PICKERING v. BOARD OF EDUCATION

-- A Study in Supreme Court Decision Making

in the Area of Public Employee Rights

by

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DIANA MARTHA DANIELS

Submitted to the Department of Urban Studies and Planning on May 10, 1974 in partial fulfillment of the requirements for the degree of Master in City Planning.

On June 3, 1968, the United States Supreme Court reversed an Illinois Supreme Court decision upholding the dismissal of Marvin Pickering, a teacher who had exercised first amendment privileges in criticizing his school board in an open letter to a newspaper. The decision is full of implications not only as to how decisions of the Supreme Court are made but as to what teachers can and cannot do. The reach of the Pickering case extends to other public employees; and the position of public employees in society today is of great concern because of the tremendous growth of the government as employer.

The Pickering case prompts some examination of why the Supreme Court found it a propitious time to grant the constitutional claims raised by Pickering. What process of change creates a judicial atmosphere conducive to the extension of certain constitutional rights to a previously disenfranchised group? Is it merely the whimsy of the nine men who sit in judgment that a case is decided on a particular day in a particular way: is it national concern for civil rights which dictates the outcome; is it a specific event or events in the political framework of the nation which guides the decision making process; or is it something else as yet undefined? This paper proposes to attempt to answer the issues posed in the above questions — how, why, and when does the Supreme Court decide a case to extend constitutional rights — as they apply to Pickering v. Board of Education and the implications for other public employees.

Unfortunately, historical and legal literature have yet to determine how the Supreme Court finally reaches its decisions. Underlying premises and doctrines, accepted without question by previous majority opinions of the Court, and factors which have caused the Court to reverse holdings and to unseat previously well established assumptions remain unexplored and undeveloped. While definitive explanations are an impossibility, through careful
scrutiny of what is presented to the Supreme Court -- the hearing board testimony, the trial record, the opinions of the lower courts, and the briefs -- as well as the social and political climate in which a case is brought, a reasoned attempt can be made to illuminate the Court process.

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Law to be effective, must conform to the world in which it finds itself. That world is given; Law does not make it.

Huntington Cairns
INTRODUCTION

Consideration must be given to the question what constitutes education and what is the proper way to be educated.

Aristotle

In 1964 the Lockport, Illinois High School school district was faced with tremendous financial problems. Attempts to pass a tax increase to meet these fiscal difficulties in May of that year had failed. Members of the school board decided to try again in September. To promote its proposal the school board hired a public relations firm and published extensive press releases and pamphlets. Teachers were urged to distribute promotional literature to voters. Not only the Superintendent of the School District but the District 205 Teacher's Organization openly supported the tax increases in a series of articles, which had been approved by the Superintendent and which appeared in the Lockport Herald in weeks preceding the election, citing the need for a "yes" vote on the referendum so as to be able to continue to provide quality education. Notwithstanding the concerted effort, on September 19th, the voters defeated the tax increase.

It was this second tax rate increase proposal defeat that brought a school teacher named Marvin Pickering from obscurity. In his first five years of teaching in the Lockport school system, Pickering had apparently taught without incident. The record contained nothing about his teaching ability. Although he had actively supported one of a series of proposed building bonds in
1961, he drew no special attention until a letter he submitted to the editor of the *Lockport Herald* on September 22, 1964, appeared in the September 24th edition of the newspaper.

In the letter Pickering criticized the manner in which the Board of Education and the District Superintendent of Schools has handled past bond issue and tax increase proposals, including the September 19th proposal. He attempted to explain why that proposal had been defeated and went so far as to suggest that there were a number of serious discrepancies between what the Board promised in prior proposals and the facilities actually built when one of the prior proposals had been approved.

Not surprisingly, the Board took great offense to the letter. The issues raised in the letter became "accusations" asserted as positive averments of fact and each point raised by Pickering was the product of "twisted and tortured logic, hearsay and unbelievably strained interpretation." The Board charged that the letter consisted of a series of falsehoods which impugned the integrity of the Board of Education and the school administrators of the District. Claiming the interests of the schools to be at stake, the Board found little difficulty in the way of discharging Pickering; and, two weeks later Marvin Pickering was dismissed from his job.

Under Illinois law, Pickering was entitled to a hearing.

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1. The full text of the September 22, 1964 letter can be found in Appendix I.
before the Board and he requested one. With the same lawyer acting as both prosecutor and as legal adviser to the Board, the Board confirmed the discharge at the hearing.

The Board of Education was the first and last tribunal to hold a fact-finding hearing in the Pickering case. And, as would be expected on administrative review by the Illinois Circuit Court of the Board's decision, the Court avoided deciding the constitutional issues of free speech and due process raised by Pickering on appeal. Hiding behind the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1963, Chap. 110, § 264), the Circuit Court found the Board's decision was not manifestly against the weight of the evidence thereby never reaching the asserted constitutional claims. The Illinois Supreme Court affirmed with the same reasoning as used in the Circuit Court, finding:

...the decision to dismiss the plaintiff was not against the manifest weight of the evidence and the circuit court properly refused to set it aside.2

The Illinois courts rejected Pickering's claim that such a letter was protected by the first and fourteenth amendments on the ground that, as a teacher, he had to refrain from making statements about the school's operation "which in the absence of such position (that of public employment) he would have an undoubted right to engage in." The courts were concerned solely

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3. Id. at 577, 225 N.E.2d, 1, 6 (1967).
with determining whether, on the facts as determined, the Board could reasonably conclude that publication of the letter was detrimental to the best interests of the schools.

Pickering then appealed to the United States Supreme Court. The outcome of such an appeal was uncertain; the Court in the past had not acted in any positive fashion to affirm public school teachers' rights in cases not dealing with political subversiveness. However, on June 3, 1968, the United States Supreme Court reversed the Illinois Supreme Court in the first decision by the high court to deal with the constitutional rights

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4. Board of Trustees v. Owens, 23 Cal. Rptr. 710 (1962), a state case, had already held the right of free speech extends to the action of a public school teacher in criticizing the school board that employed him. The teacher, who was also a parent, wrote several letters to the newspapers attacking the school and the administration. The question before the court was whether the teacher's conduct constituted unprofessional conduct warranting and justifying dismissal. The court reasoned that employment as a teacher does not prevent one from criticizing as a parent, it granted the teacher the right of free speech under the existing circumstances. To a casual observer, the Pickering decision would not seem outstanding or unusual, just, in fact, part of a continuing trend of decisions by the Warren Court extending the bounds of civil liberties guarantees. Pickering appears to be the logical "next step" in the chain of public employment and closely related public sector cases starting with Wieman v. Updegraff, 344 U.S. 183 (1952) (Oklahoma loyalty oath for all state employees), followed by: Slochower v. Board of Higher Education, 350 U.S. 551 (1956) (college teacher claimed privilege against self incrimination even though N.Y. law denied privilege); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (professor refused to answer questions during a legislative investigation); Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring teachers to file an affidavit listing every organization with which affiliated); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) (Florida teacher loyalty oath case); Torasco v. Watkins, 367 U.S. 488 (1961) (oath that affirmed belief in God before allowed to take public office); Baggett v. Bullitt, 377 U.S. 360 (1964) (Washington teachers and State employees')
4. (cont.) loyalty oath case; Elfbrandt v. Russell, 384 U.S. 11 (1966) (Arizona loyalty oath case); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (challenging the New York Feinberg Law on loyalty oath); Garrity v. New Jersey, 385 U.S. 493 (1967) (police officer challenge to dismissal after required to testify without immunity); Whitehall v. Elkins, 389 U.S. 54 (1967) (challenging Maryland loyalty oath); United States v. Robel, 389 U.S. 258 (1967) (communist remained employed even after shipyard designated defense factory). Yet the Supreme Court during that same period of time reached contrary results in cases as far back as 1947 -- United Public Workers v. Mitchell, 330 U.S. 75 (1947) (constitutionality of the Hatch Act); American Communications Association v. Douds, 339 U.S. 382 (1950) (labor organizations must file "non-Communist" affidavits); Garner v. Board of Public Works, 341 U.S. 716 (1951) (California loyalty oath upheld); Adler v. Board of Education, 342 U.S. 485 (1952) (N.Y. Feinberg Law upheld); Barsky v. Board of Regents 347 U.S. 442 (1954) (physician's license suspended after failing to produce subpoenaed papers) Beilan v. Board of Education, 357 U.S. 399 (1958) (school teacher refused to answer questions on affiliations when asked by Superintendent); Barenblatt v. United States, 360 U.S. 109 (1959) (professor held in contempt when refused to answer questions put by House Committee on Un-American Affairs); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (I.D. badge withdrawn from cook who worked on premises of naval gun factory); Konigsberg v. State Bar, 366 U.S. 36 (1961) (applicant to bar refused to answer questions on membership in communist party). For more discussion, see M. Konvitz, Expanding Liberties 86-108 (1966). As can be seen by this list of cases, in connection with first amendment rights, the modern Court has pursued, in fact, an erratic course in attempting to develop applicable doctrine to public employment cases. McCloskey, Supreme Court 193-208. See generally M. Shapiro, Freedom of Speech: The Supreme Court & Judicial Review 6-17 (1966). And so although the Will County School Board's attorney, John Cirricione, had advised against pressing for the discharge of Pickering in that case from the beginning and was surprised when the Illinois Supreme Court upheld the Board's position, the Pickering outcome was not a "sure bet." In 1964, the United States Supreme Court, in a case virtually identical to Pickering, had denied certiorari and thereby allowing the dismissal of a teacher to stand although first amendment rights were at issue. Koch v. Board of Trustees, 39 Ill. App. 2d 51, 187 N.E.2d 340 (1963), cert. denied 375 U.S. 989 (1964). Cf. Sullivan, Free Speech and the Public Employee, 58 Ill. B.J. 174 (1969). One summary of the Pickering decision, in fact, concluded that it was one of the "hardest fought cases involving a teacher's right to assume some of the erogatives of a citizen..." Hoffman, Are Teachers Citizens of Their Communities?, 16 School Management 10, 10 (1972).
of public employees not related to subversive activities. Mr. Justice
Marshall speaking for the Court in *Pickering v. Board of Education*
concluded:

> In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.7

And, today *Pickering* has remained the most definitive ruling on the right of a teacher to speak freely outside the classroom. It was a decision full of implications not only as to what teachers can and cannot do with regard to civil rights and civil liberties but as to the rights and liberties extended to all public employees. The position of public employees today is of great concern because of the tremendous growth in the area of the employment market. More and more people are being affected by public employees - either through the service they provide for the public or by virtue of the livelihood that these positions offer to more than 18% of the total work force.

> Decisions involving public employees affect the rest of society as well; thus the *Pickering* outcome prompts some examination of why

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5. The full text of the Supreme Court's decision can be found in Appendix II.


7. 391 U.S. at 574.
the high court found it a propitious time to grant the constitutional claims raised by Pickering. What process of change creates a judicial atmosphere conducive to the extension of certain constitutional rights to a previously disenfranchised group? Is it merely the whimsy of the nine men who sit in judgment that a case is decided on a particular day in a particular way; is it national concern for civil rights which dictates the outcome; is it a specific event or events in the political framework of the nation which guides the decision making process; or is it something else as yet undefined? This paper is intended as an attempt to answer the issues posed in the above enumerated questions -- how, why, and when does the Supreme Court decide a case to extend constitutional rights -- as they apply to Pickering v. Board of Education.

Unfortunately, historical and legal literature have yet to determine how the Supreme Court finally reaches its decisions. Underlying premises and doctrines, accepted without question by previous majority opinions of the Court, and factors which have caused the Court to reverse holdings and to unseat previously well established assumptions remain unexplored and undeveloped. As Westin in his introduction to The Supreme Court: Views From Inside wrote:

Following the Supreme Court, then is like trying to assemble a picture puzzle for which several important pieces have been playfully withheld by the manufacturer.8

While definitive explanations are an impossibility, through careful

scrutiny of what is presented to the Supreme Court -- the hearing board testimony, the trial record, the opinions of the lower courts, and the briefs -- as well as the social and political climate in which a case is brought, a reasoned attempt can be made to illuminate the Court process. Again Westin noted:

Even though the opinions (of the Supreme Court) open important vistas to us, they are not exactly picture-windows opening onto the Supreme Courtyard. The opinions present only a result, and because the Supreme Court does not deliberate in public, how that result was reached remains cloudy. For many rational and irrational reasons, American practice has determined that the bones of Justice -- even Constitutional Justice -- are best shaken and thrown in a darkened temple. Thus we see 'before' and 'after' at the Supreme Court but not 'during'... No outsiders know whether or what the Justices read in making up their minds. The intra-Court debates are held behind the locked door of the conference room and no transcript is made. 9

9. Id. at 6. Attempts have been made by some political scientists to overcome the barrier of secrecy surrounding Court decisions. To explain judicial process and judicial behavior, they have turned to a kind of sch... y astrology to pierce the curtain: game theory -- 'assuming each justice decides cases so as to win the deciding vote position for himself...'; or a scalgram analysis --' isolating the factors which decide the case in a given area, translating these into mathematical terms, we can predict that if a case exactly like this ever comes up again...' and a host of other alchemists' techniques. Id. at 7. See, e.g., S. Goldman and T. Jahrgie, The Federal Judicial System (1968), for an approach to studying the judiciary by means of systems theory. "First as a form of general theory, systems theory brings order and coherence to the increasingly vast range of materials and studies...Second, we are convinced of its explanatory potential. Systems theory illuminates interrelationships and processes otherwise unexplained." Id. at 1.
DEMOCRACY v. BUREAUCRACY

"...the teacher is entrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations are all involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention." Goldsmith v. Board of Education.2

Four years elapsed from the fateful day in September 1964, when Marvin L. Pickering wrote a letter criticizing his employer to the Lockport Herald, with its circulation of 2,934, to the third day in June 1968, when the highest court of this country took the first step to extend "the protective umbra of the first amendment," as was defined by the New York Times v. Sullivan rule of actual malice delineating a new standard in the area of freedom of speech, to include the speech of a public employee. All during the preliminary bouts before the appeal to the Supreme Court was sought and granted, diametrically opposed arguments were set forth by Pickering and the Board of Education centering by implication on the fundamental

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nature of education, the constitutional relationship between public
employee and government employer, and the role of each in the
educational process.

I

The Public Employment Relationship

The interaction between citizen as employee and State as employer
in the field of public employment is an interesting and important
aspect of the American political system, especially as it relates
to first amendment guarantees of free speech. This relationship
between citizen and State can be considered a factor in determining
the fundamental rights of a sizable segment of the population. And,
in recent years its significance has grown as the role of the govern-
ment in society has developed and as the number of public employees
has expanded.

In the past the public employment relationship has been a
negative one; citizens employed in the public sector, including

5. This interaction, however, is a relationship which has not
been overly analyzed or substantially conceptualized. Few studies have
sought to discover and to determine the premises and assumptions which
were at the foundation of its historical development. See generally,
D. Rosenbloom, Federal Service and the Constitution (1971) (hereinafter
cited as Rosenbloom, Federal Service); Dotson, A General Theory of

1047 (1936) (garbagemen passing out leaflets criticizing handbook which
regulates their conduct); Joyce v. Board of Education, 325 Ill. App.
543, 60 N.E.2d 431 (1945) (teacher dismissed after writing letter
to former student praising his refusal to register under the Selective
Service Act); McAuliffe v. Mayor, Etc., of the City of New Bedford, 155
Mass. 216, 29 N.E. 517 (1892) (policeman violated a regulation for
policemen, firemen and postmen, have been subjected to greater restrictions and fewer rights than the ordinary citizen. In particular, this negative discrimination has extended to public school teachers whose rights have been well-regulated and rigidly defined by school boards and state legislatures.

Education, while not mentioned specifically in the United State Constitution, has been left implicitly to the various states to carry out as part of their governmental duties designated under the tenth amendment. The States established education as a state function to be organized and regulated under general grant of police power.


There have been a few instances in which the relationship has positively benefited the public employee. For example, from 1842 to 1939 federal employees were immune from state taxation. On the whole, however, there are great possibilities for abuse, if the government is allowed to exert its considerable pressure to buy up constitutional rights through conditioning its benefits. See Reich, The New Property, 73 Yale L.J. 733, 764 (1964). See also Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1969); Hall, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935).

7. See D. Gatti and R. Gatti, The Teacher and The Law chs. 1, 4 (1972); See also Remmlein and Ware, School Law (1970).

8. Among the many pronouncements by courts and statesmen alike, the following two quotations indicate quite concisely the perceived relationship of education to the state:

"It is an axiom in my mind that our liberty can never be safe but in the hand of the people themselves and that too of the people with a certain degree of instruction. This is the business of the state to effect, and on a general plan." T. Jefferson, The Papers of Thomas Jefferson 151 (Vol. IX. J. Bond ed. 1958).
Teachers, like other public employees, have invoked, over the past thirty years, the first amendment in protecting themselves against the consequences of state action; and because public schools were established to teach concepts of freedom and democracy, "it (was) often assumed that teachers enjoy a considerable measure of personal, political and academic freedom in their status.

