When Teachers Go Viral: Balancing Institutional Efficacy Against the First Amendment Rights of Public Educators in the Age of Facebook

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Presented at Annual Conference of the Education Law Association
Orlando, Florida
November 2016

Originally Published in the University of Missouri Law Review
82 Mo. L. Rev. No. 1 (Forthcoming, Winter 2017).
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I. INTRODUCTION

Keith Allison was a tutor at an elementary school in Green Local School District in Wayne County, Ohio. By all accounts, he was a high-performing employee, earning the best ranking possible on his end-of-year evaluation. On August 19th, 2014, as he was preparing for his second year as a tutor, he was summoned to meet with his principal and superintendent. During the meeting, he was questioned about a recent post on his Facebook page that featured a photograph of calves confined in small crates on a local dairy farm. Accompanying the photos, Allison had written a brief message criticizing the treatment of the calves and advocating for plant-based milks. His superintendent advised him that there were a large number of dairy farmers in Wayne County and that teachers should not offend this constituency. Allison was told that his contract had been non-renewed and that he could work the remainder of the week, but at a reduced compensation level. He filed suit with the support of the American Civil Liberties Union and People for the Ethical Treatment of Animals. The school district eventually settled for back pay and legal expenses and reinstated Allison as a middle school tutor.

Keith Allison’s story is hardly unique. Many educators have found their careers interrupted due to seemingly innocuous online expression. In 2009, a high school teacher in Winder, Georgia, was forced to resign after school officials became aware of Facebook pictures from her European vacation that showed her holding wine and beer, even though she had not given students access to her page. In 2012, a Manhattan school counselor was fired days short of gaining tenure after online photographs surfaced from her career as a lingerie model twenty years earlier. In 2013, a girl’s basketball coach in Pocatella, Idaho, was fired after posting an “immoral” vacation picture that showed her in a swimsuit with her fiancé, who had his hand resting on her bikini top.

Public educators’ social media posts, however, are not always innocuous. Karen Fitzgibbons, a fourth grade teacher in the small west Texas district of Frenship, was terminated after she advocated through Facebook for the return of racial segregation. Her post came in the wake of a Dallas area pool party at which a police officer was captured on video wrestling a teenage African-American girl to the

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1 Appellant’s Complaint at 4, Allison v. Board of Educ. of Green Local School District, N.D. Ohio, April 2015 (No. 5:15-cv-00416).
2 Id. at 4.
3 Id. at 4.
4 Id. at 4.
5 Id. at 5.
6 Allison, at 6.
8 Id.
ground and then pulling his weapon on a group of young African-American bystanders.\textsuperscript{13} Upset over the subsequent resignation of the officer involved, Fitzgibbons blamed both the African-American children and their parents:

\begin{quote}
I guess that’s what happens when you flunk out of school and have no education. I’m sure their parents are just as guilty for not knowing what their kids were doing; or knew it and didn’t care. I’m almost to the point of wanting them all segregated on one side of town so they can hurt each other and leave the innocent people alone . . . .
\end{quote}

In the 1968 case, \textit{Pickering v. Board of Education}, the Supreme Court officially extended conditional First Amendment free speech rights to public educators.\textsuperscript{15} \textit{Pickering} established that public employees have First Amendment rights as citizens to comment on matters of “public concern;” however, those rights must be balanced against the State’s rights as an employer to efficiently manage the public services it provides.\textsuperscript{16} In 1982, the Court narrowed the scope of public employee speech rights in \textit{Connick v. Myers}, holding that employee speech that addresses “private interests” does not merit First Amendment protection.\textsuperscript{17} As of late 2016, the Court had not yet heard a case dealing with the social media expression of a public employee.\textsuperscript{18} With no clear Supreme Court precedent, legal scholars have voiced concern that the public concern/private interest distinction in \textit{Connick} could allow courts to unnecessarily limit teachers’ rights regarding online expressive activity, even when that speech has no negative impact on the school environment.\textsuperscript{19}

How can public school administrators reach legally and ethically defensible decisions in cases as widely divergent as Keith Allison and Karen Fitzgibbons? How are they to protect the efficacy of their school systems while still respecting the First Amendment rights of their employees? When can they take adverse employment action against educators on the basis of speech that is posted online, and under what circumstances is that speech protected? Does the \textit{Connick} public concern requirement effectively remove all constitutional protection from public educators who are active on social media, irrespective of whether their speech is disruptive? This Article will address these questions by examining the developing law regarding the free speech rights of public employees, with a focus on how the \textit{Connick} public concern/private interest dichotomy has been applied to social media and other electronic speech.

Section II will review Supreme Court precedent, from \textit{Pickering} and \textit{Connick} through the Court’s post-\textit{Connick} decisions. Section III will highlight circuit conflict and scholarly criticism associated with the

\begin{footnotesize}
\footnotesize\begin{itemize}
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Pickering v. Board of Education of Township High School District 205, Will Co., 391 U.S. 563 (1968).
\item \textsuperscript{16} Id. At 568.
\item \textsuperscript{17} Connick v. Myers, 461 U.S. 138 (1983).
\item \textsuperscript{18} With social media use ubiquitous throughout society, it seems inevitable that a case involving the social media expression of a public employee will eventually reach the Supreme Court. The Court has ruled in one case involving a police officer who made, starred in, and marketed police-themed pornography online. See City of San Diego, California, et. al. v. John Roe, 543 U.S. 77 (2004), discussed infra.
\end{itemize}
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public concern/private interest question introduced in *Connick*. Section IV is a review of recent federal cases dealing specifically with online speech of public employees. Finally, Section IV concludes by proposing an analytical framework designed to enable school administrators to make legally defensible decisions that both protect institutional efficacy and advance public educators’ First Amendment free speech rights.
II. THE SUPREME COURT

On multiple occasions, the Supreme Court has issued guidance on the issue of public employees and their First Amendment speech rights. This section will provide a review of that precedent. Subsection A, will examine the two Court decisions that have provided the essential framework for examining the free speech claims of public employees over the last four decades: *Pickering v. Board of Education* and *Connick v. Myers*. Subsection B will focus on the Court’s subsequent attempts to apply the principles from *Pickering* and *Connick*.

A. *Pickering and Connick*

Walter Pickering was a public high school teacher who wrote a letter to the editor of a local paper that contained criticism of the school board’s use of funds from a 1961 bond election. He also suggested in his letter that the superintendent had used heavy-handed tactics to coerce teacher support of a failed referendum. Concluding that Pickering’s claims were false and brought into question its “motives, honesty, integrity, truthfulness, responsibility and competence,” the board terminated Pickering’s employment. Pickering challenged the action, alleging that it was illegal retaliation for exercise of his First Amendment speech rights.

The Court agreed. Writing for the majority, Justice Thurgood Marshall sought to strike an appropriate balance between the rights of “the teacher, as a citizen, in commenting on matters of public concern” and the “State, as an employer, in promoting the efficiency of the public services it performs through its employees.” In order for protected speech to justify a public school teacher’s dismissal, Justice Marshall argued, the employer would have to demonstrate that the employee’s expression somehow interfered with school operations, impeded the employee’s ability to perform his job duties, or constituted a willful or reckless false statement. As examples of expressive activities that might present permissible grounds for termination, Justice Marshall specifically cited speech that breached confidentiality or undermined superior/subordinate relationships. Justice Marshall also reasoned that a public educator might sometimes engage in expression “so without foundation that it calls into question his fitness to perform his duties in the classroom.”

In its applying its balancing test, the Court concluded that there was no reason to believe that Pickering’s letter disrupted school district business or damaged his ability to effectively function as a teacher. Although the board members had alleged that the letter had a deleterious effect on their professional reputations, no evidence supporting these allegations had been introduced at the trial court. In fact, with the exception of the board members themselves, most in the community had greeted

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21 *Id.*
22 *Id.* at 567.
23 *Id.*
24 *Pickering*, 391 U.S. at 568.
25 *Id.*
26 *Id.* at 570, in footnote 3.
27 *Id.* at 573, in footnote 5.
28 *Id.* at 570.
Pickering’s letter with “massive apathy and total disbelief.” Pickering did not report directly to or even regularly interact with board members or the superintendent, so his speech did not interfere with working relationships. In fact, though the letter may have upset the superintendent and trustees, the majority found that it was inconsequential to Pickering’s ability to perform his job or to the functioning of the school system in general.

Fewer than fifteen years after granting limited First Amendment rights to public employees, the Court held that not all public employee expressive activities merit First Amendment protection. Connick v. Myers arose out of an employment dispute in an urban district attorney's office. Sheila Myers was an assistant district attorney in New Orleans when, in the fall of 1980, she was informed by her boss, District Attorney Harry Connick, that she was being transferred to another section of the criminal court. Rather than accept her transfer quietly, Myers prepared and distributed a survey to approximately fifteen other assistant district attorneys, soliciting input on a variety of topics, including office morale, confidence in supervisors, and whether there should be an official “grievance committee.” Additionally, she questioned her colleagues about whether they had ever felt pressured to work on political campaigns.

Upon learning that Myers had distributed the survey, which was termed a “mini-insurrection” by another member of the office, Connick informed Myers that she was terminated as a result of her failure to accept her transfer. Myers filed suit against Connick, claiming that the termination was in retaliation for her exercise of protected speech under the First Amendment. Applying Pickering, the district court held in favor of Myers, ordering reinstatement, as well as back pay and damages. Although Connick claimed that Myers’s refusal to accept the transfer was the reason for her termination, the district court viewed this as pretext and suggested that the real reason for her termination was the distribution of the office survey. The Fifth Circuit affirmed.

