Notre Dame Law Review

Volume 98 | Issue 4 Article 12

5-2023

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THE PRIMACY OF FREE EXERCISE IN PUBLIC-EMPLOYEE RELIGIOUS SPEECH

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INTRODUCTION

Last Term, the Court decided *Kennedy v. Bremerton School District*.[1] The decision, in which the Court finally overruled *Lemon v. Kurtzman*,[2] elicited significant commentary.[3] Critics chastised the Court for playing fast and loose with the facts[4] and inviting the reintroduction of

* J.D. Candidate, Notre Dame Law School, 2024. B.A., University of Notre Dame, 2019. I thank Professor Randy Kozel for his suggestions and feedback, the editors of the *Notre Dame Law Review* for their tireless efforts, and my parents for their constant support. All errors are my own.

1 142 S. Ct. 2407 (2022).

2 *See id.* at 2427. Technically, the Court does not say that *Lemon* is *overruled*. Instead the Court says that it "long ago *abandoned Lemon* and its endorsement test offshoot." *Id.* (emphasis added); *see also* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

3 *See, e.g.*, Mark Joseph Stern, *Supreme Court Lets Public Schools Coerce Students into Practicing Christianity*, SLATE (June 27, 2022, 4:19 PM), https://slate.com/news-and-politics/2022/06/coach-kennedy-bremerton-prayer-football-public-school.html [https://perma.cc/J77N-KRJB]; Press Release, ACLU, ACLU Comment on Supreme Court Decision in *Kennedy v. Bremerton School District* (June 27, 2022), https://www.aclu.org/press-releases/aclu-comment-supreme-court-decision-kennedy-v-bremerton-school-district [https://perma.cc/28LW-44TK]; Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District—*A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ [https://perma.cc/A2G3-EX29]; Michelle Boorstein, *Under Right-Leaning Supreme Court, the Church-State Wall Is Crumbling*, WASH. POST (July 17, 2022, 6:00 AM), https://www.washingtonpost.com/religion/2022/07/17/supreme-court-church-state-religion-coach/ [https://perma.cc/X882-K7UV]; Daniel L. Chen, Kennedy v. Bremerton School District*: The Final Demise of* Lemon *and the Future of the Establishment Clause*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1 (2022).

4 *See Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) ("To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts."); *see also* Marshall Breger, Opinion, *The Case of the Praying Coach*, MOMENT (Nov. 4, 2022), https://momentmag.com/opinion-separation-church-state/ [https://perma.cc/Z4P5-B3XT]; Ian Millhiser, *The Supreme Court Hands the Religious Right a Big Victory by Lying About the Facts of a Case*, VOX (June 27, 2022, 1:52 PM), https://www.vox.com/2022/6/27/23184848/supreme-court-kennedy-bremerton-school-football-coach-prayer-neil-gorsuch [https://perma.cc/52N3-ZU7J].

prayer in public schools—thus further eroding the separation of church and state.[5] While the Court's jettisoning of *Lemon* rightfully received the bulk of the attention, *Kennedy* is also notable for its treatment of the Free Exercise and Free Speech Clauses in tandem.

Writing for the Court, Justice Gorsuch made clear that Kennedy's conduct was "*doubly* protected by the Free Exercise and Free Speech Clauses."[6] The assertion was not novel: the Court had previously held that some religious expression is simultaneously protected by the Free Exercise Clause and other First Amendment protections—namely, speech or press.[7] But under the Free Speech and Free Exercise Clauses, courts apply varying levels of scrutiny to government action infringing on those rights. For instance, under the Free Exercise Clause, the government must meet strict scrutiny if a plaintiff demonstrates that "a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[8] Government action that is both neutral and generally applicable does not violate one's free exercise rights even if the action imposes a substantial burden on one's ability to freely exercise his or her religion.[9] Under the Free Speech Clause, viewpoint-based restrictions are subject to strict scrutiny,[10] while content-neutral statutes are subject to the somewhat less demanding intermediate scrutiny.[11]

The above levels of scrutiny apply to *private citizens'* expression. Under the Free Speech Clause, *public employees'* expression is less protected. Public-employee expression is subject to the "*Pickering-Garcetti*

5 *See* Stern, *supra* note 3.

6 *Kennedy*, 142 S. Ct. at 2433, 2421 (emphasis added) ("Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities.").

7 *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, *which the Free Speech and Free Exercise Clauses protect*." (emphasis omitted and added)); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Largent v. Texas, 318 U.S. 418, 422 (1943) ("It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment."); Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943) ("[The license tax] restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise."); Jamison v. Texas, 318 U.S. 413, 414 (1943) ("We think the judgment below must be reversed because the Dallas ordinance denies to the appellant the freedom of press and of religion guaranteed to her by the First and Fourteenth Amendments of the Federal Constitution.").

8 *Kennedy*, 142 S. Ct. at 2422 (quoting Emp. Div. v. Smith, 494 U.S. 872, 879–81 (1990)).

9 *See, e.g.*, *Smith*, 494 U.S. at 879, 885.

10 *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015).

11 *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

framework."[12] Under *Pickering-Garcetti*, the government can fire or otherwise discipline an employee for his or her speech without running afoul of the First Amendment if the employee's speech is either (1) made pursuant to official job duties *or* (2) not regarding a matter of public concern.[13] In other words, such speech receives *no First Amendment protection* from adverse employment action. But public-employee speech (1) not pursuant to official job duties *and* (2) on a matter of public concern is subject to *Pickering* balancing. Under *Pickering* balancing, courts balance the individual's speech interests against the state's interests. If a court decides that the individual's speech interests outweigh the state's interests, then the speech is protected.

Kennedy, a high school football coach employed by the Bremerton School District in Washington State, was a public employee.[14] The Court concluded that Kennedy's on-field prayers were (1) not pursuant to his official job duties and (2) on a matter of public concern.[15] Therefore, Kennedy's speech was not *per se* unprotected by the First Amendment.[16] Instead, his expression was subject to the *Pickering* balancing test.[17] But Kennedy's expression was also protected by the Free Exercise Clause, and the Court determined that the District's conduct was not neutral and generally applicable.[18] Government action deemed not neutral or generally applicable is generally subject to strict scrutiny.[19] Thus the question: when expression is protected by *both* the Free Speech and Free Exercise Clauses, what level of scrutiny do courts apply? *Pickering* balancing, the existing free exercise scrutiny regime, or something else entirely?

The Court did not answer the question.[20] Instead, the Court ruled for Kennedy because "[t]he District [could not] sustain its burden under any [potentially applicable level of scrutiny]."[21] In his concurrence, Justice Thomas highlighted the Court's sidestepping: "the Court also does not decide what burden a government employer must shoulder to justify restricting an employee's religious expression."[22]

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12 *Kennedy*, 142 S. Ct. at 2424, 2423–24; Garcetti v. Ceballos, 547 U.S. 410 (2006); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

13 *See Garcetti*, 547 U.S. at 417–20; *Pickering*, 391 U.S. at 574.

14 *See Kennedy*, 142 S. Ct. at 2415–16.

15 *See id.* at 2424–25.

16 *See id.*

17 *See id.* at 2425.

18 *See id.* at 2422 ("Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule.").

19 *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) (citing Emp. Div. v. Smith, 494 U.S. 872, 878–82 (1990)).

20 *See Kennedy*, 142 S. Ct. at 2426.

21 *Id.*

22 *Id.* at 2433 (Thomas, J., concurring).

And as Justice Thomas noted, "the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause."[23]

This Note addresses the question left open by the Court and highlighted by Justice Thomas: under what standard of review should courts review public-employee religious expression protected by both the Free Speech and Free Exercise Clauses? This Note begins by introducing the doctrine of government-employee speech. Then, this Note surveys proposals within existing scholarship that address how courts ought to treat public-employee religious expression. In doing so, this Note evaluates the following proposals: (1) applying *Pickering* balancing as is; (2) applying a modified version of *Pickering* balancing; (3) replacing *Pickering* balancing with intermediate scrutiny; (4) the Holmesian approach: deeming public-employee religious expression wholly unprotected; and (5) free exercise primacy: applying the existing free exercise scrutiny regime to public-employee religious expression.

This Note argues in favor of the last approach—free exercise primacy. Courts should apply the existing free exercise scrutiny regime to public-employee religious expression. Each alternative is seriously flawed. *Pickering* balancing should not be extended to free exercise claims for reasons both general to *Pickering* balancing and particular to religious exercise. As a general matter, *Pickering* balancing is overly malleable, as it asks judges to balance incommensurate goods against one another. Additionally, by essentially constitutionalizing the heckler's veto, the doctrine runs counter to fundamental First Amendment values. Furthermore, aspects of *Pickering* balancing are particularly ill-suited for free exercise claims. *Pickering*'s public-concern inquiry is built to capture *audience-centric* free speech justifications—not *individual-centric* religious liberty justifications. Modified versions of *Pickering* balancing and intermediate scrutiny fail to improve upon the doctrine's malleability. Deeming public-employee religious speech wholly unprotected—the Holmesian approach—unjustifiably singles out religious expression as particularly unworthy of protection. Applying the existing free exercise scrutiny regime is not a perfect solution, but it is better than any viable alternative.

