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ABSTRACT

This study proposes a new approach for analyzing teacher whistleblowing cases. In proposing this approach, the author addresses three questions:

1. Can the United States Supreme Court’s public employment-free speech jurisprudence be categorized into eras?

2. Is there a way to categorize the types of speech that whistleblowing teachers engage in under the United States Supreme Court’s public employment-free speech jurisprudence?

3. What is the author’s proposed constitutional framework for analyzing whistleblowing cases under the United States Supreme Court’s public employment-free speech jurisprudence?

The constitutional framework the author proposes is based on the three-tier framework used in the Equal Protection Clause jurisprudence. The author proposes this three-tier system to replace the current single-tier system represented in the Pickering balancing test so as to account for multiple and different categories of whistleblowing speech; this would ensure greater protection for such speech as well as opportunities for employers to proffer operational efficiency in defense of retaliatory actions taken against employees for their speech, without discounting the employee’s speech.
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ACKNOWLEDGEMENTS

The rigors of the dissertation process and the complexities of the doctoral degree program affirm the fact that no one person could accomplish success without a network of support; therefore acknowledgements are felicitous.

First, I would like to express my deepest appreciation to my advisor, my mentor, and most of all, my great friend Professor Preston C. Green, III who has always been a pillar of support and a cornerstone throughout my education here at The Pennsylvania State University. I have had the honor of being his graduate assistant for a few years and I would not trade it for anything. It is not an exaggeration when I say I would definitely not be at this point without him. He is always willing to listen and offer support when faced with both personal and professional challenges. I owe a debt of utmost gratitude to him as well as his wife, Dr. Fiona Greaves; she gave me several suggestions in the early stages of my studies as I tried to hone in on a dissertation topic.

My deepest appreciation also goes to Professor Jacqueline Stefkovich for all the support and advice she has given me over the years. I am really honored to have learned from her and to have her on my committee given her extremely busy schedule. She is truly someone I can call a lifelong mentor. I am truly grateful for each of the letters of recommendation she wrote on my behalf and the several hours she spent on the phone on my behalf. And I am genuinely beholden to her for taking the time to listen to me vent when I was commencing my job search.

I am also very grateful to Professor John Tippeconnic for his mentorship over the years. I have taken several classes with him because of his wealth of knowledge and the
opportunity to learn from him. I am deeply grateful for the pains he took in writing my letters of recommendation and serving on my committee.

I am also grateful to Dr. Dan Cahoy for priceless substantive input and advice he provided me during this dissertation process. My gratitude to all my committee members for serving on my committee, reviewing drafts of the dissertation, facilitating my defense and helping making the product what it is today; their advisement has been invaluable.

Many thanks also to Professor Paul Begley for his meritorious mentorship throughout my studies. I am also truly grateful to him for the time he invested in my job search process; I will never forget his support throughout the process.

My immense gratitude to Becky Contestabile; I truly believe every student needs a “Becky” to be successful; and so does every graduate program. She is such a treasure and her impact on my studies and my dissertation are transcendent, beyond compare and what words can express. She was my champion when I defended my proposal, sacrificing her time to take notes of committee suggestions for me, notes I have referred to repeatedly for this dissertation. Yes, Becky I could read the notes!!!

The following people also deserve commendation for all they have done to facilitate my studies and my dissertation process at The Pennsylvania State University:

Judy Leonard for her inimitable devotion to my job search process and the invaluable time she devoted to my letters of recommendation; Cindy Fetters for always making my conference travels possible as well as my graduate assistantship, and for always been willingly to help; Karen Tzilkowski for always been an encouragement.

I would be remiss without thanking my parents. They have been my anchor. At every turn of the dissertation, their encouragement and prayers have pulled me through
the various challenges of my studies as well as my dissertation process. Without their sacrifices, love and prayers, I would not be the person I am and would not have accomplished any of the things I have accomplished. Their beatific words and admonition have been the differences through the various challenges along the way. I owe all to them; they are extremely generous in their virtuosic unqualified support. I would also like to thank my brother Dr. ‘Luwi Oluwole, who inspired me along the way, himself having graduated from an extremely intensive doctoral program and for encouraging me as I made the decision to pursue a doctoral degree. My great appreciation also goes to my sister Doyin Oluwole as well as my brother Opeyemi Oluwole.

Above all, I am grateful to my Lord and Savior Jesus Christ for His help throughout my studies and dissertation and for seeing me through to successful completion! Without Him, all would be impossible; but He has enabled me every step of the way.

I thank everyone for their patience, kindness, longsuffering, gentleness, kindness and temperance throughout my studies and my dissertation!
Chapter 1

INTRODUCTION

Statement of the Problem

In the wake of the WorldCom, Enron and Arthur Andersen LLP corruption cases in which whistleblowers played a prominent role, greater attention is being paid on the national, state and local levels to unethical and illegal activities of employees at work. Bringing these activities, often performed with cunningness and outside of the public view and scrutiny, to light is no small task. Whistleblowers play a major role in the process.

Whistleblowing is defined as a form of speech in which an employee discloses unethical or illegal activities at work to the employee’s supervisors, the public, the media, or the government (England, 1999). For purposes of this dissertation, whistleblowing includes “employee speech that … invariably involve[s] some form of criticism or questioning of the public employer’s policy, or of its specific actions, or of supervisory personnel expressed either privately to the employer or publicly” (Berger v. Battaglia, 1985, p. 997; Gray, 2004, pp. 227-228). It includes speech “that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance” (Cox v. Dardanelle Public School District, 1986, p. 672). Whistleblowers have exposed violations of workplace safety and health laws, employment laws, fraudulent accounting practices and environmental laws. Whistleblowers often face dire consequences for speaking out. These include, but are not limited to, reprimand,
termination, a hostile work environment, and various other retaliatory practices, civil action and criminal prosecution (Johnson & Kraft, 1990).

Several cases have arisen where public school teachers whistleblowed and faced dire repercussions such as, though not limited to, hostile work environments, reprimands, demotions, pay cuts, reassignments, suspensions with or without pay, and even termination. For example, in Camden, New Jersey, school officials are being investigated for cheating on state examinations, falsification of data, and cover ups (Sanchez, 2006). The two whistleblowers in the case are Paula Veggian, a teacher and master scheduler who had worked for the Camden, New Jersey public schools for about 40 years; and Joseph Carruth, the new principal at Brimm Medical Arts High School, where Veggian worked.

Veggian uncovered a systematic scheme of grade-fixing and falsification of students’ transcripts at the school. While Veggian was preparing the failure list – the list of students not to be promoted to the next grade, she decided to cross-reference this list with more detailed records. What she discovered shocked her: students with Fs were getting promoted. She notified Carruth, who after examining the records with Veggian concurred that something untoward was transpiring with the records. They discovered that the administration maintained two sets of books on student grades: one accurate, the other falsified. After being notified, Annette Knox, the superintendent, and Luis Pagan, the assistant superintendent, told Carruth and Veggian to cover up what they had discovered or risk the loss of their jobs. According to Veggian’s attorney, the motivation for the falsification and grade-fixing was the performance-incentive clause in Knox’s contract which entitled her to thousands of dollars if the academic performance of
students in the district improved. Five months after the whistleblowing was initiated, Veggian was demoted with a pay cut and reassigned to another school in spite of her protest.

Pagan subsequently asked Carruth, to help cheat on the math section of the New Jersey high-school proficiency examination; he declined. Pagan nonetheless got various teachers to help with the cheating, threatening them with loss of their jobs if they failed to cooperate. In January 2006, Carruth contacted the New Jersey Department of Education to request an investigation. The department dispatched monitors to preside over testing at the school; that year, the test scores declined sharply. Carruth was terminated by the Camden Board of Education at the end of the 2005-2006 school year. The New Jersey attorney general is investigating whether Knox fraudulently gave herself the performance bonuses of about $18,000.

In Miami-Dade County, Bennett Packman, who was starting his new job as a physical education teacher at American Senior High School was told by his principal to teach driver’s education classes (Gray, 2005). Knowing he was not trained in driver’s education, Packman informed the principal accordingly, who told him he would get him a waiver. The principal subsequently asked Packman to procure his certification from Move On Toward Education and Training (MOTET). Aware that MOTET was a fraudulent school, Packman refused to attend the classes and would not sign students’ driver’s education forms, knowing fully well that legally, only teachers certified in driver’s education could endorse the forms. Even though the classes were physically taught in Miami, the academic credits for the MOTET classes came from Eastern Oklahoma and Otterbein colleges, both outside Florida. Packman asked the Florida state
education officials to investigate the school. The school district cut off his pay; after appealing to the Miami-Dade Schools Office of Professional Standards, he was reassigned to a different school.

In *Hall v. Marion School District No. 2* (1994), Margaret Hall, a special education teacher at North Mullins Primary School in Marion County, South Carolina was terminated after writing several letters to the editor of the local newspaper (*Marion Star Mullins Enterprise*) criticizing the desire of some school board members to spend $10,000 of taxpayer funds on a luxurious vacation. Prior to whistleblowing, Hall had been a teacher for over 22 years and had *in perpetuum* received excellent performance evaluations. When the superintendent of the school district failed to disclose the names of the board members involved, Hall filed a Freedom of Information Act (FOIA) request for the names. Hall also wrote letters to the editor published in the local newspaper as well as in the *Florence Morning News* and *The State* newspapers, criticizing the board’s handling of funds. The superintendent responded by sending a memorandum to the board characterizing Hall as a gadfly: “Speaking of putting a lid on our current gadfly brings the note on the enclosed newspaper letter to the editor. We … cannot say that the barrage of opinions and innuendos does not bother us. The trick is to not let her know how much a pain she is and where our pain is located! … Maybe enough rope will allow our gadfly to suspend herself in an awkward position. Hopefully, it is an uncomfortable one” (p. 187, internal quotes omitted). In an advertisement in the local newspaper, the superintendent threatened Hall:

**REMEMBER THIS**

**IF YOU WORK FOR A MAN,** in Heaven’s name, **WORK for him. If he pays you wages which supply you bread and**
butter, work for him; speak well of him; stand by him and stand by the institutions he represents. If put to a pinch, and [sic] ounce of loyalty is worth a pound of cleverness. If you must vilify, condemn and eternally disparage—resign your position, and when you are outside, damn to your heart’s content, but as long as you are part of the institution do not condemn it. If you do that, you are loosening the tendrils that are holding you to that institution, and at the first high wind that comes along, you will be uprooted and blown away, and probably will never know the reason why (Hall, 1994, p. 187).

Hall subsequently sent a letter to her principal, copied to the State Superintendent of Education, her United States Congressman as well as the President of the United States, pointing out problems with the school district and its administration. Teachers and administrators became increasingly hostile to Hall and her employment was terminated.

Examples of teachers whistleblowing abound. Teachers have blown the whistle about poor treatment of students (Starsky v. Williams, 1975); mismanagement of taxpayer funds (Hall v. Marion School District Number No. 2, 1994); lowering of academic standards (Storlazzi v. Bakey, 1995); inappropriate alteration of student grades and other grading improprieties (Storlazzi, 1995); school board violations of state open-meetings law (Dishnow v. School District of Rib Lake, 1996); removal of books from the library (Dishnow, 1996); mismanagement of budget (Stroman v. Colleton County School District, 1992); lack of concern for students, failure to offer courses needed for students to graduate, disregard of teacher morale, and the sacrifice of academic quality for increased enrollment (Daulton v. Affeldt, 1982); lack of professionalism and proposed retaliatory transfer of a teacher (Lewis v. Harrison School District No. 1, 1986); politically-motivated transfer of a teacher to a distant educational outpost (Wichert v. Walter, 1985); unwarranted severity of corporal punishment (Bowman v. Pulaski County

Other examples of whistleblowing include: suppression of evidence and fraudulent alteration of documents (Williams v. Board of Regents, 1980); principal allowing “young children to go outdoors for tornado drills during lightning storms and …[sending] home unattended small children without notifying the children's parents” (Swilley v. Alexander, 1980, p. 1019); racial discrimination (Bernheim v. Litt, 1996; Love-Lane v. Martin, 2004); falsification by locally employed, elected or appointed officials or employees of an LEA (local educational agency) of state required reports (Tenn. Code Ann. § 49-50-1403(2) (2007); and inaccurate compilation by locally employed, elected or appointed officials or employees of an LEA of statistical data or reports (Tenn. Code Ann. § 49-50-1403(2) (2007).

Teachers have likewise whistleblown about racially-motivated award of student grades (Belyeu v. Coosa County Board of Education, 1993); school policies about the administration of examinations (Storlazzi, 1995); “floating status” of teacher impeding ability to effectively teach, contributing to classroom inefficiency (Johnson v. Butler, 1977); inadequate focus on diversity (Belyeu, 1993); use of alcohol by students in the school (Storlazzi, 1995); school policies and practices about locking of student lavatories (Storlazzi, 1995); school-imposed limitation on free speech (Brammer-Hoelter v. Twin Peaks Charter Academy, 2000); impact of the failure to implement programs for emotionally- and behaviorally-impaired students (Wytrwal v. Saco School Board, 1995); policy notifying teachers prior to their classroom observation (Storlazzi, 1995);
principal’s attempts to get himself early contract renewal (Lifton v. Board of Education of the City of Chicago, 2003); inadequacy of a principal’s job performance (Harris v. Victoria Independent School District, 1999); special education director’s threats to overrule the consensus of teams of teachers, social workers and other professionals about the placement of students, in violation of law (Wytrwal, 1995); inadequate funding of kindergarten program (Lifton, 2003); too-large kindergarten classes (Lifton, 2003); lack of compliance of kindergarten program with state standards (Lifton, 2003); too-lengthy class periods (Lifton, 2003); lack of procedures for disciplining students (Wales v. Board of Education of Community Unit School District 300, 1997); placements of special education students in violation of state and federal regulations (Wytrwal, 1995); favoritism in grading athletes (Coats v. Pierre, 1989); race-based discipline of students (Love-Lane, 2004); and exchange of grades for sex (Coats, 1989).

Other examples of subjects about which teachers have whistleblown include: misrepresentation by supervisor without a doctoral degree holding himself out as a doctor – the supervisor wore distinctive doctoral robes at graduation ceremonies and represented himself as “Dr.” (Gardetto v. Mason, 1996); tampering with cheerleader selection process and contacting judges during tryouts in violation of the National Federation of Cheerleaders Guidelines (Gilder-Lucas v. Elmore County Board of Education, 2005); “high school's use of collegiate registration, a procedure through which students are permitted to choose their subjects and teachers” (Ferrara v. Mills, 1986, p. 1510); violation of rules about practice times and venues for athletics (Hall v. Ford, 1988); ineligible students on athletic teams (Hall, 1988); failures to notify parents about educational planning meetings which they have a right to attend under the Individuals
with Disabilities Education Act (IDEA) (Khuans v. School District 110, 1997); predeterminations of the classifications of certain children prior to diagnostic team’s input, in contravention of the IDEA (Khuans, 1997); change of special education students’ placements and services without diagnostic team input or parental notification, in contravention of the IDEA (Khuans, 1997); disregard of individualized educational programs (IEP) of special education children, in violation of the IDEA (Khuans, 1997).¹

Not to be lost in the examples above and in all situations where teachers whistleblow is the fact that they are in essence exercising a foundational constitutional right – the right of free speech. This right is guaranteed by the Free Speech Clause of the First Amendment to the United States Constitution which states in pertinent part:

“Congress shall make no law ... abridging the freedom of speech” (U.S. Const. amend. 1). The First Amendment is made applicable to the states via the Due Process Clause of the Fourteenth Amendment which states in pertinent part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life or liberty, or property, without due process of law” (U.S. Const. amend. XIV, §1).

The United States Supreme Court has stated: “The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses … By adjustment of rights, we can have both full liberty of expression and an orderly life” (Breard v. City

¹ Sometimes, the teachers who are terminated for whistleblowing have had several years of teaching experience with consistently positive evaluations prior to the whistleblowing (e.g., Hall v. Marion School District No. 2, 1993; Daulton v. Affeldt, 1982; Wichert v. Walter, 1985; Cromley v. Board of Education of Lockport Township High School District 205, 1994).
of Alexandria, 1951, p. 642). The lingering question is how great an adjustment in rights the Court is willing to sanction so as to ensure an orderly life. However, it is undeniable that “the threat of dismissal from public employment is … a potent means of inhibiting speech” (Pickering v. Board of Education, 1968, p. 574); moreover, the protection of free speech in the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” (Roth v. United States, 1957, p. 484).

As with all whistleblowers, teachers who blow the whistle are often retaliated against. These retaliatory acts could take various forms: nonrenewal of contract (Starsky, 1975; Greminger v. Seabone, 1978; Wytrwal, 1995); hostile work environment (Hall v. Marion School District No. 2, 1993; Hall, 1994; Love-Lane, 2004; Wash. Rev. Code Ann. § 42.41.020(3)(b) (West 2007)); termination (Hall, 1994); suspension with pay (Gardetto, 1996); closer scrutiny of performance (Hall, 1994); reprimand (Lewis, 1986; Swilley, 1980; Harris, 1999); demotion (Love-Lane, 2004); lower performance evaluations (Wren v. Spurlock, 1986; Cromley, 1994; Love-Lane, 2004); involuntary transfer (McGill v. Board of Educ. of Pekin Elementary School District No. 108 of Tazewell County, 1979); transfer to a center for disruptive students to teach subjects and grade levels the whistleblower has never taught before (Harris, 1999); increased enforcement of school rules against the whistleblower (Wren, 1986); requiring teacher to teach subjects that are not the teacher’s normal subjects, and transferring the teacher to a school several miles away with longer commute to work (Bowman, 1983; Love-Lane, 2004); incommunicado interrogations of the whistleblower (O’Brien v. Town of
Caledonia, 1984); institution of disciplinary proceedings (O’Brien, 1984); and failure to promote (Trotman v. Board of Trustees of Lincoln University, 1980).

Other retaliatory acts against teachers include: the assignment of inferior teaching schedule and other assignments (Ferrara, 1986); reduced preparation periods (Bernheim v. Litt, 1996); requiring whistleblowing teacher to serve lunchroom duty (Bernheim, 1996); assignment of a whistleblowing teacher with difficulty climbing stairs due to physical disabilities, to a fifth floor classroom (Bernheim, 1996); transferring students out of teacher’s class (Storlazzi, 1995); failing to properly process claim forms needed by the teacher (Bernheim, 1996); removing locks and belongings from whistleblowing teacher’s storage area (Bernheim, 1996); persona non grata treatment (Brammer-Hoelter, 2000); denial of access to the grievance/arbitration process (Storlazzi, 1995); failure to recall a whistleblowing teacher with seniority and priority for recall (Storlazzi, 1995); merger of departments (Cromley, 1994); making whistleblowing teacher supervise his or her own detention hall (Storlazzi, 1995); requiring teacher to justify teaching methods (Storlazzi, 1995); denying access to student records and school equipment (Storlazzi, 1995); maintaining documents in teacher’s file that should have been removed (Storlazzi, 1995); threats (Minn. Stat. Ann. § 181.932(1) (West 2007); Neb. Rev. Stat. Ann. § 81-2703(4) (Michie 2007); Tenn. Code Ann. § 49-50-1403(1) (2007)); reduction in pay (Ohio Rev. Code Ann. § 4113.52 (West 2007); Wash. Rev. Code Ann. § 42.41.020(3)(a) (West
abolition of position as department chair (Cromley, 1994); and constructive discharge\(^2\) (Lifton, 2003).


\(^2\) “A constructive discharge takes place when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job” (English v. Powell, 1979, p. 731, footnote 4, internal quotes omitted, quoting, Muller v. United States Steel Corp, 1975, p. 929; see also Ariz. Rev. Stat. Ann. § 23-1502).

Various states have some form of whistleblowing statute specifically protecting all employees (including at-will employees and private employees) from retaliation (e.g., Ohio Rev. Code Ann. § 4113.52(West 2007)), while other state statutes specifically protect state employees from retaliation for whistleblowing (e.g., Ohio Rev. Code Ann. § 4113.52 (West 2007)). However, generally the statutes require that the whistleblowing involve some kind of violation of law (e.g., Ohio Rev. Code Ann. § 124.341 (West 2007); Ohio Rev. Code Ann. § 124.341 (West 2007); Mich. Comp. Laws Ann. § 15.362 (West 2007); N.H. Rev. Stat. Ann. § 275-E:2(I) (2007); R.I. Gen. Laws § 28-50-3 (2007); Tex. Gov’t Code Ann. § 554.002(a) (Vernon 2007)).

whistleblowing statutes only protect employees who speak out about violations of state or federal statutes, rules, regulations or ordinances of a political subdivision or about misuse of public resources (Ohio Rev. Code Ann. § 124.341 (West 2007); Ohio Rev. Code Ann. § 124.341 (West 2007)); both statutes protect employees who whistleblow in private to constitutional provision, statute, or administrative rule” (Mont. Code Ann. § 39-2-903(7) (2007)); New Jersey’s via the language “objects to” (N.J. Stat. Ann. §§ 34:19-3(c) (West 2007)) suggests its protection includes the following: activities, policies and practices “incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment” (N.J. Stat. Ann. §§ 34:19-3(c)(3) (West 2007) (see phrase “objects to”)); Oklahoma adds: “[d]iscussing the operations and functions of the agency, either specifically or generally, with the Governor, members of the Legislature, the print or electronic media or other persons in a position to investigate or initiate corrective action” (Okla. Stat. Ann. tit. Whistleblower Act, 74 § 840-2.5(B)(3) (West 2007); Tennessee’s Education Truth in Reporting and Employee Protection Act of 1989 specifically protects public school employees (Tenn. Code Ann. § 49-50-1403(3) (2007)) who whistleblow “regarding any action, policy, regulation, practice or procedure, including, but not limited to, the waste of public education funds, mismanagement, falsification of state required reports, inaccurate compilation of statistical data or reports, or abuse of authority by locally employed, elected or appointed officials or employees of an LEA[Local Educational Agency]” (Tenn. Code Ann. § 49-50-1403(2) (2007)); Utah explicitly includes “waste of manpower” (Utah Code Ann. § 67-21-3(1)(a) (2007)).

their employer, as well as public whistleblowing. However, as in various statutes, if the matter the employee whistleblows about is not a violation of law or the misuse of public resources, the employee will find no protection under the statutes. Therefore, whistleblowing about a violation of school policy, unless as pertinent to misuse of public resources, will likely be unprotected under the whistleblowing statutes. Moreover, for a whistleblower to gain protection under the statutes, the employee must comply with procedures spelled out in the statutes, such as first speaking out to the employer to give the employer an opportunity to correct the violation; then, the employee can speak with the appropriate law enforcement authority such as a prosecutor, if the employer does not

(West 2007). Wyoming does not have a whistleblowing statute generally applicable to all public employees; however, whistleblowing employees might find protection under a common law action for retaliatory discharge in violation of public policy (e.g., Allen v. Safeway Stores, Inc., 1985; Boone v. Frontier Refining, Inc., 1999; Griess v. Consolidated Freightways Corp. of Delaware, 1989), or Article 1, § 20 of Wyoming’s state constitution (e.g., Mekss v. Wyoming Girls’ School, State of Wyoming, 1991; Wyo. Const. Art. 1, § 20).

5 Exception: Delaware does explicitly include violations of school district policies within the ambit of its whistleblowing statute (Del. Code Ann. tit. 29, § 5115(b) (2007); see also Maine: Me. Rev. Stat. Ann. tit. 26, § 833(1)(B) (West 2007)); Kentucky has likely done this indirectly in Ky. Rev. Stat. Ann. § 61.102(1) (Michie 2007) by adding the word “mandate” for example. Through its Education Truth in Reporting and Employee Protection Act of 1989, Tennessee specifically protects public school employees whistleblowing about “any action, policy, regulation, practice or procedure, including, but not limited to, the waste of public education funds, mismanagement, falsification of state required reports, inaccurate compilation of statistical data or reports, or abuse of authority by locally employed, elected or appointed officials or employees of an LEA” (Tenn. Code Ann. § 49-50-1403(2) (2007) (emphasis added)).

correct the violations within a certain period of time (e.g., Ohio Rev. Code Ann. § 4113.52(A)(1)(a) (West 2007)). Strict compliance with the requirements of the statute is usually required for the employee to be protected (e.g., Grove v. Fresh Mark, Inc., 2004; Haney v. Chrysler Corp., 1997; Kulch v. Structural Fibers, Inc., 1997; Contreras v. Ferro Corp., 1995; Herrington v. DaimlerChrysler Corp., 2003; Conde v. Colorado State Dept. of Personnel, 1994). Thus, an employee who wants to whistleblow has to be aware of the statute’s requirements or at least have followed the terms and procedures for whistleblowing spelled out in the statutes, in order to be protected. In addition, the whistleblowing statutes usually only protect employees who whistleblow to a government entity, which could include a school board, as opposed to the press or other entities or individuals (e.g., N.Y. Civil Service Law § 75-b (McKinney 2007); N.D. Cent. Code § 34-11.1-04(1) (2007); Neb. Rev. Stat. Ann. § 81-2702 (Michie 2007); R.I. Gen. Laws § 28-50-3 (2007); Tex. Gov’t Code Ann. § 554.002 (Vernon 2007)).

7 Exception: Oklahoma also protects whistleblowing that involves “[d]iscussing the operations and functions of the agency, either specifically or generally, with the Governor, members of the Legislature, the print or electronic media or other persons in a position to investigate or initiate corrective action” (Okla. Stat. Ann. tit. Whistleblower Act, 74 § 840-2.5(B)(3) (West 2007) (emphasis added)). Also, the nonrestrictive reference to “any information” without limitation as to the entity a public employee can whistleblow to under Oregon’s whistleblowing statute suggests Oregon is an exception; specifically, Oregon’s statute provides that a public employer shall not: “[p]rohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the disclosure of any information that the employee reasonably believes is evidence of …” Or. Rev. Stat. § 659A.203(1)(b) (2007) (emphasis added). Tennessee’s Education Truth in Reporting and Employee Protection Act of 1989 protects whistleblowing that involves “the written provision of evidence to any person, the department of education, a legislator, or individual employee of the department or general assembly, or testimony before any committee of the general assembly, regarding any action, policy, regulation, practice or procedure, including, but not limited to, the waste of public education funds, mismanagement, falsification of state required reports, inaccurate compilation of statistical data or reports, or abuse of authority by locally employed, elected or appointed officials or employees of an LEA” (Tenn. Code Ann. § 49-50-1403(2) (2007); Cf. Tenn. Code Ann. § 49-50-1408 (2007) protecting only whistleblowing “to the department of education or committee of the general assembly, or individual official, member or employee of the department or committee” and Tenn. Code Ann. § 49-50-1409 (2007), providing for a civil cause of action for employees who whistleblow, a provision the United States District Court for the Eastern District of
Tennessee (Mosley v. Kelly, 1999, pp. 732-733) has held must be interpreted collectively with Tenn. Code Ann. § 49-50-1408 (2007), in essence collectively limiting the protected whistleblowing for which the employee has a civil cause of action for employer retaliation to whistleblowing that falls within the ambit of Tenn. Code Ann. § 49-50-1408 (2007); specifically, the District Court has held that “[t]he language of these sections is meant to encourage public education employees to disclose information about persons who were required to furnish certain reports but who willfully or knowingly made or caused to be made any false report related to the operation of a local education agency. In other words, sections 49-50-1408 and 49-50-1409 encourage public employees to report any violations of sections 49-50-1404 or 49-50-1405 or the waste or mismanagement of public education funds by (1) providing for such reports in section 49-50-1409 and (2) providing a cause of action under section 49-50-1409 for any person disciplined for ‘reporting under the provisions of this part.’ When sections 49-50-1408 and 49-50-1409 are viewed as provisions drafted to effectuate the purpose in section 49-50-1402(b), it is clear the phrase ‘reporting under the provisions of this part’ in section 49-50-1409 refers to reports made pursuant to 49-50-1408. When the full statutory scheme is viewed in light of the purposes listed in section 49-50-1402, it is clear that to ‘report[ ] under the provisions of this part’ means to report under the provisions of section 49-50-1408” (Mosley v. Kelly, 1999, p. 733, internal quotes omitted); in addition, the District Court held that: “unless her reports concerned an act prohibited by section 49-50-1408 or 49-50-1405, a whistleblowing employee would not have a cognizable cause of action pursuant to Tenn. Code Ann. § 49-50-1409 (2007) unless the whistleblowing concerned an act within the ambit of § 49-50-1404 or 49-50-1405. “Thus, unless her reports concerned an act prohibited by section 49-50-1404 or 49-50-1405, [an employee who blows the whistle] would not have made a report envisioned and protected by section 49-50-1409” (Mosley v. Kelly, 1999, p. 734); the District Court summarized the protection available to public school employees who whistleblow under the civil cause of action against retaliating employers provided in Tenn. Code Ann. § 49-50-1409 (2007) thus: “[s]ection 49-50-1409 does not create a cause of action to protect persons … who report on matters outside the purposes of the Act-- namely, on matters other than falsification of records or the waste or mismanagement of public education funds” (Mosley v. Kelly, 1999, p. 735). See generally Mosley v. Kelly (1999), interpreting certain provisions of the Tennessee’s Education Truth in Reporting and Employee Protection Act of 1989 and finding that a teacher who whistleblowed about student’s bringing knives to school did not have a cognizable claim. Instead such a teacher will likely be protected under the Tennessee Public Protection Act – Tenn. Code Ann. §§ 50-1-304 et seq (2007), Tenn. Code Ann. § 50-1-304(d) (2007), Mosley v. Kelly, 1999, p. 736, footnote 7). Utah also protects whistleblowing that entails communication via “broadcast, or other communicated report” (See Utah Code Ann. § 67-21-2(2) (2007), under definition of “communicate”, together with Utah Code Ann. § 67-21-3(1)(a) (2007)). Washington State uses the phrase “appropriate person or persons” to refer to persons to whom public school employees and other local government employees can whistleblow: “Every local government employee has the right to report to the appropriate person or persons information concerning an alleged improper governmental action” (Wash. Rev. Code Ann. § 42.41.030(1) (West 2007)); the phrase is not defined in the statute; but the statute does provide that: “[t]he governing body or chief administrative officer of each local government shall adopt a policy on the appropriate procedures to follow for reporting such information and shall provide information to their employees on the policy. Local governments are encouraged to consult with their employees on the policy” (Wash. Rev. Code Ann. § 42.41.030(2) (West 2007)) and directed that: “[t]he policy shall describe the appropriate person or persons within the local government to whom to report information and a list of appropriate person or persons outside the local government to whom to report. The list shall include the county prosecuting attorney” (Wash. Rev. Code Ann. § 42.41.030(3) (West 2007)); additionally, “[i]f a local government has failed to adopt a policy as required by subsection (2) of this section, an employee may report alleged improper government action directly to the county prosecuting attorney or, if the prosecuting attorney or an employee of the prosecuting attorney participated in the alleged improper government action, to the state auditor” (Wash. Rev. Code Ann. § 42.41.030(6) (West 2007)). West Virginia’s Whistle-blower Law also protects employees whistleblowing to “organization[s] having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the … organization” (W.Va. Code Ann. § 6C-1-2(a),(g) (Michie 2007)). Wisconsin seems to protect employees who whistleblow to
Given that the United States Constitution provides a right to free speech, employees look to the Constitution as a source of their rights when they file claims alleging retaliation for whistleblowing. Moreover, the First Amendment does not have such strict terms and procedures spelled out in its language as state whistleblowing statutes; and it does not limit protection to speech about violations of law. Employees could combine claims under both the federal constitution and state whistleblowing statutes as some have done, in order to make the broadest claims in court (e.g., Wytrwal, 1995); however, the focus of this dissertation is the United States Supreme Court’s public employment-free speech jurisprudence with respect to whistleblowing teachers.

