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# The Chill of a Wintry Light? Borough of Duryea v. Guarnieri and the Right of Petition in Public Employment

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THE CHILL OF A WINTRY LIGHT? *BOROUGH OF DURYEA V. GUARNIERI* AND THE RIGHT TO PETITION IN PUBLIC EMPLOYMENT

*William A. Herbert\**

INTRODUCTION

IN *Borough of Duryea v. Guarnieri*,<sup>1</sup> the United States Supreme Court held that in order for a petition, grievance, or litigation by a public employee to be constitutionally protected against retaliation under the Petition Clause of the First Amendment,<sup>2</sup> it must satisfy the public concern test applicable in retaliation cases alleging a violation of the Speech Clause. The case exemplifies the relationship between the narrowing of First Amendment protections for public employees and contemporary efforts to eliminate or modify statutory protections. This article begins by contextualizing the decision within the current debates over public-sector collective bargaining and other statutory rights. Despite the relevance of the Court's decision to those debates, the decision has received little attention from academics and commentators. In Part II, the article examines the central historical role petitioning has played in public-sector labor relations, and the history of efforts to suppress such activities. That history underscores the inherently political nature of governmental labor relations and the importance of the First Amendment and statutory rights in defining the contours of protected activities in public-sector employment.

In Parts III and IV, the article explores Pennsylvania state law, along with the factual, contractual, and administrative background of the constitutional claim made by Charles J. Guarnieri, Jr., a background that reaffirms the adage that "bad facts make bad law."<sup>3</sup> A review of the applicable state laws and the contract provisions related to Guarnieri's retaliation claim highlights the

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\* Deputy Chair and Counsel, State of New York Public Employment Relations Board ("PERB"). The opinions and analyses expressed do not reflect the views of PERB or the State of New York. The article is based upon a paper presented at the symposium Public Sector Labor Law at the Crossroads. Mr. Herbert would like to express his appreciation to PERB Chairperson Jerome Lefkowitz for permitting him to participate in the symposium. In addition, Mr. Herbert thanks his co-panelists Ruben Garcia and Charlotte Garden for their stimulating perspectives on public sector constitutional issues. The article is dedicated to Ed Tick, the leader of a trip to Delphi.

1. 131 S. Ct. 2488 (2011).

2. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

3. *Doggett v. United States*, 505 U.S. 647, 660 (1992) (Thomas, J., dissenting).

relationship between constitutional, statutory, and contractual rights in the public sector. As will be seen, before Guarnieri turned to the First Amendment as the legal basis for his retaliation claim, he and his union pursued statutory administrative claims under a Pennsylvania collective bargaining law and contract grievances under the applicable collective bargaining agreement.<sup>4</sup> By abandoning the use of those legal avenues in favor of an arguably more difficult, and potentially more lucrative, litigation strategy under the First Amendment, Guarnieri has established constitutional precedent that may spread the chill of a wintry light over public-sector labor relations by diminishing the protections afforded public employees to grieve or petition concerning their working conditions. The premise of Guarnieri's constitutional retaliation claim under the Petition Clause is examined in Part V.

In Parts VI and VII, the article examines the development of the doctrinal standards for public employee retaliation claims under the Speech Clause, which are now applicable to claims under the Petition Clause. In Part VIII, the Court's decision in *Borough of Duryea v. Guarnieri* is analyzed from historical, doctrinal and practical perspectives. In reaching its decision, the Court ignored the centrality of petitioning, lobbying, and litigation in public-sector labor advocacy, and the historical legacy of efforts to stifle them. While the decision references the actual or potential existence of statutory rights for public employees as a rationale for narrowly construing the Petition Clause, the members of the Court failed to recognize that its decision might prove to be a tool for retarding efforts by public employees to obtain statutory protections. Finally, in Part X the article identifies paradoxes and consequences resulting from the decision that will be resolved only through future constitutional litigation or legislative and administrative changes.

#### I. THE NEW WAVE OF CONTROVERSIES REGARDING PUBLIC-SECTOR LABOR ISSUES

In the past two years, there has been renewed academic attention given to issues concerning public-sector labor relations. Although previously treated as a mere stepchild to analogous private-sector issues, public-sector labor issues are currently front and center within the labor and employment legal academy. The renewed focus on these issues is the direct consequence of efforts in a number of states to eliminate or substantially limit public sector unionism, collective bargaining, and statutory protections.

These initiatives are the fourth major national wave of executive and legislative actions in the past century aimed at restricting the rights of public-sector employees. As will be seen, at the beginning of the twentieth century, Presidents Theodore Roosevelt and William Howard Taft issued executive orders barring federal employees from directly or indirectly petitioning Congress for improved working conditions. The executive orders were issued in the aftermath of the federal government's first steps toward abandoning a patronage-based,

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4. See *infra* Part IV.

employment-at-will paradigm by granting some federal workers just cause protections.<sup>5</sup> A second wave of restrictions on public employee collective action occurred at the state and local levels in response to lobbying and petitioning by employees and their advocates aimed at improving wages and benefits. Some of those state and local restrictions were implemented before the 1919 Boston police strike; many, however, were instituted in the aftermath of that strike, which was provoked by the Boston police commissioner's suspension of police officers because their union had violated the commissioner's prohibition against affiliating with the American Federation of Labor (AFL).<sup>6</sup> A third wave of restrictions was instituted in the late 1940s in response to the multiple public and private-sector strikes that took place following World War II.<sup>7</sup>

Contemporary initiatives to eliminate or substantially limit public-sector collective bargaining and other statutory rights have a different genesis and hue. They are not responsive to an upsurge in public-sector union activism or militancy, such as strikes and demonstrations.<sup>8</sup> Rather, the initiatives are in response to the cumulative effectiveness of public-sector employees utilizing lobbying and petitioning, along with collective negotiations and impasse procedures in certain states and localities, to improve their standards of living and workplace protections.

The efforts to end or modify statutory rights have been proposed and enacted in the context of the severe economic conditions resulting from the financial collapse of 2008.<sup>9</sup> At the same time, many believe that partisanship,

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5. *Arnett v. Kennedy*, 416 U.S. 134, 147-50 (1974). See also Egon Guttman, *The Development and Exercise of Appellate Powers in Adverse Appeals*, 19 AM. U. L. REV. 323, 323-24 (1970) (discussing President McKinley's Executive Order No. 101, issued on July 27, 1897, requiring just cause to discharge employees in the federal classified service).

6. STERLING D. SPERO, *GOVERNMENT AS EMPLOYER* 29-31 (1972) [hereinafter SPERO, EMPLOYER]; William A. Cook, *Rise and Significance of the American Federation of Teachers*, 21 ELEMENTARY SCH. J. 444, 445-56 (1921). See also William A. Herbert, *Public Sector Labor Law and History: The Politics of Ancient History?*, 28 HOFSTRA LAB. & EMP. L.J. 335, 351-52 (2011) [hereinafter Herbert, *Law and History*]. See generally FRANCIS RUSSELL, *A CITY IN TERROR: CALVIN COOLIDGE AND THE 1919 BOSTON POLICE STRIKE* (1975).

7. SPERO, EMPLOYER, *supra* note 6, at 31-36. In their overview of public-sector labor history, Steve Fraser and Joshua B. Freeman correctly reference the rise in opposition to public-sector unionism during the recession of the mid-1970s. As they recognize, however, the oppositional attacks in that era did not result in major statutory changes in collective bargaining rights. See Steve Fraser & Joshua B. Freeman, *In the Rearview Mirror: A Brief History of Opposition to Public Sector Unionism*, NEW LAB. FORUM, Fall 2011, at 93, 94-95. See also JOSEPH A. MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* 214-16 (2011).

8. In fact, Stanley Aronowitz argues that the current initiatives to end or limit collective bargaining and tenure protections are the unintended consequences of complacent, non-militant, legalistic, and partisan political strategies by public-sector unions. See generally Stanley Aronowitz, *One, Two, Many Madisons: The War on Public Sector Workers*, NEW LAB. FORUM, Spring 2011, at 15.

9. See Anne Marie Lofaso, *In Defense of Public Sector Unions*, 28 HOFSTRA LAB. & EMP. L.J. 301, 304 (2011) (challenging the fiscal rationale given for proposals aimed at curbing public-sector collective bargaining).

rather than economics, is the primary motivation behind the flurry of initiatives aimed at choking off union support for progressive and partisan causes.<sup>10</sup>

As a matter of history, political considerations were one of the primary obstacles to the adoption of public-sector collective bargaining in states like Illinois.<sup>11</sup> Statutory limitations on governmental managerial discretion were opposed by politicians because they feared that it would impair the political spoils system.<sup>12</sup> Public-sector unionism was seen by many as part of civil service reform aimed at limiting political patronage in the government workplace.<sup>13</sup>

An understanding of the history and remedial purposes of merit and fitness rules, tenure protections, and collective bargaining has substantially dissipated. Indiana recently enacted legislation transforming most state workers into at-will employees, thereby eliminating the civil service legal barrier established decades ago as an anti-patronage measure.<sup>14</sup> The same bill makes collective bargaining between the State and employee organizations, as well as strikes by state employees, illegal.<sup>15</sup> A number of other states have enacted or are considering similar measures, particularly with respect to teachers.<sup>16</sup> In the process of

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10. *Id.* at 305-07 (citing labor union spending on political activities and *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 886-88 (2010), which struck down a law limiting the use of corporate funds for partisan political activity). See also Philip K. Howard, *The Public-Union Albatross*, WALL ST. J., Nov. 9, 2011, at A15, available at <http://online.wsj.com/article/SB10001424052970204190704577024321510926692.html> (proposing a constitutional ban on political contributions by public-sector unions); Joseph A. McCartin, *What's Really Going on in Wisconsin?*, NEW REPUBLIC, Feb. 19, 2011, <http://www.tnr.com/article/politics/83829/wisconsin-public-employees-walker-negotiate> (“Of course, there are no serious answers to such questions, because what Republicans are now seeking in Wisconsin and elsewhere has nothing to do with helping put America back to work. It is really all about politics.”); Christian Schneider, *The Partisan Origin of Public-Sector Collective Bargaining*, NAT’L REV. ONLINE (Feb. 23, 2011, 1:49 PM), <http://www.nationalreview.com/corner/260508/partisan-origins-public-sector-collective-bargaining-christian-schneider> (“Fifty years ago, collective bargaining [in Wisconsin] looked less like a right and more like a partisan favor.”).

11. Gregory M. Saltzman, *Public Sector Bargaining Laws Really Matter: Evidence from Ohio and Illinois* in WHEN PUBLIC SECTOR WORKERS UNIONIZE 42, 55 (Richard B. Freeman & Casey Ichniowski eds., 1988) (“Bargaining statutes were delayed in Illinois chiefly by the desire of the Chicago Democrats to maintain patronage arrangements and in Ohio chiefly by the insistence of unions that they get a strongly pro-union statute or none at all.”).

12. *Id.* See also LEO KRAMER, LABOR’S PARADOX—THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO 4-6 (1962) (describing the unsuccessful 1933 efforts by Democrats in Wisconsin to abolish civil-service tenure protections to make all government positions subject to patronage appointment and termination).

13. William A. Herbert, *Card Check Labor Certification: Lessons from New York*, 74 ALB. L. REV. 93, 101 (2010-11) [hereinafter Herbert, *Card Check*]. However, the National Civil Service Reform League had a negative view of public-sector unions because they utilized politics to petition for improved working conditions. MARGARET C. RUNG, SERVANTS OF THE STATE: MANAGING DIVERSITY AND DEMOCRACY IN THE FEDERAL WORKFORCE, 1933-1953, at 36-37 (2002).

14. H. Enrolled Act 1001, 117th Gen. Assemb., 1st Sess. (Ind. 2011), available at [http://www.in.gov/sba/files/ap\\_2011\\_HEA\\_1001-2011.pdf](http://www.in.gov/sba/files/ap_2011_HEA_1001-2011.pdf).

15. IND. CODE ANN. § 4-15-17-4 (West 2012).

16. Stephen F. Befort, *Public Sector Employment Under Siege*, 87 IND. L.J. 231, 233 (2012). See generally Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149, 153-64 (2012) (describing and comparing the modifications enacted in 2011 to public-sector collective bargaining laws in twelve states).

seeking to substantially deregulate public employment, however, there has not been much discussion concerning the adverse impact these measures will have on combating patronage-based decision-making.<sup>17</sup> As a practical matter, the elimination of statutory standards for entering and exiting public-sector, non-policymaking positions will lead to an increase in constitutional claims of politically motivated favoritism and retaliation.<sup>18</sup>

Regardless of the motivation behind current efforts to eliminate or substantially restrict public-sector collective bargaining and statutory protections, advocates who favor such measures often resort to a particular stereotypical image of government employment. The stereotype has existed since well before the dawn of public-sector collective bargaining, and its unalterable persistence is exemplified by comparing its current variations with Sterling Spero's 80-year-old summary: "There is a deep-seated conviction that government jobs are 'government snaps,' that public employees are a privileged group enjoying short hours, good pay, little work, long vacations, liberal sick leaves, pensions, fixed and certain salaries unaffected by economic depressions, security of tenure, and thus no fear of unemployment."<sup>19</sup>

The viewpoint that a public employee, regardless of occupation, individual performance, and the quality of managerial supervision, is part of a privileged class of workers is important to keep in mind when examining contemporary legislative proposals to limit public-sector statutory rights. It is also relevant when examining constitutional jurisprudence that narrowly construes the contours of protections for public employees. Today, the resilience of the stereotype is propelled, in part, by opponents of governmental domestic spending who want to "starve the beast."<sup>20</sup> The stereotype is periodically suspended, however, when commemorating the professionalism, heroism, and sacrifices of public servants such as the 9/11 first responders.

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17. Until the rise of the civil service reform movement and labor organizing in the public sector, political patronage was a prime fixture of public employment from the time of the ratification of the United States Constitution. *See generally* CARL E. PRINCE, *THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE* (1977) (demonstrating the predominance of political patronage and nepotism in federal appointments and terminations during the Washington, Adams and Jefferson Administrations).

18. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 508-12 (1980); *Elrod v. Burns*, 427 U.S. 347, 347 (1976).

19. STERLING D. SPERO, *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY* 30-31 (1971) [hereinafter SPERO, MOVEMENT]. In a May 1911 speech, President William Howard Taft utilized the phrase "privileged class" to describe public employees. *Id.* at 30 n.27. Almost a century later, Indiana Governor Mitch Daniels described public employees as a "new privileged class in America." Ben Smith & Maggie Haberman, *Pols Turn on Labor Unions*, POLITICO (June 6, 2010, 7:03 PM), <http://www.politico.com/news/stories/0610/38183.html>. *See also* Lofaso, *supra* note 9, at 331 ("[O]pponents of public sector unions employ the term 'privilege' as a rhetorical device to conjure up the lay definition of privilege as special or undeserved favor.").

20. *See generally* Fraser & Freeman, *supra* note 7. *See also* Paul Krugman, *The Bankruptcy Boys*, N.Y. TIMES, Feb. 21, 2010, at A19, available at <http://www.nytimes.com/2010/02/22/opinion/22krugman.html?adxnll=1&partner=rssnyt&emc=rss&adxnllx=1324735288-MQ/3kMESyYaUJEjg5BQg7Q>.

In the midst of the current controversies over public-sector collective bargaining and statutory protections, the Supreme Court issued its decision in *Borough of Duryea*, restricting the scope of constitutional protections for public employees who grieve and litigate about their working conditions.<sup>21</sup> The decision underscores an important but seldom-discussed issue in the debate over government employment: in light of “the complex interrelationship between public employers, employees, unions and the public,”<sup>22</sup> what enforceable rights will remain for public employees if statutory protections and rights are eliminated or curtailed?

## II. THE CENTRAL ROLE OF PETITIONING IN PUBLIC SECTOR HISTORY AND LAW

Historically, grievances, petitions, lobbying, and litigation have been instrumental in obtaining and retaining improved working conditions in government employment.<sup>23</sup> For example, in 1897, after two decades of wage stagnation, thousands of Chicago teachers, led by the Chicago Teachers’ Federation (CTF), successfully petitioned the Board of Education for a salary increase, an increase that lasted for only three years.<sup>24</sup> CTF also pursued a creative litigation strategy to compel local corporations to pay their fair share of property taxes to fund the school system.<sup>25</sup>

For most of the twentieth century, the “outstanding characteristic of public employment as contrasted with private employment [was] the fact that conditions of work [were] fixed by law rather than by negotiation between employer and employee.”<sup>26</sup> Public employees, individually or collectively, petitioned and engaged in informal, non-binding negotiations with public officials over wages and benefits.<sup>27</sup> Such activities included lobbying for changes concerning tenure, salaries, disciplinary procedures, promotions, and in support of the establishment of collective bargaining rights. For example, CTF successfully lobbied in 1917 for passage of an Illinois state law granting statutory tenure rights for teachers who successfully complete a three-year probationary period.<sup>28</sup>

During the heyday of labor voluntarism, the AFL supported protective legislation to improve public-sector working conditions.<sup>29</sup> At that time, the AFL

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21. See generally *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).

22. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 526 (1991).

23. See Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL’Y 735, 750-51 (2009).

24. JULIA WRIGLEY, *CLASS POLITICS AND PUBLIC SCHOOLS: CHICAGO, 1900-1950*, at 33 (1982).

25. *Id.* at 33-34, 127.

26. SPERO, MOVEMENT, *supra* note 19, at 25. See also Paul Buhle & Frank Emspak, *Labor, Social Solidarity, and the Wisconsin Winter*, in *IT STARTED IN WISCONSIN: DISPATCHES FROM THE FRONT LINES OF THE NEW LABOR PROTEST* 99, 102-03 (Mari Jo Buhle & Paul Buhle eds., 2011) (describing labor’s successes in obtaining improvements in wages and benefits for Wisconsin state workers prior to collective bargaining).

27. Herbert, *Card Check*, *supra* note 13, at 100.

28. WRIGLEY, *supra* note 24, at 138-39, 145.

29. Under the principle of voluntarism, a concept consistently propagated by AFL President Samuel Gompers, the AFL eschewed legislative solutions concerning workplace issues because

supported legislative efforts to create an eight-hour workday and retirement benefits for federal workers, a two-platoon system for firefighters in the District of Columbia, cash benefits for Navy employees in lieu of vacation, and higher permanent salary classifications for postal workers.<sup>30</sup> Similarly, when the AFL chartered the American Federation of State County and Municipal Employees (AFSCME) in 1936, one of AFSCME's core missions was to obtain statutory civil service reform at all levels of government.<sup>31</sup>

The grant of statutory rights for government workers on the federal, state, and local level did not occur in a vacuum or without the fertilization of direct lobbying and petitioning by individual public employees and their representatives. Public employees organized and petitioned for these rights out of self-interest in order to have a protected voice in their workplace.<sup>32</sup> Nor were the statutory rights foreordained or obtained without strong opposition from public administrators and political officials.<sup>33</sup> In fact, there was a "traditional reluctance of governmental bodies to countenance organization by their employees."<sup>34</sup>

Public employee use of non-collective bargaining means to advocate for improved working conditions was met with hostility, including active federal and state efforts to suppress lobbying and petitioning.<sup>35</sup> The historical hostility to public employee labor activities is reflected in a speech given by Montana Senator Henry Lee Myers in April 1920 in support of legislation to prohibit federal employees from joining unions affiliated with the AFL because it

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government officials could not be trusted to protect the interests of labor. Instead, Gompers insisted that labor should engage in self-reliance through direct, organized and concerted pressure to persuade employers to improve working conditions through collective bargaining. See RUTH L. HOROWITZ, *POLITICAL IDEOLOGIES OF ORGANIZED LABOR* 37-39 (1978). In contrast, the more militant International Workers of the World (IWW) rejected both political action and the AFL's limited focus on craft unionism. Instead, the IWW sought to organize workers on an industrial basis, along with mobilizing the unemployed. See THAI JONES, *MORE POWERFUL THAN DYNAMITE: RADICALS, PLUTOCRATS, PROGRESSIVES, AND NEW YORK'S YEAR OF ANARCHY* 63-65, 147-51 (2012).

30. REPORT OF PROCEEDINGS OF THE THIRTY-NINTH ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 119, 126-27, 132-34 (1919), available at <http://www.archive.org/stream/reportproceedin03labogoo#page/n6/mode/2up>. In 1919, the AFL eliminated its policy prohibiting police unions from affiliating with the federation. RUSSELL, *supra* note 6, at 58.

31. KRAMER, *supra* note 12, at 27-31.

32. See Joseph E. Slater, *Lessons from the Public Sector: Suggestions and a Caution*, 94 MARQ. L. REV. 917, 924 (2011).

33. In 1920, a Texas court upheld the right of municipal officials to terminate employees for merely joining a union. See *McNatt v. Lowther*, 223 S.W. 503, 505 (Tex. Civ. App. 1920) (upholding the termination of City of Dallas firefighters for becoming members of a union affiliated with the AFT despite a state law that stated: "It shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments.").

34. KRAMER, *supra* note 12, at viii.

35. See Herbert, *Law and History*, *supra* note 6, at 348-51.



opposed the federal government's response to the 1919 strikes in the steel and coal industries:

I claim that employees who work for the Federal Government are analogous to soldiers in the army. They should owe their entire allegiance and loyalty and affiliation to the Government for which they work. They should not enter into any movement of affiliation or association which might put them in an attitude of antagonism to the Government for which they work, because the general welfare is at stake, the welfare of the entire body politic, of the entire people, of the Government itself is at stake, and I do not believe that any Federal employee should be permitted innocently or otherwise, to join any association or affiliation which might by any chance lead him, in association with others, to take a position or a stand which might be antagonistic to the true interests of the government which employs him, feeds him, and upon which we are all dependent for our peace, tranquility, and welfare.<sup>36</sup>

Senator Myers's views were not aberrational and reflected the views of many government officials at the time. In fact, prior to Myers' speech, public employees were prohibited from lobbying and filing grievances concerning the terms and conditions of their employment under federal and local directives.<sup>37</sup>

Starting in the late nineteenth century, explicit federal prohibitions were implemented to restrict such activities by federal employees. During the last decade of that century, members of the National Association of Post Office Clerks participated in an aggressive campaign to persuade Congress to pass legislation designed to improve their working conditions, including bills to establish an eight-hour workday and a classification system.<sup>38</sup> These vigorous and persistent activities included lobbying and testifying by postal employees before congressional committees. They were, however, deemed disruptive by the Postmaster General and members of Congress.<sup>39</sup> As a result, the Postmaster General issued an order in 1895 prohibiting postal workers from lobbying Congress and restricting their right to travel:

That, hereafter no Postmaster, Post-office Clerk, Letter Carrier, Railway Postal Clerk, or other postal employee, shall visit Washington, whether on leave with or without pay, for the purpose of influencing legislation before Congress.

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36. SPERO, MOVEMENT, *supra* note 19, at 16-17 (quoting from the Congressional Record). The soldier analogy was utilized by others, including Columbia University President Nicholas Butler, who used it when criticizing a French postal strike. *Id.* at 17-18. Butler was an opponent of teacher unionism and believed that any public school teacher who joined a labor organization should be discharged. WRIGLEY, *supra* note 24, at 106. See also RUSSELL, *supra* note 6, at 53-54, 71-72 (quoting statements by Boston Police Commissioner Stephen O'Meara in 1918 and Boston Police Commissioner Edwin Curtis in 1919 opposing the affiliation of the Boston police union with the AFL on the grounds that an affiliation with the labor federation was inconsistent with the duties and responsibilities of police officers).

37. See Herbert, *Law and History*, *supra* note 6, at 348-49.

38. SPERO, MOVEMENT, *supra* note 19, at 83-84.

39. *Id.* at 84-85.

Any such employee of the Postal Service who violates this order shall be liable to removal.

Postmasters and other employees of the Postal Service are paid by the Government for attending to respective duties assigned them, which do not include efforts to secure legislation. That duty is assigned to the representatives of the people elected for that purpose.

If bills are introduced in either branch of Congress affecting the Postal Service, upon which any information or recommendation is desired, I am ready at all time to submit such as lies in my power and province.<sup>40</sup>

During the administration of President Theodore Roosevelt, groups of postal clerks and letter carriers maintained an active campaign to enact a postal classification bill. As part of that campaign, they petitioned and lobbied Congress. President Roosevelt was “deluged with telegrams, letters and petitions”<sup>41</sup> urging support for the legislation. Out of frustration with these activities, Roosevelt issued his first gag order, which applied to all federal Executive Department employees.<sup>42</sup> The order threatened the dismissal of any employee who directly or indirectly petitioned Congress to increase his salary or to influence other legislation concerning self-interest:

All officers and employees of the United States of every description, serving in or under any of the Executive Departments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, *individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever*, either before Congress or its Committees, or in any way to save through the heads of the Departments in or under which they serve on penalty of dismissal from the Government service.<sup>43</sup>

Although employee representatives circumvented the gag order through informal contacts with congressional members, it remained a “weapon in the hands of the authorities which they could invoke at any time against individuals or organizations which they did not favor.”<sup>44</sup> Lax enforcement of the order was frequently followed by “a period of rigorous enforcement usually accompanied by suspensions and removals, which always added to the discontent of the workers.”<sup>45</sup>

Opposition to Roosevelt’s gag order became a useful tool in labor organizing among federal workers.<sup>46</sup> AFL President Samuel Gompers met with

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40. *Id.* at 85-86.

41. *Id.* at 97.

42. See Herbert, *Law and History*, *supra* note 6, at 348.

43. *Id.* (emphasis added) (quoting from SPERO, MOVEMENT, *supra* note 19, at 97).

44. SPERO, MOVEMENT, *supra* note 19, at 98.

45. *Id.* at 113.

46. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 182 (1982) (“The AFL offered to help eliminate the

Roosevelt and delivered “Labor’s Bill of Grievances,” which asserted that the gag order required that “the constitutional right of citizens to petition must be surrendered by the government employee in order to retain his employment.”<sup>47</sup> Unfazed by the AFL’s opposition, Roosevelt reissued and broadened the prohibition against federal workers seeking salary increases or other legislation from Congress in a 1906 executive order:

All officers and employees of the United States of every description, serving in or under any of the Executive Departments or independent Government establishments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, individually or through associations, *to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever*, either before Congress or its Committees, or in any way save through the heads of the Departments or independent Government establishments, in or under which they serve, on penalty of dismissal from the Government service.<sup>48</sup>

Eight months after taking over the presidency from Roosevelt in 1909, President William Howard Taft issued Executive Order 1142,<sup>49</sup> which replaced Roosevelt’s revised gag order. Under Taft’s general order, federal employees “in any department of the Government” and any “officer of the Army or Navy or Marine Corps stationed in Washington” were prohibited from making requests to Congress, to any congressional committee, or to a member of Congress “for legislation or for appropriations, or for congressional action of any kind” except with the consent of the applicable department head.<sup>50</sup> In addition, employees were prohibited from responding to any congressional requests for information except when authorized by the department head.<sup>51</sup>

President Taft’s executive order did not quell complaints from federal employees “about deteriorating work conditions, an increased workload caused by agency cutbacks, and low pay.”<sup>52</sup> As Cornell Professor Kurt L. Hanslowe stated: “These severe restrictions on the ability of federal government employees to associate and communicate concerning their own working conditions were of, at best, dubious constitutionality, proved less than entirely effective, and were rejected by Congress in 1912 by the enactment of the Lloyd-La Follette Act.”<sup>53</sup>

The Lloyd-La Follette Act of 1912<sup>54</sup> was enacted as part of the 1913 appropriations bill for the Post Office Department, following an investigation by

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gag order, to regain political rights for merit employees, and to turn Congress into the agent of the federal workers in the their struggle against executive aggrandizement.”).

47. SPERO, MOVEMENT, *supra* note 19, at 112.

48. *Id.* at 113 (emphasis added).

49. Exec. Order No. 1142 (1909).

50. *See* Bush v. Lucas, 462 U.S. 367, 382-83 (1982).

51. *Id.*

52. RUNG, *supra* note 13, at 35.

53. KURT L. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 36 (1967).

54. 5 U.S.C. § 7513 (2006).

Wisconsin Republican Senator Robert La Follette, which included direct questionnaires sent to postal workers.<sup>55</sup> This century-old measure codified three separate federal-sector employment protections that are anathema to many contemporary critics of public-sector employee protections: the right to join a union; tenure; and the right to petition and grieve.<sup>56</sup> One of those critics has identified the Lloyd-La Follette Act as the “origins of our current predicament.”<sup>57</sup> In many ways, the critic is correct, if one concurs with the idea that the rights to petition, free association, and tenure for public employees are elements of the twentieth century that need to be repealed.<sup>58</sup>

The primary purpose of the Lloyd-La Follette Act was to overrule the gag orders that had been in place for over a decade, which members of Congress believed violated the constitutional rights of federal workers to petition and to engage in free speech.<sup>59</sup> The relevant section of the Lloyd-LaFollette Act overruling the gag orders stated: “The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any member thereof, or to furnish information to either house of Congress, or to any committee or member thereof, shall not be denied or interfered with.”<sup>60</sup>

With respect to the freedom of postal workers to join a union, the law stated that:

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55. *Arnett v. Kennedy*, 416 U.S. 134, 150 (1974); NANCY C. UNGER, *FIGHTING BOB LA FOLLETTE: THE RIGHTEOUS REFORMER* 224 (2000); “*My Mail Opened!*” *Cries La Follette*, N.Y. TIMES, Aug. 13, 1912, available at <http://query.nytimes.com/mem/archive-free/pdf?res=950CE6DB1630E233A25750C1A96E9C946396D6CF>.

56. The law also included an express prohibition against postal union strikes, leading one scholar to conclude, “Thus, although Congress weakened the control of executive and departmental authorities over employees, it failed to recognize employee unions as anything more than lobbying organizations.” RUNG, *supra* note 13, at 36.

57. Amity Shlaes, *How Government Unions Became So Powerful*, WALL ST. J., Sept. 4, 2010, at A15, available at <http://www.cfr.org/labor/government-unions-became-so-powerful/p22887>.

58. Steven Pearlstein, *The Republicans’ Magical Thinking*, WASH. POST, Sept. 11, 2011, at G1, available at [http://www.washingtonpost.com/the-magical-world-of-voodoo-economists/2011/09/07/gIQARBiEIK\\_story.html](http://www.washingtonpost.com/the-magical-world-of-voodoo-economists/2011/09/07/gIQARBiEIK_story.html). It would be refreshing to hear advocates for the restoration of at-will public employment state whether they agree with Murray N. Rothbard’s view that a political spoils system is preferable to a merit-based system of government organization. See Murray N. Rothbard, *The Bureaucracy and the Civil Service in the United States*, 1995 J. LIBERTARIAN STUD. 4, 21-23, available at [http://mises.org/journals/jls/11\\_2/11\\_2\\_1.pdf](http://mises.org/journals/jls/11_2/11_2_1.pdf).

59. *Bush*, 462 U.S. at 382-83 n.20 (“See [48 Cong. Rec.] 4513 (1912) (remarks of Rep. Gregg) (“[I]t is for the purpose of wiping out the existence of this despicable ‘gag rule’ that this provision is inserted. The rule is unjust, unfair, and against the provisions of the Constitution of the United States, which provides for the right of appeal and the right of free speech to all its citizens.”)). A number of the bill’s proponents asserted that the gag rule violated the First Amendment rights of civil servants. See, e.g., 48 CONG. REC. 4653 (1912) (remarks of Rep. Calder); *id.* at 4738 (remarks of Rep. Blackmon); *id.* at 5201 (remarks of Rep. Prouty); *id.* at 5223 (remarks of Rep. O’Shaunessy); *id.* at 5634 (remarks of Rep. Lloyd); *id.* at 5637-38 (remarks of Rep. Wilson); *id.* at 10671 (remarks of Sen. Ashurst); *id.* at 10673 (remarks of Sen. Reed); *id.* at 10793 (remarks of Sen. Smith); *id.* at 10799 (remarks of Sen. La Follette).

