NONPARTISAN SPEECH IN THE POLICE DEPARTMENT: THE AFTERMATH OF *PICKERING*

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All speech critical of government leaders, policies and practices manifestly jeopardizes the status quo because it tends to controvert currently held beliefs. Fully aware of this reality, the Framers of the Constitution weighed the dangers of public discussion and controversy against the dangers of censorship.[1] The First Amendment was based on the premise that the suppression of thought, speech, press or public assembly is repugnant to the principles of freedom upon which the nation was founded.[2] Consequently, Americans may express themselves on questions of current public interest as a matter of right, without legislative, executive or judicial permission.[3] In order to keep this constitutional guarantee from becoming illusory, the government must not be allowed to justify restrictions on free expression by referring to the adverse consequences of allowing certain ideas to enter the public sector.[4]

Despite the broad sweep of First Amendment guarantees, courts are increasingly examining whether and to what extent the government's prerogative to hire and discharge employees permits it to regulate the conduct of those individuals who would, in the absence of the employment relationship, be protected from sanction by the First Amendment. Historically, public employment in the United States was considered a privilege, not a right, thus the state as an employer could impose any condition on employment it desired.[5] Government em-

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1. *See* Speiser v. Randall, 357 U.S. 513, 531 (1958) (Black, J., concurring).

2. *See id. See also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, J.J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, J.J., dissenting).

3. *See* Wieman v. Updegraff, 344 U.S. 183, 194 (1952) (Black, J., concurring). *See also* Cohen v. California, 403 U.S. 15, 26 (1971); Stromberg v. California, 283 U.S. 359, 369 (1931); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948), *reprinted in* A. MEIKLEJOHN, POLITICAL FREEDOM (1960).

4. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748 (1976). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, J.J., concurring).

5. *See* Comment, *The Unclear Boundaries of the Constitutional Rights of Public Employees*, 44 U. MO. KAN. CITY L. REV. 389, 389 (1975).

ployment was often contingent upon the relinquishment of constitutional rights.[6] The applicant could either accept the conditions of employment or decline the job. As our government has grown and become more pervasive, the number of governmental employees has increased. The rights and liberties of a once small number of government employees now belong to a more substantial and influential percentage of the citizenry. Accordingly, those rights now receive greater recognition and scrutiny.[7]

A few courts have recently held that a citizen's right to comment and to engage in open debate is substantially unaffected by government employment[8] and that employees cannot be deprived of their jobs merely because they have exercised these rights.[9] Judge Leventhal of the D.C. Circuit Court of Appeals has stated that "whatever liberties a private employer might have or take, the Government cannot disregard the Bill of Rights merely by calling on its prerogative to hire and fire employees."[10] However, there remains a strong argument against unrestricted speech by government employees. With government employees providing ever increasing, indispensable services, the public interest demands an administration that is effective, disciplined, and not beset by the turmoil or anarchy that uninhibited and robust debate can create. While a free society values vigorous and essentially unrestrained public speech by its citizens, such uninhibited speech by government employees often has an inefficient, disharmonic or even chaotic effect upon a governmental office.[11] Minor constitutional infringements provide discipline which can prove indispensable to the efficient continuation of valuable public services.

These opposing interests are especially evident in the exercise of First Amendment free speech rights by police department employees. Like other workers in the public sector, police officers who engage in controversial dialogue critical of management are subject to sanctions and termination. Although a police department does not have the

6. *See* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). *See also* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951); Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

7. In 1978, the federal government employed approximately 2.9 million civilians, while state and local governments employed more than 12.7 million civilians. *U.S. Dep't of Commerce, Bureau of the Census*, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, at 313. This means that of the 94.4 million civilians employed in 1978, approximately 16.5% were working for some governmental organization. As Professor Emerson has noted, any restrictions placed upon the free speech rights of such a large percentage of the nation's work force should be a matter of serious concern. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 563 (1971).

8. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

9. *See, e.g.*, Kiiskila v. Nichols, 433 F.2d 745, 749 (7th Cir. 1970).

10. Meehan v. Macy, 392 F.2d 822, 832 (D.C. Cir. 1968).

11. *See id.* at 833.

same concern in developing instant unquestioning obedience among its employees as does a military organization, it, unlike most other governmental employers, does have a substantial interest in developing "discipline, espirit de corps, and uniformity"[12] among its employees in order to insure the adequate "promotion of safety of persons and property."[13] This interest, however, must be balanced against the employee's First Amendment rights and the right of the public to be informed.[14]

In 1968, the Supreme Court in *Pickering v. Board of Education*[15] devised a test designed to balance these various interests when determining the scope of a government employee's freedom of expression. The Court refused to establish a general standard suitable for determining whether the employee's expression was protected,[16] but it did indicate several factors which it felt courts should examine when balancing the competing interests.[17] The principal virtue of this test is its flexibility, which allows a court to consider the exigencies of justice in a particular case with minimal attention to precedent.

Unfortunately, the practice of leaving the lower courts such a large degree of discretion has created a novel problem for the public servant desiring to comment on some aspect of his employment. Since every factual situation is different and the applicable standard outlined in *Pickering* is so flexible, a government employee often cannot know whether his or her speech is protected until a court so decides. Cases since *Pickering* have shown that the application of the balancing test may produce divergent results in similar, if not parallel, factual situations.[18] Such a lack of uniformity is bound to have a chilling effect on the exercise of First Amendment rights by the employee who faces potential termination upon the mistaken exercise of such rights. Many government employees will prefer to abide by possibly unconstitutional regulations rather than risk their jobs, even if they feel strongly that their rights are being infringed. Their sole alternative is resistance with no guarantee of ultimate vindication in the courts. Most public employees do not have the economic security to take such a risk. This note will examine the difficulties inherent in the uniform application of *Pickering*'s balancing test; it will also consider the consequent dilemma which arises for government employees generally, and for police of-

12. Kelley v. Johnson, 425 U.S. 238, 246 (1976).

13. *Id.* at 247.

14. *See* Kannisto v. City of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976).

15. 391 U.S. 563 (1968).

16. *Id.* at 569-73. The Court believed that a general formula was inappropriate due to the enormous variety of factual situations in which an employee's critical statements might be deemed to be grounds for dismissal by his or her superiors.

17. *See* text accompanying notes 62-68 *infra.*

18. *Compare, e.g.*, Byrd v. Gain, 558 F.2d 553 (9th Cir. 1977) *with* Brukiewa v. Police Comm'r, 257 Md. 36, 263 A.2d 210 (1970).

ficers in particular, who wish to exercise their free speech right with regard to nonpartisan matters.[19]

I. Historical Framework

Traditionally, public employment was viewed not as a right, but as a privilege subject to any reasonable condition.[20] Since public employment was not a constitutionally protected right,[21] courts likened the state to a private employer with an absolute right to discharge.[22] Government employers were able to dismiss their employees at will—even if the termination was prompted by an employee's exercise of his or her constitutional rights.[23] Although conditions placed upon public employment often interfered with the employee's constitutional rights, those rights were not deemed violated because the restrictions were accepted voluntarily.[24]

The most famous case exhibiting the state's power to set conditions on employment was *McAuliffe v. Mayor of New Bedford*.[25] In *McAuliffe*, the Massachusetts Supreme Judicial Court upheld the dismissal of a policeman for violating regulations which prohibited officers from joining political committees or soliciting money for political purposes. Justice Holmes articulated the rationale for the state's authority to restrain freedom of speech as a condition of public employment: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[26] Holmes' rationale displayed remarkable vitality.[27] His quote continued to haunt public employees

19. Governmentally imposed limitations on public employee's partisan speech present different concerns from those expressed in this article. *See* Martin, *The Constitutionality of the Hatch Act: Second Class Citizenship for Public Employees*, 6 U. TOL. L. REV. 78 (1974); Note, *Freedom of Political Activity for Civil Servants: An Alternative to Section 9(a) of the Hatch Act*, 41 GEO. WASH. L. REV. 626 (1973); Note, *National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n: Political Activity and Government Employment*, 46 TEMP. L.Q. 606 (1973).

20. *See* Note, *Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365 (1977); Note, *First Amendment and Public Employees: Times Marches On*, 57 GEO. L.J. 134 (1968).

21. Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951); Board of Educ. v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953), *cert. denied*, 347 U.S. 937 (1954); Christal v. Police Comm'n, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); Goldsmith v. Board of Educ., 66 Cal. App. 152, 225 P. 783 (1924); Klein v. Civil Serv. Comm'n, 152 N.W.2d 195 (Iowa 1967).

22. *See* Note, *First Amendment and Public Employees: Times Marches On*, 57 GEO. L.J. 134, 135 (1968).

23. *See* Clifford v. Scannell, 74 A.D. 406, 77 N.Y.S. 704 (1902), *aff'd mem.*, 173 N.Y. 606, 66 N.E. 1114 (1903); Duffy v. Cooke, 239 Pa. 427, 86 A. 1076 (1913).

24. *See* Adler v. Board of Educ., 342 U.S. 485 (1952).

25. 155 Mass. 216, 29 N.E. 517 (1892).

26. *Id.* at 220, 29 N.E. at 517.

27. As recently as 1952 the Supreme Court stated that teachers must work in public

for years through its subsequent use by both courts[28] and governmental agencies.[29]

The ability of government employers to encroach upon the constitutional rights of employees can also be seen in the "gag rules" which Presidents Theodore Roosevelt and William Howard Taft imposed on federal employees by executive decree.[30] These executive orders forced federal employees to submit employment-related grievances to their respective department heads before they could petition Congress for review. The silencing effect which these orders had on information dealing with deficiencies in government service prompted Congress in 1912 to pass the Lloyd-La Follette Act, which established the right of federal employees to petition Congress.[31]

One often overlooked reason for the continued suppression of public employees' constitutional rights over such a prolonged period is that, until quite recently, government workers often failed to assert their due process and free speech rights in court. In *State v. Turner*,[32] for example, a Florida public school teacher, who was a conscientious objector during World War II, was dismissed from his position after making public statements expressing his unwillingness to aid the United States in the ongoing conflict. The issue of free speech was never raised in the mandamus proceeding against his employer. The Florida Supreme Court refused reinstatement and held that Turner had a statutory duty as a teacher to teach patriotism and that his refusal to defend his country rendered him incompetent to teach in a public

schools according to the "reasonable terms" set down by the state and "[i]f they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." Adler v. Board of Educ., 342 U.S. 485, 492 (1952).

28. *See* McKittrick v. Kirby, 349 Mo. 988, 1006, 163 S.W.2d 990, 996 (1942).

29. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 99 n.34 (1947); Meehan v. Macy, 392 F.2d 822, 832 (D.C. Cir. 1968).

30. Executive Order No. 402, 1 PRESIDENTIAL EXECUTIVE ORDERS 42 (1906), *amending* Executive Order No. 163, *id.* at 17 (1902), was issued by President Roosevelt and provided in part:

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

President Taft issued a similar order in 1909. Executive Order No. 1142, 1 PRESIDENTIAL EXECUTIVE ORDERS 103 (1909).

31. 5 U.S.C. §§ 7501, 7701 (1970), *formerly* 5 U.S.C. § 652(d) (1912). It should be noted that the Act held each petitioning employee liable for the content of his petition, and protected the employee only from purely retaliatory action.

32. 155 Fla. 270, 19 So. 2d 832 (1944).

school.[33]

In 1952, the United States Supreme Court reviewed the constitutionality of New York's Feinberg Law, which authorized the dismissal of any public school teacher who belonged to an organization classified as "subversive" by the State Board of Regents. In the resulting opinion, *Adler v. Board of Education*,[34] the Court recognized that while teachers "have the right under our law to assemble, speak, think and believe as they will . . . they have no right to work for the State . . . on their own terms."[35] Evidently, the plight of the public employee had not undergone much improvement during the sixty years following *McAuliffe*.

Especially distressing was the Court's continued emphasis on the voluntary nature of government employment. That is, the government employee could choose between the unrestricted exercise of his constitutional rights and his job. This reasoning overlooks the job market realities for many professionals, such as school teachers and police officers, who essentially must either rely on the government as an employer or face unemployment.[36]

But the decision in *Adler* was not unanimous. Only Justice Black and Justice Douglas seemed to recognize the fallacy of the majority's assumption. In their dissent in *Adler*, they asserted that the right of a teacher to retain his or her job should depend, not on the traditional doctrine of privilege, but on whether the teacher's "performance within the public school system meets professional standards."[37]

Nine months after *Adler* was decided, the Supreme Court, in *Wieman v. Updegraff*,[38] further explained its statement that public employees have no right to work for the state on their own terms: "To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue."[39] The Court deemed it unnecessary even to consider whether a right to public employment existed.[40] Instead, two factors were established for use when examining loyalty oath cases: the relationship of the oath to the employee's fitness for the position and the effect upon the employee's First Amendment rights.[41]

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33. *Id.* at 277, 19 So. 2d at 833-34.

34. 342 U.S. 485 (1952).

35. *Id.* at 492 (citing United Pub. Workers v. Mitchell, 330 U.S. 75 (1947)).

36. This is analyzed in greater detail in Chafee, *Thirty-Five Years with Freedom of Speech*, 1 KAN. L. REV. 1 (1952).

37. Adler v. Board of Educ., 342 U.S. 485, 511 (1952) (Douglas, J., dissenting).

38. 344 U.S. 183 (1952).

39. *Id.* at 191.

40. *Id.* at 192.

41. This new approach was more fully delineated in Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), where the Court reversed a decision which had affirmed the discharge of a college professor who had invoked his Fifth Amendment rights before a con-

It was not until the 1960's, however, that the Court's changing attitude towards public employment, as suggested in *Wieman*, produced a discernible shift away from the *McAuliffe* reasoning.[42] A change in the composition and prevailing constitutional philosophy of the Court produced a tribunal unwilling to accept the traditional argument that the state has virtually unlimited power to place restrictions upon the privilege of public employment.[43] *Sherbert v. Verner*,[44] although not a public employment case, nevertheless demonstrated the Court's new posture: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."[45] Any remaining doubt over the validity of *Adler* was dispelled in *Keyishian v. Board of Regents*,[46] where the same New York statute upheld in *Adler* was declared unconstitutional.[47] In *Garrity v. New Jersey*,[48] decided during the same term, the

gressional committee investigating subversive activities within the American educational system. Noting the effect of such a discharge on the exercise of constitutionally protected rights, the Court emphasized that the reason for the discharge had no relationship to the real issue—Slochower's fitness to teach. The Court held that such a dismissal violated due process. *Id.* at 559.

42. Several cases immediately following *Wieman* appeared to be reversionary and inconsistent. *See* Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Board of Educ., 357 U.S. 399 (1958). In *Beilan*, for example, a public school teacher was fired for failing to answer his employer's questions dealing with alleged subversive activities. In upholding the dismissal, the Court feebly attempted to distinguish Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (see discussion in note 41, *supra*), by emphasizing that Beilan had not been fired for invoking a constitutional right: "The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves." *Id.* at 405-06. This distinction is one of form, not of substance. Even if the Board did not violate Beilan's First Amendment rights, its action violated his Fifth Amendment rights since the dismissal was based on his failure to answer the Board's questions. *See also* Comment, *Teachers and the First Amendment*, 7 WILLAMETTE L.J. at 438 n.15.

43. *See* United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Elfbrandt v. Russel, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961).

44. 374 U.S. 398 (1963). In *Sherbert*, the Court declared unconstitutional a South Carolina statute which denied unemployment compensation to a Seventh Day Adventist who could not find employment because of her religious beliefs which forbade her to work on Saturday.

45. *Id.* at 404 (footnote omitted).

46. 385 U.S. 589 (1967).

47. Justice Brennan, author of the Court's opinion, stated that the "constitutional doctrine which has emerged since [*Adler*] has rejected its major premise. That premise was that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Id.* at 605. Brennan concluded that "[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." *Id.* at 605-06.

48. 385 U.S. 493 (1967).

Court held that public employees retained certain constitutional rights. "There are rights of constitutional stature [including the right of free speech] whose exercise a State may not condition by the exaction of a price."[49] This erosion of the traditional concept of rights and privileges[50] created the need for a new judicial standard from which to determine the First Amendment rights of public employees.

