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INTRODUCTION

Prisoners, by virtue of their incarceration, necessarily sacrificed some of the constitutional rights and privileges that they possessed as free citizens to ensure the effective operation of our prison system.[1] In the First Amendment context, the Supreme Court case of *Pell v. Procunier* established that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" (the "*Pell* test").[2] Yet, the Court left this "superficial formula" relatively unexamined and undefined.[3] Specifically, *Pell* refrained from determining if the First Amendment right to free speech remained "inconsistent with a prison inmate's status as a prisoner or with the

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[1] *See, e.g.*, Price v. Johnston, 334 U.S. 266, 285 (1948), *abrogated by* McClesky v. Zant, 499 U.S. 467 (1991) ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

[2] 417 U.S. 817, 822 (1974).

[3] *See* MICHAEL B. MUSLIN, RIGHTS OF PRISONERS § 1.04 (2d ed. 1993) ("This superficial formula fails to identify which constitutional rights are taken by law, but it does make the point that important rights survive incarceration.").

legitimate penological objectives of the corrections system."[4] Instead, *Pell* and its progeny primarily evaluated whether prison restrictions on prisoners' asserted free speech rights possessed a reasonable relation to the government's legitimate penological interests.[5]

Eventually, *Turner v. Safley* expressly confirmed the Court's approach to evaluating the reasonableness of prison restrictions on prisoners' asserted free speech rights.[6] *Turner* announced that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests" (the "*Turner* test").[7] *Turner* further established a very deferential rational basis standard of review and a relatively well-defined four-factor approach to evaluate the relationship between the prison's restrictions and its legitimate penological interests.[8] *Turner*, however, neglected to precisely identify the existence and scope of protection to prisoners' free speech rights.[9]

Consequently, the Court's neglect of the *Pell* test and the overall uncertain status of prisoners' free speech rights presented considerable difficulties for the Seventh Circuit when it evaluated prisoners' free speech retaliation claims.[10] Because the Court never determined if the First Amendment protected prisoners' free speech from retaliation or the proper constitutional standard for evaluating prisoners' free speech retaliation claims,[11] the Seventh Circuit found itself applying the Court's well-known and well-defined test for evaluating public employees' free speech retaliation claims to the prison setting.[12]

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[4] *See* discussion *infra* Part I.A and note 52 and accompanying text.

[5] *See* discussion *infra* Part I.A and note 61 and accompanying text.

[6] 482 U.S. 78, 89 (1987); *see* discussion *infra* Part I.B.

[7] *Turner*, 482 U.S. at 89.

[8] *See id.* at 89–93; discussion *infra* Parts I.B.

[9] *See* discussion *infra* Parts I.B–C.

[10] *See* discussion *infra* Part IV.A., IV.C, V.B.

[11] *See* Bridges v. Gilbert, 557 F.3d 541, 549 (7th Cir. 2009) (observing that the Court's prisoner free speech jurisprudence refrained from explicitly mandating, or excluding, the legitimate penological interests test for evaluating prisoners' free speech retaliation claims).

[12] *See, e.g.*, Brookins v. Kolb, 990 F.2d 308, 313(7th Cir. 1992), *abrogated in part by Bridges*, 557 F.3d 541 (7th Cir. 2009); Pearson v. Welborn, 471 F.3d 732,

In the Court's public employee free speech jurisprudence, the First Amendment protected a public employee's speech against retaliation only if the public employee (1) "spoke as a citizen on a matter of public concern" (the "public concern test");[13] and (2) the government-employer possessed no "adequate justification for treating the employee differently from any other member of the general public" (the "*Pickering* balancing test").[14] Hence, the Seventh Circuit supported the notion that the First Amendment protected a prisoner's speech against retaliation if the prisoner—like the public employee—spoke "on a matter of public concern" and the government-as-jailor possessed no legitimate interest in restricting the prisoner's speech.

Aside from the fact that the Court's precedent arguably left open what tests should apply to evaluate prisoners' free speech retaliation claims, the Seventh Circuit's application of the public concern and *Pickering* balancing tests to the prison context made some sense for three primary reasons.[15] First, unlike the uncertain and confusing status of prisoners' free speech rights, the Court specifically articulated a precise and well-defined test to evaluate free speech retaliation claims in the public employment context.[16] Second, if the First Amendment restricted public employees' free speech retaliation claims by a public concern test, then the First Amendment surely similarly restricted prisoners' free speech retaliation claims unless courts reached the absurd result of potentially granting prisoners

741–42 (7th Cir. 2006); McElroy v. Force, 403 F.3d 855, 858–59 (7th Cir. 2005) (per curiam); Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999), *abrogated in part by Bridges*, 557 F.3d 541.

[13] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (citing Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968)).

[14] *Id.*

[15] *See Bridges*, 557 F.3d at 549–50 (observing that the Court's public employee free speech jurisprudence neither expressly limited the public concern test to public employees' free speech retaliation claims, nor definitely indicated that the test should apply to other free speech retaliation claims); *supra* note 11 and accompanying text.

[16] *See* Thaddeus-X v. Blatter, 175 F.3d 378, 388 (6th Cir. 1999) (finding it helpful to draw upon the public employee free speech jurisprudence to analyze other free speech retaliation claims because the bulk of First Amendment retaliation claims arose in the public employee setting); discussion *infra* Part I.

greater free speech rights than public employees.[17] Third, the free speech rights of prisoners and public employees remained similarly situated in that both received less constitutional protection than normal citizens because the government's unique interests in controlling both populations to effectively provide government services necessarily required both groups to accept certain limitations on their freedom of speech.[18]

The Seventh Circuit, however, reconsidered its support for applying the public concern and *Pickering* balancing tests to prisoners' free speech retaliation claims in *Bridges v. Gilbert*.[19] The prisoner-claimant, Jimmy Bridges, alleged that prison officials retaliated against him for providing an affidavit in a lawsuit brought by the estate of another inmate.[20] In that prior lawsuit, Bridges averred his account of an incident involving prison officials' alleged mistreatment of the other inmate while that inmate was gravely ill and later died.[21] The trial court dismissed Bridges's complaint because his speech did not involve a matter of public concern since it only involved a matter personal to the estate of the other inmate.[22] On appeal, Bridges urged the Seventh Circuit to reject its support of a public concern test for prisoners' free speech retaliation claim in favor of the *Turner* test.[23]

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[17] *See Thaddeus-X*, 175 F.3d at 388 (commenting that the public concern requirement may be applicable to prisoners' free speech retaliation claims because "[p]risoners certainly do not have greater free speech rights than public employees.").

[18] *Compare supra* note 1 and accompanying text, *with Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."). *See generally* Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 U.C.L.A L. REV 1635 (2007) (observing that the low level of scrutiny the Court applied to prisoners' and public employees' free speech claims contrasted with the strict scrutiny standard the Court typically applied to government restrictions on free speech).

[19] *See* 557 F.3d at 546–52.

[20] *Id.* at 544.

[21] *Id.* at 544, 551.

[22] Bridges v. Huibregtse, No. 06-C-544-S, 2007 U.S. Dist. LEXIS 2477, at *4 (W.D. Wis. Jan. 8, 2007).

[23] *Bridges*, 557 F.3d at 547.

Ultimately, the Seventh Circuit agreed with Bridges and held that "a prisoner's speech can be protected even when it does not involve a matter of public concern."[24] Instead, the Seventh Circuit purportedly adopted the *Turner* test to evaluate prisoners' free speech retaliation claims.[25] In reality, however, the Seventh Circuit analyzed Bridges's free speech retaliation claim under the *Pell* test when it held that Bridges's allegedly truthful speech about possible prison abuses was "not inconsistent with legitimate penological objectives" without applying the *Turner* test, its factors, standard of review, or explicit reference to the deference courts typically reserve for the judgment of prison officials.[26] Consequently, the Seventh Circuit's attempt to clarify the constitutional level of protection for prisoners' free speech retaliation claims only left the ambiguous status of prisoners' free speech rights as uncertain as ever.[27]

This article analyzes and evaluates the Seventh Circuit's opinion in *Bridges v. Gilbert*. Part I reviews the Court's relevant First Amendment jurisprudence concerning prisoners' free speech rights, while Part II examines the Court's public employee free speech jurisprudence. Part III analyzes other federal circuits' approaches to prisoners' free speech retaliation claims, while Part IV discusses the Seventh Circuit's approach to prisoners' free speech retaliation claims. Lastly, Part V evaluates the Seventh Circuit's decision in *Bridges*. Part V argues that the Seventh Circuit's purported adoption of the *Turner* test plausibly conformed to Court precedent, but that *Bridges* effectively, and incorrectly, applied the *Pell* test to the prisoner's free speech claim. Finally, Part V contends that the Seventh Circuit should have considered applying the public concern and *Pickering* balancing tests to adjudicate a prisoner's speech on a matter of public-penological concern against the government's legitimate penological interests in restricting the prisoner's speech. This approach proves more workable than the legitimate penological interests tests, protects

[24] *Id.* at 551.
[25] *Id.* at 551–52.
[26] *See id.*; discussion *infra* Parts IV.C, V.B.
[27] *See* discussion *infra* Parts IV.C, V.B–C.

important free speech rights, and ensures that prisoners do not possess potentially broader free speech rights than public employees.

I. THE COURT'S PRISONER FREE SPEECH JURISPRUDENCE

Whether prisoners even enjoyed the protection of the Free Speech Clause of the First Amendment,[28] the "Constitution's most majestic guarantee,"[29] remained in doubt for nearly 170 years.[30] Since American prisons first developed in the early nineteenth century after the conception of the Constitution,[31] courts initially applied the Bill of Rights only as "a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead."[32] One court famously treated convicted felons as "slaves of the State," who possessed only those "personal rights . . . the law in its humanity accords . . . ."[33] Also, because the early prototypical prison institutions strictly prohibited inmates from talking, engaging in communications with other prisoners, and receiving publications except for the Bible, considerable doubt remained over whether prisoners retained their free speech rights.[34]

Early twentieth century prison reform movements relaxed these silence requirements and other prisoner speech restrictions due to then-prevailing beliefs that the harshness of prison life promoted recidivism by hardening prisoners to a criminal way of life.[35] Yet, by the mid-twentieth century, society generally considered prisons' rehabilitative efforts futile.[36] Consequently, prisons primarily became

[28] The Free Speech Clause of the First Amendment states, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[29] LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1 (2d ed. 1988).

[30] MUSLIN, *supra* note 3, § 1.02.

[31] *Id.* § 1.01.

[32] Ruffin v. Commonwealth, 21 Gratt. 790, 796 (Va. 1871).

[33] *Id.*

[34] MUSLIN, *supra* note 3, § 1.01.

[35] *Id.*

[36] *Id.*

warehouses for society's criminals with little regard for prisoners' free speech rights or other conditions of confinement.[37]

Furthermore, since courts deliberately refrained from questioning what constitutional rights survived incarceration as part of the so-called hands-off doctrine, the law perpetuated the ambiguous status of prisoners' free speech rights.[38] Courts supported the hands-off doctrine because they believed judicial intervention into internal prison affairs implicated concerns about the separation of powers,[39] federalism,[40] institutional expertise,[41] and the unstated potential for boundless—and possibly meritless—litigation.[42]

Ultimately, the Supreme Court ended the hands-off doctrine and permitted courts to adjudicate prisoners' free speech claims against prison officials.[43] Thus, the Court developed its prisoner free speech jurisprudence in cases like *Pell v. Procunier*[44] and *Turner v. Safley*.[45] These cases established the possible tests for evaluating prisoners' free speech retaliation claims, but they provided little definition or protection to prisoners' free speech rights.[46] As a result, the hands-off doctrine's legacy on the uncertain status of prisoners' free speech rights remained ever-present in the Court's prisoner free speech

[37] *Id.*

[38] *Id.* § 1.02.

[39] *Id.* (commenting that concerns about the separation of powers existed because courts generally viewed the management and control of prisons as executive and legislative functions).

[40] *Id.* (commenting that considerations about federalism arose because many prisoner suits were brought in federal courts by state inmates, and federal courts did not want to tell states how to run their prisons).

[41] *Id.* (commenting that concerns about institutional expertise developed because courts believed that the management of prisons required considerable training, skill, and experience that only corrections officials possessed).

[42] *Id.* (commenting that concerns about litigation developed because of the large volume of idle prisoners).

[43] *Id.* § 1.03; *see also* Procunier v. Martinez, 416 U.S. 396, 405–06 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

[44] 417 U.S. 817 (1974).

[45] 482 U.S. 78 (1987).

[46] *See* discussion *infra* Part I.A–C.

jurisprudence.[47] Accordingly, Part I reviews *Pell v. Procunier*, *Turner v. Safley*, and the differences between the *Pell* and *Turner* tests.

A. Pell v. Procunier

Pell upheld a prison regulation prohibiting face-to-face communications between prison inmates and members of the press.[48] In analyzing the prisoners' free speech claims,[49] the Court initially noted that lawful incarceration necessarily restricted the rights and privileges of prisoners.[50] As a corollary to that principle, the *Pell* Court announced its test that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[51] The *Pell* Court, however, did not consider the existence of prisoners' free speech rights to communicate with the journalists survived their imprisonment.[52] Instead, the *Pell* Court assumed that the prisoners possessed a free speech right to communicate with the journalists, and proceeded to evaluate the reasonableness of the prison regulation in light of the prison's legitimate penological objectives.[53]

Next, the *Pell* Court identified three generally legitimate penological interests: (1) the deterrence of crime; (2) the rehabilitation of prisoners; and (3) the maintenance of internal security

[47] *See* MUSLIN, *supra* note 3, § 1.04.

[48] *Pell*, 417 U.S. at 827–28, 835. This comment does not analyze the press officials' more famous First Amendment challenge.

[49] The *Pell* prisoners asserted a free speech right to communicate their views to any willing listener, which included a willing representative of the press for the purpose of publication by a willing publisher. *Id.* at 822. The Court assumed that the Free Speech Clause protected such a right. *Id.*

[50] *Id.* (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

[51] *Id.*

[52] *Id.*; *see also* Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (commenting that *Pell* refrained from deciding whether the asserted First Amendment right survived incarceration because the prison regulation was a reasonable exercise of the prison officials' judgment as to the appropriate means of furthering penological goals).