Teachers threatened or retaliated against for whistleblowing often allege that their free speech rights have being violated. When teachers speak out, it is crucial to recognize that they are not only employees but citizens of the United States, like every other citizen under the United States Constitution. When courts address such claims, not only do they consider the free speech rights of the employees, but serious consideration is also given to the interests of the employer. This is pursuant to Pickering v. Board of Education (1968). The struggle for courts in the constitutional analysis of whistleblowing cases is the status of the government as sovereign with all its powers on one hand, and the status of the government as employer on the other hand; in other words; courts have to grapple to account for the difference between the dynamics of the government/sovereign-citizen relationship versus government/public employer-employee relationship. In Pickering, the

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anyone: “An employee with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person” (Wis. Stat. Ann. § 230.81(1) (West 2007) (emphasis added)).
United States Supreme Court set forth a balancing test for addressing First Amendment claims of teachers and all public employees who allege employment retaliation for exercise of their free speech rights. This test requires a mostly unrestrained balancing of the public employer’s interests in operational efficiency against the free speech rights of employees, despite the fact that the text of the First Amendment itself says nothing about the interests of the employer.

The author’s literature review makes it clear that since *Pickering*, the Court has tried to avoid establishing bright-line tests for analyzing cases in its public employment-free speech jurisprudence. This avoidance has resulted in tests that are vague and without much substance, thus creating confusion for teachers, school districts, as well as lawyers. The author also finds that while the *Pickering* balancing test started as a good faith attempt to protect public employees’ free speech rights, recent cases reveal a bias in favor of the employer. This bias provides a license to “school boards to dismiss teachers for reasons of political expendiency rather than legitimate pedagogy” (Daly, 2001, p. 2). In what has amounted to pseudo-balancing, this approach fails to sufficiently take into account teachers’ rights as citizens to speak out on the issues of the day. As world eminent constitutional law scholar Professor Gunther (1972) 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” (p. 7, internal quotes omitted).
Research Questions

This study will propose a new approach for analyzing teacher whistleblowing cases. In proposing this new approach, the author will address three questions in Chapter Four:

1. Can the United States Supreme Court’s public employment-free speech jurisprudence be categorized into eras?
2. Is there a way to categorize the types of speech that whistleblowing teachers engage in under the United States Supreme Court’s public employment-free speech jurisprudence?
3. What is the author’s proposed constitutional framework for analyzing whistleblowing cases under the United States Supreme Court’s public employment-free speech jurisprudence?
In this chapter, the author will examine 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 from pre-\textit{Pickering} through 2007. It is essential to look at all the cases in the Court’s public employment-free speech jurisprudence in order to understand the current constitutional status of the free speech rights of teachers who whistleblow, as each case in the jurisprudence builds on the other. Especially in each case since \textit{Pickering} – the seminal case on public employment-free speech jurisprudence – the Court has attempted to navigate and clarify the nuances of the \textit{Pickering} balancing test - the balancing of the employee’s free speech rights against the public employer’s interests in operational efficiency. This literature review will reveal through comprehensive examination of these cases that the Court in its interpretation of the \textit{Pickering} balancing test established to protect employees, has steadily taken away \textit{sub silentio} the protection of public employee’s free speech rights to the pro-employer status quo ante that reigned mostly pre-\textit{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. As Gunther (1972) 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” (p. 7, internal quotes omitted).
This literature review will also reveal 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. A diagrammatic representation of the cases in the Court’s public employment-free speech jurisprudence since *Pickering* is presented below in Figure 1 on p. 128, *infra*. While this dissertation is focused on the United States Supreme Court’s jurisprudence, this literature review will briefly examine the approach of various federal circuit courts of appeals to the public employment-free speech jurisprudence under the *Pickering* balancing test and its progeny.

**Historical Background of the Protection of Public Employees’ Right of Free Speech**

**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.

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” (*McAuliffe v. Mayor of New Bedford*, 1892, p. 517). 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. 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
(Richards, 1998, p. 757). Under the “rights versus privileges” 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 employer.

 In fact, in what typified its absolute pro-employer position at the time, in Adler v.
Board of Education (1952), the Supreme Court held: “It is … clear that [citizens] have no
right to work for the State in the school system on their own terms” (p. 492). 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” (p. 492). This embodies the
import of the “rights versus privileges” distinction.

 In a case decided in the next Supreme Court term, Wieman v. Updegraff (1952),
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

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8 Richards (1998) notes that this “rights versus privileges” distinction has since been abandoned by
constitutional scholars: “the Court[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” (p.
757). Also see generally Van Alstyne’s (2001) The American First Amendment in the twenty-first century:
Cases and materials.
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. 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 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” (pp. 191-192).
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
tyanny 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. This along with
Justice Frankfurter’s concurrence, infra, was a crucial recognition of the constitutional
essence of free speech of public employees. Justice Black cautioned that even countries,
such as the United States, dedicated to democratic government, are vulnerable to an
inclination to impose extraordinary perils on the free speech rights of the citizenry, albeit
currently mere velleity. 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” (pp. 192-193). 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.

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” (p. 193).

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

> In 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 unmistakeable [sic] 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 (p. 195).

In spite of its holding in *Wieman* recognizing some First Amendment protection for public employees, four years later, in *Slochower v. Board of Higher Education of City of New York* (1956), the Supreme Court held that states have broad powers in selecting and terminating their employees. The Court also stated that public employees have no constitutional right to public employment.

In *Shelton v. Tucker* (1960), the United States Supreme Court heeded Justice Black’s admonition in *Wieman* by 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. 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 … Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made” (pp. 485-486). The Court added that no forum requires greater safeguard of the freedom of speech than schools.

Continuing in an emerging tenor of recognizing and enforcing public employees’ rights of free speech, a year after Shelton, in Cramp v. Board of Public Instruction (1961), the United States Supreme Court struck down a state statute which required public employees to sign an oath or face immediate discharge from public employment. The oath required public employees to swear that they had never given aid, support, counsel, advice or influence to the Communist party. Nine years into his employment, the Board of Public Instruction discovered that Cramp, a public school teacher, had never executed the oath. When asked to sign the oath, he refused. He challenged the statute as unconstitutionally vague, seeking an injunction against his termination. The Supreme Court found the statute so vague and indefinite as to be patently arbitrary, stating: “it 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” (p. 288, internal quotes omitted).

In the same year Cramp was decided, in Torcaso v. Watkins (1961), the United States Supreme Court struck down a Maryland statute as a violation of the First Amendment rights of public employees. The statute required public employees to declare
their belief in God as a condition of employment. Invalidating the statute, the Court held: “The 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” (pp. 495-496). Then in 1963, in *Sherbert v. Verner*, 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: “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege” (p. 404). One year later, in *Garrison v. State of Louisiana* (1964), the Court indicated that free speech rights extended to employee speech directed at persons who are merely nominal or quasi-employers of the speaking employee.9

In *Keyishian v. Board of Regents* (1967), the United States 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, they had disclosed this to their employers. 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. The employees filed suit challenging the constitutionality of the statute. The Court, in affirmation of the constitutional rights of public employees, 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” (pp. 605-606). 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.

These freedom-of-association cases heralded the recognition and protection of the free speech rights of public employees, including teachers. A common thread throughout these cases was the United States 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 undefined. In 1968, in *Pickering v. Board of Education*, the Court would begin the journey, which continues today, of attempting to define the scope of public employees’ free speech rights.

*Pickering v. Board of Education*

*Pickering v. Board of Education* (1968) has become the principal case in defining the scope of public employees’ free speech (DeMarco, 2006). In that case, Marvin L. Pickering, a public school teacher was terminated by the Board of Education of Township

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10 In *Garrity v. State of New Jersey* (1967), the United States Supreme Court also 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” (p. 500).
High School District 205, Will County, Illinois for speaking out. Specifically, Pickering sent a letter he wrote criticizing his employers to a local newspaper.\footnote{A copy of Pickering’s letter is included as Appendix A.}

In February 1961, the school board put a proposal on the ballot to raise $4,875,000, through bond issue, to build new schools. In May 1964 and then again on September 19 of the same year, the board proposed a tax rate hike for educational purposes; voters rejected both proposals. Leading up to the voting date on the September proposal, 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 school district; a similar letter by the superintendent was also published.

Wanting to be heard, Pickering wrote a letter to the newspaper, critiquing, \textit{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. In the letter, Pickering accused the superintendent of making efforts to silence teacher opposition to the 1961 bond issue. The board terminated Pickering, citing his writing and publication of the letter. At the due process hearing, the board gave the following as justifications for the termination: (a) many statements in the letter were false; (b) publication of the letter unjustifiably questioned the board’s motives, veracity and competence; (c) the statements would disrupt discipline, stir up “controversy, conflict and dissension among teachers, administrators, the Board of Education, and the residents of
the district” (p. 567, internal quotes omitted); and (d) the letter marred the board members’ reputation and that of other school administrators (p. 567).

Pickering challenged his termination as a violation of his First Amendment right to free speech. The Illinois state courts rejected his free speech claim stating that, even though as a citizen he would have the right of free speech under the facts of the case, as a public school teacher he was obligated not to speak out about the operation of his school. The United States Supreme Court, however, agreed with Pickering; 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 in speaking out on matters of public interest involving the operation of the schools where they work. The Court, however, indicated that the status of a public employer as an employer (as opposed to its status as sovereign vis à vis the general citizenry) made it imperative that public employers have some control over their employees’ speech.

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” (p. 568). A diagrammatic representation of aspects of the Pickering balancing test can be found on p. 129, *infra*.

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” (p. 569); rather, a balance has to be struck between the employer and employees’ concerns within the operational confines of the Pickering balancing test. The Court, however, identified certain general factors to be considered in applying the test; these factors are known as the Pickering calculus factors. 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 ability to maintain discipline; (b) whether the speech is directed toward someone with whom the employee would typically be in contact during his daily work; (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 critical to their proper functioning; (d) whether the employee’s speech (which may be false) was based on inside information accessible to the employee; and (e) flexibility for employers to terminate an employee whose speech hampers the effective performance of such an employee. These are the determinants or variables for consideration 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 the public’s interest in free and unhindered debate on matters of public importance; (b) the fact that public employees are more likely than the general citizenry to have informed and definite opinions about the matter in question; (c) the ease with which the employer could
rebut the content of the employee’s statement, albeit false; and (d) whether there is evidence that the speech actually had an adverse impact on the employer’s proper functioning.

Turning to the case *sub judice*, the Supreme Court found the statements in Pickering’s letter to be critical of the school board and the superintendent. However, none of the statements were targeted toward anyone with whom Pickering would typically be in contact during his daily work. 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. Furthermore, the employment relationship between Pickering and the school board as well as the superintendent was not so close as to require confidentiality for proper functioning.¹²

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; rather evidence of actual impact must be produced. 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. 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

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¹² In *Cockrel v. Shelby County School District* (2001), the Sixth Circuit Court of Appeals stated: “a public school teacher, we believe, is hardly the type of confidential employees the court[United States Supreme Court] had in mind” (p. 1054).
to deny a teacher the right to speak out on matters of public interest, when those statements are substantially correct.

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. “[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 public employment” (p. 574). Additionally, the Court held that the board could have easily rebutted Pickering’s statements by sending a letter to the same or other newspaper; Pickering had no greater access to the accurate information than did the board. 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.

Though “confidentiality” was not a factor applicable to the case sub judice, 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 (p. 570, footnote 3).
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: “in 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” (p. 574). 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.”

*Perry v. Sindermann*

The *Pickering* test would remain without further clarification of its nuances and its application until *Perry v. Sindermann* (1972). Beginning in 1965, Robert Sindermann, a teacher, was employed at Odessa Junior College under a series of one-year contracts for four consecutive years. During the 1968-1969 academic year, Sindermann became president of the teachers’ union and in that role testified before various committees of the Texas Legislature. He began to publicly disagree with policies of the college’s Board of Regents and to support change of the college from a two-year to a four-year institution; the Board opposed the proposed change. In addition, a newspaper advertisement featured over Sindermann’s name criticized the Board. When his contract for the year ran out, the Board decided not to offer him a renewal; the Board’s stated grounds include: insubordination; and the attendance of legislative committee meetings even after his superiors had refused him permission to attend. 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.
The Supreme Court’s first step in the case was to rule on whether a freedom-of-speech constitutional challenge to an employment retaliation claim should fail solely due to the public employee’s lack of contractual or tenure right to the employment. The Court observed:

For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable government 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 (p. 597, internal quotes omitted).

To reason otherwise, the Court noted, would be sanctioning the government – public employer – to indirectly achieve an end it could not directly. Pursuant to this reasoning, the Court held the lack of contractual, tenure or other rights to employment insufficient in itself to defeat a freedom-of-speech constitutional claim.

The Supreme Court agreed with Sindermann that a bona fide constitutional claim exists against employers who retaliate against employees who publicly criticize them. 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,

13 Various states have tenure statutes that limit the ability of public employers to terminate teachers who have tenure. Such grounds include incompetency, mental and physical incapacity, immorality, insubordination and just cause (e.g., Ohio Rev. Code Ann. § 3319.16 (West 2007); 24 Pa. Cons. Stat. Ann. § 11-1122 (West 2007)). Under the tenure statutes, employers might argue that insubordination or “just cause” provides grounds for terminating whistleblowing teachers, on the basis of its detriment to operational efficiency; however, it remains to be seen how courts will rule when they address such arguments by employers; employees often make arguments under the First Amendment since it provides greater protection; and even where employers raise insubordination as justification for the action against the employee, courts usually end up finding it a pretext or addressing the issue as a First Amendment case, thus leaving unanswered the question of the role of the tenure statute provisions such as insubordination. There is no need to go into detail about tenure statutes in this dissertation, however, since the focus of this dissertation is the United States Supreme Court’s public employment-free speech jurisprudence under the First Amendment to the United States Constitution.
therefore, be an impermissible basis for termination of his employment” (p. 598). 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 one of the pro-employee factors mentioned above: the employee’s interest in commenting on matters of public concern and the public’s interest in free and unhindered debate on matters of public importance. However, since the Court did not apply all the factors in the *Pickering* calculus, we are left to wonder whether the *Pickering* test requires consideration of all the factors in every case; if not, what kind of case would trigger which factor; or is there judicial discretion to base a ruling solely on the consideration of any one factor a court so chooses. These questions remained unanswered in the *Perry* decision.

*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* (1976). In this 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” (p. 169).

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”; the school board opposed the proposal. 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. 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. 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 for implementation of the proposal to be deferred for a year so that an impartial committee could scrutinize it further.14

During the part of the board meeting set aside for the public to express opinions on issues before the board, Holmquist read his petition to the board, adding that teachers were confused about the meaning of the “fair share” proposal; he also informed the board that 53% of the teachers in 31 schools had signed the petition. Prior to reading the petition, Holmquist told the board that he represented “an informal committee of 72 teachers in 49 schools” (p. 171). 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.

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

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14 The content of the petition is included as Appendix B, infra.
exclusive collective bargaining representative (MTI), in violation of Wisconsin law. 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.” (p. 173, internal quotes omitted).

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” (Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 1975, p. 212). 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; therefore, Holmquist’s right to free speech could be abridged due to “the necessity to avoid the dangers attendant upon relative chaos in labor-management relations” (p. 213). 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” (Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 1976, pp. 425-426). The Court went on to find Holmquist’s speech protected by the First Amendment.

In Pickering, the United States Supreme Court held that the First Amendment only protects whistleblowing employees who speak as citizens and not as employees on
matters of public concern. Yet, in *Madison Joint School District No. 8*, the Supreme 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 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” (p. 177, internal quotes omitted). 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” (pp. 174-175) and is entitled to First Amendment protection. 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. This variance with the *Pickering* balancing test is not resolved by the Court. 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.

The United States Supreme Court further strengthened the constitutional rights of teachers, and other public employees, to speak when it stated: “We have held 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” (*Madison Joint School District No. 8*, 1976, p. 175, internal quotes omitted). 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 who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings” (p. 175), as “any citizen could have presented precisely the same points and provided the board with the same information as did Holmquist” (p. 175, emphasis added). Also, the Court held that “participation in public discussion of public business cannot be confined to one category of interested individuals” (p. 175). The Court gave an additional boost to public employees’ right of free speech when it stated: “To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers *on the basis of their employment* or the content of their speech” (p. 175, emphasis added).

*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 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” (p. 176, footnote 10). Additionally, the Court found WERC’s order to be an unconstitutional prior restraint on speech of teachers with the school board:

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 communications 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 (Madison Joint School District, 1976, pp. 176-177, internal quotes omitted).

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 (1977), the United States Supreme Court would attempt to further define the niceties of the Pickering balancing test, 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, Fred 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. The administration adopted the dress code because of the belief that teacher appearance was related to public support for bond issues. Subsequent to the radio station’s broadcast of the adoption of the dress code, the board decided not to rehire Doyle, citing as reasons his lack of tact with professional issues, specifically the disclosure to the radio station, and obscene-gesture incidents.15

Doyle’s background at the school prior to the radio-station incident included an altercation with a colleague; an argument with cafeteria employees over the quantity of spaghetti he was served; swearing at students in relation to a disciplinary complaint; and making obscene gestures to female students who failed to obey him. Antecedent to the radio-station incident, he was not dismissed for any of these incidents. Doyle challenged the Board’s decision not to rehire him as a violation of his constitutional rights to free speech.

Since this case involved an untenured public employee, as in Perry, 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. 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” (pp. 283-284).

Mount Healthy was the first case in which the Supreme Court addressed the role of “mixed motives” in the Pickering balancing test. “Mixed motives” arise in cases where

15 The Board’s response to Doyle is included as Appendix C, infra.
a public employer terminates an employee ostensibly for the employee’s speech, yet other justifications exist concomitantly for terminating the employee. In such cases, courts then have to sort out actual motives of the employer from the pretentious. Essentially, “mixed motives” analysis involves an attempt to determine cause and effect: what was the actual cause of the employee’s termination? In the case *sub judice*, Doyle’s background coupled with his communication to the radio station provided ample mixed motives for his termination. Moreover, as a non-tenured teacher, Doyle could be terminated without cause or reason, absent his free speech rights of course.

While agreeing with Doyle that his communication to the radio station was constitutionally protected, the Supreme Court refused to order his reinstatement as a consequence of its “mixed motives” analysis. The lower court had applied a rule of causation which 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. The Supreme Court rejected this causation rule as solely dispositive in “mixed motives” cases, concerned that it would impede public employers’ control over crucial personnel decisions, forcing them to retain employees who would have been terminated even if the employee had not spoken out. Additionally, the Court expressed concern that the rule might make the employee better off than he would have been had he not spoken out. For example, the lower court’s findings of fact indicated that a decision reinstating Doyle would automatically give him tenure. 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” (p. 576, emphasis added).

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 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. Evidently still 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” (pp. 285-286).

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. Specifically, the allocation of the burden of proof is thus:

1. The initial burden of proof in public employment-free speech cases is on the employee to show that: (a) his or her conduct is protected by the First and Fourteenth Amendments; 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; the “substantial factor” or “motivating factor” language represents the Court’s causation test in “mixed motives” analysis. Imposition of this requirement constituted a relatively significant handicap to public employees’ vindication of their free speech rights. If the employee is unable to carry this burden, the constitutional question is to be resolved in favor of the employer.

2. After the employee successfully carries the burden of proof, the employer must then show by a preponderance of the evidence (i.e. evidence sufficient to result in a 51% believability of the facts presented by the employer) that it would have reached the same decision about the employee’s termination or nonrenewal had the employee not engaged in the protected speech. 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.

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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.\textsuperscript{17} The entire burden of proof framework that resulted from Mount Healthy is overly favorable to employers (e.g., requiring a mere preponderance of evidence and making the “same decision anyway” defense an affirmative defense) and unfavorable to employees in consequence). A 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. In fact the Court’s sundry rapt with the interests of the employer is consistent with the pro-employer bias of the framework. As Milbrath (1984) notes, Mount Healthy was a setback for public employees because through the framework, the Court “effectively eliminated the public employer's perceived jeopardy when action is taken against the 'bold employee' and shifted the advantage back to the employer” (p. 711).

\textit{Givhan v. Western Line Consolidated School District}

Notable in all the public employment-free speech cases from Pickering to Mount Healthy is the fact that all addressed employee speech in public forum (Tishler, 1988). In Pickering, the employee speech was a letter sent to a local newspaper; in Perry, it was testimony before a legislative committee; in Madison Joint School District No. 8, it was speech at a public meeting of a school board; and in Mount Healthy, it was

\textsuperscript{17} The entire Mount Healthy “mixed motives” framework is referred to it as the “balance of burdens” (Price Waterhouse v. Hopkins, 1989; Cromley v. Board of Education of Lockport Township High School District 205, 1994, p. 1068).
communication with a radio station. While, in *Pickering*, the Supreme Court had included as one of the ostensibly pro-employee factors for the *Pickering* balancing test, the employee’s interest in commenting on “matters of public concern”, the Court had never defined the term or the extent of its role in the balancing test.

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* (1979). In this case, Bessie Givhan, a teacher employed by Western Line Consolidated School District was terminated. At the time of her termination, the school district was under a desegregation order. Givhan intervened in the desegregation action, challenging her termination as a violation of her First Amendment free speech rights.

Prior to her termination, Givhan privately complained to her principal about policies and practices of the school district which she perceived to be discriminatory in purpose and effect. At trial, in defense of the school district’s termination decision, the principal characterized Givhan’s complaints as “petty and unreasonable demands” conveyed in insulting, arrogant, hostile and loud manners. 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: refusal to administer standardized tests to her students; her announced intent not to cooperate with the administration; a hostile attitude toward the administration; downgrading papers of her white students; walking out of a desegregation meeting and attempting to disrupt it; threatening, in concert with other
teachers, not to return to work after her school reopened as unitary; and helping a student conceal a knife during a weapons shakedown at her school. 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; the United States Supreme Court, however, emphasized that evidence that a termination 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. In this way, the Givhan case 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” (Ayers v. Western Lines Consolidated School District, 1977, p. 1319). 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. 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. While conceding that Pickering, Perry and Mount Healthy 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. The Court held: “The 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” (Givhan v. Western Line Consolidated School District, 1979, pp. 415-416).

Recall, the Supreme Court set forth certain factors for a Pickering balancing test analysis in Pickering. 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 some public employee-private communication cases. 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 is required in cases involving private communication; or that factors in addition to those it laid out in the Pickering case are required.\(^\text{18}\) The confusion lies in the fact that in the same breath, as set forth in the quote below, 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 to under a Pickering balancing test analysis and what would trigger their application. One thing clear from the Court’s analysis, however, is that the “time, place and manner” of the speech are some of the

\(^{18}\) 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 totally new set of factors; this replacement could also be conveyed by the Court’s of the phrase “different considerations” as opposed to additional considerations or factors.
“additional” factors the Court was referring to (Rathburn, 1985, p. 1098). 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 employee’s message but also by the *manner, time and place* in which it is delivered. (*Givhan*, 1979, p. 415, footnote 3, emphasis added, internal quotes omitted).

*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.

*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 still bears the burden of showing that “but for” the speech, he would not have been terminated.
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 for all time 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* balancing test would play out in cases of private versus public communication; and (ii) in the operational efficiency portion of the *Pickering* balancing test; 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 protected as in a public forum, one of the factors in *Pickering* indicated that constitutional protection applies only to matters of public concern. As discussed earlier, like the other factors, this
factor had never been defined, though it received consequential mention in *Perry and Madison Joint School District No. 8*, and nominal mention in *Mount Healthy* as well as *Givhan* 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; *Perry* involved speech about a college’s status as a two-year versus four-year institution; *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 the collective bargaining negotiations; *Mount Healthy* involved speech about a school administration’s beliefs that teacher dress code influences votes on bond issues; and *Givhan* involved speech about the perceived discriminatory nature of an employer’s policies and practices. 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 employer.

*Connick v. Myers*

In 1983, in *Connick v. Myers*, 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. 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. At the time of her termination, Myers had been an at-will employee for five and half years, during which her proficiency was not in question.

After Myers was advised that she was being transferred to another section of the criminal court, she expressed her objections, which went unheeded, to her supervisors, including Harry Connick, the District Attorney who implored her to accept the transfer. Her discussions with the 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. Once the first assistant district attorney learned of Myers’ distribution of the questionnaires, he informed Connick that she was stirring up a “mini-insurrection” in the office. Shortly thereafter, Connick terminated Myers, citing the following as grounds: insubordination by distributing the questionnaire and refusal to accept the transfer. Connick expressed concern and disapproval of various portions of the questionnaire, in particular one inquiring about pressures to work in political campaigns which he believed would create problems if the press heard about it; he also expressed disapproval of the question about employee confidence in superiors. Myers challenged her termination as a violation of her First Amendment freedom of speech rights.

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. The Court established that as a threshold issue, before

19 The entire questionnaire is included as Appendix D, infra.
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. 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 the First Amendment, is presented. If, however, the speech is a matter of public concern, then and only then is the *Pickering* balancing test triggered. There are three levels of matter of public concern: (i) matter of public concern; (ii) substantial matter of public concern; and (iii) inherently matter of public concern. The difference between matter of public concern and substantial matter of public concern is thus: “a *stronger* showing may be necessary if the employee's speech more substantially involved matters of public concern” (*Connick*, p. 152, emphasis added). The only example of “inherent matter of public concern” the United States Supreme Court has given can be found in *Givhan v. Western Line Consolidated School District* (1979), where the Court held that the employee’s speech about the racially discriminatory purpose and effect of her employer’s policy was inherently a matter of public concern.\(^{20}\)

In *Connick*, the Supreme Court revealed the test for determining whether public employee speech constitutes speech on a matter of public 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” (pp. 147-148, emphasis added).\(^{21}\) The content, form and context of the statement must be examined to determine whether the

\(^{20}\) Speech that is inherently a matter of public concern usually enjoys *per se* protection (*O’Connor v. Steeves*, 1993, p. 913).

\(^{21}\) For a diagrammatic representation, see p. 129, *infra*. 
employee speech “relate[s] to any matter of political, social, or other concern to the community” (p. 146, emphasis added). This test (also known as the Connick test) is Connick’s 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.

With respect to speech that does not constitute a matter of public concern pursuant to the test above, the Supreme Court held: “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior” (p. 147). The Court has never uncoiled what the “most unusual circumstances” are that would entitle an employee speaking purely on matters of personal interest to First Amendment protection; it would seem that if the “most unusual circumstances” exception is fully developed, it would open the floodgates needed to protect employee speech made in the “as employee” status, furthering the genesis of First Amendment protection for speech employees make “as employees” hinted at in Madison Joint School District No. 8. It seems the Court would find it really challenging cutting the “most unusual circumstances” Gordian knot due to the complexities inherent in circumscribing its confines. While at the Court provided the “most unusual circumstances” exception, it nonetheless held that the First Amendment does not require the judiciary to grant immunity to public employees for “employment grievances not afforded by the First Amendment to those who do not work for the state” (p. 147). Thus, it seems that the protection called for under the “most unusual
circumstances” exception would not extend to protecting “employee grievances.”

Besides, the Court iterated, “[w]hile as a 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” (p. 149). The Court did state, however, that when employees falsely criticize their employers on grounds not of public concern, the employees would be entitled to protection in a libel action (p. 147); this might constitute an example of public employee speech in “employee” status protected under the “most unusual circumstances” exception.

Addressing the case sub judice 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 pressures to work on political campaigns. 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 political service; these, the Court noted, made the speech a matter of public concern.

The Supreme Court found the other questions to be mere extensions of Myers’ employment dispute or grievance with her employer; 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. 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 disclosed, 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, 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. 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, like *Givhan*, in *Connick* the employee speech was at work, 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, in *Connick*, the Court stated that the subject matter of the speech in *Givhan*—racial discrimination—was “a matter *inherently* of public concern” (p. 148, footnote 8, emphasis added). 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 (because the Supreme Court said so) that speech about racial discrimination is inherently a matter of public concern, the Court gave no guidance as to how to determine what subject matter of speech should qualify as “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. McCabe III (1985) describes *Connick* as inherently uncertain, very restrictive of employee free speech rights and undoubtedly in consequence a chill on employees’ criticism of employers. Dittman (1984) likewise 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” (p. 848; Marks, 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. 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. Nonetheless, the Court held in *Connick*, that context is crucial to a determination of whether speech involves a matter of public concern. 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. Contexts the Court deems applicable in this respect (i.e. operational efficiency) include: whether the statement hampers discipline by superiors, harmony among coworkers and the employee’s work performance. 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. Additionally, the Court stated: “[w]hen 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” (p. 153).

In what is ostensibly a backpedaling on one of the factors in the *Pickering* balancing test, the Court held: “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” (p. 152). In *Pickering*, that factor required public employers to provide evidence demonstrating that the employee’s speech actually had an adverse impact on the employer’s proper functioning; the Court clearly stated in *Pickering* that conjecture was deemed not to suffice. In *Connick*, however, in the quote above, the Court indicates 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. The Court only cited in support of this conclusion the judgment of Myers’ supervisors that she was inciting a “mini-insurrection,” and insubordinate by distributing the questionnaire; in essence the Court deferred to the judgment of the employer, tilting a factor in the *Pickering* calculus in favor of employers, a practice evident throughout the Court’s public employment-free speech jurisprudence since *Pickering*, as discussed herein. 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” (pp. 151-152, emphasis added); how wide, the Court failed to specify; however, it almost bespeaks unfettered discretion for employers. This in essence made 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. Therefore, the time, place and manner of the speech were added to the *Pickering* calculus factors to further protect public employers, not employees, in the calculus.
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.

