The Right to be an Asshole: The Need for Increased First Amendment Public Employment Protections in the Age of Social Media

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THE RIGHT TO BE AN ASSHOLE: THE NEED FOR INCREASED FIRST AMENDMENT PUBLIC EMPLOYMENT PROTECTIONS IN THE AGE OF SOCIAL MEDIA

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Introduction .............................................................................................................286
I. Background ...........................................................................................................288
   A. The First Amendment and Speech .........................................................288
      1. Pure and Symbolic Speech.............................................................288
      2. Offensive and Unpopular Speech ...............................................289
   B. First Amendment and Public Employment ....................................290
      1. Pickering and its Progeny ..............................................................291
      2. Public Employment and Social Media Use.................................293
II. Analysis ..............................................................................................................294
   A. By Using a Myopic Focus on Testimony, Pickering and Progeny Improperly Restrict Public Employee Speech .294
      1. The Pickering-Connick Balancing Test by Design
         Encourages the Government as Employer to
         Improperly Enforce Content Based Speech
         Restrictions .................................................................295
      2. The Pickering-Connick Standard Results in an Uneven,
         Two-Tier System of Protection Between Private and
         Public Employees in Social Media Use Cases............299
   B. Facebook Posts are Pure Speech for the Purposes of the
      Pickering-Connick Balancing Test and Merit the Highest
      Protection.................................................................304
      1. The Government as an Employer Cannot Compel a
         General Code of Civility by Conditioning Continued

INTRODUCTION

According to a 2016 Pew Research Report on Social Media Use, seventy-nine percent of online Americans use Facebook and twenty-four percent use Twitter, in addition to a host of other platforms. Facebook alone boasts over 2 billion users. The content posted by users range from the frivolous to offensive. Employers now take a more reactionary role in response to online employee behavior because of heightened visibility and instantaneous spread of social media posts. As a result, anecdotal tales of people losing their jobs because of social media continue to increase. In some instances it makes perfect sense for an employee to lose her job if she reveals confidential customer information, brags about using drugs at work, or threatens her employer with violence. Yet, there are also instances in which an employee


5. See Lydia Price, 20 Tales of Employees Who Were Fired Because of Social Media, PEOPLE (Jul. 8, 2016), http://people.com/celebrity/employees-who-were-fired-because-of-social-media-posts/ (describing people fired for making posts about illicit drug use, plans to quit after using up sick leave, and crude humor).

6. See id. (referencing social media usage that merits termination).
is fired for expressing a viewpoint that her employer finds controversial or offensive.\footnote{7} Additional problems arise when an employer fires an employee because her employer learns of her private actions on social media either through a third-party or by voluntary admission.\footnote{8} Juli Briskman’s employer fired her after she learned of a viral photo on Facebook depicting Juli flashing the middle finger at the President’s motorcade.\footnote{9} Her employer terminated her because of its status as a government contractor and the negative publicity associated with the image.\footnote{10} Juli’s is another in a long line of First Amendment public employer disputes in which an employer takes issue with the content of an employee’s speech.\footnote{11}

This Comment explores the limitations of First Amendment speech protections in public employment when applied to social media.\footnote{12} It argues that opprobrious, offensive, and rude online speech warrants First Amendment protection in social media cases because the government generally may not censor discourse in public places merely because others

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10. See id. (chronicling her conversation with her former employer).

11. See U.S. CONST. amend. I (“Congress shall make no law [ . . . ] prohibiting the free exercise thereof; or abridging the freedom of speech”); see also Grutzmacher v. Howard Cty., 851 F.3d 332, 345-46 (4th Cir. 2017) (describing how a public employee’s use of an offensive image to refer to his employer sowed dissension and disharmony within the workplace); See also Liverman v. City of Petersburg, 844 F.3d 400, 414 (4th Cir. 2016) (finding disciplinary measures taken against two police officers accused of violating department social media policy as impermissible).

12. See David Wright, Recent Cases Reflect Fact Specific Character of Social Media Cases, BAR BULLETIN (Jun. 15, 2017), http://www.msba.org/Bar_Bulletin/2017/06_-_June/Recent_Cases_Reflect_Fact_Specific_Character_of_Social_Media_Cases.aspx (describing the fact specific character of social media cases and the conflicting outcomes in private and public-sector Facebook disputes).
may find it offensive.\textsuperscript{13} Part II describes the history of the First Amendment speech protection, categories of exception, public employment speech jurisprudence, and the troublesome nature of social media.\textsuperscript{14} Part III contends that current jurisprudence evaluates public employment speech as primarily testimonial speech, but social media posts require a different standard for analysis.\textsuperscript{15} Part IV recommends carving out a First Amendment protection for opprobrious and offensive social media posts by evaluating it as pure speech.\textsuperscript{16} Part V concludes by reiterating the need for a clear line of First Amendment protections for public employees.\textsuperscript{17}

I. BACKGROUND

A. The First Amendment and Speech

The First Amendment establishes the right to freedom of speech.\textsuperscript{18} However, the courts struggled with defining speech for First Amendment purposes and established varying degrees of classification.\textsuperscript{19}

1. Pure and Symbolic Speech

The First Amendment grants the highest protection to “pure speech.”\textsuperscript{20} This protection extends to the publishing and disclosure of information.\textsuperscript{21}

\textsuperscript{13} See Cohen v. California, 403 U.S. 15, 26 (1971) (holding that Cohen’s jacket emblazoned with “Fuck the draft” is protected speech because the First Amendment applies to offensive speech); see also Street v. New York, 394 U.S. 576, 592 (1969) (declaring that under the Constitution speech may not be prohibited because the ideas are offensive to those who hear it).

\textsuperscript{14} See infra Part II (discussing protected speech, exceptions, and the Pickering progeny).

\textsuperscript{15} See infra Part III (suggesting that Pickering progeny evaluate speech in its testimonial capacity: it’s ability to describe employee conditions as matters of public concern).

\textsuperscript{16} See infra Part IV (recommending an evaluation of social media speech as a form of expressive and symbolic speech).

\textsuperscript{17} See infra Part V (repeating the need for clear guidance on protected uses of social media for public employees).

\textsuperscript{18} See U.S. CONST. amend. I (establishing a restriction against laws prohibiting or abridging the exercise of free speech).

\textsuperscript{19} See Cohen v. California, 403 U.S. 15, 19-20 (1971) (explaining that Cohen falls outside the range of prior cases restricting forms of individual expression “upon a showing that such a form was employed”).

\textsuperscript{20} See Pure Speech, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining pure speech as “words or conduct limited in form to what is necessary to convey the idea.”).

\textsuperscript{21} See Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (declaring acts of ‘disclosing’
The Supreme Court also recognized the importance of symbolic speech, such as waving a red flag as an emblem of governmental opposition, wearing armbands in school to protest the Vietnam war, and attaching the peace sign to an upside-down American flag.\(^{22}\) In those instances, the Court emphasized the importance of the First Amendment as a check against prior restraints on speech.\(^{23}\) A prior restraint is a suppression of speech based on its content.\(^{24}\) The courts have held that any imposition of a prior restraint bears “a heavy presumption against its constitutional validity” and is subject to strict scrutiny.\(^{25}\) When a restriction is content-based, the government must prove the regulation is narrowly drawn to serve a compelling state interest.\(^{26}\) Otherwise, the restriction risks chilling potential speech before it happens.\(^{27}\) However, prior restraints may pass strict scrutiny if it restricts speech outside First Amendment protection.\(^{28}\)

2. Offensive and Unpopular Speech

There is no unlimited right to free speech.\(^{29}\) The First Amendment does and ‘publishing’ information constitute pure speech).


