

²⁷⁹ *Id.* at 390 (emphasis added).

²⁸⁰ *Id.* at 390–91. The pro-employee stance of the Court that pervaded the opinion is evident in the following statement:

We cannot believe that every employee . . . whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted . . . as an indication that the employee may be unworthy of employment. . . . At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee.

Id. at 391.

²⁸¹ 511 U.S. 661 (1994).

²⁸² *Id.* at 664.

²⁸³ *Id.*

²⁸⁴ *Id.* at 667.

²⁸⁵ *Id.* at 665.

Churchill criticized Waters and the obstetrics department, prompting Perkins-Graham to lose interest in the transfer.²⁸⁶ Perkins-Graham confirmed the nurse's account.²⁸⁷ She also revealed that Churchill told her about an evaluation in which Waters cited her for impeding constructive communication, fostering an "unpleasant atmosphere," and acting negatively toward Waters.²⁸⁸ Churchill's work performance was satisfactory otherwise.²⁸⁹ Churchill disagreed with both nurses' account.²⁹⁰ Without asking Churchill for her version of the conversation, Waters terminated her.²⁹¹

At trial, Churchill testified that her conversation with Perkins-Graham was primarily part of her longstanding concern over the hospital's cross-training policy which allowed nurses from an overstaffed department to work in another.²⁹² Churchill had expressed her concerns about the policy to Waters and Davis, the hospital's vice president of nursing, convinced that its focus on staff shortages rather than nurse training made for a policy that endangered patient health.²⁹³ While acknowledging that she criticized Waters for her staffing policies, Churchill denied discouraging Perkins-Graham's transfer.²⁹⁴ Testimony by the clinical head of obstetrics and a nurse, neither of whom were consulted prior to Churchill's termination, corroborated Churchill's testimony.²⁹⁵

The challenge for the Supreme Court was to determine what version of the *content* of the employee's speech the *Connick* test for matter of public concern applies: is it to what the public employer thought was said, or to what the trier of fact decides was said?²⁹⁶ The Court would thus attempt to define some additional parameters for the content portion of the *Connick* test. In a plurality opinion,²⁹⁷ the Court held that this procedural

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 666–67.

²⁹¹ *Id.* at 666.

²⁹² *Id.* at 666–67.

²⁹³ *Id.* at 666.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 664.

²⁹⁷ Even though this was a plurality opinion, pursuant to *Marks v. United States*, 430 U.S. 188 (1977), it is the holding of the Court. *See also* *Wales v. Bd. of Educ. of Cmty. Unit Sch. Dist. 300*, 120 F.3d 82, 84 (7th Cir. 1997).

determination must be cautiously fashioned so as not to exculpate unprotected speech or punish protected speech.²⁹⁸ Yet, after agonizing over the arduous task of establishing a bright-line test for when the First Amendment requires procedural standards, the plurality left such determinations from case to case ad hoc “at least until some workable general rule emerges.”²⁹⁹

The plurality observed that the practical realities of public employment effectively ensure that open, robust, and unhindered debate that would occur between the government and its citizens are not at all permissible between the government and its employees.³⁰⁰ For example, public employers do not need to tolerate “verbal tumult” or rely on counterspeech as remedy to employee speech.³⁰¹ By holding that employers do not have to rely on counterspeech as remedy to employer speech, the plurality effectively undermined the “ease of rebuttal” factor in the *Pickering* calculus.³⁰²

The plurality took great pains to point out different facets of distinctions between speech, given the realities of public employment, and speech involved in government relationships with the citizenry.³⁰³ For instance, the plurality noted that while it would be unconstitutionally vague for the government to prohibit the general citizenry from being “rude to customers,” it is permissible to prohibit government employees from engaging in the same conduct.³⁰⁴ The plurality also stated that in its public employment-free jurisprudence, the Court adopted a deferential posture towards judgments of public employers about the disruptive nature of employee speech, albeit mostly speculative judgments.³⁰⁵ This is clearly not so in *Pickering* where the Court, in discussions of the *Pickering* calculus factors, stated that mere conjecture about the adverse impact of speech on public employees was inadequate.³⁰⁶ According to the plurality, this deferential approach, not accorded the government in relation to general citizenry speech, is also given to actions of public employers that

²⁹⁸ *Waters*, 511 U.S. at 669–71.

²⁹⁹ *Id.* at 671.

³⁰⁰ *Id.* at 672.

³⁰¹ *Id.*

³⁰² See discussion of the “ease of rebuttal” *Pickering* calculus factor under Section II, *supra*.

³⁰³ *Waters*, 511 U.S. at 671–75.

³⁰⁴ *Id.* at 673.

³⁰⁵ *Id.* at 672–75.