*Rankin v. McPherson*

Four years after *Connick*, in *Rankin v. McPherson* (1987), the Supreme Court would be 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*, Ardith McPherson, a deputy in the office of Constable Rankin of Harris County, Texas was terminated for her speech. At the time of her termination, she was a probationary employee. As with all of Rankin’s employees, McPherson’s job title was “deputy constable,” even though she only performed clerical duties; she was not a commissioned peace officer. Her workstation was not accessible to the public and had no telephone – 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, according to McPherson, she stated in conversation with Lawrence Jackson, her boyfriend and coworker: “I said, shoot, if they go for him again, I hope they get him” (*Rankin*, 1987, p. 381). Another deputy constable, whom McPherson was unaware heard her, informed Rankin of McPherson’s statement. While

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22 The content of the pertinent dialogue between McPherson and Lawrence is included as Appendix E.
acknowledging the statement, McPherson insisted she meant nothing by it. Rankin, nonetheless, terminated her. McPherson challenged her termination as a violation of her right to freedom of speech.

Reaffirming its holding in *Mount Healthy*, the Court held that probationary employees might be entitled to reinstatement if their First Amendment right to free speech was the basis for their termination. 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” (p. 384).

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. The Court took a clearer step than 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” (p. 386).

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” (p. 387, footnote 10). 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” (p. 387, footnote 10). 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. This was clearly a favorable ruling for public employees.

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. 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” (p. 387). Besides, the Court noted: “a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee” (p. 388, footnote 13).

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. With respect 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. With respect to place, acknowledging the speech occurred in the office, the Court stated that McPherson’s workstation was not accessible to the public; moreover, no evidence was presented that any member of the public was actually present or heard the speech; and the manner of speech was a private conversation with a coworker.

*Rankin* was a rally for employee rights as discussed above. The Supreme Court struck the balance in the *Pickering* test in favor of McPherson. The Court further noted that the *Pickering* balancing test 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” (p. 390, emphasis added). 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. 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” (p. 391).

*Waters v. Churchill*

The pro-employee leaning in *Rankin* would be short-lived, however. Seven years after *Rankin*, in *Waters v. Churchill* (1994), 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. 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. Cheryl Churchill, a nurse employed in the obstetrics department at McDonough District Hospital (MDH), a government-operated hospital, was terminated for her speech. She challenged her termination as a violation of her First Amendment rights.

While Churchill was engaged in a conversation with Melanie Perkins-Graham, a nurse contemplating transfer to the obstetrics department, another nurse who overheard the conversation reported Churchill to Cynthia Waters, her supervisor. The nurse twice claimed that during the conversation, Churchill criticized Waters and the obstetrics department, prompting Perkins-Graham to lose interest in the transfer. Perkins-Graham confirmed the nurse’s account. 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; Churchill’s work performance was satisfactory otherwise. Churchill disagreed with both nurses’ account. Without asking Churchill about the conversation, Waters terminated her.

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

The challenge for the Supreme Court was to determine to 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? The Court thus would attempt to define some additional parameters for the content portion of the Connick test. In a plurality opinion, the Court held that this procedural determination must be cautiously fashioned so as not to exculpate unprotected speech or punish protected speech. 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 ad hoc, based on the facts of each case, “at least until some workable general rule emerges” (p. 671).

The plurality observed that the practical realities of public employment effectively ensure that open, robust and unhindered debate that would obtain between the government and its citizens are not all permissible between the government and its employees. For example, public employers do not need to tolerate verbal tumult nor rely on counterspeech as remedy to employee speech. By holding that employers do not have to rely on counterspeech as remedy to employee speech, the plurality effectively undermined the “ease of rebuttal” factor in the Pickering calculus.

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

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23 Even though this was a plurality opinion, pursuant to Marks v. United States (1977), it is the holding of the Court. See also Wales v. Board of Education of Community Unit School District 300, 1997, p. 84.
relationships with the citizenry. 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 so prohibit employees. The plurality also stated that in its public employment-free jurisprudence, the Court had adopted a deferential posture towards judgments of public employers about the disruptive nature of employee speech, albeit mostly speculative judgments. This is clearly not so in *Pickering* where the Court, in discussions of factors for the *Pickering* test, stated that mere conjecture about the adverse impact of speech on public employees was inadequate. 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 are based on private speech of employees. 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. 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 further and positively 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” (p. 675). 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” (p. 675, emphasis added).

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. 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. 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. 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. Camvel (1995) notes that: “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” (p. 583).

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. 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 basis the decision. Further spelling out the “reasonableness requirement,” the plurality stated: “If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with … 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” (p. 678).

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 action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable” (p. 678, emphasis added). 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, 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 (Ryan, 1988).

Turning to the facts of the case sub judice, 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 “[m]anagement can spend only so much of their time on any one employment decision” (p. 680).

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; therefore, Churchill’s speech was not constitutionally protected from employer retaliation. As evidence of disruptiveness, the plurality cited Perkins-Graham’s substantially dampened interest in transferring to obstetrics: “Discouraging people from coming to work for a department certainly qualifies as disruption” (p. 680, emphasis added). Additional evidence of disruption the plurality cited, which betray its pro-employer posture include: “Perkins-Graham perceived Churchill’s statements about Waters to be unkind and inappropriate, and told 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” (pp. 680-681, emphasis added, internal quotes omitted). In line with Connick, the plurality changed the requirement of actual disruptiveness in Pickering to potential disruptiveness, substantially easing the hurdles for employers to terminate employees for the exercise of their free speech rights. In addition, the Court made potential disruptiveness sufficient to terminate the employee as a matter of law. This effectively
gives employers creative leeway to post-hoc fabricate 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 those not of public concern. This was the case presented in Myers’ questionnaire in *Connick*. 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. 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 by the fact that this statement is surrounded by protected statements” (p. 681).

*Waters* was primarily a case that strengthened the position of employers in the *Pickering* balancing test (Bodner, 1995). Employees got the benefit of the “reasonableness requirement”; but as the plurality itself acknowledged, it was a fluid requirement at best. 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*, the Court extended tokens of protection to public employees’ free
speech rights. This trend would continue in *San Diego v. Roe* (2004), which though not a whistleblowing case, relied on the *Pickering* balancing test for its holding.

*San Diego v. Roe*

In *San Diego*, John 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 eBay. The supervisor reported his discovery to various persons in Roe’s chain of command, prompting an investigation by the San Diego Police Department’s (SDPD) internal affairs department. Roe admitted to selling the explicit videotapes as well as police paraphernalia. The investigation concluded that Roe’s conduct was a violation of SDPD policies. 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” (p. 78). While Roe ceased the sale of some of the items, he did not delete from his seller’s profile a description of the first two videotapes he made and their prices, prompting the SDPD to terminate him for disobedience of lawful orders and the other violations of policies stated earlier. Roe challenged the termination as a violation of his First Amendment right to free speech.
In a per curiam\textsuperscript{24} opinion, the Supreme Court held that Roe’s speech was not protected. 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 (p. 80, internal quotes omitted).

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. Additionally, the Court pointed out that:“To require \textit{Pickering} balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the \textit{proper functioning of government offices}… This concern prompted the Court in \textit{Connick} to explain a threshold inquiry (implicit in \textit{Pickering} itself) that in order to merit \textit{Pickering} balancing, a public employee’s speech must touch on a matter of public concern” (p. 83, internal quotes omitted). In essence, the Court stated that the “matter of public concern” requirement as well as the \textit{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

\textsuperscript{24} A per curiam opinion is an anonymous opinion rendered by the entire Court, as opposed to an opinion written in the name of a particular judge or justice.
rationale for the “public 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, 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” (p. 83, emphasis added). In essence, 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” (San Diego, 2004, pp. 83-84). 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. It is not clear 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. 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; in Perry, it was testimony before a legislative committee about the structure of an institution; in Madison Joint School District No. 8, it was speech about a subject of collective bargaining at a segment of the public school board meeting set aside for the public to comment about the subjects of collective bargaining; in Mount Healthy, it was communication with a radio station about dress code; and in Givhan, it was speech about racial discrimination. 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 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 would be presented with an opportunity in Garcetti v. Ceballos (2006) to vindicate
the free speech rights of public employees. However, the Court might already be so steep in its pro-employer interpretation, development and balancing of the *Pickering* balancing test that it would be difficult to recede.

**Garcetti v. Ceballos**

In this case, Richard Ceballos, a supervisory deputy district attorney for the Los Angeles County District Attorney’s Office, claimed that his employer – the District Attorney’s Office – subjected him to several retaliatory employment actions following the exercise of his right to free speech.

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. The attorney told Ceballos that the affidavit contained inaccuracies and that he had filed a motion to traverse the warrant. 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. Subsequent to communicating his conclusions to his supervisors, in a disposition memorandum presented to one of his supervisors, Ceballos discussed his concerns about the affidavit and recommended dismissal of the case. He subsequently submitted another memorandum to the supervisor detailing his second telephone discussion with the warrant affiant, prompting a meeting between Ceballos, his supervisors, the affiant and other employees of the sheriff’s department. The supervisor rejected Ceballos’ recommendation of dismissal.
At the hearing on the defense’s motion to traverse, Ceballos, in testimony for the defense, restated his findings about the affidavit; the trial court denied the motion. Ceballos alleged that the retaliatory employment actions began after all these incidents transpired, based on his speech in the memorandum. The actions which he challenged as a violation of his First Amendment right include: reassignment from his position as calendar deputy to a trial deputy position; denial of a promotion; and transfer to a different courthouse. Ceballos’ supervisors denied taking any retaliatory actions against him, contending that these actions were not retaliatory but rather based on staffing needs. In the alternative, the supervisors alleged that the memorandum was not protected speech.

In the case sub judice, the Supreme Court would attempt to clarify the “as citizen” versus “as employee” status in the Pickering balancing test; recall, in Pickering, the Court noted that the balancing test only applies to an employee who speaks as a citizen on a matter of public concern, granted that Madison Joint School District No. 8 held that speech concurrently as employee and citizen is protected. According to the Court, the central issue in the case was “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties” (Garcetti v. Ceballos, 2006, p. 1956, 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*.

The Court reaffirmed its holding in recent cases 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” (p. 1958, emphasis added). Moreover, the Court iterated that government agencies have broader discretion when acting in their *role as employer*, affirming the plurality’s ruling to this effect in *Waters*. 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” (p. 1958, emphasis added). 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. The Court expressed concerns about denying public employers control over the speech of their employees: “When [public employees] speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions” (p. 1958). Similarly, the Court declared: “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom” (p.
1958). The Court also stated that “while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the grievance” (p. 1959, internal quotes omitted). Such statements and conclusions earlier on in the opinion were indicative of the Court’s inclination in this case to strike the *Pickering* balancing test 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, as quoted above, the Court stated: “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom” (p. 1958, emphasis added); the Court added: “a citizen who works for the government is nonetheless a citizen” (p. 1958, emphasis added); these statements in essence imply that public employees can speak in a status that is 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” (p. 1958, emphasis added). Yet recall that in *Garcetti*, the Court also stated that public employees are nonetheless citizens. Besides, the Court introduced the concept of private citizens, 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.

Referring further to the “citizen” status, the Court stated: “So 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”
As discussed earlier, *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; and how this simultaneous status differs from when an employee is speaking solely as a citizen or solely as an employee.

In *Garcetti*, the Court set forth a test for making the distinction between “citizen” status and “employee” status, under the *Pickering* balancing test, though without explaining the private citizen versus public citizen concepts. The test provides: “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” (p. 1960, emphasis added). 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 laundry list of new concepts the Court has added to the *Pickering* calculus without much clarification. 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. 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.

In holding 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” (p. 1960, emphasis added), the Court in essence held: First Amendment protection is not available for speech pursuant to employees’ official duties, irrespective of whether the speech involves a matter of public concern under the Connick test; distinguishing Givhan, the Court noted that Bessie Givhan’s speech was not speech “pursuant to her official duties.”

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 enjoy in their capacities as private citizens” (Garcetti, 2006, p. 1958, emphasis added). 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. Citing San Diego, the Court noted: “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” (Garcetti, p. 1959).
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” (Garcetti, p. 1959). However such encouragement is quickly tempered by the Court’s holding that the work product of employees is not entitled to First Amendment protection.

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” (Garcetti, 2006, p. 1960). 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” (p. 1961).

Turning to the case sub judice, pursuant to Givhan, the Court held that the private office setting of Ceballos’ speech did not defeat his First Amendment claim. 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” (p. 1959). 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” (p. 1960, emphasis added).

The Court added that part of the official duties Ceballos was employed to perform in his capacity as a calendar deputy was to write disposition memos and that was his reason for preparing the memo in this case. Immaterial to the determination is “whether he[Ceballos] experienced some 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” (p. 1960). The Court tried to distinguish the letter Pickering sent to the newspaper from Ceballos’s memo. In making the distinction, the Court characterized the letter in Pickering as having no official significance, while Ceballos’ memo had official significance. Likewise, Pickering’s letter, “bore similarities to letters submitted by numerous citizens every day” (Garcetti, p. 1960), while Ceballos’ memo did not. Since “Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings … he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case” (Garcetti, p. 1960). Further, the Court noted: “When he 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” (p. 1960).
In addition, in *Garcetti*, 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.

Further strengthening the position of public employers in the *Pickering* calculus, the Court held: “Restricting 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” (p. 1960). 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” (p. 1960), and they must retain “sufficient discretion to manage their operations” (p. 1960).

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; (b) to ensure the accuracy of the speech; (c) to ensure that the speech demonstrates sound judgment; and (d) to ensure that the speech promotes the employer’s mission. The Court held that as an official memo, Ceballos’ memo was subject to the scrutiny and control of his employer, and if his superiors “thought his memo was inflammatory or misguided, they had the authority to take *proper corrective action*” (p. 1960, emphasis added). 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. 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 could well be regarded by the Court itself as an unconstitutionally vague or overbroad grant of authority – the authority to take “proper corrective action.” As long as employees are not speaking out as part of their official duties, the Court declared that they are free to speak out publicly; the determination of whether the employee is entitled to First Amendment protection in such cases would be dependent on application of the *Pickering* balancing test.

*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 stated by the Court, it seems to be a clarification 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, in essence 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.

The central holding of *Garcetti* is thus: “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities” (p. 1961). 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. 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: “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” (p. 1962). 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 employer. Even then though, such speech might still be deemed to constitute speech “pursuant to official duties” since the Court has failed to articulate the scope and consequent boundaries of the “pursuant to official duties” requirement; in fact, maybe this requirement might be helped by examining, “content, form, 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, as the test for use in determining if speech was “pursuant to official duties” even when made to an entity other than the employer.

In Garcetti, the Court suggests an “analogue approach” to determining what is “pursuant to official duties”: “[w]hen a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not
government employees” (Garcetti, p. 1961); hinting that if, when an employee
whistleblows about something related to his or her official duties, 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. The problem with this “analogue” approach,
however, is that it is highly unworkable, since there is an abundance of employee’s
speech related to employee duties that have no relevant analogue to speech by citizens
who are not government employees; in fact, the very nature of government employment
(as with other employment) is that employees 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: “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
concluding that the safest avenue of expression is to state their views in public” (Garcetti,
p. 1961). This could be a win-win approach for public employers, including school
districts.

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” (p. 1962).


The Federal Circuit Courts of Appeals have applied the *Pickering* balancing test since its formulation in 1968, to decide cases involving public employee whistleblowing. This section outlines some of the highlights of the approaches used by the Courts of Appeals.  

In general, as best described in a Fourth Circuit Court of Appeals case, the Courts of Appeals usually use a three-part inquiry, set forth below, in analyzing a public employment-free speech case. The general position of the Circuit Courts is that “[a] state may not dismiss a public school teacher because of the teacher’s exercise of speech protected by the First Amendment” (*Stroman v. Colleton County School District*, 1992, pp. 155-156); “except as qualified by the special exigencies of the employment

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25 The Circuit Courts of Appeals have interpreted the “substantial factor” requirement in the plaintiff’s burden of proof set forth in *Mount Healthy* as a “but for” causation test (See e.g., *Daulton v. Affeldt*, 1982; *Hall v. Marion School District No. 2*, 1994).

26 According to the Fourth Circuit Court of Appeals, the order of the inquiries could vary with the facts of a particular case (*Daniels v. Quinn*, 1986). It appears that courts are not always rigid as to the order in which the inquiries take place (e.g., *Jurgensen v. Fairfax County*, 1984). Unless specifically mentioned otherwise below with respect to a particular Circuit Court of Appeals, it should be assumed that the three-part inquiry is followed. As reflected below, some Circuit Courts of Appeals have had relatively more judicial activity with respect to the interpretation and application of aspects of *Pickering* and its progeny.
relationship, public employees retain the full panoply of first amendment rights enjoyed by all citizens” (Berger v. Battaglia, 1985).

As the Eleventh Circuit Court of Appeals points out: “The question of whether the employee’s speech is constitutionally protected is a different issue from the ultimate question of whether the employer has violated the employee’s right of freedom of speech … we [have] recognized this distinction between speech to which no constitutional right attaches [and] speech that, while protected, is … outweighed by the government’s interest” (Ferrara v. Mills, 1986, p. 1513, internal quotes omitted).

In addressing the rights of public employees who whistleblow, the Circuit Courts of Appeals, rely on the Pickering balancing test, using a three-pronged inquiry: 27 (i) whether the speech is about a legitimate matter of public concern; (ii) if the speech is about a matter of public concern, the next step is to determine if the employee would have been dismissed “but for” the protected speech. In this step, the employee shows the causal link between the protected speech and the retaliatory government action. It is also in this step that the employer defends itself using the “same decision anyway” defense from Mount Healthy; the same preponderance of the evidence burden of proof standard laid out in Mount Healthy is applicable; and (iii) if the employee successfully shows that the speech was the “but for” cause of the dismissal, the next step is a determination as to “whether the degree of public interest in the employee’s statement was nonetheless outweighed by the employer’s responsibility to manage its internal affairs and provide

"effective and efficient" service to the public. If so, then the employer will not be liable” (Daniels v. Quinn, 1986, p. 690).\(^{28}\)

The first step of the three-pronged inquiry determines whether the employee’s speech is protected by the First Amendment pursuant to the first part of the employee’s burden of proof as set forth in Mount Healthy. Whereas the first two steps of the inquiry determine whether the employee has a prima facie case that speech is constitutionally protected (Mount Healthy, 1977), the third step – the Pickering balancing – determines whether the employer has violated the employee’s protected speech (e.g., Ferrara, 1986; Holley v. Seminole County School District, 1985).\(^{29}\) In establishing that speech is constitutionally protected in the heritage of Pickering and its progeny, the United States Supreme Court has held that the employee must speak “as a citizen”; the Circuit Courts have seldom applied this aspect of the Pickering balancing test in the three-pronged inquiry, so it is difficult to determine which part of the three-prong inquiry they will fit this requirement under. However, as Garcetti emphasized, this is a critical part of First Amendment analysis of public employment-free speech cases. It seems however that since only “citizen” status and not “employee” status is protected, it is likely to fall under the first inquiry along with the inquiry about “matter of public concern,” as part of the


\(^{29}\) The Eighth Circuit Court of Appeals has a different approach. This Circuit holds that for speech to be protected, both the Pickering balancing test as well as the Connick tests must be satisfied. After this step of showing the speech is constitutionally protected, the next steps include the employee proving causation and finally the employer proving the “same decision anyway” defense (Lewis v. Harrison School District No. 1, 1986).
employee’s *prima facie* case; this would be consistent with the reading of *Pickering*, *Mount Healthy* and *Garcetti* since the Supreme Court has expressly only extended protection to speech of employees as “citizens on matters of public concern.”  


As part of the *Pickering* calculus factors, the Circuit Courts of Appeals also

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30 Accord *Pickering* and its progeny.

31 While this aptly captures the general view of the Circuit Courts of Appeals, the Fourth Circuit has since disavowed this position it held in *Kim v. Coppin State College* (1981), instead choosing to hold that “the entire *Pickering* balancing process is an inquiry of law for the court … the advisory jury had no role to play” (*Joyner v. Lancaster*, 1987, p. 23). Thus for the Fourth Circuit, while the second inquiry is still a question of fact, the first and third inquiries are completely questions of law; thereof, judges, not jurors, weigh the operational efficiency *Pickering* calculus factors of disruption of operations, disharmony among coworkers or breach of a confidential working relationship and the underlying facts applicable to these
consider the time, place and manner of the speech (e.g., Bowman, 1983; Ferrara, 1986, Lewis v. Harrison School District No. 1, 1986; Belyeu v. Coosa County Board of Education, 1993).

**District of Columbia Circuit Court of Appeals**

The District of Columbia Circuit Court of Appeals considers the following as part of the *Pickering* calculus factors:

[T]he sensitivity and confidential nature of the employee’s position and the government’s consequently legitimate need for secrecy; the nature of the subject on which the employee speaks out; the truth or falsity of the employee’s statement; any interference with the performance of his job resulting from the speech; the context of the speech and accompanying conduct; its anticipated effect on agency morale and upon working relationships with immediate superiors (*Hanson*, 1980, p. 50).

Of the above factors, the following are additional District of Columbia Court of Appeals factors not articulated by other Circuit Courts of Appeals as part of the *Pickering* calculus factors: (i) government's legitimate need for secrecy; (ii) nature of the subject on which the employee speaks out; (iii) the context of the conduct accompanying the speech; and (iv) anticipated effect on agency morale.

In applying the *Pickering* balancing test, the District of Columbia Circuit Court of Appeals makes “an individualized and searching review of the factors asserted by the employer to justify the discharge” (*Tygrett v. Barry*, 1980, p. 1283). According to the Circuit Court, “the *Pickering* cause of action has four elements” (*Hall v. Ford*, 1988, p. 258). First, the public employee has to show that his or her speech was on a matter of factors. See J. Wilson Parker (1985), *Free expression and the function of the jury*, 65 B.U. L. Rev. 483, for an extensive discussion of the role of juries in First Amendment cases.
public concern. “If the speech is not of public concern … it is unnecessary … to scrutinize the reasons for [the] discharge … at least absent the most unusual circumstances” (Hall, 1988, p. 258, internal quotes omitted; See p. 260, holding: “[b]ut neither does a topic otherwise of public concern lose its importance merely because it arises in an employee dispute” (emphasis in original)). If the employee meets step number one, the second step is the court’s application of the Pickering balancing test, balancing the interests of the employee, as a citizen, in commenting upon matters of public interest against the interests of the State, as an employer, in its operational efficiency. At the third step, the employee must prove that his or her speech was a substantial or motivating factor for the alleged retaliatory act of the employer. In the fourth step, the employer is afforded the opportunity to establish the “same decision anyway” defense (Hall, 1988).

**First Circuit Court of Appeals**

Like the District of Columbia Circuit Court of Appeals, the First Circuit Court of Appeals adds a new dimension to the Pickering calculus factors, noting that:

In undertaking this[Pickering] balancing procedure, both the character and effect of the public employee’s speech are relevant considerations. Thus an employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods. The government also has a more legitimate concern for speech which actually impairs its functions than for that which does not. Correspondingly, an employee’s interest in making public statements is heightened according to their veracity and innocuity (Brasslett, 1985, p. 839).

Thus, the First Circuit considers the truth or falsity of the content employee’s speech as one of the Pickering calculus factors.
According to the First Circuit Court of Appeals, there are three elements a public employee must show to prevail on a First Amendment claim against his or her employer (Fabiano v. Hopkins, 2003; O’Connor v. Steeves, 1993): First, the court must determine if the employee’s speech involves a matter of public concern. “If it does not, then its First Amendment value is low, and a federal court is not the appropriate forum in which to review the wisdom of internal decisions arising therefrom” (Fabiano, 2003, p. 453, internal citations omitted). Also, the Circuit Court has held that “[w]here a public employee speaks out on a topic which is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the "form and context" of the expression” (O’Connor, 1993, pp. 913-914). If the court finds that the employee’s speech involved a matter of public concern, the next step is the application of the Pickering balancing test. At the third step, the employee must establish causation: that his or her protected speech was a substantial or motivating factor in the alleged retaliatory act of the employer (Fabiano, 2003). Though not articulated as a step, the employer then has the opportunity to establish the “same decision anyway” defense (O’Connor, 1993).

Second Circuit Court of Appeals

While not unique to the Second Circuit Court of Appeals, other Circuit Courts have not clearly articulated as has the Second Circuit that: a whistleblowing employee “may not base her claim of retaliation upon complained-of-acts that predated her speaking out” (Bernheim, 1996, p. 325).

The Second Circuit Court of Appeals’ approach to determining if a public employee prevails in a First Amendment claim of retaliation can be summarized simply
as follows: the employee must show that “[i] the speech at issue was protected, [ii] that he suffered an adverse employment action, and [iii] that there was a causal connection between the protected speech and the adverse employment action. In particular, the causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action” (Blum v. Schlegel, 1994, p. 1010, internal citations omitted). The determination of whether speech is protected is pursuant to the Connick “matter of public concern” test (Blum, 1994). However, “the fact that an employee’s speech touches on matters of public concern will not render that speech protected where the employee’s motive for the speech is private and personal” (Blum, 1994, p. 1012). Additionally, the Circuit Court has held that: “[v]irtually every citizen has a personal interest in matters of public concern; after all, each citizen is a member of the public and is, in some way, impacted by the resolution of societal problems. The determinative question is whether that interest arises from the speaker’s status as a public citizen or from the speaker’s status as a public employee” (Blum, 1994, p. 1012).

Third Circuit Court of Appeals

The Third Circuit has held that employee testimony before an official government fact-finding or adjudicatory body is inherently a matter of public concern, regardless of its content (Pro v. Donatucci, 1996); for example, an employee’s voluntary testimony at a bail hearing is inherently a matter of public concern (Green v. Philadelphia Housing Authority, 1997). In addition, a “public employee’s appearance as a witness, even in the absence of actual testimony, is "speech" under Pickering” (Pro, 1996, p. 1291); “the context of a courtroom appearance raises speech to a level of public concern” (Green,
1997, p. 887); this could effectively confer First Amendment protection to speech that is
otherwise unprotected (Pro, 1996, p. 1291, footnote 4); however, even then the Pickering
balancing test needs to be applied to such speech (Pro, 1996, p. 1291, footnote 4). The
employee’s testimony does not have to be pursuant to a subpoena; voluntary testimonies
are also inherently matters of public concern (Green, 1997).

With respect to content, form and context elements of the Connick test, the Third
Circuit’s position is that: “[t]he content of the speech may help to characterize it as
relating to a matter of social or political concern of the community if, for example, the
speaker seeks to 'bring to light actual or potential wrongdoing or breach of public trust' on
the part of government officials. The form and context of the speech may help to
characterize it as relating to a matter of social or political concern to the community if,
for example, the forum where the speech activity takes place is not confined merely to the
public office where the speaker is employed” (Holder, 1993, p. 195). Unlike the Fourth
Circuit Court which has held that content is more important than form and context in the
Connick test (Jackson v. Bair, 1988, p. 720), the Third Circuit holds that content, form
and context all play important roles in the test (Holder, 1993, p. 195; Pro, 1996, p. 1291).

The Third Circuit uses the three-step inquiry mentioned earlier (Holder, 1993). As
part of the Pickering calculus factors, the Third Circuit considers the extent to which the
employee used the speech to resolve what is essentially, a private grievance of the
employee, as well as the extent to which the employee threatens the authority of the
employer (Holder, 1993).
Fourth Circuit Court of Appeals

In making the inquiry as to whether employee speech is about a matter of public concern, pursuant to Connick, the Fourth Circuit looks at the content, form and context of the speech. The critical inquiry in this determination as to whether the speech deals with a matter of public concern, according to the Fourth Circuit is: “whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee” (Piver v. Pender County Board of Education, 1987, pp. 1079-1080, internal quotes omitted). As part of context under the Connick test, nonexclusive and non-dispositive indicia considered by the Fourth Circuit Court includes whether the speech was at a public meeting (Love-Lane, 2004, p. 777).

Piver is one of only very few cases in any of the Circuit Courts of Appeals where “form” (an element of the Connick test) has truly been applied as opposed to just summarily mentioned (or not even mentioned in application) as applicable which is the tradition in the cases (e.g., Gilder-Lucas v. Elmore County Board of Education, 2005; Love-Lane, 2004; Sharp v. Lindsey, 2002). Any of the cases cited in this dissertation from the Circuit Courts would adequately illustrate the tendency in the Circuit Courts to summarily find “form” in existence without actually providing real substance as to how this conclusion came about and the application process.

In Piver, the Fourth Circuit distinguished between its findings about context, form and content in Jurgensen v. Fairfax County (1984) and Piver. In Jurgensen, a police officer was demoted for clandestinely releasing an internal audit report about working conditions to a newspaper reporter; in Piver, a high school teacher was terminated for
speaking out in support of his principal getting tenure. The court noted that the content of speech in *Jurgensen* was working conditions at the department, while in *Piver*, the content of the speech was focused on the adequacy of the principal’s performance. The court distinguished the “form” of speech in both cases as follows: “The form of the speech in *Jurgensen* involved the handing over of a report … to a journalist at a private dinner meeting. The forms of Piver’s speech included an oral presentation of his own thoughts at a public school board meeting, the guiding of class discussion and participation in his social studies class, and private conversations with the chairman of the school board and with other teachers” (*Piver*, 1987, p. 1080). With respect to the context, the court stated: “The context of the speech in *Jurgensen* included a departmental regulation forbidding the release of information by employees … without specific prior authorization. The context of Piver’s speech was fundamentally different. The speech took place primarily in a public meeting called for the purpose of discussing Jourdan’s[the principal] tenure. The speech delivered information uniquely available to Piver; as a teacher under Jourdan, Piver had important insights into Jourdan’s performance on the job. The speech was directed to a small community in which the speaker and the subjects were personally known by almost everyone” (*Piver*, p. 1080). In *Jurgensen*, the Circuit Court held that the speech was not a matter of public concern, whereas in *Piver*, it held the speech a matter of public concern.

The Fourth Circuit points out a crucial problem with application of the *Connick* test: “*Connick*—make[s] it plain that the ‘public concern’ or ‘community interest’ inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all
that is” (Piver, 1987, p. 1079, internal quotes omitted). Taking into account this challenge in applying the Connick test, the Fourth Circuit held thus: “[t]he principle that emerges [in application of the Connick test] is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely personal concern to the employee—most typically, a private personnel grievance” (Piver, 1987, p. 1079, internal quotes omitted). Cases where the employee speaks out about his or her own employment situation are likely to be screened out as personal grievances when “that employment situation holds little or no interest for the public at large” (Piver, 1987, p. 1080; Berger, 1985).

