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# The Free Speech Rights of Off-Duty Government Employees

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# The Free Speech Rights of Off-Duty Government Employees

*Mary-Rose Papandrea*[*]

## I. INTRODUCTION

Until recently, Andrew Shirvell was an assistant attorney general in Michigan. This past fall, he created a blog attacking the openly gay president of the University of Michigan student body as a "racist" and "liar" who was promoting "a radical homosexual agenda."[1] Initially, Michigan Attorney General Michael Cox—Shirvell's boss—condemned Shirvell's anti-homosexual rantings but resisted calls for Shirvell's firing, citing Shirvell's First Amendment right to say what he wants while he is off duty.[2] In a statement, General Cox remarked: "Mr. Shirvell's personal opinions are his and his alone and do not reflect the views of the Michigan Department of Attorney General. But his immaturity and lack of judgment outside the office are clear."[3] General Cox later fired Shirvell, citing an investigation that had revealed that Shirvell had "repeatedly violated office policies, engaged in borderline stalking behavior and inappropriately used state resources" to engage in his attack during work hours.[4]

Not all government employers would have waited so long to punish an employee for this sort of offensive off-duty speech. In addition, many lower courts have ruled against government

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1. Laura Berman, *Assistant AG Takes Leave Amid Gay-Bashing Controversy*, DETROIT NEWS, Oct. 2, 2010, *available at* http://www.detnews.com/article/20101001/METRO/10010422/Assistant-AG-takes-leave-amid-gay-bashing-controversy.

2. *Id.*

3. Michael Winter, *Michigan Law Official Fired for Harassing Gay Student Leader*, USA TODAY (Nov. 8, 2010, 6:21 PM), http://content.usatoday.com/communities/ondeadline/post/2010/11/michigan-law-official-fired-for-harassing-gay-student-leader/1.

4. *Id.*

employees in similar cases.[5] Although General Cox told Anderson Cooper of CNN that the Supreme Court has held that a government employee enjoys broad First Amendment protection for speech that does not undermine his ability to do his job,[6] the Court's jurisprudence is not so clear.

The Supreme Court's most recent public-employee speech case, *Garcetti v. Ceballos*, may have served only to muddy the waters by embracing the distinction between a government employee acting as "an employee" and one acting "as a citizen."[7] The Court had suggested this sort of binary approach to public-employee cases before,[8] but it was not until *Garcetti* that the Court endorsed this approach as a guiding principle. When an employee is acting as "an employee," he enjoys no First Amendment protection for his speech. To bolster this conclusion, the Court invoked the government

5. *See*, *e.g.*, Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008) (rejecting First Amendment claim brought by police officer who maintained sexually explicit website that featured himself and his wife); Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006) (dismissing First Amendment claim brought by police and fire officers who were terminated after they participated in a parade float that mocked stereotypes of African-Americans); Meltzer v. Bd. of Educ., 336 F.3d 185 (2d Cir. 2003) (rejecting First Amendment claim brought by teacher who was fired for his membership in NAMBLA); Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002) (dismissing First Amendment claim brought by member of police force who anonymously sent racist hate mail to nonprofit organizations that had solicited him for donations); Tindle v. Caudell, 56 F.3d 966 (8th Cir. 1995) (holding that suspension of police officer who wore racially offensive Halloween costume to party at Fraternal Order of Police Lodge did not violate First Amendment); Easton v. Harsha, 505 F. Supp. 2d 948 (D. Kan. 2007) (rejecting First Amendment claim brought by police officer who wrote racially offensive emails to author of newspaper column); Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112 (Mass. 2000) (rejecting First Amendment claim brought by employee who told racially offensive joke at retirement dinner); Karins v. City of Atlantic City, 706 A.2d 706 (N.J. 1998) (striking down First Amendment claim brought by off-duty firefighter who made racial epithet to police officer during traffic stop).

6. Martina Steward & Ed Payne, *Michigan Attorney General Defends Employee's Right to Blog*, ANDERSON COOPER 360 (Oct. 1, 2010, 5:15 AM), http://ac360.blogs.cnn.com/2010/09/30/michigan-attorney-general-defends-employees-right-to-blog/.

7. 547 U.S. 410, 418–19 (2006).

8. *See*, *e.g.*, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 456 (1995) (striking down federal law banning government employees from receiving compensation for their off-duty expressive activities because the employees "seek compensation . . . in their capacity as citizens, not public employees"); Connick v. Myers, 461 U.S. 138 (1983) (holding that courts generally should not interfere with personnel decisions "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"); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (noting the need to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

speech doctrine, arguing that when an employee speaks pursuant to his job duties, the government employer "has commissioned or created" that speech and can restrict it without violating the First Amendment.[9] This reference to the government speech doctrine raises the question of whether there are other circumstances under which the government can control the speech of its employees in order to protect its own ability to communicate.

Although *Garcetti* did not involve off-duty speech, it noted that when an employee is not speaking as part of his job duties but instead is speaking as a citizen on a matter of public concern, he may be subject to "only those speech restrictions that are necessary for [his] employer[] to operate efficiently and effectively."[10] This statement is a summary of the *Connick/Pickering* framework. Under this framework, a public employee's speech is not entitled to any First Amendment protection unless it is determined, as a threshold matter, that the speech involves a matter of public concern, and, even if that requirement is satisfied, the speech is protected only if the value of the speech outweighs the government employer's interests in restricting or punishing it. Although this is the general framework for public-employee speech cases, it is hardly clear from the Court's own jurisprudence that this is the framework that applies—or should apply—in cases involving off-duty expression, especially when the expression is not work related.

In determining what sort of First Amendment rights government employees should enjoy when they are off duty, the distinction between speech "as an employee" and speech "as a citizen" is ultimately not as useful. Employees do not stop being citizens when they are at work; likewise, they do not stop being employees when they are not. Furthermore, it does not help to compare off-duty government employees to off-duty non-government employees. Outside of the government context, private employers can discipline their employees for their off-duty expression with impunity, absent a state-statutory or constitutional requirement to the contrary. In that way, employees for private employers are always employees in terms of the precariousness of their speech rights. They enjoy the robust speech rights of citizens only vis-à-vis the government. The problem is that for public employees their employer *is* the government.

9. *Garcetti*, 547 U.S. at 421–22.

10. *Id.* at 419.

This Article contends that the *Connick/Pickering* framework should not apply in cases involving off-duty, non-work-related government-employee speech. *Connick*'s threshold public-concern inquiry is not appropriately tailored to address a government employer's legitimate interests in controlling the expressive activities of its employees in such circumstances. In addition, *Pickering*'s balancing test, which weighs the value of the employee's speech against the government-employer's interest in restricting it, fails to limit government control over its employee's speech activities sufficiently.

Instead, this Article argues that off-duty, non-work-related speech by government employees should be entitled to presumptive protection under the First Amendment. Recognizing that it is never entirely possible to separate the citizen from the employee, or vice versa, this Article asserts that a government employer can overcome this presumption by showing that particular reasons specifically related to the employment relationship warrant controlling employee expression. Such reasons include a showing that the employee is reasonably regarded as speaking for the employer and interferes with a clearly articulated message of his government employer (an extension of the government speech doctrine), or that the speech indicates that the employee is unfit to perform the duties of his position.[11]

11. Commentators have made a variety of suggestions for reforming the law governing the First Amendment rights of off-duty public employees. *See*, *e.g.*, Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988); Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 168–72 (arguing that Due Process clause might provide alternative basis for aggrieved employees disciplined for their speech made pursuant to their job duties; noting that extending this proposed Due Process model to disputes involving speech that is not related to employment is "tantalizing" but requires more study); Cythnia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990) (criticizing threshold public concern inquiry and suggesting a return to *Pickering*); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1010 (2005) (arguing for "full First Amendment protection to employee speech that occurs off the job and is directed" to the public and no First Amendment protection for speech occurring at work or that is directed to a workplace audience); Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121 (1996) (advocating for the abandonment of Connick's threshold public concern inquiry in favor of test balancing the various interests at stake); Toni Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 64–65 (2008) (arguing that government employers should have broad managerial

Part II of this Article discusses the Supreme Court's convoluted jurisprudence regarding the free speech rights of government employees. Part III illustrates how the lower courts have struggled to make sense of the Supreme Court's decisions as applied to off-duty speech cases, particularly the application of the threshold public-concern requirement and the *Pickering* balancing test. Part IV then argues that the off-duty, non-work-related expressive activities of public employees should be given presumptive protection under the First Amendment and that the government employer should be permitted to overcome the presumption only in certain limited circumstances.

## II. THE CURRENT STATE OF THE LAW

In the last fifty years, public employees[12] have seen their free speech rights ebb and flow. For the first half of the twentieth century, the Supreme Court made clear that the First Amendment placed no restraints on the ability of government employers to discharge or otherwise discipline their employees for their expressive activities.[13] Oliver Wendell Holmes, while serving on the Supreme

authority to restrict the off-duty speech of their employees that might undermine their on-duty effectiveness); D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 266 (1990) (arguing that any speech made outside of the workplace that "concerns matters unrelated to workplace personnel or policies or unrelated to political issues directly affecting the employee's working relationships" should be absolutely immune from government regulation). Few articles have considered the ramifications of applying the government speech doctrine to off-duty public employees. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech to Protect its Own Expression*, 59 DUKE L.J. 1 (2009); Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75 (2008). Professor Norton's excellent articles focus exclusively on the government speech issue and do not take on the *Pickering/Connick* framework or discuss any other permissible justifications government employers might give to defeat their employees' First Amendment claims.

12. This Article uses the terms "public employee" and "government employee" interchangeably to refer to non-civil-service employees at the federal, state, and local levels. Civil servants are hired based on competitive examinations and are subject to special speech restrictions and entitled to certain statutory rights that are beyond the scope of this Article. The First Amendment does not restrict the ability of private employers to discipline their employees for their expressive activities, although some states have constitutional provisions or statutes that do.

13. *See*, *e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (upholding state law banning members of subversive groups from employment in the public schools, reasoning that persons "have no right to work for the State in the school system on their own terms") *overruled in part by* Keyshian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589 (1967); Garner v. Bd. of Pub. Works, 341 U.S. 716, 720 (1951) (upholding loyalty oath because the inquiry

Judicial Court of Massachusetts, summed up this view when he famously proclaimed, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[14] Government employers enjoyed the same absolute right private employers did to discipline their employees for their expressive activities, absent contractual or state constitutional or statutory protections providing to the contrary. Government employers could limit their employees' speech no matter where the employees spoke or what they said.

The Supreme Court began to revise its position in the 1950s and 1960s when it held that the government could not require employees to swear loyalty oaths and reveal the groups with which they were associated.[15] The Court recognized that public employees were still citizens entitled to contribute to the public debate and that their government employers were still part of the government subject to constitutional constraints. In *Pickering v. Board of Education*, the Court held that the First Amendment protects the expressive activities of government employees as long as the government's interest in suppression does not outweigh the employee's interest in free speech.[16] Since *Pickering*, however, the Court has cut back dramatically on the free speech rights of public employees, especially with its most recent decision in *Garcetti v. Ceballos*.[17] But rather than eliminate public-employee speech rights entirely, the Court has created a confusing, multi-step inquiry. This framework has left the expressive rights of "off-duty" government employees engaging in non-work-related expressive activities particularly unclear.

is relevant to determining an employee's "fitness and suitability for the public service"); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (upholding the Hatch Act's ban on the political activities of federal civil-service employees).

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

15. *See*, *e.g.*, *Keyishian*, 385 U.S. at 605–06 (1967) (noting that the Court has rejected the theory that public employment can be subject to any conditions the government wants); Sherbert v. Verner, 374 U.S. 398, 404–05 (1963) (citing Wieman v. Updegraff, 344 U.S. 183, 191–92 (1952); Am. Comm. Ass'n v. Douds, 339 U.S. 382, 390 (1950); Hannegan v. Esquire, Inc., 327 U.S. 146, 155–56 (1946)) ("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.").

16. 391 U.S. 563, 563–64 (1968).

17. 547 U.S. 410 (2006).

### *A.* Pickering v. Board of Education*: A Balance of Interests*

In its landmark 1968 decision in *Pickering v. Board of Education*, the Supreme Court held that the First Amendment provides some protection for the free speech rights of public employees.[18] At issue in the case was a school teacher's letter to the editor criticizing the school board's funding-allocation decisions. The teacher had been terminated on the grounds that his letter was "detrimental to the efficient operation and administration of the schools of the district."[19] In a striking departure from the Holmesian view that had dominated for decades, the Court held that the teacher's dismissal violated the First Amendment.[20]

Writing for the Court, Justice Marshall noted that because "free and open debate is vital to informed decision-making by the electorate," and because government employees are often "most likely to have informed and definite opinions" on matters of public concern, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[21] At the same time, the Court recognized that the government must have some leeway to restrict the expression of its employees in ways that would be plainly unconstitutional with respect to the general public.[22] To reconcile these competing interests, the Court set up a balancing test for determining whether the employee's constitutional rights had been violated. This test requires a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[23]

In applying the balancing test to the case at hand, the Court noted that the teacher's letter involved a matter of public concern, was directed to the general public, and did not affect the teacher's proper performance of his duties.[24] The Court rejected the school

18. *Pickering*, 391 U.S. at 569–70.

19. *Id.* at 564–65.

20. *Id.* at 564.

21. *Id.* at 571–72.

22. *See id.* at 568 (holding that the government's interest in regulating the speech of its employees "differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general").