8. (cont.) "If an elective republic is to endure for any great length of time, every elector must have sufficient information, not only to accumulate wealth and take care of his pecuniary concerns, but to direct wisely the Legislature, the ambassadors, and the Executive of the nation; for some part of all these things, some agency in approving and disapproving them, falls to every freeman. If, then, the permanency of our government depends upon such knowledge it is the duty of government to see that the means of information be diffused to every citizen. This is sufficient answer to those who deem education, a private and not a public duty..." Address by T. Stevens in The Famous Speech of Hon. Thaddeus Stevens of Pennsylvania 5 (T. Stevens Memorial Association of Philadelphis Comp. 1904).


"One reason for the large amount of regulation of teachers' speech has been the almost complete failure of teachers, until recently to assert their constitutional rights of free speech and due process." Id at 382.

See also State v. Turner, 155 Fla. 570, 19 So.2d 832 (1944). Teachers and other public employees probably found little occasion to raise first amendment claims any earlier because of the "doctrine of privilege" (see p.15, 20 infra) and the lack of interest by the Supreme Court in areas of first amendment rights. R. McCloskey, The American Supreme Court 170 (1960) (hereinafter cited as McCloskey, Supreme Court).

as teachers. Yet teachers often found themselves limited in these respects more so than persons who work in private business and industry."

The judicial justification in restricting rights of public employees has been of importance in understanding the employment relationship. The courts have played a major role in determining the acceptable range of discrimination against teachers and other publicly employed citizens. Until recently, the courts almost universally have given the most perfunctory consideration to any invocation of first amendment protection when the free speech issue has been raised during an action for dismissal or an action to challenge dismissal. The "doctrine of privilege" was the legal touchstone by which the courts could base their decisions. The rights of teachers, and other employees, as individuals and as citizens, were considered by the judiciary subordinate to the rights of school boards and state legislatures who as public employers were mandated to regulate employee conduct. There was no constitution right to public employment. As a result of this judicial outlook, teachers


14. McAuliffe v. Mayor, etc. of New Bedford, 155 Mass. 216,
have had tremendous difficulty overcoming dismissal or other punitive actions by school boards after having expressed themselves to the displeasure of their administrative superiors. A California court decision was typical of the judicial response to first amendment protections claimed by teachers.

No one has a natural or inherent right to teach in a public school. 15

The judiciary has tended to define the limits of teachers' rights and liabilities with an eye to the effects they would have upon the students; since schools exist primarily for the benefit of the pupils, the judicial view is that teacher welfare is subordinate to pupil welfare.

II

A Theoretical Model

Before examining, however, the doctrinal frameworks on which the protagonists in Pickering placed their cases, the following theoretical model ought to be considered as a possible construct for this dispute and others like it in the area of public employment. The nature of the problems posed by Marvin Pickering in challenging the constitutionality of his dismissal by the Will County School Board is best related to a statement by Max Weber in which he theorized

14. (cont.) 220, 29 N.E. 517, 517 (1892). The impact of the "doctrine of privilege" and the Holmes dictum can be seen through shepardizing McAuliffe. Over 75% of the cases of the more than 90 cases citing McAuliffe found for the public employer against the constitutional claim.

that "democracy (substance) inevitably comes into conflict with the bureaucratic tendencies (form) which by its fight against notable rule, democracy has produced." Pickering, one individual, was pitting "democracy," with its characteristic elements of plurality, equality, freedom, and open access to all, against "bureaucracy" (the School Board), with its requirements of unity, hierarchy, command, and stability, which were necessary to the Board of Education's efforts to meet its mandated task of promoting "the general intelligence of the people constituting the body politic." The inevitable tension between these two forces -- democracy and bureaucracy -- has given rise to the concept that in order to control a bureaucracy with its potential to proliferate, to become all-consuming, and to develop loyalty unto itself, thereby destroying democracy, it has been necessary and desirable to abridge the constitutional rights


17. "There is some loss of academic freedom in all organized education as, indeed, there is loss of personal freedom under all organized government. One must go pretty far back in the history of education to find the teacher utterly beyond regulation in his teaching; no doubt Plato came as near to this as anyone, and Aristotle achieved it to a somewhat lesser degree; but Socrates had earlier felt the sharp discipline of the Athenian state on the very subject matter of his teaching, his instructional methods, and their effects on youth and when the school becomes the common enterprise of more than one teacher, the discipline and direction usual to common enterprises are felt as the need of the school, too." Worley v. Allen, 12 App. Div. 2d 411, 413, 212 N.Y.S.2d 236, 238 (1961).

of public employees in a democratic society. Loyalty oaths, civil service examinations and certification, and political neutrality were but examples of the reaction to what was feared to be an indispensable bureaucracy's ability to interfere with what Rosenbloom labeled "the ability of the system (a democratic political system) to maintain its essential variables within the democratic range."
The Board of Education established its case using this ideological context of the negative discrimination against public employees in the exercise of their constitutional rights.

III

Board of Education of Township High School District 205.

The Board of Education in the Pickering case adopted, in essence, the conventional arguments relating to the role of public employees in the constitutional schema, together with all of the phraseology and assumptions which had prevailed for the past seventy years in societal and judicial thinking, despite the recent in-roads made by the United States Supreme Court in its evolving interest in first amendment guarantees. Without an understanding or consideration of the

19. Rosenbloom, Federal Service 14. Rosenbloom's ideological justification for the existence of restricted constitutional protections for public employees is that public servants have a public trust and therefore must be sacrificed for the good of the political system and its members. Id. at 15.

20. See note 4, chapter 1.
relevance of such traditional concepts, as "privilege," duty of 
loyalty and "public interest," to the needs and foci of current times, 
the Board of Education very blithely and ably maintained a self-
righteous attitude in finding it necessary, for "the good of the 
school," to dismiss an errant teacher even if his only indiscretion 
was to speak out in critical terms against his employer on matters 
of public concern. The Board of Education, in listing in the notice 
of discharge its charges, causes and reasons, used language which had 
become standard for such public employee cases.

That you did write a certain letter to the editor of the 
Lockport Herald, a newspaper published in and having a general 
circulation in said District, and that you caused said letter 
to be published in said newspaper in its edition of Thursday, 
September 24, 1964 on page 4 thereof, which said letter 
contained many untrue and false statements and comments which 
directly and by innuendo and without justification questioned 
and impugned the motives, honesty, integrity, truthfulness, 
responsibility and competence of this Board of Education and 
the School Administrators of this district in carrying out 
their official duties, which said statement, comments and 
questions contained in said letter written and caused to be 
published by you seriously involved and damaged the profes-

21. See generally Van Alstyne, The Demise of the Right-
Privilege Distinction in Constitutional Law. 81 Harv. L. Rev. 
1439 (1968) for argument that the concept of "privilege" is today 
no longer viable and that "the size and power of the government role 
in the public sector requires substantive due process control of 
the state in all its capacities."

22. Opinions are often based on the premise that curtailment 
of free speech is necessary to maintain proper discipline and preserve 
the efficiency of the public service. See, e.g., Parker v. Board 
464 (4th Cir. 1965), cert. denied 382 U.S. 1030 (1966); Board of 
Education v. Swan, 41 Cal.2d 546, 261 P.2d (1953); Hayman v. City 
of Los Angeles, 17 Cal. App. 2d 674, 62 P.2d 1047 (1936); State v. 
Steinkellner, 247 Wis. 1, 18 N.W. 2d 355 (1945).
sional reputations of said Administrators and Board and the reputation of the schools of this District and are and will be highly disruptive to the discipline of the teachers and the morale and harmony among teachers, administrators, Board of Education and residents of this District, and which said statements and comments will tend to foment controversy, conflict and dissention among them and jeopardize the welfare of the schools of this District. (emphasis added)\(^2\)

These reasons for disqualifying Pickering from public employment paralleled the generalizations found in the well-noted Developments\(^2\) article on academic freedom by the Harvard Law Review. In that publication it was proposed that there were two basic premises which the state may advance in dismissing a public employee claiming first amendment protection. One, it may be alleged that a teacher's actions have brought discredit on the school and the state (which by implication included the Board of Education acting as agent for the state). The continued employment of a controversial teacher may erode public confidence in the schools in such a way as to impair their efficient operation. And two, the actions by the teacher may be such as to develop in his students values inconsistent with the aims of the educational system and of the society generally. Implicit in the second reason was the notion that extramural statements by a teacher could reflect upon that teacher's fitness to fulfill his role in carrying out goals of the educational system.


\(^2\) Developments, supra note 12 at 1066.

\(^2\) See note 60 infra on the goals of education.
In the past and even today, as indicated by the willingness of the Illinois Supreme Court to find for the Board of Education, the courts have afforded small protection to public employees for extramural statements which in any way could give rise to invoking the above mentioned justification for discharges based on reputation and unfitness. The courts, in general, did not recognize the teacher's right to freedom of speech.

A. Privilege

Although the much used Holmes' epigram on privilege was not resurrected by the Board of Education or the Illinois courts, no discussion of Pickering would be complete without some mention of the "doctrine of privilege." Indeed the "doctrine of privilege" was probably never completely discredited until 1967 with the Keyishian decision, some three years after Pickering wrote his controversial letter. Not until Keyishian had the coup de grâce been administered by the Supreme Court to its first teacher loyalty case, Adler v. Board of Education, which had treated teaching as a privilege subject to whatever conditions were "reasonable." In Keyishian the Supreme Court rejected in its entirety the constitutional doctrine, built up around McAuliffe, Adler and other such cases, which was

26. See note 14 supra.

27. 385 U.S. 589 (1967).

28. 342 U.S. 485 (1952). "It is...clear that they (persons seeking employment in public schools) have no right to work for the state in the school system on their own terms." Id. at 492.
premised on the ancient distinction in constitutional status between citizens and public employees whereby, "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."

In 1892, Oliver Wendell Holmes, then a Massachusetts Supreme Judicial Court judge, rejected Mr. Justice Bradley's conclusion in Ex parte Curtis concerning the absurdity of conditioning public employment by silence and political neutrality; and he replaced it with a doctrine which was for many years followed by the courts. The McAuliffe decision has been one of the most influential in developing and maintaining the "doctrine of privilege."

In essence, the "doctrine of privilege" established that no one had a natural or inherent right to public employment. Because there was no right to office, the government could interfere with or restrict an employee's civil liberties if it appeared reasonable so to do. One argument made for constitutional restraints was that public employment brought a citizen into contact with the government;


30. 106 U.S. 371 (1882). "Congress might just as well, so far as the power is concerned, impose, as a condition of taking any employment under the government, entire silence on political subjects and a prohibition of all conversation thereon between government employees...The whole thing seems to me absurd. Neither men's mouths nor their purses can be constitutionally tie up in that way." Id. at 377 (Bradley, J. dissenting) (case involving a statute prohibiting public employees from giving or receiving any thing of value for political purposes).

31. See notes 24 supra.
limitations of constitutional rights could be justified under the "doctrine of privilege" on the theory that benefits received from the government of and in themselves allowed for limitation of rights. The crux of the arguments, however, was simply that the citizen voluntarily relinquished his rights by seeking and accepting public employment. Any validity to be found for this theory or doctrine was embedded in the fact that relatively few people were employed by the government bureaucracy in 1892. For example, in 1891, there were 157,442 civilian employees in the federal civil service. By 1967, there were 3,002,461 civilian employees in the federal civil service. As a percentage of the total labor force, in 1929 civilian public employment made up 6.2% and in 1966 civilian public employment reached 17% of the total labor force. The doctrine of privilege was understandable at a time when government largess was on a relatively small scale and had yet to be recognized as an important enough foundation of individual security that one deprived of it should be heard to complain.

The Supreme Court addressed the issue of "privilege" and the constitutional status of public employees in the earlier-mentioned Adler case. In finding no constitutional infirmity with New York's Finberg Law which made ineligible for employment in any public school any member of an organization advocating the overthrow of the government by force, violence or any other unlawful means, Mr. Justice Minton stated emphatically in his opinion:

"It is clear that such persons (teachers) have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms."
They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.32

The mainstays for much of the judicial supports of the "doctrine of privilege" were to be found in commonly held notions about education, public employment, and the police power of the state.

32. 342 U.S. at 492.

33. "This concept that education is a function of government--a state function--is not confined to statesmen alone. It has long been accepted by our courts, which have consistently looked upon public schools as agencies created to protect and perpetuate the democratic way of life--agencies to guarantee the very essence of the democratic state." L. Garber and W. Hageny, The Law and the Teacher in New York State 16 (1967).

34. Interestingly enough, the National Education Association, the largest teachers' association, published in one of its handbooks the following excerpt on the status of public employment:

"(T)he courts have pointed out that an individual has no right to teach in the public schools. Public employment is a privilege, not a right."

NEA Research Division, The Teacher and the Law 24 (School Law Series--Research Monograph 1959-M3 1959). The Director of Membership of the NEA once complained that "(o)n every hand, one finds evidence which suggests that the public does not take us and our work seriously and it does not regard us as full-fledged citizens..." Martin, Teachers as Citizens, 84 Pa. School J. 119, 119 (1935).

Another remarkable series of comments by the NEA are to be found in a 1947 NEA Research Bulletin:

"None of these laws (little Hatch Acts) is of such scope that it can be condemned as unduly restricting the teacher's civil rights. Teachers are not included in other state laws some of which are more restrictive,...so far as this type of law is concerned, teachers are in a freer position than many other public employees...A teacher's political activity is bound by professional ethics and no teacher should become so involved in partisan politics as to
The bulwark of justifications for the doctrine was sufficiently sound and provided a foundation for substantiating restrictions on constitutional rights which was not cracked until some sixty years after McAuliffe.

In a case not unlike Pickering, the California Supreme Court accurately summed up the "doctrine of privilege," in dismissing a

34. (cont.) conduct himself in a manner unbecoming to his position as a teacher." NEA Research Bulletin, The Legal Status of the Public School Teacher (Vol. 25, No. 2 1947). (Note: The impact of these statements may be somewhat dampened if in fact they were essentially coerced by the political pressure of the "Red"-scare.)

35. See note 8 supra.

The "police power" is that power of the state to limit individual rights in the interest of the general society. Education and teachers fall within the ambit of police power. In one of the early references to police power, the Supreme Court attempted a definition: "Police power embraces every law which concerns the welfare of all the people of the State or any individual within it; whether it relates to their rights and duties; whether it respects them as men or citizens of the state. Whether it relates to the rights of persons or property of all or any individual within the state." New York v. Miln, 11 Pet. (U.S.) 102, 138, 36 U.S. 102 (1837) (constitutionality of restrictions on captains of ships bringing aliens into the port of New York).

36. Wieman v. Updegraff, 344 U.S. 183 (1952), decided shortly after Adler, rejected, in that particular case, the absence of a right to public employment as the determinative factor influencing the limits to constitutional rights for public employees. "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Id. at 192. United Public Workers v. Mitchell, 330 U.S. 75, decided some five years earlier than Wieman, however, was not overruled by Wieman. The United Public Workers case accepted the Holmes' conclusion in McAuliffe in upholding the constitutionality of political neutrality, although it did limit some of the implications. 330 U.S. at 100.
teacher employed for twenty-nine years, after the teacher had made certain derogatory statements concerning his superintendent and criticizing the School Board.

One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by the authorized governmental body or officer to the end that proper discipline may be maintained and that activities among the employees may not be allowed to disrupt or impair the public service... Because of this dominant public interest, the exercise of such control over the public employee is not only a right but it is a duty, and in the discharge thereof a wide discretion is allowed, which will not be disturbed until the point of illegality is reached.\(^\text{37}\)

In terms of the various Pickering decisions, the Cook County Circuit Court made only vague allusion to the "doctrine of privilege":

"Freedom of speech does not protect the job of an employee whose conduct is against the interests of his boss."\(^\text{38}\)

It was as though the court, based on its negative result, while mouthing the newly emerging "doctrine of substantial interests, was all the time relating back to the right-privilege distinction which had predominated for so many years. The doctrine of "substantial interest" had largely replaced the doctrine of "privilege" in Wieman v. Updegraff. The doctrine held that the absence of a constitutional right to public employment cannot itself justify conditions imposed by a public employer upon its employees. The constitutional restrictions must be weighed in terms of the injury to the interests of the individual against the undesirable consequences which will allegedly result if the employee is not restrained.\(^\text{39}\)

In keeping with the Circuit Court's opinion and the trend of decisions from other jurisdictions, the Illinois Supreme Court also avoided specific reference to Adler and other "privilege" cases. Yet the opinion of the highest state court of Illinois has given rise to speculation that it too had an unspoken preference for the "doctrine of privilege."

