

Fall 2017

"To Hell in a Handbasket": Teachers, Free Speech, and Matters of Public Concern in the Social Media World

Jessica O. Laurin

Bingham Greenebaum Doll LLP, JLaurin@bgdlegal.com

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Education Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Laurin, Jessica O. (2017) ""To Hell in a Handbasket": Teachers, Free Speech, and Matters of Public Concern in the Social Media World," *Indiana Law Journal*: Vol. 92 : Iss. 4 , Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol92/iss4/7>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

“To Hell in a Handbasket”: Teachers, Free Speech, and Matters of Public Concern in the Social Media World

JESSICA O. LAURIN*

“A complete and utter jerk in all ways. Although academically ok, your child has no other redeeming qualities.”¹ Natalie Munroe, a Pennsylvania public school teacher, blogged this comment as an example of what she would like to write on some of her students’ report cards.² Although her blog was not password protected, Munroe claimed that her blog was meant to be for friends only; she only had nine subscribers.³ But Munroe’s blog—entitled “Where are we going, and why are we in this handbasket?”⁴—generated public outrage after a reporter found the page and brought it to the school district’s attention.⁵ Munroe blogged under the name “Natalie M” and did not identify where she worked, where she lived, or her students’ names.⁶ Some of her comments about students, however, were specific. For example, in her post “Things From This Day That Bothered Me,” Munroe wrote, “[t]he fact that the jerk who was out 3 days around our last major assessment because his family took him on [a] trip to Puerto Rico . . . was out again today . . . because his family took him to the effing Master’s golf shit over Easter break.”⁷

Word of Munroe’s blog spread like wildfire. Students distributed copies of blog posts in the hallways, and parents requested that their children not be assigned to Munroe’s class—culminating in the school district’s decision to hire another teacher to “shadow” Munroe to accommodate parents’ concerns.⁸ The national media

* J.D. Candidate, 2017, Indiana University Maurer School of Law–Bloomington; B.A., 2014, Kenyon College. Thanks to Professor Michael McGregor for his thoughts throughout the Note-writing process; Professor Daniel Conkle for his help pointing me in the right direction; Notes & Comments Editors Drew Waldbeser and Rian Dawson for their insights and edits; the *Indiana Law Journal* staff for their diligence and hard work; and, of course, my family and friends who supported me the whole way.

1. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 459 (3d Cir. 2015).

2. *Id.* Other proposed comments include: “[c]oncerned your kid is automaton, as she just sits there emotionless for an entire 90 minutes, staring into the abyss, never volunteering to speak or do anything”; “[t]wo words come to mind: brown AND nose”; “[s]neaking, complaining, jerkoff”; “[j]ust as bad as his sibling. Don’t you know how to raise kids?”; and “[d]resses like a street walker.” *Id.*

3. *Id.* at 458.

4. *Id.* (italics omitted).

5. *Id.* at 461–62.

6. *Id.* at 458.

7. *Id.* at 460.

8. *Id.* at 462. The school district received 200 “opt-out” requests from parents, all of which were granted. *Id.* The teacher “shadow[ing]” Munroe would teach the exact same schedule, and the “shadow” teacher, rather than Munroe, would teach the students who “opt[ed]-out.” *Id.*

reported on the story,⁹ and Munroe appeared on several major television stations.¹⁰ During the school year's last couple of months, Munroe went on her prescheduled maternity leave.¹¹ She returned the following school year and received negative performance reviews.¹² That June, the school terminated Munroe.¹³ In response, Munroe filed a retaliation action against the school district, the superintendent, and the principal, arguing that she was fired because of her blog comments—thus abridging her First Amendment rights.¹⁴

Munroe is not alone. A school district in Cohasset, Massachusetts, forced June Talvitie-Siple, a supervisor of a high school math and science program, to resign after parents discovered her Facebook wall comments describing her students as “germ bags” and their parents as “snobby” and “arrogant.”¹⁵ Across the country, many public school teachers' social media presence has led to adverse employment actions rooted in the public employee free speech doctrine, which considers whether the speech is a matter of public concern and balances the employer's and the employee's interests.¹⁶

Given the surge of adverse employment actions connected to social media, it is important to note the ubiquity of social media sites. The growing use of Facebook and Twitter, two popular forms of social media, is astounding. As of December 2016, Facebook had 1.86 billion monthly active users¹⁷ and as of June 2016, Twitter had 313 million monthly active users.¹⁸ Perhaps more startling is the number of Facebook and Twitter mobile users during these time frames; Facebook had 1.74 billion mobile

9. See, e.g., Andrea Canning & Olivia Katrandjian, *Teacher Defends Insulting Blog Posts About Her Students: 'I Hear the Trash Company Is Hiring,'* ABC NEWS (Feb. 16, 2011), <http://abcnews.go.com/US/pennsylvania-teacher-wrote-insulting-blog-posts-students-suspended/story?id=12929001> [<https://perma.cc/4937-WH64>].

