ERAS IN PUBLIC EMPLOYMENT–FREE SPEECH JURISPRUDENCE

Joseph O. Oluwole[*†]

INTRODUCTION

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

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.[1] For the purposes of this Article, 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."[2] It includes speech "that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance."[3] 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.[4]

---

* Attorney-at-law and Assistant Professor of Education Law, Montclair State University; Ph.D. 2007, The Pennsylvania State University; J.D. 2003, The Ohio State University; B.A. 2000, Michigan State University.

† I would like to express my appreciation to my colleagues, Preston C. Green, III, Professor of Education Law at The Pennsylvania State University, Jacqueline Stefkovich, Professor of Education Law at The Pennsylvania State University, and Dan Cahoy, Associate Professor of Business Law at The Pennsylvania State University for their review of drafts of this article.

1. Lizabeth England, *Chapter 4: Whistleblowing, Alerting Management to Unethical Practices*, *in* LANGUAGE AND CIVIL SOCIETY: BUSINESS ETHICS VOLUME, (1999), http://exchanges.state.gov/forum/journal/bus4background.htm (last visited Oct. 22, 2007).

2. Berger v. Battaglia, 779 F.2d 992, 997 (4th Cir. 1985) (footnotes omitted); *see also* John A. Gray, *The Scope of Whistleblower Protection in the State of Maryland: A Comprehensive Statute is Needed*, 33 U. BALT. L. REV. 225, 227–28 (2004) (defining a whisteblower as "an employee who in good faith attempts to have his employer stop conduct that the employee reasonably believes to be injurious to the public and a violation of the law either through internal efforts . . . and/or by disclosing the conduct externally").

3. Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668, 672 (8th Cir. 1986).

4. Roberta Ann Johnson & Michael. E. Kraft, *Bureaucratic Whistleblowing and Policy*

An example of repercussions for teachers who whistleblow is evident from a case in Camden, New Jersey, where school officials are being investigated for "cheating on state tests, falsifying data and a cover-up."[5] The two whistleblowers in this 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.[6]

Veggian uncovered a systematic scheme of grade-fixing and falsifying students' transcripts at the school.[7] While Veggian was preparing the failure list—the list of students to be held back from the next grade—she decided to cross-reference this list with more detailed records.[8] What she discovered shocked her: students with failing grades were being promoted.[9] She notified Carruth, who, after examining the records with Veggian, concurred that something untoward was transpiring with the records.[10] They discovered that the administration maintained two sets of books on student grades: one was accurate and the other falsified.[11] 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 losing their jobs.[12] According to Veggian's attorney, the motivation for falsifying data 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.[13] Five months after the whistleblowing was initiated, Veggian was demoted with a pay cut and reassigned to another school in spite of her protest.[14]

Pagan subsequently asked Carruth to help cheat on the math section of the New Jersey high school proficiency examination, an offer that he declined.[15] In January 2006, Carruth contacted the New Jersey Department of Education to request an investigation.[16] The department dispatched

---

Change, 43 W. POL. Q. 849, 849 (1990).

5. Claudio Sanchez, *Widespread Fraud Alleged in Camden, N.J. Schools*, NAT'L PUB. RADIO, Aug. 11, 2006, http://www.npr.org/templates/story/story.php?storyId=5637480.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

monitors to preside over testing at the school.[17] The resulting test scores sharply declined from those previously reported.[18] Carruth was then terminated by the Camden Board of Education at the end of the 2005-2006 school year.[19] Currently, the New Jersey attorney general is investigating whether Knox fraudulently gave herself performance bonuses of about $18,000.[20]

Other contexts in which teachers have blown the whistle include: awarding racially motivated student grades;[21] school policies about administering examinations;[22] inadequate focus on diversity;[23] use of alcohol by students in the school;[24] school policies and practices about locking student lavatories;[25] school-imposed limitations on free speech;[26] impact of and the failure to implement programs for emotionally and behaviorally impaired students;[27] inadequacy of principals' job performance;[28] threats by a special education director to a team of teachers, social workers, and other professionals about the placement of students;[29] inadequate funding of a kindergarten program;[30] large kindergarten classes;[31] lack of compliance of a kindergarten program with state standards;[32] lengthy class periods;[33] lack of procedures for disciplining students;[34] placements of special education students in violation of state and federal regulations;[35] favoritism in grading athletes;[36] race-based discipline

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Belyeu v. Coosa County Bd. of Educ., 998 F.2d 925, 927 (11th Cir. 1993).
22. *E.g.*, Storlazzi v. Bakey, 894 F. Supp. 494, 499 (D. Mass. 1995) *aff'd*, 68 F.2d 455 (1st Cir. 1995).
23. *See Belyeu*, 998 F.2d at 927 (involving a teacher's complaint on the school's failure to implement a program or commemoration for Black History Month).
24. *Storlazzi*, 894 F. Supp. at 499.
25. *Id.*
26. *See, e.g.*, Brammer-Hoelter v. Twin Peaks Charter Acad., 81 F. Supp. 2d 1090, 1093 (D. Colo. 2000) ("[Teachers] articulated grievances concerning the operation of the School, including school-imposed . . . limitations on free speech . . . .").
27. *E.g.*, Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 168–69 (1st Cir. 1995).
28. *See, e.g.*, Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 219 (5th Cir. 1999) (describing the principal's lack of adherence to the Internal Component Committee's improvement plan).
29. *See Wytrwal*, 70 F.3d at 169 (asserting that the principal would overrule a consensus among teachers and social workers on illegal acts).
30. Lifton v. Bd. of Educ., 290 F. Supp. 2d 940, 943 (N.D. Ill. 2003).
31. *Id.*
32. *Id.*
33. *Id.*
34. *See, e.g.*, Wales v. Bd. of Educ., 120 F.3d 82, 83 (7th Cir. 1997).
35. Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 168 (1st Cir. 1995).

of students;[37] and exchange of grades for sex.[38]

Teachers threatened or retaliated against for whistleblowing often allege that their free speech rights were violated. When teachers speak out, it is crucial to recognize that they are not only employees, but citizens of the United States. When courts address such claims, they consider not only the free speech rights of the employees, but also the interests of the employer.[39] The struggle for courts in the constitutional analysis of whistleblowing cases is the balance between the status of the government as a sovereign on one hand and as an employer on the other. Stated differently, courts grapple to account for the difference between the dynamics of the government/sovereign-citizen relationship and the public employer-employee relationship.

