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Protecting Blogging: The Need for an Actual Disruption Standard in Pickering

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Protecting Blogging: The Need for an Actual Disruption Standard in *Pickering*

Lindsay A. Hitz*

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[O]f all the species of writer, bloggers are the least insulated from their audience, most vulnerable to the ebb and flow of attention and response. They are both alone and in a crowd. Their solitude can inspire self-indulgent ranting; their sociability can tempt them into self-serving pandering. But every now and then they manage to hold their balance in this paradoxical position for an extended, exhilarating spell.¹

I. Introduction

The blog is a powerful outlet for expression that holds the potential to reach an audience virtually unhindered by geographic and economic

1. SCOTT ROSENBERG, SAY EVERYTHING: HOW BLOGGING BEGAN, WHAT IT’S BECOMING, AND WHY IT MATTERS 326 (2009).

limits.² With this power comes the ability to disseminate socially valuable and productive speech and, conversely, speech with no apparent value.³ Some of the more controversial blog content has recently sparked litigation in the field of employment law.⁴ Although private sector employees have no First Amendment⁵ protection in connection with their employment, public employees enjoy limited constitutional protection from adverse employment actions.⁶ As the sheer number of individual bloggers continues to increase, public employee blogging will increase as well.⁷

2. See GLENN REYNOLDS, *AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS* 261 (2006) (explaining how "self-expression on any sizable scale was the limited province of the rich and powerful" prior to recent advancements in technology which allow a person to post artwork, books, and other forms of expression online "from anywhere and have them available to the entire world").

3. See, e.g., ROSENBERG, *supra* note 1, at 305 (explaining computer-science pioneer Joseph Weizenbaum's remarks discussing the value of content on the Internet). Rosenberg repeated Weizenbaum's quote that was published in the *New York Times* and also included the rest of Rosenberg's quote that was absent from the article:

Here, for instance, is one that is nearly perfect in its combination of vivid imagery and disdain: "The Internet is like one of those garbage dumps outside of Bombay. There are people, most unfortunately, crawling all over it, and maybe they find a bit of aluminum, or perhaps something they can sell. But mainly it's garbage . . ." After the story quoting him appeared, Weizenbaum wrote a letter to the editor. He affirmed the quotation's accuracy but noted that he'd gone on to say, "There are gold mines and pearls in there that a person trained to design good questions can find."

Id. (citations omitted).

4. See, e.g., *infra* Part IV (discussing cases in which the government took retaliatory action against an employee for the content of the employee's blog). A term—dooced—has even been coined to refer to the act of being fired for one's blogging activities. See Jerome P. Coleman, *Employee Blogs: Recognizing the Reality*, 762 PRACTICING L. INST. 561, 569 (Oct. 2007) ("Heather Armstrong, a web designer, was fired in 2001 for writing 'objectionable and negative' statements about her job, coworkers, and boss on her blog, *Dooce* The blogging community now uses the term 'dooced' to mean having lost one's job because of one's blogging activities.").

5. See U.S. CONST. amend. I (commanding that "Congress shall make no law . . . abridging the freedom of speech").

6. See David L. Hudson, Jr., *Balancing Act: Public Employees and Free Speech*, FIRST REPORTS (First Amendment Center, Nashville, Tenn.), Dec. 2002, at 2, available at <http://www.firstamendmentcenter.org/PDF/FirstReport.PublicEmployees.PDF> ("While the private employer probably can fire an employee whose speech he dislikes, the First Amendment governs the circumstances under which public employers may discipline employees for their speech.").

7. See Jeffrey S. Klein & Nicholas J. Pappas, *When Private Sector Employer Fires Worker for Blogging*, N.Y. L.J., Feb. 5, 2007, at 3 ("There are currently 63.2 million blogs in existence and 175,000 new blogs are created every day. . . . Accordingly, as blogs continue to rise in popularity, there have been several prominent instances where employees have

Moreover, given the limited First Amendment protections of public employees, the growing use of blogging by these employees will likely lead to an increase in employment litigation regarding their online activities.⁸

To provide consistent application of the law and prevent unnecessary chilling of speech, certain inconsistencies in the current test for establishing the First Amendment rights of public employees must be addressed. The current test for determining whether the government, as an employer, can take disciplinary action against an employee for expressing his First Amendment rights is embodied in the *Pickering* balancing test.⁹ Under this test, a court balances the employee's interest, as a private citizen, to exercise his First Amendment rights against the government's interest, as an employer, to promote efficiency of government service.¹⁰ The Court has refined this test over the years by adding certain requirements and standards.¹¹ Despite those refinements, lower courts continue to apply inconsistently parts of the balancing test.¹² These inconsistencies demonstrate a need for action by the Court or, alternatively, Congress to ensure that the constitutional rights of public employees are adequately protected. Although either body could choose to strengthen the protections for all types of speech, this Note argues that blogging presents a unique

used their blogs to comment publicly about their employers." (citations omitted)).

8. See Michelle A. Todd et al., *Employee Use, Misuse, and Abuse of Social Network Sites*, NAT'L SCH. BDS. ASS'N, Jan. 2008, <http://www.nsba.org/SecondaryMenu/COSA/Search/AllCOSADocuments/SocialNetworkSitesIA08.aspx> (last visited Sept. 22, 2010) ("In 2006, the Employment Law Alliance surveyed over 1,000 American employees and found that up to five percent maintained personal blogs. Of them, 16 percent admitted to posting unfavorable comments about their employers, co-workers, supervisors, or customers.") (on file with the Washington and Lee Law Review).

9. See MARCY S. EDWARDS, JILL LEKA, JAMES BAIRD & STEFANIE LEE BLACK, *FREEDOM OF SPEECH IN THE PUBLIC WORKPLACE* 29 (1998) (explaining that the *Pickering* balancing test "remains the current standard" used to "address the free speech rights of public employees").

10. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("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.").

11. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (limiting the scope of the *Pickering* balancing test by holding that an employee's actions pursuant to his official duties were not constitutionally protected); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (adding the requirement that a public employee's speech must touch on a matter of public concern in order to trigger *Pickering* balancing).

12. See *infra* Part III (discussing the inconsistent application of the "disruption to the workplace prong" of the *Pickering* balancing test in the Eighth and Ninth Circuits).

vulnerability under *Pickering* and requires a more certain disruption standard.

This Note opens with an anecdotal example of public employee blogging gone wrong based on a recent scandal set in the nation's capital. Part II uses these facts to examine the evolution of the *Pickering* balancing test in the Supreme Court, paying specific attention to the Court's formulation of the "disruption to the workplace" rung of the test. Next, Part III looks to various lower court formulations of the disruption rung and specifically examines inconsistent formulations found within decisions of the Eighth and the Ninth Circuits. Part V explores the specific application of *Pickering* to lower court blogging cases and establishes the significant impact that the disruption standard can have on blogging cases. Following from this analysis, Part VI examines the negative effects of the inconsistent disruption standard and, in turn, explores the benefits of creating a consistent standard. Finally, this Note suggests that the stricter standard of "actual disruption" must be effected by the Court or congressional action, at least insofar as the off-duty blogging activities of government employees are concerned. This action will be a positive step toward adequately protecting the First Amendment rights of public employees and preventing unnecessary chilling of this new and valuable form of expression.

II. A Blogging Scandal Exposes the Uncertainties of the Pickering Framework

While noncontroversial personal blogs about one's pets or other mundane aspects of a person's life will rarely, if ever, result in discipline by an employer, racier blogs, which focus on intimate sexual details of a blogger's life or public criticism of the blogger's workplace, often do trigger a strong reaction from employers who discover the entries.¹³ When public employees create these types of controversial personal blogs, the line defining First Amendment protections is often blurred. One recent instance involves the blogging activities of Jessica Cutler, a congressional staffer on Capitol Hill who was fired for content on her blog.¹⁴ Cutler wrote a blog

13. See Coleman, *supra* note 4, at 569 (discussing employees who had been fired for blogging including a flight attendant who had been "fired for posting suggestive photographs of herself in uniform on her blog").

14. See Richard Leiby, *The Hill's Sex Diarist Reveals All (Well, Some)*, WASH. POST, May 23, 2004, at D03 ("Sen. Mike DeWine (R-Ohio) on Friday fired a young staffer for 'unacceptable use of Senate computers' after she posted her sex diaries on the Internet and raised a hubbub of speculation last week: Who is this wicked woman that calls herself

chronicling her sexual escapades with high-level congressional staffers and members of the Bush administration.¹⁵ Instead of contesting her firing, Cutler profited from the instant celebrity status arising from the scandal by signing a book deal, among other benefits.¹⁶

In light of her personal gain from the incident, Cutler never raised the issue of her First Amendment rights as a government employee; however, with a few slight adjustments to this fact pattern, Cutler's statements in her blog would be subject to the balancing test enunciated in *Pickering v. Board of Education*,¹⁷ which determines whether a public employee's

'Washingtonienne'?).

15. See April Witt, *Blog Interrupted*, WASH. POST, Aug. 15, 2004, at W12 ("Jessica's blog . . . was the online diary she had been posting anonymously to amuse herself and her closest girlfriends. In it, she detailed the peccadilloes of the men she said were her six current sexual partners, including a married Bush administration official . . ."); see also *id.* ("Jessica's blog identified [the men she blogged about] only by their initials. But amateur Internet sleuths who read the blog searched electronic databases looking for likely suspects, then posted names and photographs on the Internet. Jessica still refuses to name the men publicly."); Wonkette, *The Lost Washingtonienne (Wonkette Exclusive, Etc., Etc.)*, WOKETTE, <http://wonkette.com/4162/the-lost-washingtonienne-wonkette-exclusive-etc-etc> (May 18, 2004, 6:32 PM) (last visited Sept. 22, 2010) (reproducing Cutler's deleted Washingtonienne blog) (on file with the Washington and Lee Law Review). Cutler describes her "key" to identifying the men in her blog in the following entry:

By popular demand, I have finally created a key to keeping my sex life straight. In alpha order: . . . X=Married man who pays me for sex. Chief of Staff at one of the gov agencies, appointed by Bush HK=Dude from the Senate office I jinternd in Jan. thru Feb. Hired me as an intern YZ=My new office bf with whom I am embroiled in an office sex scandal.

Id.

16. See Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1195-96 (2006) ("When her blog was linked to by the very popular political gossip blog Wonkette, Jessica gained instant celebrity. Her blog was discussed in *The Washington Post*, *The New York Times*, and CNN. She posed for Playboy and landed a book deal with a \$300,000 advance.").

17. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (holding that the dismissal of a public school teacher for writing a letter to a newspaper criticizing past policies of the Board was a violation of the teacher's First Amendment rights). In *Pickering*, the Court addressed the issue of what extent public employees are protected from retaliatory adverse employment action for exercise of their First Amendment rights. *Id.* at 565. Here, a public school teacher, Pickering, was fired for sending a letter criticizing past policies of the Board of Education to a local newspaper. *Id.* at 564. The Court reasoned that "[t]he 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." *Id.* at 568. After balancing the two interests, the Court concluded that Pickering's letter was of high public concern and low disruption; and thus, he was wrongfully dismissed because the content of his letter was protected by the First Amendment. *Id.* at 572-74.

speech is constitutionally protected by balancing the employee's interest against the government's interest in promoting workplace efficiency.¹⁸ An analysis of Cutler's potential case elucidates some of the ambiguities that complicate the application of this test. Although Cutler was fired for misuse of government resources,¹⁹ she would have a legitimate First Amendment claim if the facts were slightly altered so that all of her blog entries were posted outside of work when she was not on duty. Under these facts, an analysis of Cutler's case provides a clear picture of how the current test works and the current doctrine's weaknesses.

A. Cutler's Blog Entries Satisfy the "Not Pursuant to Official Duty" Requirement

Subsequent to the *Pickering* decision, the Supreme Court refined the balancing test by limiting its application to cases where two threshold requirements are first satisfied—both of which Cutler's blog fulfills.²⁰ In the 2006 Supreme Court case, *Garcetti v. Ceballos*,²¹ the Court added the "not pursuant to official duties" threshold to the *Pickering* analysis. Under this threshold, speech made pursuant to a government employee's official

18. See *supra* note 10 and accompanying text (discussing the *Pickering* balancing test).

19. See Leiby, *supra* note 14, at D03 (explaining that Cutler was fired for "unacceptable use of Senate computers" and that her supervisor, Sen. Mike DeWine, said that Cutler "had used Senate 'resources and work time to post unsuitable and offensive material to an Internet Web log'").

20. See *Garcetti v. Ceballos*, 547 U.S. 410, 424–26 (2006) (applying the *Pickering* analysis to determine that the appellant's actions *pursuant to his official duties* were not protected by the First Amendment); *Connick v. Myers*, 461 U.S. 138, 140 (1983) (applying the *Pickering* analysis to determine that the appellant's action of distributing an internal questionnaire that did not present a matter of *public concern* was not protected speech).

