Not a "Public Concern," Not a Problem?: Reframing the Public Employee Speech Framework to Enhance Protection for Employees' Private Speech

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I. INTRODUCTION

The Free Speech Clause of the First Amendment[1] clearly inscribes the belief that speech without state interference is foundational to the American system of

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[1] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

governance.[2] But deciding precisely the contours of the scope the Clause protects is dubious.[3] "Political and ideological" speech receives the greatest protection,[4] whereas speech with negligible political and social value—obscenity, defamation, threats, or speech inciting violence or integral to illegal conduct—receives none.[5] This much is fairly settled and straightforward. But somewhere in between these two categories is speech that is protected because it is "in pursuit of a wide variety of political, social, economic, educational, and religious ends."[6] Deciding when speech falls within that scope, and should consequently be protected, is an enduring task.

To alleviate the challenges inherent to this task, the Supreme Court directs the lower courts to analyze categories of speech with specially developed frameworks.[7] In developing these frameworks, the Court considers the factors inherent to different circumstances, and as such, creates an analytical structure that intends to appropriately balance the interests within a particular context.[8] But while the Court no doubt intends to develop a framework that strikes the proper balance for particular circumstances, there can nevertheless be imbalance within a scheme. When case outcomes demonstrate these imbalances, the opportunity to reevaluate and recalibrate presents itself.

One such framework that needs recalibrating is that of public employee speech. Ultimately, the Court's public employee speech framework is restrictive and allows for protection in quite limited circumstances because of imbalances baked into the test. The imbalance that this Note recognizes and addresses is the one created by the test's "matter of public concern" threshold, which sews into

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[2] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." (citing Leathers v. Medlock, 499 U.S. 439, 449 (1991))).

[3] *See First Amendment*, HISTORY, https://www.history.com/topics/united-states-constitution/first-amendment [https://perma.cc/7CM4-H9UD] (Sept. 25, 2019).

[4] *See* VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1 (2019). As a nation, Americans are committed to "'the principle that debate on public issues should be uninhibited, robust, and wide-open' . . . because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" Snyder v. Phelps, 562 U.S. 443, 452 (2011) (first quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); then quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

[5] KILLION, *supra* note 4, at 2.

[6] *Id.* at 1 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

[7] *See, e.g.*, Alex Schoephoerster, *Finding a Uniform Application of Law to Protect Public Employee Political Speech and Political Affiliation*, 29 A.B.A. J. LAB. & EMP. 563, 563–64 (2013) (explaining that the Supreme Court first formulated a test to protect political speech through one line of cases, and then formulated a separate test with another set of cases for protection of political affiliation).

[8] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568–69 (1968); *see also* David L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, *in* 3 FIRST REPORTS 1, 3 (2002).

the analysis the notion that only speech considered a "matter of public concern" can be protected, regardless of whether an employer has a managerial authority concern prompting the adverse action taken by the employer against the employee.[9]

This imbalance was most recently exhibited by the Tenth Circuit case *Butler v. Board of County Commissioners*,[10] wherein the court held it was permissible for the State to demote an employee for testifying in a child custody court proceeding because such testimony was unable to satisfy the "matter of public concern" threshold.[11] As such, the analysis stopped there; the State didn't have to provide a compelling reason supporting its decision to demote Butler, as the analysis never arrived at that inquiry.[12]

This result is a problem. Most prominently, the *Butler* conclusion emphasizes the policy issue with respect to the public employee speech framework specifically as it pertains to testimony in truth-seeking proceedings. Truthful testimony, regardless of whether it's on a private matter, without the threat of workplace retaliation is vital to both the truth-seeking functions of our justice system[13] and First Amendment principles.[14] But this Note also takes the position that *Butler* provides the opportunity for a broader reconsideration of the framework since it highlights the fact that the "matter of public concern" component presumes that the interests of the employer always outweigh private speech, regardless of the significance of that speech to the employee, and irrespective of the employer's justifications. For that reason, this test is systemically imbalanced.

That being the case, this Note will advocate for the adoption of a reframed analysis that creates space for truthful testimony and that also eliminates the requirement that protected employee speech *must* be a "matter of public concern." Instead, this Note's framework will prioritize balancing the interests of the employee and employer, and it will also enable private speech to oblige the State to provide sufficient reasons for the suppressive, regulatory actions it takes.

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[9] *See* discussion *infra* Part II.A.

[10] Butler v. Bd. of Cnty. Comm'rs for San Miguel Cnty., 920 F.3d 651, 655 (10th Cir. 2019).

[11] *Id.* at 663–64.

[12] *Id.* at 668 n.2.

[13] The issue in this context is plain: "If employers [are] free to retaliate against employees who provide truthful, but damaging, testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security. Those able to risk job security would suffer state-sponsored retaliation for speaking the truth before a body entrusted with the task of discovering the truth." Johnston v. Harris Cnty. Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989) (citing Smith v. Hightower, 698 F.2d 359, 368 (5th Cir. 1982)).

