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Employee Speech in the Private and Public Workplace: Two Doctrines or One?

Staughton Lynd†

Public and private employees are afforded a measure of protection against employer discipline due to their speech activities by the first amendment and section 7 of the NLRA respectively. This article traces the development of both doctrines as they are applied to employee speech. The author argues that there has been an interplay in the evolution of these two doctrines and that, as a result, there is little difference in their application.

I

INTRODUCTION

When an employee speaks critically of his or her employer, especially if the speech occurs while on the employer's property, two fundamental values of American society come into conflict. On the one hand is free speech. On the other hand is property, and the right of the property owner (private or public) to manage his enterprise as he thinks best.

Such confrontations between speech and the right to manage happen every day. In the private workplace, the button-wearing, leaflet-distributing, or membership-soliciting worker will appeal to section 7 of the National Labor Relations Act¹ as amended. In the public workplace, the employee can seek protection under the first amendment. Because this first amendment protection is not available to private employees, public employees might seem almost by definition to enjoy speech rights more ample and secure than those of employees in the private sector. This is most true where the private employer-employee relationship falls outside the jurisdiction of the National Labor Relations Act.² But in those situations where the NLRA applies, the

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1. 29 U.S.C. § 157 (1970) [hereinafter referred to as section 7]:

   Right of employees as to organization, collective bargaining, etc.
   Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

2. Even without NLRA restrictions, however, the private employer's power to fire has been
private employee's right to free speech about workplace issues turns out to be remarkably similar to that of the public employee.3

Indeed, as this article will seek to show, recent court decisions suggest a convergence of the speech rights of private and public employees. The speech rights of the private employee have been quasi-constitutionalized. As will appear, the sponsors of the National Labor Relations Act intended the rights protected by section 7 to be statutory replicas of first amendment rights, and the National Labor Relations Board drew heavily on contemporaneous first amendment decisions in establishing the presumption that speech during non-working time is protected.4 The Supreme Court took a further step in the same direction when it held in 1974 that speech thus presumptively protected may not be vicariously waived by a collective bargaining agreement.5

As to the public employee, the Court held in 1968 that he or she does not surrender first amendment rights by accepting work for the government.6 Just as in the case of the private employee, however, a showing of substan-
tional or material disruption in the operation of the enterprise will justify curtailment of the public employee's speech rights. In working out a "balance" between speech rights and efficiency for public employees, the courts have drawn heavily on precedents elaborating a similar "accommodation" in the private sphere.

Thus, if the argument of the following pages makes sense, advocates in employee speech cases may be well advised to de-emphasize whether state action is or is not present, and to concentrate instead on whether the particular speech at issue did or did not disrupt work.

II

THE FIRST AMENDMENT BASIS OF SECTION 7

A. Legislative History

The draftsmen and sponsors of the early incarnations of section 7 inherited a generation of bitter struggle on behalf of free speech for working people. In the course of that struggle, the Supreme Court held that the president of the American Federation of Labor might constitutionally be enjoined from causing to be published the word "unfair." The Court also prohibited mass picketing, in the face of free speech claims, because it conveyed a "necessary element of intimidation." Lower federal courts enjoined "abusive language," "annoying language," "indecent language," "bad language," "opprobrious epithets," and particular words such as "traitor" and "scab." One injunction ordered the officers of the

7. Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969). Although Tinker was a case involving the speech rights of students, the Court addressed itself to the first amendment rights of "teachers and students." Id. at 506. It is argued in Part II, infra, that in interpreting Pickering the lower courts have, in effect, adopted the disruption standard of Tinker.

8. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. at 568.

9. "Under the [National Labor Relations] Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, 'and to seek a proper accommodation between the two.' Central Hardware Co. v. NLRB, 407 U.S. 539, 543." Hudgens v. NLRB, 96 S. Ct. 1029, 1037 (1976).

10. Bucks Stove & Range Co. v. Gompers, 221 U.S. 418, 439 (1911). It is food for thought that in announcing the "clear and present danger" speech test Justice Holmes offered Gompers as the single relevant precedent. Schenck v. United States, 249 U.S. 47, 52 (1919). The citation has been neglected because Holmes coupled it with the famous hypothetical of a person shouting "Fire!" in a crowded theater.

11. Tri-City Central Trades Council v. American Steel Foundries, 257 U.S. 184, 207 (1921), rejecting the contention of Brief for Respondents at 111-12 that when a Court by means of an injunction, restrains working men from exercising the right of placing pickets in proximity to a factory where there is a strike, and forbids such pickets the right of free speech by which they might be able to persuade workers to remain away from such plant, it would seem that such wage earners are thus deprived of rights guaranteed to them by the constitution . . . .

United Mine Workers "and all other persons whomsoever" to cease a variety of verbal acts, including "issuing any instructions, written or oral" and "issuing any messages of encouragement or exhortation." Another injunction, verging on the sacrilegious, outlawed "persuasion in the presence of three or more persons." These court actions were halted by the Norris-LaGuardia Act of 1932, which forbade federal courts from enjoining "[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence. . . ." A review of the history of the Norris-LaGuardia Act is particularly relevant to understanding the scope of section 7, as it was in the Norris-LaGuardia Act that the phrase "concerted activities for the purpose of collective bargaining or other mutual aid or protection" first appeared. The phrase was repeated unchanged in section 7. The Norris-LaGuardia Act sponsors viewed the right to engage in "concerted activity" as a "fundamental right of human liberty and freedom" and considered that a worker who disobeyed a particularly broad injunction "would be doing only what every human being has a right to do!"

Despite the Norris-LaGuardia Act, tumultuous and often bloody encounters continued between workers attempting to gather in city parks, leaflet in city streets, picket near company gates, or solicit membership at public meetings, and armed personnel of the state or of the employer seeking to restrict such speech. Finally, in 1940, the dissemination of information about industrial conditions by means of peaceful picketing was held to be protected by the first amendment.

13. Id. at 99-100, quoting U.S.D.C. Ind. Nov. Term, 1919, In Equity, No. 312.
14. Id. at 102, quoting Clarkson Coal Mining Co. v. UMW (D.C. Ohio 1927).
   The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . . .
18. 75 CONG. REC. 4507 (1932) (remarks of Senator Norris).
19. In part, the injunction prohibited "communicating directly or indirectly to any other person . . . that there is a strike . . . ." Id.
20. Id.
Meantime, in 1935 Congress enacted the National Labor Relations Act, including section 7. The intent of section 7 was to protect from interference by the employer the same rights which the Norris-LaGuardia Act forbade federal courts to enjoin. Reporting an early version of the bill, the Senate Committee on Education and Labor declared that the part of the bill which would become section 7 "restates the familiar law already enacted by Congress in section 2 of the Norris-LaGuardia Act [and other statutes]."²³ However, the familiar rights to concerted activity for mutual aid or protection were now to be protected against action by the employer.

The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.²⁴

Although, at the time section 7 was enacted, the Supreme Court had not yet declared labor handbilling and picketing to be constitutionally protected, it is a fair summary of legislative intent to say that "Section 7 guarantees are statutory replicas of First Amendment rights."²⁵

B. Republic Aviation

The Supreme Court early declared the rights protected by section 7 to be "fundamental."²⁶ This vague if resonant language still left to the National Labor Relations Board the problem of what exactly section 7 did and did not protect. Congress deliberately worded section 7 broadly "lest the courts emasculate specific provisions or employers find practices not specifically covered which impede the progress of self organization."²⁷ As the Court stated in Republic Aviation Corp. v. NLRB,²⁸

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.

Thus it fell to the National Labor Relations Board to create a federal common law of section 7 rights, including speech rights.

The Board looked for guidance to then contemporaneous Supreme

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²⁴. Id.
²⁸. 324 U.S. 793, 798 (1945).
Court decisions interpreting the first amendment. Although the lack of state action prevented first amendment adjudication from being directly applicable to cases involving employer discipline, the Board properly viewed these decisions as expressions of policy which should be followed under section 7. This was the more natural since many of the advances in general first amendment theory during the period 1935-1945, such as the articulation of the "public forum" and "overbreadth" concepts, as well as the Supreme Court's increased use of the clear and present danger test, were associated with labor cases.

For instance, in Thornhill v. Alabama, the Court dealt with an anti-picketing statute applied to pickets who "appear to have been on company property." Holding the statute facially overbroad and hence unconstitutional, the Court declared broadly that "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Strictly speaking, the Court was referring only to state action in restraint of off-site speech. But the language of Thornhill was and still is invoked as a statement of public policy which should inform the resolution of employee speech cases in any setting.

What Thornhill and the other first amendment cases told the Board was that just as speech outside the workplace was protected except where the government could show a clear and present danger, so speech at work should be protected save where it disrupts production; hence, an employer's no-solicitation rule is overbroad if it conclusively prohibits speech during the non-working hours when a workplace is a public forum.

29. Another distinction between the average first amendment case and the typical section 7 case was that first amendment cases, unlike section 7 cases, generally involved speech activity outside the workplace. However, there is no indication that the distinction should have any effect on the policies involved. See NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941). Although that case applied first amendment policy to on-site speech of the employer only, the Court subsequently made clear that the first amendment applies equally to employers and employees. See e.g., Holodnak v. Avco Corp., 381 F. Supp. 191, 204 (1974) (Lumbard, J.).

30. Our decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. Labor Board v. Virginia Electric & Power Co., 314 U.S. 469. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. Cf. Labor Board v. Virginia Electric & Power Co., supra. But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Thomas v. Collins, 323 U.S. 516, 537-538 (1945) (citations omitted) (emphasis added).

31. 310 U.S. 88, 94 (1940).

32. Id. at 102.


In conclusion, we would do well to remember what the Supreme Court said 34 years ago in Thornhill v. Alabama, 310 U.S. 88, 103 (1940): "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."
After deciding many individual cases which involved the balancing of employer-employee interests, the Board in 1943 adopted a rule, in the form of an evidentiary presumption, which was designed to increase the predictability and consistency of future decisions. Simply stated, the Board adopted a rebuttable presumption that, absent evidence of a discriminatory purpose, an employer's general rule prohibiting all on-worksite union solicitation during working hours is permissible protection of the employer's interest in efficient production. On the other hand, an employer's general rule prohibiting all on-worksite union solicitation during non-working hours is rebuttably presumed, absent special circumstances, to be an unreasonable restriction on employee section 7 rights. One year later, in Republic Aviation, the propriety of these presumptions and, in effect, the propriety of the Board's whole approach in enforcing section 7 speech rights was addressed by the Supreme Court.

In Republic Aviation and the companion case of NLRB v. LeTourneau, the Court confronted directly the question of what employee speech on company property is protected by section 7. The employers had promulgated and enforced shop rules prohibiting (in the one case) soliciting of any type and (in the other case) distributing, posting, or otherwise circulating handbills or posters, or any literature of any description without permission. In Republic Aviation, employees who wore union buttons and solicited union membership in the plant were discharged. In LeTourneau, employees were suspended for distributing literature in the plant parking lot.

The Trial Examiner in Republic Aviation concluded that the dischargees should be reinstated because "[t]he respondent advances no cogent reason nor special circumstance in justification of its abrogation of its employees' right to self-organization and of their normal freedom of speech and action by the act of coming upon its premises." The Board affirmed, basing its decision on the presumptions adopted earlier in Peyton Packing.