21. See *Garcetti*, 547 U.S. at 421 (holding that public employee statements made pursuant to one's official duties are not protected by the First Amendment). In *Garcetti*, the Court addressed the issue of whether speech made pursuant to one's official duties had the same protections as private speech under the *Pickering* balancing test. *Id.* at 421. In this case, Ceballos, a deputy district attorney, determined that an affidavit in a pending case contained misrepresentations, which prompted him to send a memo to his supervisors recommending dismissal of the case. *Id.* at 420. Ceballos claimed that his First Amendment rights had been violated when he was then subjected to retaliatory adverse employment actions because of the memo regarding the misrepresentations. *Id.* at 415. The Court reasoned that restricting speech that is pursuant to one's official duties does not infringe any First Amendment rights that the employee holds as a private citizen and thus, is not protected speech under the *Pickering* balancing test. *Id.* at 421–22.

duties is not protected by the First Amendment.²² The Court established this threshold to ensure that the government, as an employer, has the ability to control effectively a public employee's official responsibilities.²³ Although what constitutes "pursuant to one's official duties" is unclear in certain contexts,²⁴ Cutler's personal blog discussing her various relationships and affairs is distinct from the official duties associated with her position as a staff assistant.²⁵ Thus, Cutler's speech would meet the *Garcetti* threshold.

B. Cutler's Speech Satisfies the Public Concern Requirement

In 1983, the Supreme Court in *Connick v. Myers*²⁶ added the requirement that—before triggering the *Pickering* analysis—speech must

22. See *id.* at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

23. See *id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

24. See Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 44 (2008) (discussing lower court cases in which a "key issue was what constitutes the scope of employment for purposes of applying *Garcetti*").

25. See Witt, *supra* note 15, at W12 ("Jessica tried opening and sorting mail. That's what she was paid to do as a staff assistant for Sen. Mike DeWine, a Republican from Ohio.").

26. See *Connick v. Myers*, 461 U.S. 138, 154 (1983) (finding that "Myers's questionnaire touched upon matters of public concern in only a most limited sense" and thus, her discharge "did not offend the First Amendment"). In *Connick*, the main issue was whether the public concern requirement in *Pickering* had been satisfied. *Id.* at 142. Myers, an assistant district attorney, was notified of a proposed office transfer. *Id.* at 140. Strongly opposed to this transfer, Myers created a questionnaire soliciting the views of her fellow staff members concerning office transfer policy. *Id.* at 141. Immediately after distributing the questionnaire to her co-workers, Myers was terminated for refusing to accept the transfer. *Id.* The Court reasoned that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. The Court then determined that all of the questions on the questionnaire that did not touch on a matter of public concern were not protected speech in the public employment context. *Id.* at 148. For the one question that did touch on a matter of public concern, the Court applied the balancing test and found that the questionnaire was not protected. *Id.* at 153.

touch on a matter of public concern.²⁷ This is one of the more ambiguous prongs of the test, in that the standards defining "public concern" set by the Court are vague.²⁸ Although her speech less clearly implicates this second threshold, Cutler's blog satisfies the public concern requirement under a broader interpretation.²⁹ Under a purely literal definition of public concern, a strong argument exists that a person's intimate sexual encounters are "matters only of personal interest," which the Court determined would not be protected by the First Amendment.³⁰ On the other hand, a broader

27. See *id.* at 146 ("*Pickering*, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.").

28. See Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101, 1109 (2008) [hereinafter Secunda *Whither*] (describing the various Supreme Court formulations of the "public concern" requirement). Secunda explained:

Under *Connick v. Myers*, courts are directed to look at the surrounding content, form, and context of the speech to see if the speech involves a matter of public concern. This type of speech 'typically [includes] matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment.' Sometimes courts ask whether the speech addresses a 'matter of political, social, or other concern to the community,' or is worthy of legitimate news interest. If the court determines that the speech merely involved purely private interest, like an employment dispute with one's supervisors, then there is no First Amendment protection for the speech, because it does not implicate the core concerns of the First Amendment.

Id. (citations omitted).

29. See EDWARDS, LEKA, BAIRD & BLACK, *supra* note 9, at 55–56 (discussing the broader reading of the public concern requirement in a Seventh Circuit case, *Eberhardt v. O'Malley*). The authors pointed out the Seventh Circuit's explanation that "[i]t is not the case that the only expression which the First Amendment protects is expression that deals with matters of public concern, unless this formula is understood to mean any matter for which there is potentially a public.'" *Id.* (quoting *Eberhardt v. O'Malley*, 17 F.3d 1023, 1025 (7th Cir. 1994)).

30. See *Connick*, 461 U.S. at 147 (holding that "[w]hen a public employee speaks . . . as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum" to review the personnel actions of that public employer). But see EDWARDS, LEKA, BAIRD & BLACK, *supra* note 9, at 56 (noting that the public concern requirement is relevant to private work-related grievance and not necessarily nonwork-related speech). The authors note:

If an employee speaks regarding a private work-related grievance, such as promotions, hours, or pay, courts must determine if the speech is truly personal or if, instead, it addresses a matter of public concern, such as corruption or waste. When an employee's speech goes beyond addressing a private work-related grievance, courts will require the employer to put forth some sort of justification.

Id. Although connected to the workplace, in that her sexual partners were co-workers, Cutler's blog does not appear to be airing any work-related grievances, as contemplated

construction of the public concern requirement would include these personal descriptions.³¹ Regardless of how broadly the definition of public concern is read, Cutler's descriptions of "supplementing" her income through her relationships with congressional staffers could satisfy even a literal interpretation, in that some of these acts may have the potential to be criminal or reveal corrupt employment practices in Congress.³² In light of the potential matters of public concern and the broader interpretations of this threshold, this Note presumes that Cutler's speech passes the public concern threshold.³³ With the two initial thresholds satisfied, the next step is to apply the heart of *Pickering* by balancing the competing parties' interests.³⁴

C. *Balancing Interests in Cutler's Case Reveals Uncertainties*

Balancing Cutler's free speech interest against the government's efficiency interest reveals the uncertainties associated with determining their relative weights. In *Pickering*, the Court recognized that First Amendment rights of public employees must be considered concurrently with the government's interest in promoting efficient public service.³⁵

above.

31. See, e.g., EDWARDS, LEKA, BAIRD & BLACK, *supra* note 9, at 55 (discussing the extreme example of disciplining an employee for speaking with a friend about lawn care while off-duty to point out the "difficulty with strictly adhering to *Connick's* public concern requirement"). The authors pointed out that "[c]ourts are, accordingly, reluctant to allow employers to discipline employees for speech, even speech of little or no public concern, if the employer cannot articulate some justification." *Id.*

32. See Wonkette, *supra* note 15 (reprinting Cutler's blog). Cutler's following blog entry would touch on a matter of public concern if true:

Most of my living expenses are thankfully subsidized by a few generous older gentlemen. I'm sure I am not the only one who makes money on the side this way: how can anybody live on \$25K/year?? If you investigated every Staff Ass on the Hill, I am sure you would find out some freaky shit. No way can anybody live on such a low salary. I am convinced that the Congressional offices are full of dealers and hos.

Id.

33. See RODNEY A. SMOLLA, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 18:10, at 18-34.1 (2010) [hereinafter SMOLLA 2] ("It is a simpler matter, in many instances, to err on the side of classifying speech that is in this 'hybrid' category as speech on matters of public concern, and then to concentrate on the more palpable question of disruption.").

34. See *Secunda Whither*, *supra* note 28, at 1109 ("[I]f the speech relates to a matter of public concern not connected to a public employee's official duties, a court then undertakes a *Pickering* balance of interests test.").

35. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("At the same time it

Addressing the tension between these two interests, the Court announced a balancing test that weighs the interest of the public employee, "as a citizen, commenting on 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."³⁶ The application of this balancing test to Cutler's situation exposes the main ambiguities at issue in this Note—specifically, the formulation of the "disruption to the workplace" standard.³⁷

1. Public Employee's Interest in Freedom of Expression: Cutler's Speech Does Not Deserve Substantial Protection

In Cutler's case, the first step is to determine the weight to be afforded to her blog entries under First Amendment principles.³⁸ The value of Cutler's speech depends to some extent on the degree that her speech touches on a matter of public concern.³⁹ Courts assign greater weight to an individual's speech that addresses substantial issues of public concern and lesser weight to issues that only tangentially touch on these important issues. Unless a court finds that Cutler's blog exposes a practice of employment corruption in the federal government or touches on some other important matter of public concern, a court likely will not afford Cutler's interests great weight under the First Amendment.⁴⁰

cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

36. *Id.*

37. See *infra* Part III (discussing the varying interpretations of the "disruption to the workplace" rung within the Eighth and Ninth Circuits).

38. See EDWARD, LEKA, BAIRD & BLACK, *supra* note 9, at 31 ("Hence, the Court held that only after balancing the relative importance of each party's interests can one determine if the Constitution protects the speech.").

39. See *Connick v. Myers*, 461 U.S. 138, 152 (1983) ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."); see also SMOLLA 2, *supra* note 33, § 18:18, at 18-54.6 ("[T]he state's burden in justifying the regulation varies according to the nature of the employee's expression. The greater the component of comment on issues of public concern, the greater the showing the government must make that the comment is disruptive." (citations omitted)).

40. See SMOLLA 2, *supra* note 33, § 18:10, at 18-34.9-34.10 (quoting Justice Powell's beliefs about the extra weight given to speech involving matters of public concern as opposed to matters of purely private concern). Smolla summarizes Justice Powell's opinion:

Writing for a plurality, Justice Powell observed that "[w]e have long recognized that not all speech is of equal First Amendment importance," Powell stated that speech "on matters of public concern" is at the heart of the First Amendment,

2. Government's Interest as Employer: Cutler's First Amendment Protection Depends on the Disruption Standard Applied

Even assuming that Cutler's speech will not be given substantial weight in the balancing, she prevails if the government's interest does not outweigh her First Amendment interest.⁴¹ As guidance for determining the governmental interest that led to Cutler's firing, federal courts have announced various factors to apply including:

whether the speech would create problems in maintaining discipline or harmony among co-workers, whether the employment relationship is one in which personal loyalty and confidence are necessary, whether the speech impeded the employee's ability to perform his or her responsibilities, the time, place and manner of the speech, the context in which the underlying dispute arose, whether the matter was one on which debate was vital to informed decisionmaking, and whether the speaker should be regarded as a member of the general public.⁴²

Because Cutler's dismissal was almost simultaneous with the discovery of her blog, it is highly unlikely that any actual disruption to the workplace occurred prior to her dismissal.⁴³ Disruption to the workplace is one of the unsettled standards, and the lower courts disagree whether an employee's speech must cause actual disruption or whether it need only suggest potential or likely disruption.⁴⁴ Whether disruption hinges on finding an

which "was fashioned to ensure unfettered interchange of ideas for the bringing about of political and social change." "Speech on matters of purely private concern," Justice Powell wrote, "is of less First Amendment concern."

Id. (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985)).

41. See *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (plurality opinion) (restating the balancing test). In a plurality opinion, Justice O'Connor wrote:

To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'

Id. (citations omitted); see also *SMOLLA 2*, *supra* note 33, § 18:16, at 18-54 ("[O]nce speech is deemed to be a matter of public concern, the second step of the inquiry is to determine if the injury to the government caused by the speech outweighs the employee's interest in free expression.").

42. *SMOLLA 2*, *supra* note 33, § 18:17, at 18-54.3–54.4 (citations omitted).

43. See *Witt*, *supra* note 15, at W12 (describing the events from the publication of Cutler's blog on Wonkette up to Cutler's firing).

44. See *infra* Part III (discussing the inconsistencies in the Eighth and Ninth Circuit approaches to the disruption prong).

actual hindrance to the efficiency of the workplace or whether a mere potential to cause disruption is sufficient can have serious consequences in many situations—including Cutler's case.⁴⁵

A brief look at the phrasing of the disruption standard within Supreme Court cases developing the *Pickering* framework sheds light on one source of the confusion in the test's application. The *Pickering* Court seems to require a showing of actual disruption.⁴⁶ In *Connick*, the Court found that the line between actual and potential disruption was inextricably intertwined in the public concern part of the balancing test.⁴⁷ The Court found that a showing closer to actual disruption is needed for cases in which the speech more substantially involves matters of public concern, and a lesser showing is required for cases where the speech expresses a less significant public concern.⁴⁸ A decade later, the plurality in *Waters v. Churchill*,⁴⁹ discussed standards of "reasonable predictions of disruption"⁵⁰ and "potential disruptiveness" even though the disruption standard was

45. Compare *Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999) (concluding that Nunez's speech was protected by the First Amendment and not outweighed by the claim by the employer that Nunez's speech "impaired his 'close working relationship'" with her by applying the standard that "real, not imagined, disruption is required"), with *Dible v. City of Chandler*, 515 F.3d 918, 929 (9th Cir. 2008) (finding that the government could discipline Dible for his speech without violating his First Amendment rights by applying the "potential for disruption" standard).

46. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968) (exonerating Pickering after determining that his statements had "neither shown nor [ould] be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally").

47. See *Connick v. Myers*, 461 U.S. 138, 150 (1983) ("[T]he state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.").

48. See *id.* at 152 (discussing the varying levels of disruption depending on the extent to which speech touches on a matter of public concern). The Court reasoned:

Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

Id. (citations omitted).

49. See *Waters v. Churchill*, 511 U.S. 661, 677 (1994) (plurality opinion) (finding that the *Connick* test should be applied to what the government reasonably thought was said and not only to what a trier of fact ultimately determines was said).

50. See *id.* at 673 ("But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.").

nondispositive.⁵¹ In 2006, the Court in *Garcetti* referenced a potential disruption standard; however, the Court ultimately found the disruption standard nondispositive because the employee was acting pursuant to his official duties.⁵² The Supreme Court's apparent confusion regarding the disruption standard, as displayed by these cases, has led to varying interpretations by the lower courts.⁵³

Cutler's situation highlights why uncertainty over the disruption standard matters—particularly in the case of off-duty blogging. Cutler can make a legitimate argument that the government has not met its burden of proving actual disruption.⁵⁴ However, if a court applies the potential disruption standard, the government will have a much stronger case that the disruption standard has been satisfied.⁵⁵ The content of blog entries is uniquely affected by the differing standards of disruption partly due to the personal nature of blogging.⁵⁶ Cutler claims she only intended for the blog to be seen by her close friends as a shortcut to email.⁵⁷ As evidence of this intention, she immediately deleted her entire blog

51. See *id.* at 681 ("As a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had.").

52. See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (explaining that the question was "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public" and stating that the "restrictions it imposes must be directed at speech that has some potential to affect the entity's operations").

53. See, e.g., *infra* notes 153–54 and accompanying text (discussing conflicting views about the disruption standard demonstrated by the Ninth Circuit through the original and amended opinions of *Richerson v. Beckon*).

54. See Witt, *supra* note 15, at W12 (explaining that Cutler was fired almost immediately after her blog was published on Wonkette). This nearly instant reaction to the publication of Cutler's blog suggests that, even if the content of her blog was likely to cause disruption to the workplace, Cutler was fired before there was any opportunity for disruption to occur; thus, her blog could not have caused actual disruption in the workplace related to Cutler's employment because she was no longer employed.

55. See, e.g., *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) ("And although the government's justification cannot be mere speculation, it is entitled to rely on 'reasonable predictions of disruption.'"). In this case, the government could make a strong argument that Cutler's firing was in reaction to a reasonable prediction that the news of this blog would cause disruption in the form of workplace disharmony and distrust, whereas the timing of the firing would prevent the government from applying the same reasons to prove actual disruption.

56. See Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Implications*, 47 U. LOUISVILLE L. REV. 679, 690–91 [hereinafter *Secunda Blogging*] ("[T]he combination of *City of San Diego* and *Richerson* suggests that public employee bloggers might have the hardest time finding First Amendment speech protection under *Connick*'s public concern test, given the personal nature of many blog postings.").

57. See Witt, *supra* note 15, at W12 ("Jessica's blog (short for 'Web log') was the

once she was informed that it had been published on Wonkette.⁵⁸ Cutler's intentions suggest that her blog very likely would have caused no disruption or even had the potential to disrupt if not for the Wonkette publication. In instances such as these, the Court—by requiring actual disruption—will provide a needed and valuable added protection to the First Amendment rights of public employees to express themselves.⁵⁹

III. Lower Court Inconsistencies: The Disruption Standard Is Not Articulated Uniformly

As the story of Jessica Cutler's blog reveals, the slight semantic distinctions between actual and potential disruption have a significant effect on the final disposition of a case—especially in the context of blogs.⁶⁰ Although the number of public employment blogging cases in the lower courts is small, an examination of the disruption standard across the broad spectrum of *Pickering* balancing cases in the lower courts reveals a general sense of confusion over how disruption should be formulated. An exploration of the intra-circuit inconsistencies demonstrates the need for a consistent standard. Because of the greater impact that this standard can have on off-duty blogging as opposed to more traditional forms of speech, a more consistent standard should be adopted for blogging.

A. Eighth Circuit: Conflicting Disruption Standards Exist

When articulating the disruption standard of the *Pickering* balancing test, the Eighth Circuit cases mention the similar disruption factors set out in *Shands*

online diary she had been posting anonymously to amuse herself and her closest girlfriends.").

58. See *id.* (discussing how Cutler immediately deleted her blog after being notified of its publication on Wonkette). April Witt explained Cutler's thought patterns at the time by writing:

The messages warning Jessica that her private little joke had just gone very public came from a girlfriend over on the House side. Reading it, Jessica says, she was too stunned to wonder how Wonkette had discovered her blog. Instead, the portion of Jessica's brain that had evolved to help humans survive marauding mastodons screamed: Kill the blog! Kill the blog!

Id. This instinctual reaction to delete the blog indicates that Cutler did not intend for this information to be fully public.

59. See *infra* note 199 (discussing the chilling effect associated with the uncertainties of balancing tests).

60. See *supra* notes 54–55 and accompanying text (discussing Cutler's likely outcomes depending on whether actual or potential disruption is applied).

v. *City of Kennet*⁶¹ as a starting point for analysis.⁶² The analysis flowing from these factors, however, diverges into two inconsistent standards. One line of cases requires the government to prove actual disruption⁶³ while another allows for a lesser showing.⁶⁴

1. Cases Requiring a Showing of Actual Disruption

Calling for more than mere allegations of disruption, one line of Eighth Circuit cases places a higher burden on the government by requiring a showing of actual disruption to the workplace.⁶⁵ In *Kincade v. City of*

61. See *Shands v. City of Kennett*, 993 F.2d 1337, 1346 (8th Cir. 1993) (holding that "the *Pickering* balance favor[ed] defendants" and that "plaintiffs' speech, under the facts of this case, was not protected by the First Amendment").

62. See *id.* at 1344 (discussing the six factors used to evaluate the public employer's interest in the *Pickering* balancing test); see, e.g., *Kincade v. City of Blue Springs*, 64 F.3d 389, 397 (8th Cir. 1995) (citing the *Shands* factors); *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995) (referring to the *Shands* factors). Note that even though *Kincade* requires actual disruption and *Tindle* requires less than actual disruption, both cases begin by announcing the *Shands* factors. See *infra* Part III.A.1-2 (discussing the Eighth Circuit cases requiring actual disruption and those requiring less than actual disruption). Circuit Judge Wollman announced the factors in *Shands*:

In balancing an employee's and an employer's competing interests, we weigh six interrelated factors: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Shands, 993 F.2d at 1344 (citations omitted).

63. See *infra* Part III.A.1 (discussing Eighth Circuit cases requiring a showing of actual disruption).

64. See *infra* Part III.A.2 (discussing Eighth Circuit cases requiring less than actual disruption).

65. See, e.g., *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007) (finding that to trigger *Pickering* balancing, a government employer "must, with specificity, demonstrate the speech at issue created workplace disharmony, impeded the plaintiff's performance or impaired working conditions"); *Shockency v. Ramsey County*, 493 F.3d 941, 949 (8th Cir. 2007) ("Although law enforcement predictions of disruption are due some deference, the *Pickering* balancing test only need be conducted if a government employer has produced evidence of workplace disruption."); *Washington v. Normandy Fire Prot. Dist.*, 272 F.3d 522, 526 (8th Cir. 2001) ("The *Pickering* balancing test is applicable, however, only if it is first established that the speech in question *created a disruption* in the workplace." (emphasis added)); *Kincade v. City of Blue Springs*, 64 F.3d 389, 397-98 (8th Cir. 1995) (discussing the inability of the City to meet its burden of disruption). The Court reasoned:

The Appellants' argument is largely based on bare allegations that the speech

Blue Springs,⁶⁶ Ronald Kincade was hired as the Engineer and Director of Public Works for Blue Springs, Missouri.⁶⁷ Kincade authored a status report regarding the structural integrity of a city dam.⁶⁸ Terminated by the Board shortly after delivering this report, Kincade claimed that his firing was in retaliation for his comments warning the Board about the dam's structural dangers.⁶⁹ Addressing the issue of whether Kincade's speech was constitutionally protected, the Eighth Circuit ruled that the City failed to produce sufficient evidence to trigger *Pickering* balancing.⁷⁰

In making this finding, the Eighth Circuit noted that "the primary focus of the City's interest element is to determine whether the speech undermines 'the effective functioning of the public employer's enterprise.'"⁷¹ After evaluating the City's allegations, the court found that the City "failed to provide even a scintilla of evidence that Kincade's . . . statements caused disharmony in the workplace, impaired his ability to perform his duties, or impaired his working relationships with other employees."⁷²

caused the City problems; the Appellants have not produced more than minimal specific evidence to support these assertions. . . . The Appellants have failed to provide even a scintilla of evidence that Kincade's August 5 statements caused disharmony in the workplace, impaired his ability to perform his duties, or impaired his working relationships with other employees. Therefore, the district court properly declined to conduct the *Pickering* balancing test.

Id. at 398.

66. *See* *Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995) (holding that "the district court properly declined to conduct the *Pickering* balancing test").

67. *See id.* at 392 ("On June 4, 1990, Ronald Kincade was hired as the Engineer/Director of Public Works for Blue Springs, Missouri (City).").

68. *See id.* ("On August 5, 1991, Kincade gave a verbal status report on the assignment [about the structural integrity of a dam] to the . . . [Board of Alderman] The comments Kincade made during this verbal status report are the subject of this appeal.").

69. *See id.* at 393 (explaining various safety and legal issues that Kincade raised with respect to the dam and his belief that these statements were the cause of his termination).

70. *See id.* at 398 (finding that "the district court properly declined to conduct the *Pickering* balancing test"). The Eighth Circuit affirmed the magistrate judge's reasoning that "it was impossible to balance Kincade's interest in making the speech because the City produced no evidence to support its assertions." *Id.* at 397.

71. *Id.* (citations omitted). The court also reiterated the City's burden of proving actual disruption while discussing the government interest prong of *Pickering* in the context of the qualified immunity claims. *See id.* at 398 ("[I]t is critical to determine whether the defendants have put the *Pickering* balancing test at issue by producing evidence that the speech activity had an adverse effect on the efficiency of the public employer's operations.").

72. *Id.* at 398.

The totality of the language in *Kincade* and similar cases suggests that the Eighth Circuit requires the government to show actual disruption.⁷³ These cases fail to recognize that potential disruption is sufficient to trigger *Pickering* balancing—instead requiring the more concrete standard of proving that the speech actually caused disruption, impairment, or a general hindrance to the workplace.⁷⁴

It is important to note that this more concrete depiction of disruption is most commonly articulated in Eighth Circuit cases in which the court is reviewing lower court rulings on motions for summary judgment based on qualified immunity.⁷⁵ Although the court in *Kincade* had pendent appellate jurisdiction to review the merits of the First Amendment claim,⁷⁶ many of the Eighth Circuit cases articulating this standard discuss the *Pickering* balancing test solely in connection with the merits of a government official's qualified immunity claim.⁷⁷ Nevertheless, the same test applies to the employee's First Amendment protection claim and the qualified immunity claim; thus, the standards dictated by the court do not vary depending on the claims.⁷⁸

73. See *supra* notes 70–72 and accompanying text (describing the various articulations of the disruption standard in *Kincade*); *supra* note 65 (discussing other Eighth Circuit cases that require actual disruption).

74. Compare *Kincade v. City of Blue Springs*, 64 F.3d 389, 397 (8th Cir. 1995) (using statements requiring a concrete finding such as "whether the speech creates . . . undermines . . . impedes . . . or impairs"), with *Porter v. Dawson*, 150 F.3d 887, 893 (8th Cir. 1998) (using conditional statements regarding the disruption standard such as "caused or could cause the relationship to deteriorate").

75. See *Lindsey v. City of Orrick*, 491 F.3d 892, 895 (8th Cir. 2007) ("Taylor appeals arguing the district court erred in finding she was not entitled to qualified immunity."); *Shockency v. Ramsey County*, 493 F.3d 941, 944 (8th Cir. 2007) ("Fletcher and O'Hara appeal from the order denying them qualified immunity; the county also seeks to appeal."); *Washington v. Normandy Fire Prot. Dist.*, 272 F.3d 522, 524 (8th Cir. 2001) ("In this civil rights action, Brian G. Quinlisk, Roy W. Kessler, and Robert J. Lee (collectively, the directors) appeal from the district court's denial of their motion for summary judgment based on qualified immunity."). Each of these cases purported to apply the actual disruption standard. See cases cited *supra* note 65 (demonstrating how these cases applied an actual disruption standard).