[14] *See* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 935–36 (20th ed. 2019) (discussing the importance of truth as a rationale for prohibiting the suppression of speech).

To accomplish this goal of proposing a new framework, Part II of this Note will first survey the modern public employee speech test, as it presently stands. It will also highlight the circuit split that exists regarding the "matter of public concern" prong in the context of testimony. Part III will then propose a new public employee speech framework, which takes inspiration from the Supreme Court's student speech analysis, that eschews the "matter of public concern" prong, and instead refocuses the inquiry on the actual interests of the employee and the employer.

II. PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHT OF FREE SPEECH

The scope of protection for public employee speech has been contested for decades.[15] Initially, the longstanding view was that public employment was a privilege and that it could be conditioned on the surrendering of constitutional rights.[16] But eventually, the Court arrived at a contrary conclusion and recognized public employee speech rights in the landmark 1968 case, *Pickering v. Board of Education*.[17] Since that decision, however, the Court has narrowed this right and developed a scheme that systematically prioritizes managerial authority over the speech rights of public employees.[18] This Part explains the modern test that provides for public employee speech rights, as it was first established by *Pickering* and then restricted by *Pickering*'s progeny.

A. *The* Pickering/Garcetti *Balancing Test*

In *Pickering*, the Supreme Court recognized that public employees do not forfeit their constitutional speech rights merely by virtue of working for public entities,[19] and that public employees have an interest as "citizen[s], in commenting upon matters of public concern."[20] At the same time, the Court also acknowledged that public employers have an interest in regulating the speech of its employees because it has an interest in "promoting the efficiency of the

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[15] Robert M. O'Neil, *Academic Speech in the Post*-Garcetti *Environment*, 7 FIRST AMEND. L. REV. 1 (2008) ("The speech of government employees has been, for nearly the past half century, a contentious topic in the public sector and a fertile source of constitutional litigation. Hardly a term of the United States Supreme Court has passed without a further refinement of, or nuance upon, a doctrine that remains remarkably unsettled.").

[16] *See, e.g.*, Scott R. Bauries, *Public Employees Who Testify*, 24 EMP. RTS. & EMP. POL'Y J. 75, 76 (2020); *see also* Connick v. Myers, 461 U.S. 138, 143 (1983) (explaining that the "unchallenged dogma" was that public employees did not have rights to object to employments conditions even if it restricted the exercise of constitutional rights).

[17] Bauries, *supra* note 16, at 77.

[18] *See infra* text accompanying notes 22–28.

[19] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) (rejecting the notion that public employment may be subjected to all conditions, regardless of how unreasonable)).

[20] *Id.*

public services it performs through its employees."[21] As a consequence, the Court held that an employee's interests in his speech rights and the public employer's interest in regulating it need to be balanced when analyzing whether an employee's speech should be protected.[22]

More than a decade later, leaning on its evaluation of cases prior to and after *Pickering*,[23] the Court in *Connick v. Meyers* created a requirement that employee speech must be a "matter[] of public concern" to be protected even though the Court in *Pickering*, did not overtly command that only speech on a "matter of public concern" is worthy of protection.[24] This means, that to be afforded protection under the First Amendment, a public employee's speech must pertain to a matter of political, social, or other concern to the community.[25] To determine whether speech meets this requirement, courts are required to analyze the "content, form, and context" of the speech.[26]

Two decades later, the Supreme Court again added to the analysis in *Garcetti v. Ceballos* by holding that speech expressed "pursuant to [one's] official duties" is categorically not protected by the First Amendment.[27] Thus,

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[21] *Id.* Furthermore, in its holding, the Court clearly emphasized that the State's ability to regulate speech as an employer is derived from its interest in control over and efficiency in its operations. *Id.* For this reason, employers are "not required to tolerate behavior and actions that [the employer] reasonably believes would disrupt the office, would undermine . . . authority, and negatively affect close working relationships." *Connick*, 461 U.S. at 154.

[22] *Pickering*, 391 U.S. at 569.

[23] *See* Connick v. Myers, 461 U.S. 138, 144 (1983).

[24] *Id.* at 147.

[25] *Id.* at 146.

[26] *Id.* at 147–48. Court decisions demonstrate that this category includes "statements revealing official impropriety" and speech where "the speaker intends to bring to light actual or potential wrongdoing or breach of public trust by a public official or to disclose any evidence of corruption, impropriety, or other malfeasance within a governmental entity." These types of speech are understood to safely constitute a matter of public concern. Butler v. Bd. of Cnty. Comm'rs for San Miguel Cnty., 920 F.3d 651, 655–56 (10th Cir. 2019) (internal quotation marks omitted) (first quoting Trant v. Oklahoma, 754 F.3d 1158, 1165 (10th Cir. 2014); then quoting Eisenhour v. Weber Cnty., 744 F.3d 1220, 1228 (10th Cir. 2014)). But what falls within the scope of this requirement generally has been difficult for courts to grapple with. *E.g.* Wright v. Ill. Dep't of Child. & Fam. Services, 40 F.3d 1492, 1501 (7th Cir. 1994) ("Our cases since Connick are useful in focusing the inquiry, although no hard and fast rules have emerged."); *see also* 3 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 25:27 ("Public concern is a nebulous legal concept often defined by circular cross-references.").