Whatever freedom a private critic might have to harm others by the use or misuse of speech, the plaintiff here is not a mere member of the public. He holds a position as teacher and is no more entitled to harm the schools by speech than by incompetency, cruelty, negligence, immorality or any other conduct for which there may be no legal sanction. By choosing to teach in the public schools, plaintiff undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in. (emphasis added)

B. Education, Teachers, and Tenure

Just as certain assumptions have been made about policemen, another segment of the public labor force, and administration of the police force as a paramilitary organization, so too assumpt-

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40. See note 14 supra.

41. 36 Ill. 2d at 577, 225 N.E. 2d at 6.

42. Policemen and firemen, like teachers, were considered to be second-class citizen as far back or even farther back then the McAuliffe decision. The general arguments about limitations of police rights stemmed from the structure of the police as a paramilitary organization and the concurrent need for discipline. The very nature of the role of police leaves little room for
ions were made by boards of education in seeking to restrict their employees' rights. The Will County Board of Education as did other boards operated on the premise that a set of undisputed educational goals and values existed. These goals gave substance and meaning to Board policy in its efforts to function so as to achieve the ideal.

Generally, the structure for the Board's case rested on public acceptance of the public school as an agency of the state, created by the state for the purposes of promoting the welfare of the state. The education of the youth was a matter of vital importance to the democratic state and therefore schools did not exist to enlighten individuals as individuals but they existed to protect and perpetuate the "democratic way of life." Not only was education and the public school system to insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty, it was to be the great homogenizing force in a pluralistic society -- the culturally pluralistic society was to be molded and forged into a truer and better


democratic state through education and the public school system. These assumptions placed a heavy societal burden on teachers to fulfill the desired aims of the society.

In an unusual instance, during his tenure on the United States Supreme Court, when he concurred with the majority in finding that the balance weighed in favor of the public employee and against the public employer, Mr. Justice Frankfurter, an ardent believer and admirer of the American educational system and of judicial restraint, wrote the following comment on the role of education:

The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is therefore not to indulge in hyperbole.\textsuperscript{46}

(emphasis added)

Robert McCloskey in writing on the Supreme Court since 1937 took notice of Mr. Justice Frankfurter's reluctance to enter the arena of free speech and individual rights, thus making his concurrence in \textit{Wieman} even more noteworthy. Throughout the nineteen forties and even fifties, the judicial philosophies of Felix Frankfurter and Learned Hand held center stage.

These great judges, constantly warning of the inherent and enormous risks to the court of engaging in Constitutional polities -- risks dramatically illustrated in the preceeding years -- counseled a court that had just freed itself from the dangers of defending economic freedoms to avoid becoming involved in any

\textsuperscript{44} See N. Edwards, \textit{supra} note 12, at 24; A. Meiklejohn, Free Speech and Its Relation to Self-Government 106 (1948); C. Nolte and J. Linn, \textit{supra} note 11, at 6.

new constitutional adventure, even in such a worthwhile cause as the individual liberties guaranteed by the Bill of Rights.\(^47\)

Thus one could conclude, from such pronouncements, by Mr. Justice\(^48\) Frankfurter, and from opinions of various courts, that there was an accepted understanding of the nature of education and its function in a democratic political system. It can also be assumed that the board of education's role in the educational schema was such that it had been entrusted with the conduct of the schools under its jurisdiction, their standards of education and the moral, mental and physical welfare of the pupils during school hours. The board of education's interests, the state's interests, the public's interests and the pupil's interests were all theoretically one and the same. Diagrammatically, the conventional view of these interrelationships was circular.

\[\text{Diagram: State} \rightarrow \text{Pupil} \rightarrow \text{Board} \rightarrow \text{Public} \]

1. The State's interests were in providing for the general welfare and creating a better democratic society.

2. The State, functioning through agents to carry out its interests, mandated the board of education to provide, as Mr. Justice Douglas once expressed, a "cradle of our democracy."\(^49\)

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47. R. McCloskey, The Modern Supreme Court vii (1972) (hereinafter cited as McCloskey, The Modern Court).

48. See note 43 supra.

3. The Public's interests were served by the state and the board in that both existed to further the public interest.

4. The Pupils' interests rested in receiving an education which would socialize them into the established society.

5. The State's interests were furthered by having a well-versed public on democratic goals and values.

As with the doctrine of privilege, the Illinois courts seemed to avoid detailed reference to the traditional pronouncements on education and its contribution to the advancement of the democratic state. Underlying the sentiments expressed by the Circuit Court, however, were some of these very same ideas about the societally accepted goals of education.

"The proper and efficient education of children is a vital and important function of state government. The state has a real concern in the integrity of state government.50

The Illinois Supreme Court, devoting the majority of its written opinion to the veracity and falsity of statements in the Pickering letter, did not comment on education per se but accepted in general the Circuit Court's opinion. It was probably unnecessary to enunciate what was already accepted; it may have seemed superfluous to state the "obvious."

With regard to the Board of Education's expectations and implicit assumptions about the role of teachers and of school boards in the educational system, it should be observed that the Board found ways of circumventing the emerging judicial doctrine of the 1950's


51. 36 Ill. 2d at 572-76, 578, 225 N.E. 2d at 4-6, 7.
and 1960's which asserted that a public employee cannot be made to give up his constitutional rights in return for employment. In keeping with Section 10-22.4 of the Illinois School Code of 1963 under which a board of education had the right to dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause and also the power to dismiss whenever, in its opinion, such a teacher was not qualified to teach or whenever the interests of the school required it, the Will County Board of Education had convenient legal authorization to discharge a teacher for most any reason under the guise of "fitness," "competency," "other causes," or whenever the "best interests of the school" demanded it.

The logic of this mandate seems quite irresistible. Even the most advanced civil libertarian would allow that the government should have the right to dismiss an employee who is unfit or


54. "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service." Garner v. Los Angeles Board, 341 U.S. 716, 720 (1951).

The "fitness as a teacher" test has also been applied in some pre-Pickering cases. See Hale v. Board of Education, 234, N.E. 2d 583 (Ohio 1968) (Teacher dismissed for 'hit and run' driving ordered reinstated); Jarvella v. Willoughby-Eastlake City School District, 233 N.E.2d 143 (Ohio 1967) (Teacher's private letter containing vulgar and offensive language held not to affect fitness as a teacher.)
incompetent to perform his assigned duties. Likewise, when the interests of the state which include interests of the board of education require the discharge of a teacher, the government should be in a position to be able to take such action against an employee. A second argument lending support to the Board of Education's stance is cloaked in terms of the duty of the state to provide for general welfare if the speech in question, under the circumstances surrounding it, tends to interfere with those duties and to disrupt the public service or in any way has a detrimental effect, it should be sufficient to justify discharge -- even if fitness to perform one's duties remains unaffected. Implicit in the phrasing of this argument is the assumption that criticism of public officials, if it has any effect at all, will somehow have a detrimental effect upon the efficiency of government.

Upon review of the proceeding before the District 205 hearing board, there is a noticeable absence of any testimony relating to the actual effect of the offending letter upon the community. The statements presented at the administrative hearing would appear to be almost

55. "Certainly the cause of public education demands competent teachers...should the school board be aware of the incompetency of a teacher employed in its school system and fail to institute proper dismissal proceedings, it would then be derelict in its duty. The ...school board has the authority and obligation then of determining the competency or incompetency of teachers employed in its school system..." Singleton v. Iberville Parish School Board, 136 So.2d 809, 814 (Ct. App. La. 1961).

56. Note, supra note 3, at 150.

exclusively related to establishing the truth or falsity of the statements in the Pickering letter with which the Board took such issue. This emphasis on the falsehoods and misstatements by the witnesses at the hearing, and by the Illinois courts, as well as the lack of inquiry into the actual impact of the letter on fellow-teachers and on the local residents, would give credence to the hypothesis that the Board was wholly equating its interests with those of the schools and, by implication, with those of the state and its duty to further the democratic ideal.

In a guide to school law for teachers written in 1963 by Nolte and Linde, the following was expressed as an unquestionable truth, not subject to criticism or to review:

(A) board of education must remain free to decide what is good and best for the children and for the school system.\(^{59}\)

And as far back as 1895, courts were asserting that school boards were instruments for carrying out state policy with regard to schools and, by inference, it was easy to find that board interests were school interests.

The several officers charged with the supervision of the schools, from the state board of education down to the directors of the school districts, are merely the instruments of the state government, chosen for the purposes of effectuating its policy in relation to schools.\(^{60}\)

Without doubt, the Illinois courts adopted this theory of coter-

59. C. Nolte and J. Linn, supra note 11, at 183.
60. See note 7 supra.
ominant interests -- public and government. In 1966, Circuit Judge Orenic on hearing the Pickering case wrote in language paraphrasing an earlier Illinois public school teacher case:

The best interest of the school is the guiding star of the board... (T)he board has the power to dismiss any teacher 'whenever, in its opinion, the interests of the school require it'... 61 (emphasis added)

Justice Klingbiel of the Illinois Supreme Court, in less prosaic terms, identified the same principle of equivalent interests:

A teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school, and the Board of Education does not abuse its discretion in dismissing him... The administration of the schools is within the domain of the school board... 62

In addition to these suppositions about the interests and the roles of the school board and the administration of the educational system, the Board of Education also held certain philosophical precepts, which had been reinforced, by numerous judicial pronouncements, on the status of the teacher. Again turning to Mr. Justice Frankfurter's concurrence in Wieman, he observed:

It is the special task of the teacher to foster those habits of openmindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. 63


62. 36 Ill.2d at 578, 225 N.E.2d at 6-7.

63. Wieman v. Updegraff, 344 U.S. at 196.
And nowhere was the philosophical basis of a holding about teachers and their rights more clearly stated than in Adler v. Board of Education. Mr. Justice Minton, speaking for the Court, declared:

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools.

The nobility of the teaching profession is not an ideal easily dismissed especially as teachers have sought to place themselves on par, in terms of status and prestige, to the social rank associated with doctors and lawyers. It is a concept which has significance in understanding with what ease the Board of Education could justify dismissing errant teachers. It is believed, even among teachers, that they have been charged with a tremendous responsibility — that of guaranteeing the safety and existence of our democratic society.

The rationale behind teaching is to develop "children who can discharge the citizenship obligations of their day and who can advance the meanings of freedom and democracy, and further the liberation of mankind."

All these laudatory justifications for discharging a teacher can be found in the Pickering case. In ruling on the vagueness of the Illinois statute which failed to explicitly elaborate all grounds for dismissal, the circuit court spoke in terms of the calling of the profession.

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teacher being "so intimate," and the duties being "so delicate" and the actions in which a teacher might prove so unworthy being "so numerous." Pickering was not a "mere member of the public," he held a "position" of trust and faith "as a teacher."

Understandably the traditional view of the organization of the educational system could not be expected to accept a scheme in which dissension and criticism coexisted equally with such elevated concepts as the nobility of the teaching profession and the desired status of "perpetuators of the democratic state." The teachers' right to criticize administration policies have been resisted by the Board on the articulated ground that a teacher owes a duty of loyalty to his superiors and that a teacher must not disrupt government activities through untowards conduct and speech. Pickering by virtue of the "delicacy" of his "position" had a duty, an obligation, to support generally goals of education established by the Board of Education and the state. Disloyalty, it was believed would provoke inefficiency and distrust in the public service being provided by the state.


67. 36 Ill. 2d at 577, 225 N.E.2d at 6.


69. In numerous cases, ignored by the Board of Education in its brief and by the Illinois courts, the courts of several jurisdictions have considered the question of disruption of government activities and the jeopardization of the welfare of government institution. The general rule which was emerging but not yet acted on by the Supreme Court was that in order to sustain a dismissal, impairment must be actual, not speculative. See Bagley v. Washington
In addition, it could be argued that the working relationship of all those charged with overseeing the public schools -- teachers, administrators and board members -- was built on personal loyalty and confidence. Such a relationship could not survive public criticism by one of the parties; the element of trust necessary to maintain high educational purpose would be lost and the employee would be considered unfit for further employment. Although buried in its statements about refraining from conduct injurious to the school or the school system, the Illinois Supreme Court found it necessary to allude to a duty of loyalty.

He holds a position as teacher and is no more entitled to harm the school by speech than by incompetency, cruelty, negligence, immorality, or any other conduct for which there may be no legal sanction. By choosing to teach in the public schools, plaintiff undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in.

Closely linked to the "loyalty" obligation as a justification for disqualifying teachers was an argument founded on the premise

69. (cont.) Township Hospital District, 65 Cal.2d 499, 55 Cal. Rptr. 401, 421 P.2d 409 (1966) (nurse's aide fired for participation off duty in a recall movement against hospital district administrator); Belshaw v. City of Berkeley, 54 Cal. Rptr. 727 (Ct. App. 1966) (fireman wrote letter criticizing superiors); Board of Trustees v. Owens, 206 Cal. App.2d 147, 23 Cal. Rptr. 710 (1962) (teacher who had published statements critical of Board of Education); State v. Adams, 69 So.2d 309 (Fla. Sup. Ct. 1954) (principal appointed who had actively campaigned against superintendent); City of St. Petersburg v. Pfeiffer, 52 So.2d 796 (Fla. Sup. Ct. 1951) (fireman criticized his chief); Smith v. Board of Education 264 Ky 150, 94 S.W.2d 321 (1935) (superintendent dismissed after filing charges against School Board member; Appeal of Coates, 47 Wash. 2d 51, 287 P.2d 102 (1955) (principal engaged in heated argument with members of his board).

70. See Note supra note 3 , at 151.

71. 36 Ill.2d at 577, 225 N.E.2d at 6.
that critical speech and activities discredited the Board or the school. Although Supreme Court opinions in this area have paid little or no attention to the discrediting nature of critical speech, the school's interest in preserving its "good name" has been recognized on occasion in the past by other courts. The reputation of the school and the Board was associated with public confidence and efficient operation of the schools.

Applying this rationale to the Pickering case, once the Will County Board of Education perceived its major task as that of raising revenues to operate the schools, a tarnished reputation and discredit

72. The following excerpt is taken from the Board of Education's Supreme Court brief:

"School Board members are charged with the responsibility of maintaining proper records, providing revenue to operate the schools, adopt reasonable rules and regulations governing the operation of the district, inspect school buildings and facilities hire and fix salaries of employees within certain minimum limits imposed by the legislature, (minimum salaries of teachers, see Ch. 122, Sec. 24-8, Ill. Rev. Stats. 1963) provide adequate and safe school buildings and facilities, provide for the safety of pupils, provide for the transportation of students, provide for the maintenance of school properties, provide for the discipline of students, conduct hearings for the suspension or dismissal of students and conduct hearings for the dismissal of teachers. The foregoing are some of the more important duties of the school board that can be found in more detail in Article 10, Chapter 122, Ill. Rev. Stats. 1963. The result of the duties thus imposed is that the Board of Education is constantly involved in matters arising out of the relationship between teacher and student, teacher and teacher, teacher with parent, teacher with administration, teacher with employing school board, teacher with teacher from other school district, teacher with non-teacher employees, all of which will bring the quasi-judicial function of the School Board into operation. In addition, the Illinois School Board is faced with contract negotiations with teachers within the district, negotiations with other districts in limited areas of special education, scholastic and athletic competitions.

The paramount and most distasteful responsibility of the Illinois School Board is the calling upon the taxpayers of the district to vote
of its policies would necessarily interfere with this paramount duty.

The public does not agree easily to having its taxes increased. To say that the best interests of the schools and of the children of the district would not suffer by dissemination of such false accusations and statements to the public by a teacher of the district during these critical and crucial times is contrary to common sense. 73

Related to the previous discussion of privilege, fitness and loyalty is the purpose of tenure. Despite the dissimilarity of the provisions of various states' teacher tenure laws, they are all rather alike with regard to purpose -- to improve the effectiveness of teachers and the quality of education. Any protection afforded teachers by tenure laws is incidental to their main goal of assuring pupils of a better education by having competent teachers. In the same way that pensions and early retirement in the fire and police forces were used as an incentive to improve the quality of men entering those professions, the tenure provisions are seen as a means of attracting better qualified teachers; again the "fitness" notion comes to the fore. As the National Education Association notes:

In the early days of American public school education, almost any person with a little learning could teach in the local school... 74

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72. (cont.) on to themselves a raise in taxes, a most difficult task for a school district inhabited by a populace, a considerable part of which will receive no direct benefit from such an increase. The competition for the tax dollar among the multitude of taxing bodies (county, township, cities, drainage districts, sanitation district, grade school districts, junior colleges, etc.) adds to the magnitude of defendant's difficulties to finance an adequate common school education for its high school students. The preparation necessary to convince the voters to pass a rate increase is evidence by the documents contained in the record. App. II, pages 10 through 15 inclusive, App. II, pages 17 through 39 inclusive."

