Nebraska Law Review

Volume 67 | Issue 3 Article 7

1988

Teacher Free Speech in the Public Schools: Just When You Thought It Was Safe to Talk . . .

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Comment

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I. INTRODUCTION

Only recently have our public schools been recognized as harbors for protected first amendment activity. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] When the United States Supreme Court confidently made this bold statement, however, free speech rights of students or teachers in the public schools were anything but indisputable. In fact, in cases decided before 1968, it was very rare indeed to see discussion of first amendment rights in public schools.[2]

The traditional approach to claimed first amendment violations by teachers was to dismiss those claims summarily. Courts considered themselves bound by a line of thought exemplified by Justice Holmes'

1. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506 (1969).
2. Graham, *Freedom of Speech of the Public School Teacher*, 19 CLEV. ST. L. REV. 382 (1970).

early comment that "[t]here are few employments for hire in which the servant does not agree to suspend his constitutional rights to free speech . . . by the implied terms of his contract."[3] Cases in which teachers challenged the constitutional validity of school board action were, therefore, decided on the basis that the teacher occupied a dual role: She was primarily a public employee, and secondarily a citizen. Thus, by accepting employment in the public schools, a person would indeed, contrary to *Tinker*, shed some constitutional rights.

After having been restated and reshaped in numerous lower court decisions,[4] this traditional view found approval in a 1952 Supreme Court case.[5] In *Adler v. Board of Education*, the Supreme Court upheld a New York statute which prohibited those advocating overthrow of the government from teaching in public schools. The Court displayed its approval of the traditional view with the observation that teachers "have no right to work for the state in the school system on their own terms."[6] This hostility toward teacher first amendment claims continued well into the 1960s.

In 1968, the Court began laying the foundation for a new analysis in these cases with its decision in *Pickering v. Board of Education*.[7] *Pickering* and subsequent Supreme Court cases established a framework of analysis which, after twenty years of refinement, the courts now appear to apply consistently. In attempting to lay a certain analytical framework, however, courts have been remiss in their duty to step back and look at the larger picture. Does this analysis adequately protect teacher free speech? Does it provide certainty to administrators and teachers as to what actions they are permitted to take? Is the

3. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892).

4. *See, e.g.*, Board of Educ. v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953); Goldsmith v. Board of Educ., 66 Cal. App. 157, 172, 225 P. 783, 789 (1924)("No one has a natural or inherent right to teach in a public school"); State v. Turner, 155 Fla. 270, 19 So. 2d 832 (1944); Joyce v. Board of Educ., 325 Ill. App. 543, 60 N.E.2d 431, 435 (1945)(teacher dismissed for writing letter congratulating former student for failing to register for the draft; court responded by saying that a teacher "writing such a letter ought not to be permitted to continue as a teacher in public schools"). The approach of these early courts to teacher free speech cases is epitomized by the following quotation:

> Nor can defendant prevail in her claim that affirmance of her dismissal infringes upon the constitutional guarantee of her freedom of speech, in that she is denied the right to criticise her superiors upon pain of losing her position. . . . One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by the governmental body or officer to the end that proper discipline may be maintained. . . .

Board of Educ. v. Swan, 41 Cal. 2d 546, 553, 261 P.2d 261, 267-68 (1953).

5. Adler v. Board of Educ., 342 U.S. 485 (1952).

6. *Id.* at 492.

7. 391 U.S. 563 (1968).

analysis capable of uniform application? Does it allow courts to discriminate against unpopular viewpoints?

In the courts' attempts to discern and apply the proper analysis in teacher free speech cases, these larger issues, unfortunately, have been ignored. This article will focus on these larger issues, as well as on the adequacies and inadequacies of the *Pickering* test as it is now applied in the federal courts. First, the *Pickering* test and its development in the Supreme Court will be discussed. This discussion will focus on *Pickering* itself and the four Supreme Court cases which, since *Pickering*, have shaped teacher free speech analysis in some fashion. Second, the article will focus on how the lower federal courts are applying the modified *Pickering* analysis. Finally, an analysis of the test from the perspective of the three professionals most intimately involved (the educator, the litigator, and the lobbyist) is needed in order to highlight deficiencies. Suggestions, both judicial and legislative, will be made to improve areas of the test which seem to breed more confusion than certainty.

II. BASIC LESSONS—THE SUPREME COURT FOUNDATION

A. *Pickering v. Board of Education*

After twenty years, *Pickering* remains the seminal case on the issue of a teacher's first amendment rights. Marvin Pickering, a high school teacher in Illinois, sent a letter to a local newspaper that was critical of the revenue policies of the local school board.[8] The letter came on the heels of an announcement for a proposed tax rate hike to fund educational activities. The proposal eventually was defeated.[9] Pickering's letter advocating defeat of the proposal was published only one week after supportive letters written by the superintendent and local teacher's organization appeared.

Marvin Pickering was fired after the letter appeared because the letter was deemed to be "detrimental to efficient operation of schools in the district."[10] Pickering sought review of this determination in county court, which upheld his dismissal. He then appealed to the Illinois Supreme Court, where his firing once again was upheld. He then appealed to the United States Supreme Court, claiming that the firing constituted state action in violation of the first and fourteenth amendments.

The Court reversed the determination below, holding that Pickering's dismissal was unconstitutional. In so doing, the Court made no doubt that the rationale and reasoning of *Adler v. Board of Educa-*

8. *Id.* at 564.
9. *Id.* at 566. The letter, in addition to attacking revenue procedures, also criticized the superintendent for threatening those teachers who opposed the tax hike.
10. *Id.* at 564.

tion[11] no longer controlled teacher free speech cases. "The theory that public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable, has been uniformly rejected."[12] Instead, the Court indicated that the task of the Court was to balance the interests of the employee, as a citizen, against the interests of the school board, as employer.[13]

In announcing this balancing test, the Court explicitly refused to lay down a "general standard" by which all teacher first amendment claims would be judged.[14] Factors which would be considered relevant to the determination of whether the teacher's speech was protected included the need for harmony among workers, relational factors between the speaker and his subject, the degree to which the speech addresses matters of public concern, and special knowledge which teachers possess concerning operation of schools, making it essential that teachers be able to "speak freely" on such topics.[15] On the facts of the case, Marvin Pickering's statements had not created any disruption in the operation of the schools; his expression was, therefore, held to merit constitutional protection.[16]