[53] *Pell*, 417 U.S. at 822.

considerations within the prison institutions.[54] Then, the Court upheld the prison restrictions because they furthered these legitimate penological objectives.[55] First, the Court determined that the restrictions deterred crime because isolating prisoners in presumably undesirable conditions reasonably deterred prisoners and others from committing additional criminal offenses.[56] Second, the restrictions furthered prisoners' rehabilitation and maintained prison security because the corrections officers believed that the restrictions allowed the inmates to have personal contact with people who aided their rehabilitation while not compromising the security concerns inherent in face-to-face communications.[57] Thus, in evaluating whether the prison restrictions served the legitimate penological objectives, *Pell* deferred to the "expert judgment" of the corrections officers absent "substantial evidence in the record to indicate . . . the officials . . . exaggerated their response to [the legitimate penological] considerations."[58] *Pell* also considered the regulation as a reasonable time, place, and manner restriction because it was content-neutral and allowed prisoners alternative means of communicating with outsiders.[59]

Ultimately, the *Pell* Court's failure to apply the *Pell* test left future courts without any definition or explanation of what free speech rights, if any, actually survived incarceration.[60] Instead, the Court generally adopted *Pell*'s approach to solely evaluate the validity of

[54] *Id.*

[55] *Id.* at 827–28.

[56] *Id.* at 822. The Court's reasoning under the legitimate penological interest of deterring crime placed no real limiting principle on the types of permissible prison restrictions because any restriction on prisoners' free speech rights would make conditions less desirable and thereby deter crime. *See id.*; *cf. also* Beard v. Banks, 548 U.S. 541, 546 (2006) (Stevens, J., dissenting) (arguing that the deprivation theory of rehabilitation possessed no limiting principle because any deprivation of a prisoner's constitutional right provided the prisoner an incentive to improve his or her behavior and the theoretical opportunity to have the right restored with improved behavior). However, no case since *Pell* disavowed this reasoning.

[57] *Pell*, 417 U.S. at 822, 827.

[58] *Id.* at 827.

[59] *Id.* at 823–27.

[60] *See id.* at 822; *supra* note 3 and accompanying text.

contested prison regulations on prisoners' asserted First Amendment right under a very deferential, rational basis standard of review.[61] The Court formally adopted this approach in *Turner v. Safley*.[62]

B. Turner v. Safley

In a 5–4 decision written by Justice O'Connor, *Turner* upheld a prison regulation prohibiting correspondence between inmates in the prison system unless the correspondence was between immediate family members or concerned legal matters, but invalidated a prison regulation that essentially prohibited inmates from marrying anyone.[63] *Turner* expressly resolved the constitutional standard of review for evaluating the validity of prison regulations that infringed upon the free speech rights of prisoners.[64] Specifically, *Turner* rejected evaluating contested prison regulations under a heightened or intermediate level of scrutiny.[65] Instead, *Turner* announced a rational basis standard of review and its test by declaring that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[66]

Additionally, *Turner* established four relevant factors that courts should consider when evaluating the reasonableness of the contested

[61] *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (observing that the Court generally adopted *Pell*'s refusal to consider if the prisoner's asserted right survived incarceration, and instead evaluated the reasonableness of the prison restrictions on the asserted right).

[62] *See* discussion *infra* Part I.B.

[63] Turner v. Safley, 482 U.S. 78, 81 (1987).

[64] *Id.* at 86, 89. *Turner* also announced the constitutional standard for evaluating a regulation that restricted prisoners' due process right to marry. *Id.* at 89.

[65] *Id.* In Procunier v. Martinez, 416 U.S. 396, 413 (1974) *abrogated in part by* Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989), the Court applied an intermediate level of scrutiny to invalidate a prison regulation that restricted the free speech rights of non-inmates based solely on the First Amendment rights of the non-prison population. *Thornburgh* applied *Turner*'s rational basis review to prisoners' incoming communications even from non-prisoners, but left undecided the standard of review for restrictions on prisoners' outgoing communications to non-prisoners. 490 U.S. at 413–14.

[66] *Turner*, 482 U.S. at 89.

prison regulation.[67] "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[68] Framed differently, the rational or logical connection between the prison regulation and the legitimate, content-neutral, penological interest cannot remain "so remote as to render the policy arbitrary or irrational."[69] Second, *Turner* considered the existence of "alternative means of exercising the right that remain open to prison inmates."[70] Third, *Turner* analyzed "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally."[71] Fourth, *Turner* stated that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[72]

In *Turner*, the correspondence restriction was supported by each of the factors, according to the Court's rational basis review.[73] First, the correspondence regulation was logically connected to the prison's valid security concerns because the prison officials claimed that they implemented the regulation to control communications about escape, assault, violence, and gang-related plans.[74] Second, the correspondence regulation allowed inmates alternative means of expression because it only barred communication between "a limited class of other people."[75] Third, since the *Turner* prison officials testified that accommodating the prisoners' correspondence rights entailed significant security risks to guards and inmates, the Court deferred to the prison officials' expert judgment in enacting the prison

[67] *Id.*
[68] *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
[69] *Id.* at 89–90.
[70] *Id.* at 90.
[71] *Id.* at 92–93.
[72] *Id.* at 90. Under this factor, the inmate possessed the burden of proving the contested regulation was an "exaggerated response" to prison concerns, which the inmate could accomplish by pointing to an "alternative that fully accommodates the prisoner's rights at a de minimis cost to valid penological interests." *Id.* at 90–91.
[73] *Id.* at 91–93.
[74] *Id.* at 91–92.
[75] *Id.* at 92.

regulation.[76] Fourth, the proposed alternative of having the prison officials monitor and screen the correspondence imposed more than a de minimis cost due to the administrative difficulties and risk of error in missing dangerous messages.[77]

Turner's test and its analysis definitively established a rational basis standard of review for evaluating prisoners' free speech claims.[78] The *Turner* Court granted prisoners' free speech claims the lowest level of First Amendment protection to advance the Court's policy of judicial restraint in prison affairs.[79] The Court, motivated by the same-old concerns about the separation of powers,[80] institutional expertise,[81] and federalism,[82] decided that rational basis review appropriately afforded substantial deference to the expert judgment of prison officials.[83] Rational basis review not only allowed courts to refrain from the awkward position of second-guessing prison officials, but it also provided prison officials with confidence that they would not have to second-guess "their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[84] Consequently, some commentators argued that *Turner*'s rational basis review marked a return to the thoroughly

[76] *Id.*

[77] *Id.* at 93.

[78] *Id.* at 89.

[79] *Id.* at 85.

[80] *Id.* at 84–85 ("Prison administration is . . . a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint.").

[81] *Id.* ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources."). Additionally, the Court commented that "'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.' . . . '[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.'" *Id.* at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 404–5 (1974)).

[82] *Id.* at 85 ("Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.").

[83] *Id.* at 89.

[84] *Id.*

discredited hands-off doctrine.[85] At the least, rational basis review ensured that courts recognized and protected fewer prisoners' free speech rights.[86]

Moreover, while *Turner* neglected to consider if prisoners retained a constitutional right to free speech under the *Pell* test,[87] the *Turner* Court applied the *Pell* test to expressly hold that prisoners' right to marry was not inconsistent with the prisoners' status or the legitimate penological objectives of the corrections system.[88] In applying the *Pell* test, the *Turner* Court reasoned that the right to marry survived incarceration because many of the incidents of marriage remained "unaffected by the fact of confinement or the pursuit of legitimate corrections goals."[89] Some of the incidents of marriage that survived incarceration included personal expressions of emotional support, public commitment, and religious faith.[90] The *Turner* Court, however, made no mention of a rational basis standard of review, the appropriate level of deference to apply to prison officials' contrary contentions, or the *Turner* factors when it considered whether the prisoners' right to marry was inconsistent with

[85] *See* MUSLIN, *supra* note 3, § 1.04 (citing Cheryl Dunn Giles, Turner v. Safley *and Its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219 (1993)).

[86] *Id.*

[87] *See Turner*, 482 U.S. at 84. The Court expressly noted that prisoners retained at least three constitutional rights: First, the right to petition the government for the redress of grievances under Johnson v. Avery, 393 U.S. 483 (1969); second, the right to protection against invidious racial discrimination in violation of the Equal Protection Clause under Lee v. Washington, 390 U.S. 333 (1968); and third, the right to the protections of due process under Wolff v. McDonnell, 418 U.S. 539 (1974). The Court, however, never mentioned that prisoners retained their free speech rights. *See Turner*, 482 U.S. at 84.

[88] *Id.* at 95 (citing Pell v. Procunier, 417 U.S. at 822).

[89] *Id.* at 96.

[90] *Turner* found four incidents of marriage survived incarceration. *Id.* at 95–96. First, inmate marriages, like other marriages, were personal expressions of emotional support and public commitment. *Id.* Second, inmate marriages may also be expressions of religious faith. *Id.* at 96. Third, inmates may marry with the expectation of later consummating their marriage once they were eventually released. *Id.* Fourth, marital status conferred the receipt of certain important government benefits. *Id.*

legitimate penological objectives.[91] At the same time, however, the *Turner* Court also appeared to support a total prohibition on the right to marry if the prohibition formed part of the punishment for the prisoner's crime.[92] Thus, the Court's analysis of what constitutional rights survived incarceration remained unclear.[93]

Finally, after the *Turner* Court used the *Pell* test to hold that prisoners retained the right to marry, the Court applied the *Turner* test to invalidate the prison's marriage restrictions under its rational basis review.[94] Unlike the Court's application of the *Turner* test to the correspondence restrictions, the Court seemed less willing to defer to the prison officials' judgments about the rational relationship between the marriage restrictions and the prison's legitimate penological objectives.[95] First, the Court held that the marriage restrictions possessed no reasonable relation to the prison officials' asserted interests in preventing the security threat from "love triangles" and promoting the rehabilitation of female convicts entangled in excessively dependent relationships with dangerous men.[96] Second, the Court did not expressly consider the reasonableness of the

[91] *See id.* at 95–96.

[92] *See id.* at 96 (distinguishing Butler v. Wilson, 415 U.S. 953 (1974), *summarily aff'g* Johnson v. Rockefeller, 365 F. Supp. 377 (S.D. N.Y. 1974)). Currently, only Justices Thomas and Scalia expressly support this view. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 139–41 (2003) (Thomas, J., concurring) (evaluating prisoners' challenges to deprivations of their asserted rights solely under the Eighth Amendment).

[93] *See* James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV 97, 107 (2006) (discussing the Court's lack of clarity in what rights survive incarceration).

[94] *Id.* at 97–99.

[95] *See id.* at 91–93, 97–99.

[96] *Id.* at 98–99. Regarding the security justification, the Court held that the marriage restriction was too broad because "love triangles" could exist independent of marriage relationships. *Id.* at 98. For the rehabilitation interest, the Court similarly held that the marriage restriction was too broad because it encompassed inmate-civilian marriages and male inmate marriages. *Id.* at 99. Obviously, the correspondence regulation was too broad in that it blocked non-dangerous communications; however, the Court still found the ban "logically connected" to the prison's legitimate security concerns. *See id.* at 91–92.

marriage restriction under *Turner*'s second factor, but the restriction necessarily left inmates with some alternative means of exercising their right to marry by not completely prohibiting inmate marriages.[97] Lastly, the Court found the third and fourth factors showed that the marriage restriction possessed no reasonable relation to the prison's legitimate interests largely because the Court reasoned that accommodating non-dangerous marriages posed no security risks.[98]

Thus, *Turner* itself demonstrated the important differences and consequences between the *Pell* and *Turner* tests. Part C discusses these differences in greater detail.

C. The Differences Between the Pell *and* Turner *Tests Produced Important Consequences for Prisoners' Free Speech Rights*

The *Pell* and *Turner* tests asked different questions, contained markedly different analysis, and produced different consequences with respect to protecting prisoners' rights.[99] While the *Turner* test possessed a relatively well-defined framework of analysis and standard of review that compelled courts to substantially defer to prison officials' determinations about the reasonableness of restricting prisoners' rights, the *Pell* test lacked definition, a specific standard of review, and further allowed courts to make their own determinations of proper prison administration.[100] Consequently, the *Turner* test

[97] *See id.* at 99. Since the Court claimed the marriage restriction formed an "almost complete ban on the decision to marry," it apparently left some alternative means of exercising the right and should have passed under this second factor. *See id.* at 92, 99.

[98] *Id.* at 97–98. Under the third factor, because the Court determined the marriage decision was a completely private decision that did not reasonably impact the prison's security concerns, the impact of accommodating the right to marry failed to trigger a significant "ripple effect" on other inmates and prison officials. *Id.* at 98. Under the fourth factor, the marriage regulation had an easy alternative to accommodate the right to marry at a de minimus cost because inmates could marry unless the warden specifically determined the marriage presented a security risk. *Id.* at 97–98.

[99] *See* discussion *supra* Part I.B; discussion *infra* Parts I.C, III.B–C, V.B.

[100] *See* discussion *supra* Part I.B; discussion *infra* Parts I.C, III.B–C, V.B.

recognized few prisoners' rights, but the *Pell* test is vague—it may recognize many prisoners' rights or no rights whatsoever.[101]

Essentially, the *Pell* test determined if prisoners possessed a given First Amendment right, while the *Turner* test evaluated the reasonableness of restricting that given right.[102] In the prisoner free speech retaliation claim context, courts applying the *Pell* test should ask if the prisoner's right to exercise free speech without government retaliation remained "not inconsistent with [the prisoner's] status as a prisoner or the legitimate penological objectives of the corrections system."[103] In contrast, courts applying the *Turner* test to a prisoner's free speech retaliation claim should ask if the prison's allegedly retaliatory actions were "reasonably related to legitimate penological interests."[104]

Accordingly, the *Pell* test largely operated as a threshold to the *Turner* test.[105] If a prisoner's free speech retaliation claim failed to pass the *Pell* test, then courts need not question the reasonableness of restricting the prisoner's speech under the *Turner* test because the prisoner possessed no actual right to a free speech retaliation claim, and judicial deference to prison officials should be nearly absolute.[106] But, if the prisoner's asserted free speech right passed the *Pell* test and survived imprisonment, then courts could still apply the *Turner* test to determine the reasonableness of restricting the prisoner's speech.[107] Of course, if the court's *Pell* inquiry determined that prisoners possessed

[101] *See* discussion *supra* Part I.B; discussion *infra* Parts I.C, III.B–C, V.B.