\(^{23}\) See Neb. Press Ass’n v. Stuart, 427 U.S. 539, 557 (1976) (quoting Patterson v. Colorado ex rel. Attorney Gen., 205 U.S. 454, 462 (1907)) (stating that First Amendment serves to prevent “previous restraints upon publications as had been practiced by other governments”).

\(^{24}\) See United States v. Quattrone, 402 F.3d 304, 309 (2d Cir. 2005) (defining prior restraint as a regulation that suppresses speech based on the speech’s content at the discretion of a government official).

\(^{25}\) See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (holding Rhode Island commission on obscenity imposed unconstitutional restraint on speech because it was not narrowly tailored to serve a compelling state interest).


\(^{27}\) See id. at 468 (holding that potential chilling effect on speech increases government’s burden).

\(^{28}\) See Neb. Press Ass’n, 427 U.S. at 590 (describing unprotected speech as an exception to prior restraint prohibition).

\(^{29}\) See, e.g., Gitlow v. New York, 268 U.S. 652, 666 (1925) (stressing that the First Amendment’s freedom of speech does not grant an authority that protects all uses of language, nor does it prohibit the punishment of a person who abuses the freedom).
not protect fighting words, obscenity, incitement of illegal action, or criminal speech.\textsuperscript{30} Yet, the Court allows room for speech that many consider offensive and intolerable.\textsuperscript{31} Conversely, political speech and speech on matters of public concern receive strict scrutiny, and the government requires a compelling reason to restrict those categories of speech because they are content-based restrictions.\textsuperscript{32} A content-based restriction limits speech that falls within certain categories, for example, a social media policy prohibiting disparagement of an employer.\textsuperscript{33} These limitations become more apparent in the context of public employment disputes.\textsuperscript{34}

\textbf{B. First Amendment and Public Employment}

The First Amendment provides free speech protections to public, not private, employees because it functions as a limit on government actions.\textsuperscript{35} Due to its interest in operating efficiently, the government has more authority

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\item[31.] See Cohen v. California, 403 U.S. 15, 25 (1971) (arguing certain unpleasant speech allows for open debate in society); see also Street v. New York, 394 U.S. 576, 592 (holding against suppressing the public expression of ideas because of its offensiveness).
\item[33.] See Liverman v. City of Petersburg, 844 F.3d 400, 414 (4th Cir. 2016) (finding Police Department’s social networking policy unconstitutionally broad because of provision outlawing negative posts about employer).
\end{itemize}
to regulate the speech of its employees. As a result, courts traditionally viewed public employment as a privilege which allowed employers to discipline an employee for any type of speech; a view eventually rejected by the Supreme Court in Pickering.

1. Pickering and its Progeny

The First Amendment includes the right to speak without fear of government retaliation, even if the speaker has no entitlement to the benefit in the first place. This right to be free from retaliation is not the only interest at stake; the government also has a legitimate interest in ensuring the efficient operation of the workplace. In Pickering v. Board of Education, a teacher challenged his retaliatory termination after a local newspaper published his letter criticizing the superintendent of his school and the school board’s allocation of financial resources. The Court held that the letter constituted protected speech because Pickering’s interest in commenting on matters of a public concern outweighed the state’s interest in regulating his speech. In Connick v. Myers, the Court added a threshold requirement that speech must relate to matters of public concern. In Connick, a public employee distributed an office survey on working conditions during work

36. See id. (clarifying that the First Amendment may or may not protect the job of a public employee who speaks critically of his or her employer if a reviewing court finds the speech disruptive).

37. See id. at 4 (elaborating on the early twentieth century view that employees were free to leave their jobs if they were unhappy with their conditions and that government employment is not a constitutional right).

38. See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 605-6 (1967) (declaring “the theory that public employment which may be denied altogether may be subjected to any conditions . . . has been uniformly rejected”); see also United States v. Am. Library Ass’n, 539 U.S. 194, 210 (2003) (stating that the government may not deny a constitutionally provided benefit even if the bearer’s status is in dispute).

39. See Pickering, 391 U.S. at 568 (formulating test where employee’s interest in speaking as a citizen on a ‘matter of public concern’ is weighed against the government’s interest in ‘promoting the efficiency of the public services it performs’).

40. See id. at 566-67 (recalling Pickering’s criticism of the school board’s misuse of taxpayer funds).

41. See id. at 571-72 (reasoning that statements in the letter were matters of public concern because they criticized the school board’s decisions in allocating taxpayer money).

42. See Connick v. Myers, 461 U.S. 138, 146-48 (1983) (finding a matter of public concern when the content, form, and context of a given statement “relating to any matter of political, social, or other concern to the community”) (emphasis added).
hours.\textsuperscript{43} The Court established a time, place, and manner restriction within its analysis of \textit{Connick} when it held that the survey did not constitute a matter of public concern.\textsuperscript{44} As a result, the Court concluded that the employee’s termination did not violate the First Amendment because the employee’s interest in speaking is minimal.\textsuperscript{45}

Recently, the Court employed a narrow interpretation of “citizen” in \textit{Garcetti v. Ceballos} when it held that an employee speaking pursuant to an official duty falls outside First Amendment protection.\textsuperscript{46} In \textit{Garcetti}, Deputy District Attorney Ceballos claimed that his employer retaliated against him after he recommended a dismissal for a case because of the government’s misconduct in obtaining a warrant.\textsuperscript{47} The Court held that Ceballos’s speech lacked First Amendment protection because he spoke in his capacity as a “prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case.”\textsuperscript{48} Consequently, this holding raises the novel issue of how to determine whether an employee is acting pursuant to her duties.\textsuperscript{49} The Court in \textit{Garcetti} argued that the test is “a practical one” and focuses on “the duties an employee actually is expected to perform.”\textsuperscript{50}

The Court carved a narrow exception in \textit{Lane v. Franks}, when it protected employee speech made during compelled testimony.\textsuperscript{51} Most recently, the Court in \textit{Heffernan v. City of Paterson} reintroduced the idea of evaluating an employer’s motive in retaliation when it held that an employer’s mistaken

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\item See id. at 141 (soliciting views on the office transfer policy, employee morale, and perceived pressures to work on political campaigns).
\item See id. at 153-54 (noting that the questionnaire was a personal grievance distributed in a disruptive time, place, and manner).
\item See id. at 154 (stating that the employee’s speech interest was minimal because the majority of the questionnaire was a personal grievance against an office transfer policy).
\item See Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that public employees speaking “pursuant to their official duties” are not speaking as private citizens, they are speaking as employees and employers are free to discipline them).
\item See id. at 413-15 (describing Ceballos’s testimony on the events that led to his termination).
\item See id. at 421 (denying protection because Ceballos spoke as a public employee, not as a private citizen).
\item See id. at 424-25 (declining to establish a general framework of employee duties because it is a fact specific analysis).
\item See id. (arguing that analysis requires looking at the expectations surrounding an employee’s duties).
\item See Lane v. Franks, 134 S. Ct. 2369, 2380 (2014) (holding that employee speech made during trial is protected citizen speech).
\end{enumerate}
belief did not shield him from liability.\textsuperscript{52} As a result of these narrow restrictions, a large swath of public employee speech falls outside the scope of the First Amendment.