60. SPERO, EMPLOYER, *supra* note 6, at 142-43.

[M]embership in any society, association, club, or other form of organization of postal employees ... having for its object, among other things, improvements in the conditions of labor of its members, including hours of labor and compensation therefore, and leave of absence, by any person or groups of persons in said postal service, or the presenting by any person or group of persons of any grievance or grievance to the Congress shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of person from said person.<sup>61</sup>

Finally, the Lloyd-La Follette Act codified tenure protections for many federal workers by mandating that they cannot be terminated “except for such cause as will promote the efficiency of said service,” and only after receiving written charges and being provided with a hearing.<sup>62</sup>

The Lloyd-La Follette Act did not limit, however, state and local governments from prohibiting employees from petitioning over working conditions or from joining unions. For example, the Chicago Board of Education adopted the Loeb Rule in 1915, which prohibited teachers from joining any organization affiliated with a trade union. Despite protests against the Loeb Rule by CTF, the Chicago Federation of Labor and the AFL, 48 teachers active in CTF or engaged in other labor activities were terminated.<sup>63</sup>

During the same period, New York City expressly prohibited its police officers, firefighters, and teachers from directly or indirectly lobbying for improvements in their terms and conditions of employment.<sup>64</sup> Similarly, a New York City Board of Education committee reacted strongly after female teachers lobbied in Albany in support of legislation to increase their salaries.<sup>65</sup> These New York local government restrictions were negated only after state legislation was enacted in 1920 to protect the right of employees in the civil service “to appeal to the legislature, or to any public officer, board, commission or other public body, for the redress of grievances.”<sup>66</sup> In his approval statement, Governor Alfred E. Smith expressed his strong support for the right to petition by government workers:

I am of the opinion that it would be a great deal better to have firemen and policemen come before the Legislature themselves than to be represented by paid

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61. *Id.* at 142.

62. *Id.*

63. WRIGLEY, *supra* note 24, at 130-34.

64. SPERO, MOVEMENT, *supra* note 19, at 43; Herbert, *Card Check*, *supra* note 13, at 101.

65. Robert E. Doherty, *Tempest on the Hudson: The Struggle for “Equal Pay for Equal Work” in the New York City Schools, 1907-1911*, 19 HIST. EDUC. Q. 413, 422-23 (1979). Nevertheless, the Board of Education committee stated that “[s]uch action is earnestly recommended, not to abridge the constitutional right of petition, which is abundantly secured, but to preserve the integrity of an equally important institution, known as the public school system, from the effects of disorder and demoralization if not disruption, at the hands of agitators.” *Lobbying Teachers Rebuked in Report: Drastic Reforms Recommended to Prevent the Recurrence of Such a Demonstration*, N.Y. TIMES, Sept. 12, 1907, available at <http://query.nytimes.com/mem/archive-free/pdf?res=990DE2DB1F30E233A25751C1A96F9C946697D6CF>.

66. N.Y. CIV. RIGHTS LAW § 15 (McKinney 2012).

attorneys and paid agents whose business it seems to be to constantly dig up something new in order to justify their retainers.

I can see no harm in declaring by statute what seems to be agreed by all to be a constitutional right.<sup>67</sup>

In subsequent decades, Smith's gubernatorial successors took matters further by affirmatively recognizing the right of State workers to grieve workplace issues and to be represented by union representatives of their choice. New York Governor Herbert H. Lehman issued a directive in 1939 mandating all State agencies to establish procedures for resolving workplace grievances that included a right to employee representation.<sup>68</sup> Governor Lehman's directive was followed by a formal Executive Order issued by Governor Thomas E. Dewey in 1950.<sup>69</sup>

The legacy of the earlier federal and local gag orders and restrictions underscore the historical importance of petitioning in public-sector labor relations and the real dangers connected with current efforts to eliminate statutory rights for public employees. Without a protected right to petition and grieve, public employees are deprived of a key historical means for improving their collective and individual working conditions.<sup>70</sup>

To further contextualize *Borough of Duryea*, we next turn to an analysis of the division of powers within the borough form of local government in Pennsylvania and the scope of Pennsylvania's tenure and collective bargaining statutes for public employees, including police officer Guarneri. Such contextualization is important because most federal constitutional claims by public employees are litigated in the context of governmental structures, powers and rights created by federal, state, or local law. Unlike the private sector,

[t]he public sector is marked by a diffusion of authority within levels of government. This contrasts with the private sector, where the chief executive officer is the focus of all authority in the organization. In the public sector, wages and working conditions may lie within the jurisdiction of the legislative branch or the civil service commission. Matters affecting budgets may be beyond the control of the nominal public employer.<sup>71</sup>

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67. *Amending the Civil Rights Law, in Relation to the Right of Appeal* (May 17, 1920), in PUBLIC PAPERS OF ALFRED E. SMITH, GOVERNOR: 1920, at 410 (1921). During a campaign address two years later, Smith emphasized that the right to petition is a fundamental constitutional right, which includes the right of female workers to petition the Governor for laws mandating shorter hours, maternity leave and child care. HENRY MOSKOWITZ, ALFRED E. SMITH: AN AMERICAN CAREER 102 (1924).

68. *Statement by the Governor Outlining Relationship Between State Employees and Administrative Heads of State Departments* (Dec. 15, 1939), in PUBLIC PAPERS OF HERBERT H. LEHMAN, FORTY-NINTH GOVERNOR OF THE STATE OF NEW YORK, FOURTH TERM 575 (1939).

69. Herbert, *Card Check*, *supra* note 13, at 117 n.83. In Part III.B, *infra*, the article discusses Pennsylvania's enactment in 1947 of a statutory grievance procedure for public-sector workplaces.

70. KRAMER, *supra* note 12, at 27-38.

71. MICHAEL H. MOSKOW ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 16 (1970).

It is with that observation in mind that this article turns to the state legal and historical background of the *Borough of Duryea* decision.

### III. PENNSYLVANIA'S PUBLIC-SECTOR LEGAL FRAMEWORK

#### A. *The Division of Powers Within a Pennsylvania Borough*

The separation of powers between the Duryea Borough Council and the Duryea Borough Mayor concerning the police department sets the context for the work-related disputes that led ultimately to the decision in *Borough of Duryea*.<sup>72</sup> Under Pennsylvania law, there is a unique division of powers between the executive and legislative branches governing the supervision of the Duryea Borough police department.

Under the Pennsylvania Borough Code, the Borough Council performs the executive functions of hiring, disciplining, and terminating police officers, fixing their total weekly hours, and determining the total weekly hours for police officers.<sup>73</sup> As part of its disciplinary power, the Borough Council performs the quasi-judicial function of hearing and determining misconduct charges brought against police department members who have tenure protections.<sup>74</sup> Under the same Borough Code provision, the Borough Mayor is responsible for directly

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72. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496-97 (2011).

73. 53 PA. CONS. STAT. ANN. § 46121 (West 2012). The Pennsylvania Borough Code states in relevant part:

Appointment, Suspension, Reduction, Discharge, Powers; Mayor to Have Control—

Borough council may, subject to the civil service provisions of this act, if they be in effect at the time, appoint and remove, or suspend, or reduce in rank, one or more suitable persons, citizens of the United States of America, as borough policemen, who shall be ex officio constables of the borough....

The borough council may designate one of said policemen as chief of police. The mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties, except that council shall fix and determine the total weekly hours of employment that shall apply to the policemen.

....

The borough may, by ordinance, establish a police department consisting of chief, captain, lieutenant, sergeants, or any other classification desired by the council, and council may, subject to the civil service provisions of this act, if they be in effect at the time, designate the individuals assigned to each office, but the mayor shall continue to direct the manner in which the persons assigned to the office shall perform their duties. The mayor may, however, delegate to the chief of police or other officers supervision over and instruction to subordinate officers in the manner of performing their duties....

The borough council may assign the chief of police or any member of the police force to undergo a course of training at any training school for policemen established and made available by the State or Federal government, and may provide for the payment by the borough of his expenses while in attendance in such school.

*Id.*

74. 53 PA. STAT. ANN. § 46121 (West 2011).

supervising the police chief and members of the police force, including scheduling, deployment, and performance of police duties.<sup>75</sup> However, the Mayor has the authority to delegate direct supervision of subordinate officers to the police chief.<sup>76</sup>

*B. Pennsylvania Statutory Protections for Police Officers*

Prior to 1941, borough police officers in Pennsylvania were at-will employees; they had “no civil service or job tenure rights and were subject to peremptory removal.”<sup>77</sup> This changed when the Pennsylvania Legislature enacted two laws creating disciplinary procedures for police officers: the Police Tenure Act<sup>78</sup> and the Civil Service for Police and Fireman Act.<sup>79</sup> Whether a police officer is covered by one statute or the other is dependent on the size of the particular department.<sup>80</sup> The existence of job security for police officers minimizes patronage-based hirings and terminations, and limits the ability of public employers to retaliate for engaging in collective workplace activities.<sup>81</sup> The Pennsylvania police tenure laws prohibit discipline without cause and grant a police officer the right to written charges, a public hearing on those charges, and the ability to appeal the results of the hearing in state court.<sup>82</sup> While these statutory protections are limited, they are similar to the tenure rights that were granted by the Lloyd-La Follette Act for federal employees and are substantially greater than those afforded at-will employees. Unlike at-will employment, a public employer in Pennsylvania must meet a defined evidentiary foundation at a quasi-judicial hearing demonstrating a legitimate basis for taking disciplinary action against a police officer; and the employer’s final decision is subject to judicial review.<sup>83</sup>

In 1947, Pennsylvania enacted the Public Employee Anti-Strike Act,<sup>84</sup> outlawing public-sector strikes and creating a statutory grievance procedure for state and local employees. The law was part of the nationwide wave of anti-strike legislation following World War II.<sup>85</sup> The purpose of the legislation was to “avoid or minimize any possible controversies by making available full and

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75. *Id.*

76. *Id.*

77. *George v. Moore*, 147 A.2d 148, 149 (Pa. 1959).

78. 53 PA. STAT. ANN. §§ 811–816 (West 2011).

79. 53 PA. STAT. ANN. §§ 46121–46127 (West 2011).

80. *Albrechta v. Borough of Shickshinny*, 565 A.2d 198, 211 (Pa. Commw. Ct. 1989).

81. Richard Michael Fischl, “*Running the Government Like a Business*”: *Wisconsin and the Assault on Workplace Democracy*, 121 YALE L.J. ONLINE 39, 49-50 (2011).

82. 53 PA. STAT. ANN. §§ 812, 814, 815, 46171, 46191.

83. 53 PA. STAT. ANN. § 46191 (West 2011).

84. 1947 PA. LAWS 1183 (formerly codified at 43 PA. STAT. ANN. §§ 215.1-215.5 (West) (repealed 1970)). *See also* *Phila. Fire Officers Ass’n v. Pa. Labor Relations Bd.*, 369 A.2d 259, 260 (Pa. 1977) (providing a brief description of the legislative history of the Public Employee Anti-Strike Act and Act 111 of 1968).

85. *See supra* Part I; SPERO, EMPLOYER, *supra* note 6, at 31-36.



adequate governmental facilities for the adjustment of grievances.”<sup>86</sup> It was aimed at furnishing “a forum to which aggrieved public employees could carry their demands and there subject them to the light of public opinion.”<sup>87</sup> In addition, it codified a specific right of public employees to speak, grieve, and attend meetings concerning workplace conditions.

The clear public policy rationale for Pennsylvania creating a statutory grievance procedure was to encourage the quick internal resolution of workplace disputes, thereby avoiding those problems metamorphosing into systemic disputes resulting in work stoppages and workplace disruptions. As will be demonstrated later in this article, *Borough of Duryea* turns this public policy concept on its head by paradoxically encouraging the public airing of workplace grievances in order to be protected against retaliation under the Petition Clause.

Ultimately, the grievance procedure created by the Public Employee Anti-Strike Act was unsuccessful in stopping “a general breakdown in communication between public employers and their employees,”<sup>88</sup> resulting in police and firefighter strikes. Those events led Pennsylvania to enact the Policemen and Firemen Collective Bargaining Law, commonly referred to as Act 111 of 1968,<sup>89</sup> which “was the culmination of years of unrest and instability between police officers and firemen and their respective employers, and reflected a legislative intent to return the employment relationship to the status quo.”<sup>90</sup>

Pursuant to Act 111 of 1968, Pennsylvania police officers have a statutory right to organize, engage in collective bargaining, and to settle their labor disputes through grievances:

Policemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.<sup>91</sup>

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86. 1947 PA. LAWS 1183 (formerly codified at 43 PA. STAT. ANN. § 215.1 (West) (repealed 1970)).

87. *Pittsburgh City Fire Fighters Local No. 1 v. Barr*, 184 A.2d 588, 589-90 (Pa. 1962). New York, like Pennsylvania, created a grievance procedure for state public employees well before granting collective bargaining rights. See Herbert, *Card Check*, *supra* note 13, at 117 n.83, 119-21, 141.

88. *State Police v. Pa. State Troopers' Ass'n*, 656 A.2d 83, 89 (Pa. 1995).

89. 43 PA. STAT. ANN. §§ 217.1-10 (West 2011).

90. Timothy D. Houston, Comment, *Two Roads Diverged in a Yellow Wood—The Pennsylvania Supreme Court's Seven Year Walk to Arrive Right Back at the Fork: Gehring v. Pennsylvania Labor Relations Board*, 46 DUQ. L. REV. 607, 609 (2008).

91. 43 PA. STAT. ANN. § 217.1. In 1970, the Pennsylvania Legislature enacted another public-sector collective bargaining statute, the Public Employee Relations Act (PERA), 1970 PA. LAWS 563 (codified as amended at 43 PA. STAT. ANN. §§ 1101.101-2301 (West 2011)). PERA governs

In addition, Act 111 of 1968 requires public employers to “exert every reasonable effort to settle all disputes by engaging in collective bargaining in good faith and by entering into settlements by way of written agreements and maintaining the same.”<sup>92</sup>

Pennsylvania police officers covered by Act 111 of 1968 are protected against unfair labor practices, as defined in the Pennsylvania Labor Relations Act (PLRA).<sup>93</sup> PLRA grants statutory rights and protections similar to those granted to private-sector employees under Sections 7 and 8 of the National Labor Relations Act.<sup>94</sup> Pursuant to PLRA, it is an unfair labor practice for an employer: to interfere with, restrain, or coerce police officers in the exercise of the rights guaranteed by Act 111 of 1968 and PLRA; to discriminate against an employee for engaging in a protected activity such as pursuing a contract grievance; to encourage or discourage membership in a union; and to terminate or otherwise discriminate against an employee for filing charges or giving testimony under Act 111 of 1968 and PLRA.<sup>95</sup> The Pennsylvania Labor Relations Board (PLRB) has exclusive jurisdiction to hear and determine unfair labor practices filed by police unions and officers.<sup>96</sup>

The tenure protections, collective bargaining rights, and unfair labor practice procedures granted by Pennsylvania law are precisely the types of public-sector statutory rights that are under attack in other states.<sup>97</sup> As explained below, Guarneri invoked his statutory and contractual rights under Pennsylvania law at the beginning of his workplace disputes with his employer. He did this before he made the tactical decision to pursue a federal constitutional claim challenging a collection of workplace rules imposed upon him following his return from a disciplinary suspension without pay.

#### IV. FACTUAL, CONTRACTUAL AND ADMINISTRATIVE BACKGROUND

Knowledge of “all the facts ... that surround”<sup>98</sup> the decision in *Borough of Duryea* is critical for a full understanding of the case and its relationship to the

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collective bargaining and unfair practices in the public sector but excludes from coverage those employees covered by Act 111 of 1968. 43 PA. STAT. ANN. § 1101.2002 (West 2011).

92. 43 PA. STAT. ANN. § 217.2 (West 2011).

93. 1937 PA. LAWS 118, No. 294 (codified as amended at 43 PA. STAT. ANN. §§ 211.1–13 (West 2011)). See also *Alcaraz v. Pa. Labor Relations Bd.*, 716 A.2d 1238, 1241 n.7 (Pa. 1998); *City of Coatesville v. Pa. Labor Relations Bd.*, 465 A.2d 1073, 1074 (Pa. 1983); *Phila. Fire Officers Ass’n v. Pa. Labor Relations Bd.*, 369 A.2d 259, 261 (Pa. 1977).

94. 29 U.S.C. §§ 158(a)(1), (3) & (4) (2006).

95. 43 PA. STAT. ANN. § 211.6(1)(a), (c) & (d) (West 2011). However, a police officer processing a grievance while on duty is not protected activity under PLRA. See *Ellwood City Police v. Pa. Labor Relations Bd.*, 736 A.2d 707, 710 (Pa. Commw. Ct. 1999).

96. *Borough of Nazareth v. Pa. Labor Relations Bd.*, 626 A.2d 493, 496 (Pa. 1993).

97. Last year, some Pennsylvania politicians expressed interest in pursuing legislative changes to that state’s collective bargaining laws. See Dan Kelly & Mike Urban, *Pennsylvania Could Become Another Battleground over Bargaining Rights of Public Employees*, READING EAGLE, Feb. 24, 2011, <http://readingeagle.com/article.aspx?id=289825>.