23. *Id.*

24. *Id.* at 571–73.

board's argument that employees could be disciplined based on the inherently disruptive nature of truthful statements that are critical of the government agency.[25] Because there was no evidence that the false statements in the letter undermined Pickering's ability to perform his job or interfered with the operation of the schools, the Court also held that the statements were not sanctionable simply because they were false.[26] The Court concluded that the school board could not punish Pickering because the school had no greater interest in stifling his letter than it would have in stifling similar criticism made by a member of the general public, even though the letter was critical of his superiors, especially given that in this case "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher."[27]

The Court elaborated on the *Pickering* balancing test in two subsequent cases. In *Mt. Healthy City School District Board of Education v. Doyle*, the Court made clear that the employee had the burden to prove that he was engaged in constitutionally protected expressive activities and that these activities were a motivating factor in the decision to discipline.[28] If the employee can meet these two burdens, the burden of proof shifts to the employer to show that it would have disciplined the employee regardless of her speech.[29] In *Givhan v. Western Line Consolidated School District*, the Court held that an employee does not lose First Amendment protection for her speech simply because she decides to speak privately rather than publicly.[30] In *Givhan*, a teacher had privately discussed her concerns about discriminatory practices at her school. The Court noted that although speech made privately does not automatically lose constitutional protection, "additional factors" might come into play on the employer's side of the *Pickering* balance in such cases, where the time, place, and manner of the speech may pose a threat to the institutional efficiency of the agency.[31] The Court's decision in

25. *Id.* at 570.

26. *Id.* at 572–73.

27. *Id.* at 573–74.

28. 429 U.S. 274, 287 (1977) (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977)).

29. *Id.* at 287.

30. 439 U.S. 410, 414–16 (1979).

31. *Id.* at 415 n.4.

*Givhan* does not seem to be based on the need to protect an employee's contributions to public debate, which the Court suggested as a rationale for protecting employee speech in *Pickering*, but instead on the value of requiring the government employer to tolerate some internal dissenting speech on matters of public concern.

### *B.* Connick v. Myers *and* Rankin v. McPherson*: Establishing a Threshold "Public Concern" Requirement and Fine-Tuning the* Pickering *Balancing Test*

In *Connick v. Myers*, the Court scaled back the protections it offered public employees in *Pickering* by holding that government employers should be given "wide latitude" to restrict employee speech that does not relate to a matter of public concern.[32] The Court held that "absent the most unusual circumstances," federal courts should not get involved in personnel decisions based on speech made by "an employee upon matters only of personal interest."[33] Although the Court recognized that speech on private matters did not fall outside of the First Amendment, it justified its distinction between matters of public and private concern on the ground that it is necessary only to protect the "fundamental rights" of government employees and not to give them immunity for grievances that non-government employees do not enjoy.[34]

After *Connick*, a court must first determine as a threshold matter whether the challenged expression is a matter of public concern, before even applying the *Pickering* balance test. *Connick* limited the protections *Pickering* offered because, even though *Pickering* itself involved speech on a matter of public concern, that case simply considered the high-value nature of that expression as just one factor to consider in the balance of interests, and not as a threshold requirement. *Connick* also offers courts an opportunity to avoid the difficulties of applying the *Pickering* balancing test by permitting them to throw out a significant number of claims at the outset.[35]

32. 461 U.S. 138, 146–47 (1983).

33. *Id.* at 147.

34. *Id.*

35. Allred, *supra* note 11, at 76–77 ("[B]y affording the courts the opportunity to decide close cases on the first prong of the test—that is, to rule as a matter of law that the matter is not one of public concern—the harder question of proper resolution of interests may be avoided.").

In *Connick*, a district attorney who opposed her transfer to another section of the criminal court circulated a questionnaire to her fellow employees asking various questions about transfer policies, office morale, and confidence in supervisors, as well as one question about whether they "felt pressured to work in political campaigns."[36] Evaluating the "content, form, and context" of the plaintiff's questionnaire to determine whether it involved a matter of public concern, a slim majority of the Court held that only the last question concerning pressure to work in political campaigns was entitled to any First Amendment protection because the others simply involved her dissatisfaction with a proposed transfer.[37] The last question was a matter of public concern, and not merely of personal interest to the employee, because pressuring employees to work for a political candidate "constitutes a coercion of belief in violation of fundamental constitutional rights."[38] The Court applied the *Pickering* balancing test to this last question only and concluded that the employee's speech, which threatened a "mini-insurrection" that disrupted the office and undermined the close working relationships between assistants and their supervisors,[39] outweighed the employee's interest in her speech.[40]

In its application of the *Pickering* balancing test, the Court made clear that "a wide degree of deference to the employer's judgment is appropriate."[41] It is not necessary for an employer to "allow events to unfold" demonstrating the destructive nature of the employee's speech.[42] At the same time, the Court cautioned that had the employee's speech "more substantially" involved a matter of public concern, an employer might have to make a stronger showing of disruption to prevail under the *Pickering* balancing test;[43] in this case, the employee's speech was intertwined and motivated not by "pure academic interest . . . to obtain useful research" but by a dispute she had with her supervisors over the office's transfer

36. *Connick*, 461 U.S. at 141.
37. *Id.* at 147–49.
38. *Id.* at 149.
39. *Id.* at 151–52.
40. *Id.* at 154.
41. *Id.* at 152.
42. *Id.*
43. *Id.*

policy.[44] In addition, the employee distributed her questionnaire at work, which the Court found provided additional support to the employer's disruption claims.[45]

Four dissenting Justices rejected the majority's parsing of Myers's questionnaire and argued that it all implicated a matter of public concern.[46] Focusing more on the actual content of the questionnaire rather than the employee's motivation for circulating it, Justice Brennan, writing for the dissenters, argued that "[t]he constitutionally protected right to speak out on governmental affairs would be meaningless if it did not extend to statements expressing criticism of government officials," which in this case involved criticizing the way the office was run.[47] Brennan pointed out that Myers's questionnaire would be of interest to anyone wishing to form an opinion on the ability of the elected District Attorney to run his office.[48] Brennan argued that whether an employee's speech involved a matter of public concern is more appropriately evaluated by considering the amount of disruption an employer must be required to tolerate.[49] Brennan concluded that giving protection only to speech involving matters of general interest "'is surely in conflict with the whole idea of the First Amendment.'"[50]

In *Rankin v. McPherson*, the Court applied the *Connick/Pickering* framework to speech that was not directly related to the employee's workplace.[51] In *Rankin*, a clerical employee in a county constable's office privately commented at work to her boyfriend and co-worker, upon hearing about the assassination attempt on President Reagan, "if they go for him again, I hope they get him."[52] Unknown to her, another co-worker overheard her comment and reported it to a supervisor.[53] Both the majority and dissenting opinions applied *Connick*'s public concern inquiry as a

44. *Id.* at 153–54.

45. *Id.* at 153.

46. *Id.* at 156 (Brennan, J., dissenting).

47. *Id.* at 162 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

48. *Id.* at 163.

49. *Id.*

50. *Id.* at 164 n.4 (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 554 (1970)).

51. 483 U.S. 378 (1987).

52. *Id.* at 381.

53. *Id.* at 381–82.

threshold test for the employee's First Amendment claims.[54] The five-Justice majority held that this comment involved a matter of public concern because it was made in response to a major news bulletin and in the context of a larger conversation criticizing Reagan's policies.[55] In a footnote, the majority cited dicta in *Connick* that an employee's speech that does not involve a matter of public concern does not fall outside the First Amendment, but that "'absent the most unusual circumstances'" courts should not get involved in such cases.[56]

Proceeding to the *Pickering* balancing test, the majority concluded that the government had failed to demonstrate that the employee interfered with the efficient functioning of the office or posed any danger of discrediting the office; she made the comment in a private conversation with another employee in an area at work to which there was no public access.[57] Furthermore, the comment did not relate to the workplace, and the Constable did not terminate her employment out of concern that her comment indicated an unfitness to perform her duties.[58] Although the employee worked in a law enforcement agency, the Court said that before it would accept the government's argument that an employee's speech "somehow undermines the mission of the public employer," it is essential to keep in mind that she was merely a clerical employee with no confidential, policymaking, or public contact role.[59]

Justice Powell authored a concurring opinion in which he expressed disbelief that the case had "assumed constitutional dimensions and reached the Supreme Court of the United States" even though it involved a comment that a low-level employee made to her boyfriend, who happened to be another employee, with no intention or expectation that anyone else would hear it.[60] Although Powell stated that the comment involved a matter of public concern, this conclusion was not central to his analysis of the issue. Instead, his concurrence suggested that the employer had no interest whatsoever in restricting this sort of expression in the workplace,

54. *Id*. at 384–85; *id*. at 395–96 (Scalia, J., dissenting).
55. *Id*. at 386.
56. *Id*. at 384 n.7 (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).
57. *Id*. at 388–89.
58. *Id*. at 389.
59. *Id*. at 390–91.
60. *Id*. at 392–93 (Powell, J., concurring).

regardless of whether it was a matter of public concern. Powell concluded that "it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels of the workplace."[61] Powell saw the case as a rather simple one where the employee "made an ill-considered—but protected—comment during a private conversation, and [her boss] made an instinctive, but intemperate, employment decision on the basis of this speech."[62]

While the dissenting Justices in *Connick* thought the majority had applied the public concern requirement too narrowly, the four dissenting Justices in *Rankin* complained that the majority in that case had expanded the concept too broadly. They believed that the public concern requirement was originally intended to limit the ability of government employers to restrict public employee speech that lies "'at the heart of the First Amendment's protection.'"[63] Crediting the district court's conclusion that McPherson's statement was not political hyperbole, the dissenters argued that her desire that the President be assassinated was not protected political expression.[64] Instead, they contended, her statement was on the border of various unprotected categories of speech (like incitement and fighting words) and therefore could not be considered to be anywhere near the "heart" of the First Amendment.[65]

The *Rankin* dissenters went on to argue that, even if her statement satisfied *Connick*'s public concern test, the government's interest in preventing such statements outweighed her First Amendment interests in making the statement.[66] They contended that law enforcement has a strong interest in preventing any of their employees from making violent comments like McPherson's without having to show actual disruption or that the statement indicates that the employee is unsuitable to perform her duties.[67] The dissenters argued that the statement did in fact pose a risk of undermining the

61. *Id.*

62. *Id.* at 394.

63. *Id.* at 395 (Scalia, J., dissenting) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978)).

64. *Id.* at 396.

65. *Id.* at 397–98.

66. *Id.* at 399.

67. *Id.*

public's confidence in the constable's office. Although she was a clerical worker, she had contact with the public when she answered the office telephone.[68] Furthermore, the dissent took issue with the majority's suggestion that the status of an employee should play an important role in determining the government's interest in restricting expression. Instead, they argued that "[n]onpolicymaking employees . . . can hurt working relationships and undermine public confidence in an organization every bit as much as policymaking employees."[69] Although the dissenters appeared to give employers great leeway to discipline any employee, regardless of status, for his or her non-work-related comments made in private, it is worth noting that the dissenters repeatedly emphasized that the employee made her comment while on the job.[70]

### *C. The Court's Off-Duty/Non-Work-Related Cases:* NTEU *and* Roe v. San Diego

The Court's cases leave unclear what sort of First Amendment protection attaches to expressive activities of off-duty public employees. Specifically, it is unclear whether all such speech must involve a matter of public concern to receive any First Amendment protection at all and whether the degree to which the expression is related to work affects the strength of any such protection.

In *United States v. National Treasury Employees Union* ("*NTEU*"), the Court struck down a federal law banning all government employees from receiving honoraria for individual lectures, speeches, or articles outside of work, even when their off-duty expression was not related to work in any way.[71] Although the class action was a facial challenge, evidence presented to the district court revealed that some public employees had received compensation for articles on Russian history and radio and television reviews of dance performances.[72] The Court purported to apply the *Connick/Pickering* framework in analyzing the constitutionality of the broad honoraria ban, but its approach to the public concern question was quite distinct compared to its analysis of the issue in its

68. *Id.* at 400.
69. *Id.*
70. *See id.* at 401 (mentioning "on the job" three times).
71. 513 U.S. 454, 457 (1995).
72. *Id.* at 461.

prior cases. The Court concluded that government employees' expressive activities subject to the ban fell "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace."[73] To justify its categorization of the infinite subjects of employees' off-duty speech as matters of public concern, the Court explained that the activities subject to the honoraria ban "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."[74] Embracing the employee/citizen dichotomy that pervades the Court's cases in this area, the Court added that these expressive activities are entitled to presumptive First Amendment protection because the employees "seek compensation for their expressive activities in their capacity as citizens, not as Government employees."[75] Restrictions on their ability to be paid to speak threatened to chill their expression, thereby undermining not only their right to speak but also the public's right to hear what they have to say.[76]

After mentioning that the speech at issue involved matters of public concern, the Court applied the *Pickering* balancing test and concluded that the government's interests did not outweigh the employees' free speech interests.[77] The broad sweep of the honoraria ban posed a significant restriction on both the right of employees to speak and on right of the public to hear what they have to say, but the government had failed to persuade the Court that its interest in efficiency and the appearance of impropriety justified a sweeping ban on the receipt of compensation by the "rank and file" of federal employees.[78] Given that the ban applied to all compensation, and not just to that received for expressive activities with a nexus to the workplace activities, the Court held that the ban was not sufficiently tailored to serve the government's interests.[79] The three dissenting Justices, lead by Chief Justice Rehnquist, argued that the majority failed to give sufficient deference to Congress's "reasonable"

73. *Id.* at 466.
74. *Id.*
75. *Id.* at 465.
76. *Id.* at 470.
77. *Id.*
78. *Id.* at 468–72.
79. *Id.* at 473–77.

determination that a general ban on honoraria was appropriate to avoid the impropriety, and the appearance of impropriety, that might be caused by government employees' receiving compensation for expression outside of work.[80]

The procedural posture of *NTEU* makes it difficult to determine with certainty what standard applies for off-duty employee speech. *NTEU* did not involve the application of the ban to any expression in particular, but instead was a broad facial challenge to the law. The Court suggested a significantly broader definition of what constitutes a matter of public concern, but it did so without an explicit acknowledgement of what it was doing. Instead, the Court seemed put off that the federal government would overreach to limit the liberty of its employees when they were not at work.

