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Public Employment-Free Speech Jurisprudence: A New Constitutional Test for Disciplined Whistleblowers

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PUBLIC EMPLOYMENT-FREE SPEECH JURISPRUDENCE: A NEW CONSTITUTIONAL TEST FOR DISCIPLINED WHISTLEBLOWERS

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I. INTRODUCTION

Whistleblowing occurs when an employee discloses unethical or illegal activities at work to a supervisor, the public, the media, or the government.[1] For the purpose of this Article, whistleblowing includes "employee speech [that] invariably involve[s] some form of criticism or questioning of the public employer's policy, or of its specific actions, or of supervisory personnel expressed either privately to the employer or publicly."[2] It also includes speech "that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance."[3]

An examination of newspapers and news websites reveals that whistleblowers play an important role in enforcing accountability and protecting the public.[4] They expose violations of workplace safety and health laws, employment laws, fraudulent accounting practices, environmental laws, and other illegal or unethical practices;[5] however, these whistleblowers often face repercussions.[6]

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1. Lizabeth England, *Civil Society: An On Line Journal. The English Language Teaching Forum*, BUSINESS ETHICS 3 (1999),*available at* http://exchanges.state.gov/forum/journal/bus4 background.htm; *see also* Joseph O. Oluwole, *Eras in the Public Employment-Free Speech Jurisprudence*, 32 VT. L. REV. 317 (2007).

2. Berger v. Battaglia, 779 F.2d 992, 997 (4th Cir. 1985); *see also* John A. Gray, *The Scope of Whistleblower Protection in the State of Maryland: A Comprehensive Statute is Needed*,. 33 U. BALT. L. REV. 225, 227-28 (2004).

3. Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668, 672 (8th Cir. 1986).

4. *See, e.g.*, Dwight Ott & Melanie Burney, *Whistle-blower Outraged for Students*, PHILADELPHIA INQUIRER, Jan. 4, 2007.

5. *See* Roberta Ann Johnson & Michael.E. Kraft, *Bureaucratic Whistleblowing and Policy Change*, 43 W. POL. Q. 849 (1990). While this Article focuses on whistleblowing public school teachers, the same principles discussed in this Article would apply to all public employees.

6. *Id.*

For example, public school teachers who blow the whistle on improper employer practices face various repercussions. This occurred in Miami-Dade County where Bennett Packman, a new physical education teacher at American Senior High School, was told to teach driver's education classes.[7] After Packman informed the principal that he was not trained in driver's education, the principal asked Packman to procure his certification from Move On Toward Education and Training (MOTET).[8] Because Packman believed MOTET was a fraudulent school, he refused to attend the classes.[9] Packman subsequently asked Florida education officials to investigate the school.[10] Consequently, the school district cut-off his pay and Packman appealed to the Miami-Dade Schools Office of Professional Standards.[11] As a result of his appeal, Packman was reassigned to a different school.[12]

In another instance, Margaret Hall, a special education teacher at North Mullins Primary School in Marion County, South Carolina, was terminated after writing several letters to the editor of a local newspaper criticizing some school board members' desire to spend $10,000 of taxpayer funds on luxurious vacations.[13] Hall had been a teacher for over 22 years and had *in perpetuum* received excellent performance evaluations.[14] When the superintendent of the school district failed to disclose the names of the board members involved in spending taxpayer funds, Hall filed a Freedom of Information Act (FOIA) request for the names.[15] Hall also wrote letters to the editor of the local newspaper, the *Florence Morning News*, and *The State* criticizing the board's handling of taxpayer funds.[16] The superintendent responded by sending a memorandum to the board characterizing Hall as a gadfly:

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7. Kathy Lynn Gray, *Teacher Told to Take Courses Blew Whistle*, COLUMBUS DISPATCH, July 10, 2005, at 4A.

8. *Id.*

9. *Id.* Even though the classes were physically taught in Miami, the academic credits for the MOTET classes came from Eastern Oklahoma and Otterbein Colleges, both outside Florida, in violation of state law requirements. He also refused to sign students' driver's education forms, fully well aware that under the law, only teachers certified in driver's education could endorse the forms. *Id.*

10. *Id.*

11. *Id.*

12. Gray, *supra* note 7.

13. Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 186 (4th Cir. 1994).

14. *Id.*

15. *Id.* at 186-87.

16. *Id.* at 187.

> Speaking of putting a lid on our current gadfly brings the note on the enclosed newspaper letter to the editor. We . . . cannot say that the barrage of opinions and innuendos does not bother us. The trick is to not let her know how much a pain she is and where our pain is located! . . . Maybe enough rope will allow our gadfly to suspend herself in an awkward position. Hopefully, it is an uncomfortable one.[17]

In a local newspaper advertisement, the superintendent threatened Hall:

> REMEMBER THIS IF YOU WORK FOR A MAN, in Heaven's name, WORK for him. If he pays you wages which supply you bread and butter, work for him; speak well of him; stand by him and stand by the institutions he represents. If put to a pinch, and [sic] ounce of loyalty is worth a pound of cleverness. If you must vilify, condemn and eternally disparage—resign your position, and when you are outside, damn to your heart's content, but as long as you are part of the institution do not condemn it. If you do that, you are loosening the tendrils that are holding you to that institution, and at the first high wind that comes along, you will be uprooted and blown away, and probably will never know the reason why.[18]

Hall subsequently sent a letter to her principal, a copy to the State Superintendent of Education, a copy to her U.S. Congressman, and a copy to the President of the United States, pointing out problems with the school district and its administration.[19] The workplace environment was increasingly hostile to Hall, and she was subsequently terminated.[20]

Policymakers, administrators, and educators seem perplexed that teachers whistleblow as often as their corporate counterparts. To inform policymakers, administrators, educators, the judiciary, and the public about the frequency of teacher whistleblowing, and to further illustrate its *inclemency*, the author will present other examples of teacher whistleblowing and consequent disciplinary actions. Though not garnering the media attention of corporate whistleblowing, teacher whistleblowing is variegated. Teachers "blow the whistle" for violations including poor

17. *Id.* (internal quotes omitted).
18. *Hall*, 31 F.3d at 187.
19. *Id.* at 188.
20. *See id.* at 188-90.

treatment of students;[21] mismanagement of taxpayer funds;[22] lowering of academic standards;[23] inappropriate alteration of student grades;[24] school board violations of open-meetings laws;[25] removal of books from the libraries;[26] mismanagement of budget;[27] lack of concern for students;[28] failure to offer needed courses;[29] disregard of teacher morale;[30] sacrifice of academic quality for increased enrollment;[31] lack of professionalism;[32] proposed retaliatory transfer of teachers;[33] politically-motivated transfer of teachers;[34] unwarranted severity of corporal punishment;[35] sexual misconduct against students;[36] and board decisions to terminate athletic programs.[37]

Other examples of whistleblowing include: suppression of evidence and fraudulent alteration of documents;[38] violations of safety protocols;[39] racial discrimination;[40] falsification of state required reports;[41] inaccurate compilation of statistical data or reports;[42] misrepresentations by supervisors;[43] violations of the National Federation of Cheerleaders

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21. *See, e.g.*, Starsky v. Williams, 512 F.2d 109,110 (9th Cir. 1975).
22. *See, e.g.*, *Hall*, 31 F.3d at 186.
23. *See, e.g.*, Storlazzi v. Bakey, 894 F. Supp. 494, 499 (D. Mass. 1995).
24. *Id.* at 501.
25. *See, e.g.*, Dishnow v. Sch. Dist. of Rib Lake, 77 F.3d 194, 196 (7th Cir. 1996).
26. *Id.*
27. *See, e.g.*, Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 154 (4th Cir. 1992).
28. *See, e.g.*, Daulton v. Affeldt, 678 F.2d 487, 489 (4th Cir. 1982).
29. *Id.*
30. *Id.*
31. *Id.*
32. *See, e.g.*, Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310, 312 (8th Cir. 1986).
33. *Id.*
34. *See, e.g.*, Wichert v. Walter, 606 F. Supp. 1516, 1518 (D.N.J. 1985).
35. *See, e.g.*, Bowman v. Pulaski County Special Sch. Dist., 723 F.2d 640, 642 (8th Cir. 1983).
36. *See, e.g.*, Cromley v. Bd. of Educ., 17 F.3d 1059, 1062 (7th Cir. 1994).
37. *See, e.g.*, McGee v. S. Pemiscot Sch. Dist. R-V, 712 F.2d 339, 341 (8th Cir. 1983) (school board decided to terminate junior high track).
38. *See, e.g.*, Williams v. Bd. of Regents, 629 F.2d 993, 996, 1003 (5th Cir. 1980).
39. *See, e.g.*, Swilley v. Alexander, 629 F.2d 1018, 1019 (5th Cir. 1980) (showing where a principal allowed "young children to go outdoors for tornado drills during lightning storms and . . . [sent] home unattended small children without notifying the children's parents").
40. *See, e.g.*, Love-Lane v. Martin, 355 F.3d 766, 768 (4th Cir. 2004); Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996).
41. *See* TENN. CODE ANN. § 49-50-1403(2) (2008).
42. *Id.*
43. *See, e.g.*, Gardetto v. Mason, 100 F.3d 803, 809 (10th Cir. 1996).

Guidelines;[44] violations of practice times and venues for athletics;[45] and placements of ineligible students on athletic teams.[46]

Teachers have whistleblown about placements of special education students;[47] classroom observation notice policies;[48] principals' stratagems to obtain early contract renewal;[49] and violations of the Disabilities Education Act (IDEA).[50]

As with whistleblowers in the corporate sector, teachers who expose wrongdoings often face retailiation. These retaliatory acts take various forms including nonrenewal of contract;[51] hostile work environment;[52] termination;[53] suspension with pay;[54] closer scrutiny of performance;[55] reprimand;[56] demotion;[57] lowered performance evaluations;[58] involuntary transfers;[59] strict enforcement of school rules;[60] *incommunicado*

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44. *See, e.g.*, Gilder-Lucas v. Elmore County Bd. of Educ., 399 F. Supp. 2d 1267, 1270 (M.D. Ala. 2005), *aff'd*, 186 Fed. Appx. 885 (11th Cir. 2006).

45. *See, e.g.*, Hall v. Ford, 856 F.2d 255, 257 (D.C. Cir. 1988).

46. *Id.*

47. *See, e.g.*, Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 268 (1st Cir. 1995).

48. *See, e.g.*, Storlazzi v. Bakey, 894 F. Supp. 494, 499 (D. Mass. 1995).

49. *See, e.g.*, Lifton v. Bd. of Educ., 290 F. Supp. 2d 940, 942-43 (N.D. Ill. 2003).

50. *See, e.g.*, Khuans v. Sch. Dist. 110, 123 F.3d 1010, 1016 (7th Cir. 1997) (where the school district failed to notify parents about educational planning meetings, administrative classification of children prior to a diagnostic team's input, change of special education students' placements and services without a diagnostic team's input or parental notification, and disregard of individualized educational programs (IEP) of special education children).

51. *See, e.g.*, Greminger v. Seaborne, 584 F.2d 275, 276 (8th Cir. 1978); Starsky v. Williams, 512 F.2d 109, 110 (9th Cir. 1975).

52. *See, e.g.*, Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004); Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 188 (4th Cir. 1994); Bernheim, 79 F.3d 318 (2d Cir. 1996) (assignment of whistleblowing teacher with difficulty climbing stairs due to physical disabilities, to a fifth floor classroom).

53. *See, e.g.*, *Hall*, 31 F.3d at 190.

54. *See, e.g.*, Gardetto v. Mason, 100 F.3d 803, 810 (10th Cir. 1996).

55. *See, e.g.*, *Hall*, 31 F.3d at 188.

56. *See, e.g.*, Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216 (5th Cir. 1999); Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310, 316-17 (8th Cir. 1986); Swilley v. Alexander, 629 F.2d 1018, 1019 (5th Cir. 1980).

57. *See, e.g.*, *Love-Lane*, 355 F.3d at 7774-75.

58. *See, e.g.*, *id.* at 766; Cromley v. Bd. of Educ., 17 F.3d 1059, 1062 (7th Cir. 1994); Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986).

59. *See, e.g.*, McGill v. Bd. of Educ., 602 F.2d 774, 776 (7th Cir. 1979); *Harris*, 168 F.3d at 216 (where the whistleblower was transferred to a center for disruptive students to teach subjects and grade levels he had never taught before).

60. *See, e.g.*, *Wren*, 798 F.2d at 1316.

interrogations;[61] institution of disciplinary proceedings;[62] and failure to promote.[63]

Retaliatory acts against teachers also include assignments of inferior teaching schedules;[64] reduced preparation periods;[65] assignments of non instructional duties;[66] transfer of students to different classes;[67] failure to properly process claim forms;[68] removal of locks and belongings from storage areas;[69] *persona non grata* treatment;[70] denial of access to the grievance and arbitration process;[71] failure to honor seniority and priority for recall;[72] merger of one department into another;[73] requirement of justification of teaching methods;[74] denial of access to student records and school equipment;[75] inaccurate maintenance of files;[76] threats;[77] reduction in pay;[78] abolition of previously held positions;[79] constructive discharge;[80] withholding of work;[81] denial of adequate personnel to perform duties;[82]

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61. *See e.g.*, O'Brien v. Town of Caledonia, 748 F.2d 403, 404 (7th Cir. 1984).

62. *Id.*

63. *See, e.g., Trotman v. Bd. of Trs. of Lincoln Univ.*, 635 F.2d 216, 229 (3d Cir. 1980).

64. *See, e.g.*, Ferrara v. Mills, 781 F.2d 1508, 1510 (11th Cir. 1986).

65. *See, e.g.*, Bernheim v. Litt, 79 F.3d 318,322 (2d Cir. 1996).

66. *Id.*; *see, e.g.*, Storlazzi v. Bakey, 894 F. Supp. 494, 499. (D. Mass. 1995) (making whistleblowing teacher supervise his or her own detention hall).