In *Pickering v. Board of Education*, the U.S. Supreme Court set forth a balancing test for addressing First Amendment claims of teachers and all public employees who allege employment retaliation for exercising their free speech rights.[40] This test requires a mostly unrestrained balancing of the public employer's interests in operational efficiency against the free speech rights of employees. The vagueness of this test, which has allowed considerable room for judicial discretion and plenary but fluid interpretations of the test over the years, has consequently led to the current era in which the Supreme Court's interpretations and applications of the test seem to be inauspiciously pro-school district and public employer.

This Article examines the whistleblowing rights of teachers by categorizing the public employment–free speech jurisprudence of the U.S. Supreme Court into various eras. Identifying these eras will help teachers, administrators, and policymakers gain a clearer understanding of the jurisprudence, as well as its future direction. Failure to understand this comprehensive picture through the prism of the various eras could obfuscate future development of the jurisprudence and shroud a need for a balanced respect and enforcement of the rights of teachers who whistleblow.

---

36. Coats v. Pierre, 890 F.2d 728, 732 (5th Cir. 1989).

37. *E.g.*, Love-Lane v. Martin, 355 F.3d 766, 772 (4th Cir. 2004).

38. *Coats*, 890 F.2d at 732.

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

40. *See id.* (arriving "at a balance between the interests of [public employees] in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

I. PUBLIC EMPLOYMENT–FREE SPEECH JURISPRUDENCE ERAS

The Court's public employment–free speech jurisprudence has evolved through various eras since the Court began interpreting the U.S. Constitution in this area of the law. This Article will ferret out those eras and label them accordingly. The various eras are identified based upon a review of all the significant cases in the Court's public employment–free speech jurisprudence, which are: (i) the Era of Categorical Denial; (ii) the Era of Recognition: Undefined Scope; (iii) the Era of Balancing: Scope; and (iv) the Era of Operational Efficiency > Matter of Public Concern Speech (which is closer to pseudo-balancing and quasi-categorical denial). These eras are discussed below.

A. Era of Categorical Denial

From the ratification of the U.S. Constitution until 1952, the obdurate position of the public employment–free speech jurisprudence was against any First Amendment right for citizens who took government employment. As long as an individual was a citizen without government employment, that individual was entitled to the full panoply of rights under the First Amendment's Free Speech Clause.[41] However, whoever accepted government employment took it subject to a public employment version of *caveat emptor*. Stated differently, as a government *employee*, a *citizen* of the United States became alienated from an inalienable right—the right to free speech with respect to his or her dealings with a government employer in the employment relationship. Tersely put, the jurisprudence provided simply that public employers could place any limitation, including constitutional limitations, on the conditions of employment for any employee because public employment was a privilege, not a right. In essence, public employment was a privilege for any citizen in that era of the right to be fired and the privilege to speak. Thus, employees might as well have been *Mirandized* prior to taking employment as follows: "You have

41. The First Amendment to the U.S. Constitution, ratified in 1791, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S CONST. amend. I. While the express language of the First Amendment refers to Congress, it is applicable to the states via the Due Process Clause of the Fourteenth Amendment, ratified in 1868, which provides 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, liberty, or property, without due process of law . . . ." U.S CONST. amend. XIV, § 1.

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 epigram aptly described 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."[42] Justice Holmes's reasoning was that once a citizen took public employment and became an employee, the individual was bound by the implied terms of his or her employment contract to suspend the right to free speech because employment was based solely on the employer's terms.[43] The inauspicious threat to citizens was simple: to retain the right of free speech, do not take a government job. Anyone who exercises the right of free speech as a public employee must be prepared for the consequences, including termination, without constitutional remedy. Thus, in the pre-1952 era, free speech rights for whistleblowing employees were categorically denied protection under the U.S. Constitution. Public employers, like private employers, could constitutionally retaliate against employees for their speech.

As late as 1952, just before the close of this era, in *Adler v. Board of Education*, the Supreme Court held "that [citizens] have no right to work for the State in the school system on their own terms."[44] The Court went on to state that citizens:

> [M]ay 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 retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech . . . ? We think not.[45]

This was the last case in the impregnable Era of Categorical Denial because in the very next Supreme Court term, during the same calendar year, the Court recognized some protection for the free speech rights of public employees.

---

42. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

43. *Id.* at 517–18.

44. Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952), *overruled in part by* Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967) (rejecting the notion that public employment may be denied unconditionally).

45. *Id.*

B. Era of Recognition: Undefined Scope

In *Wieman v. Updegraff*, a case decided in the Supreme Court term following the *Adler* decision, the Court for the first time decelerated the previously unbridled velocity and power of public employers to limit First Amendment Rights as a condition of employment.[46] This was the first breakthrough for public employees in the Supreme Court's public employment–free speech jurisprudence; however, it fell short of a hog-tie of employer retaliatory powers. Nonetheless, it was a departure from the categorical denial that reigned in the prior era.

In *Wieman*, at issue was an Oklahoma statute that required public employees to swear loyalty oaths within the statutorily permitted period as a qualification for employment.[47] 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 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.[48]

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. The protection offered public employees, however, came with a cost. Although the Court granted employees protection from patently arbitrary or discriminatory acts of the employer, it also thrust upon them the burden of persuasion to prove employer's acts were *patently* arbitrary or discriminatory.

Freedom of association cases such as *Wieman* were the first to recognize the free speech rights of public employees, ushering in the Era of Recognition. They served as forerunners to the Court's official recognition of protected status for employee speech under the U.S. Constitution.[49]

---

46. *See* Wieman v. Updegraff, 344 U.S. 183, 184–85, 191 (1952) (holding that the loyalty oath required by the State of Oklahoma as a prerequisite to employment violated due process).

47. *Id.* at 184–85.

