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THE *PICKERING* PAPER SHIELD:

THE EROSION OF PUBLIC SCHOOL TEACHERS' FIRST AMENDMENT RIGHTS JEOPARDIZES THE QUALITY OF PUBLIC EDUCATION

I. INTRODUCTION

"Teacher attrition is the largest single factor determining demand for additional [public school] teachers in the U.S."[1] By 2008, the country's public schools will need to hire at least 220,000 new teachers annually.[2] In light of escalating student enrollment, this would seem to be the worst time for the U.S. to face a teacher shortage.[3] Studies indicate, however, that each year 40% of qualified candidates who complete teacher training programs do not enter the teaching profession.[4] Further, mere completion of a teacher training program does not necessarily prepare an individual to "compliment the school culture and enhance the achievement of students,"—two factors which public school administrators look for in applicants.[5] The lack of qualified teacher candidates, even among the pool of individuals who have completed a teacher training program, suggests that the best potential public school teachers, such as college graduates, choose not to enter the profession.[6]

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[1] CAROLYN MCCREIGHT, TEACHER ATTRITION, SHORTAGE, AND STRATEGIES FOR TEACHER RETENTION 3 (2000), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/22/ad/b8.pdf.

[2] *Id.*

[3] JACOB EASLEY II, TEACHER ATTRITION AND STAFF DEVELOPMENT FOR RETENTION 2, 4 (2000), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/29/88.pdf.

[4] *See* MCCREIGHT, *supra* note 1, at 4. In 2000, "at least four million people in the U.S. [were] trained to teach but [chose] not to." *Id.* Presumably, the total number of trained teachers who choose not to teach has only grown over the past seven years.

[5] *Id.*

[6] It is easy to understand a typical college student's lack of interest in a career in public education. Across the country, the average starting salary for a public educator ranges

As pressure mounts on public schools to maintain a teaching workforce capable of meeting students' needs, the government should cooperate with local school districts to provide incentives for individuals to become public educators.[7] Recent federal court decisions limiting public employees' freedom of speech and association, however, may make careers in public education even less attractive. By stripping public employees of several First Amendment liberties they would ordinarily enjoy as private citizens, the courts undermine the nation's desire to provide high quality education to public school students.[8]

In *Pickering v. Board of Education*, the Supreme Court ruled that in most circumstances the First Amendment protects public employees from government retaliation on account of speech.[9] Since then, however, *Pickering* has become something of a paper shield for teachers whose viewpoints and teaching methods conflict with the local public school authority.[10] The Supreme Court has gradually carved out significant exceptions to *Pickering* that enable the government to regulate public school teachers' speech.[11] Moreover, decisions from the Second and Ninth Circuit Courts of Appeals suggest that the lower federal courts are also whittling away at public teachers' First Amendment rights.[12] The courts' latest assault has targeted teachers' right to freely associate outside of the classroom.[13]

Public school teachers risk losing their jobs whenever they stray from the pedagogical path established by their superiors.[14] Public education may suffer if the courts continue to allow the government (acting through local public school authorities) to fire public school teachers for exercising their right to associate outside of the work environment, the resulting effect on public education may be disastrous. As the government reins in public school teachers' freedom of expression and association by direct action or threats, qualified individuals who would otherwise seek careers in public education will likely turn to the private sector for employment. This, in turn, may lead to a continuing decline in the overall quality and diversity of the qualified teacher candidate pool.

This Note discusses the Supreme Court's evolving position on how and when the First Amendment protects public employees, including public school teachers, from

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between $25,000 and $30,000 per year. MCCREIGHT, *supra* note 1, at 6. Simply stated, "it is difficult [for public schools] to attract top talent into teaching" when the same candidates could make 50 to 70% higher salaries in the fields of law or medicine. *Id.*

[7] EASLEY, *supra* note 3, at 4.

[8] *See* 20 U.S.C. § 6301 (2000).

[9] Pickering v. Bd. of Educ., 391 U.S. 563, 567–68 (1968).

[10] *E.g.*, Nelson v. Pima Cmty. Coll., 83 F.3d 1075, 1081 (9th Cir. 1996).

[11] *E.g.*, Waters v. Churchill, 511 U.S. 661 (1994) (lowering government's burden to justify retaliatory employment decision based on employee's speech); Connick v. Myers, 461 U.S. 138 (1983) (narrowing class of protected expression); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (raising plaintiff's burden to prove causation).

[12] Hudson v. Craven, 403 F.3d 691 (9th Cir. 2005); Melzer v. Bd. of Educ., 336 F.3d 185 (2d Cir. 2003).

[13] *See Hudson*, 403 F.3d at 698; *Melzer*, 336 F.3d at 195–96.

[14] *Nelson*, 83 F.3d at 1081.

retaliatory employment actions. Part II provides an overview of how the Court came to recognize First Amendment protections for public employee speech, culminating with the announcement of the so-called *Pickering* balancing test. Part III chronicles how, after announcing *Pickering*, the Court slowly weakened the balancing test's ability to protect public employee speech. Part IV describes how the lower courts have applied the now-weakened *Pickering* balancing test to cases involving alleged governmental retaliation to public employees' associational activities. Part V discusses how a chill on public school teachers' freedom of expression and association detrimentally affects the quality of public education by further discouraging the country's best minds from becoming public educators. Finally, Part VI concludes with a recommendation that the Supreme Court halt any further erosion within the courts of appeals of public employees' First Amendment rights.

II. THE INITIAL POTENTIAL OF THE *PICKERING* BALANCING TEST TO PROTECT PUBLIC EMPLOYEE SPEECH.

Freedom of speech and association "lies at the foundation of [our] free society."[15] The First Amendment fiercely protects these "ultimate values of all democratic living"[16] by imposing strict limitations on the government's power to regulate what private citizens say and with whom they associate.[17] To defend First Amendment rights, the Supreme Court applies "the 'closest'" judicial review to governmental attempts to regulate private expression and association.[18] The Court will hold any state infringement upon citizens' free exercise of their First Amendment rights as "unjustified except upon a showing of a valid interest" or "controlling justification."[19]

At the beginning of the last century, however, it seemed that individuals entirely relinquished their claims to First Amendment protections when they broke ranks with the average citizenry and became public employees.[20] The prevailing jurisprudence held that the extent of an individual's right to free speech depended on the nature of the individual's relationship with the government.[21] Under this view, some rights—including free speech—that an individual held against the

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[15] Shelton v. Tucker, 364 U.S. 479, 486 (1960).

[16] Wieman v. Updegraff, 344 U.S. 183, 188 (1952).

[17] *See Shelton*, 364 U.S. at 486–87. *See* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958). "Although the first amendment does not expressly mention freedom of association, the Supreme Court . . . [has] held that the amendment's express protection of free speech, assembly and the right to petition government implicitly includes the guaranty of free association." SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 653 (2d ed., Thomson West 2000).

[18] *Hudson*, 403 F.3d at 696 n.1 (quoting *Patterson*, 357 U.S. at 460–61).

[19] *Id.*; *Patterson*, 357 U.S. at 466.