[27] Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."). This Note will not address the critiques and concerns with respect to the holding in *Garcetti* through the reframed analysis the solution provides. In fact, the reframed test maintains this part of the inquiry. It should be noted here, however, that some of the response to *Garcetti* has been rather critical. Kermit Roosevelt, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes*

when employees go to work and perform their duties, they are not citizens, they are government employees, and as a result, not afforded the same protections as citizens.[28]

So, in effect, speech is not protected at all if it is made "pursuant to official duties," or if it is not on "a matter of public concern." And then even if speech passes either of these initial threshold tests, speech may still not be protected if the interests of the employee are insufficient to overcome the interests of the public employer.[29] Altogether this framework creates multiple barriers to protection and puts the thumb on the scale in favor of the employer.

Of greatest concern is the "matter of public concern" requirement as this prong builds in the presumption that private speech is never worthy of protection, even though it may not actually threaten managerial authority or disrupt the efficient operations of the State's services.

B. *The Circuit Split Regarding Testimony: Per Se or Not Per Se*

The public employee framework presently fails to protect public employees who testify on a matter of private concern. And to date, the only way that circuits have addressed this gap is by developing a *per se* rule that posits that testimony is a *per se* matter of public concern.[30] Largely though, with the exception of a few circuits, this approach has been rejected, leaving employees largely unprotected.[31]

To alleviate the concern with outcomes like *Butler*, a minority of circuit courts have resolved the matter by implementing a *per se* rule, wherein testimony is automatically considered a "matter of public concern."[32] The

Sense, 14 U. PA. J. CONST. L. 631, 636 (2012). Some of the concerns that are raised in objection to Garcetti are as follows: (1) Speech pursuant to official duties may be important to the First Amendment point of view, (2) the line between pursuant to official duties and not is unclear, (3) this might lead to employer broadly defining the job duties so as to limit protection, and (4) this ultimately encourages employees to go outside official channels to voice concerns, and (5) this threatens academic freedom. *Id.* at 636. But while all that might be true, the public employee is not worse off than the private employee who is not afforded any protection from the First Amendment. *Id.* at 636–37. Both can lose their jobs for speech the employer does not like in the performance of their duties, and to Professor Kermit Roosevelt, it should be this way to give government employers the managerial control to address work performance. *Id.* at 659.

[28] Roosevelt, *supra* note 27, at 636.

[29] There is an additional barrier, known as the Mt. Healthy defense, where speech is again unprotected if the employer can demonstrate it would have reached the same conclusion without infringing the employee's First Amendment right. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283–86 (1977).

[30] *E.g.*, Johnston v. Harris Cnty. Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989).

[31] Anna H. McNeil, Note, *Failing to Protect Public Employees' First Amendment Rights: The Need for a Presumption of Public Concern for Truthful Testimony*, 73 OKLA. L. REV. 505, 513 (2021).

[32] *Id.* at 510.

Fifth[33], Third[34], and Second[35] Circuits have adopted this approach, believing that the "context in which the employee speaks [may be] sufficient . . . to elevate the speech to [the level] of public concern . . . . When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern."[36] To fail to adopt such a rule, and to inhibit truthful testimony, compromises the integrity of the judicial system.[37]

On the other side of the circuit split, wherein a *per se* rule has been rejected, stand the Seventh, Eighth, Eleventh, and after *Butler*, Tenth Circuits.[38] In essence, the basis for rejection has been two-fold: (1) *Connick* commands a case-by-case inquiry looking at context, content, and form, and courts cannot overlook whether "content" is on a private matter; and (2) the First Amendment is not intended to protect "airing private gripes in the form of a complaint or testimony."[39]

But while a *per se* rule addresses the issue of testimony, it fails to grapple with the overarching problem of the baked in presumption. There are other instances where private speech, important to the employee, should be afforded protection, especially if there is not a threat to managerial authority. And the framework should allow for that as a general matter, not by way of exception. Consequently, this Note's solution proposes an alternative framework that eschews the matter of public concern threshold and enables private speech to take priority in the balancing inquiry.

III. SOLUTION

This Note reconceptualizes the public employee structure in a way that eschews the "matter of public concern" threshold and accentuates the balancing inquiry. As a starting point for this reconceptualization, this Note begins with

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[33] *Johnston*, 869 F.2d at 1578.

[34] Pro v. Donnatucci, 81 F.3d 1283, 1291 (3d Cir. 1996).

[35] Catletti v. Rampe, 334 F.3d 225, 230 (2d Cir. 2003) ("[U]ninhibited testimony is vital to the success of our courts' truth-seeking functions.").