³⁰⁶ See Section II, *supra*.

are based on private speech of employees.³⁰⁷ Again, *Givhan* is a clear disputation of the plurality's conclusion, for in that case the Court did not defer at all to the employer's actions based on the employee's speech.³⁰⁸ However, the plurality was on a course to provide greater rights to employers, even at the risk of decreased protection for public employees' speech rights.

The plurality tilted the public employment-free speech jurisprudence of the Court back toward employers, particularly via its development of the *Pickering* balancing test. This is axiomatic in various parts of its opinion, as in the following holding: "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."³⁰⁹ Continuing with this pro-employer tilt, the plurality stated: "The *key* to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a *significant* one when it acts as employer."³¹⁰

Further, the plurality held that courts must give deference to the employer's version of the content of employee speech when applying the *Connick* test.³¹¹ A ruling otherwise, it noted, would compel employers to institute and learn evidentiary rules substantially similar to those used in court proceedings, a burden to employers.³¹² The plurality stated that factors such as past conduct of a similar nature by the employee, the employer's personal knowledge of witness credibility, and hearsay which might not be admissible in judicial proceedings provide sufficient and valid bases for employer actions against employees for their speech.³¹³ While acknowledging that employer reliance on such factors could well lead to erroneous punishment of protected speech, the plurality nonetheless found no constitutional infirmity with such reliance.³¹⁴ Commentators such as Patricia Camvel note that

³⁰⁷ *Waters*, 511 U.S. at 672–75.

³⁰⁸ See Section VI, *supra*.

³⁰⁹ *Waters*, 511 U.S. at 675.

³¹⁰ *Id.* (emphasis added).

³¹¹ *Id.* at 667–80.

³¹² *Id.* at 675–76.

³¹³ *Id.* at 676.

³¹⁴ *Id.* at 676–77.

Waters v. Churchill has further restricted First Amendment protection for public employees' speech by easing procedural aspects associated with employer retaliation as well as with the content of the speech. Now, public employers do not have to determine with certainty whether an employee actually engaged in unprotected speech or even what the exact content of alleged speech was before those employers can reprimand the employee.³¹⁵

Public employees, however, can get some solace from the case, as the plurality imposed a "reasonableness requirement" on employer determinations of the content of employee speech: courts must look at the reasonableness of the employer's conclusions about the speech.³¹⁶ The plurality added that it might be unreasonable for an employer to terminate an employee with no evidence whatsoever, or on the basis of extremely weak evidence where there is clearly strong evidence on which to base a decision.³¹⁷ Further spelling out the "reasonableness requirement," the plurality stated that

[i]f an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with . . . the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case.³¹⁸

In an apparent revelation of the fluid and highly subjective nature of and the challenges inherent in the "reasonableness requirement," the plurality observed:

Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of

³¹⁵ Patricia C. Camvel, Note, *Waters v. Churchill: The Denial of Public Employees' First Amendment Rights*, 4 WIDENER J. PUB. L. 581, 583 (1985).

³¹⁶ *Waters*, 511 U.S. at 677.

³¹⁷ *Id.*

³¹⁸ *Id.* at 677–78.

action will necessarily be reasonable. Only procedures outside the *range* of what a reasonable manager would use may be condemned as unreasonable.³¹⁹

If such a wide and shifting range of “reasonableness” is accorded public employers, employee rights are effectively indeterminate and could invariably be a function of arbitrary factors of no relevance to the actual case, such as the fortune of a favorably constituted judicial panel or trial court. In fact, commentators note that the *Pickering* balancing test and its progeny have inherent flaws, create a disturbing catch-22 problem for public employees and render the public employment-free speech jurisprudence unpredictable.³²⁰

Turning to the facts of the case under review, the plurality held that the decision by Waters and Davis to accept the testimony of the two nurses about the content of Churchill’s speech, without asking the clinical head of obstetrics, the other nurse or Churchill for their accounts of the conversation, was reasonable, because management only has limited time to spend on any employment decision.³²¹

Leaning again toward its pro-employer stance which pervades the opinion, the plurality stated that even if Churchill’s speech was a criticism of the cross-training policy, its potential disruptiveness outweighed any First Amendment value it might have had;³²² therefore, Churchill’s speech was not constitutionally protected from employer retaliation.³²³ As evidence of disruptiveness, the plurality relied on Perkins-Graham’s substantially dampened interest in transferring to obstetrics, noting that “[d]iscouraging people from coming to work for a department *certainly* qualifies as disruption.”³²⁴ Additional evidence of disruption cited by the plurality, which betray its pro-employer posture include:

Perkins-Graham perceived Churchill’s statements about Waters to be unkind and inappropriate, and told

³¹⁹ *Id.* (emphasis added).

