A PUBLIC CONCERN: PROTECTING WHISTLEBLOWERS UNDER THE FIRST AMENDMENT

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The United States has just witnessed an impeachment debate which may have far-reaching ramifications for our democratic institutions. These hostilities began with an anonymous whistleblower complaint from a government employee, disclosing what he or she believed were illegal activities directed by President Donald J. Trump. Ever since, discussion of whistleblowers has taken on greater salience in the news cycle.

Today, there are a number of whistleblower statutes that protect employees who disclose knowledge of their employer's illicit activities from workplace retaliation. Although whistleblowing is not unique to government workers, these individuals have an added layer of protection afforded to them by the First Amendment. Free speech protections for public employees, first recognized in the U.S. Supreme Court's 1968 decision in Pickering v. Board of Education*, have since developed an expansive body of case law. Vague terminology and legal standards have led to inconsistent rulings among courts. This Note argues that greater consistency in the treatment of whistleblowers is possible by refocusing on the key underlying principle articulated in* Pickering*: the public's right to hear information that can add to public discourse. This Note proposes that the existing framework should be modified so as not to categorically preclude free speech protection for expressions made "as an employee."*

INTRODUCTION 1544

I. THE STRUGGLE TO PROTECT WHISTLEBLOWERS 1548

A. Public and Private Employees 1549
B. Early Interpretations of Free Speech 1551
C. Pickering *and Whistleblowers* 1552
D. The Pickering *Standard Evolves* 1554
E. Deciphering Matters of Public Concern 1556

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1. Content 1557
a. Political Speech 1558
b. Academic Speech 1559
c. Personal Speech 1560
d. Other Types of Speech 1561
2. Form 1564
3. Context 1565
II. THE COMPETING INTERESTS AT PLAY 1566
A. Employee and Employer Interests 1566
B. The Connick *Factors* 1567
C. Garcetti*'s Citizen Speech Requirement* 1568
D. The Need for Constitutional Protections 1569
III. BRIDGING THE DIVIDE 1570
A. Understanding Connick 1570
B. Reconciling Garcetti 1571
C. The Continuing Need for Pickering 1573
CONCLUSION 1573

INTRODUCTION

> I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost.
>
> —Justice Hugo Black[1]

More than twenty-two million public employees work for federal, state, or local governments in the United States.[2] The modern administrative bureaucracy has grown so rapidly and become so expansive that it is difficult to discern how many federal agencies exist; the answer depends largely on who you ask.[3] Indeed, the government is a sprawling enterprise that employs individuals from nearly all walks of life: doctors, attorneys, scientists, teachers, members of the armed services, and law enforcement officers are just a few.[4]

Some employees who disclose unethical or illegal activities at work to their "supervisors, the public, the media, or the government" are referred to

1. Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring).

2. *Employment Projections: Employment by Major Industry Sector*, U.S. BUREAU LAB. STAT., https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm [https://perma.cc/5ERM-RKCR] (last updated Sept. 4, 2019).

3. Clyde Wayne Crews, *Nobody Knows How Many Federal Agencies Exist*, COMPETITIVE ENTERPRISE INST. (Aug. 26, 2015), https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist [https://perma.cc/CWU2-SWC8].

4. *See A–Z Index of U.S. Government Departments and Agencies*, USA.GOV, https://www.usa.gov/federal-agencies [https://perma.cc/ASX4-JCPL] (last visited Feb. 14, 2020).

as "whistleblowers."[5] Edward Snowden is a current example, but whistleblowers have been essential to public discourse in the United States since the nation's infancy.[6] American history is flush with examples of individuals who brought about sweeping changes by disclosing inside knowledge of illicit activity, even before the term "whistleblower" entered the public lexicon.[7] Going back as far as 1777, American sailors who revealed that the commodore of the United States Navy had tortured British captives would be considered whistleblowers nowadays.[8] More recently, Dr. Jeffrey Wigand, a former tobacco company executive, was integral in exposing the industry's deception of regulators concerning the dangers of tobacco products.[9]

With the 2020 presidential election looming and the country still reeling from an impeachment debate triggered by an anonymous whistleblower complaint, the ability of government whistleblowers to influence the public zeitgeist cannot be overstated.[10] Public sector employees often possess intimate knowledge of the inner workings of government, which enables them to act as society's bulwark against governmental corruption or misconduct.[11] Senator Charles Grassley, former chairman of the Senate Judiciary Committee and coauthor of the Whistleblower Protection Act of 1989,[12] has argued that whistleblowers are crucial for congressional oversight, which allows Congress to legislate more effectively.[13]

However, whistleblowers may face severe consequences such as termination, reprimand, hostile work environments, or other retaliatory employment practices because such disclosures can negatively affect their superiors.[14] Fear of these consequences can silence dissent, thereby allowing illegal and unethical conduct to thrive.[15] According to Merit System

5. Joseph O. Oluwole, *Eras in Public Employment–Free Speech Jurisprudence*, 32 VT. L. REV. 319, 319 (2007).

6. *See* Stephen M. Kohn, Opinion, *The Whistle-Blowers of 1777*, N.Y. TIMES (June 12, 2011), https://www.nytimes.com/2011/06/13/opinion/13kohn.html [https://perma.cc/S4XD-VNVH].

7. *See* ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 4–5 (2012).

8. *Id.* at 4.

9. Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 6 (2017).

10. *See* Letter from Anonymous Whistleblower to Senator Richard Burr, Chairman of Senate Comm. on Intelligence and Representative Adam Schiff, Chairman of the House Permanent Select Comm. on Intelligence (Aug. 12, 2019), https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf [https://perma.cc/WC2P-9KSU].

11. *See* Lane v. Franks, 134 S. Ct. 2369, 2380 (2014).

12. Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 and 22 U.S.C.).

13. Chuck Grassley, *Chuck Grassley: We Need Whistleblowers for Good Government*, IOWA STARTING LINE (Sept. 26, 2019, 12:29 PM), https://iowastartingline.com/2019/09/26/chuck-grassley-we-need-whistleblowers-for-good-government/ [https://perma.cc/TBM5-WYRL].

14. Oluwole, *supra* note 5, at 319.

15. *See Lane*, 134 S. Ct. at 2380 (explaining that employees are "torn" between an obligation to testify against their employer and a desire to avoid retaliation).

Protection Board studies from 1980 and 1983, conducted before the passage of the Whistleblower Protection Act, a substantial portion of the federal employees with knowledge of government waste, fraud, and abuse chose not to report it.[16] Many cited fear of reprisal as the reason that they did not come forward.[17] Aside from direct retaliation, other forces such as loyalty towards employers, damage to work relationships, and stunted career opportunities can deter whistleblowers.[18]

Recognizing the need for transparency in all employment sectors, various statutory whistleblower provisions provide protection from employment consequences and incentivize employees to come forward.[19] Such measures are especially important when those in power may attempt to silence whistleblowers for their own gain.[20] As Senator Grassley put it, without adequate protections, "the whistleblower's only hope is like the desperate Charge of the Light Brigade, and there are rarely any survivors."[21] The numerous whistleblower provisions in effect today are often highly specialized and can vary drastically depending on the field of employment and jurisdiction.[22]

Unlike private sector employees who must rely on the shifting sands of whistleblower statutes to provide some cover, public employees can also take advantage of the First Amendment's free speech protections.[23] Because the Bill of Rights applies only to government actions, the First Amendment restrains a public employer's ability to discipline employees for their expressions.[24] Beginning with its landmark decision in *Pickering v. Board of Education*,[25] the U.S. Supreme Court has established a balancing test for determining if the interests in allowing public sector employees to make

16. *Whistleblower Protection Act of 1987: Hearing on S. 508 Before the Subcomm. on Fed. Servs., Post Office & Civil Serv. of the S. Comm. on Governmental Affairs*, 100th Cong. 3 (1987) [hereinafter *Hearing on the Whistleblower Protection Act*] (statement of Sen. Carl Levin, Member, S. Comm. on Governmental Affairs).

17. *Id.*

18. Menell, *supra* note 9, at 40–41.

19. Jason Zuckerman, *SEC Whistleblower Protections: Dodd-Frank and Sarbanes Oxley Prohibitions Against Retaliation*, NAT'L L. REV. (Aug. 21, 2018), https://www.natlawreview.com/article/sec-whistleblower-protections-dodd-frank-and-sarbanes-oxley-prohibitions-against [https://perma.cc/BP69-6CX9]; *see, e.g.*, 5 U.S.C. § 2302(b)(8)–(9) (2018); 5 U.S.C. § 7211 (2018); 31 U.S.C. § 3730(d) (2018).

20. *See Hearing on the Whistleblower Protection Act*, *supra* note 16, at 6 (statement of Sen. Charles Grassley) (noting that the Whistleblower Protection Act was much needed considering "the Administration [was] seemingly engaged in a multiple thrust attack on all fronts against whistleblowing").

21. *Id.*

22. Garcetti v. Ceballos, 547 U.S. 410, 440–41 (2006) (Souter, J., dissenting); *see* William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. NAT'L ASS'N ADMIN. L. JUDGES 43, 48–55 (2006) (listing the whistleblower provisions that are administered by the Department of Labor).

23. *See* U.S CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

24. Daniel L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, FIRST REP., Dec. 2002, at 1, 2.

25. 391 U.S. 563 (1968).

certain statements outweigh the legitimate interests of their employers in maintaining operational efficiency.[26] In *Pickering*, the Court's balancing of the competing interests favored the employee.[27] Critically, the interest in allowing the employee to speak was considered "as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[28]

While *Pickering* placed great value on the role of whistleblowing in preserving our most important democratic values, subsequent decisions shifted the test in favor of employers.[29] In *Connick v. Myers*,[30] the Court modified *Pickering* by requiring that an employee's speech touch upon a "matter of public concern" before scrutinizing his or her employer's actions.[31] Rejecting the basic premise that it was sufficient for speech to fall "generally within the realm of matters of public concern" to engage in balancing the competing interests,[32] *Connick* required preliminary examination of the "content, form, and context of a given statement."[33] Because the term "matter of public concern" is a chameleon with as many meanings as there are people, lower courts have taken divergent, "sometimes irreconcilable," approaches towards determining what qualifies.[34]

Afterwards, in *Garcetti v. Ceballos*,[35] the Court mandated yet another threshold determination by requiring that an employee speak "as a citizen" rather than as an "employee" to receive First Amendment protection.[36] Over the objections of three dissents, the majority held that employee speech was unprotectable when spoken "pursuant to their professional duties."[37] The decision remains highly controversial.[38]

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26. *Id.* at 568. *Pickering* is the "starting point" of any legal analysis related to a public employee's right to criticize government or agency policy. ROBERT M. O'NEIL, THE RIGHTS OF PUBLIC EMPLOYEES 34 (Norman Dorsen ed., 2d ed. 1993).