48. *Id.* at 191–92.

49. *See* Shelton v. Tucker, 364 U.S. 479, 485–86 (1960) (stating that "to compel a teacher to

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.[50] Justice Black cautioned that even countries dedicated to democratic government, such as the United States, were vulnerable to imposing extraordinary perils on the *free speech rights* of the citizenry absent constitutionally recognized safeguards.[51] 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.[52]

Justice Black's words were seminal in the public employment–free speech jurisprudence. His reference to "matters of public concern,"[53] with respect to the free speech rights of public employees, later became a staple of the jurisprudence.[54]

Justice Frankfurter's concurrence in *Wieman* was also a crucial step in recognizing the importance of protecting 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 and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into

---

disclose . . . every associational tie is to impair that teacher's right of free association").

50. *Wieman*, 344 U.S. at 193 (Black, J., concurring).

51. *See id.* at 193–94 (Black, J., concurring) (expressing that laws penalizing unorthodox thought and speech can have a dampening effect on all speech and are counter to the intent of the First Amendment).

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

53. *Id.*

54. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The Court set out a balancing test that captures the "matters of public concern" requirement, which 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 an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (emphasis added).

> operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity . . . by potential teachers.[55]

In *Shelton v. Tucker*, the Court heeded Justice Black's admonition in *Wieman*, recognizing freedom of speech as a right that, like the right of association, was vulnerable to great abuse by the government as a public employer.[56] In *Shelton*, school teachers challenged the constitutionality of a state statute that required teachers to file, as a condition of employment, an annual affidavit listing all organizations they belonged to in the preceding five years.[57] The Court struck down the statute as unconstitutional, stating:

> [T]o 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 . . . .[58]

The efflorescent Era of Public Employment–Free Speech Recognition and Enforcement continued in *Cramp v. Board of Public Instruction*, where the Court struck down a state statute that required public employees to sign an oath or face immediate discharge.[59] The public employees were required to swear under oath that they had never given aid, support, advice, or influence to the Communist party.[60] The Board of Public Instruction discovered that Cramp, a public school teacher who had worked for the board, had never taken the oath.[61] He was asked to take the oath, but he refused.[62] Cramp asked a Florida court to declare the statute unconstitutionally vague and sought an injunction against his termination.[63]

---

55. *Wieman*, 344 U.S. at 195 (Frankfurter, J., concurring).

56. *See* Shelton v. Tucker, 364 U.S. 479, 485–86 (1960) (recognizing the vulnerability of free speech and free association rights of teachers).

57. *Id.* at 480, 482–83.

58. *Id.* at 485–86 (emphasis added) (citation omitted).

59. Cramp v. Bd. of Pub. Instruction, 368 U.S. 280, 288 (1961).

60. *Id.* at 289.

61. *Id.* at 280.

62. *Id.*

63. *Id.*

The state circuit court and the Supreme Court of Florida held that the statute was constitutional.[64] The Supreme Court reversed. Holding the statute to be so vague and indefinite that it was patently arbitrary, the Court declared: "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."[65]

In *Torcaso v. Watkins*, the Court invalidated a Maryland statute on the basis of freedom of religion, holding that the statute violated the First Amendment rights of public employees.[66] The Court reasoned: "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."[67] Furthermore, in *Sherbert v. Verner*, a case addressing the First Amendment free exercise rights of public employees under a South Carolina unemployment compensation statute,[68] the Court affirmed 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."[69]

As part of this era, in *Keyishian v. Board of Regents*, 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."[70] The Court added that even in the presence of legitimate purposes, public employers cannot pursue those purposes using means that broadly stifle fundamental rights when other more narrowly tailored means are available.[71]

A common theme in this era, as depicted in the above examples, was the Court's recognition and protection of public employees' free speech rights. Thus, the name given to the previous era, the Era of Categorical Denial was, as it were, passé and positively ancient history. Poignantly put, what used to be public employees' *privilege* to speak had successfully journeyed through the judicial rite of passage to become the *right* to speak.

---

64. *Id.*

65. *Id.* at 288 (citation and internal quotation marks omitted).

66. *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (holding that a requirement for a religious test violates the freedom of religion).

67. *Id.* at 495–96.

68. Sherbert v. Verner, 374 U.S. 398, 400–01 (1963).

69. *Id.* at 404 (emphasis added).

70. Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) (quoting Keyishian v. Bd. of Regents, 345 F.2d 236, 239 (2d Cir. 1965)).

71. *Id.* at 602.

While the Era of Recognition was a breakthrough for employees, the scope of recognized rights was undefined. 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 *Wieman* stated that patently arbitrary or discriminatory actions by employers were unconstitutional, a wide range of employer actions in retaliation for employee speech might not be patently arbitrary or discriminatory, yet still violate the First Amendment. Thus, it was like being on a journey without knowing how to wield a compass. In the lingua franca of the Court itself, the recognized right was a parody of "unconstitutionally vague" statutes. In *Pickering v. Board of Education*, however, the Court would initiate the current ongoing quest to give definition to the scope of public employees' free speech rights,[72] identified as the "Era of Recognition: Undefined Scope."

C. Era of Balancing: Scope

In the Era of Balancing: Scope, the Court refined the scope of free speech rights of employees protected from employer retaliation. *Pickering* was 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 published in a local newspaper.[73] The school board had proposed a bond and a tax rate increase in order to raise funds to build new schools,[74] but the voters rejected both proposals.[75] Leading up to the vote on one of the proposals, a number of articles, apparently from the teachers' union, as well as one by the superintendent, were published in the local newspaper imploring residents to vote for the proposal in order to avoid a decline of education in the district.[76] 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, which he considered to be a misallocation of school funds for athletics rather than education.[77] The board cited

72. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968) (stating that an analysis of employee free speech and employer interests depends on specific fact situations, but some general standards apply).

73. *Id.* at 564.

74. *Id.* at 565–66.