[36] *Johnston*, 869 F.2d, at 1577–78.

[37] *Id.* ("Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth." (internal citations omitted) (quoting Reeves v. Claiborne Bd. of Educ., 828 F.2d 1096, 1100 (5th Cir. 1987)).

[38] John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in* Lane v. Franks, 34 HOFSTRA LAB. & EMP. L.J. 243, 287–88 (2017); Butler v. Bd. of Cnty. Comm'rs for San Miguel Cnty., 920 F.3d 651, 663 (10th Cir. 2019).

[39] Wright v. Ill. Dept. Child. & Fam. Services, 40 F.3d 1492, 1501–05 (7th Cir. 1994). This concern is not without merit. But recall that even if testimony passes the threshold inquiry, it then must be balanced against the interests of the employer. In other words, if an employee's testimony is merely a "private grievance" then it would likely not outweigh the employer's efficiency concerns. For that reason, the "matter of public concern" threshold is just operating to preclude possible protection over private matters that are important to the employee. If a private matter is not of critical interest, or if the employer has significant interest threatened by the speech, that can be addressed in the balancing inquiry.

the First Amendment scheme used to analyze student speech. As it stands, the public employee test has notable parallels to the student speech test,[40] as this is another context where the Court has needed to adopt a framework that addresses the tension between the interests of private citizens and the State. Ultimately, the student speech test is notably better at mandating the balancing inquiry and requiring the State, as educator, to provide sufficient reasons that warrant suppression. And so even though the circumstances of the State as employer and educator are distinct, the student speech test is this Note's starting point for advancing a public employee speech framework that more often arrives at the balancing inquiry, obliging the State to provide sufficient explanation that managerial authority was at issue.

To that end, this Part will provide an overview of the student speech framework. Then, leaning on the student speech framework, this Note proposes a reconceptualized employee speech structure that maintains key components of the modern test, but that prioritizes the balancing inquiry. Lastly, this Part will survey the impact this scheme has on specific case outcomes. Overall, the outcomes will not be drastically impacted by eschewing the "matter of public concern" prong. Instead, the court will simply have more of an opportunity to grapple with and balance the interests because there will not be as broadly sweeping a bright-line threshold to stop the analysis.

A. *The School Speech Scheme:* Tinker*,* Hazelwood*,* Bethel*, and* Morse

Around the same time the Supreme Court agreed public employees need not forfeit their rights as a condition of employment, it also recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[41] But, just like the right of public employees, a student's right to freedom of speech is not absolute.[42] As will be explored in this Part, the student speech scheme shares significant similarities to that of public employee speech, but it does not include any pre-balancing thresholds as the present employee speech framework does.

Akin to the employee speech framework, the student speech framework has been set forth by a series of foundational cases wherein the first case recognized the speech rights of students, and the later cases limited them. These essential cases are *Hazelwood*, *Tinker*, *Bethel*, and *Morse.*[43] Of primary importance are

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[40] *See infra* Part III.A.

[41] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[42] *See id.* at 507.

[43] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding constitutional a school administration's decision to refuse to publish two stories—one on teenage pregnancy, the other on children and divorce—in the school paper because the school had reasonable concerns about such publication and because the determination of what speech is appropriate in schools lies with the educator); *Tinker*, 393 U.S. at 514 (holding unconstitutional a school's attempt to prevent political speech on its campus by suspending students for wearing armbands in protest of the Vietnam War); Bethel Sch. Dist. No. 403 v.

Hazelwood and *Tinker*. Standing apart from the group, these two cases stand for the primary distinction between: (1) private student expression that occurs on school premises; and (2) speech that is "school-sponsored."[44] When speech is private, the school may only regulate expressions that create or are forecasted to create "material and substantial disruption[s]" within the school.[45] When speech is "school-sponsored," the school is permitted to censor speech so long as it its "actions are reasonably related to legitimate pedagogical concerns."[46] Thus, in the school speech framework, the initial inquiry is whether the student's expression is school-sponsored or private, since that determination controls what standard applies. As this Part will explore, this initial inquiry operates in a similar vein as the "pursuant to official duties" prong and informs the initial inquiry in the reconceptualized framework.

When dealing with properly characterized "school-sponsored" speech, "educators are entitled to exercise greater control."[47] This is because educators have an interest in ensuring that students "learn whatever lessons the activity is designed to teach," are "not exposed to material that may be inappropriate for their level of maturity," or that "the views of the individual speaker are not erroneously attributed to the school."[48] Thus, educators "do not offend the First Amendment by exercising editorial control over the style and content of student speech . . . so long as their actions are reasonably related to legitimate pedagogical concerns."[49]

Alternatively, when student speech is private speech, schools are limited in their authority to regulate student speech, but are allowed to do so (1) if the

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Fraser, 478 U.S. 675, 686–87 (1986) (holding constitutional disciplining a student in response to his use of sexual innuendo in an assembly speech because the school has an interest in suppressing obscene, profane, and lewd language and gestures); Morse v. Fredrick, 551 U.S. 393, 409–10 (2007) (holding constitutional the suspension of a student who held a banner reading "BONG HiTS 4 JESUS" across the street from the school but during a public event at which the school body was present because it advocated for illegal conduct, i.e. marijuana use).