The Supreme Court, however, disagreed. The Court distinguished Myers’s survey from Pickering’s letter, suggesting the survey addressed matters almost exclusively of private interest. Employee speech that does not address a matter of public concern should be beyond judicial oversight. When employee speech can fairly be characterized as concerning a matter of personal or private concern, then employers should enjoy broad latitude to reach negative employment decisions without the courts second-guessing them.

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29 Pickering, 391 U.S. at 570.
30 Id. at 570.
31 Id.
33 Id. at 140.
34 Id. at 141.
35 Id.
36 Id.
37 Connick, 461 U.S. at 141.
38 Id.
39 Id.
40 Id.
41 Connick, 461 U.S. at 147.
42 Id. at 146.
“Whether an employee’s speech addresses a matter of public concern,” explained the Court, “must be determined by the content, form, and context of a given statement.” In examining the content of Myers’s speech, the Court concluded that only one question on her survey – the one dealing with pressure to support certain political candidates – dealt with a public concern. Regarding form and context, the Court focused on Myers’s motivation in distributing the survey, which it viewed as purely self-serving. “Myers did not seek to inform the public that the District Attorney’s Office was not discharging its government responsibilities in the investigation and prosecution of criminal cases,” wrote Justice White, “nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others.” The primary purpose of the survey, the Court suggested, was to “gather ammunition for another round of controversy with her superiors.”

The Court’s verbiage was narrow, qualifying its holding as establishing that: [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.

The test became a “threshold question” through which all public employee expression must pass before advancing to balancing under Pickering. Taken together, Pickering and Connick provide that the First Amendment protects public educators only when they speak as citizens of matters of public concern and to the extent that the speech does not interfere with school operations or employee effectiveness.

B. The Post-Connick Era

In the post-Connick era, the Court has sent somewhat mixed messages regarding the public concern requirement articulated in Connick. In 1984, the Court denied certiorari in Rowland v. Mad River School District, thus allowing a troubling Sixth Circuit decision to stand. In Rowland, a guidance counselor at Stebbins High School in Montgomery County, Ohio, was fired for confiding to coworkers that she was bisexual. The Sixth Circuit held that her speech did not touch on a matter of public concern and was, therefore, unprotected. The court so ruled despite evidence that the employee’s revelation had not interfered with her job effectiveness or adversely impacted the operation of the school in general. “Under the Connick test Ms. Rowland’s statements were not protected speech,” wrote Chief Circuit Judge Pierce Lively. The Court further noted, “It is clear that she was speaking only in her personal interest.”

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43 Id. at 147.
44 Id.
45 Id. at 148.
46 Connick, 461 U.S. at 149.
47 Id. at 149.
48 Id. at 147, italics added for emphasis.
50 Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).
51 Id. at 449.
52 Id.
53 Id.
Justice Brennen, joined by Justice Marshall, dissented in the denial of certiorari, harshly criticizing the reasoning of the Sixth Circuit, suggesting that it was based upon a “crabbed reading of our precedents.” Brennen even suggested that the Court’s true motivation was to avoid the larger question at stake in the case: whether or not a state employee can be fired because of his or her sexual orientation. Though one’s sexual preferences are essentially private, Justice Brennen suggested that the rights accorded to the LGBT community, even in the mid-1980s, were a matter of public concern. Even if Rowland’s speech were of a private interest, Justice Brennen argued, it deserved the protection of the First Amendment. The overarching goal of the Court in Pickering and Connick was to draw a balance between the rights of state employees to express themselves and the interests of “public employers in operating their workplaces without disruption.” “Speech, even if characterized as private, is entitled to constitutional protection,” as long as it “does not in any way interfere with employer’s business.”

In 1987 the Court addressed whether a public employer could legally dismiss an employee for a private remark overhead by another colleague. The incident that led to Deputy Constable Ardith McPherson’s firing occurred on March 30, 1981 – the date of the attempted assignation of President Ronald Reagan. Upon hearing about the incident, McPherson commented to her boyfriend, also employed by the constable, “[I]f they go for him again, I hope they get him.” A third party overheard the comment and reported it to the constable, who fired McPherson immediately. The Court clarified what may or may not be considered a “public concern” by focusing on the inherent public nature of the comment’s subject matter. Justice Marshall wrote for the majority, following both Pickering and Connick, and agreed with the Fifth Circuit that McPherson’s speech did indeed touch on a matter of public concern that was of the utmost importance: the life and death of the President.

Justice Lewis Powell, in a concurring opinion, took a different approach. He argued that it was unnecessary to apply the “extensive analysis normally required by Connick v. Myers,” given that McPherson’s remark was part of a private conversation with her boyfriend. McPherson could not have reasonably expected that her comment would have reached anyone outside of the other party involved in the conversation. He noted, “The risk that a single, offhand comment directed to only one other worker

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55 Id.
56 Id. at 1013.
57 Id.
58 Id.
59 Rowland, 470 U.S.at 1012.
61 Id. at 381.
62 Id. at 381.
63 Id. at 382.
64 Rankin, et. al., 483 U.S. at 385.
65 Id. at 385.
66 Id. at 393.
67 Id.
will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful.\textsuperscript{68}

The Court reinforced the idea that the non-disruptive private speech of government employees is protected in the 1995 decision \textit{United States v. National Treasury Employees' Union ("NTEU")}.\textsuperscript{69} The \textit{NTEU} case involved a challenge to a section of the Ethics Reform Act of 1989, which banned federal employees from accepting compensation for writing articles or making speeches.\textsuperscript{70} The Act’s challengers, which included individual employees and large unions, argued that by preventing employees from accepting compensation, the measure would chill speech, a point with which the Supreme Court agreed.\textsuperscript{71} The Court pointed out that almost none of the employee expression in question had any connection to their jobs nor could it be argued that it could have any negative impact on the workplace.\textsuperscript{72}

Fewer than ten years later, a police officer in San Diego unsuccessfully attempted to rely on \textit{NTEU} to claim First Amendment protection for his side business of producing, starring in, and selling adult videos. In \textit{San Diego v. Roe}, the Court upheld the municipal police department’s right to discipline and ultimately fire the officer, John Roe, as a result of his adult-oriented commercial activity online.\textsuperscript{73} Roe sold his videos on the “adults only” section of Ebay.\textsuperscript{74} The videos were police-themed, and featured him stripping out of a police uniform and engaging in autoerotic acts.\textsuperscript{75} In addition to the videos, Roe also sold police-related items, such as an official San Diego police uniform, which is ultimately what drew the attention of Roe’s supervisor.\textsuperscript{76}

Roe was ordered to discontinue his online enterprise but did not fully comply, at which time the department initiated a termination proceeding.\textsuperscript{77} Roe filed suit in federal court, alleging a violation of his rights under the First Amendment.\textsuperscript{78} The district court granted summary judgment to the city, holding that Roe’s speech was not of “public concern” under \textit{Connick}.\textsuperscript{79} On appeal, the Ninth Circuit, citing \textit{NTEU}, reversed, holding that Doe’s speech touched on a public concern because it did not constitute a workplace grievance, was unrelated to his employment, and occurred off duty.\textsuperscript{80}

In a brief per curium opinion, the Supreme Court distinguished the speech at issue in \textit{NTEU}, which was unrelated to and had no impact on the work or business of the employer, and Doe’s videos, which the Court determined were “linked to his police work, all in a way injurious to his employer.”\textsuperscript{81} In the Court’s view, Roe sought to take advantage of his employment as a police officer by identifying himself

\textsuperscript{68} Id.
\textsuperscript{70} Id. at 457.
\textsuperscript{71} Id. at 469.
\textsuperscript{72} Id. at 465.
\textsuperscript{73} \textit{City of San Diego, California, et. al. v. John Roe}, 543 U.S. 77 (2004).
\textsuperscript{74} Id. at 78.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 79.
\textsuperscript{78} \textit{City of San Diego, California, et. al.}, 543 U.S. at 78.
\textsuperscript{79} Id. at 79.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 81.
online as an officer of the law and theming his videos around his work.\textsuperscript{82} Videos depicting a police officer “performing indecent acts while in the course of his official duties” would cause anyone who might view them to develop serious doubts with regard to the San Diego police department’s professionalism and mission.\textsuperscript{83}

In 2006, the Court handed down its most significant decision concerning public employee speech rights since \textit{Connick}. In \textit{Garcetti v. Ceballos}, the Court held that speech occurring in the line of job duties is not protected.\textsuperscript{84} Richard Ceballos was a deputy assistant district attorney in Los Angeles County.\textsuperscript{85} As part of Ceballos’s duties as “calendar deputy,” he would review the work of other attorneys in the office at the requests of defense attorneys.\textsuperscript{86} One such request came early in 2000, when a defense attorney contacted Ceballos about what he believed were inaccuracies in an affidavit that was used to obtain a search warrant in his client’s case.\textsuperscript{87} Concluding the affidavit to be flawed, Ceballos notified his superiors of his findings and forwarded a recommendation to drop the case.\textsuperscript{88} His superiors proceeded with the prosecution despite his objections.\textsuperscript{89}