2. \textit{Public Employment and Social Media Use}

Public employment social media cases range from employees losing their jobs for making insensitive Facebook posts to retaliation claims for collective action.\textsuperscript{53} Often, these cases begin when a viewer draws the employer or the general public’s attention to the objectionable content in an attempt to shame the poster of the content.\textsuperscript{54} Ultimately, the degree of protection employees have depends on the nature of their employment and the specific facts of the case.\textsuperscript{55} Public sector employment cases remain subject to the \textit{Pickering-Connick} test, even in the context of social media use.\textsuperscript{56} A recent court case questioned whether a Facebook “Like” is protected speech.\textsuperscript{57} The Fourth Circuit is at the forefront of cases pertaining to public employment and speech.\textsuperscript{58} The court in \textit{Berger v. Battaglia} held

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  \item \textsuperscript{52} See Heatherman v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) (determining that an employer’s motive matters in a retaliation claim when a supervisor demoted a police officer after he saw him carrying a campaign sign for a mayoral candidate).
  \item \textsuperscript{54} See SUE SCHEFF & MELISSA SCHORR, \textit{SHAME NATION: THE GLOBAL EPIDEMIC OF ONLINE HATE} 9-10 (2017) (arguing that people, when outraged, feel entitled to share social media posts to their social network in order to shame behavior that they find rude, crass, and inappropriate).
  \item \textsuperscript{55} See Wright, \textit{supra} note 12 (describing the fact specific character of social media cases and the conflicting outcomes in private and public-sector Facebook disputes).
  \item \textsuperscript{56} See Liverman v. City of Petersburg, 844 F.3d 400, 407 (4th Cir. 2016) (determining that the traditional Pickering-Connick analysis applies to regulations on social media use); see also City of San Diego v. Roe, 543 U.S. 77, 85 (2004) (holding that police officer’s off duty sex videos were too disruptive under \textit{Pickering} because the employee intentionally sought a link between his conduct and his status as a police officer).
  \item \textsuperscript{57} See Bland v. Roberts, 857 F. Supp. 2d 599, 604 (E.D. Va. 2012) (finding Facebook “Likes” are not protected speech).
  \item \textsuperscript{58} See Grutzmacher v. Howard Cty., 851 F.3d 332, 345 (4th Cir. 2017) (ruling that employer interests outweighed employee’s speech claims), \textit{cert. denied}, 138 S. Ct. 171
\end{itemize}
that public employees retain a First Amendment right to artistic expression even if that expression is crude or vulgar.\textsuperscript{59} Most recently, in \textit{Grutzmacher v. Howard County}, the court refused to extend First Amendment protection to a volunteer paramedic’s offensive Facebook posts in an employer retaliation claim.\textsuperscript{60} First Amendment retaliation claims, where an employee argues wrongful termination due to the exercise of protected speech, often fail due to the threshold requirements of \textit{Pickering-Connick} and \textit{Garcetti}.

II. ANALYSIS

\textit{A. By Using a Myopic Focus on Testimony, Pickering and Progeny Improperly Restrict Public Employee Speech}

\textit{Pickering} and its progeny focus on the testimonial capacity of public employee speech as demonstrated by the importance these cases place on the veracity of the statements made.\textsuperscript{61} In \textit{Pickering}, the Court refused to establish a general standard for evaluating critical statements made by teachers and public employees; instead, it left a tentative framework as a guideline.\textsuperscript{62} The Court examined “testimony” as firsthand knowledge of topics such as work conditions, politics, or other areas of public concern with a strong focus on the usefulness of the speech’s content: it must inform the public of issues that require attention.\textsuperscript{63} Based on this approach, the Court determined Pickering’s termination was unconstitutional for two key reasons: (1) he wrote as a private citizen on a matter of public concern; and (2) as a teacher, Pickering was best equipped to speak on these issues.\textsuperscript{64} The

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  \item (2017); \textit{see also} Liverman v. City of Petersburg, 844 F.3d 400, 414 (4th Cir. 2016) (holding Police Department’s social networking policy unconstitutional and disciplinary measures impermissible).
  \item 59. \textit{See} Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985) (stating public employees retain a First Amendment right to uncensored artistic expression even if it is vulgar or profane).
  \item 60. \textit{See}, e.g., \textit{Grutzmacher}, 851 F.3d at 348 (holding the employer’s interests outweighed the employee’s free speech claims).
  \item 61. \textit{See} Lane v. Franks, 134 S. Ct. 2369, 2378 (2014) (clarifying that a public employee’s truthful testimony on matters outside the scope of employment is protected employee speech); \textit{see also} Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (asserting that absent proof of lying, an employee may exercise his or her right to speak on issues of public importance).
  \item 62. \textit{See Pickering}, 391 U.S. at 569 (holding that the creation of a general standard for analysis is inappropriate and unfeasible).
  \item 63. \textit{See id.} at 572 (describing Pickering and teachers as best qualified to speak on school funding and operation and more likely to inform public debate).
  \item 64. \textit{See id.} (arguing that Pickering was speaking as a private citizen on a subject he
Court evaluated his letter as testimony on budget concerns. Further, the Court focused its analysis on balancing the need for the information provided by his letter against the potential disruption to his workplace. Pickering’s experience and background served as the deciding factor because the Court found his perspective well-informed, truthful, and credible. Through Pickering and Connick, the Court implicitly argued that only qualified, testimonial speech deserves First Amendment protection because of its usefulness and ability to inform public debate.

Subsequent cases focus on employee speech in its testimonial capacity when they refer to speech on matters of public concern. By defining matters of public concern as any matter of political, social, or other concern to the community, the Court sets a broad range of acceptable topics as protected employee speech, provided the “testimony” is useful. However, few cases pass the threshold established in Connick because the Court made a conscious effort to exclude trivial speech. By limiting the scope of protected speech to include matters that serve a testimonial role, the Court sends the message that content and utility exclusively determine the scope of First Amendment protection. Ultimately, the courts embraced a narrow focus that is ill-equipped to handle social media use cases because it wrongly excludes employee speech that merits protection on other grounds.

1. The Pickering-Connick Balancing Test by Design Encourages the Government as Employer to Impermissibly Enforce Content Based Speech Restrictions

Courts have avoided creating a clear standard around employee speech for fear of increased litigation. It developed the Pickering-Connick balancing understood).

65. See id. (detailing the importance of free and open debate and the need for informed employees to speak on matters without fear of retaliatory dismissal).


67. See Pickering, 391 U.S. at 572-73 (establishing that erroneous statements made by Pickering in his letter are not evidence of his inability to teach or inform public debate as a private citizen).

68. See Connick, 461 U.S. at 146-48 (defining public concern as any matter that is social, political, or of general concern to the public).