Briefing Republic Aviation and LeTourneau to the Supreme Court on appeal, the Board repeatedly justified its treatment of sections 7 and 8(a)(1) by analogy to the Court's first amendment decisions. This is most clearly set out in the following passage from the Board's brief in LeTourneau:

34. E.g., The Denver Tent & Awning Co., 47 N.L.R.B. 586 (1943), enforced, 138 F.2d 410 (10th Cir. 1943); Carter Carburetor Corp., 48 N.L.R.B. 354 (1943), enforced, 140 F.2d 714 (8th Cir. 1944).
36. 324 U.S. 793 (1945).
37. Strictly speaking, Republic Aviation and LeTourneau dealt only with what time, place, and manner restrictions employers may place on section 7 speech. However, the policies expressed have general applicability.
40. See note 35, supra, and accompanying text. See also Peyton Packing Co., 50 N.L.R.B. 355 (1943) (Supplemental Decision).
The Board's approach thus follows closely that adopted by this Court in reconciling individual interests with community interests which demand curbs upon individual freedom. Governmental restraints upon freedom of communication give rise to the necessity, illustrated in *Martin v. Struthers*, 319 U.S. 141, 143, "of weighing the conflicting interests of the appellant in the civil rights she claims . . . against the interest of the community . . .".

The right of employees to urge the advantages of self-organization, to proselytize and solicit members on behalf of labor organizations, and their correlative right "to receive aid, advice, and information from others" concerning labor organizations, which the Act protects, are among the "fundamental rights" secured against governmental infringement by the First and Fourteenth amendments. *Hague v. C.I.O.*, 307 U.S. 496, 510; cf. *Thornhill v. Alabama*, 310 U.S. 88, 101-104. [It was Congress' intention to protect these same fundamental rights from employer infringement.] Therefore, whenever an employer blocks an effective avenue for communication . . . by a plant rule, the Board must, to adapt the words of this Court, "be astute to examine the effect" of the employer's rule and "to weigh the circumstances and . . . appraise the substantiality of the reasons advanced in the support [of it]." *Schneider v. State*, 308 U.S. 147, 161. Such an appraisal led the Board to conclude in the *Peyton Packing* case . . . that in the absence of special circumstances an employer could prohibit union solicitation within the plant during working time but not during non-working time. 4

As the Board's brief in *Republic Aviation* further points out, the Board recognized that sections 7 and 8(a)(1) are not blind to employer interests, just as the first amendment is not blind to legitimate interests of government. Concurrently, however, the Board asserted that section 7 interests of employees do not decrease in importance simply because the employee seeks to exercise his or her rights on the employer's property. The employer's interest will of course be stronger in cases regarding on-worksites speech, but section 7, like the first amendment, knows no geographical bounds.

But this does not mean that the statute precludes all recognition of competing legitimate interests of employers any more than the constitutional guarantee of freedom of speech precludes recognition of competing legitimate interests of the community as a whole. Just as the public streets are not primarily forums for the dissemination of information, so manufacturing plants are not primarily forums for solicitation of membership in labor organizations. Therefore, although neither activity may be completely curtailed, insofar as the one may interfere with the convenience of pedestrians, and the other with efficient production, both are subject to modification. 42

In answer to the employer's claim that restrictions on the time, place and manner of section 7 speech are permissible so long as alternatives are

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42. Brief for Respondent at 17, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
available, the Board again looked to the first amendment and argued that although the existence of adequate alternatives is a relevant factor, it alone could not justify any restriction.

The Act as well as the Constitution demands that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163.43

As each aspect of the Board’s policy was discussed, the Board would defend its position by pointing to a first amendment parallel, whether it was the Board’s position on union solicitation as “fighting words”44 on leaflets as section 7 speech;45 on the effect of the employer’s interest in preventing litter;46 on the strength of the employer’s property rights;47 on rebutting the employer’s allegation that permitting section 7 activity on his property would constitute an illegal assistance to a particular union;48 or on rebutting the employer’s conception of the relevance of its own motivation in adopting the plant rule under section 7 attack.49

The Supreme Court, with one dissenter, agreed with the Board, and held the employer disciplinary actions in both *Republic Aviation* and *Le Tourneau* to be unfair labor practices violative of the Act. While the Court did not comment on the first amendment analogies urged by the Board, the Court did expressly approve the *Peyton Packing* presumptions50 as appropriate expressions of “the dominant purpose of the legislation [which] ... is the right of employees to organize for mutual aid without employer interference.”51

For the purposes of this article, the greatest significance of *Republic Aviation* and *Le Tourneau* is not the Court’s reasoning in affirming the Board’s decisions, nor is it the result. What is most important is the reasoning used by the Board, and more particularly, the source of that reasoning—first amendment law as it was currently espoused by the Supreme Court.

Since those early days, NLRB decisions and rules regarding the limits

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43. *Id.* at 39.
44. *Id.* at 29-30, citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Thornhill v. Alabama, 310 U.S. 88 (1940); Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).
47. *Id.* at 38-39, citing Jamison v. Texas, 318 U.S. 413 (1943).
50. 324 U.S. at 804.
51. *Id.* at 798.
of employer time, place, and manner regulation of employee speech on company property have continued to follow the guidelines approved by the Supreme Court in Republic Aviation. A question left open by Republic Aviation was this: Did the first amendment analogy apply even to the point of giving the individual employee's section 7 speech rights a "preferred position," that is, greater protection than his or her other NLRA rights? Specifically, could these rights be immune from a waiver by the union itself, unlike the NLRA right to employee economic action? Or, in the words of one commentator, the question is "whether the right to conduct such activities belongs to each employee, so that the majority cannot deprive him of it, as is true of the constitutional freedoms, or whether this right is merely one protected against the employer." This was the question addresses in NLRB v. Magnavox Co. of Tennessee.

C. MAGNAVOX

Historically, worker rights under the NLRA were subject to waiver by the union in the collective bargaining agreement. In particular, it has been held that the union can waive the right to strike during the life of the agreement. Since the right to strike is expressly protected by the NLRA, whereas the right to speech on workplace issues is only inferred from the section 7 right to "concerted activities," it is understandable that early Board decisions indicated in dictum that a union's waiver of section 7 speech rights would also be upheld. But early dictum was not followed due to concern for the speech rights of union dissidents. This concern was expressed, inter alia, in the Landrum-Griffin Act of 1959 governing intra-union relations. In section 101(a)(2) of that statute Congress provided that "every member of any labor organization shall have the right . . . to express any views, arguments or opinions. . . ." Congress had in mind the individual's freedom to speak up vis-a-vis his or her union, but the same

52. The Peyton Packing formula has since been refined to distinguish between (a) speech by employees and speech by outside organizers, (b) solicitation and leafletting, and (c) enterprises open to the public such as department stores and other enterprises. For a brief description of these refinements, see Fanning, Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees, 9 GA. L. REV. 367 (1975).
55. The first collective bargaining agreements between the Congress of Industrial Organizations and, for example, United States Steel and General Motors contained clauses waiving the right to strike during the life of the contract. The enforceability of such waivers has been qualified, Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), but their validity has never been seriously questioned.
56. See especially section 13 of the National Labor Relations Act, providing that the Act shall not be construed "to interfere with or impede or diminish in any way the right to strike," except as expressly stated therein.
57. May Dep't Stores Co., 59 N.L.R.B. 976 (1944).
policy soon made itself felt in the section 7 setting where employee confronted employer.

The first step toward Magnavox was the Gale Products decision in 1963, where the Board held that a union may not bargain away the otherwise protected speech rights of union dissidents. The charging party in Gale Products was an organization of employees (''the Independent'') opposed to the International Association of Machinists local which was recognized by the employer. These dissident employees had declared themselves independent of the Machinists after the international union removed the officers and committee members of the local from office. The Independent then requested the employer to recognize it as the collective bargaining representative of the majority of the employees in the plant. The employer refused. No new representation election had been held at the time of the events giving rise to the charge.

A two-year contract in effect at the plant contained a section which stated: "There shall be no other general distribution or posting by employees of pamphlets, advertising or political matter, notices, or any kind of literature upon Company property, other than as herein provided." In addition, a plant rule incorporated in the contract prohibited solicitation for "Insurance Companies, Fraternal, Social or other organizations," and expressly stated: "Violation of this rule will result in discharge.'"

The Independent printed membership application cards, elected officers, adopted by-laws, and began to distribute the membership application cards in the plant. The distribution was conducted in non-working areas during non-working hours; consequently, but for the contractual waiver, the shop rules in question would have been presumptively unreasonable restraints on section 7 activity under Republic Aviation and its progeny.60 Invoking the no-solicitation rule, management issued final notices to employees who had admitted to possessing, distributing, or signing cards, or who had been alleged to have done one or more of these acts.

The Trial Examiner took the position that, were he not restrained by contrary precedent, he would find that the rule at issue was in violation of the Act because the right to solicit could not be bargained away. The Trial Examiner advanced three arguments in support of his position:

(1) "[I]t would appear that the maintenance of the rule in question is repugnant to both the Constitution of the United States and Section 8(c) of the Act."63

(2) "Since there is a clear and fundamental difference between strike

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61. 142 N.L.R.B. at 1257 (intermediate report), citing May Dep't Stores Co., 59 N.L.R.B. 976 (1944).
63. 142 N.L.R.B. at 1257 (intermediate report).
action [emphasis in original] and the mere expression or dissemination of a printed 'form' on company property, it seems needless to meet the counterclaim that a 'no-strike' clause is binding although the right to strike is specifically accorded by the Act."^64

(3) Precedent estopping a union from asserting a right it had bargained away is irrelevant in a case of this kind where the charging party is not the union, but individuals opposed to the union.^65

On appeal, the Board held 3-2 that contrary precedent could be distinguished,"^66 and that in the instant case "an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act."^67 The Board majority did not discuss the Trial Examiner's first argument on the question of constitutionality or his second argument distinguishing a strike waiver from a waiver of the right to speech. Instead, it rested its holding on the Trial Examiner's third argument—that those asserting the right were dissidents, who would be frozen in the status of outsiders if prevented from agitating in the workplace against the incumbent union.

Whereas, for supporters of the incumbent union, the union meeting might provide sufficient opportunity to ventilate concerns, the majority reasoned that proponents of a rival bargaining representative were differently situated. For dissidents, the workplace itself was the indispensable public forum.

While other problems might well be aired at union meetings, the desire to designate a different representative is hardly an appropriate subject for discussion at a meeting held under the auspices of the very union sought to be displaced. . . . [T]he effect of the present contract clause goes far in perpetuating the incumbent union by withholding from employees their customary opportunity for expression of opinions.^68

On appeal, the Court of Appeals for the Seventh Circuit denied enforcement of the Board's order in a 2-1 decision."^69 Thus matters stood for almost a decade. The Sixth Circuit joined the Seventh in rejecting Gale Products.^70 The Fifth^71 and Eighth^72 Circuits agreed with Gale Products, however, and the Board continued to follow it pending resolution of the conflict between the circuits by the Supreme Court.

