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NOTE

LIKES AND RETWEETS CAN'T SAVE YOUR JOB: PUBLIC EMPLOYEE PRIVACY, FREE SPEECH, AND SOCIAL MEDIA

FRANK E. LANGAN

I. INTRODUCTION

Public employment poses a special conundrum in employee privacy rights. The First Amendment to the United States Constitution bars Congress from making any law "abridging the freedom of speech."[1] This right exists irrespective of the intent behind the speech.[2] Indeed, the Supreme Court has recognized that "speech on public issues occupies the 'highest rung of the heirarchy [*sic*] of First Amendment values,' and is entitled to special protection."[3] Nevertheless, when a citizen becomes a government employee, they take on a "dual status" as both employee and citizen,[4] and the free speech rights that extend to citizens are often curtailed for employees.[5] In fact, until the mid-twentieth century, public employees were denied a First Amendment cause of action for wrongful termination, based on Oliver Wendell Holmes's pronouncement that the right to free speech did not extend to "a constitutional right to be a policeman."[6]

It is well-settled today, however, that public employees do not forfeit all of their free speech rights for a paycheck.[7] Indeed, the Supreme Court held in 1987 that "a purely private statement will rarely, if ever, justify discharge of a public employee."[8] The *Rankin* Court appeared to give public employees license to speak as they wished in private without being

1. U.S. CONST. amend. I.

2. E. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961).

3. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Company, 458 U.S. 886, 913 (1982) and Carey v. Brown, 447 U.S. 455, 467 (1980)).

4. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 599 (2008).

5. *Id.*

6. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892), *but see, e.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716–17 (1996) (noting that the Supreme Court had, "for decades now," rejected Justice Holmes's proposition).

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

8. Rankin v. McPherson, 483 U.S. 378, 388 n.13 (1987).

fired.[9] Yet, over the last thirty years, courts have eroded that right, often putting the government's interests in an efficient workspace over the employee's free speech rights.[10]

This phenomenon has been exacerbated by the introduction of an entirely new form of speech on an entirely new medium. Social media, described as "online communications in which individuals shift fluidly and flexibly between the role of audience and author," has not only broadened the definition of speech but also made speech much easier to trace back to the speaker.[11] The question of an employer's ability to limit or manage its employees' social media presence has exasperated employees and employers alike, in both the public and private sectors. To properly evaluate public employees' First Amendment rights in the twenty-first century, this paper, first, provides a broad overview of social media. Next, it reviews the evolution of free speech jurisprudence generally and focuses on the free speech issues caused by the rise of social media. The paper then provides suggested strategies for both government employers and public employees to protect their respective interests.

II. Social Media and Its Legal Implications

The term "social networking sites" refers to websites "that permit[ ] persons to become registered users for the purpose of establishing personal relationships with other users through direct or real-time communication with other users or the creation of web pages or profiles available to the public or to other users."[12] Examples of such websites include Facebook, Twitter, and LinkedIn.[13] Essentially, a user creates a profile, uses it to connect to people they know, and then connect to those people's connections,

9. *See also* Branti v. Finkel, 445 U.S. 507, 515 (1980) ("If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.").

10. *See, e.g.*, Palmer v. Cty. of Anoka, 200 F.Supp.3d 842, 847 (D. Minn. 2016) ("The First Amendment protects the employee's speech only if the employee's interests [in commenting upon matters of public concern] outweigh the interests of the government employer [in promoting the efficiency of the public services it performs].").

11. Heather A. Morgan & Felicia A. Davis, *Social Media and Employment Law: Summary of Key Cases and Legal Issues,* 14–15 (2013), http://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/aba_national_symposiumontechnologyinlaboremploymentlaw/10_socialmedia.authcheckdam.pdf.

12. Monique C.M. Leahy, *Facebook, MySpace, Linkedin, Twitter, and Other Social Media in Trials*, 122 Am. Jur. Trials 421 (last updated Mar. 2017).

13. *Id. See generally* Facebook, https://www.facebook.com/pg/facebook/about/ (last visited Mar. 9, 2017); Twitter, https://about.twitter.com/company (last visited Mar. 9, 2017); LinkedIn, https://press.linkedin.com/about-linkedin (last visited Mar. 9, 2017). This paper refers primarily to these three websites for examples because they are the most prevalent. This does not mean, however, that employment law issues or other legal disputes cannot arise from other social networking websites.

creating a "network."[14] Social media, on the other hand "refers to the dissemination of information through social interaction that is enabled by web-based technologies that have facilitated [the] creation and explosive growth of social media sites such as Facebook, LinkedIn, [YouTube], Twitter and others."[15] Employers are often more concerned with social media than they are with an employee's general presence on social networking sites, as an employee's untoward remarks can result in damage to the employer's reputation, or, in some cases, employer liability.[16]

Social networking has also created new legal issues that could not have been anticipated in years prior. For example, a Tennessee woman learned the hard way that "poking" someone else on Facebook can constitute the violation of a protective order when she was arrested and charged with a misdemeanor.[17] Likewise, social media has derailed many personal injury claims where a plaintiff's tweets or Facebook posts have cast doubt on his or her alleged injuries.[18] Even jury selection has gone social, with attorneys researching prospective jurors and basing questions and strikes on social media posts.[19] The brunt of the legal issues surrounding social media posts stems from the often-mistaken assumption that the posts were private, or at least more private than the person who posted them expected.[20] In the employment context, for example, employees may forget that their networks include coworkers and superiors, or they may simply believe that their privacy settings are stronger than they are.[21]

The pervasive nature of social networking sites and social media has not gone unnoticed by the Supreme Court. On February 27, 2017, the Court heard oral arguments in *Packingham v. North Carolina*, a case concerning whether North Carolina could constitutionally ban sex offenders from access to social networking sites.[22] Justice Elena Kagan pointed out that "everybody uses Twitter," including President Donald Trump, all members of

14. JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW 18–19 (2010).

15. Alan S. Gutterman, *Social Media Policies and Procedures*, 2012 NO. 6 BUS. COUNS. UPDATE 2 (Jun. 2012).

16. Morgan & Davis, *supra* note 11, at 14–15. *See also* BROWNING, *supra* note 14, at 84–85 (noting that employee social media posts may put an employer's intellectual property at risk or expose the employer to liability for libel or securities law violations).

17. Martha Neil, *Did Court Order Ban Facebook 'Poke'?*, A.B.A. J. (Oct. 13, 2009), http://www.abajournal.com/news/article/did_court_order_ban_facebook_poke.

18. BROWNING, *supra* note 14, at 69–76.

19. *Id.* at 173–80; *see also* ADAM I. COHEN, SOCIAL MEDIA: LEGAL RISK & CORPORATE POLICY 19–21 (2013) (discussing ethics opinions from New York City and San Diego regarding an attorney's freedoms and duties when reviewing a juror's social media posts).

20. COHEN, *supra* note 19, at 12–14; *see, e.g.*, NLRB v. Pier Sixty, LLC, 855 F.3d 115, 125 (2d Cir. 2017) (employee believed Facebook post that resulted in his termination was private).