[20] *E.g.*, McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

[21] *See id.*

government as sovereign did not apply against the government as employer.[22] The legal distinction between government as sovereign and government as employer effectively permitted the government to punish its employees, i.e., fire them, for speech otherwise protected by the First Amendment.[23]

The dichotomy between individuals' rights against the government as sovereign and the government as employer arose in conjunction with the doctrine of "at will" employment, which controlled the private sector.[24] "This [doctrine] made the first amendment largely irrelevant as a legal limitation on the decisions of public employers" because courts assumed that job applicants voluntarily waived their freedom of speech in exchange for the benefits of public employment.[25] Writing in *McAuliffe v. Mayor of New Bedford*,[26] Justice Holmes aptly summarized the reality of public employment: "The servant cannot complain [about government retaliation for speech], as he takes the employment on the terms which are offered him."[27] This meant that disgruntled public employees could not claim protection under the First Amendment because they freely chose to subject their speech to government regulation when they added their names to the public payroll.[28] Not unlike a private employer, the government had nearly absolute authority to terminate an employee for any reason, including offending speech. Despite the Supreme Court's eventual retreat from its pre-New Deal views of contract enforcement,[29] the government retained virtually unlimited power to terminate public employees on account of speech for over a half-century following *McAuliffe*.[30]

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[22] *Id.* ("There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech.").

[23] *See id.* ("The petitioner may have the constitutional right to talk politics, but he has no constitutional right to be a policeman."). This understanding of individuals' rights against the government as employer permitted the government to control public employee speech through adverse employment action and the threat thereof. Whereas the government as sovereign could not directly harm a private citizen for unpopular speech, the government as employer could directly harm a public employee for identical speech through adverse employment action.

[24] ESTREICHER & HARPER, *supra* note 17, at 632.

[25] *Id.*

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

[27] *McAuliffe*, 29 N.E. at 518. *See also* Lochner v. New York, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.").

[28] *McAuliffe*, 29 N.E. at 517–18.

[29] *E.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 440 (1934).

[30] *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (arguing that public employees have constitutional right to free speech, but they do not have corresponding right to State employment); Garner v. Bd. of Pub. Works, 341 U.S. 716 (1951) (finding it acceptable to condition public employment on loyalty oath and non-advocacy of anti-government views); United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947) (holding that public employees have no right to set their own terms of employment).

A. The Beginning of Constitutional Protection for Public Employee Speech: Wieman, Shelton, *and* Keyishian

Starting in the early 1950s, the Supreme Court decided several cases involving public school teachers that provide the backbone for its current protections for public employee speech.[31] The Court modified existing doctrine in stages, with each decision recognizing successively stronger limitations on the government's power to control public employee speech.[32] As an initial step in this process, the Court decided *Wieman v. Updegraff*.[33] There, the Court announced the first of several checks on the government's power to dictate the terms of public employment.[34]

1. Wieman v. Updegraff

Reaching the Supreme Court during the height of 1950s anti-Communism, *Wieman* challenged the constitutionality of an Oklahoma state statute that required all state officers and employees to take a loyalty oath as a condition of holding public office or employment.[35] An Oklahoma citizen filed the suit to compel the state government to enforce the law against the faculty and staff of a public college who had refused to take the oath.[36] The Court ruled in favor of the public employees and struck down the statute on due process grounds.[37]

While acknowledging Oklahoma's power to address the security threat allegedly posed by Communists gaining influential positions in public office or public education, Justice Clark stressed that the state could not ensure loyalty by "infringing the freedoms that are the ultimate values of all democratic living."[38] Justice Clark avoided further elaboration on the types of freedoms that deserve protection and focused instead on the unconstitutional arbitrariness of the statute.[39] The Court announced that a general "constitutional protection . . . extend[s] to the public servant whose [termination] pursuant to a statute is patently arbitrary or discriminatory."[40] In so doing, the Court laid a foundation for the premise that the government cannot extract unreasonable concessions from its employees.

Although Justice Clark, in his majority opinion, did not define the freedoms "that

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[31] *E.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952).

[32] ESTREICHER & HARPER, *supra* note 17, at 632–33.

[33] *Wieman*, 344 U.S. at 183.

[34] *Id.* at 192.

[35] *Id.* at 184–85.

[36] *Id.* at 185.

[37] *Id.* at 191. ("Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.").

[38] *Id.* at 188.

[39] *Id.* at 191.

[40] *Id.* at 192.

are the ultimate values of all democratic living,"[41] Justice Black's concurrence strongly suggested that the majority had freedom of speech in mind.[42] Refusing to distinguish public employees' freedoms from the rest of the population's freedoms, Justice Black wrote, "[w]e must have freedom of speech for *all* or we will in the long run have it for none . . . . And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually will be wholly lost."[43] By arguing for a single standard of free speech for all citizens, Justice Black apparently rejected the dichotomy between the government as sovereign and the government as employer. Although it failed to persuade a majority of the justices, Justice Black's concurrence serves as a preview of the court's subsequent decisions.

2. Shelton v. Tucker

The Court further reined in the government's power over public employee speech in *Shelton v. Tucker*,[44] where it held that the government must avoid violating employees' "fundamental personal liberties" when it can achieve its objective through less intrusive means.[45] Mr. Shelton initiated his suit after the Little Rock Public School System, a public employer, fired him for declining to submit an affidavit listing "all his organizational connections over the previous five years."[46] An Arkansas state statute required all teachers at public schools and colleges to file such an affidavit annually as a condition of employment.[47]

Similar to its holding in *Wieman*, the Court struck down the Arkansas statute for offending due process.[48] In dicta, however, the Court also held that despite its legitimate interest in the "fitness and competency of its teachers," Arkansas had failed to justify interfering with its employees' first amendment freedoms.[49] The Court implicitly found that Arkansas had arbitrarily, and therefore unlawfully, violated the First Amendment.[50] Thus, while it based its rejection of the statute on due process grounds, the Court suggested that the First Amendment may also provide a check on the government's power to regulate its employees' expressive conduct.

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[41] *Id.* at 188.

[42] *Id.* at 193 (Black, J., concurring).

[43] *Id.* (emphasis added).

[44] Shelton v. Tucker, 364 U.S. 479 (1960).

[45] *Id.* at 488.

[46] *Id.* at 482–83.

[47] *Id.* at 480.

[48] *Id.* at 490 (holding that statute offended due process because of its "unlimited and indiscriminate sweep").

[49] *Id.*

[50] *See id.*

3. Keyishian v. University of the State of New York

Six years later, the Court made a significantly stronger endorsement of protected public employee speech in *Keyishian v. Board of Regents of the University of the State of New York*.[51] Similar to Mr. Shelton, Mr. Keyishian filed suit after he lost his job with the State University of New York, a public employer, for refusing to sign a certificate disavowing any support for Communism.[52] A New York state law permitted the university to terminate any faculty member who failed to sign the anti-Communist pledge.[53] After attempting to unravel a statutory scheme which he likened to a "maze," Justice Brennan, writing for the majority, held that the laws conditioning Keyishian's public employment upon his denouncement of Communism were unconstitutionally vague.[54]

Remarkably, unlike the Court's decisions in *Wieman* and *Shelton*, which rejected similar loyalty pledge statutes on due process grounds, Justice Brennan's *Keyishian* analysis explicitly depended on the First Amendment. The *Keyishian* court expressly rejected the premise that public employment "may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[55] The Court announced a general rule for determining what terms the government may properly affix to public employment: if the government may not directly deprive a private citizen of a right, then neither may it demand surrender of that right in exchange for public employment.[56] In so doing, the Court expressly rejected Justice Holmes's *McAuliffe* ruling and may have sounded the death knell for the dichotomy between the government as sovereign and the government as employer. A plausible reading of *Keyishian* is that the First Amendment does not permit the government as an employer to accomplish what it could not accomplish as a sovereign authority.[57] By reaffirming the *Shelton* holding, however, the Court left open the issues of when and how far the First Amendment must bend to the government's needs as an employer. The following year the Court promulgated the so-called *Pickering* balancing test in an attempt to address these issues.[58]

B. *The* Pickering *Balancing Test*

In 1964, Marvin Pickering, an Illinois public high school teacher, sent a letter to

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[51] Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967).