64. Id.
65. Id.
66. 142 N.L.R.B. at 1248.
67. Id. at 1249.
68. Id.
69. NLRB v. Gale Prods. 337 F.2d 390 (7th Cir. 1964). Kiley, J., dissenting, agreed with the Board that the no solicitation rule could be voided because it "tends to smother competitive union organization activity." Id. at 392.
70. General Motors Corp. v. NLRB, 345 F.2d 516 (6th Cir. 1965); Armco Steel Corp. v. NLRB, 344 F.2d 621 (6th Cir. 1964).
71. Mid-States Metal Prods. Inc., v. NLRB, 403 F.2d 702 (5th Cir. 1968).
72. Machinists Dist. 9 v. NLRB, 415 F.2d 113 (8th Cir. 1969).
The essential criticism of *Gale Products* voiced by commentators was its denial of equal protection. They argued that the Board’s approach set up a different test for union supporters than for union dissidents. Apart from the difficulty of telling who was who, the result was that some employees were entitled to more speech rights than others. This conflicted with the even-handedness central to traditional notions of free speech and equity. Critics felt that the right to solicit should be protected despite contractual waiver for either all or no employees, but not for some employees.\footnote{73}

Beginning in 1964, Member Jenkins of the Board persistently urged his colleagues to void the contractual waiver of the otherwise protected speech rights of any employees, whether union supporters or dissidents.\footnote{74} The Fifth Circuit, a court which agreed with *Gale Products*, noted that decisions refusing to enforce the holding might be explained in part “by the fact that the [company no-solicitation] rules were enforced uniformly against all employees.”\footnote{75} In *Machinists District 9 v. NLRB*\footnote{76} the Eighth Circuit accepted Member Jenkins’ position and modified the Board’s order so as to permit distribution of literature “on behalf of any labor organization or in opposition to any labor organization.”\footnote{77} When, in *Magnavox*, the Board changed its mind and broadened *Gale Products* to cover all employees, it reviewed these opinions and adopted the position of Member Jenkins and of the Eighth Circuit.\footnote{78} Thus a rule adopted to help dissidents became a rule which helped every one.

The facts in *Magnavox* were essentially similar to the facts in *Gale Products*. Again a dissident group, the “Committee for Independent Action,” sought to distribute handbills on company property. The charging party in *Magnavox*, however, was the union rather than the group of dissidents. The union’s interest in challenging the no-solicitation rule arose from the fact that the employer was permitting the Committee for Independent Action to distribute handbills in the plant, while it invoked against the union a long standing rule against solicitation. The incumbent union was held to have accepted the no-solicitation rule as part of the contract because (1) there was general language in the contract recognizing the employer’s authority to make rules for the maintenance of orderly conditions on plant


75. Mid-States Metal Prods. Inc., v. NLRB, 403 F.2d at 705, 706.

76. 415 F.2d 113 (8th Cir. 1969).

77. *Id.* at 116 (emphasis added).

78. Magnavox Co. of Tennessee, 195 N.L.R.B. 265 (1972).}
property, and (2) the union had acquiesced in the enforcement of the rule for the preceding sixteen years. 79

In holding the employer's rule to be void, the Board modified Gale Products. The Board declared immune from contractual waiver

employee 80 distribution of literature by or on behalf of members of an incumbent labor organization which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their Section 7 rights. 81

The italicized words are especially important. First, the union may not waive the right of any of its members to distribute literature. Second, the Board's new no-waiver rule is not limited to the distribution of literature connected with the choice of a bargaining representative—literature distribution related to any employee activity protected by section 7 is equally safeguarded.

When the Sixth Circuit, consistent with its earlier refusal to follow the Gale Products rule, refused to enforce the Magnavox ruling, 82 the Supreme Court granted certiorari. The Supreme Court affirmed the Board's decision in Magnavox without making clear whether it also approved the rule on which the decision rested. Speaking for six members of the Court, Justice Douglas' opinion stated:

The union may, of course, reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the quid pro quo for the employer's acceptance of the grievance and arbitration procedure. Such agreements, however, rest on "the premise of fair representation" and presuppose that the selection of the bargaining representative "remains free." 83

Having thus keyed its reasoning to the presence or absence of a controversy over the choice of a bargaining representative, the opinion of the Court went on to embrace a distinction between "rights in the economic area" and the right to choose a bargaining representative. 84

Following the Fifth Circuit decision in Mid-States Metal Products v. NLRB 85 (an opinion approving only the earlier Gale Products rule protecting dissidents, not the Magnavox rule prohibiting all waivers), Justice Douglas stated: "When the right to such a choice [of a bargaining representative] is at issue, it is difficult to assume that the incumbent union has no self-interest of

79. Id. at 270.
80. In a footnote the Board limited its rule to exclude union institutional literature. The union could waive its own speech rights, but it could not waive the rights of its members. Id. at 266 n.9.
81. Id. at 266 (emphasis added).
82. Magnavox Co. v. NLRB, 474 F.2d 1269 (6th Cir. 1973).
83. NLRB v. Magnavox Co., 415 U.S. at 325 (citations omitted).
84. Id.
85. 403 F.2d 702 (5th Cir. 1968).
its own to serve by perpetuating itself as the bargaining representative.'"86 Therefore, absent the showing of disruption of production or discipline required by Republic Aviation, a union may not waive the right of its members to otherwise protected speech.

The Court reached the Magnavox outcome by means of the Gale Products rationale. It affirmed a prohibition against the waiver of any employee's speech related to the exercise of any section 7 rights by reasoning focused on the speech rights of dissidents in controversies over the selection of a bargaining representative. The Magnavox extension of Gale Products to the speech rights of all employees was explained in one conclusory phrase: "employees supporting the union have as secure § 7 rights as those in opposition."87

In dissent, three members of the Court argued that if the majority's concern was to protect union dissidents, the Gale Products rule would do the job more economically than the rule of Magnavox. The dissenters held that because it was the policy of the Act to promote free collective bargaining, bargained-for contractual concessions should be presumptively valid.88 It seemed to the dissenters that ordinarily, and so far as the record showed in the Magnavox situation, an incumbent union would have ample opportunity to present its views by using bulletin boards, by passing out literature at the plant gates, and by verbally soliciting support during non-working time.89 Hence the dissenters would have approved the Gale Products rule, and permitted a union to bargain away the distribution rights of its own supporters.

Notwithstanding the ambiguities of the Supreme Court opinion in Magnavox, the Board has applied the holding as if the Court had expressly approved the Board's Magnavox rule. The Board has consistently held that Magnavox prohibits the waiver of the right to distribute literature connected with any activity protected by section 7.90 Thus the Board has held that handbills protesting a union dues increase were protected under Magnavox despite a contractual waiver, although no representation campaign was being conducted and no deauthorization election was possible at the time.91 The Board has also held that the distribution of a rank-and-file newspaper which commented on the 1973 collective bargaining agreement negotiated between the UAW and the Chrysler Corporation was protected despite a contractual waiver.92 Distribution of literature by opposition candidates for union office has also been held protected.93 Not only has the Board applied

86. 415 U.S. at 325.
87. Id. at 326.
88. Id. at 328-29 (Stewart, J., joined by Powell and Rehnquist, JJ., dissenting).
89. Id. at 331.
Magnavox to the distribution of literature about all aspects of internal union affairs, it has also protected under Magnavox the distribution of a circular commenting on right-to-work and minimum wage legislation. The Board found this commentary “pertinent” to section 7.94

The courts to date have followed the Board in an expansive application of Magnavox. Especially important in this context is General Motors Corp. v. NLRB,95 a case where the Sixth Circuit, an opponent of GaleProducts and the court reversed by the Supreme Court in Magnavox, upheld the Board’s application of Magnavox to the distribution of literature by opposition candidates for union office. The Court stated:

[T]he election of officers has a significant bearing on the character of the union and hence contributes to the selection or rejection of the union as the employees’ bargaining representative. Consequently, we agree with the Board that a ban on the distribution of literature pertaining to the candidacy of individuals for union office is invalid under the Magnavox decision.96

It would appear, therefore, that both the Board and a hitherto restrictive circuit court have concluded that Magnavox prohibits waiver of the right to distribute any literature which a working man or woman would otherwise be protected in distributing.

D. Summary

Employee speech in the private workplace has come to be protected under a quasi-first amendment rationale. Under Republic Aviation, speech on company property but outside working hours is protected unless the employer can show special circumstances which make its restriction necessary to maintain production or discipline. Under Magnavox, the right to solicit membership in a labor organization or to distribute literature connected with any aspect of union activity or workplace concerns has become a right retained by each individual employee notwithstanding its purported waiver by a union representative.

These safeguards are not constitutionally required. Congress could change or eliminate them at any time. At present, however, because of the influence of the first amendment analogy, the section 7 speech right has acquired so many parallels to the first amendment97 that it can properly be termed quasi-constitutionalized.

95. 512 F.2d 447 (6th Cir. 1975).
96. Id. at 448. See also IBEW Local 1547 v. Teamsters Local 959, 507 F.2d 872, 877-78 (9th Cir. 1974), noted and approved insofar as it found Magnavox applicable to a no raiding agreement in 89 HARV. L. REV. 440, 444-45 (1975); and Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 329 n.12 (7th Cir. 1976), where Magnavox was held to protect a leaflet distributed without union approval wherein a grievent asked his fellow workers for their support.
97. Two parallels not fully explored in the text include (a) the treatment of fighting words, compare Amburgey v. Cassady, 370 F. Supp. 571 (E.D. Ky. 1974), with NLRB v. Blue Bell, 219-
III

THE BALANCING OF PUBLIC EMPLOYEE SPEECH
UNDER THE FIRST AMENDMENT

A. PICKERING

There being no public sector equivalent of the National Labor Relations Board, no set of administrative guidelines exists like those fashioned for private sector speech by Board decisions such as Republic Aviation and Magnavox. Broad principles laid down by the Supreme Court have been explicated, case by case, in state and lower federal courts. The equivalent to administrative guidelines in the regulation of public employee speech must be drawn from patterns discernable in these lower court cases.98

The key public employee speech case is Pickering v. Board of Education.99 Marvin Pickering, a high-school teacher in Lockport, Illinois, published a letter in a local newspaper which "was critical of the way in which the [School] Board and the district superintendent had handled past proposals to raise new revenue for the schools,"100 and protested an alleged policy of spending money on sports rather than on teachers' salaries. The most provocative passages of the letter declared:

[Do you know that the superintendent told the teachers, and I quote, "Any teacher that opposes the referendum should be prepared for the consequences." I think this gets at the reason we have problems passing bond issues. Threats take something away; they are insults to voters in a free society.]

Remember those letters entitled "District 205 Teachers Speak," I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn't even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teachers live in at the high school, and your children go to school in.

I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school? Respectfully, Marvin L. Pickering.101

The School Board dismissed Pickering for writing this letter.

98. The following discussion is based on recorded state and federal decisions subsequent to the most recent general summary of case law under Pickering, Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 DUKE L.J. 841.


100. Id. at 564.

101. Id. at 576-78.
Pickering brought proceedings for reinstatement, and when these were unsuccessful, appealed to the circuit court and to the Illinois Supreme Court. The Illinois Supreme Court rejected Pickering’s claim, two judges dissenting. Pickering then appealed to the United States Supreme Court.

Pickering’s brief took the position that “his speech might be subject to reprisal under two circumstances: (1) He actually disrupted a government function or posed a real threat to the operation of government. (2) His statements fell beyond the protection of the first amendment.” The brief asserted that there was no evidence in the record of disruption, or of a clear and present danger of disruption. The Supreme Court agreed with Pickering on this point. The Court stated:

No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no special findings along these lines were made.

So far as the record reveals, Pickering’s letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. Accordingly, the Court left to another day the question of what should happen when public employee speech is disruptive, and examined whether Pickering’s speech fell beyond the protection of the first amendment for other reasons.