[44] *See Hazelwood Sch. Dist.*, 484 U.S. at 271. "School-sponsored" speech is defined as the "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* School sponsorship of speech is often found when the speech creating activity is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* So essentially, schools have the authority to limit speech, due to its perceived school sponsorship, when speech reasonably suggests school control, involvement, or approval.

[45] *Tinker*, 393 U.S. at 509.

[46] *Hazelwood*, 484 U.S. at 273.

[47] *Id.* at 271.

[48] *Id.*

[49] *Id.* at 273. There is a broad range of "pedagogical concerns" that qualify as legitimate, as the "universe of legitimate pedagogical concerns is by no means confined to the academic." Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989); Schools must impart the "shared values of a civilized social order." *Id.* (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)); When these shared values come into conflict with one another, the school ultimately retains the discretion to choose which values to emphasize. *Id.*

student's expression "materially and substantially disrupt[s] the work and discipline of the school," or (2) if there is evidence that would reasonably lead school authorities to "forecast [a] substantial disruption of or material interference with school activities."[50] With respect to its forecast, the school must actually provide facts that support a reasonable forecast of a disruption that surpasses an "undifferentiated fear or apprehension."[51]

And lastly, when speech is neither "school sponsored" nor private speech that causes a substantial disruption, the school still maintains the authority to limit lewd, vulgar, and indecent speech or speech that advocates for illegal conduct under *Fraser* and *Morse*.[52] This is because such speech is "wholly inconsistent with the 'fundamental values' of public-school education" and thus entirely appropriate to censor and regulate through disciplinary measures.[53]

Thus, in operation together, student speech is unprotected (1) when speech is "school-sponsored" and then suppression is warranted by a legitimate pedagogical concern, (2) when speech is private but causes an actual disruption (or is reasonably likely to) to the school setting, or (3) when it is obscene, lewd, vulgar or advocates for illegal conduct. There is no requirement that student speech be of any particular character to be protected, i.e., the speech need not be a matter of public concern or of any great significance. At bottom, in order for speech to be protected, it must not interfere with the interests of the school in carrying out its ultimate mission to educate.

Most importantly, in the case of both "school-sponsored" and private student speech, the analysis always evaluates, rather than presumes, whether the school has an interest sufficient to overcome the student's.[54] This is distinct from the employee speech framework, where there are two instances that the employer's overriding interest is accepted.[55] Instead, if speech is "school-sponsored," the school still must have a "legitimate pedagogical concern" to suppress. And if student speech is private speech, the schools may have an interest in suppressing language, but only in circumstances that the speech has or is reasonably likely to interfere with and disrupt the school's mission. This is a key virtue of this test, as it does not circumvent balancing, nor does it allow the school to suppress speech without any sort of justification.

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[50] *Tinker*, 393 U.S. 503, 514 (1969).

[51] *Id.* at 508. The school must be able to show that it acted on "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

[52] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685–86 (1986); *see also* Morse v. Fredrick, 551 U.S. 393, 410 (2007).

[53] *Fraser*, 478 U.S. at 684–85.

[54] Which is to say that in no circumstance is it assumed that the school's interest is so plainly sufficient that the Court doesn't need to scrutinize it. The thresholds in the employee speech framework are basically a predetermination of the Court that the employer's interest is always more important unless the threshold can be met.

[55] *See supra* Part II.A.

B. *Refining the Employee Speech Framework by Adopting and Adapting the Student Speech Framework*

The student speech framework has significant parallels to the framework analyzing employee speech. This makes sense—education and employment are both settings where the State has a recognized interest in regulating speech such that there are times the State can do so without infringing on the speaker's First Amendment rights.[56] As such, the Supreme Court has necessarily created similar precedents that attempt to strike the right balance between the competing interests—those of students and employees against the those of the State as educator and employer.[57] But as has already been highlighted in this Note, the student speech analysis does not have the same level of bright-line thresholds that can altogether halt the inquiry. This next Part takes a closer look at the parallels between the two schemes and explains how an adaptation of the school scheme would work.