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11. 342 U.S. 485 (1952).
12. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)). *Keyishian* involved a challenge to the same New York statute which had been upheld in *Adler*. Noting that the "constitutional doctrine which has emerged since [*Adler*] has rejected its major premise," the Court struck down the portions of the statute (different from those challenged in *Adler*) because they were overbroad. Appellants in *Keyishian* had refused to certify that they were not communists, as the statute required, and had therefore been discharged. *Keyishian* retains its significance today because of its strong endorsement of the classroom as a first amendment playground. "The classroom is peculiarly the 'marketplace of ideas.'" Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). Thus, in cases involving academic freedom, *Keyishian* provides great protection to the educator.
13. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Even at this early stage in teacher free speech litigation, however, the Court began to narrow free speech rights by focusing on the nature of the expression involved.
14. *Id.* at 569. Interestingly, Marvin Pickering had claimed that the actual malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964), should govern these cases. On the facts of this case, the standard would have provided adequate protection to Pickering. Advocates of free speech, however, may have had cause for alarm, given that *Sullivan* initially applied only to public officials. Teachers, therefore, would have been free to comment on school board members with a full cloak of first amendment protection. All other statements apparently would be unprotected.
15. Pickering v. Board of Educ., 391 U.S. 563, 571-73 (1968). Ironically, the Court noted both that Mr. Pickering had to be free to comment knowingly about school revenue questions (because of his inside position as a teacher) *and* that Pickering's statements here were matters on which he had no expertise. The Court concluded that Pickering's statements were false and that, far from creating turmoil in the working environment, they were met largely with apathy and disbelief. *Id.* at 570.
16. The court explicitly left open the question of whether statements made which

The groundwork for future constitutional analysis had been laid. *Pickering* remains today an important component of the test evaluating the measure of protection which teacher expression receives.

B. *Mt. Healthy v. Doyle*

The second crucial case decided in the area of teacher freedom of expression, *Mt. Healthy City School District Board of Education v. Doyle*,[17] involved a topic of much less controversy—causation. Doyle was a somewhat argumentative non-tenured teacher who had been teaching, under a series of one- and two-year contracts, for five years. In his third year of teaching, he was elected president of the local teacher's association. Negotiating tension developed between the board and the association in ensuing years. During this time, Doyle was involved in some incidents unrelated to his position in the association; during one such incident, Doyle argued with a fellow teacher who eventually slapped him. Disciplinary action taken against Doyle resulted in a teacher walkout.[18]

Among other incidents,[19] the straw which finally broke the camel's back was a phone call Doyle made to a local radio station. Doyle, after receiving a memorandum on teacher dress from the board, called a local radio station and relayed the contents of the memorandum to them. The radio station subsequently announced adoption of the memo as the new teacher dress code. The court of appeals found that consideration of this phone call in the board's decision whether to rehire constituted a denial of Doyle's first and fourteenth amendment rights.[20]

The district court had held that if constitutionally protected activity played a "substantial" role in the board's decision not to rehire, the decision was constitutionally flawed. On this basis, they ordered Doyle reinstated. The Supreme Court disagreed with this test, and, therefore, ordered the case remanded for further factual findings.[21]

"The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not

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were knowingly false or made with reckless disregard for the truth (the actual malice standard) would or could be protected under this balancing test. *Id.* at 574 n.6. Justice White dissented on the grounds that statements made with actual malice were entitled to no constitutional protection regardless of their impact on the harmony of the school system. *Id.* at 584 (White, J., concurring in part and dissenting in part). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964).

17. 429 U.S. 274 (1977).
18. *Id.* at 281.
19. Doyle also argued with cafeteria employees about the amount of spaghetti served him, referred to two students as "sons of bitches," and directed an "obscene gesture" at two girls who had failed to obey his commands. *Id.* at 281-82.
20. *Id.* at 282.
21. *Id.* at 285-87.

engaged in the [constitutionally protected] conduct."[22] The Court observed that application of the causation test espoused by the district court might well afford the teacher greater protection than if the constitutionally protected activity had never occurred. It was, therefore, necessary to add additional gloss to the test laid out by the district court. First, the teacher must show that the protected activity was a "substantial" or "motivating" factor in the decision not to rehire. After the teacher meets this burden, the board can nonetheless escape liability if it can show, by a preponderance of the evidence, "that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."[23] Thus, a two-part causation test has been uniformly applied in teacher free speech cases.

C. *Givhan v. Western Line*

Thus far, all the cases discussed concerned action taken by a school board in response to public speeches made by the teacher. In *Givhan v. Western Line Consolidated School District*,[24] the Court first considered the question of whether teacher speech occurring in a private context would be subject to constitutional protection as well. A unanimous Court answered this question affirmatively.

Bessie Givhan, a junior high teacher, had complained numerous times to school administrators about policies and educational practices at the school that she perceived to be racially discriminatory. The district court found that these complaints were the "primary" reason for the board's decision not to rehire, and ordered Givhan reinstated.[25] The Fifth Circuit Court of Appeals, however, reversed on the basis that private expression was beyond the constitutional protection extended in *Pickering*.[26]

The Supreme Court reversed, upholding constitutional protection for private as well as public expression. "Although the First Amendment's protections of government employees extends to private as well as public expression, striking the *Pickering* balance in each con-

22. *Id.* at 285-86.
23. *Id.* at 287. On analytical grounds, the Court's analysis here seems similar to the "harmless error" rule: There was a constitutional violation, but no real harm resulted because the teacher would have been fired anyway. As such, the reasoning of the Court seems unassailable. Practically, however, the test appears to open the door to post-hoc rationalizations of a constitutionally suspect decision not to rehire.
24. 439 U.S. 410 (1979).
25. *Id.* at 413.
26. Ayers v. Western Line Consol. School Dist., 555 F.2d 1309 (5th Cir. 1977). The appeals court believed that protection of such private complaints would force school principals to become "ombudsmen, for damnable as well as noble causes." *Id.* at 1319.

text may involve different considerations."[27] If speech is made in public, then the *content* of the speech will be determinative of whether the teacher was hindered in his ability to perform duties properly. In private expression, however, content as well as the time, place, and manner of the speech will be determinative.[28] Because the courts below had applied an incorrect analysis (in both the causation and constitutional areas), the case was remanded for further fact finding.[29]

Subsequent Supreme Court cases make *Givhan's* primary holding, that private as well as public teacher expression is entitled to constitutional protection, somewhat questionable.[30] The case has not been overruled, however, and still may be of considerable value to litigants seeking to assert first amendment rights relating to private expression.