Pickering, and the American Civil Liberties Union as amicus, contended that his speech was protected under the test laid down in New York Times Co. v. Sullivan. In New York Times, the Court held that a citizen’s criticism of a public official was protected against liability for libel unless made “with knowledge that it was false or with reckless disregard of whether it was false or not.” Pickering and his supporters proposed that a public official has no broader recourse against the criticism of an employee whom he hires than against the criticism of a citizen who elects him. Their

104. Id. at 11, 33-34; see 225 N.E.2d at 8 (Schaefer, J., dissenting).
105. 391 U.S. at 567, 570.
106. The Court stated: “Because we conclude that appellant’s statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.” 391 U.S. at 574 n.6. Justice White, concurring in part and dissenting in part, observed that this caveat was “irrelevant” and “gratuitous” given the Court’s adoption of the New York Times test which makes no mention of harm. Id. at 582-84.
108. Id. at 280.
briefs pointed to the Court's use of its new libel test in a case involving a libel suit by a private employer against a private employee, Linn v. Plant Guard Workers Local 114. In Linn the Court held that the New York Times test should be "adopted by analogy" in cases arising under the National Labor Relations Act. Citing Linn, the American Civil Liberties Union urged: "Just as the NLRA protects the employee in the private sector from discharge by his private employer, so the rationale of New York Times protects the employee like Mr. Pickering from discharge by his criticized employer, the public official."

The Supreme Court accepted the applicability of the New York Times test and unanimously reversed. All but two justices held that Pickering's discharge must be tested by the standard of New York Times, and those two thought the standard not protective enough. A second look at Justice Brennan's opinion of the Court in New York Times explains why the approach of that case proved so attractive in Pickering. The concluding paragraph of Brennan's opinion warned against "transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed." If such "legal alchemy" were permitted, continued the New York Times opinion, governments would become able "to establish that an otherwise impersonal attack on governmental operations was a libel of an

109. 383 U.S. 53 (1966). Linn was an assistant general manager of the Pinkerton detective agency who brought a libel suit against a union, two union officers, and a Pinkerton employee. Id. at 55-56.

Subsequent to Pickering, the Supreme Court underscored the Linn holding that national labor policy in the private sphere included the New York Times test in Letter Carriers Branch 496 v. Austin, 418 U.S. 264 (1974). The case arose when a union newspaper published a list of individual workers who had legally declined to join the union. The list was accompanied by a sulphurous statement of Jack London's on the meaning of the word "scab." The individuals thus abused brought a successful libel action in the Virginia state courts. On appeal, the Supreme Court reversed, resting its decision on the Federal Executive Order which at the time of the incident governed labor relations in the postal service. The Court remarked that even before New York Times the National Labor Relations Board had "concluded that statements of fact or opinion relevant to a union organizing campaign are protected by § 7, even if they are defamatory and prove to be erroneous, unless made with knowledge of their falsity. See, e.g., Atlantic Towing Co., 75 N.L.R.B. 1169, 1171-1173 (1948)." Id. at 277-78. The Court declared in Letter Carriers that national labor policy in the public sphere mirrors that in the private sphere under the NLRA—a general thesis of this article. Id. at 273-279. The Court also expressly declined to limit its holding to representation election campaigns or to pre-recognition organizing activity. Id. at 279.

110. 383 U.S. at 65.


112. Pickering v. Board of Educ., 391 U.S. at 574; id. at 583 (White, J., concurring in part and dissenting in part).

113. Id. at 575 (Douglas and Black, JJ., concurring in the judgment). Dissenting in Arnett v. Kennedy, 416 U.S. 134, 294 (1974), Justice Douglas explained that he and Justice Black declined to join the opinion of the Court in Pickering because it intimated that "where the comments of an employee involved 'either discipline by immediate superiors or harmony among coworkers' " the interests might balance adversely to the employee. See note 130 infra and accompanying text.

Justice Marshall's opinion of the Court in *Pickering* followed the same logic. Pickering had attacked the School Board and the superintendent of schools. The Illinois Supreme Court had concluded that "[a] teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of the school..." *New York Times* seemed irrelevant to the Illinois Supreme Court because in that case "[t]here was no right of employment involved, nor are the school officials in the case at bar seeking damages for libel." The Supreme Court disagreed. Just as government officials can chill criticism if permitted to characterize it as libel, government employers can prevent useful comment by employees on public issues involving the workplace if permitted to characterize it as harmful to the agency.

Since, according to the record, Pickering's speech was not disruptive, the Court reasoned,

the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were *per se* detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools.

It was precisely this personalization of criticism that the first amendment proscribed, the Court held. Pickering's accusations, even if false, reflected a difference of opinion as to the preferable manner of operating the school system. The question whether schools require additional funds is a matter of legitimate public concern on which the judgment of the school administration cannot be taken as conclusive; teachers have a valuable contribution to make to the public discussion of such questions. "Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

To this statement of the core issue in the case the Supreme Court added a number of extremely important propositions about public employee speech in general. "Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal," the Court eschewed any attempt to lay down a "general standard." But, the Court did indicate "some of the general lines"
along which analysis in future cases should run. These general lines included:

(1) Teachers may not "constitutionally be compelled to relinquish the first amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." This statement finally laid to rest Justice Holmes' aphorism that while a man might have a constitutional right to free speech, he had no right to be a policeman. Henceforth the typical opinion in a public employee speech case could begin: Although the plaintiff had no right to the job as such, he or she had a right not to be dismissed from the job for unconstitutional reasons.

(2) "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." This statement has caused confusion. Although the Court said that the government has different interests in regulating the speech of its employees than in regulating the speech of the general populace, many courts quote the passage as if it said that the government as employer had greater interests in regulating the speech of its employees than in regulating speech in the society at large.

(3) "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." A critical ambiguity here is what constitutes a matter "of public concern." Although some courts have read the words narrowly to exclude speech about problems inside the workplace, the tendency is to find that speech about workplace problems is speech about matters of public concern so long as it (a) deals with problems of general interest to the employees at the workplace, and (b) is publicly expressed. As a practical matter, therefore, the

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122. Id. at 568.
124. 391 U.S. at 568.
125. Justice Rehnquist has cited the passage to justify regulation over a public employee's first amendment activity greater than that which would be permissible over the activity of a citizen at large. Kelley v. Johnson, 425 U.S. 238, 235 (1976); Arnett v. Kennedy, 416 U.S. 134, 160-61 (1974) (plurality opinion); accord, e.g., Alderman v. Housing Auth., 496 F.2d 164, 174 n.62 (3d Cir.), cert. denied, 419 U.S. 844 (1974). A formulation more accurately reflecting what Pickering says is: "The immunity of government employees from sanction is not necessarily co-extensive with the immunity of citizens from prosecution for speech on the public way." Waters v. Peterson, 495 F.2d 91, 98 (D.C. Cir. 1973). Often, of course, a public enterprise will have special institutional needs over and above the requirements of reasonable order in the society at large. But its needs may also be less; for instance, speech outside the workplace must be monitored with an eye to possible armed violence, whereas the use of weapons will rarely be a problem inside a private or public workplace. For a different view, see Note, The First Amendment and Public Employees—An Emerging Constitutional Right to be a Policeman?, 37 GEO. WASH. L. REV. 409, 412 n.29 (1968).
127. See generally Connecticut Fed'n of Teachers v. Board of Educ., 538 F.2d 471, 480-81
requirement that speech must be about "matters of public concern" to qualify for protection under *Pickering* overlaps with the requirement that speech must be connected with "concerted activity" to qualify for protection under section 7.128

(4) By way of anticipating the balancing which future cases would require, the text and footnotes of the *Pickering* opinion enumerate at least six factors which might have prompted a different outcome had they been present. These factors are summarized in a much quoted Seventh Circuit opinion:129

> Interests of the State which, if strong enough, the Court in *Pickering* felt might lead to a different result in the future are: (1) maintaining discipline or harmony among co-workers;130 (2) need for confidentiality;131 (3) employee's position may be such that his false accusations may be hard to counter because of the employee's presumed greater access to the real

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128. See, e.g., Teachers Local 1954 v. Hanover Community School Corp., 457 F.2d 456 (7th Cir. 1972).

129. See *id.* at 570 n.3.

130. See *Pickering v. Board of Educ.*, 391 U.S. at 570.

131. See *id.* at 570 n.3.
facts;\textsuperscript{132} (4) statements which impede proper performance of his daily duties;\textsuperscript{133} (5) statements so without foundation as to call into question his competency to perform the job;\textsuperscript{134} and (6) a close and personal relationship between the employee and supervisor which called for personal loyalty and confidence.\textsuperscript{135}

To state a claim under \textit{Pickering}, a plaintiff must allege that he or she was engaged in protected speech, and that because of the speech he or she was discharged or otherwise disciplined. A majority of the circuit courts, paralleling precedent under the National Labor Relations Act, have held that discharge is "because of" protected speech if a constitutionally impermissible reason was one of the reasons for discharge.\textsuperscript{136}

The Supreme Court, however, has recently declared that discharge cannot be assumed to be because of protected speech merely because "a dramatic and perhaps abrasive incident [involving protected speech] is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in the decision."\textsuperscript{137} Rather, the employer must have an

\begin{itemize}
  \item \textsuperscript{132} See id. at 572.
  \item \textsuperscript{133} See id. at 572-73.
  \item \textsuperscript{134} See id. at 573 n.5.
  \item \textsuperscript{135} See id. at 570 n.3. A number of commentators, echoing the views of Justices Douglas and Black, see note 104, \textit{supra}, were sharply critical of the potential speech restrictiveness of these exceptions. Note, The First Amendment and Public Employees: Time Marches On, 57 Geo. L.J. 134, 149-61 (1968); Note, Balancing Test Applied to Teacher's Criticism of School Board, 35 Brooklyn L. Rev. 270, 275 (1969); Note, Free Speech: Dismissal of Teacher for Public Statements, 53 Minn. L. Rev. 864, 871-73 (1969).
  \item \textsuperscript{136} Although discipline or discharge motivated entirely by a reason not proscribed by the National Labor Relations Act is not an unfair labor practice merely because it coincides with anti-union sentiment, \textit{see}, e.g., Tompkins Motor Lines, Inc. v. NLRB, 337 F.2d 325, 330 (6th Cir. 1964), the more stringent line of cases holds that discharge or discipline motivated wholly or even in part because of protected activity constitutes a violation of Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3), despite the existence of other causes adequate to support the employer's action. \textit{See}, e.g., NLRB v. Barberton Plastics Prod. Corp., 354 F.2d 66 (6th Cir. 1965). Five circuits have adopted the same stringent position when considering the validity of discipline or discharge actions in public sector situations. Simard v. Board of Educ., 473 F.2d 988, 995 (2d Cir. 1973), citing J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 300 (2d Cir. 1967); Roseman v. Indiana U. of Pa., 520 F.2d 1364, 1367 n.7 (3d Cir. 1975), \textit{cert. denied}, 96 S. Ct. 1128 (1976); Teachers Local 1600 v. Byrd, 456 F.2d 882, 888 (7th Cir. 1972), \textit{cert. denied}, 409 U.S. 848 (1972); Gieringer v. Center School Dist. No. 58, 477 F.2d 1164, 1166 n.2 (8th Cir. 1973); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976), citing Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975). The Fifth and Tenth Circuit courts have yet to clearly adopt a test that requires a plaintiff merely to show that the discharge or discipline was in part because of protected activity, preferring instead to require that plaintiff show that the protected activity was the primary reason for the action taken. Moore v. Winfield City Bd. of Educ., 452 F.2d 726, 728 (5th Cir. 1971), refusing to adopt the "in part" language in Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 210 (5th Cir. 1971). \textit{Compare} Starsky v. Williams, 512 F.2d 109, 111 (10th Cir. 1975) (reserving decision on whether a discharge based in part, even though not primarily or substantially, upon protected activity would be invalid) \textit{with} Bertot v. School Dist. No. 1, 522 F.2d 1171, 1182 (10th Cir. 1975), cited in Frankin v. Atkins, 409 F. Supp. 439, 446 (D. Colo. 1976). Several district courts have adopted a similar posture. Tygrett v. Washington, 346 F. Supp. 1247, 1250 (D.D.C. 1972); Parker v. Graves, 340 F. Supp. 586, 590 (N.D. Fla. 1972); Muir v. County Council, 393 F. Supp. 915, 935 (D. Del. 1975).
  \item \textsuperscript{137} Mount Healthy Bd. of Educ. v. Doyle, 45 U.S.L.W. 4079, 4082 (U.S. Jan. 11, 1977).
\end{itemize}
opportunity to show, by a preponderance of the evidence, whether "the same decision would have been reached had the incident not occurred." 138