75. *Id.*

76. *Id.*

77. *Id.*

Pickering's writing and subsequent publication of his letter as reasons for his termination.[78]

Pickering challenged his termination as a violation of his First Amendment right to free speech.[79] The Supreme Court stated that the Constitution does not allow employers to coerce public school teachers to relinquish their free speech rights, which entitle them as citizens to speak out on matters of public interest involving the operation of the schools where they work.[80] This holding affirmed the ideas established in the Era of Recognition. According to the Court, however, crucial to its public employment–free speech jurisprudence was an 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.[81] An aspect of the dynamics entailed in this relationship was the need for the employer to maintain the operational efficiency of the services it performs while sustaining some control over its employees' speech to avoid or minimize disruption of its services.[82]

The Supreme Court laid out what has since become known as the *Pickering* balancing test, which defines the scope of employee speech protected from employer retaliation. The *Pickering* balancing test reasoned that "[t]he 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."[83] The balancing test has two key parts: "employee interest in speech" versus "employer interest in operational efficiency."[84] An aspect of the employee interest in speech is the requirement for the speech to touch on a matter of public concern.[85] 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.[86]

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,

78. *Id.* at 566–67.
79. *Id.* at 567.
80. *Id.* at 568.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

against whom the statements are directed, to furnish grounds for dismissal."[87] Rather, to determine whether a particular speech was within the scope of protected speech, a balance must be struck between the employer's and employee's interests within the operational confines of the *Pickering* balancing test.[88]

To help determine whether a particular employee's speech was within the scope of protected speech, the Court identified certain general factors, known as the *Pickering* calculus factors, to consider when applying the *Pickering* test.[89] Some of these factors would more likely weigh in favor of the employer, while others would weigh in favor of the employee. However, given that both sides had a chance to make arguments about each factor, any of the factors could eventually work in the favor of the other side.

Factors that could be construed as pro-employer under the *Pickering* balancing test include: (a) whether the speech would impact harmony among coworkers or the employee's immediate supervisor's ability to maintain discipline;[90] (b) whether the speech is directed toward someone with whom the employee would typically be in contact during his daily work;[91] 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.[92]

Factors, on the other hand, that could be construed as pro-employee under 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;[93] (b) the fact that public employees are more likely than the general citizenry to have informed and definite opinions about the matter in question;[94] (c) the ease with which the employer could rebut the content of the employee's statement, if false;[95] and (d) whether there is evidence that the speech *actually* had an adverse

87. *Id.* at 569.

88. *Id.* at 568.

89. *See id.* at 569 ("[W]e shall indicate some of the general lines along which an analysis of the controlling interests should run.").

90. *Id.* at 569–70.

91. *Id.* This is known as the "close relationship" factor.

92. *Id.* at 570. This is known as the "confidentiality" factor.

93. *Id.* at 572–73.

94. *Id.* at 571–72.

95. *Id.* at 572. This is known as the "ease of rebuttal" factor.

impact on the employer's proper functioning.[96]

The Supreme Court found that the statements in Pickering's letter were critical of the school board and the superintendent.[97] However, none of the statements were targeted toward anyone with whom Pickering was typically in contact with during his daily work.[98] In addition, the Court found no evidence that the speech impaired the ability to maintain discipline or harmony among coworkers.[99] 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.[100] The Court stated that the board could easily have sent a letter to the same newspaper, or a different newspaper, to rebut Pickering's statements.[101] Pickering had no greater access to the accurate information than the board.[102]

The Court emphasized that public employers could not rely on speculations or conjectures about the impact of the employee's speech—evidence of actual impact was required.[103] Furthermore, the Court held that when its assertions were substantially correct, the critical tone of a letter was not alone sufficient to remove employee speech on matters of public interest from the category of speech protected against employer retaliation.[104]

With respect to whether false statements were within the scope of protected speech, the Court stated that "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."[105] In ruling on the case, the Court assumed, without imparting a test, that the funding of the school district was an issue of public concern and within the scope of speech protected against employer retaliation.[106]

The decision provided some guidance about situations where the "confidentiality" factor could come into play in the *Pickering* balancing

---

96. *See id.* at 570–71 (noting there was no evidence of actual harm to the school).
97. *Id.* at 569.
98. *Id.* at 569–70.
99. *Id.* at 570.
100. *Id.*
101. *Id.* at 572.
102. *Id.*
103. *See id.* at 570–72 (requiring evidence to affirm employer's allegations on the effect from an employee's speech).
104. *Id.* at 570.
105. *Id.* at 574.
106. *Id.* at 571–72.

test:

> It is possible to conceive of some positions 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 can also be imagined.[107]

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

> [I]n a case such as the present one, in which the fact of employment is only *tangentially and insubstantially* involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.[108]

However, since *Pickering*, the Supreme Court has not used this "tangentially and insubstantially" test for distinguishing speech as-citizen from speech as-employee.

In *Perry v. Sindermann*, the contract of a teacher at a public institution was not renewed after he disagreed with policies of the board and advocated changing the institutional structure of contracts from two years to four.[109] He also testified before a legislative committee.[110] The teacher challenged the board's decision not to renew his contract as a retaliatory employment practice in violation of his right to free speech.[111] The Supreme Court held that a public employee's lack of contractual or tenure right to the employment was not sufficient in itself to take speech out of the scope of speech protected against employer retaliation.[112]

Moreover, the Supreme Court affirmed the Era of Recognition, noting that a bona fide constitutional claim existed against employers who retaliate

---

107. *Id.* at 570 n.3.
108. *Id.* at 574 (emphasis added).
109. Perry v. Sindermann, 408 U.S. 593, 595 (1972).
110. *Id.* at 594–95.
111. *Id.* at 595.
112. *Id.* at 597–98.

against employees that publicly criticize them.[113] Specifically, the Court stated: "[T]his 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."[114] 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—and found that the teacher's speech was within the scope of speech protected from employer retaliation.[115] However, the Court remanded the case to determine facts on whether the board's failure to renew the teacher's contract was a result of the exercise of his right to free speech.[116]

In the Era of Balancing: Scope, the essence of the balancing test was to define the scope of employee speech protected from retaliation that genuinely accounted for the interests of the employee in speech on matters of public concern and the interests of the employer in operational efficiency. Both of these interests were balanced without de facto or de jure weight given to one interest over the other. This was illustrated, for example, in the 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 as the "Era of OE > MPC Speech."