69. See id. at 154 (holding that an employee survey is trivial and did not rise to the level of a public concern).

70. See Garcetti v. Ceballos, 547 U.S. 410, 420 (2006) (quoting Connick, 461 U.S. at 154) (establishing that the First Amendment does not grant public employees the right
test to filter out unwanted cases. However, the underlying rationale behind the threshold inquiry of the Pickering-Connick test is content based, because the inquiry begins with the question, “do people care?” The Court focuses on whether the general public cares about the issue raised in the employee’s message. If the answer is no, then the Court will end its analysis and reject the employee’s claim in its entirety because the employee did not speak on a matter of public concern. The next step in the balancing test asks, “do people care enough to disrupt government employer operations?” The balancing aspect lies in determining whether the employee’s interest in speaking outweighs the government’s interest as an employer. The employee’s interest is in speaking on certain topics without fear of losing her job; conversely, the government’s interest as an employer is maintaining an efficient work environment. Consequently, the Court defers substantially to the government’s determination of whether speech causes a disruption and does not require the government to prove actual disruption. However, the test, by design, encourages content restrictions on government employee speech which cannot pass strict scrutiny.

71. See id. (describing the Court’s refusal to evaluate every potential employment grievance arising from speech).
72. See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (formulating a test where employee’s interest in speaking as a citizen on a ‘matter of public concern’ is weighed against the government’s interest in ‘promoting the efficiency of the public services it performs’).
73. See id. at 571-72 (declaring that the general public cares about the school board’s use of tax money).
74. See Connick, 461 U.S. at 146-47 (finding that Myers spoke only on matters of personal interest).
75. See id. at 146-47 (noting that government employers need a significant degree of control over their employees for the efficient provision of public services and any discord generated by employee speech impacts efficiency).
77. See id. (stating that the employer restrictions must be directed at speech that has some potential to affect employer operations).
78. See Connick, 461 U.S. at 152 (holding the employer can act before workplace disruption appears); see also Grutzmacher v. Howard Cty., 851 F.3d 332, 345 (4th Cir. 2017) (quoting Maciariello v. Sumner, 973 F.2d 295, 300 (4th Cir. 1992)) (emphasizing that a government employer does not need to prove workplace disruption, only that it was “reasonable to be apprehended”).
79. See Connick, 461 U.S. at 159 (Brennan, J., dissenting) (“The standard announced by the Court suggests that the manner and context in which a statement is made must be
First, by stipulating that a matter of public concern is "any matter of political, social, or other concern to the community," the Court shifts the focus of its analysis to the content of the employee speech and the reaction it generates. In his dissent in Connick, Justice Brennan warned against this approach because it forced judges to make the difficult determination of whether an employee’s speech informs public debate, which is a decision better left to the general public. The First Amendment provides for the protection of speech that informs public debate in the marketplace of ideas. Whether through judges or as an employer, the government cannot decide the importance of an individual’s speech, because to do so would violate the First Amendment’s prohibition against content-based restraints.

True to Brennan’s criticism, the threshold requirement established in Connick provides an “out” for courts wishing to avoid these cases. As a result, speech on certain newsworthy subjects such as politics, race, or religion pass the first prong of the test. However, the balancing scale weighs heavily in favor of government employers if the subject matter generates controversy. This is because if an employee expresses an unpopular or offensive viewpoint, she risks losing her job even when she is commenting on a matter of public concern. The heightened visibility of social media, anonymity of internet users, and collective outrage surrounding unpopular viewpoints foster an environment where employers react to the

weighed on both sides of the Pickering balance”).

80. See id. at 159-60 (Brennan, J., dissenting) (criticizing the Court because it arbitrarily creates two classes of public concern as determined by the content of the speech).

81. See id. at 164-65 (Brennan, J., dissenting) (arguing that the general public should determine whether speech is useful, not the courts).

82. See Hudson, supra note 35 at 3 (arguing that the First Amendment rejects viewpoint discrimination because it limits the scope of the marketplace of ideas).

83. See Neb. Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976) (asserting that the First Amendment exists to prevent the arbitrary restraint on speech and publication that existed in tyrannical governments).

84. See Connick, 461 U.S. at 165 (Brennan, J., dissenting) (warning against artificially restricting the concept of public concern because it goes against the “public’s important interests”).


slightest controversy. Under the current framework, unpopular employee speech barely passes the first prong of the test if courts find the speech frivolous. Presumably under Pickering, a teacher’s observations on childrearing and discipline are matters of public concern if the public needs to know the information and the speaker is qualified to comment on the subject. Yet, Jennifer O’Brien attempted the same argument and lost because of the disruption caused by the negative publicity associated with her comment. In O’Brien’s experience, her comments attracted negative media attention, increased hostility from parents, and disrupted the school’s relationships with the community relations. However, the court still erred because it broke from the spirit of Pickering when it denied O’Brien’s First Amendment protections under the balancing test. The underlying rationale of Pickering is that the First Amendment exists to prevent government employers from retaliating against employee speech that offends them.

The qualified testimony requirement established by the Pickering progeny limits the scope of protected speech and increases the discretionary power of government employers because it gives them license to determine the worth of employee speech and punish such speech. In essence, the extreme deference given to government employers compromises the balancing test. If the employee speech generates negative publicity, and there is a risk of employer disruption, the courts will use those factors to justify government employer retaliation. For the purposes of employee speech rights, the focus on testimony limits the scope of First Amendment protections because it creates a qualification requirement for speech protection.

87. See Scheff, supra note 54, at 107 (explaining how employers in general overreact to unpopular online viewpoints out of a fear of attribution).
88. See Pickering v. Bd. of Educ., 391 U.S. 563, 571-72 (1968) (describing teachers as most likely to have a well-formed opinion concerning their employment conditions).
89. See Ivers, supra note 8 (describing a teacher terminated for comparing her student’s lack of discipline and behavioral problems to that of future criminals).
90. See id. (commenting on the negative publicity caused by O’Brien’s post and the anger it generated within the Paterson community).
91. See Pickering, 391 U.S. at 568 (detailing that teachers as government employees do not have a duty of loyalty toward their employer and should not fear retaliation).
93. See id. at 168 (Brennan, J., dissenting) (citing Pickering, 391 U.S., at 574) (arguing against extreme deference to employer judgment because the threat of termination is a “potent means of inhibiting speech”).
94. See Grutzmacher v. Howard Cty., 851 F.3d 332, 345 (4th Cir. 2017) (stating that employers need to prove a reasonable apprehension of disruption and that social media platforms increase that risk).
2. The Pickering-Connick Standard Results in an Uneven, Two-Tier System of Protection Between Private and Public Employees in Social Media Use Cases

Social media speech cases become problematic when the courts apply a balancing test to the speech. In Grutzmacher v. Howard County, in response to news coverage on gun control, a fire department’s Battalion Chief posted on Facebook “My aide had an outstanding idea . . . all kill someone with a liberal . . . then maybe we can get them outlawed too!” Grutzmacher, a volunteer paramedic, “liked” the post and replied “was it an ‘assult liberal’? Gotta pick a fat one, those are the “high capacity” ones. Oh . . . pick a black one, those are more “scary.” Buker, the battalion chief, “liked” Grutzmacher’s post and posted a response. The Fire Department found the exchange repugnant, for reasons aside from grammar and spelling, and terminated Buker’s employment because he violated the Fire Department’s conduct and social media policy. Buker challenged the Department’s social media policy as a vague and overbroad prior restraint on speech that infringed on his ability to speak on matters of public concern.