[102] *See* discussion *supra* Part I.A–B.

[103] *See* Pell v. Procunier, 417 U.S. 817, 822 (1974); discussion *supra* Part I.A.

[104] *See Turner*, 482 U.S. at 89; discussion *supra* Part I.B.

[105] *See, e.g.*, *Pell*, 417 U.S. at 822; Johnson v. California, 543 U.S. 499, 510 (2006) (finding under the *Pell* test that prisoners retained their Fourteenth Amendment Equal Protection right against invidious racial discrimination, and remanding to evaluate the prisoner's claim under strict scrutiny review rather than *Turner*'s rational basis review).

[106] S*ee, e.g.*, *Pell*, 417 U.S. at 822; Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985) (stating that when the prisoner's asserted right was found not to exist in the prison context because it was inherently inconsistent with legitimate penological objectives, there could not be any actual invasion of the purported right, and judicial deference to prison officials should be nearly absolute).

[107] *See, e.g.*, *Turner*, 482 U.S. at 95–99.

a protected right to speak freely without retaliation, then the court would perhaps be more willing to protect that right against governmental restrictions—as demonstrated by *Turner*.[108]

The standard of review and level of deference courts respectively applied to prisoners' free speech claims and prison officials' contentions about prison administration marked one critical distinction between the *Pell* and *Turner* tests. The *Turner* test specifically formed a definite framework, with a four-factor test and rational basis standard of review.[109] In fact, *Turner*'s factors and its analysis explicitly instructed courts to defer to the prison officials' considerations of whether the prison's actions reasonably related to the prison's legitimate interests.[110] Conversely, the Court failed to develop a definite framework or standard of review when it applied the *Pell* test.[111] By itself, the *Pell* test remained an indeterminate and "superficial formula" that failed to identify what constitutional rights survived incarceration.[112] Consequently, courts applying just the *Pell* test tended to make their own judgments about proper prison administration.[113]

For instance, in *Johnson v. California*,[114] the Court recently applied just the *Pell* test to hold that prisoners retained their Fourteenth Amendment Equal Protection right against invidious racial discrimination.[115] In so holding, the Court rejected evaluating the

[108] *See id.* (applying the *Pell* test to find that prisoners retained the right to marry and further invalidating the marriage restrictions under the *Turner* test, but applying the *Turner* test to uphold the correspondence restrictions); *supra* notes 96–98 and accompanying text.

[109] *See* discussion *supra* Part I.B.

[110] *See* discussion *supra* Part I.B.

[111] *See* discussion *supra* Parts I.A–B.

[112] *See supra* note 3 and accompanying text.

[113] *See* discussion *supra* Part I.B; discussion *infra* Parts I.C., III.B–C, IV.C, V.B.

[114] 543 U.S. 499 (2005).

[115] *Id.* at 510–11. *Johnson* also asserted in dicta the less controversial claim that a prisoner's Eighth Amendment rights against cruel and unusual punishment survived incarceration. *Id.* Whether rights other than those considered in *Johnson* survived incarceration remains undetermined, but recent evidence suggested courts confined *Johnson*'s reasoning to racial discrimination and Eighth Amendment

prison's unwritten policy of initially segregating prisoners' cell mates by race under *Turner*'s rational basis review, and remanded the case to review the prison's policy under strict scrutiny like all government racial classifications.[116] The *Johnson* Court held that prisoners retained their Equal Protection Clause right against racial discrimination because such a right need not "necessarily be compromised for the sake of proper prison administration . . . . [since] the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system."[117] The *Johnson* Court's reasoning cited precedent concerning the Fourteenth Amendment and the criminal justice system; but, like *Turner*'s application of the *Pell* test to the right to marry, *Johnson* made no mention of the standard of review or the level of deference courts should apply to the prison officials' contrary contentions.[118]

In dissent, Justice Thomas harshly criticized the Court's use of the *Pell* test.[119] Justice Thomas argued that the majority ignored precedent and wise policy by making its own ill-considered judgment about proper prison administration, instead of expressly deferring to the expert judgment of prison officials.[120] According to Justice Thomas, the *Pell* test necessarily required courts to make their own judgments about proper prison administration because, "[f]or a court to know whether any particular right is inconsistent with proper prison administration, it must have some implicit notion of what a proper

claims. *See* Robertson, *supra* note 93, at 108 (analyzing recent prisoner rights cases). This comment, however, contends that the federal circuits applied *Johnson*'s reasoning to prisoners' free speech retaliation claims. *See* discussion *supra* Parts III.B–C; IV.C, V.B.

[116] *Id.* at 515.

[117] *Id.* at 510–11.

[118] *Id.* (citing Rose v. Mitchell, 443 U.S. 545, 555 (1979); Batson v. Kentucky, 476 U.S. 79, 99 (1986)); *see also* Robertson, *supra* note 93, at 107 (discussing *Johnson*'s failure to further elaborate or identify why rights remained fundamentally inconsistent with incarceration); discussion *supra* Part I.B.

[119] *Johnson*, 543 U.S. at 541–42 (Thomas, J., dissenting).

[120] *Id.*

prison ought to look like and how it ought to be administered."[121] Yet, Justice Thomas argued that the Court specifically developed and routinely applied the *Turner* test because precedent and wise policy dictated that courts should not make judgments about proper prison administration.[122] Thus, Justice Thomas believed that the *Pell* test remained irreparably inconsistent with the Court's precedent and policy of deference to prison officials.[123]

The other critical difference between the *Pell* and *Turner* tests concerned how they evaluated the prisoners' asserted rights. Both tests "refused to recognize any hierarchy of values among important constitutionally protected interests"[124] and balance the prisoners' rights against the government's legitimate penological interests by always elevating any penological concern to "a higher constitutional plane than [the asserted constitutional] rights."[125] In *Shaw v. Murphy*, the Court specifically rejected a prison inmate's attempt to enhance the First Amendment protection of his speech about important legal

[121] *Id.*

[122] *Id.*

[123] *See id.* Justice Thomas advocated an approach examining the history of incarceration to determine if prisoners forfeited their asserted rights as a condition of their punishment. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 141–45 (2003) (Thomas, J., concurring). This approach, however, remained just as indeterminate as the *Pell* test because the history of incarceration constantly evolved to restrict or accommodate prisoners' free speech rights depending on then-prevailing beliefs about whether such measures best achieved legitimate penological objectives. *See* discussion *supra* Part I.

[124] MUSLIN, *supra* note 3, § 1.04; Robertson, *supra* note 93, at 119–20 ("[*Turner*'s] first [factor] functions as the leveler of rights by drawing no distinction between "weak" (non-fundamental) and "strong" (fundamental) rights.").

[125] Robertson, *supra* note 93, at 119–20 ("[*Turner*'s] first [factor's] commitment to rationality, the *sine qua non* of the test, has a clear subtext: Reasonable means of achieving goals, including petty goals, trump rights. Indeed, penal goals acquire the status of categorical imperatives."). Robertson further described the *Turner* test as "faux-balancing" because the *Turner* test "deceptively suggests balancing," but the first factor controlled the outcome of the remaining factors and was generally contrived "to foreordain a finding against the prisoner's constitutional claim." *Id.* (quoting Lynn S. Branham, *"Go and Sin No More": The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 297 (2004)).

matters—or balance the value of the prisoner's speech against the prison's legitimate interests—because such approaches contravened the *Turner* test's singular concern with the rational relationship between the prison's actions and its legitimate objectives.[126] Similarly, the *Pell* test, by definition, refrained from assigning any weight or value to the prisoner's asserted free speech rights beyond those rights' mere consistency to the prison's legitimate penological interests.[127] Yet, although the *Turner* test deliberately ignored the identity, nature, or existence of prisoners' asserted rights by solely focusing on the rational relationship between the prison's actions and its legitimate penological interests, the *Pell* test necessarily required courts to consider the identity, nature, and existence of prisoners' asserted free speech rights to determine whether they remained consistent with incarceration.[128]

For instance, when the *Turner* Court applied just the *Turner* test to the prisoner's free speech claim, the Court assumed that the prisoner retained a First Amendment right to correspond with other inmates without any further discussion or analysis of why prisoners retained such free speech rights.[129] Conversely, when the *Turner* Court applied the *Pell* test to the prisoner's right to marry claim, the Court exhaustively considered the identity, nature, and incidents of the right to marry and whether such incidents remained applicable in the prison setting.[130] Since the *Turner* test refused to question the identity or quality of prisoners' free speech rights, the *Turner* test had the effect of ignoring prisoners' free speech rights with the consequence of

[126] *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 229–30 (2001). In *Shaw*, the prisoner contested prison rules that prevented him, as a high-security inmate, from offering legal assistance to a minimum-security prisoner. *Id.* at 225 n. 1. Since the prison rules possessed a reasonable relation to the prison's legitimate security interests, the Court upheld the rules. *Id.* at 229–30. The Court expressly rejected an attempt to balance the importance of the prisoner's right, or the value of the content of the prisoner's speech, against the importance of the penological interests served by the prison rule. *Id.* at 229 n.2.

[127] *See* MUSLIN, *supra* note 3, § 1.04.

[128] *See* discussion *supra* Parts I.A–C; discussion *infra* Parts III.B–C, IV.C.

[129] Turner v. Safley, 482 U.S. 78, 84, 89 (1987).

[130] *Id.* at 95–96; *supra* notes 90–91 and accompanying text.

recognizing fewer prisoner free speech rights in practice.[131] Contrarily, when the *Turner* Court had to consider the nature and actual existence of the prisoner's asserted right under the *Pell* test, the Court felt more inclined to protect that right against the prison's restrictions.[132]

Interestingly, the Court's applications of the *Pell* test suggested that prisoners should retain their free speech rights.[133] Undoubtedly, prisoners' free speech rights encompassed the same personal expressions of emotional support, public commitment, and religious faith that survived incarceration as incidents of marriage.[134] In fact, prisoner speech helped inform the public about how the government operated prisons,[135] checked government abuses of power by prison officials,[136] contributed to the "marketplace of ideas,"[137] reduced recidivism,[138] and further enabled the political participation of "discrete and insular minorities."[139] Not surprisingly, then, courts consistently applied the *Pell* test to find that many of the incidents of free speech remained consistent with incarceration.[140] Yet, courts applying the *Pell* test could just as easily conclude that prisoners' free speech rights remained inconsistent with incarceration, making the application of the *Pell* test to prisoners' free speech retaliation claims a pyrrhic victory for prisoners.[141]

Ultimately, the differences between the *Pell* and *Turner* tests produced markedly divergent consequences with respect to protecting

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[131] *See* MUSLIN, *supra* note 3, § 1.04; discussion *supra* Part I.B–C.

[132] *See supra* note 108 and accompanying text.

[133] *See* discussion *supra* Parts I.B–C.

[134] *See supra* note 90 and accompanying text.

[135] *See* MUSLIN, *supra* note 3, § 5.00.

[136] *See id.*

[137] *See id.*

[138] *See* Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO J. ON POVERTY L. & POL'Y 249, 250 n.7 (2004).

[139] *See id.* at 249, 269, 271 (arguing that prisoners as a class consisted of a discrete and insular minority and individual prisoners typically belonged to discrete and insular minorities); MUSLIN, *supra* note 3, § 1.03 n.43 (citing United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938)).

[140] *See* discussion *supra* Parts III.B–C, IV.C.

[141] *See supra* note 106 and accompanying text.

prisoners' rights or deferring to prison officials. While the *Turner* test may defer too much to prison officials' judgments about prisoners' rights, the indeterminacy of the *Pell* test may produce a similarly extreme deference or the unfortunate consequence of unduly impeding prison officials in performing their legitimate and necessary public services. Before discussing how the federal circuits' approaches to prisoners' free speech retaliation claims further demonstrated the important differences between the *Pell* and *Turner* tests, this comment analyzes the Court's approach to evaluating free speech retaliation claims in the highly restrictive context of public employment.

II. THE COURT'S PUBLIC EMPLOYEE FREE SPEECH JURISPRUDENCE

Unlike the Court's prisoner free speech jurisprudence, the Court clearly established the test for analyzing public employees' free speech retaliation claims in the cases *Pickering v. Board of Education of Township High School District 205*,[142] *Connick v. Meyers*,[143] and *Garcetti v. Ceballos*.[144] These cases formed a two-step approach for evaluating public employees' free speech retaliation claims: First, the public employee must "speak as a citizen on a matter of public concern" (the "public concern test"); and second, the public employee's free speech interests must outweigh the government's interest—as an employer—in restricting the speech to effectively provide public services (the "*Pickering* balancing test").[145] If the public employee failed to speak as a citizen on a matter of public concern, then the employee possessed no free speech retaliation claim, and courts dismissed the claim without even engaging in the *Pickering* balancing test.[146] Although this two-step approach provided public employees with less constitutional protection for their free speech rights than normal citizens, the tests critically identified and preserved important free speech rights while not unduly interfering with essential

[142] 391 U.S. 563 (1968).
[143] 461 U.S. 138 (1983).
[144] 547 U.S. 410 (2006).
[145] *See, e.g.*, *id.* at 418.
[146] *See id.*

government interests by performing its categorical public concern and ad hoc *Pickering* balancing tests.[147] Thus, this comment briefly reviews the Court's public employee free speech jurisprudence.

A. Pickering v. Board of Education of Township High School District 205

Pickering held that a public school teacher's dismissal for sending a letter to a local newspaper that criticized the way the school board and district superintendent handled past revenue raising proposals violated the teacher's First Amendment right to free speech.[148] *Pickering* unequivocally rejected the old dogma that public employees waived their constitutional rights as citizens to comment on matters of public concern even when those matters were connected to their public employment.[149] On the other hand, *Pickering* noted that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[150] Thus, *Pickering* instructed courts to balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[151]

In striking this *Pickering* balance, the Court specially protected speech on a matter of public concern.[152] Specifically, the Court

[147] *See* Moss, *supra* note 18, at 1639; discussion *infra* Part II.