II. The New Standard: An Examination of *Pickering*

Since the rejection of the right-privilege distinction, *Pickering v. Board of Education*[51] has become the legal prototype for deciding cases involving public employees' non-partisan speech. *Pickering* involved the dismissal of an Illinois teacher for writing a letter to a newspaper editor which was critical of the Board of Education's management of revenue raising proposals and the Board's allocation of financial resouces between the educational and athletic programs of the school. The Board of Education maintained that the published letter was " 'detrimental to the efficient operation and administration of the schools of the district.' "[52] Agreeing with this line of argument, the Illinois Supreme Court affirmed the Board's action.[53] The United States Supreme Court, however, rejected the suggestion that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens"[54] as a condition of employment. The Court, reversed the lower court's decision and ordered Pickering's reinstatement.

On the one hand, the Court recognized that the state, as an employer, may have a greater interest in regulating the speech of its employees than in regulating the speech of other citizens.[55]

The *Pickering* Court also recognized, however, that public employees are in an extraordinary position to observe and comment on how their governmental departments function.[56] Cognizant that the threat of dismissal is an effective method of inhibiting speech,[57] the Court found it essential that public employees "be able to speak out

49. *Id.* at 500.

50. In Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968), *vacated on rehearing per curiam*, 425 F.2d 472 (D.C. Cir. 1969), the court reflected that the "constitutional climate of today is different from that of 1892 when Justice Holmes struck off his oft-quoted phrase." 392 F.2d at 832. The court specifically refused to apply Holmes' reasoning in *McAuliffe*.

51. 391 U.S. 563 (1968).

52. *Id.* at 564.

53. Pickering v. Board of Educ., 36 Ill. 2d 568, 225 N.E.2d 1 (1967).

54. 391 U.S. at 568.

55. *Id.*

56. *Id.* at 572.

57. *Id.* at 574.

freely on such questions without fears of retaliatory dismissal."[58] Only by being free from the threat of dismissal or sanction will a public employee be willing to inform the public of deficiencies in government departments which provide important public services. In order to determine when a state's interests are sufficient to restrict its employee's speech, the Court adopted an *ad hoc* balancing test whereby the employee's interest in his right to comment upon matters of public concern is weighed against the state's interest in promoting the efficiency of public service.[59] As the public's concern with being informed on a particular matter increases, the state must show a more compelling interest in order to justify its restriction of speech on the subject. Conversely, the more disruptive a statement is to the maintenance of a high level of government service, the greater is the government's and the public's interest in restricting the speech. Thus, the public's interest may work either for or against the government employee's expression, depending upon the context and consequences of the speech involved. Restriction of a public employee's speech will be allowed if there has been a showing that the speech in question injured a substantial public interest[60] or rendered the employee incompetent to perform his or her job.[61]

The problem of how to balance conflicting public interests is perplexing and difficult to solve. The Court in *Pickering* refused to construct a generally applicable standard for determining when the expression of public employees is constitutionally protected. The Justices believed that a uniform formula would necessarily be too rigid to adequately administer the enormous variety of factual situations in which statements by public employees may be deemed to justify dismissal.[62] The Court, however, did indicate a number of factors which should be considered when balancing the competing interests. Relevant variables which support a state's interest in suppressing an em-

58. *Id.* at 572.

59. *Id.* at 568.

60. *See id. See also* Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Roth v. Board of Regents, 310 F. Supp. 972, 979 (W.D. Wis. 1970).

61. *See* Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976); Lefcourt v. Legal Aid Soc'y, 445 F.2d 1150 (2d Cir. 1971). Although some courts have applied *Pickering*'s balancing test to speech which reveals an employee's incompetence, there is language in the Supreme Court's opinion which implies that they are not obligated to do so. The Court noted that the case before it did "not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal." 391 U.S. at 573 n.5.

Apparently, a public employee's dismissal for incompetence can be based solely on his or her speech. By treating the employee's speech as evidence of incompetency, an employer may be able to avoid the free speech protection *Pickering*'s balancing test provides in dismissal proceedings.

62. 391 U.S. at 569.

ployee's expression include: the maintenance of discipline by immediate superiors;[63] the preservation of harmony among co-workers;[64] the fostering of personal loyalty and confidence when necessary to the proper functioning of a particular working relationship or employment position;[65] the promotion of efficiency in government operations;[66] and the ability of the government to rebut false statements made by its employees without undue difficulty.[67] The Court also listed several factors which support an employee's interest in free expression and militate against the government's interest in the restriction of speech: whether the statement involves a matter of legitimate public concern; whether the speech was made in a public context; and the likelihood that the employee would have an informed opinion on the subject.[68]

Since none of the factors favoring suppression were present in *Pickering*, and the statement did involve an issue of public concern, the Court concluded that the speech in question did not justify the dismissal. As the fact of employment was only "tangentially and insubstantially involved"[69] in the subject matter of the teacher's statement, the Board's interest in restricting Pickering's speech could be no greater than its interest in restricting similar expression by a member of the general public.[70] Consequently, "[a]bsent proof of false statements knowingly or recklessly made . . . [his] exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[71]

The absence of factors favoring the state's interest in suppression

63. *Id.* at 570.

64. *Id.*

65. *Id.* at 570 n.3. The Court observed that: "[it] is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the supervisor by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined." *Id.*

66. *See* 391 U.S. at 568.

67. *Id.* at 572.

68. *Id.* at 569-73.

69. *Id.* at 574.

70. *Id.* at 572-73.

71. *Id.* at 574. Even if *Pickering*'s balancing test favors the employee, proof of knowingly or recklessly made false statements critical of the public employer by an employee may provide the basis for the employee's dismissal. This standard is essentially identical to the "actual malice" standard of New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964), and applies only after the balancing test has been resolved in favor of the employee. *See* Note, *Judicial Protection of Teacher's Speech: The Aftermath of Pickering*, 59 IOWA L. REV. 1256, 1264. Because an examination of cases subsequent to *Pickering* reveals little judicial adherence to the application of the actual malice standard in the context of public employment, this note will confine itself primarily to the balancing test enunciated in *Pickering*.

made it unnecessary for the *Pickering* Court to indicate how varying combinations of such circumstances should be weighed in the proposed balance. Not only did the Court refrain from designating the relative weight to be accorded the various factors, but it failed to indicate how many, if not all, of the factors needed to be resolved in the employee's favor before a dismissal from public employment would be overturned.[72] By confining its holding to the narrow facts before it and finding it neither "appropriate [n]or feasible" to establish broader standards against which all public statements by government employees should be judged,[73] the *Pickering* Court forced lower courts to develop their own guidelines for applying the balancing test. While the resulting judicial interpretations of the *Pickering* test have been plentiful, they have not always been consistent.[74]

III. The Teacher—Policeman—Soldier Correlation

Since the decision in *Pickering*, plaintiffs from all sectors of public employment have sought reinstatement, damages and other forms of relief upon being discharged or sanctioned for exercising their First Amendment rights.[75] Because *Pickering* dealt only with the First Amendment rights of a public school teacher, its precedential value in other areas of public employment was left in doubt. An examination of cases subsequent to *Pickering* reveals that lower courts have proceeded to apply *Pickering* to a wide range of employment situations, although not always to the same extent. The extent of a police officer's right to comment freely about his or her employment, for example, is much less than that of a teacher but more than that of a soldier.

In a 1970 decision, *Brukiewa v. Police Commissioner of Baltimore*,[76] the Maryland Court of Appeals, relying on *Pickering*, reversed the suspension of a police officer who had made public statements critical of his department. The lone dissenter, Judge Barnes, argued that there is a large "difference between the nature and character of the employment of a *teacher* and the nature and character of the employment of a *policeman* so far as First Amendment rights of free speech are concerned."[77] He pointed out some of these differences:

72. The Court enumerated the factors to indicate "some of the general lines along which an analysis of the controlling interests should run." 391 U.S. at 569.

73. *See* text accompanying note 62 *supra*.

74. *See* notes 115-80 and accompanying text *infra*.

75. *See, e.g.*, Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977); Castleberry v. Langford, 428 F. Supp. 676 (N.D. Tex. 1977); Brukiewa v. Police Comm'r, 257 Md. 36, 263 A.2d 210 (1970); Chalk Appeal, 441 Pa. 376, 272 A.2d 457 (1971); Board of Trustees v. Spiegel, 549 P.2d 1161 (Wyo. 1976).

76. 257 Md. 36, 263 A.2d 210 (1970).

77. *Id.* at 74, 263 A.2d at 229 (Barnes, J., dissenting). *See* Note, *The Policeman: Must He Be a Second-Class Citizen with Regard to His First Amendment Rights?* 46 N.Y.U. L.