1. *"School-Sponsored" Speech and Speech "Pursuant to Official Duties"*

To begin, most student speech inquiries begin by determining whether speech is private student speech or "school-sponsored" speech. This is akin to the determination of whether speech is "pursuant to official duties" or not. Speech is "school-sponsored" when it "bares the imprimatur of the school."[58] And speech is "pursuant to official duties" when it is speech expressed "within the scope" of one's employment duties.[59] The underlying rationale for these two categories is the same; the speech is expressed in a context authorized or controlled by the employer or educator and is plainly speech that wouldn't be expressed if not for the educator or employer. Thus, under both categories, the school and the employer have a heightened interest in regulating the speech. In the case of school-sponsored speech, the school is permitted to regulate speech if it has a "legitimate pedagogical concern."[60] And when an employee is understood to be speaking "pursuant to official duties," the employer can regulate to ensure that the employer's goals and mission are being expressed accurately.[61]

In this way, speech "pursuant to official duties" can be thought of as "employee-sponsored" speech. Employers have an increased interest in regulating employees as its mere conduits, much like the school does when students are speaking through means the school created and that are perceived to be school approved. The concern is that the employee or the student, as

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[56] *See* 16A AM. JUR. 2D *Constitutional Law* §§ 486, 491 (2021).
[57] *Id.*
[58] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).
[59] Garcetti v. Ceballos, 547 U.S. 410, 424 (1951).
[60] *Hazelwood*, 484 U.S. at 273.
[61] *Garcetti*, 547 U.S. at 421–22.

conduits, will either misrepresent the State's aims or otherwise interfere with its mission, and this warrants the exercise of greater control.

The similarity between "school-sponsored" speech and speech "pursuant to official duties" is the starting point of this Note's proposed framework. And the suggestion here is that evaluating whether speech is "pursuant to official duties" should be the initial inquiry. But this proposal differs from the student speech framework, which proceeds to analyzing the school's legitimate pedagogical concern, as this proposed framework will retain this inquiry as a threshold matter. Meaning that speech expressed "pursuant to official duties" remains out of the scope of protection.

2. *Private Student and Citizen Speech*

When speech is not "pursuant to official duties," however, it shall be classified as private citizen speech in the same way that non "school-sponsored" speech is classified as private student speech. When dealing with properly classified private citizen speech, the next inquiry should be whether the speech actually caused or is reasonably likely to cause an actual disruption to the workplace, much like the inquiry in the school context. Thus, instead of requiring private speech be a "matter of public concern," the speech will be analyzed for its disruptive nature and balanced to determine whether suppression is warranted or protection under the First Amendment is appropriate.

Notably, this framework does not inquire into the speech's character as a "matter of public concern." If speech is a "matter of public concern" or of great significance to the community, then this would of course weigh in favor of the employee and protection. And if the private speech causes, or it is reasonable to forecast that it will cause, an actual disruption to the efficient operations of the employer, this will weigh in favor of the employer and suppression.[62] At minimum, the key difference under this test is that even when speech is not on a matter of public concern, unless the employer has a sufficient interest to suppress the speech, employees will not automatically lose the ability to speak in non-employment spaces about private matters.

This proposal is inspired by the test under *Tinker*, but most importantly it fundamentally aligns with the holding in *Pickering*. Under *Pickering* the speech of the employee is to be balanced against the employer's interest in managerial control. If speech, whether it be private or a matter of public concern, is disruptive to the efficient operation of the public employer, the employer may absolutely have an interest sufficient to regulate it. But here, the State must provide this reason in the context of private citizen speech, and it will be the job of the court to evaluate whose interests outweigh in each circumstance.

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[62] *Cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

3. *Unprotected Speech*

Lastly, this reconceptualized test recognizes that there is speech that the employer need not tolerate. Like in *Fraser* and *Morse*, when speech is obscene, lewd, vulgar, or advocates for illegal conduct, the employer has an interest in regulating such speech through adverse consequences. If speech falls under this category, then the court need not consider the employee's interest in the speech through a balancing analysis; the employer will be presumed to have a sufficient reason to regulate that speech in the workplace.

Ultimately, adapting and adopting the scheme used to analyze student speech allows for much of the modern employee speech test to remain intact, while working to take the thumb off the scale currently weighing in favor of the employer. It does this by borrowing from the student speech analysis to reconceptualize the larger framework and eschewing the "matter of public concern" threshold.

C. *Analysis of the Reconceptualized Speech Scheme on Decided Cases*

To understand the implications of this scheme and the elimination of the "matter of public concern" threshold, this Part will consider its effect on different cases. A number of cases will have the same outcome even with the balancing inquiry because of the weight of the employer's interests, which demonstrates the redundancy of the "matter of public concern" threshold. But in other cases, the analysis arrives at the balancing inquiry and potentially has a different result now that the interests are necessarily balanced, as opposed to automatically imbalanced. Moreover, some cases will have the same conclusion because the "pursuant to official duties" threshold remains intact.

Dambrot v. Central Michigan University, is a case that demonstrates the redundancy of the "matter of public concern prong" considering the employer's overriding interest. In *Dambrot*, a head basketball coach was terminated for using a racial slur in a locker room speech.[63] Unsurprisingly, the slur was unprotected.[64] From most standpoints, this isn't a problematic outcome. But, the court reached its conclusion by holding that it wasn't a "matter of public concern" and stopped the inquiry.[65] To a large degree, it is sensible that this sort of speech does not need to be balanced—the overriding interest of the employer to not tolerate such speech is abundantly clear. But disposing of the issue under the "public concern" threshold fails to adequately address why this form of speech ought not to be tolerated by the employer.