I. THE DOCTRINE OF GOVERNMENT EMPLOYEE SPEECH

Free speech claims of government employees are governed by the two-step "*Pickering*-*Garcetti* framework."[24] First, the Court conducts a threshold inquiry. To be eligible for First Amendment protection from adverse employment action, the speech must (1) not be made

23 *Id.*

24 *Id.* at 2424 (majority opinion).

pursuant to a public employee's official duties and (2) be regarding a matter of public concern rather than purely personal matters.[25] If both threshold inquiries are cleared, then the speech is subject to a balancing test, in which the state's interests are balanced against the individual employee's speech interests.

A. Official Duties

Public-employee expression receives no First Amendment protection from adverse employment action if made pursuant to one's official job duties. The Court laid down this bright-line rule in *Garcetti v. Ceballos*.[26] There, the Court considered whether "an internal memorandum prepared by a prosecutor in the course of his ordinary job responsibilities constituted unprotected employee speech,"[27] and concluded that the memorandum was unprotected.[28] The *Garcetti* Court relied on the distinction between speech "as a citizen" and speech "pursuant to . . . official duties."[29] When a public employee speaks "as a citizen," the employee's speech is subject to First Amendment protection.[30] But when a public employee speaks "pursuant to . . . official duties," his or her speech is not subject to First Amendment protection.[31] In other words, "those two categories of speech are mutually exclusive such that an employee's official-duties speech can never be characterized, for First Amendment purposes, as also expressing the employee's views as a citizen."[32] *Garcetti* drew a bright line between protectable and unprotected public-employee expression.[33]

Garcetti raised the stakes for determining whether employee speech qualifies as on the job or private. If not pursuant to official duties, the speech is at least possibly protectable. If pursuant to official duties, the speech is not protected. As the *Garcetti* Court made clear, whether public-employee expression is on the job (and therefore wholly unprotected) or private (and therefore protectable) is a fact-intensive inquiry. *Garcetti* may have set forth a bright-line rule but determining when a public employee is acting pursuant to his or her official duties is not a purely formal inquiry. The speech's location is not

25 *See supra* note 13 and accompanying text.

26 547 U.S. 410 (2006).

27 Lane v. Franks, 573 U.S. 228, 237 (2014) (citing *Garcetti*, 547 U.S. at 424).

28 *See Garcetti*, 547 U.S. at 426.

29 *Id.* at 421–22.

30 *See id.*

31 *See id.* at 421.

32 Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 12 (2009).

33 *See id.*

dispositive,[34] and employers cannot "restrict employees' rights by creating excessively broad job descriptions."[35] Instead, "[t]he proper inquiry is a practical one."[36] The fact-intensive nature of this inquiry has led, as one might expect, to varying approaches in the lower courts.[37]

The Court's analysis in *Kennedy* is somewhat instructive. Seemingly important to the Court's determination that Kennedy was not acting pursuant to official duties when he prayed at midfield was the fact that the prayers occurred at a time when "coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands."[38] Thus, the Court may be suggesting that the extent to which one is allowed to engage in nonwork activity is at least partially determinative of whether the employee's speech is pursuant to official duties.

B. Public Concern

Public-employee speech must also be made regarding a matter of public concern in order to receive protection from adverse employment action. Speech regards a matter of public concern when "it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[39] The distinction between speech regarding matters of public concern and speech regarding merely private issues reflects the Court's judgment that speech regarding matters of public concern is especially privileged because it promotes not only self-

34 *See Garcetti*, 547 U.S. at 420–21; *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 (2022) ("Nor is it dispositive that Mr. Kennedy's prayers took place 'within the office' environment—here, on the field of play." (quoting *Garcetti*, 547 U.S. at 421)).

35 *Garcetti*, 547 U.S. at 424; *see also Kennedy*, 142 S. Ct. at 2424 ("It is an inquiry this Court has said should be undertaken 'practical[ly],' rather than with a blinkered focus on the terms of some formal and capacious written job description." (alteration in original) (quoting *Garcetti*, 547 U.S. at 424)).

36 *Garcetti*, 547 U.S. at 424.

37 *See* Thomas Keenan, Note, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 842 (2011) ("[C]oncluding that an employee's speech falls within or without his or her official duties has become an indeterminate affair. Though the circuits do share a number of tests, *Garcetti*'s nebulous language has allowed great leeway for courts to adopt their own unique approaches."); Maya Syngal McGrath, Note, *Teacher Prayer in Public Schools*, 90 FORDHAM L. REV. 2427, 2452–53 (2022) ("[C]ircuits have diverged over whether certain noncurricular [out-of-classroom] speech is nonetheless made pursuant to employment duties.").

38 *Kennedy*, 142 S. Ct. at 2425.

39 Lane v. Franks, 573 U.S. 228, 241 (2014) (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).

expression but also self-governance.[40] Whereas speech regarding strictly private matters "does not implicate the same constitutional concerns"[41] because "[t]here is no threat to the free and robust debate of public issues [and] there is no potential interference with a meaningful dialogue of ideas."[42] Like the official-duties inquiry, the public-concern inquiry is fact-intensive and requires courts to evaluate "the content, form, and context of a given statement."[43] The Court has held that an employee's sworn testimony regarding his firing of another public employee[44] and a church's picketing a U.S. Marine's funeral while displaying numerous signs like "Pope in Hell," "Don't Pray for the USA," and "God Hates Fags" are speech regarding a matter of public concern.[45] On the other hand, speech regarding personal workplace disputes and grievances is the paradigmatic example of strictly private speech.[46] And the Court has also held that videos depicting public employees engaging in sexually explicit acts[47] and "information about a particular individual's credit report"[48] are not speech regarding matters of public concern.

C. Pickering *Balancing*

If a court deems speech (1) not pursuant to official job duties and (2) a matter of public concern, then the court proceeds to *Pickering* balancing. Under *Pickering* balancing, the government may restrict its employees' speech if it can successfully demonstrate that the interests at stake tip in its favor. On one side of the ledger, courts consider both the employee's speech interest and the public's interest in receiving

40 *See Snyder*, 562 U.S. at 452 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964))). For criticism of the public-concern inquiry, see Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3 (1990) ("The public concern test will generate . . . a judicially approved catalogue of legitimate subjects of public discussion. That prospect alone should condemn the entire undertaking, for the Constitution empowers the people, not any branch of the government, to define the public agenda.").

41 *Snyder*, 562 U.S. at 452.

42 *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985)).

43 Connick v. Myers, 461 U.S. 138, 147–48 (1983).

44 *See Lane*, 573 U.S. at 228.

45 *See Snyder*, 562 U.S. at 448, 455.

46 *See Connick*, 461 U.S. at 148.

47 *See* City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam).

48 *Snyder*, 562 U.S. at 453 (discussing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)).

the employee's speech.[49] The inclusion of the public's interest recognizes that "[w]ere [public employees] not able to speak on these matters, the community would be deprived of informed opinions on important public issues."[50] Promoting workplace efficiency—which naturally involves preventing workplace disruption—is generally seen as the state's primary interest under *Pickering* balancing.[51] As the Court put it in *Lane v. Franks*, "government employers often have legitimate 'interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public,' including '"promot[ing] efficiency and integrity in the discharge of official duties,"' and '"maintain[ing] proper discipline in public service."'"[52] However, a mere invocation of an interest in workplace efficiency will not be enough. Restrictions on public-employee speech must be both necessary and rationally related to the government's legitimate state interest in workplace efficiency.[53] On the other hand, courts defer to the government actor's judgment regarding speech's disruptive impact.[54]

II. SOME FLAWED SOLUTIONS TO PUBLIC-EMPLOYEE RELIGIOUS EXPRESSION

As mentioned earlier, the Court in *Kennedy* did not decide what level of scrutiny ought to apply to claims brought by government employees under both the Free Speech and Free Exercise Clauses. While there is no doubt that *Pickering-Garcetti* currently governs public-

49 *See Roe*, 543 U.S. at 82 ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.").

50 *Id.*

51 *See* Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193, 1201–02 (2017).

52 Lane v. Franks, 573 U.S. 228, 242 (2014) (alterations in original) (quoting Connick v. Myers, 461 U.S. 138, 150–51 (1983)).