[148] Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 564–65 (1968).

[149] *Id.* at 568 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) ("The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.")); *see also* Connick v. Meyers, 461 U.S. 138, 143 (1983) ("[T]he unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment . . . including those which restricted the exercise of constitutional rights.").

[150] *Pickering*, 391 U.S. at 568.

[151] *Id.*

[152] *See id.* at 568, 573.

declared that "[t]he public's interest in having free and unhindered debate on matters of public importance [remained] *the core value* of the Free Speech Clause."[153] The *Pickering* Court also noted that the Court especially protected speech on a matter of public concern in other free speech contexts when it weakened the protections public officials and figures received against libelous statements related to their official conduct[154] and the protections individuals received against invasions of privacy when the invasive statement involved a matter of public interest.[155] Furthermore, the Court recognized that public employees, "as a class, [were] the members of a community most likely to possess informed and definite opinions" on the public questions related to their employment.[156] Since the informed opinions of public employees on matters of public concern remained critical to the "free and open debate . . . vital to informed decision-making by the electorate," the Court found it "essential that [public employees] be able to speak out freely on such questions without fear of [retaliation]."[157]

On the other side of the *Pickering* balance, the Court considered the government's interest in promoting the efficiency, integrity, and proper discipline of its employees.[158] Consequently, the *Pickering* Court established a number of relevant factors in evaluating the effect of the employee's speech on the government's interests as an employer.[159] *Pickering* noted that the government's interests in restricting the employee's speech were stronger when the employee's speech was (1) directed to people the employee shared daily contact with, (2) adversely affected discipline by immediate supervisors or disrupted workplace harmony, (3) impeded the employee's performance of duties or interfered with the regular operations of the

[153] *Id.* at 573 (emphasis added).

[154] *Id.* at 573–74. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[155] *Pickering*, 391 U.S. at 573–74. *See generally* Time, Inc. v. Hill, 385 U.S. 374 (1967).

[156] *Pickering*, 391 U.S. at 572.

[157] *Id.* at 571–72.

[158] *Id.* at 568; *see also* Connick v. Meyers, 461 U.S. 138, 150–51 (1983).

[159] *Pickering*, 391 U.S. at 569–70.

workplace, and (4) the employer-employee relationship was of a personal and intimate nature necessarily requiring loyalty and confidences to properly function.[160] Since the *Pickering* employee's speech "only tangentially and insubstantially" involved matters related to his employment, the *Pickering* balance favored the employee's right to speak as a citizen on a matter of public concern.[161]

Thus, *Pickering* demonstrated how the Court protected critically important First Amendment speech while not unduly interfering with the government's unique interests in restricting that speech.[162] Later, in *Connick* and *Garcetti*, the Court refined the public concern and *Pickering* balancing tests to afford additional weight to the government's unique interests.[163]

B. Connick v. Meyers

Connick definitively established that a public employee's speech must involve a matter of public concern to even merit further adjudication in the form of the *Pickering* balancing test.[164] In *Connick*, an Assistant District Attorney ("ADA") was fired after she contested a position transfer by writing and distributing a questionnaire that solicited the views of her fellow staff members about office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.[165] The Court dismissed the ADA's free speech retaliation claim by holding that the ADA did not engage in

[160] *Id.*

[161] *Id.* at 574.

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

[163] *See* discussion *supra* Part II.B–C.

[164] *Connick*, 461 U.S. at 147, 154. *Connick* still held that the First Amendment afforded limited protection to public employee speech that did not involve a matter of public concern. *Id.* However, *Connick* claimed that the federal judiciary possessed virtually no role in adjudicating public employee speech that did not involve a matter of public concern, and should defer to the employer's personnel decisions "absent the most unusual circumstances." *Id.*

[165] *Id.* at 140–42.

protected speech.[166] Specifically, *Connick* held that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[167] Thus, *Connick* deferred to the employer's interests by (1) refusing to engage in the *Pickering* balance when the employee's speech did not involve a matter of public concern and (2) strengthening the government's interests in the *Pickering* balance when the context of the employee's speech about matters of public concern directly implicated the employer's interests in performing public services.[168]

Furthermore, *Connick* clarified two additional factors for courts to consider when performing the *Pickering* balancing test. First, *Connick* noted that "the state's burden in justifying a particular discharge varie[d] depending upon the nature of the employee's expression."[169] Hence, when the employee's speech concerned itself more with causing insubordination and disrupting close working relationships than matters of public concern, the Court afforded "a wide degree of deference to the employer's judgment."[170] This deference allowed the employer to prevent the employee from disrupting the office and destroying working relationships before such events unfolded.[171] Second, *Connick* considered the time, place, and manner of the

[166] *Id.* at 147–49, 154. Specifically, *Connick* held that the ADA's speech about pressure to work in political campaigns entailed a matter of public concern, but that all the other speech merely reflected her personal grievances with internal office policy. *Id.* Accordingly, the Court applied the *Pickering* balance test to the ADA's speech about pressure to work in political campaigns, but the Court favored the employer's interests, because the ADA's speech was designed to cause insubordination among the close working relationships essential to perform the public services. *Id.* at 151–52.

[167] *Id.* at 146.

[168] *Id.* at 146–47, 150–53.

[169] *Id.* at 150.

[170] *Id.* at 151–52.

[171] *Id.* at 152.

employee's speech.[172] Speech at the workplace, especially if it violated office policy, tilted the balance in favor of the government's interest in institutional efficiency.[173] In *Garcetti*, the Court further strengthened the employer's interest in restricting "workplace speech" by categorically removing such speech from any First Amendment protection.[174]

C. Garcetti v. Ceballos

Garcetti held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[175] In *Garcetti*, a deputy district attorney complained that he suffered retaliation for writing a memorandum about misrepresentations in a warrant affidavit, speaking to his supervisors about his opinions, and testifying for the defense at a suppression hearing concerning the warrant.[176] Since the employee's speech "owe[d] its existence to [the] . . . employee's professional responsibilities," government restrictions on the employee's speech failed to implicate "any liberties the employee might have enjoyed as a private citizen."[177]

The *Garcetti* Court removed an employee's speech about matters of public concern from First Amendment protection because "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity."[178] Since "government employers . . . need a significant degree of control over their employees' words and actions" to efficiently provide public services,[179] the Court substantially deferred to the government's

[172] *Id.*
[173] *Id.* at 152–53.
[174] *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); discussion *infra* Part II.C.
[175] *Garcetti*, 547 U.S. at 421.
[176] *Id.* at 413–15.
[177] *Id.* at 421–22.
[178] *Id.* at 422.
[179] *Id.* at 418.

interests by removing employees' speech from constitutional protection.[180] The Court further refrained from adjudicating employees' speech made pursuant to their official duties because a contrary ruling would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."[181]

Hence, the Court's public employee free speech jurisprudence showed that courts can provide definition and protection to free speech rights while also affording substantial deference to the government's unique interests in restricting free speech rights. Unfortunately, the federal circuits' approaches to prisoners' free speech retaliation claims failed to accomplish the same results by not extending the public concern and *Pickering* balancing tests to prisoners' free speech retaliation claims.

III. THE APPROACHES OF OTHER FEDERAL CIRCUITS TO PRISONERS' FREE SPEECH RETALIATION CLAIMS

Interestingly, none of the federal circuits expressly held that the public concern test applied to prisoners' free speech retaliation claims, but none of the circuits explicitly held the opposite until the Seventh Circuit decided *Bridges*.[182] Only the Sixth Circuit exhaustively considered whether the public concern test should apply to prisoners' First Amendment retaliation claims before ultimately leaving the question undecided.[183] The Second and Third Circuits doubted the applicability of the public concern test to the prison context by merely commenting, without much explanation, that prisoners' First Amendment retaliation claims typically addressed matters of personal

[180] *See id.* at 422–23.

[181] *Id.* at 423. Presumably, the federalism concerns developed from federal courts adjudicating the First Amendment claims of state employees, while the separation of powers concerns derived from courts interfering with the public offices of the other co-equal branches of government. *See id.*

[182] *See* Bridges v. Gilbert, 557 F.3d 541, 550–51 (7th Cir. 2009); Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999).

[183] *See* discussion *infra* Part III.A.

concern.[184] The Fifth and Eighth Circuits summarily applied the *Pell* test to prisoners' free speech retaliation claims without even considering the public concern test.[185] In so doing, the Fifth and Eighth Circuits' approaches shared many similarities to the Seventh Circuit approach in *Bridges*. Thus, this comment discusses the approaches of the Fifth, Sixth, and Eighth Circuits to prisoners' free speech retaliation claims.

A. The Sixth Circuit's Approach to Prisoner Free Speech Retaliation Claims

In *Thaddeus-X v. Blatter*, the Sixth Circuit thoroughly discussed the history and purpose of the prisoner and public employee free speech doctrines when the court considered whether it should adopt the public concern test for prisoners' First Amendment retaliation claims.[186] Specifically, the court expressly distinguished between prisoners' free speech rights and their right to access the courts under the First Amendment's Petition Clause.[187] The court reasoned that prisoners possessed a "well-established constitutional right to access the courts,"[188] which definitely and clearly survived incarceration unlike the "less clear . . . contours of free speech rights in the prison setting."[189] Thus, the court held that no authority existed to further limit prisoners' "most 'fundamental political right' [to access the

[184] *See* Friedl v. City of New York, 210 F.3d 79, 87 (2d Cir. 2000) (refusing to extend the public concern test to prisoners' petitions for redress of grievances because such petitions typically addressed matters of personal concern); *cf. also* Eichenlaub v. Township of Indiana, 385 F.3d 274, 283–84 (3d Cir. 2004) (refusing to extend the public concern requirement to a private citizen's free speech retaliation claim; and, commenting in dicta that the Third Circuit permitted prisoners' free speech retaliation claims without applying a public concern requirement even though prisoners' "complaints are often highly particularized objections to alleged individual mistreatment").

[185] *See* discussion *infra* Part III.B–C.

[186] 175 F.3d at 388–93.

[187] *Id.* at 391–92.

[188] *Id.* at 391; *see also* Lewis v. Casey, 518 U.S. 343 (1996).

[189] *Thaddeus-X*, 175 F.3d at 391.

courts]"[190] by subjecting it to an additional public concern test.[191] Accordingly, the court refused to determine "the appropriateness of explicitly applying the public concern limitation to prisoners, whose free speech rights are uncontrovertedly limited by virtue of their incarceration."[192] The court's analysis, however, provided a number of salient points for the free speech analysis.

First, the *Thaddeus-X* defendants disputed the prisoners' free speech claim by arguing that the prisoners' speech must involve a matter of public concern to receive First Amendment protection against retaliation so that prisoners do not possess potentially greater free speech rights than public employees.[193] The court unequivocally agreed by observing that "[p]risoners certainly do not have greater free speech rights than public employees."[194] Second, the court found it helpful to draw upon the public employee free speech jurisprudence when analyzing other free speech retaliation claims because the bulk of First Amendment retaliation claims arose in the public employee setting.[195] Third, the court reasoned that the public concern test should not limit prisoners' most valued right to access the courts because the test initially developed to broaden public employees' free speech

[190] *Id.* at 391 (quoting Hudson v. McMillian, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring)).

[191] *Id.* at 392. The Sixth Circuit reasoned that applying the public concern test to prisoners' right to access the courts would eliminate virtually all prisoner suits because such suits were nearly always a matter of personal concern to the prisoner. *Id.* Alternatively, the Sixth Circuit recognized that it could hold that all prisoner suits were per se matters of public concern because of the policies embodied in the enabling statutes governing prisoners' right to access the courts like the habeus corpus and § 1983 statutes. *Id.* at 392 n.8. Yet, the Sixth Circuit realized that such a holding had the same effect as not adopting a public concern test because the prisoners' right to access the courts would not be limited by the content of their suits. *Id.*

[192] *Id.* at 392.

[193] *Id.* at 388.

[194] *Id.* The court similarly asserted that "[a] prisoner's First Amendment rights are not more extensive than those of a government employee; in fact, under most clauses of the First Amendment, they are much more strictly limited." *Id.* at 392.

[195] *Id.* at 388.

rights.[196] Fourth, the court observed that the First Amendment protected speech based on the context of the speech, and the differing First Amendment analyses accounted for the various levels of protection.[197] For instance, the free speech rights of an individual varied depending on whether the individual spoke in a classic public forum,[198] as a public employee in the public office,[199] or as a prisoner in a prison cell.[200] Lastly, the court commented that "[t]he *Pickering* balancing test . . . has been applied in a variety of First Amendment settings,"[201] and "can . . . easily be applied in the prison context, accommodating the difference between the government as employer and as jailor."[202] Yet, the court cautioned that the distinctions between the public employees' free speech rights and the prisoners' valued right to access the courts, the separate interests of the government entities, and the dissimilar nature of the relationship between the plaintiff and the government in the two settings meant that "any honest attempt to perform the [*Pickering*] balancing . . . cannot unhesitatingly import reasoning from the public employment setting into the prison setting."[203]

[196] *See id.* at 389, 393.

[197] *Id.* at 388–89.

[198] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that speakers in a classic public forum can say virtually anything without government interference because government speech restrictions in class public forums remained subject to strict scrutiny review; i.e., they must be content-neutral, leave open alternative channels of communication, and "narrowly tailored to serve a significant government interest.").

[199] *See* discussion *supra* Part II.

[200] *See* discussion *supra* Part I.

[201] *Thaddeus-X*, 175 F.3d at 392; *see also* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 678 (1996) (applying the *Pickering* balancing test to evaluate an independent contractor's free speech retaliation claim).

[202] *Thaddeus-X*, 175 F.3d at 392.

[203] *Id.* at 393. When the Seventh Circuit cited this language in *Bridges v. Gilbert* to claim the Sixth Circuit doubted the propriety of applying a public concern requirement to prisoners' free speech, it failed to mention that this language specifically referred to the right to access the courts. *See* 557 F.3d at 551–52.