Ceballos’ supervisors subsequently stripped him of his position as calendar secretary, transferred him to another courthouse, and denied him a promotion.\textsuperscript{90} Believing the actions were taken as a result of his recommendations, he filed a suit in a federal court, alleging that his superiors had illegally retaliated against him in violation of the First Amendment.\textsuperscript{91} The district court agreed with Ceballos, finding that his free speech rights were violated.\textsuperscript{92} The Ninth Circuit affirmed, reasoning that he was clearly speaking as a “citizen upon matters of public concern,” and there was no evidence that his speech had caused any type of disruption.\textsuperscript{93}

The Supreme Court reversed, holding that Ceballos’s recommendation to his superiors to drop the case was part of his job; therefore, he was functioning in his role as deputy assistant attorney, not as a private citizen.\textsuperscript{94} Justice Kennedy wrote for the majority, “We hold that when public employees make statements pursuant to their official job duties, the employers are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”\textsuperscript{95} In the Court’s view, Ceballos was not a victim of illegal retaliation over the exercise of constitutionally protected speech; rather, he was simply disciplined for poor job performance – in this

\textsuperscript{82} \textit{City of San Diego, California, et. al.}, 543 U.S. at 81.
\textsuperscript{83} \textit{Id.}
\textsuperscript{85} \textit{Id. at 413.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id. at 414}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Garcetti}, 547 U.S at 414.
\textsuperscript{90} \textit{Id. at 415.}
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Garcetti}, 547 U.S at 421.
\textsuperscript{95} \textit{Id.}
The Supreme Court cases discussed above establish First Amendment protection for public employees who speak as citizens on matters of public concern, so long as their speech does not undermine their job effectiveness or disrupt workplace operations under *Pickering*. It is also clear under *Garcetti* and *Connick* that when employees speak pursuant to job duties or on matters of private interests, they lose that First Amendment protection. What is less clear is exactly how to determine the nature of an employee’s speech and whether he was speaking as an employee or citizen. The Court’s admonition to consider the “content, form and context” of speech has provided minimal help, and the Court, in its post-*Connick* decisions, has struggled to provide much additional clarity. The resulting ambiguity has led to conflict between circuit courts and calls from legal scholars to abandon the *Connick* threshold test altogether.

**III. **

**CONNICK: CONFLICT AND CRITICISM**

Section III of this article will forward a proposition that the *Connick* decision has left a problematic First Amendment legacy. Sub-section A will highlight how a significant interpretive split between circuits has resulted in disparate First Amendment rights for public employees based upon where they live.

Subsection B will focus on scholarly criticism of *Connick*.

**A. Conflict Between Circuits**

Whatever guidance the Court sought to provide in differentiating citizen speech on a public concern from employee speech on a private interest has been insufficient, as circuit courts have taken drastically different approaches. Specifically, courts have disagreed on what should be the most important consideration: content, form, or context. The majority of circuits have chosen a content-based approach in which form and context are largely overlooked if the speech is found to be inherently of public interest. Other circuits, however, have adopted a contextual approach, allowing form and context of speech to trump the nature of the content, thus exposing public employees to adverse action even when the speech content is non-disruptive and touches on a matter of inherent public concern.

Contextual circuits place significant weight on both the capacity and the motivation of the speaker, as exemplified by the Eleventh Circuit’s 1986 decision *Ferrara v. Sims*, in which it ruled against a public school teacher after he criticized his school’s registration, scheduling, and teacher assignment processes. The teacher was not fired after speaking out, but he was assigned to teach exclusively

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96 Id. at 423.

97 Content-based circuits include the First, Second, Third, Sixth, Seventh and Ninth. See McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983), O’Connor v. Steeves, 994 F.2d 905, 907, 913 (1st Cir. 1993), Azzaro v. County of Allegheny, 110 F. 3d. 968 (3rd Cir. 1997), Banks v. Wolfe Co. Bd. Of Educ., 330 F.3d. 888 (6th Cir. 2003), Sullivan and Blanco v. Ramirez, 360 F.3d. 692, 698 (7th Cir. 2004), and Cioffi v. Averill Park Central School District Board of Education, 444 F.3d. 158, 165 (2d Cir. 2006).

98 Contextual circuits include the Fourth, Fifth, Eighth, Tenth and Eleventh Circuits. See also Ferrara v. Sims, 781 F.2d 1508 (11th Cir. 1986), Harris v. Virginia Beach, 1990 U.S. App. LEXIS 30912, 8 (1990), Terrell v. University of Texas System Police, 792 F. 2d 1360, 1361, 1362 (5th Cir. 1986), David v. City and County of Denver, 101 F.3d 1344, 1356 (10th Cir. 1996), and Sparr v. Ward, 306 F.3d. 589 (8th Cir. 2002).

99 *Ferrara v. Sims*, 781 F.2d 1508 (11th Cir. 1986).
freshman and sophomore courses.\textsuperscript{100} Though the topics about which he complained might have been inherently of interest to members of the public, the court viewed his motivation for speaking as purely personal.\textsuperscript{101} His opposition to the school’s registration system was driven by the fact that he thought it contributed to difficulties in controlling his classroom.\textsuperscript{102} The comments regarding teacher assignments were merely an extension of a personal grievance over the school’s internal policies.\textsuperscript{103} Finally, the teacher’s criticism of out-of-field placements was motivated by the fact that an out-of-field teacher had been assigned the newly created social studies class that he wanted to teach.\textsuperscript{104} Despite the inherent public interest in the content of the speech, the court held that a “public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run.”\textsuperscript{105}

Another example of the contextual focus on speaker motivation and capacity is found in the Fifth Circuit’s 1996 decision, \textit{Terrell v. University of Texas System Police}. In this case, Houston University Police Captain Gary Terrell secretly kept a diary that was critical of his supervisor, Chief Charles Price.\textsuperscript{106} Photocopies of the diary were given anonymously to Chief Price, who terminated Terrell as a result.\textsuperscript{107} The Fifth Circuit declined to focus on the “inherent interest or importance of the matters discussed by the employee,” because almost anything said in a public office might possibly be considered of interest to the public.\textsuperscript{108} Terrell made no effort to communicate the contents of his journal to anyone else outside the department.\textsuperscript{109} The court therefore concluded the journal was the unprotected speech of a disgruntled government employee, not the protected speech of a citizen.\textsuperscript{110}

Content-based circuits focus more on the nature of the speech and less on the speaker’s motivation or capacity.\textsuperscript{111} In the 1983 case \textit{McKinley v. City of Eloy}, the Ninth Circuit ruled in favor of Michael McKinley, a peace officer who was fired after publicly advocating for an increase in pay.\textsuperscript{112} In holding that McKinley’s speech passed the “public concern” test, the Ninth Circuit cited the Supreme Court’s decision in \textit{Richmond Newspapers, Inc. v. Virginia}, which stated, “[T]he ‘expressly guaranteed freedoms’ of the first amendment ‘share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.’”\textsuperscript{113} McKinley’s speech dealt with compensation rates for police officers, which carried implications related to the city’s ability to recruit and retain qualified

\begin{footnotes}
\footnote{100} Ferrara, 781 F.2d at 1516.
\footnote{101} Id. at 1516.
\footnote{102} Id. at 1516.
\footnote{103} Id. at 1516.
\footnote{104} Id. at 1516.
\footnote{105} Id. at 1516.
\footnote{106} Terrell v. University of Texas System Police, 792 F. 2d 1360, 1361, 1362 (5th Cir. 1986).
\footnote{107} Id. at 1361.
\footnote{108} Id. at 1362.
\footnote{109} Id. at 1362. Granting First Amendment protection to everything said by a public employee would be impractical, according to the court.
\footnote{110} Id.
\footnote{111} Although no circuit has adopted a “form-based” approach, it is interesting to note that the form of Terrell’s speech, a privately kept diary, was influential to the Fifth Circuit. The fact that Terrell took no action to make his diary public indicated to the court that he was not speaking on a public concern.
\footnote{113} McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983). McKinley spoke in favor of a police pay raise at a city council meeting.
\end{footnotes}
officers, as well as numerous other aspects of police and governmental functioning that the court viewed as being of inherent interest to the public.\textsuperscript{114}

The Sixth Circuit also followed a content-based approach when it decided the case of Netta Banks, an instructional aide in Wolfe County, Kentucky.\textsuperscript{115} Banks was reassigned after she filed formal complaints with the state, alleging irregularities in her school’s interview and hiring process.\textsuperscript{116} The complaints came after a five-year period during which she repeatedly interviewed for full-time teaching positions but was never offered a job as a certified teacher.\textsuperscript{117} The Sixth Circuit found evidence in Bank’s testimony that suggested mixed motivation for her complaints – her personal grievance in having been passed over for employment, but also her desire to bring attention to and correct systemic problems within the hiring process.\textsuperscript{118} While the court acknowledged that Bank’s complaints were predominately private, it also found that some of them touched on matters of public concern.\textsuperscript{119}