In a more recent case, *City of San Diego v. Roe*,[81] the Court missed an opportunity to offer a coherent First Amendment analysis of the protection afforded off-duty expression that does not clearly involve a matter of public concern. In this decision, which was decided per curiam without benefit of briefing or oral argument, the Court upheld the dismissal of a San Diego police officer "Roe" who created sexually explicit videos of himself stripping off a generic police officer uniform and masturbating.[82] Roe posted these videos for sale on eBay under the code name "Code3stud@aol.com." He also sold clothing and police equipment, including official uniforms of the San Diego Police Department, under the same code name.[83] The officer's supervisor discovered the videos after he came across the official police uniforms for sale. He ran a search on eBay for other items "Code3stud@aol.com" was selling, found listings for the videos, and recognized Roe's face.[84] The supervisor shared this information with the chain of command. When confronted, Roe did not deny selling the police equipment and sexually explicit videos.[85] The police claimed that Roe violated several SDPD policies, including conduct unbecoming of an officer, immoral conduct, and outside employment. They ordered him to stop selling sexually explicit videos, but Roe refused and was charged with the additional

80. *Id*. at 492 (Rehnquist, C.J., dissenting).
81. 543 U.S. 77 (2004) (per curiam).
82. *Id*. at 78.
83. *Id*.
84. *Id*.
85. *Id*. at 78–79.

violation of failing to following orders. Roe was dismissed from the police force.[86] There was no evidence that anyone other than Roe's supervisors and the other officers involved in the investigation knew about Roe's activities.[87]

The Supreme Court unanimously rejected Roe's First Amendment claim, but, as one commentator has noted, the Court's analysis was "deeply unsatisfying."[88] The Court first noted that two tests had developed for evaluating a public employee's free speech claims. Under *Pickering* and *Connick*, a public employee has the right to comment on matters of public concern related to his or her employment subject to a balancing test of competing interests.[89] Under *NTEU*, government employees also have a right to engage in expressive activities "on their own time on topics unrelated to their employment," absent some government interest in restricting those activities that is "'far stronger than mere speculation.'"[90] The Court concluded that Roe's claim could not survive either test.[91]

The Court first distinguished *NTEU*, upon which the Ninth Circuit had relied heavily in ruling in favor of Roe.[92] The Ninth Circuit had held that Roe's expressive activities were protected because they did not involve an internal workplace grievance, they occurred while he was off-duty, and they were unrelated to his employment.[93] The Supreme Court disagreed, holding that although the videos were not related to Roe's workplace in that they did not "comment on the workings or functioning" of his police department, they were in fact related to his employment because he "took deliberate steps to link his videos and other wares to his police work."[94] The Court noted that Roe had deliberately linked his expression to his employment by wearing a uniform, by referencing law enforcement on his Web site, by describing himself as "in the field of law enforcement," and by creating a "debased parody of an

86. *Id*. at 79.

87. Roe v. City of San Diego, 356 F.3d 1108, 1111 (9th Cir.), *rev'd per curiam*, 543 U.S. 77 (2004).

88. Rosenthal, *supra* note 11, at 64.

89. *Roe*, 543 U.S. at 80.

90. *Id*. (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995)).

91. *Id*.

92. *Id*.

93. *Id*. at 79.

94. *Id*. at 81.

officer performing indecent acts while in the course of official duties."[95] The Court did not indicate that Roe's activities undermined the police force's confidence in his ability to perform his professional duties, but rather that these activities "brought the mission of the employer and the professionalism of its officers into serious disrepute."[96]

Although in *NTEU* the Court applied both *Connick* and *Pickering*, the Court in *Roe* did not, perhaps indicating that neither inquiry was required for speech in the off-duty/non-work-related category. At least one commentator has suggested that the Court must have concluded that off-duty, non-work-related expressive activities are entitled to almost the same robust constitutional protection that citizens at large would enjoy.[97] Indeed, this view makes some sense in light of the Court's description of the *NTEU* case as stemming from a separate "line of cases" from *Pickering* and *Connick*.[98] This may be what the Court intended to hold, but this approach is not consistent with *NTEU* itself, which applied both *Connick* and *Pickering* to off-duty, non-work-related expression. In addition, lower courts have not interpreted *Roe* this way.[99] It is hard to know what the Court meant to do in this unusually poorly reasoned opinion.

Furthermore, even if the Court did intend to hold that off-duty, non-work-related expression enjoys almost full constitutional protection, the Court defined "work-related" too broadly to do most plaintiffs any good.[100] The Court's conclusion in *Roe* that the expressive activities at issue were work-related rested primarily on concerns that they were detrimental to the SDPD's mission. Indeed, it is worth noting that the City of San Diego had not argued in the

95. *Id.*

96. *Id.*

97. *See* Estlund, *Harmonizing Work and Citizenship*, *supra* note 11, at 132.

98. *Roe*, 543 U.S. at 80.

99. *See*, *e.g.*, Dible v. City of Chandler, 515 F.3d 918, 925–29 (9th Cir. 2008) (explaining that if the speech is work-related, then the employee must satisfy both *Connick* and *Pickering*; if the speech is not work-related, the employee must still prevail under the *Pickering* balancing test, but that *Roe* does not make clear whether the employee must show that his expressive activities are matters of public concern); Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250 (6th Cir. 2006) (applying *Connick* and *Pickering* to off-duty, non-work-related expression; the court virtually ignored *Roe* and focused on the mode of analysis in *NTEU*); Navab-Safavi v. Broad. Bd. of Governors, 650 F. Supp. 2d 40, 55–62 (D.D.C. 2009) (applying the same analysis as *Scarbrough*).

100. *See* Estlund, *Harmonizing Work and Citizenship*, *supra* note 11, at 133.

lower courts that Roe's expression was work related,[101] and, the Supreme Court's holding to the contrary, it is not obvious how it was. These videos certainly did not comment directly on police activities. Although Roe's expressive activities were not in private, they were done in practical anonymity. He was not wearing his San Diego police force uniform, and he did not identify himself as a member of the San Diego police force. The only reason his supervisors discovered that he was engaging in this behavior was by searching for other items for sale by a person offering SDPD police officer uniforms.

After concluding that Roe's case fell outside of the more robust speech protections offered under *NTEU*, the Court turned to the *Connick/Pickering* framework.[102] The Court concluded that Roe's expressive activities did not satisfy *Connick*'s threshold public concern requirement. The Court explained that to satisfy the public concern requirement, the expression must involve "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."[103] The Court took this definition from two of its prior cases involving the common law right of privacy, *Cox Broadcasting Corp. v. Cohn* and *Time, Inc. v. Hill*.[104] The Court said that it was "not a close case" under any conception of the definition of public concern because it offered nothing of value to persons interested in evaluating the effectiveness of SDPD's operations.[105] The Court also said that Roe's activities were nothing like the private expression at issue in *Rankin* because Roe's expression "was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image."[106]

101. Roe v. City of San Diego, 356 F.3d 1108, 1112 n.4 (9th Cir. 2004) ("[T]he defendants have not argued that Roe's speech is in any way related to his employment with the San Diego Police Department or the City, nor do they argue that offering to sell a uniform formerly used by the SDPD somehow linked Roe's videos to the Department.").

102. *City of San Diego*, 543 U.S. at 81–82.

103. *Id.* at 83–84.

104. *Id.* at 83.

105. *Id.* at 84.

106. *Id.*

### *D.* Garcetti v. Ceballos *and the Invocation of the Government Speech Doctrine*

The Court's most recent decision in this area erected yet another barrier in the path of First Amendment protection for the speech of government employees. In *Garcetti v. Ceballos*, deputy district attorney Richard Ceballos alleged he was subjected to a series of retaliatory actions after he wrote a memo questioning the accuracy of an affidavit submitted in support of a search warrant. Writing for the Court, Justice Kennedy held that rather than asking initially whether the expression at issue involved a matter of public concern, the inquiry should be whether Ceballos was speaking "as a citizen" or "as an employee."[107] Employees speaking as "citizens" about matters of public concern must be subject to "only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[108] Speech made by an employee acting pursuant to his "official duties," however, is categorically excluded from First Amendment protection. Because there was no dispute that Ceballos wrote the memo pursuant to his job duties, Justice Kennedy concluded that the First Amendment offered him no protection.[109]

Although the Court had referred to the concept of public employees speaking in their capacity "as citizens" and "as employees" in its prior cases, *Garcetti* was the first time that the Court held that this categorization must take place at the start of any First Amendment inquiry. Before *Garcetti*, the Court appeared to regard any employee speech on a matter of public concern as speech made as a citizen, even if made at work, and that such speech was entitled to some constitutional protection. After *Garcetti*, if an employee's speech is made pursuant to his official duties, he is no longer acting as a citizen entitled to some modicum of First Amendment protection. Instead, that person is speaking entirely as an employee and loses all constitutional protection for his speech. *Garcetti*'s stripping of constitutional protection for any speech made in the scope of the employee's duties marks a significant retreat in the free speech rights for government employees and adds yet another obstacle to an employee's First Amendment claim.

107. Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006).
108. *Id.* at 419.
109. *Id.* at 421–25.

In reaching this holding, the Court reiterated as it had in prior cases that a citizen who becomes a public employee "by necessity must accept certain limitations on his or her freedom" because government employers must be afforded some leeway to control their employees' speech in order to provide services efficiently.[110] In addition, the expression of trusted public officials may "contravene governmental policies or impair the proper performance of governmental functions."[111] Although Kennedy, writing for the majority, recognized the valuable contributions government employees can make to the public debate as well as the public's right to receive these contributions, he concluded that the government's interest as employer trumped these interests.[112] He contended that whistleblower protection laws and labor codes would sufficiently protect employees who expose unlawful and otherwise inappropriate actions.[113]

Perhaps the most curious part of this opinion is that the Court invoked the government speech doctrine to justify its holding. Kennedy wrote 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."[114] Kennedy included a "cf" citation to *Rosenberger v. Rector & Visitors of University of Virginia*, which interpreted the Court's decision in *Rust v. Sullivan* as meaning that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[115]

In dissent, Justice Souter criticized the majority's invocation of the government speech doctrine in the context of this case.[116] Souter argued that while the government is entitled to control the speech of employees who are hired to promote a particular message, an assistant district attorney is not such an employee. He was not hired

110. *Id*. at 418, 421–25.

111. *Id*. at 419.

112. *Id*. at 419–23.

113. *Id*. at 425–26.

114. *Id*. at 421–22 (including a "cf" citation to *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 833 (1995)).

115. *Rosenberger*, 515 U.S. at 833.

116. *Garcetti*, 547 U.S. at 436–39 (Souter, J., dissenting).

to promote any particular message aside from "the relatively abstract point of favoring respect for law and its evenhanded enforcement."[117] Souter conceded that the government had an interest in ensuring that Ceballos engaged in evenhanded and lawful prosecutions, that he not needlessly create tension within the workplace, and that he not make inaccurate and misleading statements in the course of his work, but the presence of these government interests do not render everything Ceballos says in the course of his work "government speech."[118]

Justice Souter, whose dissent was joined by Justices Stevens and Ginsburg, also challenged the majority's decision to draw a "strange line" between employee-speech and citizen-speech and argued that the balancing of individual and public interests could be taken into account through the *Pickering* balancing test.[119] Souter suggested that one factor that should be taken into the balance was that employee expression have a "minimum heft" to outweigh the government-employers' legitimate authority to control it.[120] But he argued that often the value of government-employee speech will be even greater when they are speaking pursuant to their official duties because they are more likely to know what they are talking about.[121] This sort of expression may also be particularly important to the employees, who may, Souter contended, "share the poet's 'object . . . to unite [m]y avocation and my vocation.'"[122] Souter also took issue with the majority's reliance on whistleblower laws to protect reporting on wrongdoing by government actors because the protections these laws afford vary greatly among local, state, and federal jurisdictions.[123]

117. *Id.* at 437.

118. *Id.* at 438.

119. *Id.* at 434.

120. *Id.* at 434–35.

121. *Id.* at 430–31.

122. *Id.* at 432 (quoting Robert Frost, *Two Tramps in Mud Time*, *in* COLLECTED POEMS, PROSE, & PLAYS 251, 252 (Richard Poirier & Mark Richardson eds., 1995)).

123. *Id.* at 439–41. Justice Breyer filed a dissenting opinion in which he took a middle road between Justice Kennedy's and Justice Souter's approaches. Breyer argued that in most cases employee speech made in the course of employment is not entitled to First Amendment protection because the government has legitimate need to control such speech. However, Justice Breyer contended that the *Pickering* test should apply in cases like this where an employee faces professional and constitutional requirements obligating him to speak. *Id.* at 444–49 (Breyer, J., dissenting).