The Fourth Circuit has held that “disharmony is not a per se defense to dismissal” (Daulton v. Affeldt, 1982). Moreover, this Circuit Court has held that the content portion of the Connick test is the most important of “content, form and context” (Jackson, 1988, p. 720). The Circuit Court has also held that the negative definition of “matter of public concern is not consequential to the determination of what constitutes matter of public concern: “In deciding that a statement falls within the realm of public concern, it is not sufficient to determine that it does not fall on the "private grievance" end of the spectrum” (Arvinger v. Mayor and City Council of Baltimore, 1988, p. 79).

Fifth Circuit Court of Appeals

The Fifth Circuit Court’s framework for determining whether an employee’s speech constitutes protected speech under the First Amendment is as follows: “First, the speech must have involved a matter of public concern ... Second, the public employee’s interest in commenting on matters of public concern must outweigh the public
employer’s interest in promoting efficiency…The third prong of the test is based on causation; the employee's speech must have motivated the decision to discharge the employee” (Fowler v. Smith, 1995, p. 126).

According to the Fifth Circuit, the Pickering calculus includes: “(1) the degree to which the employee’s activity involved a matter of public concern; (2) the time, place, and manner of the employee’s activity; (3) whether close working relationships are essential to fulfilling the employee’s public responsibilities and the potential effect of the employee’s activity on those relationships; (4) whether the employee’s activity may be characterized as hostile, abusive, or insubordinate; (5) whether the activity impairs discipline by superiors or harmony among coworkers” (Brady, 1998, p. 707; Click v. Copeland, 1992; Matherne v. Wilson, 1988). The inclusion of factors number one and four as part of the Pickering calculus factors is unique to the Fifth Circuit.32 Also

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32 Although, there is a reference to the matter of public concern in one of the Pickering calculus factors as set forth by the United States Supreme Court in Pickering, that factor deals with the employee’s interest in commenting on the matter of public concern. Therefore, before the Pickering calculus factors are applied, the employee’s speech must already be determined to be a matter of public concern. Viewed one way, what the Fifth Circuit Court of Appeals in essence has done by including this factor (“the degree to which the employee’s activity involved a matter of public concern” (Brady v. Fort Bend County, 1998, p. 707)) as one of the Pickering calculus factors is include the threshold determination in the calculus—a redundant inclusion, since the United States Supreme Court held in Connick that the determination of whether speech touches on a matter of public concern is a threshold requirement for cases in the public employment-free speech jurisprudence under the First Amendment. Viewed another way, the Fifth Circuit Court’s inclusion of this factor as part of the Pickering calculus might only be a way for the court to look at the degree to which the employee’s speech – already determined to touch on a matter of public concern – involves a matter of public concern. If so, this might be a Pickering calculus factor that helps determine the degree to which speech that is a matter of public concern involves (i) matters of public concern; (ii) substantial matters of public concern; or (iii) inherent matters of public concern. Often, however, as part of the threshold requirement, courts have already determined what degree of public concern the speech is as part of the process inherent in proving that the speech constitutes matter of public concern in the first place. So this factor in the Pickering calculus as set forth by the Fifth Circuit could actually be the step for applying the determination, made earlier in a case by a court, of the degree to which the speech involves matter of public concern.
considered is whether the speech is “likely to generate controversy” (*Harris v. Victoria Independent School District*, 1999, p. 223).

Like the Fourth Circuit, the Fifth Circuit has held that in the *Pickering* balancing test, disharmony (one of the factors from the *Pickering* calculus) is not a per se defense to termination of whistleblowing employees (*Williams v. Board of Regents*, 1980). Moreover, an employee’s speech may contain both private concerns and public concerns and still constitute speech on a matter of public concern (*Benningfield v. City of Houston*, 1998, p. 375; *Thompson v. City of Starkville, Mississippi*, 1990, pp. 463-465)

With respect to the employee’s burden of proof in a First Amendment whistleblowing case, the Fifth Circuit requires a factor assumed but not explicitly stated as a requirement in the framework used by most of the other Circuit Courts of Appeals: proof that the employee suffered adverse action (*Harris*, 1999, p. 220). In addition, the Fifth Circuit adds that the employee must prove that his or her interest in commenting on matters of public concern outweighs the employer’s interest in operational efficiency (*Harris*, 1999, p. 220).

The Fifth Circuit Court has held that employee testimony before an official government fact-finding or adjudicatory body is inherently a matter of public concern, regardless of its content (*Harris*, 1999, p. 222, *Johnston v. Harris County Flood Control District*, 1989; *Pro*, 1996); this includes testimony before a grand jury, as well as testimony in a civil or criminal proceeding (*Reeves v. Clairborne County Board of*

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The reasoning is thus: “[t]he goal of grand jury proceedings, of criminal trials, and of civil trials is to resolve a dispute by gathering the facts and arriving at the truth, a goal sufficiently important to render testimony given in these contexts speech of public concern” (Johnston, 1989, p. 1578, internal quotes omitted).

With respect to the “citizen” status versus “employee” status, the Circuit Court has held that: “public employees are entitled to the same measure of constitutional protection as enjoyed by their civilian counterparts when speaking as citizens and not as employees” (Kirkland, 1989, p. 798, internal quotes omitted).

In determining what constitutes matter of public concern, the Fifth Circuit has held thus: “[a]nother factor considered in determining whether speech is on a matter of public concern is whether the comments were made against a backdrop of widespread debate in the community” (Harris, 1999, p. 223). “[I]ssues do not rise to a level of public concern by virtue of the speaker’s interest in the subject matter; rather, they achieve that protected status if the words or conduct are conveyed by the teacher in his role as a citizen and not in his role as an employee of the school district” (Kirkland, 1989, pp. 798-799, internal quotes omitted, emphasis in original); accordingly, for the Fifth Circuit Court of Appeals, a determination of whether the employee spoke as a citizen versus as an employee is dispositive of whether speech is about a matter of public concern (e.g.,

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34 The Seventh Circuit Court of Appeals has refused to adopt this position taken by the Third and Fifth Circuits (Wright v. Illinois Dept. of Children and Family Services, 1994, p. 1505); so has the Fourth Circuit, noting that adoption of such a position would be elevating context over content, since a court appearance or other appearance before a fact-finding or adjudicatory body deals with context; according to the Fourth Circuit, content is more important than context and form in the Connick test (Jackson v. Bair, 1988; Arvinger v. Mayor and City Council of Baltimore, 1988).
Sixth Circuit Court of Appeals

The framework used by the Sixth Circuit in analyzing cases of First Amendment retaliation claims by public employees is as follows – the employee must show that:

(i) his or her speech is constitutionally protected speech under the First Amendment; (ii) the employer’s adverse action caused the employee to suffer injury that is likely to chill a person of ordinary firmness from continuing to engage in the protected speech; and (iii) the adverse action was motivated at least in part as a response to the employee’s exercise of his or her right to free speech (Leary v. Daeschner, 2000, p. 737; Cockrel v. Shelby County School District, 2001, p. 1048). If the employee meets all these three steps of his or her burden, only then and only then does the burden of persuasion shift to the employer to establish the “same decision anyway” defense by a preponderance of the evidence (Leary, 2000, p. 737; Cockrel, p. 1048).

The Sixth Circuit Court of Appeals uses a two-part test to determine if speech is constitutionally protected under the first prong of the plaintiff’s burden of proof under the Mount Healthy “balance of burdens.” The first step is a determination of whether the

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35 Retaliatory acts could be the basis for an employee to establish adverse action that caused the employee injury that would chill a person of ordinary firmness from continuing to engage in the speech, e.g., termination (Cockrel v. Shelby County School District, 2001, p. 1055); involuntary transfer (Leary v. Daeschner, 2000, p. 738).

36 This is the very same framework the Fifth Circuit Court of Appeals uses (See e.g., Fowler v. Smith (1995)).

37 Recall, the entire Mount Healthy “mixed motives” framework is sometimes referred to as the “balance of burdens” (Price Waterhouse v. Hopkins, 1989; Cromley v. Board of Education of Lockport Township High School District 205, 1994, p. 1068). Also, recall that the first prong of the plaintiff’s burden of proof under
speech is about a matter of public concern; if so, the employee must show in the second step that the employee’s interests, as a citizen, in commenting upon matter of public concern outweigh the State’s interests, as an employer, in the efficiency of the services it performs (Wernicke, 2003, p. 1482; Bailey v. Floyd County Board of Education, 1997). Thus, it is in this second step of the determination of whether employee speech is constitutionally protected that the Sixth Circuit applies the Pickering balancing test. The Sixth Circuit has rejected the approach of the Fourth and Fifth Circuits which holds that, in the analysis of whether speech touches on a matter of public concern, the role of the employee as citizen or employee in speaking is determinative (Wernicke, 2003, p. 1482; Kirkland, 1989; Boring v. Buncombe County Board of Education, 1998; Cockrel, 2001); instead, the Sixth Circuit gives the greatest relative determinative importance to the content of the speech (Wernicke, 2003; Cockrel, 2001, p. 1052).

In addition, it is the position of the Sixth Circuit that “even if a public employee were acting out of a private motive with no intent to air her speech publicly … so long as the speech relates to matters of political, social, or other concern to the community, as opposed to matters only of personal interest, it shall be considered as touching upon matters of public concern” (Cockrel, 2001, p. 1052). Likewise, in applying the Pickering calculus factors, the Circuit Court “give[s] substantial weight to the government employer’s concerns of workplace efficiency, harmony, and discipline” (Cockrel, 2001, p. 1054); an exception is “when the disruptive employee speech can be traced back to when the government’s express decision permitted the employee to engage in that

the Mount Healthy “balance of burdens” is a determination of whether the employee’s speech is protected under the First Amendment.
speech” (Cockrel, 2001, p. 1054). Moreover, an employee’s “decision to speak cannot immunize her from an adverse employment decision arising out of inappropriate workplace behavior unrelated to her protected speech. Similarly, an employer is not immunized from its decision to terminate an employee based on her speech simply because that employee has engaged in other conduct that could have constituted legitimate grounds for discharge” (Cockrel, 2001, p. 1059).

Seventh Circuit Court of Appeals

This Circuit looks at the three-pronged inquiry instead as a two-step process. The first step is a determination of whether the speech involves a matter of public concern pursuant to the Connick test; if so, the next step is the application of the Pickering balancing test, a part of which process is application of the Pickering calculus factors including context, time, place and manner, the employee’s motives in voicing the concerns as well as the gravity of the matter of public concern expressed (Yoggerst v. Hedges, 1984; Knapp, 1985; Zook v. Brown, 1984). The employer “does not have to prove a legitimate reason for taking adverse action against the plaintiff until the plaintiff has come forth with sufficient evidence to support a prima facie case of substantial motivation” (Cromley v. Board of Education of Lockport Township High School District 205, 1994, p. 1068, emphasis added).

In this Circuit Court of Appeals, public employee speech is protected by the First Amendment if: (i) it will be protected if uttered by a private citizen; (ii) it involves more than a personal employee grievance; and (iii) the employer does not show a convincing reason to prohibit the speech (Brown v. Disciplinary Committee of Edgerton, 1996; Dishnow v. School District of Rib Lake, 1996; Hulbert v. Wilhelm, 1997). Once the
employee establishes that the speech is on a matter of public concern, that would “place
his speech, prima facie, within the protection of the First Amendment” (Dishnow, 1996,
p. 197). The Seventh Circuit uses the term “prima facie” protection to distinguish the fact
that when a public employee—as opposed to a nonpublic employee citizen—speaks and
proves that the speech was protected by the First Amendment, that is not the end of the
case, as the employer has the benefit of the Mount Healthy defense to avoid liability; in
other words, the employee who meets his or her burden of proof pursuant to Mount
Healthy only has “prima facie” First Amendment protection (Dishnow, 1996).

Enucleating the “matter of public concern,” the Seventh Circuit has stated that:
“when the Supreme Court in its cases establishing and bounding the rights of public
employees to exercise free speech limited those rights to speech on matters of public
concern, they did not mean matters of transcendent importance, such as the origins of the
universe or the merits of constitutional monarchy” (Dishnow, 1996, p. 197). Building on
this, the Circuit Court has held thus: “[t]hat the public was not large, that the issues were
not of global significance, and that … [the employee’s] participation was not (we mean
no disrespect) vital to the survival of Western civilization did not place his speech outside
the orbit of protection” (Dishnow, p. 197).

With respect to private communication to superiors, the Seventh Circuit has held
that: “[a]lthough the first amendment is not limited to speech that is broadcast to the
world … an employee's decision to deliver the message in private supports an inference
that the real concern is the employment relation--and a school district as employer may
react to speech about the workplace in ways a government as regulator may not” (Wales
v. Board of Education of Community Unit School District 300, 1997, p. 84, emphasis
added). However, the Circuit Court recognizes that: “first amendment protection extends to public employees who express their opinions during working hours as well as those who engage in speech while off-duty” (Conner v. Reinhard, 1988, p. 392).

Like the Sixth Circuit, the Seventh Circuit has held that employee speech will constitute protected speech if two requirements are met: “to be protected by the First Amendment, (1) the speech by a government employee must be on a matter of public concern, and (2) the employee’s interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state, as employer, in promoting efficient and effective public service” (Khuans v. School District 110, 1997, p. 1014). In this Circuit Court, these two elements thus need to be met to satisfy the first part of the burden of the employee under Mount Healthy: that the employee’s speech is protected by the First and Fourteenth Amendments.

In essence, what this Circuit Court does in real terms, like the Sixth Circuit, is collapse the balancing aspect of Pickering into the employee’s portion of the burden of proof allocation set forth in Mount Healthy, so that the employee is required to show that the employee’s interest in speaking is not outweighed by the interests of the state, as employer, in promoting effective and efficient service. Unclear and unarticulated is why the Circuit Court takes this approach, since in the very same case it stated: “even termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong” (Khuans, 1997, p. 1014, emphasis added); in

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38 Keep in mind, however, that while taking this approach, the Seventh Circuit Court of Appeals in the very same case acknowledged the muffled nature of the Pickering balancing test (Khuans v. School District 110, 1997, p. 1014).
other words, the Circuit Court distinguishes (i) protected speech on one hand and (ii) countervailing government interests on the other hand – a distinction more in line with the United States Supreme Court’s holdings in *Pickering* and its progeny than the approach the Seventh Circuit Court takes. Making this distinction clearly contradicts the Circuit Court’s own approach of collapsing into the “protected speech” determination, a burden on the employee to show that the speech was not outweighed by the countervailing interests of the employer.\(^{39}\) It is also inconsistent with the Circuit Court’s statement that “[w]hen an employee speaks out about actual wrongdoing or breach of public trust … the government must make a more substantial showing that the speech is, in fact, likely to be disruptive” (*Khuans*, 1997, p. p. 1018, emphasis added). If the government is to bear the burden of proving that speech is disruptive – a *Pickering* calculus factor and consequentially an integral part of the *Pickering* test – does the speech not have to first be shown to constitute protected speech under the First Amendment?; for if the speech is not yet determined to be protected speech, why would a court go through the entire process of applying the *Pickering* balancing test and require the government to bear the burden of proof with respect to some of the *Pickering* calculus factors, without yet moving beyond the employee’s part of the burden of proof enunciated in *Mount Healthy*? – that would be in contravention of *Mount Healthy*’s burden of proof framework and the very notion of judicial economy and the concept of fairness to the parties – for it is unfair to the parties to go through the entire balancing test even before

\(^{39}\) This very same inconsistency is evident in the Sixth Circuit Court of Appeals approach.
the employee has met the very first part of the *Mount Healthy* balance of burdens – that
the employee prove that the speech is protected by the First and Fourteenth Amendments.

With respect to the *Connick* test for matter of public concern, the Seventh Circuit
Court has held that content is more important than form and context (*Khuans*, 1997, p.
1014). In this Circuit, indicia of matter of public concern under the *Connick* test includes
whether the employee “issue[d] a public call to change” (*Khuans*, 1997, p. 1016). The
Seventh Circuit adds the following to the *Pickering* calculus factors: (i) the context in
which the underlying dispute began; (ii) whether the subject matter of the speech was one
on which debate was crucial to informed decision-making; (iii) “whether the speaker
should be regarded as a member of the general public” (*Khuans*, 1997, p. 1015); (iv) “our
inquiry must also take into account the point of the speech in question: was it the
employee’s point to bring wrongdoing to light? Or to raise other issues of public concern,
because they are of public concern? Or was the point to further some purely private

The third factor above seems very similar to the “citizen” versus “employee”
status determination which is vital in the first place to the determination of whether the
employee’s speech is protected speech under the First Amendment pursuant to *Pickering*,
a fact not recognized by the Seventh Circuit. While inclusion of this factor as part of the
*Pickering* calculus factors is consistent with the Seventh Circuit’s approach that to be
protected speech under the First Amendment, a determination that the employee’s interest
in speaking is not outweighed by the countervailing interests of the public employer must
be made (See *Khuans*, 1997), it is inconsistent with the very language of *Pickering* and
its progeny as it subsumes the Pickering calculus factors within the employee’s Mount Healthy burden of proof.

**Eighth Circuit Court of Appeals**

The Eighth Circuit adds the following factors to the Pickering calculus factors: (i) context in which dispute arose; and (ii) degree of public interest in speech (Bowman, 1983; Lewis, 1986). Thus, context is not merely considered when applying the Connick test; it is also considered as part of the Pickering balancing test.

The Eighth Circuit has held that “courts must also accord to the government the wide degree of discretion necessary for the proper management of internal affairs and personnel decisions. The degree of discretion allowed varies with the nature of the employee’s duties and the legitimate needs of the government” (Bowman, p. 644). With respect to the “degree of public interest in speech,” indicia used by the Eighth Circuit include media attention and parent involvement (Bowman, 1983; Roberts v. Van Buren Public Schools, 1985). In addition, with respect to public school employees, the court gives weight to the fact that “[t]he question of what constitutes the proper care and education of children is one of the most frequently debated issues in the public forum” (Bowman, p. 644).

As pointed out earlier, the Eighth Circuit approaches the three-pronged inquiry differently from the other Circuit Courts of Appeals. This approach is summarized thus:

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40 While the “degree of public interest in speech” is considered by the Eighth Circuit Court of Appeals as one of the Pickering calculus factors, in determining whether the speech involves a “matter of public concern” pursuant to the Connick test, the Eighth Circuit does not consider the degree of public interest in speech; instead, as the Eighth Circuit has noted, the “focus [is] on the employee’s role in conveying the speech rather than the public’s interest in the speech’s topic” (Bausworth v. Hazelwood School District, 1993, p. 1198).
First amendment decisions in the public-employee-firing context require application of a three-step process … The first step is to determine whether the speech was "protected" under the Constitution. Under Connick, only speech addressing a "matter of public concern" is protected … Even then, Pickering instructs the court to balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees … To be protected, speech must pass both the Connick and Pickering tests. The second and third steps involve causation. The employee must show that the speech was a substantial or motivating factor in the adverse employment decision … Finally, the defendant may show that the employment action would have been taken even in the absence of the protected conduct (Lewis, 1986, pp. citing, Roberts, 1985, internal quotes omitted).

With respect to private communication to supervisors, the approach of the Eighth Circuit is that: “A teacher has a constitutional right … to privately express to his superiors, in a reasonable manner, his criticism of … educational or disciplinary policies” (Roberts, 1985, p. 956, citing, Derrickson v. Board of Education, 1983); the first inquiry is to determine if a matter of public concern is concerned; if so, pursuant to Givhan, the time, place and manner of the speech as well as its content must then be examined in order to determine if operational efficiency is threatened (Roberts, 1985).

In determining whether speech is a matter of public concern, the Eighth Circuit defines the focus of this determination as follows: “The focus is on the role that the employee has assumed in advancing the particular expressions: that of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with the internal policies or practices which are of relevance only to the employees of that institution” (Cox v. Dardanelle Public School
District, 1986, p. 672). “When focusing on the employee's role, we consider whether the employee attempted to communicate the speech to the public at large and the employee’s motivation in speaking” (Bausworth v. Hazelwood School District, 1993, p. 1198); as part of this examination of the employee’s role, the Circuit Court looks at whether the employee when speaking was in the role of a citizen (Bausworth, 1993).

Ninth Circuit Court of Appeals

The Ninth Circuit uses the same three-pronged inquiry as generally used by the other Circuit Courts of Appeals.41 Due to the inherent challenges in figuring out what constitutes “matter of public concern,” the Ninth Circuit Court has defined the concept in the negative: “Speech by public employees may be characterized as not of public concern when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public’s evaluation of the performance of the governmental agencies” (McKinley, 1983, p. 1114).

Tenth Circuit Court of Appeals

The Tenth Circuit has added the truth or falsity of speech to the Pickering calculus factors and assigned non-specific weights to this factor (Westbrook v. Teton County School District No. 1, 1996; Ware v. Unified School District, No. 492, 1989) and to the value of the employee’s speech to the public (Wulf v. Wichita, 1989). According to the Tenth Circuit, “the issue of the truth or falsity of the statements at issue is relevant to both the threshold public concern analysis and the balancing required under Pickering. It is difficult to see how a maliciously or recklessly false statement could be viewed as

41 See p. 90, supra, for the three-pronged inquiry.
addressing a matter of public concern. Nonetheless, a merely erroneous statement may be of public concern” (Wulf, 1989, p. 858, footnote 24).42

Like the other Circuit Courts of Appeals, the Tenth Circuit looks to content, form and context in determining what constitutes matter of public concern. In examining content, the court will examine: “the extent to which the content of the employee speech was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties” (Koch v. City of Hutchinson, 1988, pp. 1445-1446). In Wulf, the court held that an employee who wrote to the Attorney General asking for an investigation into the practices of the department spoke on a matter of public concern. The court noted that the “form” of speech in that case was the letter to the Attorney General.

The following four-step process represents the Tenth Circuit Court’s framework for reviewing public employees’ First Amendment retaliation claims:

First, the court must determine whether the employee’s speech can be fairly characterized as constituting speech on a matter of public concern … If so, the court must then proceed to the second step and balance the employee’s interest, as a citizen, in commenting upon matters of public concern against the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees … Assuming that the Pickering balancing test tips in favor of the employee, the employee, under the third step, must prove that the protected speech was a substantial factor or a motivating factor in the detrimental employment decision ... Finally, if the employee makes this showing, the burden then shifts to the employer to show by a preponderance of evidence that it would have reached the same decision ... even in the absence of the protected conduct.

42 Despite assertions that various statements in the case were false and trivial, the court found those statements in Wulf to be matters of public concern, noting that only knowingly or recklessly false statements may not be matters of public concern.
Steps one and two concern whether the expression at issue is subject to the protection of the First Amendment. Thus, they present legal questions to be resolved by the court. In contrast, the third and fourth steps concern causation and involve questions of fact to be resolved by the jury (Gardetto v. Mason, 1996, p. 811, internal quotes omitted).

Moreover, the Tenth Circuit Court considers the motive of the speaker, particularly whether the employee “spoke out based on the same motivation that would move the public to speak out” (Gardetto, 1996, p. 812; see also Jilka, 2002) as indicium of whether speech constitutes matter of public concern. According to the Circuit Court, “the controversial character of a statement is irrelevant to the question [of] whether it deals with a matter of public concern … because the focus is on the motive of the speaker” (Gardetto, 1996, p. 814, internal quotes omitted).

Eleventh Circuit Court of Appeals

The Eleventh Circuit’s approach to public employment-free speech cases can be glimpsed from the following: “the fact that an employee is retaliated against for exercising constitutionally protected speech does not automatically render the disciplinary action unconstitutional. A public employee’s free speech rights are not absolute. The employee’s interest must be weighed against that of the state to determine which is more compelling in a given situation” (Ferrara, 1986, p. 1513, emphasis in original). Moreover, in the Eleventh Circuit, “[t]he Pickering balance is not triggered unless it is first determined that the employee’s speech is constitutionally protected” (Ferrara, 1986, pp. 1513-1514, emphasis in original).

Like the Eighth and Tenth Circuit Courts of Appeals, the Eleventh Circuit Court has added the degree of public interest in the employee’s speech to the Pickering calculus.
factors (Ferrara, 1986). However, it has also held that the degree of public interest in the subject of speech must not be equated with whether the speech is a matter of public concern: “The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—regardless of whether it actually becomes the subject of a public controversy” (Ferrara, 1986, p. 1514, quoting, Connick, 1983, 461 U.S. 138, 160, Justice Brennan, J. dissenting).

The Eleventh Circuit has a different order to the three-prong inquiry:

First, the court must determine whether the expression addressed a matter of public concern … Second, the court must consider whether the employee’s first amendment interest outweighs the interests of the government, as an employer, in the efficiency of public services … If the public employee prevails on the balancing test, the district court must determine whether the employee’s speech played a substantial part in the government’s decision to demote or discharge her … If the public employee prevails on these issues, the government has the opportunity to show … that it would have reached the same employment decision in the absence of the protected conduct (Belyeu, 1993, p. 928).

The Eleventh Circuit Court considers whether the employee spoke in the role of a citizen or primarily as an employee, in analyzing the context portion of the Connick test (Gilder-Lucas, 2005, p. 1271). In addition, this Circuit recently held that “[w]hile speech already determined to discuss a matter of public concern does not lose its public character solely because it is privately expressed, a failure to make the public aware of a grievance can undermine its public nature” (Gilder-Lucas, 2005, p. 1272).

A theme evident in the discussions supra of the various Circuit Courts of Appeals approaches to Pickering and its progeny is that just like with the United States Supreme Court’s development of the public employment-free speech jurisprudence, the Circuit
Court’s jurisprudence has been hazy, at variance intra- as well as inter-circuit and often indeterminate.

**Matter of Public Concern**

In *Connick*, the Supreme Court revealed the test for determining whether public employee speech constitutes speech on a matter of public 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” (pp. 147-148, emphasis added). The content, form and context of the statement must be examined to determine whether employee speech “relat[es] to any matter of political, social, or other concern to the community” (p. 146, emphasis added).

Recall that there are three levels of matter of public concern: (i) matter of public concern; (ii) substantial matter of public concern (e.g., *McKinley*, 1983); and (iii) inherently matter of public concern. The difference between speech about a matter of public concern and that which is about a substantial matter of public concern is thus: “a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern” (*Connick*, pp. 152, emphasis added).

With respect to inherent matters of public concern, the Fifth Circuit Court, for example, has held that employee testimony before an official government fact-finding or adjudicatory body is inherently a matter of public concern (*Johnston v. Harris County Flood Control District*, 1989; *Harris*, 1999, p. 222). In *Givhan*, the United States Supreme Court held that an employee’s speech about the racially discriminatory nature of her employer’s policies in purpose and effect was inherently a matter of public concern. “[C]ourts have had some difficulty deciding when speech deals with an issue of public
concern” (McKinley, 1983, p. 1113, internal quotes omitted) because “[t]he definition of matters of public concern is imprecise” (Kirkland, 1989, p. 798, internal quotes omitted; Allred, 1988; Estlund, 1990; Seog Hun Jo, 2002); in fact, Smith (1990) describes “the matter of public concern” as having many faces in the Circuit Courts of Appeals (pp. 257-258). In this section, the author briefly points out various examples of subject matter that have been found by various federal courts to constitute “matters of public concern.”

In a case where the teacher’s speech was in the nature of several articles written to various newspapers alleging the school board’s mismanagement of taxpayer funds, Freedom of Information Act (FOIA) public requests for salaries and travel expenses of board members and distribution of questionnaires to her colleagues about how teachers are treated or not treated as professionals by the school district, the Fourth Circuit held that the teacher’s speech involved substantial matters of public concern (Hall, 1994).

Speech expressing concern about lack of responsiveness to students’ needs and that of the community has been recognized as speech about a matter of public concern (Daulton, 1982). Speech about salaries and other employment benefits has also been found to constitute matter of public concern (e.g., Greminger v. Seaborne, 1978; Hanson v. Hoffman, 1980; McKinley, 1983); in addition, speech about maternity leave has been

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43 In fact, faced with the confusion surrounding the Connick test for matter of public concern and its application, the Sixth Circuit Court of Appeals in Sharp v. Lindsey (2002) stated: “application of the Connick test can be difficult. In the case before us, happily, the nettle is one we need not grasp” (p. 485, emphasis added). Continuing on an assumption without further ferreting out the intricacies of the Connick test, the Circuit Court added: “Pretermitting this particular issue [issue of whether plaintiff’s speech constituted a matter of public concern under the Connick test], we shall assume for purposes of analysis, without so deciding” (Sharp, 2002, p. 485) that the plaintiff’s speech constituted speech on a matter of public concern.
specifically held to be a matter of public concern (Hanson, 1980). Speech of a teacher voicing concerns about issues interfering with the education of students has been found to constitute speech on a matter of public concern (e.g., Johnson v. Butler, 1977; Daulton, 1982).

A memorandum criticizing the employee’s immediate supervisor for unprofessional conduct and use of various epithets has been held to be of public concern (Collins v. Robinson, 1983); criticism of the superintendent at a public meeting for lack of professionalism and for the transfer of a teacher constitutes matter of public concern (Lewis, 1986). A teacher’s letter asking for the investigation of a principal for harassing and intimidating her, and interfering with her classroom performance constitutes matter of public concern (Wren v. Spurlock, 1986); likewise, a matter of public concern is involved when a public employee writes to the Attorney General requesting the investigation of events within the department (Wulf, 1989). Advocacy of a method for use in determining whether racial equity exists in a school district and submission of equity report has been held to constitute matter of public concern (Curtis v. Oklahoma City Public Schools Board of Education, 1998).

Speech at public meeting accusing a state agency of inefficiency, waste and fraud constitutes speech on matter of significant public concern (Czurlanis, 1983); so is speech critical of a school district’s medication policy which permitted nurses, with only parental permission, to give prescription and nonprescription drugs to students (Johnsen, 1989). “[G]enerally, speech by a public school employee about a policy or practice which can substantially and detrimentally affect the welfare of the children attending the school
constitutes speech on a matter of public concern” (Morfin v. Albuquerque Public Schools, 1990).

Other examples of “matter of public concern” include: a teacher’s letter to a school board about the district’s athletic program, where the program had become a matter of public debate (Anderson v. Central Point School District No. 6, 1984); comments to parents about a school coach’s inappropriate use of corporal punishment (Bowman, 1983); letter to a newspaper about school board’s decision to get rid of junior high track (McGee, 1983); statements about the quality of education with respect to achievement test scores and students’ yearly academic deterioration (Bernheim, 1996); statements about a principal’s publication of false student test scores (Bernheim, 1996); statements about a principal’s misrepresentation of student achievements (Bernheim, 1996); statements about the administration of the educational process (Cox, 1986); speech about racially discriminatory policies and practices (Leonard v. City of Columbus, 1983); communication about inequitable mileage allowances (Knapp v. Whitaker, 1985); statements about the inadequacy of the liability insurance provided by school district to coaches and parent volunteers who transport students to school events (Knapp, 1985); speech about the impact of the failure to have programs specifically for emotionally and behaviorally impaired students (Wytrwal v. Saco School Board, 1995); revelations of special education director’s threats to overrule the consensus of teams of teachers, social workers and other professionals about the placement of students in violation of law (Wytrwal, 1995); disclosure of sexual misconduct against students to the Department of Children and Family Services (Cromley, 1994); speech about school placement of special education students in violation of state and federal regulations (Wytrwal, 1995);
statements to reporter about supervisor “holding himself out as a doctor when he did not have a Ph.D. or other doctoral degree” (*Gardetto*, 1996, p. 812); statements concerning potential dangers to the community’s citizens (*Kincade v. City of Blue Springs, Missouri*, 1995).