27. *Pickering*, 391 U.S. at 574–75.

28. City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam).

29. Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 125 (1996); Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 909 (2005).

30. 461 U.S. 138 (1983).

31. *Id.* at 146.

32. Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L. REV. 43, 48 (1988).

33. *Connick*, 461 U.S. at 147–48.

34. Ma, *supra* note 29, at 132. Even results in the same court, decided in close proximity, can seem inconsistent. *Compare* Butler v. Bd. of Cty. Comm'rs, 920 F.3d 651, 663 (10th Cir. 2019) (holding that speech made while testifying as a character witness in a child custody hearing did not relate to a matter of public concern), *with* Bailey v. Indep. Sch. Dist. No. 69, 896 F.3d 1176, 1181–82 (10th Cir. 2018) (finding that letters sent on behalf of a criminal defendant prior to his sentencing did touch on matters of public concern).

35. 547 U.S. 410 (2006).

36. *Id.* at 418.

37. *Id.* at 426.

38. *See* John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in* Lane v. Franks, 34 HOFSTRA LAB. & EMP. L.J. 243, 246 (2017) (arguing that "*Garcetti* should be overruled forthwith"); Elizabeth M. Ellis, Note, Garcetti v. Ceballos*:*

Despite these employer-friendly alterations, *Pickering*'s focus on society's interest in hearing from public employees on matters of grave importance resonates with the justifications offered for whistleblower protections in general.[39] Although *Pickering* covers far more speech than whistleblowing,[40] the interest in improving public discourse elevated public employee speech into the echelons of protected expression.[41] Accordingly, *Connick*'s "public concern" test should be understood primarily as protecting speech that furthers this public interest.[42] Viewed through this lens, *Connick* would predominantly shield speech with political[43] or academic[44] content.

To better serve this purpose, modifying the current *Pickering* framework may be necessary.[45] In particular, *Garcetti*'s requirement to speak "as a citizen" is a major obstacle for whistleblowers to overcome.[46] As Justice David Souter recognized, whether or not an employee speaks in his or her official capacity need not be dispositive.[47] Unlike his suggestion to include the *Garcetti* inquiry as part of *Pickering*'s balancing of interests, another possibility would be to consider it in tandem with *Connick*'s "public concern" test.[48]

Part I of this Note discusses how courts analyze public employee free speech claims with an emphasis on *Connick*'s public concern inquiry, the ideological core of the standard. Part II explains the difficulties of finding an appropriate balance between protecting whistleblowers and governmental autonomy. Finally, Part III will attempt to reinterpret the *Pickering* standard to strike the appropriate balance.

I. THE STRUGGLE TO PROTECT WHISTLEBLOWERS

Threats of employment consequences are powerful deterrents against employees speaking out with damaging information.[49] As previously

Public Employees Left to Decide "Your Conscience or Your Job," 41 IND. L. REV. 187, 208–13 (2008) (elaborating on various policy concerns that *Garcetti* may inhibit).

39. *Compare* Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968), *with Hearing on the Whistleblower Protection Act*, *supra* note 16, at 6 (statement of Sen. Charles Grassley).

40. *See, e.g.*, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 477 (1995) (nullifying a ban on public employees accepting honoraria as compensation for their expressive works); Rankin v. McPherson, 483 U.S. 378, 381–82 (1987) (involving statements expressing negative opinions about the president).

41. Before this, courts had accepted that public employees surrendered their right to speak freely as a condition of employment. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

42. *See infra* Part III.A.

43. *See infra* Part I.E.1.a.

44. *See infra* Part I.E.1.b.

45. *See infra* Part III.B

46. *See* Oluwole, *supra* note 5, at 349; Rumel, *supra* note 38, at 244–46; Darryn Cathryn Beckstrom, Note, *Reconciling the Public Employee Speech Doctrine and Academic Speech After* Garcetti v. Ceballos, 94 MINN. L. REV. 1202, 1223 (2010).

47. Garcetti v. Ceballos, 547 U.S. 410, 430 (2006) (Souter, J., dissenting).

48. *See infra* Part III.B.

49. Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 9 (1999).

mentioned, the First Amendment's prohibition on actions "abridging" freedom of expression provides public employees with an extra measure of protection as compared with private sector employees.[50]

Part I discusses the necessary legal background concerning the development of constitutional whistleblower protections. Part I.A briefly distinguishes public and private employment. Part I.B addresses some of the judiciary's initial interpretations of free speech. Part I.C explains the Supreme Court's public employee free speech standard and the interests underpinning the *Pickering* decision. Part I.D traces the evolution of the modern standard used to analyze these claims. Finally, Part I.E elaborates on the "matter of public concern" prong articulated in *Connick*.

A. Public and Private Employees

Throughout U.S. history, a crucial aspect of economic liberty has been the right to contract the terms of one's own employment.[51] Granting individuals the means to set out the terms of their own obligations through contracts is credited as an essential element of modern, market-based economies.[52] Prior to the Great Depression, freedom of contract was considered so sacred that the Supreme Court invoked it to strike down New York's attempt to regulate working hours for bakers in the now infamous *Lochner v. New York*[53] decision.[54] Nevertheless, while a lack of government oversight in the employer-employee relationship may provide some freedom, the typical power imbalance between the parties can leave the individual employee with little room to negotiate.[55]

The *Lochner* era's abhorrence for any government intrusion into employment arrangements has subsided, but freedom of contract remains deeply ingrained in American labor relations.[56] Even today, private employment relationships are presumed to be "at will" in nearly every American jurisdiction.[57] Under this arrangement, employers are free to

50. U.S. CONST. amend. I. In addition to federal and state whistleblower statutes, many jurisdictions now recognize a tort for "wrongful discharge in violation of public policy." RESTATEMENT OF EMP'T LAW § 5.01 (AM. LAW INST. 2015). For a more in-depth discussion, see generally Joseph R. Grodin et al., *Working Group on Chapter 4 of the Proposed Restatement of Employment Law: The Tort of Wrongful Discipline in Violation of Public Policy*, 13 EMP. RTS. & EMP. POL'Y J. 159 (2009).

51. Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1251 (1967).

52. *Id.*; David. P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 52 (2013).

53. 198 U.S. 45 (1905).

54. *Id.* at 57–58.

55. *See* Tobriner & Grodin, *supra* note 51, at 1252.

56. Weber, *supra* note 52, at 52.

57. *At-Will Employment Overview*, NAT'L CONF. ST. LEGISLATURES (Apr. 15, 2008), http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/SF2X-CVYV]. The exception is Montana, which requires "good cause" to discharge an employee. *See* MONT. CODE ANN. § 39-2-904(b) (2020).

terminate employment for any reason except those made expressly illegal.[58] By contrast, public sector employees can generally only be disciplined for adequate "cause."[59]

Since the New Deal, public and private employment have also seen divergent developments in other respects.[60] It is still a crime for federal employees to strike.[61] Even allowing public employees to unionize continues to be controversial.[62] Giving unions disproportionate influence over public policy is seen as undemocratic,[63] and some believe that unionization can impede government functioning in time-sensitive areas like national security.[64] Compensation rates between public and private sectors also differ because public employee salaries are tied to legislative action while the private sector is subject only to the market's whims, for better or worse.[65] As a result, ever-changing policy initiatives can have drastic effects on the workers charged with implementing those policies.[66] Public employees often become hostages of the divisive political process.[67]

In exchange, government jobs have traditionally offered superior retirement benefits and job security.[68] Furthermore, the civil service systems prevent managers from arbitrarily exercising their power to discipline employees.[69] The Bill of Rights, a restraint on the government, does not apply to private entities.[70]

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58. Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co., 112 P. 886, 888 (Cal. 1910). Congress has passed legislation prohibiting discharge on account of the individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2018).

59. 5 U.S.C. § 7513(a) (2018); Christopher Raines, *Public Sector vs. Private Sector Employee Rights*, CHRON (Mar. 6, 2019), https://smallbusiness.chron.com/private-sector-vs-public-sector-employee-rights-47957.html [https://perma.cc/74JJ-4RYN].

60. The National Labor Relations Act specifically excluded "the United States . . . or any State or political subdivision thereof" from its definition of "employer." 29 U.S.C. § 152 (2018).

61. 18 U.S.C. § 1918(3) (2018).

62. Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1369 (2009).

63. *Id.* at 1372; *see* Commonwealth v. Cty. Bd., 232 S.E.2d 30, 41 (Va. 1977) (holding that a local government was powerless to enter into collective bargaining agreements).

64. Malin, *supra* note 62, at 1375.

65. *See* Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1117 (1969).

66. *Compare* Exec. Order No. 12,871, 3 C.F.R. § 655 (1993), *reprinted as amended in* 5 U.S.C. § 7101 (2018) (resolving to improve the efficiency of government agencies), *with* Exec. Order No. 13,203, 3 C.F.R. § 781 (2002), *reprinted as amended in* 5 U.S.C. § 7101 (2018) (revoking Executive Order 12,871).

67. *See, e.g.*, Jonathan Allen, *Will Trump Shut Down the Government to Fight Impeachment?*, NBC NEWS (Oct. 23, 2019), https://www.nbcnews.com/politics/politics-news/will-trump-shut-down-government-fight-impeachment-n1070106 [https://perma.cc/9QLR-44XR].

68. These advantages may erode as the private sector responds to market demands. *See* Wellington & Winter, *supra* note 65, at 1117.

69. *Id.*

70. The Bill of Rights secures the rights of U.S. citizens against government actions. *See* U.S. CONST. amends. I–X. These protections did not apply to state governments until passage of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV.

B. Early Interpretations of Free Speech

Free speech, a pillar of modern democracy, is among the most enduring contributions of the Constitution's framers.[71] Notwithstanding its venerable lineage, the scope and purpose of free speech have been constant sources of debate among jurists.[72] The right to free speech has never been absolute or unrestrained.[73] Like every fundamental right, sufficiently compelling government interests can overcome an individual's freedom of expression.[74] "The question in every case is whether the words used are used in such circumstances . . . that they will bring about the substantive evils that Congress has a right to prevent."[75] Certain exceptions lack First Amendment protection entirely, such as obscenities,[76] "fighting" words,[77] and intentional falsehoods.[78] Such expressions "are of such slight social value" that any benefits derived from them are "outweighed by the social interest in order and morality."[79]

Limitations on free speech for public employees were especially evident.[80] Although the government was restricted in its ability to abridge freedom of expression when acting as a sovereign, the same restrictions were not applicable when the government acted as an employer.[81] For decades, courts

71. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (recognizing the right to "freedom of opinion and expression").