53 Garcetti v. Ceballos, 547 U.S. 410, 418, 419 (2006) ("[T]he [speech] restrictions [the government entity] imposes must be *directed at* speech that has some potential to affect the entity's operations." (emphasis added)); *id.* at 419 ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are *necessary* for their employers to operate efficiently and effectively." (emphasis added)). One scholar has highlighted attenuation as a relevant factor in *Pickering* balancing. *See* Thomas E. Hudson, *Talking Drugs: The Burdens of Proof in Post-*Garcetti *Speech Retaliation Claims*, 87 WASH. L. REV. 777, 792 (2012) ("[T]he more attenuated the connection between the employee's speech and her work, the more likely that the employee's interests will outweigh the employer's interests, because the speech is less likely to threaten workplace harmony if it has nothing to do with the employee's job." (footnote omitted)).

54 Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion) ("[W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern."); *Connick*, 461 U.S. at 151–52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

employee claims brought *solely* under the Free Speech Clause, the Supreme Court has never applied *Pickering* balancing to expression deemed protected by both the Free Exercise and Free Speech Clauses or to a sole free exercise claim.[55] I now take up the matter directly and consider various approaches court might take to analyzing public-employee religious expression.

A. The Pickering-Garcetti *Framework*

Courts could elect to simply apply the *Pickering-Garcetti* framework to free exercise claims. Lower courts have consistently done so. For example, the Second Circuit considered in tandem similar § 1983 claims brought by a state sign language interpreter and a state nurse consultant.[56] The first appellant, the nurse consultant, discussed her belief in the attainment of salvation through Jesus Christ during an in-home visit to a homosexual couple, telling the couple that "[God] doesn't like the homosexual lifestyle."[57] After the couple filed complaints, the nurse was suspended for four weeks without pay.[58] The second appellant, a sign language interpreter, was reprimanded for discussing her "relationship with the Lord" with a client and providing a client with "religious tracts" that "contained passages from the Bible and were stamped with the name of a church."[59] Appellants alleged that their employers violated their First Amendment rights, and the court applied *Pickering* balancing.[60] In doing so, the court found that the appellants' religious speech was disruptive "and that disruption outweighed appellants' free speech interests."[61]

The Eighth Circuit has also applied *Pickering* balancing to free exercise claims. In *Brown v. Polk County*, the appellant, Brown, a born-again Christian who worked for Polk County, was fired by the county after he was repeatedly reprimanded by the county for, among other things, his participation in religious activities "that could be considered to be religious proselytizing, witnessing, or counseling."[62] The activity in question included praying in-office with coworkers, directing another employee to type Bible study notes for him, affirming his

55 *See* Scott R. Bauries, *The Logic of Speech and Religious Rights in the Public Workplace*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 137, 152 (2018); *see also* Chaz Weber, Note, *Picking on* Pickering*: Proposing Intermediate Scrutiny in Public-Employee Religious-Speech Cases via* Berry v. Department of Social Services, 58 CASE W. RSRV. L. REV. 513, 530–31 (2008).

56 *See* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 160 (2d Cir. 2001).

57 *Id.* at 161.

58 *Id.*

59 *Id.* at 162.

60 *See id.* at 163–66.

61 *Id.* at 164.

62 Brown v. Polk Cnty., 61 F.3d 650, 658–59 (8th Cir. 1995) (emphasis omitted).

Christianity, and referencing Bible passages addressing the value of work in a meeting with another employee.[63] Brown was also instructed to remove all items with religious connotations from his office, including a Bible in his desk, three prayer-bearing plaques, and a poster with nonreligious "inspirational commonplaces" written by an author with "Cardinal" in his name.[64] Brown brought both free exercise and free speech claims against Polk County.[65] The court did not explicitly address whether the county burdened his right to free speech but did conclude that his right to free exercise was substantially burdened.[66] The court applied *Pickering* balancing to Brown's free exercise claim and concluded that the county violated Brown's free exercise rights.[67] The court held that (1) the county failed to demonstrate any workplace disruption "sufficient to allow for this extraordinary action on the part of Polk County"; (2) the county's interest in avoiding an Establishment Clause violation cannot justify a blanket prohibition on workplace religious exercise; and (3) the county was not justified in ordering Brown to remove offensive religious displays if the display's offensiveness "was based on the content of their message."[68]

Like the Second and Eighth Circuits, the Ninth Circuit has applied *Pickering* balancing to free exercise claims. In *Berry v. Department of Social Services*, the appellant, Daniel Berry initially filed a lawsuit against his employer, Tehama County Department of Social Services.[69] Tehama County reprimanded Berry, a self-described Evangelical Christian, for keeping a Bible on his desk and hanging a sign on his cubicle that read "Happy Birthday Jesus."[70] Berry was also told that he could not use a department conference room to hold a monthly prayer meeting and that department policy prohibited him from talking about religion with clients.[71] Berry sued seeking declaratory and injunctive relief against the county.[72] He alleged that the Department violated his rights under both the First Amendment and Title VII of the Civil Rights Act of 1964.[73] The district court applied *Pickering* balancing and granted summary judgment against Berry.[74] On appeal,

63 *See id.* at 652.
64 *See id.* at 659.
65 *See id.* at 653.
66 *See id.* at 658.
67 *See id.*
68 *Id.* at 659.
69 *See* Berry v. Dep't of Soc. Servs., 447 F.3d 642, 645 (9th Cir. 2006).
70 *See id.* at 647.
71 *See id.* at 646.
72 *See id.* at 648.
73 *See id.*
74 *See id.*

the Ninth Circuit also applied *Pickering* balancing.[75] In doing so, the Ninth Circuit held that the state's restrictions were reasonable, and the state's interest in avoiding an Establishment Clause violation "outweigh[ed] the restriction's curtailment of Mr. Berry's religious speech on the job."[76]

Other circuits have conducted similar analyses.[77] The above discussion constitutes a far from comprehensive account of lower court treatment of public-employee religious expression, but detailed discussion of each circuit's treatment of religious expression is forgone here.

Despite some lower courts' application, it's not obvious that claims brought by government employees under the Free Exercise Clause *should* be analyzed under the *Pickering-Garcetti* framework. Scholars have pointed out several potential problems with importing the *Pickering-Garcetti* framework as is into free exercise doctrine.[78] But first, before turning to religious expression in particular, this Note briefly sketches several general critiques of the *Pickering-Garcetti* framework. These critiques focus on *Pickering* balancing rather than *Garcetti*'s bright-line rule. *Garcetti* has been the subject of significant scholarly criticism.[79] However, as discussed later,[80] *Garcetti*'s application to religious expression is less troublesome than *Pickering*'s.

First, *Pickering* balancing is remarkably malleable and difficult to apply. The Court itself has acknowledged the difficulty posed by *Pickering* balancing.[81] In a recent Sixth Circuit concurrence, Judge Eric Murphy reiterated that difficulty.[82] As Judge Murphy put it, *Pickering*'s

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75 *See id.* at 649–50.

76 *Id.* at 650–51.

77 *See* Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 260 (6th Cir. 2006) (concluding that *Pickering* balancing should apply to freedom of association and free exercise claims as well as free speech claims). Similarly, see Lee v. York Cnty. Sch. Div., 484 F.3d 687, 694 (4th Cir. 2007), in which the Fourth Circuit applied *Pickering* balancing to a Virginia teacher's § 1983 claim alleging that the school board violated his free speech rights. There, the teacher did not bring a free exercise claim even though the speech in question was religious. *Id.* at 689.

78 *See* Corbin, *supra* note 51, at 1249–51; Weber, *supra* note 55, at 530–35.

79 *See, e.g.*, Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1470–74 (2007); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 563 (2008); Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 911 (2010); Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 117 (2008); Corbin, *supra* note 51, at 1242 n.240 (aggregating various scholarly critiques of *Garcetti*).

80 *See infra* Section III.A.

81 *See* Connick v. Myers, 461 U.S. 138, 150 (1983) ("[S]uch particularized balancing is difficult . . . .").