21. COHEN, *supra* note 19, at 12.

22. Transcript of Record, Packingham v. North Carolina, 137 S. Ct. 1730 (2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1194_0861.pdf [hereinafter *Packingham* Transcript].

Congress, and every state governor.[23] She added that social media sites, such as Facebook and Twitter, "have become incredibly important parts of our political culture, of our religious culture."[24] Justice Kagan further noted that "[social networking] is the way people structure their civic community life."[25] Likewise, Justice Ginsburg noted that social networking sites now constitute "a very large part of the marketplace of ideas" and that the First Amendment includes the right to receive information as well as the right to free speech.[26] Justice Alito also joked that "there are people who think life is not possible without Twitter and Facebook."[27]

The Supreme Court issued its opinion four months later.[28] Writing for the majority, Justice Kennedy described "cyberspace—the 'vast democratic forums of the Internet'" as the "most important place[ ] . . . for the exchange of views."[29] The Court added that "social media users employ these websites to engage in a wide array of First Amendment activity."[30] The Court then held that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[31] Ultimately, the Court invalidated North Carolina's law.[32] To be sure, *Packingham* does not stand for the prospect that the Supreme Court would ever require a private business, such as Facebook or Twitter, to allow access to all citizens.[33] But *Packingham* nevertheless defines social media as speech within the ambit of the First Amendment, and thus reflects a Court leery of state-imposed restrictions on social media.

If, as Justice Kennedy suggested in *Packingham*, social media is the twenty-first century "public square," then the logical conclusion appears to be that social media posts are public speech.[34] And yet, social networking sites have taken the time to develop extensive privacy policies and to offer their users adjustable privacy settings. For example, Facebook promises its users: "You have control over who sees what you share on Facebook."[35] Twitter, on the other hand, cautions that "[w]hat you share on Twitter may

23. *Id.* at 28.
24. *Id.* at 32.
25. *Id.* at 46.
26. *Id.* at 47.
27. *Packingham* Transcript, *supra* note 22, at 54.
28. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
29. *Id.* at 1735 (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).
30. *Id.* at 1735–36.
31. *Id.* at 1737.
32. *Id.* at 1738.
33. *See* Grandbouche v. Clancy, 825 F.3d 1463, 1466 (10th Cir. 1987) ("the First Amendment does not normally restrict the actions of purely private individuals"); *cf.* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (declining to apply the Fourteenth Amendment to "merely private conduct, however discriminatory or wrongful").
34. *Packingham* Transcript, *supra* note 22, at 28.
35. *Privacy Basics*, FACEBOOK, https://www.facebook.com/about/basics (last visited Apr. 15, 2017).

be viewed all around the world instantly. You are what you Tweet!"[36] LinkedIn takes a middling approach, telling its users that they freely agree to the collection and use of their information by using the social networking site but that they can also withdraw or modify that consent by changing their account settings.[37] Similarly, Instagram's privacy policy states that the photos and videos its users post are available to the public, "as controlled by any applicable privacy settings that [the user sets]."[38] All four policies, however, seem contrary to Justice Kennedy's analogy to the "public square." A citizen stepping into the public square to speak has no way to adjust or limit who can hear their speech. But a Facebook user who can limit the audience of their posts, or a Twitter or Instagram user who can set their account to "private" so that only their selected, pre-approved followers can see their social media content, is fundamentally different than the citizen who speaks in the public square.

This friction has caused and continues to cause problems with applying First Amendment case precedent to cases involving online "speech." The next section will review the development and current state of the law surrounding public employee First Amendment rights and will highlight the tension between pre-internet First Amendment jurisprudence and the definition of "speech" in the social media age.

III. Employee First Amendment Rights and Social Media

A. *Private Employees*

1. At-Will Employment States

Private employees are largely subject to the doctrine of at-will employment.[39] This means that "an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability."[40] At-will employers also "can change the terms of the employment relationship with no notice and no consequences," again provided that their reasons for doing so are not illegal.[41]

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36. *Twitter Privacy Policy*, Twitter, https://twitter.com/privacy?lang=en (last visited Sept. 30, 2016).

37. *Your Privacy Matters*, LinkedIn, https://www.linkedin.com/legal/privacy-policy (last visited Apr. 24, 2017). Users should note, however, that LinkedIn's privacy policy changed effective June 7, 2017; *Privacy Policy*, LinkedIn, https://www.linkedin.com/legal/preview/privacy-policy (last visited May 4, 2017).

38. *Privacy Policy*, Instagram, https://help.instagram.com/155833707900388 (last visited Jan. 19, 2013).

39. *The At-Will Presumption and Exceptions to the Rule*, Nat'l Conf. of St. Legislatures, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last visited Mar. 23, 2017).

40. *Id.*

41. *Id.*

"[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."[42] Private employers, therefore, are not constitutionally prohibited from abridging their employees' speech, and social media posts by private employees can, and often do, lead to their termination. A particularly well-known example of a woman who was fired for complaining on Facebook about her boss, who she was Facebook friends with, has reached almost mythic status on the internet.[43] In fact, some internet users have even dedicated themselves to contacting the employers and educators of people who post racist messages on their social media accounts.[44] While these employees may have other claims regarding their firings, they cannot raise the First Amendment as a defense to being terminated by a private employer at-will.[45]

2. *Montana*

Montana, however, has carved out an exception to the at-will employment doctrine. Under Montana's Wrongful Discharge from Employment Act, non-probationary employees can only be discharged for good cause.[46] Good cause means "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[47] Thus, private employees in Montana have an additional level of protection and theory for wrongful discharge that no other state offers. However, no Montana court has addressed the issue of whether a private employee can be fired for social media posts.[48] The question remains open, therefore, as to whether such a

42. Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

43. Cathal Kelly, *Facebook Firing After 'Friend' Boss Ripped*, THE STAR (Aug. 15, 2009), https://www.thestar.com/news/world/2009/08/15/facebook_firing_after_friend_boss_ripped.html; *see also Calling Boss 'Pervy Wanker' on Facebook—Terminable Offense?*, HR DAILY ADVISOR (Dec. 14, 2010), http://hrdailyadvisor.blr.com/2010/12/14/calling-boss-pervy-wanker-on-facebook-terminable-offense/ (citing this example as one instance of employees being fired for social media posts); *but see Facebook Firing*, SNOPES, (Aug. 12, 2009), http://message.snopes.com/showthread.php?t=49414 (message board debating validity/verifiability of the Facebook post in question and/or whether it was a hoax).

44. *Racists Getting Fired*, TUMBLR, http://racistsgettingfired.tumblr.com/ (last visited Apr. 2, 2017); *see also Racists Getting Fired*, *GOTTEN*, http://racistsgettingfired.tumblr.com/tagged/GOTTEN (last visited Apr. 2, 2017) (collecting examples of people who have actually been fired or expelled as a result of blog visitors contacting their employers and/or educators about social media posts listed on the blog).

45. This does not mean that various state laws may not afford similar protections. *See, e.g.*, CAL. LAB. CODE § 1101 (West 2017) (barring all employers from making any rule or policy compelling or restricting their employees' political affiliations).

46. MONT. CODE. ANN. § 39-2-904(1)(b) (2017).

47. *Id.* at § 39-2-903(5) (2017).