The following have also been found to constitute “matters of public concern”: statements about mismanagement of public funds (*Hamer v. Brown*, 1987); statements about favoritism in grading athletes (*Coats v. Pierre*, 1989); speech about exchange of grades for sex (*Coats*, 1989); speech about the inefficiencies in school’s implementation of Right to Read program – a federally funded program to fight illiteracy (*Wells v. Hico Independent School District*, 1984); speech about failures to notify parents about educational planning meetings which they have a right to attend under the Individuals with Disabilities Education Act (IDEA) (*Khuans*, 1997); speech about predeterminations of the classifications of certain children prior to diagnostic team’s input, in contravention of the IDEA (*Khuans*, 1997); statements about change of special education students’ placements and services without diagnostic team input or parental notification, in contravention of the IDEA (*Khuans*, 1997); statements about disregard of individualized educational programs (IEP) of special education children, in violation of the IDEA (*Khuans*, 1997); speech about illegal use of retirement funds to balance budget (*Patrick v. Miller*, 1992); speech about the implementation of a reduction-in-force plan and the overly subjective procedures in the implementation process (*Gardetto*, 1996); statements about the “integrity, qualifications, and misrepresentations of a highly visible public official” (*Gardetto*, 1996, p. 812); speech endorsing or opposing candidates in an electoral process (*Gardetto*, 1996; *Kinsey*, 1992); statements advocating the legalization...
of marijuana (Blum, 1994); speech criticizing national drug control policy (Blum, 1994; and speech debating civil disobedience (Blum, 1994).  

In McKinley (1983), the Ninth Circuit Court of Appeals held that “speech [which] dealt with the rate of compensation for members of the city’s police force and, more generally, with the working relationship between the police union and elected city officials” (p. 1114) involved substantial matters of public concern. The Fourth Circuit has found speech about an employer’s widespread discriminatory policies and practices to constitute speech on substantial matters of public concern (Love-Lane, 2004, p. 779). Also, the Seventh Circuit has held that speech about “educational improvement and fiscal responsibility in public schools clearly are matters of public concern” (Klug v. Chicago School Reform Board of Trustees, 1999, p. 858).

According to the Fourth Circuit: “a complaint published in a school newspaper that a public school discriminates on the basis of sex raises a question of public concern” (Seemuller v. Fairfax County School Board, 1989, p. 1583). The Sixth Circuit has ruled speech about industrial hemp, made as part of public debate, to be speech involving substantial matters of public concern (Cockrel, 2001, p. 1053). In addition, the Sixth Circuit Court of Appeals held in Leary that: “subjects of student discipline and the appropriate educational program to be implemented are undoubtedly matters of concern to the community at large” (p. 737). The Seventh Circuit has held that speech involves substantial matters of public concern “[w]hen an employee speaks out about actual

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44 The Second Circuit Court of Appeals in Blum v. Schlegel (1994) found that speech about the “legalization of marijuana, criticizing national drug control policy, and debating civil disobedience on its face implicates matters of public concern …[because] the abuse of and traffic in controlled substances is a major societal problem” (p. 1012, emphasis added). It is unclear whether this reference to “on its face” is a determination of substantial matters of public concern or inherent matters of public concern.
wrongdoing or breach of public trust on the part of her superiors” (Khuans, 1997, p. 1018); the Sixth Circuit agrees (Leary, p. 737).

**Articulating the Current Public Employment-Free Speech Framework Consistently with Pickering and its Progeny**

What has been lost in the approaches of the various Circuit Courts is a clear articulation of the steps for employees and employers involved in a First Amendment retaliation whistleblowing case. The United States Supreme Court articulated the applicable framework within which courts must analyze First Amendment retaliation cases in *Mount Healthy*. This framework is summarized thus:

1. The initial burden of proof is on the employee to show that: (a) his or her conduct is protected by the First and Fourteenth Amendments; 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 (or retaliate) against the employee. If the employee is unable to carry this burden, the case is to be resolved in favor of the employer.

2. After the employee successfully carries the burden of proof, the employer must then show by a preponderance of the evidence that it would have reached the same decision about the employee’s termination or nonrenewal (or other alleged retaliatory act) had the employee not engaged in the protected speech. This is the “same decision anyway” defense (also known as the *Mount Healthy* defense).

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45 As the Seventh Circuit Court of Appeals noted in *Khuans v. School District 110* (1997), “Pickering is fuzzy at best regarding how the balancing of interests is to be done” (p. 1014, emphasis added).
As the Eleventh Circuit points out: “[t]he question of whether the employee’s speech is constitutionally protected is a different issue from the ultimate question of whether the employer has violated the employee’s right of freedom of speech” (Ferrara, 1986, p. 1513). Thus, these two legal questions must be treated as distinct; in other words, even though speech is constitutionally protected by the First Amendment, retaliatory acts might be constitutionally permissible against such protected speech, making the employer not liable for the alleged retaliatory acts. Working within this Mount Healthy framework and pursuant to the language of Pickering is very important. In doing so, it is important to literally work from left to right within the very language of the Pickering balancing test and to be aware that the cases in the United States Supreme Court’s public employment-free speech jurisprudence since Pickering have interpreted or elaborated on aspects of the Pickering balancing test. Recall that the language of 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” (Pickering, 1968, p. 568).

Keeping all these points in mind, pursuant to Mount Healthy, employees who come to court alleging retaliation for speech must first show that the speech is protected. An examination of Pickering and its progeny reveals that the complete framework is thus:

1. The initial burden of proof is on the employee to show that:
   (a) his or her conduct is protected by the First and Fourteenth Amendments. To prove this, the employee has to show and pursuant to Pickering and the language of
Pickering (working from left to right): (i) “public employee” requirement: the employee must show that he or she is a public employee; (ii) “adverse government action”: the employee must show that he or she suffered adverse government action, i.e. adverse action from a government act (Harris, 1999, p. 220); (iii) “speech” requirement: the employee must show that his or her conduct constituted “speech” under the First Amendment, i.e. the employee must show that he or she commented; this step is the same every citizen who brings a First Amendment case must prove; (iv) “citizen status” requirement: the employee must show that he or she spoke as a citizen, and not merely as an employee (pursuant to the Garcetti test); (v) “matter of public concern” requirement (pursuant to the Connick test of content, form and context): the employee must show that his or her speech was on a matter of public concern; and (vi) “interests in commenting” requirement: The employee has to show that he or she has interests, as a citizen, in commenting on matters of public concern.

If the employee proves all this, the employee has proved that the employee’s speech is protected by the First Amendment pursuant to the first part of the employee’s burden of proof as set forth in Mount Healthy. The next step is then for the employee to show:

(b) “substantial factor” or “motivating factor” requirement: the employee must show that his or her speech was “a substantial factor” or a “motivating factor” in the employer’s decision to terminate or not rehire him or her (or retaliate) against the employee. If the employee is unable to carry this burden, the case is to be resolved in favor of the employer.
All of the steps listed in (1) (a) and (b) above determine whether the employee has a 
*prima facie* case that speech is constitutionally protected. If the employee carries the 
burden and thus establishes a *prima facie* case, the burden then shifts to the employer 
portion of the *Pickering* balancing test.

2. (a) “employer status” requirement: the employer (if at issue) might have to show 
that it acted in its role as employer toward the employee and not merely as 
government. In other words, the relationship with respect to the plaintiff is a 
public employer-public employee relationship, as opposed to a government-
citizen relationship. In *Pickering* and its progeny, the United States Supreme 
Court has held that the status of a public employer as an employer (as opposed to 
its status as sovereign when dealing with the general citizenry) makes it 
imperative that public employers have some control over their employees’ speech;

(b) “same decision anyway” defense: The employer has to show by a 
preponderance of the evidence that it would have reached the same decision about 
the employee’s termination or nonrenewal (or other alleged retaliatory act) had 
the employee not engaged in the protected speech;

(c) operational efficiency concerns: the employer should then argue that pursuant 
to the *Pickering* calculus factors that it has interests as an employer in promoting 
the efficiency of the public services it performs through its employees. The 
employer could rely on the *Pickering* calculus factors in making this argument;

(d) operational efficiency concerns outweigh interests of the employee in 
commenting as a citizen on matters of public concern: the employer should also
show that its operational efficiency concerns outweigh interests of the employee in commenting as a citizen on matters of public concern;

(e) the employer should also rebut (if applicable) any of the employee’s proof under 1 (a) and (b) above. Similarly, the employee has a chance to rebut any of the employer’s steps 2 (a) through (e) proof. Steps 2 (a) through (e) would help the court in determining whether the employer has violated the employee’s protected speech (e.g. Ferrara, 1986; Holley, 1985).

As noted earlier, “the extent of protection afforded by the first amendment to expression is ultimately a question of law for the courts, but … the jury's function is to find the underlying facts to which the legal standard is ultimately applied” (Kim, p 1062; Brockell, 1984; McGee, 1983, Connick, 1983). Step 1(b) above is also a question of fact for the fact finder (Acevedo-Diaz, 1993; Brady, 1998; Daniels, 1986; Jett, 1986; Wulf, 1989). The court weighs all the evidence and in so doing, the court then balances within the Pickering balancing test, the interests of the employee in speech on matters of public concern against the interests of the employer in operational efficiency. The result of this entire process would be the determination as to whether the employer who has violated the employee’s constitutionally protected speech is liable.
Figure 1: Summary of the Evolution of the United States Supreme Court’s Public Employment-Free Speech Jurisprudence since *Pickering*:

- **Perry v. Sindermann** (1972): Court’s first application of a calculus factor post-*Pickering*.
- **Waters v. Churchill** (1994): Employer version of "content" controls; "reasonableness" requirement.
**Figure 2**: Diagrammatic Representation of Aspects of the *Pickering* Balancing Test:

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Pickering balancing test

“Matter of public concern”
“Citizen” status
“Operational efficiency”
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**Figure 3**: Diagrammatic Representation of Aspects of the Matter of Public Concern:

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“Matter of public concern”

Content
Form
Context
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Chapter 3

RESEARCH METHODOLOGY

Legal research has been around for as long as the law itself has been around. In fact, legal methodology is intricate to the law itself and to the understanding of the law. It entails a methodical inquiry into the law itself and various other sources that enrich understanding and interpretation of the law. Primarily in the nature of document analysis of hard copies of legal data for many years, the explosion of electronic data has increased access to various legal data and documents that have greatly enhanced legal research. Nonetheless, document analysis remains the essence of traditional legal research, the form of research the author employs in this dissertation.

Russo (2006) notes that legal research methodology is really a form of historical-legal research that “employs a timeline that looks to the past, present, and future for a variety of purposes” (p. 6). However, in this research into the past, present and future, the basic building block of legal research subsequent to consultation of the text of the law itself is legal precedent; legal research is heavily dependent on precedent, pursuant to the doctrine of *stare decisis*. *Stare decisis* is the doctrine under which courts are authoritatively bound in all future cases by previous decisions on questions of law by the pertinent court or a higher court in its jurisdiction. This doctrine aims to promote consistency and reliability of the law as well as to ensure judicial economy; therefore, once a question of law has been determined, it is settled law unless some form of extraordinary circumstances or facts compels the court or a higher court in its jurisdiction to reexamine the question of law. Due to its considerable reliance on past precedent, legal
research demands investigation into past legal data in order “to locate authority that will
govern the disposition of the question under investigation, whether school prayer, search
and seizure or another topic” (Russo, 2006, p. 7).

Law itself, which is the heart and soul of legal research, is a “reactive, rather than
proactive, force that is shaped by past events that can help lead to stability in its
application” (Russo, 2006, p. 7). Given that the law is reactive, factual circumstances
guide its development. When facts similar to those of a previous case in a court’s
jurisdiction are presented to a court, questions of law settled in the case prior must by
precedent dictate the decision in the later case. However, when faced with different
factual circumstances and previously undecided questions of law or different perspectives
to the previously undecided law, courts would often use that opportunity to further
develop the law or clarify the law. It is a settled principle of law that courts must not give
advisory opinions; therefore, unless presented with facts of an actual dispute or
controversy, courts, especially federal courts, would dismiss the case, barring compelling
circumstances. “In light of the more-or-less reactive nature of the law, when attorneys
challenge adverse rulings or as researchers study emerging questions, they each look to
see how past authoritative decisions have dealt with the same issue” (Russo, p. 7).

As legal researchers examine past cases, “[i]f there is a case supportive of their …
points of view, then they can argue it should be followed. However, if precedent is
contrary to their position, then they will seek to distinguish their case by attempting to
show that it is sufficiently different and inapplicable to the facts at hand” (Russo, 2006, p.
7). In this dissertation, the author constantly looks to past precedent in analyzing the free
speech rights of public school teachers. Several sources of the law exist for legal research; these sources are discussed next.

**Sources of Law for Legal Research**

There are three broad sources of law for legal research: (a) primary sources; (b) secondary sources; and (c) research (or finding) tools (Russo, 2006). All three sources of law are readily accessible through electronic subscription to such databases as Westlaw, Lexis-Nexis, FindLaw and other websites that are available to the public at no charge, including some court websites which make available copies of cases adjudicated by the court. Most of the electronic databases involve searches conducted using various descriptive words or phrases similar to a google search; in some other cases, searches are conducted using a Boolean system. The three sources of data can also be found by pouring through hard copies of pertinent publications. “The source of law that one begins with is, in large part, a matter of preference, depending on how familiar one is with legal sources and research” (Russo, p. 8).

**(A) Primary Sources**

Primary sources of law for legal research include constitutions, statutes, legislative histories, administrative regulations and case law (Russo, 2006).

Constitutions are supreme within their respective jurisdictions. Each state has its own constitution applicable within the state. The federal constitution applies throughout the country and is the supreme law. “As the primary source of American law, the [United States] Constitution provides the framework within which the entire legal system operates” (Russo, 2006, p. 8). When any federal or state statutes, regulations, common
law, executive order, or state constitutions contradicts the United States Constitution, the United States Constitution is supreme.

“[T]he [United States] Constitution establishes the three co-equal branches of government that exist on both the federal and state level. The legislative, executive, and judicial branches of government, in turn, give rise to the three other sources of law” (p. 9). While the legislative branch of government enacts statutes, the executive branch enforces those statutes and creates regulations that provide details and guidance for the interpretation and implementation of the statute. Administrative agencies, which are a part of the executive branch, also issue administrative decisions and rulings that aid in the interpretation of the regulations. In addition, the “United States Department of Education issues policy letters, typically in response to inquiries from state or local educational officials, to either clarify a regulation or interpret what is required by federal law. These letters are generally published in the Federal Register and are often reproduced by loose leaf, law-reporting services” (p. 9).

The judicial branch interprets the laws. The judiciary also develops case law, sometimes referred to as judge-made law or common law. “Common law refers to judicial interpretations of issues that may have been overlooked in the legislative or regulatory process or that may not have been anticipated when a statute was enacted” (p. 10). Common law is of two forms: (a) binding precedent; and (b) persuasive precedent. As Russo (2006) notes in describing binding precedent, the “[c]ommon law is rooted in the concept of precedent, the proposition that a majority ruling of the highest court in a given jurisdiction, or geographic area over which a court has authority, is binding on all lower courts within its jurisdiction” (p. 10). Persuasive precedent on the other hand is as
the name suggests merely persuasive. Decisions of judges in a given jurisdiction are merely persuasive precedent for judges in other jurisdictions (Russo, 2006). Legal research can get overwhelming and very quickly for the inexperienced researcher, therefore a librarian with knowledge of legal research is invaluable.

Primary sources of law can be found in various sources discussed below:

(i) **Constitutions**

The federal constitution and the various state constitutions are usually published in their respective jurisdiction’s statutory compilations (Russo, 2006). Like other forms of legal material, they are accessible both in hard copy and electronically.

(ii) **Statutes**

After a governor or the president signs a bill into law, the statute is first published as an individual copy (Russo, 2006). The statute is then published as a session law, which is a chronological compilation of the various laws passed in a particular session of the legislature. For example, Public Law 94-142 (the Individuals with Disabilities Education Act (IDEA)) indicates that in the 94th Congress in 1975, the IDEA was the 142nd piece of legislation passed (Russo, 2006). Several weeks or months after the statute is enacted, it is then published in the official reporter for that jurisdiction’s statutes: for federal statutes, this official reporter is United States Code (U.S.C.); each state has its own official reporter with the name of the state often in the title. Non-official versions of these statutes could also prove very helpful to researchers. For example, United States Code Annotated (U.S.C.A) includes not only federal statutes, but also annotations and summaries of cases which have interpreted the statute or applied it (Russo, 2006).
When legislatures enact statutes, they often prepare legislative histories. Legislative “history traces the development of a statute through legislative hearings and can be useful to clarify its meaning because reviewing what a bill’s author or others may have had to say about it can provide guidance” (Russo, 2006, p. 13) in interpreting the statute. When signing the bill into law, presidents also sometimes include signing statements in an attempt to influence judicial interpretations of the statutes; the constitutionality of signing statements remains to be determined. Legislative histories for federal statutes are usually published in the Congressional Record. The United States Code Congressional and Administrative News (USCCAN) publishes certain congressional committee reports; these reports could also be very helpful legislative history. Both publications as well as others covering legislative hearings are available in libraries that are federal document depositories (Russo, 2006).

When statutes are revoked or amended by a legislature, these updates are usually included once a year as a pamphlet pocketed at the back of the main volume (Russo, 2006). The frequency of statutory revocations or amendments dictates the extent to which the jurisdiction issues updated hardbound volumes.

(iii) Regulations

To fully grasp a statute, it is essential that researchers examine the administrative regulations implementing that statute (Russo, 2006). Federal administrative regulations are printed daily in the Federal Register. The Federal Register also publishes executive orders of the president, presidential proclamations and various other documents of administrative agencies. The Code of Federal Regulations (C.F.R.) is the official permanent compilation of administrative regulations; the C.F.R. is not updated as
frequently, thus it is always advisable for the legal researcher to consult the Federal Register in addition to the C.F.R. when consulting administrative regulations (Russo, 2006).

(iii) Case Law

Since the judiciary is the interpreter of the law, it is usually best for legal researchers to commence their research with case law in order to fully comprehend the meaning of the pertinent constitutional, statutory or regulatory provision (Russo, 2006). In addition, since the nature of trial court decisions is mostly limited to factual and legal determinations for the litigants before the court, legal researchers need to look to appellate decisions because of their precedential value. Thus, the author’s great reliance on United States Supreme Court decisions, since the Court’s decisions have the greatest precedential value in the United States, particularly with respect to questions of federal law.

The day a court renders its decision in a case, the decision is issued as a slip opinion (Russo, 2006). The slip opinions are usually available from the clerk of the court or increasingly from the court’s website. “A slip opinion is a bare-bones presentation of a court’s decision, not containing a syllabus or any research aids commonly found in the reporter systems” (p. 14). A few weeks after the ruling, the court’s opinion is then published in the federal or state reporter’s softbound advance sheets, as applicable. For the legal researcher, these advance sheets are more helpful since they include research aids and such cross-references as headnotes. Headnotes, also referred to as the keynote system, “consists of a series of short succinct summaries of the specific points of law in an opinion. These head notes are numbered sequentially in bold-faced print at the start of
an opinion so that by turning to the appropriate identified key in the ruling, a researcher can find the court’s detailed discussion of that given point of law” (p. 20). Several months or years after the slip opinion is issued, the opinion is then published in the official hardbound reporter for the jurisdiction (Russo, 2006).

The decisions of federal trial courts are published in hardbound form in the Federal Supplement (F.Supp.) series (Russo, 2006). Those of the federal circuit courts of appeals are published in the Federal Reporter (F.) series, which is currently in its third series, i.e. F.3d. When circuit court decisions are not accepted for publication in the Federal Reporter, they are often published in the Federal Appendix (Fed. Appx.); otherwise, they remain unpublished, as is the case with several judicial opinions (Russo, 2006).

United States Supreme Court decisions are first issued as slip opinions before being published in weekly loose-leaf publications known as the United States Law Week (U.S.L.W.) and Supreme Court Bulletin (Russo, 2006). Subsequently, the decisions are published in West’s Supreme Court Reporter (S.Ct.) as well as Lawyer’s Edition (L.Ed.). After several months or years, the decision is published in the official reporter for United States Supreme Court decisions, the United State Reports (U.S.) (Russo, 2006).

Many state court decisions are never published. When they are, however, they are usually published in West’s National Reporter System, a system that divides the country arbitrarily into seven regions and gives its reporters names of the regions (Russo, 2006). The regions are as follows: Atlantic (A.), North Eastern (N.E.), South Eastern (S.E.), North Western (N.W.), South Western (S.W.), South (So.), and Pacific (P.). Therefore, we have the Atlantic Reporter, the North Eastern Reporter, the South Eastern Reporter,
the North Western Reporter, the South Western Reporter, the Southern Reporter and the Pacific Reporter. West’s National Reporter System is especially useful to legal researchers, because of its various research aids and cross-references (Russo, 2006). In addition, there are about 30 state reporters which essentially reproduce the contents of that state’s cases in the regional reporter.

If a case has the citation 429 U.S. 167, it means the case is a United States Supreme Court case which may be found in volume 429 of the United State Reports, page 167. If a case has the citation 100 N.E. 113, it means the case is reported in volume 100 of the North Eastern Reporter, page 113.

(B) Secondary Sources

Unlike primary sources of law, secondary sources do not present the law itself; instead they are “writings about the law” (Russo, 2006, p. 16). Scholarly publications in law reviews and other legal journals, for example, provide “critiques of the law and advanced arguments about what the authors believe that the law should be” (p. 16). Other secondary sources include: encyclopedias, dictionaries, treatises, and restatements.

There are two primary encyclopedias in law: *Corpus Juris Secundum* (CJS) and *American Jurisprudence* (Am Jur). The American Law Institute publishes ten *Restatements of the Law* spanning various areas of the law (not including education); these restatements analyze the law in-depth, thus serving as very useful aids for legal researchers.

Treatises and hornbooks often focus on specific areas of the law and provide excellent sources of explanation of the law for researchers facing difficult challenges maneuvering the law. While secondary sources are not authoritative sources of law, they
are cited by courts in judicial opinions. Additionally, they serve as a great starting source for researchers who find it challenging dissecting, analyzing or comprehending judicial opinions (Russo, 2006).

(C) Research (or Finding) Tools

As pointed out above, the ever-evolving nature of the law makes it imperative that legal researchers familiarize themselves with research (or finding) tools that would help them ensure that they are relying on the most up-to-date law and interpretations of the law. Particularly, legal researchers need to be familiar with the most common means of accessing the most up-to-date judicial interpretations of the law: (i) case digests; (ii) topic method; (iii) descriptive word searches; and (iv) Shepard’s.

(i) Case Digests

A case “digest is a comprehensive compilation, or index, to the law around major points in a judicial opinion, briefly summarized as paragraph length head notes or squibs, thereby granting a researcher relatively easy access to a particular question” (Russo, 2006, p. 20). Key number digest, the most comprehensive digest system, uses seven major headings to “digest the law into more than 400 numbered and keyed topics, including such education-related topics as schools, colleges and universities, civil rights, and labor relations, each of which is further organized and subdivided into manageable units” (p. 20). The seven headings are as follows: Contracts, Crimes, Government, Persons, Property, Remedies and Torts. As Russo points out, under this digest system, a researcher interested in search and seizure would first check under the major topic of schools, then look at the major subheading students, before finally looking at key 169.5, for “Searches and Seizures.”
Since West, publisher of the key number system, “has a uniform key system for all of its federal and state reporters, when searching through a digest, one can begin with a table (or alphabetical list) of cases that can be found as a separate volume at the end of a descriptive-word index … providing examples of key concepts that can assist an individual in thoroughly researching a topic” (Russo, 2006, p. 20).

(ii) Topic Method

The topic method of legal research is particularly helpful to novice legal researchers (Russo, 2006). Examples of resources based on the topic method include: the Index to Legal Periodicals, the Guide to Periodical Literature, the Current Law Index, and the Education Index.

(iii) Descriptive Word Searches

West publishes a forty-six volume encyclopedia known as Word and Phrases or descriptive word searches to aid legal research (Russo, 2006). This encyclopedia alphabetically lists various words and phrases, followed by the “summaries of opinions that have interpreted, defined, or construed them” (p. 21). The encyclopedia is particularly helpful in locating materials for legal research if the researcher has some familiarity with words and phrases in the pertinent area of research.

(iv) Shepard’s

Shepard’s is very important for legal researchers who want to ensure case law they seek to rely on in their research is still good law. Specifically, Shepard’s, a citatory, makes it possible for “a researcher to verify the status of a ruling (or statute) as well as to find other opinions that have cited the main cause[sic]” (Russo, 2006, p. 19). This process is described as “shepardizing.” Both Westlaw and Lexis-Nexis allow researchers to
shepardsize a case. Westlaw has a red flag which signifies that a case is no longer good on
at least one point of law, while a yellow flag signifies that the researcher should proceed
with caution when using a case because the case has been distinguished from other cases
or was not followed in subsequent cases, even though the case has never been overruled.
When neither flag is present, the researcher can often feel confident in the currency of the
case.

While primary and secondary sources as well as finding tools are very helpful to
legal researchers, the legal researcher has wide discretion as to how to proceed. The
researcher often must sort through several documents and conduct detailed analysis of
those documents in order to determine its relevance to the subject of research. This is part
and parcel of the author’s research in this dissertation.
Chapter 4

ANALYSIS

This chapter is divided into three parts. In the first part, the author categorizes the public employment-free speech jurisprudence of the United States Supreme Court, from pre-*Pickering* till date, into various eras. In the second part, the author will attempt to classify speech under the jurisprudence into various categories. In the third part of the chapter, the author will then propose a constitutional test for analyzing cases under the jurisprudence.

Part I:

**Eras in the United States Supreme Court’s Public Employment-Free Speech Jurisprudence**

The United States Supreme Court’s public employment-free speech jurisprudence has evolved through what seem to be various eras since the Court began interpretation of the United States Constitution. In this part of the chapter, the author will attempt to ferret out those eras and label them according. The various eras in the Court’s jurisprudence discussed below are: (i) Era of Categorical Denial; (ii) Era of Recognition: Undefined Scope; (iii) Era of Balancing: Scope; and (iv) Era of OE > MPC Speech (which is closer to pseudo-balancing and quasi-categorical denial).

**Era of Categorical Denial**

From the ratification of the United States Constitution till 1952, the obdurate position of the public employment-free speech jurisprudence was agin any First Amendment right for citizens who took government employment. As long as one was a
citizen without government employment, one was entitled to the full panoply of rights under the First Amendment’s Free Speech Clause; however, whoever took government employment took it subject to what I would describe as the employer-employee relations version of *caveat emptor*. In other words, as a government *employee*, a *citizen* of the United States became alienated from what seemed like an inalienable right – the right to free speech with respect to his or her dealings with that government employer in the employment relationship. Tersely put, the jurisprudence was simply: 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. In other words, public employment was a privilege for any citizen; I dare say, and satirically so, that it was an era of the right to be fired and the privilege to speak: employees might as well have been *Mirandized* prior to taking employment as follows: “You have the right to remain silent. Anything you say can and will be used against you in the workplace. You do not have the right to speak to an attorney, and to have an attorney present during any questioning. If you cannot afford speech quietude with respect to your employment, the pink slip will be shown to you. Choose now or forever be silent.”

Justice Oliver Wendell Holmes’s famous apothegm aptly describes 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” (*McAuliffe v. Mayor of New Bedford*, 1892). Justice Holmes’ reasoning was that once a citizen took public employment and thus became an employee, the employee is bound by the implied terms of his or her contract of employment to suspend the right to free speech because he or she takes the employment solely on the employer’s terms. The
inauspicious minatory to citizens 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. In other words, in this era, free speech rights for whistleblowing employees were categorically denied protection under the United States Constitution. Public employers could constitutionally retaliate against employees for their speech in the same way private employers could against their employees with impunity.

Even in 1952, just before the close of this era, in *Adler v. Board of Education* (1952), the Supreme Court held: “It is … clear that [citizens] have no right to work for the State in the school system on their own terms” (p. 492). The Court went on to hold 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” (p. 492). This would be the last case in the impregnable era of categorical denial, for in the very next Supreme Court term, in 1952, the Court would recognize some protection for the free speech rights of public employees.

**Era of Recognition: Undefined Scope**

In *Wieman v. Updegraff* (1952), a case decided in the Supreme Court term following that in which *Adler* was decided, the Court for the first time decelerated the previously unbridled velocity and power of public employers to limit, as a condition of employment, employees’ First Amendment rights. This was the first breakthrough public employees got in the Supreme Court’s public employment-free speech jurisprudence; it
fell short of hog-tie of employer retaliatory powers, however. Nonetheless, it was a departure from the categorical denial that reigned in the era prior.

In *Wieman*, at issue was an Oklahoma statute which required public employees to swear loyalty oaths, within the statutorily permitted period, as a qualification for employment. Referring to the holding quoted above from *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 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” (pp. 191-192). In essence, the Court held that if the retaliation against a public employee was patently arbitrary or discriminatory, it would be unconstitutional. Thus, if it could not be shown that the retaliation was patently arbitrary or discriminatory, the retaliatory action of the employer would withstand constitutional scrutiny. Thus it offered public employees a carrot and a stick: the carrot was protection from patently arbitrary or discriminatory acts of the employer, while the stick was the burden employees had to bear: burden to prove that the act was *patently* arbitrary or discriminatory.

Freedom of association cases such as *Wieman* became the first cases to recognize the free speech rights of public employees, ushering in the era of recognition. They served as the forerunners to the official recognition by the United States Supreme Court, *as a Court in Shelton v. Tucker* (1960) *infra*, of protected status under the United States Constitution for public employee speech.
In his concurring opinion in *Wieman*, Justice Black expressed great apprehension that loyalty oaths would be used like other tools of tyranny not only to deny employees the freedom of association but also to suppress the *right to free speech*, shackling the minds of free people. 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 absent constitutionally recognized safeguards. The importance of Justice Black’s famous admonition in *Wieman* cannot be underestimated: “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. 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” (p. 193); this was a progenitor in the public employment-free speech jurisprudence; it’s reference to “matter of public concern,” with respect to the free speech rights of public employees, which later became a staple of the jurisprudence is unmistakable.