[52] *Id.* at 591–92.

[53] *Id.*

[54] *Id.* at 604. (finding that "the regulatory maze created by [the statute was] wholly lacking in terms susceptible of objective measurement" and was therefore unconstitutional (quoting Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286 (1961) (internal quotations omitted))).

[55] *Id.* at 605.

[56] *Id.*

[57] *See id.*

[58] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

the editor of a newspaper to voice his frustration over the local school board's mishandling of a recently proposed tax increase.[59] The school board, Pickering's public employer, responded to Pickering's criticism by terminating his employment.[60] In his lawsuit against the school district, Pickering alleged that his dismissal violated his First Amendment right to free speech.[61] The school board countered that it based its decision on the finding that Pickering's comments were "'detrimental to the efficient operation and administration'" of the school district.[62] Essentially, the school board conceded that it had retaliated against Pickering for his speech, but nonetheless argued that the circumstances surrounding the adverse employment action justified any resulting First Amendment violation. The Supreme Court agreed to hear Pickering's case to decide whether the school board's justification for firing Pickering should trump the public employee's First Amendment right to free expression.[63]

Writing for the majority, Justice Marshall reaffirmed the *Keyishian* holding that the government may not lawfully compel public employees to "relinquish the First Amendment rights they would otherwise enjoy as citizens."[64] He added, however, that the government has greater regulatory power over its employees' speech than over its citizens' speech.[65] As such, Justice Marshall recognized the conflict between citizens' interest to freely exercise First Amendment rights and the government's interest as an employer to retain necessary control over its employees.[66] To resolve the apparent conflict, Justice Marshall outlined a balancing test:

> The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[67]

By fashioning this balancing test, it appears that the Court wanted to embrace a middle-ground position between Justice Holmes's now-defunct government as sovereign/employer dichotomy and Justice Black's "freedom of speech for all" absolutist standard. The Court did not have an opportunity to balance the parties' interests, however, because it found that Pickering's comments did not affect the school district's efficiency.[68] Further, the Court found no other reason why

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[59] *Id.* at 564–67.

[60] *Id.* at 567.

[61] *Id.* Pickering claimed that the school board had violated his First Amendment right as incorporated against the states by the Fourteenth Amendment. *Id.* at 565.

[62] *Id.* at 564 (quoting the Board of Education's dismissal).

[63] *See id.* at 565.

[64] *Id.* at 568.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] The court found, despite the school board's assertions to the contrary, that "Pickering's letter was greeted [overwhelmingly] . . . with massive apathy and total disbelief." *Id.* at 570.

Pickering's speech deserved less First Amendment protection than the speech of any other private citizen.[69]

Though it did not apply its newly-announced balancing test, the *Pickering* Court made several important contributions to the areas of public employment and speech. The Court endorsed public employees' rights to publicly criticize their employers.[70] Noting that public employees tend to add "informed and definite opinions" to public policy debates, the Court held that "it is essential that they be able to speak out freely . . . without fear of retaliatory dismissal."[71]

More importantly, *Pickering* recognized that, absent qualifying circumstances, the First Amendment protects public employees from adverse employment actions on account of their speech.[72] In doing so, the Court took a momentous step away from Justice Holmes' view in *McAuliffe*. The *Pickering* balancing test established a rule that prevents the government from arbitrarily retaliating against a public employee for exercising his or her right to free speech.[73] Even if the government as employer has a legitimate reason to regulate speech, courts applying *Pickering* may nonetheless find that the employee's interest in speaking outweighs the government's interest in maintaining control over its workforce.[74]

III. THE SUPREME COURT'S GRADUAL WEAKENING OF THE *PICKERING* BALANCING TEST AS A SHIELD AGAINST GOVERNMENT RETALIATION TO PUBLIC EMPLOYEE SPEECH.

Pickering may have indicated the zenith of First Amendment protection for public employee speech. Although the Court has preserved the general contours of the *Pickering* balancing test, its subsequent decisions have heightened the plaintiff-employee's burden for proving causation,[75] narrowed the definition of protected speech,[76] and minimized the government's burden for justifying its adverse

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[69] *Id.* at 573. Simply, the court had no reason to balance the parties' interests because the government failed to point to an interest tending to justify the school district's violation of Mr. Pickering's first amendment right. *See id.*

[70] *Id.* at 572.

[71] *Id.*

[72] *Id.* at 574 (holding that by itself "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment").

[73] *Id.* at 568 ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 605–06 (1967) (internal quotations omitted))).

[74] This is the literal state of the law; in theory, the *Pickering* balancing test enables a reviewing court to overturn a governmental employment decision despite the government's legitimate interest in improving efficiency. *Id.* at 568. *See also* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 477 (1995) (government must point to especially compelling interest when it seeks to control speech of a group of employees, as opposed to particular employee).

[75] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[76] Connick v. Myers, 461 U.S. 138 (1983).

employment decisions.[77]

A. Mt. Healthy *Raised the Plaintiff's Burden of Proof for Causation.*

The Court made its first major refinement to the *Pickering* balancing test in *Mt. Healthy City School District Board of Education v. Doyle*, where it commented on the causal relationship that the employee-plaintiff must prove to prevail in a suit alleging unlawful retaliation for protected speech.[78] Causation had not been at issue in *Pickering*, where the Court found without discussion that the school board had fired Pickering "for writing and publishing [a] letter."[79] In contrast, the causal connection between the plaintiff's protected speech and the government's alleged retaliation was not so clear in *Mt. Healthy*.[80]

Mt. Healthy involved an untenured teacher, Fred Doyle, who "convey[ed] the substance of [a sensitive school district] memorandum to a disc jockey at . . . a [local] radio station."[81] Doyle claimed that the Mt. Healthy School District Board declined to renew his employment contract because of this incident.[82] The Board explained it decided not to renew the contract because of Doyle's "'notable lack of tact in handling professional matters.'"[83] In support of its decision, the Board pointed to the radio station incident and to an incident in which Doyle allegedly made an obscene gesture toward a student.[84] These events led the district court to find that Doyle's speech to the radio station "'played a substantial part in the [Board's] decision not to renew'" Doyle's contract.[85] The district court further held that Doyle's alleged lack of tact provided an insufficient reason for the Board to infringe upon his First Amendment freedoms.[86]

When the district court decided *Mt. Healthy*, it had some discretion to determine the level of causation the law required Doyle to prove in support of his claim.[87] Ruling for Doyle, the district court apparently found that the plaintiff satisfied his burden of proof by showing that his speech was a contributory cause of the Board's decision.[88] The Supreme Court disagreed.[89] Writing for the majority, Justice Rehnquist explained that the district court erred by adopting a contributory cause

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[77] Churchill v. Waters, 977 F.2d 1114, 1127 (7th Cir. 1992), *vacated*, 511 U.S. 661 (1994).