> A *teacher* in the public school system, by virtue of the position itself, is expected to stimulate and encourage thought and discussion by his students of conflicting ideas in regard to public issues. He is expected to keep himself abreast of such issues, have opinions in regard to them and to express them fully and vigorously. He has no responsibility, as a general matter, for the enforcement of the criminal laws of the State or municipality. He is not part of a semi-military organization directly concerned with the preservation of the public safety and security. In the State employment spectrum, a teacher by the nature and character of his employment has the right to exercise the maximum of the right of free speech. On the other hand, a *policeman* is directly charged with the preservation of the public safety and security in a daily struggle with crime—organized and otherwise—upon which his life and limb, as well as the lives, bodies and properties of the citizens within the jurisdiction, depend. To accomplish this primary public duty, discipline and obedience to the orders of superiors are of the essence. . . . In short, the policeman by the nature and character of his public employment has the most qualified and limited freedom of speech.[78]

The argument that the First Amendment freedoms of police officers are more limited than those of other public employees stems from the premise that the police force usually depends on strict and rigid discipline.[79] Regardless of the historical origin of the municipal police force—whether it arose out of the need to supplement the private citizen's role in keeping the peace[80] or an interest in creating a civilian military—municipal police forces are paramilitary organizations.[81] This is reflected in the police force's centralized administrative structure, hierarchy of command and uniform dress and appearance, all designed to promote competent public service and harmony within the department.[82]

REV. 536, 537-39 (1971) (hereinafter cited as *Policeman*). *But cf.* Ambach v. Norwick, 441 U.S. 68 (1979), where the Court held that public school teachers, like police officers, perform a task "that go[es] to the heart of representative government." The Justices reasoned that "[p]ublic education, like the police function, fulfills a most fundamental obligation of government to its constituency" *Id.* at 75-76 (citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973) and Foley v. Connelie, 435 U.S. 291, 297 (1978)).

78. Brukiewa v. Police Comm'r, 257 Md. 36, 263 A.2d 210 (1970). *See also* Pickering v. Board of Educ., 391 U.S. 563 (1968); Byrd v. Gain, 558 F.2d 553, 554 (9th Cir. 1977).

79. *See Policeman, supra* note 77, at 537.

80. "The Anglo-Saxon police tradition . . . springs from a configuration of attitudes which were profoundly suspicious of central authority and hostile to the idea of guarding the local peace with militia." TAFT & ENGLAND, CRIMINOLOGY 318 (4th ed. 1964). *See also* Hall, *Legal and Social Aspects of Arrest Without Warrant*, 49 HARV. L. REV. 566, 579 (1936); Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 135-37 (1953).

81. *See* Gasparinetti v. Kerr, 568 F.2d 311, 321 (3d Cir. 1977) (Rosenn, J., concurring in part and dissenting in part); Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973).

82. *Id. See* note 81 *supra.*

Even though many police departments are organized along paramilitary lines, they remain significantly different in character from the military.[83] Police departments are locally managed and organized, and are more directly controlled by the electorate. Police officials are given broad discretion in running a department and dismissals are subject to review by civil rather than provincial military tribunals. Most importantly, the discipline necessary for the efficient functioning of the military and of police forces is not of the same variety. Instant unquestioning obedience, while essential for a soldier in action, is not necessary for an effective police force.[84] It has even been suggested that the military model of organization and discipline be discouraged somewhat in police departments because a police officer, unlike a soldier, must frequently act on his or her own initiative without immediate direction or supervision.[85]

Substantial differences between the public interest in education and the public interest in safety and order justify a difference in the standards by which schools and police departments protect themselves from potentially disruptive speech by their employees.[86] The question thus arises: what effect does police employment have on the balancing test enunciated in *Pickering*? In *Muller v. Conlisk*,[87] a 1970 case from the Seventh Circuit Court of Appeals, a major portion of the defendant's brief was devoted to distinguishing *Pickering* by emphasizing the difference between teachers and police officers due to the quasi-military alignment of the police department and its need for rigid internal discipline in order to be effective.[88] The court held:

> We cannot agree that such considerations make *Pickering* inapplicable. Rather, their possible effect is no more than to influence the balance which *Pickering* says must be struck in each case. To the extent that being a policeman is public employment with unique characteristics, the right of the employee to speak on matters concerning his employment with the full freedom of any citizen may be more or less limited. It is not, however, destroyed.[89]

83. "The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Parker v. Levy, 417 U.S. 733, 758 (1974). *See* Kelley v. Johnson, 425 U.S. 238 (1976); Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977); Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974); Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973); Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970).

84. *See* Greenwald v. Frank, 40 A.D.2d 717, 721-22, 337 N.Y.S. 225, 231-32 (1972) (Shapiro, J., dissenting), *aff'd mem.*, 32 N.Y.2d 862, 346 N.Y.S. 2d 529, 299 N.E.2d 895 (1973). *Cf.* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (military discipline is separate from that of the civilian sector).

85. *See* W. LEE, A HISTORY OF POLICE IN ENGLAND 401-02 (1971).

86. Byrd v. Gain, 558 F.2d 553, 554 (1977).

87. 429 F.2d 901 (7th Cir. 1970).

88. *Id.* at 904.

89. *Id.* (citations omitted).

Other courts have agreed that while a police officer might be entitled to less First Amendment protection than other public servants, the unique character of the employment should be considered as but one element in the balance of interests in his or her individual case.[90]

IV. *Pickering* in Operation: A Flaw in the Balancing Test

A. Causation in Government Employee Discharge Cases

In order to state a cause of action, post-*Pickering* cases have required the employee to demonstrate that the speech at issue was protected under the First Amendment and that it was one of the factors which led to the imposition of the challenged sanction.[91] Until the recent Supreme Court case of *Mt. Healthy City School District Board of Education v. Doyle*,[92] there was much disagreement concerning just how large a factor the speech had to be in the decision to implement the disciplinary action before the suit would be upheld. Some courts held that governmentally imposed sanctions were unconstitutional only if the protected expression was the sole reason for their imposition.[93] Other courts determined that such sanctions were unconstitutional even if they were only partially due to the exercise of protected speech.[94] Finally, a few courts took the relatively moderate position that such sanctions were unlawful only if the protected speech was the predominant cause of the employer's action.[95] Those courts which were least tolerant of disciplinary actions based on protected expression maintained that a contrary approach would produce a chilling effect on the exercise of constitutional rights by public employees[96] and would per-

90. *See, e.g.*, Gasparinetti v. Kerr, 568 F.2d 311, 315 (3d Cir. 1977); Hanneman v. Breier, 528 F.2d 750, 754 (7th Cir. 1976); Muller v. Conlisk, 429 F.2d 901, 904 (7th Cir. 1970).

91. *See, e.g.*, Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Speiser v. Randall, 357 U.S. 513, 526 (1958); Smith v. Losee, 485 F.2d 334, 339 (10th Cir. 1975); Tygrett v. Washington, 543 F.2d 840, 846 (D.C. Cir. 1974); Ring v. Schlesinger, 502 F.2d 479, 490 (D.C. Cir. 1974); Jannetta v. Cole, 493 F.2d 1334, 1338 (4th Cir. 1974); Chitwood v. Feaster, 468 F.2d 359, 361 (4th Cir. 1972).

92. 429 U.S. 274 (1977).

93. *See* Abeyta v. Town of Taos, 499 F.2d 323 (10th Cir. 1974); Parker v. Graves, 340 F. Supp. 586, 590 (N.D. Fla. 1972), *aff'd per curiam*, 479 F.2d 335 (5th Cir. 1973).

94. *See, e.g.*, Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 573 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); Roseman v. Indiana Univ. of Pa., 520 F.2d 1364, 1367 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976); Simard v. Board of Educ., 473 F.2d 988, 995 (2d Cir. 1973); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 210 (5th Cir. 1971); Lusk v. Estes, 361 F. Supp. 653, 660 (N.D. Tex. 1973); Board of Trustees v. Spiegel, 549 P.2d 1161, 1173-74 (Wyo. 1976).

95. *See, e.g.*, Bertot v. School Dist. No. 1, 522 F.2d 1171, 1182 (10th Cir. 1975); Franklin v. Atkins, 409 F. Supp. 439, 446-47 (D. Colo. 1976), *aff'd*, 562 F.2d 1188 (10th Cir. 1977); Turbeville v. Abernathy, 367 F. Supp. 1081, 1086 (W.D.N.C. 1973).