72. *See, e.g.*, Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced."); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("The only difference between expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion . . . ."); Schenck v. United States, 249 U.S. 47, 52 (1919) (articulating the "clear and present danger" standard). *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971) (arguing for a more limited view of free speech that covers only "explicitly political" speech).

73. *See Schenck*, 249 U.S. at 52 (finding that a statute penalizing obstruction of the draft was constitutional although there were free speech concerns).

74. *See, e.g.*, *id.* ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); *see also* Roe v. Wade, 410 U.S. 113, 164–65 (1973) (creating a trimester framework to balance the competing interests of pregnant mothers and the state); Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (authorizing the internment of individuals with Japanese ancestry for national security purposes), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

75. *Schenck*, 249 U.S. at 52.

76. Roth v. United States, 354 U.S. 476, 485 (1957). *But see* Cohen v. California, 403 U.S. 15, 23 (1971) (overturning a conviction for disturbing the peace when a Vietnam War protestor wore a shirt containing an expletive while inside a courthouse).

77. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

78. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

79. *Roth*, 354 U.S. at 485 (quoting *Chaplinsky*, 315 U.S. at 572).

80. Justice Oliver Wendell Holmes's holding that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," was long the authoritative view on the subject. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

81. *See id.*; *see also* Waters v. Churchill, 511 U.S. 661, 671 (1994) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.").

believed that a public employer was free to manage workers as it pleased and could "impose any reasonable condition upon holding offices within its control."[82]

C. Pickering *and Whistleblowers*

Pickering v. Board of Education marked a seismic shift in how courts evaluate public employees' free speech claims.[83] Marvin Pickering, a public school teacher, was dismissed after he criticized the school board's proposal to raise taxes in a letter sent to a local newspaper editor.[84] Although many of his colleagues agreed with him, most did not publicly show support out of fear of losing their jobs.[85] Lower courts ruled in favor of the school board, but the Supreme Court reversed, finding that the letter was protected speech.[86] Justice Thurgood Marshall's majority opinion was rooted in the public's need to have "free and unhindered debate on matters of public importance."[87] He recognized that the public benefits substantially when those most knowledgeable about governmental institutions are able to speak freely about them.[88]

Perhaps cognizant that the Court was breaking with decades of precedent, Justice Marshall did not believe it was "either appropriate or feasible to attempt to lay down a general standard" for all public employee speech claims given the "enormous variety of fact situations" possible.[89] However, he did determine that the crux of the issue was to balance the interests of the employee, "as a citizen, in commenting upon matters of public concern" with the state's interests in efficiently performing public services.[90] To do so, courts should evaluate factors such as the working relationship between the parties, the speech's negative effects on the employer, and the nature of the issue on which the employee spoke.[91] Subsequent decisions would clarify the balancing test further.[92]

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82. *McAuliffe*, 29 N.E. at 518.
83. *See* O'NEIL, *supra* note 26, at 33–34; VAUGHN, *supra* note 7, at 5.
84. Pickering v. Bd. of Educ., 391 U.S. 563, 566 (1968).
85. *See* Hudson, *supra* note 24, at 9.
86. *Pickering*, 391 U.S. at 574–75.
87. *Id.* at 573.
88. *See id.* at 572.
89. *Id.* at 569.
90. *Id.* at 568. Possible employer rationales for restricting speech include the risks of increased publicity impeding operations, harm to staff morale, damage to agency credibility, compromising the employer's neutrality, or fear of releasing sensitive information. O'NEIL, *supra* note 26, at 34.
91. Allred, *supra* note 32, at 45; *see also Pickering*, 391 U.S. at 570–71.
92. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979) (holding that expressing views privately does not forfeit constitutional protection); Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–86 (1977) (establishing a defense whereby an employer can show that they would have made the same decision regardless of the contested speech); Perry v. Sindermann, 408 U.S. 593, 598 (1972) (finding that refusing renewal of a teacher's employment based on testimony before a legislative committee could be unconstitutional).

The nine Supreme Court justices agreed on the result, but Justice Byron White expressed his dissatisfaction with the new standard in a partial dissent.[93] He saw that the majority drew on elements of defamation law taken from *New York Times Co. v. Sullivan*,[94] which established that statements on "matters of public concern" could not be subject to defamation claims unless the plaintiff could show actual malice.[95] Thus, Justice White argued that unless an employee had been "knowingly or recklessly false" in her statements, it was unnecessary to consider any harm to the employer.[96] The majority's balancing test may have been a concession that, "as an employer," the state's interests in regulating employees are different from its interests in regulating speech more generally.[97]

Emanating from the *Pickering* Court's decision are two essential values that the First Amendment protects: the individual employee's right to speak[98] and the public's right to hear valuable information on important issues.[99] Until then, the individual's free speech rights were insufficient because the prevailing view was that most employees agreed to suspend their constitutional right of free speech "by the implied terms of [their] contract."[100] *Pickering*'s recognition of the public's right to "free and unhindered debate on matters of public importance" allowed the Court to enter uncharted territory.[101]

Pickering was the first time that the Court recognized constitutional protections for government whistleblowers.[102] Congress has also enacted various statutory measures to protect whistleblowers based on the public's need to hear from industry insiders on important issues like governmental malfeasance.[103] Like private sector employees, public employees alleging governmental misconduct can turn to these statutes.[104]

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93. *Pickering*, 391 U.S. at 582–84 (White, J., concurring in part and dissenting in part).
94. 376 U.S. 254 (1964).
95. *See id.* at 281–82.
96. *Pickering*, 391 U.S. at 583 (White, J., concurring in part and dissenting in part).
97. *Id.* at 568 (majority opinion).
98. *See id.* (rejecting the notion that teachers may be "compelled to relinquish" First Amendment rights).
99. *Id.* at 573.
100. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1892).
101. *Pickering*, 391 U.S. at 573; *see* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1304–06 (Robert C. Clark et al. eds., 19th ed. 2016).
102. O'NEIL, *supra* note 26, at 34; VAUGHN, *supra* note 7, at 5.
103. Dorsey, *supra* note 22, at 47; *see, e.g.*, 5 U.S.C. § 2302(b)(8)–(9) (2018).
104. One of the better-known whistleblowers of his time was Ernest Fitzgerald, the former deputy for management systems of the U.S. Air Force who testified before Congress regarding a massive cost overrun. VAUGHN, *supra* note 7, at 50. It was later discovered that President Richard Nixon had said to "get rid of" Fitzgerald on a White House tape recording. *Id.* Ironically, Nixon had introduced a bill protecting whistleblowers as a senator nearly two decades earlier. *Id.* Fitzgerald's claim for retaliatory discharge against Nixon was dismissed when the Supreme Court ruled that the president enjoys "absolute immunity" from damages arising from official acts. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

D. The Pickering *Standard Evolves*

In *Connick v. Myers*, the Supreme Court revisited public employee free speech doctrine by elaborating on what it meant to speak on matters of public concern.[105] Whereas before there was no separate inquiry into whether or not to apply the balancing test, here the Court required a preliminary determination on whether or not the expression touched on such matters.[106] Sheila Myers, an assistant district attorney disgruntled with her superior's decision to transfer her, circulated a questionnaire among the staff to solicit their opinions regarding certain office policies.[107] She was fired for inciting what was characterized as a "mini-insurrection" in the office and filed suit, asserting a free speech violation.[108] In a 5-4 decision, the Supreme Court held that every question on the survey except for one was unrelated to matters of public concern based on their "content, form, and context."[109] One question concerning whether or not employees had been pressured to work on political campaigns related to a matter of public concern, but the Court found that the action was nevertheless justified during the balancing stage, considering the threat to workplace decorum.[110] The Court's decision characterizes the questionnaire more as a personal grievance than an attempt to discuss pressing issues.[111]

Justice William Brennan objected to the majority's reasoning in a dissent.[112] He disagreed that examining content, form, and context was a proper method of sifting out speech on matters of public concern.[113] According to him, "[u]nconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government."[114]

The Supreme Court would next breathe life into what it meant to "speak as a citizen" in *Garcetti v. Ceballos*.[115] Following the lead of multiple circuits,[116] *Garcetti* held that employees making statements "pursuant to their official duties" do not speak as citizens—and so the First Amendment is inapplicable.[117] This meant that Richard Ceballos, a deputy district

105. *See* Connick v. Myers, 461 U.S. 138, 147–49 (1983).
106. Allred, *supra* note 32, at 47–48.
107. *Connick*, 461 U.S. at 141.
108. *Id.* at 151.
109. *See id.* at 147–48.
110. *Id.* at 152. The plaintiff disputed the idea that there was any harm to her employer. *See* Hudson, *supra* note 24, at 19.
111. *See Connick*, 461 U.S. at 154; Schoen, *supra* note 49, at 19.
112. *Connick*, 461 U.S. at 156–70 (Brennan, J., dissenting).
113. *Id.* at 159–60. Justice Brennan also asserts that the majority weakens its argument by stating that some matters may be "inherently of public concern." *Id.*
114. *Id.* at 161.
115. 547 U.S. 410, 422 (2006).
116. *See* Urofsky v. Gilmore, 216 F.3d 401, 407 (4th Cir. 2000); Morris v. Crow, 142 F.3d 1379, 1382 (11th Cir. 1998). Both cases found that employees speaking in their official capacities were unprotected although the *Morris* court did so as part of the *Connick* public concern test. *Morris*, 142 F.3d at 1382.
117. *Garcetti*, 547 U.S. at 421.

attorney, was unprotected when he wrote an internal memorandum recommending the dismissal of an ongoing criminal proceeding.[118]

Garcetti elicited three separate dissents from Justices John Paul Stevens,[119] David Souter,[120] and Stephen Breyer.[121] The primary dissent came from Justice Souter, who suggested an alternative framework where employees speaking on matters of "unusual importance" could proceed to the balancing stage even when they were speaking pursuant to their official duties.[122] He argued that the inquiry should not end if an employee spoke in an official capacity, but that fact should weigh against First Amendment protection in the *Pickering* calculus.[123] Justice Stevens joined Justice Souter's dissent, adding that "[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."[124] Justice Breyer did not join this dissent because he felt that this method would not adequately account for governmental interests.[125]