D. Era of OE > MPC Speech

Recall that the *Pickering* balancing test provided: "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

---

113. *Id.* at 598.

114. *Id.*; *see also* City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175 (1976) (asserting that under the First Amendment teachers are allowed to comment as private citizens in matters of public interest in regard to the operation of public schools).

115. *See Perry*, 408 U.S. at 598 (asserting that the plaintiff's public criticism of school policies was protected by the First and Fourteenth Amendments, based on the holding in *Pickering*).

116. *See id.* (stating the court precluded proper fact-finding by granting summary judgment, and that "there is a genuine dispute as to 'whether the college refused to renew the teaching contract on an impermissible basis—as a reprisal for the exercise of constitutionally protected rights'" (quoting Sindermann v. Perry, 430 F.2d 939, 943 (5th Cir. 1970))).

the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[117] As noted earlier, the balancing test has two key parts—employee interest in speech versus employer interest in operational efficiency—which are weighed against each other.[118] An aspect of the employee interest in speech is the matter-of-public-concern requirement. That is, to be protected against employer retaliation, employee speech must touch on a matter of public concern.[119] 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.[120]

In the title of this subpart, OE refers to the "operational efficiency" interests of the employer, while MPC Speech refers to the employee's interest in speech on matters of public concern. The greater than sign (>) signifies the Court's tendency to favor employers during this era following its interpretation of the parts and aspects of the *Pickering* balancing test.

Since 1977, the Court has given increasingly greater weight to operational efficiency under the *Pickering* balancing test relative to the employee's interest in speech on matters of public concern. Moreover, even though the matters-of-public-concern requirement is an aspect of the employee's interest in speech, the interpretation of matters of public concern has effectively ensured relatively greater weight to operational efficiency over speech on matters of public concern. It would be better if the era could be categorized as OE "less than or equal to (≤)" MPC Speech; as OE simply "less than (<)" MPC Speech; as the tolerable OE "equal to or greater than (≥)" MPC Speech (tolerable because MPC Speech could at least enjoy equal status with OE); or as was originally intended by the formulation of the test, as OE "equal to (=)" MPC Speech.[121] However, the Supreme Court's interpretation of the test has eroded the test's original intent. This era is aptly titled because the interpretations of the test have made a case for de facto or quasi-denial of protection for employee speech rights against employer retaliation. Alternatively phrased, this is a case of pseudo-balancing because the interpretations have ensured weightings that

---

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

118. *Id.*

119. *Id.*

120. *Id.*

121. In *Rankin v. McPherson*, the Court seemed to extend rights to employees by stating that "[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 a discharge." Rankin v. McPherson, 483 U.S. 378, 386 n.10 (1987). Additionally, the Court held that private speech of employees who have no confidential, policymaking, or public contact role poses minimal danger to their employers. *Id.* at 390–91.

keep OE > MPC Speech.

This era of preference for operational efficiency started in 1977 with the case *Mount Healthy City School District Board of Education v. Doyle*.[122] In this 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.[123] The dress code was adopted because school administrators believed that a teacher's appearance correlated with the public's support for bond initiatives.[124] The teacher challenged the board's decision not to rehire him as a violation of his constitutional right to free speech.[125] His background at the school prior to his speech on the radio station included a fight with another teacher,[126] an argument with cafeteria employees,[127] and obscene gestures to female students.[128]

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 when a public employer disciplines an employee ostensibly for the employee's speech, yet proffers other reasons related to the discipline.[129] In such cases, courts must distinguish the employer's actual motives from the pretextual. 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 on the radio station, provided ostensibly mixed motives for his termination.[130] 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.[131]

To understand how *Mount Healthy* played out in this era, weighing operational efficiency over speech on MPC via interpretation of *Pickering*,

---

122. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977) *superseded by statute*, Pub. L. No. 101-12, 103 Stat. 29, *as recognized in* Rivera v. United States, 924 F.2d 948 (9th Cir. 1991).

123. *Id.* at 282.

124. *Id.*

125. *Id.* at 276.

126. *Id.* at 281.

127. *Id.*

128. *Id.* at 281–82.

129. *See id.* at 285 (requiring that the speech in question is a substantial part of the reasoning for terminating a teacher's employment).

130. *Id.*

131. *Id.* at 283–84.

it is important to note that the Supreme Court refused to order the teacher's reinstatement as a consequence of its mixed-motives analysis.[132] The district court adopted a rule of causation that provided even when there were constitutionally permissible grounds for the discharge of an employee, the employee was entitled to reinstatement.[133] The Supreme Court rejected this causation rule as solely dispositive in mixed-motives cases.[134] The Court was concerned about operational efficiency: the district court's rule would impede public employers' control over important personnel decisions and coerce employers to keep employees on their payrolls who would have been terminated if the employee had not spoken out.[135] Besides, the Court added, the rule might make the employee better off than he would have been had he not spoken out.[136] 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.[137]

The relative weighting of operational efficiency over speech on matters of public concern continued with the Supreme Court's establishment of a burden-of-proof allocation (also known as the *Mount Healthy* "balance of burdens") as the expedient for analyzing cases under the *Pickering* balancing test when mixed motives arise.[138] It is important to keep in mind that the balance of burdens was a development and interpretation of the *Pickering* balancing test.

The initial burden of proof in public employment–free speech cases is

---

132. *Id.* at 284, 287.

133. *See id.* at 284 (addressing the circumstances in which a substantial part of the employee's discharge involved free speech).

134. *Id.* at 285.

135. *Id.*

136. *Id.*

137. *Id.* at 286.

138. *Id.* at 287.

on the employee.[139] The employee must show that his or her conduct is protected by the First and Fourteenth Amendments,[140] and that the conduct was "a substantial factor" or a "motivating factor" in the employer's decision to discipline him or her.[141] The substantial-factor or motivating-factor language represented the Court's causation test in its mixed-motives analysis.[142] Requiring a substantial factor for proof, rather than just a "factor," 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.[143]

Should the employee successfully carry the burden of proof, the employer could then show by a preponderance of the evidence that the same decision would have been reached about disciplining the employee in the absence of the protected speech.[144] This is the same-decision-anyway defense, which provides an affirmative defense for employers.[145] By requiring employers only to meet a preponderance of evidence standard, and by making the same-decision-anyway defense an affirmative defense, the Court augmented employers' interests in the *Pickering* calculus furthering OE > Speech on MPC.