D. *Connick v. Myers*

Along with *Pickering*, *Connick v. Myers*[31] stands as the primary case for consideration of free speech rights in teacher employment cases. While *Connick* did not involve first amendment rights of a teacher, it did substantially alter the *Pickering* analysis. *Connick* set the contemporary tone of first amendment analysis in teacher employment cases.

Ms. Myers, an attorney with the district attorney's office, distributed a questionnaire that sought her co-worker's opinions in areas of office morale, supervisor trust, and political pressure within the office.[32] The questionnaire had been prepared after Myers had learned of her impending transfer to another office—a transfer she opposed. Upon learning of the questionnaire's circulation, Myers's superior promptly fired her for "insubordination."[33] She subsequently filed suit under 42 U.S.C. Section 1983.

The district court held that Myers's constitutional rights had been violated. In so doing, the court found that the matters addressed in the questionnaire were of public concern, and that the state had not met its burden of showing "substantial" interference with office functions sufficient to justify Myers's termination.[34] The Fifth Circuit Court of Appeals affirmed.

The Court, in a 5-4 decision, reversed. "When employee expression cannot be fairly considered as relating to any political, social, or other

27. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979).
28. *Id.*
29. *Id.* at 416-17.
30. *See infra* note 36.
31. 461 U.S. 138 (1983).
32. *Id.* at 141.
33. *Id.*
34. *Id.* at 142. *See* Myers v. Connick, 507 F. Supp. 752 (E.D. La. 1981).

concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[35] Thus, the analysis invoked by the Court was clearly expanded to two parts: first, was the speech of public concern; second, how do the *Pickering* balancing factors apply?

When addressing the initial public concern prong of the test, the content, form, and context of the speech must be considered.[36] The one factor that the Court seemed to rely on in *Myers* was context; Myers was not seeking to "inform the public," or "bring to light actual or potential wrongdoing."[37] Instead, the expression at issue arose in the context of a private employment dispute—an issue the Court characterized as important only to Myers. An employee who speaks not as a citizen, but rather as a self-interested employee, will not be entitled to constitutional protection.[38] Thus, focusing on the speaker's motive for speaking appears to be crucial under this analysis.

After concluding that the content, form, and context of Myers's questionnaire called for a conclusion that it addressed matters of private concern, the Court turned to the *Pickering* balancing factors. Having held that the speech was not of public concern, the Court concluded that it was "unnecessary . . . to scrutinize the reasons for [Myers's] discharge."[39] Thus, for the first time, the Court made it clear that the public concern inquiry was a threshold issue which the teacher must overcome in order to challenge board action on constitutional grounds. Only after the teacher shows that the expression dealt

35. Connick v. Myers, 461 U.S. 138, 149 (1983).

36. *Id.* at 147-48. The Court, in announcing this test, attempted to square it with the result in *Givhan*. *See supra* notes 24-30. While Givhan's statements were expressed in private, the Court in *Connick* nonetheless regarded them as addressing matters of public concern. Connick v. Myers, 461 U.S. 138, 146 (1983). While it is easy to see that matters of public concern can be addressed in private, the test that the Court espoused to determine public concern militates against the Court's own conclusion. Anytime a teacher is fired for private expression, two prongs of the *Connick* public concern test, form and context, will strongly support a finding that the speech was *not* of public concern.

37. *Id.* at 148.

38. *Id.* at 147. The Court did leave open the possibility that, under "most unusual circumstances," a teacher speaking as a self-interested employee might nonetheless be entitled to first amendment protection. These possible circumstances, however, were not delineated.

The Court did say that speech, even on private matters, is not totally devoid of constitutional value. "We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction." *Id.* Thus, while an employee may be fired for such speech, other state action, such as prosecution for libelous private statements, may still be subject to constitutional scrutiny.

39. *Id.* at 146.

with matters of public concern does the *Pickering* balancing test become crucial.[40]

One portion of Myers's questionnaire was held to be of public concern.[41] Therefore, with respect to this single question, the Court was forced to employ the *Pickering* balancing test. Employment of the balancing test in *Connick* involved granting to public employers "a wide degree of deference" because "close working relationships" were essential to the proper functioning of the District Attorney's Office.[42] Consideration of factors such as the time, place, and manner of the questionnaire distribution, the context in which the expression arose, and the need to avoid office disruption before it occurs led the Court to conclude that Myers's discharge violated none of her free speech rights.[43]

Justice Brennan, dissenting with three other Justices, appparently would have reversed the order in which the majority applied the two separate inquiries that must be made.

> [W]hether a public employee's speech addresses a matter of public concern is relevant to the constitutional inquiry only when the statements at issue—by virtue of their content or the context in which they were made—may have an adverse impact on the government's ability to perform its duties efficiently.[44]

The dissent also took issue with the majority's finding that *potential* or *possible* office disruption was sufficient to justify Myers's termination.[45]

In spite of the criticism raised in the dissent, *Connick's* analytical framework stands today as the accepted analysis of teacher free

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40. Whether the speech is of public concern is an issue of law to be decided by the court. Page v. DeLaune, 837 F.2d 233, 237 (5th Cir. 1988). Thus, Federal Rule of Civil Procedure 56(c) becomes an important weapon for state attorneys. If the court decides that the speech was of private concern, Rule 56(c) may be used to dispose of the case through summary judgment. *See* Ferrara v. Mills, 781 F.2d 1508, 1514 (11th Cir. 1986). Summary judgment after a finding that the speech was of private concern remains prevalent in spite of the Supreme Court's comment that, under unusual circumstances, termination after such speech could be constitutionally actionable. *See* Connick v. Myers, 461 U.S. 138, 147 (1983); *see also supra* note 38.
41. Connick v. Myers, 461 U.S. 138, 149 (1983). The question which was held to implicate a matter of public concern dealt with whether the attorneys in the office ever felt "pressured to work in political campaigns on behalf of office supported candidates." *Id.* The Court characterized this question as dealing with a matter of public concern *without* any reference to the content, form, and context test which it had just promulgated. Possibly the Court considered the content of the speech as "inherently a matter of public concern," so that reference to the other two factors seemingly would be unnecessary. If, however, the Court believed that there were topics of inherent public concern, perhaps, in the interest of certainty, some of those topics should be set forth.
42. *Id.* at 151-52.
43. *Id.* at 152-54.
44. *Id.* at 157 (Brennan, J., dissenting).
45. *Id.* at 158 (Brennan, J., dissenting).