98. See MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 63 (2009). See also *id.* at 131, 212–17, 596–97 (describing the high importance Brandeis placed on thoroughness in distilling and using

debate over public-sector collective bargaining and statutory rights. It is also important because it shows that Guarnieri's particular claims of retaliation were a poor vehicle for achieving a broad interpretation of protected rights for public employees under the Petition Clause. The facts can be discerned from the Court's decision, the provisions of the applicable collective bargaining agreement, two prior arbitral decisions determining Guarnieri's grievances and related decisions concerning an unfair-labor-practice claim pursued by Guarnieri's union.

Duryea Borough is a small municipality in northeast Pennsylvania with a population of approximately 4,634 residents.<sup>99</sup> In September 2000, Guarnieri was designated the Duryea Borough police chief.<sup>100</sup> Guarnieri was a member of a collective bargaining unit represented by a union comprised of three full-time Duryea Borough police officers.<sup>101</sup> Consistent with the terms of the agreement between Duryea Borough and the union, as well as the parties' past practice, the officer appointed police chief is included in the collective bargaining unit.<sup>102</sup>

Under the agreement, disputes over the interpretation and application of Duryea Borough's policies and procedures that "affect terms of conditions of employment, including matters of discipline" were subject to the grievance procedure, ending in binding arbitration.<sup>103</sup> The recognition clause of the agreement prohibited discrimination against union members.<sup>104</sup> The agreement required that the Duryea Borough have just cause to discharge, suspend, or demote a full-time police officer.<sup>105</sup> In addition, the agreement contained a

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facts during his career as an advocate and later in deciding cases as a Supreme Court Justice). An excellent example of Brandeis's utilization of facts as an advocate was his brief in *Muller v. Oregon*, 208 U.S. 412 (1908), which cited relevant reports, studies and foreign law to persuade the Court to reject a constitutional challenge to a protective Oregon labor law prohibiting woman from working more than 10 hours per day.

99. *Brief History of Duryea Borough*, DURYEA BOROUGH, LUZERNE COUNTY, PA., <http://www.duryeaborough.com/history.htm>. See also *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2492 (2011).

100. *Duryea Borough Police Dep't v. Duryea Borough*, 34 P.P.E.R. ¶ 158, Findings of Fact ¶¶ 2-4 (2003); *Borough of Duryea v. Duryea Borough Police Dep't*, AAA Case No. 14 390 00720 03, Joint App'x 14 (2004) (Loewenberg, Arb.) [hereinafter *Loewenberg Arbitration*].

101. *Duryea Borough*, 34 P.P.E.R., at Findings of Fact ¶¶ 3-4.

102. *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 14.

103. *Duryea Borough Police Dep't v. Borough of Duryea*, AAA Case No. 143-0 00419 05 RVB, Joint App'x 56 (2006) (Pereles, Arb.) [hereinafter *Pereles Arbitration*].

104. "The Borough as it has in the past recognized the Duryea Borough Police Bargaining Unit as the sole representative of all full time police officers. The Borough shall not discriminate against a member of the bargaining unit, or try to discourage membership in said bargaining." *Pereles Arbitration*, *supra* note 103, at Joint App'x 55, Art. 1.

105. *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 14. Like many other agreements in the private and public sectors, the phrase "just cause" in the agreement was undefined at the time of Guarnieri's 2003 termination. Most arbitrators selected to determine disciplinary grievances apply all or some of the seven tests for just cause originally announced by Arbitrator Carroll R. Daugherty in *In re Enterprise Wire Co.*, 46 L.A. 359 (1966) (Daugherty, Arb.). The following are the seven tests set forth in *Enterprise Wire Co.*:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probabl[e] disciplinary consequences of the employee's conduct?

maintenance of benefits clause precluding the Borough from modifying existing, non-contractual benefits and past practices.<sup>106</sup>

Prior to the disputes that arose between Duryea Borough and Guarneri, there appears to have been a long period of relative calm in police-related labor relations. While the lack of employee grievances is not an exact barometer of labor contentment, for two decades prior to the Guarneri's grievances in 2002 and 2003, there had not been a single grievance filed by a union member.<sup>107</sup>

Following the 2001 municipal election, there was a power shift on the Duryea Council.<sup>108</sup> The new Council majority expressed concerns over the deficit in the Borough police overtime budget, and it convened a meeting with Guarneri to discuss revising the 2002 departmental budget. After Guarneri assured Council members that he would keep overtime expenditures within the allotted budget, the Council decided not to modify the departmental budget.<sup>109</sup>

By late summer 2002, however, the relationship between the Council and Guarneri deteriorated.<sup>110</sup> In June, Guarneri had a hostile encounter with a Council member following a meeting. By July, the police department had spent \$111,000 from its annual overtime budget of \$133,000.<sup>111</sup> There were additional issues that precipitated a clash between the Council and Guarneri. The description of those other events by Arbitrator J. Joseph Loewenberg,<sup>112</sup> who heard the grievance challenging Guarneri's 2003 termination, reaffirms the inherently politicized nature of public-sector labor relations, particularly when

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2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
  3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
  4. Was the company's investigation conducted fairly and objectively?
  5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
  6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
  7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

*Id.*

106. *Perelles Arbitration*, *supra* note 103, at Joint App'x 56.

107. *Duryea Borough*, 34 P.P.E.R., at Findings of Fact ¶ 19. The lack of grievances might be reflective of a positive labor-management relationship or it may be symptomatic of other factors, including the small size of the unit, or apathy and fear among unit members.

108. *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 16-19.

109. *Id.* at Joint App'x 16.

110. *Id.* at Joint App'x 24.

111. *Duryea Borough Police Dep't v. Duryea Borough*, 34 P.P.E.R. ¶ 158, Findings of Fact ¶¶ 7-8 (2003).

112. Loewenberg is Professor Emeritus in Industrial Relations at Temple University, a member of the National Academy of Arbitrators, and an author on public-sector labor relations issues. See MOSKOW ET AL., *supra* note 71, at 16; J. Joseph Loewenberg, *Compulsory Arbitration for Police and Fire Fighters in 1968*, 23 INDUS. & LAB. REL. REV. 367, 367-79 (1970).

labor relations interface with tensions between the executive and legislative branches:

[Duryea] Council's attempt to reorganize the Sewer Authority may have been a critical turning point. [Council President] Dommies and Mr. Guarnieri concurred that she had asked him to intervene with the Mayor in an effort to prevent a veto of Council's bill. Mr. Guarnieri refused the request, and the Mayor vetoed the bill. Although Mr. Guarnieri had wanted to keep himself and the Police Department out of politics, it did [not] prove to be possible. Mr. Guarnieri and the Mayor were now seen as allies, and Mr. Guarnieri made no effort to dispel that view. As relations between the Mayor and Council deteriorated, so too, did relations between Mr. Guarnieri and Council. Council's tolerance for Mr. Guarnieri's independent ways dissipated and its efforts to regain control over Police Department spending increased. What Mr. Guarnieri did not appreciate was that the Mayor has limited responsibilities regarding the Police Department and that the ultimate authority for the Chief of Police lies with Council.<sup>113</sup>

In early September 2002, Guarnieri did not attend a scheduled Council meeting to discuss departmental spending and scheduling.<sup>114</sup> On September 5, 2002, Guarnieri was asked to provide the Council with an update concerning his actions regarding three departmental issues. Rather than abide by the request, Guarnieri sent a letter criticizing the Council for communicating with him indirectly.<sup>115</sup> The Council responded with a directive that he comply with its inquiry and stated that his continued failure to respond would constitute insubordination and grounds for disciplinary action.<sup>116</sup> A few days later, Guarnieri received another letter mandating that he attend a Council meeting to discuss the police budget, scheduling issues, and his job performance.<sup>117</sup> One day before that scheduled meeting, however, Guarnieri sent a letter stating that he would not attend.<sup>118</sup>

In November 2002, Guarnieri was issued two consecutive written reprimands for violating Council directives concerning police officer scheduling.<sup>119</sup> During that month, Guarnieri filed four contract grievances and had another encounter with a Council member.<sup>120</sup> The following month, Guarnieri received a third reprimand after he refused to abide by a directive to submit a written report to the Council describing his duties and responsibilities.<sup>121</sup>

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113. *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 24-25.

114. *Duryea Borough*, 34 P.P.E.R., at Findings of Fact ¶ 9.

115. *Id.* at Findings of Fact ¶ 11.

116. *Id.* at Findings of Fact ¶ 12.

117. *Id.* at Findings of Fact ¶ 13.

118. *Id.* at Findings of Fact ¶ 14.

119. *Id.* at Findings of Fact ¶¶ 15-16; *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 27-28.

120. *Id.* at Findings of Fact ¶ 18; *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 26.

121. *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 28-29.

In January 2003, Guarnieri was ordered to attend a Council meeting or face disciplinary charges for failing to appear.<sup>122</sup> When Guarnieri attended the meeting, he was interrogated concerning his work performance and informed that he faced potential disciplinary action.<sup>123</sup> The investigatory questioning proceeded without Guarnieri being represented by his union, even though he had requested representation.<sup>124</sup> At the conclusion of the meeting, Guarnieri was informed that he had been insubordinate.<sup>125</sup>

The Duryea Council conducted a quasi-judicial disciplinary hearing on February 5, 2003, during which five Council members testified against Guarnieri.<sup>126</sup> Thereafter, the Council unanimously approved a motion to terminate him.<sup>127</sup> On February 14, 2003, Guarnieri was sent a letter setting forth a dozen specifications forming the basis for his discharge.<sup>128</sup> The specifications included his mishandling of the police department budget, insubordination, his hostile encounters with two Council members, the content of his answers during the interrogation, and his submission of erroneous information with respect to police scheduling.<sup>129</sup>

On February 20, 2003, Guarnieri filed a grievance under the union contract asserting that the Duryea Borough lacked just cause to terminate him.<sup>130</sup> On the same day, his union filed an unfair practice charge with PLRB alleging that his discharge violated Act 111 of 1968 and Sections 6(1)(a) and (c) of PLRA, because Guarnieri was deprived of union representation during the investigatory questioning and because his termination was improperly motivated by anti-union animus.<sup>131</sup>

Following an evidentiary hearing, a PLRB Administrative Law Judge (ALJ) concluded that Duryea Borough had Section 6(1)(a) of the PLRA by questioning Guarnieri without union representation during the investigatory meeting, which may have reasonably resulted in the imposition of the discipline.<sup>132</sup> As a remedy, the ALJ ordered Guarnieri's reinstatement on the basis that one of the grounds for his termination was his conduct during the investigatory meeting. The ALJ

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122. *Duryea Borough Police Dep't v. Duryea Borough*, 34 P.P.E.R. ¶ 158, Findings of Fact ¶ 20 (2003).

123. *Id.* at Findings of Fact ¶¶ 21-27.

124. *Id.* at Findings of Fact ¶¶ 24-26.

125. *Id.* at Findings of Fact ¶ 28.

126. *Id.* at Findings of Fact ¶ 31.

127. *Id.* at Findings of Fact ¶ 32.

128. *Id.*

129. *Id.* at Findings of Fact ¶¶ 32-38.

130. *Id.* at Findings of Fact ¶ 15.

131. *Id.* at Proposed Decision and Order.

132. *Duryea Borough Police Dep't v. Duryea Borough*, 34 P.P.E.R. ¶ 158, Findings of Fact ¶ 20. *See also* *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 251-52, 267 (1975) (recognizing an implicit statutory right to union representation during an interrogation under the National Labor Relations Act). *See generally* *Pennsylvania v. Pa. Labor Relations Bd.*, 768 A.2d 1201 (Pa. Commw. Ct. 2001); *AFSCME Council 13 v. Pa. Labor Relations Bd.*, 514 A.2d 255 (Pa. Commw. Ct. 1986).

further reasoned that had a union representative been present at the meeting, the underlying budgetary and scheduling disputes may have been resolved.<sup>133</sup>

The ALJ, however, dismissed the union's claim that Guarnieri's termination was improperly motivated in violation of Act 111 of 1968 and Section 6(1)(c) of PLRA.<sup>134</sup> Although the ALJ found the union had presented sufficient evidence to create an inference that Guarnieri was terminated in retaliation for filing contract grievances and for invoking his right to union representation, the ALJ concluded that Duryea Borough met its burden of demonstrating non-discriminatory reasons for the discharge, thereby rebutting the inference of unlawful motivation.<sup>135</sup> Among the factual reasons cited by the ALJ were Guarnieri's failure to provide a written report regarding his job duties, submitting erroneous information to the Council, and his encounters with Council members.<sup>136</sup>

Duryea Borough filed exceptions with PLRB challenging the proposed remedy of reinstatement. It asserted that the discharge was based upon Guarnieri's documented acts of insubordination and misconduct unrelated to the information obtained during the interrogation. The union did not file cross-exceptions challenging the ALJ's dismissal of its claim that the discharge was in retaliation for Guarnieri's grievances in violations of Section 6(1)(c) of PLRA.<sup>137</sup> PLRB sustained Duryea Borough's exceptions, concluding that the ALJ erred in ordering reinstatement because the evidence demonstrated that the termination had not been improperly motivated.<sup>138</sup> The union's subsequent state court action seeking vacatur of PLRB's decision was unsuccessful.<sup>139</sup>

In the meantime, Guarnieri's contract grievance challenging his termination was processed to arbitration by his union.<sup>140</sup> The stipulated issue presented to Arbitrator Loewenberg for determination were two standard questions in disciplinary arbitrations: "Did the Borough have just cause to terminate Guarnieri? If not, what should be the remedy?"<sup>141</sup>

In his decision and award, Arbitrator Loewenberg concluded that the Duryea Borough lacked just cause to discharge Guarnieri and ordered his reinstatement with back pay effective February 7, 2004.<sup>142</sup> The arbitrator found, however, that there was sufficient evidence of misconduct to warrant the imposition of a one-year disciplinary suspension without pay.<sup>143</sup>

The arbitrator concluded that Guarnieri was guilty of many of the misconduct allegations. He determined, however, that there was insufficient

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133. *Duryea Borough*, 34 P.P.E.R. at Discussion.

134. *Id.*

135. *Id.*

136. *Id.* at Findings of Fact ¶ 35.

137. *See Duryea Borough Police Dep't v. Pa. Labor Relations Bd.*, 862 A.2d 122, 124 (Pa. Commw. Ct. 2004).

138. *Duryea Borough Police Dep't v. Duryea Borough*, 35 P.P.E.R. ¶ 23, Final Order (2004).

139. *Duryea Borough Police Dep't*, 862 A.2d at 126.

140. *Loewenberg Arbitration*, *supra* note 100, at Joint App'x 38.

141. *Id.* at 14.

142. *Id.* at 38.

143. *Id.*

evidence to justify discharge under just cause and progressive discipline standards.<sup>144</sup> While crediting the testimony of Council members concerning Guarnieri's encounters with them, the arbitrator found that the incidents did not justify termination because the Duryea Borough failed to act at the time of the incidents by conducting a prompt investigation and imposing a reasonable discipline aimed at correcting the misbehavior. In summary, the arbitrator concluded:

Some charges, such as those involving encounters with individual Council members, must be excluded because they were never brought to Mr. Guarnieri's attention as serious offenses prior to February 2003. Other charges, including informal verbal warning for misadministration of the Police Department in 2002, may be substantively correct but cannot be included in the reasons to support the discharge because such warnings were not viewed as steps in the disciplinary system.<sup>145</sup>

The arbitral result was also based upon the arbitrator's conclusion that the Duryea Borough engaged in two serious procedural irregularities: it failed to postpone the disciplinary hearing to accommodate the request for union representation, and it violated the terms of the union contract by publishing a letter from the Council commenting on the reasons for Guarnieri's termination.<sup>146</sup>

#### V. THE JANUARY 2005 DIRECTIVES AND GUARNIERI'S CONTRACTUAL AND CONSTITUTIONAL CHALLENGES

Following Guarnieri's reinstatement in January 2005, the Duryea Council sent him a series of directives relating to the length of his shift and workweek, his attendance at Council meetings, his duties during his shift, his use of police cars for personal business, and his compliance with workplace smoking prohibitions.<sup>147</sup> In response, a new grievance was filed by Guarnieri claiming that the directives violated the union contract because they were discriminatory and changed past practices affecting his terms and conditions of employment.<sup>148</sup> The grievance sought withdrawal of the directives and an order prohibiting the Duryea Borough from discriminating against bargaining unit members.<sup>149</sup>

Without waiting for a final resolution of his grievance challenging the directives, Guarnieri commenced a lawsuit in United States District Court asserting that the directives constituted unconstitutional retaliation. It is unlikely that the timing of the lawsuit was coincidental, as it was filed one day before the

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144. *Id.* at 37-38.