67. *See, e.g., Storlazzi*, 894 F. Supp. at 494.

68. *See, e.g., Bernheim*, 79 F.3d at 322.

69. *Id.*

70. *See, e.g.*, Brammer-Hoelter v. Twin Peaks Charter Acad., 81 F. Supp. 2d 1090, 1093 (D. Colo. 2000).

71. *See, e.g., Storlazzi*, 894 F. Supp. at 499..

72. *Id.*

73. *See, e.g.*, Cromley v. Bd. of Educ., 17 F.3d 1059, 1062 (7th Cir. 1994).

74. *Id.*

75. *Id.*

76. *Id.*

77. MINN. STAT. ANN. § 181.932(1) (2008); NEB. REV. STAT. § 81-2703(4) (2007); TENN. CODE ANN. § 49-50-1403(1) (West 2008).

78. OHIO REV. CODE ANN. § 4113.52(B)(5) (West 2008); WASH. REV. CODE ANN. § 42.41.020(3)(a) (West 2008).

79. *See, e.g.*, Cromley v. Bd. of Educ., 17 F.3d 1059, 1062 (7th Cir. 1994).

80. *See, e.g.*, Lifton v. Bd. of Educ., 290 F. Supp. 2d 940, 943 (N.D. Ill. 2003). "A constructive discharge takes place 'when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job.'" English v. Powell, 592 F.2d 727, 731 n.4 (4th Cir. 1979) (quoting Muller v. U.S. Steel Corp, 509 F.2d 923, 929 (10th Cir. 1975)). *See also* ARIZ. REV. STAT. ANN. § 23-1502(A) (2008).

81. MO. ANN. STAT. § 105.055(4) (West 2008).

82. NEV. REV. STAT. ANN. § 281.611(5)(a) (West 2008); WASH. REV. CODE ANN. § 42.41.020(3)(a) (West 2008).

frequent replacement of staff members;[83] frequent and undesirable office relocations;[84] refusal to assign meaningful work;[85] admonishment;[86] reduction in rank;[87] reclassification;[88] removal of duties;[89] refusal to restore duties;[90] verbal or physical harassment;[91] implementation of surveillance measures;[92] discrimination;[93] denial of education or training;[94] failure to increase base pay;[95] requirement of fitness-for-duty examinations;[96] requirement of disability retirement;[97] frequent changes in working hours or workdays;[98] withholding earned salary increases or benefits;[99] and referrals for psychiatric or psychological counseling.[100]

Central to the examples above, and in all situations where teachers whistleblow, is that teachers who whistleblow exercise their foundational constitutional right to free speech.[101] This right is guaranteed by the Free Speech Clause of the First Amendment[102] and applicable to the states via the Fourteenth Amendment.[103] According to the U.S. Supreme Court,

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83. NEV. REV. STAT. ANN. § 281.611(5)(b) (West 2008); WASH. REV. CODE ANN. § 42.41.020(3)(a) (West 2008).

84. NEV. REV. STAT. ANN. § 281.611(5)(c) (West 2008); WASH. REV. CODE ANN. § 42.41.020(3)(a) (West 2008).

85. NEV. REV. STAT. ANN. § 281.611(5)(d) (West 2008); WASH. REV. CODE ANN. § 42.41.020(3)(a) (West 2008).

86. NEB. REV. STAT. ANN. § 81-2703(4) (West 2008); TENN. CODE ANN. § 49-50-1403(1) (West 2008).

87. NEB. REV. STAT. § 81-2703(4) (2007).

88. *Id.*

89. WIS. STAT. ANN. § 230.80(2)(a) (West 2008).

90. *Id.*

91. *Id.*

92. WIS. STAT. ANN. § 230.86(1) (West 2008).

93. UTAH CODE ANN. § 67-21-2(1) (West 2008).

94. WIS. STAT. ANN. § 230.80(2)(b) (West 2008).

95. WIS. STAT. ANN. § 230.80(2)(d) (West 2008).

96. NEB. REV. STAT. ANN. § 81-2703(4) (LexisNexis 2008).

97. *Id.*

98. NEV. REV. STAT. ANN. § 281.611(5)(1) ([LexisNexis 2008).

99. OHIO REV. CODE ANN. § 124.341(B)(2) (West 2008).

100. D.C. CODE § 2-223.01(6) (2001); D.C. CODE § 1-615.52(5) (2001).

101. Sometimes, prior to whistleblowing, the teachers who are terminated for whistleblowing had several years of teaching experience with consistently positive evaluations. *See, e.g.*, Hall v. Marion Sch. Dist. No. 2, 860 F. Supp. 278, 282 (D. S.C. 1993).

102. U.S. CONST. amend. I. The First Amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ." *Id.*

103. The First Amendment is made applicable to the states via the Due Process Clause of the Fourteenth Amendment which provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

however, "[t]he First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses . . . . By adjustment of rights, we can have both full liberty of expression and an orderly life."[104] The lingering question is how great an adjustment in rights the Court is willing to sanction so as to ensure an orderly life. It is undeniable, however, that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech."[105] Moreover, the protection of free speech in the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[106]

In *Pickering v. Board of Education*,[107] the U.S. Supreme Court set forth a balancing test for addressing First Amendment claims of teachers and all public employees who allege employment retaliation for exercise of their free speech rights.[108] Despite the fact that the text of the First Amendment says nothing about the interests of an employer,[109] the *Pickering* balancing test requires a fluid and unfettered "balancing of the public employer's interests in operational efficiency against the free speech rights of employees."[110] Until recent cases, the *Pickering* balancing test was used as a good-faith attempt to protect public employees' free speech rights. In the application and interpretation of the balancing test, however, recent cases reveal a proclivity for favoring the employer's operational efficiency over employee free speech rights. This proclivity could provide a license to "school boards to dismiss teachers for reasons of political expendiency rather than legitimate pedagogy."[111] In what has amounted to pseudo-balancing, this approach fails to sufficiently consider teachers' rights as citizens to speak about issues of the day. According to éclat constitutional law scholar Gunther, in interpreting and applying balancing tests, "the single most important trait for *responsible* balancing [is] the capacity to

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deprive any person of life, or liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

104. Breard v. City of Alexandria, 341 U.S. 622, 642 (1951).

105. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

106. Roth v. United States, 354 U.S. 476, 484 (1957).

107. *Id.*

108. *Id.* at 568.

109. Oluwole, *supra* note 1, at 320.

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

111. Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 2 (2001).

identify and evaluate separately each analytically distinct ingredient of the contending interests."[112]

II. ROAD MAP TO ARTICLE

The author proposes a constitutional framework based on the three-tier framework used in Equal Protection jurisprudence. To account for multiple categories of whistleblowing speech, the author proposes this three-tier system to replace the current single-tier system used in the *Pickering* balancing test. A new three-tier system would ensure greater protection for teacher whistleblowing as well as opportunities for employers to proffer operational efficiency to defend retaliatory actions against employees for their speech.[113] In proposing this new approach, the author will address three questions:

1. What are the eras in the United States Supreme Court's public employment-free speech jurisprudence?
2. Is there a way to categorize the types of speech that whistleblowing teachers engage in under the Court's public employment-free speech jurisprudence?
3. What is the author's proposed constitutional framework for analyzing whistleblowing cases under the Court's public employment-free speech jurisprudence?

In Part III, the author categorizes the Supreme Court public employment-free speech jurisprudence, from pre-*Pickering* to date, into various eras.[114] In Part IV, the author will classify speech under the jurisprudence into various categories. Finally, in Part V, the author will propose a constitutional test for analyzing cases under public employment-free speech jurisprudence.

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112. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 7 (1972) (emphasis added) (internal quotes omitted).

113. The U.S. Supreme Court considers public employee whistleblowing speech (including that of public school teachers) under its public employment-free speech jurisprudence; thus, the author's reference to public employment-free speech jurisprudence in this Article is inclusive of the whistleblowing First Amendment jurisprudence.

114. *See* Oluwole, *supra* note 1, at 320-21.

III. ERAS IN THE SUPREME COURT'S PUBLIC EMPLOYMENT-FREE SPEECH JURISPRUDENCE

The Supreme Court's public employment-free speech jurisprudence has unfolded in four discernable eras.[115] These eras are: (a) Categorical Denial; (b) Recognition of Undefined Scope; (c) Balancing Scope; and (d) OE > MPC Speech.[116]

A. *Era of Categorical Denial*

Prior to 1952, "public employers could place any limitation, including constitutional limitations, on the conditions of employment for any employee because public employment was a privilege, [and] not a right."[117] While a non-government employee citizen was entitled to First Amendment protection,[118] any citizen who took government employment automatically became automatically subject to judicially-sanctioned strictures on the right to free speech.[119] Justice Holmes's famous epigram aptly captures the public employment-free speech jurisprudence in this era: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[120] In essence, there was no constitutionally protected right to whistleblow; therefore, public employees could be disciplined or terminated for whistleblowing without constitutional remedies. Accordingly, in this era, free speech rights for public whistleblowing employees were completely denied protection under the Constitution.[121]

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115. *See id.*

116. OE refers to "operational efficiency" interests of the public employer, and MPC Speech refers to the employee's interest in speech on matters of public concern. *Id.* The greater than (>) mathematical symbol represents the trend in this era of Supreme Court interpretation of the elements and aspects of the *Pickering* balancing test that resulted in increasingly greater weight granted to the "operational efficiency" element of the balancing test relative to the "employee interest in speech on matters of public concern." *Id.*

117. *Id.* at 321.

118. The First Amendment to the U.S. Constitution, passed in 1791, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S CONST. amend. I. While the express language of the First Amendment refers to Congress, it is applicable to the states via the Fourteenth Amendment's Due Process Clause passed in 1868. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985).

119. *See* Oluwole, *supra* note 1, at 321.

120. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

121. *See* Oluwole, *supra* note 1, at 322.

B. *Era of Recognition: Undefined Scope*

In December 1952, the Supreme Court limited the unlimited power of public employers to deny First Amendment rights to their employees.[122] The breakthrough case was *Wieman v. Updegraff*.[123] In *Wieman*, a public employee brought a Fourteenth Amendment challenge to a state statute which, as a qualification for employment, required public employees to swear loyalty oaths.[124] Invalidating the statute, the Court held that patently arbitrary or discriminatory government acts against an employee are unconstitutional.[125] Its corollary might be that if the government act was not patently arbitrary or discriminatory, the action would withstand constitutional scrutiny.[126] While this was a freedom of association case, Justice Black, in his concurring opinion, cautioned that loyalty oaths could be used as a tool of tyranny to impose extraordinary perils on *free speech* and shackle the minds of free people;[127] therefore, Justice Black beseeched the majority for First Amendment protection of public employee speech.[128] He famously admonished the majority:

> We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost.[129]

The reference to "matters of public concern," was a progenitor in the public employment-free speech jurisprudence and became a staple of the jurisprudence.[130]

The Court finally adhered to Justice Black's admonition in *Shelton v. Tucker*,[131] recognizing freedom of speech as a right, which, like freedom of association, is vulnerable to extraordinary perils and abuse by the government public employer.[132] Subsequently, in this efflorescent era of public employment-free speech recognition and enforcement, in *Cramp v.*

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122. *See* Wieman v. Updegraff, 344 U.S. 183 (1952).
123. 344 U.S. 183 (1952).
124. *Id.* at 184; *see generally supra* note 103.
125. *Wieman*, 344 U.S. at 192.
126. *Id.*
127. *Id.* at 193-94 (Black, J., concurring).
128. *Id.*
129. *Id.* at 193.
130. *See* Oluwole, *supra* note 1, at 324.
131. 364 U.S. 479 (1960).
132. Oluwole *supra* note 1, at 324-25.

Board of Public Instruction,[133] and then in *Torcaso v. Watkins*,[134] the Court reaffirmed constitutional protection against patently arbitrary or discriminatory action.[135] Two years after Cramp and *Torcaso*, the Court in *Sherbert v. Verner*,[136] reaffirmed the era of recognition of public employees' free speech rights, stating that "[i]t is too late in the day to doubt that the liberties of religion and *expression* may be infringed by the denial of or placing of conditions upon a benefit or privilege."[137]

The leitmotiv of this era was the Court's recognition and protection of public employees' free speech rights. Thus, with this Era of Recognition, the Era of Categorical Denial was indubitably brought to a close. Even though recognition was a breakthrough for employees in this era, the scope of the recognized rights was undefined. In other words, the Court failed to articulate a test for determining when employers could restrict or deny employee free speech rights without contravening the First Amendment. Finally, in 1968, in *Pickering*,[138] the Court would set out to define the scope of public employees' free speech rights recognized in the "Era of Recognition: Undefined Scope."[139]

C. *Era of Balancing: Scope*

In the "Era of Balancing: Scope," the Court ventured to define the scope of public employees' free speech rights, and *Pickering* was the seminal case in formulating this definition.[140] In *Pickering*, a public school teacher was terminated by the school board for his criticism of his employer in a newspaper article.[141] In the article, he criticized the board and the superintendent for their handling of various proposals to raise revenues as well as for a misallocation of school funds.[142] The teacher challenged his termination as a violation of his right to free speech under the First Amendment.[143]

The Court stated that the nature of an employment relationship between a government and public employer-public employee demands that the

133. 368 U.S. 278 (1961).
134. 367 U.S. 488 (1961).
135. *Cramp*, 368 U.S. at 288; *see Torcaso*, 367 U.S. at 495-96.
136. 374 U.S. 398 (1963).
137. *Id.* at 404 (emphasis added).
138. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
139. Oluwole, *supra* note 1, at 327.
140. *Id.*
141. *Pickering*, 391 U.S. at 566.
142. *Id.* at 564.
143. *Id.* at 565.