10. *Munroe*, 805 F.3d at 462.

11. *Id.* at 463.

12. *Id.* at 464.

13. *Id.*

14. *Id.*

15. Ki Mae Heussner & Dalia Fahmy, *Teacher Loses Job After Commenting About Students, Parents on Facebook*, ABC NEWS (Aug. 19, 2010), <http://abcnews.go.com/Technology/facebook-firing-teacher-loses-job-commenting-students-parents/story?id=11437248> [<https://perma.cc/467J-B8X5>].

16. See, e.g., *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008) (involving a teacher's MySpace comments); *In re O'Brien*, No. 108–5/11, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013) (involving a teacher's Facebook posts). As time goes on, it is likely that even more cases similar to *In re O'Brien* and *Spanierman* will reach the courts. See Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1602 (2012). The balancing test is referred to as “the *Pickering* balance” and was established in *Pickering v. Board of Education*. 391 U.S. 563, 568 (1968); see *infra* text accompanying notes 45–47.

17. *Company Info: Stats*, FACEBOOK: NEWSROOM, <http://newsroom.fb.com/company-info/> [<https://perma.cc/K3H9-ZULS>].

18. *Twitter Usage/Company Facts*, TWITTER, <https://about.twitter.com/company> [<https://perma.cc/NR4W-V63B>].

monthly active users,¹⁹ and 82% of Twitter users were active on mobile devices.²⁰ Given the continuous growth of social media use, it seems that social media will not go away any time soon;²¹ it is inexorably a part of the modern world.²²

Despite its potential problems, online speech can be valuable for teachers because of its personal and professional uses.²³ On a personal level, social media is used to deepen connections and to maintain relationships with others.²⁴ It can be used to unite people with common interests who have never met in person.²⁵ Professionally, social media allows teachers to communicate with each other and with unions; it also provides a means to keep up-to-date with teaching techniques.²⁶ But issues can arise when students stumble across a teacher's purely personal speech online.²⁷ Because it can be difficult for teachers to insulate their online speech from students, teachers may refrain from using social media at all—thus resulting in a chilling effect upon speech that has First Amendment value.²⁸ Even short of total social media abstinence, a general fear of using social media may stop teachers from expressing their concerns

19. *Company Info: Stats*, *supra* note 17.

20. *Twitter Usage/Company Facts*, *supra* note 18.

21. Just seven years ago, Facebook reported 373 million monthly active users. Eric Eldon, *Facebook Traffic Reaches Nearly 375 Million Monthly Active Users Worldwide, Led by US*, ADWEEK (Feb. 1, 2010), <http://www.adweek.com/socialtimes/facebook-traffic-reaches-nearly-375-million-monthly-active-users-worldwide-led-by-us/234992> [<https://perma.cc/K72J-52XM>].

22. See Jonah Berger & Katherine L. Milkman, *What Makes Online Content Viral?*, 49 J. MARKETING RES. 192, 192 (2012) ("Sharing online content is an integral part of modern life."); Emily H. Fulmer, Note, *Privacy Expectations and Protections for Teachers in the Internet Age*, 2010 DUKE L. & TECH. REV. No. 014 ¶¶ 1, 6 ("Social networking websites are part of modern American culture."). While all age groups have increased their social media use over time, younger generations use social media more on average. *Social Media Fact Sheet*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewinternet.org/data-trend/social-media/social-media-use-by-age-group/> [<https://perma.cc/NQF5-J6SW>]. As of November 2016, 86% of adults aged eighteen to twenty-nine use social networking sites, compared to ages thirty to forty-nine (80%) and ages fifty to sixty-four (64%). *Id.* Therefore, it is logically inferable that future generations—the ones being taught by teachers using the platform—are more likely to uncover their teachers' social media posts.

23. See Berger & Milkman, *supra* note 22, at 193 ("People may share emotionally charged content to make sense of their experiences, reduce dissonance, or deepen social connections.").