[78] *Mt. Healthy*, 429 U.S. at 276, 286.

[79] *Pickering*, 391 U.S. at 566.

[80] *Mt. Healthy*, 429 U.S. at 285.

[81] *Id.* at 282.

[82] *Id.*

[83] *Id.* (quoting statement of reasons for Board's actions).

[84] *Id.* at 282–83.

[85] *Id.* at 284 (quoting district court's opinion).

[86] *Id.*

[87] *See id.* at 285. The Supreme Court read the lower court's opinion as fashioning a rule of causation in response to a question of first impression. *Id.*

[88] *Id.*

[89] *Id.*

rule of causation because application of the rule "could place an employee in a better position as a result of [exercising] constitutionally protected conduct than [the employee] would have occupied had [the employee] done nothing [at all]."[90] Since the Board could have decided not to renew Doyle's contract without providing any reason, the Court ruled that Doyle could not avoid an otherwise lawful termination by simply exercising his First Amendment right of free speech.[91] Instead, the Court held that the district court should have permitted the Board to justify its decision by showing that it would have reached the same decision regardless of Doyle's speech.[92] Such a showing, Justice Rehnquist argued, would distinguish the Board's decision from one impermissibly "caused by a constitutional violation."[93]

Mt. Healthy modified the *Pickering* balancing test by requiring that plaintiffs show that their protected speech was the only cause of the government's employment decision.[94] Formally, the Court found that Doyle had carried his trial burden by proving that his speech was a "motivating factor in the Board's decision not to rehire him."[95] Yet, by permitting the Board to avoid liability by showing that Doyle's speech was merely one among several legitimate reasons for its employment decision, the Court functionally required Doyle to foreclose the possibility that factors unrelated to his speech more likely than not motivated his dismissal.[96]

The Court's decision in *Mt. Healthy* limited the protective power of the *Pickering* balancing test in two ways. First, it created a previously unavailable defense for the government.[97] In cases preceding *Mt. Healthy*, once the plaintiff proved its *prima facie* case, the government could defend its employment decision by arguing that its interest in promoting efficiency outweighed the plaintiff's interest in speaking.[98] After *Mt. Healthy*, in contrast, the government may defend its employment decision by arguing that (1) its interests in promoting efficiency outweigh the plaintiff's interests in speaking; and (2) even if the plaintiff's interests outweigh the government's, the government would have made the same decision regardless of the plaintiff's speech.[99] Thus armed with an additional defense, the

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[90] *Id.*

[91] *Id.* at 286.

[92] *Id.* at 287.

[93] *Id.* at 286.

[94] *See id.* at 287 ("[T]he proper test to apply [to find causation] is one which . . . protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.").

[95] *Id.* (internal quotations omitted).

[96] *See id.*

[97] *See id.* at 286. *See also* Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 81 (1st Cir. 2006).

[98] *E.g.*, Arnett v. Kennedy, 416 U.S. 134, 160–63 (1974); Donahue v. Staunton, 471 F.2d 475, 481 (7th Cir. 1972).

[99] *See, e.g.*, Jones v. City of Allen Park, 2006 U.S. App. LEXIS 83, at *15–16 (6th Cir. Jan. 3, 2006); Gronowski v. Spencer, 424 F.3d 285, 296 (2d Cir. 2005); Culver v. Gorman &

government has a greater ability to convince the factfinder to permit state regulation of public employee speech.

Additionally, by placing a heightened burden on the plaintiff, *Mt. Healthy* likely discourages some plaintiffs from enforcing their rights. The availability of the government's *Mt. Healthy* defense requires the plaintiff to produce evidence proving that his or her protected conduct was more than merely a contributory cause of the government's employment decision. Whereas previously, to survive summary judgment, a plaintiff would have just had to show that the government employer substantially considered the plaintiff's protected conduct when making an employment decision,[100] now, to persuade the factfinder, the plaintiff must show that, absent the protected conduct, no other factor or combination of factors would have resulted in the employer's decision.[101] If the plaintiff proves only that the conduct was a contributory cause, the government may nonetheless prevail.[102] This may mean that, in practice, only plaintiffs with extraordinarily strong evidence of a causal connection between their speech and the government's retaliatory decision will file suit to vindicate their First Amendment rights. Alternatively, the plaintiff's evidentiary burden may prevent a "borderline or marginal" employee from filing suit for fear that the government can justify its decision with reference to the employee's allegedly poor performance record.[103] Accordingly, the causation requirement imposed by *Mt. Healthy* may limit access to First Amendment protections to only those plaintiffs with strong evidence of causation and relatively spotless performance records.

B. Connick *Narrowed the Class of Protected Expression.*

The Court made its next major refinement to the *Pickering* balancing test in *Connick v. Myers*, where it dealt with the meaning of "matter[s] of . . . public concern."[104] Because the *Pickering* opinion specifically considered the "interests of the [public employee] . . . in commenting upon matters of public concern," it left open the possibility that employee speech not regarding matters of public concern should receive no First Amendment protection.[105] The Court endorsed this argument in *Connick*, ruling that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their

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Co., 416 F.3d 540, 545–46 (7th Cir. 2005).

[100] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

[101] *See Mt. Healthy*, 429 U.S. at 287. *See also Rodriguez-Marin*, 438 F.3d at 81.

[102] *Jones*, 2006 U.S. App. LEXIS 83 at *15–16; *Gronowski*, 424 F.3d at 296; *Culver*, 416 F.3d at 545–46.

[103] *Mt. Healthy*, 429 U.S at 286.

[104] Connick v. Myers, 461 U.S. 138, 145 (1983) (citation omitted). The court also used *Connick* as an opportunity to comment on the nature of the government's burden under the *Pickering* balancing test. It held that "the [government's] burden in justifying a particular discharge varies depending on the nature of the employee's expression." *Id.* at 150.

[105] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

offices."[106] Here, the Court narrowed the class of public employee expression that receives First Amendment protection by interpreting the "public concern" element of the *Pickering* balancing test as a threshold requirement.[107] Indeed, the Court found no reason to apply the *Pickering* balancing test at all because the plaintiff's speech did not include a matter of public concern.[108]

To justify its refinement of the balancing test, the Court pointed to the *Pickering* precursors, e.g., *Wiemann*, *Shelton*, and *Keyishian*, all of which, the Court claimed, involved speech on issues of public concern.[109] These decisions, the Court explained, struck down statutes intending to "suppress the rights of public employees to participate in public affairs."[110] *Connick* characterized the pre-*Pickering* decisions as involving governmental attempts to use the threat of retaliatory discharge to discourage or intimidate public employees from participating in the political process.[111] Therefore, under the *Connick* Court's analysis, the outcome of *Pickering* depended upon the finding that Mr. Pickering's speech involved "a matter of legitimate public concern."[112]

Having given controlling weight to the public concern element of the *Pickering* balancing test, the *Connick* Court proceeded to comment on how public employee speech may qualify for First Amendment protection. [113] As an initial matter, the Court clarified that "[t]he inquiry into the protected status of speech is one of law, not fact."[114] Future judges should consider the "content, form, and context of a given statement, as revealed by the whole record," to determine whether employee speech "addresses a matter of public concern."[115]

By detailing its analysis of the speech at issue in that case, the *Connick* Court provided some guideposts to help future judges reach their own determinations. Regarding content, the Court cautioned that First Amendment protections may apply even when the speaker does not address *per se* political issues.[116] The Court, however, flatly denied protection to a public employee who speaks "upon matters

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[106] *Connick*, 461 U.S. at 146.