Court account for the operational efficiency of the public employer in a First Amendment constitutional analysis.[144] Therefore, the public employer must be able to maintain some control over its employees' speech.[145] The Court then enunciated the *Pickering* balancing test for defining the scope of protected employee speech.[146] The test provides:

> The problem in any case is to arrive at a balance between 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.[147]

The balancing test has two key parts: "employee interest in speech" and "employer interest in operational efficiency."[148]

An aspect of the "employee interest in speech" is the "matter of public concern" (MPC) requirement: that is, to be protected against employer retaliation, the employee speech must touch on a matter of public concern.[149] "The other aspect of the 'employee interest in speech' within the balancing test is the 'as citizen' versus 'as employee' status of the employee's speech."[150] Fundamentally, "to determine whether a particular speech is within the scope of protected speech, a balance [has to] be struck between the employer and employee's interests within the operational confines of the *Pickering* test."[151]

In aid of this balancing, there are certain identifiable factors in the opinion, known as the *Pickering* calculus factors.[152] When applied, some of the factors would more likely weigh in favor of the employer, while others weigh relatively in favor of the employee.[153] Factors that could be viewed as pro-employer in the *Pickering* balancing test include:

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144. *Id.* at 568.

145. Oluwole, *supra* note 1, at 328.

146. *See Pickering*, 391 U.S. at 568.

147. *Id.*

148. *Id.*

149. This is the "matter of public concern," Justice Black progenitored in Wieman v. Updegraff, 344 U.S. 183, 193 (Black, J., concurring); Oluwole, *supra* note 1, at 328.

150. *See Pickering*, 391 U.S. at 568.

151. Oluwole, *supra* note 1, at 328.

152. *See id.*

153. *Id.* at 328-29. Given that both sides, as in adversarial litigation, have a chance to make arguments about each factor, many of the factors could work in the favor of either side. *Id.* at 329.

> (a) whether the speech would impact harmony among coworkers or the employee's immediate supervisor's ability to maintain discipline; (b) whether the speech is directed toward someone with whom the employee would typically be in contact during his daily work; and (c) whether the nature of the employment relationship between the employee and the person toward whom the speech is directed is so close that personal loyalty and confidence are critical to their proper functioning.[154]

Factor (b) is known as the "close working relationship" factor,[155] and factor (c) is known as the "confidentiality" factor.[156]

Factors that could be relatively more pro-employee in the balancing test include: (a) the employee's interest in commenting on matters of public concern and the public's interest in free and unhindered debate on matters of public importance;[157] (b) the fact that public employees are more likely than the general citizenry to have informed and definite opinions about the matter in question;[158] (c) the ease with which the employer could rebut the content of the employee's statement, if it were false;[159] and (d) whether there is evidence that the speech actually had an adverse impact on the employer's proper functioning.[160]

The Court held that the critical tone of a letter alone is not sufficient to take employee speech on matters of public interest outside of the scope of speech protected against employer retaliation, when those statements are substantially correct.[161] The Court also held that speech constituting false statements is also within the scope of protected speech, unless the false statements were intentionally or recklessly made.[162] In its decision, the Court assumed, without apologia, that the funding of the school district was an issue of public concern and thus within the scope of speech protected against employer retaliation.

In *Perry v. Sindermann*,[163] the Court expanded the scope of protected public employee speech to include testimony before a legislative

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154. *Id.*
155. *Id.* at 329 n.91.
156. Oluwole, *supra* note 1, at 329 n.92.
157. *See Pickering*, 391 U.S. at 573.
158. *See id.* at 572.
159. *Id.*
160. *Id.* at 572-73.
161. *Id.* at 570.
162. *Pickering*, 391 U.S. at 573.
163. 408 U.S. 593 (1972).

committee.[164] In making this determination, the Court applied one of the factors in the *Pickering* calculus—the employee's interest in commenting on matters of public concern and the concomitant interest of the public in free and unhindered debate on matters of public importance.[165] Additionally, the Court held that a public employee's non-tenured status was not sufficient in itself to take speech out of the scope of protected speech.[166]

Four years later, in *Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*,[167] applying the *Pickering* balancing test, the Court again expanded the scope of protected speech to include employee speech in forums open to citizen involvement.[168] The essence of this era was the definition of the scope of protected employee speech via balancing that genuinely accounted for the interests of the employee in speech on matters of public concern and the interests of the employer in operational efficiency and balancing both interests without *de facto* or *de jure* weights assigned one interest over the other.[169] Accordingly, this era resulted in a greater expanse of employee rights within the scope of protected speech.[170] Since *Pickering*, *Perry*, and *Madison Joint School District No. 8,* however, the Court's interpretation of parts and aspects of the balancing test have *de facto* and *de jure* created the current era of the jurisprudence labeled by the author as the "era of OE > MPC Speech."[171]

D. *Era of OE > MPC Speech*

The *Pickering* balancing test states: "The problem in any case is to arrive at a balance between 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."[172] Also recall that there are two key parts to the balancing test: "employee interest in speech" versus "employer interest in operational efficiency;" and these two interests are weighed

164. *Id.* at 584-95.
165. *See id.* at 598.
166. *Id.* at 597.
167. 429 U.S. 167 (1976).
168. *See id.* at 175.
169. *See* Oluwole, *supra* note 1, at 332.
170. *See id.* at 327-32.
171. *See id.* at 332.
172. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

against each other in the test.[173] One aspect of the "employee interest in speech" element is the "matter of public concern" (MPC) requirement: to be protected against employer retaliation, employee speech must touch on a matter of public concern.[174] The other requirement of the "employee interest in speech" is the "as citizen" versus "as employee" status of the employee's speech.[175]

As titled, the Court's interpretative favoritism of the operational efficiency element in the test has thus eroded the original intent of the test to be a balance between employee and employer interests.[176]

The "OE > MPC Speech" era began in 1977 in *Mount Healthy City School District Board of Education v. Doyle*.[177] In this case, a public school teacher was terminated after he disclosed, to a radio station, a new mandatory dress for teachers.[178] The dress code was adopted because school administrators believed that teacher appearance correlated with public support for bond initiatives.[179] The teacher challenged the board's decision not to renew his contract as a violation of his constitutional rights to free speech.[180] This was the first case in which the Court addressed the role of "mixed motives" in the *Pickering* balancing test.[181]

"Mixed motives" arise where a public employer disciplines an employee ostensibly for the employee's speech, yet other reasons centrolineal to the discipline are proffered by the employer.[182] Therefore, courts have to determine the employer's actual and pretentious motives.[183] This "analysis involves an attempt to ascertain cause and effect: what was the actual cause of the employer's discipline of the employee?"[184] The teacher's background in *Mount Healthy,* prior to the speech, coupled with his speech to the radio station served as mixed motives for his termination.[185] This background included a fight with a colleague, an argument with cafeteria employees, and obscene gestures to female

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173. *See supra* Part III.C (discussing "Era of Balancing: Scope"); *see also* Oluwole, *supra* note 1.

174. Oluwole, *supra* note 1, at 332.

175. *Id.*

176. *Id.* at 333.

177. 429 U.S. 274 (1977).

178. *Id.* at 282.

179. *Id.*

180. *Id.* at 276.

181. *See id.*

182. Oluwole, *supra* note 1, at 334.

183. *Id.*

184. *Id.*

185. *Id.*

students.[186] The Supreme Court refused to order the teacher's reinstatement, consequent to its "mixed motives" analysis.[187]

The district court had adopted a causation rule which stated: as long as the employee speech had a "substantial part" in the employer's termination decision, the employee notwithstanding, the employee is entitled to reinstatement.[188] In rejecting this rule as irrebuttably dispositive in the "mixed motives" analysis, the Supreme Court expressed concern that the rule would hamper the control of public employers over personnel decisions and force employers to retain inefficient employees who would have been terminated absent the speech. The Court was foremost concerned about operational efficiency.[189] Thus, the Court reasoned, the rule might place the speaking employee in a better off position than he or she would have been without the speech.[190] Relative weighting of operational efficiency over MPC speech continued with the Court's formulation of a burden-of-proof allocation framework for "mixed motives" cases under the *Pickering* balancing test.[191] Consequently, the balance of burdens was a development and interpretation of the *Pickering* balancing test. The framework provides:

1. The initial burden of proof is on the public employee to show that (a) the employee's conduct is protected by the First and Fourteenth Amendments;[192] and (b) that the conduct was "a substantial factor" or a "motivating factor" in the employer's decision to discipline the employee. The "substantial factor" or "motivating factor" language represents the Court's causation test in "mixed motives" analysis, however, it is rebuttable.[193] Nevertheless, the Court's requirement of a "substantial factor," rather than just a "factor," in proof is an indicium of OE > Speech on MPC. If the employee is unable to carry this burden, the constitutional question is to be resolved in favor of the employer.[194]
2. If the employee successfully carries this burden of proof, the employer could then show, by a preponderance-of-the-evidence standard, that it

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186. Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 281-82 (1977).

187. *See id.* at 284.

188. *Id.*

189. *Id.* at 285-86.

190. *Id.* at 285.

191. *See Mount Healthy*, 429 U.S. at 287. This burden of proof allocation is also known as the *Mount Healthy* "balance of burdens," the *Mount Healthy* framework, or the "mixed motives" framework.

192. *Id.* at 287.

193. *Id.* at 287.

194. *See id.*

would have reached the same decision about disciplining the employee without the protected speech.[195] This is the "same decision anyway" defense, and it provides an affirmative defense for employers,[196] which is further indicium of OE > Speech on MPC.[197]

Furthermore, the entire framework, including the "same decision anyway" affirmative defense could buoy employers to concoct post-hoc, multiple motives, other than restricting the employee's free speech, in justification of the inflicted discipline. Allowing the employer to recast what in actuality is a "single motive," employee exercise of free speech rights, as a sham stratagem: "mixed motives."[198]

Fundamentally, in the era of OE > MPC Speech, diminution of employer rights against employee speech within the *Pickering* balancing test has been *de minimis*.[199] In fact, it has enjoyed preferment as a consequence of the significance the Court attaches to the operational efficiency of the public employer and the materiality of personnel control.[200] This trend would continue in *Connick v. Myers*,[201] as the Court tried to unfurl the "matter of public concern" aspect of the *Pickering* balancing test.[202] Notwithstanding the fact that "matter of public concern" is an aspect of the employee part of the *Pickering* balancing test, the Court's interpretation effectively affirmed OE > Speech on MPC.[203]

First, the Court made it a threshold requirement for the application of the *Pickering* balancing test to determine whether the matter that is the subject of the speech is simply an employment dispute or a matter of public concern.[204] If simply an employment dispute, courts will defer to the

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195. *Id.*

196. *See Mount Heathy*, 429 U.S. at 287. The *Mount Healthy* "same decision anyway" defense is also known as the *Mount Healthy* defense.

197. *Id.*

198. Oluwole, *supra* note 1, at 336.

199. *Id.* In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court extended some rights to employees, noting that "[a] public employer may not divorce a statement made by an employee from its context by requiring the employee to repeat the statement, and use that statement standing alone as the basis for a discharge." *Id.* at 387 n.10. Additionally, the Court held that private speech of employees who have no (a) confidential, (b) policymaking, or (c) public contact role poses very minimal danger to their employers. *Id.* at 390-91. While this case extended these rights to public employees, it did not reverse the primacy of operational efficiency over MPC speech in the jurisdiction.

200. Oluwole, *supra* note 1, at 338.

201. 461 U.S. 138 (1983).

202. *Id.* at 140.

203. *See id.*

204. *See id.* at 146-47.

employer action against the employee, unless some ground other than the First Amendment is presented.[205] If the speech, however, touches on a matter of public concern, the *Pickering* balancing test is triggered.[206]

The Court set forth the test for determining whether public employee speech constitutes speech on MPC: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[207] The content, form, and context of the statement must be examined to determine whether the employee's speech "relat[es] to *any matter of political, social, or other concern to the community*."[208] If the speech fails this test, then "absent the *most unusual* circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[209] The Court, however, failed to specify what would constitute the "most unusual circumstances."[210]

Continuing the primacy of operational efficiency over speech on MPC, in its discourse of the *Pickering* balancing test, the Court held variously that public employers must retain "wide discretion," "control," "wide latitude" over the permissability of employee speech, "wide degree of deference to employer judgment" and the prerogative to terminate employees hindering efficiency.[211] In the same spirit, the Court held that "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, *additional* weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."[212]

In a countermand of a *Pickering* calculus factor, certifying the underpinning of the current era, the Court held that employers could rely on speculations about the disruptiveness of speech to operational efficiency in disciplining employees.[213] The requirement in *Pickering* of evidence of actual adverse impact of speech on operational efficiency was no more.[214]

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205. *Id.* at 146-47, 151.

206. *See Connick*, 461 U.S. at 142-47.

207. *Id.* at 147-48 (emphasis added). This test is known as the *Connick* test. *See* Oluwole, *supra* note 1, at 338.

208. *Connick*, 461 U.S. at 146-48 (emphasis added).

209. *Id.* at 147 (emphasis added).

210. *See id.*

211. *See id.* at 151-53.

212. *Id.* at 153 (emphasis added).

213. *Connick*, 461 U.S. at 152.

214. *See supra* Part III.C (discussing this *Pickering* calculus factor); *see also* Oluwole, *supra* note 1.

Interpretation and development of the *Pickering* balancing test would continue in *Waters v. Churchill*[215] as the Court sought to develop the "content" component of the "content, form and context" test for matter of public concern.[216] Specifically, the Court made a procedural determination as to whether the *content* of employee speech should be determined from the government employer's perspective or from the trier of fact's perspective.[217] The ruling further truncated employee speech protection by increasing the primacy of operational efficiency in the era.[218] With respect to the procedural determination, the plurality held that courts must defer to the employers' version of the content.[219] While the plurality did state that employer determinations of the content of employee speech must be reasonable,[220] it conceded that:

> there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, *many* different courses of action will necessarily be reasonable. Only procedures outside the *range* of what a reasonable manager would use may be condemned as unreasonable.[221]

If the discretion of an indeterminate and fluid range of "reasonableness" is given to public employers, employee rights are consequently tenebrous.