Although *Garcetti* involved employee expression during the course of his work duties, the broader theory of *Garcetti*—that government employees have no First Amendment rights when they speak on behalf of their employers—has potential application in the off-duty context, at least when the public might perceive the employee as representing the government's views.

## III. CONFUSION IN THE LOWER COURTS

The lower courts disagree about whether and how to apply the public concern inquiry to off-duty expressive activities as well as how to conduct the *Pickering* balancing test. Given the mixed messages the Supreme Court has sent on the public concern requirement, this confusion is not surprising. Since *Connick*, many courts and commentators have questioned the wisdom of having such a threshold requirement.[124] This test has proven particularly difficult to apply in cases that are not directly related to the workplace. Lower courts have also struggled to apply the *Pickering* balancing test to off-duty speech and to figure how the balancing of interests should be done. All of these unanswered questions leave the Court's jurisprudence in this area a huge mess.

### *A. Criticisms of a Public Concern Requirement*

*Connick* has been the target of extensive scholarly criticism. *Connick*'s assertion that speech on public issues is at the heart of the First Amendment was not a new idea. The Court has frequently embraced the importance of political debate to democratic self-governance in expanding the protections of the First Amendment in a variety of contexts, from incitement to libel to commercial speech to labor picketing to the creation of the public forum doctrine.[125]

124. *See*, *e.g.*, Allred, *supra* note 11 (advocating for a rejection of *Connick*'s threshold inquiry in favor of *Pickering* balancing in all cases); Massaro, *supra* note 11 (arguing for an alternative to *Connick* that instead asks as a threshold matter whether the speech is "permissible street corner discourse" before proceeding to *Pickering* balancing). *But see* R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987) (embracing *Connick*'s threshold inquiry but suggesting that the inquiry be refined to consider whether the speaker could have "generalized" his speech for a broader public discussion).

125. For a more extensive discussion of how the Court has reshaped First Amendment to protect speech on public issues, see Estlund, *Speech on Matters of Public Concern*, *supra* note 11, at 13–20; Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1 (1990).

*Connick* is unusual, however, because it is rare for the Court to embrace the inverse principle that speech that does *not* involve a matter of public concern falls outside of the First Amendment. The Court used a public concern inquiry to strip First Amendment protection from speech, rather than to extend protection to it.

The adoption of a public concern test in the context of government employees was the first time a majority of the Court explicitly stratified speech related to public and private matters.[126] This approach is inconsistent with the Court's statements in other cases that its decisions "have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a non-exhaustive list of labels—is not entitled to full First Amendment protection."[127] In *Connick*, the Court focused exclusively on only one instrumental theory of the First Amendment—the promotion of political debate—and failed to consider the other values the freedom of speech serves.

*NTEU* and *Roe* fail to answer conclusively whether courts must make a public concern inquiry in every government employee First Amendment case and if so, what that inquiry looks like. In *NTEU*, the Court analyzed the honoraria ban only as applied to matters of public concern. Furthermore, in holding that lectures on Russian history and radio and television reviews of dance performances constituted matters of public concern, the Court applied a rather broad conception of matters of public concern, at least as compared to the approach the Court took in *Connick* and *Rankin*. Indeed, the Court did not seem to care about the actual content of the employees' speech but instead appeared particularly concerned that the honoraria ban applied to speech that did not take place at work and had no connection to work.[128]

In *Roe*, the Court performed two alternative analyses, only one of which involved the public concern inquiry. Had the Court believed that public concern was a threshold requirement in all cases, there would have been no need for the Court to continue on to

126. For a more extensive discussion of this point, see Estlund, *Speech on Matters of Public Concern*, *supra* note 11, at 20–23.

127. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

128. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995) (noting that the employees' expressive activities "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment").

examine the SDPD's interest in restricting the randy officer's expression once it concluded it was not a matter of public concern.

The Court made things even more confusing when it applied the public concern standard to Roe's pornographic activities on eBay. Rather than stopping after noting that Roe's activities "did nothing to inform the public about any aspect of the SDPD's functioning or operation," the Court went on to remark that Roe's expression "was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image," and that it also "was detrimental to the mission and functions of the employer."[129] The only one of these factors that has traditionally been considered part of a public concern inquiry is whether the speech was made privately or to the general public, and the Court's prior cases have indicated that speech directed to the general public is *more* likely to be labeled speech as a matter of public concern.[130] That his expression "exploited his employer's image" and undermined the "mission and functions" of the police seem to have nothing at all to do with the public concern inquiry; instead, they are the sort of factors a court might take into account when conducting the *Pickering* balancing test.

The narrow view of public concern that the Court embraced in *Connick* and *Roe* was not only inconsistent with its approach in *Rankin* and *NTEU*, but it was also inconsistent with the Court's approach to this same inquiry in privacy and defamation contexts. The Court's privacy cases have taken a much broader approach to the public concern question.[131] Most notably, in *Time, Inc. v. Hill*, the Court invoked a public concern requirement to strike down a false light claim based on a fictionalized depiction of a family who suffered a home invasion.[132] The Court explained that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to

129. City of San Diego v. Roe, 543 U.S. 77, 84 (2004).

130. The officer's extracurricular activities were directed to the public on an eBay site, and although we do not know the numbers of people who were interested in his particular pornographic offerings, we do know that pornography in the United States is extremely (if not secretly) popular.

131. *See* Connick v. Myers, 461 U.S. 138, 165 n.5 (1983) (Brennan, J., dissenting) (discussing that the majority's approach to the public concern inquiry in *Connick* was inconsistent with the Court's evaluation of the same issue in its privacy cases).

132. Time, Inc. v. Hill, 385 U.S. 374 (1967).

healthy government."[133] Instead, the "'[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'"[134] Furthermore, although the magazine article at issue in *Hill* functioned more to entertain than to inform, the Court concluded that "'[t]he line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].'"[135] It is difficult to square the conclusion that a fictionalized, entertaining article about a house invasion is a matter of public concern while an employee's criticisms of her government employer are (usually) not. Instead, these cases can make sense only if the government's interest in restricting its employee's speech is taken into account in making the public concern determination, but this is not what the Court professes to be doing.

Subsequent cases in the employment context indicate that the Court continues to be deeply divided on how to interpret and apply *Connick*'s public concern requirement. In *Rankin*, for example, only a slim majority concluded that the employee's remark about the assassination attempt on President Reagan was a matter of public concern; the four dissenting Justices concluded that it was not because this sort of hyperbolic comment was too close to the margins of unprotected expression.[136] For the majority, it was sufficient that the underlying subject matter of her comment involved a matter of public concern, even if the specific comment did not contribute much of value to the public discussion of that issue and was not directed to the public.[137] In *Gavhin*, the Court held that private communications—in that case, allegations of discriminatory conduct—can be matters of public concern because it is the content of those communications that matter, not the audience. In *NTEU*, the Court offered yet another approach to the public concern question. This approach focuses the inquiry on the location, time,

133. *Id*. at 388.

134. *Id*. (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)) (internal quotation marks omitted).

135. *Id*. (quoting Winters v. New York, 333 U.S. 507, 510 (1948)) (internal quotation marks omitted).

136. *See supra* note 65 and accompanying text; Rankin v. McPherson, 483 U.S. 378; *id*. at 395–96 (Scalia, J., dissenting).

137. *See Rankin*, 483 U.S. at 386–87.

and audience of the speech rather than its precise content. The Court held that speech that is addressed to a public audience, made outside of the workplace, and involves content "largely unrelated to their Government employment" is speech on a matter of public concern.[138] This is a significantly more expansive definition of matters of public concern than the Court offered in *Connick*.

For most people, their personal experiences—work-related or not—affect their views on political and social issues, and stories they hear about others' personal experiences can have a similar effect. (This no doubt accounts for the common political strategy of finding "real people" to tell their story to the American public in order to generate support for a particular measure or candidate.) *Connick*'s limited view of what constitutes a matter of public concern inappropriately discounts these personal experiences.[139] In contrast, the Court determined that the off-hand comment at issue in *Rankin* was a matter of public concern simply because it related to a political figure, even though it likely would add much less to the public debate than the personnel grievance deemed outside the public debate in *Connick*. This is not to say that the Court reached the wrong result in *Rankin*, but simply that its reasoning was less than satisfying.

In *Roe*, the Court further muddied the waters on what exactly is meant by a matter of public concern, particularly when applied to off-duty expressive activities. The Court concluded that "under any view of the public concern test," the officer's activities failed it.[140] There, the Court said that a matter of public concern is one 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."[141] This is a very narrow view of what constitutes a matter of public concern. Indeed, the Court noted that even the dissenters in *Connick* would have applied a test that considered whether the speech would help persons interested in developing "'informed opinions about the manner in which . . . an elected official charged with managing a vital governmental agency,

138. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995).

139. *See* Estlund, *Speech on Matters of Public Concern*, *supra* note 11, at 37–38.

140. City of San Diego v. Roe, 543 U.S. 77, 84 (2004).

141. *Id.* at 83–84.

discharges his responsibilities,'" without a requirement that the expression contribute to a public debate that is already ongoing.[142]

This dispute highlights another aspect of a public concern inquiry that is uncertain: whether it is a normative (what *should* be a matter of public concern) or descriptive one (what *is* a matter of public concern).[143] The latter approach threatens to greatly undermine public employee speech when the employees have inside information that should be a matter of public concern. However, it is often the case that before they speak there is not an ongoing public discussion to which the public employee is contributing. This is frequently the case when government employees serve as whistleblowers. In addition, a test that considers the actual "popularity" of a particular subject may result in the overprotection of speech that is not particularly valuable—such as most celebrity gossip—and penalizes less popular speech, even if it does involve a meaningful topic.

In determining whether speech involves a matter of public concern, it is unclear how large this audience must be to be "public" and how we figure out whether the speech at issue is of sufficient "concern" to them. In *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, the Court concluded that a credit report indicating that a company was bankrupt was not a matter of public concern in part because only five business subscribers received it.[144] As Justice Brennan argued in his dissent, however, the very same content clearly would have been a matter of public concern had it appeared in a newspaper or magazine; the fact that the credit report had a limited circulation and was published by a non-media entity for commercial gain should not change the analysis. After all, "[f]ew published statements are of universal interest, and few publications are distributed without charge."[145] In the digital age, the public concern inquiry has become even more difficult as infinite numbers of communities exist. What is a matter of great concern to one may

142. *See id.* at 84 (quoting Connick v. Myers, 461 U.S. 138, 163 (1983) (Brennan, J., dissenting)) (internal quotation marks omitted).

143. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 670, 672 (1990).

144. 472 U.S. 749 (1985) (Powell, J.) (plurality opinion); *id.* at 763 (Burger, C.J., concurring in the judgment) (agreeing that credit report was not matter of public concern); *id.* at 765 (White, J., concurring in the judgment) (same).

145. *Id.* at 783 n.6 (Brennan, J., dissenting).

be of no concern to another. Much of the content that does attract a broad swath of the public is merely entertaining (think YouTube videos that go viral). The size of the audience is not necessarily a useful measurement of what constitutes a matter of public concern.

Because there is no precise definition of what constitutes a matter of public concern and what does not, the threshold public concern requirement makes it hard for both public employees and their employers to know what speech is constitutionally protected. This vague standard can result in the chilling of otherwise protected speech. It also can lead to inconsistent rulings. Employees with lawyers who can spin their private expressive activities as part of a larger political debate will be able to pass the *Connick* threshold, while those who are not skilled at creating that sort of narrative will find their claims dead on arrival.[146]

### *B. Disagreement Among the Lower Courts*

The doctrinal confusion surrounding the public concern inquiry outlined above has played itself out in the lower courts, which have struggled to determine whether it is necessary to apply the public concern test in all cases involving off-duty expression, and if so, what the alternative approach to such cases should be.[147] Although many courts routinely apply the public concern test in all their government employee cases,[148] others have recognized that applying the test does not always make sense. To deal with this problem, some courts faced

146. Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 555–56 (1998).

147. Of course in many cases it is not difficult to conclude that an employee's off-duty speech activities involve a matter of public concern. For example, in one recent decision, a federal district court concluded that it was "beyond dispute" that a federal employee's music video criticizing United States involvement in Iraq involved a matter of public concern. *See* Navab-Safavi v. Broad. Bd. of Governors, 650 F. Supp. 2d 40, 55 (D.D.C. 2009).

148. *See*, *e.g.*, Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 256 (6th Cir. 2006) (applying public concern inquiry in case involving former superintendent's offer to speak at a convention sponsored by a church with a predominantly gay congregation); Tindle v. Caudell, 56 F.3d 966, 970–71 (8th Cir. 1995) (applying a threshold public concern test to a case involving an officer who wore a racially offensive costume to a Halloween party widely attended by other members of the force); Karins v. City of Atl. City, 706 A.2d 706, 715–16 (N.J. 1998) (holding that a racial epithet uttered by an off-duty firefighter during a police stop "was not remotely related to any matter of public concern"); Hawkins v. Dep't of Pub. Safety & Corr. Servs., 602 A.2d 712, 717–18 (1992) (holding that off-duty prison guard's anti-Semetic outburst directed to a bank teller was not entitled to any First Amendment protection because it did not implicate a matter of public concern).

with cases that involve off-duty speech have refused to apply a public concern test,[149] others have embraced a broad conception of public concern,[150] and many have simply chosen to dodge this difficult issue altogether by concluding that the plaintiffs would lose anyway even if they could satisfy this inquiry.[151] In addition, courts have struggled to determine whether the *Pickering* balancing test should apply to off-duty speech and how to apply *Roe*'s "work-related" inquiry.