The split between the contextual and content-based circuits is significant because it has led to disparate First Amendment protections for public employees depending upon where they live. Nowhere is this more clearly seen than when comparing and contrasting the Tenth Circuit case \textit{David v. City and County of Denver} with the Third Circuit Case \textit{Azzaro v. County of Allegheny}.\textsuperscript{120} Both cases dealt with public employees who complained about sexual harassment in the public workplace, but the outcomes were starkly different. The Tenth Circuit shockingly held in \textit{David v. City and County of Denver} that a female officer’s complaints of sexual harassment against male officers were personally motivated and did not touch on a matter of public concern.\textsuperscript{121} The capacity in which the employee spoke was the “fundamental inquiry” in its analysis.\textsuperscript{122} The speech, according to the court, was “calculated to redress personal grievances (and therefore spoken as an employee).”\textsuperscript{123} Had she been motivated to address a broader public purpose, the court would have viewed her speech as being that of a citizen.”\textsuperscript{124} Her complaints of sexual harassment, therefore, were unprotected. A year later, however, the Third Circuit held that an Allegheny county employee had engaged in protected speech over a matter of public concern when she complained to the county commissioner about sexual harassment by an executive assistant.\textsuperscript{125} According to the court, the complaint concerned an “incident of sexual harassment” allegedly perpetrated by someone “exercising authority in the name of a public official.”\textsuperscript{126} If true, such conduct by a public official would constitute a form of discrimination that would inherently rise to the level of public concern, regardless of the speaker’s personal motivation.\textsuperscript{127}

\textsuperscript{114} \textit{Id.} at 1115.
\textsuperscript{116} \textit{Id.} at 890, 891.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 897.
\textsuperscript{119} \textit{Id.} at 895.
\textsuperscript{120} David v. City and County of Denver, 101 F.3d 1344 (10th Cir. 1996).
\textsuperscript{121} \textit{Id.} at 1356.
\textsuperscript{122} \textit{Id.} at 1344.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} Azzaro v. County of Allegheny, 110 F. 3d. 968 (3rd Cir. 1997).
\textsuperscript{126} \textit{Id.} at 977.
\textsuperscript{127} \textit{Id.}
B. Criticism of Connick

In addition to producing conflict and disparity between the circuits, Connick has drawn sharp criticism from the scholarly community. As early as 1990, legal scholars were highlighting problems with, and even advocating abandoning, Connick.\(^\text{128}\) Gordon Smith, Dean of the Brigham Young University School of Law, proposed an alternative test of “relatedness,” which would require asking whether the speech occurred away from the workplace and concerned “matters unrelated to workplace personnel or policies or unrelated to political issues directly affecting the employee's working relationships.”\(^\text{129}\) In Dean Smith’s proposal, if the employee were to engage in speech unrelated to and away from the workplace, then he would be acting in the capacity of a citizen and should be absolutely protected.\(^\text{130}\) If, on the other hand, the employee speaks at work or on a matter related to the workplace, he would be acting in his capacity as an employee, and his speech would then be balanced under Pickering.\(^\text{131}\)

Mary Rose Papandrea, Dean of the University of North Carolina School of Law, also criticized reliance on the Connick “threshold question,” arguing that it “undermines” the constitutional rights of public school teachers.\(^\text{132}\) She would entirely abandon the Pickering/Connick framework, arguing that it allows school districts too much latitude to discipline teachers without having to prove that the speech interfered with school business.\(^\text{133}\) Dean Papandrea called for presumptive First Amendment protection for private teacher speech unless the school district can demonstrate a substantial “nexus” between the speech and teacher job effectiveness.\(^\text{134}\)

Other scholars have warned that any expressive content posted by a public educator that does not touch on a matter of public concern only has to reach the wrong parent, student, or school board member to become a job-threatening event.\(^\text{135}\) In a 2010 article in the University of Dayton Law Review, one scholar suggested that it is unreasonable for a teacher to face adverse work consequences as a result of posting content that, while not touching on a public concern, may be neither broadly offensive nor inappropriate.\(^\text{136}\) The author advocated abandoning Connick in favor of a modified Pickering balancing test in which the teacher’s First Amendment interests are balanced against the state’s rights as an educator rather than employer.\(^\text{137}\) That same year, an article in the Valparaiso University Law Review contained a proposal for examining the online speech of teachers that involved placing the content of the speech along a continuum, with purely private speech on one end, political or social speech in the middle,

\(^{129}\) Id. at 265.
\(^{130}\) Id.
\(^{131}\) Id.
\(^{133}\) Id. at 1630.
\(^{134}\) Id.
\(^{136}\) Id.
\(^{137}\) Id. at 136.
and speech relating to employment on the other end. According the article, if the speech is purely private, then the speaker will always be acting as a private citizen and should therefore be protected completely by the First Amendment.

The proposals these scholars advance are thought provoking and would advance the speech rights of public educators. However, the majority of these proposals likely tip the scales too far in the direction of the employee, thus not giving adequate consideration to the level of disruption the employer might suffer. This is particularly true in sensitive environments such as public education and law enforcement. Even when speaking in the capacity of a private citizen and on matters of public concern, a public educator who engages in expression that reasonably calls into question his judgment, decision-making ability, or general commitment to treating students with fairness can have a tremendous negative impact on the school community.

The broadly expressed concern of these scholars – that courts would rely on Connick to effectively exclude educators from First Amendment protection whenever they engage in online expressive activity – certainly seems justified. But as litigation involving public educators and social media has increased over the last ten years, it is worth considering whether these fears have been realized. Has Connick, in fact, stripped public educators of First Amendment protection for social media expression?

IV. FEDERAL CASES INVOLVING INTERNET-BASED EMPLOYEE SPEECH

Section IV focuses on recent federal cases that deal specifically with public employee speech disseminated via social media or other internet-based forms of communication. Subsection A reviews four decisions from the Federal Courts of Appeals, and subsection B will focus on a sampling of illustrative cases from various federal district courts. In the discussion of these cases, a number of trends will emerge regarding both the application of Connick public concern/private interest test as well as the Pickering balancing test.

A. Circuit Courts

Four federal circuits have decided cases dealing with public employees and Internet-based expression. The Connick public concern/private interest test was not decisive in any of the cases. Each of the cases turned instead on the analysis of the employee speech under Pickering. The employee prevailed in only one of those four cases. The following section will provide a discussion of these four circuit decisions.

The first of these cases came in the summer of 2009, when the Ninth Circuit decided the case of Tara Richerson, a curriculum specialist and instructional coach at Central Kitsap School District in Washington State. Richerson published a blog in which she made personally insulting remarks about her supervisors and colleagues. There were numerous complaints regarding Richerson’s blog,
including one from a teacher who was being coached by Richerson.\textsuperscript{142} As a result, the human resources director reassigned Richerson from coaching back into a teaching role.\textsuperscript{143} Richerson claimed that she had been retaliated against in violation of her First Amendment rights.\textsuperscript{144} The district court granted summary judgment in favor of the school, and the Ninth Circuit affirmed.

The Ninth Circuit bypassed the \textit{Connick} threshold question by assuming, without deciding, that some of Richerson's speech was related to a matter of public concern.\textsuperscript{145} Richerson's case, however, failed balancing under \textit{Pickering}.\textsuperscript{146} The court specifically looked at whether Richerson's blog was disruptive to the relationships in the workplace, particularly those "premised on personal loyalty and confidentiality."\textsuperscript{147} Additionally, the court sought to determine whether the blog interfered with Richerson's effectiveness in her role.\textsuperscript{148} "It is abundantly clear from undisputed evidence in the record," the court concluded, "that Richerson's speech had a significantly deleterious effect in each of these ways."\textsuperscript{149} Because her role as an instructional coach relied upon personal relationships and several teachers were refusing to work with her in the wake of her blog, the Ninth Circuit determined her speech to be sufficiently disruptive to justify the transfer.\textsuperscript{150}

With \textit{Bland v. Roberts} in 2013, the Fourth Circuit became the first court of appeals to decide case dealing specifically with public employee speech and social media.\textsuperscript{151} B.J. Roberts, the sheriff of Hampton, Virginia, won his re-election and subsequently decided not to reappoint eight employees.\textsuperscript{152} Two of the employees, Daniel Ray Carter and Robert McCoy, had engaged in expressive activities on social media and argued that Roberts was illegally motivated to fire them after they had supported his opponent, Jim Adams.\textsuperscript{153}

Carter and McCoy were both deputy sheriffs in Hampton.\textsuperscript{154} After Adams announced his candidacy, Carter visited and “liked” the Adams campaign Facebook page.\textsuperscript{155} In addition, he posted a brief comment of support.\textsuperscript{156} McCoy posted a similar message of support on the Adams page.\textsuperscript{157} When Roberts became aware of the two men's social media support of Adams’s candidacy, he made general statements warning employees that publicly supporting Adams would be grounds for termination.\textsuperscript{158} At one point, Roberts angrily confronted Carter: "You made your bed, and now you're going to lie in it. After the election, you're gone."\textsuperscript{159} The sheriff argued, and the district court agreed, that when Carter "liked"
the Adams campaign page, it was not “speech” for the purposes of the First Amendment. The court disagreed, suggesting that “once one understands the nature of what Carter did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech.” The court continued: “In the context of a political campaign’s Facebook page, the meaning that the user approves of the candidate whose page is being liked is unmistakable.” The judge then turned to the Connick public/private threshold question and determined that Carter and McCoy had both spoken on a matter inherently linked to public concern – politics. Because the sheriff failed to show that Carter and McCoy had caused disruption through their speech, the balancing test under Pickering tipped toward the two employees.

Later in 2013, the Seventh Circuit decided the case of Bryan Craig, a high school guidance counselor and girls’ basketball coach whose self-published book raised red flags for his employer. Craig was a tenured guidance counselor and girls’ basketball coach in Rich Central High School in Chicago’s southern suburban area. In 2012, Craig self-published It’s Her Fault, purportedly a “self-help” book for women interested in improving their romantic relationships. Craig’s thesis was that women act based upon emotion rather than intellect. He advised female readers that, in order to shift the balance of power toward them in their relationships, that they should use sex to control men’s behavior. He also advised women to be sexually submissive in order to make their men “feel” as if they had power in the relationship. The book was replete with explicit discussion of sexual topics, including a “comparative analysis of the female genitalia of various races,” which went “into an excruciating degree of graphic detail.”