Furthermore, the Court held that public employers do not need to tolerate verbal tumult nor rely on counterspeech as a remedy to employee speech.[222] In so holding, the plurality effectively undermined the "ease of rebuttal" factor in the *Pickering* calculus.[223] In further affirmation of the primacy of operational efficiency in the era, the plurality held that "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."[224] The plurality also emphasized a tradition of deference to

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215. 511 U.S. 661 (1994).
216. *Id.* at 664.
217. *Id.*
218. *See generally Waters*, 511 U.S. at 661.
219. *Id.* at 677.
220. *See id.* at 677-78 (emphasis added).
221. *Id.* at 678.
222. *See id.*
223. *See supra* Part III.C (discussing the "ease of rebuttal" *Pickering* calculus factor).
224. *Waters*, 511 U.S. at 675.

judgments of public employers in its public employment-free speech jurisprudence.[225] This tradition of deference would continue in *San Diego v. Roe*,[226] with the Court holding that:

> requir[ing] *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the *proper functioning of government offices* . . . This concern [i.e., concern about operational efficiency] prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of public concern.[227]

At heart, the Court held that the "matter of public concern" requirement and the *Connick* test were created to avoid compromising operational efficiency and the interest of the public employer; concern for the free speech rights of employees is not included in this rationale.[228] Nevertheless, the Court held that MPC "is something that is a subject of legitimate news interest . . . [to employees] at the time of publication."[229]

The most recent decision in the current era is *Garcetti v. Ceballos*.[230] In that case, the Court tried to clarify the distinction between the "as citizen" status and the "as employee" status in the *Pickering* balancing test. Therefore, *Garcetti* was a further interpretation and development of *Pickering*. Recall that in *Pickering*, the Court held that the balancing test is only applicable to an employee who speaks "as a citizen" on a matter of public concern.[231]

The test the Court formulated for this purpose provides 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."[232] This is the "pursuant to official duties" test, or the *Garcetti* test, and it is *Garcetti's* contribution to the public employment-free speech

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225. *Id.* at 673.

226. 543 U.S. 77 (2004).

227. *Id.* at 82-83 (emphasis added) (internal quotes omitted).

228. *Id.* at 83.

229. *Id.* at 84.

230. 126 S. Ct. 1951 (2006).

231. *See supra* Part III.C (discussing *Pickering* under the "Era of Balancing: Scope"); *see also* Oluwole, *supra* note 1.

232. *Garcetti*, 126 S. Ct. at 1960 (emphasis added).

jurisprudence. Intrinsic to the *Garcetti* test is the primacy of operational efficiency.[233]

The Court failed to define the phrases "pursuant to" and "official duties" under this test, consequently ensuring employers leeway to work with the vague, undefined phrases represented in the test. Additionally, the categorical exclusion of speech pursuant to official duties from First Amendment protection is evidence of the relative paramountcy of operational efficiency. This primacy is further seen in the Court's refusal to extend First Amendment protection to public employees' work product.[234]

The Court reaffirmed its holding in *Connick* and the plurality's holding in *Waters* that potential disruptiveness to operational efficiency was a sufficient basis for public employers to restrict employee speech or to discipline employees for speech.[235] Moreover, the Court held that public employers "need a *significant* degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[236] According a "significant degree of control" to employers due to operational efficiency reinforces the primacy of operational efficiency in the era. To protect operational efficiency, the Court extended employers the right to scrutinize and control official speech of public employees thereby ensuring (a) substantive consistency and clarity;[237] (b) accuracy;[238] (c) sound judgment;[239] and (d) the speech promotes the employer's mission.[240]

Because *Garcetti* seemed to afford First Amendment impunity to employers who discipline employees for speech made pursuant to official responsibilities,[241] the primacy of operational efficiency over MPC speech continues in the era.

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233. The Court's inclination to defer to employers is evident in various portions of the opinion. *See generally id.* at 1951.

234. *Id.*

235. *Id.* at 1958.

236. *Id.* at 1958 (emphasis added).

237. *Garcetti*, 126 S. Ct. at 1960.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 1961.

IV. CATEGORIZING SPEECH IN THE U.S. SUPREME COURT'S PUBLIC EMPLOYMENT-FREE SPEECH JURISPRUDENCE

The Supreme Court's public employment-free speech jurisprudence consists of a variety of speech. In this part of the Article, the author will attempt to categorize speech in the public employment-free speech jurisprudence in a way that would enhance the author's new constitutional test for the jurisprudence proposed in Part VI of this Article. The various categories the author uses are: (a) Purely Employee Speech; (b) Citizen-Employee Hybrid Speech; and (c) Purely Citizen Speech.

A. *Purely Employee Speech*

All employee speech that criticizes the employer, solely regards that particular employee's employment (including criticisms of the employer's actions, policies, or practices), or other employment contract disputes of that particular employee with his or her employer should be classified under this category. Additionally, employee speech that proximately arises out of the employee's own employment dispute with the employer would fall under this category, irrespective of its impact on the public or other government employees, unless the relative importance of the issue to the public or other government employees substantially outweighs the import of the speech's proximate relation to the employee's employment dispute with the employer. In such cases, the speech should be accorded relatively greater protection than "purely employee speech" and consequently classified instead under the "citizen-employee hybrid speech."

Examples of "citizen-employee hybrid speech" include an employee's complaints about the employer's handling of pay or other benefits. Likewise, in this category would include employee grievances over working conditions or the employee's employment contract. Speech in the "purely employee speech" category should be accorded the lowest level of constitutional protection of the three speech categories.[242]

In *Connick*, for example, an assistant district attorney was terminated after she prepared and distributed to her coworkers a questionnaire requesting their opinions about office morale, office transfer policy, level of confidence in supervisors, need for a grievance committee, and pressures to work in political campaigns.[243] The Court found only one of

242. Besides, employees who complain about their own employment issues have grievance procedures in their union contracts or other statutorily-provided grievance procedures for addressing those issues with their employees. Employees might seek to avail themselves of such procedures.

243. Connick v. Myers, 461 U.S. 138, 140-41 (1983).

the assistant district attorney's questions in the questionnaire touched on a matter of public concern: the question about pressure to work on political campaigns.[244] According to the Court, the other questions were *mere extensions of employment dispute or grievance with the employer.*[245] As justification for this distinction, the Court reasoned that speech about political pressure to work in campaigns might reveal unconstitutional, official coercion of belief and embody the historical value this country places on government employment being a function of meritorious rather than public service.[246] This, the Court noted, made the speech about political pressure to work on campaigns a matter of public concern.[247] Unfortunately, the Court failed to articulate any test for determining what distinguishes the other questions in the questionnaire those concerning pressure to work on political campaigns. The author's categorization scheme, however, would change this.

Recall that employee speech that arises out of the employee's employment dispute with the employer would fall under the "purely employee speech" category, irrespective of its impact on the public or other government employees, unless the relative importance of the issue to the public or other government employees substantially outweighs the import of the speech's proximate relation to the employee's employment dispute with his or her employer. The employee, in *Connick*, prepared the questionnaire because of her dissatisfaction with her employer's decision to transfer her:[248] in essence, her speech arose out of her dispute with her employer. Thus, all questions therein should be classified as "purely employee speech," unless the relative importance of the issue to the public or other government employees substantially outweighs the import of the speech's proximate relation to the employee's employment dispute with his or her employer. Pursuant to this test, employer pressure on employees to work on political campaigns is of great importance, outweighing the import of the proximate relationship of the employee's speech to his or her employment dispute. A close examination of the facts of *Connick* reveals that the other issues in the questionnaire have to do with an employee disgruntled with the employer's decision to transfer her.[249] Those issues,

244. *Id.* at 147-49.
245. *Id.*
246. *Id.* at 149.
247. *Id.*
248. *Connick*, 461 U.S. at 140-41.
249. *Id.*

therefore, cannot be said to substantially outweigh the proximate relationship of the employee's speech to her grievance about her transfer.[250]

B. *Purely Citizen Speech*

Speech of public employees that has absolutely nothing to do with their employment, made while at work or made in any other capacity, would fall under the "purely citizen speech" category. It is purely citizen speech because it is unadulterated by any element of employment. Speech in this category should be treated like speech of any other citizen who is not a government employee. In other words, in cases of "purely citizen speech" the relationship of the government employer to the government employee for purposes of First Amendment analysis should be treated precisely as that of the government sovereign to the citizenry, not public employer-employee. Of course, when the employee is not at work, but rather is with family and friends and other settings having nothing to do with work, the employee is just a regular citizen. Accordingly, speech in such situations should be treated for purposes of the First Amendment as speech by any citizen that is not a government employee.

For citizen speech, as the Supreme Court noted in *Bose Corp. v. Consumers Union of United States, Inc.*:[251]

> [t]here are categories of communication and certain special utterances to which the majestic protection of the *First Amendment* does not extend because they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[252]

As the U.S. Supreme Court noted in *Pickering*,[253] these categories include speech that is intentionally false or made with reckless disregard of the truth. Other examples of such citizen speech categorically excluded from First Amendment protection include: libelous speech;[254] fighting words;[255]

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250. *See generally id.* at 138.

251. 466 U.S. 485 (1984).

252. *Id.* at 504 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (internal quotes omitted)).

253. *See supra* Part III.C "Era of Balancing: Scope."

254. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984); *see also* Beauharnais v. Illinois 343 U.S. 250, 255-58 (1952); *see also* Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

255. *Bose Corp.*, 466 U.S. at 504; *see also Chaplinsky,* 315 U.S. at 571-72; Cohen v.

speech inciting riot;[256] obscenity;[257] and child pornography;[258] and speech presenting "clear and present" danger.[259]

An example of "purely citizen speech" is that of the employee in *Rankin v. McPherson*.[260] In that case, Ardith McPherson, a deputy in the office of Constable Rankin of Harris County, Texas, was terminated for her speech.[261] According to *McPherson*, after she heard on an office radio that someone had tried to assassinate the President of the United States, she said to Lawrence Jackson, her boyfriend and coworker: "Shoot, if they go for him[, the President,] again, I hope they get him."[262] Clearly, the employee's speech had nothing whatsoever to do with employment;[263] therefore, it is "purely citizen speech." This kind of speech should be entitled to the highest level of constitutional protection in the public employment-free speech jurisprudence, for it is similarly protected for every citizen who is not a government employee. As the Court indicated it was not speech that presented a clear and present danger to the President,[264] so it was not categorically unprotected speech.

C. *Citizen-Employee Hybrid Speech*

Speech in this category includes speech that is a hybrid of citizen speech and employee speech. When a public employee speaks out in criticism of his or her employer's actions, policies, or practices toward any other government employee while the speaking employee is at work or off work (irrespective of whether the "other-employee" is an employee of the speaking employee's government employer or another government employer); or about the actions, policies, or practices of any government employer (other than the speaking employee's employer) against any government employee, the employee's speech falls under the "citizen-employee hybrid speech" category. The "employee speech" component of

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California, 403 U.S. 15, 20 (1971); Gooding v. Wilson, 405 U.S. 518, 522 (1972).

256. *Bose Corp.*, 466 U.S. at 504; *see also* Brandenburg v. Ohio, 395 U.S. 444, 477-78 (1969).

257. *Bose Corp.*, 466 U.S. at 504; *see also* Roth v. United States, 354 U.S. 476, 481-85 (1957); Miller v. California, 413 U.S. 15, 21, 23 (1973).

258. *Bose Corp.*, 466 U.S. at 504; *see also* New York v. Ferber, 458 U.S. 747, 764 (1982).

259. *See, e.g.*, Pennekamp v. Florida, 328 U.S. 331 (1946); *Brandenburg*, 395 U.S. at 447-48. For a more extensive discussion of the U.S. Supreme Court's examination of unprotected versus protected categories of speech, see *Bose Corp.*, 466 U.S. at 485.

260. 483 U.S. 378 (1987).

261. *Id.* at 380-82.

262. *Id.* at 381.

263. *See generally id.*

264. *Id.* at 386-87.

the hybrid comes from the fact that the speech has to do with some issue related to government employment. The "citizen speech" component of the hybrid results from the "Good-Samaritan" doctrine that should be in place to encourage employees to whistleblow about the government-employer treatment of any other government employee. If such government-employer treatment deals with allegations of government-employer discrimination against the allegedly victimized other-employee on the basis of race, color, ethnicity, gender, religion, illegitimacy, national origin, religion, or sexual orientation, then the applicable level of protection accorded such speech should be dependent on and coextensive with the level of constitutional protection given citizens with respect to the protected category in question under the three-tier constitutional framework.

Likewise, when an employee blows the whistle on his or her own employer's actions, policies, or practices that have nothing to do with the actions, policies or practices' application to the employee but rather the application of those actions, policies or practices to the general public, the speech should be treated as a "citizen-employee hybrid speech" because it is based on the "Good-Samaritan" doctrine. As conceived by the author, the "Good Samaritan" doctrine encourages employees to look out for the interests of the public and speak out when they find anything that is detrimental to the general public.[265] Akin speech would include speech exposing employer crimes, fraud or other violations of federal, state, or local law.

In addition, when a government employee lodges non-work related complaints about the government's handling of the employee's employment-related issues, such as criticisms of the Internal Revenue Service's (IRS) handling of the employee's taxes, it should fall under the "citizen-employee hybrid speech" category. Though similar to such criticisms nongovernment employees could make against the IRS or other government agency, it is not a "purely citizen speech" because it has elements of employment to it, making it a hybrid.

For teachers, speech criticizing the actions, policies, or practices of the teacher's employer toward *students* (irrespective of whether or not those students are the teacher's own students, and regardless of whether the speech occurs in a classroom or out of the classroom) also would fall under the "citizen-employee hybrid speech" category. This would be the case

265. Under the author's proposition, the employee who is being a "Good-Samaritan" does not necessarily have to be "good" in the purest sense of the word; all that is required is that the employee, by speaking, protects the public or some other person or entity, other than him or herself.

even if the teacher spoke out about the actions, policies, or practices of school districts outside the teacher's own school district, since the speaker's employment as a teacher introduces an element of employment into the speech, taking it out of the scope of the "purely citizen speech."