B. The Fifth Circuit's Approach to Prisoner Free Speech Retaliation Claims

Two Fifth Circuit cases, *Jackson v. Cain*[204] and *Freeman v. Texas Department of Criminal Justice*,[205] illustrated how the Fifth Circuit used the *Pell* test to evaluate prisoners' free speech claims even when the court claimed to apply the *Turner* test.[206] As a result, the Fifth Circuit further confused the status of prisoners' free speech rights and unduly interfered with the prerogatives of prison officials.[207]

In *Jackson*, prison officials allegedly retaliated against a prisoner for writing a letter to the warden that complained about how the prison failed to include some of the clothing he intended to transfer from his old prison.[208] The court cited *Pell* to acknowledge that the prisoner possessed a "First Amendment right to freedom of expression so long as it is not inconsistent with his status as a prisoner and does not adversely affect a legitimate state interest."[209] Then, the court claimed to extend the *Turner* test to the prisoner's free speech retaliation claim.[210] Yet, the court protected the prisoner's expression by simply holding—without reference to the *Turner* factors, standard of review, or any further explanation—that "complaining about treatment by means of a private letter to the warden can be compatible with the acceptable behavior of a prisoner and thus may not adversely affect the discipline of the prison."[211] If the prison officials offered a contrary assertion indicating that the prisoner's letter was actually inconsistent with legitimate penological objectives, the court either failed to consider the level of appropriate deference to apply to such an assertion or simply refused to defer to the prison officials' assertion.[212]

[204] 864 F.2d 1235 (5th Cir. 1989).
[205] 369 F.3d 854 (5th Cir. 2004).
[206] *See* discussion *infra* Part III.B.
[207] *See* discussion *infra* Part III.B.
[208] *Jackson*, 864 F.2d at 1238–39.
[209] *Id.* at 1248 (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).
[210] *Id.*
[211] *Id.*
[212] *See id.*

Jackson thus showed that the court applied the *Pell* test to protect a prisoner's relatively low-value speech about missing laundry.[213]

In *Freeman*, a prisoner alleged retaliation for circulating a statement to his fellow inmates and non-incarcerated Church of Christ leaders that criticized the chaplain, a prison official, for "depart[ing] from the faith" and further requested that the chaplain no longer lead the prisoner members of the Church of Christ.[214] The prisoner also sought and received permission from the chaplain to read the statement during a church service.[215] The chaplain ordered the prisoner to stop reading the statement, and the prisoner quickly complied.[216] Prison officials then escorted the prisoner from the service, but roughly fifty other inmates also left the service with the prisoner.[217] The prisoner later received a disciplinary violation for causing a disturbance, which he argued retaliated against his freedom of speech.[218]

In deciding this case, the Fifth Circuit again applied just the *Pell* test to recognize that prisoners retained a general First Amendment right to criticize prison officials, prison conditions, and official misconduct.[219] The court, however, restricted prisoners' general right to complain about prison conditions and official misconduct by requiring prisoners to exercise this right in a manner consistent with their status as a prisoner.[220] Consequently, the court held that "[p]rison officials may legitimately punish inmates who verbally confront

[213] *See id.*; discussion *supra* Part I.C.

[214] Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 858 (5th Cir. 2004).

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.* The prisoner also made a free exercise and equal protection claim based on the prison's rules allegedly restricting the worship of Church of Christ members. *See id.* at 860–63. These claims are not relevant to this comment.

[219] *Id.* at 864 (citing Woods v. Smith, 60 F.3d 1161, 1164 (5th Cir. 1995); Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir. 1986)).

[220] *Id.*

institutional authority without running afoul of the First Amendment."[221]

In applying the *Pell* test, the *Freeman* court ruled against the prisoner's free speech claim because the manner of his public criticism was not consistent with his status as a prisoner.[222] According to the court, the prisoner's speech was inconsistent with his status because the prisoner intended his speech to incite a disturbance and his speech actually incited a disturbance.[223] Remarkably, this reasoning was identical to the very protective standard the Court established for evaluating government restrictions on speech advocating illegal action in *Brandenburg v. Ohio*.[224] Additionally, the *Freeman* Court did not mention if it determined that the prisoner's speech was inconsistent with his status by explicitly deferring to the judgment of the prison officials or through its own independent evaluation of the speech.[225] Lastly, the court appeared to support the idea that prisoners retained no free speech rights whatsoever because the *Freeman* prisoner could have exercised his Petition Clause rights to make his criticism through the prison's internal grievance procedures, which would have further prevented a disturbance or otherwise threaten internal prison security.[226]

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[221] *Id.* (citing Goff v. Dailey, 991 F.2d 1437, 1439 (8th Cir. 1993) (recognizing that a "prison has a legitimate penological interest in punishing inmates for mocking and challenging correctional officers by making crude personal statements about them in a recreation room full of other inmates")).

[222] *Id.*

[223] *Id.*

[224] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). Yet, in the prison setting, Court precedent established that prison officials should have much greater leeway in restricting prisoners' speech. *See* discussion *supra* Part I.

[225] *See Freeman*, 369 F.3d at 864.

[226] *Id.*; *see also* Adams v. Gunnell, 729 F.2d 362, 367–68 (5th Cir. 1984) (limiting prisoners' right to collaborate in a prison-wide petition because available internal grievances procedures better avoided the potential for inciting violence from internally circulated petitions).

Thus, *Freeman* demonstrated how the Fifth Circuit applied the *Pell* test to prisoner's free speech retaliation claims with unpredictable results, ranging from no protection whatsoever to applying inflexible and highly speech-protective legal rules to govern proper prison administration.

C. The Eighth Circuit's Approach to Prisoner Free Speech Retaliation Claims

In *Cornell v. Woods*,[227] the Eighth Circuit applied just the *Pell* test to hold that the First Amendment protected a prisoner's right to freely and truthfully respond to a prison official's investigation of another official's misconduct without fear of retaliation.[228] In *Cornell*, the head of the prison's internal affairs division promised the prisoner-claimant immunity from discipline if the prisoner cooperated in the investigation of another prison official's suspected violation of prison rules that prohibited transactions between prison employees and prisoners.[229] The prisoner truthfully admitted that he made such a transaction with the prison official, but later complained that he suffered retaliation for participating in the investigation.[230]

In deciding the case, the court first considered whether the prisoner possessed a constitutional right to participate in the internal prison investigation.[231] Initially, the court noted that ordinary citizens enjoyed a constitutional privilege to freely participate in governmental investigations.[232] The court also analogized to the limited First Amendment rights of public employees by commenting that even public employees remained "constitutionally shielded from employer retaliation for their participation in investigations concerning matters of public concern."[233] Then, the court applied the *Pell* test to find that:

[227] 69 F.3d 1383 (8th Cir. 1995).
[228] *Id.* at 1388.
[229] *Id.* at 1386.
[230] *Id.*
[231] *Id.* at 1388.
[232] *Id.*
[233] *Id.* (citing Gorman v. Robinson, 977 F.2d 350, 356 (7th Cir. 1992)).

> [T]he right to respond to a prison investigator's inquiries [was] not inconsistent with a person's status as a prisoner or with the legitimate penological objectives of the corrections system. To the contrary, . . . truthfully answering questions concerning a misconduct investigation against a correctional officer [was] undoubtedly quite consistent with legitimate penological objectives.[234]

The court, however, neglected to expressly consider the appropriate level of deference or standard of review for any contrary claim made by the prison officials that the prisoner's speech was inconsistent with legitimate penological objectives.[235] Thus, the court may have simply made its own judgment that the prisoner's speech was "undoubtedly quite consistent with legitimate penological objectives."[236] Ultimately, the court's rule may also unduly prevent prison officials from legitimately punishing prisoners who prison officials discovered violated prison rules through misconduct investigations.[237]

The Fifth and Eighth Circuits' approaches represented the path the Seventh Circuit later adopted in *Bridges*, while the Sixth Circuit's analysis demonstrated that the Seventh Circuit may have correctly applied the public concern test to prisoners' free speech retaliation claims in the first place. This comment now reviews the Seventh Circuit's approach to prisoners' free speech retaliation claims.

IV. THE SEVENTH CIRCUIT'S APPROACH TO PRISONER FREE SPEECH RETALIATION CLAIMS IN *BRIDGES V. GILBERT*

The Seventh Circuit's approach to evaluating prisoners' free speech retaliation claims depicted the unclear status of prisoners' free speech rights.[238] First, the Seventh Circuit unhesitatingly applied the

[234] *Id.* (internal quotations omitted).
[235] *See id.*
[236] *See id.*
[237] *See id.*
[238] *See* discussion *infra* Parts IV–V.

public concern test to the prison setting.[239] Then, after thoughtful consideration, the Seventh Circuit claimed to adopt the *Turner* test for prisoners' free speech retaliation claims.[240] Yet, a careful reading of the court's opinion in *Bridges v. Gilbert* demonstrated that the Seventh Circuit, like the Fifth and Eighth Circuits, applied the *Pell* test to evaluate a prisoner's free speech retaliation claim.[241] Accordingly, Part IV of this comment reviews the Seventh Circuit's prior support of the public concern test for prisoners' free speech retaliation claims and the court's opinion in *Bridges* to "bridge" the irregular and unchartered waters of the *Pell* test.[242]

A. The Seventh Circuit's Prior Support for a Public Concern Test for Prisoner Free Speech Retaliation Claims

The Seventh Circuit first signaled its support for applying the public concern test to prisoners' free speech retaliation claims in *Brookins v. Kolb*.[243] In *Brookins*, a prison inmate, who was the co-chair of a prison paralegal committee, complained that prison officials retaliated against him for exercising his First Amendment rights to free association and speech.[244] While acting as the co-chair of the paralegal committee, the inmate wrote a letter advocating that the committee pay for the polygraph testing of all the concerned parties in another prisoner's upcoming disciplinary proceedings.[245] The letter violated prison rules requiring that a prison official authorize any committee correspondence and disbursement of committee funds.[246] The court rejected the inmate's free speech claim, reasoning that the letter did not involve a matter of public concern.[247] Yet, *Brookins* failed to

[239] *See* discussion *infra* Part IV.A.
[240] *See* discussion *infra* Part IV.D.
[241] *See* discussion *infra* Parts IV.D., V.B.
[242] *See* discussion *infra* Parts IV.A, IV.D.
[243] 990 F.2d 308, 313 (7th Cir. 1992), *abrogated in part by* Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).
[244] *Id.* at 310.
[245] *Id.*
[246] *Id.*
[247] *Id.* at 313.

consider why the prisoner's speech must involve a matter of public concern to receive protection against retaliation.[248]

In *Sasnett v. Litscher*,[249] Judge Posner summarily dismissed the free speech claims of Protestant prisoners disputing prison regulations that restricted them from wearing crosses outside their clothing.[250] While Judge Posner's decision primarily held that the prisoners' free speech claims were merely duplicative of their valid free exercise claims,[251] Judge Posner also reasoned that the free speech claims failed by analogy to the *Pickering* line of cases because the prisoners did not want to wear the crosses to make a public statement or convert other inmates.[252]

In *McElroy v. Lopac*,[253] a prison inmate complained that prison officials retaliated against him for his inquiries into whether he would receive "lay-in" pay while he awaited transfer from his prison sewing job to another job after the prison closed the sewing factory.[254] The majority's opinion rejected the prisoner's free speech retaliation claim because the prisoner's questions about "lay-in" pay were a matter of purely individual economic interest, and not a matter of public concern.[255] The dissent argued that the prisoner's inquiry involved a matter of public concern to the prison population who lost their sewing jobs and to the general public's concern about compensating unemployed prison workers.[256]

Finally, in *Pearson v. Welborn*,[257] a prisoner claimed that he suffered retaliation for complaining about the lack of yard time, shackling of inmates to one another around a small table during group therapy, and refusing to become a prison informant on prison gang

[248] *See id.*

[249] 197 F.3d 290 (7th Cir. 1999), *abrogated in part by* Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

[250] *Id.* at 292.

[251] *Id.*

[252] *Id.*

[253] 403 F.3d 855 (7th Cir. 2005) (per curiam).

[254] *Id.* at 856–57.

[255] *Id.* at 858–59.

[256] *Id.* at 859 (Fairchild, J., dissenting).

[257] 471 F.3d 732 (7th Cir. 2006).

members while he was incarcerated in a new, restrictive security environment designed to transfer prison inmates who renounced their gang membership back into the general prison population.[258] The prison officials argued that the prisoner possessed no general right to complain about prison conditions, and that his complaints only involved mere personal grievances.[259] The court held that the prisoner's complaints about the lack of yard time and shackling during group therapy involved matters of sufficient public concern because they urged a change in the prison policy for all the similarly incarcerated prisoners and discussed how the prison operated its fledgling program to transition prisoners from the restrictive conditions at the maximum-security prison to the standard general population prison.[260]

Ultimately, the Seventh Circuit's application of the public concern test to prisoners' free speech retaliation claims ended with the court's decision in *Bridges v. Gilbert*. Thus, this comment reviews the factual allegations of *Bridges* before discussing the court's opinion in *Bridges*.

B. Factual Allegations in Bridges v. Gilbert

On September 22, 2006, Jimmy Bridges alleged the following facts were true according to his pro se § 1983 complaint that various prison officials retaliated against him for exercising his First Amendment rights to free speech, to access the courts,[261] and to petition the government for redress of grievances.[262]

[258] *Id.* at 734–36.

[259] *Id.* at 740.

[260] *Id.* at 741–42.

[261] This comment does not discuss Bridges's First Amendment claim to a right to access the courts. The court rejected this claim because Bridges made his affidavit in support of Powe's right to access the courts, but was not critical to vindicate Powe's right. Bridges v. Gilbert, 557 F.3d 541, 544, 553–54 (7th Cir. 2009).

[262] This comment also does not discuss Bridges's claims concerning the right to petition for redress of grievances. The court rejected this claim because (1) Bridges's threat to file a grievance did not constitute a protected grievance, (2) there was insufficient retaliation, and (3) Bridges's current suit encompassed any harm from alleged prior infringements on his Petition Clause rights. *Id.* at 554–55.