[107] *Id.*

[108] *See id.* (holding that, unless plaintiff's speech touches on a matter of public concern, "it is unnecessary for [the court] to scrutinize the reasons for her discharge").

[109] *Id.* at 144–45. Incidentally, Justice Black's *Wieman* concurrence also specifically referred to "the right to speak on matters of public concern." Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring). The *Connick* Court did not refer to Justice Black's *Wieman* concurrence in its analysis. *Connick*, 461 U.S. at 138. However, it appears that Justice Black would have agreed with the outcome of *Connick*.

[110] *Connick*, 461 U.S. at 144–45.

[111] *Id.* at 145.

[112] *Id.* (citations omitted).

[113] *Id.* at 147–48.

[114] *Id.* at 148 n.7.

[115] *Id.* at 147–48.

[116] *Id.* at 147 ("'[T]he first amendment does not protect speech and assembly only to the extent it can be characterized as political.'" (quoting Mine Workers v. Ill. Bar Ass'n, 389 U.S. 217, 223 (1967))).

only of personal interest," such as his or her personal disapproval of an internal office policy.[117] Moreover, judges must evaluate the content in light of circumstances as they are, not as they might or ought to be.[118] The fact that the content of the employee's speech would have interested the public if the speech had been made in a different forum does not bolster the employee's case.[119] In terms of evaluating the context of the speech, the Court's analysis appears to encourage the judge to determine the employee's intent in speaking or writing. Based on the facts in *Connick*, the Court stated that the timing of the employee's speech might suggest that she intended to air her personal grievances rather than contribute to public debate.[120] Specifically, the Court emphasized the fact that the employee's critical speech "followed upon the heels" of an unfavorable personnel decision.[121] A plausible reading of this passage is that proof of an employee's animus towards the public employer may negate the speech's elements of public concern.[122]

Two decades after *Connick*, the Court still struggles to define "matters of public concern."[123] *Connick*, however, had a clear impact on the government's ability to regulate public employee speech. The decision "put a series of new pitfalls and obstacles in the way of public employees who wished to vindicate their speech rights."[124] By making resolution of the "public concern" issue a threshold matter, the Court armed the government with another weapon to attack a plaintiff's case alleging unlawful retaliation for protected speech. Under *Connick*, public employee speech does not receive any First Amendment protection unless it passes the awkwardly-defined "public concern" test.[125] Accordingly, the government may avoid *Pickering* and First Amendment liability altogether by successfully characterizing the plaintiff's speech as private or at least not a matter of public concern.[126] Moreover, the Court's imprecise definition of "public concern" most likely dissuades some plaintiffs from bringing suit when the "content, form, and context" of their speech presents the court with a novel question.[127] Since *Connick* instructs judges to consider the "whole record," rather than a prescribed set of

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[117] *Id.* at 147. "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

[118] *Id.* at 148 n.8.

[119] *See id.*

[120] *Id.* at 153–54.

[121] *Id.* at 153.

[122] Arguably, this analysis does not apply beyond *Connick*.

[123] In *City of San Diego v. Roe*, the Court stated that "the boundaries of the public concern test are not well-defined." City of San Diego v. Roe, 543 U.S. 77, 83 (2004). However, the Court continued to hold that "public concern is something that is a subject of legitimate news interest; . . . a subject of general interest and of value and concern to the public at the time of publication." *Id.*

[124] Richard H. Hiers, *New Restrictions on Academic Free Speech:* Jeffries v. Harleston II, 22 J.C. & U.L. 217, 236–37 (1995).

[125] *Connick*, 461 U.S. at 147.

[126] *See id.*

[127] *Id.* at 147–48.

variables, to determine whether the plaintiff's speech qualifies for constitutional protection, it seems that only plaintiffs with claims firmly backed by court precedent can proceed with confidence of ever reaching the *Pickering* balancing test.[128]

Further, *Connick* explained that the "public concern" test constitutes a question of law, and not of fact.[129] A reviewing court reviews the trial court's resolution of the "public concern" test *de novo*.[130] Accordingly, the appellate court owes little deference to the trial court's finding that the speech in question involved a matter of public concern.[131] This means that, especially in cases where the plaintiff's speech raises a novel question, a favorable trial court ruling may prove short-lived. This provides a hesitant plaintiff with all the more reason not to file a lawsuit.

C. Waters *Eased the Government's Burden for Justifying a Retaliatory Employment Decision.*

A decade after deciding *Connick*, which raised the threshold requirement for protected employee speech, the Court released its opinion in *Waters v. Churchill*, which lightened the burden *Pickering* had placed on the government to justify its employment decisions.[132] To determine the weight of the government's interest under the *Pickering* balancing test, lower courts before *Waters* had routinely inquired into the quality of the information that the government had relied upon when making its employment decision.[133] Courts reasoned that before the government could justifiably infringe on a public employee's First Amendment right, it must first show that it had based its employment decision on sufficiently strong evidence.[134]

In some circuits, the government faced a formidable challenge in satisfying its evidentiary burden. For example, the Court of Appeals for the Seventh Circuit required the government to prove that the plaintiff actually made the speech that caused his or her termination.[135] The Court of Appeals for the Second Circuit insisted on proof that the plaintiff's speech "*actually* disrupted the employer's operations."[136] Thus, when *Waters* reached the Supreme Court, some courts required the government to prove that it based its termination decision on

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[128] *See id.*

[129] *Id.*

[130] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 939 (1995) (holding that courts of appeals "should . . . decid[e] questions of law *de novo*").

[131] *Id.*

[132] Waters v. Churchill, 511 U.S. 661 (1994).

[133] *See id.* at 670.

[134] *Id.* The *Connick* Court also faced this issue, but declined to announce the proper evidentiary standard for government personnel decisions. *See Connick*, 461 U.S. at 145.

[135] *See* Churchill v. Waters, 977 F.2d 1114, 1127 (7th Cir. 1992), *vacated*, 511 U.S. 661 (1994).

[136] Jeffries v. Harleston, 52 F.3d 9, 12 (2d Cir. 1995) (citing Jeffries v. Harleston, 21 F.3d 1238, 1245 (2d Cir. 1994), *vacated*, 513 U.S. 996 (1994)) (emphasis in original).

conclusive evidence of both what the employee's speech contained and how the speech impaired efficiency.