Justice Frankfurter’s concurrence in *Wieman* was also a crucial step in the recognition of the importance of constitutionally protecting the free speech rights of public employees. He emphasized the importance of guaranteeing teachers their free speech rights even while employed by the government:

[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 [sic] 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 (p. 195).

In *Shelton*, the United States Supreme Court heeded Justice Black’s admonition in *Wieman*, recognizing freedom of speech as a right which, like the right of association, is vulnerable to great abuse and castigation by the government as public employer. 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. 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 … Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made” (pp. 485-486, emphasis added).

Continuing in the efflorescent era of public employment-free speech recognition and enforcement, in *Cramp v. Board of Public Instruction* (1961), the Court struck down a state statute which required public employees to sign an oath or face immediate discharge from government employment. The public employees were required to swear under oath that they had never given aid, support, advice or influence to the Communist party. The Board of Public Instruction discovered that Cramp, a public school teacher who had worked for the Board had never taken the oath. He was asked to take the oath but refused. Cramp asked a Florida state court to declare the statute unconstitutionally vague and he sought an injunction against his termination; the state court and the Supreme Court of Florida held the statute constitutional. The United States Supreme
Court reversed, finding the statute to be so vague and indefinite that it was patently arbitrary, stating: “it 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” (p. 288, internal quotes omitted).

In *Torcaso v. Watkins* (1961), the United States Supreme Court invalidated a Maryland statute, finding it to be a violation of the First Amendment rights of public employees. Invalidating the statute, the Court held: “The 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” (pp. 495-496). Furthermore, in *Sherbert v. Verner* (1963), a case addressing the First Amendment Free Exercise rights of public employees under a South Carolina unemployment compensation statute, the Court would affirm the era of recognition of public employees’ free speech rights: “It is too late in the day to doubt that the liberties of religion and *expression* may be infringed by the denial of or placing of conditions upon a benefit or privilege” (p. 404, emphasis added). Additionally, in *Garrison v. State of Louisiana* (1964), the Court recognized employee speech directed at nominal or quasi-employers of the speaking employee as speech within the free speech rights of the First Amendment.

As part of this era, in *Keyishian v. Board of Regents* (1967), the Court declared that: “the theory that public employment which may be denied altogether, may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected” (pp. 605-606). The Court added that even in the presence of legitimate purposes, public employers cannot pursue those purposes using means that broadly stifle
fundamental rights, such as the right to free speech, where other means that are more narrowly tailored are available.

A common theme in this era, as depicted in the above examples of cases in the era, is the United States Supreme Court’s recognition and protection of public employees’ free speech rights – thus the name of the era; in essence, the era of categorical denial was, as it were, passé and positively ancient history. Poignantly put: what was public employees’ privilege to speech successfully made it through the judicial rite of passage to right to speak.

While the era of recognition was a breakthrough for employees, the scope of the recognized rights was undefined. In other words, the Court did not articulate a clear test for determining when employers could restrict employee rights or retaliate against employees for their exercise of those rights without violating the First Amendment. While from Wieman, we know that patently arbitrary or discriminatory actions by employers are unconstitutional, a wide range of employer actions in retaliation for employee speech might not be patently arbitrary or discriminatory, yet be in violation of the First Amendment. Thus, it was like being on a journey with a compass and not knowing how to wield it; in the lingua franca of the Court itself, one might dare say, the recognized right was a parody of “unconstitutionally vague” statutes. In Pickering v. Board of Education (1968), however, the Court would initiate the currently ongoing quest to give definition to the scope of public employees’ free speech rights it recognized in the “era of recognition: undefined scope.”
Era of Balancing: Scope

In the “era of balancing: scope,” the Court strives to define the scope of free speech rights of employees protected from employer retaliation. *Pickering* is the seminal case in the definition of the scope of public employees’ free speech.

In *Pickering*, a school board terminated Marvin L. Pickering, a public school teacher, for criticizing his employers in a letter he published in a local newspaper. The school board had put bond proposals on the ballot to raise funds to build new schools. Additionally, the board proposed a tax rate increase; voters rejected both proposals. Leading up to the vote on one of the proposals, a number of articles, apparently from the teachers’ union and one by the superintendent, were published in the local newspaper, imploring residents to vote for the proposal so as to avoid the decline of education in the district. Pickering also wrote a letter to the newspaper, criticizing the board and the superintendent for the way various proposals to raise revenues had been handled as well as what he considered to be misallocation of school funds to athletics over education. In terminating Pickering, the board cited as reasons his writing and publication of the letter.

Pickering challenged his termination as a violation of his First Amendment right to free speech. The Supreme Court affirmed the era of recognition, stating that the Constitution does not allow employers to coerce public school teachers to relinquish the 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. According to the Court, however, crucial to the public employment-free speech jurisprudence is an

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46 A copy of Pickering’s letter is included as Appendix A.
acknowledgement of the very real differences between the status of the government when dealing with its citizens and the status of the government as an employer dealing with its employees; in other words, different dynamics are implicated when the government is an employer as opposed to its status as sovereign to the general citizenry; an aspect of the dynamics entailed in the government/public employer-public employee relationship is the need for the employer to maintain the operational efficiency of the services it performs and in so doing maintain some control over its employees’ speech to avoid or minimize disruption to its services.

The Supreme Court then laid out what has since become known as the *Pickering* balancing test which defines the scope of employee speech that is protected from employer retaliation. 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” (p. 568). The balancing test has two key parts: “employee interest in speech” versus “employer interest in operational efficiency.” An aspect of the “employee interest in speech” is the “matter of public concern” (MPC) requirement: that is, to be protected against employer retaliation, the employee speech must touch on a matter of public concern. The other aspect of the “employee interest in speech” within the balancing test is the “as citizen” versus “as employee” status of the employee’s speech.

However, the Court abstained from establishing a bright-line standard against which all statements of public employees would be judged, given “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” (p. 569); rather, to determine whether a particular speech is within the scope of protected speech, a balance has to be struck between the employer and employee’s interests within the operational confines of the *Pickering* balancing test.

To help with the determination of whether a particular employee speech is within the scope of protected speech, the Court identified certain general factors – known as the *Pickering* calculus factors – for consideration in applying the *Pickering* test. When applied, some of the factors would more likely weigh in favor of the employer, while others weigh in favor of the employee; however, given that both sides have a chance to make arguments about each factor, any of the factors could eventually work in the favor of the other side, other than as identified below. Factors that could be 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 ability to maintain discipline; (b) whether the speech is directed toward someone with whom the employee would typically be in contact during his daily work. This is 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 critical to their proper functioning. This is the “confidentiality” factor.

Factors that could be relatively more pro-employee in the balancing test include: (a) the employee’s interest in commenting on matters of public concern and the public’s interest in free and unhindered debate on matters of public importance; (b) the fact that public employees are more likely than the general citizenry to have informed and definite
opinions about the matter in question; (c) the ease with which the employer could rebut the content of the employee’s statement, albeit false; and (d) whether there is evidence that the speech actually had an adverse impact on the employer’s proper functioning.

The Supreme Court found the statements in Pickering’s letter to be critical of the school board and the superintendent. However, none of the statements were targeted toward anyone with whom Pickering would typically be in contact during his daily work. In addition, the Court found no evidence that the speech impaired the ability to maintain discipline or harmony among coworkers. Furthermore, the employment relationship between Pickering and the school board as well as the superintendent was not so close as to require confidentiality for proper functioning. The Court also held that the board could have easily rebutted Pickering’s statements by sending a letter to the same or other newspaper; Pickering had no greater access to the accurate information than did the board.

The Court emphasized that public employers could not rely on speculations or conjectures about the impact of the employee’s speech; rather evidence of actual impact is required. Furthermore, the Court held that the critical tone of a letter alone is not sufficient to take employee speech on matters of public interest outside of the scope of speech protected against employer retaliation, when those statements are substantially correct.

With respect to whether speech that constitutes false statements is within the scope of protected speech, the Court held: “absent 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 public employment” (p. 574).
In ruling on the case, the Court assumed without explaining that the funding of the school district was an issue of public concern and thus within the scope of speech protected against employer retaliation.

The Supreme Court also gave a cue about 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 (p. 570, footnote 3).

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: “in 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” (p. 574, emphasis added). However, since *Pickering*, the Supreme Court has not used this “tangentially and insubstantially” test for distinguishing “as citizen” versus “as employee” speech.

In *Perry v. Sindermann* (1972), the contract of a teacher at a public institution was not renewed after he began to publicly disagree with policies of the institution’s board and to advocate change, opposed by the board, of the institutional structure from two-year to four-year; he also testified before a legislative committee accordingly. The teacher challenged the board’s decision not to renew his contract as a retaliatory
employment practice in violation of his right of free speech. The Supreme Court, in ruling on the case, held that a public employee’s lack of contractual or tenure right to the employment is not sufficient in itself to take speech out of the scope of speech protected against employer retaliation (p. 597).

Moreover, the Supreme Court affirmed the era of recognition, noting that a bona fide constitutional claim exists against employers who retaliate against employees who publicly criticize them. 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” (p. 598; see also Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 1976, p. 175). The Court also applied one of the factors in the Pickering calculus – 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 – finding the teacher’s speech to be within the scope of speech protected from employer retaliation; however, the Court remanded the case for a factual determination of whether the board’s failure to renew the teacher’s contract was a result of the exercise of his right of free speech. In addition, in Madison Joint School District No. 8 (1976), the Court added employee speech in a forum open to direct citizen involvement to speech within the scope of protection (p. 175).

In the “era of balancing: scope,” the essence of the balancing test was to define the scope of employee speech protected from retaliation via balancing that genuinely accounts for the interests of the employee in speech on matters of public concern and the interests of the employer in operational efficiency; balancing both interests without de
facto or de jure weights being given one interest over the other. This is illustrated for example, in the virtually evenly distributed factors for employers and employees in the Pickering calculus. However, since Pickering and Perry, the Court’s interpretation of parts and aspects of the Pickering balancing test has de facto and de jure created the current era of the jurisprudence labeled by the author as the “era of OE > MPC Speech.”

Era of OE > MPC Speech

Recall, 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” (p. 568). As noted earlier, the balancing test has two key parts: “employee interest in speech” versus “employer interest in operational efficiency;” these two interests are to be weighed against each other. An aspect of the “employee interest in speech” is the “matter of public concern” (MPC) requirement: that is, to be protected against employer retaliation, employee speech must touch on a matter of public concern. The other aspect of the “employee interest in speech” within the balancing test is the “as citizen” versus “as employee” status of the employee’s speech.

In the title the author has given this era, OE refers to “operational efficiency” interests of the employer, while MPC Speech refers to the employee’s interest in speech on matters of public concern. As depicted by the greater than sign (>), the trend in this era is United States Supreme Court interpretation of the parts and aspects of the Pickering balancing test in essence, since 1977, giving relatively increasingly greater weights to the “operational efficiency” part of the Pickering balancing test relative to the “employee’s
interest in speech on matter of public concern” part of the test. Moreover, even though, the “matter of public concern” requirement is an aspect of the “employee interest in speech,” the interpretation of the matter of public concern has effectively ensured relatively greater weights to operational efficiency over speech on matters of public concern. It would be good if the era at least was OE “less than or equal to (≤)” MPC Speech; or if OE was simply “less than (<)” MPC Speech; or tolerably OE “equal to or greater than (≥)” MPC Speech (tolerable because MPC Speech would at least enjoy equal status with OE); or as was originally intended by the formulation of the test, OE “equal to (=)” MPC Speech. However, the Supreme Court’s interpretation of the test has eroded the original intent of the formulation. This era is aptly titled because the interpretations of the test have made for a case of de facto or quasi denial of protection for employee speech rights against employer retaliation; or alternatively put, a case of pseudo-balancing, because in essence the interpretations have ensured weightings that keep OE > MPC Speech.

The “OE > MPC Speech” era started in 1977 with the case Mount Healthy City School District Board of Education v. Doyle. In that case, an untenured public school teacher was terminated after he called a local radio station to disclose the contents of a memorandum his principal circulated to teachers about a new mandatory dress code for teachers. The dress code had been adopted because of the belief among school administrators that teacher appearance correlated with the public’s support for bond initiatives. The teacher challenged the board’s decision not to rehire him as a violation of his constitutional rights to free speech. His background at the school prior to his speech to
the radio station included a fight with another teacher; an argument with cafeteria employees; and obscene gestures to female students.

*Mount Healthy* was the first case in which the Supreme Court addressed the role of “mixed motives” in the *Pickering* balancing test; thus, *Mount Healthy* was a further interpretation of the *Pickering* balancing test. “Mixed motives” occur where a public employer disciplines an employee ostensibly for the employee’s speech, yet other reasons centrolineal to the discipline are proffered by the employer. In such cases, courts then have to distinguish the employer’s actual motives from the pretentious. Essentially, “mixed motives” analysis involves an attempt to ascertain cause and effect: what was the actual cause of the employer’s discipline of the employee? In *Mount Healthy*, the teacher’s background prior to the speech together with his speech to the radio station provided distensible mixed motives for his termination. Additionally, as a non-tenured teacher, the board could terminate him without cause or reason as long as it was not in violation of the Constitution or some other law.

To understand the way this case played out in this era, weighing operational efficiency over speech on MPC via interpretation of *Pickering*, it is important to note that the Supreme Court refused to order the teacher’s reinstatement as a consequence of its “mixed motives” analysis. The district court had adopted a rule of causation which provided that even when there are constitutionally permissible grounds for the discharge of an employee, if the employee’s speech had a “substantial part” in the discharge, the employee is entitled to reinstatement. The Supreme Court rejected this causation rule as solely dispositive in “mixed motives” cases; its expressed concern was about operational efficiency: that the rule the district court applied would impede public employers’ control
over important personnel decisions and coerce employers to keep on their payrolls employees who would have been terminated had the employee not spoken out. Besides, the Court added, the rule might make the employee better off than he would have been had he not spoken out. The Court’s concern for operational efficiency relative to speech can also be gleaned from the following: “[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” (pp. 285-286).

The relative weighting of operational efficiency over speech on MPC would continue with the Supreme Court’s establishment of a burden-of-proof allocation (also known as the Mount Healthy “balance of burdens”) as the way to deal with cases under the Pickering balancing test where “mixed motives” arise. Again, keep in mind that the balance of burdens is a development and interpretation of the Pickering balancing test. Specifically, the allocation of the burden of proof provides:

1. The initial burden of proof in public employment-free speech cases is on the employee: (a) the employee must show that his or her conduct is protected by the First and Fourteenth Amendments; and (b) that the conduct was “a substantial factor” or a “motivating factor” in the employer’s decision to discipline him or her; the “substantial factor” or “motivating factor” language represents the Court’s causation test in “mixed motives” analysis. Requiring a “substantial factor,” rather than just a “factor,” in proof is an indicium of OE > Speech on
MPC. If the employee is unable to carry this burden, the constitutional question is to be resolved in favor of the employer.

2. Should the employee successfully carry the burden of proof, the employer could then show, by a preponderance of the evidence, that it would have reached the same decision about disciplining the employee in the absence of the protected speech. This is the “same decision anyway” defense, and it provides an affirmative defense for employers. By requiring of employers only a preponderance of evidence standard and making the “same decision anyway” defense an affirmative defense, in this development of the *Pickering* balancing test, the Court augmented employers’ interests in the *Pickering* calculus; furthering OE > Speech on MPC.

Besides, the entire “mixed motives” framework and the “same decision anyway” affirmative defense could encourage employers to concoct post-hoc, multiple motives other than the employee’s free speech in justification of discipline for speech, re-posturing what is actually a “single motive” – employee exercise of free speech rights – as a stratagem of sham: “mixed motives.”

All the public employment-free speech cases from *Pickering* to *Mount Healthy* involved speech in public forums. In *Pickering*, the employee speech was a letter sent to a local newspaper; in *Perry*, it was testimony before a legislative committee; in *Madison Joint School District No. 8*, it was speech at a public meeting of a school board; and in *Mount Healthy*, it was speech to a radio station. In *Givhan v. Western Line Consolidated School District* (1979), the Supreme Court ostensibly took a caesura in this era to extend First Amendment free speech protection, for the first time, to whistleblowing of the
following nature: private communications between employers and employees or employer-employee communications in private forum. In this case, a public school teacher who privately complained to her principal about policies and practices of the school district which she perceived to be discriminatory in purpose and effect was terminated; she challenged the termination as a violation of her First Amendment free speech rights; the Court agreed (Givhan, pp. 415-416). The scope of protected private whistleblowing speech, however, is dependent on a Pickering balancing test analysis in the pertinent case, within the operational confines of the Court’s interpretations of Pickering and progeny. The Court added that the time, place and manner of the employee’s speech would be taken into account in cases involving private employee speech.

In this post-Pickering era, the diminution of employer rights against employee speech has been *de minimis*; in fact, it has enjoyed preferment, given the importance the Court attaches to the operational efficiency of the government as employer and the essence of personnel control. This trend would continue in *Connick v. Myers* (1983) as the Court endeavored to unravel the nub of the “matter of public concern” aspect of the Pickering balancing test.

In *Connick*, an Assistant District Attorney was terminated after she prepared and distributed to her coworkers a questionnaire requesting their opinions about office morale, office transfer policy, level of confidence in supervisors, need for a grievance committee, and pressures to work in political campaigns.47 The Assistant District

47 The entire questionnaire is included as Appendix D, *infra.*
Attorney challenged her termination as a violation of her First Amendment freedom of speech right. Prior to her termination, her proficiency was not in question.

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; in essence, the Court had to interpret an aspect of the *Pickering* balancing test. While “matter of public concern” is an aspect of the employee part of the *Pickering* balancing test, the Court’s interpretation of it would effectively affirm OE > Speech on MPC.

The Court established that as a threshold requirement, before application of the *Pickering* balancing test, a determination must be made as to whether the matter that is the subject of the speech is merely an employment dispute or a matter of public concern. 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 the First Amendment, is presented. If, however, the speech touches on a matter of public concern, then and only then is the *Pickering* balancing test triggered. The problem with this as a threshold requirement is that “matter of public concern” is the *Pickering* balancing test – it is an integral part of the very core and literal language of the balancing test, so saying it is a threshold requirement before application of the *Pickering* balancing test is an anomaly because making a determination about the matter of public concern is application of the *Pickering* test, albeit an aspect only, but an aspect nonetheless.

In *Connick*, the Supreme Court revealed the test for determining whether public employee speech constitutes speech on MPC: “Whether an employee’s speech addresses a matter of public concern must be determined by the *content, form, and context* of a
given statement” (pp. 147-148, emphasis added); the content, form and context of the statement must be examined to determine whether the employee’s speech “relat[es] to any matter of political, social, or other concern to the community” (p. 146, emphasis added). This test is known as the Connick test.

With respect to speech that does not constitute a matter of public concern pursuant to the test above, the Supreme Court held: “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior” (p. 147); thus employee speech that is of personal interest has a very thin thread of protection, if any. Furthering the primacy of operational efficiency over speech on MPC, the Court held: “[w]hile as a 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” (p. 149). In this respect, it is also important to note that the Court found only one of the Assistant District Attorney’s questions in the questionnaire to her coworkers touched on a matter of public concern: the question about pressure to work on political campaigns. According to the Court, the other questions were mere extensions of employment dispute or grievance with the employer.

Illustrative of this era in which operational efficiency has relative primacy over employee speech on MPC, the Supreme Court in its discourse on the Pickering balancing test held variously that public employers must retain “wide discretion,” “control,” “wide
latitude” over employee speech, “wide degree of deference to employer judgment” and the prerogative to terminate, with dispatch, employees hindering efficiency. Similarly, 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” (p. 153, emphasis added).

In an apparent volte-face with respect to one of the Pickering calculus factors, a further validation of the current era, the Court held in this palinode: “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” (p. 152). In Pickering, that factor required public employers to provide evidence showing that the employee’s speech actually had an adverse impact on operational efficiency; in Pickering, the Court had held that mere conjecture about the impact of employee speech on operational efficiency was unacceptable. In Connick, however, the Court indicated that employers could rely on speculations about the disruptiveness of speech to operational efficiency in disciplining employees; actual evidence of adverse impact was no more the requirement.

With respect to the “close working relationship” factor, the Court found as sufficient evidence of the threat the employee’s speech posed to close working relationships, the employer’s judgments that the speech was inciting a “mini-insurrection”; fundamentally, the Court deferred to employer judgment. As part of the general trend of deference to employers that typifies the current era, 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” (pp. 151-152, emphasis added); this statement is basically symptomatic of unfettered discretion (or at least quasi-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, increasing the relative weighting of operational efficiency relative to speech on MPC within the *Pickering* balancing test.

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 keep *de minimis* the threats posed to operational efficiency in cases involving the private communications of employees with their employers. Therefore, the time, place and manner of the speech were intended to further protect public employers, not employees, in the *Pickering* calculus.

In *Waters v. Churchill* (1994), the Court would further interpret and develop the *Pickering* balancing test, particularly the content component of the “content, form and context” test for matters of public concern; particularly, the Court would rule on whether the content of employee speech should be as determined from the government employer’s perspective or from the trier of fact’s perspective. The decision would further reduce the protection of employee speech relative to operational efficiency. In this case, a nurse employed by a government-operated hospital was terminated for her speech; she challenged her termination as a violation of her First Amendment rights. There were two accounts of the nurse’s speech: one version was from the only two witnesses the employer chose to speak to prior to terminating her, while the other version (the nurse’s
own account of her speech) was corroborated by two other witnesses whom the employer chose not to speak with prior to terminating the nurse; the employer did not ask the nurse either to give her account of her speech. At trial, the nurse testified that her speech was primarily part of her longstanding concern, which she had on prior occasions voiced to her supervisors, over the hospital’s cross-training policy which allowed nurses from an overstaffed department to work in another. The account the employer relied on for the termination stated that the nurse criticized her supervisors and discouraged another employee from transferring to a position where she would work with that supervisor; the nurse denied discouraging the transfer. The plurality opinion observed that the practical realities of public employment effectively ensure that open, robust and unhindered debate which would otherwise exist between the government and its citizens are not completely permissible between the government and its employees. Besides, the Court held that public employers do not need to tolerate verbal tumult nor rely on counterspeech as remedy to employee speech. 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.

The plurality also stated that in its public employment-free jurisprudence, the Court has a tradition of deference to judgments of public employers about the disruptive nature of employee speech on operational efficiency, even speculative judgments. According to the plurality, this deferential approach, not accorded the government in relation to general citizenry speech, is also accorded disciplinary actions of public employers based on private speech of employees. Similarly, the plurality held: “[w]hen 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’’ (p. 675); again resounding
the primacy of operational efficiency. Characteristic of the relative weight of operational
efficiency in the current era, 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” (p. 675,
emphasis added).

With respect to the procedural determination about the version of the content of
the employee’s speech to which the Connick test applies, the plurality held that courts
must accord deference to employers’ version of the content. Expressing concern for
operational efficiency, the plurality stated that ruling otherwise would force employers to
institute and learn evidentiary rules substantially similar to those used in court
proceedings, a burden to employers. 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 were also endorsed as sufficient
bases for employer discipline of employees for speech. While it conceded the fact that
employer reliance on such factors could result in erroneous disciplinary action against
protected speech, nevertheless the plurality found no constitutional infirmity with such
reliance. The plurality did state that employer determinations of the content of employee
speech must be reasonable; however, it observed that: “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 action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable” (p. 678, emphasis added). If such a broad and erratic range of “reasonableness” is accorded public employers, employee rights are effectively indeterminate and could invariably be a function of arbitrary factors having no relevance to the actual case.

Turning to the facts of the case, the Court held that the decision by the hospital to accept the testimony of only the two witnesses chosen by the employer about the content of the nurse’s speech was reasonable, because “[m]anagement can spend only so much of their time on any one employment decision” (p. 680); this echoes the primacy of operational efficiency in the current era.

_Waters_ is replete with other illustrations of the relatively greater influence accorded operational efficiency in the current era: “Discouraging people from coming to work for a department certainly qualifies as disruption” (p. 680, emphasis added) of operational efficiency. Additional evidence of disruption the plurality cited in support of its stance on operational efficiency include an employee’s perception of the nurse’s statements as “unkind and inappropriate,” potentially undermining employer authority (p. 680); the plurality held that: “[a]s a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had” (p. 681, emphasis added, internal quotes omitted). Consonant with _Connick_, the plurality stated that potential disruptiveness to operational efficiency is all employers need to take disciplinary action under the _Pickering_ balancing test.
In *San Diego v. Roe* (2004), the precedence of operational efficiency over speech would continue with the Court holding that: “requir[ing] *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 [i.e. concern about operational efficiency] 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” (p. 83, internal quotes omitted). In essence, 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 operational efficiency of public employers; nowhere does the Court include as part of its rationale for the “public concern” requirement or the *Connick* test, a concern for the free speech rights of employees. Moreover, *San Diego* added a new twist to the MPC requirement: “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*” (*San Diego*, 2004, pp. 83-84, emphasis added).

The latest case in the current era of the Court’s public employment-free speech jurisprudence is *Garcetti v. Ceballos* (2006). In this case, a supervisory deputy district attorney alleged that his employer took various retaliatory actions against him because of his speech, in violation of his First Amendment rights; these actions include: reassignment from his position as calendar deputy to a trial deputy position; denial of a promotion; and transfer to a different courthouse. The speech in the case involved a memorandum written by the supervisory deputy district attorney to his superiors criticizing the handling of a pending criminal case and pointing out serious
misrepresentations in the affidavit used to get a search warrant in the case; he recommended dismissal of the case, but his supervisors disagreed.

In the case, the Supreme Court would seek to clarify the “as citizen” versus “as employee” status in the Pickering balancing test; recall, in Pickering, the Court stated that the balancing test only applies to an employee who speaks as a citizen on a matter of public concern.

The Court affirmed its holding in various cases in this era that employers can restrict employee speech on the basis of its potential disruptiveness to operational efficiency. Specifically, the Court stated that employers can restrict employee “speech that has some potential to affect the entity’s operations” (p. 1958, emphasis added). 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” (p. 1958, emphasis added); again according “significant degree of control” to employers because of operational efficiency, fundamentally reinforced the primacy of operational efficiency in this era. 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 operational efficiency; nonetheless it so held because of its emphasis on operational efficiency. Furthermore, the Court expressed concerns about denying public employers significant 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” (p. 1958); again, an articulation of the preponderancy of operational efficiency in this era.
As noted earlier, in *Garcetti*, the Court set forth the test for distinguishing the “as citizen” status and “as employee” status, under the *Pickering* balancing test. The test provides: “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” (p. 1960, emphasis added). This is the “pursuant to official duties” test or the *Garcetti* test and it is *Garcetti*s contribution to the Court’s public employment-free speech jurisprudence.

Written all over the *Garcetti* test is operational efficiency. The Court failed to define the phrases “pursuant to” and “official duties” under this test, effectively giving employers very broad discretion to work with under the vagueness of the phrases. Moreover, by categorically excluding speech pursuant to official duties from First Amendment protection, the relative concernment of speech lessened while operational efficiency’s improved. Also, true to the era, the Court refused protection for work product (*Garcetti*, p. 1960). Applying the *Garcetti* test to the facts of the case, the Court held that the supervisory deputy district attorney’s speech was not protected against disciplinary actions by his employer.

Further strengthening the operational efficiency part of the *Pickering* balancing test, the Court held: “[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” (p. 1960). Similarly, the Court stated: “[e]mployers have heightened interests in controlling speech made by an employee in his
or her professional capacity” (p. 1960, emphasis added), and they must retain “sufficient discretion to manage their operations” (p. 1960).

In the name of operational efficiency, 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; (b) to ensure the accuracy of the speech; (c) to ensure that the speech demonstrates sound judgment; and (d) to ensure that the speech promotes the employer’s mission. The Court also indicated that if an employer thinks that employee speech is “inflammatory or misguided” (p. 1960), the employer has “authority to take proper corrective action” (p. 1960, emphasis added). Moreover, the Court’s sanction of employer discipline of the broad undefined categories of “inflammatory or misguided” left to the thought or judgment of the employers is tantamount to a grant to broad discretion to employers over employer speech in the name of operational efficiency; so is the vague and uncircumscribed scope – “proper corrective action.”

The central holding of *Garcetti*, clearly pregnant with relative predilection for operational efficiency, is thus: “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities” (p. 1961). The *Garcetti* test could constrain 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, merely declaring 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” (p. 1962).
We will have to wait to find out if the next case the United States Supreme Court decides in the public employment-free speech jurisprudence will make any changes in the current era or merely be a further affirmation of the current era via development and interpretation of *Pickering*.

**Part II:**

**Categorizing Speech in the United States Supreme Court’s Public Employment-Free Speech Jurisprudence**

The Supreme Court’s public employment-free speech jurisprudence has involved speech of various kinds and so have cases in the various federal courts. In this part of the chapter, the author will attempt to categorize speech in the public employment-free speech jurisprudence in a way that would enhance the author’s new constitutional test for the jurisprudence proposed in the third part of this chapter. The various categories the author uses are: (i) Purely Employee Speech; (ii) Citizen-Employee Hybrid Speech; and (iii) Purely Citizen Speech. These categories stem from the review of literature on the historical development of the United States Supreme Court’s public employment-free speech jurisprudence in Chapter 2, *supra*.

**Purely Employee Speech**

All employee speech, criticizing his or her employer, that solely has to do with that particular employee’s employment (including criticisms of that employer’s actions, policies, or practices) or other employment contract dispute of that particular employee with his or her employer should be classified under this category. Additionally, employee speech that proximately arises out of the employee’s own employment dispute with the employer would fall under this category, irrespective of its impact on the public or other
government employees, unless the relative importance of the issue to the public or other
government employees substantially outweighs the import of the speech’s proximate
relation to the employee’s employment dispute with his or her employer; in such cases,
the speech should be accorded relatively greater protection than “purely employee
speech” and classified instead under the “citizen-employee hybrid speech.”