145. *Id.* at 31-32.

146. *Id.* at 4-5.

147. *Pereles Arbitration*, *supra* note 103, at Joint App'x 39-41.

148. *Id.* at 24-25. Article 18 of the agreement, entitled "Past Practices," states: "All existing benefits and practices previously enjoyed by the members of the Collective Bargaining Unit and the Borough and not modified by this agreement shall remain as is." *Id.* at Joint App'x 57.

149. *Id.* at 53.



scheduled arbitration regarding his related contract grievance.<sup>150</sup> Whether the union supported Guarnieri's tactical decision and its timing is unclear. What is certain, however, is that the attorney representing Guarnieri in his federal lawsuit was not one of the union attorneys who had represented the union in the prior PLRB administrative case, the state litigation challenging PLRB's decision, or the two arbitrations. Furthermore, as demonstrated in Part IV *supra*, the union did not challenge the PLRB ALJ's rejection of its claim that Guarnieri's discharge was improperly motivated by his earlier grievances.

In the federal complaint, Guarnieri alleged, *inter alia*, that the Council's directives constituted unconstitutional retaliation for grieving his discharge, which as a petition, constituted protected activity under the First Amendment.<sup>151</sup> Notably, Guarnieri did not pursue another state administrative law claim under Act 111 of 1968 and Sections 6(1)(a), (c), and (d) of PLRA, which protect employees against retaliation for grievance activities.<sup>152</sup> Instead, he chose to pursue an arguably weaker constitutional claim in the face of a growing body of Supreme Court precedent narrowly interpreting the contours of protected activities by public employees under the First Amendment. Regardless of the legal theory, the inherent difficulties associated with the claim of retaliation are self-evident: the directives he received upon reinstatement from the disciplinary suspension were issued following an arbitrator's findings of serious misconduct and the imposition of a lengthy suspension without pay.

During the pendency of Guarnieri's lawsuit, two days of arbitration were held before another arbitrator concerning the related contract grievance.<sup>153</sup> In his February 2006 decision and award, the arbitrator granted the grievance in part, finding that some of the directives "were vague, interfered with the authority of the mayor, or were contrary to the collective bargaining agreement."<sup>154</sup> The arbitrator, however, did not find the directives discriminatorily motivated. As a remedy, the arbitrator mandated clarification and reissuance or withdrawal of the directives within ninety days of the award.<sup>155</sup>

In the midst of the lawsuit and the arbitration, Guarnieri filed an overtime complaint with the United States Department of Labor alleging a violation of the Fair Labor Standards Act of 1938 (FLSA)<sup>156</sup> when he was denied overtime compensation during one pay period.<sup>157</sup> The Council denied the overtime claim on the grounds that he had failed to demonstrate the necessity for the overtime

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150. *Id.* at 53-54; Guarnieri v. Duryea Borough, No. 3:05-CV-1422, 2007 WL 7563751, at \*3 (M.D. Pa. Nov. 15, 2007). On the same day, Duryea Borough police officer Nicholas Lohman filed his own federal lawsuit alleging unconstitutional retaliation under the First Amendment when he was furloughed following Guarnieri's reinstatement. *See* Lohman v. Borough, No. 3:05-CV-1423, 2007 WL 4260943, at \*1-2 (M.D. Pa. Nov. 29, 2007).

151. *Id.* at 43.

152. 43 PA. STAT. ANN. §§ 211.6(1)(a), (c) & (d) (West 2011). *See also* Ellwood City Police Wage & Policy Unit v. Ellwood City Borough, 29 P.P.E.R. ¶ 29213, Final Order (1998).

153. *Pereles Arbitration*, *supra* note 103, at Joint App'x 79-80.

154. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2492 (2011).

155. *Pereles Arbitration*, *supra* note 103, at Joint App'x 79.

156. 29 U.S.C. §§ 201-219 (2006).

157. *Borough of Duryea*, 131 S. Ct. at 2492.

worked.<sup>158</sup> The total value of the FLSA complaint was \$338.53, and the Department of Labor concluded that he was entitled to \$284.11 for six and one-half hours of unpaid overtime.<sup>159</sup> Thereafter, Guarnieri amended his federal complaint to allege that the denial of the overtime compensation constituted further retaliation by Duryea Borough because he had filed his lawsuit, which Guarnieri contended was a petition protected by the First Amendment.<sup>160</sup>

Following completion of discovery, a motion for summary judgment by Duryea Borough and the individual defendants was granted, in part, with the District Court, dismissing Guarnieri's free speech and other constitutional claims.<sup>161</sup> The motion was denied, however, concerning the claim that the directives and the withholding of overtime compensation were in retaliation for protected activity under the Petition Clause.<sup>162</sup> The case proceeded to trial and the jury returned a favorable verdict for Guarnieri, awarding him compensatory and punitive damages.<sup>163</sup>

After the defendants' post-verdict motions were denied, they appealed to the Third Circuit Court of Appeals arguing, among other things that the First Amendment does not protect a government employee from retaliation for filing a petition unless it addresses a matter of public concern.<sup>164</sup> Consistent with its prior precedent,<sup>165</sup> the Third Circuit rejected that argument: "This court [has] held that 'a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern.'"<sup>166</sup> As the Third Circuit acknowledged, it was the only circuit court to hold that the public concern test is inapplicable to claims by public employees under the Petition Clause.<sup>167</sup> Thereafter, the Supreme Court granted a writ of certiorari to the Duryea Borough for purposes of resolving the following question presented:

Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment's Petition Clause when they petitioned the government on matters of purely private

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158. *Guarnieri v. Borough of Duryea*, 364 F. App'x 749, 752 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 456 (2010), *vacated sub nom. Borough of Duryea*, 131 S. Ct. at 2488.

159. *Perelles Arbitration*, *supra* note 103, Joint App'x at 108.

160. *Borough of Duryea*, 131 S. Ct. at 2492.

161. *Id.* at 2492-93.

162. *Id.* at 2492.

163. *Id.*

164. *Guarnieri*, 364 F. App'x at 752-53.

165. *See Foraker v. Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007); *San Filippo v. Bongiovanni*, 30 F.3d 424, 442 (3d Cir. 1994).

166. *Guarnieri*, 364 F. App'x at 753 (citing *Foraker*, 501 F.3d at 236).

167. *Borough of Duryea*, 131 S. Ct. at 2491-92. *See also* William A. Herbert, *The First Amendment and Public Sector Labor Relations*, 19 LAB. LAW. 325, 346-48 (2004) [hereinafter Herbert, *First Amendment*].

concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue.<sup>168</sup>

With this legal and factual background concerning the constitutional claims, the article now turns to the substantive doctrinal standard that has developed in the past four decades for public employee claims under the Speech Clause, which the Court in *Borough of Duryea* held is applicable to claims under the Petition Clause.

#### VI. THE CITIZEN V. PUBLIC EMPLOYEE DICHOTOMY AND THE PUBLIC CONCERN TEST

The burning of the American flag by a protestor who believes public employees are overpaid or work too little would be considered constitutionally protected symbolic speech.<sup>169</sup> Depending on the context, a public employee's statement that her salary is insufficient or that her workload has become too great will not be constitutionally protected under the Speech Clause.<sup>170</sup>

Those unequal legal conclusions stem from the Supreme Court's adoption of a dichotomous constitutional analysis for public employee rights under the Speech Clause, which distinguishes between speech by a citizen and by a public employee. The distinction is premised upon a view that public employers, "like private employers, need a significant degree of control over their employees' words and actions [because] without it, there would be little chance for the efficient provision of public services."<sup>171</sup> Therefore, when a public employee is found to have not spoken as a citizen on a matter of public concern, an employer may retaliate against the speech without violating the Speech Clause. Under this analysis, most public employee speech concerning workplace issues has the legal equivalence of those unique sub-categories of expression lacking in constitutional protections, such as incitement, defamation, obscenity, and child pornography.<sup>172</sup> While the Court has been careful not to explicitly articulate that equivalency,<sup>173</sup> as a practical matter, speech by a public employee concerning the terms and conditions of employment in a government workplace is deemed to

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168. 09-1476 *Duryea v. Guarnieri: Question Presented*, SUPREME COURT OF THE UNITED STATES, available at <http://www.supremecourt.gov/qp/09-01476qp.pdf> (last visited May 10, 2012).

169. *Texas v. Johnson*, 491 U.S. 397 (1989).

170. See generally *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Waters v. Churchill*, 511 U.S. 661 (1994); *Connick v. Myers*, 461 U.S. 138 (1983).

171. *Garcetti*, 547 U.S. at 418.

172. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002). See also Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 934 (2009).

173. See *Connick*, 461 U.S. at 147 ("We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment."). Since *Connick*, however, the Court has not clarified or explained in what context public employee speech not related to a matter of public concern is protected under the First Amendment.

have insufficient societal value to be worthy of protection under the Speech Clause.

The public employee/citizen dichotomy in free speech cases originated in *Pickering v. Board of Education*.<sup>174</sup> In *Pickering*, the case came to the Court on an appeal from a decision by the Illinois Supreme Court upholding a school district's decision, following an administrative hearing under Illinois' Teacher Tenure Law, to terminate a teacher for the content of his published letter to a newspaper critical of the district and the school superintendent.<sup>175</sup> The letter was written and submitted by the teacher in response to pre-election letters published from other teachers and the school superintendent in support of a proposed school tax increase.<sup>176</sup> The teacher criticized the school district's handling of an earlier bond issue and the superintendent's "totalitarianism" toward the teachers, including attempts to suppress teacher opposition to the tax increase.<sup>177</sup>

In *Pickering*, the Supreme Court set forth the general framework of a balancing test to be applied in employment-related free speech retaliation claims by public employees: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>178</sup>

This formulation of the balancing test appears to have been heavily influenced by the wording utilized in the closing paragraph of the teacher's letter, which used the citizen/employee dichotomy to describe his plight: "I must sign this letter as a citizen, taxpayer and voter, not as a teacher since that freedom has been taken from the teachers by the administration."<sup>179</sup>

For most of the history of the public concern test, the citizen/employee dichotomy has been primarily metaphorical. Therefore, when a public school teacher addressed his school board during a public meeting regarding a pending union contract proposal, the Court concluded that he spoke "not merely as one of its employees but *also* as a concerned citizen."<sup>180</sup> Similarly, in a per curiam opinion, the Court concluded that the First Amendment protects the right of a

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174. Paul M. Secunda, *The Most Important Public Employment Law Case: Pickering v. Board of Education*, 391 U.S. 563 (1968), MARQ. U. L. SCH. FACULTY BLOG (Oct. 25, 2010), <http://law.marquette.edu/facultyblog/2010/10/25/the-most-important-public-employment-law-case-pickering-v-board-of-education-391-u-s-563-1968/>.

175. See *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 225 N.E.2d 1, 6 (Ill. 1967) ("The Teacher Tenure Law was enacted primarily for the protection of Illinois teachers. Its object is to improve the school system by assuring teachers of experience and ability a continuous service based upon merit, and by protecting them against dismissal for reasons that are political, partisan or capricious.").

176. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 566 (1968).

177. *Id.* at 575-78.

178. *Id.* at 568.

179. *Id.* at 577.

180. *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174-75 (1976) (emphasis added).

public employee to “associate and speak freely and petition openly”<sup>181</sup> without referencing a requirement that such activities relate to an issue of public concern. Indeed, the term “citizen” in the Court’s public employee free speech cases has never been used in a literal or legal sense.

The hardening of the citizen/public employee dichotomy began 15 years after *Pickering* in *Connick v. Myers*.<sup>182</sup> In *Connick*, an at-will assistant district attorney challenged her termination claiming that it violated her rights under the Speech Clause.<sup>183</sup> She was terminated for circulating a questionnaire in the workplace after being involuntarily transferred to a different section of the criminal court.<sup>184</sup> The questionnaire sought the views of other assistant district attorneys concerning “office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.”<sup>185</sup>

In determining her claim, the Court in *Connick* formulated a standard for applying the threshold public concern test in public employee retaliation cases under the Speech Clause: “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.”<sup>186</sup> In a more recent decision, the Court emphasized that free speech protections were applicable to a public employee “only when [the speech] falls within the core of First Amendment protection—speech on matters of public concern.”<sup>187</sup>

In *City of San Diego v. Roe*, the Court conceded that the “boundaries of the public concern test are not well defined,”<sup>188</sup> and proceeded to reformulate the test: “[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”<sup>189</sup>

The *City of San Diego* test strongly suggests that whether a communication touches upon a matter of public concern is a question of fact tied to community standards concerning what constitutes “legitimate news” of general interest and value to the public. Unlike the community standards test under the law of obscenity,<sup>190</sup> however, the issue of whether speech touches upon a matter of public concern is treated as a legal question to be determined by the court.<sup>191</sup> Inevitably, this requires a judge to render a societal judgment with respect to the

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181. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam).

182. See generally *Connick v. Myers*, 461 U.S. 138 (1983).

183. *Id.*

184. *Id.* at 140-41.

185. *Id.* at 141.

186. *Id.* at 147-48.

187. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 600 (2008).

188. *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004).

189. *Id.* at 83-84.

190. *Miller v. California*, 413 U.S. 15, 24 (1973).

191. *Snyder v. Phelps*, 131 S. Ct. 1207, 1212 (2011).

importance “of speech grounded in the real, everyday experience of ordinary people,”<sup>192</sup> a role traditionally performed by juries.

The reformulation of the public concern test in *City of San Diego* created more questions than it answered. The reformulated test does not provide any guidance for the lower courts concerning what defines legitimate news in a 24/7 news culture obsessed with faux celebrity, gossip, tragedy, and violence. The spectacular growth in electronic exhibitionism through social media further limits the easy application of the reformulated test.<sup>193</sup> It is also unclear what methodology a judge should apply in deciding whether a particular subject is of general interest and of value to the public. Thus, the public concern test remains an “amorphous”<sup>194</sup> and ill-defined legal concept that continues to prove to be “difficult” to apply,<sup>195</sup> because it provides only “guiding principles”<sup>196</sup> and “undermines the protection of speech that is important to public discourse.”<sup>197</sup>

More recently, in *Garcetti v. Ceballos*, the Court solidified its dichotomous approach to public employee free speech claims by adopting a bright-line rule that when a public employee makes a statement pursuant to official duties, the employee is not speaking as a citizen on an issue of public concern; therefore the Speech Clause does not insulate the communication from employer retaliation.<sup>198</sup> In *Garcetti*, a prosecutor’s communications over possible perjury in an affidavit submitted in support of a warrant was determined to have no First Amendment protections because the speech was made as part of his official duties.<sup>199</sup> *Garcetti* is at variance with the Court’s general reluctance to “recognize new categories of unprotected speech,” which create firm rules of exclusion rather than establishing legal guidelines or principles to be applied in future freedom of speech cases.<sup>200</sup> It is indicative, however, of the major shift that has taken place in the Court’s jurisprudence since *Pickering*.

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192. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 37 (1990).

193. See generally William A. Herbert, *The Workplace Consequences of Electronic Exhibitionism and Voyeurism*, 30 TECH. & SOC’Y MAG. 25 (2011).

194. *Bartnicki v. Vopper*, 532 U.S. 514, 542 (2001) (Rehnquist, C.J., dissenting).

195. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2005).

196. *Snyder*, 131 S. Ct. at 1216.

197. Estlund, *supra* note 192, at 3.

198. *Garcetti*, 547 U.S. at 418. See also Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 123, 143 (2008).

199. *Garcetti*, 547 U.S. at 421. In *Weintraub v. Board of Education of the City School District of the City of New York*, the Second Circuit determined that a grievance filed by a public school teacher with his union about the failure of an administrator to discipline a student was unprotected under *Garcetti* because the union grievance was filed pursuant to the teacher’s official duties. *Weintraub*, 593 F.3d 196 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 444 (2010).

200. See generally Farber, *supra* note 172, at 924-25. In his article, Farber omits *Garcetti v. Ceballos* as a case adopting a categorical exclusion of expression from First Amendment protections. Instead, he identifies only two other cases adopting categorical exclusions: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); and *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (“[T]rue threats’ ... where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”).