76. See *Kincade*, 64 F.3d at 395 (finding pendent appellate jurisdiction to hear the City's claim that "Kincade's . . . speech is not constitutionally protected because the claims are 'inextricably intertwined' with their qualified immunity arguments").

77. See cases cited *supra* note 75 (presenting qualified immunity cases in which the Eighth Circuit required an actual disruption standard).

78. See *Kincade*, 64 F.3d at 395 ("Both issues [claim of qualified immunity and claim of constitutionally protected speech] require application of the same constitutional test.").

2. Cases Requiring Less than Actual Disruption

In contrast to the cases in Part III.A.1, other cases originating in the Eighth Circuit place a lesser burden on the government by finding potential disruption sufficient to trigger *Pickering* balancing.⁷⁹ In *Tindle v. Caudell*,⁸⁰ the Eighth Circuit responded to the lack of actual disruption by explaining that "a showing of actual disruption is not always required in the balancing process under *Pickering*."⁸¹ The court went on to explain that a "reasonable prediction of disruption is entitled to substantial weight" in the balancing process.⁸² With these statements, the court concedes that *Pickering* balancing will be applied even absent proof of actual disruption. This stance is squarely in conflict with the cases in Part III.A.1 which require a public employer to demonstrate "with specificity . . . [that] the speech at issue created workplace disharmony, impeded the plaintiff's performance or impaired working relationships."⁸³

3. General Trends and Analysis from Eighth Circuit Cases

An analysis of the cases discussed in this Part reveals that the court tends to find consistently for the employee or the employer depending on the disruption standard applied. In the cases examined that required a showing of actual disruption, the employee prevailed.⁸⁴ When the court

79. See, e.g., *Bailey v. Dep't of Elementary & Secondary Educ.*, 451 F.3d 514, 521 (8th Cir. 2006) ("[I]n determining whether particular speech caused disruption in the workplace and therefore is not protected, we have held '[e]vidence of actual disruption . . . is not required in all cases.'"); *Tindle v. Caudell*, 56 F.3d 966, 972 (8th Cir. 1995) (refuting *Tindle*'s claim that a showing of actual disruption was required); *Gordon v. City of Kansas City*, No. 98-0951-CV-W, 1999 WL 33453793, at *4 (W.D. Mo. Nov. 2, 1999) (finding that "a showing of actual disruption is not always required" and noting that "a government employer's reasonable prediction of disruption is entitled to substantial weight" (citations omitted)).

80. See *Tindle*, 56 F.3d at 973 (holding that *Tindle* had "not made the requisite showing to avoid summary judgment in defendants' favor").

81. *Id.* at 972.

82. See *id.* (citations omitted).

83. *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007).

84. See *id.* at 901 (holding that the government "has not alleged sufficient disruption to trigger *Pickering*"); *Shockency v. Ramsey County*, 493 F.3d 941, 948 (8th Cir. 2007) (holding that "Fletcher retaliated against Moore and Shockency for their First Amendment conduct"); *Washington v. Normandy Fire Prot. Dist.*, 272 F.3d 522, 527 (8th Cir. 2001) (holding that "[b]ecause the directors' showing of actual or potential disruption is insufficient to trigger the *Pickering* balancing test, their claim of qualified immunity fails"); *Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995) (holding that the City had

minimized the government's burden of disruption by allowing potential disruption to trigger balancing, however, the public employer prevailed.⁸⁵ Although many factors play a role in the ultimate result of each case, the general trend correlating the disruption standard with the prevailing party invokes the basic notion that deference and burdens play a significant role in litigation.⁸⁶ Intuitively, the party with the greater burden will have more to overcome to prevail on the claim.⁸⁷ In terms of the theories underlying the First Amendment, this single favor given to one party can have a significant impact on the level of protection given to public employees, and in turn, the furtherance of those theories.⁸⁸

B. Ninth Circuit: Inconsistent Formulations of the Disruption Standard Are Present

Like the Eighth Circuit, the Ninth Circuit cases can be divided into two separate lines regarding the disruption standard—cases requiring actual disruption and cases requiring less than actual disruption.⁸⁹ One case,

not "put the *Pickering* balancing test at issue" because the City "merely asserted" disruption "without presenting any specific evidence to support" the assertions). The Eighth Circuit required a showing of actual disruption in each of these cases. See cases cited *supra* note 65 (discussing the actual disruption standard in *Lindsey*, *Shockency*, *Washington*, and *Kincade*).

85. See *Bailey v. Dep't of Elementary & Secondary Educ.*, 451 F.3d 514, 522 (8th Cir. 2006) (holding that "the *Pickering* balancing test weighs in favor of" the Department of Elementary & Secondary Education); *Tindle v. Caudell*, 56 F.3d 966, 973 (8th Cir. 1995) (holding that Tindle did not "make the requisite showing to avoid summary judgment" in the police department's favor); *Gordon v. City of Kansas City*, No. 98-0951-CV-W, 1999 WL 33453793, at *4 (W.D. Mo. Nov. 2, 1999) (holding that the factors in the case "tip the scale in favor of the government as an employer"). These cases each required less than actual disruption to trigger *Pickering* balancing. See cases cited *supra* note 79 (discussing the disruption standard in *Bailey*, *Tindle*, and *Gordon*).

86. See *SMOLLA 2*, *supra* note 33, § 18:8, at 18-27 (discussing *Waters v. Churchill* in the context of the *Pickering* balancing test and noting that the case "appeared to set a tone of greater deference to government decision making . . . on the disruptive effect of the speech in those instances in which it is of public concern").

87. Cf. Elizabeth Mertz, Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U.L. REV. 492, 500 (1988) ("Allowing one fact to be presumed or inferred once another has been proven lightens the burden on the party trying to prove the presumed or inferred fact."). In a similar manner, by deferring to the government's predictions of disruption as opposed to requiring an actual showing, this deference lightens the burden on the government.

88. See *infra* Part V.A (discussing how blogging uniquely serves the classic theories underlying the First Amendment); see also Mertz, *supra* note 87, at 519-21 (discussing the various policy reasons for protecting free speech).

89. See *infra* Part III.B.1 (discussing Ninth Circuit cases requiring a showing of actual

Richerson v. Beckon,⁹⁰ particularly demonstrates the intra-circuit conflict regarding this standard. Part IV.B of this Note examines *Richerson* in-depth and explores the court's conflict over the proper disruption standard as played out in the initial and amended opinions written by the Ninth Circuit.⁹¹

1. Cases Requiring a Showing of Actual Disruption

In one formulation of the disruption standard, a line of cases in the Ninth Circuit requires a finding of actual disruption using language such as "real, not imagined, disruption" to convey this requirement.⁹² Representative of these cases, the Ninth Circuit in *Nunez v. Davis*,⁹³ applied this standard in the context of determining whether a "close working relationship" between a municipal court judge and his court administrator had been impaired as a result of the court administrator's speech at issue.⁹⁴ The Ninth Circuit emphasized that this standard ensures that a public employer's claim of disruption cannot be used as a vehicle for silencing an employee out of personal animus toward that employee.⁹⁵ Although not

disruption); *infra* Part III.B.2 (discussing Ninth Circuit cases requiring less than actual disruption).

90. See *Richerson v. Beckon*, 337 Fed. App'x 637, 639 (9th Cir. 2009) (finding that "the district court did not err in concluding that the legitimate administrative interests of the School District outweighed Richerson's First Amendment interests in not being transferred because of her speech").

91. See *infra* notes 153–54 and accompanying text (discussing the original and amended Ninth Circuit opinions in *Richerson v. Beckon*).

92. *Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999) (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983)); see also *McKinley*, 705 F.2d at 1115 ("However, real, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views."); *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 515 (9th Cir. 2004) (finding that "[t]he administrators who testified also failed to show that Settlegoode's letter was unusually disruptive or caused actual injury").

93. See *Nunez*, 169 F.3d at 1229 (finding that "Nunez's expressive conduct of allowing the court clerks to attend the training seminar is . . . constitutionally protected under the *Pickering* balancing test").

94. See *id.* (requiring that the "real, not imagined, disruption" standard apply to Davis's argument that "Nunez's speech impaired his 'close working relationship' with Nunez").

95. See *id.* (discussing the importance of finding real and not imagined disruption to the workplace). The Ninth Circuit reasoned:

As this court has previously stated, "real, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for

explicitly requiring actual disruption, this call for more than an imagined sense of inefficiency or harm requires something more concrete.⁹⁶ In *Nunez*, the court administrator protested her judge's policy of only allowing employees who had worked on the judge's reelection campaign to attend training seminars by arranging for two clerks who had not worked on the campaign to attend a seminar.⁹⁷ The judge fired the court administrator, alleging that the absence of the clerks from court during the training seminars disrupted the office routine and that the administrator's speech contravening the judge's policy impaired his close working relationship with her.⁹⁸ Finding that these allegations did not constitute credible evidence of disruption, the Ninth Circuit held that the court administrator's expressive conduct was protected under the *Pickering* balancing test.⁹⁹ Within the cases following this line, *Pickering* balancing will not be triggered absent evidence of real disruption to the public employer.¹⁰⁰

stifling legitimate speech by penalizing public employees for expressing unpopular views." A public employer cannot claim disruption of a close personal relationship to cover up animus toward an employee's speech and a desire to silence the employee.

Id. (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983)).

96. *See id.* (determining that allegations of an eroded relationship did not constitute "credible evidence to tip the scales in [the public employer's] favor").

97. *See id.* at 1226 (explaining that "Nunez arranged for two court clerks who did not work in Davis's reelection campaign to attend a training seminar" in protest of Judge Davis's instruction "to limit attendees at training seminars to those court employees who had worked in his reelection campaign").

98. *See id.* at 1229 ("Davis testified that the absence of the clerks for two days to attend the training seminar disrupted officer routine and exacerbated the court's backlog. . . . Davis also argue[d] that Nunez's speech impaired his 'close working relationship' with Nunez." (citations omitted)).

99. *See id.* (discussing the lack of credible evidence to support Judge Davis's interest in promoting government efficiency). The Ninth Circuit noted:

In short, Davis has offered no credible evidence to tip the scales in his favor, and thus has failed to demonstrate a state interest that outweighs Nunez's First Amendment rights. Nunez's expressive conduct of allowing the court clerks to attend the training seminar is therefore constitutionally protected under the *Pickering* balancing test.

Id.

100. *See id.* at 1229-30 (explaining that "there were no factors weighing in Davis's favor" because "[t]he jury found Davis's testimony of office disruption not credible"); *see also McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (discussing the "real, not imagined, disruption" requirement).

2. Cases Requiring Less than Actual Disruption

Contrary to the line of Ninth Circuit cases requiring evidence of actual disruption to trigger *Pickering* balancing,¹⁰¹ other Ninth Circuit cases recognize that "reasonable predictions of disruption" are sufficient to trigger the interest balancing.¹⁰² In *Brewster v. Board of Education*,¹⁰³ Brewster, an elementary school teacher, claimed that his nonrenewal by the Board was a violation of his First Amendments rights.¹⁰⁴ Brewster claimed his nonrenewal was in retaliation for expressing concerns to his superior that his classroom attendance records had been falsified.¹⁰⁵ To analyze whether Brewster's First Amendment rights had been violated, the Ninth Circuit first applied the traditional thresholds associated with the *Pickering* balancing test.¹⁰⁶ After finding that the public concern and official duty thresholds were satisfied, the court explained the government interest prong of the balancing test, noting that "courts must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs.'"¹⁰⁷ In contrast to the real, not imagined, standard,¹⁰⁸ the Ninth Circuit in *Brewster* explicitly stated that government employers

101. See *supra* Part III.B.1 (discussing the real, not imagined, disruption standard in a line of Ninth Circuit cases).

102. *Brewster v. Bd. of Educ.*, 149 F.3d 971, 979 (9th Cir. 1998) (quoting *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion)). See also *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) ("And although the government's justification cannot be mere speculation, it is entitled to rely on 'reasonable predictions of disruption.'" (quoting *Waters*, 511 U.S. at 673)).

103. See *Brewster v. Bd. of Educ.*, 149 F.3d 971, 987 (9th Cir. 1998) (concluding that "neither Brewster's First Amendment rights under *Pickering* nor his procedural due process rights under *Mathews* were 'clearly established'").

104. See *id.* at 977 ("[Brewster] argues that the District's decision not to rehire him on these bases violated his First Amendment right to free speech.").

105. See *id.* ("Brewster first claims that his nonreelection was in retaliation for his work as a union grievance representative and his allegations regarding what he believed to be errors in the school's attendance-accounting practices."). Brewster said that he reported the allegedly erroneous attendance records because "'changing attendance records was very important because they affect the [Average Daily Attendance] and therefore the amount of federal funding received.'" *Id.* at 975.