speech cases. Combined with *Pickering*, *Connick* provides a two-part analysis that places a heavy burden on the teacher seeking to sustain a constitutional claim. First, the teacher must show that the expression at issue pertains to matters of public concern. Second, the *Pickering* balance must reveal that the teacher's interest in speaking outweighs the government's interests as employer. Coupled with the stiff causation requirements outlined in *Mt. Healthy*,[46] these constitutional tests place substantial barriers before a teacher seeking to challenge her dismissal on first amendment grounds.

E. *Rankin v. McPherson*

The final and most recent Supreme Court case for discussion is *Rankin v. McPherson*.[47] Like *Connick*, *Rankin* did not deal specifically with teacher employment, but rather with the broader subject of public employment in general. *Rankin's* application of the public concern test, however, has played some significance in recently decided teacher employment cases.

Ardith McPherson, a nineteen-year-old deputy in a county constable's office, was fired after a co-employee overheard a conversation she had with her boyfriend, also an employee in the office. While discussing the state of welfare assistance in the United States after an attempt on the President's life, Ms. McPherson commented: "if they go for him again, I hope they get him" (referring to the President).[48] As a result of making this comment, McPherson was fired.

She challenged her dismissal on first amendment grounds, the district court twice granting summary judgment for the defendant. The Fifth Circuit reversed both times, finally holding that McPherson's statements concerned matters important to the public, and that her interest in making the comment outweighed the employer's interest in firing her.[49]

A sharply divided Supreme Court affirmed the circuit court's determinations. To do so, the Court was required to find that McPherson's comments related to matters of public concern. The opinion of the Court, a four-justice plurality, concluded that McPherson's speech was a commentary on the policies of the administration.[50] While only one of the *Connick* public concern factors, context, was specifically mentioned, both the form and the content of the statement entered into the plurality's determination that the speech addressed issues of public concern.[51]

46. *See supra* notes 17-23 and accompanying text.
47. 107 S. Ct. 2891 (1987).
48. McPherson v. Rankin, 786 F.2d 1233 (5th Cir. 1986).
49. *Id.*
50. McPherson v. Rankin, 107 S. Ct. 2891, 2897-98 (1987).
51. *Id.*

After determining that the statement was of public concern, the Court went on to the *Pickering* balance. In this portion of its analysis, the Court cleared up a point that had been unclear in *Connick*: The state "bears a burden of justifying the discharge on legitimate grounds."[52] In meeting this burden, the State must focus on its primary interest in discharge cases—assuring that "the effective functioning of the public employer's enterprise" will not be hampered.[53]

The Court found that the government had not met its burden, paying particular attention to McPherson's authority and position in the office. "Where, as here, an employee serves no confidential, policy making, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal."[54]

Rankin stands as an example of how far the public concern test may be stretched. Comments which the dissent characterized as "only one step removed from statements that we have previously held entitled to no First Amendment protection even in the nonemployment context"[55] were held to address matters of public concern, entitled to the most prominent first amendment position. Teachers seeking to establish that their comments addressed matters of public concern might find assistance by comparing their comments to McPherson's.

Rankin brings us up to date on the Supreme Court's fashioning of an analytical framework by which to evaluate teacher first amendment claims. *Pickering* and *Connick* together establish a set analysis that seems ordered and certain. An examination of post-*Connick* lower court opinions is necessary to reveal how those courts implement the *Pickering-Connick* test in educational employment situations.

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52. *Id.* at 2898 (citing Connick v. Myers, 461 U.S. 138, 150 (1983)).

53. *Id.* at 2899.

54. *Id.* at 2900. It is apparent from the opinion that the Court was concerned about the inappropriate or controversial nature of McPherson's statements. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees' speech." *Id.* at 2896.

In essence, the opinion returns us to the question implicitly addressed in the *Connick* case: Which portion of the *Connick-Pickering* test should be applied first? Should the state first be required to prove that the functioning of its agency will be hampered? Or should the teacher be required to first show that her statements addressed issues of public concern? *Rankin* illustrates how the public concern test can be diluted if the statement clearly will not hamper agency functioning. In any situation in which an employee has been terminated for comments which clearly would *not* affect the functioning of the agency, courts may be hesitant to grant summary judgment to the employer because the speech was not of public concern. Thus, the courts may simply water down the public concern test to assure that private but harmless discourse remains protected.

55. *Id.* at 2903 (Scalia, J., dissenting). Justice Scalia compared McPherson's comments to "fighting words," "epithets or personal abuse, and advocacy of force or violence." *Id.* (citations omitted).

III. HOW THE TEST WORKS: AN ANALYSIS OF LOWER COURT DECISIONS APPLYING THE *PICKERING-CONNICK* TEST

Only recently have courts applied the *Pickering-Connick* test in a coherent fashion. The primary source of confusion first arose with respect to the two differing prongs of the test; some courts, even after the decision in *Connick*, appeared to focus only on the *Pickering* balancing factors. Other courts combined the *Pickering* and *Connick* tests into a single inquiry, not differentiating the factors that each test uniquely employs.[56] In *Ferrara v. Mills*,[57] the Court of Appeals for the Eleventh Circuit noted the confusion with respect to the factors applied in the different prongs of the test:

> Several courts which the parties rely upon fail to enunciate clearly that the analysis consists of three separate and progressive steps. The question of whether the employee's speech is constitutionally protected is a different issue from the ultimate question of whether the employer has violated the employee's right to freedom of speech.[58]

The problems regarding initial application of the analysis were largely semantic, however, and for the most part these problems have been resolved. An independent and detailed focus on how the lower courts are applying *Connick's* public concern test and *Pickering's* balancing test nonetheless provides insight into the manner in which different fact patterns are resolved by the federal courts.