Under the proposed employee speech scheme, the outcome would be the same, but for distinctive reasons. First, because this was speech in a locker room

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[63] Dambrot v. Cent. Mich. Univ. 55 F.3d 1177, 1180–81 (6th Cir. 1995).
[64] *Id.* at 1185.
[65] *Id.* at 1187.

discussion during a game, this speech was likely "pursuant to official duties,"[66] so the school has a heightened interest in regulating this speech. Second, racial slurs fall into the category of obscene, vulgar language, so it is presumed that the employer's interests override. Hence, the court could easily arrive at the same conclusion—suppression warranted—by engaging with and balancing the interests.

The result would also be the same in *Padilla v. South Harrison R-II School District*, where a teacher's speech in the context of compelled testimony was also not protected because it was not a "matter of public concern."[67] Here, the teacher was accused of sexual misconduct with respect to students, and the teacher ultimately testified during the criminal trial that it was not inappropriate to have a sexual relationship with a student.[68] As a result, the school did not renew his teaching contract.[69] The teacher's speech was not protected, as the court determined it was not a "matter of public concern" since the testimony was not about the teacher's legitimate disagreement with a school board's policy.[70]

Even without the "public concern" requirement, this speech would again not be protected under this Note's framework. Since this testimony was not "pursuant to the official duties of the teacher," the speech would be balanced against the employer's interests. But the school's interest in regulating is prominent here: "[s]chool boards not only have a legitimate interest in forbidding and seeking to prevent teacher-student sexual relationships, they have a duty to do so . . . ."[71] Thus, while most would agree the court reached the correct decision, it did not need to rely on the "public concern" prong to do so. Because while the teacher has an interest in testifying and answering questions truthfully, the school simply has an overwhelming overriding interest to react as it did to protect students.

Wright v. Illinois Department of Children and Family Services[72] demonstrates when the court would need to analyze whether speech is "pursuant to official duties" or private citizen speech and balance the interests in the latter case. In *Wright*, a social worker was unprotected from disciplinary action taken against her related to an ongoing disagreement between the social worker and department of children's services.[73] The social worker believed that children were being subjected to abuse, and the department did not, so the employee submitted a report that detailed her concerns of the shortcomings of the

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[66] This analysis is missing from the case because *Garcetti* was not decided for another decade. *Cf. Garcetti*, 547 U.S. at 421–22.

[67] Padilla v. S. Harrison R-II Sch. Dist., 181 F.3d 992, 997 (8th Cir. 1999).

[68] *Id.* at 995.

[69] *Id.* at 996.

[70] *Id.* at 997.

[71] *Id.* (citing Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607 (8th Cir. 1998)).

[72] Wright v. Ill. Dep't of Child. & Fam. Servs., 40 F.3d 1492 (1994).

[73] *Id.* at 1494–95.

department, to a juvenile court without supervisory approval.[74] The court ultimately held that the speech was a "matter of public concern," but unprotected because the employer's interest in disciplining the employee for insubordination was sufficient. The employee knowingly submitted a report without obtaining supervisory approval—a blatant act of insubordination.[75] All things considered, the court found that the disciplinary action was precisely aimed at reestablishing orderly and efficient functioning, and thus it was not a violation of the employee's First Amendment right.

The outcome would be the same under the proposed test without the "matter of public concern" prong. As an act of insubordination, there is a question of whether this would be considered speech made "pursuant to official duties."[76] But even if this is considered private speech, the speech would likely still be unprotected because the employer has a legitimate and overriding managerial interest in addressing insubordination. This speech directly threatens the functioning of the employer by directly conflicting with the direction of authority, so the State would have a significant interest in regulating the speech and addressing the defiance that would likely outweigh the employee's interest regarding the welfare of the child as the court in *Wright* thought it did.

Lastly, *Butler*[77] demonstrates why the "matter of public concern" requirement is underinclusive since it undervalues private speech that is of significant interest to the employee (and the justice system). Under the reconceptualized regime, the court would be able to consider the interest of the employee in testifying in a child custody proceeding. Because the court would not be forced to stop the analysis for its failure to satisfy the "matter of public concern" threshold, the court would be required to consider Butler's interest in that speech and the interests of the employer in regulating it. Ultimately, the employer in *Butler* did not provide an explanation for disciplining Butler, nor did the court consider what potential threat to the employer the testimony had or could have reasonably been perceived to have.[78] The court didn't have to.[79]

Under this Note's proposed regime, since this is not speech "pursuant to official duties," nor is its character so inappropriate that the employer needn't

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[74] *Id.* at 1496–97, 1503–05.

[75] *Id.* at 1503. The court explained: "[T]he relevant departmental decisionmakers have a responsibility to use their judgment in choosing an official position to represent and defend to the court, and may reasonably expect that their judgment will not be sideswiped by an independent submission to the court by a subordinate who fought and lost the internal policy battle but still hopes to win the war." *Id.* at 1504.