Ultimately, the court erred when it made its Pickering-Connick determination before analyzing the social media policy argument because the court broke with precedent established in United States v. Nat’l Treasury Employees Union. The Court in NTEU, recognized that because of the potential chilling effect of a speech regulation, the Pickering-Connick test

95. See Wright, supra note 12 (explaining conflicting outcomes between private and public employment Facebook disputes).
96. See Grutzmacher, 851 F.3d at 338 (describing Buker’s initial post on gun control and subsequent posts criticizing Department’s social media policy as vague).
97. See id. (providing the quote that resulted in Buker’s and Grutzmacher’s termination).
98. See id. (describing Buker’s response to Grutzmacher’s post on Facebook).
99. See id. at 337 (describing social media policy as prohibiting personnel from posting “any statements, endorsements, or other information, images or personnel matters that could reasonably be interpreted to represent or undermine the views or positions of the Department” and “off-duty activities that may impugn the reputation of the Department or any member”).
100. See id. at 348 (stating Buker’s challenge of social media policy and assertion of third party standing in response to district court’s dismissal of his facial challenge as moot).
requires proof of actual harm. An employer must prove a disruption of
the work environment in order to justify a prior restraint on speech because
unlimited discretion creates the risk for an oppressive workplace. However, the court in *Grutzmacher* erred when it refused to weigh the
department’s social media policy as a prima facie issue because the fire
department revised its social media policy during litigation rendering the
issue moot.

Under the *Pickering* threshold inquiry, the court must determine whether
the challenged speech discusses matters of public concern. In *Grutzmacher*, the court used a totality of the circumstances test to accurately
conclude that some of Buker’s posts met the first prong of the test because
issues of gun control are matters of public concern and are newsworthy. Ultimately, he failed the second prong of the test because the court found his
subsequent posts criticizing his employer disruptive to workplace efficiency,
which included a post where he “liked” an image of an old woman flashing
the middle finger and commented “for you Chief”. In reaching its
decision, the court erred when it focused on the insubordinate nature of his
posts and the paramilitary structure of the fire department instead of the
social media policy. By failing to address the department’s broad social
media policy as it applied to *Buker*, the court failed to weigh his rights
because a broad social media policy prohibiting any speech that may reflect
negatively on the employer warrants strict scrutiny. In *Grutzmacher*, the

102. *See id.* (stating that a burden on expression requires a reasonable belief that actual
harm will result from the exercise of free speech).

103. *See id.* (advocating for a strict scrutiny approach because chilling speech is an
extreme response).

104. *See Grutzmacher*, 851 F.3d at 349 (describing how fire department revised social
media policy to remove prohibitions on private account use rendering Buker’s claim
moot).

as: (1) determining whether speaker is private citizen commenting on matter of public
concern; (2) balancing speaker’s speech rights against government’s interest in
maintaining order; (3) granting protection if speaker’s rights outweigh disruption).

106. *See Grutzmacher*, 851 F.3d at 344 (holding that Buker passed the first prong
because gun control is a matter of public concern).

107. *See id.* at 345-46 (holding that employee speech led to “dissension and
disharmony” within the fire department).

at 347 (stating Buker’s conduct upset his superior and that fire departments operate as
“paramilitary organizations in which ‘discipline is demanded, and freedom must be
correspondingly denied’”)

manner in which he conducted himself combined with the deference given to his employer defeated his First Amendment claim.\textsuperscript{110}

However, due to the pervasiveness of social media and the reticence of the Supreme Court in establishing clear guidance on First Amendment speech protections, inconsistent results appear in private and public employment court cases.\textsuperscript{111} In the private sector, the National Labor Review Board (NLRB) determined that an employee’s crude and offensive Facebook post about his employer constituted protected \textit{concerted} activity.\textsuperscript{112} The Board emphasized that the National Labor Relations Act (NLRA) establishes certain protections against unlawful retaliation for employee speech deemed concerted activity.\textsuperscript{113} Contrasting the protected expletive laden statement with unprotected public employee speech, such as “I feel as if I’m teaching future criminals,” demonstrates the limits of current employee speech jurisprudence in the public sector.\textsuperscript{114} Under current jurisprudence, speech designated “concerted activity” is protected in the private sector.\textsuperscript{115}

Moreover, the panel in \textit{NLRB} held that the insubordinate and “opprobrious” nature of the employee’s speech did not diminish his protection under the NLRA.\textsuperscript{116} Yet, the key difference between Buker and the Pier Sixty employee, Perez, both with similar levels of coarse and insubordinate speech, is that the phrase “vote yes for the union” grants the speech greater protection under the NLRA than similar speech under the First Amendment.\textsuperscript{117}

\textsuperscript{110} See \textit{Grutzmacher}, 851 F.3d at 348 (holding that Buker’s First Amendment claims failed the balancing test).

\textsuperscript{111} See \textit{NLRB v. Pier Sixty, LLC}, 855 F.3d 115, 117-18 (2nd Cir. 2017) (holding that employee Facebook post criticizing his employer as “a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!!! Fuck his mother and his entire fucking family!!!!. . . Vote YES for the UNION!!!!!!!” is protected speech).

\textsuperscript{112} See \textit{id.} at 122-24 (stating that concerted activities are those for the purpose of collective bargaining or other mutual aid).

\textsuperscript{113} See \textit{id.} at 122 (stating that the NLRA prohibits employers from discharging an employee for concerted or union-related activity).

\textsuperscript{114} See \textit{Ivers}, supra note 8 (referencing NJ teacher who was fired for complaining about her class).

\textsuperscript{115} See \textit{NLRB}, 855 F.3d at 122 (“Section 7 of the NLRA guarantees employees the right to ‘engage in. . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.’").

\textsuperscript{116} See \textit{id.} at 125-26 (holding that the employee’s egregious speech did not strip him of NLRA protection).

\textsuperscript{117} See \textit{Connick v. Myers}, 461 U.S. 138, 154 (1983) (emphasizing that a limited First Amendment interest does not require an employer to tolerate disruptive activity).
Although the NLRA explicitly protects concerted activity, the NLRB panel used the same reasoning as the Court in Pickering.\footnote{118} For the panel, an employer can not punish his employee for using protected speech that is opprobrious and offensive.\footnote{119} This inconsistent application of employee speech protection results in a two-tiered system of justice for public and private employees.\footnote{120} Aside from issues of equity, the First Amendment rests on the premise that society operates as a marketplace of ideas and restrictions on speech require compelling justifications.\footnote{121}

The court made numerous attempts to reconcile these tensions when it held certain classes of public employees to an even higher standard of behavior.\footnote{122} Based on this standard, employees with public contact such as teachers, fire fighters, and police officers lack protection because offensive speech erodes public confidence.\footnote{123} Initially, an employee within these categories could maintain speech protection if she could prove that she was speaking as a private citizen on a matter of public concern.\footnote{124} However, the Court in Garcetti reduced protection because it is harder to draw the line between action taken as a private citizen and action taken as pursuant to his official duties.\footnote{125} The Court in Garcetti refused to establish a framework defining the scope of employee duties which raised the issue of whether an employee’s private use of her home computer, social media account, and skillset preclude her from obtaining First Amendment protection.\footnote{126} The Court’s rigid insistence on a subset of testimonial speech results in the rolling