Waters dramatically reduced the government's trial burden by permitting the government to justify its employment action with less than conclusive evidence.[137] The case arose when Cheryl Churchill, a nurse at a public hospital, lost her job for allegedly saying "unkind and inappropriate negative things about [a superior staff member]."[138] Because the termination occurred after *Connick*, the government employer could lawfully retaliate against Churchill for making personal attacks against another employee because such speech was not a matter of public concern.[139] However, Churchill disputed the content of her speech.[140] She claimed that in actuality her speech was critical of hospital policy regarding patient care—a matter of public concern—and therefore should receive First Amendment protection.[141] The Court of Appeals for the Seventh Circuit reversed the trial court's grant of summary judgment to the hospital and instructed the lower court to decide the case based on what Churchill actually said, as opposed to what her employer believed she said.[142]

The Supreme Court vacated the Seventh Circuit's decision.[143] Justice O'Connor, in her plurality opinion, stated that the appellate court's standard tended to "force the government employer to come to its factual conclusions" regarding the disruptive effect of employee speech "through procedures that substantially mirror the evidentiary rules used in court."[144] Justice O'Connor argued that, to avoid liability under this scheme, government managers, despite their professional training and experience, must suborn their findings to those of a future jury.[145] This, in turn, places a substantial limit on the types of evidence the public employer may rely upon because courts normally bar the sort of evidence typically available to public or private managers.[146] Reviewing the burden such an evidentiary standard places on the government, Justice O'Connor concluded that the First Amendment does not require a public employer to base personnel decisions solely on conclusive evidence.[147]

To resolve the circuits' divergent views on the matter, Justice O'Connor announced a new standard for examining government decision-making based on reasonableness.[148] Under the refined evidentiary standard, the government need not

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[137] *Waters*, 511 U.S. at 676–77.

[138] *Id.* at 665.

[139] *See Connick*, 461 U.S. at 148–49.

[140] *Waters*, 511 U.S. at 666.

[141] *Id.* at 666–67.

[142] Churchill v. Waters, 977 F.2d 1114, 1116 (1992).

[143] *Waters*, 511 U.S. at 682.

[144] *Id.* at 676.

[145] *Id.*

[146] *See id.* ("If [the manager] relies on hearsay, or on what she knows about the . . . employee's character, she must be aware that this evidence might not be usable in court.").

[147] *Id.* at 676–77.

[148] *Id.* at 677.

produce conclusive evidence of the content of an employee's speech.[149] Rather, the government must only prove what it "reasonably" believed the employee said.[150] Further, courts should defer to the government's reasonable prediction of the harm that might result from the employee's speech.[151] Based on these standards, O'Connor concluded that the appellate court had erroneously given "insufficient weight to the government's interest."[152]

The *Waters* reasonableness standard for government retaliation to public employee speech significantly loosens the First Amendment protections that previously restrained government action. The reasonableness standard adds a pro-government wrinkle to the "public concern" test. In pre-*Waters* cases, courts examined the employee's actual speech to determine whether First Amendment protections applied.[153] After *Waters*, however, at least one circuit has interpreted *Waters* to permit "the government [to] fire an employee for disruptive speech based on [its] reasonable belief of what the employee said, regardless of what [the employee] actually said."[154] Therefore, instead of examining the employee's actual speech, courts applying *Waters* may examine the government's reasonable interpretation of the speech to determine if it deserves First Amendment protection.[155] This adds a new source of uncertainty to the "public concern" test as would-be plaintiffs try to predict (1) whether the government's account of the speech is reasonable under the circumstances; and (2) if so, whether the Constitution protects the government's version of the speech. Moreover, it appears that evidence of the true content of the speech does not bolster the plaintiff's case so long as the government based its decision on at least some reasonably reliable evidence.[156]

In addition to tilting the "public concern" test in the government's favor, the *Waters* reasonableness standard also assists the government in showing that its interest in preserving an orderly workplace outweighs the employee's interest in making protected speech. *Waters* instructs courts to defer to the government's prediction of the disruptive impact of an employee's speech.[157] Some circuit courts of appeals have subsequently read *Waters* to mean that "the government's burden is [merely] to show that the speech *threatened* to interfere with government operations."[158] *Waters* thus transformed the government's burden from showing

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[149] *Id.*

[150] *Id.*

[151] *See id.* at 673 ("[The Court has] consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."); Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995).

[152] *Waters*, 511 U.S. at 675.

[153] *E.g.*, Connick v. Myers, 461 U.S. 138, 149 (1983).

[154] *Jeffries*, 52 F.3d at 12.

[155] *Id.* at 13–14.

[156] *Waters*, 511 U.S. at 677.

[157] *Id.* at 673.

[158] *Jeffries*, 52 F.3d at 13 (citing *Waters*, 511 U.S. at 674–79) (emphasis added). *See*

that the employee's speech impaired efficiency to showing how a reasonable person could have expected the employee's speech to impair efficiency.[159] Therefore, the government can meet its evidentiary burden even if the employee's speech caused no actual harm.[160]

Moreover, the *Waters* reasonableness standard may permit the government to preemptively silence employees. Specifically, the government can fire an employee before he or she has spoken in cases where the government knows the general contours of the speech, and predicts that it might cause a disruption.[161] Even if the speech qualifies for protection because it addresses a matter of public concern, the plaintiff still must rebut the government's evidence that the public employer was reasonable in believing that a disruption might occur.[162] The plaintiff must challenge the government's contention that the severity of the potential (hypothetical) disruption would outweigh the employee's interest in speaking.[163]

D. The Aggregate Effect of Mt. Healthy, Connick, *and* Waters *Severely Weakens* Pickering.

The post-*Waters* version of the *Pickering* balancing test is but a mere shell of its original incarnation. Under *Pickering*, the plaintiff could satisfy his or her burden by showing that his or her interest in speaking outweighed the government's interest in controlling its employees.[164] Since *Pickering*, the plaintiff's burden has grown enormously to require proof that (1) his or her speech involves a matter of public concern despite the government's reasonable belief to the contrary,[165] (2) the value of his or her speech outweighs the government's interest in maintaining workforce efficiency despite the government's reasonable belief that the speech *might* have caused a disruption,[166] and (3) the government had no other reason besides the speech to terminate the employee.[167] The Supreme Court's post-*Pickering* decisions grant the government considerable power to prevent public employees from exercising their First Amendment rights.

IV. APPLICATION OF THE WEAKENED *PICKERING* BALANCING TEST TO ASSOCIATIONAL RIGHTS

Several circuit courts of appeals have adopted the weakened *Pickering* balancing

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Hudson v. Craven, 403 F.3d 691, 700 (9th Cir. 2005).

[159] *See id.*

[160] *See Hudson*, 403 F.3d at 700.

[161] *See Jeffries*, 52 F.3d at 13.

[162] *See id.* at 12–13.

[163] *See id.*

[164] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[165] Waters v. Churchill, 511 U.S. 661, 677 (1994); Connick v. Myers, 461 U.S. 138, 146 (1983).

[166] *Waters*, 511 U.S. at 677; *Jeffries*, 52 F.3d at 13. *See* Hudson v. Craven, 403 F.3d 691, 700 (9th Cir. 2005).