24. Papandrea, *supra* note 16, at 1606–07.

25. *Id.* at 1607.

26. *Id.* at 1606.

27. See Amy W. Estrada, Note, *Saving Face from Facebook: Arriving at a Compromise Between Schools' Concerns with Teacher Social Networking and Teachers' First Amendment Rights*, 32 T. JEFFERSON L. REV. 283, 283 (2010) ("Because a teacher's main objective in using a social networking site is not to interact with students, some of their profile content may be inappropriate in light of their professional responsibilities."); see also Papandrea, *supra* note 16, at 1608 (arguing that Facebook often poses problems for teachers because "it is difficult for users to present multiple personas to different audiences").

28. Papandrea, *supra* note 16, at 1607. Papandrea notes that privacy controls on Facebook do not completely alleviate the problem, as privacy settings can be tough to navigate and can be bypassed easily. *Id.* at 1608–09.

about valuable topics online. They may hold back or temper their opinions in important political and social dialogues.²⁹

The First Amendment protects a public employee's speech that addresses a matter of "public concern," meaning that the speech is the subject of "legitimate news interest," or, put another way, "a subject of general interest and of value and concern to the public at the time of publication."³⁰ Thus, categorizing the speech's content is a key part of First Amendment analysis. The varied content of social media posts, however, complicates the content inquiry.³¹ Munroe's case exemplifies the difficulties when an online poster blurs the personal and professional spheres. Between August 2009 and November 2010, Munroe wrote eighty-four blog posts on varying subjects. Some posts were school related, centering on Munroe's coworkers, school district administration, and students and their parents, while others were personal, focusing on Munroe's movie preferences, her children,³² and yoga classes.³³ Several posts contained both school-related and personal content.³³ Given the breadth of topics that even a single post may address, it is difficult to define the content as either a matter of public concern or not a matter of public concern. For example, Munroe wrote, "The first semester of this school year, when I had a parade of whiny, entitled kids run to the guidance department to tell on me for giving them the low grades they earned on their shoddy papers, sort of scarred me. I consider myself very fair with my grading."³⁴ Munroe's words could be viewed either as a mere workplace gripe or as part of a broader dialogue on millennials' attitudes. The latter interpretation is not farfetched. In fact, Munroe's comments fit with what Professor Berenson has asserted: "[Millennials] want it all, they want it now, and believe that they deserve it."³⁵

The court's analysis in *Munroe* exemplifies the difficulties in applying the public concern doctrine in the social media context. Through the *Munroe* case, this Note addresses current issues regarding the First Amendment's public concern requirement. Its goal is to highlight tensions within the public concern doctrine and suggest how courts should apply the doctrine in the social media context. This Note argues that courts should narrow the scope of examined speech and place little weight on the amount of media attention that the speech received. Although courts sometimes

29. *See id.* at 1607 ("To avoid the problems of controlling the audience for their information, some teachers simply . . . engage in significant self-censorship to post only the most benign content.").

30. *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam). The public concern requirement is a prerequisite to reach the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), which balances the employee's interest in speech and the employer's interest in efficiency. *Roe*, 543 U.S. at 82.

31. *See infra* text accompanying notes 74, 98.

32. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 458 (3d Cir. 2015).

33. An example is a post entitled, "Things From This Day That Bothered Me." *Id.* at 460. It contained both of the following complaints: (1) "[t]he fact that several students in 3rd block did a lame job on their easy assignment today," and (2) "[t]he new chick who seems to be on or near my elliptical all the damn time." *Id.*

34. *Id.* at 461. Another example is Munroe's comment that "this new-aged soft-on-crime/bribery and overindulgence is probably the reason that kids are so horrible today." *Id.*

35. Steven K. Berenson, *Educating Millennial Law Students for Public Obligation*, 1 CHARLOTTE L. REV. 51, 54 (2008).

reject First Amendment protection on the *Pickering* balancing test instead of the public concern issue, the public concern requirement is a threshold issue that plays a critical role in successful First Amendment claims.³⁶ Accordingly, courts need to revisit the public concern doctrine to ensure that its analysis is sound and yields the correct outcome.