Moreover, since the speech is in the "Good-Samaritan" role, speaking out for students, the speech has an element of "citizen speech"; this mixture makes it "citizen-employee hybrid speech." Examples include teacher speech about: (1) the unwarranted severity of corporal punishment imposed on students;[266] (2) handling of sexual misconduct against students;[267] (3) lowered academic standards;[268] (4) handling of student alcohol use;[269] (5) inappropriate alteration of student grades; and (6) other grading improprieties.[270] However, some teacher speech must be afforded greater constitutional protection and judicial scrutiny. In cases where the teacher alleges discrimination by the employer against students on the basis of race, color, ethnicity, gender, religion, illegitimacy, national origin, religion, or sexual orientation, relatively greater constitutional protection and judicial scrutiny coextensive with that discussed *supra* under the "purely employee speech" category should apply.

Another example of "citizen-employee hybrid speech" was addressed in *Mount Healthy*, where the employee spoke to a radio station about a dress code that affected all teachers at a public school.[271] The dress code was generally applicable and based on efforts to influence the inflow of taxpayer funds to the school.[272] In essence, it could be said that the teacher upheld the "Good-Samaritan" role with respect to the public and his fellow teachers, beyond merely the employee's own employment. In *Perry*, the teacher's speech advocating structural change from a two to a four-year institution was not related to the employer's actions, policies, or practices applicable to the teacher's own employment.[273]

Similarly, in *Madison Joint School District No. 8*,[274] the employee's speech dealt with the implementation of a "fair share" clause[275] generally

266. Bowman v. Pulaski County Special Sch. Dist., 723 F.2d 640 (8th Cir. 1983).

267. Cromley v. Bd. of Educ. of Lockport Township High Sch., 17 F.3d 1059 (7th Cir. 1994).

268. Storlazzi v. Bakey, 894 F. Supp. 494, 501 (D. Mass. 1995).

269. *Id.*

270. *Id.*

271. *See* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281-82 (1977).

272. *Id.*

273. Perry v. Sindermann, 408 U.S. 593, 594 (1972).

274. 429 U.S. 167 (1976).

275. A fair share clause/agreement is a provision included in a collective bargaining agreement obligating all employees irrespective of union membership to contribute to union dues. Madison Joint School District No. 8, 429 U.S. at 169. WIS. STAT. § 111.70(1)(f) describes the fair share

applicable to all teachers in the school district.[276] Again, this extended beyond solely the employee's own personal employment issues for the teacher was in the "Good-Samaritan" role on behalf of other teachers in the school district. In *Pickering*, the employee's speech criticizing his employer's handling of various bond initiatives and the relative allocation of funds to athletics dealt with employment;[277] thus, the "employee speech" component of the hybrid. The "citizen speech" component comes from the fact that the employee's speech extended beyond his or her personal employment issues. Similarly, the speech in *Pickering* about the school board's handling of bond initiatives and its allocation of taxpayer funds protects the public's interest in the school board and the appropriation of taxes, inter alia.[278] Since the speech in *Givhan v. Western Line Consolidated School District*[279] was employment-related and involved allegations of racial discrimination,[280] it is an example of "citizen-employee hybrid speech"; however, it should be entitled to the relatively greater constitutional protection and equal to the judicial scrutiny applied to government actions based on race.[281]

Garcetti is another example of "citizen-employee hybrid speech." In that case, the employee was allegedly retaliated against for his speech conveying to his employer serious misrepresentations in an affidavit used

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clause/agreement as follows:

> Fair-share agreement means an agreement between a municipal employer and a labor organization under which all or any of the employees in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by said agreement and to pay the amount so deducted to the labor organization.

Id. (internal quotes omitted).

276. *Id.* at 169-73.

277. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 564-68 (1968).

278. *See generally Pickering*, 391 U.S. at 563.

279. 439 U.S. 410 (1979). *Givhan* involved a case where a black teacher complained to her employer about policies she found discriminatory in purpose and effect. *See id.* at 411-13. The Court found the whistleblowing speech about racial discrimination to be an inherent matter of public concern and, therefore, protected speech under the First Amendment. *See id.* at 415-16.

280. *Id.* at 411-13.

281. *See* Joseph O. Oluwole, *Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approach of the Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133, 138-39 (2008) (discussing the Court's finding of race as a matter inherently of public concern in *Givhan*).

to obtain a warrant and recommending dismissal of the case.[282] Since the employee's speech deals with an employment-related issue and also has elements in the public interest—obtaining affidavits using serious misrepresentations[283]—the employee's speech is a hybrid. Other examples of "citizen-employee hybrid speech" include public employee's speech about actions of their employers such as: politically-motivated transfer of a fellow teacher to a distant educational outpost;[284] mismanagement of taxpayer funds;[285] violations of the state's open-meetings law;[286] suppression of evidence and fraudulent alteration of documents;[287] school-imposed limitations on free speech;[288] failure to implement programs for emotionally and behaviorally impaired students;[289] inadequate funding of kindergarten program;[290] favoritism in grading athletes;[291] race-based discipline of students;[292] and exchange of grades for sex.[293]

V. A NEW CONSTITUTIONAL TEST FOR ANALYZING CASES IN THE PUBLIC EMPLOYMENT-FREE SPEECH JURISPRUDENCE

The Supreme Court's public employment-free speech jurisprudence has evolved through interpretations and applications that have resulted in increasingly pro-employer leanings in the *Pickering* balancing test—a test originally intended to balance countervailing interests of the employer and the employee.[294] To provide better consideration of the countervailing interests of the public employer and that of the public employee, the author proposes a three-tier review framework for the categories of public employee speech. As legal scholar Ashutosh Bhagwat[295] aptly stated in

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282. Garcetti v. Ceballos, 126 S. Ct. 1951, 1955-56 (2006).

283. *Id.*

284. Wichert v. Walter, 606 F. Supp. 1516, 1517 (D.N.J. 1985).

285. Hall v. Marion Sch. Dist. No. 2, 31 F.3d 183, 186 (4th Cir. 1994); Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 154 (4th Cir. 1992).

286. Dishnow v. Sch. Dist. of Rib Lake, 77 F.3d 194 (7th Cir. 1996).

287. Williams v. Bd. of Regents, 629 F.2d 993 (5th Cir. 1980).

288. Brammer-Hoelter v. Twin Peaks Charter, 81 F. Supp. 2d 1090 (D. Colo. 2000).

289. Wytrwal v. Saco Sch. Bd., 70 F.3d 165 (1st Cir. 1995).

290. Lifton v. Bd. of Educ. of Chi., 290 F. Supp. 2d 940 (N.D. Ill. 2003).

291. Coats v. Pierre, 890 F.2d 728 (5th Cir. 1989).

292. Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004).

293. *Coats*, 890 F.2d at 728, *cert. denied*, 498 U.S. at 821.

294. *See supra* Part III.D (discussing "Era of OE > MPC Speech").

295. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297

another context, I believe readers must keep in mind that

> [n]o analysis, including the framework I propose, can provide precise answers to all difficult questions. Indeed, the search for a universal test is partly responsible for the current doctrine's disarray. What I present here is a broad and hopefully useful framework, but actual analysis must proceed right-by-right and case-by-case.[296]

Hopefully, however, by taking account of the different categories of employee speech, the government as employer has greater leeway to accommodate operational efficiency.

The test the author proposes is based on the trifurcated review framework the Supreme Court employs in its analysis of Equal Protection cases.[297] The author introduces a brief history of the Equal Protection Clause[298] three-tier framework in this part of the Article. The history will provide context to the three-tier framework on which the author's proposal is based. In the next section, the author then sets forth the Equal Protection Clause three-tier framework. The final section presents the framework as modified by the author for the public employment-free speech jurisprudence, with the applicable categories of public employee speech.

A. *History of the Equal Protection Clause Three-Tier Framework*

There are three tiers of review for the Equal Protection Clause jurisprudence: (a) rational basis; (b) intermediate scrutiny; and (c) strict scrutiny.[299] A brief historical overview of each follows.

Under rational basis standard of review, courts defer to government action as long as it is rationally related to a legitimate government interest. Rational basis is the oldest of the three tiers of review. Commentator

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(1997).

296. *Id.* at 326-27 (internal quotes omitted).

297. For an extensive discussion of the three-tier framework, see generally *id. See also* Sanford Levinson, *Tiers of Scrutiny—From Strict through Rational Bases—and the Future of Interests: Commentary on Fiss and Linde*, 55 ALB. L. REV. 745 (1992).

298. The Equal Protection Clause of the Fourteenth Amendment states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the U.S. Supreme Court held that the Equal Protection Clause is applicable to the federal government via the Due Process Clause of the Fifth Amendment. U.S. CONST. amend. V.

299. Bhagwat, *supra* note 295, at 303.

Robert W. Bennett[300] credits the origin of rational basis review to as far back as 1897.[301] At the time, the Court often deferred to government action and legislation, choosing instead to give great leeway to the political branches of the government: a *laissez faire* approach. The Court essentially deferred to state exercises of police power, as long as the exercise entailed efforts to protect the morals, health, or safety of the public. This was effectively rational basis review, though not in the exact form and rhetoric as the test is articulated today.[302] In fact, today's form of rational basis review traces back to the:

> Court's decision during the mid-1930s to withdraw from the highly interventionist posture taken in *Lochner v. New York* . . . [, and the decision] has come to embody the notion that most legislation is entitled to a strong presumption of constitutionality and that, all things considered, the judicial invalidation of social and economic legislation should be an exceptional event.[303]

Lochner v. New York[304] ushered in a period known as the *Lochner* era (1905-1937), a period typified by ambitious judicial review of government action. During this era, the Supreme Court invalidated approximately 200 statutes[305] and made it a frequent practice to second-guess legislative policy judgments.[306]

In *Lochner*, the Supreme Court struck down a New York state labor statute that prohibited any bakery or confectionery from requiring or permitting its employees to work over 60 hours in any one week or over 10 hours in any day.[307] The plaintiff in the case had been mistakenly indicted

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300. Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979).

301. *Id.* Specifically, Bennett credits the origins of the rational basis standard of review to *Gulf, Colorado & Santa Fe Railway v. Ellis,* 165 U.S. 150 (1897).

302. *See generally* Lochner v. New York, 198 U.S. 45 (1905).

303. Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 603 (2000). For early examples of cases articulating rational basis review, see Mobile, Jackson & Kansas City RR. Co. v. Turnipseed, 219 U.S. 35, 43 (1910); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Ft. Smith Light & Traction Co. v. Bd. of Improvement, 274 U.S. 387 (1927); State of Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927); Metro. Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935).

304. 198 U.S. 45 (1905).

305. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 221 (1991).

306. *Id.* at 219.

307. *Lochner,* 198 U.S. at 45.

for violating the statute.[308] Breaking from its tradition of deference to legislative policy judgments that had characterized the pre-*Lochner* era, the Court ruled that the statute interfered with the right to contract of employers and employees *sui juris*, a "part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[309]

The Court made it a requirement of judicial review under Equal Protection and Substantive Due Process jurisprudence that the following question be answered: "Is this a fair, *reasonable* and appropriate exercise of the police power of the State, or is it an *unreasonable, unnecessary and arbitrary* interference with the right of the individual."[310] This kind of scrutiny was clearly a departure from the prior laissez faire approach. While the Court noted that its goal is not to substitute "the judgment of the court for that of the legislature," the Court made clear that courts still have the determinative voice.[311] The Court went on to invalidate the labor statute in the case, declaring that "[t]here is *no reasonable ground* for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[312] The grounds proffered by the state of New York in justification for the statute were deemed not to serve the "safety, health, morals, and general welfare of the public."[313]

The approach *Lochner* heralded for judicial review of government action under the Equal Protection Clause could be grasped by reading the following passage:

> It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have *a more direct relation*, as a *means* to an *end*, and the *end* itself must be *appropriate and legitimate*, before an act can be held to be valid which interferes with the general right of an individual.[314]

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308. *Id.* at 52.

309. *Id.* at 53-54.

310. *Id.* at 56 (emphasis added).

311. *Id.* at 57 ("But the question would still remain: Is it within the police power of the state? and that question must be answered by the *court*.") (emphasis added).

312. *Lochner*, 198 U.S. at 57 (emphasis added).

313. *Id.* at 53, 58.

314. *Id.* at 57-58 (emphasis added).

In other words, a means-end scrutiny is required. No longer would "mere meddlesome interferences with the rights of the individual"[315] be "saved from condemnation by the claim that they are passed in the exercise of the police power."[316] Emphasizing the change of era from one of deference to *Lochner*'s, the Court stated that "the limit of the police power has been reached and passed in this case."[317]

The *Lochner* era lasted until 1937 when President Franklin Delano Roosevelt threatened the Court with the legendary "Court packing plan." Pursuant to its *Lochner* era activism, the Court struck down various New Deal legislations,[318] prompting President Roosevelt to propose the Court packing plan. Then in 1938, the Court officially abandoned its *Lochner* era approach in *United States v. Carolene Products Co.*,[319] holding that

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315. *Id.* at 59.

316. *Id.* at 61.

317. *Lochner*, 198 U.S. at 58.