[167] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977).

test in cases involving the right of free association.[168] In *Melzer v. Board of Education*, the Court of Appeals for the Second Circuit could not determine whether a public school terminated plaintiff Melzer, a teacher, for his "associational activities or the attendant speech."[169] Nevertheless, the court decided to apply the *Pickering* balancing test (in its post-*Waters* form), rather than a stronger form of judicial review, to Melzer's claim because it found that no individual First Amendment freedom deserves more protection than another.[170] Applying *Pickering*, the court found that, although Melzer's right to association received First Amendment protection, the government had nonetheless satisfied its burden by showing that Melzer's associational activities "caused disruption to . . . [government] operations."[171]

The Court of Appeals for the Ninth Circuit also decided to apply *Pickering* to a claim alleging unlawful retaliation on account of association.[172] The court reasoned that "[t]he speech and associational rights at issue . . . [were] so intertwined that [the court saw] no reason to distinguish this hybrid circumstance from a case involving only speech rights."[173] The Ninth Circuit declined to extend the Supreme Court's ruling in *NAACP v. Patterson*, which instructs courts to closely scrutinize governmental infringement upon the free association rights of private citizens to public employees.[174] Similar to the Second Circuit's ruling in *Melzer*, the Ninth Circuit found that despite the First Amendment's protection of the plaintiff's associational activities, the government lawfully terminated her based on its reasonable belief that her behavior might have caused a disruption.[175]

The courts of appeals have also interpreted *Pickering* to apply in cases where the employee's protected activities occurred wholly outside of the employment context. In *Jeffries v. Harleston*, the Court of Appeals for the Second Circuit applied the *Pickering* balancing test to a public university's decision to demote a professor in reaction to a speech the professor made off-campus.[176] Likewise, the plaintiffs in *Melzer* and *Hudson* both engaged in their offending activities outside of their respective workplaces.[177] Further, the Second Circuit found that plaintiff

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[168] *Hudson*, 403 F.3d at 693; Melzer v. Bd. of Educ., 336 F.3d 185, 185 (2d Cir. 2003). *See* Balton v. City of Milwaukee, 133 F.3d 1036 (7th Cir. 1998). *Contra* Hatcher v. Bd. of Educ., 809 F.2d 1546 (11th Cir. 1987).

[169] *Melzer*, 336 F.3d at 195.

[170] *See id.* ("[W]here multiple branches of First Amendment protection are implicated by an employment decision, the affected rights enjoy no more protection than each would receive when viewed separately.").

[171] *Id.* at 200.

[172] *Hudson*, 403 F.3d at 698.

[173] *Id.*

[174] *Id.* at 696 n.1.

[175] *Id.* at 699.

[176] Jeffries v. Harleston, 52 F.3d 9, 12–13 (2d Cir. 1995).

[177] *Hudson*, 403 F.3d at 695–96; Melzer v. Bd. of Educ., 336 F.3d 185, 194 (2d Cir. 2003).

Melzer's associational activities were "largely unconnected" to his work.[178] Nonetheless, the courts of appeals decided to examine the government's adverse employment actions against plaintiffs Melzer and Hudson under the *Pickering* test,[179] rather than under the more protective standard applied to cases involving private citizens.[180]

V. DISCUSSION: THE EXTENSION OF *PICKERING* TO ASSOCIATIONAL RIGHTS MAY HAVE A DISASTROUS IMPACT ON PUBLIC EDUCATION.

After *Waters*, the government has more power to regulate the speech of public employees, including public educators. If *Melzer* and *Hudson* become the rule of decision in the circuits, the resulting "chill" on public educators' exercise of their First Amendment rights might have a terrible impact on the quality of public education. *Waters* and *Melzer/Hudson* may further dissuade talented, creative individuals from entering the teaching profession by arming public school administrators with nearly unbridled authority to terminate teachers with whose speech or association (both inside and outside of the classroom) they disagree. This, in turn, may further damage the quality of public education by homogenizing the composition of the public educator workforce thereby depriving students of the opportunity to interact with educators representing diverse backgrounds.

Consider first the current state of First Amendment protections for public school teachers (including public university professors) in the Second and Ninth circuits. Under *Waters* and *Melzer/Hudson*, a public school teacher places himself or herself at significant risk of termination whenever he or she says anything or associates with any person or group inside or outside of the classroom, which the school administration reasonably believes impairs or might impair its ability to efficiently operate the school.[181] The Court of Appeals for the Ninth Circuit has established five rather vague factors to help judges determine whether a teacher's First Amendment-protected activities impair the efficient operation of a school.[182] The factors are "whether the speech [or association] (1) impairs discipline or control by superiors, (2) disrupts coworker relations, (3) erodes close working relationships premised on personal loyalty and confidentiality, (4) interferes with the [teacher]'s performance of his or her duties, or (5) obstructs the routine operation of the [school]."[183] Further, with regard to the first factor, the Ninth Circuit has held that public school administrators have a strong interest in maintaining "pedagogical oversight" and "political neutrality."[184] Although the Second Circuit has not established guiding factors similar to the Ninth Circuit's, it has held that the

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[178] *Melzer*, 336 F.3d at 194.

[179] *Hudson*, 403 F.3d at 698; *Melzer*, 336 F.3d at 195–96.

[180] *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463–66 (1958).

[181] Waters v. Churchill, 511 U.S. 661, 673 (1994). *See Hudson*, 403 F.3d at 699–701; *Melzer*, 336 F.3d at 197–200.

[182] Nelson v. Pima Cmty. Coll., 83 F.3d 1075, 1081 (9th Cir. 1996).

[183] *Id.*

[184] *Hudson*, 403 F.3d at 700–01.

government may satisfy its burden with evidence that students or their parents reacted negatively to the teacher's speech or association.[185]

Given the Second and Ninth Circuit's broad definitions of teacher conduct that impairs efficient operation, teachers who stray from government-dictated norms do so at their own risk. Except in cases of flagrant First Amendment violations, it is hard to imagine how a government defendant could fail to justify retaliating against a teacher for his or her speech or association. The government may avoid liability by simply showing that the teacher's activities annoyed his or her coworkers or offended the sensibilities of the local community.[186]

A. Qualified, Creative Individuals who Would Otherwise Seek Careers in Public Education Will Likely Turn Elsewhere for Employment.

If *Melzer* and *Hudson* become controlling precedent across the circuits, the public school system's inability to convince the best and brightest individuals to become school teachers will likely worsen. Public school teachers' meager compensation and relatively low social position already make the profession an unattractive career option for many people.[187] Individuals that nonetheless choose to become public school teachers routinely complain that several factors diminish the quality of their work environment.[188] Assuming that the factors that reduce the quality of public teaching careers are also factors that discourage individuals from entering the profession in the first instance, any aggravation of these factors should further decrease the desirability of careers in public education. Much to the detriment of the public education system, public school administrators' increased power to regulate teacher conduct appears to exacerbate the factors that already create an undesirable workplace for teachers.

1. Factor One: Support and Value

Under *Melzer/Hudson*, the level of government control over teacher conduct will likely exacerbate the sentiment among public school teachers that they are "undersupported" and "undervalued" in their positions.[189] "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[190] Safety and support are essential to such free inquiry.[191] Where, however, as in the Ninth and Second Circuits, courts give school administrators substantial leeway to regulate teachers' speech and association, teachers must assume that any divergence from mainstream curriculum could lead

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[185] *Melzer*, 336 F.3d at 198.

[186] *See id.*; *Nelson*, 83 F.3d at 1081.

[187] *See supra* note 6 and accompanying text; EASLEY, *supra* note 3, at 5 ("[teachers] feel . . . not respected as professionals").

[188] EASLEY, *supra* note 3, at 5–6.

[189] *Id.* at 5.