106. See *id.* at 978 ("In evaluating the First Amendment rights of a public employee, the threshold inquiry is whether the statements at issue substantially address a matter of public concern." (citations omitted)); *supra* Part II.A–B (outlining the two threshold inquiries—public concern and pursuant to official duty).

107. *Brewster*, 149 F.3d at 979.

108. See *supra* Part III.B.1 (discussing the line of Ninth Circuit cases that require a showing of real, not imagined, disruption to trigger the *Pickering* balancing test).

"need not allege that an employee's expression actually disrupted the workplace."¹⁰⁹

The Ninth Circuit defended the use of the less-than-actual disruption standard applied in *Brewster* by attempting to show that cases requiring actual disruption are whistleblowing cases.¹¹⁰ Although some cases that explicitly require actual disruption do concern whistleblowing,¹¹¹ this distinction does not extend to every case in which the Ninth Circuit has called for actual disruption.¹¹² In *McKinley v. City of Eloy*,¹¹³ for example, the Ninth Circuit required actual disruption in a case involving speech criticizing a municipal policy decision not to raise salaries of police officers.¹¹⁴ Although this criticism raised public concerns,¹¹⁵ McKinley did

109. *Brewster v. Bd. of Educ.*, 149 F.3d 971, 979 (9th Cir. 1998) ("Moreover, public employers need not allege that an employee's expression actually disrupted the workplace; 'reasonable predictions of disruption' are sufficient." (quoting *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion))).

110. *See Voigt v. Savell*, 70 F.3d 1552, 1562 (9th Cir. 1995) (distinguishing a Ninth Circuit case in which actual injury was required from the facts of the present case). The Ninth Circuit justified the requirement of actual injury which was lacking in the *Voigt* case by reasoning:

Johnson is readily distinguishable Johnson's statements regarding criminal misuse of public funds, wastefulness, and inefficiency in managing, and operating government entities were matters of *inherent* public concern We held that the employer had to show more than mere disruption of office relationships. We reasoned that the employer had to show actual injury to its *legitimate* interests in order to prevail under the *Pickering* test. An employer does not have "a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure."

Id. (citing *Johnson v. Multnomah County*, 48 F.3d 420, 425–27 (9th Cir. 1995)).

111. *See Johnson*, 48 F.3d at 427 (explaining that the County must show "actual injury to its legitimate interests" and that the County does not have "a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers").

112. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (discussing the requirement of real, not imagined, disruption in a case where the speech was criticizing the City's compensation policies for the police).

113. *See id.* at 1115 (agreeing that the "[F]irst [A]mendment protected plaintiff against discharge for the type of speech in which he engaged").

114. *See id.* at 1115 (requiring real, not imagined, disruption where a police officer criticized the rate of compensation of the city's police force).

115. *See id.* at 1114 (finding that the public employee speech at issue involved matters of public concern). The Ninth Circuit explained the connection between the officer's criticism and public concern by stating:

First, compensation levels undoubtedly affect the ability of the city to attract and retain qualified police personnel, and the competency of the police force is surely a matter of great public concern. Second, the interrelationship between

not raise allegations of corruption or wrongdoing associated with the decision not to grant pay raises.¹¹⁶ A mere criticism of a budget decision, without more, does not constitute whistleblowing, at least in the sense contemplated by the Ninth Circuit.¹¹⁷ Thus, the Ninth Circuit's attempt to explain the inconsistencies by distinguishing among purposes underlying the expression does not fully address the conflicts.

3. General Trends and Analysis from Ninth Circuit Cases

Similar to the results found in the Eighth Circuit analysis, actual disruption cases in the Ninth Circuit tend to result in a ruling in favor of the employee¹¹⁸ while less-than-actual disruption cases tend to result in rulings favoring the public employer.¹¹⁹ These results—while admittedly, not

city management and its employees is closely connected with "discipline and morale in the workplace"—factors that "are related to an agency's efficient performance of its duties."

Id. (citations omitted).

116. *See id.* at 1112 (discussing McKinley's speech in which he protested for a pay raise). The Ninth Circuit recited the three instances in which McKinley criticized the compensation decision:

On July 24, 1978, plaintiff attended an Eloy city council meeting to protest the council's decision not to give police officers their annual raise. Eloy's Mayor, Robert Facio, told plaintiff to "shut up and sit down" and adjourned the meeting. Later that evening plaintiff was permitted to speak at a second session, but the council refused to respond to the issues he raised. The next day plaintiff was interviewed by a Phoenix television station regarding the dispute between the City of Eloy and its police officers.

Id.

117. *See Voigt v. Savell*, 70 F.3d 1552, 1562 (9th Cir. 1995) ("An employer does not have 'a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means of avoiding the disruption that necessarily accompanies such exposure.'). McKinley did not allege corruption or covering up mismanagement, but rather criticized a policy, the terms of which were available to the public. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1112 (9th Cir. 1983) (explaining that McKinley "publicly criticized the City's decision not to give police officers an annual raise").

118. *See Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999) (concluding that Nunez's speech was "constitutionally protected under the *Pickering* balancing test"); *McKinley*, 705 F.2d at 1116 (holding that the public employee "engaged in [F]irst [A]mendment conduct for which he could not be dismissed"); *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 516 (9th Cir. 2004) (holding that Settlegoode's speech was protected and that she was entitled to damages). These cases required either a real, not imagined, standard of disruption or a showing of actual injury to the workplace. *See supra* note 92 (discussing the actual disruption standard in *Nunez*, *McKinley*, and *Settlegoode*).

119. *See Dible v. City of Chandler*, 515 F.3d 918, 929 (9th Cir. 2008) (determining that

demonstrating correlation—do strengthen the arguments discussed in Part III.A.3 concerning the role that deference and lesser burdens play in determining outcomes.¹²⁰ Because this inconsistent standard has a significant effect on the level of protection enjoyed by public employees, these cases demonstrate the need for the Supreme Court or Congress to articulate a uniform and clear disruption standard for the lower courts to follow.¹²¹

IV. Case Law Application of *Pickering* Balancing to Blogging

Although the Supreme Court has not addressed the application of the *Pickering* balancing test in the context of employee blogging, litigation regarding employee expression via the Internet is beginning to develop in the lower courts.¹²² In the district court cases discussed *infra*, an actual workplace disruption was clear.¹²³ For these cases, the distinctions between which standard was applied made no difference to the outcome of the case because the stricter standard of actual disruption was present. Regardless of the effect the standard plays in the outcome of each case, the disruption standard conveyed by the courts is unclear and inconsistent.¹²⁴ These lower

"the City could discipline [Dible] for those activities without violating his First Amendment rights"); *Brewster v. Bd of Educ.*, 149 F.3d 971, 982 n.5 (9th Cir. 1998) (concluding that "no official violated any of Brewster's clearly established First Amendment rights"); *Voigt v. Savell*, 70 F.3d 1552, 1557 (9th Cir. 1995) (stating that "an application of the balancing test articulated in *Pickering* . . . leads us to conclude that Voigt's speech is not entitled to constitutional protection" (citations omitted)). The Ninth Circuit applied a less-than-actual disruption standard in each of these cases. *See supra* note 102 (explaining how reasonable predictions of disruption could satisfy the disruption standard in *Brewster* and *Dible*); *supra* note 110 (explaining how less than actual injury was required in *Voigt*).

120. *See supra* notes 86–87 and accompanying text (discussing the tone of deference given to government decision making in *Waters* and examining the effect of presumptions and inferences on burdens).

121. *See infra* Part V.C (discussing the need for the Supreme Court to articulate a clear and consistent standard of disruption to address the lower court inconsistencies).

122. *See Stengle v. Office of Dispute Resolution*, 631 F. Supp. 2d 564, 576–78 (M.D. Pa. 2009) (applying the *Pickering* balancing test to an employee's off-duty blog entries discussing her personal views about topics related to her work as a hearing officer); *Richerson v. Beckon*, No. C07-5590 JKA, 2008 WL 833076, at *2 (W.D. Wash. Mar. 27, 2008), *aff'd*, 337 Fed. App'x 637, 639 (9th Cir. 2009) (applying the *Pickering* balancing test to an employee's off-duty blog entries about her co-workers).

123. *See infra* Part IV.A–B (discussing the nature of the blogs in *Stengle* and *Richerson*).

124. *See infra* notes 138–40 and accompanying text (discussing the disruption standard in *Stengle*); *infra* notes 153–54 and accompanying text (discussing the disruption standard in

court blogging cases demonstrate the difficulties of applying the traditional *Pickering* framework to the blogging context and sufficiently illustrate the critical need for Supreme Court or congressional action.

A. Stengle: A Clear Case of Disruption through Compromising Impartiality

While explicitly setting a potential disruption standard, the court in *Stengle v. Office of Dispute Resolution*¹²⁵ emphasized factors that demonstrated the employee's actual disruption in concluding that her speech was not protected—suggesting that the court may, in practice, require more than potential disruption. In *Stengle*, the employee, Stengle, was a special education due process hearing officer.¹²⁶ She had a blog "in which she regularly discussed special education issues."¹²⁷ After discovery of her blog led to complaints about her ability to remain impartial, the Office of Dispute Resolution (ODR) chose not to reappoint Stengle as a hearing officer.¹²⁸ Upon refusal to reappoint, Stengle was provided with the following justifications:

(I) Plaintiff's blog constituted "advocacy," which ultimately compromised her ability to serve as an impartial hearing officer; (II) in refusing to recuse herself in one matter and using intemperate and inappropriate language in denying the recusal motion; and (III) Plaintiff failed to comply with timeliness requirements in rendering her opinions.¹²⁹

One of Stengle's several claims alleged that her First Amendment rights were violated when she was denied reappointment due to the content of her blog.¹³⁰ To analyze the First Amendment claim, the district court examined

Richerson).

125. See *Stengle v. Office of Dispute Resolution*, 631 F. Supp. 2d 564, 577 (M.D. Pa. 2009) (holding that because Stengle's blog "posed a legitimate threat to the efficient operation of the due process system," Stengle's "free speech rights could be constitutionally abridged under the extant circumstances, and she has thus not suffered a deprivation of those rights as afforded under the First Amendment").

126. See *id.* at 568 ("At all times relevant to the instant action, Plaintiff Stengle was an independent contractor who entered into consecutive yearly contracts.").

127. *Id.* at 569.

128. See *id.* at 571–72 ("Defendant Smith ultimately followed Frankhouser's [legal] advice when . . . she sent Plaintiff a letter notifying Plaintiff that her contract as a hearing officer was non-renewed.").

129. *Id.* at 572.

130. See *id.* at 573 ("Plaintiff has lodged the following counts and allegations in her

the case in light of the *Pickering* framework.¹³¹ First, the court found that Stengle had satisfied the burden to prove that she did not write her blog pursuant to her official duties.¹³² The court then found that the government conceded that Stengle's speech touched upon a matter of public concern.¹³³ With the two threshold requirements met, the court then proceeded to balance Stengle's free speech interests with the ODR's interest in workplace efficiency.¹³⁴ The court found that the ODR had a legitimate interest because the blog discussed matters that came before Stengle as a hearing officer.¹³⁵ Moreover, attorneys and parents brought up concerns about Stengle's impartiality.¹³⁶ Because the "blog posed a legitimate threat to the efficient operation of the due process system," the court found that the ODR's interest outweighed Stengle's interest; thus, her speech was not protected by the First Amendment.¹³⁷

The controlling factor in this case was whether the content of Stengle's blog had the potential to disrupt the workplace environment.¹³⁸ According to the court, the government demonstrated potential disruption, which meant the speech was not protected.¹³⁹ Although the court seems to set the standard at potential disruption in this case,¹⁴⁰ the government produced

Second Amended Complaint: (I) violations of the First and Fourteenth Amendments . . .").

131. *See id.* at 574 (applying the facts of Stengle's case to the elements of the *Pickering* balancing test).

132. *See id.* at 575 ("In light of these contentions, we believe that the Plaintiff has adduced evidence from which a reasonable jury could conclude that she was not maintaining her blog in her official capacity as a hearing officer.").

133. *See id.* ("ODR Defendants concede that Plaintiff's speech was a matter of public concern.").

134. *See id.* ("[S]o we consider whether Plaintiff's interest in her speech outweighs ODR's interest in promoting workplace efficiency and avoiding workplace disruption.").

135. *See id.* at 570 (finding that while writing her blog entries, "Stengle relied on her experiences as a hearing officer and in the special education industry, which engendered discussions involving Gaskin issues and other legal issues with which she was confronted in her capacity as a hearing officer").

136. *See id.* (discussing complaints against Stengle from various sources).

137. *Id.* at 577.

138. *See id.* ("The Supreme Court has stated that in order to pass constitutional muster, restrictions on free speech must be 'directed at speech that has *some potential* to affect the entities' operations.'" (citations omitted)).

139. *See id.* ("From these facts, one can readily infer that Plaintiff's blog had the potential to induce recusal motions from those who came before her in her hearing officer capacity In either instance, governmental efficiency would be adversely affected.").