Part I provides background concerning retaliation claims, criticism of the public concern requirement, and special issues that teachers face in the social media world.³⁷ Part II identifies current issues with how courts apply the public concern doctrine.³⁸ Finally, Part III suggests the best way to apply the public concern doctrine to address problems unique to social media speech.³⁹

I. RETALIATION AND TEACHERS' VULNERABILITIES

This Part explains how the public concern requirement fits into the public employee free speech doctrine and into employment retaliation claims.⁴⁰ It also addresses how public school teachers face unique problems when pursuing successful retaliation claims.⁴¹

A. *The First Amendment and Retaliation Claims*

Public employees, like all citizens, have free speech rights under the First Amendment.⁴² Thus, "a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."⁴³ To succeed in a retaliation claim, therefore, a public employee must first demonstrate that his or her speech was protected under the First Amendment.⁴⁴ Courts have long recognized that a public employer's interest in maintaining efficient performance sometimes conflicts with the free speech rights of its employees.⁴⁵ This recognition led to a special free speech doctrine for public employees developed in *Pickering v. United*

36. See *infra* text accompanying note 49; *infra* note 68 and accompanying text.

37. See *infra* Part I.

38. See *infra* Part II.

39. See *infra* Part III.

40. See *infra* Part I.A.

41. See *infra* Part I.B.

42. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (recognizing that teachers have First Amendment rights, although the rights are somewhat restricted). When a teacher speaks online, the balance between the school's and the teacher's respective interests may tend to tip toward the school; the speed at which online speech is spread may augment the disruption that the school seeks to avoid. See Heussner & Fahmy, *supra* note 15 ("The fact that [the speech is] online makes it more easily findable and have a broader potential impact." (quoting Jonathan Ezor, Assistant Professor of Law and Technology at Touro Law Center)).

43. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

44. See, e.g., *Dougherty v. Sch. Dist.*, 772 F.3d 979, 986 (3d Cir. 2014).

45. See, e.g., *Pickering*, 391 U.S. at 568. Further, when public employees speak on matters related to the workplace, they are in the position to hinder governmental functioning. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

States, where a teacher was terminated for his letter to a local newspaper that criticized the school board's handling of prior tax proposals.⁴⁶ The *Pickering* test balances an employer's interests in efficiency and the employee's interest in free speech.⁴⁷

The *Pickering* Court articulated the employee's interest narrowly: the employee's interest "as a citizen, in commenting upon matters of public concern."⁴⁸ Two subsequent United States Supreme Court cases refined the public employee free speech doctrine. First, *Connick v. Myers* established that the employee's speech must be about a matter of public concern before the court even reaches the *Pickering* balance.⁴⁹ According to the *Connick* Court, whether speech is a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record."⁵⁰ A matter of public concern is "a subject of legitimate news interest," meaning "a subject of general interest and of value and concern to the public at the time of publication."⁵¹ Second, the Court in *Garcetti v. Ceballos* held that public employees do not receive First Amendment protection when they "make statements pursuant to their official duties" because public employees do not speak in their capacity as citizens in such situations.⁵²

In addition to showing that the First Amendment protects his or her speech, the public employee must also show that there was a causal connection between the

46. 391 U.S. at 564–65.

47. *Id.* at 568.

48. *Id.* Later, the Court in *Connick v. Myers* explicitly stated why not every form of government speech should be a matter of public concern: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 461 U.S. 138, 146 (1983). Further, the Court was concerned that considering all government speech a matter of public concern would open the floodgates to constitutional causes of action. *Id.* at 149. "While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.*

49. See *Connick*, 461 U.S. at 146 ("Pickering, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."). But see Frances E. Faircloth, Note, *Freedom of Speech and Government Employees: A Reasonable Test for the Digital Age*, 6 J. MARSHALL L.J. 55, 66–67 (2012) (arguing that *Connick* did not, in fact, institute the public concern question as a threshold issue). The Court in *Connick* arguably stated the opposite: "We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." *Connick*, 461 U.S. at 147. Nevertheless, courts have interpreted *Connick* as establishing the requirement of public concern as a threshold issue; therefore, it is now recognized as such. See, e.g., *Garcetti*, 547 U.S. at 418 (designating that the question of whether or not the employee speech is a matter of public concern is the first question in determining whether or not the speech is protected).

50. *Connick*, 461 U.S. at 147–48.

51. *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam).