This marked yet another major evolution in the Supreme Court's analysis of public employee First Amendment claims.[126] Two threshold determinations must be made to fit under the umbrella of free speech: (1) a public employee must have been speaking as a citizen and (2) that individual's speech must have been related to a matter of public concern.[127] The analysis only proceeds to the balancing of interests between employer and employee if both conditions are met.[128]

The Supreme Court grappled with public employee speech doctrine most recently in *Lane v. Franks*,[129] which provided an opportunity to expound on these two threshold inquiries. When Edward Lane, an administrator at a public university, discovered that a state representative on the school's payroll was not attending work, he dismissed her.[130] That same representative was later indicted for mail fraud and theft.[131] Subsequently, Lane was subpoenaed to testify regarding his reasons for firing her at a criminal trial.[132] After the representative was convicted, the university fired Lane, who alleged that the decision was retaliation for his testimony.[133]

118. *Id.*
119. *Id.* at 426–27 (Stevens, J., dissenting).
120. *Id.* at 427–44 (Souter, J., dissenting).
121. *Id.* at 444–50 (Breyer, J., dissenting).
122. *Id.* at 435 (Souter, J., dissenting).
123. *Id.* at 434.
124. *Id.* at 427 (Stevens, J., dissenting).
125. *Id.* at 447–48 (Breyer, J., dissenting).
126. *See id.* at 418 (majority opinion).
127. *Id.*
128. *Id.*
129. 134 S. Ct. 2369 (2014).
130. *Id.* at 2375.
131. *Id.*
132. *Id.*
133. *Id.* at 2376.

Writing for the Court, Justice Sonia Sotomayor rejected the lower court's finding that Lane was speaking as an employee.[134] Instead, his speech was "a quintessential example of speech as a citizen" because of his responsibility "to the court and society at large, to tell the truth."[135] The Court read *Garcetti* narrowly by finding that Lane's testimony was not part of his official duties even though he had learned of the misconduct while acting in the scope of his employment.[136]

Furthermore, in analyzing the matter of public concern inquiry, the Court separately evaluated the content, form, and context of Lane's speech and found that each supported the employee.[137] The Court noted that the content, statements concerning corruption and misuse of state funds, "obviously involve[d] a matter of significant public concern."[138] Additionally, the form and context, which the Court analyzed simultaneously as "sworn testimony in a judicial proceeding," had "the formality and gravity necessary" to add credence to his statements.[139] This analysis indicates that the Court viewed content, form, and context as distinct attributes of speech that could be analyzed individually.[140] However, *Lane* left numerous questions unanswered.[141]

E. Deciphering Matters of Public Concern

Connick requires courts to examine the content, form, and context of disputed statements on a case-by-case basis when deciding whether the speech at issue relates to a matter of public concern.[142] This procedure has spawned decisions that run the gamut from highly permissive readings of public concerns to highly restrictive interpretations.[143] Unpredictability "inevitably chills some protected speech even as it discourages government officials from acting vigorously against some unprotected speech."[144] The Fourth Circuit simplified the question as asking whether or not the contested speech was just a "personal concern," most often a private grievance.[145] This conceptualization may be accurate in some respects, but it does not capture

134. *Id.* at 2378.
135. *Id.* at 2379.
136. *See* Rumel, *supra* note 38, at 262.
137. *Lane*, 134 S. Ct. at 2380.
138. *Id.*
139. *Id.* (quoting United States v. Alvarez, 567 U.S. 709, 721 (2012) (plurality opinion)).
140. *See id.*
141. *See* Rumel, *supra* note 38, at 246–48 (listing a number of "open questions" after *Lane*).
142. *See* Allred, *supra* note 32, at 75; *supra* notes 105–11 and accompanying text.
143. *See* SULLIVAN & FELDMAN, *supra* note 101, at 1311–14. *Compare* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995) (determining that speeches and articles written by government workers satisfied *Connick*), *with* City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam) (finding that a police officer's sale of explicit content was not a public concern because it "did nothing to inform the public about any aspect of the [department's] functioning or operation").
144. Gonzalez v. Benavides, 774 F.2d 1295, 1303 (5th Cir. 1985).
145. Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985).

the staggering variety of scenarios that could involve the *Pickering* test.[146] Instead, given *Lane*'s method of analysis, a more holistic view is needed to examine content, form, and context in greater detail.[147] The following sections examine each of the *Connick* factors.

1. Content

The content of speech, namely the ideas that a speaker is expressing,[148] involves a matter of public concern if it can be "fairly considered as relating to any matter of political, social, or other concern to the community."[149] Because ideas that a speaker expresses are at the heart of free speech, courts tend to focus on this one attribute above form and context.[150] Not all varieties of speech are treated the same under the First Amendment.[151] Former D.C. Circuit Judge Robert Bork went so far as to argue that only "[e]xplicitly political speech" is entitled to First Amendment protection.[152] This assertion was wholly repudiated in *Connick* itself, which states that "[g]reat secular causes, with smaller ones, are guarded."[153] Nevertheless, the content of speech plays a major role in how First Amendment claims are adjudicated, both in general and as part of the *Connick* inquiry.[154] Content frequently associated with whistleblowing, primarily political speech, tends to receive favorable consideration.[155]

Therefore, this section surveys how courts view various types of speech that constitute the content prong of *Connick*, including political speech,

146. *See* Allred, *supra* note 32, at 50–75.

147. *See* Lane v. Franks, 134 S. Ct. 2369, 2380 (2014).

148. *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011) ("In considering content, form, and context . . . it is necessary to evaluate all of the circumstances of the speech, including what was said, where it was said, and how it was said."). Although a defamation case, the public concern standard is identical and *Connick* is cited. *Id.* at 452–53. The ideas expressed by the speaker refer to "what was said." *Id.* at 454.

149. Connick v. Myers, 461 U.S. 138, 146 (1983).

150. *See, e.g.*, *Lane*, 134 S. Ct. at 2380 (analyzing content independently while viewing form and context together); Butler v. Bd. of Cty. Comm'rs, 920 F.3d 651, 663–64 (10th Cir. 2019) (holding that lack of appropriate content was fatal to an employee's claim despite favorable form and context); *Berger*, 779 F.2d at 998 ("The principle that emerges is that *all* public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action . . . .").

151. Political speech in particular "is central to the meaning and purpose of the First Amendment." *See* Citizens United v. FEC, 558 U.S. 310, 329 (2010).

152. Bork, *supra* note 72, at 28.

153. *Connick*, 461 U.S. at 147 (quoting Mine Workers v. Ill. Bar Ass'n, 389 U.S. 217, 223 (1967)). Bork himself would later recognize other types of speech as protected. Johnathan H. Adler, *Robert Bork & Commercial Speech*, 10 J.L. ECON. & POL'Y 615, 616–17 (2014); *see* FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 43 (D.C. Cir. 1985) (Bork, J.) (recognizing commercial speech as protected).

154. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam) (refusing to recognize a police officer's sale of lewd videotapes as protected speech); Berry v. Dep't of Soc. Servs., 447 F.3d 642, 646 (9th Cir. 2006) (applying *Pickering* balancing to a religious exercise case, but also analyzing certain religious expression under a public forum analysis).

155. *See infra* Part I.E.1.a. Academic speech, although not as directly tied to whistleblowing, implicates similar interests. *See infra* Part I.E.1.b.

academic speech, speech on personal concerns, and some other types of speech that do not directly relate to whistleblower activity.

a. Political Speech

Political speech refers to expressions "concerned with governmental behavior, policy or personnel."[156] Unsurprisingly, many cases brought by government employees relate to political issues.[157] Such speech is highly likely to be of substantial interest and value to society.[158]

Rankin v. McPherson[159] demonstrates the considerable weight given to political statements. Upon hearing of an assassination attempt on President Ronald Reagan, deputy constable Ardith McPherson said to a coworker, "If they go for him again, I hope they get him."[160] Writing for the majority, Justice Marshall found that her remark about the president "plainly dealt with a matter of public concern"[161] and that the "inappropriate or controversial character of a statement is irrelevant."[162] Dissenting, Justice Antonin Scalia was incensed, saying that this permitted employees to openly "ride with the cops and cheer for the robbers" without fear of retribution.[163] He saw the expression as "violent words" that would not warrant First Amendment protection.[164] Justice Lewis Powell cast the tiebreaking vote and found the statement was protected speech.[165] However, he wrote separately that he believed it was unnecessary to apply the full *Pickering* analysis to private speech unrelated to an employee's job.[166] The justices' disagreements were centered on how to classify the statement, as even the dissent seemed to concede that a political statement would weigh in favor of the employee.[167]

McPherson also emphasized that a court's determination on the public concern test often hinges on how the factfinder characterizes the contested speech.[168] Occasionally, these characterizations turn on the speaker's

156. Bork, *supra* note 72, at 27.

157. Most of the categories that Professor Stephen Allred identified could be considered more specific types of political speech, such as speech related to current community debates, abuse of office, public safety, public education, or discriminatory government practices. *See* Allred, *supra* note 32, at 50–68.

158. *See Roe*, 543 U.S. at 84.

159. 483 U.S. 378 (1987).

160. *Id.* at 380.

161. *Id.* at 386.

162. *Id.* at 387.

163. *Id.* at 394 (Scalia, J., dissenting).

164. *Id.* at 396.

165. *Id.* at 393 (Powell, J., concurring).

166. Justice Powell believed that "it will be an unusual case" where an employer's interests could justify punishment for such private speech. *Id.* As he agreed that the statement touched on matters of public concern, he would not have even engaged in the balancing test, unlike Justice Marshall. *See id.*

167. *See id.* at 396 (Scalia, J., dissenting). Justice Scalia instead accused the majority of conflating the speaker's motive with the content of her speech to transform the statement into political commentary. *Id.* at 396–97.