In the introduction and throughout the book, Craig referenced his employment at Rich Central High School and, specifically, his experience as a counselor to bolster his qualifications to be giving relationship advice. When the district learned of It’s Her Fault, it terminated Craig’s employment. The board cited resultant “disruption, concern, distrust and confusion” within the community. The board also alleged that Craig’s conduct had created “an intimidating, hostile or offensive educational environment,” and that he had “failed to present [himself as] a positive role model and failed to properly comport himself in accordance with his professional obligations as a public teacher.”

Craig filed suit in federal court, claiming a First Amendment violation, but the district court granted the school

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160 Bland, 730 F.3d at 384.
161 Id. at 386.
162 Id.
163 Id. at 387.
164 Id.
165 Craig v. Rich Township High School Dist. 227, 736 F 3d. 1110, 1113 (7th Cir. 2013). This case did not involve social media or Internet communication, per se. But like blogging and social media, the practice of self-publishing utilizes technology to allow individuals to more easily make their unfiltered writing broadly available to the public. It is, therefore, a case that has relevance to this study.
166 Id. at 1113
167 Id.
168 Id.
169 Id.
170 Craig, 736 F 3d.at 1114.
171 Id. at 1114.
172 Id. at 1115.
173 Id.
174 Id.
175 Craig, 736 F 3d.at 1115.
district summary judgment, holding that *It’s Her Fault* did not touch on a matter of public concern.\(^{176}\) In doing so, the district court relied heavily on *San Diego v. Roe*, and, in fact, deemed that *It’s Her Fault* was substantially similar to Roe’s police-themed adult videos, a proposition that the Seventh Circuit dismissed on appeal.\(^ {177}\) “Whatever one may think of Craig’s book,” the court explained, “it is fundamentally different in character from the ‘debased parody’ at issue in *Roe*.\(^ {178}\) *It’s Her Fault*, while provocative, at least addressed “the structure of adult relationships, an issue with which some segment of the public would be interested.”\(^ {179}\) In the court’s view, the dynamics of adult relationships was an overall topic of public interest, and therefore Craig’s book qualified as being on a matter of public concern, and progressed to the balancing test under *Pickering*.\(^ {180}\)

Interestingly, the court pointed out that the circumstances in the case did not really merit consideration of *Connick* because the public/private question was designed to evaluate speech only in cases where “a public employee speaks out about her employer’s policies, conduct, or other issues more directly related to her public employment.”\(^ {181}\) Put another way, the exercise of analyzing the public or private nature of the content of an employee’s speech was a merely a method to help courts distinguish between an employee’s “purely personal gripes,” which are unprotected, and a citizen’s attempt to “notify the public of a work-related issue about which the public is concerned,” which is protected.\(^ {182}\)

Though Craig’s speech did qualify as touching on matters of public concern, the school district prevailed in the balancing test and his termination was upheld.\(^ {183}\) The court found it reasonable to predict that students and parents would ultimately become aware of *It’s Her Fault* and that this would impact Craig’s ability to function effectively in his job.\(^ {184}\) “Knowing Craig’s tendency to objectify women,” the court reasoned, “defendants could reasonably anticipate that some female students would feel uncomfortable reaching out to Craig for advice.”\(^ {185}\) The court went even further, suggesting “some students may forego receiving the school’s counseling services entirely rather than take the risk that Craig would view them not as a person but instead as an object.”\(^ {186}\)

The most recent appellate case dealing with an educator and internet-based speech came out of the Third Circuit in 2015. Natalie Munroe was a tenured English teacher at Central Bucks East High School in Doylestown, Pennsylvania.\(^ {187}\) Between August of 2014 and November of 2015, Monroe made eighty-four entries on her blog, mostly discussing various areas of personal interest, such as yoga, food, movies, and her own children.\(^ {188}\) In select posts, however, she commented on her students and co-workers.\(^ {189}\) In October of 2009, Munroe wrote about her students, calling them “rude, disengaged, lazy

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\(^ {176}\) *Id.*

\(^ {177}\) *Id.* at 1117.

\(^ {178}\) *Id.*

\(^ {179}\) *Id.*

\(^ {180}\) *Craig*, 736 F.3d. at 1117.

\(^ {181}\) *Id.* at 1116.

\(^ {182}\) *Id.* at 1119.

\(^ {183}\) *Id.*

\(^ {184}\) *Craig*, 736 F.3d. at 1120.

\(^ {185}\) *Id.*

\(^ {186}\) Munroe v. Central Bucks Sch. Dist., 805 F.3d 454, 458 (3d Cir. 2015).

\(^ {187}\) *Id.*

\(^ {188}\) *Id.*

\(^ {189}\) *Id.*
In January of 2010, Munroe mused about comments she would like to enter on a student’s report card, such as “frightfully dim,” “lazy asshole,” “argumentative fuck,” and “utterly loathsome in all imaginable ways.”

Students discovered the blog and began discussing it via social media. The school became aware of Munroe’s blog in February of 2011 after a local newspaper began raising questions. The principal, Abram Lucabaugh, confronted Munroe about the blog and immediately suspended her with pay. Lucabaugh described the fallout from the blog as a “ticking time bomb” and reported that angry students were distributing printed copies of the blog entries in the hallways. Ultimately, over two hundred parents contacted the school, requesting that their children not be placed in Munroe’s class.

On March 1, Munroe went on maternity leave, which had been scheduled prior to the district learning of her blog. Between her paid suspension and maternity leave, Munroe was out for the remainder of the school year, while the district deliberated over the constitutional implications of terminating her employment. Munroe returned to work in August of 2011 for a new school year. She was placed on a highly prescriptive growth plan, including a requirement that she complete lesson plans that she believed were, by design, impossible to complete accurately.

At the year’s end, her supervisor gave her an unsatisfactory evaluation and the district terminated her employment. Munroe challenged the decision in federal court, alleging that the district had retaliated against her for exercising her First Amendment rights. The district court granted summary judgment to the school district, and Munroe appealed to the Third Circuit.

The Third Circuit focused on the public concern/private interest question presented in Connick. While the vast majority of her blog posts were related to private interests, the court acknowledged the district court’s finding that Munroe did occasionally write on matters that might be of public concern, such as “the value of integrity, the value of honor, and students’ lack of effort.” The court also recognized that Munroe only addressed these topics incidentally, while focusing primarily on her personal reactions to “negative interactions between herself and her students.” Munroe used the extensive media coverage to touch more deeply on the larger areas of public interest she mentioned in her blog. “We
reluctantly assume for the purposes of this opinion that Munroe’s speech satisfied the ‘public concern’ requirement,” wrote the court.\textsuperscript{207}

Having concluded that Munroe’s blog posts dealt with a public concern, Circuit Judge Cowan turned to a balancing test under \textit{Pickering}.\textsuperscript{208} The “opprobrious” tone of Munroe’s blog posts was a dispositive factor in their failure to survive balancing under \textit{Pickering}.\textsuperscript{209} The court reasoned that “invective directed against the very persons that the governmental agency is meant to serve could be expected to have serious consequences for the performance of the speaker’s duties and the agency’s regular operations.”\textsuperscript{210} On the other hand, more elevated speech would be much less likely to “impair discipline or employee harmony” or otherwise cause a disruption.\textsuperscript{211}

\textbf{B. District Courts}

Because the technological advances in communication have largely happened within the last ten years, there have been a limited number of cases involving Internet-based speech and public employees in the lower federal courts, although the number has increased in recent years. In some of the earliest cases, such as \textit{Spanierman v. Hughes} and \textit{Snyder v. Millersville Univ.}, the courts relied on the \textit{Connick} public concern/private interest test to disqualify teacher social media activity from First Amendment protection.\textsuperscript{212} In more recent cases, federal courts have seemed more likely to hold (or at least assume) that public employee speech addresses matters of public concern.\textsuperscript{213} This section will provide a sample of several of the most recent lower court decisions.\textsuperscript{214}

In 2011, the federal courts heard the first case involving a public employee’s Facebook post.\textsuperscript{215} A federal district court in Arkansas held in favor of Dana Mattingly, who was fired from her job in the Circuit Clerk’s office in Saline County, Arkansas, after a Facebook post in which she expressed sympathy with her terminated co-workers.\textsuperscript{216} Dennis Milligan had been elected Saline County Circuit Clerk in 2010.\textsuperscript{217} On December 27, 2010, Milligan dismissed four of the nine employees within the Circuit Clerk’s office.\textsuperscript{218} According to Mattingly, at least two of the four terminated employees had supported Milligan’s political opponent.\textsuperscript{219} Later that evening, Mattingly posted the following comment on her Facebook page: “My heart goes out to the ladies in my office that were told by letter they were no longer needed ... It’s sad.”\textsuperscript{220} The post elicited expressions of both anger and concern from a number of Mattingly’s thirteen hundred

\begin{thebibliography}{200}
\bibitem{footnote1} Id. at 470.
\bibitem{footnote2} Munroe, 805 F.3d at 473.
\bibitem{footnote3} Id.
\bibitem{footnote4} Id. at 474.
\bibitem{footnote5} Id.
\bibitem{footnote8} Ten district court cases were reviewed for this article, five are included in the discussion, all ten are summarized in Table 1 on page 33.
\bibitem{footnote9} Mattingly v. Milligan, No. 4 11CV00215 J LH U.S. Dist. LEXIS 126665, 4-5 (E.D. Ark. 2011).
\bibitem{footnote10} Id. at 21.
\bibitem{footnote11} Id. at 3.
\bibitem{footnote12} Id.
\bibitem{footnote13} Id.
\bibitem{footnote14} Mattingly, No. 4 11CV00215 J LH U.S. Dist. LEXIS 126665 at 4.
\end{thebibliography}
Facebook friends. According to Milligan, he received multiple critical phone calls from anonymous callers at his home that evening. Ultimately, the controversy attracted the attention of local media.