The public concern test has been applied by the Court in only two cases related to public-sector collective bargaining. Neither, however, involved a First Amendment retaliation claim.<sup>201</sup> In one case, the Court ruled that the First Amendment precluded a school board from prohibiting a teacher from speaking at a public meeting with respect to a proposed contractual agency fee arrangement.<sup>202</sup> In *Bartnicki v. Vopper*, the Court held that the subject matter of a secretly recorded conversation between a public employee union official and the union's chief negotiator concerning the status of negotiations touched upon a matter of public concern.<sup>203</sup> In that conversation, the union official and chief negotiator discussed a proposed strike, problems created by public comments with respect to negotiations, and the need for a dramatic response to the employer's position at the bargaining table, including the suggested use of violence.<sup>204</sup> In two other public-sector cases that did not involve collective bargaining, the Court did not reference the public concern test.<sup>205</sup> However, circuit court decisions indicate that speech related to unionization and collective bargaining will not be deemed to inherently touch upon an issue of public concern.<sup>206</sup>

As Cynthia Estlund has pointed out, application of the public concern test results in erroneous judicial rulings that exclude from First Amendment protections "speech that others would consider to be relevant to public debate."<sup>207</sup> The metaphorical distinction between a citizen and a public employee and the public concern test are not easily applied by the courts, public employers, employees, and unions because they are artificial and unrealistic.<sup>208</sup> More

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201. *Bartnicki v. Vopper*, 532 U.S. 514, 517-18 (2001); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174-75 (1976).

202. *City of Madison, Joint Sch. Dist., No. 8*, 429 U.S. at 176-77.

203. *Bartnicki*, 532 U.S. at 518, 525.

204. *Id.* at 518-19. In his concurrence, Justice Breyer agreed that the information publicized from the conversation is "a matter of unusual public concern, namely, a threat of potential physical harm to others." *Id.* at 536 (Breyer, J., concurring).

205. See generally *Minn. State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 271, 273 (1984); *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 465 (1979).

206. See *Gregorich v. Lund*, 54 F.3d 410, 415 (7th Cir. 1995) (determining inquiry into "precise content, form, and context" necessary despite the fact that case involved union activity); *Boals v. Gray*, 775 F.2d 686, 693 (6th Cir. 1985) (concluding that union-related does not inherently touch upon a matter of public concern). See also *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008) (holding that speech related to union matters is suggestive that the speech involved a matter of public concern); *Labov v. Lalley*, 809 F.2d 220, 222-23 (3d Cir. 1987) ("Plainly efforts of public employees to associate together for the purpose of collective bargaining involve associational interests which the first amendment protects from hostile state action."); *McGill v. Bd. of Educ. of Pekin Elementary Sch. Dist. No. 108 of Tazewell Cnty.*, 602 F.2d 774, 778 (7th Cir. 1979) (holding that advocacy for a collective bargaining agreement in the teachers' lounge and in an open meeting of the school board constitutes speech involving a matter of public concern); *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 883 (D.D.C. 1971) (per curiam), *aff'd*, 404 U.S. 802 (1971) ("The right [of public employees] to organize collectively and to select representatives for the purposes of engaging in collective bargaining is ... a fundamental right.").

207. Estlund, *supra* note 192, at 3.

208. See Karin B. Hoppman, *Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993, 1008-10 (1997) (concluding that lower

importantly, the Court's doctrinal approach does not ensure a fair and robust debate about public sector workplace issues in a democratic society, especially at a time when informed and reasoned debate has become the exception rather than the norm in our political culture.

#### VI. *PICKERING/CONNICK* BALANCING AT A TIME OF POLITICAL AND FISCAL TURMOIL

Under the *Pickering/Connick* balancing test, even after a judge finds that a public employee spoke as a citizen on an issue of public concern, the "speech is not automatically privileged."<sup>209</sup> Instead, the right to engage in such speech under the First Amendment is balanced against the interests of the government employer in providing efficient and effective services.<sup>210</sup>

When applying the balancing test under the Speech Clause, a judge will consider the "manner, time, and place of the employee's expression" along with its context.<sup>211</sup> Among the relevant facts and circumstances that will be examined is whether a statement impairs discipline, disrupts workplace harmony, has a detrimental impact on close working relationships, impedes the performance of the employee's duties, or otherwise interferes with the operations of the public agency.<sup>212</sup>

Significantly, the courts will grant "greater deference to government predictions of harm used to justify restriction of employee speech"<sup>213</sup> than similar government predictions utilized to justify the suppression of speech by members of the public. In fact, "substantial weight [will be given] to government employers' reasonable predictions of disruption, and even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential."<sup>214</sup> Whether the employee speech was made in public or expressed privately may be relevant in a court's application of the balancing test.<sup>215</sup> Furthermore, the scope of judicial deference to governmental

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courts' analyses create "contradictory results that strip the public concern prong of all predictability and leave both public employers and public employees uncertain of their rights").

209. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011).

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

211. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

212. *Id.*

213. *Waters v. Churchill*, 511 U.S. 661, 673 (1994). *See also* *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996) (stating that the *Pickering*, *Connick* and *Waters* decisions require a court to grant substantial deference to the government's reasonable view of its legitimate interests).

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

215. *See Rankin*, 483 U.S. at 388 (holding that a private comment in a constable's office by a data-entry clerk concerning the attempted assassination of President Reagan was protected because it did not discredit the office or adversely impact the functioning of the office). *See also* *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979) ("Although the First Amendment's protection of government employees extends to private as well as public expression, striking the *Pickering* balance in each context may involve different considerations.... Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's



prediction of harm from public employee speech will be dependent on whether the speech has already taken place or whether the prediction has been made to justify a governmental ban on a particular form of speech.<sup>216</sup> Having examined the background of these doctrines for public employee retaliation claims under the Speech Clause, the article turns to the Court's opinion in *Borough of Duryea*, which extends those doctrines to retaliation claims under the Petition Clause.

## VII. THE OPINION IN *BOROUGH OF DURYEY*

### A. *The Court's Holding and Reasoning*

In the midst of the renewed nationwide debate over public-sector collective bargaining and statutory protections, the Supreme Court issued *Borough of Duryea*. In its decision, the Court held that the threshold public concern test is applicable to a retaliation claim brought by a public employee under the Petition Clause. Therefore, if the subject of a petition is determined by a judge to not touch upon an issue of public concern, it will not be protected under the Petition Clause.<sup>217</sup> In addition, the majority held that lawsuits and appeals through established governmental procedures by public employees for the resolution of legal disputes may be protected under the Petition Clause if the substance of the petition satisfies the public concern test.<sup>218</sup> While the holding is limited to applying the public concern test to retaliation claims brought by public employees under the Petition Clause, the Court clearly concluded that *Pickering/Connick* balancing between employee and employer interests is equally applicable to such claims.

The Court's opinion reasoned that the right to free speech and the right to petition "share substantial common ground" and that retaliation claims under the Speech and Petition Clauses can factually overlap.<sup>219</sup> It, therefore, concluded that treating public employee retaliation claims under the Petition Clause differently than under the Speech Clause is unjustified because the limitations on public employee rights under both Clauses are necessary to protect the substantial government interests of providing efficient and effective operations.<sup>220</sup> In

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institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered.").

216. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 n.21 (1995). When the Court in *United Public Workers of America v. Mitchell* upheld the prohibition against certain political activities by federal workers under the Hatch Act, the Court stated: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947). See also GILBERT J. GALL, *PURSUING JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* 223 (1999) (describing the background and the constitutional arguments made by CIO General Counsel Lee Pressman against the Hatch Act in *United Public Workers of America v. Mitchell*).

217. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2501 (2011).

218. *Id.*

219. *Id.* at 2494-95.

220. *Id.* at 2495.

essence, the Court conflated Speech Clause precedent by citing to the rationale underlying the *Pickering/Connick* balancing test as a justification for holding the threshold public concern test applicable for determining whether a public employee's petition is protected under the Petition Clause.

In the Court's view, limiting public employee protections under the Petition Clause to grievances touching upon issues of public concern is necessary because a public employee petition, like his or her speech, "may seek to achieve results 'that contravene governmental policies or impair the proper performance of governmental functions.'"<sup>221</sup> Therefore, because a petition may challenge a governmental policy, which can lead to workplace disruptions and adversely impact morale, a public employer must have the authority "to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve."<sup>222</sup> In particular, the Court expressed concern that employee grievances may cover a multitude of workplace topics including "working conditions, pay, discipline, promotions, leave, vacations and terminations."<sup>223</sup> These are core subjects of negotiations in jurisdictions where employees have collective bargaining rights.

In deciding that a petition must meet the public concern test in order to receive constitutional protection from retaliation, the Court did not distinguish between public employee petitions to the executive, legislative, or judicial branches of government. Nor did it consider the fact that Guarnieri's grievance and lawsuit challenged acts by legislators performing executive functions. In addition, when the Court examined the "history and purpose of the Petition Clause,"<sup>224</sup> it did not discuss the central role petitioning has played in public-sector labor relations in setting the employment rights of government workers.<sup>225</sup> As demonstrated in Part II *supra*, petitioning the legislative and executive branches, and commencing litigation, have been the central means public employees utilized to obtain, expand, and protect their wage levels, benefits, and working conditions. Today, lobbying remains an essential tool for public employees and their advocates, even in jurisdictions with collective bargaining laws.<sup>226</sup> Nevertheless, under *Borough of Duryea*, petitioning a legislative body for a wage increase, as Chicago teachers did in 1897, or for other changes in working conditions, may no longer be an activity protected by the Petition Clause.

In the opinion, the Court also failed to consider the historic legacy of the earlier gag orders and other restrictions aimed at suppressing public employee petitioning. Grievances by public employees seeking to maintain or challenge the status quo in a government workplace are not always received by government officials with equanimity. This partially explains the imposition of the gag orders and restrictions in the late nineteenth and early twentieth centuries. Under

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221. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006)).

222. *Id.* at 2495-96.

223. *Id.* at 2496.

224. *Id.* at 2494.

225. Herbert, *First Amendment*, *supra* note 167, at 347-48.

226. *Lenhart v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991).

*Borough of Duryea*, the Court has, intentionally or unintentionally, established precedent that might bestow constitutional legitimization to governmental restraints on public employee petitioning for salary adjustments and statutory changes affecting their terms of employment, which were statutorily abolished a century ago.

Another rationale cited by the Court in support of applying the public concern test is a fear that unrestrained application of the Petition Clause to the public workplace would lead to “judicial superintendence,” requiring determinations concerning the governmental motivation underlying an adverse employment action alleged to be retaliatory.<sup>227</sup> In light of the precedent and legal framework already in place for litigating governmental motivation under the Constitution and the plethora of federal and state employment discrimination statutes, this concern is unpersuasive. There is no evidence cited in the decision that the applicable burdens of proof for public employee retaliation claims, set over three decades ago, have resulted in undue judicial entanglement with governmental operations.<sup>228</sup> The Court’s expression of concern is, however, reminiscent of the caseload-related *Connick* dictum that “a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.”<sup>229</sup>

While conceding that future cases may present issues that highlight the “special concerns of the Petition Clause,” warranting the application of a distinct analysis from the one applicable to Speech Clause cases, the Court stated in a definitive manner that “claims of retaliation by public employees do not call for this divergence.”<sup>230</sup> The Court’s broad declarative statement strongly suggests that it will find that public employees are not protected against retaliation under the Petition Clause when their petitions are over terms and conditions of employment, regardless of the branch of government it is directed to. This reasonable interpretation, however, must be measured against other language in the opinion suggesting, perhaps, a narrower reading. For example, the opinion states that *Guarnieri*’s case did not necessitate the Court to consider the proper application of the Petition Clause beyond the context of a public employee’s right to access the courts and other governmental forums for the resolution of legal disputes.<sup>231</sup> The Court also stated that the forum in which a petition is lodged will be a relevant factor in determining whether the subject matter meets the public concern standard.<sup>232</sup> Based upon the increasing constriction of First Amendment protections for government workers from *Pickering* to *Garcetti*, a narrow interpretation of *Borough of Duryea* may be illusory. The scope of the decision can be discerned from the Court’s treatment of the text and history of the Petition Clause, to which this article now turns.

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227. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011).

228. *See id.* at 2496-97.

229. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

230. *Borough of Duryea*, 131 S. Ct. at 2495.

231. *Id.* at 2494.

232. *Id.* at 2501.

*B. The Court's Selective Use of History Concerning the Right to Petition*

Although the Court overlooked relevant public-sector labor history in reaching its opinion, it did discuss the history and purpose of the Petition Clause. In the Court's selective view of that history, the fundamental purpose of the Petition Clause was to protect citizens who file petitions "to express their ideas, hopes and concerns to their government."<sup>233</sup> According to the Court, the fact that purely private grievances were regularly filed and acted upon during the colonial period does not justify a broader interpretation of the Petition Clause.<sup>234</sup> However, the history of the right to petition and the text of the Petition Clause do not support the Court's decision to exclude protections under the Petition Clause based upon the status of an individual as a public employee or based upon the particular subject matter of the employee's grievance.

In interpreting the Petition Clause, the Court cited many significant events in the British origin of the right to petition, dating back to the Magna Carta, as well as the role of the right of petition in the events leading to the ratification of the Constitution.<sup>235</sup> However, in describing "the historic and fundamental principles"<sup>236</sup> that led to inclusion of the Petition Clause in the Bill of Rights, the Court chose to dismiss textual and historical material that are counterevidence to its conclusion.

While petitioning constitutes an essential democratic right necessary for ensuring that government is receptive to the demands of the populace,<sup>237</sup> evidence from the colonial period also demonstrates that a fundamental purpose of the right was to permit grievances limited to purely private concerns. Nevertheless, the right to petition, like other rights guaranteed under the First Amendment, was not absolute,<sup>238</sup> and petitioners were subject to financial sanctions in colonial time for filing meritless or vexatious grievances.<sup>239</sup> The opinion in *Borough of Duryea* minimizes references to colonial history and experience regarding petitioning, and omits the history of the drafting and ratification of the First Amendment, which support a broader reading of the Petition Clause. The substance of such material, as Justice Scalia states in his concurrence and partial dissent, goes far beyond what Justice Kennedy described as the "mere[ly by] tallying up petitions to the colonial legislatures."<sup>240</sup>

The first explicit protection of the right to petition in colonial America was set forth in Massachusetts' Body of Liberties of 1641:

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233. *Id.* at 2495.

234. *Id.* at 2498.

235. *Id.* at 2499. *See also* McDonald v. Smith, 472 U.S. 479, 482-83 (1985).

236. *Borough of Duryea*, 131 S. Ct. at 2498.

237. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1154-55 (1992); Stephen A Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 146-47, 150-55 (1986).

238. McDonald v. Smith, 472 U.S. 479, 484 (1985).

239. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 31 (1994).

240. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503-04 (2011).

Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.<sup>241</sup>

In contrast to the holding in *Borough of Duryea*, the right to petition guaranteed by the Body of Liberties did not include substantive limitations or conditions. This codified colonial right did not distinguish between the personal and the political or between a citizen and an individual with no or minimal citizenship rights, including the enslaved.<sup>242</sup> In fact, a group of slaves in Massachusetts in June 1773 petitioned Governor Thomas Hutchinson and the state legislature seeking personal freedom along with the right to own property.<sup>243</sup>

At the time of the American Revolution, five other colonies had explicit provisions protecting the right to petition: Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont. All of the remaining colonies recognized petitioning as a means for seeking redress of personal grievances.<sup>244</sup> The subject matter of most petitions during the colonial period focused upon private disputes, and those petitions took the form of individual or collective grievances.<sup>245</sup> Petitions were directed to colonial bodies, the courts, or the governor.<sup>246</sup> Petitioning was a means for individuals to check an abuse of power by public officials towards them and obtain relief for private wrongs. As one scholar has observed:

Petitioning provided not just a method whereby individuals within those groups might seek reversal of harsh treatment by public authority, judicial or otherwise, but also a method whereby such individuals could seek the employment of public power to redress private wrongs that did not fit neatly into categories of action giving rise to a lawsuit.<sup>247</sup>

In Connecticut, petitions were filed by the guards to the Governor over their “arms and expenses.” In addition, petitions were filed by individuals paid with public funds to provide direct care to the ill and the orphaned, as well as those

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241. Spanbauer, *supra* note 239, at 27-28.

242. Higginson, *supra* note 237, at 153; Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2176-77, 2181-82 (1998).

243. *Petition for Freedom to Massachusetts Governor Thomas Hutchinson, His Majesty's Council, and the House of Representatives, June 1773*, MASS. HIST. SOC'Y, available at [http://www.masshist.org/database/img-viewer.php?item\\_id=558&img\\_step=1&tpc=&pid=&mode=large&tpc=&pid=#page1](http://www.masshist.org/database/img-viewer.php?item_id=558&img_step=1&tpc=&pid=&mode=large&tpc=&pid=#page1) (last visited May 11, 2012).