48. The closest case to the subject of this paper is Rusthoven v. Victor Sch. Dist. No. 7, wherein a *pro se* plaintiff alleged he was discriminated against in part on the basis of his Facebook posts. No. CV-14-170-M-DLC, 2014 WL 6460190, at *4 (D. Mont. Nov. 17, 2014). However, because the employee in question pled his claim under the Genetic Information Nondiscrimination

claim would be tenable, or whether the extra layer of protection, at least in this context, is illusory.

B. Public Employees

1. Overview

Up until the 1950s and 1960s, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."[49] The term "public employees" refers to people who are "employed in a department responsible for conducting the affairs of a national or local government."[50] These employees are faced with a special duality as both citizens and employees. The Supreme Court has articulated this duality by recognizing that "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large."[51] In the eyes of the Court, it is "common sense" that "government offices could not function if every employment decision became a constitutional matter."[52] The *Engquist* Court noted two main principles in public employee jurisprudence:

> First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, [courts] consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.[53]

Thus, while public employees maintain some constitutional rights, courts will also consider the government's interests as an employer, and will also require plaintiff-employees to make some showing that their constitutional rights are implicated.[54]

"At the same time, the [Supreme] Court has recognized that a citizen who works for the government is nonetheless a citizen."[55] It is well-settled

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Act of 2008 (GINA) but did not actually post his genetic information on Facebook, the district court dismissed his suit for failing to state a claim. *Id.*

49. Connick v. Myers, 461 U.S. 138, 143–44 (1983); *see also* Joseph O. Oluwole, 32 VT. L. REV. 317, 321–22 (2007) (describing this time as the "Era of Categorical Denial" of public employee free speech rights).

50. *Civil Servant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

51. Engquist, v. Or. Dep't of Agric., 553 U.S. 591, 599 (2008).

52. *Connick*, 461 U.S. at 143.

53. 553 U.S. at 600 (internal citation omitted).

54. *But see* O'Connor v. Ortega, 480 U.S. 709, 721–22 (1987) (holding that the Fourth Amendment does not require public employers to obtain a warrant before searching an employee's office).

55. Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

that public employees do not fully abandon their First Amendment rights when they accept their positions.[56] In fact, the Supreme Court has recognized the importance of allowing public employees to speak publicly because they are " 'the members of a community most likely to have informed and definite opinions about a wide range of matters related, directly or indirectly, to their employment."[57]

2. Pickering v. Board of Education

In *Pickering v. Board of Education*, the Supreme Court provided the framework for delineating the extent of a public employee's free speech rights.[58] Marvin Pickering, a teacher, was fired for writing a letter to his local newspaper criticizing the local Board of Education and school district superintendent.[59] The *Pickering* Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[60] It also noted that "the public interest in having free and unhindered debate on matters of public importance . . . is so great" that public officials could not recover damages for defamatory statements absent a showing that the person who made those statements knew they were false or made them with reckless disregard for the truth.[61] The Court thus concluded that Pickering's termination violated the First Amendment.[62]

3. Connick v. Myers

Since *Pickering*, courts have been tasked with striking a balance between employee free speech rights and governmental interests in avoiding disruptions by its employees. While the law has continued to defend public employees from interference with their constitutional rights, courts have also worked to hone and refine elements of *Pickering*'s holding. For example, in *Connick v. Myers*, a prosecutor who was aggrieved by a proposed transfer distributed a questionnaire to her coworkers regarding various office policies, office morale, and whether they felt a grievance committee should be created.[63] She was terminated both for refusing to accept the transfer, and for "creating a 'mini-insurrection' within the office" with her

56. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); *see also* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979) (extending First Amendment right to private communications between public employee and supervisor, in addition to public communications).

57. Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 397 (2011) (quoting *Pickering*, 391 U.S. at 572).

58. 391 U.S. 563 (1968).

59. *Id.* at 564–65.

60. *Id.* at 574.

61. *Id.* at 573.

62. *Id.* at 575.

63. Connick v. Myers, 461 U.S. 138, 140–41 (1983).

questionnaire.[64] When the former prosecutor sued alleging that her First Amendment rights were violated, her employer replied that, while her questionnaire constituted "speech," it dealt with only internal office issues, and thus did not touch on a matter of public concern.[65] The Court agreed and held that, based on the *Pickering* line of cases, if a plaintiff's speech "cannot be fairly characterized as constituting speech on a matter of public concern, then it is unnecessary for us to scrutinize the reasons for her discharge."[66] "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices."[67]

This raises the question: what does it mean to "relate" to "any matter of political, social, or other concern to the community?" *Connick* provides that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[68] Read together with the Court's characterization of "public concern" as "any matter of political, social, or other concern to the community," *Connick* could be construed to create a broad, flexible standard for public employees to speak their minds.[69] The reality, however, is that *Connick* created a new defense for government employers. If the government employer can show that the public employee's speech does not touch on any matters of political, social, or community concern, then that public employee cannot claim that their employer violated the First Amendment. A private grievance specific to the employee and his or her employer, therefore, does not suddenly fall within the ambit of the First Amendment because the employer is a government agency.[70]

4. Rankin v. McPherson

The Supreme Court revisited the boundary it established in *Connick* just four years later in *Rankin v. McPherson*. In *Rankin*, a clerical worker styled as a "deputy constable" in the Harris County Constable's Office, Ardith McPherson, was discussing the 1981 attempt on Ronald Reagan's life.[71] After criticizing President Reagan's stance on food stamps and Medi-

64. *Id.* at 141.
65. *Id.* at 143.
66. *Id.* at 146.
67. *Id.*
68. *Connick*, 461 U.S. at 147–48.
69. Ira P. Robbins, *What is the Meaning of "Like"?: The First Amendment Implications of Social-Media Expression*, 7 FED. CTS. L. REV. 127, 140–41 (2013).
70. *See, e.g.*, Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985) (noting that the public is not concerned with "private" matters between employer and employee). It bears noting, however, that if the employee's private grievance regarding his or her working conditions concerns a report of an illegality, the speech may be protected by whistleblower statutes, rather than the First Amendment. *See* Waters v. Churchill, 511 U.S. 661, 674 (1994).
71. 483 U.S. 378, 380–81 (1987).

caid benefits, the deputy constable said "if they go for him again, I hope they get him."[72] A third coworker overheard this statement and reported it to the Constable, who fired McPherson.[73]

McPherson sued, alleging a violation of her First Amendment rights.[74] The Southern District of Texas held that advocating for the President's assassination was not a matter of public concern.[75] The Fifth Circuit, however, held that "the life and death of the President are obviously matters of public concern."[76] The Supreme Court held that "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern," and concluded that McPherson's speech "plainly dealt with a matter of public concern."[77] In doing so, the Court emphasized that an attempt on the President's life is "a matter of heightened public attention," and that McPherson's original statement was "made in the course of a conversation addressing the policies of the President's administration."[78]