[76] This is an act of insubordination that openly criticizes the department, and so could fall outside the scope of official duties. But if it were determined that the speech, despite being an act of insubordination, was "pursuant to official duties," then the speech would be unprotected under this framework.

[77] Butler v. Bd. of Cnty. Comm'rs for San Miguel Cnty., 920 F.3d 651, 655 (10th Cir. 2019).

[78] *See id.*

[79] *See id.* at 665.

ever tolerate it,[80] the court would be required to balance the interests of the two parties. This is an important role the courts ought to play. The justice system has a significant interest in truthful testimony as part of its fact-finding function and employees have an interest in testifying on matters of personal importance. Consequently, an employer should be required to provide sufficient facts to support either a finding or an inference that such testimony did or would likely threaten managerial control to override the employee's interests and permit retaliation. Without more, the framework is needlessly imbalanced in favor of the employer.

As it currently stands, the framework prematurely stops the inquiry with the "matter of public concern" threshold despite there being instances where private speech is important enough to require the State to defend its decision. Having the opportunity to engage the balancing inquiry, the court will have more of a chance to consider the underlying implications of its outcomes and consider when speech ought to be constitutionally protected, or alternatively, when the State's interests are paramount. This is a difficult inquiry, but an imperative one.

D. *Counterarguments and Responsive Justifications for this Solution*

There are several possible concerns or counterarguments to this proposed framework, but none are sufficient to justify adherence to the current test. This final Part briefly considers these counterarguments in turn and responds to each. The counterarguments include the following: (1) bright-lines are preferable because they allow for more consistent, predictable outcomes; (2) public employers are first and foremost employers, and should be regulated in a manner more akin to that of private employers, who don't have to worry about the First Amendment; and (3) speech on a "matter of public concern" is the heart of the First Amendment and the only thing sufficient to override the interests of the State as employer.

First, the balancing versus bright-line question is a critical debate in the space of constitutional freedoms, including the First Amendment.[81] The debate is essentially whether consistency and predictability are more important than greater protection.[82] Being that bright-lines can be underinclusive, protection is more often limited. This Note surveys this problem in action: a private matter cannot satisfy the matter of public concern prong and therefore is never protected. This Note agrees with the stance that greater protection is warranted, and thus creates space for balancing. Courts are equipped to engage in this fundamental inquiry, and though there may be challenges with inconsistency and unpredictability, allowing for courts to engage and consider what outcomes serve the First Amendment is of primary constitutional importance.

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[80] Per a *Bethel*/*Morse* consideration.
[81] FELDMAN & SULLIVAN, *supra* note 14, at 942–45.
[82] *Id.* at 942–43.

Second, with respect to the disparate treatment between private and public employers, the inability of the Constitution to constrain behavior in the private sector should not serve as a reason that the Constitution's restraints do not apply to the State. The reason that the State has leeway to regulate employee speech is because of its interest in managerial authority and in its efficient operations, not merely because private sector employers aren't limited to concerns of free speech. The public employer is just as much the State as it is employer. Though it has similar concerns, it is reasonable that it has the additional requirement to balance its responsibility not to infringe on the fundamental rights of citizens.

Lastly, though it is true that the First Amendment's primary concern is allowing for the free flow of "political and ideological"[83] thought, and the advancement of those ideas, it is also concerned with truth.[84] Thus, truthful speech on a matter of any concern should be of paramount importance to the First Amendment and worthy of potential protection. Speech deserving of constitutional protection remains a question for our nation to consider. The notion that there is some speech the government cannot infringe on is clearly inscribed into the nation's founding document. As this principle is implicated in both public and private spaces, there should be space for a critical analysis. Questions this important never have easy answers and are rarely decided once and for all, meaning that bright line thresholds are inappropriate.

V. CONCLUSION

A framework that engages with the balancing inquiry is essential in the space of constitutional freedoms. Theoretically, bright lines provide predictable and consistent outcomes, but this too often leads to less protection. Allowing courts, the discretion to balance the interests between employers and employees is an important aspect to striking the right balance between the two parties. Political and ideological speech may be the worthiest of protection, and the State, as employer, absolutely does have a significant interest in managerial authority and efficient operations. But that does not mean that the public speech framework must automatically eschew protection for speech because it is not a "matter of public concern." Employees have an interest in speech on private matters, especially in the context of testimony in a judicial proceeding, that ought to have a chance of protection. As such, the framework that is applied in this space must allow for the balancing of the interests, and not prematurely stop the analysis as the current framework does. Constitutional protections, and in particular the First Amendment, are foundational to the success of our democratic society. The debate on what protection the Amendment affords is essential. It should not be categorically shied away from under the command of the court best positioned to protect the rights of Americans.

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[83] *E.g.,* Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968); *see also* KILLION, *supra* note 4, at 1.

[84] FELDMAN & SULLIVAN, *supra* note 14, at 935–36.