While Bridges was a prisoner incarcerated at the Wisconsin Secure Program Facility, he lived in a prison cell adjacent to the cell of inmate Leon Powe.[263] On the night of March 14, 2003, Bridges heard Powe complain about a terrible smell in his drinking cup and that he had been vomiting.[264] A nurse brought Powe some Tylenol and Tums.[265] The next morning, Bridges called through a vent to check on Powe again.[266] Powe weakly responded that he was in pain and could not eat.[267] Several prison officials came to Powe's cell and told him to eat, but Powe failed to respond.[268] Afterward, Powe told another group of prison officials that he was in terrible pain and could not move.[269] The prison officials responded by threatening to beat-up Powe for not responding to earlier inquiries.[270] Eventually, prison officials removed Powe from his prison cell and brought him to the prison's medical center, but Powe died the following morning.[271]

Later, Powe's estate brought a wrongful death action against several prison authorities.[272] In March 2005, attorneys for Powe's estate interviewed Bridges as a witness to the care Powe received.[273] Bridges supplied Powe's attorneys with an affidavit and agreed to testify as a trial witness.[274] The case settled before trial, but Powe's attorneys used Bridges's affidavit in response to the prison officials' motion for summary judgment.[275]

After the case settled, Bridges believed that prison officials subjected him to a campaign of harassment in retaliation for his

[263] *Id.* at 544.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*

participation in the Powe lawsuit.[276] Prison officials allegedly caused delays in Bridges's mail, repeatedly kicked open his cell door, turned his cell light on and off, and loudly slammed his cell door shut when he was sleeping.[277] Bridges complained about this treatment to a prison guard.[278] In response, the guard filed a disciplinary charge against Bridges that was later upgraded to a major offense indicating that Bridges's conduct created a serious risk of disruption at the prison.[279] Eventually, Bridges was exonerated of any wrongdoing in connection to the disciplinary charge.[280] Bridges also complained that prison officials further retaliated against him by improperly treating the grievances he filed about these incidents.[281]

Ultimately, the district court dismissed Bridges's complaint for his failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because, like *Brookins*, Bridges's affidavit only involved a matter personal to Powe's estate and did not advocate a change in prison policy or criticize the administration of prison policy.[282]

C. The Seventh Circuit's Opinion in Bridges v. Gilbert

On appeal, Bridges urged the Seventh Circuit to abandon its support for a public concern test to prisoners' free speech claims.[283] Instead, Bridges contended that the Seventh Circuit should apply the legitimate penological interest tests from the Court's prisoner free speech jurisprudence to evaluate whether Bridges engaged in protected speech.[284]

In a decision written by Judge Tinder and joined by Chief Judge Easterbrook and Judge Wood, the Seventh Circuit reversed the district

[276] *Id.* at 545.
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *See* case cited *supra* note 22.
[283] *Bridges*, 557 F.3d at 547.
[284] *Id.* at 547, 551.

court's opinion in Bridges's favor for his free speech retaliation claim.[285] In so doing, the Seventh Circuit expressly disavowed its support for the public concern test in prisoners' free speech retaliation claims.[286] The court, however, left open the possibility of applying the public concern test for a prisoner-employee's complaints about compensation like in *McElroy*.[287] Since the panel's decision overruled the Seventh Circuit's support for a public concern test in prisoners' free speech retaliation claims, the panel circulated its decision among all the judges of the Seventh Circuit in regular active service to determine if a majority of the judges favored a rehearing en banc pursuant to the Seventh Circuit's Rule 40(e), but no judge favored a rehearing.[288]

Instead of applying the public concern test to prisoners' free speech retaliation claims, the court claimed to adopt the *Turner* test.[289] The court's opinion in *Bridges* advanced three principal reasons to support its purported adoption of the *Turner* test.[290] First, the court held that the *Turner* test constituted the proper test for evaluating prisoners' asserted constitutional interests.[291] Second, the court reasoned that public employees voluntarily chose the restrictions on their free speech rights by accepting public employment, while imprisonment remained involuntary.[292] Third, the court held that applying a public concern test to prisoners' speech would unnecessarily restrict prisoners' rights more than required to preserve legitimate penological interests.[293] This comment discusses in turn *Bridges*'s analysis of its three principal reasons for adopting the *Turner* test.

[285] *Id.* at 551–52, 555–56.
[286] *Id.* at 551 n.2.
[287] *Id.* at 552 n.3; *see also* McElroy v. Lopac, 403 F.3d 855, 858–59 (7th Cir. 2005) (per curiam).
[288] *Bridges*, 557 F.3d at 551 n.2; *see also* 7TH CIR. R. 40(e).
[289] *Bridges*, 557 F.3d at 551.
[290] *See id.* at 550.
[291] *Id.*
[292] *Id.*
[293] *Id.*

First and foremost, the court chose to evaluate prisoners' free speech retaliation claims under the *Turner* test rather than the public concern test because the court acknowledged that the two tests developed in two different contexts to account for the unique institutional differences between public employment and prisons.[294] Specifically, the court recognized that the Court created the public concern test "to maintain the delicate balance between a citizen's right to speak (and the public interest in having thoughtful debate) and the employer's need to effectively provide government services," while the Court formed the legitimate penological interests tests "to preserve some free speech rights for prisoners in a restrictive and challenging environment where prison officials must be focused on crime deterrence, prisoner rehabilitation, and internal prison security."[295]

Second, the court rejected applying the public concern test to prisoners' free speech retaliation claims because the court placed significant emphasis on the notion that public employees voluntarily consented to the limitations on their freedoms whereas prisoners remained incarcerated against their will.[296] The court justified the differing levels of constitutional protection between prisoners and public employees by reasoning that "obviously, a citizen has the choice to enter into public employment, while imprisonment is not voluntary."[297] Similarly, when discussing in dicta the applicability of a public concern test to the speech of a prisoner-employee, the court commented that "[t]he official interest in the efficient provision of [government] services, *coupled with the benefits to the prisoner from taking the job*, may justify a public concern limitation on the prisoner's speech made as an employee."[298]

Third, the court held that applying the public concern test to prisoners' free speech retaliation claims would eliminate virtually all constitutional protection afforded to prisoner speech.[299] Instead of

[294] *See id.*
[295] *Id.*
[296] *See id.*
[297] *Id.* (emphasis added).
[298] *Id.* at 552 n.3 (internal quotations omitted) (emphasis added).
[299] *See id.* at 550.

expressly arguing that prisoner speech rarely involved a matter of public concern (like the Second and Third Circuits), the court observed that applying *Garcetti*'s distinction between speech as a public employee and as a citizen would be impossible in the prison context.[300] Specifically, the court reasoned that because prisoners remained "[s]hut-off from the outside world, the prisoner's speech would nearly always be speech made as a prisoner rather than as a citizen."[301] Similarly, when discussing in dicta if the public concern test should apply to a prisoner-employee's speech, the court observed that "the degree of control exercised by officials over all aspects of a prisoner's life may make any distinction between speech as an inmate and speech as a prisoner-employee unworkable."[302] Lastly, the panel also noted that a public concern test for prisoners' free speech retaliation claims needlessly imposed an additional barrier that "seem[ed] to restrict prisoners' constitutional rights far more than is 'justified by the considerations underlying our penal system.'"[303]

Finally, the court purportedly applied the *Turner* test to protect Bridges's speech in the affidavit.[304] Yet, the court protected Bridges's speech by simply holding that "[p]roviding an eyewitness account . . . of an incident where prison officials are alleged to have mistreated an inmate who was gravely ill (and later died) is not inconsistent with legitimate penological interests."[305] The panel supported its holding only by analogizing to the Eighth Circuit's decision in *Cornell*.[306] Thus, the court declared that "[p]risons have an interest in keeping the inmates as safe and secure as possible while imprisoned, and truthful speech that describes possible abuses can actually be quite consistent with that objective."[307] Accordingly, the court concluded that "Bridges . . . adequately alleged, for the purposes of surviving a

[300] *Id.*; *see also* cases cited *supra* note 184 and accompanying text.
[301] *Bridges*, 557 F.3d at 550 (internal quotations omitted).
[302] *Id.* at 552 n.3.
[303] *Id.* at 550 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).
[304] *See id.* at 551–52.
[305] *Id.* at 551.
[306] *Id.*; *see also* discussion *supra* Part III.C.
[307] *Bridges*, 557 F.3d at 551.

motion to dismiss, that he engaged in activity protected by the First Amendment."[308]

V. EVALUATION OF *BRIDGES*: BRIDGING THE GAP BETWEEN *PELL*, *TURNER*, AND THE FREE SPEECH RIGHTS OF PRISONERS AND PUBLIC EMPLOYEES.

Part V first argues that the Seventh Circuit's disavowal of the public concern test in the prison context likely conformed with, but was not required by, Supreme Court precedent. Then, Part V contends that the court likely erred in actually applying the relatively unexamined and indeterminate *Pell* test to protect Bridges's allegedly truthful speech about prison abuses with unfortunate consequences for the clarity of prisoners' free speech rights and the prerogatives of prison officials. Lastly, Part V argues that the court should have continued to use a modified version of the public concern and *Pickering* balancing tests for prisoners' free speech retaliation claims because those tests offered clarity and protection to important First Amendment speech, provided sufficient deference to prison officials' needs, and ensured that prisoners do not possess potentially greater free speech rights than public employees.

A. The Seventh Circuit Likely Conformed to Court Precedent by Disavowing the Public Concern Test for Prisoners' Free Speech Retaliation Claims

In rejecting the public concern test and purportedly adopting the *Turner* test to evaluate prisoners' free speech retaliation claims, the Seventh Circuit likely conformed to the Court's precedent. Although the Court's prisoner and public employee free speech jurisprudences do not expressly affirm or reject applying the public concern and *Pickering* balancing tests to prisoners' free speech retaliation claims,[309] *Bridges* correctly reasoned that the Court created the public concern and legitimate penological interests tests to account for and

[308] *Id.* at 551–52.
[309] *See supra* notes 11, 15 and accompanying text.

evaluate the level of First Amendment protection in two different institutional contexts.[310] While the Court's approach to create a First Amendment "doctrine for every institution" may actually exaggerate institutional uniqueness to the detriment of protecting fundamental free speech rights and promoting uniformity in the law,[311] the Sixth Circuit rightly observed that "context matters" in the Court's First Amendment jurisprudence.[312] Hence, even though the Court applied the public concern and *Pickering* balancing tests to other free speech claims,[313] because the Court created the public concern and penological interest tests to accommodate the First Amendment distinctions in two different institutional contexts, inferior courts likely remained bound to following the Court's tests for each context.[314]

Furthermore, the Court's opinion in *Shaw v. Murphy* provided the Seventh Circuit with sufficient precedential support to reject the public concern test for prisoners' free speech retaliation claims.[315] First, the *Shaw* Court declared that "*Turner* . . . adopted a unitary, deferential standard for reviewing prisoners' constitutional claims."[316] Secondly, the *Shaw* Court specifically refused to enhance the constitutional protections of a prisoner's speech based on the content of the prisoner's speech because "the *Turner* test, by its terms, simply does not accommodate valuations of content."[317]

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[310] *See Bridges*, 557 F.3d at 551; discussion *supra* Part IV.C.

[311] *See* Moss, *supra* note 18, at 1671. Moss argued for evaluating the First Amendment claims of public school students, public employees, and prisoners under intermediate scrutiny review because the Court's current approaches exaggerated the risk of affording greater protection to constitutionally guaranteed rights. *Id.* at 1644–45, 1674–79. Moss further asserted that the Court's strict scrutiny review of racial discrimination claims in each of these institutional settings proved the Court not only exaggerated the risks in the First Amendment setting, but also caused disharmony in the law by granting different levels of constitutional protection to similar fundamental rights in the same institutional settings. *Id.* at 1674–79.

[312] *See* Thaddeus-X v. Blatter, 175 F.3d 378, 388 (6th Cir. 1999); discussion *supra* Part III.A.

[313] *See* cases cited *supra* notes 154–55, 201.

[314] *See Bridges*, 557 F.3d at 551.

[315] *See* 532 U.S. 223, 228–30 (2001); *supra* note 126 and accompanying text.

[316] *Shaw*, 532 U.S. at 229.

[317] *Id.* at 229; *see also supra* note 126 and accompanying text.

While *Shaw* incorrectly claimed that *Turner* adopted a "unitary" standard for evaluating prisoners' constitutional claims,[318] the Court consistently applied just the *Turner* test to evaluate prisoners' asserted free speech claims.[319] Additionally, if the Seventh Circuit adopted the public concern test for prisoners' free speech claims, then the Seventh Circuit would necessarily make a valuation of the content of the prisoners' speech by preferring prisoners' speech on a matter of public concern.[320] *Shaw* rejected such preferential valuations based on the content of a prisoner's speech because they (1) contravened *Turner*'s singular focus between the prison's legitimate interests and the prison's restrictions on speech and (2) frustrated the Court's policy of deference to prison officials by requiring courts to undertake a greater role in adjudicating prison affairs.[321] Arguably, if the public concern test actually limited the constitutional protection granted to prisoner speech, then *Shaw* may implicitly endorse the test.[322] In any event, *Shaw* provided sufficient precedential support for the Seventh Circuit's decision to reject the public concern test in favor of the *Turner* test when evaluating prisoners' free speech retaliation claims.[323]

[318] *Turner* clearly failed to adopt a "unitary" standard for reviewing prisoners' constitutional claims. The Court extended *Turner* in Overton v. Bazzetta, 539 U.S. 126 (2003) (prisoners' First Amendment right to freedom of association); Lewis v. Casey, 518 U.S. 343 (1996) (prisoners' First Amendment right of access to the courts); Washington v. Harper, 494 U.S. 210 (1990) (prisoners' due process right against involuntary medication); and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (prisoners' First Amendment right to free exercise of religion). Yet, the Court refused to extend *Turner* in Johnson v. California, 543 U.S. 499 (2005) (prisoners' Fourteenth Amendment right against invidious racial discrimination); McKune v. Lile, 536 U.S. 24 (2002) (prisoners' Fifth Amendment right against self-incrimination); and Farmer v. Brennan, 511 U.S. 825 (1994) (prisoners' Eighth Amendment right against cruel and unusual punishment).