244. Spanbauer, *supra* note 239, at 15, 28.

245. Higginson, *supra* note 237, at 146; Mark, *supra* note 242, at 2181; Spanbauer, *supra* note 239, at 28.

246. Spanbauer, *supra* note 239, at 28.

247. Mark, *supra* note 242, at 2182.

seeking to expose corruption by public officials.<sup>248</sup> A decade prior to the ratification of the Bill of Rights, the overwhelming number of laws enacted by the Connecticut General Assembly granted personal petitions.<sup>249</sup> In Virginia, publicly appointed inspectors of tobacco in public warehouses petitioned the legislature regarding their wages in 1791, 1792, 1796, and 1798.<sup>250</sup>

The 1780 Massachusetts Constitution's Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts included a separate and distinct article protecting the right to petition, including personal grievances:

Art. XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.<sup>251</sup>

When James Madison drafted his proposed constitutional amendments, he drew upon existing state constitutions, and in particular the constitution of Massachusetts.<sup>252</sup> In drafting the proposed Bill of Rights, Madison prepared a separate clause aimed at protecting the rights to petition and free assembly from the clause aimed at protecting freedom of speech and freedom of the press.<sup>253</sup> Madison's proposals stated:

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.<sup>254</sup>

Significantly, Madison's proposal did not seek to exclude or limit protections to individuals based upon their employment status or the subject matter of their grievances.

248. Higginson, *supra* note 237, at 152-54. Although the Higginson article is cited by the Court, the opinion omits mention of the historical use of petitions concerning terms and conditions of employment by those employed by the government and those employed with public funds. See *Borough of Duryea*, 131 S. Ct. at 2498.

249. Higginson, *supra* note 237, at 146.

250. See *Legislative Petitions Database*, LIBRARY OF VA., <http://www.lva.virginia.gov/public/guides/petitions/petitionsSearch.asp> (last visited May 11, 2012); PERCY SCOTT FLIPPIN, *THE FINANCIAL ADMINISTRATION OF THE COLONY OF VIRGINIA* 50-51 (1912).

251. MASS. CONST. art. XIX (emphasis added), available at <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited May 11, 2012).

252. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 144-45, 166 (1988).

253. Higginson, *supra* note 237, at 155-56.

254. *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, in 1 *ANNALS OF CONGRESS* 450-53 (1789) (Joseph Gales ed., 1834) (emphasis added), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=227>.

Following a review of Madison's proposed amendatory clauses to the Constitution by a House of Representatives select committee, the clauses were merged into a single amendment with the breadth of the right to petition substantially expanded from Madison's proposal. Under the revised amendment, the term "Legislature" was replaced by the word "government," thereby extending constitutional protections to petitions that are directed at any of the three branches of government.<sup>255</sup> This interpretation is confirmed by a comparison with the Delaware, Pennsylvania, and Vermont constitutions, which like the 1780 Massachusetts Constitution protected the right to pursue petitions directed only at the legislature.<sup>256</sup> While the majority in *Borough of Duryea* found that the Petition Clause generally protects access to the courts, it did not base that conclusion upon the textual history of the First Amendment.<sup>257</sup>

After ratification, petitioning played an important role in the hiring and discharge of employees within the federal civil service. Both federal office seekers and aggrieved federal employees petitioned for relief.<sup>258</sup> When a collector of customs was terminated in Massachusetts, he petitioned Alexander Hamilton for a complete description of his alleged misconduct.<sup>259</sup> Similarly, a customs officer in Rhode Island filed a petition challenging his demotion and salary reduction.<sup>260</sup> Federal marshals in Delaware and Massachusetts were able to successfully petition for appointment to higher paying positions.<sup>261</sup>

In selectively utilizing history to conclude that the status of a public employee limits the substantive protections under the Petition Clause, the Court in *Borough of Duryea* failed to discuss an important historical analogy. Although the Court briefly mentioned the antebellum debate over the right to petition Congress on the subject of slavery,<sup>262</sup> and referenced William Lee Miller's exceptional book on the subject,<sup>263</sup> it omitted the inconvenient truth that a central issue in that debate was whether the legal status of slaves deprived or

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255. Spanbauer, *supra* note 239, at 40. Thus, the history of the ratification of the First Amendment supports the Supreme Court's conclusion that the right to petition extends to all branches and departments of government. See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002); *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

256. Mark, *supra* note 242, at 2201-02.

257. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011). In their separate opinions in *Borough of Duryea*, Justices Thomas and Scalia reject the majority's conclusion that lawsuits are protected by the Petition Clause. Rather than apply the public concern test to claims under the Petition Clause, Justices Thomas and Scalia would adopt a *per se* rule similar to the rule in *Garcetti*, rendering all public employee petitions addressed to the government as employer, rather than as sovereign, unprotected under the Petition Clause. *Id.* at 2506 (Scalia, J., concurring); *id.* at 2501-03 (Thomas, J., concurring). Notably, neither concurrence relied upon the text and history of the First Amendment as the basis for the proposed *per se* rule.

258. JACK McLAUGHLIN, *TO HIS EXCELLENCY THOMAS JEFFERSON: LETTERS TO A PRESIDENT* 40-71 (1991).

259. PRINCE, *supra* note 17, at 34-35.

260. *Id.* at 64-65.

261. *Id.* at 264.

262. *Borough of Duryea*, 131 S. Ct. at 2499-2500.

263. See generally WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY* (1995).

limited their right to petition.<sup>264</sup> In 1837, John Quincy Adams described that issue as “the most important question that ever came before the House since its first origin.”<sup>265</sup>

C. *Private Employer Rights > Government Employee Rights Under the Petition Clause*

The Court’s decision to exclude grievances about employee workplace-related issues from constitutional protection under the Petition Clause is at odds with the reasoning utilized by the Court in other cases holding that purely private workplace-related litigation by employers is generally protected.

In *Bill Johnson’s Restaurants, Inc. v. NLRB*,<sup>266</sup> the Court found that a private employer had a general right of access to the courts under the Petition Clause to pursue a well-founded state defamation action against its employees in order to protect, which the Court subsequently described as the employer’s “personal interest in its own reputation.”<sup>267</sup> The general constitutional right of an employer to pursue personal litigation against its employees is proscribed by the sham exception developed under federal anti-trust law.<sup>268</sup> The basis for the employer’s libel action in *Bill Johnson’s Restaurants* was the content of a leaflet distributed as a part of a protest over the treatment of unrepresented hourly waitresses at an Arizona restaurant.<sup>269</sup> Based upon the employer’s rights under the Petition Clause, the Court held that the National Labor Relations Board (NLRB) could not order the restaurant owner to cease and desist from prosecuting the state defamation action, even if it was improperly motivated under the National Labor Relations Act (NLRA), unless the lawsuit lacked a reasonable basis in fact or law.<sup>270</sup>

The Court, in *BE & K Construction Co. v. NLRB*, revisited the scope of constitutional protections afforded employers to pursue retaliatory litigation under the Petition Clause.<sup>271</sup> In that case, a general contractor challenged an NLRB decision finding that it had violated Section 8(a)(1) of the NLRA by filing an unsuccessful lawsuit against various unions for lobbying in favor of stronger

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264. *Id.* at 260-70.

265. *Id.* at 260.

266. *See generally* *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

267. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

268. *See* *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002). *See also* *E. R.R. President’s Conference v. Noerr Motor Freight*, 365 U.S. 127, 138, 144 (1961) (concluding that under the Petition Clause, lobbying activities to persuade government officials to enact or enforce laws do not generally violate the Sherman Act unless the petitioning “is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor”). *See generally* *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (lobbying by the United Mine Workers, in conjunction with coal producers, to persuade the Secretary of Labor to obtain a high minimum-wage requirement for small contracting companies did not constitute a restraint on trade).

269. *Bill Johnson’s Restaurants*, 461 U.S. at 733-34.

270. *Id.* at 748.

271. *See generally* *BE&K Constr. Co.*, 536 U.S. 516.



toxic waste admission standards for the contractor's project, picketing the contractor's premises, filing a state court action alleging health and safety violations, and pursuing grievances against the contractor's joint venture partner.<sup>272</sup> In rejecting the standard of liability applied by the NLRB, the Court found that the contractor's pursuit of its private interests through an unsuccessful but reasonably based lawsuit enhanced First Amendment interests by publicly airing disputed facts, by raising matters of public concern, by promoting the evolution of the law, and adding legitimacy to the court system as a dispute resolution mechanism.<sup>273</sup>

Unlike the concerns expressed in *Borough of Duryea* about possible workplace disruptions caused by employee-initiated litigation to remedy a personal employment complaint, the Court in *Bill Johnson's Restaurants* concluded that an employer's protected right to pursue a lawsuit over a purely private interest outweighed the legal costs to employees and the limitations placed on the scope of their statutory rights under the NLRA.<sup>274</sup> Similarly, in *BE & K Construction*, litigation on behalf of an employer's economic interests was treated as protected under the Petition Clause because it has the potential of raising First Amendment issues, while a public employee's lawsuit concerning his own purely personal workplace interests is treated as being outside of First Amendment protections under *Borough of Duryea*.

There is a double standard at work in these cases, which is not directly addressed by the Court. A public employee's grievance concerning a workplace issue is far more likely to generate media attention and sustained public discussion than a private employer's lawsuit seeking monetary damages, which, at best, may result in a single day's news story. Furthermore, an employer's lawsuit against its employees for engaging in concerted activity has an equal likelihood of causing workplace disruption as a public employee's lawsuit. Nevertheless, under *Borough of Duryea*, the Petition Clause is deemed to afford greater protections to private employers than public employees in pursuing litigation over personal economic interests related to the workplace. The judicially-created stratification of rights, which is premised upon status and power within our society, does not find support in the egalitarian text and general history of the Petition Clause.

D. *The Floor of Protected Rights for Public Employees: The Constitution or Statutes?*

In determining the breadth of employer rights under the Petition Clause, the Court in *Bill Johnson's Restaurants, Inc.* and *BE & K Construction* did not reference the statutory rights granted to private employers under Section 8(c) of

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272. *Id.* at 519-20.

273. *Id.* at 532. See also Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 *FORDHAM L. REV.* 2617, 2643-44 (2011).

274. *Bill Johnson's Restaurants*, 461 U.S. at 740-41.

the NLRA<sup>275</sup> concerning labor disputes.<sup>276</sup> Nor did the Court emphasize that private employers can seek revision to the NLRA to expand their statutory rights by including an express provision protecting their right to commence litigation against their employees concerning a labor dispute.<sup>277</sup> Implicit in both decisions is the recognition that the Constitution sets the floor of rights, which can be expanded, but not narrowed, through legislative measures.

In contrast, the Court in *Borough of Duryea* rationalized its narrow construction of protected rights against retaliation under the Petition Clause for public employees based upon the existence of or potentiality of statutory rights and remedies. This approach is not consistent with the Court's prior rejection of a rule of constitutional construction that makes First Amendment violations dependent on the terms of state public-sector laws because it "would sacrifice sound constitutional analysis for the appearance of administrability."<sup>278</sup>

At a time when there are efforts in various parts of the country to repeal or narrow the statutory rights of public employees, the Court made the following observation in *Borough of Duryea*:

The government can and often does adopt statutory and regulatory mechanisms to protect the rights of employees against improper retaliation or discipline, while preserving important government interests. Employees who sue under federal and state employment laws often benefit from generous and quite detailed antiretaliation provisions. See, e.g., Pa. Stat. Ann., Tit. 43 § 1101.1201(a)(4). *These statutory protections are subject to legislative revision and can be designed for the unique needs of State, local, or Federal Governments, as well as the special circumstances of particular governmental offices and agencies.* The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances.<sup>279</sup>

This is not the first time that the Court has referenced existing statutory protections to justify a narrow interpretation of First Amendment rights for public employees. In *Garcetti*, the Court cited federal and state laws protecting whistleblowers to justify its holding excluding official reports of misconduct from constitutional protections.<sup>280</sup> Similarly, in *Waters v. Churchill*, the Court

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275. 29 U.S.C. § 158(c) (2006).

276. *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008) ("It is indicative of how important Congress deemed such 'free debate' that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis."); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974) (The NLRA favors "uninhibited, robust, and wide-open debate in labor disputes.").

277. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of § 8(a)(1) [of the NLRA].").

278. *Lenhart v. Ferris Faculty Ass'n*, 500 U.S. 507, 526-27 (1991).

279. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2497 (2001) (emphasis added) (citation omitted).

280. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2005).

referred to the fact that a legislative body can chose to grant protections beyond those mandated by the First Amendment, “out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system.”<sup>281</sup> While protective legislation has always been at the core of public-sector labor relations, and usually provides a firmer source of law for challenging public-sector workplace retaliation,<sup>282</sup> it is not a replacement for the Constitution in establishing fundamental rights.

The Court’s reference to anti-retaliation laws being subject to legislative revision is reminiscent of the observation by AFL President Samuel Gompers that “what the law gives or what the state gives, the state can take away; but what you get through your own exertions you can hold as long as you maintain your strength.”<sup>283</sup> It is safe to assume, however, that the Court did not intend its comment to be an encouragement to public employees to adopt Gompers’ “pure and simple unionism,” which would involve the use of traditional private-sector union tactics to obtain improved working conditions solely through collective bargaining. As a practical matter, the adoption of Gompers’ pre-Wagner Act private-sector labor strategy would adversely impact the efficient and effective governmental operations, a societal interest that the *Pickering/Connick* balancing test is aimed at protecting.

Instead, the Court’s statement may be more properly interpreted as a reaffirmation of its laissez-faire approach toward the scope of constitutional protections for public employees, and its view that a federal court is not the appropriate forum to hear most public sector workplace disputes. As the Court revealed in *Garcetti*, it will defer to the executive and legislative branches in determining the scope of rights, if any, public employees have to grieve or petition concerning working conditions:

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281. *Waters v. Churchill*, 511 U.S. 661, 674 (1993). *See also* *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (“In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts. Nor is there any reason to discount Congress’ ability to make an evenhanded assessment of the desirability of creating a new remedy for federal employees who have been demoted or discharged for expressing controversial views.”).

282. *Compare* *MacFarlane v. Vill. of Scotia*, 241 A.D.2d 574, 577 (N.Y. App. Div. 1997) (holding that under the *Pickering/Connick* balancing test, a Village’s interest in maintaining harmony between the police chief and members of a small police force outweighed the free speech interests of a police union official to send a letter to the Village Board sharply criticizing the police chief), *with* *Vill. of Scotia v. N.Y. State Pub. Emp’t Relations Bd.*, 241 A.D.2d 29, 31-32 (N.Y. App. Div. 1998) (affirming an administrative determination concluding that the Village violated provisions of New York’s public sector collective bargaining statute, N.Y. Civ. Serv. Law §§ 209-a[1][a] and [c], when it disciplined the police union official for his letter to the Village Board). *See also* *Macfarlane v. Vill. of Scotia*, 86 F. Supp. 2d 60, 66 (N.D.N.Y. 2000) (dismissing on the grounds of collateral estoppel a federal lawsuit alleging a First Amendment cause of action stemming from the discipline imposed in retaliation for the same letter).

283. PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR 284 (1964).

A public employer that wishes to encourage its employees to voice concerns privately retains the options of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.<sup>284</sup>

A related interpretation of the comment in *Borough of Duryea* is that it confirms what Richard Moberly has termed the Court's "Antiretaliation Principle," a phrase he coined to explain the Court's relatively consistent record of liberal construction of anti-retaliation provisions in federal employment statutes.<sup>285</sup> As Moberly observes, the primary focus of the Court's Antiretaliation Principle is the enforcement of legislatively created rights, rather than judicial recognition of rights stemming from constitutional interpretation. Under this principle, the Court examines statutory anti-retaliation protections:

as a law-enforcement tool that benefits society, rather than simply as extra protection for employees provided at a cost to employers. The Court makes three assumptions throughout its opinions to support the Principle: (1) employees are in the best position to know about illegal conduct by their employer or other employees; (2) employees will report this information if the law protects them from employer retaliation; and (3) employee reports about misconduct will improve law enforcement.<sup>286</sup>

Consistent with this principle, during the same term that *Borough of Duryea* was decided, the Court issued decisions broadly interpreting statutory anti-retaliation provisions involving workplace rights. In *Thompson v. North American Stainless*, a unanimous Court held that the termination of an employee in retaliation for his fiancée filing a charge of discrimination stated a cause of action under the anti-retaliation section of Title VII of the Civil Rights Act of 1964.<sup>287</sup> In another case, the Court concluded that an oral complaint constituted protected activity under the anti-retaliation provision of the Fair Labor Standards Act of 1938 (FLSA),<sup>288</sup> which prohibits retaliation because an employee "filed any complaint."<sup>289</sup>

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284. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

285. Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 421 (2010).