Examples of adjudicated cases that should be put in this category include an
employee’s complaints about his or her employer’s handling of his or her pay or other
benefits. Likewise, in this category would be the typical employee grievances over
working conditions of that employee or the employee’s contract with the employer.
Speech in the “purely employee speech” category should be accorded the lowest level of
constitutional protection, of the three speech categories.48

In Connick, the questionnaire dealt with office morale, office transfer policy, level
of confidence in supervisors, need for a grievance committee, and pressures to work in
political campaigns. Recall that employee speech which proximately arises out of the
employee’s own employment dispute with the employer would fall under the “purely
citizen speech” category, irrespective of its impact on the public or other government
employees, unless the relative importance of the issue to the public or other government
employees substantially outweighs the import of the speech’s proximate relation to the
employee’s employment dispute with his or her employer. The employee in the case
prepared the questionnaire because of her dissatisfaction with her employer’s decision to

48 Besides, employees who complain about their own employment issues have the grievance procedures in
their union contracts or other statutorily-provided grievance procedure for addressing those issues with
their employees; employees might seek to avail themselves of such procedures.
transfer her: in essence, her speech arose out of her dispute with her employer. Thus, all questions therein should be classified as “purely employee speech” unless the relative importance of the issue to the public or other government employees substantially outweighs the import of the speech’s proximate relation to the employee’s employment dispute with his or her employee. Employer pressure on employees to work on political campaigns clearly is of great importance to warrant giving it substantial weight over the import of the proximate relationship the employee’s speech has to his or her own employment dispute. A close examination of the facts of the case reveals that the other issues in the questionnaire have to do with an employee disgruntled with the employer’s decision to transfer her; and moreover cannot be said to substantially outweigh the proximate relationship of the employee’s speech to her grievance about her transfer.

**Purely Citizen Speech**

Speech of public employees that has absolutely nothing to do with their employment, made while at work or made in any other capacity, would fall under the “purely citizen speech” category. It is purely citizen speech because it is unadulterated by any element of employment. Speech in this category should be treated like speech of any other citizen who is not a government employee. In other words, in cases of “purely citizen speech” the relationship of the government employer to the government employee for purposes of First Amendment analysis should be treated precisely as that of government sovereign to the citizenry, not public employer-employee. Of course, when the employee is not at work, for example, when the employee is with family and friends and other settings having nothing to do with work, the employee is just a regular citizen
and speech in such situations should accordingly be treated for purposes of the First Amendment as speech by any citizen that is not a government employee.

For citizen speech, as the Supreme Court noted in *Bose Corp. v. Consumers Union of United States, Inc.* (1984), “there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality” (p. 504, quoting *Chaplinsky v. New Hampshire*, 1942, p. 572, internal quotes omitted). These categories include speech that is intentionally false or made with reckless disregard of the truth as the United States Supreme Court noted in *Pickering*. Other examples of such citizen speech categorically excluded from First Amendment protection include: libelous speech (*Bose Corp.*, p. 504, citing *Beauharnais v. Illinois*, 1952; see also *Harte-Hanks, Inc. v. Connaughton*, 1989); fighting words (*Bose Corp.*, p. 504, citing *Chaplinsky*; see also *Cohen v. California*, 1971, p. 20 and *Gooding v. Wilson*, 1972, p. 518); speech inciting riot (*Bose Corp.*, p. 504, citing *Brandenburg v. Ohio*, 1969); obscenity (*Bose Corp.*, citing *Roth v. United States*, 1957; see also *Miller v. California*, 1973); and child pornography (*Bose Corp.*, p. 504, citing *New York v. Ferber*, 1982); and speech presenting “clear and present” danger (see e.g., *Pennekamp v. Florida*, 1946 and *Brandenburg*, 1969).

An example of “purely citizen speech” would be that of the employee in *Rankin v. McPherson* (1987). In that case, Ardith McPherson, a deputy in the office of Constable

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49 For a more extensive discussion of the United States Supreme Court’s examination of unprotected versus protected categories of speech, see *Bose Corp. v. Consumers Union of United States, Inc.* (1984).
Rankin of Harris County, Texas was terminated for her speech: after hearing on an office radio that someone had tried to assassinate the President of the United States, according to McPherson, she stated in conversation with Lawrence Jackson, her boyfriend and coworker: “I said, shoot, if they go for him again, I hope they get him” (Rankin, 1987, p. 381). Clearly, the employee’s speech had nothing whatsoever to do with employment; therefore, it is “purely citizen speech.” This kind of speech should be entitled to the highest level of constitutional protection in the public employment-free speech jurisprudence, for it is similarly protected for every citizen who is not a government employee; as the Court indicated it was not speech that presented a clear and present danger to the President, so it was not categorically unprotected speech.

Citizen-Employee Hybrid Speech

Speech in this category includes speech that is a hybrid of citizen speech and employee speech. When a public employee speaks out in criticism of his or her employer’s actions, policies or practices toward any other government employee while the speaking employee is at work or off work (irrespective of whether the “other-employee” is an employee of the speaking employee’s own government employer or of another government employer); or about the actions, policies or practices of any government employer (other than the speaking employee’s own employer) against any government employee, the employee’s speech falls under the “citizen-employee hybrid speech” category. The “employee speech” component of the hybrid comes from the fact that the speech has to do with some issue related to government employment; the “citizen

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50 The content of the pertinent dialogue between McPherson and Lawrence is included as Appendix E.
speech” component of the hybrid results from the “Good-Samaritan” doctrine that should be in place to encourage employees to whistleblow about the government-employer treatment of any other government employee. If such government-employer treatment deals with allegations of government-employer discrimination against the allegedly victimized other-employee on the basis of race, color, ethnicity, gender, religion, illegitimacy, national origin, religion or sexual orientation, the applicable level of protection accorded such speech should be dependent on and coextensive with the level of constitutional protection given citizens with respect to the protected category in question under the three-tier constitutional framework proposed below.

Likewise, when an employee blows the whistle on his or her own employer’s actions, policies, or practices that have nothing to do with the actions, policies or practices’ application to him or her, but rather the application of those actions, policies or practices to the general public, the speech should be treated as a “citizen-employee hybrid speech” because it is based on the “Good-Samaritan” doctrine, encouraging employees to look out for the interests of the public and speak out when they find anything that is detrimental to the general public. 51 Akin speech would include speech exposing employer crimes, fraud or other violations of federal, state or local law.

In addition, when an employee complains about the government’s (other than his or her very own government employer) treatment of him or her as an employee or its handling of his or her employment-related issues, such as criticisms of the Internal

51 Note: the employee who is being a “Good-Samaritan” does not necessarily have to be “good” in the purest sense of the word; all that is required is that the employee, by speaking, protects the public or some other person or entity, other than him or herself.
Revenue Service’s (IRS) handling of his or her taxes, it should fall under the “citizen-employee hybrid speech” category. Though similar to such criticisms non-government employees could make against the IRS or other government agency, it is not a “purely citizen speech” because it has elements of employment to it, making it a hybrid.

For teachers, speech criticizing the actions, policies or practices of the teacher’s employer toward students (irrespective of whether or not those students are the teacher’s own students, and regardless of whether the speech occurs in a classroom or out of the classroom) also would fall under the “citizen-employee hybrid speech” category. This would be the case even if the teacher spoke out about the actions, policies or practices of school districts outside the teacher’s own school district, since the speaker’s employment as a teacher introduces an element of employment into the speech, taking it out of the scope of the “purely citizen speech.” Moreover, since the speech is in the “Good-Samaritan” role, speaking out for students, the speech has an element of “citizen speech”; this admixture makes it a “citizen-employee hybrid speech.” Examples include teacher speech about: the unwarranted severity of corporal punishment imposed on students (Bowman v. Pulaski County Special School District, 1983); handling of sexual misconduct against students (Cromley v. Board of Education of Lockport Township High School District 205, 1994); lowered academic standards (Storlazzi v. Bakey, 1995); handling of student alcohol use (Storlazzi, 1995); inappropriate alteration of student grades and other grading improprieties (Storlazzi, 1995). The exception to the application of the same level of constitutional protection and judicial scrutiny used for “citizen-employee hybrid speech” to teacher speech critical of school administrators’ actions, policies, or practices toward students would be cases where the teacher alleges
discrimination by the employer against students on the basis of race, color, ethnicity, gender, religion, illegitimacy, national origin, religion or sexual orientation; in such a case, relatively greater constitutional protection and judicial scrutiny coextensive with that discussed supra under the “purely employee speech” category should be applicable.

Having set forth the above, some other examples of adjudicated cases in which there were “citizen-employee hybrid speech” include: Mount Healthy, where the employee spoke to a radio station about a dress code that affected all teachers at a public school. The dress code was generally applicable and was based on efforts to influence the inflow of taxpayer funds to the school. In essence, it could be said that the teacher upheld the “Good-Samaritan” role with respect to the public and his fellow teachers, beyond merely the employee’s own employment; in Perry, the teacher’s speech advocating structural change of the institution from two to four-year was not related to the employer’s actions, policies, practices as applicable to the teacher’s own employment.

Similarly, in Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm’n (1976), the employee’s speech dealt with the implementation of a “fair share” clause generally applicable to all teachers in the school district; again, this extended beyond solely the employee’s own personal employment issues. The teacher was in the “Good-Samaritan” role on behalf of other teachers in the school district. In Pickering, the employee’s speech criticizing his employer’s handling of various bond initiatives and the relative allocation of funds to athletics dealt with employment, thus the “employee speech” component of the hybrid; the “citizen speech” component comes from the fact that the employee’s speech extended beyond his or her own personal employment issues. The speech in Pickering about the school board’s handling of bond
initiatives and its allocation of taxpayer funds, protects the public’s interest in the school board and in the appropriation of taxes, inter alia. Since the speech in *Givhan* was employment-related and involved allegations of racial discrimination, it is an example of “citizen-employee hybrid speech”; however, it should be entitled to the relatively greater constitutional protection and judicial scrutiny applied to government actions based on race, proposed *infra*.

*Garcetti* is another example of “citizen-employee hybrid speech.” In that case the employee was allegedly retaliated against for his speech conveying to his employer serious misrepresentations in the affidavit used to obtain a warrant and recommending dismissal of the case. Since the employee’s speech deals with an employment-related issue and also has elements in the public interest – obtaining affidavits using serious misrepresentations, the employee’s speech is a hybrid. Other examples of “citizen-employee hybrid speech” include public employee’s speech about actions of their employers: politically-motivated transfer of a fellow teacher to a distant educational outpost (*Wichert v. Walter*, 1985); mismanagement of taxpayer funds (*Hall v. Marion School District No. 2*, 1994; *Stroman v. Colleton County School District*, 1992); violations of the state’s open-meetings law (*Dishnow v. School District of Rib Lake*, 1996); suppression of evidence and fraudulent alteration of documents (*Williams v. Board of Regents*, 1980); school-imposed limitations on free speech (*Brammer-Hoelter v. Twin Peaks Charter Academy*, 2000); failure to implement programs for emotionally and behaviorally impaired students (*Wytrwal v. Saco School Board*, 1995); inadequate funding of kindergarten program (*Lifton*, 2003); favoritism in grading athletes (*Coats v.*
Part III:

A New Constitutional Test for Analyzing Cases in the Public Employment-Free Speech Jurisprudence

As revealed through the literature review in Chapter 2, the United States Supreme Court’s public employment-free speech jurisprudence has evolved through interpretations and applications that have resulted in increasingly pro-employer leanings in the *Pickering* balancing test – a test originally intended to balance countervailing interests of the employer and the employee. To provide better consideration of the countervailing interests of the public employer and that of the public employee, the author proposes in this part of Chapter 4, a three-tier review framework for the categories of public employee speech cataloged in Part II above. As Bhagwat (1997) aptly stated in another context, I believe readers must keep in mind that “no analysis, including the framework I propose, can provide precise answers to all difficult questions. Indeed, the search for a universal test is partly responsible for the current doctrine’s disarray. What I present here is a broad and hopefully useful framework, but actual analysis must proceed right-by-right and case-by-case” (pp. 326-327, internal quotes omitted). Hopefully, however, by taking account of the different categories of employee speech, at one end of the spectrum “citizen speech” of employees is protected as speech by other citizens, and at the other end of the spectrum, when employees speak merely as employees pursuant to the pertinent category above, the government as employer has greater leeway to accommodate operational efficiency.
The test the author proposes is based on the trifurcated review framework the United States Supreme Court uses in the analysis of Equal Protection cases. In this part of the chapter, the author starts with a brief history of the Equal Protection Clause three-tier framework on which the author’s proposal is based; this will give some context to the framework. In the next section of this part, the author then sets forth the Equal Protection Clause three-tier framework; the final section presents the framework as modified by the author for the public employment-free speech jurisprudence, with the applicable categories of public employee speech.

**History of the Equal Protection Clause Three-Tier Framework**

There are three tiers of review for the Equal Protection Clause jurisprudence: (i) rational basis; (ii) intermediate scrutiny; and (iii) strict scrutiny. A brief historical overview of each follows.

Under rational basis standard of review, courts defer to government action as long as it is rationally related to a legitimate government interest. Rational basis is the oldest of the three tiers of review. Bennett (1979) credits the origin of rational review to as far back as 1897. Essentially, in the years that followed, the Court often deferred to

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53 The Equal Protection Clause of the Fourteenth Amendment states in pertinent part: “No State shall … deny to any person within its jurisdiction the equal protection of the laws” (U.S Const. amend. V). In *Bolling v. Sharpe* (1954), the United States Supreme Court held that the Equal Protection Clause is applicable to the federal government via the Due Process Clause of the Fifth Amendment (U.S Const. amend. XIV, § 1).

government action and legislation, choosing instead to give great leeway to the political branches of the government: a *laissez faire* approach. This period saw the Court essentially defer to state exercises of police power, as long as the exercise entailed efforts to protect the morals, health or safety of the public; this was effectively rational basis review, though not in the exact form and rhetoric as the test is articulated today (Accord *Lochner v. New York* (1905), recognizing judicial deference to exercises of police power up until *Lochner*). The modern form in which rational basis review is stated can be traced “to the Court’s decision during the mid-1930s to withdraw from the highly interventionist posture taken in *Lochner v. New York*. It has come to embody the notion that most legislation is entitled to a strong presumption of constitutionality and that, all things considered, the judicial invalidation of social and economic legislation should be an exceptional event” (Saphire, 2000, p. 603).

*Lochner* ushered in a period known as the *Lochner* era (1905-1937): a period typified by ambitious judicial review of government action. During this era, the Supreme Court invalidated approximately 200 statutes (Klarman, p. 221) and made it a frequent practice to second-guess legislative policy judgments (Klarman, p. 219).

In *Lochner*, the Court struck down a New York state labor statute which prohibited any bakery or confectionery from requiring or permitting its employees to

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55 For more on rational basis and the Equal Protection jurisprudence, see Richard B. Saphire (2000), *Equal protection, rational basis review, and the impact of Cleburne Living Center, Inc.*, 88 Ky. L.J. 591. For early examples of cases articulating rational basis review, see *Mobile, Jackson & Kansas City R. Co. v. Turnipseed* (1910); *Lindsley v. Natural Carbonic Gas Co.* (1911); *Fl. Smith Light & Traction Co. v. Board of Improvement* (1927); *State of Ohio ex rel. Clarke v. Deckebach* (1927); and *Metropolitan Casualty Insurance Co. v. Brownell* (1935).

56 For more on modern equal protection, see generally Michael J. Klarman (1991), *An interpretive history of modern equal protection*, 90 Mich. L. Rev. 213.
work over 60 hours in any one week or over 10 hours in any day; the plaintiff in error in
the case had been indicted for violating the statute. Breaking from its tradition of
deferece to legislative policy judgments that had characterized the pre-*Lochner* era, the
United States Supreme Court ruled that the statute interfered with the right to contract of
employers and employees *sui juris*, a “part of the liberty of the individual protected by
the 14th Amendment of the Federal Constitution” (*Lochner*, p. 53).

The Court made it a requirement of judicial review under Equal Protection and
Substantive Due Process jurisprudence that the following question be answered: “Is this a
fair, *reasonable*, and appropriate exercise of the police power of the state, or is it an
*unreasonable, unnecessary, and arbitrary* interference with the right of the individual”
(p. 56, emphasis added). This kind of scrutiny was clearly a departure from the prior
laissez faire approach. While the Court noted that in the review, the goal is not to
substitute the judgment of the court for that of the legislature, the Court made clear that
courts still have an overwhelming voice: “But the question would still remain: Is it within
the police power of the state? and that question must be answered by the *court*” (p. 57,
emphasis added). The Court went on to invalidate the labor statute in the case, stating:
“There is *no reasonable ground* for interfering with the liberty of person or the right of
free contract, by determining the hours of labor, in the occupation of a baker” (p. 57,
emphasis added); the grounds proffered by the state of New York in justification for the
statute were deemed not to serve the “safety, morals, [health] and general welfare of the
public” (pp. 53, 58). The Court also dismissed any suggestions that the employees are
“wards of the state” (p. 57).
The approach *Lochner* heralded for judicial review of government action under Equal Protection Clause could be grasped by reading the following, line upon line and precept upon precept: “It is a question of which of two powers or rights shall prevail, -- the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual” (pp. 57-58, emphasis added); in other words, a means-end scrutiny is required; “[t]here must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty” (p. 59). The Court added: “Statutes of the nature of that under review… are mere meddlesome interferences with the rights of the individual, and they are not asved from condemnation by the claim that they are passed in the exercise of the police power” (p. 61). Signaling the change of era from deference to *Lochner’s*, the Court stated: “the limit of the police power has been reached and passed in this case” (p. 58).

The *Lochner* era lasted until 1937 when President Franklin Delano Roosevelt threatened the Court with the legendary “Court packing plan.” Pursuant to its *Lochner* era activism, the Court struck down various New Deal legislations, prompting President

57 New Deal refers to the various plans President Franklin Roosevelt proposed for economic recovery, relief and reform during the Great Depression, after the infamous Black Tuesday, October 29, 1929, when the stock market crashed. The United States Supreme Court struck down many of the plans as unconstitutional, including provisions of the Agricultural Adjustment Act of 1933 in *United States v. Butler* (1936); Bituminous Coal Conservation Act of 1935 in *Carter v. Carter Coal Co.* (1936); National Industrial Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States* (1935) and in *Panama Refining*
Roosevelt to propose the Court packing plan. Then in 1938, the Court officially abandoned its *Lochner* era approach in *United States v. Carolene Products Co.* (1938), holding that: “the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators” (pp. 152-153); this is the origin of the modern form of rational basis review Saphire (2000) refers to.

Under strict scrutiny standard of review, to pass constitutional muster, government action must be narrowly tailored to achieve a compelling government interest. The strict scrutiny standard of review has its origins in *Carolene Products*. After establishing the rational basis standard of review as the standard of review for social and economic legislation, Justice Harlan Fiske Stone, writing for the Court, added in Famous Footnote Four: “There may be narrower scope for operation of the presumption of

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*Co. v. Ryan* (1935); Railroad Retirement Act in *Railroad Retirement Board v. Alton R. Co.* (1935); see also *Humphrey’s Ex’r v. United States* (1935). President Roosevelt then proposed the Judiciary Reorganization Bill (1937) to add to the nine Justices then on the Court, one additional Justice for each Justice then over seventy years. Since 1869, Congress had statutorily set the number of Justices on the Supreme Court at nine. This bill would have increased the number of Justices on the Court at the time to 15, giving President Roosevelt the opportunity to add six new Justices. The Justices opposed to the New Deal were known as the Four Horsemen, conservative members of the Court who included the following Justices: James Clark McReynolds, George Sutherland, Pierce Butler and Willis Van Devanter. On the other side were the Three Musketeers, made up of the liberal members of the Court: Justices Louis Brandeis, Benjamin Cardozo, and Harlan Stone. Chief Justice Evans Hughes and Justice Owen Roberts were the swing votes, with Justice Owens Roberts aligning often with the Four Horsemen, and the Chief Justice with the Three Musketeers, making for a 5-4 majority against the New Deal. Ostensibly due to the threat of the Court packing plan of President Roosevelt, Justice Roberts switched to vote with the Three Musketeers and Chief Justice Hughes in *West Coast Hotel Co. v. Parrish* (1937), upholding the constitutionality of a state minimum wage law; this was the switch in time that saved nine. In the same year, Justice Van Devanter (a member of the Four Horsemen) retired and Justice Hugo Black replaced him on the Court. This shift helped fuel the decline of the *Lochner* era and a Court more friendly to President’s Roosevelt’s New Deal. See also *United States v. Carolene Products Co.* (1938) and *National Labor Relations Board v. Jones & Laughlin* (1937), two other cases affirming the end of the *Lochner* era.
constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth” (p. 153). While Footnote Four did not mention the phrase “strict scrutiny,” it implied strict scrutiny through references to “more exacting judicial scrutiny,” and “more searching judicial inquiry,” introducing a two-tier judicial review process: (i) rational basis; and (ii) strict scrutiny. In other words, as the Court went from the \( \textit{Lochner} \) era’s highly interventionist posture Saphire (2000) describes in his article to the non-interventionist posture articulated in \( \textit{Carolene Products} \), the Court felt compelled to add Footnote Four to forewarn that not all government action would be entitled to the non-interventionist posture. Footnote Four

\[ \text{Footnote Four fully states:} \]
\[ \text{There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369, 370, 51 S.Ct. 532, 535, 536, 75 L.Ed. 1117, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, decided March 28, 1938. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458; on restraints upon the dissemination of information, see Near v. Minnesota, 283 U.S. 697, 713--714, 718--720, 722, 51 S.Ct. 625, 630, 632, 633, 75 L.Ed. 1357; Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; Whitney v. California, 274 U.S. 357, 373--378, 47 S.Ct. 641, 647, 649, 71 L.Ed. 1095; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, or national, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047; Farrington v. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646, or racial minorities. Nixon v. Herndon, supra; Nixon v. Condon, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428, 4 L.Ed. 579; South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734, decided February 14, 1938, note 2, and cases cited (\textit{United States v. Carolene Products Co.}, 1938, p. 153).} \]
intimates that a standard of review which essentially amounts to strict scrutiny would likely be applicable to legislation: (i) which appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments; (ii) which restricts those political processes, such as the right to vote, political organizations, peaceable assembly, dissemination of information, which can ordinarily be expected to bring about repeal of undesirable legislation; or (iii) directed at discrete and insular minorities such as religious, national or racial minorities. 59

The phrase “strict scrutiny” was first used by the Court in *Skinner v. State of Oklahoma ex rel. Williamson* (1942). In that case, an Oklahoma state statute provided that any person convicted of three felonies involving moral turpitude could be made sexually sterile via vasectomy for males and salpingectomy for females. The petitioner-defendant in the case had been convicted of three felonies involving moral turpitude: stealing chickens once and twice, robbery with firearms. Petitioner appealed the decision of the Supreme Court of Oklahoma affirming the lower court ruling that vasectomy be performed on him. In finding the statute unconstitutional, the Supreme Court stated: “We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws” (p. 541); therein lay the first mention of the phrase strict scrutiny in the Court’s jurisprudence.

Building on Footnote Four, in *Korematsu v. United States* (1944), the Court introduced “suspect classification” to the lingua franca of strict scrutiny: “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny” (p. 216, emphasis added; reference to “most rigid scrutiny” is a reference to “strict scrutiny”).

In *McLaughlin v. Florida* (1964), the Court held that racial classifications are constitutionally suspect (p. 192). Additionally, in *McLaughlin*, the Court articulated an early rendition of the strict scrutiny standard: “There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy” (p. 196). According to the Court, “the traditional indicia of suspectness [are as follows]: the class is … saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political

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60 See also *Adarand Constructors, Inc. v. Pena*, 1995, p. 227.

61 The requirement of “necessary” rather than “compelling” as is currently required under the strict scrutiny standard was an early articulation of the strict scrutiny standard of review. The Court as a whole first articulated the “compelling” interest requirement in *National Association for Advancement of Colored People v. State of Alabama, ex rel. Patterson*, 1958, p. 463, according Justice Frankfurter’s language in *Sweezy v. State of New Hampshire*, 1957, pp. 262, 265 which introduced the “compelling interest” requirement; then subsequently in *Bates v. City of Little Rock*, 1960, p. 524; *Sherbert v. Verner*, 1963, pp. 403, 406; and *Shapiro v. Thompson*, 1969, p. 634.
powerlessness as to command extraordinary protection from the majoritarian political

In Skinner (1942), the Court held that the right to marriage and procreation are
fundamental rights, infringement of which is subject to strict scrutiny; in Graham v.
Richardson (1971), the Court extended strict scrutiny to classifications based on resident
alienage. Recognizing the right to interstate travel as fundamental, in Shapiro v.
Thompson (1969), the Court held that strict scrutiny applies to the infringement of the
fundamental right to interstate travel: “in moving from State to State or to the District of
Columbia appellees were exercising a constitutional right, and any classification which
serves to penalize the exercise of that right, unless shown to be necessary to promote a
compelling governmental interest, is unconstitutional” (p. 634; accord United States v.

The following rights were also recognized as fundamental rights: voting (Yick Wo
references to “close and exacting examination”); right of free association (National
Association for Advancement of Colored People v. State of Alabama, ex rel. Patterson,
1958); and criminal appeals (Gunther, 1972, pp. 8-9). Additionally, in Sherbert v. Verner
(1963), the Court held that strict scrutiny was applicable to infringements of the
constitutional right to free exercise of religion (pp. 403, 406-407).

62 For critic of strict scrutiny, see e.g. Eugene Volokh (1996), Freedom of speech, permissible tailoring and
transcending strict scrutiny, 144 U. Pa. L. Rev. 2417 and Gerald Gunther (1972), Foreword: In search of
evolving doctrine on a changing court: A model for a newer equal protection, 86 Harv. L. Rev. 1.
“Compelling state interest” first appeared in the lingua franca of the Court in *Sweezy v. State of New Hampshire* (1957), in Justice Frankfurter’s concurring opinion: “the subordinating interest of the State must be compelling” (pp. 265, 262). The Court required that under the strict scrutiny standard of review, government action must be narrowly tailored to serve the government interest in *Murdock v. Commonwealth of Pennsylvania* (1943, pp. 116-117; see references therein to “narrowly drawn”).

Esteemed constitutional law scholar, Professor Gunther (1972) describes strict scrutiny as sometimes “strict in theory and fatal in fact” (p. 8) and rational basis review as “minimal scrutiny in theory and virtually none in fact” (p. 8). At one end of the constitutional review spectrum lies strict scrutiny with its concern for protecting core constitutional rights while at the other end is rational basis with its inclination for deference to the legislative and executive arms of government. There had to be a middle ground; and in its search for a middle ground for those cases that do not lie at either end of the spectrum, the Court developed intermediate scrutiny (Wexler, 1998, p. 319).

In fact, in *Craig v. Boren* (1976), Justice Powell, in his concurring opinion, stated: “As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative

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64 For variants of the terminologies the Court uses to characterize government interests under the three-tier review process, see *United States v. O’ Brien*, 1968, pp. 376-377.
classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court’s decisions in the past decade” (p. 210, footnote*). 65

In 1972, Professor Gunther observed “mounting discontent with the rigid two-tier formulations of the Warren Court’s equal protection doctrine” (Gunther, 1972, p. 12, see also p. 8). Expressing optimism about the development of a “middle-tier,” Gunther (1972) stated: “The Court is prepared to use the clause as an interventionist tool without resorting to the strict scrutiny language of the new equal protection” (p. 12).

Under the intermediate scrutiny standard of review, to pass constitutional muster, government action must be substantially related to an important government interest. The origin of the intermediate scrutiny standard of review can be traced to Craig v. Boren (1976). 66 In that case, the Court invalidated a state statute which forbade the sale of nonintoxicating 3.2% beer to males under age 21 and females under age 18. The plaintiffs had challenged the statute as an unconstitutional gender-based discrimination because it denied males between the ages of 18-20 years the equal protection of the law. Articulating the intermediate scrutiny standard, the Court stated that: “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives” (p. 197); the Court found the statute in the case did not

65 Justice Powell was reluctant to characterize the intermediate scrutiny standard as a middle-tier, however, noting that: “our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases” (p. 210, footnote*).

66 While the Court had articulated the substance of the intermediate scrutiny standard earlier than Craig v. Boren (1976), e.g., United States v. O’Brien (1968), Craig was the first case in which the phrase “intermediate scrutiny” was used to describe and label the substance of the standard.
satisfy the intermediate scrutiny standard of review and thus violated the Equal Protection Clause.\textsuperscript{67}

Intermediate scrutiny has been extended to classifications based on gender\textsuperscript{68} (\textit{Craig v. Boren}, 1976, p. 204) and illegitimacy\textsuperscript{69} (\textit{Clark v. Jeter}, 1988, p. 461).\textsuperscript{70}

\textsuperscript{67} Specifically, the Court held that: “We accept for purposes of discussion the District Court's identification of the objective underlying … [the statute] as the enhancement of traffic safety. Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' [State of Oklahoma] statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed [\textit{Reed v. Reed} withstand equal protection challenge” (pp. 199-200, emphasis added); accord \textit{Reed v. Reed} (1971). Besides, the Court added: “It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective. We hold, therefore, that under Reed, Oklahoma's 3.2% beer statute invidiously discriminates against males 18-20 years of age” (p. 204, footnote omitted).

\textsuperscript{68} See also \textit{Mississippi University for Women v. Hogan} (1982), articulating “exceedingly persuasive justification” as an alternative formulation of the intermediate scrutiny standard: “Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification. \textit{Kirchberg v. Feenstra}, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981); \textit{Personnel Administrator of Mass. v. Feeney}, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979). The burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. \textit{Wengler v. Druggists Mutual Ins. Co.}, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)” (\textit{Mississippi University for Women v. Hogan}, 1982, p. 724, internal quotes omitted).

\textsuperscript{69} For a broad exposition on intermediate scrutiny, see Jay D. Wexler (1998), \textit{Defending the middle way: Intermediate scrutiny as judicial minimalism}, 66 Geo. Wash. L. Rev. 298.

\textsuperscript{70} While as noted earlier, strict scrutiny is applied to classifications based on alienage (\textit{Graham v. Richardson}, 1971), in \textit{Phyle v. Doe} (1982), the Court applied intermediate scrutiny to invalidate a law that denied state funding for the education of children of illegal aliens and authorized school districts to deny such children enrollment, reasoning that while “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population” (p. 223). As justification for the intermediate scrutiny it chose to apply, the Court reasoned that the state statute in the case “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation” (p. 223).
Additionally, in *Metro Broadcasting, Inc. v. Federal Communications Commission* (1990), the Court held that benign racial classifications by the federal government (e.g., affirmative action or other classifications that favor minorities or disfavor whites) are subject to intermediate scrutiny: “benign race-conscious measures mandated by Congress--even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination--are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives” (pp. 564-565, footnote omitted).

The Court distinguished its decision in the previous term in *City of Richmond v. J.A. Croson Co.* (1989), which held that racial classifications by state and local governments are subject to strict scrutiny; specifically, the Court noted that *City of Richmond* only governed benign racial classifications by states and municipalities, not Congressionally-adopted race-conscious benign classification (p. 565). In support of this reasoning, the Court cited its decision in *Fullilove v. Klutznick* (1980) reviewing a federal affirmative action plan, as authority for the difference in the standard of scrutiny applicable to states (and municipalities) versus the federal government: “In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments” (p. 565). In essence, the Court held that Congress had greater leeway than states and municipalities in the adoption of race-conscious classifications: “Congress [contradistinct: states and municipalities] may identify and redress the effects of society-
wide discrimination, and … Congress need not make specific findings of discrimination to engage in race-conscious relief” (p. 565, internal quotes and quotations omitted).