\footnote{118}{See NLRB, 855 F.3d at 124 (noting that the subject matter of Perez’s speech included workplace concerns); see also Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (finding that the First Amendment protects employee speech made as a private citizen on matters of public concern).}

\footnote{119}{See NLRB, 855 F.3d at 124 (holding that the offensive nature of Perez’s speech did not strip him of his rights).}

\footnote{120}{See Wright, supra note 12 (chronicling disparate outcomes of employee speech cases).}

\footnote{121}{See Hudson, supra note 35 at 3 (arguing that the First Amendment prevents the government from enacting viewpoint discrimination).}

\footnote{122}{See Grutzmacher v. Howard Cty., 851 F.3d 332, 346 (4th Cir. 2017) (quoting McIvory v. Spencer, 124 F.3d 92, 103 (2d Cir. 1997)) (stipulating that the “more the employee’s job requires . . . public contact, the greater the state’s interest in firing her for expression that offends her employer . . . “).}

\footnote{123}{See id. (describing the diminished speech expectation of public contact employees).}

\footnote{124}{See Pickering, 391 U.S. at 568 (describing the first prong of the balancing test).}

\footnote{125}{See Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (noting the lack of a comprehensive framework for employee duties in retaliation cases).}

\footnote{126}{See id. (repeating the Court’s ambivalence toward establishing guidelines).}
back of First Amendment employment law gains and the arbitrary application of law.

The ruling in Pickering began as a continuation of a series of cases rejecting the view that government employment is a privilege; it advanced the claim that the government as an employer cannot condition employment on the forfeiture of individual rights. However, the Court distorted this standard in Connick out of a misplaced fear that increasing employee protections would increase the amount of frivolous First Amendment cases. Since then, the balancing test aims to exclude as many of these cases as possible and defer to the judgment of government employers. As a result, there are few instances where a public employee is successful in a First Amendment claim.

Social media posts complicate matters further because the speech conveyed may fall into categories of speech outside the narrow parameters of the Pickering-Connick test. For example, unpopular and offensive social media posts from employees are denied First Amendment protection under Pickering-Connick because they are either too disruptive or outside the scope of public concern. Yet, unpopular and offensive speech still warrants First Amendment protection. A perfect illustration of this tension is considering what would happen if Paul Robert Cohen is tagged in a Facebook post wearing his “Fuck the Draft” jacket, as a government employee. The Court held that his jacket warranted protection under the

127. See Pickering, 391 U.S. at 568 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)) (emphasizing that the government as an employer cannot use the threat of termination to compel employee speech).


129. See Liverman v. City of Petersburg, 844 F.3d 400, 414 (4th Cir. 2016) (finding that the Police Department’s social networking policy violated the officer’s First Amendment rights); see also Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985) (holding that the police officer’s blackface performance was protected).

130. See Liverman, 844 F.3d at 408 (emphasizing that a social media policy prohibiting speech may affect the public interest when it limits the sharing of information).

131. See Grutzmacher v. Howard Cty., 851 F.3d 332, 345-46 (4th Cir. 2017) (holding that the plaintiff’s social media posts lacked protection because he disrupted his work environment).


133. See Cohen, 403 U.S. at 21 (emphasizing that the presence of potential witnesses and listeners does not justify limiting speech).
First Amendment because of the expressive message it contained.\footnote{See id. (holding that jacket message criticizing the draft is protected speech under the First Amendment).} If the message is protected under the First Amendment, it should follow that a social media post with the same imagery would be protected as well.

Under the Pickering-Connick balancing test, Cohen would pass the threshold inquiry if he can prove he was speaking as a private citizen because the draft is a newsworthy subject of public concern. The next question is whether the government has a strong interest in suppressing his right to speak on that issue. Given the deference provided to a government employer’s interest in avoiding disruption, Cohen’s Facebook post would likely not enjoy protection under Pickering-Connick because of the controversy it could generate. The same would apply to Juli Briskman under the current balancing test standard. These posts should be evaluated as pure speech because they express unpopular viewpoints in the marketplace of ideas that the First Amendment protects.

\subsection*{B. Facebook Posts are Pure Speech for the Purposes of the Pickering-Connick Balancing Test and Merit the Highest Protection}

The Supreme Court recently addressed the relationship between the First Amendment and social media in Packingham v. North Carolina.\footnote{See Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (holding that the “access to social media altogether is . . . the legitimate exercise of First Amendment rights”).} The Court, in striking down a restrictive statute, argued that “social media users employ these websites to engage in a wide array of protected First Amendment activity.”\footnote{See id. at 1735-36 (outlining the prevalence of social media use and its potential for First Amendment activity).} In light of this recognition, one solution to the inconsistencies caused by Pickering-Connick social media analysis is to consider online speech as pure speech. Facebook by definition is a platform built on the convergence of different viewpoints and the conveying of particular messages.\footnote{See id. at 1737 (arguing that social media websites “provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard”).}

The Fourth Circuit explored the relationship between Facebook “likes” and employee speech in Bland v. Roberts when it dismissed an employee retaliation claim.\footnote{See Bland v. Roberts, 857 F. Supp. 2d 599, 604 (E.D. Va. 2012) (holding Facebook likes are not protected speech because they are not substantive enough, compared to actual Facebook posts).} In Bland, six former sheriff’s office employees brought
suit against a sheriff for violating their First Amendment rights when he terminated them after his reelection.139 One of the employees, Carter, claimed he was terminated because he clicked “like” on his employer’s political opponent’s Facebook page.140 After subjecting his claims to the threshold inquiry of the Pickering-Connick test, the court dismissed his claim because a Facebook “like” is not substantive enough to constitute speech.141 Conversely, the court implied that textual posts are substantive enough to constitute speech since a social media post is closer to the forms of pure speech allowed by the Court. A social media post is visible, unambiguous, and clearly conveys a message to the viewer.142

The court in Bland illustrated the difficulty in interpreting the context of speech in social media cases.143 Moreover, the manner in which the court hastily opted for the path of least resistance demonstrates the problem with the current standard.144 The Pickering-Connick test fails to protect employee speech because courts avoid questioning employer motive.145 In cases such as Bland and Grutzmacher, the main source of conflict emerged from a social media post that irritated a government employer.146 The Government as an employer chooses to regulate the content of speech and conditions continued employment on public outcry.147 The inconsistent outcomes of Pickering-Connick result in a world where an employee’s future hinges on whether people care enough about her post to complain; ultimately, what the First