³²⁰ See, e.g., John M. Ryan, Comment, *Teacher Free Speech in Public Schools: Just When You Thought It Was Safe to Talk*, 67 NEB. L. REV. 695 (1988).

³²¹ *Waters*, 511 U.S. at 680 (“Management can spend only so much of their time on any one employment decision.”).

³²² *Id.* at 680–81.

³²³ *Id.* at 681. The Court, however, remanded the case for a determination of whether Churchill was actually terminated for her speech or for some other reason other than her speech. *Id.* at 682.

³²⁴ *Id.* at 680 (emphasis added).

management that she knew they could not continue to tolerate that kind of negativism from Churchill. This is *strong* evidence that Churchill's complaining, if not dealt with, threatened to undermine management's authority in Perkins-Graham's eyes. . . . As a matter of *law*, this *potential* disruptiveness was enough to outweigh whatever First Amendment value the speech might have had.³²⁵

In line with *Connick*, the plurality affirmed the change in "actual disruptiveness" requirement in *Pickering*³²⁶ to *potential* disruptiveness, substantially easing the hurdles for employers to terminate employees for the exercise of their free speech rights.³²⁷ In addition, the Court made potential disruptiveness sufficient to terminate the employee as a matter of law.³²⁸ This effectively gives employers creative leeway to fabricate, *post-hoc*, scenarios of potential disruptiveness emanating from the employee's speech.

The pro-employer trend in *Waters* would continue as the plurality distinguished between the constitutional import of "mixed content" speech—speech that contains both matters of public concern and matters not of public concern. Myers' questionnaire in *Connick* was an example of "mixed content" speech.³²⁹ Like in *Connick*, the plurality held that in cases of "mixed content" speech, efforts should be made to distinguish speech on matters of public concern from those not of public concern, as employers can constitutionally terminate employees for speech not on public concern.³³⁰ The plurality stated:

So long as Davis and Waters discharged Churchill only for the part of the speech that was either [a] not on a matter of public concern, or [b] on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive. . . . An employee who makes an unprotected statement is not immunized from discipline

³²⁵ *Id.* at 680–81 (emphasis added) (internal quotes omitted).

³²⁶ See *Pickering* calculus factors under Section II, *supra*.

³²⁷ *Waters*, 511 U.S. at 680–81.

³²⁸ *Id.* at 681.

³²⁹ See Section VII, *supra*.

³³⁰ *Waters*, 511 U.S. at 681.

by the fact that this statement is surrounded by protected statements.³³¹

Commentators note that *Waters* was primarily a case that strengthened the position of employers in the *Pickering* balancing test.³³² Employees got the benefit of the “reasonableness requirement”; but as the plurality itself acknowledged, it was a fluid requirement at best.³³³ It seemed the strong pro-employee nature of *Pickering* was no longer the order of day. From 1968 to 1994, each interpretation of the *Pickering* balancing test seemed more like an opportunity to improve the position of employers in the *Pickering* balancing test relative to employees, albeit sometimes *sub silentio*; occasionally, as pointed out *supra*,³³⁴ the Court extended tokens of protection to public employees’ free speech rights. This trend would continue in *San Diego v. Roe*.³³⁵

X. *SAN DIEGO V. ROE*

In *San Diego*, Roe, a police officer for the City of San Diego, was terminated for selling certain sexually explicit videotapes he made of himself stripping off a police uniform after his supervisor discovered the videotape on the Internet auction site, eBay.³³⁶ The supervisor reported his discovery to various persons in Roe’s chain of command, prompting an investigation by the San Diego Police Department.³³⁷ Roe admitted to selling the explicit videotapes and police paraphernalia.³³⁸ The investigation concluded that Roe’s conduct was a violation of department policies and he was ordered to cease and desist from selling the videotapes and from engaging in similar behaviors over the internet or mail.³³⁹ While Roe ceased sale of some of the items, he did not delete from his seller’s

³³¹ *Id.*

³³² See, e.g., Bruce Bodner, *Constitutional Rights—United States Supreme Court Gives Public Employers Greater Latitude to Curb Public Employee Speech—Waters v. Churchill*, 114 S. CT. 1878 (1994), 68 TEMP. L. REV. 461 (1995).

³³³ *Waters*, 511 U.S. at 678.

³³⁴ See Section IV, *supra*.

³³⁵ 543 U.S. 77 (2004).

³³⁶ *Id.* at 78–79.

³³⁷ *Id.* at 78.

³³⁸ *Id.* at 79.