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 to justify any disciplinary actions. This re-postures what is actually a "single motive"—employee exercise of free speech rights—as a stratagem of sham and 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.[146] In *Perry,* it was testimony before a legislative committee.[147] In *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, it was speech at a public meeting of a school board.[148] In *Mount Healthy*, it was speech to a radio

---

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 285.

143. *Id.* at 287.

144. *Id.*

145. *Id.* The *Mount Healthy* "same decision anyway" defense is also known as the *Mount Healthy* defense.

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

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

148. *See* City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 169 (1976) (addressing whether states can instruct elected school boards to ban teachers from

station.[149]

In *Givhan v. Western Line Consolidated School District*, the Supreme Court ostensibly diverged from this focus to extend First Amendment free speech protection, for the first time, to whistleblowing that involved private communications between employers and employees.[150] In this case, a public school teacher perceived the school district's policies and practices to be discriminatory in purpose and effect.[151] The teacher had privately complained to the principal about these policies and was subsequently terminated.[152] She challenged the termination as a violation of her First Amendment free speech rights,[153] and the Court agreed.[154] 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 its progeny.[155] 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.[156]

In this post-*Pickering* era, the diminution of employer rights against employee speech has been *de minimis*. In fact, in this era the Court gave preference to employers by attaching weight to the government's interest as an employer in operational efficiency and personnel control. This trend continued in *Connick v. Myers*, as the Court endeavored to clarify the public-concern aspect of the *Pickering* balancing test.[157]

In *Connick*, an assistant district attorney was terminated after she prepared and distributed a questionnaire to her coworkers requesting their opinions about office morale, office transfer policy, level of confidence in supervisors, the need for a grievance committee, and pressures to work in political campaigns.[158] The assistant district attorney challenged her termination as violating her First Amendment right to freedom of speech.[159] Prior to her termination, her proficiency was not in question.[160]

---

speaking at meetings where public participation is allowed).

149. *See Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 282.

150. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979).

151. *Id.* at 411–13.

152. *Id.*

153. *Id.* at 411–12.

154. *Id.* at 413.

155. *See id.* at 415 n.4 (noting that "striking the *Pickering* balance in each context may involve different considerations").

156. *Id.*

157. Connick v. Myers, 461 U.S. 138, 143 (1983).

158. *Id.* at 141.

159. *Id.*

160. *See id.* at 147–48 (listing the factors which must be considered to determine "whether an

The challenge for the Supreme Court was to distinguish mere employment disputes not entitled to First Amendment protections from matters of public where the *Pickering* balancing test applied.[161] In essence, the Court interpreted an aspect of the *Pickering* balancing test. While the matter of public concern is an aspect of the employee part of the *Pickering* balancing test, the Court's interpretation of it effectively affirmed OE > Speech on MPC.[162]

The Court established as a threshold requirement that before application of the *Pickering* balancing test, a determination must be made whether the subject matter of the speech is merely an employment dispute or a matter of public concern.[163] If the matter is merely an employment dispute, deference is given to the employer's termination decision, unless some other statutory or constitutional ground, other than the First Amendment, is presented.[164] However, if the speech touches on a matter of public concern, then only the *Pickering* balancing test is triggered.[165] The problem with this as a threshold requirement is that the matter-of-public-concern analysis is the *Pickering* balancing test—it is an integral part of the very core and literal language of the balancing test. Stating that a matter of public concern 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 only an aspect, but an aspect nonetheless.

In *Connick*, the Supreme Court revealed the following 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."[166] Thus, the content, form, and context of the statement must be examined to determine whether the employee's speech "relat[ed] to *any matter of political, social, or other concern to the community*."[167] This is known as

---

employee's speech addresses a matter of public concern").

161. *See id.* at 140, 147–49 (dictating how to determine whether an employee's statement is one of public concern).

162. *See id.* at 149 (promoting efficiency over matters of public concern, stating "[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").

163. *Id.* at 150.

164. *Id.* at 146–47, 151.

165. *See id.* at 146 (stating that the reasons for discharge do not need to be analyzed if the speech "cannot be fairly characterized as constituting speech on a matter of public concern").

166. *Id.* at 147–48 (emphasis added).

167. *Id.* at 146 (emphasis added).

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:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[168]

Thus, employee speech of personal interest has a very thin thread of protection, if any. Furthering the primacy of operational efficiency over speech on matters of public concern, the Court stated: "While 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."[169] In this respect, it is important to note that the Court only found one of the assistant district attorney's questions in her questionnaire to coworkers touched on a matter of public concern—the question about pressure to work on political campaigns.[170] According to the Court, the other questions were *mere extensions of the employment dispute and grievance with the employer*.[171]

Illustrative of this era in which operational efficiency has relative primacy over employee speech on matters of public concern, the Supreme Court in its discourse on the *Pickering* balancing test has held that public employers must retain wide discretion, control, and latitude over employee speech.[172] This discretion should be exercised with a "wide degree of deference to the employer's judgment," having a prerogative to terminate, with dispatch, employees hindering efficiency.[173] 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."[174]

---

168. *Id.* at 147.
169. *Id.* at 149.
170. *Id.* at 149.
171. *Id.* at 148.
172. *Id.* at 146, 151.
173. *Id.* at 152.
174. *Id.* at 153 (emphasis added).