A. *Connick* Public Concern Test

Perhaps the most disturbing aspect of the public concern test is the inability of courts to agree on what statements are of public concern. In an attempt to incorporate some certainty in this area, one court

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56. For example, in Hamer v. Brown, 831 F.2d 1398 (8th Cir. 1987), the court outlined a three-prong test, the first prong of which asked whether the plaintiff had engaged in any protected activity. Incorporated into this prong was the *Pickering-Connick* test. *Id.* at 1401.

    The remaining two factors concerned causation. *See* Cox v. Dardanelle Public School Dist., 790 F.2d 668, 672 (8th Cir. 1986).

57. 781 F.2d 1508 (11th Cir. 1986).

58. *Id.* at 1513 (citations omitted). Interestingly, one of the cases which the court cites as indicative of this confusion is McPherson v. Rankin, 736 F.2d 175 (5th Cir. 1984). Recall that the United States Supreme Court, on appeal in *Rankin*, affirmed the decision of the Fifth Circuit. *See* McPherson v. Rankin, 107 S. Ct. 2897 (1987).

    Even the Eighth Circuit has encountered internal semantic difficulties, but has now seemingly overcome them. "In *Cox v. Dardanelle Public School Dist.*, a panel of this court referred to a two-step process. The panel noted that *Connick* provides a 'public concern' test and that *Pickering* provides a 'balancing test.' We have no disagreement here; we simply speak of a combined 'protected speech' inquiry and two further steps relating to causation." Lewis v. Harrison School Dist. No. 1, 805 F.2d 310, 313 n.4 (8th Cir. 1986)(citations omitted).

merely listed the factual circumstances in which the Supreme Court has concluded that topics are of public concern.[59] Given the Supreme Court's admonitions that these cases will be handled on a case-by-case basis, however, such a listing provides little guidance. Unless the factual setting is identical to one previously encountered, the court must engage in an independent content, form, and context analysis.

Separating these three factors and analyzing them independently may, at first blush, seem wise. Upon an examination of the case law, however, the futility of such an approach becomes readily apparent. Under some views, for example, certain topics are of "inherent" public concern merely due to their content; an analysis of the context and form of these topics would, therefore, be superfluous.[60] Furthermore, few courts appear to separate out the three factors and discuss them independently. Instead, a general analysis of the entire communicative event is used—something akin to a "totality of the circumstances" test.[61]

A review of the lower court decisions on this issue reveals one factor that, time and again, appears to play a significant role in determining whether a particular expression implicates matters of public concern. The "role" of the speaker, or the speaker's "motive" in making the statements in question, is a factor that some courts seem to indicate is determinative, in and of itself, of the public concern question.[62]

This role or motive analysis is drawn directly from language in *Connick*: "The repeated emphasis in *Pickering* on the right of the public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental."[63] Courts have taken this "as a citizen" language and incorporated it as a part of *Connick's* public concern test.

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59. Page v. DeLaune, 837 F.2d 233, 237-38 (5th Cir. 1988). The list of topics which were of public concern included: 1) welfare policies; 2) attempts on the President's life; 3) need for increased school taxes; 4) special police treatment for wealthier people; 5) controversial federally funded reading programs; 6) powers of the county commission. *Id.*

60. *See* Note, *The Public Employee Can Disagree with the Boss—Sometimes*, 66 NEB. L. REV. 601, 613 (1987). At least one court appears to have expressly rejected the notion that certain topics are of inherent public concern. Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987).

> Hence, while it is undoubtedly true that incidences of sexual harassment in a public school district are inherently matters of public concern, the *Connick* test requires us to look at the *point* of the speech in question: was the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?

Id. at 417 (quoting Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985)(emphasis supplied)).

61. *See, e.g.*, Terrell v. University of Texas Sys. Police, 792 F.2d 1360 (5th Cir. 1986).

62. *See* Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987).

63. Connick v. Myers, 461 U.S. 138, 143 (1983).

> The focus is on the role the employee has assumed in advancing the particular expressions: That of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution.[64]

A fair reading of *Pickering* and *Connick*, however, is inconclusive on of whether the role or motive of the speaker should be considered part of the public concern test. Arguably, the motive or role of the speaker should become important only in the *Pickering* balancing test; if the teacher was speaking as a citizen, then the first amendment concerns will be weightier. If the teacher was speaking as an employee, then the balance will tip towards the state. Such an interpretation squares with *Pickering's* recommendation that the interests of the teacher be balanced against the interests of the state.

Be that as it may, courts nonetheless consider the role of the speaker as indicative of public concern. Courts which characterize teacher speech as "airing private employer-employee grievances"[65] or motivated primarily by the teacher's own self-interest[66] are likely to hold that the speech does not deal with matters of public concern. A brief review of some cases employing this role or motive analysis proves illustrative.

In *Page v. DeLaune*,[67] a Texas A & M CETA supervisor of an ex-offender program was fired after her boss overheard a telephone conversation between Page (the fired employee) and another worker. The two discussed their intention to go "over the head" of their supervisor and complain about the manner in which the ex-offender program was being managed. Page eventually brought suit claiming that the firing violated, among other things, her first amendment rights. The district court dismissed her first amendment claim.[68]

The court of appeals affirmed, focusing primarily on the role that Page occupied when speaking. When determining whether an employee's speech dealt with matters of public concern, the court considered its task as reviewing "the speech and its context."[69] After citing the language in *Connick* referring to the citizen-employee dichotomy, the court determined that Page was acting as an employee while speaking in this case. "The telephone conversation between Page and Witte-Howell chiefly concerned the decision of both employees to go over DeLaune's head and speak to her supervisor, Turner. Such a decision to bypass normal communication channels is clearly a personnel

64. Cox v. Dardanelle Pub. School Dist., 790 F.2d 668, 672 (8th Cir. 1986).
65. *Id.*
66. Piver v. Pender County Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987).
67. 837 F.2d 233 (5th Cir. 1988).
68. *Id.* at 237.
69. *Id.* No mention of the third *Connick* factor—form—was made.

matter internal to the program, not a matter of public concern."[70] Because the two were speaking as employees on matters internal to the program, their speech was not entitled to constitutional protection.[71]

Perhaps the most disturbing and restrictive public concern analysis was performed by the Eleventh Circuit in *Ferrara v. Mills*.[72] In *Ferrara*, a high school teacher spoke out against a system of registration that made it difficult for him to control his classes. He also criticized the practice of filling teacher vacancies in the social studies department with physical education teachers, some of whom were not certified in that area. After being assigned what he considered an inadequate teaching schedule, he filed a Section 1983 action alleging violations of his rights to free speech.[73]

The district court dismissed Ferrara's complaint on the basis that the expression at issue "constitute[d] nothing more than a series of grievances with school administrators over internal school policies."[74] The court of appeals affirmed. "Ferrara concedes that he spoke out against collegiate registration because it contributed to his inability to maintain control of students and to effectively enforce discipline. . . . Ferrara's inability to govern his own students is undoubtedly a matter of interest only to Ferrara."[75] Parents might justifiably question the validity of this bold conclusion.