The *Rankin* Court then moved to balancing McPherson's interest in making her statement against her employer's interests in promoting the efficiency of its services, as required by *Pickering*.[79] The Court noted that the pertinent considerations for such a balancing test were "whether the statement impairs discipline by superiors or 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."[80] The *Rankin* Court resolved this balance in favor of McPherson, noting that there was no evidence she had disrupted or "interfered with the efficient functioning of the office."[81] The Court further highlighted that there was no "danger that McPherson had discredited the office by making her statement in public."[82] "Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal."[83] Because McPherson's duties were purely clerical, her speech did not impact the functioning of the office, and she did not interact with the general public,

72. *Id.* at 381.
73. *Id.* at 381–82.
74. *Id.* at 383–84.
75. *Id.* at 385 n.8.
76. *Id.* at 385 (quoting McPherson v. Rankin, 786 F.2d 1233, 1236 (5th Cir. 1986)).
77. *Rankin*, 483 U.S. at 386–87.
78. *Id.* at 386. The Court also noted that the fact that McPherson had repeated her statement at her supervisor's request did not create a separate instance of speech which she could be terminated for. *Id.* at 386 n.10.
79. *Rankin*, 483 U.S. at 388.
80. *Id.*
81. *Id.* at 389.
82. *Id.*
83. *Id.* at 390–91.

the County Constable's Office's interest in terminating her was outweighed by McPherson's interests in her First Amendment rights.[84]

Rankin had two major impacts on public employee free speech rights. First, it established that the First Amendment protections of even controversial or distasteful speech extended into the arena of public employment, which helped establish a broad definition of "public concern" under *Connick*.[85] Second, *Rankin* carved out advantages in the *Pickering* balance for public employees who have minimal interaction with the public, and who make their statements in private.[86] These principles, taken at face value, seem to suggest that a statement made on an individual's private social networking profile that relates to a matter of public concern would be immunized. The case law that has developed in the thirty years since *Rankin,* however, has taken a decidedly pro-employer turn.

5. Garcetti v. Ceballos

Almost twenty years later, the Supreme Court added a caveat to *Rankin*'s protection of private speech that touches on a matter of public concern. In *Garcetti v. Ceballos*, Deputy Los Angeles County District Attorney Ceballos became aware of a potentially inaccurate affidavit that had been used to obtain a search warrant.[87] Ceballos reported these possible inaccuracies to his supervisors, and submitted multiple memoranda on the subject.[88] Ceballos claimed that, because he voiced his concerns, he was denied a promotion, was transferred to another courthouse, and had his duties reassigned.[89] Ceballos contended that these actions constituted retaliation in violation of the First Amendment.[90]

The Supreme Court noted that Ceballos spoke only to his superiors, rather than publicly but held that it would not serve *Pickering*'s goals to deny him the protections of the First Amendment solely because his speech occurred in the office.[91] Likewise, the Court held that the fact that Ceballos's memorandum concerned the subject matter of his employment did not automatically mean that he was not entitled to these same protections.[92] Rather, the Court found that the controlling factor was that his speech was made "pursuant to his duties," and held that "when public employees make statements pursuant to their official duties, the employees are not speaking

84. *Id.* at 392.

85. The Court did note, however, that had McPherson threatened to kill the President herself, the First Amendment would have been inapposite to her case. *Rankin*, 483 U.S. at 386–87.

86. *See id.* at 388 n.13 (noting that purely private speech will rarely justify discharging a public employee).

87. 547 U.S. 410, 413–14 (2006).

88. *Id.* at 414.

89. *Id.* at 415.

90. *Id.*

91. *Id.* at 420–21.

92. *Id.* at 421.

as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[93]

The duality recognized by *Pickering* and affirmed two years later in *Engquist* thus took on a new importance: under *Garcetti*, speech could be private, and could touch on matters of public concern but still not be protected because the employee was not speaking as a citizen. This immediately raised a pressing question: how broadly could the scope of an employee's "official duties" be construed?[94] Even Justice Souter, in his dissent, expressed concern that *Garcetti* could limit the First Amendment protections enjoyed by professors at public colleges and universities, whose speech and writings may be almost entirely attributable to their official duties.[95] The Court also admitted that it had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."[96] The *Garcetti* Court made it clear, however, that speech which merely "concerned" the employment duties was not the same as speech in the scope of those duties.[97] Additionally, in 2014, the Supreme Court made clear that it was overbroad to apply *Garcetti* to testimony pursuant to a subpoena, because the purpose of testifying in response to a subpoena is to fulfill an obligation as a citizen to speak the truth.[98] Fortunately, for purposes of this paper, the scope of an employee's official duties is largely a secondary consideration, because posting on social media is rarely an "official duty" of the public employees in this type of case.

6. Attempts to Apply This Precedent to Social Media "Speech"

The four major cases described above appear to create a framework where (1) public employees retain some of the First Amendment rights they are guaranteed as citizens[99] (2) provided that their speech touches on matters of public concern,[100] and (3) these protections are more likely to prevail if the employee speaks privately,[101] (4) unless they are speaking pursuant to

93. *Garcetti*, 547 U.S. at 421.

94. Krystal LoPilato, Recent Case, *Garcetti v. Ceballos: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537, 543 (2006).

95. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting). Justice Kennedy, writing for the majority, reserved this question in *Garcetti*. *Id.* at 425. Lower court opinions have sought to be more explicit. *See, e.g.*, Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2012) (holding that *Garcetti* does not apply to teaching and academic writing performed by public school teachers and public university professors).

96. *Id.* at 424.

97. *Id.* at 421.

98. Lane v. Franks, 134 S. Ct. 2369, 2379 (2014).

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

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

101. Rankin v. McPherson, 483 U.S. 378, 389–91 (1987).

their official duties as an employee.[102] Courts have had difficulty applying these general guidelines to social media speech, however, particularly with respect to whether an employee can ever speak "privately" when "speaking" on the internet.

Few appellate courts have had the opportunity to apply *Garcetti* in the context of social media. As discussed further in Section IV, the Fourth Circuit is on the cutting edge of First Amendment retaliation claims related to social media, having already ruled on whether "liking" a Facebook post constitutes "speech," and whether a public employer's social media policy can be a prior restraint on free speech. None of these cases, however, have spent much time assessing the parameters of *Garcetti*'s language regarding whether the speech was made pursuant to the employee's official duties.[103]

However, the Fifth Circuit has held that identifying oneself as a public employee, even on Facebook, does not erase the employee's First Amendment rights.[104] "To the contrary, such identification by public employees is welcome as they 'occupy trusted positions in society.'"[105] Thus, the Firth Circuit reasoned, *Garcetti* did not preclude a First Amendment retaliation claim by a former police officer who identified herself as such and used pronouns like "we" and "our" in her Facebook posts.[106] By contrast, the Sixth Circuit recently held that a fire chief who signed an email with his title constituted evidence that the email was sent pursuant to his official duties, over and above the fact that the information contained in the body of the email was information that he had a duty to distribute to his subordinates.[107] Thus, a circuit split currently exists regarding whether identifying oneself by one's title in an electronic "speech" can be evidence that the speech was made as an employee rather than as a citizen.