96. *See* Perry v. Sinderman, 408 U.S. 593, 597 (1972); Mabey v. Reagan, 537 F.2d 1036, 1044 (9th Cir. 1976); Kiishila v. Nichols, 433 F.2d 745, 749 (7th Cir. 1970).

mit government employers to terminate employment on seemingly legitimate grounds even though the underlying motives were unconstitutional.[97] Conversely, those courts which favored the "predominant test" argued that a rule of causation which allowed the government employee to escape sanctions whenever protected speech played a part in the disciplinary action would enable the employee to insure the retention of his position by purposely engaging in constitutionally protected behavior.[98]

In *Mt. Healthy*, the Supreme Court set forth what it viewed as the constitutionally required standard of causation. In that case, Doyle, an untenured teacher with a controversial employment record,[99] notified a local radio station about a school memorandum regarding teacher dress and appearance requirements. Soon afterwards, the school board allowed Doyle's employment contract to expire. When explaining why it did not renew Doyle's employment contract, the board cited a " 'lack of tact in handling professional matters' " demonstrated by the phone call to the radio station and Doyle's use of obscene gestures to reprove disobedient students.[100] Doyle brought suit in federal district court. The court determined that the telephone call was constitutionally protected under *Pickering* and that it was a substantial factor in the Board's decision not to rehire. In an unpublished opinion, the court ordered the Board to reinstate Doyle with back pay. The Sixth Circuit Court of Appeals affirmed.[101]

In a unanimous opinion authored by Justice Rehnquist, the Supreme Court vacated the district court's judgment. The Rehnquist opinion rejected the premise that any employment termination based substantially on protected behavior is unconstitutional.[102] Utilization

97. *See* Mabey v. Reagan, 537 F.2d 1036, 1045 (9th Cir. 1976); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975).

98. *See* Franklin v. Atkins, 409 F. Supp. 439, 446 (D. Colo. 1976). *Cf.* Butler v. Hamilton, 542 F.2d 835 (10th Cir. 1976), where the court stated that "[t]he exercise of a [F]irst [A]mendment right . . . does not insulate a public employee from being discharged for occurrences prior to the exercise of the right. Furthermore, the exercise of a constitutional right does not provide a grace period for a public employee immunizing him from a discharge immediately following such exercise, as long as the exercise of the right did not motivate the dismissal." *Id.* at 839. *See also* Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965), which held that "[w]hen [the employee's] speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech." *Id.* at 827-28.

99. The trial court found that Doyle had argued with other teachers, complained to employees of the school cafeteria about the amount of spaghetti served to him, and referred to students involved in a disciplinary complaint as "sons of bitches." 429 U.S. at 281-82.

100. *Id.* at 282.

101. No. 75-1382 (6th Cir. Dec. 10, 1975).

102. 429 U.S. at 285-87.

of this standard, according to the Court, would necessitate reinstatement in cases where the employer would have dismissed the employee even if the constitutionally protected expression had not occurred.[103] This could place an employee who engages in constitutionally protected behavior in a more secure position than one who does not.[104] In the Court's view, the proper causation test in a public employee discharge case has not one, but two stages.[105] The first stage places the burden of proof on the employee to show that his or her expression was constitutionally protected and was a substantial or motivating factor in the subsequent disciplinary action.[106] Such a showing no longer terminates the inquiry; rather, it initiates the second stage which shifts the burden of proof to the employer, who must then prove that it would have made the same determination regarding the employee's continued employment even if the constitutionally protected behavior had never occurred.[107] As one writer has observed, the Court, in effect, adopted the district court's "substantial factor" criterion as a threshold test, but then added a "but for" causation analysis.[108]

The causation test adopted in *Mt. Healthy* appears to place the discharged employee in the same position in relation to his employer that he or she would have occupied had no protected speech been made. In actuality, however, an employee dismissed on constitutionally impermissible grounds remains in a far better position to appeal such a decision than he or she would have been in if the protected speech had not occurred. While the state as an employer may decline to renew an employee's contract for "no reason whatever,"[109] it may not deny such a renewal in retaliation for the lawful exercise of constitutionally protected speech.[110] Since the Constitution does not require an opportunity for a hearing prior to the nonrenewal of a nontenured government employee's contract unless it is demonstrated that the decision not to rehire deprived the employee of a liberty or property interest protected by the due process clause of the Fourteenth Amendment,[111] the employee who engages in protected speech is in a better position to obtain judicial review than the employee who refrains

103. *Id.* at 285.
104. *Id.*
105. *Id.* at 287.
106. *Id.*
107. *Id.*
108. Note, *The Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365, 377 (1977).
109. 429 U.S. at 283-84.
110. In Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court held that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Id.* at 597.
111. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

from such activity.[112] The employee, by proving that a substantial factor in the termination decision was his or her constitutionally protected speech, forces the state to demonstrate that the employment would have been terminated even absent the protected activity. Since presumably the state will find it difficult to make such a showing, placing this burden on the employer improves the employee's position from what it would have been had the state not retaliated against his or her exercise of protected speech.[113] Improperly motivated dismissals can be further prevented by encouraging conscientious courts to view after-the-fact rationales for termination with skepticism.[114]

B. The Balancing Test in Operation

While *Mt. Healthy* clarified the causation issue by establishing a generally applicable standard, judicial application of the *Pickering* balancing test still requires a case-by-case analysis of the relative weights to be assigned to various governmental and free speech interests.[115] In practice, the balancing test requires courts to decide each case on its own facts, with only a minimal amount of attention given to precedent or to the development of uniform standards against which the legality

112. First Amendment protection encompasses not only the nonrenewal of a public employee's contract (whether or not he or she has a contractual or tenurial right to renewal), Perry v. Sindermann, 408 U.S. 593, 597-98 (1972), but it also covers administrative sanctions, *see, e.g.*, Adcock v. Board of Educ., 10 Cal. 3d 60, 513 P.2d 900, 109 Cal. Rptr. 676 (1973), as well as job transfers which remove a public employee from a position "uniquely suited to her talents and desires." Bernasconi v. Tempe Elementary School Dist. No. 3, 548 F.2d 857, 860 (9th Cir. 1977).

113. *See* Note, *supra* note 108, at 377 n.54 (1977).

114. Application of the *Mt. Healthy* causation test may endanger the protection of free expression provided by *Pickering* if, once the public employee has shown that his or her dismissal was due in substantial part to the protected speech, the employer is allowed to base the discharge on fictitious grounds. In Aumiller v. University of Delaware, 434 F. Supp. 1273 (D. Del. 1977), the court determined that the University refused to renew the plaintiff's employment contract solely because of statements he made about homosexuality. The University argued that certain institutional concerns, including budget difficulties and the need to establish an affirmative action program, would have forced the plaintiff's dismissal, regardless of his speech. The court rejected these contentions as weak and speculative, noting that the reasons for dismissal were never even mentioned during the previous grievance proceeding. Only the court's skepticism of the employer's facially valid justifications for nonrenewal prevented a dismissal actually based on constitutionally protected speech. *See also* Skehan v. Board of Trustees, 501 F.2d 31, 39 (3d Cir. 1974); Simard v. Board of Educ., 473 F.2d 988, 995 (2d Cir. 1973); Muir v. County Council, 393 F. Supp. 915, 933 (D. Del. 1977); Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500, 507-09 (E.D. Pa. 1973).

115. Even the Supreme Court has engaged in such case-by-case analysis. *See* Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979), where the Court held unanimously that *Pickering* applies to private, as well as public, expression by public employees. In so holding, the Court acknowledged that "[p]rivate expression . . . may in some situations bring additional factors to the *Pickering* calculus" not present when the employee speaks publicly. *Id.* at 415 n.4.

of certain conduct may be measured prior to judicial determination.[116] The primary advantage of such a case-by-case analysis is that it permits the significance of all competing interests to be considered in each individual case, thereby theoretically promoting more equitable results. Additionally, it avoids the difficulty of establishing a formula generally applicable to a myriad of factual situations.