[319] *See* discussion *supra* Part I.

[320] *See* Connick v. Meyers, 461 U.S. 138, 147–48 (1983) ("Whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement.").

[321] *Shaw*, 532 U.S. at 230.

[322] *See id.*

[323] *See id.*

B. The Seventh Circuit Incorrectly Applied the Pell *Test Instead of the* Turner *Test to Evaluate Bridges's Free Speech Retaliation Claim*

Although the Seventh Circuit likely conformed to Court precedent by purportedly adopting the *Turner* test to evaluate Bridges's free speech retaliation claim, the court probably erred by actually applying the *Pell* test when it considered Bridges's free speech retaliation claim. Consequently, the court's attempt to navigate the relatively unchartered waters of the *Pell* test left the court making its own judgments about proper prison procedure with potentially vast consequences for prisoners' free speech rights and prison officials' pursuit of legitimate penological objectives.

Like the Fifth and Eighth Circuits, the Seventh Circuit clearly applied the *Pell* test rather than the *Turner* test when the court evaluated Bridges's free speech claim.[324] In claiming to apply the *Turner* test to Bridges's free speech claim, the Seventh Circuit failed to quote the language of the *Turner* test, apply the *Turner* factors, evaluate the rational basis between the prison officials' actions and the prison's legitimate interests, explicitly invoke rational basis review, or expressly consider the level of deference it afforded to the prison officials.[325]

Instead, the court merely held that Bridges sufficiently alleged a free speech retaliation claim because his eyewitness account of an incident where prison officials allegedly mistreated a gravely ill inmate was not inconsistent with legitimate penological objectives.[326] Had the Seventh Circuit correctly applied the *Turner* test, then the court would have questioned if the prison's allegedly retaliatory actions possessed a reasonable relationship to the prison's legitimate penological interests.[327]

For example, if the Seventh Circuit applied the *Turner* test, the *Bridges* prison officials could have asserted that they engaged in the

[324] *See* discussion *supra* Parts III.B–C, IV.C.
[325] *See* discussion *supra* Parts I.B, IV.C.
[326] *See* Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009).
[327] *See supra* note 349.

allegedly retaliatory actions because—in their expert judgment—such actions reasonably related to the prison's legitimate interests in having Bridges use the prison's internal grievance system to report official abuse or request medical attention.[328] As the Fifth Circuit similarly recognized in *Freeman*, such internal grievance systems not only preserved prisoners' First Amendment rights (to petition, not to speak), but also decreased the risk of violence from prisoners' public criticisms of officials' conduct and "kept inmates as safe and secure as possible while imprisoned" by swiftly assessing the need to provide medical services and punish official abuse.[329] If the Seventh Circuit applied the *Turner* test to this contention, then the court likely would have concluded that the prison officials possessed a rational basis for restricting Bridges's speech.[330]

Furthermore, because the court did not question the reasonableness of restricting Bridges's allegedly truthful speech about prison abuses under the *Turner* test, the court formed a rigid rule categorically protecting prisoners' allegations about prison abuses.[331] By simply applying the *Pell* test to hold that prisoners' allegedly truthful speech about prison abuses was not inconsistent with legitimate penological objectives, the court determined that restricting such speech remained unreasonably inconsistent with legitimate penological objectives unless the court later drew an exception to its rule.[332] Yet, restrictions on prisoners' speech about prison abuses may be entirely consistent with legitimate penological objectives. For

[328] *See* discussion *supra* Parts I.B, IV.B; *cf. also* Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 864 (5th Cir. 2004).

[329] *See Freeman*, 369 F.3d at 864; *Bridges*, 557 F.3d at 551. This argument could also imply that prisoners' free speech rights remained entirely inconsistent with incarceration under the *Pell* test, especially where prisons operated grievance procedures. *See Freeman*, 369 F.3d at 864.

[330] *See id.*; discussion *supra* Part I.B. The prison officials' actions would be logically connected to the prison's legitimate interest in responding appropriately to prisoners' requests for medical attention or complaints about official abuse instead of waiting to dispute such information in an adversarial lawsuit. *See Bridges*, 557 F.3d at 544–45; discussion *supra* Part I.B.

[331] *See Bridges*, 557 F.3d at 551; discussion *supra* Part I.C.

[332] *See Bridges*, 557 F.3d at 551.

instance, prison officials may want to restrict prisoners' complaints about prison abuses due to the potential danger to incite a riot like in *Freeman* or because of its insulting, demonstrably false, or otherwise unproductive character.[333] Thus, while it may be reasonable in some instances to restrict prisoners' speech about prison abuses, the court's rule in *Bridges* unduly threatens prison officials with liability for appropriately responding to speech threatening the prison's legitimate interests.

Finally, the court protected Bridges's allegedly truthful speech describing prison abuses by making its own judgment that such speech remained consistent with the prison's interest in keeping "inmates as safe and secure as possible while imprisoned."[334] Consequently, the court not only contravened Court precedent explicitly instructing courts to not make judgments about proper prison administration, but the Seventh Circuit's judgments may unduly impede proper prison administration.[335]

For instance, the court's decision in *Bridges* failed to mention the level of deference it applied to any of the prison officials' contrary contentions that Bridges's speech was inconsistent with incarceration.[336] Instead, the court reasoned from the Eighth Circuit's determination in *Cornell* that truthful speech about prison official abuses was consistent with imprisonment.[337] Even if the Eighth Circuit made its own judgment about proper prison administration in *Cornell*, the court merely enforced the prison officials' promise of immunity to the prisoner for participating in the prison's own investigation; i.e., the Eighth Circuit only extended protection to prison-solicited prisoner speech.[338] Conversely, the Seventh Circuit's rule may allow the inmates to run the asylum by protecting unsolicited allegations about prison abuses even if such speech interfered with

[333] *See Freeman*, 369 F.3d at 864; discussion *supra* Part I.A–B.
[334] *See Bridges*, 557 F.3d at 551.
[335] *See* discussion *supra* Part I.A–C; discussion *infra* Part V.B.
[336] *See Bridges*, 557 F.3d at 551.
[337] *Id.* (citing Cornell v. Woods, 69 F.3d 1383, 1388 (8th Cir. 1995)).
[338] *See* discussion *supra* Part III.C.

prison officials' legitimate penological interests.[339] Essentially, the Seventh Circuit's rule treated prisoners as potentially helpful assistants in prison administration.[340] While prison officials may act wisely by not retaliating against prisoners' allegedly truthful speech about prison abuses, the Court's precedent left this judgment to prison officials, and not the dictates of the First Amendment.[341]

Ultimately, the Seventh Circuit's application of the *Pell* test to Bridges's free speech retaliation claim arguably supplanted the prison officials' judgment of proper prison administration and created a categorical rule that may unduly interfere with prison officials' provision of legitimate penological objectives. Lastly, while the Seventh Circuit applied the *Pell* test to protect Bridges's speech, future applications of the *Pell* test may leave prisoners' speech completely unprotected.

C. The Seventh Circuit Should Have Adapted the Public Concern and Pickering *Balancing Tests to Evaluate Bridges's Free Speech Retaliation Claim*

Instead of applying the legitimate penological interest tests to prisoners' free speech retaliation claims, the Seventh Circuit should have considered balancing Bridges's speech as a prisoner on a matter of public concern against the prison's legitimate penological interests in restricting Bridges's speech. Such an approach proves more workable than the legitimate penological interest tests, protects critical free speech rights, and ensures that prisoners do not possess potentially broader free speech rights than public employees.

[339] *See Bridges*, 557 F.3d at 551.

[340] *See id.*

[341] *See cf.* Connick v. Meyers, 461 U.S. 138, 149 (1983) ("While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."); *see* discussion *supra* Part I.

1. The Public Concern and *Pickering* Balancing Tests Evaluate Prisoners' Free Speech Retaliation Claims Better than the Legitimate Penological Interests Tests

As the Sixth Circuit recognized, the public concern and *Pickering* balancing tests are easily adaptable to the prison context provided courts perform an honest attempt to not unhesitatingly import reasoning from the public employee setting to the prison context.[342] The Seventh Circuit reasoned that applying the public concern test to the prison context resulted in an unworkable rule because (1) prisoners rarely spoke as *citizens* on matters of public concern and (2) prisoners' complaints generally involved matters of purely private concern.[343] However, the Seventh Circuit's prior applications of the public concern test to prisoners' free speech claims should resolve both of these concerns.[344]

In addressing this first concern, the Seventh Circuit largely ignored the requirement that prisoners must speak as a citizen.[345] Such an approach may be appropriate because prisoners generally and necessarily lack the freedom public employees possess to exercise their dual rights as citizens.[346] Yet, prisoners often speak as citizens, especially when they engage in any outgoing communications; i.e., communications intended for use outside the prison walls like writing letters, articles, books, etc.[347] For instance, Bridges probably spoke as

[342] Thaddeus-X v. Blatter, 175 F.3d 378, 392 (6th Cir. 1999); *see also* discussion *supra* Part III.A .

[343] *Bridges*, 557 F.3d at 550; *see also* cases cited *supra* note 184 and accompanying text.

[344] *See* discussion *supra* Part IV.A.

[345] *See* discussion *supra* Part IV.A.

[346] *See Bridges*, 557 F.3d at 550, 552 n.3. *Compare* discussion *supra* Part I, *with* discussion *supra* Part II.

[347] *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) (holding that the public employee did not speak as a citizen when he wrote the memorandum pursuant to his official duties); Thornburgh v. Abbott, 490 U.S. 401, 411–12 (1989) (holding that prisoners' incoming communications posed a greater threat to internal prison security than outgoing communications because outgoing communications were not intended for an inmate audience and officials could readily identify the predictable dangers from outside communications).

a citizen when he gave his affidavit in a legal proceeding.[348] While Bridges owed the existence of his speech describing possible prison abuses to his status as a prisoner, Bridges did not make his speech pursuant to any duties he possessed as a prisoner.[349] In any event, simply evaluating the prisoner's speech as a prisoner resolves this concern. If the government-as-jailor possesses special interests in restricting a prisoner's speech as a prisoner compared to a prisoner's speech as a citizen, then the *Pickering* balancing test can properly account for those interests by giving stronger weight to the government's interests.[350]

In addressing the second concern, the Seventh Circuit's prior applications of the public concern test prove that the test is readily applicable to the prison setting.[351] The Seventh Circuit's precedent showed that prisoners' speech involved a matter of public concern if the speech urged a change in prison policy, criticized the official administration of prison policy, informed the general public about how the government operated important prison institutions, or involved a matter of concern to the prison population.[352] This not only protects a significant quantum of prisoner speech, but it offers protection to roughly the same type of speech that courts categorically protected

[348] *Compare Bridges*, 557 F.3d at 544–45 (prisoner providing an affidavit in a public lawsuit), *with Garcetti*, 547 U.S. at 421–22 (employee writing a memorandum pursuant to his official duties).

[349] *See supra* note 348 and accompanying text.

[350] *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 569–70 (1968); Connick v. Meyers, 461 U.S. 138, 150 (1983) (stating that "the State's burden in justifying [its interests] varie[d] depending upon the nature of the employee's expression.").

[351] *See* discussion *supra* Part IV.A.

[352] Brookins v. Kolb, 990 F.2d 308, 313 (7th Cir. 1992) (holding that prisoners' speech urging a change of prison policy or criticizing official administration of prison policy involved a matter of public concern); Pearson v. Welborn, 471 F.3d 732, 741–42 (7th Cir. 2006) (holding that prisoner's speech informing the general public about the internal operations of a new prison program to integrate gang members into the general prison population involved a matter of public concern); *see also* McElroy v. Lopac, 403 F.3d 855, 859 (7th Cir. 2005) (Fairchild, J., dissenting) (claiming that prisoner's speech about "lay-in" pay after prison terminated prisoners' sewing jobs involved a matter of public concern to the respective prison population).

under their applications of the *Pell* test.[353] Moreover, prisoners can pursue purely private concerns through the prison's internal grievance procedures or by otherwise exercising their Petition Clause rights.[354] As the Sixth Circuit warranted, this distinction between prisoners' free speech and petition rights may be justified because prisoners possess a well-established and well-regulated right to petition unlike their ambiguous and more restricted free speech rights.[355] Also, because prisoners' individual free speech rights can be justified largely due to the public's interest in "free and unhindered debate on matters of public importance," unlike prisoners' highly individualized right to petition, a public concern test may be uniquely appropriate and workable for prisoners' free speech claims.[356]

More importantly, the Seventh Circuit should have recognized that both of the legitimate penological interest tests form unworkable rules in evaluating prisoners' free speech retaliation claims. The *Pell* test either (1) forces courts to make their own improper judgments about appropriate prison administration with the consequence of dictating inflexible categorical rules to prison officials, (2) allows courts to defer absolutely to prison officials, or (3) permits courts to simply determine that prisoners retained no free speech rights whatsoever.[357] As for the *Turner* test, it compels courts to defer too much to prison officials, with the consequence of recognizing practically no prisoner free speech rights and remaining especially unworkable in evaluating free speech retaliation claims.[358]

Since the *Turner* test protects prisoners' free speech retaliation claims only if the prison officials' allegedly retaliatory actions possess no reasonable relation to the prison's legitimate penological concerns, the test conflated the third element in prisoners' free speech retaliation

[353] *See* discussion *supra* Parts III.B–C, IV.C.

[354] *See, e.g.*, Friedl v. City of New York, 210 F.3d 79, 87 (2d Cir. 2000).

[355] *See* Thaddeus-X v. Blatter, 175 F.3d 378, 391–92 (6th Cir. 1999).

[356] *See id.*; *cf. also* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 571–72 (1968) (protecting public employees' limited free speech right to speak on a matter of public concern because the First Amendment specially protected the public's interest in free and unhindered debate).

[357] *See* discussion *supra* Parts I.C., V.B.