318. "New Deal" refers to the various plans President Franklin Roosevelt proposed for economic recovery, relief, and reform during the Great Depression, after the stock market crashed on October 29, 1929 (also known as "Black Tuesday"). The U.S. Supreme Court struck down many of the plans as unconstitutional. Agricultural Adjustment Act of 1933 in United States v. Butler, 297 U.S. 1 (1936); Bituminous Coal Conservation Act of 1935 in Carter v. Carter Coal Co., 298 U.S. 238 (1936); National Industrial Recovery Act in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Railroad Retirement Act in R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330 (1935); *see also* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). President Roosevelt proposed the Judiciary Reorganization Bill (1937), which suggested adding to the nine Justices on the Court. Specifically, the bill proposed adding one additional Justice for each Justice then over seventy years. Since 1869, Congress statutorily had set the number of Justices on the Supreme Court at nine. This bill would have increased the number of Justices on the Court at the time to fifteen, giving President Roosevelt the opportunity to add six new Justices. The Justices opposed to the New Deal were known as the "Four Horsemen," conservative members of the Court including: James Clark McReynolds, George Sutherland, Pierce Butler, and Willis Van Devanter. On the other side were the "Three Musketeers," made up of the liberal members of the Court: Justices Louis Brandeis, Benjamin Cardozo, and Harlan Stone. Chief Justice Evans Hughes and Justice Owen Roberts were the swing votes, with Justice Owens Roberts often aligning with the Four Horsemen, and the Chief Justice with the Three Musketeers, making for a 5-4 majority against the New Deal. Ostensibly due to the threat of President Roosevelt's "Court packing plan," Justice Roberts switched to vote with the Three Musketeers and Chief Justice Hughes in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), thus upholding the constitutionality of a state minimum wage law. This was the "switch in time that saved nine." In the same year, Justice Van Devanter (a member of the Four Horsemen) retired, and Justice Hugo Black replaced him on the Court. This shift helped fuel the decline of the *Lochner* era and a Court more friendly to President Roosevelt's New Deal. *See also* United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding Congress's power under the Commerce Clause); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (affirming the end of the *Lochner* era).

319. *Carolene Prods. Co.*, 304 U.S. at 144.

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[320]

This is the origin of the modern form of rational basis review.[321]

Under strict scrutiny standard of review, to pass constitutional muster, government action must be narrowly tailored to achieve a compelling government interest.[322] The strict scrutiny standard of review has it origins in *Carolene Products'* Famous Footnote Four. After establishing the rational basis standard of review as the standard of review for social and economic legislation, Justice Harlan Fiske Stone, writing for the Court, added in Footnote Four: "There may be *narrower* scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[323]

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320. *Id.* at 153.

321. *See supra* text accompanying note 303.

322. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

323. *Carolene Prods. Co.*, 304 U.S. at 153 (emphasis added). Footnote Four fully states:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369, 370, 51 S.Ct. 532, 535, 536, 75 L.Ed. 1117, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, decided March 28, 1938. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458; on restraints upon the dissemination of information, see Near v. Minnesota, 283 U.S. 697, 713-714, 718-720, 722, 51 S.Ct. 625, 630, 632, 633, 75 L.Ed. 1357; Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; Whitney v. California, 274

While Footnote Four did not mention the phrase "strict scrutiny," it implied strict scrutiny through references to "more exacting judicial scrutiny," and "more searching judicial inquiry,"[324] introducing a two-tier judicial review process: (a) rational basis; and (b) strict scrutiny. In other words, as the Court went from the *Lochner* era's highly interventionist posture[325] to the non-interventionist posture articulated in *Carolene Products*, the Court felt compelled to add Footnote Four to forewarn that not all government action would be entitled to the non-interventionist posture.[326] Footnote Four intimates that a standard of review, which essentially amounts to strict scrutiny, would likely be applicable to legislation that: (1) appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments;[327] (2) restricts those political processes, such as the right to vote, political organizations, peaceable assembly, dissemination of information, which can ordinarily be expected to bring about repeal of undesirable legislation;[328] or (3) is directed at discrete and insular minorities such as religious, national, or racial minorities.[329]

> U.S. 357, 373-378, 47 S.Ct. 641, 647, 649, 71 L.Ed. 1095; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278. Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, or national, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047; Farrington v. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646, or racial minorities. Nixon v. Herndon, supra; Nixon v. Condon, supra. We also do not inquire whether prejudice against discrete and insular minorities may be a special condition, which seriously tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428, 4 L.Ed. 579; South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734, decided February 14, 1938, note 2, and cases cited.

Id. at 153 n.4.

324. *See id.*

325. *See* Saphire, *supra* note 303 (describing the highly interventionist posture of the Court).

326. *See generally Carolene Prods. Co.*, 304 U.S. at 144.

327. *See supra* text accompanying note 323.

328. *See supra* text accompanying note 323.

329. *See supra* text accompanying note 323. For a more extensive discussion of Footnote Four, see Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (1995).

The Court first used the phrase "strict scrutiny" in *Skinner v. State of Oklahoma ex rel. Williamson.*[330] In that case, an Oklahoma state statute provided that any person convicted of three felonies involving moral turpitude could be sexually sterilized.[331] The petitioner-defendant in the case had been convicted of three felonies involving moral turpitude: stealing chickens once, robbery with firearms twice.[332] The petitioner appealed the Supreme Court of Oklahoma's decision, which affirmed the lower court ruling that vasectomy be performed on him.[333] In finding the statute unconstitutional, the Supreme Court stated that "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[334]

Building on Footnote Four, in *Korematsu v. United States*,[335] the Court applied strict scrutiny to "suspect classification:" "all legal restrictions which curtail the civil rights of a single racial group are *immediately suspect.* That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[336]

Similarly, in *McLaughlin v. Florida*,[337] the Court, articulating an early rendition of the strict scrutiny standard, held that racial classifications are constitutionally suspect.[338] This rendition stated that laws with invidious racial discrimination "even though enacted pursuant to a valid state interest, bear[] a *heavy* burden of justification."[339] These laws would be ruled unconstitutional unless they are "necessary, and not merely rationally related to the accomplishment of a permissible state policy."[340] According

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330. 316 U.S. 535 (1942).

331. *Id.* at 536-37.

332. *Id.* at 537.

333. *Id.* at 536.

334. *Id.* at 541. For a critique of strict scrutiny, see, e.g., Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996); Gunther, *supra* note 112.

335. 323 U.S. 214 (1944).

336. *Id.* at 216 (emphasis added); reference therein to "most rigid scrutiny" is a reference to "strict scrutiny."

337. 379 U.S. 184 (1964).

338. *Id.* at 192; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

339. *McLaughlin,* 379 U.S. at 196 (emphasis added).

340. *Id.* The requirement of "necessary" rather than "compelling" as is currently required under the strict scrutiny standard was an early articulation of the strict scrutiny standard of review. The Court as a whole first articulated the "compelling" interest requirement in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958), according Justice Frankfurter's language in *Sweezy v. New Hampshire*, 354 U.S. 234, 262, 265 (1957), which introduced the "compelling interest"

to the Court, "the traditional indicia of suspectness [are as follows]: the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[341]

In further expanding the strict scrutiny doctrine, the Court, in *Skinner*, held that the right to marriage and procreation are fundamental rights, infringement of which is subject to strict scrutiny.[342] In *Graham v. Richardson*,[343] the Court extended strict scrutiny to classifications based on resident alienage.[344] Similarly, in *Shapiro*, the Court recognized the fundamental right to interstate travel.[345] The Court noted that "moving from State to State or to the District of Columbia . . . [is] a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."[346] The following rights were also recognized as fundamental rights: voting;[347] right of free association;[348] and criminal appeals.[349] Additionally, in *Sherbert v. Verner*,[350] the Court held that strict scrutiny was applicable to infringement on the free exercise of religion.[351]

"Compelling state interest" first appeared in *Sweezy v. State of New Hampshire*.[352] In Justice Frankfurter's concurring opinion, he stated that: "the subordinating interest of the State must be compelling."[353] In a later decision, the Court required that under the strict scrutiny standard of

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requirement; then subsequently in *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

341. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

342. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541-43 (1942).

343. 403 U.S. 365 (1971).

344. *Id.* at 371-72.

345. *Shapiro*, 394 U.S. at 630-31.

346. *Id.* at 634; *accord* United States v. Guest, 383 U.S. 745, 757-58 (1966); Crandall v. Nevada, 73 U.S. 35, 48-49 (1867).

347. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); Harper v. Va. Bd. of Elections, 383 U.S. 663, 667-68 (1966); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969)(referring to "close and exacting examination").

348. Nat'l Ass'n for Advancement of Colored People v. State of Alabama, *ex rel.* Patterson, 357 U.S. 449 (1958).

349. Gunther, *supra* note 112, at 8-9.

350. Sherbert v. Verner, 374 U.S. 398 (1963).

351. *Id.* at 403, 406-07.

352. Sweezy v. State of New Hampshire, 354 U.S. 234 (1957).

353. *Id.* at 262, 265.

review, government action must be narrowly tailored to serve the government interest.[354]

Esteemed constitutional law scholar, Gunther, describes strict scrutiny as sometimes "strict in theory and fatal in fact"[355] and rational basis review as "minimal scrutiny in theory and virtually none in fact."[356] At one end of the constitutional review spectrum lies strict scrutiny with its concern for protecting core constitutional rights while at the other end is rational basis review with its inclination for deference to the legislative and executive arms of government. There had to be a middle ground; and in its search for a middle ground for those cases that do not lie at either end of the spectrum, the Court developed intermediate scrutiny.[357] In fact, in *Craig v. Boren*,[358] Justice Powell wrote in his concurring opinion:

> As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade.[359]

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354. 319 U.S. 105, 116-17 (1943); *see* references therein to "narrowly drawn." For other early articulations of the strict scrutiny standard of review, see Oregon v. Mitchell, 400 U.S. 112, 118 (1970); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); *see also* Greg Robinson & Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29 (2005) (a disquisition on the origins of strict scrutiny). Other cases indicate that substituting terminology for the "narrow tailoring" requirement may be the "least restrictive means." *See, e.g.*, Thomas v. Rev. Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) ("a state may justify an in road on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *see also* Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989); *accord* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

355. Gunther, *supra* note 112, at 8.

356. *Id.*

357. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 319 (1998).

358. 429 U.S. 190 (1976).

359. *Id.* at 210 n.*. Justice Powell was reluctant to characterize the intermediate scrutiny standard as a middle-tier, however, noting that:

> our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases.

In 1972, Gunther observed "mounting discontent with the rigid two-tier formulations of the Warren Court's equal protection doctrine."[360] Expressing optimism about the development of a "middle-tier," Gunther declared that "[t]he Court is prepared to use the clause as an interventionist tool without resorting to the strict scrutiny language of the new equal protection."[361]

Under the intermediate scrutiny standard of review, to pass constitutional muster, government action must be substantially related to an important government interest.[362] The origin of the intermediate scrutiny standard of review can be traced to *Craig*.[363] In that case, the Court invalidated a state statute that forbade the sale of nonintoxicating 3.2% beer to males under age 21 and females under age 18.[364] The plaintiffs challenged the statute as an unconstitutional gender-based discrimination, because it denied males between the ages of 18-20 the equal protection of the law.[365] Articulating the intermediate scrutiny standard, the Court stated that: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[366] The Court explained that the statute in the case did not satisfy the intermediate scrutiny standard of review and consequently violated the Equal Protection Clause.[367]

Id.

360. Gunther, *supra* note 112, at 12.

361. *Id.*

362. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

363. *Craig*, 429 U.S. at 190. Actually, the Court articulated the substance of the intermediate scrutiny standard earlier than *Craig*. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968). However, *Craig* was the first case in which the phrase "intermediate scrutiny" was used to describe and label the substance of the standard. *Craig*, 429 U.S. at 217.

364. *Craig*, 429 U.S. at 191-92.

365. *Id.*

366. *Id.* at 197.

367. *Id.* at 204. Specifically, the Court held that:

> We accept for purposes of discussion the District Court's identification of the objective underlying . . . [the statute] as the enhancement of traffic safety. Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed [*Reed v. Reed*] withstand equal protection challenge.

Id. at 199-200 (emphasis added); *accord* Reed v. Reed, 404 U.S. 71 (1971). Besides, the Court added:

Intermediate scrutiny has been extended to classifications based on gender[368] and illegitimacy.[369] Additionally, in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[370] the Court held that benign racial classifications by the federal government (e.g., affirmative action or other classifications that favor minorities or disfavor whites) are subject to intermediate scrutiny. The Court held that:

> [B]enign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of

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> It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective. We hold, therefore, that under Reed, Oklahoma's 3.2% beerstatute invidiously discriminates against males 18-20 years of age.

Craig, 429 U.S. at 204 (footnote omitted).

368. *Craig*, 429 U.S. at 204. *See also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (articulating "exceedingly persuasive justification" as an alternative formulation of the intermediate scrutiny standard).

> Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Id. (internal citations omitted).

369. Clark v. Jeter, 486 U.S. 456, 461 (1988). For a broad exposition on intermediate scrutiny, see Wexler, *supra* note 357.

370. 497 U.S. 547 (1990).

> Congress and are substantially related to achievement of those objectives.[371]

The Court distinguished this decision in *City of Richmond v. J.A. Croson Co.*,[372] which held that racial classifications by state and local governments are subject to strict scrutiny.[373] Specifically, the Court noted that *City of Richmond* only governed benign racial classifications by states and municipalities, not congressionally -adopted race-conscious benign classifications.[374] In support of this reasoning, the Court cited its decision in *Fullilove v. Klutznick*,[375] reviewing a federal affirmative action plan, as authority for the difference in the standard of scrutiny applicable to states (and municipalities) versus the federal government. The Court stated that, "much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."[376] In essence, the Court held that Congress had greater leeway "to identify and redress the effects of society-wide discrimination" than states and municipalities in the adoption of race-conscious classifications.[377]

However, in *Adarand Constructors, Inc. v. Pena*,[378] the Court overruled *Metro Broadcasting, Inc.*, holding that all racial classifications (including benign racial classifications), whether utilized by the federal, state, or local governments, are subject to strict scrutiny rather than intermediate scrutiny.[379] In addition, the Court ruled that to the extent that *Fullilove* held that federal classifications are subject to intermediate scrutiny rather than strict scrutiny, *Fullilove* is no longer controlling.[380]

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371. *Id.* at 564-65 (footnote omitted).
372. 488 U.S. 469 (1989).
373. *Id.* at 493-94.
374. *Metro Broad.*, 497 U.S. at 565.
375. 448 U.S. 448 (1980).
376. *Metro Broad.*, 497 U.S. at 565.
377. *Id.* (internal quotes and citations omitted).
378. 515 U.S. 200 (1995).
379. *Id.* at 227.
380. *Id.* at 235. Recall, *City of Richmond,* 488 U.S. 469 (1989), already held that racial classifications by state and local governments are subject to strict scrutiny; *Adarand Constructors, Inc.*, 515 U.S. 200 (1995), thus brought the federal government within the ambit of strict scrutiny.