139. See id. at 602 (describing how sheriff office employees lost their jobs after allegedly endorsing their employer’s political rival).
140. See id. at 603 (elaborating upon Carter’s claim that he was terminated because he “liked” a sheriff candidate’s Facebook page).
141. See id. at 604 (holding that a Facebook “like” is not substantive speech because it does not directly convey a message and is too ambiguous to interpret).
142. See Packingham, 137 S. Ct. at 1735 (emphasizing that Facebook users can convey messages on religion and politics and directly engage with others).
143. See Bland, 857 F.Supp. at 604 (describing the difficulty in determining whether a “like” falls into the category “speech” of prior cases).
144. See Connick v. Myers, 461 U.S. 138, 165 (1983) (Brennan, J., dissenting) (criticizing the Court for modifying the Pickering test to avoid taking more cases).
145. See Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) (holding that the Court should analyze an employer’s motive in a retaliation claim when determining whether the plaintiff’s rights were violated).
146. See Grutzmacher v. Howard Cty., 851 F.3d 332, 338 (4th Cir. 2017) (listing the initial post that resulted in the terminations); see also Bland, 857 F. Supp. 2d at 603 (chronicling Carter’s alleged Facebook activity that upset the employer).
147. See generally Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (rejecting the premise that the government may condition employment on the forfeiture of rights and pledging of loyalty).
Amendment is designed to prevent. 148

1. The Government as an Employer Cannot Compel a General Code of Civility by Conditioning Continued Employment on Compliance

The First Amendment enshrines a hallmark of American citizenship, which is the ability to criticize without fear of reprisal. 149 The Court in Pickering, reiterated the established doctrine that the government as an employer cannot condition employment on the forfeiture of individual rights. 150 Nevertheless, the Court held that the “content, form, and context of a given statement” is subject to scrutiny in an employee speech dispute. 151 Justice Brennan emphasized in his Connick dissent that the First Amendment allows for the free exchange of ideas and robust debate. 152 Similarly in Cohen v. California, the Court emphasized that free expression “removes governmental restraints from the arena of public discussion,” since it puts “the decision as to what views shall be voiced largely in the hands of each of us.” 153 As a consequence of free expression and the instantaneous nature of online communication, offensive and opprobrious speech is visible and prone to drawing negative overreactions. 154 Yet, despite the controversy it generates, offensive and opprobrious speech is still expressive speech. 155 The Court consistently holds that the government cannot police speech


149. See Cohen v. California, 403 U.S. 15, 26 (1971) (quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) (emphasizing the importance of criticism, which includes “not only informed criticism but the freedom to speak foolishly and without moderation”).

150. See Pickering, 391 U.S. at 568 (reiterating that the government cannot condition employment on employee loyalty).


152. See id. at 162 (Brennan, J., dissenting) (claiming the First Amendment expresses commitment to uninhibited debate on public issues, which may include “sharp attacks on government and public officials”) (quoting New York Times Co. v. Sullivan) (citation omitted).


154. See Ronson, supra note 3 (describing executive’s offensive tweet about Africa and AIDS); see also Price, supra note 5, at 1-6 (recounting stories of Facebook posts resulting in employee termination).

155. See Cohen, 403 U.S. at 21 (noting that offensive speech is protected under the First Amendment).
because it offends people. Offensive speech is at the heart of the First Amendment, and the government as an employer cannot compel a general code of civility online or in person. In Oncale v. Sundowner Offshore Services, the Supreme Court held that the government as an employer cannot use Title VII provisions to create a general code of civility. The Court reasoned that offensive and contentious people will always exist in the workplace, and it is not the government’s responsibility to compel individuals to act as decent human beings nor police human behavior. The same reasoning should apply to the government as an employer in the context of offensive Facebook and Twitter posts. By using social media restrictions and disciplinary actions, the government indirectly controls speech to curtail offensive behavior.

The prohibition against a government employer compelling behavior extends into the realm of social media use and employee speech through the rejection of broad social media policies. The Supreme Court in Packingham held that the government cannot deny access to social media platforms to citizens based on their status as sex offenders. Although Packingham addressed a general restriction on access to social media, the Court’s reasoning still applies to broad restrictions on social media use and access.

Social media policies specifically restrict speech when they prohibit

156. See id. at 25 (arguing certain unpleasant speech allows for open debate in society); see also Street v. New York, 394 U.S. 576, 592 (arguing against the suppression of speech because it may offend others).
158. See id. (declining to expand the scope of Title VII workplace provisions).
159. See id. (holding that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview”).
160. See Liverman v. City of Petersburg, 844 F.3d 400, 414 (4th Cir. 2016) (finding the social networking policy unconstitutional because it chilled speech before it could occur).
161. See Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (striking down the broad N.C. statute banning access to social media platforms); see also Liverman v. City of Petersburg, 844 F.3d 400, 414 (4th Cir. 2016) (finding the police department’s social networking policy unconstitutional and disciplinary measures impermissible).
162. See Packingham, 137 S. Ct. at 1737 (striking down the N.C. statute prohibiting sex offenders from registering on social media websites since social media use implicates the First Amendment).
163. See id. at 1738 (holding that the State cannot apply broad restrictions on speech in forums such as airports or the internet).
critical and offensive speech on employers, employment conditions, and speech that deserves First Amendment protection.164 In the public employment context, the Fourth Circuit specifically addressed the issue of employee speech and social media policies in Liverman v. City of Petersburg.165 In Liverman, two veteran police officers were terminated after violating a department social media policy banning the spread of any information that reflected “unfavorably upon the [Department].”166 The Police Department crafted its social media policy to meet the requirements of the Pickering-Connick test.167 Yet, the court held that the policy was unconstitutionally overbroad because it operated as a prior restraint that chills potential speech before it happens.168 Based on the court’s reasoning, broad social media policies are analogous to prior restraints on speech because of the potential of a social media policy to chill speech.169 A prior restraint is unconstitutional because it prevents speech before it takes place, a content based social media policy which does the same violates the First Amendment.170

When a government employer takes retaliatory action against an employee because of her offensive social media post, the employer exercises a content-based restriction on speech. It should follow that if it is unconstitutional for the government as an employer to establish a broad policy outlawing inflammatory speech on social media, then it is also impermissible to punish an employee on the basis of her offensive speech. Both social media policies and compelled employee speech are impermissible content-based restrictions that punish speech before it occurs. The government as an employer cannot compel employee behavior through retaliatory terminations

164. See Liverman, 844 F.3d at 414 (finding the Police Department’s social networking policy unconstitutionally broad because of a provision outlawing negative posts about the employer).
165. See id. at 407 (stating that the scope and content of speech restrictions applies to First Amendment analysis).
166. See id. at 404 (describing the Negative Comments provision of the police department’s social media policy).
167. See id. (elaborating upon the Public Concern Provision of the department’s social media policy which allowed officers to comment on matters of public concern so long as they do not disrupt the workforce or undermine public confidence in the department).
169. See Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (arguing that restrictions on social media access and use chill speech before it occurs).
170. See Liverman, 844 F.3d at 409 (stating that the department “can craft a regulation that does not have the chilling effects on speech that the Supreme Court deplored”).
or broad social media policies.

2. Social Media Posts are Matters of Public Concern Even When Employees Operate Off Duty

The Court in City of San Diego v. Roe, touched on the idea of public concern when it defined public concern as “a subject of legitimate news interest” and of value to the general public. The Court recognized that certain private remarks, including negative comments about the President of the United States, touch on matters of public concern. When applying prior Court doctrines to social media posts, the content of the post determines whether it touches on matters of public concern. This proves problematic because political posts, humorous memes, petitions, and certain forms of social commentary may fall outside the ambit of public concern.