140. *See id.* ("[T]he government need not point to actual disruptiveness in order for its conduct to be rendered constitutional. . . . Plaintiff would be obliged to show that the conduct in question, her blogging activities, had no *potential* to disrupt government

sufficient evidence to demonstrate the actual disruption created by Stengle's blogging activities.¹⁴¹ If the facts had been slightly different and the effects of the blog not as clear, it is debatable whether the court would have adhered to the potential disruption standard. The passive nature of a blog entry written outside of the workplace suggests that any showing less than actual disruption would involve a very subjective determination that would be difficult to demonstrate. Given that the extent of disruption in Stengle's case was relatively concrete, the distinction between potential and actual disruption likely did not play a role in the finding of disruption;¹⁴² however, the issue will resurface in future blogging cases where disruption is less concrete.

B. Richerson: *Demonstrating Ninth Circuit Confusion over Disruption*

*Richerson v. Beckon*¹⁴³ is another case in which a court applied the *Pickering* balancing test to employee blogging activities. In *Richerson*, the Ninth Circuit held that the content of Richerson's blog, which included "vituperative" comments about her employer, did not warrant First Amendment protections under the *Pickering* balancing test.¹⁴⁴ Richerson, a curriculum director for the Central Kitsap School District, posted a personal blog entry in which she commented on the qualifications of the person hired to assume duties that she had previously held.¹⁴⁵ When district

operations.").

141. See *id.* (discussing how Stengle's blog "had the potential to raise questions as to her impartiality" while also noting the actual complaints received by outside attorneys regarding Stengle's blog).

142. See, e.g., *id.* at 570 ("A parent involved in the litigation of a case that was to go before a hearing officer stated that after review of Plaintiff's blog, she did not want Plaintiff to be the hearing officer in her case because she doubted Plaintiff's ability to maintain impartiality.").

143. See *Richerson v. Beckon*, 337 Fed. App'x 637, 639 (9th Cir. 2009) (deciding that "the district court did not err in concluding that the legitimate administrative interests of the School District outweighed Richerson's First Amendment interests in not being transferred because of her speech").

144. See *id.* at 638 ("We nevertheless affirm the summary judgment because Richerson's transfer was appropriate under the balancing test laid out in *Pickering* Richerson's publicly-available blog included several highly personal and vituperative comments about her employers, union representatives, and fellow teachers." (citations omitted)).

145. See *Richerson v. Beckon*, No. C07-5590 JKA, 2008 WL 833076, at *2 (W.D. Wash. Mar. 27, 2008), *aff'd*, 337 Fed. App'x 637 (9th Cir. 2009) (discussing the content of Richerson's blog entries). The court included the following blog entry entitled "Save us

administration officials became aware of the blog entry, they verbally reprimanded Richerson.¹⁴⁶ After discovery of a subsequent blog entry, which sharply criticized the chief negotiator of the teacher's union, Richerson was reassigned from her position as curriculum director and instructional coach to classroom teacher.¹⁴⁷

In conducting the *Pickering* analysis, the court first assumed that Richerson's speech was a matter of public concern.¹⁴⁸ The court then analyzed Richerson's First Amendment interests and the government's interest as employer.¹⁴⁹ The court determined that the position of instructional coach required Richerson to enter into trusting mentor relationships with less experienced teachers—at least one of whom refused to work with Richerson after reading the blog.¹⁵⁰ For these reasons, the

White Boy!" to demonstrate the vituperative nature of Richerson's comments:

I met with the new me today: the person who will take my summer work and make it a full-time year-round position. I was on the interview committee for this job and this guy was my third choice . . . and a reluctant one at that. I truly hope that I have to eat my words about this guy But after spending time with this guy today, I think Boss Lady 2.0 made the wrong call in hiring him He comes across as a smug know-it-all creep. And that's probably the nicest way I can describe him He has a reputation of crapping on secretaries and not being able to finish tasks on his own And he's white. And male. I know he can't help that, but I think the District would have done well to recruit someone who has other connections to the community Mighty White Boy looks like he's going to crash and burn.

Id.

146. *See id.* ("[D]efendant Jeanne Beckon (Executive Director of Human Service for the school district) met with plaintiff, confirmed the source of the blog entry, and verbally reprimanded plaintiff for violating the confidentiality expected of a member of an employee interview team.").

147. *See id.* ("The blog entry of concern to Brown was critical of the Central Kitsap Education Association (teachers' union). It included the following statement: 'What I wouldn't give to draw a little Hitler mustache on the chief negotiator.'").

148. *See Richerson*, 337 Fed. App'x at 638 ("We assume, without deciding, that at least some of Richerson's speech was of public concern.").

149. *See Richerson v. Beckon*, 337 Fed. App'x 637, 638 (9th Cir. 2009) (examining the effect of Richerson's speech on the efficiency of the workplace). The Ninth Circuit reasoned:

It is abundantly clear from undisputed evidence in the record that Richerson's speech had a significantly deleterious effect Beckon provided testimony, not controverted by Richerson, indicating that several individuals refused to work with Richerson in the future. Common sense indicates that few teachers would expect that they could enter into a confidential and trusting relationship with Richerson after reading her blog.

Id.

150. *Id.*

court found that Richerson's "blog had fatally undermined her ability to enter into trusting relationships as an instructional coach."¹⁵¹ The Ninth Circuit decided that the "district court did not err in concluding that the legitimate administrative interests of the School District outweighed Richerson's First Amendment interests in not being transferred because of her speech."¹⁵²

A thorough examination of the court's reasoning in *Richerson* exposes the Ninth Circuit's genuine confusion over the disruption standard and demonstrates why the Supreme Court should clarify this test. In the initial opinion, the Ninth Circuit found that the government had the burden of showing a "reasonable prediction" of disruption.¹⁵³ However, this decision was subsequently amended to delete the passage referring to the "reasonable prediction" standard and replace it with a passage referring to the "actual injury" to the school district.¹⁵⁴ Although the Ninth Circuit found that Richerson's blog content was not protected under either disruption standard, the fact that the court deleted the reference to the reasonable prediction passage seems to reflect the court's acknowledgement of Richerson's argument that the government has the burden of proving actual disruption and not merely potential disruption. As discussed in Part III.B, the Ninth Circuit decisions are inconsistent on this point. While some cases allow potential disruption to trigger *Pickering* balancing, the Ninth Circuit has required a showing of actual injury to the government in other cases.¹⁵⁵ These conflicting standards explain the confusion the Ninth Circuit exhibited in this recent case.

151. *Id.*

152. *Id.* at 639.

153. See Order at 1, *Richerson v. Beckon*, No. 08-35310, slip. op. (9th Cir. Aug. 27, 2009), available at <http://www.ca9.uscourts.gov/datastore/memoranda/2009/08/27/08-35310oa.pdf> ("[D]elete the following passage: Beckon need only make a 'reasonable prediction' that such disruption would occur; she need not demonstrate that it has occurred or will occur to a certainty. This standard was clearly met." (citations omitted)).

154. See *id.* at 2 ("[S]ubstitute the following: This uncontroverted testimony therefore demonstrates an actual injury to the school's legitimate interests." (citing *Settlegoode v. Portland Public Schools*, 371 F.3d 503, 513 (9th Cir. 2004))).

155. Compare *Brewster v. Bd. of Educ.*, 149 F.3d 971, 979 (9th Cir. 1998) ("Moreover, public employers need not allege that an employee's expression actually disrupted the workplace; 'reasonable predictions of disruption' are sufficient." (citations omitted)), with *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 514 (9th Cir. 2004) (holding that the magistrate judge failed to find actual injury to the school district).

C. Lessons Gleaned From Blogging Cases

Both *Stengle* and *Richerson* involved blog content that specifically interfered with each employee's ability to fully perform her job. In *Stengle*, impartiality was a requirement for a hearing officer,¹⁵⁶ and in *Richerson*, the ability to be trusted was a key quality necessary to being an effective instructional coach.¹⁵⁷ The direct and negative impact that the blogs in these cases had on the efficiency of the workplace demonstrates why interest balancing is important.¹⁵⁸ Regardless of the disruption standard applied, the interest in having employees who can fully perform their official duties should outweigh the limited First Amendment interests involved in these cases. However, if the facts in these cases were changed slightly and the speech was not related directly to the employee's ability to perform effectively, the difference between actual and potential disruption would be significant. Thus, as cases with more difficult facts reach the courts, it will be important to have a firm standard in place to give this new and important form of expression adequate protection.¹⁵⁹

V. Recommendations: Actual Disruption Should Be Required

As Oliver Wendell Holmes so aptly wrote, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right."¹⁶⁰ The ability to predict how the law will treat different types of expression is necessary to the protection of the First Amendment.¹⁶¹ As

156. See *Stengle v. Office of Dispute Resolution*, 631 F. Supp. 2d 564, 571 (M.D. Pa. 2009) (noting that a hearing officer is "required to be impartial").

157. See *Richerson v. Beckon*, 337 Fed. App'x 637, 638 (9th Cir. 2009) (noting that "the positions from which Richerson was transferred required that she enter into trusting mentor relationships with other, less experienced teachers in order for her to give honest, critical, and private feedback").

158. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

159. See Lauren B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1435 (1962) (discussing the role that definer judges can play in creating lines for constitutional tests).

160. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

161. See, e.g., *id.* at 457 ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.").

the foregoing discussion reveals, under the current public employee free speech doctrine, the ability to predict what speech will be protected is flawed due to the confusion regarding what standard of disruption is necessary.¹⁶² Blogging is a unique form of expression that efficiently serves the purposes of the classic free speech rationales.¹⁶³ Because of the continuing expansion of blogging and the useful purposes for which it serves, the Supreme Court must adopt the actual disruption standard to more adequately protect this type of speech. Alternatively, due to the importance of the blog as a vehicle for expression, Congress should intervene by enacting a statute designed to protect the electronic communications of public employees. Either of these suggestions or the combination will be a positive step to ensure the First Amendment rights of public employees are fully protected.

A. Blogging Implicates the Classic Free Speech Theories

An examination of the theories and rationales underlying the First Amendment reveals the importance of protecting speech and expressive conduct in general, while also highlighting the reasons why the unique nature of blogging and other electronic communications deserves protection under the First Amendment. The three classic free speech theories are typically referred to as "the marketplace of ideas," "human dignity and self-fulfillment," and "democratic self-governance."¹⁶⁴ This section explores the classic rationales underlying free speech theory and examines the role these theories play in the public employee blogging context.

1. Marketplace of Ideas

By breaking down geographic and economic barriers, the blog is an extremely efficient conduit for the marketplace of ideas.¹⁶⁵ The

162. See *supra* Part III (describing the lower court inconsistencies regarding the disruption standard).

163. See *infra* Part V.A (discussing how blogging implicates the classic free speech rationales).

164. See RODNEY A. SMOLLA, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:3, at 2-3 (2010) [hereinafter SMOLLA 1] (explaining the classic free speech theories).

165. See, e.g., ROSENBERG, *supra* note 1, at 327 ("Whatever the outcome of each of our individual bets, we can now see that collectively they constitute something unprecedented in human history: a new kind of public sphere, at once ephemeral and timeless, sharing the characteristics of conversation and deliberation.").

marketplace of ideas rationale is often associated with Justice Holmes's dissent in *Abrams v. United States*.¹⁶⁶ Justice Holmes articulated this theory by reasoning:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹⁶⁷

This theory acknowledges that humans have a tendency to suppress viewpoints with which they disagree, but, Holmes argues, the best way to reach the ultimate truth is through the open competition of opposing viewpoints.¹⁶⁸ While the established exceptions to the First Amendment are not protected under the marketplace theory,¹⁶⁹ less dangerous speech that does not fit an exception warrants protection.¹⁷⁰

166. See *Abrams v. United States*, 250 U.S. 616, 624 (1919) (finding that the defendants were not entitled to First Amendment protections for their speech); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 157 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("Instead, [Holmes] proposed the now-famous theory of the marketplace of ideas . . .").

167. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

168. See MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 2–8 (2001), for a discussion of the development of the marketplace theory in First Amendment law.

169. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (describing the classes of speech that deserve no protection under the First Amendment). Justice Murphy wrote:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. (citations omitted).

170. Cf. BUNKER, *supra* note 168, at 6 (describing John Stuart Mill's influence on the marketplace of ideas theory and specifically, how he "purported to show that whether an unpopular view is true, partially true, or entirely false, it should not be suppressed").