The following day, Milligan fired Mattingly via telephone. He later sent written notification, citing the fallout from her comments that were made “in a public domain.” Mattingly filed suit in federal court claiming that her First Amendment speech rights had been violated. In court, Milligan argued that Mattingly’s motive in posting her comment was the purely personal concern of eliciting “affirmation and support” from her Facebook friends and should not be protected. The court answered that, even if Mattingly’s motives were personal, “the fact remains that she did not make them as an employee but as a citizen.” The form of her speech (the “public domain” of Facebook), as well as the fact that local media had expressed interest in the story, suggested to the court that the matter was of public concern. Under the Pickering balancing test, Milligan could not produce ample evidence that Mattingly’s Facebook post had any disruptive impact on the efficacy of the Circuit Clerk’s office, so she was able to prevail on her First Amendment claim.

The Mattingly case is informative in several respects. First, it is an example of a case in which the form of the expression (a public Facebook post to over 1300 friends) was a distinct factor in the judge holding that the speech touched on a matter of public concern. Second, it illustrates how when employee speech attracts media attention, it can influence a judge’s determination that the speech touched on an inherently public concern. Third, the case underscores the importance of employers documenting any workplace disturbance that might result from employee speech. This lack of evidence was the reason that Mattingly’s speech claim was able to withstand the scrutiny of the Pickering test.

The Northern District of Georgia issued a ruling in early 2014 on Duke v. Hamil, a case dealing with a police officer who posted an image of the Confederate flag. Rex Duke was the Deputy Chief of Police at the Clayton State University Police Department near Atlanta, Georgia. Duke had thirty-plus years of experience and a clean record of service when, in November of 2012, he posted an image of the flag, along with the comment, “It’s time for the second revolution” on his Facebook page. Duke’s posting came in the aftermath of the 2012 presidential election as an expression of “general dissatisfaction with Washington politicians.” The post came to the attention of an Atlanta television station, and the department began receiving complaints regarding the matter. After an investigation,
Duke was demoted from the position of deputy chief to an undesirable morning patrol duty typically reserved for inexperienced officers, which resulted in a $15,000 cut in annual pay.235

Duke filed a lawsuit against the CSU Chief of Police, Bobby Hamil, claiming that Hamil had violated his First Amendment rights by demoting him in retaliation for “privately advocating for his personal political beliefs.”236 “Because it expressed disapproval of elected officials,” the court reasoned that Duke’s post dealt with a topic of importance to an informed electorate.237 Therefore, it easily passed the “public concern” requirement of Connick.238 The court then turned to the balancing test under Pickering, where Duke’s speech failed decisively. In holding in Chief Hamil’s favor, Judge Richard Story explained that the post could convey messages that were more troubling than simple disapproval of Washington politicians.239 “Many of these messages are controversial, divisive, and prejudicial to say the least,” explained Judge Story.240 Because Duke was second-in-command, the court viewed it as reasonable to foresee a negative impact on the “discipline, mutual respect, or trust” among those that Duke supervised.241 Further, Duke’s speech conveyed ideas that might undermine the department’s reputation, as well as the public trust.242 “Many in the community would take offense to his chosen form of speech,” Judge Story argued, “not just because they disapprove of it, but because it raises concerns of Plaintiff’s prejudice—and the Department’s.”243

The court believed the racial overtones of Duke’s post raised serious questions regarding Duke’s ability to treat all of the members of the community he served in a fair manner, regardless of their race or ethnicity. This rationale could easily be applied to a teacher or school administrator who posts images or remarks online that could be viewed as racially inflammatory. As it is critical for parents and students to perceive that school employees are making decisions that impact them in a just and ethical manner, this type of expressive behavior seems highly likely to damage an educator’s effectiveness.

An example of how racially insensitive remarks can provide grounds for dismissal in an educational setting occurred in 2015, when a federal district court ruled against Mary Czapinski, a school security guard in Vineland, New Jersey, after she announced on Facebook that she was “praying hard” for a Philadelphia police officer who’d been shot and killed in the line of duty by “another black thug.”244 Her post also included the exhortation that “white people should start riots and protests.”245 Czapinski attempted to temper her comments a day later, commenting that “there are thugs of every race,” but it

235 Id.
236 Duke, 997 F. Supp. 2d at 1294.
237 Id. at 1300.
238 Id.
239 Id. at 1301.
240 Id.
241 Id.
242 Id.
245 Id. at 2.
was already too late.\textsuperscript{246} By the end of the day, her post had been anonymously forwarded to the superintendent of Vineland schools.\textsuperscript{247} Czaplinski was immediately suspended and within a week, the district held a hearing and terminated her.\textsuperscript{248} In the letter informing her of her termination, the district stated the following:

School personnel are entrusted to use training, judgment, and commitment to fairness to diffuse, resolve and/or appropriately react to disputes, rules violations, safety concerns, and other day-to-day events which might otherwise compromise student learning and school climate.

...Your pronouncement has greatly jeopardized your ability to effectively conduct the business of public school safety and security because it reasonably calls into question the basis of your decision-making.\textsuperscript{249}

Czaplinski sought an injunction against her termination on the basis that it violated her First Amendment right to free speech.\textsuperscript{250} In denying her request, the court acknowledged that she was speaking in the capacity of a private citizen on a matter of public concern but found that her First Amendment claim was unlikely to succeed because, as the school district had aptly pointed out in the letter of termination, her comment could “reasonably be presumed to impede her proper performance of her daily duties as a security guard.”\textsuperscript{251}

In September of 2015, the Eastern District of Virginia decided the case of Liverman \textit{v.} City of Petersburg. This case is particularly interesting because it dealt with two police officers who were disciplined over an exchange on social media, and only one of the two was able to prevail on his First Amendment claim.\textsuperscript{252} Herbert Liverman and Vance Richards were veteran officers in the Petersburg police department in Virginia.\textsuperscript{253} In the summer of 2013, Liverman commented on his personal Facebook page about what he perceived as inexperienced officers being promoted to leadership positions in law enforcement.\textsuperscript{254} He emphasized the safety-related concerns of placing inexperienced officers in specialty units or as instructors.\textsuperscript{255} He cited a 2006 FBI report to support his claims.\textsuperscript{256} The post was “liked” by over thirty of Liverman’s contacts, many of whom were department employees.\textsuperscript{257} Liverman’s post also prompted numerous comments, one of which was Richards’s.\textsuperscript{258}

Richards voiced his support of Liverman and alluded to a specific example of someone who had received what he considered to be an undeserving promotion: “you know who I'm talking about . . . How can ANYONE look up, or give respect to a SGT in Patrol with ONLY 1 1/2 years experience in the street? Or less as a matter of fact.”\textsuperscript{259} Liverman responded to Richards’s comment by stating: “There used to be a time when you had to earn a promotion or a spot in a specialty unit . . . but now it seems as though

\begin{itemize}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.} at 3.
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} Czaplinski, No. 15-2045, U.S. Dist. LEXIS 38349 at 4,5.
\item \textsuperscript{250} \textit{Id.} at 1.
\item \textsuperscript{251} \textit{Id.} at 10.
\item \textsuperscript{252} Liverman \textit{v.} City of Petersburg, 106 F. Supp. 3d. 744 (E.D. Va. 2015).
\item \textsuperscript{253} \textit{Id.} at 749.
\item \textsuperscript{254} \textit{Id.} at 750, 751.
\item \textsuperscript{255} \textit{Id.} at 750.
\item \textsuperscript{256} \textit{Id.} at 751.
\item \textsuperscript{257} Liverman, 106 F. Supp. 3d. at 750.
\item \textsuperscript{258} \textit{Id.} at 751.
\item \textsuperscript{259} \textit{Id.}
\end{itemize}
anything goes and beyond officer safety and questions of liability, these positions have been devalued. Richards then added "your Agency is only as good as it’s (sic) Leader(s) . . . It’s hard to 'lead by example' when there isn't one . . . smh."  

After an employee brought the posts to the department’s attention, the two officers were investigated and ultimately disciplined for violating the department’s social media policy. Both officers were returned to "probationary status," which excluded them from promotion eligibility. The men sought relief in federal court, claiming the department social media policy violated the Free Speech Clause of the First Amendment.  

District Judge James Spencer analyzed the comments each officer made individually and determined that, while Liverman had commented as a citizen on matters of public concern, Richards had only spoken in his capacity as an employee on matters of personal interest. "Liverman was participating in or propelling a debate over public safety as a member of a community most likely to have informed and definite opinions," wrote Judge Spencer. Richards’s comments, on the other hand, “pertained to personal grievances and complaints about conditions of employment rather than broad matters." Having found that Liverman’s speech was protected, the court then turned to the balancing test under Pickering. Because the police department had not presented sufficient evidence to suggest that Liverman’s comments had harmed the department or had the reasonable potential to do so, the balancing test leaned in Liverman’s favor.  