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

alleged retaliatory action and the protected speech.⁵³ If the public employee satisfies these elements, the government may avoid liability by showing that it would have taken the same employment action even if the employee had never spoken.⁵⁴

B. Special Issues with Teachers

Teachers are especially vulnerable to employer retaliation when the school finds that their social media posts are improper. As one scholar has noted, teachers using social media "have faced severe punishments for posting content that school officials claim interferes with a school's educational mission, sets a bad example for students, or is otherwise inappropriate or unprofessional."⁵⁵ While all areas of public employment have expectations of professionalism, teachers have always been held to a high standard.⁵⁶ The main reason for this is that public school teachers have ample opportunities to influence children and their development.⁵⁷

Although social media cases highlight society's high expectations for teachers, our expectations existed long before social media became popular.⁵⁸ Near our nation's founding, community schools had a heavy Protestant presence that emphasized morality.⁵⁹ Even with a diminished religious emphasis long after the founding, strict regulations persisted in schools. For example, rules from the early twentieth century prohibited unmarried women teachers from wearing fewer than two petticoats⁶⁰ and from "keep[ing] company with men."⁶¹ Moral expectations persisted into the mid-twentieth century when states allowed school boards to terminate or suspend teacher licenses for immoral behavior.⁶²

Today, teachers are held to high standards offline *and* on social media.⁶³ As social

53. See, e.g., *Dougherty v. Sch. Dist.*, 772 F.3d 979, 986 (3d Cir. 2014); *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 308 (D. Conn. 2008).

54. *Dougherty*, 772 F.3d at 986; *Spanierman*, 576 F. Supp. 2d at 308.

55. Papandrea, *supra* note 16, at 1604.

56. See Lumturije Akiti, Note, *Facebook Off Limits? Protecting Teachers' Private Speech on Social Networking Sites*, 47 VAL. U. L. REV. 119, 148 (2012).

57. See Rachel A. Miller, Note, *Teacher Facebook Speech: Protected or Not?*, 2011 BYU EDUC. & L.J. 637, 637 (stating that teachers are "mentors, coaches, and examples for the nation's youth").

58. See generally Angela Lumpkin, *Teachers as Role Models Teaching Character and Moral Virtues*, J. PHYSICAL EDUC. RECREATION & DANCE, Feb. 2008, at 45, 45.

59. John E. Rumel, *Beyond Nexus: A Framework for Evaluating K-12 Teacher Off-Duty Conduct and Speech in Adverse Employment and Licensure Proceedings*, 83 U. CIN. L. REV. 685, 688-89 (2015).

60. Fulmer, *supra* note 22, ¶ 28.

61. Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning*, 58 AM. U. L. REV. 1285, 1317 (2009).

62. Rumel, *supra* note 59, at 689-90. Rumel cites examples persisting into the twenty-first century, such as legislation in the California Education Code. *Id.* at 690 n.29.

63. Miller, *supra* note 57, at 639 ("While parents and communities may want their students' teachers to set a high example, teachers are average people that go to parties (sometimes where alcohol is served) and rant out their frustrations of work or school to their friends (occasionally in unpleasant terms).").

media proliferates, we will likely see more and more teachers suffer adverse employment actions due to their online speech.⁶⁴ Because many teachers understand that posting online may jeopardize their jobs, there is the risk that they may refrain from speaking online altogether.⁶⁵

II. CURRENT ISSUES WITHIN THE PUBLIC CONCERN DOCTRINE

The public concern requirement articulated in *Connick* has been widely criticized, particularly within the social media context.⁶⁶ Because the Supreme Court has not addressed social media specifically, current precedent does not provide clear guidelines for when social media speech will meet the public concern requirement.⁶⁷ Additionally, acute focus on public concern as a threshold requirement often precludes courts from ever reaching the *Pickering* balance of government and employee interests in the first place, effectively eliminating the balancing test from the equation.⁶⁸ Another criticism is that speech on social media often implicates both matters of public concern and purely private speech, thus increasing the difficulty of its proper classification.⁶⁹

Perhaps because the public concern test can be difficult to apply, recent court decisions—the latest being *Munroe*⁷⁰—have dodged a full assessment of the issue and have instead relied on the *Pickering* balance to dispose of the case.⁷¹ The *Munroe*

64. See *Snyder v. Millersville University*, No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008), for an example. Snyder was a student teacher who was denied her degree after she posted a picture of herself on MySpace wearing a pirate cap and holding a plastic cup with the caption, “drunken pirate.” *Id.* at *6.