82 Bennett v. Metro. Gov't, 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, J., concurring in the judgment) ("In my respectful view after struggling with the task, *Pickering*'s

balancing test asks litigants and judges to balance "incomparable interests"—the employee's free speech interest and the government's interest in operational efficiency.[83] And because *Pickering* asks judges to balance incommensurate goods, the test is malleable.[84] Significant judicial discretion is inherent in the test: "the proper outcome is bound to be in the eye of the beholder."[85] The test's malleability has several negative consequences. First, it is likely to chill speech. As Justice Alito has pointed out, "[v]ague laws force potential speakers to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'"[86] There's no reason to think that vague, all-things-considered balancing tests work any different. Second, the test's malleability is likely to invite varying outcomes depending solely upon the jurisdiction one is in and judge one is in front of.[87] Of course, some variation is inevitable when applying virtually any legal doctrine. But the scope of a public employee's free speech rights should not vary significantly from judge to judge. The inherent discretion in the *Pickering* balancing inquiry makes "equality of treatment . . . impossible to achieve" and decreases law's predictability.[88]

Not only is *Pickering* difficult to apply in practice and malleable, but it's inconsonant with First Amendment values. Take the way in which the *Pickering* balancing test conceives of the state's interest as avoiding workplace disruption.[89] This framing of the state's interest singles out disruptive speech as less worthy of protection. For example, under *Pickering* balancing, if employee speech harms workplace collegiality, that is a point in the state's favor.[90] But if the exact same speech

instructions to engage in open-ended balancing do not provide helpful guidance to resolve concrete cases.").

83 *Id.* at 553–54. For a more general critique of balancing in First Amendment law, see Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 788, 787–93 (2001) ("The intelligibility of balancing in First Amendment law is hardly perspicuous. Nothing can be balanced against anything else without a common unit of measure. What is the unit of measure when First Amendment rights are 'weighed' against governmental interests? No court has ever said.").

84 *Bennett*, 977 F.3d at 554 (Murphy, J., concurring in the judgment).

85 *Id.*

86 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 807 (2011) (Alito, J., concurring in the judgment) (omission in original) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

87 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

88 *Bennett*, 977 F.3d at 554 (Murphy, J., concurring in the judgment) (quoting June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment)).

89 *See* Randy J. Kozel, *Government Employee Speech and Forum Analysis*, 1 J. FREE SPEECH L. 579, 589 (2022).

90 *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987) ("We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or

were to produce no hostile reaction from one's coworkers, the state's case under *Pickering* balancing would be weaker. This conception is akin to a "heckler's veto."[91] If government employee speech "makes waves," courts are more likely to find that the state was justified in retaliating against the employee *on the basis of the speech's wave-making*.[92] Tying constitutional protection to listener reaction "runs counter to [the] core principle of expressive liberty."[93] The First Amendment protects the expression of unpopular ideas. As Justice Douglas wrote for the Court in *Terminiello v. Chicago*, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[94] Or as the Court put it in *Texas v. Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[95] The alternative—not vigorously protecting unpopular speech—"would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."[96] Current government-employee speech doctrine gets it exactly backward.

The *Pickering* balancing test also maps poorly onto free exercise claims because the public-concern inquiry fits oddly with the Free Exercise Clause. Under *Pickering*, a court must determine whether the expression touches a matter of public concern. Conceptually, the transfer makes little sense. To understand why, it's necessary to understand the different justifications for free speech and religious exercise. Free speech theorists have set forth a number of different justifications. Kent Greenawalt has catalogued those justifications, arguing that they include truth discovery, social stability, checking government authority, autonomy, liberal democracy, promoting tolerance, social

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harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." (citing Pickering v. Bd. of Educ., 391 U.S. 563, 570–73 (1968))).

91 *See Heckler's-Veto Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle that a public entity may not suppress a speaker's right of free speech solely because a crowd reacts negatively."); Kozel, *supra* note 89, at 590; Norton, *supra* note 32, at 47 ("[U]nexamined deference to government's fears about onlookers' reactions to workers' off-duty speech threatens to institutionalize the long-maligned 'heckler's veto' as a basis for government's employment actions." (footnote omitted)).

92 *See* Kozel, *supra* note 89, at 589–90.

93 *Id.* at 590.

94 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

95 Texas v. Johnson, 491 U.S. 397, 414 (1989).

96 *Terminiello*, 337 U.S. at 4–5.

contract theory, and dignity and equality.[97] Caroline Mala Corbin has argued that there are three classic justifications for protecting free speech: "(1) to encourage a diverse marketplace of ideas to aid our search for knowledge; (2) to facilitate democratic self-rule; and (3) to promote autonomy, self-expression, and self-realization."[98] And as Corbin noted, "two of . . . [those] justifications—promoting a marketplace of ideas and facilitating democratic self-governance—are audience focused."[99] The public-concern test promotes the first two free speech justifications but not the third: autonomy.[100] And Corbin has argued that the public-concern test specifically supports democratic self-governance.[101] As the Court put it in *Lane v. Franks*, "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[102]

Justifications for religious liberty do transcend individual autonomy,[103] but they don't focus on fostering democratic self-governance in the way that the public-concern test does. For example, the civic-republican tradition justifies religious liberty partially based on religion's ability to inculcate a virtuous citizenry.[104] This is not an autonomy-based justification. Regardless of whether one accepts such a justification, it bears little resemblance to the argument that public-employee speech on matters of public concern serves democratic self-

97 *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–54 (1989).

98 Corbin, *supra* note 51, at 1216.

99 *Id.* at 1248.

100 *See id.* at 1216.

101 *Id.* at 1216–17.

102 Lane v. Franks, 573 U.S. 228, 240 (2014).

103 *See, e.g.*, Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 494–95 (2017) ("All kinds of secular justifications have been pressed for religious liberty. Some of them focus on the benefits flowing to the people involved. Religious liberty preserves individual identity, enables rich associational life, enables obedience to perceived divine commands, protects conscience, and shields minorities from majoritarian control. Others focus on benefits flowing to society at large. Religious liberty reduces civil strife, buffers the power of the state, and encourages civic virtue. Still others focus on the state, grounding religious liberty primarily in distrust of government on the particular topic of religion." (footnotes omitted)); Andrew Koppelman, *How Could Religious Liberty Be a Human Right?*, 16 INT'L J. CONST. L. 985, 986 (2018) (mentioning religious liberty's value in fostering social stability in a diverse society).

104 *See* JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 54, 53–57 (5th ed. 2022) ("A key to the Civic Republicans' understanding was that religion, particularly Christianity, was foundational for the prosperity and happiness of citizens, and for the efficacy and efficiency of good government."); *see also* Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 343–44 (2001) ("[R]eligion often offers communitarian values that emphasize spirituality, nurturing, and social justice in contrast to the market values that tend to be individual, selfish, and materialistic.").

governance by informing the public of important matters. Given the divergent justifications for free speech and religious liberty, the public-concern test maps poorly onto religious expression protected by the Free Exercise Clause. As Chaz Weber aptly put it, "[a]ttempting to analyze religious expression under this rubric is like aligning a square peg with a round hole."[105]

The conceptual mismatch between the Free Exercise Clause and the public-concern inquiry leads to some public-employee religious expression claims failing to even reach *Pickering* balancing. For example, in *Daniels v. City of Arlington*, the Fifth Circuit held that a police officer wearing a cross pin on his uniform did not qualify as speech on a matter of public concern: "Although personal religious conviction . . . obviously is a matter of great concern to many members of the public, in this case it simply is not a matter of 'public concern' as that term of art has been used in the constitutional sense."[106] Likewise, the Third Circuit has held that a high school football coach's silent bowing of his head and taking a knee during student-led pregame prayers is not speech on a matter of public concern.[107] In both cases, the plaintiff lost before the court even applied *Pickering* balancing.[108] This is troubling. A coach's bowing of his head in prayer or a police officer's wearing of a religious medal are not less socially valuable than a teacher's refusal to call his students by their preferred pronouns[109] or a police officer's Facebook posts criticizing Islam.[110] Both sets of speech have social value. The public-concern inquiry is built to capture the latter's value but not the former's.

To summarize: applying *Pickering* balancing to religious expression protected by both the Free Speech and Free Exercise Clauses poses several disadvantages. By asking judges to balance incommensurate goods, the *Pickering* balancing test's malleability invites excessive judicial discretion. The test's focus on audience reaction instantiates a heckler's veto, which is contrary to fundamental free speech values. And the public-concern test is a poor fit for free exercise claims.

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105 *See* Weber, *supra* note 55, at 531.

106 Daniels v. City of Arlington, 246 F.3d 500, 504 (5th Cir. 2001).

107 Borden v. Sch. Dist., 523 F.3d 153, 162–63, 169–71 (3d Cir. 2008). In *Kennedy v. Bremerton School District*, both sides agreed that Coach Kennedy's speech "implicate[d] a matter of public concern." 142 S. Ct. 2407, 2424 (2022).

108 *Borden*, 523 F.3d at 171; *Daniels*, 246 F.3d at 504.

109 *See* Meriwether v. Hartop, 992 F.3d 492, 508–09 (6th Cir. 2021) (finding that a professor's unwillingness to call a transgender student by the student's preferred pronouns qualified as speech on a matter of public concern).