B. *Equal Protection Clause Three-Tier Framework*

There are three-tiers to the judicial standard of review under the Equal Protection Clause: (a) strict scrutiny; (b) intermediate scrutiny; and (c) rational basis review.

The first step in determining what level of scrutiny is applicable in a given case is ascertaining whether the government classification involves a suspect (or quasi-suspect) classification or a fundamental right.[381] If there is a suspect classification or fundamental right, then strict scrutiny applies, and if there is a quasi-suspect classification, then intermediate scrutiny applies.[382] Otherwise, rational basis review is applicable.

1. Strict Scrutiny

The strict scrutiny standard of review is only applied when government action results in a classification that "interferes with a fundamental right, or discriminates against a 'suspect class.'"[383] When strict scrutiny applies, the government action is presumed unconstitutional. To pass constitutional muster under the strict scrutiny standard of review and thus overcome the presumption, the burden is on the government to show that the classification is narrowly tailored to achieve a compelling interest.[384]

The test for determining if a right is fundamental is: whether the right is explicitly or implicitly guaranteed by the U.S. Constitution—"implicit in the concept of ordered liberty."[385] The Supreme Court has recognized

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381. For application of strict scrutiny to fundamental rights, see, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966); Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92, 101 (1972); Shapiro v. Thompson, 394 U.S. 618, 638 (1969). For application of strict scrutiny to suspect classifications, see, e.g., *Adarand Constructors*, 515 U.S. at 227; Graham v. Richardson, 403 U.S. 365, 371-72 (1971); Korematsu v. United States, 323 U.S. 214, 216 (1944); Loving v. Commonwealth of Va., 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). For application of intermediate scrutiny to quasi-suspect classifications, see, e.g., Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982).

382. The Court has refused to add to the list of suspect classifications subject to srict scrutiny.

383. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457 (1988).

384. Roe v. Wade, 410 U.S. 113, 155 (1973). Stated another way, the strict scrutiny standard of review requires that government classifications affecting a suspect class or a fundamental right must serve a compelling interest and be narrowly tailored to achieve that compelling interest. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

385. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937); *accord San Antonio Indep. Sch. Dist.*, 411 U.S. at 33-34. For example, in *San Antonio Independent School District*, the Court stated:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering

the following rights as being fundamental voting in federal and state elections;[386] interstate travel;[387] marriage and procreation;[388] free association;[389] privacy;[390] and criminal appeals.[391] Suspect classifications for purposes of strict scrutiny jurisprudence include: race, ethnicity, and national origin;[392] and resident alienage.[393]

2. Intermediate Scrutiny

The intermediate scrutiny standard of review is applied when government action results in a classification that discriminates against a quasi-suspect class.[394] As with strict scrutiny, when intermediate scrutiny

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> whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education *explicitly or implicitly* guaranteed by the Constitution.

Id. (emphasis added).

386. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969). Note that in *Sailors v. Bd. of Education,* 387 U.S. 105 (1967), the Court held that there is no fundamental right to vote in local elections, affirming the holding in *Reynolds,* that the fundamental right is limited to federal and state elections.

387. *Shapiro,* 394 U.S. at 618; United States v. Guest, 383 U.S. 745, 757-58 (1966); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974). Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 904-05 n.4 (1986) (holding that: "regardless of the label we place on our analysis—right to migrate or equal protection—once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest.").

388. Skinner v. State of Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978).

389. Nat'l Ass'n for Advancement of Colored People v. State of Alabama, *ex rel.* Patterson, 357 U.S. 449, 489 (1958).

390. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

391. Gunther, *supra* note 112, at 8-9.

392. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212-13 (1995); Graham v. Richardson, 403 U.S. 365, 372 (1971); Korematsu v. United States, 323 U.S. 214, 216 (1944); Loving v. Commonwealth of Va., 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964); Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

393. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219-20 (1984); *Graham,* 403 U.S. at 372; *In re* Griffiths, 413 U.S. 717, 721 (1973). As a general matter, "a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal,* 467 U.S. at 219-20 (footnote omitted).

394. Quasi-suspect classes are classifications that have great constitutional import, which entitles them to greater scrutiny than rational basis, but is not as strict scrutiny, which suspect

applies, the government action is presumed unconstitutional.[395] To pass constitutional muster under the intermediate scrutiny standard of review and thus overcome the presumption, the burden is on the government to show that the classification is substantially related to an important government interest.[396] Articulated in other words by the Court, intermediate scrutiny requires the government to establish an "exceedingly persuasive justification"[397] for the classification.

Intermediate scrutiny is the middle-tier scrutiny between strict scrutiny and rational basis review: the "substantially related" requirement is less stringent than the "narrowly tailored" requirement of strict scrutiny but more stringent than the "rationally related" requirement of rational basis review. Consequently, the "important interest" requirement is less stringent than the "compelling interest" requirement of strict scrutiny but more stringent than the "legitimate interest" required under rational basis review.[398] The Court has recognized gender[399] and illegitimacy as quasi-suspect classes.[400]

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classifications are entitled. *See generally, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Stanton v. Stanton, 421 U.S. 7 (1975).

395. *See generally Guest*, 383 U.S. 745; *Adarand Constructors, Inc.* 515 U.S. at 200.

396. Craig, 429 U.S. 190, 197 (1976).

397. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

398. *See generally Rodriguez*, 411 U.S. at 1.

399. *Craig*, 429 U.S. at 190, 197; Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

400. Levy v. Louisiana, 391 U.S. 68, 72 (1968); Clark v. Jeter, 486 U.S. 456, 461 (1988). *Levy* was the first case to require that classifications discriminating on the basis of illegitimacy be scrutinized under a greater or heightened standard than rational basis, because of the "intimate, familial relationship." *Levy*, 391 U.S. at 71. The Court reasoned:

> Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy? . . . We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done . . . We can say with Shakespeare: "Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?" King Lear, Act I, Scene 2.

Id. at 71-72 (all footnotes omitted except footnote 6). However, Clark v. Jeter was the first case to bring illegitimacy within the ambit of the intermediate scrutiny standard. *Clark*, 486 U.S. at 461. Prior to *Clark*, the Court held in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985), that "[b]ecause illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society, official discriminations resting on that characteristic are also subject to somewhat heightened review" (internal quotes and citations

3. Rational Basis Review

The rational basis standard of review is applied when government action results in a classification that does not involve a suspect (or quasi-suspect) class or a fundamental right.[401] Unlike strict scrutiny and intermediate scrutiny, under rational basis review, the government action is presumed constitutional.[402] To pass constitutional muster under the rational basis standard of review and thus overcome the presumption, the burden is on the plaintiff[403] to show that the classification is not rationally related to a legitimate government interest.[404] Thus, rational basis embodies a very deferential judicial posture toward government action.[405]

Under rational basis, a government classification will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[406] It will withstand rational basis review, even if the classification is "based on rational speculation unsupported by evidence or empirical data."[407]

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omitted). The Court explained that a heightened standard of review was applicable because such "restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 441 (internal quotes and citations omitted). The "substantially related" is in the language of the intermediate scrutiny as currently articulated by the Court, while the "legitimate state interest" is part of the lexicon of rational basis review.

401. *See generally Rodriguez*, 411 U.S. at 1.

402. *See generally* Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307 (1993).

403. *See id.* at 315 ("those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it") (internal quotes omitted).

404. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.").

405. Note that sometimes the "rationally related" requirement of the rational basis means-end scrutiny is also characterized as a "reasonably related" requirement. *See, e.g., U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 184 (1980).

406. *Fed. Comm'ns Comm'n*, 508 U.S. at 313.

407. *Id.* at 315. The Court also has articulated:

> [t]hat a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.

Mobile, Jackson & Kansas City R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910). The Court stated:

Of the three-tier Equal Protection standards of review, rational basis is the least stringent.[408] As the Court noted in *Lindsley v. Natural Carbonic Gas Co.*[409]:

> A classification having some reasonable basis does not offend against . . . [the Equal Protection Clause] merely because it is not made with mathematical nicety, or because in practice it results in some inequality . . . . When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed . . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[410]

In his dissenting opinion, in *U.S. Railroad Retirement Board v. Fritz*,[411] Justice Brennan articulated the steps for rational basis review: "When faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes."[412]

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1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

408. Gunther, *supra* note 112, at 8 (describing rational basis as "minimal scrutiny in theory and virtually none in fact"). For a disquisition on the rational basis standard of review, see Gunther, *supra* note 112.

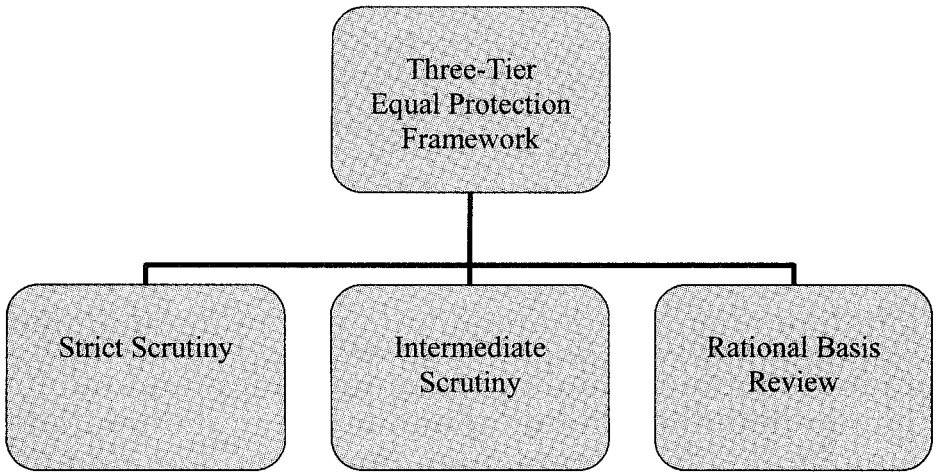
409. *Lindsley,* 220 U.S. at 61.

410. *Id.* at 78-79.

411. 449 U.S. 166 (1980).

412. *Id.* at 184.

FIGURE 1: THE EQUAL PROTECTION CLAUSE THREE-TIER FRAMEWORK



The above is an overview of the three-tier framework used in the Equal Protection Clause jurisprudence. The author's proposed constitutional test for analyzing cases in the public employment-free speech jurisprudence is based on this framework.

C. *Proposal of a Three-Tier Framework for the Public Employment-Free Speech Jurisprudence*

This section presents the Equal Protection three-tier framework for cases in the public employment-free speech jurisprudence. For this purpose, the author will couple each tier of the framework with a category of public employee speech taxonomy catalogued above: purely citizen speech; citizen-employee hybrid speech; and purely employee speech.

Since the proposed test is based on the trifurcated review framework the U.S. Supreme Court uses in the analysis of Equal Protection cases, it is unnecessary to restate the entire three-tier framework of the Equal Protection Clause. Therefore, this section will only present the basic elements of each tier that are necessary to set forth the proposed test.

1. *Strict Scrutiny—"Purely Citizen Speech"*

Employee speech that has nothing to do with their employment should be classified as "purely citizen speech."[413] Such speech should be entitled to the full protection of the First Amendment as speech of citizens who are not government employees.

Of the three categories of speech the author sets forth above, "purely citizen speech" has the greatest semblance to speech of "non-government employee" citizens. Accordingly, it should be entitled to the highest level of scrutiny of the three categories. The author thus proposes that a review of public employer actions against public employees' speech which constitutes "purely citizen speech," warrants strict scrutiny. In other words, if an employee's speech is "purely citizen speech," the employer's actions[414] against such speech should be presumed unconstitutional unless the employer can show that the action is narrowly tailored to satisfy a compelling interest. In addition to the speech that would fall under the "purely citizen speech" category, as disserted above, employee speech alleging violations of fundamental rights including the right to vote, the right to interstate travel, and the right to criminal appeals would be reviewed under the strict scrutiny standard. Similarly, speech disclosing suspect classifications and discriminations on the basis of race, ethnicity, national origin, and resident alienage would also be reviewed under strict scrutiny.

2. *Intermediate Scrutiny—"Citizen-Employee Hybrid Speech"*

Under the intermediate scrutiny standard of review, government action against the employee on the basis of the employee's speech should be presumed unconstitutional unless the employer shows that the action is substantially related to an important government interest. As suggested by its name, speech in the "citizen-employee hybrid speech" is a hybrid of citizen speech and employee speech.[415] Under this category would fall speech of public employees who criticize their employer's actions or actions of any other government employer toward any government

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413. *See* Part IV.B (discussing the classification of speech under the "purely citizen speech" category).

414. Under the author's framework, employer policies, practices, and procedures should be similarly scrutinized as employer actions. Thus, where the author mentions "actions, policies, practices and procedures," can be parenthetically inserted as succedanea.