³³⁹ *Id.* Specifically, Roe was ordered to “cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public.” *Id.*

profile a description of the first two videotapes he made and their prices, prompting the department to terminate him for disobedience of lawful orders and the other violations of department policies.³⁴⁰ Roe challenged the termination as a violation of his First Amendment right to free speech.³⁴¹

In the *per curiam* opinion, the Supreme Court held that Roe's speech was not protected.³⁴² The Court stated that even though Roe's speech occurred outside his workplace, and purported to deal with subjects unrelated to his employment, his speech compromised his employer's legitimate and substantial interests. The Court pointed out that

[t]o require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the *proper functioning of government offices*. . . . This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of public concern.³⁴³

Essentially, the Court stated that the "matter of public concern" requirement as well as the *Connick* test were established by the Court in order to avoid compromising the proper functioning of public employers; nowhere does the Court include as part of its rationale for the "public

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* at 84–85. The Court distinguished between speech in the workplace and speech employees make on their own time on topics not related to their employment:

The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. . . . Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification far stronger than mere speculation in regulating it.

Id. at 80 (internal quotes omitted).

³⁴³ *Id.* at 82–83 (emphasis added) (internal quotes omitted).

concern” requirement or the *Connick* test, a concern for the free speech rights of employees.

In contrast to its holding in *Madison Joint School District No. 8*, where the Court held that an employee who speaks concurrently as employee and citizen is entitled to constitutional protection,³⁴⁴ the Court stated: “*Connick* held that a public employee’s speech is entitled to *Pickering* balancing only when the employee speaks as a citizen upon matters of public concern rather than as an employee upon matters only of personal interest.”³⁴⁵ Fundamentally, the Court held that when an employee speaks as an employee on matters purely of personal interest, the employee’s speech is not entitled to First Amendment protection; however, when the same employee speaks as a citizen on matters of public interest, the employee’s speech is protected by the First Amendment. Unclear from the Court’s holding is whether the employee who speaks *as an employee* on matters of public concern is protected.

While the *Connick* test already directs courts to look at the content, form and context of speech in determining what constitutes a matter of public concern for purposes of the *Pickering* balancing test, in *San Diego*, the Court finally provided a definition for “matter of public concern”: “public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”³⁴⁶ This definition recognizes as a matter of public concern the subject of any speech that is of legitimate news interest and of concern to the public *at the time of the speech*.³⁴⁷ The Court did not make clear, however, whether the “legitimate news interest” and “at time of publication of the speech” are additional requirements to the content, form and context elements of the *Connick* test or entirely *different* considerations.

In the following cases, the Court found the employee speech to be a matter of public concern: In *Pickering*, the employee speech was a letter sent to a local newspaper about school funding;³⁴⁸ in *Perry*, it was testimony before a legislative committee about the structure of an institution;³⁴⁹ in *Madison Joint School District No. 8*, it was speech about a subject of collective bargaining at a segment of the public school board

³⁴⁴ See Section IV, *supra*.

³⁴⁵ *San Diego*, 543 U.S. at 83.

³⁴⁶ *Id.* at 83–84.

³⁴⁷ *Id.*

³⁴⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 566 (1968).

³⁴⁹ *Perry v. Sindermann*, 408 U.S. 593, 594–95 (1972).

meeting set aside for the public to comment about the subjects of the collective bargaining,³⁵⁰ in *Mount Healthy*, it was communication with a radio station about dress code;³⁵¹ and in *Givhan*, it was speech about racial discrimination.³⁵² While it is readily apparent that school funding, structure of an institution, and racial discrimination are of “legitimate news interest,” it is difficult to say that speech about dress code is. Moreover, while in *Pickering*, “at the time of the publication of the speech,” school funding was of concern and general interest to the public, it is difficult to state without nictitating that the speech about dress code in *Mount Healthy*, racial discrimination in *Givhan*, and institutional structure in *Perry* were of concern and general interest to the public *at the time of the publication of the speech*. Moreover, in *Madison Joint School District No. 8*, aside from the fact that the speech was at a public meeting where the public could comment about the subjects of collective bargaining, it is a challenging and synthetic leap to conclude that the subject of collective bargaining was of interest to the public at the time of the speech.

San Diego essentially strengthened the position of employers in regulating employee speech. As indicated above, the Supreme Court increasingly favored greater public employer control of employee speech over the years, especially between 1983 when *Connick* was decided and 2004 when *San Diego* was decided. In 2006, the Supreme Court was presented with an opportunity in *Garcetti v. Ceballos*³⁵³ to vindicate the free speech rights of public employees. However, the Court might already be so steeped in its pro-employer interpretation, development and balancing of the *Pickering* balancing test that it would be difficult to recede.