110 *See* Hernandez v. City of Phoenix, 43 F.4th 966, 977–79 (9th Cir. 2022) (finding that a police officer's Facebook posts criticizing Muslims and Islam qualified as speech on a matter of public concern).

B. Reconfiguring Pickering-Garcetti

Rather than jettison *Pickering-Garcetti* in its entirety, one might favor applying a slightly reformulated version to religious expression. Caroline Mala Corbin has explored the possibility of retaining the bulk of the *Pickering-Garcetti* framework while simply dropping the public-concern requirement for free exercise claims.[111] Under this arrangement, so long as the religious expression is not pursuant to one's official duties, *Pickering* balancing would apply.[112] With the exception of the public-concern inquiry, analysis of government-employee religious expression would mirror that of government-employee speech.[113] Some lower courts have taken such an approach by broadly defining speech on a matter of public concern or presuming religious expression to constitute speech on a matter of public concern.[114] Alternatively, one might reformulate *Pickering*'s interest-balancing test by reframing the state's interest in tempering public-employee religious expression as avoiding an Establishment Clause violation rather than promoting workplace harmony and efficiency. Some lower courts have done exactly that in cases involving religious speech.[115]

Simply reframing *Pickering* by dropping the public-concern requirement (or concluding that religious expression is per se speech regarding a matter of public concern) fails to avoid the so-called heckler's veto problem. *Pickering* balancing's audience-centric conception of the state's interest is likely to consistently punish unpopular religious views. A Sixth Circuit case exemplifies the problem. In *Scarbrough v. Morgan County Board of Education*, a school superintendent

111 *See* Corbin, *supra* note 51, at 1251–56.

112 *Id.* at 1252.

113 *See id.*

114 Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996) (defining speech on a matter of public concern "broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace" (citing Gillette v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989))); Draper v. Logan Cnty. Pub. Libr., 403 F. Supp. 2d 608, 615–17 (W.D. Ky. 2005); Nichol v. Arin Intermediate Unit, 268 F. Supp. 2d 536, 559 (W.D. Pa. 2003) (concluding that a teacher's regular wearing of a small cross on a necklace was "an expression of her personal religious convictions . . . which is a matter of social and community concern entitled to the full protection of the First Amendment").

115 *See, e.g.*, Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 165–66 (2d Cir. 2001) (recognizing the State's interest in avoiding an Establishment Clause violating as part of *Pickering's* interest balancing); McGrath, *supra* note 37, at 2455 ("For religious speech in public schools, circuit courts have primarily considered the countervailing governmental interest to be the potential Establishment Clause violation."); *Tucker*, 97 F.3d at 1211 (considering the state's interest in avoiding an Establishment Clause violating as part of *Pickering*'s balancing test and concluding that the state's interest was insufficient to justify the restriction on religious expression); Berry v. Dep't of Soc. Servs., 447 F.3d 642, 645–46 (9th Cir. 2006) (considering the same).

brought § 1983 claims alleging that his free speech and free exercise rights were violated after he was not appointed to a newly created position replacing that of superintendent.[116] The plaintiff, Scarbrough, initially accepted an invitation to attend and speak at a local church with a predominantly homosexual congregation.[117] Scarbrough argued that his decision to attend the church service was fundamentally a matter of religious exercise. While he did not approve of homosexuality himself,[118] his religious beliefs "counsel[ed] him to share his faith with others and to embrace those individuals whose lifestyles may diverge from his own."[119] A local newspaper then published an article announcing Scarbrough's plans to speak at the church.[120] Scarbrough alleged that he was not appointed to the newly created position because school board members disapproved of his decision to attend the church service.[121] The Sixth Circuit held that Scarbrough's speech touched on a matter of public concern and therefore applied *Pickering* balancing.[122] The court noted that some board members "claim[ed] that Scarbrough's agreement to speak at the Metro convention created an atmosphere in which work would be difficult" because of the board and broader community's disapproval of homosexuality.[123] As the court put it, the "detrimental impact on the work environment results directly from Scarbrough's intended speech and his religious beliefs. It would contravene the intent of the First Amendment to permit the Board effectively to terminate Scarbrough for his speech and religious beliefs in this way."[124] Fortunately, the Sixth Circuit reversed the district court's granting of summary judgment in the government's favor.[125]

One can easily imagine essentially the opposite scenario. A state employee divulges to his coworkers that he disapproves of homosexuality and gender-transition surgeries on religious grounds. Or he refuses to call a coworker by his or her preferred pronouns because they differ from that coworker's biologically assigned sex at birth. The employee's views become known at work, and coworkers allege that they feel threatened or devalued by the employee's retrograde views on matters of sexual morality. Workplace tensions increase, and the

116 *See* Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 253–54 (6th Cir. 2006).
117 *See id.* at 253.
118 *See id.* at 254.
119 *Id.* at 258.
120 *See id.* at 253–54.
121 *See id.* at 254.
122 *See id.* at 257–60.
123 *Id.* at 258.
124 *Id.*
125 *See id.* at 260.

employee is passed over for a promotion, let go, or his contract is not renewed. The employee then files a § 1983 suit alleging that the state's adverse employment action violated his free speech and free exercise rights. A court, applying *Pickering* balancing, rules against the employee, judging that the state's interest in workplace harmony and efficiency outweigh the employee's speech interests.

In both *Scarbrough* and the imagined scenario, an employee is punished for dissenting *on religious grounds* from public orthodoxy. *Pickering* balancing's consideration of the state's interest in efficiency and workplace harmony is likely to consistently disadvantage unpopular religious expression. Regardless of the extent to which religious expression ought to be protected, there is good reason to disfavor a test that systematically disfavors unpopular religious expression. As Justice Scalia wrote for the Court in *Capitol Square Review and Advisory Board v. Pinette*, "in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech."[126] American history is no stranger to the suppression of minority religious views. One need only look as far as the myriad of cases dealing with suppression of the Jehovah's Witnesses,[127] the persecution of the Mormons,[128] or anti-Catholicism in nineteenth-century America[129] for examples of maltreatment of religious minorities in American history. Doctrinal rules that systematically favor orthodox expression by public employees are not only inconsonant with free speech values[130] but are also likely to produce a government with less employees who hold minority views—religious or otherwise. A government workforce disproportionally comprised of employees who hold orthodox views is a troubling outcome—one that may even lead to further discrimination against minority religious views. And to the extent that *religious belief itself* is on the decline,[131] *all religious viewpoints*—not just

126 Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

127 *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Fowler v. Rhode Island, 345 U.S. 67 (1953); *see also* Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 419–20 (1986).

128 *See, e.g.*, Laycock, *supra* note 127, at 416–17; *Anti-Mormon Violence*, PBS: AM. EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/mormons-opposition/ [https://perma.cc/9YKN-2YVT].

129 *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268–74 (2020) (Alito, J., concurring) (documenting the history of the Blaine Amendments' anti-Catholic origins); Laycock, *supra* note 127, at 417–18.

130 For a general discussion of the "anti-orthodoxy principle" in Free Speech doctrine, see Rubenfeld, *supra* note 83, at 818–22.

131 *See, e.g.*, Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/ [https://perma.cc/55BX-HJ6M].

minority ones—could become underrepresented in government employment.

Reformulating the state's interest as avoiding an Establishment Clause violation fares little better than simply dropping the public-concern test. It's true enough that avoiding an Establishment Clause violation may constitute a compelling state interest.[132] But pitting a plaintiff's free exercise interest against the state's nonestablishment interest in an all-things-considered balancing test only makes sense if the state may legitimately promote its nonestablishment interest in a way that burdens a plaintiff's free exercise. Otherwise, any application of the balancing test would be unconstitutional. As the Court said in *Espinoza v. Montana Department of Revenue*, "an interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise."[133] In other words: the state has a compelling interest in enforcing the Establishment Clause but not in *over*-enforcing the Establishment Clause. A litigant's invocation of an interest in avoiding an Establishment Clause violation is limited by the boundaries of the Free Exercise Clause, just as a litigant's invocation of the Free Exercise Clause is limited by the boundaries of the Establishment Clause. As the state does not have a compelling interest in separating church and state in such a way that infringes on free exercise, reconfiguring *Pickering* balancing to take explicit account of the state's nonestablishment interest is a dead end.

Virtually any reconfigured version of the *Pickering-Garcetti* framework has problems. Notwithstanding efforts to drop the public-concern inquiry or reframe the state's interest, a reconfigured version of *Pickering* balancing is still a balancing test. And if one of *Pickering*'s most fundamental flaws is the doctrine's malleable and open-ended nature, then tweaking the existing framework while leaving the balancing test in place looks a bit like fixing a leaky faucet in a burning building.