However, in *Adarand Constructors, Inc. v. Pena* (1995), the Court overruled *Metro Broadcasting, Inc.*, holding that all racial classifications (including benign racial classifications), regardless of whether by the federal, state or local government are subject to strict scrutiny rather than intermediate scrutiny (p. 227). In addition, the Court ruled that to the extent that *Fullilove* held that federal classifications are subject to intermediate scrutiny rather than strict scrutiny, *Fullilove* is no longer controlling (*Adarand Constructors, Inc.*, p. 235). 71

The above is a brief history of the evolution of the three-tier review process used for review of cases in the Equal Protection jurisprudence. Next, the author sets forth the Equal Protection Clause three-tier framework.

**Equal Protection Clause Three-Tier Framework**

There are three-tiers to the judicial standard of review under the Equal Protection Clause: (i) strict scrutiny; (ii) intermediate scrutiny; and (iii) rational basis review; each is described below.

The first step in determining what level of scrutiny is applicable in a given case is ascertaining whether the government classification involves a suspect (or quasi-suspect) classification or a fundamental right. If so, strict scrutiny or intermediate scrutiny is applicable as discussed below; otherwise, rational basis review is applicable.

71 Recall, *City of Richmond* already held racial classifications by state and local governments are subject to strict scrutiny; *Adarand Constructors, Inc.* thus brought the federal government within the ambit of strict scrutiny. See *Adarand Constructors, Inc. v. Pena* (1995). 515 U.S. 200; and *City of Richmond v. J.A. Croson Co.* (1989). 488 U.S. 469.
(i) **Strict Scrutiny**

The strict scrutiny standard of review is only applied when government action results in a classification that “interferes with a fundamental right or discriminates against a suspect class” (*Kadrmas v. Dickinson Public Schools*, 1988, p. 457).\(^72\) When strict scrutiny applies, the government action is presumed unconstitutional. To pass constitutional muster under the strict scrutiny standard of review and thus overcome the presumption, the burden is on the government to show that the classification is narrowly tailored to achieve a compelling interest (*Roe v. Wade*, 1973; *San Antonio Independent School District v. Rodriguez*, 1973, pp. 16-17).\(^73\)

The test for determining if a right is fundamental is: whether the right is explicitly or implicitly guaranteed by the United States Constitution – “implicit in the concept of ordered liberty” (*Palko v. Connecticut*, 1937, pp. 324-325; accord *San Antonio Independent School District v. Rodriguez*, 1973, pp. 33-34).\(^74\) Rights the United States Supreme Court has recognized as fundamental include: voting in federal and state

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72 For application of strict scrutiny to fundamental rights, see e.g., *Dunn v. Blumstein* (1972); *Harper v. Virginia Board of Elections* (1966); *Police Department of the City of Chicago v. Mosley* (1972); and *Shapiro v. Thompson* (1969). For application of strict scrutiny to suspect classifications, see e.g., *Adarand Constructors, Inc. v. Pena* (1995); *Graham v. Richardson* (1971); *Korematsu v. United States* (1944); *Loving v. Commonwealth of Virginia* (1967); and *McLaughlin v. Florida* (1964).

73 Stated in another way, the strict scrutiny standard of review requires that government classifications affecting a suspect class or a fundamental right must serve a compelling interest and be narrowly tailored to achieve that compelling interest (*San Antonio Independent School District v. Rodriguez*, 1973, pp. 16-17).

74 E.g., in *San Antonio Independent School District v. Rodriguez* (1973), with respect to the test for determining whether there is a fundamental right to education, the Court stated: “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution” (p. 33, emphasis added).

Suspect classifications for purposes of strict scrutiny jurisprudence include: race, ethnicity and national origin (e.g., Adarand Constructors, Inc. v. Pena, 1995; Graham v. Richardson, 1971, p. 372; Korematsu v. United States, 1944; Loving v. Commonwealth of Virginia, 1967; McLaughlin v. Florida, 1964; Palmore v. Sidoti, 1984; Strauder v. West Virginia, 1879) and resident alienage (e.g. Bernal v. Fainter, 1984; Graham v. Richardson, 1971; In re Griffiths, 1973).\(^{77}\)

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\(^{75}\) Note that in Sailors v. Bd. of Education (1967), the Court held that there is no fundamental right to vote in local elections, affirming the holding in Reynolds v. Sims (1964) that the fundamental right is limited to federal and state elections.

\(^{76}\) In Attorney General of New York v. Soto-Lopez (1986), the Court held: “regardless of the label we place on our analysis-- right to migrate or equal protection--once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest” (pp. 904-905, footnote 4).

\(^{77}\) “As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available” (Bernal v. Fainter, 1984, pp. 219-220, footnote omitted).
(ii) Intermediate Scrutiny

The intermediate scrutiny standard of review is applied when government action results in a classification that discriminates against a quasi-suspect class. As with strict scrutiny, when intermediate scrutiny applies, the government action is presumed unconstitutional. To pass constitutional muster under the intermediate scrutiny standard of review and thus overcome the presumption, the burden is on the government to show that the classification is substantially related to an important government interest (Craig v. Boren, 1976). Articulated in other words by the Court, intermediate scrutiny requires the government to establish an “exceedingly persuasive justification” (Kirchberg v. Feenstra, 1981, p. 461) for the classification.

Intermediate scrutiny is the middle-tier scrutiny between strict scrutiny and rational basis review: the “substantially related” requirement is less stringent than the “narrowly tailored” requirement of strict scrutiny but more stringent than the “rationally related” requirement of rational basis review; consonantly, the “important interest” requirement is less stringent than the “compelling interest” requirement of strict scrutiny but more stringent than the “legitimate interest” required under rational basis review.

Quasi-suspect classes the Court has recognized for intermediate scrutiny include: gender (Craig v. Boren, 1976; Mississippi University for Women v. Hogan, 1982) and illegitimacy (Levy v. Louisiana, 1968; Clark v. Jeter, 1988, p. 461).  

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78 Quasi-suspect classes are classifications that have great constitutional import entitling them to greater scrutiny than rational basis but not as stringent as that which suspect classifications are entitled to – strict scrutiny (See generally e.g., Reed v. Reed (1971) and Stanton v. Stanton (1975)).

79 Note that Levy v. Louisiana (1968) was the first case to require that classifications discriminating on the basis of illegitimacy be scrutinized under a greater or heightened standard than rational basis, because of the “intimate, familial relationship” (p. 71) entailed. The Court reasoned: “Why should the illegitimate
(iii) Rational Basis Review

The rational basis standard of review is applied when government action results in a classification that does not involve a suspect (or quasi-suspect) class or a fundamental right. Unlike with strict scrutiny and intermediate scrutiny, under rational basis review, the government action is presumed constitutional. To pass constitutional muster under the rational basis standard of review and thus overcome the presumption, the burden is on the plaintiff\textsuperscript{81} to show that the classification is not rationally related to a legitimate government interest (\textit{San Antonio Independent School District v. Rodriguez}, 1973, p.

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\textsuperscript{80} The Court has refused to add to the list of quasi-suspect classifications \textit{supra} subject to intermediate scrutiny; and similarly refused to add to the list of suspect classifications \textit{supra} subject to strict scrutiny.\textsuperscript{81} E.g., \textit{Federal Communications Commission v. Beach Communications, Inc.} 1993, p. 315 (“those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it”) (internal quotes omitted).
Thus, rational basis embodies a very deferential judicial posture toward government action. Under rational basis, a government classification will be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification” (*Federal Communications Commission v. Beach Communications, Inc.* 1993, p. 313); it will withstand rational basis review, even if the classification is “based on rational speculation unsupported by evidence or empirical data” (*Federal Communications Commission v. Beach Communications, Inc.* 1993, p. 315).

Of the three-tier Equal Protection means-end scrutiny standards of review, rational basis is the least stringent. As the Court noted in *Lindsley v. Natural Carbonic Gas Co.* (1911): “A classification having some reasonable basis does not offend against

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82 *San Antonio Independent School District v. Rodriguez,* 1973, p. 40 (“A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes”)

83 Note that sometimes the “rationally related” requirement of the rational basis means-end scrutiny is also characterized as a “reasonably related” requirement. See e.g., *United States Railroad Retirement Board v. Fritz* (1980); and *Federal Communications Commission v. Beach Communications, Inc.* (1993).

84 Another articulation of this by the Court is thus: “[t]hat a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate” (*Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 1910, p. 43). Additionally, in *Lindsley v. Natural Carbonic Gas Co.* (1911), the Court stated: “1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary” (pp. 78-79).

85 In fact, as pointed out earlier, Gunther (1972) describes rational basis as “minimal scrutiny in theory and virtually none in fact” (p. 8). For a disquisition on the rational basis standard of review, see Gerald Gunther (1972), *Foreword: In search of evolving doctrine on a changing court: A model for a newer equal protection*, 86 Harv. L. Rev. 1.
that clause[Equal Protection Clause] merely because it is not made with mathematical nicety, or because in practice it results in some inequality... When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed … One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary” (pp. 78-79).

In United States Railroad Retirement Board v. Fritz (1980), in his dissenting opinion, Justice Brennan articulated the steps for rational basis review: “When faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes” (p. 184).

**Figure 4**: Diagrammatic Representation of the Equal Protection Clause Three-Tier Framework:
The above is an overview of the three-tier framework used in the Equal Protection Clause jurisprudence. The author’s proposed constitutional test for analyzing cases in the public employment-free speech jurisprudence is based on this framework.

Proposal of a Three-Tier Framework for the Public Employment-Free Speech Jurisprudence

In this section, the author presents the Equal Protection three-tier framework as a framework/test for cases in the public employment-free speech jurisprudence. For this purposes, the author will couple each tier of the framework with a category of public employee speech taxonomy catalogued above: purely citizen speech; citizen-employee hybrid speech; and purely employee speech.

Since as noted earlier, the test the author proposes is based on the trifurcated review framework the United States Supreme Court uses in the analysis of Equal Protection cases, as discussed supra, it is unnecessary to restate the entire Equal Protection Clause three-tier framework. Only basic elements of each tier necessary to set forth the proposed test will be presented in this section.

1. Strict Scrutiny—“Purely Citizen Speech”: As discussed earlier,\(^86\) speech of employees that have nothing to do with their employment should be classified under the “purely citizen speech.” Such speech should be entitled to the full protection of the First Amendment as speech of citizens who are not government employees.

Of the three categories of speech author set forth above, the “purely citizen speech” has the greatest semblance to speech of “non-government employee” citizens;

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\(^86\) See under category titled “Purely Citizen Speech,” supra for more on the discussion of speech the author classifies under the “purely citizen speech.”
accordingly, it should be entitled to the highest level of scrutiny of the three categories. The standard of scrutiny the author thus proposes for review of public employer actions against speech of public employees that constitute “purely citizen speech” is strict scrutiny. In other words, if an employee’s speech is “purely citizen speech,” the employer’s actions against such speech should be presumed unconstitutional unless the employer can show that the action is narrowly tailored to satisfy a compelling interest. In addition to the speech that would fall under the “purely citizen speech” category, as dissertated above, employee speech alleging violations of fundamental rights such as the right to vote, right to interstate travel, right to criminal appeals, and others discussed supra, would be reviewed under the strict scrutiny standard; so would speech disclosing suspect classifications and discriminations on the basis of race, ethnicity, national origin and resident alienage.

2. Intermediate Scrutiny-“Citizen-Employee Hybrid Speech”:

   Under the intermediate scrutiny standard of review, government action against the employee on the basis of the employee’s speech should be presumed unconstitutional unless the employer shows that the action is substantially related to an important government interest. As suggested by its name, speech in the “citizen-employee hybrid speech” is a hybrid of citizen speech and employee speech. Under this category would fall speech of public employees who criticize their employer’s actions or actions of any other government employer toward any government employee (other than the speaking

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87 Note: Employer policies, practices and procedures should be similarly scrutinized as employer actions. Thus where the author mentions, actions, policies, practices and procedures can be parenthetically inserted.

88 For more discussion of this category of speech and examples of speech under this category subject to intermediate scrutiny under the author’s proposal, see supra under “Citizen-Employee Hybrid Speech.”
employee him/herself). If the employee speech alleges government-employer
discrimination on the basis of gender or illegitimacy, intermediate scrutiny of the
government action against the employee should be required.\textsuperscript{89}

When an employee blows the whistle on employer actions of a criminal or
fraudulent nature or other violations of federal, state or local law, the speech should be
subject to intermediate scrutiny. Likewise, when an employee complains about the
government’s (other than his or her very own government employer) treatment of him or
her as an employee or its handling of his or her employment-related issues, as noted
above, the author would categorize the speech under the “citizen-employee hybrid
speech” category. Though similar to such criticisms non-government employees could
make against a government agency, it is not “purely citizen speech” because it has
elements of employment to it, making it a hybrid. Other examples of speech that would
be subject to the intermediate level scrutiny include speech of public school teachers
about: the unwarranted severity of corporal punishment imposed on students (Bowman v.
Pulaski County Special School District, 1983); handling of sexual misconduct against
students (Cromley v. Board of Education of Lockport Township High School District 205,
1994); lowered academic standards (Storlazzi v. Bakey, 1995); handling of student
alcohol use (Storlazzi, 1995); and inappropriate alteration of student grades and other
grading improprieties (Storlazzi, 1995).

\textsuperscript{89} The author suggests that in developing the public employment-free speech jurisprudence based on the
author’s proposal, the Court track the development of its Equal Protection Clause jurisprudence; thus when
new suspect classes or fundamental rights are recognized, just as those would be subject to strict scrutiny
under Equal Protection Clause jurisprudence, speech involving those suspect classifications should be
subject to strict scrutiny under the public employment-free speech jurisprudence; similar reasoning would
prevail with quasi-suspect classifications, to which intermediate scrutiny would apply as new quasi-suspect
classifications are identified by the United States Supreme Court.
3. Rational Basis Review—“Purely Employee Speech”: As discussed supra, the rational basis review is the least stringent of the three-tiers of review; thus, it should provide leeway for courts to give relative greater deference to operational efficiency concerns when reviewing cases in the public employment-free speech jurisprudence, than under “compelling interest” required of strict scrutiny or “important interest” required of intermediate scrutiny.

Under the rational basis review the author proposes, there would be a presumption that public employer action against the employee on the basis of his or her speech is constitutional; the burden would then be on the employee to show that the government action is not reasonably (or rationally) related to a legitimate interest of the employer. As the author propounded above, employee speech, criticizing his or her employer, that solely deals with the employer’s actions with respect to that particular employee’s employment should constitute “purely employee speech” for purposes of the three-tier framework the author proposes.

Likewise, employee speech that proximately arises out of the employee’s own employment dispute with the employer would be subject to the rational basis review, irrespective of its impact on the public or other government employees, unless the relative importance of the issue to the public or to other government employees

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90 For more on the kinds of speech the author classifies under the “purely employee speech” category, see the section bearing the same name, supra.

91 Operational efficiency concerns articulated in the Pickering balancing test can be accounted for in the different “interests” of the government each tier requires: compelling interest for strict scrutiny; important interest for intermediate scrutiny; and legitimate interest for rational basis review.

92 Recall, in Pickering v. Board of Education (1968) and its progeny, the United States Supreme Court gives relatively greater weight to operational efficiency in reviewing cases in the public employment-free speech jurisprudence.
substantially outweighs the import of the speech’s proximate relation to the employee’s employment dispute with his or her employee; as noted supra, in such cases, the speech should be accorded relatively greater protection than “purely employee speech” and classified instead under the “citizen-employee hybrid speech,” and thus subject to intermediate level scrutiny.

Employee speech alleging discrimination by his or her employer against him or her on the basis of race, ethnicity, national origin or alienage, however will be subject to strict scrutiny, as would employee speech alleging violations by the employer of his or her fundamental rights as relates to the employee’s employment;93 employee speech alleging discrimination by the employer against him or her on the basis of gender and illegitimacy would be subject to intermediate level scrutiny. For employee speech alleging discrimination by the employer against him or her on the basis of religion or sexual orientation, rational basis review would apply, tracking the Court’s treatment of same under the Equal Protection Clause jurisprudence.94 Employee speech whistleblowing about unethical practices of the employer which do not constitute violations of law should be reviewed under rational basis review, since they lack the weight from endorsement of legislation.

This rational basis review the author proposes tallies with the Court's holding in Connick v. Myers (1983) that: “When employee speech concerning office policy arises

93 This is the case, even though the speech is solely related to that employee’s own employment and would traditionally under the author’s model be classified as “purely employee” speech. However, because it involves discrimination on the basis of a suspect classification or violation of a fundamental right, is would be subject to the strict scrutiny standard of review; same reasoning applies to discrimination on the basis of a quasi-suspect classification, to which intermediate scrutiny is applicable.

94 The United States Supreme Court reviews classifications on the basis of religion and sexual orientation under rational basis review.
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” (p. 153).

In applying the rational basis review, courts should not speculate about legitimate government ends that could justify the government action against the employee. As Gunther (1971) stated in another context, the author accords in stating that as here postulated for the public employment-free speech jurisprudence, “[t]he [rational basis review] model would have the Court assess the justification for the … [government action] largely in terms of information presented … rather than hypothesizing data of its own” (p. 47).

In the initial stages of developing the public employment-free speech jurisprudence using the three-tier framework, it would be helpful for the Court to track its development of the Equal Protection Clause jurisprudence until the public employment-free speech off-shoot is well established as an independent framework.

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95 Note that in this respect, the author’s proposal is different from the rational basis review as used by the Court in the Equal Protection Clause jurisprudence. As discussed supra, under the rational basis review applied in Equal Protection cases, government action will withstand rational basis review, even if “based on rational speculation unsupported by evidence or empirical data” (Federal Communications Commission v. Beach Communications, Inc. 1993, p. 315).
Table 1: Diagrammatic Representation of the Three-Tier Framework Proposed by the Author, and the Applicable Categories of Speech:

<table>
<thead>
<tr>
<th>Standard of Review</th>
<th>Category of Speech</th>
</tr>
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<tbody>
<tr>
<td>Strict Scrutiny</td>
<td>Purely Citizen Speech</td>
</tr>
<tr>
<td>Intermediate Scrutiny</td>
<td>Citizen-Employee Hybrid Speech</td>
</tr>
<tr>
<td>Rational Basis Review</td>
<td>Purely Employee Speech</td>
</tr>
</tbody>
</table>
In this study, the author has been guided by three questions addressed in Chapter Four:

1. Can the United States Supreme Court’s public employment-free speech jurisprudence be categorized into eras?

2. Is there a way to categorize the types of speech that whistleblowing teachers engage in under the United States Supreme Court’s public employment-free speech jurisprudence?

3. What is the author’s proposed constitutional framework for analyzing whistleblowing cases under the United States Supreme Court’s public employment-free speech jurisprudence?

To address these questions, the author conducted an extensive literature review in Chapter Two, showing the evolution of the United States Supreme Court’s jurisprudence as well as highlighting the approaches of the various Federal Circuit Courts of Appeals. In *Pickering v. Board of Education* (1968), the seminal case in the public employment-free speech jurisprudence, the United States Supreme Court set forth the following test for reviewing speech of whistleblowing employees. This test, known as 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” (p. 568). The two aspects of this test which are to be
weighed in a balance are: (i) the interests of the employee, as a citizen in speaking on matters of public concern; and (ii) the operational efficiency of the employer. As revealed in this study, however, interpretation and development of the jurisprudence has resulted in an unbalanced scale of justice, where the left hand scale depicts the greater weight given operational efficiency relative to the interests of the employee in free speech represented on the right scale.

In Chapter Four, the author found that the United States Supreme Court’s public employment-free speech jurisprudence has been through four different eras: (i) Era of Categorical Denial; (ii) Era of Recognition: Undefined Scope; (iii) Era of Balancing: Scope; and (iv) Era of OE > MPC Speech. Progressively, the eras have resulted in a pseudo-\textit{Pickering} balancing test rather than the veritable-\textit{Pickering} balancing test articulated in \textit{Pickering}. Progressive development of such eras is less likely with a three-tier system as proposed by the author because with the three tier system, no one tier prevails for an entire era; all three tiers are available every era for application to the pertinent category of speech, thus curbing manipulation of a one-tier system as currently subsists, to govern entire eras.

Under the three-tier system, the applicable category of speech is identified and then subjected to the apropos standard of review. The three categories of speech the author identified in Chapter Four are: (i) Purely Employee Speech; (ii) Citizen-Employee Hybrid Speech; and (iii) Purely Citizen Speech.

The author then proposed a test for reviewing cases in the public employment-free speech jurisprudence based on the three-tier review framework used in the Equal Protection Clause jurisprudence. The three levels of scrutiny under this framework are:
(i) rational basis; (ii) intermediate scrutiny; and (iii) strict scrutiny. Echoing the words of wisdom of Gunther (1972), the author believes that the three-tier “model is, in sum, not a simple formula capable of automatic, problem-free application. It is a suggestion of a direction for modest interventionism with substantial promise” (p. 48). Three-tiers as opposed to the one-tier balancing test represented by the *Pickering* balancing test helps account for the different categories of public employee whistleblowing speech; thus minimizing room for judicial carte blanche in review of cases. While this proposal has not been previously so applied to the public employment-free speech jurisprudence, it is not without guidance as would be the case if a test previously unapplied in any jurisprudence is proposed. With the author’s proposal, there is already a body of work (as discussed in Chapter Four, *supra*) applying the three-tier framework in the Equal Protection Clause jurisprudence upon which the Court could build in initiating and developing the three-tier framework in the context of the public employment-free speech jurisprudence.

In applying the three-tiers, the Court must “identify and evaluate separately each analytically distinct ingredient of the contending interests” (Gunther, 1971, p. 7): compelling interest under strict scrutiny; important interest under intermediate scrutiny; and legitimate interest under rational basis review. Each of the three levels of scrutiny with their varying levels of stringency ensures that operational efficiency as well as employee speech are accounted for; yet comprehending within the analysis the different categories of employee whistleblowing speech that exist. Since each tier accounts for the two fundamental doctrinal components the Court has identified to the *Pickering* balancing test: (i) employee speech; and (ii) operational efficiency (under “compelling
interest” for strict scrutiny; “important interest” for intermediate scrutiny; and “legitimate interest” for rational basis review); the three-tier model provides an “opportunity to make changes without losing doctrinal continuity” (Gunther, 1971, p. 4). While concerns about stare decisis may linger, as the author revealed in Chapter Two there are several questions on which clearly solid precedent has been nubilous; and as Gunther (1971) notes: “when solid precedent is lacking on many questions, a conservative adherence to stare decisis is less confining” (p. 4).

It is important for teachers and administrators alike to be able to whistleblow without the lingering threat of judicial-review sanctioned retaliation. This would help ensure the interests of students, teachers, and the community are protected. The author’s proposal would move closer to approximating this, since as noted above, it is three-tiered rather than one.96 The author accords Bhagwat (1997) in stating that “no analysis, including the framework I propose, can provide precise answers to all difficult questions.” As the jurisprudence develops based on the author’s proposal, application and interpretation should help unravel the framework’s operational confines and ground the test on firmer footing. Unlike Pickering which requires analysis of all categories of employee whistleblowing speech under the one-tier Pickering balancing test, the three-tier test provides a tier for each category of employee whistleblowing speech; thus three categories are not cramped into one tier but rather uncramped in three.

Schools and school districts need to educate their teachers about their whistleblowing rights and the costs and benefits of whistleblowing so that teachers do not

96 As Justice Marshall noted in his concurring opinion in Plyler v. Doe (1982), there is “wisdom … [in] … employing an approach that allows for varying levels of scrutiny” (p. 231).
make uninformed decisions, whistleblowing without recourse; professional development activities could be offered to facilitate this education. If the current trend in the development of the public employment-free speech jurisprudence continues, Justice Black’s famous premonition in *Wieman v. Updegraff* (1952) might actually become a reality for teachers: “we will in the long run have it [free speech] for none but the cringing and the craven” (p. 193), through pseudo-*Pickering* balancing.

To avoid the extraordinary costs and consequences that could result to employer or employee when employees whistleblow and institute judicial proceedings based on employer retaliatory actions, it is best for school districts to come up with policies that allow and encourage employees to speak privately with their employers about their concerns, irrespective of the category of employee speech involved, so that emanating issues could be resolved internally without litigation. In that way, the employer saves the often prohibitive costs of defending a lawsuit and other sundry costs, while the employee gets to keep his or her job – a win-win solution. In that way, the work environment remains as amicable as possible and excellent teachers are not lost. 97 As the United States Supreme Court noted in *Garcetti v. Ceballos*, “[g]iving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public” (p. 1961). If schools are also to be learning centers for impacting culture, such examples of irenical dispute resolution could inspire students in ways untold. School districts should solicit teacher input and work with the union to implement the internal procedures. Alternatively, the school district could

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97 Recall as discussed in Chapter One, a number of teachers who whistleblow have excellent performance records.
contract with third parties to serve as the orifice of employees who choose to be anonymous, and even for non-anonymous employees. Avenues should be provided in any procedure implemented for protected public whistleblowing after the employee has exhausted provided administrative remedies without employer action in resolution. Additionally, phone numbers for anonymous calls could be provided to facilitate employee whistleblowing.

State legislatures and Congress should mandate school districts keep record of teachers terminated or disciplined for whistleblowing; this would also further accountability in employer action against whistleblowing teachers, and provide greater visibility to the problem. Unfortunately, unlike with corporations, media spotlight is not nearly as focused at all on the plight of whistleblowing teachers, thus there has been little motivation to address this plight as thoroughly as has been done with respect to the corporate arena.

Policymakers need to provide incentives for school districts to implement policies to facilitate internal resolutions of employee whistleblowing concerns. Without such incentives, school districts might not appreciate the essence of providing such conciliatory mechanisms, especially if districts are aware of the current trend of interpretation and application of the *Pickering* balancing test which is increasingly more favorable to employers. Such incentives could include grants, tax breaks, increasing revenue allocations, inter alia. State legislatures could also statutorily require such conciliatory mechanism and regularly audit its implementation and effectiveness. School districts should also internally formatively and summatively evaluate any conciliatory mechanisms implemented to address employee whistleblowing concerns. Empirical
research should be done to determine what would incentivize school districts to implement conciliatory mechanisms; such incentives should then be accordingly provided. It is a matter of social justice and social responsibility owed to the many teachers who continue to face employer retaliation for whistleblowing. As revealed in the various examples in Chapter One, whistleblowing is very important to ensuring law, order, safety, efficiency and accountability and should be preserved.
Appendix A

Pickering’s Letter to Graphic Newspapers, Inc., the Local Newspaper in Will County, Illinois

Dear Editor:

I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February through November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn’t quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn’t supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can’t help noticing it. I am not saying the school shouldn’t have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers’ salaries total $1,297,746 for one year. Now that must have been the total
payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn’t the case. However, this shows their ‘stop at nothing’ attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, ‘Any teacher that opposes the referendum should be prepared for the consequences.’ I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any. Remember those letters entitled ‘District 205 Teachers Speak.’ I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn’t even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That’s the kind of totalitarianism teachers live in at the high school, and your children go to school in.

In last week’s paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer’s child should only have to pay about 30¢ for his lunch instead of 35¢ to pay for free lunches for the athletes.

In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn’t pay
for the $200,000 a year they have been spending on varsity sports while neglecting the
wants of teachers.

You see we don’t need an increase in the transportation tax unless the voters want
to keep paying $50,000 or more a year to transport athletes home after practice and to
away games, etc. Rest of the $200,000 is made up in coaches’ salaries, athletic directors’
salaries, baseball pitching machines, sodded football fields, and thousands of dollars for
other sports equipment.

These things are all right, provided we have enough money for them. To sod
football fields on borrowed money and then not be able to pay teachers’ salaries is getting
the cart before the horse. If these things aren’t enough for you, look at East High. No
doors on many of the classrooms, a plant room without any sunlight, no water in a first
aid treatment room, are just a few of many things. The taxpayers were really taken to the
cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr.
Hess would be interested to know that we need blinds on the windows in that building
also.

Once again, the board must have forgotten they were going to spend $3,200,000
on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying
to push tax-supported athletics down our throats with education, and a public that has
mixed emotions about both of these items because they feel they are already paying
enough taxes, and simply don’t know whom to trust with any more tax money.
I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,

Marvin L. Pickering.

Appendix B

Holmquist and Reed’s Petition

December 6, 1971

To: Madison Board of Education

To: Madison Teachers, Incorporated

We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following:

1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.
2) The findings of this study be made public.
3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.
4) The results of this written ballot be made public.

Appendix C

Mount Healthy City School District Board of Education’s Statement to Doyle
Stating the Grounds for the Decision Not to Renew His Contract

I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

A. You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

Sincerely yours,

Rex Ralph
Superintendent

Appendix D

Questionnaire Distributed by Sheila Myers

Please take the few minutes it will require to fill this out. You can freely express your opinion WITH ANONYMITY GUARANTEED.

1. How long have you been in the Office? ___________________________

2. Were you moved as a result of the recent transfers? ______________

3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted? _____________________

4. Do you think as a matter of policy, they should have been? _____________

5. From your experience, do you feel office procedure regarding transfers has been fair? _____________________________________________________

6. Do you believe there is a rumor mill active in the office? ______________


8. If so, how do you think it effects [sic] office morale? __________________

9. Do you generally first learn of office changes and developments through rumor? __________________________________________________________________________

10. Do you have confidence in and would you rely on the word of:

Bridget Bane ______________________________________________________

Fred Harper _______________________________________________________

Lindsay Larson ____________________________________________________

Joe Meyer __________________________________________________________________
Dennis Waldron

11. Do you ever feel pressured to work in political campaigns on behalf of office
    supported candidates? ___________________________________________

12. Do you feel a grievance committee would be a worthwhile addition to the
    office structure? _______________________________________________

13. How would you rate office morale? ________________________________

14. Please feel free to express any comments or feelings you have. ___________

THANK YOU FOR YOUR COOPERATION IN THIS SURVEY.

(Connick v. Myers, 1983, pp. 155-156)
Appendix E

Content of the Dialogue between McPherson and Lawrence (according to McPherson’s uncontroverted testimony)

Q: What did you say?
A: I said I felt that that would happen sooner or later.
Q: Okay. And what did Lawrence say?
A: Lawrence said, yeah, agreeing with me.
Q: Okay. Now when you – after Lawrence spoke, then what was your next comment?
A: Well, we were talking – it’s a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use Medicaid, and at the time, I was thinking that’s what it was. … But then after I said that, and then Lawrence said, yeah, he’s cutting back Medicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him.

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