73. Id. at 12. It is interesting to speculate on just how far
Tenure was not, however, intended to preclude dismissal where the standards of operation and administration of the schools were in question. The object of tenure as the Illinois Supreme Court indicated was to "improve the school system by assuring teachers of experience and ability a continuous service based upon merit..."

C. A Final Note

The Board of Education in Pickering, when challenged on its policy of dismissal, resorted to a defense which until some twenty years ago would have been almost assuredly accepted by the courts. Its philosophical premises were all based on tradition-bound doctrinal restrictions and justifications of the existing constitutional relationship of public employee to public employer.

73. (cont.) the Board's interest in protecting the "good name" of the school extends. Does it, for instance, mean that the Board has to defend the reputations of the individual members of the Board?


See Martin, Teachers as Citizens, 84 Pa. School J. 119, 119 (1935) in which teachers and the teaching profession are discussed in terms of their social status. "Perhaps teaching and teachers are still handicapped by their social ancestry. Possibly some people have not yet discovered that teaching is well on the way to becoming a full-fledged profession and teachers are no longer slaves but full-fledged citizens."; see also McSherry v. City of St. Paul, 202 Minn. 102, 105-7, 277 N.W. 541, 543-44 (1938). "The bases for recommendation (of adopting tenure laws) were that better talent would be attracted to the teaching profession;...that the principle of annual election or appointment was not generally applied to policemen, firemen, or judicial officers, and in the very nature of things should not be applied to teachers..."Id. at 106-07, 277 N.W. at 543.

75. 36 Ill.2d at 577-578, 225 N.E. 2d at 6; see also Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787 (1952) (question of the application of the tenure act in case where the primary question is whether notice of dismissal has to include reasons.)
There was nothing particularly unique about the reasoning which Pickering advanced on his behalf. There were the same basic propositions put forth by public employees in such cases as United Public Workers, Adler, Garner, Wieman, Beilan and Keyishian and by civil libertarians such as Professor Zachariah Chafee who in 1920 wrote:

But we have to remember that not only do we have the social interest in order, and in the education of the young, and in morals, but that freedom of speech is itself a social interest; that one of the purposes for which society exists just as much as for the maintenance of order is the discovery and the order is the discovery and the spread of truth. 82

John Ligtenberg, Pickering's attorney throughout all four reviews of the case, in commenting on his research and thinking in the case, noted:

We started from the McAuliffe case in which Justice Holmes made his famous dictum, then tried to trace the development of the idea that teachers and other public employees are necessarily second class citizens. We went through the teacher oath cases and somewhere arrived at the point where we could assert with confidence that a teacher has the right of free speech and can criticize the board of education by which he is employed. 83

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76. 330 U.S. 75 (1947).
77. 342 U.S. 485 (1952).
79. 344 U.S. 183 (1952).
Despite the lack of noteworthiness in his arguments, the facts together with the emerging judicial acceptance of the doctrines set out in his presentation gave Pickering his victory on the fourth try. Just as the first part of this chapter reviewed the foundations and suppositions inherent in the Board of Education's case, the following will try to identify the premises and assumptions made by Pickering.

A. **Doctrine of Privilege**

Although the "doctrine of privilege" had been expressly rejected by the United States Supreme Court as a reason for imposing conditions which restricted constitutional rights of public employees, the doctrine nevertheless had to again be disposed of before Pickering could advance his case. The concept of "privilege" underlying the Holmesian epigram remained nominally intact although its implications for positive law have gradually been eroded. Adler, the premier case for applying the doctrine of privilege to public school teachers, had not yet been discredited.

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82. Chafee, Freedom of Speech 368 (1920).

83. Letter from John Ligtenberg to Diana Daniels, February 27, 1973.

84. See McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); see also note 14 and p.20-26 supra.


86. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); see also Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965).
by Keyishian when Pickering was dismissed. Although brought in the same year, the effects of Keyishian, however, were not readily apparent in the Illinois decisions because it was decided after the Illinois Supreme Court reached its decision. Only Judge Schaefer in his dissent alluded to the emerging doctrines which were preempting judicial approval once reserved for the "doctrine of privilege." 87

In fact, as late as 1965, the Eighth Circuit in a decision, involving a case worker who had made certain critical statements about political influence and fraud as well as reports of inefficiency within his department, referred to the privilege of government employment. The doctrine was far from dead in every jurisdiction when the Pickering case was being litigated. 88

To counter any implied privilege which might be alleged to extend to teaching, Pickering seemed to be postulating that he could ignore it entirely. Whether he had a "right" to employment was immaterial to whether he should be a second-class citizen. 89

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87. "And if the general assembly did intend to authorize imposition of the ultimate sanction of discharge against a teacher for exercising first-amendment rights, I think that State and Federal constitutions require a more precise standard than 'the interests of the schools.'" 36 Ill. 2d at 579, 225 N.E. 2d at 7.

88. See, e.g., Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965). "Plaintiff, however, has not right to public employment...(T)he privilege of government employment may be withdrawn without it being said that he was denied his freedom of speech...(T)here is no basic right to government employ, any more than there is to employment by any other particular employer." Id. at 828.

publicly employed, Pickering, in effect, was challenging the conditions imposed on his employment without disturbing the presumption that he had no "right" to that employment.

In dismissing McAuliffe and its progeny, Pickering needed more than a mere phrase from a cited precedent to erase some sixty years of judicial reliance on the "doctrine of privilege." Looking at Holmes' statement in McAuliffe and the government's position in society in 1964, the conclusion reached in McAuliffe was unsound and undesirable to apply in a case such as Pickering. The foundations on which McAuliffe rested were no longer there. The government as an economic unit had greatly increased in size; it was no longer true that a "particular infringement made by government (was) no greater than a particular infringement made by a public employer." As government programs have expanded so has governmental employment. Exclusion from or the loss of

89. (cont.) scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher." 342 U.S. 485, 508 (1952). See also Garrity v. New Jersey, 385 U.S. 493, 500 (1967) in which Justice Douglas, now speaking for the majority, stated: "We conclude that policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights." See Spevak v. Klein, 385 U.S. 511 (1967); Slochower v. Board of Higher Education, 350 U.S. 551 (1956).


public employment could foreclose a person from an ever expanding
segment of the job market. The thesis asserted by Pickering was that
any demarcation between public employees and other citizens which ever
existed have been obliterated over time and by changing circumstances.

The vacuum left after the "doctrine of privilege" had been
rejected was gradually filled with the "doctrine of substantial
interests;" it was still recognized that absolute freedom of speech
might not be applicable in all situations and that there might be
some areas where restriction is necessary. The doctrine of substantial
interests which precluded the conditioning of public employment on the
loss of civil liberties has minimized the perceived incompatibility
between the roles of the citizen and the public employee. A court
which accepts this reasoning must weigh the interests of the individual
against the paramount interests of the state and its lack of alternatives
to achieve that paramount interest. This balancing was to be partially
determinative of the final outcome of the **Pickering** case.

In the curious way which so many of the arguments, now used
in suits for individual rights, derived from Supreme Court decisions
affecting economic regulation of the last century, much of the force
behind the "doctrine of substantial interests" was to be found in an
opinion of Mr. Justice Sutherland. Speaking on the use of state
highways by private carriers, he observed:

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93. "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 interests of the State, as an employer, in
promoting the efficiency of the public services it performs through
its employees." 391 U.S. at 568.
The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege...In reality, the carriers given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.94

It was this restatement of the "doctrine of substantial interests" which formed the basis of many of the public employment-civil liberties cases tried in the last twenty-five years.

B. Education and Teachers

Throughout the numerous hearings and appeals, Pickering did not disagree with the general goals of the educational system at the core of the Board of Education's case. Only the emphasis on how to achieve the goals and the singleness of interests assumed by the Board with regard to the school's interests were under attack. Whereas the Board of Education maintained that the school and public education were to be used to further the prevailing homogeneous societal values, Pickering was adhering to concepts suggested by Justices Brennan and Douglas in furthering the democratic state-pluralism in achieving the ideal society.

The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.96


We need be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction.97

Not inconsistent with these thoughts, it was argued that criticism as long as it did not interfere with performance in the classroom should not become the cause of reprisals. The public school was to be a "market place of ideas" and the teacher was to be free to represent varying ideas; the educational system should not merely be

95. See pp. 23-27 of text, supra.


97. Adler v. Board of Education, 342 U.S. 485, 511 (1952) (Douglas J., dissenting). See also Board of Education v. Barnette in which the Supreme Court held that compulsory flag salutes for children in public schools violated the First and Fourteenth Amendments. "Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing... We can have intellectual individualism and the rich cultural diversities that we own to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or the state as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation; it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not occur to us now." 319 U.S. 624, 640-642 (1943).
a conveyor of an appreciation of a single "American way of life."
The Board of Education's position with regard to the role of education in America as previously noted, embraced the narrow view of the American way of life and the social ideal of the democratic state. The Board centered on the concept that schools develop the youth of America to become part of a society whose structure had been already established by those who sought to preserve a status quo in the balance of power and prestige. The same ideologies gave rise to the "Horatio Alger" myths and the great American reform movements. Thus, where the Board of Education was stressing the disruptive force inherent in criticism and its negative implications for efficient operation of the system, the teacher was emphasizing the value and importance of public debate and the public interest in the free flow of information, fully cognizant of the unsettling nature which is inherent in criticism itself.

Because Pickering's line of argument relied on the "doctrine of substantial interest," he was, in effect, required to dispute every ground which the Board of Education, by negative inference, had identified as "interests" it deemed worthy of greater protection than free speech:

- Discipline of the teacher and implicit duty of loyalty; question of fitness to continue in the classroom.

98. C. Nolte and J. Linn, supra note 11, at 6.

Reputation of the Board, administration and schools; Board interests and school interests.

Morale and harmony among teachers, Board, administration, and residents of the district.

Avoidance of controversy, conflict, and dissension among teachers, Board administration and residents of the district.

The discipline, necessary for the school to function efficiently, recognized to be a legitimate Board prerogative, should not, reasoned Pickering, turn on mere speculation of the disruptiveness of the letter in question. The testimony at the Board hearing did not reveal any evidence that there was any reaction by any of the teachers to the letter. For Pickering, the presumption was that without a showing of actual impairment, freedom to criticize could not automatically be assumed to disrupt the discipline and the efficiency of the school.

It was also evident that there existed in the Board's arguments and in the Illinois court decisions a negative impression centered on the belief that criticism would result in disorder in the classroom and that one's fitness as a teacher could not longer be trusted. Pickering's activities as critic and fomentor of "dissension" were assumed to influence his teaching presence in the classroom; he was, by Board standards no longer a "good" teacher. The response to this line of reasoning was that given by Mr. Justice Douglas in his dissent to Adler:

100. "That the instant school board has a legitimate interest in avoiding disruption of its services is not denies." See Plaintiff's Brief at 38, Pickering v. Board of Education, 391 U.S. 563 (1968).
"So long as (he) is a law-abiding citizen, so long as (his) performance within the public school system meets professional standards, (his criticism) should not be the cause of reprisals against (him)." 101

With regard to the Board's second interest, the reputations of the school, the Board and the administration, the threshold question is: does a governmental body, much less the agent of the governmental body, have a reputation capable of vindication? An earlier Illinois Supreme Court decision seemed to have answered this question although mention of it was not to be found in its Pickering opinion. In *City of Chicago v. Tribune Company*, the Illinois Supreme Court noted:

> For good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.102

The previously mentioned *Developments* article in the Harvard Law Review also suggested a response. Written prior to the high court's decisions in *Pickering*, it advised teachers who were dismissed from their jobs for publicly criticizing the administrative policy decisions of their superiors to seek refuge in two 1964 United States Supreme Court decisions on public officials and libel -- *New York Times v. Sullivan* 104 and *Garrison v. Louisiana*. 105

101. 342 U.S. at 511.

102. 307 Ill. 595, 601, 139 N.E. 86, 88 (1923) (city suing a newspaper because of alleged injuries resulting from statements made with intent to destroy financial standing of the city).


104. 376 U.S. 254 (1964). "The constitutional guarantees require we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct
Moreover, even where the utterance is false, the
great principles of the Constitution which secure
freedom of expression in this area preclude attach-
ing adverse consequences to any except the knowing
or reckless falsehood. 106

The Supreme Court has declared that the debate on public issues
and the public interest in truth outweighed the reputation of
public officials and agencies in the conduct of public business.

Pickering's assumptions that free speech did not per se interfere
with efficient operations of the schools and that public criticism
was inimicable to a democratic society were heavily based on a
statement by Alexander Meiklejohn in his book on free speech.

Far more essential if men are to be their own rulers, is the
demand that whatever truth may become available shall be
placed at the disposal of all the citizens of the community...
The primary purpose of the First Amendment is, then, that all
the citizens shall, so far as possible, understand the issues
which bear upon common life. That is why no idea, no opinion,
no doubt, no belief, no counterbelief, no relevant information,
may be kept from them. 109

104. (cont.) unless he proves that the statement was made with
'actual malice' -- that is, with knowledge that it was false or with
reckless disregard of whether it was false or not..." Id. at 279.

105. 379 U.S. 64 (1964) (arising as a result of public
accusations made at a press conference against state court judges;
applied rule of New York Times to a statute making malicious defamation
criminal).

106. Id. at 73.


109. A. Meiklejohn, Free Speech and Its Relation to Self-
Government 88 (1948).
Furthermore, it was questionable, argued Pickering, whether the government's interests and the Board's interests in its reputation and the reputation of its members were analogous. These propositions were well-received by Judge Schaefer who rejected any claim that reputation weighed against any first amendment protection for teachers.

Teachers are not necessarily the best critics in matters of school finance and administration, but they are in closer contact with the actual operation of the schools than anyone else and the public should not be deprived of their views.

Under our system of school administration the most important part of the job is done by hard working, conscientious, even consecrated members of local school boards who serve without compensation. It is understandable that they should be quick to take offense at statements which they feel impugn their motives, honesty and integrity. But they are public officials engaged in the conduct of public business and they cannot be immunized from criticism, even by teachers. (emphasis added)\textsuperscript{110}

Pickering was, in effect, theorizing that to punish those who are publicly employed and who criticize their employers works a disservice to the public interest and the goals of the educational process; it would inevitably chill "the free inquiry and expression of opinion by the very individuals who are in the best position to contribute knowledgeable and constructive criticism -- those on the 'inside' of a government agency." As a logical consequence of this theory, Pickering was not allowing the presumed duty of loyalty to interfere with his exercise of free speech:

\textsuperscript{110} 36 Ill. 2d at 584, 225 N.E. 2d at 10.

The social costs of throttling public criticism of school policy by teachers are high; teachers are often uniquely situated to expose poor administration of the school system. Consequently, the claim of the state to loyalty by its teachers should be honored only in cases in which the teacher's action causes unnecessary disruption. 112

His sense of a duty of loyalty was shifted from the Board of Education to the public in keeping with Pickering's resistance to any implications that Board interests were always synonymous with the public's.

Freedom of speech would be a hollow liberty if it could be abridged on the theory that it was disruptive or disturbed the morale and harmony of established institutions. The teacher was implicitly underscoring the fact that freedom of speech can only be a liberty, a right, when it was tested by critical speech and controversial statements. Agreement with Board policies and administration would never produce a situation in which first amendment protections would have any bearing. All of the protections of free speech should be extended without reference to whether or not the person criticizing was a public employee. 113

112. Developments, supra note 12, at 1070.

113. "(T)he fact that a private employer may enforce a given condition without constitutional restraint yields nothing about employment erogatives in the public sector, since it is the lazy analogy between the two sectors which is condemned by the express constitutional distinction between private and governmental action. (Strictures by the 14th Amendment) Exactly because it is the state (if only the state) which is foreclosed from negotiating terms permitted to private employers, nothing instructive of governmental power can ever be received by false analogical reasoning from what is permitted in the private sector. So far as government may insinuate its authority and Congress, it remains uniformly constrained." Van Alstyne, The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy, 16 U.C.L.A.L. Rev. 751, 753 (1969).
The United States Supreme Court in *Terminello v. Chicago*, a case which involved public disorder growing out of radical speech, stated a similar proposition to that adopted by Pickering:

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.114

C. A Final Note

All of the discussion, so far, about Pickering's counter arguments and assumptions as to two interests of the Board of Education -- reputation and discipline -- is equally applicable to its other two interests -- harmony and avoidance of controversy among all the parties participating in the educational process. All rest primarily on Pickering's rejection of the assumption that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the schools in which they work..." It is the old "doctrine of privilege" resurrected with modifications versus the emerging "doctrine of substantial interests" with its case-by-case approach which characterizes this dispute.

114. 377 U.S. 1, 4 (1948).