286. *Id.* at 380-81.

287. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011).

288. 29 U.S.C. § 215(a)(3) (2006) (making it unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee").

289. *Kasten v. Saint-Gobain Performance Plastic Corp.*, 131 S. Ct. 1325, 1329 (2011).

VIII. PARADOXES, ISSUES AND CONSEQUENCES EMANATING FROM  
*BOROUGH OF DURYEA*

The decision in *Borough of Duryea* raises multiple paradoxes, issues and consequences in the related fields of public-sector labor law and labor relations.

The first stems from the factual and legal background of the case. Proper case selection is critical when seeking to transform the law through litigation.<sup>290</sup> The context and substance of Guarnieri's lawsuit strongly suggests that it was not initiated for a larger constitutional purpose. Despite the inherent limitations in Guarnieri's claim, his appellate counsel made a valiant effort to persuade the Court that the Petition Clause was intended to protect personal grievances, even those filed by a public employee.

Unlike most American workers, Guarnieri had union representation and broad contractual and statutory protections against arbitrary termination, retaliation, and discrimination. His discharge was set aside after his union successfully pursued a grievance to arbitration under the just-cause provision of a collective bargaining agreement.<sup>291</sup> However, he received a substantial suspension without pay based upon his acts of misconduct and insubordination. His union was partially successful in pursuing an unfair labor practice charge under Pennsylvania's collective bargaining law concerning his interrogation without union representation.<sup>292</sup> After receiving the 2005 directives upon his reinstatement, Guarnieri invoked his contractual right against discrimination. Apparently, he and/or his union decided not to pursue a new unfair labor practice charge asserting a statutory claim of unlawful retaliation for pursuing the disciplinary grievance or an FLSA retaliation claim.<sup>293</sup> Instead, he invoked the First Amendment over the more specifically related anti-retaliation statutes, and without awaiting the result of his pending contract grievance.

In light of the breadth of Guarnieri's contractual and statutory protections, the Court's clear skepticism concerning his constitutional claim is understandable. Nevertheless, the existence of statutory and contractual protections did not require the Court to narrowly construe the protections afforded by the Petition Clause. The existence of those protections raises, however, genuine issues related to judicial economy, election of remedies, deferral and issue preclusion.<sup>294</sup> The final results from claims brought in other

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290. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN v. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975) (describing the litigation strategy developed by Charles Hamilton Houston and Thurgood Marshall as part of the NAACP's legal campaign against segregation).

291. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2492 (2011).

292. See *Duryea Borough Police Dep't v. Pa. Labor Relations Bd.*, 862 A.2d 122, 124 (Pa. Commw. Ct. 2004).

293. *Borough of Duryea*, 131 S. Ct. at 2492.

294. See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (holding that an unreviewed state administrative determination rejecting a claim that disciplinary action was motivated by race discrimination had preclusive effect of federal causes of action under 42 U.S.C. § 1983 and other Reconstruction-era civil rights laws).

forums can narrow the issues in dispute in a First Amendment retaliation claim and thereby avoid a de novo fact-finding determination in federal court. For example, in *Pickering*, the Court analyzed the First Amendment issues based upon a record created in a teacher tenure administrative hearing. More recently, in *Elgin v. Department of the Treasury*,<sup>295</sup> the Court concluded that a federal employee subject to the Civil Service Reform Act of 1978,<sup>296</sup> which subsumed the provisions of the Lloyd-La Follette Act, is required to exhaust federal administrative procedures before challenging the constitutionality of an adverse employment action in federal court. Although the decision was premised on a construction of the Civil Service Reform Act of 1978, the announced rule will result in many future federal employee constitutional claims being determined by a federal court based upon a record and decision from an administrative body.

The Court's observation in *Borough of Duryea* about federal, state, and local governments adopting and revising anti-retaliation protections for the public-sector workplace has an ironic quality, if the phrase "the Supreme Court reads the newspapers"<sup>297</sup> is accurate. As noted, the decision was issued at a time when statutory rights and protections for public employees are under attack in many jurisdictions. In the present climate, it is unlikely that laws in those jurisdictions are going to be enacted or revised to broaden protections unless there is another rapid directional change in the winds of public policy.

The Court's reference to a potential legislative solution also creates a paradox. In presenting this alternative, the Court ignored the potential impact its decision might have on the ability of public employees to influence the adoption of such protections. Depending on the context, petitioning by public employees for workplace protections might be determined by a court to be unprotected under the Petition Clause because it seeks a special workplace privilege, rather than being an act by citizens seeking a change in public policy. Under the *Pickering/Connick* balancing test, even if the petition is found to touch upon an issue of public concern, an employer may lawfully retaliate if it reasonably believes that the petition could or did result in disharmony or disruption in the workplace.

As a result, traditional non-collective bargaining means for obtaining or preserving workplace rights and benefits in the public sector might no longer be protected under the Petition Clause. The resolution of this paradox will have to await future cases to see whether petitioning of the legislative branch regarding governmental workplace issues is entitled to greater protections than a contract grievance or lawsuit under the Petition Clause. In the meantime, the holding in *Borough of Duryea* may chill the willingness of public employees to personally engage in activities aimed at improving or protecting their working conditions.

A related issue concerns the legacy and legality of public-sector gag orders. The two executive orders issued by Theodore Roosevelt specifically prohibited

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295. *Elgin v. Dep't of the Treasury*, No. 11-45, 2012 WL 2076340, at \*4 (U.S. June 11, 2012).

296. 5 U.S.C. §§ 1101–1105 (2006).

297. See Robert C.L. Moffat, *Mustering the Moxie to Master the Media Mess: Some Introductory Comments in the Quest for Media Responsibility*, 9 U. FLA. J.L. & PUB. POL'Y 137, 140 n.10 (1998) (describing the origins of the often-quoted phrase).

federal employees from soliciting salary increases or other self-interested benefits from Congress. A century after the enactment of the Lloyd-La Follette Act, the holding in *Borough of Duryea* raises the issue of whether a similar gag order today would run afoul of the Petition Clause if its restrictions are limited to prohibiting public employees from seeking salary increases and other changes in their terms and conditions of employment. As a prior restraint on the right to petition, the prohibition would be subject to heightened scrutiny under the First Amendment.<sup>298</sup> Depending on how *Borough of Duryea* is applied in future Petition Clause cases, a gag order on petitioning the legislature may be found constitutional if it is narrowly drafted and responsive to complaints received from managers or legislators, which was the genesis for the original presidential gag order.

A consequence that might result from the decision is that the public concern test may encourage the increased use of publicity regarding internal grievances and petitions over workplace disputes. The threshold test makes it advantageous for public employees and their representatives to publicize grievances, petitions, and litigation to ensure protections against retaliation under the Petition Clause.<sup>299</sup> As *Bartnicki v. Vopper* teaches, aggressive tactics in public-sector labor relations increase the likelihood that conduct or threatened conduct will be treated as touching upon an issue of public concern.<sup>300</sup> This runs counter to one of the purposes of a workplace grievance procedure, as the Court recognized in *Garcetti*: to resolve disputes discretely, thereby minimizing public exposure.<sup>301</sup> While publicity frequently can undermine the successful resolution of disputes, *Borough of Duryea* provides a constitutional incentive for public employees to seek transparency about their workplace-related grievances.

The relevance of publicity in satisfying the public concern test is underscored by the Court's comment that a "petition filed with an employer using an *internal grievance procedure* in many cases *will not seek to communicate to the public* or to advance a political or social point of view beyond the employment context."<sup>302</sup> It is, therefore, unsurprising that when Guarnieri's case was remanded to the Third Circuit, he cited newspaper stories about his termination to support his argument that his grievance touched upon a matter of public concern.<sup>303</sup> Those stories probably stemmed from the letter published by the Duryea Council commenting on the reasons why Guarnieri was terminated, which was found by the arbitrator to violate the contract. As we have seen, proof of legitimate news interest at the time of publication can help

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298. See *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465-77 (1995) (applying a stricter standard under the Free Speech Clause to an honoraria ban placed on federal workers who engage in public speaking).

299. An excellent example of this tactic was the publicity generated by the 1955 pre-collective-bargaining protests by AFSCME against New York power broker Robert Moses. See Herbert, *Card Check*, *supra* note 13, at 129 n.135.

300. See generally *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

301. See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

302. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2501 (2011) (emphasis added).

303. *Guarnieri v. Duryea Borough*, Nos. 08-3949, 08-4428, 2011 WL 3288377, at \*1 (3d Cir. Aug. 2, 2011).

demonstrate that speech or a petition meets the public concern test.<sup>304</sup> In declining to rule on whether Guarnieri's petitions touched upon an issue of public concern, the Third Circuit stated on remand:

We are not prepared to hold on this meager record that the dismissal of a police chief in a small town can never be a matter of public concern in that community. It might be, for example, if the Chief were dismissed because he disfavored one race over another, or because he overlooked actions of a sexual predator. We do not suggest that there is any such issue lurking in this matter, but merely note that not all dismissals of government employees would necessarily fall on one side or another of the rule.<sup>305</sup>

Of course, wide publicity can be counterproductive both practically and constitutionally. On a practical level, publicity can alienate the very decision-maker, and the public, which a public employee or her union seeks to persuade. It is also far more likely to impair the government's substantial interest in providing efficient and effective public services than the discrete pursuit of an internal grievance or the filing of a lawsuit. The adverse impact on the workplace from publicity generated by a grievance or litigation may tip the *Pickering/Connick* balance against an employee's subsequent retaliation claim under the Speech or Petition Clause. The more publicized a disputed grievance becomes, the more likely it can lead to disharmony and disruptions in the workplace, and therefore be determined to be unprotected under *Pickering, Connick* and *Borough of Duryea*.

Ironically, *Borough of Duryea* does create an incentive for collective action by public employees. In contrast to civil service merit-based individualism, collective action concerning a workplace issue has a greater likelihood of satisfying the public concern test. The history of the presidential gag orders and the events leading to passage of the Lloyd-La Follette Act, demonstrate that repressive acts by government officials toward the right to petition can be an effective union organizing tool. Additionally, limitations placed on individual constitutional rights to petition or grieve may lead public employees to rely more heavily on union or employee association representation. Finally, *Borough of Duryea* may impact a related legal issue in public employment, which brings us back full circle to the contemporary attacks upon public-sector collective bargaining and other statutory rights. For over a century, public employees have joined associations and unions out of self-interest to improve their lot in the workplace. As Wellington and Winter observed four decades ago:

Organizations based on mutual economic interests, such as trade associations or labor unions, are paradigms of associations, factions, or—as they are usually called today—interest groups. Such groups are absolutely necessary to the survival of political democracy in the United States. They are the means by which individual make claims on government; thus they are important to the structure of our federal

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304. See generally *City of San Diego v. Doe*, 543 U.S. 77 (2004).

305. *Guarnieri*, 2011 WL 3288377, at \*1.



system. These groups collect, create, transmit the economic desires of their members to other interest groups; thus they are vital to political, economic, and social organization.<sup>306</sup>

The holding and reasoning in *Borough of Duryea* raises the genuine question of whether the Court, in a future case, will find that public employee associational activities are not protected under the First Amendment, if those activities are limited to mutual aid and protection.

The Court has identified two associational interests protected by the Constitution. The first relates to a personal liberty interest involving intimate relationships. The second, and more relevant in the public sector, is the “right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>307</sup> In *Smith v. Arkansas State Highway Employees*, the Court indicated that the First Amendment protects the right of a public employee to freely associate. However, the Court did not identify the contours of that right except to state that it does not obligate an employer to consider or respond to a grievance filed by a union on behalf of a member because “the First Amendment is not a substitute for the national labor relations laws.”<sup>308</sup>

At present, there is a conflict in the Circuit courts over whether the public concern test is applicable to the constitutional right of public employees to associate.<sup>309</sup> Following the decision in *Borough of Duryea*, the Tenth Circuit has expressed doubt that the Supreme Court would decide not to impose the public concern test to a claim brought by a public employee charging workplace retaliation for engaging in associational activities.<sup>310</sup> There is obvious logic to this view. While there are multiple legal and historical reasons for not extending the public concern test to the right of free association, if public employee speech and petitions focused on self-interest in the workplace are unprotected against retaliation, applying the same lack of protection to collective associational activities would be consistent with the reasoning in the Court’s First Amendment jurisprudence. A Court determination narrowing the scope of protections to the right of free association for public employees concerning terms and conditions of employment would be in close harmony with those advocating for eliminating or narrowing statutory protections regarding collective bargaining and statutory protections. As the Boston police strike of 1919 teaches, however, the abridgement of the right of association can provoke public-sector employee militancy.<sup>311</sup>

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306. HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* 72 (1971).

307. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984).

308. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464-65 (1979) (per curiam).

309. See *Merrifield v. Bd. of Cnty. Comm’rs, Cnty. of Santa Fe*, 654 F.3d 1073, 1083 (10th Cir. 2011). See also Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right to Association in the Workplace*, 59 FLA. L. REV. 931, 937-38 (2007).

310. *Merrifield*, 654 F.3d at 1081.

311. See generally RUSSELL, *supra* note 6.

## IX. CONCLUSION

The current efforts to eliminate or modify public-sector collective bargaining and other statutory rights have stimulated a lively national debate resulting in renewed academic interest in the topic of public-sector labor law and labor relations. Unfortunately, related constitutional issues concerning public-sector labor law have not received the same level of attention. This is due, in part, to the fact that the topic falls between two silos of academic interests: labor law and constitutional law. It is also a consequence of constitutional issues related to the governmental workplace being largely ignored or deemphasized by scholars, commentators and political disputants. It would be a mistake, however, to overlook the significance and potential consequences of *Borough of Duryea*. The Court chose to extend the application of judicial restraint toward public-sector workplace retaliation issues at a time when the scope of related statutory protections is being challenged in many states. While the application of the same doctrinal standards to both the Speech and Petition Clauses of the First Amendment may be convenient, judicial convenience is not a justification for an imbalanced jurisprudence recognizing broader rights under the Petition Clause for private employers to sue their employees than the rights of public employees to challenge their employers in court. Nor is judicial convenience a principle of constitutional interpretation.

The centrality of petitioning in public-sector labor relations and the legacy of the gag orders should have led the Court to explicitly state in *Borough of Duryea* that its holding is inapplicable to the traditional means for obtaining improvements in governmental employment through petitioning and lobbying. The explicit adoption of a bright-line rule that grievances and petitions directed to the legislature presumptively touch upon a matter of public concern would have avoided future judicial entanglement in the relationship between public employees and legislatures over workplace-related issues.

The vagueness of the public concern test constitutes part of the weakness of the opinion in *Borough of Duryea*. The reformulated test in *City of San Diego*, and its application to the Petition Clause, transforms federal judges into new mandarins of “judicial superintendence” over whether the substance of a grievance or petition to any branch of government is of general interest, value, and concern to the public. While this judicial role can result in expedited decisions dismissing a complaint for failing to state a cause of action or granting summary judgment dismissing an action, the vagueness of the test is guaranteed to result in inconsistencies in decisional results under the Petition Clause, as it has under the Speech Clause.<sup>312</sup> Those inconsistencies stem from differences in how judges interpret what workplace-related subjects are of interest and value to society. In future cases, some judges may find that a public employee’s individual petition to her legislator requesting a wage increase does not satisfy the public concern test, even when it was submitted in the context of group picketing over wages. Other judges may reach a different conclusion inferring

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312. See generally Herbert, *First Amendment*, *supra* note 167.

that the grievance, even without the picketing, is protected because it seeks to eliminate gender-based wage inequality.

Finally, *Borough of Duryea* may constitute persuasive authority regarding the importance and scope of public-sector statutory and contractual rights. By limiting the scope of constitutional protections under the Petition Clause, and referencing Pennsylvania's collective bargaining law and the possibility of future protective laws, the opinion is a reminder that statutory and contractual dispute resolution mechanisms are effective means for maintaining workplace harmony in the governmental workplace. The decision might persuade some executives and legislators to support laws protecting the right of government employees to negotiate, associate, petition and grieve over workplace conditions. Like the congressional supporters of the Lloyd-La Follette Act, and New York Governor Alfred E. Smith, public officials today may conclude that it is more effective, efficient and productive to hear about public-sector workplace problems and issues directly from employees and their representatives, rather than listening solely to professional lobbyists and well-funded nationwide ideological advocacy groups.