65. See *supra* text accompanying notes 27–28.

66. See, e.g., Mark Schroeder, *Keeping the “Free” in Teacher Speech Rights: Protecting Teachers and Their Use of Social Media To Communicate with Students Beyond the Schoolhouse Gates*, 19 RICH. J.L. & TECH. 5, ¶ 200 (2013).

67. Papandrea, *supra* note 16, at 1617. Papandrea also raises the question of whether it is even necessary for non-work-related speech to meet the public concern requirement. *Id.*

68. Patricia M. Nidiffer, Comment, *Tinkering with Restrictions on Educator Speech: Can School Boards Restrict What Educators Say on Social Networking Sites?*, 36 U. DAYTON L. REV. 115, 125 (2010); see also Papandrea, *supra* note 16, at 1620 (arguing that it will be difficult for many social media cases to meet the public concern requirement). By virtue of being a threshold requirement, the public concern element of course makes it more difficult for a court to deem speech protected. However, several courts in recent teacher speech cases have assumed that the speech is a matter of public concern, while ultimately denying the retaliation claim on the *Pickering* balance. See *infra* note 71 and accompanying text. Thus, it may be that the *Pickering* balance is more of a hurdle to teachers than the *Connick* threshold requirement.

69. See *infra* text accompanying note 98. This criticism is one of the main issues that this Note addresses.

70. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 470 (3d Cir. 2015) (“[W]e reluctantly assume for the purposes of this opinion that Munroe’s speech satisfied the ‘public concern’ requirement.”).

71. See, e.g., *Richerson v. Beckon*, 337 F. App’x 637, 638 (9th Cir. 2009) (“We assume, without deciding, that at least some of Richerson’s speech was of public concern”); *Melzer v. Bd. of Educ.*, 336 F.3d 185, 196 (2d Cir. 2003) (“For purposes of Melzer’s claims, we assume *arguendo* that his activity centers on a matter of public concern, and is thus protected.” (italics in original)).

court's unwillingness to decide definitively whether the speech addressed a matter of public concern indicates discomfort applying the doctrine in this context. This Part highlights two problems with the public concern requirement in teacher social media cases: (1) the scope of the speech that the court examines, and (2) the role that media attention should play in the court's analysis.

A. The Scope of the Court's Examination: "Cherry Picking"?

To determine whether speech is a matter of public concern, *Connick* provided vague guidelines that require courts to examine the "content, form, and context of a given statement, as revealed by the whole record."⁷² But social media speech complicates this inquiry: How broad is the "whole record"? If the contested speech comes from one particular Facebook post, should the court examine *just* that post, or should it examine the entire Facebook page? Because Facebook pages often contain both protected and unprotected speech,⁷³ the scope of what the court analyzes can be determinative. Social media presents problems that traditional media does not. Compared to Facebook speech, it may well be easier to determine whether a single editorial, for instance, addresses a matter of public concern as a whole.⁷⁴

Attempting to follow *Connick*'s guidelines, the Third Circuit has applied a "no cherry picking" rule, meaning that the court cannot "cherry pick" speech that is of public concern while ignoring its overall form and context.⁷⁵ Part II.A critiques the "no cherry picking" rule, arguing that it is not necessarily a logical product of *Connick*.⁷⁶ Part II.A then underscores the relevant problems in *Munroe*⁷⁷ before addressing the larger implications for social media free speech cases.⁷⁸

1. Historical Inconsistency of the "Cherry Picking" Prohibition

Superficially, the "no cherry picking" rule properly adheres to the *Connick* standard: A court must examine the *entire* record rather than mere portions of it.⁷⁹ *Munroe* relies on authority from *Connick* and its progeny for the proposition that courts cannot "cherry pick" while ignoring the overall context of the speech.⁸⁰

While the "no cherry picking" rule has roots in *Connick*, a close reading of the case reveals that the *Connick* Court itself "cherry picked." In *Connick*, an assistant district attorney opposed her impending transfer to another office and discussed the

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

73. Emily McNee, Note, *Disrupting the Pickering Balance: First Amendment Protections for Teachers in the Digital Age*, 97 MINN. L. REV. 1818, 1838 (2013).

74. *Id.* at 1839.

75. *See, e.g., Munroe*, 805 F.3d at 467.

76. *See infra* Part II.A.1.

77. *See infra* Part II.A.2.

78. *See infra* Part II.A.3.

79. *See supra* text accompanying note 72.