Even circuits that have not addressed *Rankin* or *Garcetti* in the context of social media still have established tests that offer some insight into how such claims would be litigated. For example, the First Circuit has created a two-part inquiry for *Garcetti* defenses: "(1) what are the employee's official responsibilities? and (2) was the speech at issue made pursuant to those responsibilities?"[108] For the first prong of this test, the First Circuit does not consider the job description but rather "the duties an employee is actually expected to perform."[109] This test could, in future cases, create a presumption that public employee social media posts are citizen speech, and not

102. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

103. *See generally* Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016); Bland v. Roberts, 730 F.3d 386 (4th Cir. 2013); Grutzmacher v. Howard Cty., 851 F.3d 332 (4th Cir. 2017).

104. Graziosi v. City of Greenville, 775 F.3d 731, 737 (5th Cir. 2015).

105. *Id.* (quoting *Garcetti*, 547 U.S. at 419).

106. *Id.*

107. Holbrook v. Dumas, 658 F. App'x 280, 288–89 (6th Cir. 2016).

108. Mercado-Berrios v. Cancel-Alegria, 611 F.3d 18, 26 (1st Cir. 2010).

109. *Id.* (quoting *Garcetti*, 547 U.S. at 424–25).

employee speech, unless posting on social media is one of the duties that employee is expected to perform. *Garcetti* is unlikely, therefore, to bar any civil servants in the First Circuit from claiming their tweets or YouTube videos are subject to the First Amendment.

There are some obvious exceptions to the doctrines described above. For example, the public university professor who "jokes" on Facebook about hiring a hit man to kill a student, by contrast, is understandably not afforded First Amendment protections, even if their speech was private and outside the scope of their ordinary duties.[110] Such speech evokes concerns about college campus shootings.[111] The example becomes more nuanced, however, if the verb is changed from "kill" to, for example, "slap," or if the professor simply writes "I hate my students" as a Facebook status. Does the professor have a right to express disappointing but not necessarily illegal sentiments such as "I hate my students?" What if the professor simply "likes" or "retweets" a post about (hypothetically) slapping a student? Can the university attempt to govern what the professors it employs do and do not say on social media? Does it make a difference if the professor's Facebook page says that they work for that university or not? What if the example is not a professor and a public university but rather a firefighter and a county? The next section attempts to offer a (by no means exhaustive) set of strategies that anticipate the answers to these questions. This paper devotes additional time to employee strategies because the employees bear the burden of proving that they were terminated in violation of their First Amendment rights.

IV. Moving Forward: Social Media Strategies for Government Employers and Employees

A. Employer Strategies

1. Government Employers Should Recognize That Their Social Media Policy May be a Prior Restraint on Free Speech.

The main issue facing government employers currently is whether a social media policy constitutes a "prior restraint" on free speech. Prior restraints on speech are heavily disfavored at law.[112] Likewise, "[c]ontent-based regulations are presumptively invalid."[113] A government employer that creates a policy dictating what subjects its employees cannot speak on

110. Browning, *supra* note 14, at 81.

111. *Id.*

112. *See* Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.") (internal quotation omitted).

113. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

runs the risk, therefore, of facially violating the First Amendment.[114] This issue was tangentially addressed in the employment context by the Supreme Court in *United States v. National Treasury Employees Union* ("*NTEU*"), where the Court held that, to regulate speech in anticipation of future harms, the government needed to demonstrate "real . . . not conjectural" harm that would be in fact alleviated "in a direct and material way" by the regulation.[115]

Currently, there is a paucity of case law addressing how this precedent would apply to social media policies. However, in December of 2016, the Fourth Circuit struck down a city police department social networking policy which precluded "any information that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees."[116] The Fourth Circuit held that "the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers' freedom to debate matters of public concern."[117] This reflects the *NTEU* standard that the government cannot merely point to speculative future harms to justify limiting a public employee's First Amendment rights and suggests that future courts would also find an attempt to preemptively limit social media expression overly broad unless the government employer can show actual harm that will be directly prevented.

Also, the Supreme Court noted in *NTEU* that it "normally accord[s] a stronger presumption of validity to a congressional judgment than to an individual executive's disciplinary action."[118] If § 501(b) of the Ethics in Government Act, which was passed by Congress, cannot pass muster, then an executive agency's internally drafted social media policy may face an even greater uphill battle. Accordingly, government employers should be careful to craft social media policies that do not restrict what their employees can post but rather warn them of what types of posts can be cause for discipline (e.g., posts that discredit the office or disrupt its efficient functioning).

114. *Cf.* COHEN, *supra* note 19, at 26 (noting that regulators and legislators have a clear interest in protecting social media speech, and cautioning employers to "be careful not to overreach in seeking to curb such activity through policy.").

115. 513 U.S. 454, 475 (1995).

116. Liverman v. City of Petersburg, 844 F.3d 400, 408–09 (4th Cir. 2016) (internal quotation omitted) (alteration in original).

117. *Id.*

118. 513 U.S. at 468.

2. *Government Employers Currently Have No Reason to Fear State "Off-Premises Legal Activity" Statutes but Should Be Mindful of How These Statutes May Evolve.*

As a separate consideration, social media policies that regulate what public employees can post while off-duty may run afoul of different state laws. For example, California, Colorado, New York, and North Dakota statutes all prohibit an employer from "discriminating" against an employee "based on any lawful activity" that the employee engages in "off the premises and during non-working hours."[119] Such statutes, however, typically include exceptions allowing employers to regulate off-duty activity that is "related to a bona fide occupational qualification" or "the employee's ability to perform his job," or if such regulation "is necessary to avoid a conflict of interest with the employer."[120] Even though posting on social networks is a lawful activity, a government employer can make the same argument that the employee's posts negatively impact his or her ability to perform the job and can thus defeat both the First Amendment and state law claims. Therefore, government employers in these states do not yet have to worry about crafting a separate defense for any state law claims under these statutes.

B. Employee Strategies

1. *Public Employees Should Assume That "Speech" is Broadly Defined*

It is axiomatic that a blog post, a tweet, a Facebook status, or a YouTube video is an act of speech.[121] Taking the time to record a video, or to type a blog, status, or tweet is functionally no different than writing a letter to your local newspaper. But what about the aspects of social media that require no typing or recording, and are as simple as pushing a button?

A commonly cited example is "retweeting," which is "a way to republish a post that another Twitter user has written."[122] This is accomplished by "hover[ing your mouse] over the 'tweet,' click[ing] 'retweet,' and con-

119. Christine Burke & Barbara Roth, *Labor: Lifestyle Discrimination Laws are Becoming Increasingly Prevalent*, INSIDE COUNS. (Jun. 13, 2011), http://www.insidecounsel.com/2011/06/13/labor-lifestyle-discrimination-laws-are-becoming-I; *see also* CAL. LAB. CODE § 98.6 (West 2017); COLO. REV. STAT. ANN. § 24-34-402.5 (West 2017); N.Y. LAB. LAW § 201-d (McKinney 2017); N.D. CENT. CODE. ANN. § 14-02.4-03 (West 2017).

120. Burke & Roth, *supra* note 119.

121. Examples of cases concluding Facebook posts are a form of speech include: Keefe v. Adams, 840 F.3d 523, 530 (8th Cir. 2016); Grutzmacher v. Howard Cty., 851 F.3d 332, 342–44 (4th Cir. 2017); Grazioski v. City of Greenville, 775 F.3d 731, 737 (5th Cir. 2015). *Cf.* NLRB. v. Pier Sixty, LLC, 855 F.3d 115, 121–22 (2d Cir. 2017) (addressing whether Facebook post qualifies as union-related speech).