Once the plaintiff has established that he or she has been dismissed for exercising constitutional rights, 139 "the State assumes the burden of justifying its action." 140 That burden has been variously described. A rational relationship between the governmental restraint and enhancement of the public service involved would appear to be the bare minimum. 141 Some courts have expressed the burden as a requirement that the state show (a) either a compelling state interest or a state interest which outweighs the impairment of the right, and (b) that no alternative means "less subversive to the constitutional right" are available. 142

Regardless of the abstract words used to frame the balancing test mandated by Pickering, the crux of judicial inquiry will be the nexus between the speech at issue and the employee's work. It is here that Tinker v. Des Moines Independent Community School District 143 contributes by proposing, as a general standard to guide that inquiry, the test of whether the controversial speech caused, or could reasonably have been expected to cause, "material and substantial" disruption.

B. The Tinker Disruption Test

In Tinker the Court held that high school students who wore black armbands in school to protest the Vietnam War could not be suspended under a school rule prohibiting armbands. At the outset, the Court made it clear that the general principles announced in the opinion applied to both teachers and students. 144 Two of these principles are particularly pertinent here:

138. Id. at 4082-83. This test presents the very difficult problem of proving a hypothetical: what the employer would have done had the speech-related incident not occurred. It is disturbing that the unanimous Court rationalized the test by reference to pre-Miranda cases where the Court sought to assess the voluntariness of confessions case by case. These cases represent an approach the Court later abandoned as being both too burdensome and not protective enough of the individual's constitutional rights.

139. "It was not incumbent upon the board to show that its reasons for denying tenure to petitioner were proper; it was for the petitioner to prove that the reasons for denying tenure were improper." Bergstein v. Board of Educ., 34 N.Y.2d 318, 320; 313 N.E.2d 767, 769 (1974); accord, Bogacki v. Board of Supervisors, 5 Cal. 3d 771, 779; 489 P.2d 537; 542, 97 Cal. Rptr. 657, 662 (1971), stating that "[the] employee bears the burden of showing that he was in fact dismissed because he exercised constitutional rights in defiance of restraints sought to be placed by the employing agency."

140. Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971).

141. The Supreme Court has required no more than a rational relationship in a case involving the regulation of sideburns, but not, in the Court's interpretation, involving the first amendment. Kelley v. Johnson, 425 U.S. 238, 247 (1976).


144. First Amendment rights, applied in light of the special characteristics of the school
(1) While speech may be restricted because of fear of future disturbance, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." To justify prohibition, the state must show "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

What then, is the something more which justifies speech restriction? According to Tinker, speech may be restricted if it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "substantially interfere with the work of the school or impinge upon the rights of other students." The Court derived this standard from a Fifth Circuit case concerning black high-school students in Philadelphia, Mississippi, who, soon after the murder of three civil rights workers in the same neighborhood, wore buttons in school which said "One Man One Vote" and "SNCC." Finding that no material or substantial disruption resulted from wearing the buttons, the circuit court held that is was constitutionally protected expression. The Tinker standard is variously paraphrased at a number of points in the opinion. Its essence is the need for material and substantial disruption before speech may be restricted.

(2) The first amendment rights of students apply not only in the classroom, but also "in the cafeteria, or on the playing field, or on the campus during the authorized hours." Citing a Fifth Circuit case, which held protected a meeting on campus of 300 students to express their views on school practices, the Court in Tinker declared that a school "is a public environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

145. Id. at 508.
146. Id. at 509.
147. Id. at 509, quoting Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
148. Burnside v. Byars, 363 F.2d at 749. As Freedom School director of the Mississippi Summer Project of 1964, I was intimately involved with these events. The three men who were murdered were killed in June 1964 while inspecting the ruins of a church which had been burned because of its intended use as a freedom school. Their bodies were found in August 1964. I recall helping to remodel a pickup truck to serve as a mobile freedom school in Philadelphia, it being thought too dangerous to try again to have a freedom school in one place. The button incident took place when public school opened in September 1964. There was no time and place when "undifferentiated fear" of disruption might more plausibly have been justified. That the Fifth Circuit insisted on a showing of more tangible danger is testimony to the sturdiness of the tradition on which the Supreme Court relied in Tinker.
149. (a) "material and substantial interference with schoolwork or discipline." Tinker v. Des Moines School Dist., 393 U.S. at 511.
   (b) "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Id. at 513.
   (c) "materially and substantially disrupt the work and discipline of the school." Id. at 513.
   (d) "substantial disruption or material interference with school activities." Id. at 514.
150. Id. at 512-13.
place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property."\textsuperscript{152} At any place on school property, even during school hours, the permissibility of speech should be judged by the previously stated standard of material and substantial disruption.

These remarks in \textit{Tinker} merely introduced a discussion of the speech appropriate in different places on school property which subsequent public employee cases would continue.\textsuperscript{153} But \textit{Tinker} made one thing clear: the speech rights of the public employee are not confined to speech like that involved in \textit{Pickering}, which took place after work and away from the workplace.

Lower court cases interpreting \textit{Pickering} have generally followed \textit{Tinker} in focusing on the question: Did the speech at issue significantly disrupt the operation of the enterprise? Thus \textit{Pickering} has been restated to hold "that a governmental employee is constitutionally entitled to participate in open public discussion so long as his utterances do not affect the efficiency of his own performance or the efficiency of the agency in which he is employed."\textsuperscript{154} So, too, it has been held: "The school administration, however, may not infringe on teachers' exercise of their First Amendment rights absent a showing that, without the infringing policy or regulation, there would be a substantial and material interference with the requirements of appropriate discipline in the operation of the schools. In making this showing, the administration must rely on reasonable inferences from concrete facts, not on the mere apprehension or speculation that disturbances or interferences with appropriate discipline will occur."\textsuperscript{155} Likewise, the Federal Labor Relations Council, in response to a suggestion by the District Court of the District of Columbia, has issued a statement on picketing by government employee unions according to which picketing will be found permissible unless it "actually interferes or reasonably threatens to interfere with operation of the affected Government agency."\textsuperscript{156}

Vaguer criteria, such as disharmony and insubordination, have been less favored than the \textit{Tinker} disruption test.

\textbf{1. Disharmony}

Disciplining employee speech on the grounds that it causes disharmony

\textsuperscript{152} Tinker v. Des Moines School Dist., 393 U.S. at 512 n.6.
\textsuperscript{153} See, e.g., Los Angeles Teachers Union v. Los Angeles Bd. of Educ., 71 Cal. 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969), and II C infra.
\textsuperscript{155} Connecticut State Fed'n of Teachers v. Board of Educ., 538 F.2d 471, 478 (2d Cir. 1976).
among co-workers is a rationale expressly envisioned in *Pickering.*\(^{157}\) The Tenth Circuit has held that teachers were properly discharged because, \textit{inter alia}, they "had a clique which created disharmony and undermined morale among other members of the faculty."\(^{158}\) In an Oregon case,\(^ {159}\) the dischargee was president of the local education association. At a meeting of a few area residents and teachers which plaintiff did not attend, a fact sheet and a questionnaire critical of the School Board were drafted. Plaintiff mailed these materials to area parents. Responses were to be returned to a post office box for which plaintiff’s husband had applied. The plaintiff’s discharge was held to have been in good faith, because "[t]he criticism led to formation of antagonistic factions among the teachers and to an undermining of the administration."\(^ {160}\)

Were such evidence of disharmony among co-workers generally held to be a sufficient defense to a claim under *Pickering*, public employees would have less freedom of speech than private employees. (Recall that in fashioning the *Gale Products-Magnavox* doctrine for speech in the private sector the Board and the courts showed special solicitude for the speech rights of dissidents.\(^ {161}\)) However, this is not the prevailing view. The disharmony defense was sharply criticized in *Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*,\(^ {162}\) where the court held that a hospital "may not stifle one employee’s freedom of expression by professing a duty to create a sterilized, anxiety-free vacuum for its other employees, all of whom should by training be able to weather minor upsets without totally disintegrating."\(^ {163}\) The disharmony test has also been expressly rejected by the state courts of California:

[D]isharmony from speech is a natural by-product and any limitation or penalty imposed in the name of prevention of disharmony is an attack on speech. . . . [D]isharmony is not a sufficient state interest to compel restrictions on First Amendment activity or to penalize a teacher for exercising First Amendment freedoms.\(^ {164}\)

\(^{157}\) See note 130, \textit{supra} and accompanying text.

\(^{158}\) Adams v. Campbell County School Dist., 511 F.2d 1242, 1246, 1246 n.1 (10th Cir. 1975).


\(^{160}\) \textit{Id.} at 72.

\(^{161}\) See part IIC, \textit{supra}.


\(^{163}\) \textit{Id.} at 508.


It cannot seriously be argued that school officials may demand a teaching faculty composed either of unthinking 'yes men' who will uniformly adhere to a designated side of any controversial issue or of thinking individuals sworn never to share their ideas with one another for fear they may disagree and, like children, extend their disagreement to the level of general hostility and uncooperativeness.
In general, where a public employee is "abrasive" in the exercise of his or her speech rights but there has been no showing of a tangible disruption of the common work, the majority of cases under Pickering do not justify serious discipline.

2. Insubordination

Sometimes an insubordination charge is clearly makeweight—duplicative of the substantive offense with which the employee is charged—or a last-minute substitute for a charge which it is clear the court will reject. In such cases, the courts generally disregard the superfluous insubordination charge. However, when a teacher literally threatens the life of a superior, or calls his superior a "liar," or during an orientation session for new teachers attacks the superintendent of schools in language which the court finds "insulting," "vituperative," "intemperate," "venomous," and "brawling," discharge may be upheld, Pickering notwithstanding. In such instances, it may be said that speech loses its first amendment protection because it constitutes "fighting words."

Similarly, if the employee is guilty of actual disobedience—as when a teacher refused to permit his class to attend a "pep rally" because he had scheduled tests for the whole day, or twice refused to obey an order to report to the principal's office, or refused to teach economics rather than politics in an economics class, or, suspecting his students of marijuana dealing, reported the matter to the Federal Narcotics Bureau rather than to
the school administration as school policy required—\textsuperscript{176} a court can be expected to find that such outright refusal to obey is disruptive enough to justify discharge.