As to Ferrara's complaints about unqualified teachers, the court once again concluded that no public concern was implicated.[76] In so deciding, the court placed some emphasis on the fact that Ferrara was motivated by personal concerns—that he would not be able to teach the classes he wanted to teach. "We hold merely that a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run."[77]

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70. *Id.* at 238.
71. One Supreme Court Justice has opined that there should be no need for constitutional analysis in cases like *Page*. Rankin v. McPherson, 107 S. Ct. 2891, 2900 (1987)(Powell, J., concurring):

> There is no dispute that McPherson's comment was made during a private conversation with a co-worker who happened to be her boyfriend. She had no intention or expectation that it would be overheard or acted on by others. Given this, I think it is unnecessary to engage in the extensive analysis normally required by [*Connick* and *Pickering*].

Id. at 2901 (Powell, J., concurring).
72. 781 F.2d 1508 (11th Cir. 1986).
73. *Id.* at 1510-11.
74. Ferrara v. Mills, 596 F. Supp. 1069, 1071 (S.D. Fla. 1984).
75. Ferrara v. Mills, 781 F.2d 1508, 1515-16 (11th Cir. 1986).
76. *Id.* at 1516.
77. *Id.* One cannot help but wonder whether the court, in its determination of the public concern test, also had in mind the comparatively innocuous "sanction" given the teacher in *Ferrara*. While teaching assignments are indeed important to those affected, the severity of the sanction pales when compared to the typical

Few people will vigorously fight for any goal unless they have a personal motive for seeing the goal achieved. Courts that consider this personal motive to remove the expression from the realm of public concern do a great disservice to the educational profession. As evident in *Ferrara*, "personal" motives can spark heated discussion about topics which must be of great concern to those interested in seeing public education succeed. Removing these comments from the category of public concern seems tantamount to saying that a presidential candidate's remarks are not of public concern because, after all, she wants to be president.

One final case will complete the illustration on how motive can defeat a claim of public concern. In *Callaway v. Hafeman*,[78] Franzetta Callaway, a human relations officer for a local school district, received what she claimed to be a de facto demotion after making complaints regarding sexual harassment by her boss.[79] Ms. Callaway made the complaints privately and informally because "she did not want to make a public issue of the allegations."[80] Callaway also was openly critical of the reorganization plan under which she was reassigned.

The district court dismissed her first amendment claims, and the Seventh Circuit Court of Appeals affirmed. "While the content of Callaway's communications touched upon an issue of public concern generally, she was not attempting to speak out as a citizen concerned with problems facing the school district; instead, she spoke as an employee attempting to resolve her private dilemma."[81] Because such speech, in its form and context, does not implicate matters of public concern, it is unprotected by the first amendment.

Notably, the court in *Callaway* did not mention the Supreme Court holding in *Givhan v. Western Line*[82] that private as well as public expression is protected. Instead, the court stressed the private nature of the speech in order to conclude that the employee's role was not one of a concerned citizen. Given the fact that *Connick's* three-prong test arose after the decision in *Givhan*, one must question whether *Givhan's* holding still stands. *Callaway* vividly demonstrates how two of the *Connick* prongs, context and form, can easily drag down the status of speech even though the content seems to implicate matters of public concern. Ironically, had Franzetta Callaway chosen to take her dispute to the public (thereby damaging the reputation and public confidence in the school system), her speech, it seems, would have been

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teacher termination case. This author suspects that, had the sanction in *Ferrara* been termination, the public issue test may well have been decided in favor of the teacher.

78. 832 F.2d 414 (7th Cir. 1987).
79. *Id.* at 415.
80. *Id.*
81. *Id.* at 417.
82. *See supra* notes 24-30 and accompanying text.

protected.[83]

Not all courts appear so concerned with the role or motive of the speaker. Some courts, in the discharge of their duty to answer the public concern question, appear to place more importance on the content of the speech at issue. Decisions in these cases are characterized by broad, sweeping conclusions classifying certain topics of discussion as "obviously" of public concern.[84]

In *Lewis v. Harrison School District No. 1*,[85] the court was faced with a first amendment claim asserted by a high school principal. Bill and Judy Lewis, husband and wife, were employed at Harrison High School. In 1979, Judy Lewis was elected to a committee of the local teacher's association, pursuant to which she wrote a letter to the superintendent, criticizing some of the school board's policies.[86] The superintendent then told Bill Lewis to "muzzle" his wife.[87]

Mrs. Lewis subsequently was notified that she would be transferred, and Mr. Lewis requested a school board meeting to protest the proposed transfer. At the meeting, Bill Lewis and others expressed their concern about the lack of "common sense" in the transfer decision, accusing the superintendent of being unprofessional.[88] One and one-half months later, Mr. Lewis received word that his contract as principal would not be renewed for the upcoming school year. He then filed suit.

The district court set aside a jury verdict for the plaintiff, and ruled that as a matter of law Lewis's comments were not entitled to first amendment protection. The Eighth Circuit Court of Appeals vacated the judgment notwithstanding the verdict and remanded with instructions to enter judgment for the plaintiff.[89]

Had the court employed a motive test, a strong case could have been made that Lewis's speech was not of public concern. He was speaking on a topic of keen interest to him—the impending transfer of his wife. Furthermore, the transfer was a subject of internal school policy; it involved an employment decision which had been made by the school board.