C. The Holmesian Approach

One alternative to the *Pickering-Garcetti* framework—either as currently formulated or in some revised shape—is reverting to an older standard. For most of the twentieth century, public employees had no basis for objecting to government-imposed restrictions on their speech.[134] This position was famously put by Justice Oliver Wendell

132 *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 271 (1981).

133 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020) (first quoting Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (Mont. 2018); and then quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017)).

134 *See* Connick v. Myers, 461 U.S. 138, 143 (1983).

Holmes during his time on the Supreme Judicial Court of Massachusetts: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[135] The Holmesian approach conceptualized government employment as more of a privilege than a right.[136] But in the second half of the twentieth century, the Court moved away from the Holmesian position.[137] Now, "it has become insufficient to assert that, because an employee has no constitutional right to a government paycheck, his employment is a mere privilege whose various conditions are beyond the First Amendment's purview."[138]

Courts could apply the Holmesian approach to either all public-employee expression or solely public-employee religious expression. Either approach is undesirable. As a practical matter, reverting to the Holmesian approach for all public-employee expression would require the Supreme Court to overrule the entire line of cases governing public-employee speech from *Pickering* onwards. The Holmesian approach makes no distinction between expression pursuant to one's official duties and expression not pursuant to one's official duties—including off-duty speech. This would constitute a dramatic freezing of currently protected public-employee speech. *Pickering*, despite its flaws, at least provides for the possibility of First Amendment protection for employee expression outside the scope of official duties. But the Holmesian approach of "requiring public employees to relinquish their free speech rights as a condition of employment suppresses expression at a great cost to key First Amendment values in promoting individual autonomy, contributing to the marketplace of ideas, and facilitating citizen participation in democratic self-governance."[139] The Holmesian approach would dramatically curtail the speech rights of the millions of American citizens who work as government employees.[140]

Either the Supreme Court—or an enterprising lower court—could apply the Holmesian approach to *only* religious expression. Under such a framework, a government employee could be fired or disciplined for off-duty religious expression—even worship. Such a

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

136 *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440 (1968); Estlund, *supra* note 79, at 1465 ("Public employees were once relegated to that black hole of constitutional law known as the rights-privileges distinction.").

137 *See Myers*, 461 U.S. at 144.

138 Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2005 (2012).

139 Norton, *supra* note 32, at 49–50.

140 *See* Steven P. Brown, *Leaving the Spiritual Sphere: Religious Expression in the Public Workplace*, 49 J. CHURCH & ST. 665, 665 (2007).

framework would single out public employee religious expression as especially unworthy of protection. But as Justice Scalia wrote for the Court in *Capitol Square Review & Advisory Board v. Pinette*, "exil[ing] private religious speech to a realm of less-protected expression . . . is outright perverse when one considers that private religious expression receives preferential treatment under the Free Exercise Clause."[141] At a minimum, courts should treat public-employee religious expression no more harshly than nonreligious expression.

D. Intermediate Scrutiny

Courts could also apply a tier of scrutiny. Chaz Weber has argued in favor of applying intermediate scrutiny. Applying intermediate scrutiny, he argues, would "still allow[] courts flexibility to address variant factual situations with different levels of intensity . . . [while] prevent[ing] Establishment Clause concerns alone from being enough to allow the restriction to proceed."[142] Compared to *Pickering* balancing, intermediate scrutiny "would force courts to undergo a more thorough evaluation of the employee's desired religious exercise to determine whether the employer's restriction overburdens the expression."[143] And at least one circuit has explicitly applied intermediate scrutiny to free exercise claims brought by public employees.[144]

Importing intermediate scrutiny is hardly a solution to *Pickering*'s indeterminacy and malleability. As then-Justice Rehnquist put it, intermediate scrutiny's requirements that a law serve important government objectives and be substantially related to achieving those objectives is "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation,

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141 Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 766–67 (1995) (plurality opinion) (emphasis omitted); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022) ("That the First Amendment doubly protects religious speech is no accident."); Michael R. Dimino, *A Foolish Inconsistency: Religiously and Ideologically Expressive Conduct*, 4 ITALIAN L.J. 619, 627 (2018) ("Because the First Amendment specifically enumerates the right of free exercise in addition to the right of free speech, it is conceivable that religious speech and expressive conduct should receive *more* protection than non-religious ideological speech and expressive conduct.").

142 Weber, *supra* note 55, at 536.

143 *Id.* at 536–37.

144 *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 n.7 (3d Cir. 1999) ("While *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny." (citations omitted) (first citing Emp. Div. v. Smith, 494 U.S. 872, 884 (1990); and then citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993))).

masquerading as judgments."[145] Various scholars have also criticized the test's indeterminacy and malleability.[146] Furthermore, it's not clear that replacing *Pickering* balancing with intermediate scrutiny would constitute much of a change. At least one scholar has argued that *Pickering* balancing is substantially similar to intermediate scrutiny.[147] And at least one circuit has characterized *Pickering* balancing as a form of intermediate scrutiny.[148] There is not good reason to replace *Pickering* balancing with intermediate scrutiny. Doing so would not constitute much of a change, and it would hardly solve *Pickering*'s problems.

E. A More Dramatic Shift

Some scholars have proposed more dramatic reconceptualizations of public-employee speech doctrine. For example, Randy Kozel has recently proposed rethinking the way courts treat public-employee speech.[149] In place of the existing *Pickering* regime, Kozel suggests applying the public forum doctrine.[150] Alternatively, Cynthia Estlund has argued in favor of due process as a solution to the problem of government-employee speech.[151] Both proposals are intriguing and worthy of further examination. This Note flags them here merely to suggest that it is worth pondering whether, and in what ways, the proposed reconceptualizations map well onto free exercise claims.

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145 Craig v. Boren, 429 U.S. 190, 220–21 (1976) (Rehnquist, J., dissenting).

146 *See* Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1412 (1982) ("Unfortunately, standards of middle level review give the courts relatively little guidance in individual cases."); *Leading Cases*, 110 HARV. L. REV. 135, 185 (1996) (describing the intermediate scrutiny test as "malleable"); George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1375 ("The intermediate scrutiny test . . . has no basis whatsoever in precedent prior to *Craig v. Boren*, and is a much more malleable test that permits judges' subjective preferences to come into play."). *But see* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998).

147 *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 795–96.

148 *See* Akers v. McGinnis, 352 F.3d 1030, 1037 (6th Cir. 2003); Montgomery v. Carr, 101 F.3d 1117, 1129 n.7 (6th Cir. 1996).

149 *See* Kozel, *supra* note 89. Kozel is not the only scholar to examine the application of the public forum doctrine to government employee speech. As Kozel mentions, Darryn Cathryn Beckstrom and Wayne Batchis have both considered forum analysis' application to academic speech. *See id.* at 596 n.77 (first citing Darryn Cathryn Beckstrom, Note, *Reconciling Public Employee Speech Doctrine and Academic Speech After* Garcetti v. Ceballos, 94 MINN. L. REV. 1202 (2010); and then citing Wayne Batchis, *The Government Speech-Forum Continuum: A New First Amendment Paradigm and Its Application to Academic Freedom*, 75 N.Y.U. ANN. SURV. AM. L. 33 (2019)).

150 *See* Kozel, *supra* note 89, at 581–83.

151 *See* Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 117; Estlund, *supra* note 79, at 1476.

III. FREE EXERCISE PRIMACY: A LESS-FLAWED SOLUTION TO PUBLIC-EMPLOYEE RELIGIOUS EXPRESSION

A. What is Free Exercise Primacy?

Courts could—and, this Note argues, should—apply the existing free exercise scrutiny regime to government employee religious speech claims brought under both the Free Speech and Free Exercise Clauses. As mentioned earlier, this Note refers to such an approach as *free exercise primacy*.[152] Under the free exercise primacy approach, courts would treat public-employee religious expression claims brought under the Free Exercise Clause largely the same as free exercise claims brought by private citizens. They would apply the existing free exercise scrutiny regime: if government action is neutral and generally applicable, rational basis review applies even if that government action substantially burdens one's ability to exercise his or her religion.[153] But if a law is either not neutral or not generally applicable, strict scrutiny applies.[154]

B. Two Versions of Free Exercise Primacy

There are at least two versions of free exercise primacy: a thicker one and a thinner one. Under a thicker version, courts would not apply either *Garcetti*'s bright-line rule or *Pickering* balancing to public-employee religious expression claims protected by both the Free Speech and Free Exercise Clauses. Even religious expression pursuant to one's official duties would be subject to free exercise scrutiny. And under a thinner version, courts would apply *Garcetti*'s bright-line rule but would not apply *Pickering* balancing.