*1. Confusion with the public concern inquiry*

The conceptual difficulties of applying the public concern test, as framed in *Connick*, to non-work-related, off-duty speech has lead some courts to hold that this threshold inquiry does not apply at all in such cases.[152] The leading case to take this approach is *Flanagan v. Munger* from the U.S. Court of Appeals for the Tenth Circuit.[153] *Flanagan* involved a small group of high-ranking police officers who operated a video rental store. Sexually explicit adult films comprised less than four percent of the store's inventory. Store policy permitted only adults over twenty-one to rent these films, and none of the films was obscene under federal, state, or local law or in any other way contained unlawful content.[154] The police chief learned that the store contained some pornographic films and conducted an investigation; the officers were not reprimanded but complied with the chief's suggestion that they remove the pornographic inventory from the

149. *See*, *e.g.*, Eberhardt v. O'Malley, 17 F.3d 1023 (7th Cir. 1994); Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989).

150. *See*, *e.g.*, Berger v. Battaglia, 779 F.2d 992, 997 (4th Cir. 1985).

151. These courts tend to hold that it is not necessary to determine whether the speech involved a matter of public concern because even if it did, the government would prevail under the *Pickering* balancing test. *See*, *e.g.*, Dible v. City of Chandler, 515 F.3d 918, 927–29 (9th Cir. 2008) (holding it was not necessary to determine whether officer's sexually explicit videos involved matter of public concern because the City of Chandler would prevail under *Pickering* regardless); Locurto v. Giuliani, 447 F.3d 159, 175 (2d Cir. 2006) (assuming without deciding that a racially offensive public float related to a matter of public concern); Melzer v. Bd. of Educ., 336 F.3d 185, 196 (2d Cir. 2003) (assuming without deciding that teacher's membership in NAMBLA and advocacy for change in laws regarding sexual relationships with minors satisfied public concern requirement); Pappas v. Giuliani, 290 F.3d 143, 146 (2d Cir. 2002) (assuming without deciding that racist materials constituted speech on a matter of public concern).

152. *Flanagan*, 890 F.2d at 1564 ("[T]he *Connick* public concern test is intended to weed out speech by an employee speaking *as* an employee upon matters of only personal interest."); Pereira v. Commonwealth, 733 N.E.2d 112, 120–21 (Mass. 2000).

153. *Flanagan*, 890 F.2d at 1562–63.

154. *Id.* at 1560 & n.2.

store. After the local press ran some stories about the investigation, the chief reprimanded the officers, and the officers filed suit claiming that their First Amendment rights had been violated.[155]

In reviewing the district court's decision to grant summary judgment to the defendants, the Tenth Circuit said that in a public employee case, it would normally ask first whether the expression involved a matter of public concern.[156] The court noted that the case before it differed significantly from the typical *Pickering/Connick* fact pattern because it did not involve speech about work. Although the Court applied the public concern test to speech that was unrelated to work in *Rankin*, in that case the challenged comment was made at the workplace.[157] The court held that the public concern test does not apply in cases involving nonverbal expression that is neither at work nor about work.[158] Driving the court's conclusion was the difficulty of applying the test in this particular case, which involved the ownership of a video store. The court noted that it was hard to say what, if anything, the officers were saying by offering pornographic videos for rent.[159] Even if it were possible to conclude that the officers were making a statement about the desirability of such films, the court held that it would be hard to imagine how this implicit statement could contribute to the public debate on that issue.[160] Given the difficulties of determining whether the police officers' activity involved a matter of public concern, the court decided instead to adopt a threshold test that asks merely whether the expressive activity at issue constituted "protected expression."[161]

The Seventh Circuit has taken a similar approach. In *Eberhardt v. O'Malley*, an assistant state's attorney wrote "a fictional novel involving fictitious prosecutors and other persons in the criminal justice system."[162] The district court dismissed the plaintiff's First Amendment claim because, in the court's view, it did not involve a matter of public concern by failing to inform the public about possible wrongdoing in the State's Attorney's Office or any other

155. *Id.* at 1560–61.
156. *Id.* at 1562.
157. *Id.*
158. *Id.*
159. *Id.* at 1563.
160. *Id.*
161. *Id.* at 1564.
162. Eberhardt v. O'Malley, 17 F.3d 1023, 1024 (7th Cir. 1994).

matter of public concern.[163] The Seventh Circuit reversed.[164] Judge Posner, writing for the panel, criticized the lower court's decision in two different ways. Posner first suggested that the lower court applied the public concern test too narrowly because a fictional novel could in fact meaningfully contribute to the public debate by offering insights into the workings of the criminal justice system. He noted a long history of "sociological and muckraking novels," many of which were written by employees on the inside.[165]

More fundamentally, Judge Posner criticized the district court for failing to recognize that "[t]he First Amendment protects entertainment as well as treatises on politics and public administration."[166] As a result, the government employer could not discipline the employee for his novel unless it had a reason.[167] Posner argued that in *Connick* the Court simply intended "'to distinguish grievances of an entirely personal character from statements of broader interest concerning one's job, rather than to fix the boundaries of the First Amendment.'"[168] Posner proposed taking the value of the speech at issue into account in the *Pickering* balancing process, where "[t]he less serious, portentous, political, significant the genre of expression, the less imposing the justification that the government must put forth in order to be permitted to suppress the expression."[169] The public concern test, Posner argued, is really just shorthand for distinguishing between speech that is socially valuable and speech that is not.[170] Judge Posner did not consider *NTEU*'s approach to the public concern inquiry because the Court had not yet decided that case.

Some courts have found it particularly difficult to apply *Connick*'s public concern test in cases involving the right of association.[171] As the Second Circuit has noted, applying the test in

163. *Id.* at 1025.

164. *Id.* at 1029.

165. *Id.* at 1026.

166. *Id.*

167. *Id.*

168. *Id.* (quoting Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990) (internal quotation marks omitted)).

169. *Id.*

170. *Id.* at 1027.

171. *See, e.g.*, Hatcher v. Bd. of Pub. Educ., 809 F.2d 1546, 1558 (11th Cir. 1987) (holding that *Connick* does not apply to right of association claims). *But see* Hudson v. Craven, 403 F.3d 691, 698 (9th Cir. 2005) (applying *Connick* in case involving participation in a

association cases is "awkward" given the Court's instructions to consider the content, context, and form of the expression at issue when conducting a public concern inquiry because associations "may deliver many different statements at many different times and places and under many different circumstances."[172]

Other courts that have recognized the theoretical and practical difficulties of applying *Connick*'s public concern test in off-duty cases have chosen to embrace a broad conception of what the public concern standard requires rather than to discard the test entirely. In *Berger v. Battaglia*, for example, the Fourth Circuit applied the public concern test in a case involving a police officer's popular off-duty public music performances at nightclubs and other venues, including his impersonation of the late singer Al Jolson in blackface.[173] The court concluded that these performances "constituted speech upon a matter of obvious public interest" to the large numbers of persons who paid to hear him perform.[174] The court concluded that the fact that his speech was merely entertainment "presumably neutral as to any political or even social views" did not remove it from this category.[175]

More recently, the Sixth Circuit applied the public concern test in a case where a superintendent candidate alleged he was not selected for the position due to the city's reaction to an (inaccurate) newspaper article reporting that he had accepted an invitation to speak at a convention sponsored by a church with a predominantly gay congregation.[176] Because the superintendent had not in fact accepted the invitation, it would have been impossible for the circuit court to consider the actual content of that speech to determine whether it involved a matter of public concern. The court dodged that problem by focusing on *NTEU*'s broader approach to the public concern inquiry. Because the speech would not have occurred during work hours or at the workplace, would have been presented to a

WTO protest activity, a hybrid speech/association claim, because it was easy to conclude the expressive activities at issue involved a matter of public concern).

172. Melzer v. Bd. of Educ., 336 F.3d 185, 196 (2d Cir. 2003). Although the Second Circuit has recently applied the public concern test in an association case, Piscottano v. Murphy, 511 F.3d 247, 274 (2d Cir. 2007), an earlier panel decision suggested that it would be inappropriate to do so. *Melzer*, 336 F.3d at 196.

173. *See* Berger v. Battaglia, 779 F.2d 992, 993, 997–99 (4th Cir. 1985).

174. *Id*. at 999.

175. *Id*.

176. Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 253–54 (6th Cir. 2006).

public audience, and would not have related to his employment, the court concluded his non-existent "intended speech" was a matter of public concern.[177]

*2. Applying* Roe*'s "work-relatedness" inquiry*

*Roe* suggested, though not conclusively, that if speech is outside work and is not work-related, an employee does not have to satisfy a public concern inquiry and that even the *Pickering* balancing test does not apply. Unfortunately, *Roe* undermined any extra constitutional protection it may have offered off-duty, non-work-related expression by defining "work-related" extraordinarily broadly. Prior to *Roe*, courts generally adopted a common-sense interpretation of when speech was work related, limiting it to speech that referred to internal workplace disputes or the employee's own employment situation.[178] In contrast, *Roe* suggested that work-related expressive activities are not merely those that refer to the subject matter of plaintiff's government employment or to supervisors and co-workers but also speech that undermines the mission of the employer and reflects poorly on the employee's fitness for his profession. Not many courts have had the opportunity to apply this expansive "work-relatedness" inquiry suggested in *Roe*, but these few cases reveal some uncertainty about how to do it.

After *Roe*, the Ninth Circuit heard another case involving a policeman who was punished when it was discovered he ran a sexually explicit website. This case was arguably distinguishable from *Roe* because Officer Dible's website primarily featured his wife, and it did not invoke his police work in any way.[179] The court nevertheless concluded that Dible's involvement with the sexually explicit website was work-related because ultimately the public did learn about his connection with the website. The court also noted that "it can be seriously asked whether a police officer can ever disassociate himself from his powerful public position sufficiently to make his speech

177. *Id.* at 257–58. The circuit court also cited as apparently relevant the plaintiff's statements during a newspaper interview that he "didn't do it as a Morgan County Superintendent of Schools but as an individual and friend of the man who invited him." *Id.* at 258.

178. *See*, *e.g.*, Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112, 120 (Mass. 2000) (noting that racially offensive joke employee told at retirement dinner was not work-related because it did not involve internal office affairs or the employee's employment status).

179. Dible v. City of Chandler, 515 F.3d 918, 922–23 (9th Cir. 2008).

(and other activities) entirely unrelated to that position in the eyes of the public and his superiors," and his activities "had the same practical effect" as Roe's X-rated activities—they "'brought the mission of the employer and the professionalism of its officers into serious disrepute.'"[180]

The federal district court in *Navab-Safavi v. Broadcasting Board of Governors* took a more restrictive view of the work-relatedness inquiry in a case involving a Voice of America translator who participated in a music video criticizing the United States' invasion of Iraq.[181] The court held that the videos were unrelated to her government work because she made the videos on her own time, without using government resources, without mentioning VOA or any of its activities or employees, and without mentioning that she worked for VOA.[182] Notably, although the Court in *Roe* found it relevant that the plaintiff had used a generic police officer's uniform in his strip routines, the court in *Navab-Safavi* found that the music video was not related to the translator's work at VOA, even though the challenged music video was superficially similar to a VOA broadcast, set in a television studio featuring an anchorperson sitting behind a desk and delivering news and commentary.[183]

Although *Roe* also suggests that an employee's speech may be work related if it undermines the mission and functions of the employer, the district court ignored that expansive view of work-relatedness and instead cited *NTEU*, which held that expressive activities are not work-related when they have at most "an indirect nexus to her workplace by virtue of an 'adverse impact on the efficiency of the office in which plaintiff worked.'"[184] The court rejected the government's argument that the employee's participation in the music videos "drew her objectivity into question" because the argument was based on mere speculation, given that there was no evidence that "plaintiff ever mistranslated anything, that her translations were found to be biased, or that the audience perceived such bias in her translations."[185] The court also

180. *Id.* at 926 (quoting City of San Diego v. Roe, 543 U.S. 77, 81 (2004)).

181. 650 F. Supp. 2d 40 (D.D.C. 2009).

182. *Id.* at 55.

183. *Id.* at 59 n.7.

184. *Id.* at 57 (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465 (1995)).

185. *Id.* at 58–59.

rejected the contention that her activities "compromised VOA's journalistic integrity and credibility."[186] The court noted that no one would have associated the videos with VOA because the plaintiff "was not held out to the public as a representative of VOA, as she never appeared on-air as a VOA worker, and her name was never used on-air in association with her services."[187]

*3. Whether and how to apply* Pickering*'s balancing test*

The lower courts have also reached different conclusions about how and when to conduct the *Pickering* balancing test. Before *NTEU*, some courts questioned whether the balancing test was appropriate at all for expression outside of work. After that case, the Court has suggested that the *Pickering* test does apply in such cases, but it is hardly clear that it should.[188] Even if a balancing test is appropriate in such cases, questions remain about how to conduct it. Courts struggle to determine the "value" of speech, especially when it does not involve political speech, and how to evaluate the government employer's interests in restricting expression that is not clearly about work.