The court, however, disregarded the motive factor. "Because the teachers and coaches in a public school district can deeply impact children's lives, school personnel assignments obviously are of considera-

83. Although, as we shall see, this is a double-edged sword, by making her accusations public, the factors under the *Pickering* balance begin to weight more heavily against the speaker.
84. Lewis v. Harrison School Dist. No. 1, 805 F.2d 310 (8th Cir. 1986).
85. *Id.*
86. *Id.* at 311.
87. *Id.* at 312.
88. *Id.*
89. *Id.* at 311.

ble concern to those children, their parents, and others in the community."[90] Lewis's comments, then, were held to be of public concern merely on an analysis of their content.

Additional Eighth Circuit cases use the same type of broad language seen in *Lewis*. "The questions of how we teach the young, what we teach them, and the environment in which we teach them are of the most central concern to every community in the nation."[91] As one commentator has noted, "the Eighth Circuit has continued to take a broad view of what constitutes speech dealing with matters of public concern.... It has declined to apply the form and context analysis and hold that speech of public interest in content was not of 'public concern.' "[92]

The variety of approaches and results under the public concern test points out a major flaw in its use. Teachers who wish to speak out on matters they consider important have no way of knowing whether the comments they make will be held to be of public concern. Indeed, judges familiar with these concepts have differing opinions regarding the same or similar fact patterns. As the Supreme Court noted in *Keyishian v. Board of Regents*:[93] "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone. . . .' "[94] Because the content, form, and context analysis is not amenable to predictability, it seems reasonable that teachers would avoid expressing themselves in close cases. This "chilling effect" has been noted with disapproval in other first amendment contexts.

To avoid this chilling effect, a test that is capable of uniform application and that lends itself to predictable results must be developed. This author seriously doubts whether such a public concern test can be developed. An alternative is to provide a public concern test with a "zone of comfort," so that some comments, which under the present *Connick* test are of private concern, would nonetheless be constitutionally protected. Employing this protective device would make it easier for the teacher, calculating his chances on being terminated for arguably protected activity, to decide to go ahead with the conduct. Such a protective device might be provided by placing the burden on the school board to prove, by clear and convincing evidence, that the comment was *not* of public concern.

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90. *Id.* at 314. The court then went on to compare the facts of *Lewis* with those of Cox v. Dardanelle Public School Dist., 790 F.2d 668 (8th Cir. 1986). In *Cox*, the court held that a teacher's grievance with her principal's policies constituted a matter of public concern because they dealt with the faculty's ability to discharge the public function of education. *Id.* at 673.

91. Cox v. Dardanelle Public School Dist., 790 F.2d 668, 673 (8th Cir. 1986).

92. Note, *supra* note 60, at 613.

93. 385 U.S. 589 (1966).

94. *Id.* at 604 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

Even less drastic alternatives could strengthen the test somewhat. Answering crucial questions regarding the application of the content, form, and context test would be a start. How strongly is each factor to be weighed? Can content alone be determinative of public concern? How do the form and context factors apply in cases in which the teacher airs her concerns in a one-on-one situation? Answering these and other important questions that exist with regard to the *Connick* test may make the test more palatable.

As mentioned previously, if a court determines that the content, form, and context of the speech call for a conclusion that it is not of public concern, no further analysis need be done. The teacher, absent most unusual circumstances, will not be constitutionally protected. When the speech is deemed to be of public concern, the court must go on to the second stage of the *Pickering-Connick* test—balancing.

B. *Pickering* Balancing Test

The fashion in which courts apply the balancing test is as unpredictable as the application of the public concern test. The first job of any court in seeking to balance the respective interests of the school and the teacher is to identify factors which will play significant roles in the balance. The *Pickering* court provided some guidance by outlining some of the factors which should be considered.[95] These factors have been restated and enumerated as follows:

1) the need for harmony in the workplace;
2) the need for maintenance of close working relationships between employees and supervisors;
3) the time, place, and manner of the speech;
4) the context of the speech;
5) the degree to which the speech addresses matters of public interest;
6) the degree to which the speech impeded the employee's ability to perform her duties.[96]

Note that some of the factors listed, such as context and public interest, seem to mesh with the analysis under the public concern test. Perhaps this contributed to the previously mentioned confusion some courts encountered when attempting to apply the combined tests. For example, two Eighth Circuit opinions completely disregard the public concern test, applying only a *Pickering* analysis with strong focus on the public interest factor.[97] In both cases, a strong argument can be made that the speech at issue indeed involved matters of public concern, but the court never performed the necessary analysis to make that determination.

95. Pickering v. Board of Educ., 391 U.S. 563, 569-71 (1968).
96. Hamer v. Brown, 831 F.2d 1398, 1402 (8th Cir. 1987).
97. Raposa v. Meade School Dist. 46-1, 790 F.2d 1349 (8th Cir. 1986); Bowman v. Pulaski County Special School Dist., 723 F.2d 640 (8th Cir. 1983).

In the larger scheme, the balancing test always will involve a focus on whether the teacher's right to speak on matters of public concern is outweighed by the school's asserted interest in controlling the workplace. The degree to which the school environment must be disrupted before school board action will be constitutionally permissible is quite uncertain. The Court in *Connick* appeared to allow a great deal of employer discretion in the determination of when to take action. "[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office . . . is manifest. . . ."[98]

When criticisms are leveled directly at a co-worker or supervisor, the factor concerning the need for close working relationships becomes paramount. For example, in *Cox v. Dardanelle Public School District*,[99] the court considered the constitutionality of a teacher's discharge for comments critical of the principal's administration of the educational process.[100] After finding that Cox's speech dealt with matters of public concern, the court went on to analyze the *Pickering* factors. Since a majority of the teachers agreed with Cox's comments, the court concluded that there had been no disharmony between the teachers caused by the criticisms. As to the relationship between Cox and the principal, the court commented:

> Although we do not intend to minimize the importance of the teacher-principal relationship, it is not a 'relationship between superior and subordinate . . . of such a personal and intimate nature that certain forms of [ ] criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them. . . .' The teacher-principal relationship is not of such a personal and intimate nature that teachers must be precluded from filing responsible grievances.[101]

Thus, as long as the teacher's comments satisfy the public concern test, *Cox* might be used to provide protection to teacher comments critical of her own principal.