122. Sandra Graschopf, *Retweet Definition: What Retweet Means and How to Use Them*, THE BALANCE (Aug. 12, 2016), https://www.thebalance.com/retweet-definition-what-retweet-means-and-how-to-use-them-896699.

firm[ing] the action by clicking on the 'retweet' button again."[123] This functionality has sparked a debate: does retweeting another user's tweet mean that you have endorsed the message of that tweet?[124] Some argue that, because "'retweeting' someone else's 'tweet' creates words on the user's Twitter profile, as if the user typed the words," a retweet constitutes an act of speech, or at least expressive conduct, because "the user intends to convey the message that she agrees with the 'tweet' and viewers will understand it that way."[125] Others argue that "Twitter users understand that sometimes a retweet is just a retweet — that it 'involves sharing or pointing something out, not necessarily advocating or endorsing.'"[126] To be on the safe side, public employees should assume that their retweets constitute an act of speech, because clicking the button to do so is a voluntary act.

Additionally, the Fourth Circuit recently held that "liking" a post on Facebook can constitute an act of speech.[127] While some theorize that this is likely to become a minority opinion,[128] it is currently the *only* opinion available on the subject. "Liking" a Facebook post, at the time that *Bland* and *Grutzmacher* were filed, required only the click of a single button, and, in the age of smartphones, was fairly easy to do accidentally. In 2016, however, Facebook unveiled additional "reactions" that users can apply to a post, including "love," "sad," "angry," and "haha."[129] While no case has yet addressed whether these "reactions" are speech, the fact that choosing a reaction other than "like" requires the user to click and hold the "like" but-

123. Bethany C. Stein, Comment, *A Bland Interpretation: Why a Facebook "Like" Should be Protected First Amendment Speech*, 44 SETON HALL L. REV. 1255, 1276 (2014).

124. *See* Sam Kirkland, *Retweets are Endorsements at NPR and AP, but not at NYT*, POYNTER (Jul. 10, 2014), http://www.poynter.org/2014/retweets-are-endorsements-at-npr-and-ap-but-not-at-nyt/258240/ (comparing and contrasting policies of National Public Radio, the Associated Press, and the New York Times on whether retweets constitute endorsements); *see also* Kate Knibbs, *The FBI Says Retweets are Endorsements*, GIZMODO (Sept. 17, 2015, 7:45 PM), http://gizmodo.com/the-fbi-says-retweets-are-endorsements-1731526051 (noting FBI usage of retweets as evidence in criminal complaints); Charles Pulliam-Moore, *You May Not Think Retweets are Endorsements, but the Justice Department Might*, FUSION (Apr. 5, 2016, 11:45 AM), http://fusion.net/you-may-not-think-retweets-are-endorsements-but-the-ju-1793855990 (noting same for U.S. Department of Justice).

125. Stein, *supra* note 123, at 1277.

126. Jack Shafer, *Twitter Panic in the Newsroom*, REUTERS (Jul. 10, 2014), http://blogs.reuters.com/jackshafer/2014/07/10/twitter-panic-in-the-newsroom/; *see also* Jay Rosen (@jayrosen_nyu), TWITTER (Jul. 11, 2014, 7:38 AM), https://twitter.com/jayrosen_nyu/status/487591850857885697 (opining that argument for retweets constituting endorsement belies a lack of trust in users).

127. Grutzmacher v. Howard Cty., 851 F.3d 332, 342–44 (4th Cir. 2017); *see also* Bland v. Roberts, 730 F.3d 386, 386 (4th Cir. 2013) (same); *see also* Stein, *supra* note 125, at 1276–77 (advocating for recognition of Facebook "like" as substantive speech, or at least expressive conduct).

128. *See* MORGAN & DAVIS, *supra* note 11, at 20 (expressing doubt that other courts would adopt this viewpoint).

129. Liz Stinson, *Facebook Reactions, The Totally Redesigned Like Button, Is Here*, WIRED (Feb. 24, 2016, 8:00 AM), https://www.wired.com/2016/02/facebook-reactions-totally-redesigned-like-button/.

ton and then select another reaction makes these other reactions even more similar to "retweets." And if the default "like" is an act of speech, there is an even stronger case that a "reaction," which requires additional user effort to post, is also speech. These "reactions" are comparable to "retweets" in terms of the steps required, and therefore public employees, or at least public employees in West Virginia, Virginia, and the Carolinas, should anticipate that "retweets" would also be considered an act of speech. This is dangerous territory, however, because now the person who "retweets" is dependent on the poster of the original tweet to have touched on a matter of public concern. Even then, if it is someone else's opinion, "retweeting" it may not be protected speech, because a court could find that all "retweeting" accomplishes is "simply adding one's views to the views of countless others."[130]

This assumption poses a two-edged sword: on the one hand, almost anything the public employee does on social media constitutes "speech" and, if it touches on a matter of public concern, can be protected by the First Amendment. On the other hand, almost anything the public employee does on social media is speech that could get them fired for discrediting their employer or disrupting the workplace. Thus, while public employees do not entirely forfeit their First Amendment rights, they do, to some extent, take on additional risks if they have an active social media presence.

2. *Public Employees Can Take Steps to Tip the* Pickering *Balance in Their Favor.*

Multiple federal circuits have noted that "*Pickering*'s constitutional rule turns upon a fact-intensive balancing test."[131] Different circuits have broken *Pickering*'s holding into different factors. For example, the Fourth Circuit evaluates

> whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.[132]

Similarly, the Eighth Circuit considers

130. *See* Palmer v. Cty. of Anoka, 200 F.Supp.3d 842, 848 (D. Minn. 2016) (holding that employee did not have strong First Amendment interest where she did not contribute new insights or facts to the debate).

131. Bartlett v. Fisher, 972 F.2d 911, 916 (8th Cir. 1992).

132. Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006).

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.[133]

This test "is flexible and the weight to be given to any factor varies depending on the circumstances of the case."[134] The Second, Sixth, and Tenth Circuits' tests, by contrast, consider only the first, second, and sixth factors of the Eighth Circuit's test.[135] Thus, for example, a public school teacher in Minnesota might prevail or lose based in part on whether the public has any interest in his or her speech being protected, whereas a police officer in Kentucky or a firefighter in Connecticut does not have to make any showing of such interest.[136] In general, however, the employee's successful argument focuses on a lack of disruption in the workplace, the lack of public exposure to their speech, and the absence of any impact on their ability to perform the duties of their job, which courts often tie to evidence of friction (or lack of friction) in the workplace as a result of the speech.[137]

One argument some plaintiffs have advanced is that courts should apply an actual disruption standard.[138] This would mean that a government employer had to show that the employee's speech had actually resulted in a disruption or complaints in the workplace before it could justify terminating them. This change would allow for a more objective and certain test of whether a public employee's speech, in fact, impairs their ability to do their job or whether that speech actually causes friction in the workplace.[139] Such a standard, unfortunately, has been rejected by at least eight circuit courts, most recently the Sixth Circuit in January 2017.[140] It bears noting that the

133. Hemminghaus v. Missouri, 756 F.3d 1100, 1114 (8th Cir. 2014).

134. Germann v. City of Kan. City, 776 F.2d 761, 764 (8th Cir. 1985).

135. *See, e.g.* Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York, 336 F.3d 185, 197 (2d Cir. 2003) (quoting Rankin v. McPherson, 483 U.S. 378, 388 (1987)) (government can meet its burden by showing that employee's speech impairs discipline by superiors or workplace harmony, detrimentally impacts working relationships, and/or impedes performance of the employee's job); Gillis v. Miller, 845 F.3d 677, 684 (6th Cir. 2017); Schalk v. Gallemore, 906 F.2d 491, 496 (10th Cir. 1990).