A Zig-Zag Course

Any analysis of Pickering at its early stages reveals an interesting facet of American legal history -- the "zig-zag" course which an emerging trend takes in the courts in achieving preeminence in judicial thinking. The emerging trend being referred to is that of the employment of the doctrine of "substantive interests" in the course of judicial thinking about constitutional rights of civil servants. While Holmes' epigram and all the vestiges of the "doctrine of privilege" in controlling the constitutional relationship between public employees and their employers have for a number of years been discredited, the same arguments and assumptions which were the backbone of "privilege" again surface in the Illinois state courts. The old political theories concerning bureaucracy and the rights of the civil servant die a slow-death -- aberations in the trend toward evolving a new schema which affords greater rights with an existing bureaucracy are the result and the early Pickering decisions are just one example.
"A SWITCH IN TIME...?"

Teachers do not claim, do they, that their own thoughts are perceived and grasped by the pupils, but rather the branches of learning that they think they transmit by speaking? For who would be so absurdly curious as to send his child to school to learn what the teacher thinks? But when they have explained, by means of words, all those subjects which they profess to teach, and even the science of virtue and of wisdom, then those who are called pupils consider within themselves whether what has been said is true...

St. Augustine

On June 3, 1968, the Supreme Court of the United States applied de novo the New York Times media rule in an academic situation. The Court, per Mr. Justice Marshall, holding that the removal of a public school teacher based on the publication of a critical letter which was factually incorrect in several respects violated the teacher's first amendment rights, gave as its reasons the following:

...(I)n a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. 118

The Supreme Court on review of the record was in fact, convinced that "Justice Schaefer was correct in his dissenting opinion in this case when he concluded that many of appellant's statements which were found to be false were in fact substantially correct."

117. For an explanation of the New York Times rule, see note 14, supra.
119. 391 U.S. at 578-79.
Only four of eight statements challenged by the Board were declared factually incorrect by the Court: a) the amount by which discontinuing free lunches for athletes would have decreased the charge for lunch to other students; b) the nonrecurring capital nature of expenditure on athletics; c) the amount spent on transportation for athletes; d) the question of whether teachers' salaries were paid. Because it was troubled, however, by the variety of possible fact situations under which statements might be challenged as failing to come within the scope of the first amendment, the Court did not "deem it either appropriate or feasible to attempt to lay down a general standard against which all such standards may be judged." In applying New York Times to this particular situation, the Court registered its "disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit."

Nevertheless, as was indicated above, the Court's specific holding was essentially a rephrasing of the New York Times test and the establishment of a new standard for judging speech in the public employment area.

Initially, the Court in Pickering, deeming it necessary to once more exorcise McAuliffe's ghost, unequivocally restated its

120. Id. at 569.

rejection of the "doctrine of privilege" and "unconstitutional conditions." Relying on its decisions in *Wieman*, *Shelton* and *Keyishian*, Mr. Justice Marshall called again for a balancing of interests while denying validity to the "old analogy" of public employment-private employment.

(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 regulation of the speech of the citizenry in general.123

In characterizing the conflict of interests and philosophies, the Court summed it up as a clash between "claims of First Amendment protection and the need for orderly school administration." Central to Mr. Justice Marshall's opinion were some general lines along which an analysis of controlling interests should run:

- Disruption of superior-subordinate relationships, e.g., discipline.
- Breach of loyalty or confidentiality.
- General disruption of public service (the School Board coterminant interests argument).
- Fitness to perform one's duties based on exercise of first amendment rights.

The Court in every instance found the balance tipped in favor of the teacher.

An examination of the letter resulted in the conclusion that that statements were "in no way directed towards any person" with

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122. 391 U.S. at 568.

123. Id.

124. Id. at 569.
whom Pickering would in the course of his daily work be in contact. The "harmony and discipline among co-workers" argument so heavily stressed by the Board of Education was not and could not have been disturbed by the contents of the letter. The working relationships of Pickering with the Board and with the superintendent were not of such a nature as to demand personal loyalty and confidence as necessary conditions for proper functioning. The Court was thereby rejecting any claim that loyalty and efficiency were so closely related that they could become grounds for dismissal. The Court did allow however, in a footnote that there may be on occasion a need for confidentiality in certain areas of public employment which could furnish a permissible grounds for dismissal regardless of the truth of the public statements. The Court went on, however, to decline to establish a fixed standard relating to confidentiality.

In evaluating the factual situation before it, the Court noted that the offending letter in question was not shown to have "interfered with the operation of the schools generally." Acceptance of the argument that employee criticism tended to "disrupt the public service" had been a substantial impediment in the assertion of first amendment rights by employees. In this particular case, the Board of Education looked to equate its own interests with that of the schools; therefore damage to its reputation could not help but

125. Id. at 570, n. 3. See United Public Workers v. Mitchell, 330 U.S. 75 (1947) (Douglas, J., dissenting); see also note 57, supra.

126. 391 U.S. at 573.
disrupt efficiency of public service and "foment controversy and conflict among the Board, teachers, administrators, and the residents of the district." The Court reinterpreted the Board's original charges to say that "the statements were per se harmful to the operation of the schools." In denoting the absence of direct evidence of any effect of the contents of the letter on the community, which would have demonstrated interference with the public interest, the Court remarked that the only way in which the letter could be per se harmful to the interests of the school was to equate the Board members' own interests with that of the school. This, the Court declined to accept, finding instead that "the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the school board, cannot...be taken as conclusive!" In agreeing with Judge Schaefer's dissent, Mr. Justice Marshall declared:

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent...(I)t is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. Any of the statements including those which were false were viewed

127. Note 23 supra.
128. 391 U.S. at 571.
129. Id.
130. Id. at 572.
by the Court as support of Pickering's perspective which in itself represented a difference of opinion between him and the Board on a matter of public concern. In addition the Court somewhat contradictorily found that it was easy to see that the letter concerned matters of public record in which a teacher had no special competence or authority to speak by virtue of his position in the educational system. Any damage to the school as a result of as yet unproved public reaction to this letter was substantially decreased because such statements were not special knowledge known only to Pickering—they were susceptible to rebuttal by publication of the "accurate figures..., either via a letter to the same newspaper or otherwise."

The emphasis placed by the Court on the effectiveness of the letter has unfortunate implications which are clearly expressed by Mr. Justice White's concurring opinion in which he observed that "the question of harm is clearly irrelevant given the Court's determination that Pickering's statements were neither knowingly nor recklessly false." For Mr. Justice White, a teacher could be dismissed without violation of the first amendment for deliberately making false statements "regardless of their harmful impact..."

The result of this concurrence and the majority opinion is to suggest that only ineffective speech is protected. Such an observation is at odds with the New York Times rule which the Court is purporting to apply to public employee speech, i.e., "criticism of...official

131. Id.
132. Id. at 583.
133. Id. at 584.
conduct does not lose its constitutional protection merely because it is effective criticism."

In a related area, the Court indicated that this case did not "present a situation in which a teacher's public statements (were) so without foundation as to call into question his fitness to perform his duties in the classroom." The Court was unwilling to accept the Board's presumption that lack of qualification resulted from the act not merely the contents of speech; the Court went beyond this in holding that contents of speech must necessarily be examined in any finding on fitness and even then the statements would be but slight evidence of general competence, or lack thereof, not an independent basis of dismissal.

If the Pickering decision could be easily summarized, one would probably arrive at two conclusions: one, the roles of citizen and public employee are not to be divided so as to provide a basis for constitutionally restricting the rights of the public employee; and two, even if the roles should prove incompatible the balancing approach demands a weighing of the public employee's interest in civil-liberties with that of the state's if such Bill of Rights are granted. Perhaps more importantly, however, to this paper are why and how the Supreme Court reached its decision, which while not of the "constitutional

136. 36 Ill. 2d at 577, 578, 225 N.E. 2d at 6.
status of *Times*, ... nevertheless ... a significant first step in procuring a full measure of first amendment rights for critical public employees." A number of intertwined pieces of the jigsaw puzzle which comprise judicial review may be fitted together from an examination of several historic changes represented by:

- the tidewater mark of the 1937 Supreme Court
- expanded employment by the government
- unionization and professionalism in public employment.

Two other factors, which were certain to have affected the *Pickering* result, were the composition of the Court and the timing of the notice of appeal. No discussion of any Court decision would be understandable without some reference to the nine individuals who made the decision. Sitting with Mr. Justice Marshall who wrote the Court's opinion in *Pickering* were Justices Black, Douglas, Brennan, Fortas, Harlan, Stewart, White and Chief Justice Warren. Anthony Lewis, columnist for *The New York Times*, commenting on the Warren Court, wrote: "It hardly needs saying that without the happenstance of other appointments to the Court, the Chief Justice might have expressed in dissent many of the views that become law."

The timing of constitutional litigation is also often of critical importance. It should be noted that Court had in a sense postponed its ultimate decision in *Pickering* by some four years when it denied the

138. Note, supra note 56, at 149.

petition for certiorari in *Koch v. Board of Trustees*, 375 U.S. 989 (1964), a case almost identical in its facts to Pickering. Paul Freund in discussing the issue of timing suggested that the question "(s)hould the determination of constitutional issues be postponed or expedited" raised "questions of policy that affect the Court, the government, and the public. Traditionally, the Court professes never to decide a constitutional question unless and until it is necessary to the decision of an actual controversy..."

I

In 1934, the Supreme Court of the United States stood on the edge of a "revolution" which was to result in the modern Court as we know it today. In the latter part of the nineteenth century and the early part of the twentieth century, the Court had constructed a series of doctrines that could be employed in the judicial supervision of the business-government relationship. Its main role at this time

140. See note 4, chapter 1, *supra*.

141. Freund, The Supreme Court 165 (1961). Another example of the critical nature of timing was the recently decided *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In rejecting wealth discrimination as a means for striking down school financing laws the Court largely overruled four very recent lower court decisions -- *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241, 5 Cal.3d 584 (1971); *Van Dusartz v. Hatfield*, 344 F. Supp. 870 (Minn. 1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972); *Milliken v. Green*, No. 54, 809 (Mich. S.C., Jan. 1973). Unfortunately for the proponents of the lower court case, *Rodriquez* was decided too soon after *Serrano* for a large number of precedents to be established in the Courts of Appeals before being presented as an issue to the Supreme Court. Here timing may have been important. The Court usually feels less constrained by lower court cases if there are very few precedents available.
was protecting business interests from government intervention.

The Court had learned well to trace the complex consequences of its economic decisions for the quality of American life. The majority of cases through 1934 seemed to reflect the moderate approach of using its plenary power discreetly, although from time to time, the Court employed its veto absolutely stemming the trend toward government intervention in economic affairs. The Court until the 1930's had been disposed to use its power of intervention more as a salutory threat than as instrument of contentious control.

The Court, however, beginning in 1935, brought to bear on New Deal policies all the negative economic doctrines concerning government regulation which had been accumulating for a century;

142. See, e.g., Adkins v. Children's Hospital, 261 U.S. 525 (1923); Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918); Lochner v. New York, 198 U.S. 45 (1905); United States v. E.C. Knight Co. 156 U.S. 1 (1895); Slaughter-House Cases, 16 Wall. 36 (1873).

143. See, e.g., Adkins v. Children's Hospital, 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905); Hammer v. Dagenhart, 247 U.S. 251 (1918).

"the idea that a nine-man court can and should save society from itself and the past from the present -- these ideas were no longer rhetoric; they had become the well springs of action." For two busy terms the Court tore giant holes in New Deal programs. By the spring of 1936, the high court's assault on the New Deal had fomented a crisis around the Supreme Court itself and had produced a storm of antijudicial criticism. Alpheus Mason in his biography of Chief Justice Stone summarized the impending tempest of 1937 as follows:

Within one short term (1935-1936) the Court had woven a constitutional fabric so tight as to bind political power at all levels. In their desperate attempt to stop Roosevelt and preserve "rugged individualism", the judges themselves had advanced civic education, disabusing even the most credulous on the belief that court decisions are 'babies brought by constitutional storks.' Thrusting themselves into the vortex of a raging political controversy, they abandoned traditional judicial caution and indulged in a 'form of indecent exposure.' The Justices themselves made clear what they sought most anxiously to disguise -- that judicial decisions are, in fact, born out of the travail of economic and political conflict. 146

Roosevelt, re-elected President in 1936 by an overwhelming plurality, set about to manage the Court and to stem the "log jam" of negative decisions which were eviscerating his New Deal programs and economic relief measures. His solution was the ill-fated Court-packing plan whose desired effect was seen as a way to force the reluctant Court to treat the Constitution as an instrument of progress rather than a device for preventing action. Opposition

145. McCloskey, Supreme Court 165.

to this plan came from all quarters including Congress whose enactment of New Deal programs were the ones being struck down by the Court; nevertheless, the continued existence of the Court as a force in the political system was in doubt.

It is not certain whether the Court-packing plan of 1937; the decisive Roosevelt victory in the 1936 elections; and/or the continued gravity of the economic health of the country broke the crisis which had embroiled the Court in one of its worst political battles; but in a series of remarkable decisions, the Court turned about-face dramatically -- its old interests in protecting from government intrusion a free market economy were gone. Whatever the reason for the Court's dramatic about-face in the 1937, it must be viewed as proof that Supreme Court is not isolated from public opinion and that its decisions reflect contemporary values of the society. Paul Freund philosophically observed: "so far as American Constitutional law is concerned, it might almost as truly be said that the judge is a servant seated before his masters. The relationship was fairly put... by Jeremy Bentham when he insisted the law is not


made by judge alone, but by 'Judge and Company.'"

Constitutional doctrine emerged from the crisis profoundly changed. The Court's relationship to the American polity had undergone a fundamental alteration. It is quite likely that the justices themselves did not understand how great a withdrawal was portended by their switch in 1937.

To avoid what might have been a predicted twilight period for the Supreme Court and judicial review in the political process the Court needed to evolve a new sphere of interests and a new set of values to guide them within that sphere. The traditions developed by Marshall, Holmes and other high court greats together with a public reverence for the institution itself as the co-equal third branch of government were of such compelling force that the justices were not apt to recede into humble obscurity unless they had no other choice. The problems of their past -- the nation-state problem, the business-government problem -- had successively been withdrawn from their pervue by history. To fill the void left by the 1937 turn of events, the Court began the necessary development of a new role for itself and this time it was to be in the field of civil rights. The judicial "revolution" did not merely bring an end to

148. Freund, The Supreme Court 146.

149. See generally A. Mason and W. Beanery, The Supreme Court 285 (1968); McCloskey, Modern Court 3, 49, 327; A. Mason, Harlan Fiske Stone-Pillar of Law 515 (1968); McCloskey, Supreme Court 177; Pfeffer, Court 336-352.
the old, it also gave rise to the new.

One of the first expressions of the modern court's growing concern for civil liberties came unexpectedly in the otherwise obscure case of United States v. Carolene Products Co. decided in 1938 and which had nothing whatsoever to do with individual liberties. In a footnote, Chief Justice Stone fired the opening round which was to place the Court in the special role of protector of minority and individual liberties. As Pfeffer in his book This Honorable Court noted, "every revolution needs a rationale and a manifesto. It was Stone who supplied both..."

The interest of the Court in the Bill of Rights did not occur instantaneously to the time when it needed to replace its past pre-occupation with regulation of government interference in business. At the height of its concern for economic matters, the Court had begun to devote a small but increasing portion of its time to matters of the liberties of man as man, not merely as economic man. Between 1787 and World War I, the first amendment served little more than a reminder of the concern for personal freedom (Alien and Sedition Acts, Federalist papers) expressed during the early years of the nation. The rhetoric of individual rights which for so long had been part of the great "American Tradition" had rarely been translated into concrete legislative prescriptions and judicial

150. 304 U.S. 144, 152-54 n. 4 (1938).
151. Pfeffer, Court 340.
doctrines in the nineteenth century. The libertarian flourishes were material for anthologies, not legal case books.

With World War I, the perceived need for security and national loyalty brought a series of cases before the Supreme Court which began the free speech chapter in the history of judicial review. The first case was Schenck v. United States, 249 U.S. 47 (1919), which upheld a 1917 act applied to anti-draft leaflets under a "clear and present danger" test. At this time the first amendment had not yet been incorporated into the fourteenth amendment. In the same year as Schenck, the Supreme Court upheld convictions of five defendants convicted under the Federal Espionage Act of 1917 for again leafleting.

The change in attitude toward allowing free speech to apply to state action came in Gilbert v. Minnesota, 254 U.S. 325 (1920), even though on the merits the state sedition law as applied to anti-war writings was upheld. Three years later, Meyer v. Nebraska, 262 U.S. 390 (1923), proclaimed a broader meaning of "liberty" that could not be denied without due process in a case involving the right to teach German in the public schools. By 1925, the Court although it ruled that a 1902 criminal anarchy act did not unduly restrict freedom of speech or press, accepted the view that the freedoms guaranteed in the first amendment are safeguarded by the due process clause of the fourteenth amendment.


The logic of the shift according to Robert McCloskey in his book, *The American Supreme Court* was inevitable; "(c)ould it really be successfully contended that the 'liberty' mentioned in that clause (the fourteenth amendment which had been used to justify economic liberty for the businessman) meant the liberty of economic man, and that only?"