168. *See* Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985).

perceived motive.[169] Expressions that a court finds to be genuine statements about political issues tend to succeed, while speech motivated by more personal reasons will likely fail.[170] However, not everyone considers it appropriate to consider motive at this stage.[171] Doing so is also inconsistent with statutory whistleblower protections, which disregard why a whistleblower chooses to speak.[172]

b. Academic Speech

Academic freedom developed out of the McCarthy era, when government officials sought to test the loyalty of university professors and expose alleged dissidents.[173] In *Sweezy v. New Hampshire*[174] and *Keyishian v. Board of Regents*,[175] the Supreme Court established that academic freedom was "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[176] Educators and students must have the freedom to learn unimpeded, "otherwise our civilization will stagnate and die."[177] The precise contours of academic freedom are unclear,[178] but public universities are indisputably a "marketplace of ideas,"[179] which "occupy a special niche in our constitutional tradition."[180]

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169. Professor Rodric Schoen viewed motive in conjunction with context. Schoen, *supra* note 49, at 18–19. However, because motive appears to influence how courts interpret the ideas that a speaker expresses, this Note will consider motive alongside content.

170. *Compare* Ohse v. Hughes, 816 F.2d 1144, 1152 (7th Cir. 1987) (distinguishing the facts from *Connick*), *and* Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983) (holding that "the motivations underlying Czurlanis' [speech]" aligned with the content as falling within "core public speech"), *with* Lipsey v. Chi. Cook Cty. Criminal Justice Comm'n, 638 F. Supp. 837, 842 (N.D. Ill. 1986) (rejecting a racial discrimination complaint as a personal dispute rather than a statement about office policy), *and* Johnson v. Orr, 617 F. Supp. 170, 176 (E.D. Cal. 1985) (finding that a service member's letter revealing her sexual orientation to her commanding officer was a personal matter rather than advocacy).

171. *See Rankin*, 483 U.S. at 397 (Scalia, J., dissenting) (equating transforming motive into content with "viewing a political assassination preceded by a harangue as nothing more than a strong denunciation of the victim's political views"); Hubbard v. EPA, 949 F.2d 453, 457 (D.C. Cir. 1991) ("Hubbard's motivation, unless personal, is irrelevant to whether the speech itself is a matter of public concern.").

172. Dorsey, *supra* note 22, at 78. Congress providing monetary incentives for whistleblowers is strong evidence that a whistleblower's motive in coming forward is not a relevant consideration. *See Hearing on the Whistleblower Protection Act*, *supra* note 16, at 6 (statement of Sen. Charles Grassley).

173. *See* David M. Rabban, *Academic Freedom, Individual or Institutional?*, ACADEME, Nov.–Dec. 2001, at 16, 17.

174. 354 U.S. 234 (1957).

175. 385 U.S. 589 (1967).

176. *Id.* at 603.

177. *Sweezy*, 354 U.S. at 250.

178. *See* Rabban, *supra* note 173, at 17–20 (explaining the debate regarding whether academic freedom is an individual right of professors or an institutional right of universities); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 139–40 (2004) (arguing that "colleges and universities have a distinct approach to speech that deserves reasonable deference from society at large.").

179. *Keyishian*, 385 U.S. at 603; *see* Beckstrom, *supra* note 46, at 1202 (describing public universities as the "quintessential marketplace of ideas").

180. Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

Neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[181]

Considering academic speech under the *Connick* inquiry, "the whole justification for academic freedom is that the professional speech of professors does concern the public."[182] "Scholarship cannot flourish in an atmosphere of suspicion and distrust" and the threat of employment consequences would "impose [a] strait jacket upon the intellectual leaders in our colleges and universities."[183] Congress has acknowledged the immense public benefits of protecting academic speech in all institutes of higher learning by codifying the fair use defense to copyright infringement, carving out exceptions for "teaching . . . scholarship, or research."[184] Like much of copyright law, fair use is meant as a means of encouraging the creation of works that are of benefit to society.[185]

Therefore, justifications for protecting academic speech are substantially similar to the rationale behind *Pickering* and whistleblower statutes in general.[186] The driving force behind all this is that society benefits tremendously if certain individuals are able to speak freely.[187] Thus, like political speech, academic speech should favor employees under the public concern test.[188] Uncertainty arises when courts refuse to view academics speaking outside of their teaching and scholarship duties as academic speech.[189] Speech that fosters learning may be protected, but expressions related to internal operations often are not.[190]

c. Personal Speech

Speech with purely personal content does not relate to matters of public concern and such expressions will typically fail to clear the *Connick*

181. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
182. Byrne, *supra* note 178, at 112.
183. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
184. 17 U.S.C. § 107 (2018).
185. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).
186. *See supra* notes 98–104 and accompanying text.
187. *Compare* Byrne, *supra* note 178, at 112, *with* Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968), *and* Menell, *supra* note 9, at 18.
188. In his *Garcetti* dissent, Justice Souter expresses concern that the majority's citizen speech requirement will endanger academic freedoms. Garcetti v. Ceballos, 547 U.S. 410, 438–39 (2006) (Souter J., dissenting). The majority responds to his concerns by acknowledging that such expressions may involve "additional constitutional interests that are not fully accounted for" by their analysis, but it refuses to address that point further. *Id.* at 425 (majority opinion).
189. Beckstrom, *supra* note 46, at 1223; *see, e.g.*, Colburn v. Trs. of Ind. Univ., 973 F.2d 581, 588 (7th Cir. 1992) (finding that complaints centered on how faculty at Indiana University were evaluated touched on only "matters of personal interest" even though the plaintiffs "had good reason to be concerned given the mounting hostility in the department"); Hong v. Grant, 516 F. Supp. 2d 1158, 1169 (C.D. Cal. 2007) (holding that comments regarding faculty performance reviews, departmental staffing, and faculty hiring were not public concerns).
190. *See Hong*, 516 F. Supp. 2d at 1169 ("[I]nternal administrative disputes . . . have little or no relevance to the community as a whole.").

threshold.[191] This includes speech that may seem to implicate public issues but is instead found to be an extension of personal grievances.[192] Complaints about internal operations are unprotected unless there are public interests at stake.[193] It is still unclear if speech with purely personal content can still satisfy the *Connick* inquiry on form and context alone,[194] but lacking in this area severely harms the employee's chances of success.[195] These employees may have to pursue other avenues for relief, such as whistleblower statutes, tort law,[196] or even possibly state constitutional protections.[197]

d. Other Types of Speech

As *Pickering* acknowledges, there are innumerable scenarios that could form the basis for employee discipline.[198] Nevertheless, not all topics implicate the public's interest in free and unhindered debate even though they may have great personal significance.[199] Other types of expressions such as religious, commercial, or artistic speech are unlikely to implicate the interests

191. Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985); *see* Allred, *supra* note 32, at 72.

192. *See, e.g.*, Wales v. Bd. of Educ., 120 F.3d 82, 85 (7th Cir. 1997) (determining that a teacher's memorandum was more of a private concern than a public one, "even though it has elements of both"); Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 787 (1st Cir. 1985) (ruling that a teacher publicly posting letters she received from the school administration was an attempt to resolve her own disciplinary proceedings); Day v. S. Park Indep. Sch. Dist., 768 F.2d 696, 700 (5th Cir. 1985) (finding that a teacher's complaint regarding her performance evaluation was a personal matter); Singh v. Lamar Univ., 635 F. Supp. 737, 740 (E.D. Tex. 1986) (holding that the plaintiff's complaint related to "individual interests, desires, disputes and grievances"); Cook v. Ashmore, 579 F. Supp. 78, 84 (N.D. Ga. 1984) (finding that contested speech pertained to an employee's grievance over the amount of advance notice he received prior to his discipline, which was "clearly" a matter of personal concern).

193. *Compare* Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984) ("[T]he role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontented employee do not."), *and* Luck v. Mazzone, 52 F.3d 475, 477 (2d Cir. 1995) (affirming that a note sent to a radio station about the lack of air conditioning in the building where the employee worked was not a public concern), *with* Egger v. Phillips, 710 F.2d 292, 317 (7th Cir. 1983) (raising issues related to the integrity of law enforcement officials was a substantial public concern).

194. *See* Rumel, *supra* note 38, at 285.

195. In *Butler v. Board of County Commissioners*, the Tenth Circuit ruled against the plaintiff on the public concern inquiry despite highly favorable form and context. 920 F.3d 651, 663–64 (10th Cir. 2019).

196. *See* RESTATEMENT OF EMP'T LAW § 5.01 (AM. LAW INST. 2015).

197. The U.S. Constitution sets the lower bound of free speech protection rather than the limit. Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HASTINGS CONST. L.Q. 141, 161 (2004). State constitutions can contain independent free expression provisions, which may be more expansive. *See* Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 734–39 (1991). State courts are often hesitant to read their own constitutions more broadly than the U.S. Supreme Court reads the federal constitution, but some have. *Id.* at 724.

198. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

199. *See supra* Part I.E.1.c.

of informing the public and, thus, do not often satisfy the public concern inquiry.[200]

To date, the Supreme Court has not analyzed a case involving the free exercise of religion[201] under the *Pickering* standard.[202] Some lower courts have nonetheless imported the *Pickering* balancing test when government employees have alleged that their employer infringed on their free exercise rights.[203] The Establishment Clause[204] complicates the analysis because the government is obligated to avoid taking actions that endorse a particular religion.[205] Importantly, application of *Pickering* has been limited to the final balancing inquiry; there is no separate consideration as to whether the religious exercise related to a matter of public concern.[206] The balancing test is a useful analytical tool, but as the considerations implicated in religious exercise cases are significantly different from those articulated in *Pickering*, applying the entire standard would be inappropriate.[207]

Restrictions on commercial activity or commercial speech[208] are likewise infrequently analyzed under the *Pickering* test. However, the Supreme Court did so in *United States v. National Treasury Employees Union*.[209] There, a class of unions and civil servants alleged that banning executive branch employees from receiving compensation for writing or speaking on various topics was unconstitutional.[210] The Court concluded that this was a matter of public concern, but the case was unusual because it dealt with a preemptive restriction on the speech of thousands of workers rather than an individual.[211]

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200. This is not an exhaustive list of other types of content for particular expressions; these examples simply illustrate that political and academic speech add to public discourse in a way that many expressions will not. *See supra* notes 99–104 and accompanying text.

201. The Free Exercise Clause mandates that Congress cannot make any law "prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

202. Brian Richards, Note, *The Boundaries of Religious Speech in the Government Workplace*, 1 U. PA. J. LAB. & EMP. L. 745, 748 (1998); Chaz Weber, Note, *Picking on* Pickering*: Proposing Intermediate Scrutiny in Public-Employment Religious-Speech Cases via* Berry v. Department of Social Services, 58 CASE W. RES. L. REV. 513, 530–31 (2008).

203. *See, e.g.*, Berry v. Dep't of Soc. Servs., 447 F.3d 642, 648–50 (9th Cir. 2006); Shahar v. Bowers, 114 F.3d 1097, 1103 (11th Cir. 1997); Brown v. Polk County, 61 F.3d 650, 658 (8th Cir. 1995).