In an apparent volte-face with respect to one of the *Pickering* calculus factors, and a further validation of the current era, the Court reasoned in this palinode: "[W]e 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."[175] In *Pickering*, that factor required public employers to provide evidence showing the employee's speech *actually* had an adverse impact on operational efficiency.[176] In *Pickering,* the Court stated that mere conjecture about the impact of employee speech on operational efficiency was unacceptable.[177] In *Connick*, however, the Court indicated that employers could rely on speculations about the disruptiveness of speech to operational efficiency in disciplining employees.[178] Actual evidence of adverse impact was no longer required.[179]

With respect to the "close working relationship" factor, the Court found that the employer's determination that the employee's speech posed a threat to close working relationships was supported by sufficient evidence.[180] Fundamentally, the Court deferred to the employer's judgment.[181] As part of the general trend of deference to employers typically evident in 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."[182] This statement basically announces unfettered discretion (or at least quasi-unfettered discretion) for employers. In essence, this makes it more difficult for employees that have close working relationships with their employers to bring First Amendment challenges to the employment retaliation practices of their employers. In effect, this increases the relative weighting of operational efficiency relative to speech on matters of public concern 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

---

175. *Id.* at 152.

176. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 569–71 (1968) (articulating the need for evidence to show interference with the working environment).

177. *Id.* at 570–71.

178. *Connick*, 461 U.S. at 154.

179. *Id.* at 152.

180. *See id.* at 151–52 (encouraging deference to an employer's judgment that the speech was inciting a "mini-insurrection").

181. *Id.*

182. *Id.* (emphasis added).

efficiency in cases involving the private communications of employees with their employers.[183] 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*, a plurality of the Court further interpreted and developed the *Pickering* balancing test, particularly the content component of the "content, form and context" test for matters of public concern.[184] Specifically, the plurality ruled on whether the *content* of employee speech should be determined from the government employer's perspective or from the trier of fact's perspective.[185] The decision further reduced the protection of employee speech relative to operational efficiency.[186] In *Waters*, a nurse employed by a government-operated hospital was terminated for her speech.[187] She subsequently challenged this termination based upon her First Amendment rights.[188] There were two accounts of the nurse's speech: one version from the only two witnesses the employer chose to speak to prior to her termination,[189] which contrasted with the nurse's own account of her speech corroborated by two other witnesses whom the employer did not speak to prior to her firing.[190] Notably, the employer did not ask the nurse to account for her own speech.[191]

At trial, the nurse testified that her speech constituted a long-standing concern, which she had voiced on prior occasions, regarding the hospital's cross-training policy that allowed nurses from an overstaffed department to work in another.[192] The account the employer relied on for terminating her employment stated that the nurse criticized her supervisors and discouraged another employee from transferring to a position where she would work with that supervisor.[193] The nurse denied discouraging the transfer.[194] The plurality opinion observed that the practical realities of public employment effectively ensured that open, robust, and unhindered debate that would

183. *See id.* at 152–53 (stating that time, place, and manner factors enhanced the danger of office inefficiency).

184. Waters v. Churchill, 511 U.S. 661 (1994).

185. *Id.* at 664.

186. *See id.* at 677 (stating that courts will look to the facts surrounding employer's decisions as the employer reasonably found them).

187. *Id.* at 664.

188. *Id.* at 667.

189. *Id.* at 665–66.

190. *Id.* at 666.

191. *Id.*

192. *Id.*

193. *Id.* at 665–66.

194. *Id.*

otherwise exist between the government and its citizens is not completely permissible between the government and its employees.[195] Besides, the plurality held, public employers do not need to tolerate verbal tumult nor rely on counterspeech as a remedy to employee speech.[196] By holding that employers do not have to rely on counterspeech as a remedy to employee speech, the plurality effectively undermined the "ease of rebuttal" factor in the *Pickering* calculus.[197]

The plurality also stated that in its public employment–free speech 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.[198] According to the plurality, this deferential approach, not accorded to the government in relation to general citizenry speech, is also accorded to disciplinary actions by public employers based on private speech of employees.[199] Similarly, the plurality reasoned that "[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."[200] This emphasized the resounding primacy of operational efficiency. Characteristic of the relative weight of operational efficiency in the current era, the plurality stated that "[t]he *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."[201]

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 judicial deference must be afforded to the *employers'* version of the content.[202] 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 borne by employees.[203] Factors such as past

195. *Id.* at 672.

196. *Id.*

197. *See supra* Part I.C. (referring to the third prong of the *Pickering* balancing test that considers the ease with which the employer could rebut the content of the employee's statement).

198. *Waters*, 511 U.S. at 673.

199. *Id.* at 674.

200. *Id.* at 675.

201. *Id.* (emphasis added).

202. *Id.* at 677.

203. *Id.* at 675–76.

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.[204] While the plurality conceded that employer reliance on such factors could result in erroneous disciplinary action against protected speech, they found no constitutional infirmity with such reliance.[205]

The plurality did state that the content of employee speech must be reasonable, as determined by the employer.[206] However, they observed:

> [T]here 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.[207]

If such a broad and erratic range of "reasonableness" is accorded to 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 plurality 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."[208] This echoes the primacy of operational efficiency in the current era.

Waters is replete with other illustrations of the relatively greater influence accorded to operational efficiency in the current era. For example, the plurality stated that "[d]iscouraging people from coming to work for a department *certainly* qualifies as disruption" of operational efficiency,[209] potentially undermining the employer's authority.[210] The

---

204. *Id.* at 676.

205. *See id.* at 676–77 ("It is true that these [employer] practices involve some risk of erroneously punishing protected speech . . . . But we do not believe that the First Amendment requires [the government] to [adopt other practices].").

206. *Id.* at 677.

207. *Id.* at 678 (emphasis added).

208. *Id.* at 680.

209. *Id.* at 680 (emphasis added).

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."[211] Consonant with *Connick*, the plurality stated that *potential* disruptiveness to operational efficiency validated any employer's disciplinary actions under the *Pickering* balancing test.[212]

In *San Diego v. Roe*, the Court reaffirmed the precedence of operational efficiency, stating:

> [R]equir[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 [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.[213]

In essence, the Court stated that the matter-of-public-concern requirement, as well as the *Connick* test, was established by the Court in order to avoid compromising the operational efficiency of public employers. The Court did not include, as part of its rationale for the public-concern requirement, a concern for the free speech rights of employees. Moreover, *San Diego* added a new twist to the MPC requirement: "[P]ublic 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*."[214]

The latest case in the current era of the Court's public employment–free speech jurisprudence is *Garcetti v. Ceballos*.[215] In this case, a supervisory deputy district attorney alleged that his employer took various retaliatory actions against him because of his speech, violating his First Amendment rights.[216] These actions included reassignment from his position as calendar deputy to a trial deputy position,[217] denial of a promotion,[218] and transfer to a different courthouse.[219] The speech in this

---

210. *Id.* at 680, 681.