A teacher will frequently lose at the balancing stage if a court finds that the expression at issue hindered his ability to perform his job. An interesting example is provided by *Patterson v. Masem*.[102] In *Patterson*, a teacher claimed that she was not appointed supervisor of English and social studies because of her objections to the performance of the play "You Can't Take it With You."[103] Ms. Patterson had been given the task of mediating a dispute over racial inequities in the play's production. Instead of calming the situation, however, Patter-

98. Connick v. Myers, 461 U.S. 138, 152 (1983). The Court did caution, however, that if speech is shown to be of strong public concern, a more substantial showing of disruption might be required. *Id.*

99. 790 F.2d 668 (8th Cir. 1986).

100. *Id.* at 671.

101. *Id.* at 674 (quoting Pickering v. Board of Educ., 391 U.S. 563, 570 n.3 (1968)(citations omitted)).

102. 774 F.2d 251 (8th Cir. 1985).

103. *Id.* at 253.

son found herself in agreement with minorities who felt they were being discriminated against. Patterson's requests that the play be cancelled were categorized by the superintendent as "neither appropriate nor in good faith."[104]

The court concluded that Patterson's first amendment claim was without merit.

> Here a play was selected by the school district (or by the drama teacher, to whom such authority had been delegated); it was Dr. Patterson's duty to respect the district's choice. While her conduct did indeed address a matter of public concern, it also interfered with the proper performance of her job.[105]

The unique character of Patterson's duty with respect to the play—mediation—obviously had some impact on the court's decision. She was given an assignment that, in the court's view, required her to stifle her own opinions. Because she "failed" to perform this task, the action taken against her was not constitutionally unsound.

Because of the variety of fact patterns encountered by courts, and because of the number of factors which may be weighted differently in each court's decision, it is simply impossible to predict how a court will view any given case. As a result, the balancing test suffers the same infirmity as the public concern test; teachers seeking to speak out, even on issues of clear public concern, have no guarantee against possible termination as a result of their speaking.

The combination of the *Pickering-Connick* tests creates an even more disturbing catch-22 problem. In order to be of public concern, the speech must, under some formulations, deal with the manner in which the institution discharges its duties. Speech critical of the functioning of the institution, however, may not fare well under the balancing test. Such speech will undoubtedly create a certain amount of tension and conflict within the institution—tension that the employer will want to extricate.

Scholars have been critical of the use of balancing tests in constitutional decision making.[106] Even the Fifth Circuit Court of Appeals has derogated the *Pickering* balancing test, saying that the test "inevitably chills some protected activity."[107] Given the seemingly inherent flaws of the test, it may be wise to consider dropping it altogether, leaving the *Connick* test as the only hurdle that must be cleared to establish a first amendment violation. This would leave teachers free to comment on matters of public concern without fear of retaliatory discharge (assuming, of course, that the statements were not made with

104. *Id.*
105. *Id.* at 257.
106. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). Emerson criticized balancing tests because, among other reasons, they give "no real meaning to the first amendment" and they do not afford "the individual adequate advance notice of the rights to be protected." *Id.* at 912.
107. Gonzales v. Benavides, 774 F.2d 1295, 1303 (5th Cir. 1985).

actual malice). Thus, the public school teacher would be as free from state sanction as the private citizen.

For now, however, the system remains unpredictable. How best to deal with this unpredictability is a matter faced by litigators and educators every working day. It is also a problem that should, but unfortunately has not, confronted a third group of professionals deeply concerned with the success of the education system: the lobbyist.

IV. LESSONS FOR THE PROFESSIONALS

The lesson for the educator is simple and short: Until the system changes, there is simply no way to tell whether certain speech will be protected by the Constitution. If a teacher chooses to speak, she should consider not only the content of her expression, but also the form and context in which she speaks. She should seek to minimize any perceived "personal interest" she might have in the subject of communication. All of these may help the teacher clear the public concern issue, making constitutional protection of her statements possible.

Perhaps it also may be wise for a public educator to consider a "mitigation of damages" approach to expression concerning his employment. If disruption of the educational process can be kept at a minimum, the speech may weigh heavily when it comes to the *Pickering* balance. Above all, the educator should consider the expression's potential impact on his job performance (both for constitutional and educational reasons). If the speech impedes the teacher's ability to perform his assigned duty, it almost certainly will be unprotected.

Litigators representing teachers in employment termination cases face some of the same problems. Characterizing a case factually as something much more than an employee dispute is extremely important. While the public concern test and the balancing test are matters of law, a court may be required to consider the factual findings of a jury when rendering its decision on those issues.

Litigators also should consider whether they want to bring these actions in state court, assuming the state has a statute similar to section 1983. While the foregoing analysis controls when a teacher claims she was fired in violation of the United States Constitution, state constitutional analysis need not be so restrictive. Many states have only begun to brave the waters of independent constitutional analysis. For litigators seeking to use this tool, the unfortunate fact is that the text of most state constitutional free speech clauses are similar or identical to the text of the first amendment. When there are few textual distinctions between the corresponding constitutional guarantees, many courts will simply choose to adopt federal reasoning to determine the

meaning of their own state constitution.[108]

Some state constitutions, however, have free speech clauses that seem to require independent analysis to derive their meaning. For example, article I, section 5, of the Nebraska Constitution provides: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense."[109] When a state constitutional provision differs so markedly from its federal counterpart, a strong case can be made that a state court should not feel bound by a more restrictive interpretation of the corresponding federal right.[110]

Lobbyists and state educational associations typically carry a good deal of political power. Some of these associations may want to consider drafting a statute which would provide greater protection to the public school teacher fired or demoted for expressive reasons. Such a statute could incorporate the previously mentioned suggestion that teachers be absolutely protected for any speech addressing issues of public concern.

V. CONCLUSION

Rights thought sacred by the first amendment are, under the current *Pickering-Connick* test, in jeopardy. Teachers are much more susceptible to government action in violation of the Constitution because they, unlike others, rely on the government for a monthly paycheck. Instead of recognizing the vast influence that governmental action can have on a teacher's communicative activity, courts have chosen to vindicate the rights of the government as employer. Tipping the scales in this fashion assures that our most valuable educational resource, our teachers, will be muzzled.

Change, which keeps our school system vital, can be fostered only by encouraging free expression among its professionals. Only when professional educators are permitted to speak without fear of sanction will our school system benefit from the best, brightest, and most innovative thinking. When we unmuzzle our educators, we release our potential.

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108. *See, e.g.*, State v. Havlat, 222 Neb. 554, 385 N.W.2d 436 (1986).
109. NEB. CONST. art. I, § 5.
110. *See Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).