Courts should apply the thinner version of free exercise primacy—meaning apply *Garcetti* but not *Pickering* balancing to public-employee expression claims brought under the Free Speech and Free Exercise Clauses. First, as Caroline Mala Corbin has argued, applying *Garcetti* to religious speech claims does not harm democratic accountability even if its application to other speech claims does. Leaving speech pursuant to official duties unprotected may harm democratic accountability because "it allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters' views and facilitate their ability to hold the

152 *See supra* INTRODUCTION.

153 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

154 *See, e.g.*, *id.* at 531–32.

government politically accountable for its choices."[155] On-the-job religious expression "does not further democratic self-government in the way that speech about the government does."[156] Second, *Garcetti* functions as a proxy for the Establishment Clause when it comes to on-the-job religious expression. The Establishment Clause, of course, applies against government action,[157] and public-employee on-duty speech is essentially government speech.[158] Therefore, applying *Garcetti* to religious expression essentially instantiates a bright-line rule respecting Establishment Clause concerns.[159] Applying *Garcetti* to public-employee religious expression would allow a state or local government to, for example, lawfully discipline a middle school teacher for proselytizing his students during history class or a state-employed nurse for handing out religious literature to her clients during an in-home visit.

Garcetti functions as a proxy Establishment Clause rule preventing on-the-job religious expression by public employees. Under the thinner, more reasonable conception of free exercise primacy, public-employee religious expression claims—just like nonreligious speech claims—would be subject to *Garcetti*'s bright-line rule. Expression, religious or not, pursuant to official job duties would remain unprotected. Expression not pursuant to official job duties would be treated just like private religious expression. Government action that substantially burdens religious exercise and is either not neutral or not generally applicable would be subject to strict scrutiny.

C. Addressing the Objections to Free Exercise Primacy

There are several objections one might make to even the thinner version of free exercise primacy. This Note addresses the following four objections, though surely there are others. The first objection is that courts shouldn't apply *any* tier of scrutiny. The second objection is that free exercise primacy doesn't take enough account of the Establishment Clause. The third objection is that free exercise primacy doesn't fully recognize the state's interest in regulating an employee's speech that negatively impacts the employer's ability to pursue its

155 Corbin, *supra* note 51, at 1243 (quoting Norton, *supra* note 32, at 4).

156 *Id.* at 1245.

157 *Id.* at 1207; Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion).

158 *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006); *see also* Corbin, *supra* note 51, at 1199 ("[*Garcetti*] suggests, although it does not explicitly state, that public employee speech pursuant to official duties is government speech.").

159 *See* Corbin, *supra* note 51, at 1247 ("Public employees practicing religion pursuant to their official duties amounts to government religion, or at least government-sponsored religion, and should trigger Establishment Clause scrutiny.").

mission. The final objection is that there's no good reason to treat religion and nonreligious expression differently.

The first objection is that courts shouldn't apply *any* tier of scrutiny to public-employee religious expression. This objection is likely to be made primarily by originalists.[160] Rather than replace *Pickering* balancing with the existing free exercise scrutiny regime, why not a test more rooted in history and tradition? But arguing for bringing public-employee religious expression in-line with existing free exercise doctrine is not to say that free exercise doctrine should not move away from the tiers of scrutiny. It's conceivable that the Court moves away from tiers of scrutiny analysis in First Amendment jurisprudence and replaces the existing balancing regime with more categorical, per se rules that better reflect history and tradition. Deciding whether to overrule *Employment Division v. Smith*[161]—and, if so, what to replace it with—is a task for the Court.[162] Dumping *Pickering* balancing for religious-expression claims in favor of the existing free exercise framework does nothing to prevent the Court from moving away from *Smith*.

The second objection is that treating public-employee and private-employee religious expression alike doesn't take sufficient account of the Establishment Clause. Surely states and localities have a greater interest in avoiding the religious expression of individuals who work for and represent the government itself. However, as discussed above,[163] *Garcetti's* application instantiates Establishment Clause values by blocking religious expression pursuant to official government job duties. Thus the objection flounders unless there is reason to think that doctrine governing public-employee religious expression ought to take even more account of the Establishment Clause. But it's not clear why the Establishment Clause should have anything to say about public-employee religious expression not pursuant to official duties. After all, such expression is *private*. And in *Kennedy*, the Court rejected the argument that the Establishment Clause can "trump" a public employee's protected expression.[164] Sometimes government employees function as employees. But sometimes they function as *citizens*. And

160 *See* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 73 (2019) ("The tiers of scrutiny have no basis in the text or original meaning of the Constitution. They emerged as a political solution invented by the justices to navigate internal factions at the Supreme Court, and they do not withstand critical analysis even on their own terms.").

161 494 U.S. 872 (1990).

162 For commentary on the challenges of replacing *Smith*, see *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

163 *See supra* Section III.B.

164 *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022).

when that's the case, their religious expression should be just as protected as that of their fellow citizens.

The third objection is that free exercise primacy doesn't fully recognize the state's interest in regulating an employee's speech that negatively impacts the government's ability to function. Undoubtedly, some employee speech not pursuant to official job duties may reveal something about that employee's fitness for the job. For example, "a probationary prison guard's off-duty anti-Semitic outburst at a bank . . . signals his own inability to handle prisoners' provocative insults when on the job."[165] The government's interest in the above example is not linked to audience reaction: "[t]he proper referent is not *the impact* of the speech qua speech, but *the information* the speech provides about its speaker."[166] Furthermore, the government-qua-employer may have an interest in the associational quality of an employee's off-duty speech.[167] Even if the off-duty speech doesn't necessarily suggest that the employee cannot effectively do his job, it could still effect the government's "ability to communicate its own views effectively."[168] Legal doctrine preventing the government from disciplining an employee for expression that reveals an inability to adequately function as an employee would be bad legal doctrine.

There are two reasons to think the above objection doesn't sink free exercise primacy. First, it's not clear how often off-duty *religious* expression would in fact reveal an inability to adequately perform one's job duties. A widely seen racist tirade by a white police officer who regularly patrols a predominantly African-American neighborhood clearly interferes with the police department's interest in fostering trust with the community. But is there an analogue for religious speech? Perhaps not. There's no lack of caselaw showing that nonreligious speech is sometimes indicative of an inability to adequate perform one's job duties.[169] But there's a distinct lack of caselaw exemplifying this phenomenon in the context of religious speech, which might suggest that it's not much of a problem.[170] Second, even conceding that off-duty public-employee *religious* expression could indicate an inability to adequately perform one's job duties, there's little reason to

165 Norton, *supra* note 32, at 48 (citing Hawkins v. Dep't of Pub. Safety & Corr. Servs., 602 A.2d 712, 720 (Md. 1992)).

166 Kozel, *supra* note 138, at 2026 (emphasis added).

167 *See* Norton, *supra* note 32, at 41–46.

168 *Id.* at 41.

169 *See id.* at 48–49 n.195 (citing cases in which courts have found off-duty public-employee speech that adversely affected the employee's ability to perform his or her job).

170 *But see id.* at 6 (citing Scott Jaschik, *When Equity Official Takes Anti-Gay Stance*, INSIDE HIGHER ED (May 5, 2008), http://www.insidehighered.com/news/2008/05/05/Toledo [https://perma.cc/J9Q2-83UP]).

think such claims cannot be adequately resolved per this Note's approach. Strict scrutiny is, of course, a notoriously high bar.[171] But the government action will only be subject to strict scrutiny if it's first found to be either not generally applicable or not neutral toward the plaintiff's religious exercise.[172] As public-employee religious-expression claims have not been litigated under the Free Exercise Clause, it's difficult to speak generally about how courts would resolve them. But a government showing that an employee's religious expression truly harms the government's ability to function (other than by merely creating workplace tension or disruption) ought to qualify as a compelling government interest and pass strict scrutiny if the government action in question also constitutes the least restrictive means.

The final—and perhaps strongest—objection is that such an approach would essentially create a special rule for *religious* speech. Why, one might ask, should courts treat public-employee religious expression as different than nonreligious expression? Fully resolving this objection requires delving into a deeply theoretical and value-laden debate about whether—and, if so, to what extent—religion is special.[173] Resolving such a complicated and fraught debate is far beyond the purview of this Note. But it's worth pointing out that one's views on the question of whether (and in what way(s)) religion is special will likely influence how one views the prospect of treating religious speech somewhat different than nonreligious speech. If one thinks there's no good reason for singling out religion, then free exercise primacy is likely to look unattractive—at least as long as free speech claims continue to be litigated under *Pickering* balancing. If one thinks there is good reason for singling out religion, then free exercise primacy might look more attractive—even if free speech claims continue to be litigated under *Pickering* balancing.