Unfortunately, the flexibility and resulting uncertainty inherent in *Pickering*'s balancing test has created serious problems for many government employees wishing to exercise nonpartisan free speech. Because each factual situation is different, and the applicable standard so flexible, the public servant often cannot know whether his or her speech is protected until a court reviews it. One cannot reasonably assume that government employers can distinguish between protected and unprotected speech when such a determination requires the application of a complicated balancing test.[117] Such judgments are even more difficult to make when a dramatic and perhaps abrasive incident has just occurred.[118] This situation is bound to have a chilling effect on public employees' First Amendment rights since the exercise of such rights can result in termination. The public employee may prefer to abide by possibly unconstitutional regulations rather than risk his or her job, even if the employee strongly believes that his or her rights are being infringed. The sole alternative is judicial mediation—a final resort which may prove unsatisfactory since adjudication does not guarantee vindication.

The use of a balancing test in order to determine whether or not certain speech is constitutionally protected has undergone considerable criticism.[119] Professor Thomas I. Emerson, for instance, asserts that:

> [t]he principal difficulty with the ad hoc balancing test is that it frames the issues in such a broad and undefined way, is in effect so unstructured, that it can hardly be described as a rule at all. As a legal doctrine for affording judicial protection to a system of

116. Rosenbloom & Gille, *The Current Constitutional Approach to Public Employment*, 23 KAN. L. REV. 249, 249 (1975).

117. There exists a real danger that government employers may fail to consider the competing interests outlined in *Pickering* when dismissing an employee who has engaged in protected speech. If the employee successfully challenges such a dismissal—and few employees probably have the resources to maintain such litigation—the state may still show at trial that it would have reached the same decision absent the employee's controversial speech. *See* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977).

118. *See* 429 U.S. at 285.

119. *See, e.g.*, Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Grossman, *Public Employment and Free Speech: Can They Be Reconciled?*, 24 AD. L. REV. 109 (1972); Rosenbloom & Gille, *supra* note 116; Comment, *supra* note 5, at 394.

freedom of expression, it is not tenable.[120]

In an article predating *Pickering*, Emerson identified several fundamental difficulties present in the use of such a test.[121] First, he noted that a test of this type lacks a hard-core doctrine suitable for guiding a court in reaching a decision.[122] Second, he claimed that diligent application of the test requires difficult and time-consuming factual determinations which are unsuitable for the judicial process.[123] Third, he argued that the test gives almost conclusive weight to legislative judgment because a court utilizing the test is forced to base its decision on broad policy considerations which are usually more appropriately determined by the legislature than the judiciary.[124] Fourth, he alleged that the balancing test provides no protection for speech other than that which is already furnished by the due process clause.[125] Finally, he contended that since no speech is unequivocally protected until a court so decides, the test fails to provide the notice which is essential to judicial administration.[126]

Several of the balancing test's constructional problems can be traced to the unique factual situation involved in *Pickering*. In that case, the Supreme Court concluded that the teacher's letter to the newspaper had no disruptive effect on the regular operation of the school.[127] This forced lower courts to blindly determine how they should balance in the more common factual situations involving disruptive speech. Furthermore, since the Supreme Court assigned no weight to the various factors to be considered when balancing the state's interests against the employee's, lower courts have been forced in subsequent cases to develop the contours of the balancing test.[128] In the absence of detailed direction, it is not surprising that the lower courts' application of this innovative doctrine has not always been consistent.[129]

The confusion and inconsistency present in the application of

120. Emerson, *supra* note 119, at 912.
121. *Id.* at 913-14.
122. *Id.* at 913.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 913-14.
127. 391 U.S. at 572-73.
128. *See* note 72 and accompanying text *supra*.
129. In *Pickering*, Justice Marshall recognized the wide range of factual situations which require a court to determine the scope of employee free speech and he also realized that the Court's opinion would be of limited assistance to the resolution of such issues. He stated that: "[i]t is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We

Pickering's balancing test can plainly be seen by analyzing *Byrd v. Gain*,[130] a 1977 Ninth Circuit Court of Appeals case. The controversy in *Byrd* resulted from a series of unsolved murders and attempted murders which terrorized the city of San Francisco between December 1973 and April 1974.[131] All seventeen victims were white, and descriptions by witnesses and survivors vaguely described the assailant as a black male between the age of twenty and thirty. The San Francisco Police Department initiated a special investigation into the murders, assigning the letter "Z" and code name "Zebra" to the shootings. As a result of the police department's inability to apprehend the murderer through the use of traditional law enforcement techniques and the increased racial tensions created by the Zebra shootings,[132] the department implemented a unique strategy to identify and capture the killer. All patrolling officers were authorized to detain any person fitting the vague description of the suspect and to make a pat down search of such persons for possible weapons. The departmental directive did not require the patrolling officers to consider a suspect's behavior as a factor when determining probable cause for detainment. These stop-and-frisk tactics disproportionately affected black males and immediately created a heated public controversy. In the midst of this controversy, police officers Jesse Byrd and Travis Tapia issued a press release and made other public comments critical of these special police tactics. The department reprimanded the two officers following complaints by other police employees. Byrd and Tapia sued in federal district court under section 1983 of the Civil Rights Act,[133] to compel the department to remove the written reprimands from their personnel files, claiming that such sanctions violated their First Amendment rights. The district court granted the defendants' summary judgment motion, and the plaintiffs appealed.[134]

In his opinion for the court of appeals, Judge Goodwin made no reference to the balancing of opposing interests as required by *Pickering*.[135] Instead, Goodwin pointed to the reasoning developed in two previous Ninth Circuit cases, *Kannisto v. City of San Francisco*[136] and

intimate no views as to how we would resolve any specific instances of such situations." 391 U.S. at 570 n.3.

130. 558 F.2d 553 (9th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

131. Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977) (class action brought to enjoin officials of the San Francisco Police Department from continuing certain investigative practices).

132. Some city officials claimed that the Zebra murders produced tensions which created a danger of racial conflict and violence. Williams v. Alioto, 549 F.2d at 138.

133. 42 U.S.C. § 1983 (1964).

134. 558 F.2d 553, 554 (9th Cir. 1977).

135. *See* text accompanying notes 56 & 62-71 *supra*.

136. 541 F.2d 841 (9th Cir. 1976).

Phillips v. Adult Probation Department,[137] and found that "while First Amendment rights of employees are deserving of protection against unreasonable and arbitrary restriction in the name of institutional policy, the employee does not have an unqualified right to abuse his employer in public while remaining on the payroll."[138] A close examination of *Kannisto* and *Phillips* reveals few similarities in the factual situations and gravity of interests which would allow those cases to be controlling in *Byrd*.

Kannisto was an action which challenged the constitutionality of a San Francisco Police Department regulation, under which the plaintiff, a lieutenant, was suspended for making disrespectful and belittling remarks about a superior officer while addressing his subordinates during a morning inspection.[139] The police department initially cited Kannisto's publication of his opinion in a local newspaper as an alternative reason for his suspension.[140] The district court held that such a publication was constitutionally protected and remanded the case to the Police Commission because it could not determine what weight the Commission had given to the invalid reason.[141] Seen in this light, *Kannisto* should have prompted the *Byrd* Court to classify Byrd's and Tapia's press release as constitutionally protected speech.

The *Kannisto* Court acknowledged *Pickering*'s recognition of government employees' abstract right to comment on matters of public concern.[142] The Ninth Circuit asserted that such an interest was substantial in *Kannisto* because a police officer is a person " 'extraordinarily able to inform the public of deficiencies in this important governmental department.' "[143] The Justices also weighed in the balance the right of the public to be informed about matters of general concern.[144] The court, however, upheld the department's imposition of sanctions and questioned whether the plaintiff's statements were vital to informed decision-making by those persons legitimately concerned with the police force's operations.[145] Even though they regarded the substance of Kannisto's speech as immaterial to the protection of his constitutional rights, the court still ruled that its character was relevant in determining the substantiality of the public's interest in the free flow of information.[146] The court determined that the public interest was

137. 491 F.2d 951 (9th Cir. 1974).
138. 558 F.2d at 554.
139. Kannisto v. City of San Francisco, 541 F.2d 841, 842 (9th Cir. 1976).
140. *Id.* at 842 n.1.
141. *Id. See* Hanneman v. Breier, 528 F.2d 750 (7th Cir. 1976).
142. 541 F.2d at 843. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).
143. 541 F.2d at 843.
144. *Id.*
145. *Id.* at 844.
146. *Id.*

minimal since Kannisto's speech was limited to insulting a superior officer's personality.[147] Conversely, in *Byrd*, the public's interest in being informed was significantly greater because the speech in question concerned police tactics directly affecting the public. The public's interest in the free flow of information in *Byrd* was substantial, especially considering that the police tactics involved were later ruled unconstitutional.[148]

Byrd can be further distinguished from *Kannisto* by examining the effect of the contested speech in each case upon the maintenance of discipline and the preservation of harmony. In *Byrd*, as in *Pickering*, "[t]he statements [were] in no way directed towards any person with whom appellant would normally be in contact within the course of his daily work."[149] Nor could it be presumed that the statements at issue either impeded the police officer's proper performance of his daily duties or interfered with the regular operations of the department.[150] Rather, the criticism centered upon questionable departmental policy.[151] The facts in *Kannisto* sharply contrast with those in *Byrd* and *Pickering*. A close daily working relationship existed between Kannisto and the object of his criticism. Therefore, questions of harmony and discipline existed in *Kannisto* which did not exist in *Byrd*. As the

147. The San Francisco Police Department imposed sanctions on Kannisto for describing "his superior as a most 'unreasonable, contrary, vindictive individual,' whose behavior was 'unreasonable, belligerent, arrogant, contrary and unpleasant.'" *Id.* at 842.