80. *Munroe*, 805 F.3d at 467 ("We can not 'cherry pick' something that may impact the public while ignoring the manner and context in which that statement was made or that public concern expressed. Our inquiry must also consider the form and circumstance of the speech in question." (quoting *Miller v. Clinton Cnty.*, 544 F.3d 542, 550 (3d Cir. 2008)).

matter with her superior.⁸¹ In response to her superior's suggestion that other colleagues did not share her concerns, the assistant district attorney created and distributed a questionnaire to her colleagues that included a variety of matters: the office's transfer policy, office morale, a possible grievance committee, the level of confidence in supervisors, and any perceived pressure to work in political campaigns.⁸² With one exception, the court concluded that the questionnaire did not contain matters of public concern. The exception was the question whether employees "ever feel pressured to work in political campaigns on behalf of office supported candidates."⁸³ Only analyzing that single question, the Court conducted the *Pickering* balance.⁸⁴ By doing so, the *Connick* Court "cherry picked" a question that addressed a matter of public concern from the rest of the survey questions. This isolation is exactly what other courts have interpreted *Connick* to prohibit.

2. Application and Problems in *Munroe*

Because the prohibition on "cherry picking" is not well rooted, it is unsurprising that the court in *Munroe* struggled in applying it. The *Munroe* court noted that the school district made a "strong case" for why the speech failed to meet the public concern requirement.⁸⁵ *Munroe* stated that she blogged to keep up with friends and that most of her posts were not work related.⁸⁶ Moreover, the school district stressed "rather persuasively" that *Munroe* used her blog "to vent personal grievances or express her visceral reaction to her daily experiences."⁸⁷

Even though the school district's analysis conforms to *Connick*'s mandate of analyzing the "content, form, and context of a given statement, as revealed by the whole record,"⁸⁸ the *Munroe* court "reluctantly assume[d]" that *Munroe*'s speech met the public concern requirement.⁸⁹ The court's assumption is surprising given its observation that "Munroe's various comments about her students arguably were no different than, inter alia, her restaurant critique."⁹⁰ In so commenting, the court implicitly recognized that the blog overall was a forum for venting. Yet it proceeded to "cherry pick" particular posts—isolated from the overall context—to support its "reluctant assumption." The court reasoned that *Munroe*'s list of proposed report card comments⁹¹ was included in a post that also criticized the school's grading system, and so the post "ultimately involved more" than personal grievances against her students or the administration.⁹² Although it may be true that this post in particular "ultimately involved more" than personal grievances, that does not mean that the overall thrust

81. *Connick v. Myers*, 461 U.S. 138, 140 (1983).

82. *Id.* at 141.

83. *Id.* at 148–49.

84. *Id.* at 149–50, 154.

85. *Munroe*, 805 F.3d at 469.

86. *Id.* at 458.

87. *Id.* at 469 (quoting Brief for Appellees at 32, *Munroe*, 805 F.3d 454 (No. 14-3509)).

88. *Connick*, 461 U.S. at 147–48.

89. *Munroe*, 805 F.3d at 470.

90. *Id.*

91. *See supra* notes 1–2 and accompanying text.

92. *Munroe*, 805 F.3d at 470.

of the post addresses a matter of public concern. Even if the court is correct—that the particular post addresses a matter of public concern—the court cannot examine any one post in isolation without violating the “no cherry picking” rule. Moreover, the court noted that “there were, at the very least, *occasional* blog posts that touched on broader issues like academic integrity, honor, and the importance of hard work.”⁹³ In singling out “occasional” blog posts as addressing matters of public concern, the court, by definition, “cherry picked.”⁹⁴

Why did the *Munroe* court “cherry pick” after explicitly stating that it could not “cherry pick”?⁹⁵ Perhaps the court implicitly recognized that the social media context, because of its vastness, necessitates “cherry picking.” As *Munroe* argued, it does not make sense for the court to consider posts on “mundane topics like pie recipes and movie reviews” because such posts are unrelated to what allegedly triggered the school’s employment action.⁹⁶ Although *Munroe*’s argument is logical—as the employee must show a causal connection between the alleged retaliatory action and the protected speech—the court immediately noted that it could not “cherry pick” the particular posts that likely triggered the employment action.⁹⁷

3. Implications in the Social Media Context

As exemplified in *Munroe*, one of the primary issues in a court’s analysis is defining the “whole record.” The greater the breadth, the greater the odds are that particular speech will contain both public and private elements.⁹⁸ Social media, unlike traditional print, is potentially infinite. As one scholar points out, “social media involves extensive amounts of rapidly changing, interactive speech.”⁹⁹ Social media users can publish an endless number of posts with a click of a button.¹⁰⁰ Given the continual opportunity to post—whether from one’s computer or one’s phone—discerning the overall thrust of something so vast is potentially difficult.