The usual insubordination case is more subtle. What the employer commonly terms "insubordination" is often not refusal to obey a direct order, but a generalized attitude of criticism felt to be intolerable in an employee. The genre is neatly suggested by a case in which an employee was fired for insubordination because he sought to have his supervisor disciplined for an offense because of which, a few days earlier, the supervisor had disciplined him.\textsuperscript{177}

Some courts have held that a public employee who criticizes an immediate superior may properly be fired for insubordination, distinguishing \textit{Pickering} as a case where the employee criticized only the ultimate employer.\textsuperscript{178} In \textit{Reed v. Board of Education}\textsuperscript{179} plaintiff was a member of the Missouri Classroom Teachers' Association who, in addition to placing a report of the convention of the Association in the personal mail boxes of other teachers at her school, placed a sign on the school bulletin board announcing that a teacher demoted the year before by the school principal had been transferred to a better position. The district court granted the school board's motion to dismiss plaintiff's complaint, stating:

Plaintiff's exercise of her right of "free speech" is logically and properly regarded as insubordination. Plaintiff has the right to talk; she has the right to write; she has the right to distribute hand bills; but she must bear the responsibility of her acts—and the natural consequences thereof.\textsuperscript{180}

More convincingly, some courts have held that a \textit{high-ranking} employee may be under a special obligation not to express even truthful criticisms of a superior.\textsuperscript{181} This view can be described as a presumption: state-


\textsuperscript{177} Burkett v. United States, 402 F.2d 1002 (Ct. Cl. 1968). Paul Burkett was a supervisory engineer at the Rock Island Arsenal. One of his subordinates left a classified document unguarded. Burkett's superior, Milne, found the document and locked it in his safe. After Burkett and his subordinate had searched for the document for some time, Milne returned it "with a lecture on the need to safeguard security information." Id. at 1003. A day or so later, Burkett walked into Milne's office and saw a paper marked "For Official Use Only" lying there unguarded. Burkett picked up the paper and reported what he had found to the Director, Milne's superior. The Court of Claims, assuming (what Burkett admitted) that Burkett's intent was to embarrass his superior, nevertheless found this insufficient grounds for discharge.

\textsuperscript{178} See, e.g., Roseman v. Indiana Univ. of Pa., 520 F.2d 1364, 1368 (3d Cir. 1975), cert. denied, 96 S. Ct. 1128 (1976).


\textsuperscript{180} Reed v. Board of Educ., 333 F. Supp. at 820.

ments critical of a superior, with whom the employee works so closely that
the relationship demands personal loyalty or confidence or harmony, are
presumed to have a detrimental effect on work. There is authority in the
Pickering opinion for this exception.

The majority view, however, is that criticism of an immediate superior
even by a high-ranking employee is cause for discharge only when shown to
be actually disruptive. One striking case is Dendor v. Board of Fire and
Police Commissioners. At a meeting of the village trustees, Dendor said
of his superior, the fire marshall, "If you allow him to stay here longer,
there will be incredible damage. The chief just can't handle a regular fire
department. He doesn't know how." The judgment reversing Dendor's
discharge for these remarks was affirmed because there had been no showing
of impairment of the village fire service. The Tenth Circuit took a similar
view in a case which centered on a conflict between a university president
and certain faculty members. Disruption of work was distinguished from a
superior's demand that employees "conform to [his] patterns and molds, all
of which were personal and subjective on his part." The court concluded
that the right to be free from personality control is itself a first amendment
right of expression. The "valid authority" of a college president therefore
does not include the right to demand "loyalty to him personally."

The majority view subordinates exceptions envisioned in dicta of the
Pickering opinion to the central thrust of the Pickering rationale, namely,
that criticism of superiors should not be punished absent a showing of
disruption of work. Absent evidence of disruption, it has been held that to
state at a professional meeting of engineers that the State Engineer, not
being a civil engineer, should not have been appointed is protected under
Pickering. Similarly protected was a junior faculty member's attempt to
add to a faculty meeting agenda a discussion of why the college president
had, according to the press, referred to junior members of the faculty as
"punks." A school bus driver, fired because he joined in filing an elec-

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182. Where a police lieutenant made disrespectful remarks about a superior to subordinates
during morning inspection, a circuit court observed: "Kannisto's diatribe, delivered as it was before
his men while in formation for inspection, can be presumed to have had a substantial disruptive
influence on the regular operations of the department." Kannisto v. City and County of San
Francisco, 541 F.2d 841, 844 (9th Cir. 1976).
183. See notes 131 & 135 supra, and accompanying text.
184. 11 Ill. App. 3d 582, 297 N.E.2d 316 (1973).
185. Id. at 584, 297 N.E.2d at 318.
186. Id. at 589-90, 297 N.E.2d at 322.
188. Id.
190. Mabey v. Reagan, 376 F. Supp. 216 (N.D. Cal. 1974), aff'd, 537 F.2d 1036 (9th Cir.
1976).
In sum, some insubordination is ground for discharge under *Pickering*, but only that insubordination shown to impair job performance. The majority view does not recognize insubordination as an independently sufficient ground for discharge. If the employer can show words so abusive as to be "fighting words," or actual disobedience of a direct order, a court will probably find the conduct disruptive *per se* and uphold resulting discipline. Absent these specialized circumstances, the employer can make out his insubordination defense only by clearly establishing that the speech at issue disrupted work. Therefore, under the majority of cases, the insubordination defense like the disharmony defense collapses into the requirement that the defendant show "the communication's impact on the efficient operation of the . . . department."

### C. Refining the Disruption Test

What is disruption? The California Supreme Court has held that the boundary line drawn by *Tinker* between protected speech and unprotected disruption is reached when speech becomes "incitement to violence or conduct physically incompatible with the peaceful functioning of the campus." Other courts have drawn the line much earlier. In *Watts v. Seward School Board*, the Alaska Supreme Court, on remand from the U.S. Supreme Court to reconsider in light of *Pickering*, held that teachers who circulated an "Open Letter To The Seward School Board" had been justly discharged. In part, this was because their letter produced prolonged public controversy rather than the "massive apathy" which followed *Pickering*’s actions. In *Vance v. Board of Education*, a teacher at an Illinois high school was found to have conducted discussions in his classroom about "student power," and to have stated that the only way to get anything changed was through demonstrations such as "walk outs." Distinguishing *Pickering* as a case where speech "did not affect the internal operation of the school," an Illinois appellate court held that Vance had been justly dismissed.

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192. Consistent with the majority view, a regulation forbidding Milwaukee civil servants to engage in, *inter alia*, "insubordination or disgraceful conduct whether while on or off duty," was found unconstitutionally overbroad because not "limited to 'on the job' situations or . . . directed toward job performance." *Zekas v. Baldwin*, 334 F. Supp. 1158, 1162 (E.D. Wis. 1971).
195. *454 P.2d 732 (Alaska 1969), cert. denied, 397 U.S. 921 (1970).* The case was also distinguished from *Pickering* because the teachers (a) criticized an immediate superior, (b) caused disharmony among co-workers, (c) voiced work grievances rather than opinions on matters of public concern, and (d) expressed themselves on matters which were not of public record and could not readily be corrected by the school board.
197. *Id.* at 749, 277 N.E.2d at 340.
Such decisions make plain the need to elaborate the disruption test. In *Pickering* and *Tinker* the Court found no evidence of disruption in the record. Accordingly, a lower court which finds any significant disruption is free to distinguish *Pickering* and *Tinker* and to sustain employer discipline. The bare term "disruption," therefore, did not do away with ad hoc balancing, and the resulting judicial unpredictability detrimental to all concerned. The disruption concept is an adequate analytical instrument only if elaborated in rules or presumptions which, however mechanical in appearance, give employer and employee reasonable expectations as to what speech will be found protected and what speech will not.

1. Refining by Use of General First Amendment Principles

One way courts could flesh out the disruption test is to do as *Pickering* did: borrow from first amendment law outside the employment context. The following are illustrative of propositions suggested by this approach:

(a) *The employer should be required to specify exactly in what way speech has disrupted work.* If the employer is pushed to be precise, speech will be less restricted than if he need only allege disruption "of the good order and discipline of the department." 198 The point can be illuminated by recent cases involving sideburns. If a fire department is required to prove that lengthy sideburns either (a) constitute a serious physical danger because hair is highly flammable, or (b) prevent a satisfactory seal on gas masks, the employee will probably win. 199 If, however, as in the most recent Supreme Court case, a police department need merely prove that sideburns interfere with its "mode of organization," the employer is likely to be victorious. 200

(b) *The employer should not be permitted to punish speech as if it were conduct.* One cannot quarrel with cases upholding the discharge of a professor who participated in a sit-in, counselled students to reject administration demands, and joined with students in refusing to leave an occupied building; 201 or of welfare workers who took their telephones off the hook during a dispute with management. 202 There, the plaintiffs went beyond speech to action. However, discharge has also been affirmed in cases arguably involving conduct which was symbolic speech. Discharges of teachers who protested certain college policies by failing to wear academic regalia at commencement; 203 of an employee who applied for a marriage license to register

200. Kelley v. Johnson, 425 U.S. 238, 246 (1976). In adopting this more vague standard, the majority of the Court in *Kelley* did not view the case as involving the first amendment.
201. Rozman v. Elliot, 467 F.2d 1145 (8th Cir. 1972).
202. Herzbum v. Milwaukee County, 504 F.2d 1189 (7th Cir. 1974).
his belief in the right of homosexuals to equal protection; and of a professor who protested the planned participation of the university band in a parade of the all-white Veiled Prophet Order through the streets of St. Louis have all been upheld. In this last case, the professor first protested by writing an open letter to the university chancellor, then by engaging in a hunger strike and shaving his head in front of the university auditorium, and finally by lying down in front of the parade. In one case, employees of the Library of Congress were found to have been properly dismissed for conducting a sit-down strike in the main reading room, although the Supreme Court had previously held that the sit-down strike of citizens in a library to protest the same injustice was protected symbolic speech.

The difficulty of symbolic speech cases should not be permitted to blur the usual distinction in first amendment law between speech and conduct. A police officer who wrote a letter to fifty-four other patrolmen urging their support of a certain political candidate may have been in the wrong, but the court was mistaken to characterize what he did as "conduct" rather than "speech." It is too easy to say that a teacher "does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized." Of course the teacher does not immunize himself; nevertheless, there remains a critical distinction between, for instance, affirming a belief in the right to strike and actually striking.

(c) The distinction of general first amendment law between mere advocacy, and the incitement of concrete, imminent illegal acts, should be maintained. Consistent with first amendment cases involving non-employees, an Alabama law denying pay raises to any teacher who "encourages or condones any mass truancy even for a day, or any extracurricular demonstration which is not approved by the City, County or State Board of Education" was held facially unconstitutional because it was not limited to activities which disrupt or are about to disrupt the normal opera-

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204. McConnell v. Anderson, 451 F.2d 193, 196 n.7 (8th Cir. 1971).
210. See Judge Wyzanski's opinion in a case where a board of education denied salary increases to seven public school teachers because they refused to sign a contract which stated that the local education association would no longer be recognized as a bargaining agent because it affirmed the right to strike. The Seventh Circuit held the board's action unconstitutional because it "precludes a teacher from receiving a full salary and perquisites if, as a mere matter of dogma, he holds to the belief that teachers should be free to strike against governmental agencies." Aurora Educ. Ass'n East v. Board of Educ., 490 F.2d 431, 434 (7th Cir. 1973), cert. denied, 416 U.S. 985 (1973).
211. For a review of recent law in this area, see Comment, Brandenburg v. Ohio: A Speech Test for All Seasons?, 43 U. Chi. L. Rev. 151 (1975).
tion of the schools. More questionable was a decision upholding the discharge of a high school teacher who disagreed with the administration about having Army recruiters on campus. His discharge was based on the following actions: he told his algebra class that they were "4000 strong" and capable of ridding the campus of Army recruiters; he later approached a display table in the school lobby manned by three recruiters, pointed a finger at them (but did not touch them), and in a loud voice stated that faculty members and students did not want them there. His discharge was affirmed although no substantial disruption ensued.