XI. *GARCETTI V. CEBALLOS*

In this case, Ceballos, a supervisory deputy district attorney, claimed that his employer—the Los Angeles County District Attorney’s Office—subjected him to several retaliatory employment actions following the exercise of his right to free speech.³⁵⁴ The actions that he challenged as violative of his First Amendment right included: reassignment from his

³⁵⁰ *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 169–72 (1976).

³⁵¹ *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282–83 (1977).

³⁵² *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 411–13 (1979).

³⁵³ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

³⁵⁴ *Id.* at 413, 415.

position as calendar deputy to a trial deputy position;³⁵⁵ denial of a promotion;³⁵⁶ and transfer to a different courthouse.³⁵⁷ Ceballos' supervisors denied taking any retaliatory actions against him, contending that these actions were based on staffing needs.³⁵⁸ In the alternative, the supervisors alleged that the memorandum at issue was not protected speech.³⁵⁹

The incidents giving rise to the cause of action started after a defense attorney asked Ceballos to review a pending criminal case and an affidavit used to get a search warrant in the case.³⁶⁰ The attorney informed Ceballos that the affidavit contained inaccuracies.³⁶¹ After an investigation, which included a review of the affidavit, a visit to the site described therein and a telephone conversation with the warrant affiant (a deputy sheriff in the county sheriff's department) Ceballos concluded that the affidavit contained serious misrepresentations.³⁶² He discussed his concerns and criticism of the affidavit with his supervisor and in a memorandum recommended dismissal of the case;³⁶³ the supervisor rejected his recommendation.³⁶⁴

Though not precisely stated, the Supreme Court attempted to clarify the "as citizen" versus "as employee" status in the *Pickering* balancing test. Recall that in *Pickering* the Court noted that the balancing test applies to only an employee who speaks as a citizen on a matter of public concern;³⁶⁵ granted, *Madison Joint School District No. 8* held that speech made as employee and citizen concurrently is protected.³⁶⁶ According to the Court, the central issue in the case was "whether the First Amendment protects a

³⁵⁵ *Id.* at 415.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 413.

³⁶¹ *Id.*

³⁶² *Id.* at 414.

³⁶³ *Id.*

³⁶⁴ *Id.* At the hearing on the defense motion to traverse, Ceballos, in testimony for the defense, restated his findings about the affidavit. *Id.* at 414–15.

³⁶⁵ See Section II, *supra*.

³⁶⁶ See Section IV, *supra*.

government employee from discipline based on speech made *pursuant to* the employee's official duties."³⁶⁷

The Court reaffirmed its holdings in *Connick*³⁶⁸ and *Waters*³⁶⁹ allowing employers to restrict employee speech on the basis of potential disruptiveness. It stated that employers can restrict employee "speech that has some *potential* to affect the entity's operations."³⁷⁰ Moreover, the Court iterated that government agencies have broader discretion when acting in their *role as employer*, affirming the ruling to this effect in *Waters*.³⁷¹ It added: "Government employers, like private employers, need a *significant* degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."³⁷² The Court provided no empirical or other evidence in support of its conclusion that, absent significant control over employees' words and actions, *little* chance exists for efficient provision of public services.

Additionally, the Court stated that public employers need more control over the speech of their employees because public employees often hold trusted positions in society.³⁷³ The Court expressed concerns about denying public employers control over the speech of their employees because "[w]hen [public employees] speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions."³⁷⁴ Similarly, the Court declared that "[w]hen a citizen enters government service, the citizen by necessity must accept

³⁶⁷ *Garcetti*, 547 U.S. at 413 (emphasis added). The Court set forth two inquiries from *Pickering* and its progeny of cases essential to the determination of whether a public employee's speech is entitled to First Amendment protection: (1) Did the employee speak as a citizen on a matter of public concern? If the answer is no, then the employee has no First Amendment cause of action against the employer's reaction to the speech. If the answer is yes, however, the employee has the possibility of a First Amendment claim based on the employer's reaction to the speech; the second inquiry must then be made. (2) Did the employer have an adequate justification for treating the employee differently from any other member of the general public? This is the affirmative defense for employers recognized in *Mount Healthy*. *Id.* at 418.

³⁶⁸ See Section VII, *supra*.

³⁶⁹ See Section IX, *supra*.

³⁷⁰ *Garcetti*, 547 U.S. at 418 (emphasis added).

³⁷¹ *Id.*

³⁷² *Id.* (emphasis added).

³⁷³ *Id.* at 419.

³⁷⁴ *Id.*

certain limitations on his or her freedom.”³⁷⁵ Such statements and conclusions earlier in the opinion were indicative of the Court’s inclination in this case to strike the *Pickering* balancing in favor of the employer, and in so doing strengthen the position of employers in the balancing test.