Understanding this theory as one that protects the structure of the marketplace, it is easy to see how the blog uniquely facilitates a free and open exchange. The marketplace of ideas theory is best understood as a "defense of the *process* of the open marketplace" and not as a theory guaranteeing the ultimate truth.¹⁷¹ From the perspective of process, the blog is uniquely tailored to accommodate the exchange of opposing viewpoints.¹⁷² Concededly, many entries on blogs are trivial at best;¹⁷³ however, under the marketplace of ideas theory, the process that allows for the free exchange of ideas is what matters most, and society is essentially willing to take the bad with the good.¹⁷⁴

Although the Court has recognized that government employee speech is only given limited First Amendment protections,¹⁷⁵ the theories underlying the First Amendment must remain a driving consideration in applying the balancing method. Commenting on the power of Holmes's dissent, Dean Robert Post notes that "[b]y tightening the constitutionally required connection between speech and action in this way, Holmes sought both to provide ample room for the functioning of the marketplace of ideas and to empower the state to regulate speech when it was sufficiently close to causing prohibitable substantive evils."¹⁷⁶ A similar tightening of the connection between "speech" on blogs and "action" in terms of disruption to the workplace follows Holmes's marketplace of ideas reasoning. Because of the immense number of blogs in existence and the wide range of topics they cover,¹⁷⁷ the application of Holmes's reasoning from *Abrams*

171. SMOLLA 1, *supra* note 164, § 2:19, at 2-1 (citing *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

172. See ROSENBERG, *supra* note 1, at 326 ("[O]f all the species of writer, bloggers are the least insulated from their audience, most vulnerable to the ebb and flow of attention and response.").

173. See *id.* at 304 ("Individually, blogs, like 'unnecessary' quotation marks are mere diversions.").

174. See *City of Houston v. Hill*, 482 U.S. 451, 472 (1987) ("But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive."); SMOLLA 1, *supra* note 164, § 2:20, at 2-19 ("One of the consequences of an open marketplace, of course, is that society must at times tolerate the volatility and disorder that all open markets will occasionally produce." (citations omitted)).

175. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.").

176. Post, *supra* note 166, at 159-60.

177. See ROSENBERG, *supra* note 1, at 311 ("All these developments together fueled the phenomenal growth in sheer numbers that blogging continued to experience as the first

warrants a heightened protection of public employee speech on blogs. This can be achieved by "tightening" the disruption standard and requiring actual disruption as opposed to potential disruption. Such a shift will more adequately protect the process necessary for a free marketplace of ideas by preventing unnecessary chilling of electronic speech by public employees due to fear produced by the uncertainties of the balancing test.¹⁷⁸

2. Democratic Self-Governance

While not always implicated in the blogging activities of public employees, the theory of democratic self-governance does play a heightened role in the context of public employment speech, and the medium of blogging can go a long way in quickly disseminating this information.¹⁷⁹ From the outset, it is important to note that understanding this theory as the exclusive rationale underlying the First Amendment would greatly reduce the constitutional protections for content on public employee blogs; however, the theory must be considered alongside the other classic First Amendment theories.¹⁸⁰ After accepting democratic self-governance as an addition to the body of First Amendment theory, it follows that the rationales underlying this concept also support a firmer disruption standard for blogging.¹⁸¹

decade of the 2000s wore on. A March 2008 study by Universal McCann found that 184 million people worldwide had started a blog"); *id.* at 315 ("The success of blogging at a scale of millions has ensured that voices at each end of this spectrum, and at every point in between, will always find a wealth of supporting examples for their cases.").

178. See Frantz, *supra* note 159, at 1443 (discussing how the ad hoc balancing test "fails to give effective encouragement" to free speech and how many "will be deterred merely by the pervasive and ineradicable uncertainty" associated with these ad hoc balancing tests).

179. See, e.g., ROSENBERG, *supra* note 1, at 312–13 (discussing the "milbloggers" in Iraq, which are "legions of Americans in uniform on tours of duty posting about their frustrations and small triumphs, their fears and doubts"). One "milblogger" aptly expressed the importance of democratic self-governance in a blog post by stating, "[i]f there is any hope for the long term success of democracy, it will be if people agree to listen to and try to understand their political opponents rather than simply seeking to crush them . . ." *Id.* at 313; see also REYNOLDS, *supra* note 2, at 135 (discussing the "potential for constructive and spontaneous group action" that can be sparked through online forms of communication).

180. See SMOLLA 1, *supra* note 164, § 2:36, at 2-39 ("[A] principal guiding thesis of this treatise is that it is far better to understand the self-governance rationale as *one of many* arguments that, in combination, provide an overwhelmingly compelling case for heightened constitutional protection for freedom of speech.").

181. See REYNOLDS, *supra* note 2, at 131 (discussing the pressure that "horizontal knowledge," achieved through blogging, can place on governments).

The self-governance theory suggests that the First Amendment protects the free and open exchange necessary to a democratic society.¹⁸² Narrower than the marketplace of ideas theory, the democratic self-governance theory focuses primarily on political speech.¹⁸³ One conception of this theory is that the First Amendment protects the ability for citizens to communicate and disseminate ideas and viewpoints relevant to the voting process.¹⁸⁴ Justice Brandeis's "safety-valve" rationale from his concurring opinion in *Whitney v. California*¹⁸⁵ can also be included under this theory.¹⁸⁶ The safety valve rationale recognizes the importance of giving all voices in a democracy—especially the minority voice—an outlet for expression to encourage stability.¹⁸⁷ Where the need for a safety valve

182. See BUNKER, *supra* note 168, at 8 ("Alexander Meiklejohn, perhaps the leading proponent of the self-government theory, argued that the freedom of speech guaranteed by the First Amendment was the means by which democracy functioned.").

183. See *id.* at 8–9 ("The speech protected by the First Amendment, Meiklejohn argued, was speech aimed at enhancing citizen participation in political issues.").

184. See Post, *supra* note 166, at 165 ("The First Amendment is understood to protect the communicative processes necessary to disseminate the information and ideas required for citizens to vote in a fully informed and intelligent way.").

185. See *Whitney v. California*, 274 U.S. 357, 371 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that "[n]or is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association").

186. See *id.* at 375 (Brandeis, J., concurring) (discussing the importance of free speech as a "path of safety"). Justice Brandeis explained why the founders created the right to free speech:

They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the *path of safety* lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id. (emphasis added).

187. See SMOLLA I, *supra* note 164, § 2:35, at 2-38 ("[T]he democratic process will on occasion produce majority decisions that squelch the speech of the minority. When this conflict of values occurs, a society will be both more stable and more free in the long run if openness values prevail."); see also Paula A. Monopoli & Marin R. Scordato, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185, 199 (2002) (discussing a recent interpretation of the safety valve rationale in the "the post-September 11 environment"). Scordato and Monopoli reasoned that:

Some might argue that allowing citizens to express their anger and grief may act to release such emotions and may in fact minimize the rise of ethnic violence against those in society who are of the same ethnic origins as the terrorists who flew planes into the World Trade Center, the Pentagon and a Pennsylvania field.

exists, the blog will allow many people to express themselves quickly and efficiently.¹⁸⁸

In terms of public employee speech, the Court has recognized a form of heightened protection for some political speech in the form of a sliding scale approach regarding the extent to which the speech touches on a matter of public concern.¹⁸⁹ However, a firm standard of actual disruption for blogs would more uniformly protect all forms of political speech. This theory does have added protections under the *Pickering* balancing test in that political speech will typically touch on a higher level of public concern.¹⁹⁰ A firmer disruption standard, however, will ensure that all forms of political speech are given equal protection when weighed against the government's interests.

3. Human Dignity and Self-Fulfillment

The broadest of the three theories—human dignity and self-fulfillment—looks at "freedom of speech as an end in itself."¹⁹¹ Under this theory, self-expression is viewed as an essential component of individual liberty.¹⁹² Self-expression and the ability to hear the expression of others is associated with happiness and self-realization, and thus, restrictions on speech are viewed as inhibiting self-realization.¹⁹³

Id.

188. See, for example, REYNOLDS, *supra* note 2, at 121, for a discussion of the power of "horizontal knowledge," which is an important form of expression that internet communications such as blogging permit. Reynolds explained that "[h]orizontal knowledge is communication among individuals, who may or may not know each other, but who are loosely coordinated by their involvement with something, or someone, of mutual interest. And it's extremely powerful, because it makes people much stronger." *Id.*

189. See *Connick v. Myers*, 461 U.S. 138, 152 (1983) (explaining that there is no need "for an employer to allow events to unfold to the extent that the disruption of the office . . . is manifest," but cautioning "that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern").

190. See, e.g., EDWARDS, LEKA, BAIRD & BLACK, *supra* note 9, at 53–54 ("Courts almost always find that employee speech related to the political process addresses a matter of public concern. . . . When a public employer disciplines an employee for political speech, courts react harshly, often characterizing such action as a 'coercion of belief.'" (citations omitted)).

191. SMOLLA 1, *supra* note 164, § 2:21, at 2-22.

192. See BUNKER, *supra* note 168, at 11 ("[T]he individual autonomy theory holds that free speech is an important component of individual liberty, regardless of its products.").

193. See *id.* at 12 ("Human beings cannot develop their humanity or, in a slightly different formulation, achieve self-realization under a regime that restricts freedom of

Blogs are uniquely able to accommodate self-expression and self-realization.¹⁹⁴ Some of the drawbacks to self-expression that come with other forms of speech are eliminated with the blog. For example, in writing a novel or an article for a newspaper, the barriers of publication and limited space often prevent the average person from access to these avenues.¹⁹⁵ Similarly, although the simple act of speaking to express one's self is accessible to most in that there are no monetary, professional, or educational barriers to simply speaking, this form of expression also comes with limitations. If self-realization is dependent on being able to express oneself to an audience, the pure ability to speak will not always be as effective as the ability to reach an audience unhindered by geographic boundaries.¹⁹⁶ Furthermore, some people cannot gain the same type of fulfillment by spoken word that they can achieve through the act of writing for an audience.¹⁹⁷ Thus, blogging opens an avenue for self-expression for situations where more traditional forms of expression cannot fully accommodate a speaker.¹⁹⁸ Placing the burden on the government to prove that off-duty blogs cause actual disruption before taking retaliatory action furthers this theory. If blogging is a person's avenue of choice for self-expression, then an unpredictable haphazard standard would deter many from blogging for self-fulfillment out of fear that their thoughts may disturb a coworker and be used against them.¹⁹⁹

thought and expression.").

194. See ROSENBERG, *supra* note 1, at 311 ("Blogs are, after all, notable for enabling the expression of individuality.").

195. *But see id.* at 312 (discussing how a stay-at-home mother of two living in New Jersey became "one of the best sources of information in the United States about regional conflicts in Yemen").

196. See, e.g., BUNKER, *supra* note 168, at 14 (noting that self-fulfillment can be achieved by both the "citizen as listener, seeking to form her own opinions" and by the "citizen as speaker, seeking to communicate her view of justice, truth, or the good life").

197. See, e.g., *id.* at 12 (describing the individual autonomy theory by referring to a scholarly quote recognizing the importance of achieving self-expression through multiple mediums). Bunker noted: "As humans, . . . we also need to be able to express openly those possibilities through words, clothing, dance, decoration, architecture, music, art, literature." *Id.* (quoting ROBERT TRAGER & DONNA L. DICKERSON, FREEDOM OF EXPRESSION IN THE 21ST CENTURY 101 (1999)).

198. See, e.g., ROSENBERG, *supra* note 1, at 326 ("Bloggers, most of them solo bootstrappers of their own stream of self-expression, are the most autonomous writers the world has yet seen—the least dependent on others to publish their words.").

199. See Frantz, *supra* note 159, at 1443 (discussing how uncertainties associated with balancing tests can prevent or chill speech that would otherwise be protected).

B. Return to Cutler's Blog: Why Actual Disruption Matters

This section reexamines Cutler's blog with a full understanding of the lack of a predictable disruption standard and the unique ways in which off-duty blogging implicates the classic First Amendment theories. If Cutler's blog had been written off-duty, the content could implicate all three classic theories—suggesting that this is the type of speech that should be protected in order to have a thriving First Amendment. Cutler's descriptions of potentially corrupt employment practices are relevant to the democratic self-governance theory in that these are the types of activities that a voter would want to know to make a fully informed decision.²⁰⁰ Approaching the marketplace of ideas theory from the process standpoint, Cutler's ability to broadcast her experiences working on Capitol Hill contributes to the free and open exchange of ideas.²⁰¹ Finally, Cutler's purpose for starting this blog is essentially the self-fulfillment rationale.²⁰² Cutler was putting her life experiences, her emotions, and her feelings on a blog for her close friends to read—she was expressing herself.²⁰³

Because Cutler's blog had value under the First Amendment, her ability to predict whether she could be retaliated against for her blog matters under current constitutional doctrine. The disruption standard would have made a difference in the outcome of a case if Cutler had chosen to litigate.²⁰⁴ Recognizing the extra protections that should be allotted to private, off-duty speech, Circuit Judge Sotomayor—now a Supreme Court Justice—wrote:

The fact that speech takes place in private and away from the workplace favors the employee on both sides of the balancing test: First, it reduces the likelihood of disruption. Second, it enhances the free speech

200. See *supra* note 184 and accompanying text (describing how free speech protects the ability of citizens to disseminate information relevant to the voting process).