148. *See* Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977), where the Ninth Circuit reviewed a district court judgment which had held that the police tactics were unconstitutional. The court dismissed the appeal as moot, vacated the judgment of the district court, and stated that there was no longer an issue in controversy since the Zebra murderers had been apprehended and the special investigatory methods were no longer necessary. *Id.* at 142-45.

149. 391 U.S. at 569-70. One recent attempt to define "insubordination" required that there be a close working relationship existing between the employee and the object of his criticism. The court defined insubordination as disobedience of orders, infraction of rules, or unwillingness to submit to authority. Nebraska Dep't of Roads Employee Ass'n v. Department of Roads, 364 F. Supp. 251 (D. Neb. 1973).

150. While it is true that the plaintiffs' comments in *Byrd* provoked other officers' complaints, 558 F. Supp. at 554, the disruptive value of the speech within the department was minimal when one compares the massive amount of public criticism of the police department's tactics. *See* Williams v. Alioto, 549 F.2d 136 (9th Cir. 1977).

151. *See* Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. CHI. L. REV. 530 (1975); Comment, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 108 (1976). *See generally* R. NADER, J. PETKAS, & K. BLACKWELL, WHISTLE BLOWING (1972).

Emphasizing the right of a government employee to comment on matters of public concern, Justice Marshall has asserted that "[t]he importance of Government employees being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times." Arnett v. Kennedy, 416 U.S. 134, 228 (1974) (Marshall, J., joined by Douglas and Brennan, J.J., dissenting).

court concluded, Kannisto's tirade, "delivered as it was before his men while in formation for inspection, can be presumed to have had a substantial disruptive influence on the regular operation of the department."[152]

As in *Kannisto*, there exist substantial differences in the factual situations and gravity of interests involved in *Phillips v. Adult Probation Department*[153] which render that case minimally valuable as precedent for resolving *Byrd*. Phillips was a deputy probation officer in the Family Support Section of the Adult Probation Department of the City and County of San Francisco. In September 1970, Phillips placed a large poster on the wall of his office which contained the legend "Wanted by the F.B.I."[154] Beneath the legend were likenesses of H. Rap Brown, Angela Davis and Eldridge Cleaver, who were at that time fugitives sought by the Federal Bureau of Investigation. Below the three drawings were these additional lines:

Faith, Beauty, Integrity
REWARD
Love—Peace—Happiness[155]

Protests by co-workers persuaded a supervisor to order Phillips to remove the poster. Phillips' refusal to obey the order led to a five-day suspension. Phillips brought suit for injunctive and compensatory relief, claiming that his suspension was constitutionally impermissible.[156] In affirming the district court's decision denying relief,[157] the Ninth Circuit emphasized two points which compelled it to hold that the government interest in promoting the efficiency of public service outweighed the appellant's right of expression.[158] First, the court distinguished *Pickering* by stressing the difference between expressions made outside the work premises during off-duty hours and expressions made on the work premises during working hours.[159] Second, the court noted the specific warning and reasonable opportunity Phillips was given to remove the objectionable poster before any disciplinary action was taken.[160] While *Phillips* indicates the ability of government to restrict an employee's freedom of expression in certain circumstances, its value as a precedent which would resolve the issues in *Byrd* is limited

152. Kannisto v. City of San Francisco, 541 F.2d 841, 844 (9th Cir. 1976).
153. 491 F.2d 951 (9th Cir. 1974).
154. *Id.* at 952.
155. *Id.*
156. In the action, brought under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, 1985 (1964), Phillips contended that his First, Fifth and Fourteenth Amendment rights had been violated.
157. The district court had granted the defendants' summary judgment motion. 491 F.2d at 952.
158. 491 F.2d at 955-56.
159. *Id.* at 955.
160. *Id.* at 955-56.

at best. The disputed expression in *Byrd* was made outside work premises during off-duty hours and the police department, unlike the probation department in *Phillips*, failed to give the penalized officers a specific warning before it invoked sanctions.

If the reasoning in *Phillips* and *Kannisto* is inapplicable to the issues in *Byrd*, then how did the *Byrd* Court balance the competing interests necessary for reaching its determination? The court of appeals' short opinion provides only a few clues. Judge Goodwin seemed to agree with the district court's finding when he stated that "the First Amendment does not guarantee the plaintiffs an unqualified platform from which publicly to hector their department and its superior officers by language calculated to inflame the public or part of it against the police and to affect adversely the morale and discipline of the department."[161] Presumably, this assertion signifies that the plaintiffs' expression caused some actual impairment of a governmental interest. Many courts have required that the impairment of the governmental interest must be material and substantial before a speech-based sanction can be sustained.[162] The only state interest enunciated in *Pickering* which the court identified in *Byrd* was the disruption of discipline and harmony among co-workers.[163] The questionable police tactics utilized in the Zebra manhunt, however, were at least as responsible for the public controversy and resulting discord among police employees as were the plaintiffs' public criticisms.

Perhaps the most enlightening clue in attempting to explain the result in *Byrd* is Judge Goodwin's refusal to bring the plaintiffs within the *Pickering* line of cases which guarantee school teachers a First Amendment right to publicly criticize their school and its officials.[164] According to Goodwin, "[s]ubstantial differences between the public interest in education and the public interest in safety and order justify a difference in the standards by which the respective institutions may protect themselves from attempted destruction by their employees."[165] While these differences have been recognized by other courts, they have generally not been viewed as substantial enough to make *Pickering* inapplicable.[166] The proper approach is to classify the unique char-

161. 558 F.2d at 554.

162. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 361 (1976); Mabey v. Reagan, 537 F.2d 1036, 1047-50 (9th Cir. 1976); Tygrett v. Washington, 543 F.2d 840, 849 (D.C. Cir. 1974); Smith v. United States, 502 F.2d 512, 518 (5th Cir. 1974); Smith v. Losee, 485 F.2d 334, 339 (10th Cir. 1973); Battle v. Mulholland, 439 F.2d 321, 324-25 (5th Cir. 1971); Teachers Union Local 1021 v. Los Angeles Bd. of Educ., 71 Cal. 2d 551, 563, 455 P.2d 827, 835, 78 Cal. Rptr. 723, 731 (1969).

163. 558 F.2d at 554. *See* text accompanying note 161 *supra*.

164. 558 F.2d at 554.

165. *Id.*

166. *See e.g.*, Gasparinetti v. Kerr, 568 F.2d 311, 315 (3d Cir. 1977); Hanneman v. Breier, 528 F.2d 750, 754 (7th Cir. 1976); Muller v. Conlisk, 429 F.2d 901, 904 (7th Cir.

acter of police employment as but one element in the balance of interest in an individual case.[167]

The *Byrd* opinion does not contain a thorough examination of the various factors which *Pickering* indicated should be considered when determining whether a public employee's speech is constitutionally protected. Rather, the *Byrd* court determined that the existence of two variables supporting the state's interest in suppression was sufficient to surpass any interest supporting First Amendment protection. Such an analysis overlooks the public's substantial interest in free and open debate about its police department's operations as well as Byrd's and Tapia's free speech interests.[168]

The public has a strong interest in hearing a police officer's statements concerning his or her department, especially when the comments are directed towards departmental procedures which allegedly infringe upon the rights of a substantial portion of the populace. If such procedures are in need of change or investigatrion, the police officer's opinion should be encouraged because he or she speaks as an expert.[169] By disciplining a police officer for critical public comments and thereby discouraging such dialogue between police employees and members of the public, the police department can only alienate the community in which it works and advance a lack of trust in the policeman.[170]

When a police officer's criticisms are directed towards police tactics directly affecting the general populace rather than police personnel or internal departmental affairs, the interests supporting protection of the comments are similar to those associated with the speech of an ordinary citizen. *Pickering* implies that the fact that the statements are not directed at a person with whom the speaker must deal on a daily basis tends to support the position that the courts should protect the speech.[171] The Ninth Circuit recognized this concept in *Kannisto*.[172]

1970). The Supreme Court has emphasized that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

167. *See* text accompanying note 90 *supra*.