The heart of the objection can be stated as follows: regardless of whether religion is in *some sense* special, it's not special in the *relevant sense*. That is, religious expression is not special such that it warrants different treatment from that of nonreligious expression. Michael Dimino has argued against divergent standards governing generally applicable laws that burden speech and religious exercise:

> As a theoretical matter, both rights are part of the right to be free from government interference in one's thoughts, beliefs, and

171 *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting) ("[S]trict scrutiny leaves few survivors.").

172 *See supra* INTRODUCTION.

173 *Compare* Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1377–1403 (2012), *and* BRIAN LEITER, WHY TOLERATE RELIGION? 54–67 (2013), *with* Lund, *supra* note 103, at 493–500, *and* Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

> feelings. As a practical matter, one's right to speak includes the right to speak about religious topics, so that "(m)any free exercise claims can (. . .) be recast as a freedom of speech or freedom of expressive association claims."[174]

Others have argued that consistent application across First Amendment rights is a point in favor of applying *Pickering* to free exercise claims because "[u]sing the same test to analyze a broad range of First Amendment rights would be consistent with the notion that the Framers wrote the First Amendment as one thought in order to protect the broad notion of 'freedom of conscience' or 'freedom of expression.'"[175] In other words, protecting religious expression is primarily about protecting *conscience*. And as protecting nonreligious expression is also about protecting conscience, there's no good reason to treat *religious* expression on different, more favorable terms. Some circuit court judges, in choosing to apply *Pickering* balancing to free exercise claims, have also gestured at this objection.[176]

The objection, as put by Dimino, has both theoretical and practical appeal. As the Court recently reiterated in *Kennedy*, the Free Speech and Free Exercise Clauses *do* provide substantial "overlapping protection for expressive religious activities."[177] And as a theoretical argument, it seems difficult to doubt that both rights are at least partially grounded in autonomy-based justifications.[178] And as a historical matter, the inconsistent-treatment objection is strong if it's correct to say that "the rights of the First Amendment are derived from the same concerns and are of equal nature."[179]

But is there still good reason to think that religious expression is special enough to warrant slightly different treatment here? After all, the Constitution undoubtedly reflects a judgment that religion *is special*.[180] Perhaps religion's specialness is grounded in its (perceived)

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174 Dimino, *supra* note 141, at 623 (quoting Rubenfeld, *supra* note 83, at 810 n.96).

175 *See* Brian Richards, Note, *The Boundaries of Religious Speech in the Government Workplace*, 1 U. PA. J. LAB. & EMP. L. 745, 751 (1998).

176 *See* Brown v. Polk Cnty., 61 F.3d 650, 658 (8th Cir. 1995) ("[B]ecause we see *no essential relevant differences* between [the free speech and free exercise rights], we shall endeavor to apply the principles of *Pickering* to the case at hand." (emphasis added)); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001); Berry v. Dep't of Soc. Servs., 447 F.3d 642, 648–49 (9th Cir. 2006) (rejecting the appellant's argument that the court should apply heightened scrutiny relative to *Pickering* balancing because the restrictions in question violated appellant's rights under *both* the Free Speech and Free Exercise Clauses).

177 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022).

178 *See* Dimino, *supra* note 141, at 624–25.

179 *See* Richards, *supra* note 175, at 780. For work that casts some doubt on this claim as a historical matter, see Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 295 (2017).

180 *See* McConnell, *supra* note 173, at 3.

imposition of "dut[ies] to a *higher* authority"—namely, God.[181] Adherence to conscience for nonreligious reasons does not involve calculations about eternal damnation versus eternal glory. Given that religious freedom involves unique obligations (or at least the perception of such obligations by the individual practitioner) between an individual and God, there may be special reason to protect an individual's ability to fulfill those (perceived) obligations. Alternatively, perhaps religion's specialness is grounded in its unique role in fostering a morally virtuous citizenry. As discussed earlier,[182] this view has deep roots in American political thought, going back to Founding-era figures like Washington and Adams.[183] Take, for example, the Northwest Ordinance,[184] Washington's *Farewell Address*,[185] or John Adams' famous statement that "[o]ur Constitution was made only for a moral and religious People."[186] Each statement asserts that that religion is especially important for the health of the nation's civic culture. If religion has unique salience in public life and civic culture, then there is good reason to be especially concerned about creating doctrinal rules that stifle religious expression—even that of public employees. The above discussion presents just two ways in which it might be said that religion is special and is not meant to constitute a comprehensive cataloguing of such ways.[187]

In response, one could argue that setting forth some justification for why religion is *in some sense* special (or at least was understood to be when the First Amendment was ratified) isn't justification for treating the religious expression of public employees different than comparable nonreligious expression. As Michael McConnell points out, "[t]he Constitution 'singles out' a number of ideas, interests, and

181 *Id.* at 30 (emphasis added).

182 *See supra* Section II.A.

183 WITTE ET AL., *supra* note 104, at 53–57; *see also* Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1406 (2021) ("Religion in America and in American constitutional law has long been an irreplaceable *public* as well as private good. The Founding is unfathomable without taking on board this commitment of those who wrote and later ratified the Constitution." (footnote omitted)).

184 *See* Northwest Territory Ordinance of 1789, ch. 8, 1 Stat. 50, 52 n.(a) ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

185 George Washington, Farewell Address (Sept. 17, 1796), *reprinted in* S. DOC. NO. 106-21, at 20 (2000) ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.").

186 John Adams, *From John Adams to Massachusetts Militia, 11 October 1798*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-3102 [https://perma.cc/76VZ-L585].

187 For more comprehensive accounts of the various ways in which religion might be special, see generally, among others, Schwartzman, *supra* note 173, and McConnell, *supra* note 173.

concerns," *including speech.*[188] So if the Constitution treats both religion and speech specially, why treat religious speech as *especially* special?

Debating religion's specialness can come to feel a bit like a never-ending merry-go-round. Thankfully, it's one we need not ride endlessly.[189] Ultimately, attempting to justify differential treatment between religious and nonreligious expression exclusively on theoretical grounds reflects a misplaced obsession with abstraction and theoretical consistency. As Christopher Lund put it, "the Supreme Court does not arrive at its legal doctrines through abstract thought alone; it comes to its doctrines through the lived experience of having to resolve particular legal disputes."[190] This Note has argued that *Pickering* balancing (and most of its plausible alternatives) make for poor legal doctrine. Refusing to apply *Pickering* balancing or another similarly flawed doctrine to free exercise claims does not require buying the claim that religious expression is entitled to special treatment because of some philosophical or metaphysical reason. It does not require buying the claim that a religious citizenry fosters moral virtue or good governance. Rather, refusing to extend *Pickering* balancing requires nothing more than an unwillingness to extend bad doctrinal rules to new areas—something judges and Justices do on a regular basis.[191]

CONCLUSION

This Note has argued that rather than extend or reformulate *Pickering* balancing, revert to a Holmesian framework, or apply intermediate scrutiny, courts should treat public-employee religious expression claims brought under the Free Speech and Free Exercise Clauses just as they would treat free exercise claims brought by private citizens—so long as the public employee's claim clears the *Garcetti* threshold.

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188 McConnell, *supra* note 173, at 31.

189 *See* Lund, *supra* note 103, at 498 ("So many have spent so much time trying to find a single characteristic (or set of characteristics) that can cleanly and perfectly separate (all) religious commitments from (all) nonreligious commitments and can justify giving special protection to the religious commitments but not to the secular ones. Maybe it can be done; maybe it cannot. But it does not need to be done. Distinctive protections for speech can be justified by reference to values not distinctive to speech. Distinctive protections for religion can be justified by reference to values not distinctive to religion." (footnotes omitted)).

190 *Id.*

191 *Cf.* Garza v. Idaho, 139 S. Ct. 738, 756–59 (2019) (Thomas, J., dissenting) (arguing that the Court should be careful before extending precedent that arguably conflicts with original meaning); NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Loc. 229, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting from the denial of rehearing en banc) ("But, where precedent is seriously questioned 'as an original matter' or under current Supreme Court doctrine, courts 'should tread carefully before extending' it." (quoting *Garza*, 139 S. Ct. at 756 (Thomas, J., dissenting))).

Large questions would remain. For example, where is the line between speech pursuant to official duties and off-duty speech? When is government action not neutral or generally applicable? What constitutes a substantial burden on religious exercise? When can the government succeed under strict scrutiny? These are not small questions, and much clarifying work remains for scholars and courts with respect to each of the above questions. But these are not new questions. These are questions that existing free exercise doctrine already must confront.

While imperfect, applying *Garcetti* while substituting existing free speech scrutiny for *Pickering* balancing avoids the problems wrought by *Pickering* balancing and each plausible alternative. This Note's proposed solution—free exercise primacy—more adequately respects the employee's interest in religious exercise without neglecting the state's interest as employer.