In what was a further obfuscation of the already fuzzy line between “citizen” status and “employer” status in the *Pickering* balancing test, the Court, having already noted that citizens who enter government service must accept limitations on their freedoms, added: “a citizen who works for the government is nonetheless a *citizen*.”³⁷⁶ In essence, these statements imply that public employees can speak concurrently “as citizen” and “as employee.” The Court also declared that “[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as *private citizens*.”³⁷⁷ Yet recall that in *Garcetti*, the Court also stated that public employees are nonetheless citizens.³⁷⁸ Besides, the Court introduced the concept of *private citizens*,³⁷⁹ without clarifying the distinction, if any, between private citizen and public citizen. It remains unclear whether “public employee” status is synonymous with “public citizen” status for purposes of the jurisprudence.

Referring further to the “citizen” status, the Court stated that “[s]o long as employees are speaking as *citizens* about matters of public concern, they must face only those speech restrictions that are necessary for their employees to operate efficiently and effectively.”³⁸⁰ As discussed earlier,³⁸¹ *Madison Joint School District No. 8*, which held that an employee speaking simultaneously as a citizen and as an employee is entitled to First Amendment protection under the *Pickering* balancing test, presents a problem for the Court’s holding in *Garcetti*. Even in *Garcetti*, the Court failed to define parameters for determining when an employee speaks simultaneously as an employee and a citizen or how this simultaneous status differs from when an employee is speaking solely as a citizen or solely as an employee.

³⁷⁵ *Id.* at 418. As further evidence of the pro-employer nature of the opinion, the Court declared that the First Amendment does not empower employees to constitutionalize the grievance process. *Id.* at 420.

³⁷⁶ *Id.* at 419 (emphasis added).

³⁷⁷ *Id.* (emphasis added).

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* (emphasis added).

³⁸¹ See Section IV, *supra*.

The Court set forth a test for making the distinction between “citizen” status and “employee” status, under the *Pickering* balancing test.³⁸² The test provides 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.”³⁸³ This is the “pursuant to official duties” test (or the *Garcetti* test) and it is the most important contribution of the *Garcetti* case to the Court’s public employment-free speech jurisprudence. The Court failed to define the phrase “pursuant to,” adding to the litany of new concepts the Court has added to the *Pickering* calculus without much clarification, a further obfuscation of the jurisprudence. Moreover, left to ponder is a clarification or test for what constitutes “official duties” under this test; in other words, the Court failed to create a framework for defining the scope of an employee’s official duties. The Court did reveal, however, in illustration, that statements and complaints by employees such as those in *Pickering* and *Connick* were not made pursuant to official duties, but rather outside the scope of employment duties.³⁸⁴ In both cases, the employer did not authorize the speech and the employees did not speak out because it was a part of their job requirement to speak out.³⁸⁵

In its holding quoted in the immediately preceding paragraph herein,³⁸⁶ the Court fundamentally held that First Amendment protection is not available for speech pursuant to employees’ official duties, irrespective of whether it involves a matter of public concern under the *Connick* test.³⁸⁷

The Supreme Court decision did have a few favorable aspects for employees. As noted above, the Court held that: “[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, *incidentally* or intentionally, the liberties employees

³⁸² *Garcetti*, 547 U.S. at 421–24 (this was done without defining or developing the “private citizen” versus “public citizen” concepts).

³⁸³ *Id.* at 421 (emphasis added).

³⁸⁴ *Id.* at 424.

³⁸⁵ *Id.*

³⁸⁶ “[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.” *Id.* at 421 (emphasis added).

³⁸⁷ *Id.* at 424. Distinguishing *Givhan*, the Court noted that Givhan’s speech was not speech pursuant to her official duties. *Id.* at 420–21.

enjoy in their capacities as private citizens.”³⁸⁸ This statement represents the greatest protection the Court gave employees in the opinion. The declaration that employers could not incidentally restrict employee speech by leveraging the employment relationship is new to the Court’s public employment-free speech jurisprudence. In describing the foundational nature of First Amendment rights to society, the Court stated that even though public employees have some First Amendment protection, the public interest in the informed views of public employees is a First Amendment interest that transcends the individual employee.³⁸⁹ Employees can also be encouraged by the Court’s holding thus: “Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like ‘any member of the general public,’ to hold that all speech within the office is automatically exposed to restriction.”³⁹⁰ However such encouragement is quickly tempered by the Court’s holding that the work product of employees is not entitled to First Amendment protection.³⁹¹

³⁸⁸ *Id.* at 419 (emphasis added).

³⁸⁹ *Id.* “Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public’s interest in receiving informed opinions as it is the employee’s own right to disseminate it.” *Id.* at 420 (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004)).

³⁹⁰ *Id.* at 420–21 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968)).