*a. Does the test apply at all?* The first question is whether the *Pickering* balancing test applies to all public employee expression that takes place outside of work. The *Pickering* balancing test was developed in a particular context to address the need to give employees the opportunity to discuss public issues while protecting the government employer's right to run an efficient and effective workplace. *Pickering* involved a public school teacher who wrote a letter to the editor about the funding decisions of the school board—her ultimate supervisor. Although Pickering's complaints did not directly involve his co-workers or immediate supervisors, his editorial letter did relate in some way to his employment, even if only tangentially. The Court established the balancing test to apply in "the enormous variety" of fact situations that might arise when it is important for an employer to have some power to discipline its employees for their expressive activities.[189] The Court mentioned

186. *Id.* at 60.
187. *Id.* at 62.
188. *See supra* III.B.1.
189. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

several possibilities, such as situations where the employee criticizes his direct supervisor or co-workers and undermines harmonious working relationships with them;[190] the employee has breached confidences when loyalty and confidentiality are essential to the job;[191] or the employee's speech impedes the proper performance of his job duties or interferes with the general operation of the employer.[192]

It is less obvious that the Court in *Pickering* meant that a balancing test should apply even when the employee's speech does not have any obvious connection to his employment. True, *Rankin* applied the balancing test to an employee's non-work-related comment about the Reagan assassination attempt, but the employee made that comment at the workplace. It might make some sense to give an employer greater authority to restrict speech at the workplace because there is a greater chance that such speech will disrupt or otherwise interfere with efficient government operations, but this rationale is less persuasive when off-duty speech is at issue. Some lower courts have recognized this possibility, but because the Court applied *Pickering* in *NTEU*, a case that involved off-duty, non-work-related speech activities, most courts simply apply *Pickering* because they feel they have no choice.[193] Bound by *NTEU*, the lower courts have held that the location and work-relatedness of the expressive activity at issue are more appropriately taken into account during the balancing process itself.[194]

*b. Applying the* Pickering *balancing test in off-duty/non-work-related cases.* In applying the *Pickering* balancing test, courts must weigh the value of the employee's speech against the government employer's interest in restricting that expression. Courts have struggled to determine how to conduct the "value" inquiry as well as what to consider cognizable government interests.

190. *Id.* at 569–70.

191. *Id.* at 570.

192. *Id.* at 572–73.

193. *See*, *e.g.*, Navab-Safavi v. Broad. Bd. of Governors, 650 F. Supp. 2d 40, 55–57 (D.D.C. 2009) (noting in case involving employee's off-duty criticisms of United States involvement in Iraq that "*Pickering* and its progeny primarily addressed government employees' criticisms of their immediate supervisors or coworkers," but going on to apply the balancing test in light of *NTEU*).

194. Locurto v. Giuliani, 447 F.3d 159, 175 (2d Cir. 2006); Melzer v. Bd. of Educ., 336 F.3d 185, 194 (2d Cir. 2003).

One issue dividing the lower courts is whether the "value" of the employee's speech should be taken into account in the *Pickering* balancing test. Rather than decide at the outset through application of *Connick*'s public concern inquiry that the speech is not valuable enough to be entitled to any First Amendment protection, several courts have used the *Pickering* balancing test to take into consideration the value of the speech when balancing the employee's interest in making the expression against the government employer's interest in suppressing it, as Judge Posner suggested in *Eberhardt*.[195] Thus, even employee speech that arguably involves a matter of public concern can be given little weight in the *Pickering* balance if that speech is not considered "serious" or "portentous."

In *Pereira v. Commonwealth*, the Supreme Judicial Court of Massachusetts took the approach Judge Posner recommended when it applied the *Pickering* balancing test to a racially offensive joke an investigator for the Department of Social Services made while attending a dinner honoring retiring public officials. Although the parties stipulated that the employee had an "unblemished" record throughout her twelve years of employment at DSS, she was fired when the press inaccurately reported that she had made this joke during her prepared remarks.[196] The court rejected the Commonwealth's argument that the joke failed the public concern test and instead considered the value of the joke as part of the *Pickering* balancing test. The court concluded that the government interests easily outweighed any interest the employee had in making the joke.[197] The court explained that the employee's "motive was not to engage in debate, raise awareness, or press a position."[198]

Some courts have held that the employee's motivation for engaging in the expressive activity at issue is relevant. As one court put it, "[t]he fundamental question is whether the employee is seeking to vindicate personal interests or bring to light a matter of political, social, or other concern to the community."[199] Thus, speech that might otherwise relate to a matter of public concern might fall out of that category if the speaker's "intent" was not to

195. Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112, 120–21 (Mass. 2000); Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994).

196. *Pereira*, 733 N.E.2d at 116.

197. *Id.* at 120–21.

198. *Id.* at 121.

199. Cahill v. O'Donnell, 75 F. Supp. 2d 264, 272 (S.D.N.Y. 1999).

reveal wrongdoing but instead just to do his job, or if his speech is also somehow wrapped up with an interest in improving his particular job situation.[200] Courts have also focused on the audience to whom the employee's speech was directed. Focusing on the audience to whom the employee communicates her dissatisfaction puts the employee in a bind. If the employee limits her speech to the workplace, courts are less likely to conclude that it involves a matter of public concern. On the other hand, if she does communicate with the outside world, she runs the risk of strengthening her employer's argument that the speech is unnecessarily disruptive to the workplace.[201]

Lower courts disagree about whether off-duty speech that involves a matter of public concern should be given more weight in the *Pickering* balance. The Second Circuit has suggested it should, holding that "[t]he more speech touches on matters of public concern, the greater the level of disruption the government must show."[202] Other courts have held that the *Pickering* test asks what the plaintiff's interest was in making the challenged expression, not in the value of that expression.[203] These courts have argued that off-duty public employee speech is entitled to the same protection given to comparable speech made by non-employees, which includes the right to "free, uncensored artistic expression—even on matters trivial, vulgar, or profane."[204]

*c. Weighing the government's interest.* In *Rankin*, the Court said that relevant government interests include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[205] The Court has held that these harms need not have actually occurred. Rather, lower courts typically follow the Court's direction to give deference to government employer determinations

200. For a discussion of this issue with case examples, see Ma, *supra* note 11, at 132–34.

201. *See* Massaro, *supra* note 11, at 23–24.

202. Melzer v. Bd. of Educ., 336 F.3d 185, 197 (2d Cir. 2003).

203. Flanagan v. Munger, 890 F.2d 1557, 1565 (10th Cir. 1989); Berger v. Battaglia, 779 F.2d 992, 999–1000 (4th Cir. 1985).

204. *Flanagan*, 890 F.2d at 1565; *Berger*, 779 F.2d at 1000.

205. Rankin v. McPherson, 483 U.S. 378, 388 (5th Cir. 1987).

concerning the harm of its employee's speech and the risk of disruption.[206]

Lower courts have also disagreed whether any actual or expected external disruption resulting from an offended public can play a role in the *Pickering* balancing. Some courts have held that only actual or potential disruption of internal operations could outweigh an employee's right to engage in otherwise protected expressive activities.[207] These courts contend that relying on the public's reaction to an employee's speech is equivalent to permitting a "heckler's veto," which the Supreme Court has rejected as a constitutional basis for restricting protected expression.[208]

Other courts have recognized that although allowing the majority to silence an unpopular minority through a heckler's veto is unconstitutional, at times public reaction is a legitimate government interest. For example, the Second Circuit has held that allowing the government to cite parental outrage about a teacher's membership in NAMBLA did not constitute an impermissible heckler's veto because this reaction was more properly considered an internal disruption: "Parents are not outsiders seeking to heckle Melzer into silence, rather they are participants in public education, without whose cooperation public education as a practical matter cannot function."[209] Some courts have tried to dodge the heckler's veto issue by holding that the requisite disruption is shown not by the public reaction itself, but rather the internal disruption caused in the government workplace when it has to divert its resources to respond to that adverse public reaction.[210]

Many courts have also rejected First Amendment claims by police and fire employees who had engaged in hate speech off duty on the grounds that the speech undermined the public trust. The Second

206. Waters v. Churchill, 511 U.S. 661, 673 (1994). *But see* United States v. Wilcox, 66 M.J. 442, 449–52 (C.A.A.F. 2008) (reversing conviction of member of military who attended KKK rally and advocated and encouraged participation in extremist organizations online using the identifier "US Army Paratrooper" because military had failed to show actual or potential adverse impact on good order and discipline in the armed services or that his racist views adversely affected his job performance).

207. *Flanagan*, 890 F.2d at 1566–67; *Berger*, 779 F.2d at 1000–01.

208. *Flanagan*, 890 F.2d at 1566–67; *Berger*, 779 F.2d at 1001.

209. Melzer v. Bd. of Educ., 336 F.3d 185, 199 (2d Cir. 2003).

210. *See*, *e.g.*, Easton v. Harsha, 505 F. Supp. 2d 948, 969–70 (D. Kan. 2007) (recognizing actual disruption to the internal functioning of a police department caused by having to respond to public criticism of employee's blog posts).

Circuit has explained that public racist speech poses a "reasonable threat of disruption in the context of the jobs of police officers and firefighters,"[211] and that "[t]he First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect."[212] In the context of the police department, for example, courts contend that when their employees engage in racist and other offensive speech off the job, "respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired."[213] Similar rationale has been used in cases involving other government officers that routinely interact with the public, such as social service workers.[214]

When now-Justice Sotomayor was sitting on the Second Circuit, she dissented in a case involving an employee of the New York City Police Department who anonymously sent racist material in the mail to various nonprofit organizations that had solicited him for donations.[215] The majority rejected the employee's First Amendment claims on the ground that his actions undermined the mission of the NYPD and threatened to promote racial strife among the officers.[216] The employee was a computer operator who did not hold a high-level position, or have policy-making authority or contact with the public.[217] Sotomayor argued that it was essential to consider not just the mission of the government agency at stake, but also the relationship of the disciplined employee to that mission.[218] Sotomayor argued that it was significant that "Pappas engaged in the

211. Locurto v. Giuliani, 447 F.3d 159, 178 (2d Cir. 2006); *see also* Karins v. City of Atl. City, 706 A.2d 706, 715–16 (N.J. 1988) (rejecting First Amendment claim based on firefighter's racial slur to police officer; court noted that "bigotry in a fire department can endanger lives," and that racial tensions between firefighters and police officers were dangerous because an "almost symbiotic relationship" exists between the police and fire departments).

212. *Locurto*, 447 F.3d at 183.

213. Pappas v. Giuliani, 290 F.3d 143, 147 (2d Cir. 2002); *see also Easton*, 505 F. Supp. 2d at 970–71.

214. *See also* Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112, 121–22 (Mass. 2000) (upholding dismissal of investigator for Department of Social Services for making racially offensive joke at a testimonial dinner because DSS was not required to take the risk that its investigators would be regarded as biased and unfair, and at the very least, the joke illustrated that the employee had poor judgment that is "inconsistent with the task often fraught with difficulties that investigators face every day").

215. *Pappas*, 290 F.3d at 154–59 (Sotomayor, J., dissenting).

216. *Id*. at 147 (majority opinion).

217. *Id*. at 148; *id* at 158 (Sotomayor, J., dissenting).

218. *Pappas*, 290 F.3d at 156 (Sotomayor, J., dissenting).

speech anonymously, on his own time, and through mailings sent from his home."[219] These factors are important, she explained, for several reasons. First, because he did not identify himself as a member of the police force, and because he was a low-level employee with no public contact, no one would think his views represented the NYPD—as they might if he were the Police Commissioner.[220] Although Sotomayor recognized that the employee was eventually unmasked and that the resulting bad publicity threatened to undermine NYPD's relationship with the community, she noted that in this case the NYPD itself had unmasked its employee and created the bad publicity by publicizing his activities.[221] Because the employee engaged in this admittedly offensive speech in private and on his own time as a "private citizen," Sotomayor concluded that the *Pickering* balancing tilted strongly in his favor.[222]

## IV. SUGGESTED APPROACH

This Article argues that the Court should reconsider its approach to the off-duty expressive activities of government employees, particularly when they are not work-related. First, the Court should abandon a threshold public concern requirement in such cases. When an employee engages in speech outside of work on topics that are not directly related to work, the government employer's interest in restricting that speech is low. The public concern inquiry inappropriately gives employers almost complete control over their employees' private discourse. Because this suggested approach turns on whether speech is in fact work-related, a more robust discussion of the definition of "work-related" is essential. This Article argues that expressive activities should be considered work-related only when they criticize the workplace where the employee works, including criticism of her co-workers or supervisors.

This Article also argues that the Court should also reconsider the application of the *Pickering* test in cases involving off-duty, non-work-related expressive activities. Rather than subjecting this speech to the vagaries of a balancing test, the Court should conclude that such speech is presumptively entitled to strong First Amendment

219. *Id.* at 157.
220. *Id.* at 157–58.
221. *Id.* at 159.
222. *Id.* at 158.

protection that can be overcome only in two limited circumstances. The first is when the government can demonstrate that the employee's expressive activities reveal that the employee is unfit to perform his duties. The second, informed by the government speech doctrine, is when the employee holds such a significant leadership position within the organization that it is reasonable for the public to associate the views of that employee with the agency, and the speech actually disrupts or threatens to disrupt the proper functioning of the agency.

### *A. Abandon the Public Concern Requirement in Cases Involving Non-Work-Related Expressive Activities*

The Court should abandon the public concern inquiry in off-duty cases involving expressive activities that are not directly related to the employee's work. As Justice O'Connor argued in her concurring opinion in *NTEU*, *Connick*'s "public concern" inquiry has no place as applied to "off-hour speech bearing no nexus to Government employment-speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee."[223]

#### *1. Narrow definition of "work-related"*

The first step is for the Court to narrow its definition of what it means for speech to be work-related. The definition of "work-related" is important because it serves as a threshold inquiry to the two tracks of constitutional analysis the Court has suggested for off-duty expression. If speech is not "work-related," then a public employer faces a much higher burden to overcome its employee's First Amendment rights. If the speech is work-related, in contrast, the employee can succeed only if he can survive the *Pickering/Connick* framework, a daunting task.