In October of 2014, the Northern District of West Virginia decided Austin v. Preston County Commission. Courtney Austin was the director of the Preston County Animal Shelter and administered a Facebook page for the shelter within the auspices of her own personal Facebook account. Between February of 2012 and January of 2013, Austin was disciplined on two separate occasions for content that she had posted on the shelter’s page. The first post celebrated the shelter having gone sixty days without euthanizing an animal and urged citizens to like the post in order to support a no-kill facility. The second included a complaint about alleged loss of heat and water at the shelter during cold weather, which prompted a number of incoming phone calls to commissioners from citizens who were concerned about the animals’ welfare.

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260 Id.  
261 Id. Note “smh is an abbreviation meaning "shaking my head."  
262 Liverman, 106 F. Supp. 3d at 752.  
263 Id. at 753.  
264 Id. at 754.  
265 Id. at 759, 760.  
266 Id. at 759.  
267 Liverman, 106 F. Supp. 3d at 753.  
268 Id. at 762.  
270 Id. at 3.  
271 Id. at 3, 4, 5, 6.  
272 Id. at 3, 4.  
273 Id. at 4.
After the second post, members of the commission stipulated that Austin should not post anything on the page without the approval of at least two different commissioners. The commission also requested access to the Facebook page, a request Austin declined because the page was created from within her personal Facebook page. The commissioners and Austin discussed simply closing the page and starting a new one but decided against it because the page was already established within the community. An ITS employee was directed to find a way to grant the commissioners access to the page without compromising Austin’s personal Facebook privacy. Eventually, the commissioners directed Austin to change her password. However, rather than complying, Austin unilaterally decided to shut the page down. Within a week after Austin’s deletion of the Facebook page, the commission voted unanimously to terminate her employment.

Austin challenged her dismissal in federal court as illegal retaliation for her exercise of speech protected by the First Amendment. The court relied on a broad reading of Garcetti in ruling against her. “An employee may still be acting ‘pursuant to official duties,’” the court argued, “even if she engages in speech that is not part of her official job duties so long as it is in furtherance of such job duties.” Though Austin’s official job duties did not include the maintaining a shelter Facebook page, and indeed the page was established and maintained through her own personal page, the court felt that, when posting on the shelter page, Austin was acting pursuant to job duties. She did not use the page for personal communication, only for shelter business. The page was titled “Preston County Animal Shelter,” and Austin posted in that name as opposed to her own. The shelter’s Facebook page was listed in shelter information as its official website. All of this led the court to conclude that Austin was speaking in the capacity of an employee “pursuant to her job duties,” and, as such, had no claim under the First Amendment.

This decision is significant, because it is the only case reviewed in which employee speech was disqualified from First Amendment protection because of the Garcetti standard. Because school employees often maintain websites for classes or school programs such as band or orchestra, it is possible that such online speech could be considered pursuant to job duties, although school administrators should be cautious.

274 Austin, U.S. Dist. LEXIS 146041 at 6.
275 Id.
276 Id.
277 Id.
278 Id. at 7.
279 Austin, U.S. Dist. LEXIS 146041 at 7.
280 Id.
281 Id. at 9.
282 Id.
283 Id. at 16, 17.
284 Austin, U.S. Dist. LEXIS 146041 at 17.
285 Id. at 16.
286 Id.
287 Id.
288 Id.
289 Id.
290 Id.
291 Id.
292 When a teacher set up a class MySpace page, the court did not view his speech as “pursuant to job duties,” because he used the site to communicate with student about personal matters as well as school matters. See Spanierman v. Hughes, 576 F. Supp. 2d. 292, 297, 298 (2008) a teacher who had
Table 1: Summary of Federal Holdings on Public Employees and Internet Speech

<table>
<thead>
<tr>
<th>Date/Court</th>
<th>Case</th>
<th>Speech</th>
<th>Pursuant to Duties?</th>
<th>Public Concern?</th>
<th>Pickering Balance Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>District of Maryland: 2015</td>
<td>Buker v. Howard Co.</td>
<td>Paramedic comments on Facebook disparaging gun control and liberals. After being directed to remove comment, he complained about social media policy.</td>
<td>No.</td>
<td>Yes with regard to initial post, no with regard to subsequent posts.</td>
<td>Passed (Liverman) due to lack of evidence of disruption. NA (Richards).</td>
</tr>
<tr>
<td>Northern District of West Virginia: 2014</td>
<td>Austin v. Preston Co. Commission</td>
<td>County animal shelter director puts objectionable posts on official animal shelter Facebook page, refuses to give password to bosses.</td>
<td>Yes.</td>
<td>NA.</td>
<td>NA.</td>
</tr>
<tr>
<td>Court of Georgia: 2014</td>
<td>and calls for second revolution the morning after President Obama’s re-election.</td>
<td></td>
<td></td>
<td>communicated racist ideology which undermines public trust and confidence in law enforcement.</td>
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<tr>
<td>Southern District of Iowa: 2014</td>
<td>Vincent v. Story Co.</td>
<td>Employee in county attorney’s office “likes” Facebook post that is highly critical of findings clearing local police officers in the shooting of a family member.</td>
<td>No.</td>
<td>Yes.</td>
<td></td>
</tr>
<tr>
<td>No.</td>
<td>NA – but would have failed if speech had been deemed on public concern, due to disruption of working relationships.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northern District of Mississippi: 2013</td>
<td>Graziosi v. City of Greenville</td>
<td>Veteran police officer criticizes chief’s decision not to send representative to officer funeral in neighboring city.</td>
<td>No.</td>
<td>No.</td>
<td></td>
</tr>
<tr>
<td>No.</td>
<td>NA – but would have failed if speech had been deemed on public concern, due to disruption of working relationships.</td>
<td></td>
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</tr>
<tr>
<td>No.</td>
<td>Passed – employer showed no evidence of disruption.</td>
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<td></td>
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<tr>
<td>No.</td>
<td>NA (but would have failed, disruption would have outweighed First Amendment value of speech.</td>
<td></td>
<td></td>
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<tr>
<td>No.</td>
<td>NA.</td>
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</tbody>
</table>
V. PROPOSAL

In Connick, Justice White created a threshold to Pickering designed to protect public employers from what he viewed as an unreasonable burden of having to defend the constitutionality of routine employment decisions. However, extending the Connick test to public employee speech that is completely unrelated to the workplace seems to be not only out of line with Justice White’s intent, but also to have limited utility. In Connick, the content and capacity variables were presented as if they were perfectly correlated. That is, “employee speech” is explicitly linked with “private interests” and “citizen speech” with “public concerns.” But when a public educator posts social media content, he is frequently acting in the capacity of a citizen, while still communicating on a matter of private interest – a combination that the test was not designed to evaluate. This limited utility may explain why one circuit court simply assumed that speech met the Connick public concern requirement and relied on the Pickering test to evaluate cases involving the online speech of educators and other public employees. Twelve of the sixteen employees in the cases reviewed lost their Free Speech claims, but only three of them had their speech disqualified under Connick. When employees did win these cases, it was only because their employers failed to show a disruption under Pickering. The implication for school administrators is clear: it is not prudent to pursue negative employment action against an employee without first assessing evidence of any adverse impact the speech may have had on institutional efficacy.

It does not impose an unreasonable burden to require a public school administrator to consider whether an employee’s private speech has adversely impacted school operations when considering negative employment action. Because the concept of disruption is so expansively defined in Pickering, the balance will generally favor the employer in cases where an employee’s speech has truly caused problems, even if it is unrelated to work. Pickering allows public employers to punish employees for speech that interrupts office routines, distracts workers, damages workplace relationships, or demonstrates disloyalty or incompetence. But when a public employee engages in private speech that does not meet the broad definition of “disruptive” as set forth in Pickering, then how can an employer ethically justify adverse action?

Clearly, public school administrators need a new a framework to guide them in implementing legally defensible personnel decisions regarding educator online speech. The following proposal is a step-by-step decision-making model for administrators that will serve to broaden, define, and protect educator speech rights in the age of the Internet. Yet it will still safeguard the state’s legitimate interest in institutional efficacy. It comports with and does not require abandoning any black letter law. The

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291 See Richerson v. Beckon, 337 Fed. Appx. 637 (2009). Although 12/16 employees in the cases reviewed lost their Free Speech claims, only three had their speech disqualified under Connick. When public employers discipline their employees because of their online expressive activity, the courts are generally supportive, as long as the employer can show evidence of some type of workplace disruption.
293 Id.
framework requires a balanced examination of both content and capacity variables and is based on philosophical assumptions that acknowledge the complex relationship between those variables.

A. The New Threshold Question

With Garcetti, the court introduced the question of whether or not public employee speech occurs pursuant to job duties. In doing so, the court developed a new “threshold” question – one that is more narrowly constructed than the Connick public/private dichotomy. This query becomes the first step in the new framework: was the speech made pursuant to job duties? If not, then it passes to the next stage of the analysis. If the speech was made pursuant to job duties, then it is unprotected.