136. *See also* Palmer v. Cty. of Anoka, 200 F. Supp. 3d 842, 848 (D. Minn. 2016) (balancing *Pickering* test against employee in part because "the degree of public interest in her speech was minimal" and "[s]he was simply adding her views to the views of countless others").

137. *Rankin*, 483 U.S. at 388.

138. Emily McNee, Note, *Disrupting the* Pickering *Balance: First Amendment Protections for Teachers in the Digital Age*, 97 MINN. L. REV. 1818, 1847–48 (May 2013).

139. *See id.* at 1851–52.

140. *Gillis*, 845 F.3d at 685 (citing Tindle v. Caudell, 56 F.3d 966, 972 (8th Cir. 1995); Wallace v. Benware, 67 F.3d 655, 661 n.8 (7th Cir. 1995); Shahar v. Bowers, 114 F.3d 1097, 1108 (11th Cir. 1997); Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 979 (9th

Tenth Circuit, however, has held that "[t]he government must produce evidence of an actual disruption of services which results from the employee's speech."[141] Thus, there is some hope for employees that the Supreme Court might take up this issue, although the likelihood that the Court would overrule eight circuit courts of appeals in favor of a ninth is slim.

Moreover, an "actual disruption" standard is easy to measure for teachers when it is couched in the context of student complaints.[142] The "actual disruption" standard becomes much more difficult, however, in the context of public employees like firefighters, 911 operators, or IRS agents, who serve important public functions but have far fewer interactions with the general public, and thus fewer opportunities for public complaints.[143] Accordingly, even if the Supreme Court could be persuaded to adopt an "actual disruption" standard, there is still a risk that the standard would be tailored to some subset of public employees, and would not offer protection to all civil servants.

An alternate proposal advanced by Professor Toni M. Massaro would be to eliminate the distinction between speech on matters of public and private concern.[144] This would necessarily eliminate the distinction between the public employee's speech as a citizen and his or her speech as an employee.[145] The problem with such a proposal, however, is that it would not only require an abandonment of the Supreme Court precedent in the public employee free speech context, but also would blur the Court's distinction between "high value" and "low value" speech in First Amendment case law as a whole.[146] Moreover, as the Court has noted, the government cannot operate efficiently "if every employment decision became a constitutional matter."[147] And Massaro's proposal would require the employee's prima facie case to consist solely of "the assertion that the employee was disciplined for speech activity."[148] This, effectively, would eliminate the use of motions to dismiss under Rule 12 in any public employee free speech claim, subjecting the government employer in every First Amendment wrongful termination case to the burden of discovery and clogging the courts with summary judgment rulings. This runs completely counter to the Supreme Court's goal of governmental efficiency. Massaro's justification for this

Cir. 1998); Lewis v. Cohen, 165 F.3d 154, 163 (2d Cir. 1999); Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 472 (3d Cir. 2015)).

141. *Schalk*, 906 F.2d at 496.

142. McNee, *supra* note 138, at 1851.

143. These types of public employees, however, have an advantage in the *Pickering* balancing test under *Rankin*, because they are less likely to discredit their employers.

144. Toni M. Massaro, *Significant Silences*, 61 S. CAL. L. REV. 1, 67 (Nov. 1987).

145. *Id.* at 68.

146. For a discussion of "high value" and "low value" speech, see Marcy S. Edwards, Jill Leka, James Baird & Stefanie Lee Black, *An Overview of the First Amendment's Protection of Speech Generally*, *in* FREEDOM OF SPEECH IN THE PUBLIC WORKPLACE, A.B.A. (1998) Westlaw.

147. Connick v. Myers, 461 U.S. 138, 143 (1983).

148. Massaro, *supra* note 144, at 68.

proposal—that the negative consequences of being fired from a government position for the employee outweigh the negative impact on a court's docket—is unlikely to convince the Supreme Court or most other governmental officials.[149]

3. *Public Employees Can Work to "Privatize" Their Online Speech.*

While this paper is not focused on the technical aspects of social networking, no list of suggestions and strategies for public employees would be complete without reminding them to tune up their privacy settings. As social media users have been burned by their inflated perception of their own privacy, different authors have provided suggestions for how all users can better manage their privacy settings. Limiting more personal posts to a set audience of connections can help avoid creating a workplace disruption and exposing oneself to termination.[150] Facebook allows its users to create "lists" of friends and then adjust the privacy settings of individual posts so that only people on set lists can see those posts.[151]

Another strategy would be for public employees to limit the disclosure of their employment information to LinkedIn. The holding in *Rankin* makes it clear that the employee is more likely to prevail in the *Pickering* balance if they cannot discredit their employer.[152] LinkedIn offers an entire free social network related to careers, networking, and job advancement, so employees can still be part of an online community based on that part of their identity without adding that information to their profiles attached to other social media sites like Facebook, Twitter, and Instagram. This is not entirely necessary, as the Northern District of Ohio recently determined when it found that a police officer whose profile displayed a police emblem still spoke as a citizen because he "communicated through Facebook while he was off-duty and using his home computer."[153] If the officer had not displayed the police emblem on his profile, however, the judge might have been even more convinced that the speech was private.

Likewise, public employees may find themselves afoul of *Rankin*'s dicta protecting an employee who does not discredit their employer if they decide that using their title or employer will lend credence to their argu-

149. *Id.*

150. Julie D. Andrews, *6 Easy Steps to Increase Your Privacy on Facebook*, ADWEEK (Apr. 26, 2011) http://www.adweek.com/digital/6-easy-steps-to-increase-your-privacy-on-facebook/.

151. *Id.*

152. Rankin v. McPherson, 483 U.S. 378, 389 (1987); *but see* Palmer v. Cty. of Anoka, 200 F. Supp. 3d 842, 846, 848–49 (D. Minn. 2016) (Plaintiff reduced confidence in her employer and her Facebook posts impaired her ability to do her job even though her Facebook did not identify her employer).

153. Hamm v. Williams, Case No. 1:15CV273, 2016 WL 5462959, at *4 (N.D. Ohio Sept. 29, 2016).

ment.[154] There is a clear difference between Ardith McPherson telling her boyfriend in the back room of the Harris County Constable's Office that she hopes whoever shot at Reagan gets him next time,[155] and twenty-first century "McArdith Pherson" going to the Harris County Sheriff's Office's Facebook page[156] and writing "I work here and I just wanted to say that I hope someone shoots Donald Trump because he wants to build a wall along the southern border of the United States." To be sure, this is not a threat, and was not expressly proscribed by *Rankin*.[157] The proposed border wall is also certainly a matter of public concern—it touches on a matter of political and social interest. However, by posting "I work here" on a public Facebook page, "McArdith Pherson" has discredited her employer in a way that Ardith McPherson did not in 1987. Thus, public employees need to be extremely careful if they plan to use their job titles and experience to lend credence to their social media posts.