The Court has been inconsistent about what it means for expressive activities to be work-related. In *Pickering*, a school teacher criticized his school district's school board in a letter to the editor, in which he did not conceal his identity. The subject matter of his expression directly concerned his workplace writ large—the school system—but not his immediate supervisors, co-workers, or job duties. Nevertheless, the Court declared that his expression was

223. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 480 (1995) (O'Connor, J., concurring in part and dissenting in part).

"only tangentially and insubstantially" related to his public employment.[224]

In contrast, in *Roe*, the Court held that the fact that a police officer indirectly referred to his employment in the context of selling sexually explicit videos was sufficient to make his expression work-related. In that case, the officer's speech did not concern his supervisors, his co-workers, or the subject matter of his work. There was no indication that consumers of Roe's sexually explicit tapes knew his identity; he did not wear his uniform in the videos, nor did he identify himself in those videos as an officer. Following this expansive view of "work related," the Ninth Circuit concluded that another officer's sexually explicit website was also "work related" even though he had done nothing to tie the website to his employment, noting that "it can be seriously asked whether a police officer can ever disassociate himself from his powerful public position sufficiently to make his speech (and other activities) entirely unrelated to that position in the eyes of the public and his superiors."[225]

Interpreting "work related" in the broad manner *Roe* suggests threatens to swallow all of the expressive activities of public employees, at least as soon as the public at large learns the identity of the speaker, and places employees in perpetual danger of losing their jobs for anything they say, even outside of the workplace. The Court should back away from a broad definition of work related that encompasses any speech that refers to the employee's status as a government employee. Instead, the Court should return to a common-sense notion of "work-related" that restricts that category to speech that itself directly refers to the employee's workplace, supervisors, or co-workers. Any concerns about how the speech may reflect on the employee's ability to do his job or how the speech may interfere with the work of the government employer can be taken into account in other ways. Under this approach, the speech at issue in *Pickering*—a teacher's criticism of the school board's funding decisions—would represent the outer edge of what constitutes work-related expression.

224. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

225. Dible v. City of Chandler, 515 F.3d 918, 926 (9th Cir. 2008).

*2. Abandon public concern requirement in non-work-related cases*

In *Connick*, the Court made it clear that its imposition of a public concern requirement was an attempt to carve out a small but important subset of work-related expression from First Amendment protection as a way of reducing litigation. In that case, the employee's speech concerned specific details about her workplace; there could be no doubt that her expression was work related, and the Court established a public concern test because it was particularly concerned about opening up the floodgates to First Amendment litigation involving work-related speech. While it may have been appropriate for the Court to establish this sort of threshold requirement for work-related expression—although there are good reasons to believe that even in that context the test is misplaced—it is clear that this threshold inquiry question is not appropriate for cases involving expression that does not directly involve work.[226]

As discussed in Section III.A, there are many fundamental problems with a public concern inquiry in any context. In addition to the lack of clear guidance from the Court regarding how this inquiry should be conducted, perhaps the greatest problem is the "squishiness" of the inquiry that permits courts to make explicit ad hoc value judgments about expression.[227] Applying the public concern inquiry in off-duty cases has been particularly difficult. Courts have especially struggled to figure out how to conduct a public concern inquiry in cases involving expressive associations and in cases involving hate speech. For example, in *Pappas v. Giuliani*, all three judges sitting on the Second Circuit panel had different views about whether hate speech sent anonymously in the mail constituted a matter of public concern. One judge dodged the issue, another said it was clearly not a matter of public concern, and still a third (then-Judge Sotomayor) said that it was just as obvious that it was a matter of public concern.[228] In the case of Andrew Shirvell, anti-gay

226. Some lower courts have noted this problem. *See*, *e.g.*, Flanagan v. Munger, 890 F.2d 1557, 1563–64 (10th Cir. 1989); Berger v. Battaglia, 779 F.2d 992, 997 (4th Cir. 1985).

227. *See* Connick v. Myers, 461 U.S. 138, 164 (1983) (Brennan, J., dissenting) (arguing against public concern standard, noting that in the defamation context the Court had rejected that approach in favor of focusing on the status of the plaintiff) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974))).

228. This same issue has been raised in Synder v. Phelps, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010), where the Court must determine whether hate speech directed at a particular individual involves a matter of public concern entitled to greater First

comments may, to some, seem to fall outside of the category of public concern, but given that they were made in the context of criticizing an elected student leader, they are arguably a matter of public concern.

Similarly, it is not obvious whether the type of sexually explicit material at issue in *Dible* and *Roe* is a matter of public concern. As distasteful as the expression might be, it clearly does have some expressive value, and it was disseminated to a public audience. Just as the Supreme Court has held—in other contexts—that artistic and entertaining speech is entitled to full First Amendment protection even if it lacks a political message, protection for the cop's strip tease in *Roe* should not turn on whether he can convince a court that he was using this form of expression to make some sort of political comment on sexuality and power in our society.

Even if we could establish a workable definition of what constitutes a matter of public concern, it still would not make sense to place the rights of government employees to engage in private expression at the whim of their government employers. When considering the employee's interests at stake, it is necessary to consider not merely his interest in contributing to the public debate, or even society's interest in hearing what he has to say, but also in his interest in autonomy and freedom from governmental interference in matters pertaining to his personal life.[229] The Court's decision in *Lawrence v. Texas* underscores the need to give protection to public employee speech on private matters. As Paul Seconda has pointed out, "*Lawrence* attaches some form of heightened review when the government seeks to interfere with the private and personal lives of individuals."[230]

The public concern requirement is overbroad because it operates to strip First Amendment protection from speech that does not necessarily interfere in any way with the operation and management of the government agency.[231] This problem appears particularly likely

Amendment protection. The Court heard oral argument in this case in October 2010; a decision is expected by June 2011.

229. Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence*: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 123 (2006).

230. *Id.* at 117.

231. For a more thorough discussion of the vagueness and overbreadth concerns *Connick* created, see Rosenthal, *supra* note 146, at 557–67.

when the speech at issue does not directly involve the workplace. A public concern requirement therefore is not appropriately tied to the underlying theory of why we would permit a government employer to restrict the speech of its employees, especially when that speech is not directly related to the workplace.[232]

Although the focus of this Article is on off-duty expression, the Court should abandon a public concern inquiry for all non-work-related expression, whether it takes place at work or off-duty. Public employees have private conversations at work on both public and private issues, and the government's interest in preventing or punishing these sorts of conversations typically has very little to do with the subject matter of the comment and more to do with whether the comment interferes with the employee's work. Employees spend too much of their lives at work to be expected to limit all their expression at work to work-related topics, and as the facts of *Rankin* illustrate, in many cases the employer has little legitimate reason to restrict most of what its employees say at work that is not directly work related.

One reason to address the applicability of a public concern requirement to all non-work-related expression is that any legal regime that turned on whether the employee was on- or off-duty could be difficult to apply in some cases. In the age of the Internet and other electronic technologies, it is more common than ever before for employees to engage in non-work-related expression while they are technically on the job. Indeed, Andrew Shirvell was ultimately terminated in part because his employer discovered that he was using his work computer to blog and his work telephone to call Nancy Pelosi's office, where the student leader was interning, to insist that the student be fired. As people spend a greater proportion of their waking hours at work, the opportunity for self-expression outside of the workplace diminishes. Furthermore, as greater numbers of employees telecommute from home, the line between workplace and home diminishes. With the pervasive use of electronic technology, like cell phones and the Internet, employees often perform work-related functions while they are not at work. As the next subsection will discuss, in many cases government employers will still be able to defeat their employee's First Amendment claims without having to rely on a threshold public concern test.

232. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 573–74 (1968).

The ambition of this Article is modest, and as a result it does not take a position on whether the public concern inquiry should be abandoned in all employee speech cases. Given all the difficulties inherent in a public concern inquiry, and the ability of the *Pickering* balancing test to account for the value of the employee's speech, that might be a good idea, and many commentators have made that very suggestion. Regardless of the merits of that broader argument, however, the need to abandon a public concern test in non-work-related, off-duty cases is especially compelling. When speech is not work related, *Connick*'s concern about constitutionalizing all employee grievances is not present. Furthermore, in that context there is no good reason to accept as a general rule that the government employer's interests always trump its employee's interest in engaging in off-duty, non-work-related expression unless it is a matter of public concern.

### *B. Presumptive Protection for Off-Duty, Non-Work-Related Expressive Activities and Limited Government Defenses*

Courts should not apply the *Pickering* balancing test to evaluate the First Amendment rights of public employees to engage in off-duty, non-work-related expressive activities. Such a test is inherently subjective, lacks uniformity, and as a practical matter, offers little protection to government employees. Instead, assuming that the employee's speech does not fall within a category of unprotected expression, off-duty, non-work-related speech should be presumptively protected and can lose this protection only if the government employer can show one of two things. The first is that the speech reveals that the employee is unfit to perform his duties. The second is that the employee holds a leadership position within the organization that makes it reasonable for the public to conclude that the employee's views represent those of the government. The latter exception would apply in a very narrow group of cases.

#### *1. Reject* Pickering *test in favor of presumption*

When evaluating whether the expressive activities of a government employee are entitled to First Amendment protection, courts should not apply the *Pickering* balancing test. Instead, courts should presume that such speech activities are protected, provided they do not fall into a category of unprotected expression, and permit the government employer to overcome this presumption only

in those limited circumstances when the government's interest so warrants.

The biggest problem with applying the *Pickering* balancing test to the off-duty, non-work-related expressive activities of government employees is that it offers too little protection to that speech. Often these cases involve speech that lies at the fringes of the First Amendment, such as hate speech and sexually explicit expression, or speech that is otherwise regarded as offensive. As a result, courts all too often conclude that the employee's expression has such limited value that it is easily outweighed by whatever interests the employer asserts. In conducting the balancing, courts do not consider how government control of its employees' off-duty expressive activities can have broader societal impact by resulting in a significant chilling effect on the speech of a huge number of citizens and on the marketplace of ideas generally.[233] Indeed, the *Pickering* balancing test is *designed* to focus more narrowly on the facts of the particular case.

Another problem with the *Pickering* balancing test as most courts have applied it is that it permits adverse public reaction to the expressive activities to be considered on the government's side of the balance. As a result, it theoretically matters very little what an employee says. If there is a public reaction, then the employee will likely lose constitutional protection for his speech. If the public never learns about the employee's speech, or for whatever reason does not react strongly to the employee's speech, then the employee has a stronger chance of winning his case.[234] Relatedly, given that the *Pickering* balancing test gives substantial deference to the government employer's predictions of disruption, there is a great chance in any given case that an employee is punished not because his speech actually caused or threatened disruption, but, as Justice Marshall noted in *Rankin*, "simply because superiors disagree with the content" of the expression.[235]

Rejecting the *Pickering* balancing test in favor of presumptive protection for the off-duty, non-work-related expressive activities of government employees recognizes the inherent difficulties of

233. For an excellent discussion of the serious problems inherent in balancing tests, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

234. For a lengthier discussion of this problem, see Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1021 (2005).

235. Rankin v. McPherson, 483 U.S. 378, 384 (1987).

applying a balancing test to such speech. This is not a presumption that is insurmountable, but it serves simply to give an employee's expressive activities a fighting chance against government suppression.

*2. Overcoming the presumption*

Although this Article contends that the off-duty, non-work-related expressive activities of government employees should be given robust First Amendment protection, it recognizes that it is essential to give government employers the ability to overcome this protection in appropriate circumstances. Government employers should be permitted to overcome the presumptive protection for its employees' speech activities when it can demonstrate either that (1) the speech demonstrates that the employee is unfit to perform his work duties, or (2) the public reasonably believes that the government employee speaks for the government enterprise, and the message of that employee undermines the proper functioning of that agency.

*a. Unfit to perform work duties.* Although an employee's off-duty, non-work-related speech should be entitled to a strong presumption of constitutional protection, the government employer must be given the authority to suppress or punish that speech when the speech reveals that the employee is unfit to perform his job duties. By focusing on the employee's ability to perform his job, this approach avoids the dangerous and easily abused inquiry into whether the speech is inconsistent with the overall mission of the government enterprise.

This approach requires the government to demonstrate that the employee cannot perform his own job, not that his speech undermines the mission of the government agency as a whole. This defense would necessarily be very fact- and context-specific. The position and responsibilities of the employee would be of paramount importance in determining whether the expressive activities indicate unfitness. Jobs that require the exercise of discretion or public trust demand a higher standard of conduct from those who hold them. Thus, it is unlikely that the NYPD could demonstrate that racial bias rendered the computer operator in *Pappas* unfit to do his job given that there was no showing that he interacted with the public in any way or that his job required the exercise of discretion. The majority

in that case emphasized that at any moment Pappas could become a beat officer; however, the officer was not in fact a beat officer when he was terminated, and under the approach this Article proposes, there is no reason why the NYPD should not be able to take his off-duty expressive activities into account before promoting him to such a position. In addition, this defense would not be of much help in cases involving sexually explicit speech, such as that of the cops in *Roe* and *Dible*. Vague assertions that the officers' sexually explicit activities undermined the "professionalism" of the office would be insufficient; instead, their employers would have to demonstrate that the activities undermined their ability to do their jobs. It is hard to see how such activities would have that effect.