415. For more discussion of this category of speech and examples of speech under this category subject to intermediate scrutiny under the author's proposal, see *supra* Part IV.C (discussing citizen-employee hybrid speech).

employee (other than the speaking employee). If the employee speech alleges government-employer discrimination on the basis of gender or illegitimacy, intermediate scrutiny of the government action against the employee should be required.[416]

When an employee blows the whistle on employer actions of a criminal or fraudulent nature or other violations of federal, state, or local law, the speech should be subject to intermediate scrutiny. Likewise, when an employee complains about the government's (*other than* his or her government employer) treatment of him or her as an employee or its handling of his or her employment-related issues, the author would categorize the speech under the "citizen-employee hybrid speech" category. Though similar to criticisms non-government employees could make against a government agency, it is not "purely citizen speech," because it has elements of employment to it, making it a hybrid. Other examples of speech that would be subject to the intermediate level scrutiny include speech of public school teachers regarding the unwarranted severity of corporal punishment imposed on students;[417] handling of sexual misconduct against students;[418] lowered academic standards;[419] handling of student alcohol use;[420] and inappropriate alteration of student grades and other grading improprieties.[421]

3. *Rational Basis Review—"Purely Employee Speech"*

The rational basis review is the least stringent of the three-tiers of review.[422] Thus, it should provide leeway for courts to give relative greater

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416. The author suggests that in developing the public employment-free speech jurisprudence based on the author's proposal, the Court track the development of its Equal Protection Clause jurisprudence. Thus, when new suspect classes or fundamental rights are recognized, just as those would be subject to strict scrutiny under Equal Protection Clause jurisprudence, speech involving those suspect classifications should be subject to strict scrutiny under the public employment-free speech jurisprudence. Similar reasoning would prevail with quasi-suspect classifications, to which intermediate scrutiny would apply as new quasi-suspect classifications are identified by the U.S. Supreme Court.

417. *See* Bowman v. Pulaski County Special Sch. Dist., 723 F.2d 640, 643-46 (8th Cir. 1983).

418. *See* Cromley v. Bd. of Educ. of Lockport Township High Sch. Dist., 17 F.3d 1059, 1060-63 (7th Cir. 1994).

419. Storlazzi v. Bakey, 894 F. Supp. 494 (D. Mass. 1995).

420. *Id.*

421. *Id.*

422. *See supra* Part IV.A (discussing more on the kinds of speech the author classifies under the "purely employee speech" category).

deference to operational efficiency concerns[423] when reviewing cases in the public employment-free speech jurisprudence,[424] compared to the "compelling interest" required by strict scrutiny or the "important interest" required by intermediate scrutiny.

Under the rational basis review the author proposes, there would be a presumption that public employer action against the employee on the basis of his or her speech is constitutional; the burden would then be on the employee to show that the government action is not reasonably (or rationally) related to a legitimate interest of the employer. As propounded above, employee speech that criticizes employer and solely deals with the employer's actions with respect to that particular employee's employment should constitute "purely employee speech" for purposes of the proposed three-tier framework.

Likewise, employee speech that proximately arises out of the employee's own employment dispute with the employer would be subject to the rational basis review, irrespective of its impact on the public or other government employees, unless the relative importance of the issue to the public or to other government employees substantially outweighs the import of the speech's proximate relation to the employee's employment dispute with his or her employer. As noted, in such cases, the speech should be accorded relatively greater protection than "purely employee speech," classified instead under the "citizen-employee hybrid speech," and would be subject to intermediate level scrutiny.

Employee speech alleging discrimination by the employer against the employee on the basis of race, ethnicity, national origin, or alienage, however, will be subject to strict scrutiny, as would employee speech alleging violations by the employer of the employee's fundamental rights as those rights relate to the employee's employment.[425] Employee speech whistleblowing about the employer's unethical practices, which do not

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423. Operational efficiency concerns articulated in the *Pickering* balancing test can be accounted for in the different "interests" of the government, as each tier requires: compelling interest for strict scrutiny; important interest for intermediate scrutiny; and legitimate interest for rational basis review.

424. Recall, in *Pickering* and its progeny, the U.S. Supreme Court gives relatively greater weight to operational efficiency in reviewing cases in the public employment-free speech jurisprudence. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

425. This is the case, even though the speech is solely related to that employee's own employment and would traditionally, under the author's model, be classified as "purely employee" speech. However, because it involves discrimination on the basis of a suspect classification or violation of a fundamental right, it would be subject to the strict scrutiny standard of review. The same reasoning applies to discrimination on the basis of a quasi-suspect classification, to which intermediate scrutiny is applicable.

constitute violations of law, should be reviewed under rational basis review because they lack statutory protection. This rational basis review the author proposes is consistent with the Court's holding in *Connick*:[426] "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."[427]

In applying the rational basis review, courts should not speculate about legitimate government ends that could justify the government action against the employee.[428] As Gunther stated in another context, "[t]he [rational basis review] model would have the Court assess the justification for the . . . [government action] largely in terms of information presented . . . rather than hypothesizing data of its own."[429] In the initial stages of developing the public employment-free speech jurisprudence using the three-tier framework, it would be helpful for the Court to track its development of the Equal Protection Clause jurisprudence until the public employment-free speech off-shoot is well established as an independent framework.

TABLE 1: THE PROPOSED THREE-TIER FRAMEWORK AND THE APPLICABLE CATEGORIES OF SPEECH:

Standard of Review	Category of Speech
Strict Scrutiny	Purely Citizen Speech
Intermediate Scrutiny	Citizen-Employee Hybrid Speech
Rational Basis Review	Purely Employee Speech

426. *See supra* Parts III & IV (discussing *Connick*).

427. Connick v. Myers, 461 U.S. 138, 153 (1983).

428. Note that in this respect, the author's proposal is different from the rational basis review as used by the Court in the Equal Protection Clause jurisprudence. Under the rational basis review applied in Equal Protection cases, government action will withstand rational basis review, even if "based on rational speculation unsupported by evidence or empirical data." Fed. Commc'ns Comm'n v. Beach Commc'ns, 508 U.S. 307, 315 (1993).

429. Gunther, *supra* note 112, at 47.

VI. CONCLUSION

In this Article, the author has been guided by three questions:

1. What are the eras in the U.S. Supreme Court's public employment-free speech jurisprudence?
2. Is there a way to categorize the types of speech that whistleblowing teachers engage in under the Court's public employment-free speech jurisprudence?
3. What is the author's proposed constitutional framework for analyzing whistleblowing cases under the Court's public employment-free speech jurisprudence?

In *Pickering*, the seminal case in the public employment-free speech jurisprudence, the U.S. Supreme Court set forth the following test for reviewing speech of whistleblowing employees. This test, known as the *Pickering* balancing test, provides: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees."[430] The two aspects of this test, which are to be weighed in a balance are as follows: (1) the interests of the employee, as a citizen in speaking on matters of public concern; and (2) the operational efficiency of the employer.[431] As revealed in this study and represented in figure 2 below, however, interpretation and development of the jurisprudence has resulted in an unbalanced scale of justice, where the left hand scale depicts the greater weight given operational efficiency relative to the interests of the employee in free speech represented on the right scale.

430. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

431. *See supra* Part III.D (discussing "era of OE > MPC speech").

FIGURE 2: The BALANCE OF SCALES UNDER THE *PICKERING* BALANCING TEST AS INTERPRETED AND APPLIED BY THE SUPREME COURT SINCE 1968:

The author found that the U.S. Supreme Court's public employment-free speech jurisprudence has been through four different eras: (a) Era of Categorical Denial; (b) Era of Recognition: Undefined Scope; (c) Era of Balancing: Scope; and (d) Era of OE > MPC Speech. Progressively, the eras have resulted in a pseudo-*Pickering* balancing test rather than the veritable-*Pickering* balancing test articulated in *Pickering*. Progressive development of such eras is less likely with a three-tier system, as proposed by the author, because with the three-tier system, no tier is likely to prevail for an entire era. Instead, all three tiers are available in every era for application to the pertinent category of speech, thus curbing manipulation of a one-tier system as currently exists.

Under the three-tier system, the applicable category of speech is identified and then subjected to the apropos standard of review. The author identified three categories of speech: (a) Purely Employee Speech; (b) Citizen-Employee Hybrid Speech; and (c) Purely Citizen Speech.

The author then proposed a test for reviewing cases in the public employment-free speech jurisprudence based on the three-tier review framework used in the Equal Protection Clause jurisprudence. The three levels of scrutiny under this framework are: (a) rational basis; (b) intermediate scrutiny; and (c) strict scrutiny. Echoing Gunther's words of wisdom, the author believes that the three-tier "model is, in sum, not a simple formula capable of automatic, problem-free application. It is a suggestion of a direction for modest interventionism with substantial promise."[432] Three tiers, as opposed to the one-tier balancing test represented by the *Pickering* balancing test, help account for the different categories of public employee whistleblowing speech, thus minimizing room for judicial carte blanche in review of cases. While this proposal has not been previously applied to the public employment-free speech jurisprudence, it is not without guidance as would be the case if a test

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432. Gunther, *supra* note 112, at 48.

previously unapplied in any jurisprudence is proposed. With the author's proposal, there is a body of work applying the three-tier framework in the Equal Protection Clause jurisprudence that the Court could build upon in initiating and developing the three-tier framework in the context of the public employment-free speech jurisprudence.

In applying the three tiers, the Court must "identify and evaluate separately each analytically distinct ingredient of the contending interests":[433] compelling interest under strict scrutiny; important interest under intermediate scrutiny; and legitimate interest under rational basis review. Each of the three levels of scrutiny ensures that operational efficiency and employee speech are accounted for. Since each tier accounts for the two fundamental doctrinal components the Court identified in the *Pickering* balancing test—(1) employee speech; and (2) operational efficiency (under "compelling interest" for strict scrutiny; "important interest" for intermediate scrutiny; and "legitimate interest" for rational basis review)—the three-tier model provides an "opportunity to make changes without losing doctrinal continuity."[434] While concerns about stare decisis may linger, current available precedent in this area of law has left several questions unanswered. As Gunther notes: "when solid precedent is lacking on many questions, a conservative adherence to stare decisis is less confining."[435]

It is important for government employees, including teachers and administrators, to be able to whistleblow without the lingering threat of judicially sanctioned retaliation. This would help to ensure that the interests of students, teachers, and the community are protected. The author's proposal would move closer to protecting such interests because, as noted above, it is three-tiered rather than one.[436] However, in accordance with Bhagwat's principles, the author recognizes that no analysis, including the framework proposed, can provide precise answers to all difficult questions.[437] As the jurisprudence develops based on the author's proposal, application and interpretation should unravel the framework's operational confines and ground the test on firmer footing. Unlike *Pickering*, which requires analysis of all categories of employee whistleblowing speech under the one-tier *Pickering* balancing test, the three-tier test provides a tier for each category of employee whistleblowing

433. *Id.* at 7.

434. *Id.* at 4.

435. *Id.*

436. As Justice Marshall noted in his concurring opinion in *Plyler*, 457 U.S. at 231, there is "wisdom . . . [in] . . . employing an approach that allows for varying levels of scrutiny." *Id.*

437. Bhagwat, *supra* note 295, at 326.

speech. Thus, the three categories are not cramped into one tier but rather uncramped in three.

To prevent employers from making uninformed decisions, public employers, including schools and school districts, must educate their employees about their whistleblowing rights and the costs and benefits associated with whistleblowing. For example, professional development activities could be offered to facilitate this education. If the current trend in the development of the public employment-free speech jurisprudence continues, then Justice Black's famous premonition that "we will in the long run have it [free speech] for none but the cringing and the craven,"[438] may become a reality for teachers and other public employees.

To avoid the extraordinary costs and consequences that could result to employer or employee when employees whistleblow and institute judicial proceedings based on employer retaliatory actions, school districts should implement policies that allow and encourage employees to speak privately with their employers about their concerns, irrespective of the category of employee speech involved, so that emanating issues could be resolved internally without litigation. In that way, the employer will save the prohibitive costs of defending a lawsuit, while the employee gets to keep his or her job—a win-win solution. Consequently, the work environment remains as amicable as possible and excellent teachers are not lost.[439] As the Court noted in *Garcetti*, "[g]iving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public."[440] If schools also strive to be learning centers for impacting culture, such examples of irenical dispute resolution could inspire students in ways untold. School districts should solicit teacher input and work with the union to implement the internal procedures.[441] Alternatively, the school district could contract with third parties to serve as each employee's spokesperson. Schools should provide avenues in any procedure implemented for protected public whistleblowing after the employee has exhausted administrative remedies. Additionally, phone numbers for anonymous calls could be provided to facilitate employee whistleblowing.

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438. Wieman v. Updegraff, 344 U.S. 183, 193 (1952).

439. As noted in *supra* note 113, a number of teachers who whistleblow have excellent performance records.

440. Garcetti v. Ceballos, 126 S. Ct. 1951, 1961 (2006).

441. These suggestions may similarly enhance conciliation with respect to other whistleblowers. The author focuses on the plight of whistleblowing teachers in this conclusion, given the fact that the media spotlight on this plight is minimal in comparison to other public employees, as is evident also in the various cases about public employee whistleblowing. Likewise, the author intends the framework proposed in this Article as universal to all public employees.

State legislatures and Congress should mandate that school districts keep records of teachers terminated or disciplined for whistleblowing. This would further accountability in employer action against whistleblowing teachers and provide greater visibility to the problem. Unfortunately, unlike with corporations, the media spotlight is not nearly as focused on the plight of whistleblowing teachers. Thus, there has been little motivation to address this plight as thoroughly as has been done with respect to the corporate arena.

Policymakers need to provide incentives for school districts to implement policies to facilitate internal resolutions of employee whistleblowing concerns. Without such incentives, school districts may not appreciate the essence of providing such conciliatory mechanisms, especially if districts are aware of the current trend of interpretation and application of the *Pickering* balancing test, which is increasingly more favorable to employers. Such incentives could include grants, tax breaks, and increasing revenue allocations. State legislatures could also statutorily require such conciliatory mechanism and regularly audit its implementation and effectiveness. School districts should also internally, formatively, and summatively evaluate any conciliatory mechanisms implemented to address employee whistleblowing concerns. Empirical research should be done to determine what would incentivize school districts and other public employers to implement conciliatory mechanisms; such incentives should be accordingly provided. It is a matter of social justice and responsibility owed to the many teachers and the other public employees who continue to face employer retaliation for whistleblowing that the courts begin to apply a better framework to public employee whistleblowing.