When principals specifically direct teachers to communicate with students or parents via social media sites, the resultant exchanges would likely be pursuant to job duties. Even when an employee acts upon his own initiative, his social media activity could be considered “pursuant to job duties” in some cases. For example, a high school band director who creates a band page on Facebook to communicate with students and parents regarding band activities would likely be acting in furtherance of his job duties. The West Virginia case of Austin v. Preston County Shelter provides an example of an employee who, at her own initiative, established and maintained the County Animal Shelter Facebook page. She posted on the page as “Preston County Animal Shelter” exclusively regarding shelter business – thus her expressive activity on the page fell within the scope of her duties as shelter director. Different fact circumstances, however, will produce different results and when unsure, employers should err conservatively and assume that the speech was not pursuant to job duties, thus allowing it to move to step two of the test.

B. Is the Speech of Inherent Public Concern?

In the second step in the new test, we consider the public concern/private interest threshold test from Connick but only as a vehicle to help us identify whether or not an employee is speaking in his “citizen capacity.” The Supreme Court, in San Diego v. Roe, attempted to clarify the public/private dichotomy by declaring that in order for speech to qualify as a matter of public concern, it must be “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.” The First, Second, and Third Circuits have agreed in O’Connor, Cioffi, and Azzaro, respectively, that speech that adds value to the process of self-governance, and citizens’ ability to make informed decisions regarding their government is inherently of public concern.

The Sixth and Seventh Circuits have held that the personal motivation of a speaker should not

\[295\] Whether speech can be considered “pursuant to job duties” is a difficult question and requires school administrators to be aware of their state whistle-blower laws as well as any holdings within their circuits regarding academic freedom at the PK-12 level. Only one of the cases reviewed in this note featured a holding that an educator had engaged in online speech that was considered “pursuant to job duties, so a cautious approach is advised.
\[297\] Spanierman v. Hughes, 576 F. Supp. 2d. 292, (2008). Jeffery Spanierman set up a MySpace page to communicate with students on both academic and personal matters, however, a federal judge determined he was not speaking pursuant to his job duties.
\[298\] City of San Diego, California, et. al. v. John Roe, 543 U.S. 77, 84 (2004).
detract from the inherent public concern of the content.\textsuperscript{299} A public employee (not speaking pursuant to job duties) who speaks out on a matter of public concern is automatically functioning, at least partially, in his capacity as a citizen, and his rights should be balanced appropriately against the state’s interests. Therefore, if it is determined that the content of the speech itself at least touches partially on a matter of inherent public concern, then it should advance to step four of the test, analysis under \textit{Pickering}. If the speech does not even partially touch on a public concern, the analysis advances to step three, where there is no assumption that the speaker is acting as a citizen. When speaking solely on private interests, the employee may be speaking either in the capacity of citizen or employee, or in a mixed capacity.

\textit{C. Private Concern Speech: Determining Capacity}

If speech was not made pursuant to job duties and does not touch on a matter of inherent public concern, then it must be private interest speech. In this step of the process, the speaker’s capacity is the primary consideration because an employee speaking on private interests might be speaking as a citizen, as an employee, or in a mixed capacity. It is important to note the contours of what it means to be functioning in the capacity of an employee versus the capacity as a citizen. Not everything that is said by an employee during the course of the workday constitutes “employee” speech. State employees who engage in private and personal conversational interchanges during the course of the workday would very likely be speaking in their capacities as private citizens and not employees. Justice Powell touched on this in his concurrence in \textit{Rankin v. McPherson}, where he highlighted the private nature of McPherson’s conversation with her boyfriend, even though the conversation occurred at work and during work hours.\textsuperscript{300} Justice Powell attached importance to the fact that McPherson lacked any intent or expectation that her private comment to her boyfriend would ever be shared or acted upon by someone else.\textsuperscript{301}

Conversely, public employees engaging in expressive activities outside of work and off-duty may still be acting in an employee capacity in certain circumstances. For the purposes of this framework, even when not speaking on matters directly related to his employment, if an educator seeks to link his expression to his professional life, he may be functioning in the capacity of an employee and not as a citizen. \textit{San Diego v. Roe} is illustrative in this regard. The Court noted that Roe had “taken deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer.”\textsuperscript{302} Roe’s identity as a police officer was integral to the central message of his speech. Though he was not acting pursuant to job duties, the steps he took to link the content of his speech to his status as a police officer caused him to cross over into the capacity of a police officer. In \textit{Craig v. Rich Township}, the Fourth Circuit took into account that Bryan Craig had repeatedly referenced his counseling activities at Rich Central High School to bolster his credentials as a relationship expert.\textsuperscript{303}

\textsuperscript{299} See Banks v. Wolfe Co. Bd. Of Educ., 330 F.3d. 888 (6th Cir. 2003), and Sullivan and Blanco v. Ramirez, 360 F.3d.692, 698 (7th Cir. 2004).
\textsuperscript{301} Id.
\textsuperscript{302} \textit{City of San Diego, California, et. al.} 543 U.S. at 81.
\textsuperscript{303} \textit{Craig v. Rich Township High School Dist. 227}, 736 F 3d. 1110, 1114 (7th Cir. 2013).
In analyzing whether private interest speech is spoken from the capacity of an employee, one must consider the content, form, and context to discover any nexus between the employee speech and the workplace. The following questions may be helpful:

- Did the speaker make attempts to present himself as a school/district employee or as a professional educator in general?
- Did the speaker take steps to make it more likely that members of the school community (students/parents/colleagues/administrators) were exposed to his speech?
- Did the speaker gain (or seek to gain) greater authority/credibility for readers/listeners by virtue of his professional experience or employment?
- Did the speaker’s expression contain information to which he would not otherwise have had access if not for his status as an employee?
- Did the speaker express himself on a matter that pertained directly to his work or employer?

If there is an affirmative answer to one or more of these questions, then an argument can be made that the speaker was acting within his capacity as an employee. His expression would qualify as employee speech on a matter of private concern, unprotected under *Connick* and therefore not eligible for the *Pickering* balancing test. This type of speech would include complaints about the job or working conditions that do not rise to the level of public concern. This might also include speech about superiors, colleagues, or students that a school administrator may find objectionable, so long as it did not rise to a level of public concern.

If the preceding questions produce only negative answers, then the employee’s “private” speech was likely made in his capacity as a private citizen. Even though this speech touches on a matter of private interest, it should be afforded First Amendment protection subject to the *Pickering* balancing test. Trust, confidence, and respect from the students and parents within the community are essential if an educator is to function effectively in the job. When educator speech undermines that trust, it is likely to erode his effectiveness as an educator, and in turn, the institutional effectiveness. Further, because educators work with children who may be easily influenced, the role-modeling function of the job is a critical consideration. Even purely private speech, if seen or heard by parents or students, could substantially disrupt school or employee function. For these reasons, at least in the case of the public educator, even purely private speech should be subjected to balancing under *Pickering*.

**D. The *Pickering* Balancing Questions**

Step four of the process involves analyzing the speech under *Pickering*. Any speech made by an educator in the capacity as a citizen, whether on a public concern or a private interest, should be balanced under *Pickering*. The *Pickering* Balancing Questions (see Table 2 on page 43) are a set of considerations that would allow school administrators to effectively balance their interests as employers and educators against the employees’ First Amendment rights. The questions offer school administrators a concrete template for considering the impact of a specific employee speech sample on institutional efficacy. Affirmative answers to any of these questions suggest that a school district would be justified in
taking adverse employment action against an employee. If a school administrator cannot answer at least one of the Pickering Questions affirmatively, then the employee’s speech should not provide the basis for a negative employment decision.

The case review suggest that, at least in the educational setting, speech that could be categorized as racist or sexist is highly likely to damage the ability of the employee to continue to function effectively in the job and cause community to question the fitness of the employee to continue to function effectively in his job. Further, employee who disparage supervisors, students or colleagues online may damage working relationships to the point that he can no longer be effective in his job.

In review, the proposed model involves four essential steps. The first step is determining whether the speech in question was uttered pursuant to the educator’s job duties, rendering it ineligible for First Amendment protection. If the speech was not pursuant to job duties, then the analysis proceeds to step two, which is determining whether the speech touched on an inherent public concern. If so, then the speaker was acting in capacity of a private citizen and is protected by the First Amendment and would advance to step four – the Pickering questions. If not, then we proceed to the third step, in which we evaluate whether or not the speaker acted in his capacity as an employee when he spoke. If so, then the speech is employee speech on a matter of private interest and not protected. If not, then it is protected private citizen speech that will be evaluated under Pickering. The model will require school administrators to evaluate whether or not the employee’s speech has disrupted institutional efficacy, but this will not be an onerous task. The time and consideration required seems to be nothing more than what a fair-minded employer should be doing anyway. Table 2 on page 43 summarizes the proposed framework.

School administrators are caught in a difficult position when one of their employees engages in controversial speech that goes viral. They must respect the First Amendment rights of their employees while still responding to the needs of the school system and community. The pace of advances in communication technology and the lack of a clear Supreme Court precedent make it difficult for school administrators to walk that fine line. Not only is it confusing to school leaders, but school employees also lack clarity about what is and isn’t acceptable in terms of online expressive conduct. Adopting this approach to evaluating teacher speech cases would provide much needed clarity for school administrators and teachers alike, as well as a legally defensible framework that would advance teacher expression rights while still recognizing the state’s legitimate interest as both an employer and educator. Under the proposed model, an educator who expresses himself as a citizen would have his speech analyzed under Pickering, even when the expression does not address a matter of public concern, administrators would retain broad leeway to discipline employees for disruptive speech, and school
districts would routinely place themselves in more defensible positions.