204. *See* U.S CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

205. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (explaining the criteria used to analyze claims of Establishment Clause violations).

206. *See Brown*, 61 F.3d at 658–59 (balancing the competing interests between the Establishment Clause and Free Exercise rights without any mention of *Connick*).

207. Neither interest identified in *Pickering*, an individual's right to free speech and society's interest in improving public discourse, is implicated by an individual's free exercise of religion. *See supra* notes 98–101 and accompanying text.

208. Commercial speech has been defined as "speech proposing a commercial transaction" for "the economic interests of the speaker." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–62 (1980); *see* David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 383 (1990). Advertising is the most recognizable form of commercial speech. *See* FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 43 (D.C. Cir. 1985) (discussing allowable restrictions on tobacco advertising).

209. 513 U.S. 454 (1995).

210. *Id.* at 461.

211. *See id.* at 466.

Commercial speech may involve expressions that would be covered under the First Amendment "if it were freestanding."[212] Thus, to the extent the expression "alludes to, or touches on, matters of collective or public interest to the society and engages the interest of members of the audience in considering such matters," it could satisfy a *Connick* analysis.[213] Such a broad ban on potential commercial speech would likely stifle at least some speech that informed the public, even if most government employees' individual economic activity would not receive protection.[214]

In rare circumstances, artistic speech may also touch on matters of public concern, as demonstrated by *Berger v. Battaglia*.[215] The Fourth Circuit determined that a police officer's public musical performance while wearing blackface constituted protected speech, immunizing him from discipline.[216] Curiously, this was the opposite of a whistleblower situation because public backlash to an employee's speech prompted the employer's decision.[217] Unquestionably, the content of the employee's speech was artistic, but it also spoke to racial issues within the Baltimore Police Department, something of great concern to the community.[218] This is likely an exceptional case because, generally, artistic expression is not guarded as closely as other types of expression previously identified.[219] Still, this demonstrates the flexibility that *Pickering* and *Connick* sought to achieve.[220] Courts repeatedly state their intention to avoid defining art or judging its merits.[221] To the extent that artistic expressions touch on matters of public concern, they may satisfy the *Connick* threshold. But more often, they would be considered matters of personal concern for the individual, like religious exercise or commercial activity.[222]

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212. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1157 (2012).

213. *Id.* at 1176.

214. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam) (concluding that a policeman's sale of explicit content was "not a close case" as the Court ruled unanimously that it did not touch upon matters of public concern).

215. 779 F.2d 992 (4th Cir. 1985).

216. *Id.* at 1002.

217. *See id.* at 997.

218. *See id.* at 995 (recounting that the NAACP had protested this employee's performance).

219. *See id.* at 999 ("We do not disagree with the general assessment that entertainment ranks lower on the scale of first amendment values than does pure political debate."); *see also supra* Part I.E.1.a.

220. Connick v. Myers, 461 U.S. 138, 154 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

221. Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005); *see* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . .").

222. *See supra* notes 201–14 and accompanying text.

2. Form

Form receives far less attention than content; if mentioned at all, it is typically disposed of quickly.[223] The most accurate description of form is "how" the speaker expresses herself.[224] Individuals are capable of expressing themselves in a nearly infinite number of ways, but broad categories emerge.

Three political patronage cases have established when public employees may be removed because of their associations with particular groups.[225] *Elrod v. Burns*,[226] *Branti v. Finkel*,[227] and *Rutan v. Republican Party of Illinois*[228] have forbidden employers to retaliate against employees for their association with political groups.[229] Such cases are related to *Pickering* but utilize a different analysis.[230]

The public concern inquiry frequently examines verbal expressions.[231] Utterances spoken with more "formality and gravity" are more likely to influence public discourse and are weighed favorably for employees.[232] Nevertheless, statements made in private may still be protected.[233] Failing to protect private disclosures would encourage employees to voice concerns overtly rather than addressing them more discreetly, a scenario that publicity-wary employers would wish to avoid.[234]

The same philosophy applies to written expressions, the other common form of employee speech examined under *Connick*.[235] Expressions made in a manner that can effectively inform the public are favored but not

223. *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369, 2380 (2014) (discussing form alongside context); Rankin v. McPherson, 483 U.S. 378, 386–87 (1987) (failing to analyze form at all).

224. *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011) (noting that, in evaluating the content, form, and context of speech, "how it was said" is a relevant consideration).

225. Hudson, *supra* note 24, at 33.

226. 427 U.S. 347 (1976).

227. 445 U.S. 507 (1980).

228. 497 U.S. 62 (1990).

229. This protection does not extend to individuals who occupy "policymaking positions." *Elrod*, 427 U.S. at 372; Hudson, *supra* note 24, at 34.

230. *See Branti*, 445 U.S. at 518 ("[T]he question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.").

231. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 679–80 (1994) (ruling that a conversation between two nurses did not touch on matters of public concern); Rankin v. McPherson, 483 U.S. 378, 386 (1987) (finding that a statement about the president was related to a matter of public concern); Berger v. Battaglia, 779 F.2d 992, 1002 (4th Cir. 1985) (holding that a police officer's musical performance was constitutionally protected speech).

232. Lane v. Franks, 134 S. Ct. 2369, 2380 (2014) (quoting United States v. Alvarez, 567 U.S. 709, 721 (2012) (plurality opinion)).

233. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979).

234. *See* Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting).

235. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 148 (1983) (explaining that a questionnaire distributed around the plaintiff's office must have touched on matters of public concern to be protected); Bailey v. Indep. Sch. Dist. No. 69, 896 F.3d 1176, 1181–82 (10th Cir. 2018) (finding that letters sent in connection with a criminal sentencing proceeding were related to a matter of public concern); Colburn v. Trs. of Ind. Univ., 973 F.2d 581, 586 (7th Cir. 1992) ("In the present case, the employee speech was in the form of letters addressed to University officials.").

dispositive.[236] Perhaps most crucially, expressions made in a way likely to disrupt office operations are unlikely to succeed.[237] More obscure forms of expression, like symbolic gestures, do not appear to have been addressed under this inquiry, but analysis should proceed along similar lines.

3. Context

Context refers to the circumstances under which the contested speech was made.[238] Disentangling context from the other factors can be difficult,[239] but there are some common issues that courts examine.

Whether speech is internal or external to the particular government employer is pertinent to the inquiry.[240] Issues entirely related to internal affairs are not seen as relevant to the public.[241] On the other hand, more discreet disclosures are less likely to impede office operation or be considered extensions of personal grievances.[242] The external or internal question is often highly fact intensive and may be considered in tandem with other details.[243]

Context also considers whether or not the given speech was truthful.[244] Generally, the First Amendment protects true statements but not intentional falsehoods.[245] Nevertheless, misrepresentations made in good faith can still relate to matters of public concern and receive First Amendment protection.[246]

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236. *Compare* Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968) (finding a letter sent to the editor of a newspaper was protected), *with Connick*, 461 U.S. at 148 (holding that all questions except one in an internal questionnaire were not protected speech).

237. *See Connick*, 461 U.S. at 154. *But see* Porter v. Califano, 592 F.2d 770, 773–74 (5th Cir. 1979) ("[I]t would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.").

238. In *Snyder v. Phelps*, the Supreme Court appeared to view a statement's context, at least partially, as "where it was said." 562 U.S. 443, 454 (2011). However, the venue appeared to only be part of context—other circumstances surrounding the contested speech have been included. *See id.* at 454–55; *see also* Rankin v. McPherson 483 U.S. 378, 386–87 (1987) (giving consideration to the events which precipitated the employee's comments).

239. *See* Lane v. Franks, 134 S. Ct. 2369, 2380 (2014) (analyzing form and context together by considering the two as "sworn testimony in a judicial proceeding").

240. *Compare id.*, *with* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979) (finding that an employee expressing views privately does not forfeit their free speech protection).

241. Hong v. Grant, 516 F. Supp. 2d 1158, 1169 (C.D. Cal. 2007).

242. *See* Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting); *supra* Part I.E.1.c.

243. Consider *Rankin*, where the majority determined that an employee's statement was not a threat on the president's life but rather a political statement about a public official because it was spoken in private with a coworker. 483 U.S. at 386–87. Justice Powell's tiebreaking vote was motivated largely by the fact that the comment was part of a private conversation. *See id.* at 394 (Powell, J., concurring).

244. *Lane*, 134 S. Ct. at 2380.

245. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

246. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 582 (1968) (finding that a teacher's speech was protected although some of the information he provided was found to be factually incorrect).

Finally, certain venues appear to receive special consideration when evaluating context.[247] Public court proceedings in particular carry a great deal of weight.[248] Providing testimony inside a courtroom is a situation where the public has a heightened interest in allowing individuals to speak openly.[249] The entire legal system depends on witnesses speaking honestly during such proceedings, and testimony can also serve as a public means of communicating information.[250]

II. THE COMPETING INTERESTS AT PLAY

The nature of *Pickering*'s case-by-case approach to adjudicating First Amendment protection for public sector employees has produced substantial uncertainty.[251] The same court may reach drastically different results even on cases decided in close proximity.[252] While the standard first announced in *Pickering* was intentionally vague so as to accommodate the wide array of situations where employees could claim free speech violations,[253] uncertainty inevitably arises.

The following sections focus on several issues particularly relevant to public employee whistleblowing under *Pickering*. Part II.A discusses the conflicting employee and government interests that the test is meant to reconcile. Part II.B delves into how the *Connick* factors are to be weighed in the public concern inquiry. Part II.C presents the issues that *Garcetti* now poses for whistleblowers. Part II.D questions if constitutional protections for whistleblowers are necessary in light of the whistleblower statutes now in place.

A. Employee and Employer Interests

Public employees have inside knowledge and are capable of illuminating the government's inner workings in ways that could be impossible

247. *See* Snyder v. Phelps, 562 U.S. 443, 454–455 (2011) (considering that, although a funeral was a private event, protestors displayed their signs on public land). More generally, the forum where speech is made can have a major impact on First Amendment analysis. *See* Berry v. Dep't of Soc. Servs., 447 F.3d 642, 652–54 (9th Cir. 2006) (analyzing certain parts of an employee's claim under *Pickering* and others under a public forum analysis); Weber, *supra* note 202, at 530.

248. *See, e.g.*, *Lane*, 134 S. Ct. at 2380; Bailey v. Indep. Sch. Dist. No. 69, 896 F.3d 1176, 1181–82 (10th Cir. 2018).