168. In *Pickering*, the Supreme Court recognized these interests and discussed the various factors which might support them in a particular case. *See* text accompanying notes 57-59 & 68 *supra*.

169. The opinion of a police officer on matters of police service and procedures is just as valuable to the public as a teacher's opinion on a matter which concerns the school system. In *Pickering*, the Court asserted that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S. at 572.

170. *See* 10 *National Comm'n on the Causes and Prevention of Violence, Law and Order Reconsidered* 298-304 (1969) (staff study report).

171. *See* 391 U.S. at 569-70.

172. *See* 541 F.2d at 843-44. *See also* Bernasconi v. Tempe Elementary School Dist. No. 3, 548 F.2d 857, 862 (9th Cir. 1977).

Any disruption of superior-subordinate relations or of harmony among co-workers which results from such critical speech is presumably caused by the unpopularity of the expressed viewpoint. Speech of this type should be highly valued since it stimulates political debate which is essential to a free society.[173] In a paramilitary organization such as the police department there exists a constant danger of repression of unpopular ideas. This is due in part to the common backgrounds and attitudes police employees often share.[174] In focusing on the harmful effects of public employees' speech, *Pickering* may have indicated that the Court did not fully appreciate this subtle but potent means of suppressing dissident behavior. *Pickering* may also be interpreted in such a way as to provide for those situations in which the right to contemplate and voice unpopular opinions is so precious to the preservation of our country's democratic ideals of free speech that it outweighs any minimal disruptive effect.[175] The reaction of superiors and other employees who share the prevailing views should not be permitted to chill the rights of dissidents.[176]

Since no mention of the substantial interests which support the protection of Byrd's and Tapia's speech can be found in the *Byrd* opinion, one may conclude that such interests were not recognized, or perhaps deemed not relevant to the disposition of the case. This deduction creates serious doubts concerning the court's understanding of the *Pickering* balancing test and its ability to apply the proper standard. The *Pickering* test cannot function properly if the mere showing that a police officer's speech has caused some disruption disposes of the issue. The balancing process requires the trier of fact not only to determine the existence and extent of the harm to the governmental interest caused by the disciplined employee's speech, but also to weigh that injury against the employee's and the public's interest in the speech.[177]

Byrd exemplifies the dilemma which plagues a public employee when a court balances opposing interests to determine whether his or her speech is constitutionally protected. Clearly, many factors listed in *Pickering* which support the employee's and public's interest in free speech were present in *Byrd*.[178] The existence of so many anti-suppression ingredients with respect to the limited number of factors favoring restriction could easily have led the plaintiffs in *Byrd*, or even an attor-

173. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 20-26 (1960). According to Meiklejohn, "What is essential is not that everyone shall speak, but that everything worth saying shall be said." *Id.* at 20.

174. *See* S. ASCH, POLICE AUTHORITY AND THE RIGHTS OF THE INDIVIDUAL 35 n.18 (1968).

175. *See Policeman*, *supra* note 77, at 548-49.

176. *See id.* at 549.

177. *See* 391 U.S. at 568.

178. *See* text accompanying note 68 *supra*.

ney acting as an advisor, to believe that their critical comments were constitutionally protected under *Pickering*. Unfortunately, since the Supreme Court failed to designate what weight should be given to each individual factor listed in *Pickering*, the *Byrd* court, like any other lower court, can defend its decision by stating that the factors favoring suppression outweighed those favoring protection, regardless of the number of factors which support protection. Even if the assignment of fixed weights to these factors would be inappropriate, since that might transform the fluid balancing test into a relatively inflexible standard,[179] the Supreme Court should grant certiorari in cases such as *Byrd* in order to provide lower courts with some guidelines as to how the balancing test should properly be applied.[180]

Conclusion

In *Pickering* the Supreme Court attempted to develop a test that would apply to the vast assortment of factual situations in which statements by public employees may be deemed to justify sanctions. The Court, recognizing the limitations of a rigid formula, devised a test requiring courts to balance factors which either support or oppose constitutional protection. While some courts have felt obliged to limit their inquiry to the specific factors enunciated in *Pickering*, others have adopted *Pickering* in spirit, if not in letter, by incorporating into the balance other considerations which reflect the governmental, public and private interests connected with an employee's speech.

Since *Pickering*, cases dealing with the First Amendment rights of police officers demonstrate that the wide discretion left to the courts when they balance opposing interests has made possible the justification of divergent results in similar if not parallel factual situations. These differing conclusions are possible only because the Supreme Court has not specified what combinations of factors dictate one result instead of another. *Pickering*'s guidelines are so vague that they practically leave the fate of a police officer, or any other public employee sanctioned because of his or her speech, to the unrestrained discretion of the trial court. The lack of clear guidelines creates the obvious danger that hostility to the expressed views will play a significant role in the enforcement decision.

Because each factual situation is different and the applicable standard so flexible, a public employee often cannot know whether his or her speech is protected until a court so decides. This is bound to have a

179. The main benefit of the *Pickering* test is that in the balancing of opposing interests there exists an intrinsic flexibility which allows a court to consider the exigencies of justice in a particular case without the confinement of precedent.

180. The plaintiffs in *Byrd* appealed to the Supreme Court, which denied certiorari. 558 F.2d 553 (1977), *cert. denied*, 434 U.S. 1087 (1978).

chilling effect on the exercise of First Amendment rights by the employee who faces potential termination for his or her speech. Many government employees will prefer to abide by possibly unconstitutional regulations, even if they feel strongly that their rights are being infringed, since the sole alternative requires resistance with no guarantee of ultimate vindication. It is ironic that a judicial doctrine designed to provide public employees with many of the rights enjoyed by their colleagues in the private sector makes the assertion of those rights such a tenuous proposition.[181] The chilling effect created by the employee's inability to recognize the boundaries of constitutionally protected speech may also drastically limit the free flow of information essential to the protection of the public interest in free and open debate about governmental agencies.

What can be done to remedy this undesirable situation? The First Amendment reflects our nation's "profound mutual commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[182] The suppression of speech relevant to public issues, controversies and investigations inhibits the thorough discussion of public matters necessary in a free, democratic society.[183] Thus, where a police officer's or any other public employee's statements concern a public issue, the need for censorship and discipline is not very compelling. Although it is frequently easier to silence a critic than to respond to criticism, under our system of government, counterargument and education, rather than the abridgment of free speech, should be used to expose errors in judgment or unsubstantiated opinions.[184] Accepting the premise that free and open debate of public issues is vital to the informed decision-making process of the electorate,[185] the government as an employer should not be allowed to sanction its employees for making serious contributions to public discussion on matters of general interest. Where the matter is already one of public awareness, and no need for confidentiality exists, it should not be necessary for a court to balance conflicting interests. In such a situation, the right to comment

181. *See* Rosenbloom & Gille, *supra* note 116, at 275.

182. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

183. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

184. *See* Wood v. Georgia, 370 U.S. 375, 389 (1962).

185. *See* Houchins v. KQED, 438 U.S. 1, 29 n.17 (1978) (Stevens, J., dissenting); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968).

should be constitutionally protected, regardless of the speaker's occupation.

This is not to say that the *Pickering* test is unworkable. The fundamental difficulties present in regulating government employee speech are not entirely the result of the balancing test's amorphous guidelines. Blame for the lower courts' inconsistent application of the *Pickering* standard may also be placed on the Supreme Court's unwillingness to provide guidance as to how the test should be applied to varying factual situations. Until the Court delineates what combinations of the factors outlined in *Pickering* mandate the extension of constitutional protection, judicial inconsistency will abound. The Court can begin solving this problem by granting certiorari in cases such as *Byrd v. Gain*.