II

**Pre-1937: Formation of the Public Employment Relationship**

The negatively regulated public employment relationship which so characterized the Illinois court decisions in *Pickering*, developed during a period of time from 1776 to 1829, the infant years of the Republic. It grew largely out of suspicion against public officials which had evolved from colonial days and an attempt to curb widespread patronage and corruption by the Continental Congress. Strong arguments on both sides of the public employment relationship matured out of the "Decision of 1789," a policy developed in the House of Representatives during the course of establishing a Department of Foreign Affairs, and it concerned the President's power to remove the department head. The arguments centered on two points:

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154. McCloskey, Supreme Court 171.


the adverse effect of removal upon dismissal warranted a procedural check on the power to remove; and

the public interest demanded removal free of cumbersome procedures to prevent employees from using their position against their employers at the public good.

Surprisingly the debates expressed then were very similar to the positions adopted by the parties in Pickering. The stance, assumed by the Board favoring easy removal and its judicial counterpart, the "doctrine of privilege," has for the most part dominated the history of public employment relationships. The arguments embraced by Pickering, placing greater importance on the injury to an individual's reputation or constitutional rights caused by removal or exclusion from office, have only recently been judicially recognized and been the basis of the "doctrine of substantial interest."

Much of that which was negative about the public employment relationship stemmed from a dislike of the English notion of property rights to employment. The long tenure of office, the upper social class bias of civil service and the importance of kinship, and the inheritance of office so characteristic of the English system produced restrictions on public employees in the early years of the Nation. The "common man" syndrome and the arrival of Andrew Jackson and the spoils system destroyed most of the transplanted concepts about employment as "property."

158. See Rosenbloom, Federal Service 44; Bailyn supra note 155.
The ideological justification for the spoils system was that by instituting the principle of rotation one could create a more sociologically representative public service. With regard to the constitutional relationship between public employee and employer, however, the spoils system meant a vindication of the infringement on constitutional rights and of the removal from office of an employee for reasons having nothing to do with his fitness to hold that job. While altering the social class composition of the bureaucracy and creating better equality of access to government employment by increasing political removals and by coercing political contribution and activity, the spoils system abridged implicit Bill of Rights guarantees not to engage in political activity against one's will and the right to vote free of official coercion.

A reform movement began near the close of the Civil War as a reaction to the spoils system -- political neutrality of public employees and competitive examinations for positions were the result.

159. C. Fish, The Civil Service And The Patronage ch. IV (1920). "Its main objects (rotation) were to educate as many of the people as possible in the business of political life, and to protect them from the usurpations of men habituated to office." Id. at 83.

160. One of the earliest judicial statements on political neutrality was written in 1882 by Mr. Justice Bradley in his dissent in Ex parte Curtis, 106 U.S. 371, 377-78 (1882). Although political neutrality had not been successfully adopted as of that time, Mr. Justice Bradley's statements were in striking contrast to the general body of law which developed later with McAuliffe among its most well known representatives. Accord, Louthan v. Commonwealth, 74 Va.Rpts. 197 (1884); Rosenbloom, Federal Service 113.
The political machines and the spoils system were based on a series of assumptions which were to conflict with the reformers' goals. Much of the legislation from this period affecting the public employment relationship was enacted as a reaction to the perceived effects created by the spoils system.

The struggle between the reformers and the "machines" was over the distribution of wealth, power and prestige. The reformers were intellectual and social leaders, some of whom had been active abolitionists. They were sociologically similar to the elite group which had predominated the political life of the country before being displaced by the spoils system and the "common man." They were lawyers, editors, clergymen, professors, mercantile and financial, rather than industrial businessmen. The reformers tended to be from prominent or old-established New England families and were predominantly Protestants from urban areas. In their attempts to regain the power they had lost and to change the direction in which the "American way of life" was moving, the reformers wanted "to restore, ability, high character, and true spirit once more to their legitimate spheres in our public life, and to make active politics once more attractive to men of self-respect and high patriotic aspirations." The culturally pluralistic spoils system was more than

161. Public services under the spoils system were viewed as a means of providing jobs and mobility, not services. In addition, it was generally assumed under such a system that cultural pluralism was a proper expression of the American life style. See generally, Hayes, The Politics of Reform in Municipal Government in the Progressive Era, in American Urban History (A. Callow ed. 1969).


the reformers could tolerate. A major canker of the spoils system and political machines, apart from excluding men of the social status of the reformers from their perceived role in the political system, was that "the moral tone of the country is debased" by the present pluralism which exists and flourishes under such a system.

The results of the reform movement were to have a significant impact on the public employment relationship including that of the teacher. Strict political neutrality was the order of the day. The importance of that doctrine in destroying the spoils system was also of great consequence in abridging first amendment rights of public employees; the "doctrine of privilege" was one of the reformers' efforts to insulate the political neutrality of employers.

During the first two terms of the Franklin Roosevelt administration, the welfare state became a reality and as it grew so did the bureaucracy surrounding the welfare state. The shift in emphasis in the politico-economic system from the "laissez-faire" economy and "rugged individualism" in the economic sense to the welfare state was to compel a change in constitutional doctrines, resulting in the development of a judicial role in protecting civil liberties and the Pickering decision.

164. Id. at 73-74.

165. See Linde, Constitutional Rights..., 40 Wash. L. Rev. 10 (1965).

166. See generally McCloskey, Supreme Court chs. 6, 7; McCloskey, Modern Court; A. Mason, The Supreme Court ch. 6 (1962); A. Mason and W. Beaney, The Supreme Court in a Free Society ch. 14 (1968).
III

Post-1937: The Road to Pickering and Greater Civil Liberties

The years after the "revolution" of 1937 are best characterized as years in which the Court inched its way towards developing theories and applicable doctrines in the area of its greatest new concern -- the Bill of Rights. The course, it pursued, was somewhat irregular, alternating between modesty and self-assertion, restricting and advancing by turns. The Court which had spent some seventy years learning the complex consequences of its economic decisions for the quality of American life faced the same learning process with regard to libertarian decisions. The Court had to readjust its position in the American polity. The disagreements and self-doubts expressed by the Stone, Vinson and Warren Courts over their decisions on first amendment issues were not unreasonable or unexpected. World War II and the Cold War period which followed the judicial about-face of 1937 were not ideal environments in which to develop new judicial doctrines.

In the first few years after 1937, with Mr. Justice Stone's philosophy predominating the growing number of Roosevelt appointees to the Court, the justices seemed inclined to stand the old constitutional order on its head; the first amendment was granted a measure of protection far greater than it had ever been accorded before -- consideration of judicial self-restraint was not at all

167. A. Sutherland, Constitutionalism In America ch. 16 (1965). See p. 70, supra.

In a burst of enthusiasm to drive out all traces of its New Deal nadir in judicial history, the Court, with the same extreme lack of judicial modesty as had characterized its 1935 and 1936 terms afforded the liberties of individuals greater judicial protection than liberties which derived from shifting economic arrangements.

Two-thirds of all civil liberties cases decided in the six terms from 1941 to 1945 were in favor of the individual claimant. Underneath the resolute facade of judicial activism, however, doubts were growing in the minds of the justices; McCloskey, writing on the Court in its quest for a new role, noted:

(t)he tension between the instinct to dominate and the instinct to forebear has been most clearly evident in connection with the subject (of)...civil rights. 169

The cavalier attitude toward stare decisis troubled observers, including Justices Roberts and Frankfurter, both of whom set a high value on continuity and predictability in the law.

169. McCloskey, Supreme Court 193.

170. For an indication of Mr. Justice Roberts' dislike for that which upset the conservative role of the Court in following its doctrines of stare decisis and restraint, see the memorandum concerning his vote in West Coast Hotel, Co. v. Parrish, 300 U.S. 379 (1937). It is to be found in Frankfurter, Mr. Justice Roberts, 104 U. Pa. L. Rev. 311, 314-15 (1955). Part of Mr. Justice Frankfurter's view of the Court and the need for continuity and predictability in the law can be discerned from his opinion in Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) and his concurrence in Kovacs v. Cooper, 336 U.S. 77, 89 (1949). See also Sacks, Mr. Justice Frankfurter, 26 U.Chi. L. Rev. 217, 219-21 (1959). For a later related opinion by Mr. Justice Frankfurter on desirability for a "uniform course of decision," see his dissent in Baker v. Carr, 369 U.S. 186, 266-70 (1962). A further comment on Mr. Justice Frankfurter's judicial philosophy can be found in a biography written in 1969:
McCloskey, again commenting on the Stone and Vinson years in an attempt to explain the inconsistencies in the Court's efforts to evolve a consistent theory of law which had as a goal greater first amendment protection, wrote:

Instead of working out a viable judicial attitude toward the infringements on free speech, the court had enunciated a policy of flat negation; and when that policy had to be abandoned, there was nothing to take its place except critical acquiescence to the legislative will.172

Even more important than the lack of historical precedents in the area of individual liberties and the fumbling efforts by the Court to develop a judicial framework, to explain the negative impact felt after the Stone years of unrestrained championing of the ordinary man, was the character of the period following World War II. McCarthyism, the Cold War, the Korean War, the fear of subversion and the totalitarian threat had generated a mood of national hysteria. At no time in its history had the Court been able to maintain a position squarely opposed to a strong popular majority...In contrast to the negativism of the first

170. (cont.)
"'Those who pass laws,' he soliloquized, 'are also under a duty to observe the constitution.' That being so, the legislatures must be allowed considerable discretion to make and unmake laws. The Court, he concluded, must be 'very self restrained' since it can only 'unmake laws.'" L. Baker, Felix Frankfurter 269 (1969). Accord, Pfeffer, Court 357.


172. McCloskey, Supreme Court 196.
The majority of cases decided in the Vinson years involving public employees were to signal the abandonment by the Court of the role of uncompromising defender of liberty against all comers, so recently asserted by the Stone Court. United Public Workers v. Mitchell, American Communications Ass'n v. Douds, Garner v. Board of Public Works and Adler v. Board of Education were all decided between 1947 and 1952. Faced with repressive measures that the spirit of the times had fostered, the Court was reluctant to strike down legislation which limited the civil rights of not only public employees but other citizens as well. The Court seemed content to settle back to some doctrinal housekeeping and development of libertarian justifications for greater judicial protection of individual rights which had so eluded the Stone years. The justices were building into

173. McCloskey, Supreme Court 196. See also Pfeffer, Court ch. 14. Leo Pfeffer commented on this retrenchment of the Vinson Court in areas of civil liberties particularly with regard to the Japanese internment cases of World War II. "That a Court whose majority consisted of Stone, Black, Douglas, Murphy and Rutledge could sanction the Japanese evacuation program indicates strongly that in periods of great national fear, only modest reliance can be placed on the Supreme Court. The Court may keep its head when most have lost theirs, but it cannot single-handedly preserve the civil liberties that every other dominant part of our nation seeks to suppress. The experience of the Vinson Court during the McCarthy era testifies to that." Id. at 352.

their decisions upholding government action doctrines which would one day compel a case like *Pickering* to be decided in favor of the individual on stronger precedent than mere judicial whim.

When the opinions of the decisions of the early 1950's are examined carefully, it can be seen that the justices were whittling away the "doctrine of privilege" which had previously made it difficult to extend judicial review to constitutional protections for public employees. The "doctrine of substantive interests" was slowly replacing the Holmes' epigram as the prevailing rule even though the Court continued upholding particular government requirements and restrictions on the basis of "reasonableness."

In *United Public Workers* and *Adler* language can be found extending to public employees some claim to constitutional rights despite their negative holdings. *Wieman v. Updegraff*, decided in the same term as *Adler*, was the beginning of the modern court's tortuous route in arriving at *Pickering*. Although limited in scope to a procedural *scienter* issue, the majority opinion by Mr. Justice Clark referred disapprovingly to "the facile generalization that there is no constitutionally protected right to public employment...We need not pause to consider whether an abstract right to public employment exists.

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179. An example of "whittling" can be seen in a variety of decisions in which the Court noted that particular oath requirements were not unreasonable so as to declare them unconstitutional. See, *e.g.*, *Adler v. Board of Education*, 242 U.S. 485 (1952); *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951).
It is sufficient to say that constitutional protection does extend to the public servant whose exclusion is patently arbitrary or discriminating." If a public employee could claim one right, due process, there was no logical basis from barring claims to other constitutional rights such as first amendment protection of free speech.

In retrospect, it now appears that by the time Earl Warren assumed the Chief Justiceship in 1954, the Court had developed a pattern of theories on individual rights with which it was comfortable. The justices, in seeking a fairly coherent judicial policy, were avoiding the problems put to them by the subversive issue of the late 40's and early 50's -- the double standard was developed. In keeping with the growing disenchantment with Senator Joseph McCarthy and the expanding public acceptance of co-existence with the Communist nations, when subversive activities were at issue, the Court's decisions now were couched in terms of statutory interpretation and procedural defects; the government's power to regulate remained unchallenged. When the subversive issue was not involved, decisions like Brown v. Board of Education and Slochower v. Board of Higher Education pushed the barriers to personal liberties further back even to the extent of inhibiting governmental exercise


of power on the basis of the doctrine of substantial interests. The new judicial guardianship was now reflected in the major share of the Court's work load.

The Warren Court's reluctance to a total return to the commitment to personal freedoms which characterized the 1937 revolution can be viewed as the development of solid libertarian doctrine (in contrast to the "shot gun" approach of the Stone Court) against which to apply to the Bill of Rights cases coming before the Court and/or as the hesitancy of the Court to arouse tremendous controversy when skirmishes in the Cold War were still taking place and McCarthyism was still more than a mere memory. Interestingly, the attacks on the Warren Court, which did occur from the libertarian decisions of that Court, came from the right and the defense of it from the left. The assaults so generated by the Warren Court while sharp in nature were not of the intensity and quality which have rocked the Court in the past under Marshall, Taney, and Hughes. The "revolution" of 1937 can explain this; that date marked the reversal of roles for the Court and its critics. One view of decisions such as Beilan, Barenblatt and Konigsberg was that they were tactical withdrawals from positions too forward for general public acceptance. While Justices Warren, Black, Douglas and Brennan did not share this caution, the other Justices Clark, Whittaker, Frankfurter, Harlan and Stewart probably never approved of taking particularly forward positions in civil liberties. Although these cases, in fact, did not signal a broad retreat by the Court from the libertarianism of the Stone Court, they did indicate a reservoir of conservatism on
the bench in approaching cases involving personal freedoms.

Even as the volumes about the history of the Warren Court and its numberous extensions of the Bill of Rights are being written, the decisions upon examination do not reflect the unequaled vigor of the Stone Court in its uncompromising zeal to erect formidable constitutional barriers to defend freedom of speech and expression. The fourteen years of Warren Court rulings prior to Pickering have not all universally increased the constitutional rights of public employees -- Barsky v. Board of Regents, Barenblatt v. United States, Beilan v. Board of Education, and Konigsberg v. State Bar. With more caution perhaps than its approach in the criminal rights area, the Warren Court has slowly come to give first amendment protections to public employees including school teachers.

IV

Growth of Public Employment

One of the relevant conditions surrounding the change in attitude towards the public employment relationships and efforts to alter it, including the doctrine of substantial interests,

184. See note 149 supra; Pfeffer, Court 405, 407-408.

185. See, e.g., A. Cox, The Warren Court (1968); J. Frank, The Warren Court (1964); A. Lewis, The Supreme Court (1966); McCloskey, Modern Court chs. 4, 5; J. Weaver, Warren: The Man, The Court, The Era (1967).

186. Cases cited note 168 supra.

187. See note 4, chapter 1.

has been the growth of public employment on all levels and the belief in the trend that it will continue to grow. Loss of public employment at a time when government was ever expanding its role in the job market could foreclose a person from his only source of livelihood. Conditions were not the same as those in 1892, the year of the McAuliffe decision, when the government provided few jobs and the market was wide open to find alternative employment.

As government operations in education, defense, housing, welfare and other fields have expanded to the point where they constitute over 16 per cent of the total job market, they have become the basis of security for many individuals or at least a new kind of "property." Mr. Justice Douglas viewed loss of employment, not just public employment, in today's society as a deprivation of "property" and when


189. See also Note, supra note 3. "The government's very size and complexity increase the need for informed criticism from its employees. Furthermore as more and more people become involved in public employment, limitations on free speech extend to an increasingly large number of people. Undoubtedly there is a point at which the "efficiency of the public service" is no longer served by such restrictions on public employees." Id. at 157-58. See generally A. Sutherland, Constitutionalism In America 521 (1965).


192. In a series of articles commemorating Mr. Justice Douglas' twenty-fifth year on the Court, Hans Linde summed up Mr. Justice
done by the government akin to punishment demanding procedural safe-
193
guards.