249. *See Lane*, 134 S. Ct. at 2380 (citing United States v. Alvarez, 567 U.S. 709, 721 (2012) (plurality opinion)).

250. *See* Rumel, *supra* note 38, at 291–92.

251. *Id.* at 246–47 (listing various questions still unanswered after the *Lane* decision).

252. *Compare* Butler v. Bd. of Cty. Comm'rs, 920 F.3d 651, 663 (10th Cir. 2019) (concluding that testimony as a character witness in a child custody proceeding was not a matter of public concern), *with Bailey*, 896 F.3d at 1181–82 (10th Cir. 2018) (finding that letters sent in support of an employee's nephew in a sentencing proceeding related to a matter of public concern).

253. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

otherwise.[254] Failing to protect employment, a "focal point[] in the lives of individuals," deprives society of the benefits of employees' expertise by stifling disclosures.[255] We rely on whistleblowers, both in the public and private sectors, to aid law enforcement.[256] Senator Grassley has estimated that whistleblowers have saved the federal government $56 billion since 1986.[257]

Nonetheless, restricting governmental autonomy to manage staff impedes efficient operations and threatens to turn every workplace dispute into a constitutional matter.[258] Governmental entities are typically given a great deal of deference in the areas where they are most knowledgeable.[259] Public employers may have legitimate reasons for regulating employees' speech.[260] For instance, it would be difficult to argue that an employer should be prohibited from disciplining a police officer or intelligence agent who put lives at risk by leaking sensitive information.[261]

B. The Connick *Factors*

In *Lane*,[262] the Court viewed content, form, and context as discrete characteristics of speech.[263] This made the criteria more explicit but left questions unanswered.[264] Content appears to be the most heavily weighted factor, but it is unclear whether appropriate content is a necessary condition to satisfy the public concern threshold.[265] From one perspective, because the content of speech is what actually serves to inform the public, it can be difficult to see how speech could add to public discourse absent relevant content.[266] Conversely, finding content a necessary condition would make one factor dispositive, which goes against the Supreme Court's seemingly holistic view.[267]

This problem is most apparent when government employees testify in judicial proceedings—only to be disciplined later.[268] Professor John Rumel argues that there is such a public interest in ensuring truthful testimony in judicial proceedings that employees should be protected, even if their

254. *See, e.g.*, Julian E. Barnes et al., *Whistle-Blower Complaint Is Said to Involve Trump and Ukraine*, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/us/politics/intelligence-whistle-blower-complaint-trump.html [https://perma.cc/FRQ7-VRFS].

255. Ma, *supra* note 29, at 128.

256. Menell, *supra* note 9, at 18.

257. Grassley, *supra* note 13.

258. *See* Connick v. Myers, 461 U.S. 138, 143 (1983) ("[G]overnment offices could not function if every employment decision became a constitutional matter.").

259. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S 837, 844 (1984).

260. O'NEIL, *supra* note 26, at 34.

261. *Id*.

262. *See supra* notes 129–41 and accompanying text.

263. Lane v. Franks, 134 S. Ct. 2369, 2380 (2014).

264. Rumel, *supra* note 38, at 246.

265. *Id.* at 247.

266. *Id.* at 291.

267. *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011) ("[N]o factor is dispositive.").

268. *See, e.g.*, *Lane*, 134 S. Ct. at 2380; Falco v. Zimmer, 767 F. App'x 288, 309 (3d Cir. 2019); Butler v. Bd. of Cty. Comm'rs, 920 F.3d 651, 663–64 (10th Cir. 2019).

testimony's content did not relate to matters of public concern.[269] Even after *Lane*, there is conflict between lower courts regarding how testimony should be treated under the public concern test.[270] Testimony before legislative bodies like Congress implicates the same concerns and precedent indicates similar protections.[271]

On a more fundamental level, merely examining an expression's content, form, and context may not be an appropriate analysis for uncovering matters of public concern.[272] In his *Connick* dissent, Justice Brennan argued that the inquiry should only ask if the speech "discussed subjects that could reasonably be expected to be of interest."[273] He asserted that the majority had seriously restricted what would qualify as a matter of public concern.[274] The majority's position was that Justice Brennan's more permissive approach would cause speech about nearly anything transpiring inside a government office to be sufficient, "plant[ing] the seed of a constitutional case."[275]

Uncertainty regarding how to account for motive further adds to confusion.[276] Some courts use motive to determine if an employee's expression is really a personal grievance.[277] Others see motive as largely irrelevant because it has no bearing on the ideas that the speaker is expressing.[278]

C. Garcetti*'s Citizen Speech Requirement*

By imposing a threshold requirement that individuals speak "as a citizen," *Garcetti*[279] provides a mechanism for dismissing claims as a matter of law[280]

269. Rumel, *supra* note 38, at 292.

270. *Id.* at 289; *see, e.g.*, *Butler*, 920 F.3d at 663 (refusing to adopt a rule that testimony in judicial proceedings is per se a public concern); Stillwell v. City of Williams, 831 F.3d 1234, 1239 (9th Cir. 2016) (finding *Connick* satisfied if testimony contributed to the resolution of a proceeding where significant government misconduct was at issue); Moriates v. City of New York, No. 13-cv-4845 (ENV)(LB), 2016 WL 3566656, at *5 (E.D.N.Y. June 24, 2016) (rejecting sworn testimony that did not have any relation to a public concern).

271. Perry v. Sindermann, 408 U.S. 593, 598 (1972).

272. *See* Connick v. Myers, 461 U.S. 138, 159–60 (1983) (Brennan, J., dissenting).

273. *Id.* at 163.

274. *Id.* at 158; Allred, *supra* note 32, at 49.

275. *Connick*, 461 U.S. at 149 (majority opinion).

276. *See* Ma, *supra* note 29, at 133; Schoen, *supra* note 49, at 17.

277. *See, e.g.*, Falco v. Zimmer, 767 F. App'x 288, 302 (3d Cir. 2019) (asserting that *Connick* "encompasses" the speaker's motive); Kock v. City of Hutchinson, 847 F.2d 1436, 1447 (10th Cir. 1988) (finding that motive did not "transform his speech into speech on a matter of public concern"); Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984) ("[T]he part of a 'good government' partisan is no doubt very attractive as the last refuge of the incompetent or discontented.").

278. *See* Rankin v. McPherson, 483, U.S. 378, 397 (1987) (Scalia, J., dissenting); Hubbard v. EPA, 949 F.2d 453, 457 (D.C. Cir. 1991); Ma, *supra* note 29, at 133.

279. *See supra* notes 115–25 and accompanying text.

280. *See* Garcetti v. Ceballos, 547 U.S. 410, 436 (2006) (Souter, J., dissenting) (arguing that the majority incorrectly found that statements made within the scope of employment should be differentiated "as a matter of law" from protected statements). The public concern inquiry is also a question of law. *Connick*, 461 U.S. at 148 n.7.

before fact-intensive *Pickering* balancing.[281] The *Garcetti* decision has been criticized as chilling valuable speech.[282] It also produces counterintuitive results such as incentivizing employees to "voice their concerns publicly before talking frankly to their supervisors."[283] Furthermore, because *Pickering* already took the parties' "working relationship" into account during balancing, the examination is partially redundant.[284]

On the other hand, employers have "heightened interests in controlling speech made by an employee in [their] professional capacity."[285] When employees speak in an official capacity, they represent their employers and the government has a legitimate interest in maintaining "consistency and clarity" in their messaging.[286] Like all employers, the government needs to exert a substantial degree of control over its employees.[287] Public employees may "contravene governmental policies" when they speak out of turn.[288]

D. The Need for Constitutional Protections

The *Garcetti* majority partially justified its decision by pointing out the numerous federal and state whistleblower provisions which can serve to shield whistleblowers.[289] Indeed, it could be argued that First Amendment protections are no longer necessary in light of all these other protective measures.[290]

However, as Justice Souter's dissent points out, statutory whistleblower provisions can fall short of assuring employees that their courage will be vindicated.[291] Congress often tailors statutes to combat contemporary concerns, an approach which sometimes leaves gaps in protection.[292] The result is a patchwork of rules that can be difficult for legal experts to wade through, let alone those who need to avail themselves of these protections.[293]

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281. Schoen, *supra* note 49, at 20.

282. *See* Rumel, *supra* note 38, at 244–46; Ellis, *supra* note 38, at 210; Zack, *supra* note 29, at 909.

283. *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

284. *See* Pickering v. Bd. of Educ., 391 U.S. 566, 570 (1968); Allred, *supra* note 32, at 45.

285. *Garcetti*, 547 U.S. at 422 (majority opinion).

286. *Id.*

287. *Id.* at 418.

288. *Id.* at 419.

289. *Id.* at 425; *see* Dorsey, *supra* note 22, at 48–51 (listing various whistleblower statutes that the Department of Labor administers).

290. *See Garcetti*, 547 U.S. at 425–26.

291. *Id.* at 440–41 (Souter, J., dissenting); *see* Connor Berkebile, Note, *The Puzzle of Whistleblower Protection Legislation: Assembling the Piecemeal*, 28 IND. INT'L & COMP. L. REV. 1, 21 (2018).

292. To illustrate this, Congress created a public policy exception for whistleblowers accused of misappropriating trade secrets in the Defend Trade Secrets Act of 2016. Menell, *supra* note 9, at 2. This was too late for Mary Cafasso, who disclosed evidence of what she believed was her employer's illegal activity and was ordered to pay damages and attorney's fees when her employer counterclaimed for breach of their confidentiality agreement. *See* Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1061–63 (9th Cir. 2011).

293. *See* Dorsey, *supra* note 22, at 48–49 (tallying eight separate whistleblower provisions in the environmental area alone).

With all this uncertainty, combined with traditional deterrents, it may be surprising that anyone comes forward at all.[294]

III. BRIDGING THE DIVIDE

To harmonize various conflicts with the modern *Pickering* standard, it is necessary to reiterate that the driving force behind the original decision was the idea that certain individuals' speech better informs the public on important topics.[295] Even though *Connick* and *Garcetti* have placed barriers to constitutional protection, this guiding principle can ensure that public employees, and particularly whistleblowers, receive free speech protection when warranted.

This Part argues that, by focusing on this interest in public discourse, the modern *Pickering* standard can be adapted to better serve its original purpose. Part III.A focuses on clarifying *Connick*'s public concern test. Part III.B proposes a means of modifying *Garcetti* so as to better accommodate this interest. Lastly, Part III.C argues that constitutional protections for public employees are still needed despite the various other statutory protections in place.