³⁹¹ *Id.* at 422. The Court added that its refusal

to recognize First Amendment claims based on government employees’ work product does not prevent them [public employees] from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Id. The prospect of protection is retained, however, only when employees speak outside of their official duties:

Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper or discussing politics with a co-worker.

Id. at 423.

Turning to the case, pursuant to *Givhan*, the Court held that the private office setting of Ceballos' speech did not defeat his First Amendment claim.³⁹² In addition, the fact that Ceballos' memorandum related to the subject matter of his employment was not dispositive, as "[t]he First Amendment protects some expressions related to the speaker's job."³⁹³ Applying the "pursuant to official duties" test, the Court stated that

[t]he controlling factor in Ceballos' case is that his expressions were made *pursuant to* his duties as a calendar deputy. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline.³⁹⁴

The Court added that part of Ceballos' official duties in his capacity as a calendar deputy was to write disposition memos and that was his reason for preparing the memo in this case.³⁹⁵ Immaterial to the determination is whether Ceballos got "personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties."³⁹⁶

To distinguish the letter Pickering sent to the newspaper from Ceballos' memo, the Court characterized the letter in *Pickering* as having no official significance, while Ceballos' memo had official significance.³⁹⁷ Likewise, Pickering's letter, "bore similarities to letters submitted by numerous citizens every day," while Ceballos' memo did not.³⁹⁸ Since "Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges,

³⁹² *Id.* at 420–21.

³⁹³ *Id.* at 421.

³⁹⁴ *Id.* (citation omitted) (emphasis added).

³⁹⁵ *Id.*

³⁹⁶ *Id.* The Court held that as long as employees are not speaking out as part of their official duties, they are free to speak out publicly; the determination of whether the employee is entitled to First Amendment protection would be dependent on application of the *Pickering* balancing test. *Id.* at 417.

³⁹⁷ *Id.* at 422.

³⁹⁸ *Id.*

and preparing filings. . . he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.”³⁹⁹

In addition, the Court recognized two new categories of employee speech that are unprotected: (a) employee speech that owes its very existence to official duties of the employee; and (b) employee speech that the employer commissioned or created.⁴⁰⁰

The Court also gave employers the right to scrutinize and control employees’ official speech for the following reasons: (a) to ensure substantive consistency and clarity;⁴⁰¹ (b) to ensure the accuracy of the speech;⁴⁰² (c) to ensure that the speech demonstrates sound judgment;⁴⁰³ and (d) to ensure that the speech promotes the employer’s mission.⁴⁰⁴ The Court held that as an official memo, Ceballos’ memo was subject to the scrutiny and control of his employer,⁴⁰⁵ and if his superiors “*thought* his memo was inflammatory or misguided, they had the authority to take *proper corrective action*.”⁴⁰⁶ Moreover, the Court held that since Ceballos’ memo was prepared pursuant to his official duties, by disciplining or terminating him for the speech, his employers would not be in violation of his First Amendment rights.⁴⁰⁷ As it added to the power of employers in the *Pickering* balancing test, the Court essentially sanctioned employer control over any official speech the employer thinks is inflammatory or misguided; moreover, the Court failed to define what in other contexts of its jurisprudence could well be regarded as an unconstitutionally vague or

³⁹⁹ *Id.* Furthermore, the Court noted: “When he [Ceballos] went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance.” *Id.*

⁴⁰⁰ *Id.* at 421–22. Strengthening the position of public employers in the *Pickering* calculus, the Court stated that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Id.* Building on the pro-employer emphasis of its reasoning and holdings, the Court stated that “[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity,” and they must retain “sufficient discretion to manage their operations.” *Id.* at 422.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 422–23.

⁴⁰³ *Id.* at 423.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* (emphasis added).

⁴⁰⁷ *Id.* at 424.

overbroad grant of authority—the authority to take “proper corrective action.”

Garcetti represents the Court’s latest ruling on the free speech rights of public employees. It introduced what is known as the *Garcetti* test, for cases where the type of speech in question is “official speech,” private or public. Though not expressly stated by the Court, it seems to be a development of the “form” aspect of the *Connick* test, distinguishing official speech from unofficial speech. As stated in *Connick*, when speech is not a matter of public concern, the *Pickering* balancing test is not applied. In the same way, when official speech, held as a matter of law by the Court not to constitute matter of public concern, is the focus of a case, the *Pickering* balancing test is not applied to that speech.