211. *Id.* at 681 (emphasis added) (internal quotation marks omitted).

212. Connick v. Myers, 461 U.S. 138, 152, 168 (1983); *see supra* Part I.D. (discussing the assistant district's attorney's termination for distributing a questionnaire to her co-workers).

213. San Diego v. Roe, 543 U.S. 77, 82–83 (2004) (per curiam) (emphasis added) (citing Connick v. Myers, 461 U.S. 138, 143 (1983)).

214. *Id.* at 83–89 (emphasis added).

215. Garcetti v. Ceballos, 126 S.Ct. 1951 (2006).

216. *Id.* at 1956.

217. *Id.*

218. *Id.*

case involved a memorandum written by the supervisory deputy district attorney to his superiors that criticized the handling of a pending criminal case and identified serious misrepresentations in the affidavit used to get a search warrant in the case.[220] He recommended dismissal of the case, but his supervisors disagreed.[221]

The Supreme Court sought to clarify the as-citizen versus as-employee status in the *Pickering* balancing test. 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.[222] The Court stated that employers can restrict employee "speech that has some *potential* to affect the entity's operations."[223] Also, it added that "[g]overnment 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."[224] This accorded a "significant degree of control" to employers because of operational efficiency and fundamentally reinforced the primacy of operational efficiency in this era. The Court cited no empirical or other evidence to support its conclusion that absent *significant* control over employees' words and actions, *little* chance exists for operational efficiency. Nonetheless, it arrived at this holding because of its penchant for 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."[225] This was an articulation of the preponderancy of operational efficiency in this era.

As noted earlier, the Court in *Garcetti* set forth the test for distinguishing the as-citizen status from as-employee status under the *Pickering* balancing test.[226] The test provides that "when public employees make statements *pursuant to* their *official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution

---

219. *Id.*

220. *Id.* at 1955–56.

221. *Id.* at 1956.

222. *See id.* at 1958 (emphasizing that disruptive employee speech can be limited by the employer).

223. *Id.* at 1958 (emphasis added).

224. *Id.* (emphasis added).

225. *Id.*

226. *See supra* Part I.C. (referring to the two aspects of employee interest in speech).

does not insulate their communications from employer discipline."[227] 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. Writ large in the *Garcetti* test is operational efficiency.[228] The Court failed to define the phrases "pursuant to" and "official duties" under this test, effectively giving employers very broad discretion due to the vagueness of these phrases. Moreover, by categorically excluding speech pursuant to official duties from First Amendment protection, the relative concern for speech lessened while the concern for operational efficiency increased. Also, true to the era, the Court refused protection for employee work product.[229] 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.[230]

Further strengthening the operational efficiency part of the *Pickering* balancing test, the Court reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[231] Similarly, the Court stated that "[e]mployers have *heightened* interests in controlling speech made by an employee in his or her professional capacity,"[232] and they must retain "sufficient discretion to manage their operations."[233]

In the name of operational efficiency, the Court also gave employers the right to scrutinize and control employees' official speech to ensure: (a) substantive consistency and clarity;[234] (b) the accuracy of the speech;[235] (c) that the speech demonstrates sound judgment;[236] and (d) that the speech promotes the employer's mission.[237] The Court indicated that if an employer thinks that employee speech was "inflammatory or misguided,"[238]

---

227. *Garcetti*, 126 S.Ct. at 1960 (emphasis added).

228. *See generally id.* at 1958 (describing the Court's inclination for deference towards employers).

229. *See id.* at 1960 (discrediting the First Amendment claims that employees' work products do not bar them from participating in public debate).

230. *Id.*

231. *Id.*

232. *Id.* (emphasis added).

233. *Id.*

234. *Id.*

235. *Id*.

236. *Id.*

237. *Id.*

238. *Id.* at 1960–61.

the employer has "authority to take *proper corrective action*."[239] The Court's sanction of employer discipline of the broad, undefined categories of inflammatory or misguided speech (left to the thought or judgment of the employers) was tantamount to a grant of broad discretion to employers over employee speech in the name of operational efficiency.

The central holding of *Garcetti*, clearly pregnant with relative predilection for ensuring operational efficiency, was that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."[240] 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."[241]

Only time will reveal if the next employment free speech case decided by the Court will make any changes in the current era or merely be a further affirmation of the current era via development and interpretation of *Pickering*.

CONCLUSION

As discussed above, the Court's public employment–free speech jurisprudence has developed since ratification of the U.S. Constitution through four major eras: (i) the Era of Categorical Denial; (ii) the Era of Recognition: Undefined Scope; (iii) the Era of Balancing: Scope; and (iv) the Era of OE > MPC Speech.

The apogee of First Amendment protection of the rights of teachers and other public employees who are retaliated against for whistleblowing came in the Era of Recognition: Undefined Scope and the Era of Balancing: Scope. In the other two eras, the Era of Categorical Denial and the current Era of OE > MPC Speech, the judicial proclivity is operational efficiency focused. Evident from the discussions above, and increasingly over the

239. *Id.* at 1961 (emphasis added).
240. *Id.*
241. *Id.* at 1962.

years since *Pickering*, the Court has progressively regressed to the Era of Categorical Denial, providing fewer protections for whistleblowing teachers and other public employees against employer retaliations without the plenary denial that obtained for decades in the Era of Categorical Denial. Upon recognizing this right, it is unlikely the Court will completely retract it. However, the *Pickering* balancing test, which provides room for great judicial discretion in interpretation and application, can be used to further results to de facto plenary denials. Teachers who whistleblow, and those contemplating whistleblowing, will benefit from the knowledge and history of the jurisprudence in this area of the law in order to make more informed decisions.