A. Understanding Connick

The Supreme Court's "fuzzy" standards have caused contradictory and conflicting results regarding the public concern inquiry in lower courts.[296] Nevertheless, protections for political speech are particularly strong because they, by definition, will concern governmental affairs.[297] Likewise, the Supreme Court has affirmed the tremendous public benefits associated with academic speech.[298] Both are central to the core value of *Pickering*: "having free and unhindered debate on matters of public importance."[299] At the other end of the spectrum is speech involving mere personal concerns, which will very likely fail the public concern test.[300] On occasion, content of other varieties may favor employees.[301]

Numerous courts have placed undue emphasis on the speaker's motive as part of the public concern analysis.[302] This can lead courts to the conclusion that the contested speech was the extension of a personal grievance and, thus, rule against the employee.[303] This misinterprets *Connick*, which considered

294. Menell, *supra* note 9, at 42.
295. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968).
296. Wales v. Bd. of Educ., 120 F.3d 82, 85 (7th Cir. 1997).
297. Bork, *supra* note 72, at 28; *see* Rankin v. McPherson, 483 U.S. 378, 387 (1987).
298. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
299. *Pickering*, 391 U.S. at 573.
300. Allred, *supra* note 32, at 72; *see* Connick v. Myers, 461 U.S. 138, 148 (1983); *supra* Part I.E.1.c.
301. *See supra* Part I.E.1.d.
302. *See* Ma, *supra* note 29, at 133; Schoen, *supra* note 49, at 17.
303. *See* Allred, *supra* note 32, at 72–75.

motive but primarily during the subsequent balancing test.[304] Considering motive is inherently fact intensive and inappropriate to evaluate during the *Connick* inquiry, which is a question of law.[305] Motive can be relevant in determining the speaker's credibility, but otherwise it should not play much of a role in the *Pickering* analysis.[306] This is also more consistent with whistleblower statutes, which are unconcerned with why a person discloses information.[307]

It is evident that content is given the most weight of the three factors, form given the least, and the weight given to context varies depending on the particular circumstances.[308] Content may be the preeminent factor, but it should not be considered a necessary condition as this would make a single factor dispositive, which the Supreme Court has forbidden.[309] This question is most pressing when public employees testify in court.[310] Considering *Pickering*'s abhorrence for bright-line rules, judges must have the discretion to weigh these factors as the situation demands.[311] Justice Brennan noted in his *Connick* dissent that rote analysis of content, form, and context is too formalistic to genuinely evaluate the overwhelming variety of speech that could implicate public concerns.[312] Judicial discretion is necessary to adapt *Connick* to a wide array of factual permutations.[313] For speech made during judicial proceedings, a court should weigh context more heavily given the public benefits of encouraging truthful and open testimony.[314]

B. Reconciling Garcetti

Garcetti's "as a citizen" requirement not only suppresses whistleblowing but also harms government interests.[315] More specifically, it incentivizes employees to publicly air their concerns rather than use official channels to address those concerns more privately.[316] *Garcetti* arguably conflicts with precedent that specifically found private disclosures to be protected.[317] The

304. *See Connick*, 461 U.S. at 152 (considering the questionnaire's "purpose" during the balancing stage). Each question that Sheila Myers asked her colleagues had very similar form, context, and motive. *See id.* at 155–56. Yet, one question was considered related to a public concern because of its relation to political campaigning. *Id.* at 149.

305. *Id.* at 148 n.7.

306. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) ("[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

307. Dorsey, *supra* note 22, at 78.

308. *See supra* Parts I.E.1–3.

309. *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011); Butler v. Bd. of Cty., 920 F.3d 651, 666 (10th Cir. 2019) (Lucero, J., dissenting).

310. *See* Rumel, *supra* note 38, at 285–92.

311. *See Butler*, 920 F.3d at 665 (Lucero, J., dissenting).

312. *See* Connick v. Myers, 461 U.S. 138, 163–64 (1983) (Brennan, J., dissenting).

313. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

314. *See* Rumel, *supra* note 38, at 292.

315. *See* Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting).

316. *Id.*

317. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979).

Court also acknowledged that the decision could endanger academic freedom.[318]

Limiting the scope of the "as a citizen" requirement would greatly aid whistleblowers. The Court may be amenable to changes considering their treatment of the question in *Lane*, their most recent foray into public employee speech.[319] Justice Sotomayor's use of the phrasing "ordinary job responsibilities" to describe when an employee spoke in his or her official capacity rather than *Garcetti*'s "official duties" terminology implies a more limited reading.[320] Any significance of the shift is unclear, but a more limited reading is possible, bearing in mind the maxim that "exceptions to First Amendment protections should be narrowly construed."[321]

A variation of Justice Souter's approach to speech as an employee would create a framework less likely to restrict informative speech, particularly of whistleblowers.[322] To begin, *Garcetti* appears to imply that public employees are not citizens when they are speaking in their official capacity—an inaccurate characterization.[323] Rather than finding that speech spoken as an employee is completely unqualified for First Amendment protection, the *Garcetti* and *Connick* threshold inquiries could be viewed in tandem rather than in isolation.[324] Unlike Justice Souter's suggestion to merge *Garcetti* into the balancing inquiry, this would preserve the current structure of the test and is more consistent with the Court's language.[325] This design would require employees speaking in their official capacity to make a heightened showing of public concern to demonstrate that their speech touched on what Justice Souter calls matters of "unusual importance."[326] The precise line between matters of unusual importance and just normal importance would be hazy, but it could still be analyzed using the *Connick* factors, requiring that content, form, and context weigh more heavily in favor of the employee than usual.[327] Such an analysis would reassert the primacy of the public concern test, the embodiment of the public's First Amendment interest that *Pickering* espouses.[328]

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318. *Garcetti*, 547 U.S. at 425 (majority opinion).
319. *See supra* notes 134–36 and accompanying text.
320. *See* Rumel, *supra* note 38, at 261–64.
321. *See id.* at 264.
322. *See Garcetti*, 547 U.S. at 435 (Souter, J., dissenting).
323. *Id.* at 427 (Stevens, J., dissenting).
324. *See id.* at 434 (Souter, J., dissenting) ("But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job?").
325. *Pickering* refers to arriving at a balance between the interests of the employer and the employee, "as a citizen, in commenting upon matters of public concern." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Similarly, *Garcetti* characterizes the analysis as two inquiries, with the first encompassing both threshold determinations and the second as the balancing test. *Garcetti*, 547 U.S. at 418 (majority opinion).
326. *Garcetti*, 547 U.S. at 435 (Souter, J., dissenting).
327. *Id.*
328. *See supra* notes 98–101 and accompanying text.

C. The Continuing Need for Pickering

The presence or absence of adequate statutory measures have no bearing on constitutional rights that have "never depended on the vagaries of state or federal law."[329] A public employee's right to free speech is unaffected by whether or not a legislature has extended protections to certain spheres.[330] Additionally, baseline constitutional safeguards allow legislatures to reinforce specific areas where protections may be lacking with more specific measures.[331] They also guard against gaps in protection that a legislature may have neglected with targeted statutes.[332] Recognizing greater constitutional protections for whistleblowers would encourage disclosures by public employees who can provide such a valuable service for society.[333] Objections that this burdens government employers are overblown when employer interests still receive ample consideration in the final balancing test.[334] Although the *Pickering* standard has become somewhat distorted since its inception, it is still useful for protecting public employees.[335]

This is not to say that the multitude of statutory protections granted to whistleblowers are superfluous; legislatures may enact additional measures as they see fit.[336] With all of the psychological barriers that inhibit whistleblowers, statutes can be vital in providing incentives for those considering coming forward.[337] Statutes can protect whistleblowers in ways that would not be possible through the Constitution alone, such as establishing procedures to ensure whistleblower anonymity.[338] Of course, statutes are also needed to protect private sector whistleblowers who cannot rely on free speech.[339]

CONCLUSION

Constitutional protections for whistleblowers have undergone radical changes as the *Pickering* standard has evolved over the years.[340] *Connick* embodies *Pickering*'s core value of improving public discourse by requiring

329. *Garcetti*, 547 U.S. at 439 (Souter, J., dissenting) (quoting Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996)).

330. *See id.*

331. *See, e.g.*, Dorsey, *supra* note 22, at 48–49.

332. *See Garcetti*, 547 U.S. at 440–41 (Souter, J., dissenting); Berkebile, *supra* note 291, at 21.

333. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).

334. *See* Ma, *supra* note 29, at 138.

335. *See* VAUGHN, *supra* note 7, at 5 ("[Whistleblower laws] can also be perceived as a part of human rights law, protecting freedom of expression.").

336. *See Garcetti*, 547 U.S. at 425 (majority opinion).

337. *See* Menell, *supra* note 9, at 37–42.

338. Senator Rand Paul stirred controversy at President Trump's impeachment trial when he appeared to name the previously anonymous whistleblower on the Senate floor. Jordain Carney, *Rand Paul Reads Alleged Whistleblower's Name on the Senate Floor,* HILL (Feb. 4, 2020, 1:13 PM), https://thehill.com/homenews/senate/481417-rand-paul-reads-alleged-whistleblowers-name-on-senate-floor [https://perma.cc/65PN-EMF7].

339. *See* U.S. CONST. amend. I.

340. *See supra* Part I.D.

that speech touch on topics of societal importance.[341] It is vital that courts analyze the content, form, and context of public employee speech through this lens.[342] Greater consistency is possible by recognizing that *Pickering* sought to give special protection to speech that informed the public.[343] Political and academic speech most clearly fill this role, although not exclusively.[344] Government whistleblowers, who will typically engage in political speech, should enjoy substantial constitutional safeguards.[345]

Furthermore, reading *Garcetti* in conjunction with *Connick* could avoid chilling valuable speech simply because of who was speaking at the time.[346] It contradicts *Pickering*'s stated purpose by quashing valuable speech simply because an employee acted in his or her official capacity.[347] Providing a mechanism for public employees to overcome *Garcetti* through a heightened public concern showing is more consistent with *Pickering*'s central holding.[348]

341. *See supra* notes 105–11 and accompanying text.
342. *See supra* Part III.A.
343. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968).
344. *See supra* Part I.E.1.
345. *See supra* Part I.E.1.a.
346. *See supra* Part III.B.
347. *See* Rumel, *supra* note 38, at 244–46.
348. *See id.*