201. See *supra* note 171 and accompanying text (describing the process view of the open marketplace theory).

202. See Witt, *supra* note 15, at W12 (describing Cutler as "an American uber-individualist demanding the right to tell her own story her own way"); *supra* Part V.A.3 (discussing the human dignity and self-fulfillment theory).

203. See *id.* at W12 (describing Cutler's blog as "the online diary she had been posting anonymously to amuse herself and her closest girlfriends").

204. See *supra* note 43 and accompanying text (explaining how actual disruption could not be demonstrated because the discovery of Cutler's blog and her firing were nearly simultaneous).

interests at stake because the employee is speaking in his capacity "as the member of the general public he seeks to be."²⁰⁵

Because of the value that personal blogs can add to free expression, it is imperative that a clear standard exists so that other bloggers in Cutler's shoes are aware of the consequences and not prevented from expressing protected speech.

C. The Supreme Court Should Address Prior Inconsistencies and Adopt an Actual Disruption Standard

In light of the ambiguity associated with the meaning of disruption in the context of *Pickering*, the Supreme Court must adopt a clear standard that lower courts can apply uniformly. Balancing tests, by their very nature, come with a level of uncertainty in application.²⁰⁶ Although this uncertainty is, in ways, viewed positively for providing flexible application of legal rules to specific facts,²⁰⁷ it is important to maintain firm guidelines within the tests in order to ensure that rights—particularly constitutional rights—are adequately protected.²⁰⁸

The distinction between actual and potential disruption may seem insignificant at first glance; however, certain types of speech—including blogs and other electronic communications—are vulnerable where the standard requires less than actual disruption.²⁰⁹ Although the outcome differences between potential and actual disruption for speech occurring at work are less significant, the differences between the two standards become more pronounced when the speech at issue occurs off-duty and outside the traditional workplace.

205. *Pappas v. Guiliani*, 290 F.3d 143, 158 (2d Cir. 2002) (Sotomayor, J., dissenting) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968)).

206. See, e.g., *Frantz*, *supra* note 159, at 1431 (suggesting the uncertainty of balancing tests in commenting on a Supreme Court announcement of First Amendment balancing). *Frantz* questioned: "Does this not say that, even where First Amendment protection 'exists,' it need not, and often will not, 'prevail'?" *Id.*

207. See *id.* at 1427 (quoting Justice Frankfurter's view that balancing was desirable because of its ability to avoid absolute rules and inflexible dogmas).

208. See *id.* at 1434 (describing the difference between balancing to adopt a new rule and balancing to determine the disposition of a case and praising the certainties that come with the former).

209. See, e.g., *supra* note 95 (discussing the need for real, not imagined, disruption in order to prevent restrictions on speech that are solely based on an employer's personal animus toward an employee).

The contrast between the majority and dissenting opinions in the Second Circuit case, *Pappas v. Giuliani*,²¹⁰ illustrates the difference the disruption standard can have on the outcome of a case. In *Pappas*, Pappas worked in the computer maintenance department of the New York Police Department.²¹¹ Annoyed with receiving letters from the local auxiliary, which solicited charitable contributions, "Pappas stuffed the reply envelopes with offensive racially bigoted materials and returned them anonymously."²¹² After a lengthy investigation, the police department determined Pappas's identity and eventually dismissed him for violating an internal police regulation.²¹³ The majority in *Pappas* applied a potential disruption standard and found that the "Department's reasonable perception of serious likely impairment of its performance of its mission outweighed Pappas's interest in free speech."²¹⁴ Circuit Judge Sotomayor focused on the lack of actual disruption and the off-duty characteristic of Pappas's speech in dissenting from the majority opinion.²¹⁵ Both the majority and dissenting justices in *Pappas* claimed to apply Supreme Court precedent in reaching their respective conclusions regarding disruption.²¹⁶ Nevertheless,

210. See *Pappas*, 290 F.3d at 151 (deciding that the "Department's reasonable perception of serious likely impairment of its performance of its mission outweighed Pappas's interest in free speech").

211. See *id.* at 144 (explaining that "Pappas was employed by the New York City Police Department" and "worked in the Department's Management Information Systems Division . . . which was responsible for maintenance of its computer systems").

212. *Id.* at 144–45.

213. See *id.* at 145 (discussing the investigation and eventual decision to terminate Pappas).

214. *Id.* at 151. The majority responded to the dissenting argument by noting that it was "premised on a misunderstanding of the government's burden under *Pickering*" and that the governmental interest in discharging an employee "does not depend on the employer's having suffered *actual* harm resulting from the speech." *Id.*

215. See *id.* at 154 (Sotomayor, J., dissenting) (dissenting from the majority's grant of summary judgment in favor of the New York Police Department). Circuit Judge Sotomayor powerfully opened her dissent:

Today the Court enters uncharted territory in our First Amendment jurisprudence. The Court holds that the government does not violate the First Amendment when it fires a police department employee for racially inflammatory speech—where . . . the speech occurred away from the office and on the employee's own time; where the employee's position involved no policymaking authority or public contact; where there is virtually no evidence of workplace disruption resulting directly from the speech; and where it ultimately required the investigatory resources of two police departments to bring the speech to the attention of the community.

Id.

216. Compare *id.* at 151 (citing *Waters v. Churchill* and *Connick v. Myers* in support of

Pappas's speech was protected under the actual disruption standard and outweighed by balancing under the potential disruption standard.²¹⁷

Electronic communications such as blogging are especially vulnerable to these distinctions between actual and potential disruption. As Part V.A discussed, these electronic forms of communication are also some of the most powerful forms of communication in terms of furthering the theories underlying the First Amendment.²¹⁸ Because of the importance of electronic forms of expression and the effect that the disruption standard can have on them, the Court should clarify that public employers must demonstrate actual disruption.

D. Proposed Federal Statute: A Showing of Actual Disruption is Required for Public Employment Actions Involving Electronic Communication

Alternatively, Congress should intervene to address the inconsistent and unpredictable application of the disruption prong. Because of the widespread use and importance of blogging and other forms of electronic communications, Congress should draft a law that will create clear standards regarding the extent of protection that federal employees enjoy when using these resources. By enacting a statute that requires a showing of actual disruption to the workplace before a federal employer can take adverse action against an employee for off-duty electronic communications, Congress can provide a more predictable standard. Moreover, by setting the standard at actual disruption, Congress may still defer to interest balancing when the electronic communications cause actual disruption to the workplace. Admittedly, a Supreme Court adoption of the disruption standard would apply to all public employers²¹⁹ while the proposed congressional statute's reach would not extend beyond federal employees.²²⁰

a potential disruption standard), *with id.* at 156 (Sotomayor, J., dissenting) (citing *Rankin v. McPherson* in support of the need for a disruption showing).

217. Compare *id.* at 151 (holding that Pappas's speech was not protected), *with id.* at 154 (Sotomayor, J., dissenting) (finding that the balancing factors "counsel[] against granting summary judgment in favor of the police department employer").

218. See *supra* Part V.A (discussing how blogging uniquely implicates the classic free speech theories).

219. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (determining that free speech applies to the states under the due process clause of the Fourteenth Amendment). The Court stated: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.*

220. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding that the Religious Freedom Restoration Act (RFRA) exceeded Congress's enforcement power under the

Nevertheless, a congressional statute would at least provide a sense of certainty to federal employees and may prompt states to adopt similar statutes.²²¹ Although no federal laws specifically address public employee rights with respect to off-duty electronic communications, statutes governing off-duty conduct of employees exist in several states.²²² Providing the broadest off-duty protections, a New York statute protects the off-duty "recreational activities" of employees.²²³

Enforcement Clause of the Fourteenth Amendment). RFRA was a congressional response to the Supreme Court interpretation of the Free Exercise Clause in *Employment Division v. Smith*. *Id.* at 512. Congress attempted to "restore the compelling interest test as set forth in *Sherbert v. Verner*" through the enactment of RFRA, which was applicable to "all Federal and State law." *Id.* at 515–16. In *City of Boerne v. Flores*, the Court emphasized that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" under § 5 of the Fourteenth Amendment. *Id.* at 519. Although not directly on point, *City of Boerne* does shed light on whether Congress could pass a law that would essentially interpret the First Amendment rights of all public employees by mandating actual disruption. In light of *City of Boerne*, it would be highly unlikely that a congressional statute which attempted to apply this employment standard to the states would be upheld under the Enforcement Clause of the Fourteenth Amendment.

221. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Following from Justice Brandeis's famous laboratories of democracy theory, the states may choose to experiment with employee protections by passing slightly different statutes to protect the First Amendment rights of their public employees.

222. See Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 640–69 (2004) (discussing statutory protection of off-duty conduct in California, New York, North Dakota, Colorado, Massachusetts, and Connecticut).

223. See N.Y. LABOR LAW § 201-d (McKinney 2009) (describing protections for employees from "discrimination against the engagement in certain activities" including recreational activities). The statute reads:

- 1.b. "Recreational activities" shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material . . .
2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of . . . c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or . . .
3. The provisions of subdivision two of this section shall not be deemed to protect activity which: a. creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest; . . .
4. Notwithstanding the provisions of subdivision three of this section, an employer shall not be in violation of this section where the employer takes action based on the belief either that: (i) the employer's actions

The stability and power of prediction that come from this state statute should be incorporated in a federal statute tailored to protect electronic communications. This Note proposes the following text for a federal statute:

Federal Government Employee Protections from Retaliatory Action for Electronic Communications

(a) Prohibited Action

Unless otherwise provided by law, it shall be unlawful for any federal government employer to discharge from employment, or otherwise take adverse action against an individual in compensation, promotion, terms, conditions or privileges of employment because of an individual's off-duty electronic communications.

(b) Limitations

Notwithstanding the provisions of subdivision (a), the federal government employer shall not be in violation of this section when the employer demonstrates a showing of actual disruption to the workplace caused by the off-duty electronic communications.

(c) Definitions

"Off-duty" means conducted outside work hours, off of the employer's premises and without use of the employer's equipment or other property.

"Electronic communications" means any speech expressed through use of the Internet including but not limited to blogging, social networking, and postings on discussion boards.

VI. Conclusion

Blogging and other types of electronic communication are continuously evolving into widely used forms of expression.²²⁴ The growth of blogging will

were required by statute, regulation, ordinance or other governmental mandate, (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.

Id. While not specifically listed, off-duty blogging could fall under the "recreational activities" category of this law. The limitations on the protections found in § 201-d(3)-(4) recognize the interests of the employer while also creating predictable standards for when the employer can take actions against the employee. *Id.* at § 201-d(3)-(4).

224. See ROSENBERG, *supra* note 1, at 302 ("It has taken blogging roughly a decade to evolve from the pursuit of a handful of enthusiasts on the fringes of the technology industry into the dominant media form online.").

lead to an increase in litigation regarding this evolving form of expression, and public employee blogging cases will play a significant role in defining the boundaries of free speech rights.²²⁵ The blog serves the classic theories underlying the First Amendment in ways that other forms of speech cannot. The special role that the blog plays in facilitating the First Amendment supports the need for clear guidelines defining what types of speech on blogs are protected in order to prevent unnecessary chilling.

Blogs are especially vulnerable in the employment context. Written outside of the workplace and often of a personal nature, the off-duty public employee blog is particularly susceptible to manipulation in the context of the *Pickering* balancing test.²²⁶ By deferring to the governmental interest in promoting efficiency, the disruption prong—depending on the standard—can provide an opportunity for a public employer to embellish the effects of an employee's blog by imagining some sort of potential disruption that the employee may not have foreseen at the time of writing.²²⁷ One way to increase the protections given to public employee blogs is to tighten the standards under the *Pickering* balancing test. By applying the actual disruption standard uniformly to all public employee blogging cases, the Supreme Court will prevent unnecessary chilling of this valuable form of speech. Alternatively, Congress should legislatively mandate an actual disruption standard for the electronic communications of federal employees. Creating a firm actual disruption standard is one incremental step that will provide more certainty and reduce the chilling effect associated with the uncertain balancing test. Combined with the value of consistency, this change will be a significant step in the direction of ensuring that the First Amendment rights of public employees for off-duty electronic communications are adequately protected.

225. See, e.g., Todd et. al., *supra* note 8 ("In 2006, the Employment Law Alliance surveyed over 1,000 American employees and found that up to five percent maintained personal blogs. Of them, 16 percent admitted to posting unfavorable comments about their employers, co-workers, supervisors, or customers.").

226. See *supra* note 56 (discussing the vulnerability of blogs under *Pickering* due to their personal nature).

227. See *supra* note 95 and accompanying text (discussing the importance of a real, not imagined, disruption standard to prevent employers from covering up a personal animus toward an employee through a claim of disruption).