In an urban and industrial society, the job, the
opportunity to earn a living by one's efforts
and skills, rather than land or other tangible
property, is the fundamental economic base of
individual liberty.194

Mr Justice Minton in the Adler decision asserted that teachers
were free to look "elsewhere" for employment if they did not want
to work for "reasonable" terms. This understanding of the nature
of public employment, however, did not square with a growing
reliance on public employment as the only source of employment.

The 'elsewhere' of this airy dismissal may seem to the
teacher, when virtually all schools are public schools,
to have no locale but links; but the comfortable nine-
teenth-century premises of total individual mobility in
the labor market of a pluralistic society in which
government is only one among innumerable competing
employers still override the modern realities of public
education, of accreditation, of the teacher's investment
in preparation for what can only be public employment, 196
and in the accumulated fringe benefits of such employment.

192. Douglas' perception of employment in the twentieth century:
"A man's freedom in the modern economy, as in the agricultural economy
of the 18th century, depends on immunity of his livelihood from
official prejudice and reprisals...Whatever a private employer may do
on his own, and though the relevant reasons for disqualification may
vary, the test runs against government whether it governs work in
the private or public sectors." Linde, "Justice Douglas...," 39 Wash.
L. Rev. 4, 46 (1964).

Accord, Board of Regents v. Roth, 408 U.S. 564 (1972) (Marshall,
J., dissenting) "In my view, every citizen who applies for a govern-
ment job is entitled to it unless the government can establish some
reason for denying the employment. This is the 'property' right that
I believe is protected by the Fourteenth Amendment and that cannot be
denied 'without due process of law.' And it is also liberty -- liberty
to work -- which is the 'very essence of the personal freedom and
opportunity' secured by the Fourteenth Amendment." Id. at 588-89.

194. Linde, supra note 192, at 37.
Recognition of the validity of the second half of the above quotation may have brought the high court closer to an appreciation of the complexity of and the dependence on public employment especially as it related to public school teachers. The need for greater protection of the public employee may have become more apparent as the employee continued to have an increasingly large stake in retaining his position.


196. Linde, supra note 192 at 38. See Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, 185 (1951) (Jackson, J., concurring); United States v. Lovett, 328 U.S. 303, 316-17 (1946).

197.

Table 1. Public Elementary and Secondary Schools -- Summary: 1900-1970 (Prior to 1960, excludes Alaska and Hawaii)

<table>
<thead>
<tr>
<th>Year</th>
<th>Instructional Staff</th>
<th>Classroom Teachers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1900</td>
<td>N.A.*</td>
<td>423</td>
</tr>
<tr>
<td>'20</td>
<td>678</td>
<td></td>
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<tr>
<td>'40</td>
<td>912</td>
<td></td>
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<tr>
<td>'50</td>
<td>962</td>
<td></td>
</tr>
<tr>
<td>'60</td>
<td>1464</td>
<td>657</td>
</tr>
<tr>
<td>'64</td>
<td>1717</td>
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<tr>
<td>'68</td>
<td>2071</td>
<td>1387</td>
</tr>
<tr>
<td>'69</td>
<td>N.A.</td>
<td>1625</td>
</tr>
<tr>
<td>'70</td>
<td>N.A.</td>
<td>1786</td>
</tr>
</tbody>
</table>

* N.A. means figures are not available


In addition to any loss of "property" which might be considered the result of losing one's position, in looking for a new job, the teacher will be under a handicap of carrying his own burden of proof when he alleges dismissal for constitutionally impermissible reasons. See Greene v. McElroy, 360 U.S. 474 (1958); see also Palmer, Due Process Termination of Untenured Teachers, 1 J. Law & Ed. 469, 473 (1972).
Unionization and Militancy

There are other factors, perhaps less significant, that have made public employees more militant and the courts more receptive to their needs. One such element was the growth of certain organizations -- the American Civil Liberties Union, the National Association for the Advancement of Colored People, the National Education Association and the American Federation of Teachers -- all of whom often subsidized court tests that individual plaintiffs would be unwilling or unable to undertake.

The unionization of teachers, which did not succeed until the 1960's because of an aversion by teachers to militant tactics, brought with it a changed perspective on the role of the teacher in society. No longer content to be ideologically committed to a view of professionalism which precluded public notoriety, discharged teachers in the late 50's and early 60's began to bring an increasing number of suits against their former employers. The courts were being pressured in the area of public employment simply through an expanded public interest in individual rights evidenced by the sudden ballooning in their dockets of cases on public school teacher cases.


199. "Public school teachers, once the docile handmaidens of public education, are no longer quiescent...The former widespread, if passive consensus on the operating rules of the education
Unionization, which had succeeded upon the election by public employees to pursue an activist role in securing rights and benefits led teachers to demand more control over salaries and compensation, of course, but also over many board of education prerogatives—"assignment, promotion, transfer, curriculum development, class size, textbook selection, supplies, teacher aides and substitutes, school hours, principals, superintendents, district lines, extracurricular activities, lighting and plumbing." If the teachers were demanding these prerogatives, it was a not inconceivable "next step" to demand a full share of the civil liberties guaranteed to the populace-at-large. Teachers who had previously refrained from asserting first amendment protections were, in the spirit of the times, acquiescing less and insisting on more.

Despite the existence of teachers associations and unions for the past thirty years, until recently opposition to them has often been extreme. As private employee organizations, however, began to


200. "Militancy is contagious and the activism is not confined to public employees, with a variety of societal groups demanding more participation and more power." Walsh, Sorry No Government Today, Unions v. City Hall 309 (1969). The reverse of this statement may also be true -- as more societal groups such as private unions, students and minorities, demand more participation and power, militancy is contagious and the activism may spread to public school teachers.


202. Id. at 38.
gain stature and rights in collective bargaining and in the assertion of certain previously management-held prerogatives the unionization of teachers also began to develop. Increased pressure on society for an erosion of the distinction between public and private employees, as the labor force in public employ grew, has caused the courts to focus more attention on the rights of individual employees regardless of their employer, public or private.

VI

Professionalism = Status?

Still another condition, which may have influenced the Court's changing attitude in its review of first amendment restrictions and public policy considerations with regard to constraints on public school teachers, has been the interest and the need to attract more talented people to the teaching profession and the metamorphosis which has occurred with respect to perceptions of professionalism, so long an influence on the conduct of teachers. In an argument which called on the ever-present "interest of efficient public service," it became questionable whether first amendment restrictions serve the interests of the public if they discourage talented people from accepting public employment. One could hardly

203. See Rosenbloom, Federal Service 200; Note supra note 3, at 158.

204. Although sufficient data are lacking, a general increase in the status and prestige of teachers may have been associated with or resulted in more favorable attitudes toward teachers and other public employees and decreasing societal support for a negatively discriminatory public employment relationship. Rosenbloom, Federal Service 201.
have raised the status of teachers so as to attract highly qualified personnel if the constraints on teachers' individual liberties were such that they became "second-class citizens" upon accepting public employment.

Teachers themselves saw their status differently in 1960 than they did twenty-five years ago. In an effort to be equated with the social standing of such professions as doctors and lawyers, teachers in the past found justifications for their being regulated and restricted in exercising their rights; their importance to society was indicated and measured by the amount of regulation attached to their profession.

204. (cont.) An indication of the old attitude toward professionalism and the desire to achieve the same professional status as doctors and lawyers can be discerned from the article "Teachers as Citizens" written in 1935 by the Director of Membership of the National Education Association. See Note 21 supra. Another example of the abiding interest of teachers in professionalism is to be found in a National Education Association Research Bulletin: "In the early days of American public school education, almost any person with a little learning could teach in the local school..." National Education Association Research Bulletin, The Legal Status of the Public School Teacher XXX, 29 (1947). See generally S. Cole, The Unionization of Teachers ch. 10 (1969).

205. Mr. Justice Black in his dissent to United Public Workers v. Mitchell stated:

"There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs..." 330 U.S. at 111.

In Adler v. Board of Education, Mr. Justice Douglas in his dissent said:

"I cannot...find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression... All are entitled to it (first amendment rights); and none needs it more than the teachers." 342 U.S. at 508.
The National Education Association, a professional organization, commented on the status of the public school teacher in the following manner:

One characteristic of a profession is that its legal status is defined by state laws. Usually the state defines a profession because of its importance to the welfare of the people and the state. Rather than considering such state laws as imposing upon the individual certain obligations to society...(the regulations make) the profession a selected group distinguished by preparation, experience, and essential personal qualifications. 206

Regardless of state laws, the NEA cautioned teachers to conduct themselves in manners becoming their positions as professionals.

In another admonition to teachers on their roles as professionals, Lee Garber and Charles Micken wrote:

Teachers automatically are identified with the profession of teaching and, whether they wish it or not, they, therefore, are expected and required to accept responsibility for discharging obligations of the profession. To be a teacher, at least in the public schools, is to be a professional educator. This status places heavy demands upon those who teach far beyond the mere possession of knowledge of subject matter. 207

Such views on teaching have changed as unions have taken actions such as walkouts and strikes which were inconsistent with old notions of the status and the prestige which dignified the profession. Teachers were beginning to see that teaching differed in significant ways from both law and medicine: "the income of their (doctors' and lawyers') practitioner is higher; they enjoy greater prestige; they have greater control over admission


to their ranks, greater autonomy in regulating professional conduct and a more highly developed body of professional knowledge.\textsuperscript{208} It has now developed that teachers do not expect to have their social standing measured against the medical and legal professions. No longer constrained by traditional views, it was easy to pressure for more individual rights without jeopardizing the profession as a whole.

The growing public interest in education, e.g., Head Start Programs, "new" math and educational television, has created a need to attract more highly qualified teachers; teachers secure in their understanding of their social rank who would probable view restrictions on their personal rights as a disincentive to becoming public employees. The status of teachers at the time of the \textit{Pickering} controversy was thus to be tested against achievement of true citizenship and full equality with other citizens.

\textbf{VII}

The \textit{Pickering} decision was not an accident in judicial history, but rather occurred because of a number of complex social and political factors, not all of which are identifiable. One might observe that such forces as the judicial "revolution" of 1937, the growth of public employment, the unionization and evolving militancy of public employees, and the changed attitude towards professionalism

\textsuperscript{208} S. Cole, \textit{The Unionization of Teachers} 162-63 (1969).
and status, all had their influence on the nine men who as individuals
and as a collective body constitute the highest court of review and
whose ruling extended first amendment rights to Pickering, a public
school teacher, which he would otherwise have enjoyed as a private
citizen to comment on "matters of public interest in connection with
the operation of the public schools." In Pickering, the final
result was a coalescence of four years of litigation and the emerging
trend of affording public employees more protection than in the recent
and much of the distant past. John Ligtenberg, the plaintiff's
attorney in Pickering, expressing his thoughts on the outcome
of the case, concluded: "It is noteworthy that the result that had
been so difficult to reach was recognized by almost everyone as
inevitable, once the Supreme Court had spoken."

210. Note 83 supra.
SOME REFLECTIONS ON PICKERING

The rulers of the state have said that only free men shall be educated; but Reason has said that only educated men shall be free.

Epictetus

The implications of the Pickering decision and its value as a precedent in future litigation over the first amendment rights of public school teachers and other public employees are uncertain. The "doctrine of substantial interests" now adopted by the Supreme Court, by its very nature, demands a case-by-case approach. Thus it would not be unreasonable to foresee a limited role ahead for Pickering despite its importance as the first decision of the high court to deal with constitutional rights not related to subversive activities of public employees. It might even be possible for the Court under the unstructured, nebulous standards developed in Pickering to reach the opposite conclusion in the same case depending upon prevailing sentiment on the bench and of the country at-large. As time passes, Pickering, limited by its facts, may be relegated to a small niche in an evolving series of cases on constitutional rights for public employees.

Cases decided since Pickering do not present a clear image of the impact of that case on others involving the constitutional relationship of public employment. Pickering has not meant that


212. See, e.g., Meehan v. Macy, 392 F.2d 822, vacated, 425 F.2d 472 (D.C. Cir. 1969) (discharge of police officer for publication of defamatory materials reconsidered in light of Pickering); McLaughlin v. Tilendis, 398 F.2d 287 (2d. Cir. 1968) (actions by school board because of association with union are impermissible).
all is now "roses" for employees in the free speech area. Often it is cited by the dissent to an opinion as well as by the majority. The following post-Pickering decisions which were chosen for their varying results are but a sample of the approximately two hundred cases which have mentioned Pickering.

Is an employee's public criticism of a superior on a matter of public concern constitutionally protected?

The Supreme Court ruling in Pickering does not clearly answer this question. There is no easy formula to apply. In one subsequent case, for example, the Alaska Supreme Court held that statements of teachers attacking the school superintendent were not protected where there were only two schools and thirty teachers in the entire system and where the superintendent was in fact the principal as well. Using the "daily contact" test of Pickering,

213. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972) (fourteenth amendment does not require opportunity for a hearing prior to nonrenewal of nontenured unless can show discrimination or arbitrariness); Cole v. Richardson, 405 U.S. 676 (1972) (employment at State hospital terminated after refusal to take oath was upheld as constitutionally permissible); Long v. Board of Education, 331 F.Supp. 193 (E.D. Mo. 1971), aff'd, 456 F.2d 1058 (8th Cir. 1972) (dismissal over letter written on board stationary criticizing department of education upheld). It is also interesting to observe that in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), in which the Court formulated the rule that first amendment rights in context of a school may be curtailed only when their exercise threatens to "materially and substantially disrupt the work and discipline of the school," never once cited Pickering although it was the last case to have been decided extending first amendment rights in the academic area. Id. at 513.


the court found the question of "maintaining discipline by an immediate superior was involved" and the state's interest had become predominant.

Yet, in a similar case in the New York courts, it was found that a high school teacher's strident accusations over his board's failure to renew the contract of a probationary teacher, although easily characterized as excessive, were not shown to have produced actual or threatened damage to the school system. Despite the inaccuracies of the accusations, in light of Pickering, the New York court held:

Indiscreet bombast in an argumentative letter, to the limited extent present here, is insufficient to sanction disciplinary action. Otherwise, those who criticize in any area where criticism is permissible would either be discouraged from exercising their rights or would be required to do so in such innocuous terms as would make the criticism seem ineffective or obsequious.218

The Federal District Court of Connecticut, however, decided in 1970, that a teacher who stooped to name-calling and personal invective was not sheltered by the Constitution from the consequences of his acts. In ruling that a probationary teacher's statements, at a school board hearing calling his administrative


218. Id. at 999, 250 N.E. 2d at 233, 302 N.Y.S. 2d at 826.

supervisor a liar and challenging the integrity of the board's staff was not constitutionally protected. The court declared that the board's refusal to review his contract because such statements did not violate his first amendment rights.

And in still another suit, a federal court in Indiana held that a teacher, who was president of his local teacher's association and a member of its negotiating team, had a right under Pickering to state at a meeting of the association that "the school administration was trying to buy them off with small items at the expense of big ones." The teacher's comments were directed at least in part toward the actions of his principal. Superiors were not, under Pickering as interpreted by the Indiana court, insulated from all criticism by teachers.

In related cases concerning the right to discuss problems, pertaining to one's employment and one's superiors, on public media, one noteworthy case has been decided after the Pickering ruling. In Brukiewa v. Police Commissioner, a Maryland court found a police officer's statements on television about the morale of the police force and the management of the department were protected under the first amendment. Using Pickering criteria, the court stressed that


the statements were not shown to have affected discipline or harmony or the effectiveness of the department in the performance of public service.

When does an issue become of such public importance that Pickering can be applied?

As before, no pattern or standard has clearly emerged. A federal district court in Philadelphia in Leslie v. Philadelphia Bicentennial Corp. held that criticism of the leadership of the Bicentennial Corporation and its policies, which were alleged to be racist, was not protected under Pickering. The Court found that although it was a "well-settled proposition that the employment of a public employee may not, in general, be terminated for exercise of constitutionally protected rights," the Pickering court had posited certain exceptions, such as confidentiality, to the general rule and enunciated a "balancing" test. This decision and others like it seem inconsistent with Swaaley v. United States in which a letter was held constitutionally protected even though it was from a naval shipyard worker to the Secretary of the Navy criticizing favoritism in promotions.

223. Id.
224. 376 F.2d 857 (Ct. Cl. 1967).
What constitutes the standard of fitness to be used in vindicating the right of an employer qua employer to retain an efficacious employment relationship.

The Pickering standards, if such exist, have also been cited to add support to the argument that the teacher's private conduct will subject him to dismissal only in such instances as it affects his fitness as a teacher. The California Supreme Court in Morrison v. Board of Education adopted this philosophy in holding that a teacher who had engaged in a limited noncriminal homosexual relationship could not have his teaching certificate revoked. Yet, in its opinion, the California court cited with approval another California case in which a teacher was properly disciplined for making homosexual advances towards a police officer at a public beach and the teacher had admitted to a history of homosexual activities. It would seem apparent that Pickering has not been successfully molded into establishing definitive standards with regard to fitness against which subsequent cases and activities can be tested.