[190] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[191] *See id.*

to dismissal.[192] Accordingly, *Melzer/Hudson* renders public school teachers wholly unsupported when they introduce new ideas and concepts into their classrooms. Further, the power to regulate teacher conduct permits school administrators to terminate a teacher irrespective of the value that her non-mainstream inquiry provides her pupils.

2. Factor Two: Trust

A half-century ago, the Supreme Court noted that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."[193] Today, however, teachers complain that "[t]hey feel they are not trusted by their superiors or the public."[194] By increasing school administrators' power to police teachers' classroom activities and private associations, *Melzer/Hudson* can only legitimize teachers' fears that their superiors do not trust them.

Consider that, in light of *Waters*, local public school authorities may terminate teachers without any conclusive evidence of wrongdoing.[195] Essentially, school administrators may punish a teacher based on any reasonable hunch that whatever a teacher says (or plans to say) has impaired (or might impair) the school's ability to operate efficiently. Administrators can punish a teacher for his or her social associations on the same grounds. Further, under *Melzer*, school administrators may fire a teacher for exposing students to issues that the students find captivating but that their parents might nonetheless find offensive.[196] This level of control at the hands of school officials virtually eliminates the need for any trust flowing from the administration to teachers. If school administrators have scruples regarding a teacher, the law as interpreted by the Second and Ninth Circuits provides them with great discretion to remove that teacher. Therefore, not only does *Melzer/Hudson* undermine trust in teacher/administrator relationships, it also frees school officials to take preemptive action based on the mistrust it engenders.

3. Factor Three: Intra-faculty Competition

Public school teachers also report that they feel forced to compete with other teachers within the same school for resources and jobs.[197] To the extent that the holdings enable school administrators to give preferential treatment to teachers with approved views and social associations, *Melzer* and *Hudson* will likely increase intra-faculty competition. Although nothing in either opinion specifically empowers school officials to make employment decisions solely based on issues such as a teacher's political and social ties, the pro-defendant shift in the law makes it difficult for a plaintiff to prove that he or she was discriminated against for

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[192] *See supra* note 186 and accompanying text.

[193] *Sweezy*, 354 U.S. at 250.

[194] EASLEY, *supra* note 3, at 5.

[195] *See Hudson*, 403 F.3d at 695–96; *Melzer*, 336 F.3d at 194.

[196] *See Melzer*, 336 F.3d at 198.

[197] EASLEY, *supra* note 3, at 5.

having such ties.[198] In turn, school officials may reward teachers for associations just as easily as they may punish them. In an already competitive environment, a teacher's knowledge that associational choices may greatly affect his or her career can further isolate teachers from one another, worsening the situation.[199] *Melzer/Hudson* adds a new layer to intra-faculty competition by requiring teachers to compete not only on merit, but also on out-of-the-classroom social ties.

4. Factor Four: Control

Lastly, public school teachers lament that they "do not feel in charge of their work lives."[200] In light of the foregoing discussion, it should be clear that *Melzer* and *Hudson* transfer great control regarding all aspects of education from teachers to administrators. By minimizing public school teachers' First Amendment protections, the Second and Ninth Circuits have allowed school administrators to use the threat of retaliatory dismissal to force teachers to censor their speech and association. In effect, public school teachers must choose either to wear intellectual straitjackets or to risk losing their jobs.[201] Accordingly, teachers who value their paychecks have strong incentives to surrender control over both their speech and association to the public school authority.

B. The Government's Increased Policing Authority over Teachers May Result in a Homogeneous Teacher Workforce.

Diversity within the public teacher workforce helps to ensure that students receive the benefit of "wide exposure" to a "robust exchange of ideas," which, in turn, prepares them to become productive members of society.[202] Applying the *Pickering* balancing test to associational rights, however, effectively homogenizes the class of individuals who become public school teachers. The *Melzer* and *Hudson* holdings, which permit the government to retaliate against public employees for their associational activities outside the workplace, may preclude an entire subculture of individuals from becoming public educators.[203] If the government may satisfy its *Pickering* burden merely by showing that the prospective teacher's associational activities will likely upset the students, parents, or other faculty members, individuals with ties to minority political groups or who engage in "alternative" lifestyles (or even those who attend midnight showings of the *Rocky Horror Picture Show*) need not apply.[204] As a result, the individuals who do become teachers will most likely share substantially similar backgrounds, and

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[198] *See supra* notes 164–67 and accompanying text.

[199] *See* EASLEY, *supra* note 3, at 6.

[200] *Id.*

[201] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[202] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 251.

[203] Hudson v. Craven, 403 F.3d 691, 695–96 (9th Cir. 2005); Melzer v. Bd. of Educ., 336 F.3d 185, 194 (2d Cir. 2003).

[204] *See Hudson*, 403 F.3d at 695–96; *Melzer*, 336 F.3d at 194.

public education will lose the benefit it derives from a diverse teacher force.

VI. CONCLUSION

In 1957, the Supreme Court stated that "[t]he essentiality of freedom in the community of American [schools] is almost self-evident."[205] "To impose any strait jacket upon the intellectual leaders in our colleges and universities," the Court argued, "would imperil the future of our [n]ation."[206] The Second and Ninth Circuits appear to have lost sight of the Court's stated commitment to academic freedom. When a society hinders academic progress by barring controversial ideas from the classroom, the society will ultimately "stagnate and die."[207] While this prediction may seem like alarmist hyperbole, it does raise a serious question: If public school teachers do not introduce their students to new ideas, where else will the students learn to think innovatively?

As the foregoing analysis shows, any further erosion by the courts of public educators' First Amendment liberties may devastate the quality of public education. If public school teachers must choose between job security and challenging their students with new and non-traditional ideas, many may choose not to enter the teaching profession at all. Further, the prospect of having their classroom activities and private relationships scrutinized by superiors will likely dissuade many qualified minority candidates from becoming public educators. As a result, a large portion of the nation's public school students will lose perhaps their only opportunity to develop critical thinking skills necessary for success outside of the classroom.

The composition and ideology of the Supreme Court has changed so much since *Pickering* that a return to the level of protection provided by the original *Pickering* balancing test is unlikely.[208] *Pickering* may indeed reflect the views of an era in which the value of civil rights did not succumb to government authority so easily. As such, *Waters* may provide the extent to which the Court will recognize First Amendment protections for public employee speech.[209] The Court, however, has not yet decided how the *Pickering* balancing test applies to public employees' right to free association.[210] When the Supreme Court eventually addresses this issue, it must reverse the steps taken in *Melzer* and *Hudson*. If the federal government values high quality public school teachers, the federal courts must not further

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[205] *Sweezy*, 354 U.S. at 250.

[206] *Id.*

[207] *Id.*

[208] Justice Scalia, for example, believes that the "public concern" requirement should be more narrowly construed so that fewer instances of public employee speech qualify for First Amendment protection. Rankin v. McPherson, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting).

[209] Justices Scalia and Thomas may believe that the protections reaffirmed in *Waters* are themselves unnecessarily broad. *See* Waters v. Churchill, 511 U.S. 661, 686 (1994) (Scalia & Thomas, JJ., concurring).

[210] *See* Hudson v. Craven, 403 F.3d 691, 693 (9th Cir. 2005).

discourage talented individuals from pursuing careers in public education.

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