However, the Fourth Circuit in Berger v. Battaglia carved out a potential exception to the narrow testimonial approach to employee speech when it granted protection for content that served no purpose other than entertainment even “on matters trivial, vulgar, or profane.” In Berger, the court held that a police officer’s off-duty blackface performances is protected under the First Amendment. The court ultimately construed Pickering in a manner where it presumed his performance held some value as a matter of public concern, especially because it took place off duty. In this instance, the Fourth Circuit allowed for the inclusion of speech that is trivial, vulgar, and profane, much like the speech found on Facebook and Twitter. By extending the court’s logic, it should follow that an employee’s off duty Facebook activity may warrant protection for artistic, entertainment, and

171. See City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (holding that police officer’s off duty sex videos were detrimental to employer’s efficiency under Pickering).
172. See id. (holding that negative comments about public figures fall into that category).
174. See id. at 154 (1983) (holding that employee survey was trivial and therefore not a matter of public concern).
175. See Berger v. Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985) (holding an off duty cop’s blackface performance is protected speech because a vulgar performance is still artistic and expressive).
176. See id. at 993-994 (describing Berger’s off duty blackface performance of late singer Al Jolson).
177. See id. at 993 (holding that Berger’s off duty performance held some vulgar and artistic value).
178. See id. (establishing that vulgar speech and entertainment fall within the panoply of First Amendment rights).
symbolic purposes even if it is vulgar, crude, and distasteful.\textsuperscript{179} A crude joke on Facebook, a sarcastic quip on Twitter, and a viral image all hold some form of value outside the narrow parameters of a \textit{Pickering} analysis.

Yet, the same court in \textit{Grutzmacher}, ultimately decided that a firefighter’s right to speak on gun rights on Facebook did not outweigh his employer’s right to run an efficient work environment.\textsuperscript{180} The court used the \textit{Pickering} balancing test to determine that speech on gun rights is a matter of public concern for First Amendment purposes; however, the court has established a higher standard of expectations for employees that have heightened contact with the public.\textsuperscript{181} Ultimately, the court treated these cases differently due to the potential for workplace disruption.\textsuperscript{182} In all likelihood, the fact that \textit{Berger} took place in the early 1990s before the use of social media decreased the risk of viewers taking offense to his performances. The court in \textit{Grutzmacher} focused primarily on the grief caused by his insubordination and deferred substantially to his employer’s interests which illustrates the need to provide protection for offensive speech.\textsuperscript{183}

\section*{III. POLICY RECOMMENDATION}

Public sector retaliation claims fail because the limiting constraints of \textit{Pickering-Connick} substantially increase the employee’s burden of proof. A government employee must prove that, (1) she lost her job because of her exercise of constitutionally protected speech, (2) her speech interests outweigh her employer’s interests, and (3) her speech was a substantial factor in her termination.\textsuperscript{184} However, she exclusively bears the burden of proof for each step of the case. Moreover, the increased visibility of social media posts renders employers hypersensitive to controversy and public overreaction and therefore more reactionary.\textsuperscript{185} As a result, the threshold

\begin{footnotesize}
\begin{enumerate}
\item See id. at 1000 (commenting on the worth of unconventional forms of speech and the value that they may hold in society).
\item See \textit{Grutzmacher} v. Howard Cty., 851 F.3d 332, 348 (4th Cir. 2017) (holding that the firefighter’s conduct was too disruptive and insubordinate to outweigh his employer’s interests in efficiency).
\item See id. at 346 (holding that public employees with heightened contact with the public are held to a higher standard because community trust is vitally important to the employer’s function).
\item See \textit{Berger} v. Battaglia, 779 F.2d 992, 1001 (4th Cir. 1985) (insisting that the mere threat of an angry response to an employee’s speech is not enough to justify employer retaliation).
\item See \textit{Grutzmacher}, at 348 (finding that Boker’s insubordinate behavior risked undermining public confidence and was intolerable).
\item See id. at 342 (outlining requirements for a successful retaliation claim).
\item See Wright, supra note 7, at 1 (describing the risk of controversial and offensive
\end{enumerate}
\end{footnotesize}
inquiry narrows the scope of protected speech and risks a return to pre-Pickering employment conditions where continued employment rests on the forfeiture of individual rights and the suppression of unpopular viewpoints.

For social media cases, one possible solution lies in balancing the burdens by rejecting the current Pickering-Connick standard. The Court provided the first step in Heffernon v. City of Paterson when it required analysis of an employer’s motive for retaliating against an employee. Instead of pretending otherwise, courts should determine whether the employer terminated the employee because of the content of a social media post. Next, if the employer retaliated against an employee for off duty social media speech, courts should determine whether the speech falls outside of First Amendment protections: obscenity, incitement to violence, and fighting words. If it falls outside those categories, then the employee speech warrants protection as pure speech. The burden then rests on the employer to prove the speech lacks protection. An additional factor to consider includes whether the employer established a restrictive social media policy. If so, then strict scrutiny analysis applies.

It should not matter whether an employee’s post is controversial, opprobrious, or offensive because the First Amendment recognizes the importance of unpopular speech and divergent viewpoints. Moreover, modifying the approach taken toward analysis would not impact employers adversely because the employer may still justify the termination under a conduct policy violation. First Amendment jurisprudence consistently holds that the government may not discriminate on the basis of viewpoints nor compel citizens to act as decent human beings.

In the interest of justice, it is not fair that private employees have a lower

social media posts for employees).

186. See Heffernon v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) (stating that employer motive is an important factor in determining a retaliation claim, even if mistake of fact exists).


189. See Liverman v. City of Petersburg, 844 F.3d 400, 412-13 (4th Cir. 2016) (holding that employer investigation into an employee’s job related conduct was not an improper retaliation).
standard or that a public-sector employer may terminate an employee because of a disagreeable picture on Facebook. In the court of public opinion, employees who create offensive social media posts are often punished with impunity. The First Amendment encourages open debate in a marketplace of ideas and always seeks to include more speech rather than less.

CONCLUSION

This Comment argued that the current approach Courts take to free speech claims are limited in the context of social media and that the Pickering test implicitly applies to testimonial speech. When the Court applies a threshold inquiry, it is simultaneously judging the content of the speech for its ability to testify about conditions the public may have an interest in against the possibility of employer disruption. The Court defers to the rights of the employee when it is established that they are competent and speaking on matters that are newsworthy. Conversely, if the Court finds the possibility of disruption or if it deems the speech trivial, then the termination stands. Instead of continuing a subjective system, Facebook speech should be weighed for its content as pure speech. Such an approach allows for speech that is offensive, opprobrious, and controversial to exist in the open marketplace of ideas and is in line with Free Speech jurisprudence.
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<table>
<thead>
<tr>
<th>Volume</th>
<th>Number of Issues per Volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-2</td>
<td>1</td>
</tr>
<tr>
<td>3-5</td>
<td>2</td>
</tr>
<tr>
<td>6-14</td>
<td>3</td>
</tr>
<tr>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>16</td>
<td>4</td>
</tr>
<tr>
<td>17-18</td>
<td>3</td>
</tr>
<tr>
<td>19-25</td>
<td>4</td>
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<td>26</td>
<td>3</td>
</tr>
<tr>
<td>27</td>
<td>4</td>
</tr>
</tbody>
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