A further illustration of the nebulous character of Pickering, the California Supreme Court in Los Angeles Teachers' Union v. Los Angeles City Board of Education enjoined the enforcement of a school board regulation prohibiting teachers from circulating a petition during duty-free lunch periods. The petition opposed certain


reductions in the state legislature's proposed budget and in no way concerned the teachers' duties in the classroom. The fact that the circulation of a document critical of the legislature might foment some discord and disturbance within the school system was not sufficient to justify the school's attempt to restrict the teachers' use of their free time. The court noted that "(t)olerance of the unrest intrinsic to the expression of controversial ideas is constitutionally required even in the schools."

Perhaps the only conclusion to be drawn from Pickering is that the old concept that public employers have absolute discretion has been destroyed. It remains for further litigation to demarcate the limits of public employee rights and activities.

II

Conclusions

The interaction between the citizen as employee and the government as employer has been an important feature of American political development from the very beginning in 1789 to the present. With varying degrees the relationship has been a negatively restrictive one for public employees, including public school teachers. A result of the perceived incompatibility between the status of citizen and that of employee, the numerous restrictions imposed on public employees relating to constitutional rights have reflected the tension between

228. Id. at 559, 455 P.2d at 832, 78 Cal. Rptr. at 728.
bureaucracy and democracy with their conflicting demands for efficient operation and for individual liberties. Using the "actual malice" standard of New York Times v. Sullivan and the emerging doctrine of substantial interest in testing the public employment relationship Pickering v. Board of Education attempted comprehensively to deal with the "theoretical aspects" of public employment and the first amendment.

No one will know exactly how or why Pickering was decided in 1968. The mechanics of the Supreme Court cannot be correlated with one or two factors. Instead the Court and its decisions reflect the influence of a wide variety of political, economic, and social factors. By examining the social climate at the time the case was litigated, the record and briefs, and the previous decisions of various courts, it is possible to surmise how a result was reached. As Alan Westin wrote in his preface to The Supreme Court: Views From Inside, American practice has determined that the bones of Justice...are best shaken and thrown in a darkened temple."

It can be concluded, however, that teachers and public employees enjoy a greater measure of constitutional protection than ever before. Mr. Justice Holmes' uneradicable 1892 dictum has been exorcised and the ghost of "privilege" should not continue to dominate the field of public employee rights. Although no one has an absolute right to one's job, an employee cannot be summarily discharged where the discharge is related to an exercise of fundamental rights.


It should be noted with regard to the future of Pickering as a precedent that even with a change in the composition and tenor of the Supreme Court, as the Warren Court becomes a chapter in judicial and political history, the decisions of the Warren Court have not been wholesale reversed. Although certain recent opinions have sufficiently distinguished the earlier Court's rulings, e.g., Bd. of Regents v. Roth, 408 U.S. 564 (1972), stare decisis and judicial modesty still prevail as leading judicial philosophy. The trend in extending first amendment rights to public employees may be temporarily halted by the Berger Court but it is unlikely that it will be overturned.

In Pickering, the Supreme Court took the first step in extending first amendment protection, defined by the New York Times rule, to include speech by public school teachers and by implication, other public employees. Despite the Court's cautious approach in Pickering, it remains for history to determine whether this case was the beginning of an irreversible course leading to full citizenship for the public employee particularly in the first amendment area.


233. But see Meinhold v. Clarke County School District, 506 P.2d 420 (Nev. 1973), cert. denied, 42 U.S.L.W. 3223 (Oct. 16, 1973) in which a school teacher was dismissed for views and conduct relating to compulsory attendance at school mentioned in the privacy of his home. "A teacher's influence upon his students is not limited to what he says and does in the schoolroom and a teachers right to teach cannot depend solely on his conduct in the school room." Id at 425-26.
Dear Editor:

I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February thru November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their "stop at nothing" attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, "Any teacher that opposes the referendum should be prepared for the consequences." I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

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

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30 cents for his lunch instead of 35 cents to pay for free lunches for the athletes.

In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn't pay for $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers.

You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the $200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse.

If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.

Once again, the board must have forgotten they were going to spend $3,200,000 on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.
I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,

Marvin L. Pickering
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Syllabus.

PICKERING v. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 203, WILL COUNTY.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.


Appellee, Board of Education, dismissed appellant, a teacher, for writing and publishing in a newspaper a letter criticizing the Board's allocation of school funds between educational and athletic programs and the Board's and superintendent's methods of informing, or preventing the informing of, the school district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. At a hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the Board and school administration. The Board found all the statements false as charged and concluded that publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and that "the interests of the school require[d] [appellant's dismissal]" under the applicable statute. There was no evidence at the hearing as to the effect of appellant's statements on the community or school administration. The Illinois courts, reviewing the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether the Board could reasonably conclude that the publication was "detrimental to the best interests of the schools," upheld the dismissal, rejecting appellant's claim that the letter was protected by the First and Fourteenth Amendments, on the ground that as a teacher he had to refrain from making statements about the schools' operation "which in the absence of such position he would have an undoubted right to engage in." Held:

1. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U. S. 589, 605-606 (1967). The teacher's interest as a citizen in making public comment must be balanced against the State's interest in promoting the efficiency of its employees' public services. P. 568.

2. Those statements of appellant's which were substantially correct regarded matters of public concern and presented no questions
Opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the rele-
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Opinion of the Court.


Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill. 2d 568, 225 N. E. 2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments.1 389 U. S. 925 (1967). For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond

1 Appellant also challenged the statutory standard on which the Board based his dismissal as vague and overbroad. See Keyishian v. Board of Regents, 385 U. S. 589 (1967); NAACP v. Button, 371 U. S. 415 (1963); Shelton v. Tucker, 364 U. S. 479 (1960). Because of our disposition of this case we do not reach appellant's challenge to the statute on its face.
sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication
of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection.
In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E. g., Wieman v. Updegraff, 344 U. S. 183 (1952); Shelton v. Tucker, 364 U. S. 479 (1960); Keyishian v. Board of Regents, 385 U. S. 589 (1967). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, supra, at 605-606. 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. 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.

III.

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with
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his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not," New York Times Co. v. Sullivan, 376 U. S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in

*We have set out in the Appendix our detailed analysis of the specific statements in appellant's letter which the Board found to be false, together with our reasons for concluding that several of the statements were, contrary to the findings of the Board, substantially correct.*
contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant’s employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board’s position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)–(4) of appellant’s letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.3

We next consider the statements in appellant’s letter which we agree to be false. The Board’s original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering’s letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore,

3 It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.
have decided, perhaps by analogy with the law of libel, that the statements were *per se* harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were *per se* detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, *infra*) cannot reasonably be regarded as *per se* detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open
debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.4

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in

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4 There is likewise no occasion furnished by this case for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public.
the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v. Sullivan, 376 U. S. 254 (1964); St. Amant v. Thompson, 390 U. S. 727 (1968). Compare Linn v. United Plant Guard Workers, 383 U. S. 53 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a "matter of public interest" is involved. Time, Inc. v. Hill, 385 U. S. 374 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

* We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.
This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. Louisiana, 379 U. S. 64 (1964); Wood v. Georgia, 370 U. S. 375 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no

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Because we conclude that appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment. See also n. 5, supra.
such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.  

It is so ordered.


APPENDIX TO OPINION OF THE COURT.

A. Appellant's letter.

**** Graphic Newspapers, Inc.

Thursday, September 24, 1964, Page 4

Dear Editor:

I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February thru November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even
though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their "stop at nothing" attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, "Any teacher that opposes the referendum should be prepared for the consequences." I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

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

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30¢ for his lunch instead of 35¢ to pay for free lunches for the athletes.

In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn't pay for the $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers.

You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the $200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse.

If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.
Once again, the board must have forgotten they were going to spend $3,200,000 on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don’t know whom to trust with any more tax money.

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

Respectfully,

Marvin L. Pickering.

B. Analysis.

The foregoing letter contains eight principal statements which the Board found to be false. Our independent review of the record convinces us that Justice

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1 We shall not bother to enumerate some of the statements which the Board found to be false because their triviality is so readily apparent that the Board could not rationally have considered them as detrimental to the interests of the schools regardless of their truth or falsity.

2 This Court has regularly held that where constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case. E. g., Norris v. Alabama, 294 U. S. 587 (1935); Pennekamp v. Florida, 328 U. S. 331 (1946); New York Times Co. v. Sullivan, 376 U. S. 254, 255 (1964). However, even in cases where the upholding or rejection of a constitutional claim turns on the resolution of factual questions, we also consistently give great, if not controlling, weight to the findings of the state courts. In the present case the trier of fact was the same body that was also both the victim of appellant’s statements and the
Schaefer was correct in his dissenting opinion in this case when he concluded that many of appellant's statements which were found by the Board to be false were in fact substantially correct. We shall deal with each of the statements found to be false in turn. (1) Appellant asserted in his letter that the two new high schools when constructed deviated substantially from the original promises made by the Board during the campaign on the bond issue about the facilities they would contain. The Board based its conclusion that this statement was false on its determination that the promises referred to were those made in the campaign to pass the second bond issue in December of 1961. In the campaign on the first bond issue the Board stated that the plans for the two schools did not include such items as swimming pools, auditoriums, and athletic fields. The publicity put out by the Board on the second bond issue mentioned nothing about the addition of an auditorium to the plans and also mentioned nothing specific about

The state courts made no independent review of the record but simply contented themselves with ascertaining, in accordance with statute, whether there was substantial evidence to support the Board's findings.

Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-à-vis appellant. Compare Tumey v. Ohio, 273 U. S. 510 (1927); In re Murchison, 349 U. S. 133 (1955). Accordingly, since the state courts have at no time given de novo consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board.
athletic fields, although a general reference to "state required physical education" facilities was included that was similar to a reference made in the material issued by the Board during the first campaign.

In sum, the Board first stated that certain facilities were not to be included in the new high schools as an economy measure, changed its mind after the defeat of the first bond issue and decided to include some of the facilities previously omitted, and never specifically or even generally indicated to the taxpayers the change. Appellant's claim that the original plans, as disclosed to the public, deviated from the buildings actually constructed is thus substantially correct and his characterization of the Board's prior statement as a "promise" is fair as a matter of opinion. The Board's conclusion to the contrary based on its determination that appellant's statement referred only to the literature distributed during the second bond issue campaign is unreasonable in that it ignores the word "original" that modifies "promises" in appellant's letter.

(2) Appellant stated that the Board incorrectly informed the public that "teachers' salaries" total $1,297,746 per year. The Board found that statement false. However, the superintendent of schools admitted that the only way the Board's figure could be regarded as accurate was to change the word "teachers" to "instructional" whereby the salaries of deans, principals, librarians, counselors, and four secretaries at each of the district's three high schools would be included in the total. Appellant's characterization of the Board's figure as incorrect is thus clearly accurate.

(3) Pickering claimed that the superintendent had said that any teacher who did not support the 1961 bond issue referendum should be prepared for the consequences. The Board found this claim false. However, the statement was corroborated by the testimony of two other teachers, although the superintendent denied making the
remark attributed to him. The Illinois Supreme Court appears to have agreed that something along the lines stated by appellant was said, since it relied, in upholding the Board's finding that appellant's version of the remark was false, on testimony by one of the two teachers that he interpreted the remark to be a prediction about the adverse consequences for the schools should the referendum not pass rather than a threat against noncooperation by teachers. However, the other teacher testified that he didn't know how to interpret the remark. Accordingly, while appellant may have misinterpreted the meaning of the remark, he did not misreport it.

(4) Appellant's letter stated that letters from teachers to newspapers had to have the approval of the superintendent before they could be submitted for publication. The Board relied in finding this statement false on the testimony by the superintendent that no approval was required by him. However, the Handbook for Teachers of the district specifically stated at that time that material submitted to local papers should be checked with the building principal and submitted in triplicate to the publicity coordinator. In particular, the teachers' letters to which appellant was specifically referring in his own letter had in fact been submitted to the superintendent prior to their publication. Thus this statement is substantially correct.

The other four statements challenged by the Board, are factually incorrect in varying degrees. (5) Appellant's letter implied that providing athletes in the schools with free lunches meant that other students must pay 35¢ instead of 30¢ for their lunches. This statement is erroneous in that while discontinuing free lunches for athletes would have permitted some small decrease in the 35¢ charge for lunch to other students, the decrease would not have brought the price down to 30¢. (6) Appellant claimed that the Board had been spending $200,000 a year on athletics while neglecting the wants
of teachers. This claim is incorrect in that the $200,000
per year figure included over $130,000 of nonrecurring
capital expenditures. (7) Appellant also claimed that
the Board had been spending $50,000 a year on transpor-
tation for athletes. This claim is completely false in
that the expenditures on travel for athletes per year were
about $10,000. (8) Finally, appellant stated that foot-
ball fields had been sodded on borrowed money, while
the Board had been unable to pay teachers' salaries.
This statement is substantially correct as to the football
fields being sodded with borrowed money because the
money spent was the proceeds of part of the bond issue,
which can fairly be characterized as borrowed. It is
incorrect insofar as it suggests that the district's teachers
had actually not been paid upon occasion, but correct if
taken to mean that the Board had at times some diffi-
culty in obtaining the funds with which to pay teachers.
The manner in which the last four statements are false
is perfectly consistent with good-faith error, and there
is no evidence in the record to show that anything other
than carelessness or insufficient information was respon-
sible for their being made.

MR. JUSTICE WHITE, concurring in part and dissenting
in part.

The Court holds that truthful statements by a school
teacher critical of the school board are within the ambit
of the First Amendment. So also are false statements
innocently or negligently made. The State may not fire
the teacher for making either unless, as I gather it, there
are special circumstances, not present in this case, dem-
onstrating an overriding state interest, such as the need
for confidentiality or the special obligations which a
teacher in a particular position may owe to his superiors.¹

¹ See ante, at 569-570, 572 and nn. 3, 4. The Court does not elabo-
rate upon its suggestion that there may be situations in which, with
The core of today's decision is the holding that Pickering's discharge must be tested by the standard of New York Times Co. v. Sullivan, 376 U. S. 254 (1964). To this extent I am in agreement.

The Court goes on, however, to reopen a question I had thought settled by New York Times and the cases that followed it, particularly Garrison v. Louisiana, 379 U. S. 64 (1964). The Court devotes several pages to re-examining the facts in order to reject the determination below that Pickering's statements harmed the school system, ante, at 570–573, when the question of harm is clearly irrelevant given the Court's determination that Pickering's statements were neither knowingly nor recklessly false and its ruling that in such circumstances a teacher may not be fired even if the statements are injurious. The Court then gratuitously suggests that when statements are found to be knowingly or recklessly false, it is an open question whether the First Amendment still protects them unless they are shown or can be presumed to have caused harm. Ante, at 574, n. 6. Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment. The Court unequivocally recognized this in Garrison, where after reargument the Court said that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." 379 U. S., at 75. The Court today neither

reference to certain areas of public comment, a teacher may have special obligations to his superiors. It simply holds that in this case, with respect to the particular public comment made by Pickering, he is more like a member of the general public and, apparently, too remote from the school board to require placing him into any special category. Further, as I read the Court's opinion, it does not foreclose the possibility that under the First Amendment a school system may have an enforceable rule, applicable to teachers, that public statements about school business must first be submitted to the authorities to check for accuracy.
explains nor justifies its withdrawal from the firm stand taken in Garrison. As I see it, a teacher may be fired without violation of the First Amendment for knowingly or recklessly making false statements regardless of their harmful impact on the schools. As the Court holds, however, in the absence of special circumstances he may not be fired if his statements were true or only negligently false, even if there is some harm to the school system. I therefore see no basis or necessity for the Court’s foray into fact-finding with respect to whether the record supports a finding as to injury. If Pickering’s false statements were either knowingly or recklessly made, injury to the school system becomes irrelevant, and the First Amendment would not prevent his discharge. For the State to be constitutionally precluded from terminating his employment, reliance on some other constitutional provision would be required.

Nor can I join the Court in its findings with regard to whether Pickering knowingly or recklessly published false statements. Neither the State in presenting its evidence nor the state tribunals in arriving at their findings and conclusions of law addressed themselves to the elements of the new standard which the Court holds the First Amendment to require in the circumstances of this case. Indeed, the state courts expressly rejected the applicability of both New York Times and Garrison. I find it wholly unsatisfactory for this Court to make the initial determination of knowing or reckless falsehood from the cold record now before us. It would be far more appropriate to remand this case to the state courts for further proceedings in light of the constitutional standard which the Court deems applicable to this case, once the relevant facts have been ascertained in appropriate proceedings.

Even if consideration of harm were necessary in this case, I could not join the Court in concluding on this record that harm to the school administration was not proved and could not be presumed.