Clearly wrong under the first amendment, at least as applied outside the employment setting, were two recent Sixth Circuit decisions. In one case, three school principals voted for a strike as delegates to the Kentucky Education Association. However, when the strike began, they personally reported to their desks at their respective schools during school hours on each day of the strike. After the strike, all three were demoted to the rank of classroom teacher. Reversing the trial court, the Sixth Circuit held the demotions permissible because "we decline to recognize any federal constitutional right on the part of the principal of a public school to urge and encourage teachers under his jurisdiction to commit illegal acts. . . ."

In a second Sixth Circuit case, plaintiff Whitsel was a high school teacher whose duties included supervision of a student teacher from nearby Kent State University. Whitsel gave the student teacher permission to attend a Kent State demonstration which, as it turned out, was the demonstration in which four students were killed. The high school immediately dismissed the student teacher. The next morning students at the high school assembled to ask the reason for the dismissal. The superintendent of schools addressed the students, and when his explanation failed to convince, instructed the students to return to classes. Whitsel then spoke, stating that he had given the student teacher permission to attend the demonstration, and that the latter might have a viable court case. Soon after, Whitsel was discharged. In affirming the discharge, the court observed that Whitsel did not urge the students to obey the superintendent and, therefore, "was terminated not only for what he said but also for what he did not say." By not counselling the students to go, Whitsel was found to have impliedly counselled them to stay.

2. Refining by Use of Section 7 Presumptions

A second approach to giving the disruption test more bite looks not to the first amendment, but to private sector precedent under the National

215. Id. at 867.
217. Id. at 1228.
218. The court found Whitsel’s action (or non-action) to be a violation of a duty under school regulations to help quell a student disruption.
Labor Relations Act. Without quite realizing or acknowledging what they were about, a majority of lower courts have, in effect, adopted presumptions parallel to those espoused in *Peyton Packing* and *Republic Aviation*. This dominant tendency may be expressed in the proposition:

> The courts, like the National Labor Relations Board, should regard as presumptively unreasonable employer restriction of employee speech in those settings where speech is unlikely to cause material and substantial disruption of work. Three such settings have been defined: speech outside the workplace; speech at the workplace during nonworking hours; and silent symbolic speech at the workplace during working hours.

**a. Speech Outside the Workplace**

Speech outside the workplace is sufficiently unlikely to interfere with work that in the private sector the law has not found it necessary to establish guidelines. So, too, in the public sector, typically the employer's attitude is that whatever he [the employee] wanted to do outside of the hospital in distributing leaflets was his business and I was not concerned with that factor; [I was concerned] that he should not do this sort of thing in the hospital, but what he did outside the hospital was his business.\(^2\)

An Arizona district court explains that the reason for this presumption is pragmatic: speech is simply less likely to be disruptive when it takes place away from work.\(^2\)

The generalization that comparable speech activity is more likely to be disciplined if it takes place inside the workplace is illustrated by the following three cases.

In the first case,\(^2\) a probation officer placed a 2' x 3' poster on the wall of his office. At the top of the poster were the words "Wanted by the F.B.I."; thereunder were pictures of Rap Brown, Angela Davis, and Eldridge Cleaver; and at the bottom were the words:

Faith, Beauty, Integrity  
REWARD  
Love—Peace—Happiness

The employee refused to remove the poster from the wall of his office and was discharged. Affirming the action, the circuit court remarked: "In distinguishing *Pickering* the district court properly noted the critical distinction between expressions outside work premises during off-duty hours and those carried on during work hours and on the work premises."\(^2\)

\(^{219}\) Grausam v. Murphey, 448 F.2d 197, 203 (3d Cir. 1971) (testimony of hospital medical director).

\(^{220}\) "Although this balancing test [of *Pickering*] is technically the same for on-campus speech and speech as a citizen, as a practical matter it may be easier for the school to show a counterbalancing interest where the speech is closely connected with the speaker's on-campus duties." Starsky v. Williams, 353 F. Supp. 900, 921 (D. Ariz. 1972).

\(^{221}\) Phillips v. Adult Probation Dept., 491 F.2d 951 (9th Cir. 1974).

\(^{222}\) *Id.* at 955 n.9.
In the second case, a probation officer was transferred against his wishes from one kind of work to another. That evening he wrote a poem expressing his displeasure at the transfer. The next day he showed the poem to a few of his friends in the office and to his immediate supervisor. One of his fellow employees, with his permission, copied the poem and posted it on her wall. The court upheld the employee's discharge, which was based on these actions.

In the third case, a black school teacher named Creed Buck resigned under pressure from his job as principal of an all-black public elementary school in Starkville, Mississippi. His wife Sylvia, a teacher at another all-black school in the same system, expressed her displeasure by mailing “to numerous persons in and out of Starkville” a picture depicting a black man hanging on a cross with blood spilling from his side. Several questions were written on the picture, including: “Were you there when the black principal and teachers were fired.” The words, “One of these days all mankind will have justice” also appeared on the picture. Mrs. Buck mailed a poem and “a call for help” along with the picture. Following the incident, the school board refused to renew her teaching appointment despite the recommendation of her principal. The court found the mailing protected speech, and directed her reemployment.

Little basis appears for distinguishing these cases except the location of the speech. No doubt correctly, the courts have concluded that speech is more likely to be disruptive when it occurs inside the workplace.

The presumptive protectedness of public employee speech outside the workplace has been affirmed by the courts in a variety of circumstances. A police department regulation prohibiting officers from associating with any convicted criminal was found to violate first amendment freedom of association because, under Pickering, “that freedom may be circumscribed only as reasonably and narrowly related to the effective performance of a police officer’s duties.” In addition, a police department may not refuse to hire an applicant who legally practices nudism when such practice is not shown

224. The poem read as follows:
   I am the person / who when you leave me / free to do / what I feel / is right will work
   my butt off Most responsible / when I sense / you trust me include / me in your plans I’ll
   help / you reach a dream
   Don’t put me down / cut me low Don’t burn / me shine me on Don’t / treat me like a
   pawn / and try to push me / all around your big / heavy chessboard I won’t / be your piano
   key / cause I know how to make / my own music
   When you leave me / out, let me know / I don’t count, show me / you don’t care / you
   help me hate you
   So when you feel / the bomb / blow you out / your window Remember / you put the
   fuse in.
Id. at 29 n.1, 106 Cal. Rptr. at 863 n.1.
to interfere with police duties.\textsuperscript{227} Even off-duty political activities have persistently been protected if (a) non-partisan, and (b) unrelated to job performance, because under \textit{Pickering}, when these conditions are met, the public employee must be treated for purposes of adjudicating his speech rights as a member of the public.\textsuperscript{228} Indeed in one case,\textsuperscript{229} a social worker who, after working hours and speaking only as a private individual, appeared at a public meeting and urged welfare recipients ‘‘to get on caseworkers’ backs and demand their rights,’’ was held by the Pennsylvania Supreme Court to have been engaged in protected speech. This was in part \textit{because} his work enabled him to make a ‘‘unique, and valuable’’ contribution to the meeting.\textsuperscript{230}

As in the private sector, the presumptive protection for speech outside the workplace is rebuttable. Sometimes the courts have held that publicity causes sufficient harm to strip speech of that protection.\textsuperscript{231} More defensible are decisions finding speech outside the workplace unprotected because of unique circumstances. For example, should it have tipped the balance against a teacher who criticized her superiors that she taught in a Navy school on a very small atoll in the mid-Pacific where people were ‘‘thrown together constantly’’?\textsuperscript{232} It has often been argued, similarly, that policemen because of their para-military mission are subject to more regulation than other public employees.\textsuperscript{233} Finally, there are instances where the speech or activity away from work is nonetheless demonstrably work-connected,\textsuperscript{234} as when a teacher, while never encouraging truancy in his students, encouraged it in his daughters,\textsuperscript{235} or when Mississippi public school teachers defied a school board order by enrolling their own children in an all-white private school.


\textsuperscript{228} Phillips \textit{v.} City of Flint, 57 Mich. App. 394, 225 N.W.2d 780, 783-84 (1975); Hobbs \textit{v.} Thompson, 448 F.2d 456, 475 (5th Cir. 1971). \textit{See also} Holden \textit{v.} Finch, 446 F.2d 1311 (D.C. Cir. 1971); Lecci \textit{v.} Cahn, 360 F. Supp. 759, 769 n.10 (E.D.N.Y. 1973).

\textsuperscript{229} In re Chalk, 441 Pa. 376, 272 A.2d 457 (1971).

\textsuperscript{230} \textit{Id.} at 384, 272 A.2d at 461.

\textsuperscript{231} \textit{See} Sprague \textit{v.} Fitzpatrick, 45 U.S.L.W. 2294, 2295 (3d Cir. Dec. 6, 1976), where the court declared that ‘‘if the arousal of public controversy exacerbates the disruption of public service, then it weighs against, not for, First Amendment protection in the \textit{Pickering} balance.’’ Thus in Magri \textit{v.} Giarrusso, 379 F. Supp. 353, 357-58 (E.D. La. 1974), the dismissal of the president of a patrolmen’s trade union was upheld because he had violated a New Orleans Police Department rule which prohibited \textit{publicly} ‘‘criticiz[ing] or ridicul[ing] the department.’’ \textit{See also} O’Brien \textit{v.} Galloway, 362 F. Supp. 901 (D. Del. 1973), where plaintiff was found to have been justly discharged, not because of what he said to his supervisors in a meeting, but because when he stormed out of the meeting, he was overheard by a reporter to say that he would not let an idiot make a monkey of him.

\textsuperscript{232} Ring \textit{v.} Schlesinger, 502 F.2d 479, 495 (D.C. Cir. 1974) (Robb, J., dissenting).


\textsuperscript{234} These cases, as well as the earlier mentioned cases involving the effect of publicity, may be said to involve potential types of disruption the occurrence of which is not easily predicted by reference to the setting of the speech.

These cases are hard to decide on a principled basis. Whatever is decided about the white Mississippi teachers should be consistent with the decision about the black Mississippi policeman who was fired, or induced to resign, because he permitted two white anti-poverty workers to stay in his home.237

b. Speech at the Workplace during Nonworking Hours

In cases involving speech inside the workplace, the courts appear to be moving toward the same distinction adopted in Peyton Packing and Republic Aviation between speech on the employer's property during working time and speech on the employer's property during the lunch hour, rest breaks, and the time before and after work. As one circuit court sensibly observes, it "would appear that there arises from the contractual relationship of employer-employee a right in the employer to place reasonable restrictions upon an employee's sphere of permissible conduct during actual work period[s]. . . ."238

Just as the right to distribute literature in nonwork areas of the employer's property during nonworking hours has been recognized for private employees,239 it has been recognized for public employees as well. The Los Angeles Teachers Union circulated on school premises during duty-free lunch periods a petition relating to the financing of public education addressed to various public officials. Like decision makers in the private sphere, the California Supreme Court found that the workplace during off-duty hours was "the most effective forum" for communication among employees, and held that the speech was protected.240

The right to free speech during the lunch hour was also affirmed in a thoughtful opinion by Judge Leventhal of the Circuit Court of Appeals for the District of Columbia. In Waters v. Peterson,241 two black employees of the Bureau of the Census brought suit seeking to void a five-day disciplinary suspension. The reason for the suspension was that

[d]uring a lunch hour the plaintiffs, who were with others picketing in the lobby of the Census building at Suitland, Maryland, complaining against discriminatory discharges, entered the Census cafeteria which is open to the public and approached two white women supervisors who were there seated having lunch. They carried a two-foot-by-four-foot sign which read: "Pigs

Off Census," and held it silently next to the women's table for several minutes.\textsuperscript{242}

The supervisors became upset and left the cafeteria.