Of course, there is always the option to abstain from social networking sites altogether. This is almost certainly a guarantee for public employees that they will not be fired for online speech. However, as the Supreme Court noted in *Packingham*, fewer and fewer Americans are choosing this option.[158] Likewise, declining to engage with coworkers on social networking websites reduces the chance that one's social media posts will create a workplace disruption or be reported to a superior. However, many US workers enter the workforce in part to forge social connections.[159] It is no solution, therefore, to tell public employees that they gave up their freedom to participate in social networking sites or to befriend their coworkers when they signed their contracts, any more than it was a solution for Justice Holmes to suggest in *McAuliffe* that public employees sacrificed their First Amendment rights by taking their jobs.[160]

These opportunities for public employees to privatize their online speech are not perfect solutions. For example, even if a user sets his or her Twitter account to private, a user who follows them could still take a screenshot of a tweet, post the screenshot, and then the original user's tweet lives on, even if they delete it.[161] Again, many social networking users have an overinflated idea of how private their profiles and posts truly are.

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154. *Rankin*, 483 U.S. at 389; *but see* Graziosi v. City of Greenville, 775 F.3d 731, 737 (5th Cir. 2015) (holding that identification by public employees is welcome).

155. *Id.* at 381.

156. *Harris County Sheriff's Office*, FACEBOOK, https://www.facebook.com/HCSOTexas/?ref=BR_rs (last visited May 2, 2017).

157. *Rankin*, 483 U.S. at 386–87.

158. *See generally Packingham* Transcript, *supra* note 22, at 28, 32, 54 (noting pervasiveness of social media use among Americans).

159. Susan J. Stabile, *Workers in the Vineyard: Catholic Social Thought and the Workplace*, 5 VILL. J. CATH. SOC. THOUGHT 372, 377 n.29 (2008).

160. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

161. *Cf. Racists Getting Fired*, TUMBLR (Oct. 26, 2015, 3:33 AM), http://racistsgettingfired.tumblr.com/post/131938828592/dicksandwhiches-racist-getting-fired-is-such-a. In this case, the

C. *Review of Previous Hypothetical Questions and a Legislative Proposal*

Returning to the hypothetical about the public university professor who writes about slapping his or her students on Facebook, a court would likely conclude that the professor could be fired under *Connick*, because such speech does not address a matter of public concern.[162] The same applies to the professor who writes "I hate my students," because the general public has no great interest in how the professor feels about his or her students, nor is that a matter of political or social concern. However, "liking" or "retweeting" a post has only been judicially labeled "speech," in the Fourth Circuit. Accordingly, if the hypothetical public university professor "liked" or "retweeted" a post about slapping a student in any other jurisdiction, and was fired for that post, that professor would need to make an additional showing of "speech" before they can even claim First Amendment retaliation.[163] Whether the professor's social networking profile says where they work could hurt their case if the court applies *Rankin* and finds that the post discredited their employer, or it could be a non-factor under the Fifth Circuit's case precedent.[164] The university can certainly adopt a social media policy and a code of conduct for online behavior, but it needs to be wary of imposing a prior restraint on its professors' speech. For example, a social media policy that merely says "professors at Pub University shall not post comments that could reflect negatively on the institution or its educational experience on social networking sites" is likely too general.[165] Pub University could strengthen its case, however, if it could identify specific examples of online speech that would result in termination and highlight how those examples would disrupt the workplace.

As Section IV of this paper has highlighted, outside of the general framework created by the Supreme Court, the rules regarding employee free speech rights are inconsistent across different jurisdictions. Supreme Court action, however, is likely to be incremental, slow, and narrow. Rather than waiting for the Supreme Court to resolve circuit splits on how many factors the *Pickering* balancing test weighs, or whether an "actual disruption" standard is appropriate, Congress could weigh in and establish, once and for all, some form of online privacy act. Such an act could protect the free speech rights of all employees, public or private, on social media websites that are "adequately protected," so long as their posts are not made using an em-

subject's Twitter account no longer exists. *Sorry, that Page Doesn't Exist*, TWITTER, https://twitter.com/eri82915 (last visited Apr. 29, 2017). However, the screenshot captured and uploaded to another blog, along with a screenshot of the subject's Facebook account, remains publicly available online.

162. 461 U.S. 138, 146 (1983).

163. Grutzmacher v. Howard Cty., 851 F.3d 332, 342–44 (4th Cir. 2017).

164. Rankin v. McPherson, 483 U.S. 378, 389 (1987); Graziosi v. City of Greenville, 775 F.3d 731, 737 (5th Cir. 2015).

165. *Accord* Liverman v. City of Petersburg, 844 F.3d 400, 408–09 (4th Cir. 2016).

ployer's device or while acting within the scope of their employment. The statute, or any accompanying regulations by the Federal Communications Commission or the Department of Labor, could then define the baseline privacy settings for various social media sites that employees must implement for their own profiles to be "adequately protected" for purposes of the statute.

This proposed act and regulations would recognize the various degrees of privacy and control that people can exercise in their use of social media, nuances that often elude judicial opinions, and also allow the statute to effectively create a rebuttable presumption that the speech was not disruptive if the speaker adequately privatized their profile. Employers would still have the opportunity to point to actual disruptions that occurred to overcome this presumption, but would not need to if the online profile was not "adequately protected."

This proposed legislation is not a perfect solution. For example, discovery in such litigation could prove extremely frustrating because the claim would turn, in part, upon what privacy settings the employee had in place at different times, and because the user could change those settings so quickly. However, in the spirit of above-mentioned state statutes that prohibit termination for engaging in lawful activity or using lawful products outside of work, a detailed act of Congress to safeguard employee speech rights would go a long way in guiding the judiciary to uniform treatment of public employees' free speech rights. Moreover, it would reflect Justice Kennedy's understanding that social networking sites are the new "public square," and would incentivize public employees to contribute their knowledge, rather than chilling their speech for failure that it will fall into one of the pitfalls established by *Connick* or *Garcetti*.

V. Conclusion

The ongoing evolution of social media guarantees that the definition of speech will continue to evolve. As these changes shift the framework created by *Pickering* and its progeny, public employees' First Amendment rights are likely to wax and wane in different spheres. Public employees can take heart in the strides they have made in just the last fifty to sixty years, but at the same time need to recognize the new challenges presented by social media. Likewise, public employers must recognize that their attempts to adjust for the social media age may actually run afoul of the First Amendment. Barring legislative action, it appears extremely unlikely that freedom of expression will ever constitute an absolute defense against termination for public employees. However, by using some of the strategies and proposals outlined above, employees may be able to carve out greater protections for their private social media posts, and avoid the career damage that stems from termination. After all, if social networking sites are the

twenty-first century public square, then the rest of society has an interest in hearing the informed speech of its civil servants on social networking sites as well.