[358] *See* discussion *supra* Parts I.B–C, V.B.; discussion *infra* Part V.C.1.

claims with the first element.[359] In the first element to a prisoner's free speech retaliation claim, the prisoner must prove that they engaged in activity protected by the First Amendment; and in the third element, the prisoner must prove that the First Amendment activity was at least a motivating factor in the prison officials' decision to take the retaliatory action.[360] The *Turner* test conflates these two elements because courts would likely determine if the prison officials' allegedly retaliatory actions possess a reasonable relation to the legitimate penological objective by inquiring into the prison officials' motivation for suppressing the prisoners' speech.[361] Hence, if a prisoner's freedom of speech forms a motivating factor in the prison official's retaliatory actions, then the prison official's actions probably possess no reasonable relationship to legitimate penological objectives unless the prisoner's freedom of speech remains fundamentally inconsistent with legitimate penological objectives.[362] Since the *Pell* test ultimately questions whether a prisoner's free speech rights remains fundamentally inconsistent with legitimate penological objectives, courts understandably found themselves applying the undefined and indeterminate *Pell* test to evaluate prisoners' free speech retaliation claims.[363]

Unlike the legitimate penological interest tests, the Court established the public concern and *Pickering* balancing tests to specifically evaluate the level of constitutional protection in free speech retaliation claims.[364] Thus, as the Sixth Circuit implicitly recognized, a test that adapts the Court's sole test for evaluating free speech retaliation claims to the prison context may better account for the institutional uniqueness of prisons than blindly applying the current legitimate penological interest tests to prisoners' free speech retaliation claims.[365]

[359] *See* discussion *supra* Parts I.B–C.
[360] *See, e.g.*, Bridges v. Gilbert, 557 F.3d 541, 546 (7th Cir. 2009).
[361] *See* discussion *supra* Parts I.B–C, V.C.1.
[362] *See* discussion *supra* Parts I.B–C, V.C.1.
[363] *See* discussion *supra* Parts I.B–C, III.B–C, IV.C.
[364] *See* discussion *supra* Parts I–II.
[365] *See* Thaddeus-X v. Blatter, 175 F.3d 378, 389 (6th Cir. 1999).

Furthermore, the *Pickering* balancing test may prove more practical for evaluating prisoners' free speech retaliation claims than the legitimate penological interest tests for three primary reasons. First, courts can easily adapt the *Pickering* factors to deal with prisons' unique interests in performing legitimate penological objectives, and lots of the current *Pickering* factors similarly apply to the prison context.[366] For instance, *Connick* affords "a wide degree of deference to the employer's judgment" when the employee's speech concerns itself more with causing insubordination or violates office policy; and, this wide degree of deference even allows employers to take action before a disruption unfolded. [367] Likewise, prison officials should probably receive "a wide degree of deference" when a prisoners' speech is more concerned with causing insubordination, and especially if it violates prison policy.[368] Yet, when the Fifth Circuit in *Freeman* attempted to afford this wide degree of deference to a prisoners' "insubordinate" speech, the court likely frustrated prison officials' future efforts by protecting insubordinate speech that did not intend to or actually incite a disturbance.[369]

Second, while the *Shaw* Court criticized content-balancing tests for supplanting the due deference courts owe to prison officials,[370] cases like *Connick* demonstrate that the *Pickering* balance sufficiently affords substantial deference to the government's interests.[371] *Connick* specifically created the categorical balancing in the public concern test so that courts would completely defer to the employer's interests when the employee fails to speak on a matter of public concern.[372] Thus, a rule requiring prisoners to speak on a matter of public-penological concern before evaluating the legitimate penological interests involved may prove more deferential than a rule solely examining the asserted

[366] *See id.* at 392; discussion *supra* Parts II.A–B.
[367] Connick v. Meyers, 461 U.S. 138, 151–52 (1983).
[368] *See id.*; discussion *supra* Part I.
[369] *See* Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 864 (5th Cir. 2004); *supra* note 224 and accompanying text.
[370] Shaw v. Murphy, 532 U.S. 223, 229–30 (2001).
[371] *See* discussion *supra* Part II.B.
[372] *Connick*, 461 U.S. at 146–47.

penological interests.[373] Moreover, courts sufficiently possess the requisite expertise to appropriately balance the prison's legitimate interests against the prisoners' free speech rights.[374] Not only is it the role of courts to balance competing interests in adjudicating constitutional claims, but courts routinely "adjudicate case fields alien to them" without deferring to certain interests or claims like they would in the *Pickering* balancing test.[375]

Third, the legitimate penological interest tests may not provide adequate deference to the government's interests. Courts routinely apply the indeterminate *Pell* test to afford little or no deference to prison officials' judgments, and they further create inflexible categorical rules dictating proper prison administration.[376] Alternatively, because the *Pickering* balancing test depends on the unique facts of the case, courts' applications of the *Pickering* balancing test would not inappropriately form inflexible categorical rules dictating proper prison administration.[377]

Hence, applying the public concern and *Pickering* balancing tests to prisoners' free speech retaliation claims forms a practical rule that would prove more feasible than applying the legitimate penological interest tests to prisoners' free speech retaliation claims.

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[373] *See id.*; discussion *supra* Part V.B.

[374] *See* Moss, *supra* note 18, at 1666–68. Moss noted that "judges do have a fair bit of expertise in the criminal justice system, given both their extensive adjudication of prisoner filings and the background a great many federal judges have as prosecutors or otherwise as government officials in the executive or legislative branch." *Id.* at 1667. Moss further argued that "even if certain institutions are harder for courts to analyze effectively, parties and courts are unlikely to accept erroneous rulings easily, but instead will spend more time and resources remedying the problem of imperfect information." *Id.* at 1667–68.

[375] *See id.* at 1666–67; discussion *supra* Part II.

[376] *See* discussion *supra* Parts I.C, III.B–C, V.B.

[377] *See, e.g.*, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 569 (1968) ("Because of the enormous variety of fact situations . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.").

2. The Public Concern and *Pickering* Balancing Tests Protect Prisoners' Most Important First Amendment Rights While Ensuring that Prisoners Do Not Possess Potentially Broader Free Speech Rights than Public Employees

The Seventh Circuit's opinion in *Bridges* recognized that adopting the legitimate penological interests tests not only protects speech on a lower "rung [in] the hierarchy of First Amendment values," but also potentially affords prisoners with broader free speech rights than public employees.[378] Conversely, applying the public concern and *Pickering* balancing tests to prisoners' free speech retaliation claims would protect prisoners' important free speech rights, provide definition to the Court's amorphous prisoner free speech jurisprudence, and ensure that prisoners do not absurdly possess potentially greater free speech rights than public employees.

As demonstrated by the Court's public employee free speech jurisprudence, "the First Amendment's *primary aim* is the *full protection* of speech upon issues of public concern."[379] The Court specifically created and defined the free speech rights of public employees to protect speech on a matter of public concern because of (1) "the Constitution's *special concern* with threats to the right of citizens to participate in political affairs,"[380] and (2) "[t]he public's interest in having free and unhindered debate on matters of public importance [remained] *the core value* of the Free Speech Clause."[381] Lastly, "the [C]ourt has frequently reaffirmed that speech on public issues occupies the '*highest rung of the hierarchy of First Amendment values*,' and is entitled to *special protection*."[382]

Thus, if the First Amendment's primary aim remained the full protection of speech on matters of public concern, then the legitimate

[378] *See* Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

[379] Connick v. Meyers, 461 U.S. 138, 154 (1983) (emphasis added).

[380] *Id.* at 144–45 (emphasis added).

[381] *Pickering*, 391 U.S. at 573 (emphasis added).

[382] *Connick*, 461 U.S. at 145 (quoting *Carey*, 447 U.S. at 467) (emphasis added).

penological interest tests' failure to specially protect speech on matters of public concern serves no real or important First Amendment interests.[383] In fact, since the legitimate penological interests tests "refused to recognize any hierarchy of values among important [free speech] interests" by elevating any penological concern to "a higher constitutional plane than [the prisoner's free speech] rights," they protect practically worthless speech while failing to protect cherished First Amendment values.[384] Tellingly, the legitimate penological interest tests protects low-value speech about a prisoner's missing laundry in *Jackson*, but it may not protect the *Pearson* prisoner's critically important speech about prison officials coercing prisoners into becoming prison informants.[385]

Obviously, the Court developed the legitimate penological interest tests because it wanted to accommodate the needs of prison officials, and not because it wanted to protect valuable speech.[386] Thus, if the public concern and *Pickering* balancing tests sufficiently accommodate prison officials' needs, then the tests should be preferred because they also protect critically important speech at the heart of the First Amendment's self-government rationale.

Additionally, the fact that prisoners necessarily sacrifice some of the rights and privileges that they normally possess as citizens does not mean that the First Amendment should potentially afford no protection to prisoners' speech on matters of public concern.[387] Like public employees, prisoners retain some rights as citizens to engage in public debate; so, the First Amendment should specially protect their speech on matters of public concern.[388] More importantly, the First Amendment should especially protect prisoners' speech on matters of public concern because such speech critically informs "the public's

[383] *See id.*

[384] *See* discussion *supra* Part I.C; *supra* notes 124–25 and accompanying text.

[385] *See* Jackson v. Cain, 864 F.2d 1235, 1428 (5th Cir. 1989); Pearson v. Welborn, 471 F.3d 732, 741–42 (7th Cir. 2006).

[386] *See* discussion *supra* Part I.

[387] *See supra* note 1 and accompanying text; discussion *supra* Parts II, V.C.2.

[388] *See supra* note 1 and accompanying text; discussion *supra* Parts I, II, V.B., V.C.2.

interest in having free and unhindered debate on matters of public importance;" e.g., the operation of prison institutions.[389] Like public employees, prisoners are "as a class, the members of a community most likely to possess informed and definite opinions," and share critical facts and information about the operation of prison institution.[390] Since prisons are typically isolated from the general public, and because government's power in operating prisons is at its apex, the First Amendment should afford special protection to prisoners' speech on matters involving prison operations to inform the public debate and serve as a check on governmental abuse of power.[391] At the least, this proposition seems more sensible and in accord with the First Amendment's purposes than a test treating prisoners as partners in proper prison administration.[392]

Furthermore, the public concern and *Pickering* balancing tests provide critical definition and protection to prisoners' amorphous free speech rights. The legitimate penological interests tests fail to identify and assess any value to prisoners' free speech rights as against the government's interests.[393] Consequently, courts possess little guidance in identifying what free speech rights to protect—if any—and when to actually protect those rights against legitimate governmental restrictions.[394] Alternatively, the public concern and *Pickering* balancing tests expressly inform courts to protect a prisoner's speech on a matter of public concern unless the government possesses greater legitimate penological interests in restricting the prisoner's speech.[395] Whether courts will actually protect prisoners' speech on matters of public-penological concern depends on the strength of the prison's legitimate penological objectives, to which courts give great deference

[389] *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 573 (1968); MUSLIN, *supra* note 3, § 5.00.

[390] *See Pickering*, 391 U.S. at 572.

[391] *See* MUSLIN, *supra* note 3, § 5.00; discussion *supra* Part I.

[392] *See* discussion *supra* Parts V.B, V.C.2.

[393] *See* discussion *supra* Part I.C; *supra* notes 124–25 and accompanying text.

[394] *See* discussion *supra* Part I.C.

[395] *See* discussion *supra* Part II.

under the Court's prisoner free speech jurisprudence and similar *Pickering* balancing factors.[396]

Lastly, applying the public concern and *Pickering* balancing tests to prisoners' free speech retaliation claims ensures that prisoners do not posses potentially greater free speech rights than public employees. While the Seventh Circuit accurately noted that "[a] prisoner's speech can be circumscribed in many ways that a public employee's speech cannot, and the two tests for assessing protected speech account for those differences," the legitimate penological interests test may afford prisoners greater free speech rights than public employees by not specifically subjecting prisoners' speech to a public concern requirement.[397] Thus, the court's holding in *Bridges* presents an absurd result. As the Sixth Circuit said, "[p]risoners certainly do not have greater free speech rights than public employees."[398]

The Seventh Circuit, however, justified this potentially absurd result on the thoroughly discredited rationale that public employees waived restrictions on their free speech rights by consenting to their government employment.[399] The Court unequivocally rejected the view that public employees waived their constitutional rights as a condition of their employment.[400] If anything, "[t]he waiver argument seems strongest as to prisoners."[401] Arguably, prisoners waive their rights by virtue of committing a crime or as a necessary incident of their incarceration or punishment.[402]

Concededly, a balancing test that ignores the requirement that prisoners speak as citizens and further permits prisoners to speak on matters of penological concern may give prisoners greater free speech rights than public employees. It just seems absurd, however, that the

[396] *See* discussion *supra* Parts I, II, V.C.1.

[397] Bridges v. Gilbert, 557 F.3d 541, 550 (7th Cir. 2009); *see also supra* note 17 and accompanying text.

[398] *See* Thaddeus-X v. Blatter, 175 F.3d 378, 388 (6th Cir. 1999); see also *supra* note 194 and accompanying text.

[399] *See* discussion *supra* Part IV.C.

[400] *See, e.g.*, cases cited *supra* note 149 and accompanying text.

[401] Moss, *supra* note 17, at 1652.

[402] *Id.* at 1652–53.

First Amendment would not specially protect speech on a public concern; and in so doing, potentially grant prisoners more freedom of speech than trusted and invaluable public servants.

CONCLUSION

Ultimately, applying the public concern and *Pickering* balancing tests to prisoners' free speech retaliation claims would provide definition and security to prisoners' free speech rights, promote important speech at the heart of the First Amendment, afford sufficient deference to prison officials' needs, and ensure that prisoners do not possess potentially greater free speech rights than public employees. The public concern and *Pickering* balancing tests offer a bridge to a new First Amendment future in prisoners' free speech retaliation claims. That bridge provides definition and protection to the uncertain, amorphous, and largely unprotected status of prisoners' free speech rights. That bridge also does not unduly interfere with prison officials' pursuit of legitimate penological objectives or potentially protect vast amounts of relatively worthless speech. That is the bridge the Seventh Circuit should have built for evaluating prisoners' free speech retaliation claims.