Once pared, the central holding of *Garcetti* is aptly thus: “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.”⁴⁰⁸ The Court’s failure to articulate a test for determining the scope of employee rights could encourage employers to write up job descriptions which define employee duties very broadly.⁴⁰⁹ This could ineluctably present a situation where whistleblowing public employees are unprotected under the First Amendment because their job description comprehends whistleblowing job duties, functions or responsibilities. Laconically responding to such concerns as these, the Court noted that the determination of the scope of employees’ duties must be based not on what is on paper but rather on what the employee actually does.⁴¹⁰ In addition, it presents a situation where employees who want to privately criticize their employers or their policies but fear that their speech would fall within the ambit of speech “pursuant to official duties” under *Garcetti* might be better served expressing those very concerns to the press or some entity other than their

⁴⁰⁸ *Id.*

⁴⁰⁹ The *Garcetti* test could well limit the right of teachers to speak out about matters of academic scholarship or classroom teaching when whistleblowing, if they believe that those matters are within their official duties, and thus unprotected by the First Amendment. The Court refused to address this, only stating that “expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.” *Id.* at 425.

⁴¹⁰ *Id.* at 424–25. (“Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.”).

employer. Even such speech, however, might be deemed to constitute speech “pursuant to official duties,” since the Court failed to articulate the scope and consequent boundaries of the “pursuant to official duties” requirement; maybe this requirement might be helped by examining the “content, form, and context” of the speech—the *Connick* test, and the “time, place and manner” pursuant to *Givhan*, if guidelines for the application of those factors and their nuances could be better defined; these could then serve as navigators for determining if speech was “pursuant to official duties,” even when made to an entity other than the employer, such as the media.

The Court suggests an “analogue approach” might be used for determining what is “pursuant to official duties; under this approach, when an employee whistleblows about something related to his or her official duties, if there is no relevant analogue to speech by citizens who are not government employees, the speech is “pursuant to the employee’s official duties” and thus not afforded protection under the First Amendment against employer discipline.⁴¹¹ The problem with this “analogue” approach, however, is that it is highly unworkable, since there is an abundance of employee speech related to employee duties that have no relevant analogue to speech by non-government employee citizens. In fact, the very nature of all employment is that employees have duties. However, with respect to government employees, they have duties—and, consequently, speech—which citizens who are not government employees do not. In essence, the “analogue” approach is an abnegation of the opportunity presented the Court in the case to cut the Gordian knot—the “pursuant to official duties” requirement.

The Court does make an excellent suggestion about alternative dispute resolution to public employers which could save thousands of dollars, as well as other tangible and intangible costs, that follow from whistleblowing and the consequent litigation:

[The] public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from

⁴¹¹ *Id.* at 424.

concluding that the safest avenue of expression is to state their views in public.⁴¹²

This could be a win-win approach for public employers and public employees and avoid the current befuddle and proclivity of the jurisprudence.

CONCLUSION

In this Article, the author has conducted an extensive and comprehensive review and analysis of the United States Supreme Court's public employment-free speech jurisprudence. In *Pickering*, the seminal case in the jurisprudence, the Court set forth the test for reviewing speech of public employees. This test, known as the *Pickering* balancing test, requires a balancing of the interests of the employee in commenting on matters of public concern against the employer's operational efficiency concerns. As revealed in this study, however, the Court's interpretation and development of the jurisprudence has devolved into greater weights being assigned to the interests of the public employer within the *Pickering* balancing test. This effectively approximates the test as a pseudo-balancing test. The Article also reveals various mysteries yet unveiled by the Court in its development of the jurisprudence and a rather obfuscated jurisprudence pregnant with tests.

The author hopes that with the percipience of the historical development of the jurisprudence, a better understanding can be provided to the judiciary in future interpretations of the jurisprudence. What started out as a genuine balancing of interests in *Pickering*, and a Court determined to reverse the trend that mostly prevailed pre-*Pickering* of absolutely denying protection to public employees' free speech rights has regressively led to a quick ebb of the free speech rights. If the trend continues, free speech rights of public employees could soon become a quondam right, or a fictional right at best. Balancing should mean just that—balancing—and interpretation and application should bear that out. In the public employment-free speech jurisprudence, it is even more important that balancing be truly balancing at the very least, given that the text of the First Amendment says nothing about “operational efficiency.” Given that the Court introduced the concept of “operational efficiency” to the constitutional analysis of public employment-free speech jurisprudence, it should behoove the Court as guardian of the Constitution, to faithfully avoid denying what is a fundamental right—the right of free

⁴¹² *Id.*

speech. Therefore, if interpretation and application of the *Pickering* balancing test is betraying the guardianship of the First Amendment, prudence might call for the Court to either take an interregnum and pivot its interpretation and application of the test to give further protection to free speech, or completely abandon the test in favor of a less discretionary test. As Justice Black noted in *Wieman*, “We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.”⁴¹³

⁴¹³ *Wieman v. Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring).