The district court approved the suspension.\textsuperscript{243} The incident, it stressed, occurred "at the employee's place of work." Such conduct if tolerated would impair the efficiency of the federal service, the court continued.\textsuperscript{244}

On appeal, the circuit court remanded for a determination as to whether the agency based its decision on the words used by the protestors or on their conduct in approaching the table and silently standing there. Judge Leventhal's summary of the facts began by noting that the plaintiffs were leaders of a so-called Task Force of black employees at the Bureau of the Census which on several previous occasions had protested in the cafeteria, either standing near the entrance or parading through the aisles with signs. One of the signs carried on these previous occasions also read, "Pigs Off Census." During the months that these earlier protests occurred the employees had never been warned or disciplined as a result.

By putting the incident at issue in the context of previous demonstrations, Judge Leventhal's opinion established that the Census cafeteria was "a public place where demonstrations and messages are part of the basic pattern of life."\textsuperscript{245} In short, it was a public forum. The words "Pigs Off Census" could not be considered "fighting words," inherently likely to provoke, because they had previously been used in the cafeteria without violence. And, the cafeteria could not be considered an inappropriate place for the words to be used because their use in that place had become customary.

Judge Leventhal also responded to the frequently asserted government defense that nonwork-hour controversial speech on the worksite disrupted subsequent work. The court declared:

The asserted governmental interest here is a tranquil environment for government employees during their lunch hour, so that work might be more efficiently performed after the completion of lunch. . . . The difficulty is that a man's right of free speech comprehends the possibility that persons may be upset by what he says.\textsuperscript{246}

c. Silent Symbolic Speech at the Workplace during Working Hours

Although the most obvious case for the nondisruptiveness of worksite speech is where the speech occurs outside working hours, it is possible to

\textsuperscript{244} Id. at 442.
\textsuperscript{245} Waters v. Peterson, 495 F.2d at 99.
\textsuperscript{246} Id. at 98.
identify some types of speech activity occurring during working hours that warrant presumptive protection. Writing in 1970, Professor Van Alstyne deplored the frequent failure of cases under Pickering to protect the academic freedom of the teacher who is "made an implement of governmental practices which are themselves violative of the first amendment." Since then, at least two circuit courts have expressly rejected the claim that there is a first amendment right to employ unorthodox teaching methods contrary to the dictates of the employer. Nor have the courts generally been sensitive to the claims of conscience on the professional service employee. It is one thing to hold that a teacher misuses his tenth grade biology classroom to express criticisms of the school superintendent, the school board, and the school system, especially without a presentation of opposing views. It may be something quite different to discharge a special education teacher who insisted, contrary to the judgment of her superiors, that a mentally retarded, pregnant girl who was her student should be permitted to choose between childbirth and abortion, or to fire a social worker in a Mental Health Center who permitted a 16-year-old girl committed by her mother to call a Legal Aid office about her rights, and who, subsequently, herself made inquiry as to the patient's right to refuse electroshock therapy. Presumably, at some point society wants an employee thus situated to be able to say "No," even during working time.

One court has recognized at least some first amendment interest in teaching unorthodox theories. The case involved a substitute teacher, unaware until he stepped into the classroom that the lesson assignment for the day concerned Near Eastern religion, who responded to specific questions from members of the class by explaining his own religious beliefs. He was discharged for "giving his own religion rather than reading the text"; talking Darwin to a 'captive audience'; [and] failing to observe a minimum 'standard of rapport' with the students." The court held that academic freedom was a first amendment right, and further, that "[t]o discharge a teacher without warning because his answers to scientific and theological questions do not fit the notions of the local parents and teachers is a violation of the Establishment clause of the First Amendment." The right to answer questions about collective bargaining was upheld in a New Jersey case. There, the Board of Education instructed its faculty

251. Harnett v. Ulett, 466 F.2d 113 (8th Cir. 1972).
253. Id. at 1043.
not to answer questions about negotiations for a new collective bargaining agreement which they might be asked "in the classroom, hallways, and during extra-curricular activities." The court held that while prolonged discussion might present a different case, "[o]ur Constitution permits answers to controversial questions in the classroom."  

An interesting variation of the right to answer questions appears in *Mailloux v. Kiley.* There a high school teacher wrote the word "Fuck" on the blackboard to illustrate the concept of a taboo word. Holding the teacher's speech protected in the circumstances, the court gave weight to the fact that the teacher had not asked any particular student to define the word "fuck," but called for a volunteer.

The better line of cases applies the material and substantial disruption standard of *Tinker* even to a teacher's classroom work. Thus an eleventh-grade teacher who assigned "Welcome to the Monkey House" by Kurt Vonnegut was held to have exercised protected academic freedom when the administration "failed to show either that the assignment was inappropriate reading for high school juniors, or that it created a significant disruption to the educational processes of the school."  

If, absent disruption, there is a qualified right to answer questions about matters outside the prescribed assignment, and to work in a manner expressive of the worker's own conscience and creativity, it is a small further step to the next presumption regarding a right to express individual views about public matters in a silent symbolic form.

It is sometimes forgotten that *Republic Aviation* held not only that speech was presumptively protected in nonworking time, but also that union buttons might be worn during work. Similar holdings in the public sector have begun to establish the right to silent symbolic speech even during work hours.

That public employees may engage in symbolic speech, even during working hours, was forecast by *Tinker,* for if students have the right, absent disruption, to wear black armbands, how can the same right convincingly be denied to teachers? So held the Second Circuit in *James v. Board of Education.* The court expressly rejected the school board's attempt to "distin-

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255. *Id.* at 354, 300 A.2d at 366. The court expressly rejected the contention that *Pickering* did not apply because Pickering's statements were not made in the classroom or in the school building. "[Pickering] nevertheless gives compelling support for the position that a teacher's statements, wherever made, are to be given no less opportunity for issuance than those of any other citizen." *Id.* at 353, 300 A.2d at 364. *But see Nigosian v. Weiss,* 343 F. Supp. 757, 758 (E.D. Mich. 1971), holding constitutional a school board regulation prohibiting "classroom discussion of any aspect of the recent labor dispute in the District without the express permission of the principal concerned."


257. *Id.* at 1389.


guish Pickering by [drawing] an arbitrary line between first amendment rights exercised in school and out of school," and distinguished James' silent expression from cases in which the teacher had taken class time to introduce controversial topics for discussion.

Similarly, in Russo v. Central School District, the Second Circuit held that a teacher may not be discharged for doing what the Supreme Court had held students might do in the Barnette case during World War II: stand in respectful silence, with arms at one's sides, during the pledge of allegiance and salute of the flag. Other courts which have dealt with symbolic expression by armbands and refusal to take the pledge concur.

Like the other presumptions concerning speech outside the workplace, and speech in the workplace during nonworking time, the presumption about silent symbolic expression is rebuttable. This is illustrated by the case of a clinical psychologist who was held to have been constitutionally discharged for refusing to remove "a pin, about the size of a nickel, fashioned with the outline of a dove superimposed upon a replica of the American flag," because he wore this peace pin in a Veterans Hospital.

D. Summary

Pickering established that citizens do not give up first amendment rights when they become public employees and that mere criticism of a supervisor, without more, will ordinarily not justify an employee's discharge. In Tinker, the Supreme Court held that material and substantial disruption was required to restrict the speech rights of students and teachers. Reflecting Tinker, the cases under Pickering indicate that "disharmony" and "insubordination" will not justify discipline or discharge unless it can be shown that the speech at issue caused, or could reasonably have been expected to cause, disruption of work. The courts have also elaborated the

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261. Id. at 572 n.13.
262. Id. at 575 n.21. The principal precedent distinguished was Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970), holding that an Air Force civilian employee had been properly discharged because, during English classes he taught to foreign military officers, he had praised those who burned themselves in protest against the Vietnam War and commented that Jews in the United States were discriminated against. See Nahmod, Controversy in the Classroom: The High School Teacher and Freedom of Expression, 39 Geo. Wash. L. Rev. 1032, 1044-47, 1056-59 (1971) (approving distinction between silent and oral expression). The distinction between silent and oral expression may be compared to the distinction between written and oral expression, in that in each instance the listener is free to ignore the non-oral expression. Cf. Lehman v. City of Shaker Heights, 418 U.S. 298, 320 (1974) (Brennan, J., dissenting).
266. Smith v. United States, 502 F.2d 512, 514 (5th Cir. 1974). The court accepted the testimony of the hospital's chief of staff that, because many of the patients with whom the psychologist worked had suffered serious injuries in the Vietnam War, the therapeutic process could be seriously disrupted if therapists openly advertised their opposition to the war while on duty.
disruption test by *sub silentio* adopting presumptions similar to those adopted in the private sphere by Peyton Packing and Republic Aviation. Under this approach, it is presumptively unreasonable for a public employer to restrict speech outside the workplace, speech at the workplace during nonworking hours, and silent symbolic speech at the workplace during working hours.

IV

CONCLUSION

The following similarities have been noted in the protection of employee speech in the private and public workplace:

1. The right to speak out about workplace issues may not be waived by a union,267 nor does a citizen give up speech rights by becoming a public employee.268

2. Speech is not libelous unless made with knowledge or reckless disregard of its falsity.269

3. Speech about workplace issues is protected if related to concerted activity for mutual aid or protection (private workplace),270 or if it deals with problems of general interest to the employees at the workplace and is publicly expressed (public workplace).271

4. Discharge or other discipline is because of protected speech even if it is only in part because of protected speech, (and in the public sphere, if the employer would not have discharged the employee anyway if the speech-related incident had not occurred).272

5. Speech may be just cause for discharge or other discipline if it interferes with necessary production or discipline (private workplace),273 or causes or can reasonably be expected to cause substantial and material disruption (public workplace).274

6. Fighting words and actual disobedience of a direct order are *per se* disruptive and just cause for discharge or other discipline.275

7. The employer's property during nonworking time is a natural public forum for the communication of ideas among employees.276

8. Wearing buttons and armbands, and other forms of silent symbolic

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267. See Part IIC, *supra*.
268. See Part IIIA, *supra*.
269. See notes 107-13, *supra*, and accompanying text.
270. See notes 127-28, *supra*, and accompanying text.
271. *Id.*
272. See notes 136, 137, *supra*, and accompanying text.
273. See Part IIB, *supra*.
274. See Part IIIIB, *supra*.
275. See notes 97, 172, *supra*, and accompanying text.
speech, will ordinarily be permitted during working time.277

This is surely a rather remarkable convergence. It would appear that, under whatever labels, decision makers required to balance free speech in the workplace against the interest in efficient operation have reached much the same conclusions. There would seem to be one doctrine of employee speech, not two.

277. See notes 259-266, supra, and accompanying text.