Notably, the government's ability to succeed on this defense would have nothing to do with the public's reaction to the employee's expressive activities, thus avoiding the risk of a heckler's veto.[236] Thus, it would not matter that the parents in *Meltzer* were up in arms and threatened to withdraw their children from school. It should not be up to the community to determine whether the employee is fit to perform his job; otherwise, First Amendment freedoms would hang by a very slender thread. It is not hard to imagine parents getting upset if a teacher created sexually explicit videos like those at issue in *Roe*, but assuming the teacher did not share them with his students, it is not clear that such conduct reveals unfitness for teaching. Instead, under the unfitness standard this Article proposes, the school district would have to demonstrate that a teacher's association with NAMBLA renders him unfit to teach high school students. Although in that case there was no evidence that the teacher had ever abused his students or other minors, the school would have a strong argument that his active membership in an organization that advocates for such relationships indicates unfitness for a position where it is essential that he can be trusted with minors.

An unfitness defense might also come into play in cases involving non-work-related expression that happens at work. When an employee engages in non-work-related expression while performing his job duties at work, the government employer should generally be given more power to restrict that speech on the grounds that the

236. It would also avoid the risk that a public employee's speech rights would depend on whether the public learns about his expressive activities.

employee is unable to do his job effectively. For example, if the clerk at the Department of Motor Vehicles has a proclivity for lecturing customers about his view of political affairs, the employer should be given more leeway to restrict that expressive activity, even though it relates to a matter of obvious public concern.

In evaluating a government employer's assurance that its employee's off-duty speech indicates unfitness for office, courts should take care to take into account the precise form, content, and context of the speech. Random or isolated comments made privately should rarely be sufficient to indicate unfitness. For example, it is not clear that an isolated off-color joke like that at issue in *Pereira* would be sufficient to demonstrate that a social worker is unfit to perform her job, any more than the off-handed remark about the Reagan assassination attempt in *Rankin* indicated that the employee was ill-suited for law enforcement work. If an employee has been working for the government agency for some time, the government should be required to present evidence that the alleged character trait has revealed itself in the employee's work.[237] The government should not serve as the political-correctness police and punish their employees any time the employees engage in expressive activities that are outside of the mainstream. As one judge has argued, if courts are quick to accept the unfitness defense, "[t]he State, in short, with impunity, could not only chill, but control, the speech of a significant number of citizens, who work for State government, simply because they work for State government."[238]

It is not clear that the unfitness defense would help the Michigan Attorney General's office justify its termination of Andrew Shirvell. In his initial comments defending his decision to keep Shirvell on the job, Attorney General Cox emphasized that Shirvell was just a low-level, line attorney who worked on appellate matters. It is not clear what sort of discretion was involved in his daily activities or what sort of contact he had with the public, if any. Without knowing more about Shirvell's job responsibilities, it is difficult to know whether his anti-homosexual views would impede his ability to do his job. The Michigan Attorney General's office should be required to show

237. *See*, *e.g.*, Hawkins v. Dep't of Pub. Safety & Corr. Servs., 602 A.2d 712, 721 (Md. 1992) (Bell, J., dissenting) (arguing that a prison guard's First Amendment rights were violated when he was terminated for offensive remarks he made to a bank teller while attempting to cash a check off-duty).

238. *Id.* at 727.

specifically how his bias has played out or threatens to play out in the kinds of cases that he handles.

The point of my argument is that courts should not immediately accept the government's vague assertion that its employee's offensive or unpopular speech reveals unfitness for his job duties without a more searching analysis that considers both the content of the expression and the precise duties of the employee. Membership in NAMBLA probably does not indicate unfitness to be a prosecutor (unless the prosecutor is responsible for litigating child abuse cases) but does indicate unfitness to be a school teacher. Participation in explicit sexual videos does not indicate unfitness to serve as a police officer (unless those videos contain violence), but may indicate unfitness to serve on a government commission against pornography. This sort of fact-specific inquiry protects the government's legitimate interests in performing its functions efficiently and effectively without sacrificing the expressive rights of its employees unnecessarily.

Notably, General Cox does not appear to be resting his decision to terminate Shirvell solely on concerns that his anti-gay attacks indicated that he could not perform his job, but rather the ground that he misused his work computer and telephone to engage in these attacks.[239] Although government employers, like private employers, should have the right to control the use of their own equipment, relying on this defense to defeat Shirvell's First Amendment claim is problematic. Employees frequently use their work telephones and emails for personal use while they are on break. Although Shirvell may technically have used state resources to wage his attack, it is not clear from publicly available information whether Shirvell used his work email account or invoked his position as an assistant attorney general to engage in his criticisms of the student body president.[240] Furthermore, it is unrealistic to expect that public employees will spend every moment they are at work engaged in work-related activities. At the very least, courts should pause before concluding that government employers have absolute power to discipline their

239. *See* David Jesse, *Andrew Shirvell fired from job at Michigan Attorney General's Office*, ANNARBOR.COM (Nov. 8, 2010, 2:46 PM) http://www.annarbor.com/news/andrew-shirvell-fired-from-job-at-attorney-generals-office/. In announcing Shirvell's termination, General Cox stated that although he still believes employees have First Amendment rights, Shirvell was terminated for misusing state resources, engaging in borderline stalking behavior, and for lying to investigators during his disciplinary hearing. *Id.*

240. If he had, the Attorney General's Office would have a much stronger argument that Shirvell had misused his authority and misrepresented the views of the AG's office.

employees whenever they use government equipment for non-work-related speech.[241]

*b. Interference with government speech.* A second possible defense in cases involving a public employee's off-duty, non-work-related expression involves a permutation of the government speech doctrine the Court invoked in *Garcetti*. When it is reasonable for the public to associate the expressive activities of a government employee with his employer, and that speech is inconsistent with the clearly articulated mission of the employer, the employee's First Amendment rights must yield. This defense draws loosely upon the government speech doctrine.

It is difficult to apply the government speech doctrine in a straightforward manner in cases involving non-work-related expressive activities. Whereas in *Garcetti* the majority suggested that the government speech doctrine had traction in cases involving any speech an employee might make pursuant to his job duties, it is impossible to justify restrictions on off-duty, non-work-related expression on the grounds that it is speech that the government has bought and paid for.

That does not mean, however, that the government speech doctrine is not relevant in off-duty, non-work-related cases. The Court has suggested in some of its freedom of association cases that it is important to require a group to accept a member whose viewpoints are at odds with those of the organization as a whole because it would essentially force the group to engage in compelled speech. Thus, in *Boy Scouts of America v. Dale*, the Supreme Court held that forcing the Boy Scouts of America to admit a gay scoutmaster in order to comply with a state anti-discrimination law "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[242] The Court majority relied heavily on its prior decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, which held that the

241. The Supreme Court recently noted the difficulties of resolving cases involving government-issued electronic devices. *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2629–30 (2010) (in a case involving an employee's communications on government-issued pager, the Court declined to issue a "broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment" citing concerns that technology and community and workplace norms were constantly changing).

242. 530 U.S. 640, 653 (2000).

First Amendment protected the right of the organizers of a private St. Patrick's Day Parade to exclude an Irish-American gay, lesbian, and bi-sexual group that wanted to march behind their own banner.[243] In *Hurley*, a unanimous Court concluded that requiring the private group to admit the GLIB group would interfere with a speaker's "autonomy to choose the content of his own message."[244] The Court held that including the GLIB group in the parade, marching behind their own banner, would send the message that people of their sexual orientation have as much of a right to unqualified social acceptance as heterosexuals, and the private group had every right to keep that message out of their own parade.[245]

There are several problems with extending the rationale of *Dale* and *Hurley* to the context of government employment, not the least of which is that a government agency is not an expressive organization.[246] But even putting that major obstacle to one side, the sheer number of government employees would make it unreasonable for a citizen to assume that the off-duty speech of any one of them represents the views of the employer. As Justice Stevens noted in his *Dale* dissent with respect to the Boy Scouts, which has admitted over 87 million young Americans into its ranks during its existence: "The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling."[247] The same must certainly be true, if not more so, for governmental agencies that are bound by the First Amendment. Just as a reasonable person should not view all speech in the public square as expressing a government-endorsed message, neither is all off-duty speech of a government employee.

While it might not make sense to permit a government employer to claim that all of its employees' off-duty expressive activities reflect on the government agency in some way, there may be some cases where it might be reasonable for the public to associate an

243. 515 U.S. 557, 572 (1995).

244. *Id*. at 573.

245. *Id*. at 574–75.

246. For an excellent criticism of the assumption that government employers are expressive associations with First Amendment rights to disassociate itself from any message it deems antithetical, see Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767 (2007).

247. 530 U.S. at 697 (Stevens, J., dissenting).

employee's off-duty expressive activities with his employer. In a separate dissenting opinion in *Dale*, Justice Souter argued that "[i]t is certainly possible for an individual to become so identified with a position as to epitomize it publicly," particularly if that person is in a leadership position.[248]

It might also be reasonable for the public to associate the off-duty speech of a government employee with the government agency that employs him in cases where the employee uses his government position to communicate his message. In a footnote in *Rankin*, the Court made clear that it did not mean to suggest that low-level employees were immune from discharge on account of their expressive activities. The Court cited approvingly a case from a federal appellate court that upheld the discharge of a clerical employee who stated on television news that he was an employee of the sheriff's office and a member of the KKK.[249] Similarly, a reasonable person might think that an employee is speaking as an employee if he uses his work email account or office letterhead to communicate.[250] It is not reasonable, however, to assume an employee speaks for his government agency whenever his private communications are made public. If an employee engages in anonymous speech, as in *Pappas*, it is not reasonable for the public to associate that employee's speech with his employer even when he is unmasked. Similarly, in *Roe*, the fact that the stripping officer used a generic police uniform in his videos is not a sufficient basis for a reasonable person to connect Roe's activities with the San Diego Police Department.

Even if the government can show that the public reasonably associates the employee's speech with his employer, the government must also demonstrate that the speech is inconsistent with a clearly (and previously) articulated message that is essential to its mission. Because government enterprises are not expressive associations, there is no reason to defer to their assertions of what viewpoints are essential to their mission, as the Court did with the Boy Scouts in

248. *Id.* at 702 (Souter, J., dissenting). Justice Souter explained he voted to reject the BSA's claim because it had failed "to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message." *Id.* at 701.

249. Rankin v. McPherson, 483 U.S. 378, 391 n.18 (1987) (citing McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985)).

250. This is not the same as simply using a work computer or other electronic device to communicate. One does not have to use a work email account to send an email from work.

*Dale*. Requiring that the government agency clearly articulate before litigation what viewpoints are essential to its mission both provides notice to the employees of what speech will not be tolerated and also limits the ability of the government to discipline employees for speech it simply does not like. Thus, in *Roe*, even if a reasonable person could connect the stripping officer to the San Diego Police Department, it is unclear how his activities were inconsistent with the mission of that agency.

In considering whether the speech of public employees interferes with the ability of their government employers to communicate a particular message, it is also important for courts to consider the ability of the government employer to engage in effective counterspeech.[251] Such counterspeech can serve to distance the government employer from its employee's speech. Indeed, *Pickering* itself found it relevant that the school board could easily use counterspeech measures to rebut any inaccuracy in Pickering's budget figures.[252] The statement issued by Michigan Attorney General Mike Cox early on in the Shirvell scandal is this sort of counterspeech that reminds the public that government employees retain their First Amendment rights to say what they please when they are not at work, and that his views did not represent the views of the Michigan Attorney General's office. Of course, counterspeech may not always be effective in cases where it is not possible for the public to "disassociate" the employee's speech from his government employer. Typically this will occur in cases involving high level, supervisory employees.

The government speech defense may, in some cases, give government employers greater authority to restrict the speech of their employees while they are at work. After all, there is a much greater likelihood that the expression of a government employee at work will be reasonably regarded as representing the views of the government, particularly when it is made to the public in the course of performing work-related duties. Thus, when a government employee speaks to a customer at a government office, a customer might reasonably believe that the employee represents the views of the government because the employee is serving as the "public face"

251. Smith, *supra* note 11, at 273.

252. Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).

of the government agency. In addition, government counterspeech is likely to be ineffective in such circumstances.

## V. CONCLUSION

The aim of this Article is not to suggest that the Court must entirely revamp its jurisprudence regarding public employee expressive rights, although that would probably not be a bad idea. Instead, it has an admittedly myopic focus on First Amendment claims brought by public employees who have been disciplined as a result of their non-work-related expressive activities that take place outside of the workplace.

It is tempting to give government employers wide berth to restrict the expressive activities of their employees given that most of the cases involve highly offensive speech. It is worth noting, however, that granting government employers this authority would authorize the punishment of employee speech simply because contrary to the views of the supervising government official. For example, lower courts have seen cases involve anti-gay speech as well as pro-gay rights speech. In addition, if employees do not have robust protection for their off-duty speech, it is hard to see how they would be entitled to robust protection for their private off-duty conduct. Thus, an employer could fire an employee for any conduct that the government employee believes is contrary to the government's mission, including intimate (and constitutionality protected) decisions regarding sexuality, marriage, cohabitation, and abortion. Permitting public employees to invoke the First Amendment to protect speech that we abhor also permits others to invoke it to protect speech that we think is worth protecting.