Perhaps in recognition of this immense task, several courts have engaged in “cherry picking.” For example, the court in *In re O’Brien* only analyzed two of the teacher’s statements on Facebook: (1) “I’m not a teacher—I’m a warden for future criminals!” and (2) “They had a scared straight program in school—why couldn’t [I] bring [first] graders?”¹⁰¹ The court made no mention of other Facebook posts,

93. *Id.* (emphasis added).

94. An example is when the court referenced a “critical” post in which *Munroe* discussed the grading process to support its conclusion that the public concern requirement was met. *Id.*

95. “[I]t is also well established that (as we explained in *Miller*) the courts ‘can not ‘cherry pick’ something that may impact the public while ignoring the manner and context in which that statement was made or that public concern expressed.’” *Id.* at 469 (quoting *Miller v. Clinton Cnty.*, 544 F.3d 542, 550 (3d Cir. 2008)).

96. *Id.* Similarly, the defendants focused on the student-related posts in particular. *Id.*

97. *Id.*

98. Schroeder, *supra* note 66, ¶ 192.

99. *Id.* ¶ 191.

100. *See id.* (“[A]bout 62% of Facebook users update their status at least once every two weeks. Most Facebook users comment on other users’ statuses even more frequently, at least one to two days per week.”)

101. *In re O’Brien*, No. 108–5/11, 2013 WL 132508, at *1 (N.J. Super. Ct. App. Div. Jan.

although it is unlikely that these were the only two Facebook posts on the teacher's page. *Hemminghaus v. Missouri*¹⁰² is another example where the court "cherry picked." In *Hemminghaus*, a court reporter for a state circuit court judge published blog posts regarding her pending case against a nanny who allegedly abused the reporter's children.¹⁰³ Although the court reporter's posts discussed the details of her own case, the court held that the speech, "at least in part," addressed a matter of public concern.¹⁰⁴ Clearly, the fact that at least *some* of her speech did not address a matter of public concern was not fatal to the reporter's challenge.¹⁰⁵

As *O'Brien* and *Hemminghaus* illustrate, not all courts apply the "no cherry picking" rule, and for good reason. The rule restricts courts' ability to hone in on the speech that is actually relevant to the retaliation action in a potentially vast sea of information. Moreover, the prohibition on "cherry picking" does not align with how the *Connick* Court actually analyzed the form and context of the speech.¹⁰⁶

B. The Role of Media Attention: A Red Herring?

In determining whether speech meets the public concern requirement, some courts have considered the media attention that the subject of the speech has received.¹⁰⁷ In a way, analyzing the surrounding media attention is logical. As the Supreme Court in *City of San Diego v. Roe* stated, a matter of public concern is "a subject of legitimate news interest," meaning "a subject of general interest and of value and concern to the public at the time of publication."¹⁰⁸ Although it may make sense in some instances to measure the media attention received in the public concern

11, 2013) (alterations in original). Another example where the court "cherry picked" is *Spanierman v. Hughes*, in which the court noted that a teacher's MySpace page contained diverse content, including the teacher's comments to other users, comments from other users to the teacher, pictures, blogs, and poetry. 576 F. Supp. 2d 292, 310 (D. Conn. 2008). Although the court held that virtually all of the teacher's MySpace did *not* address matters of public concern, one part did address a matter of public concern—the teacher's poem about his opposition to the Iraq War. *Id.* at 310–11. True to the *Connick* Court's analysis, the *Spanierman* court held that the poem is protected speech. *Id.*

102. 756 F.3d 1100 (8th Cir. 2014).

103. *Id.* at 1111.

104. *Id.* at 1111–12.

105. *Craig v. Rich Township High School District 227* provides a similar example outside of the social media context. 736 F.3d 1110 (7th Cir. 2013). In *Craig*, the court held that a guidance counselor's book entitled *It's Her Fault* met the public concern requirement—even if parts "viewed in isolation" would not. *Id.* at 1117. While the book contained sexually explicit language and addressed provocative topics, the court determined that the book, as a whole, "addresses adult relationship dynamics, a subject that interests a significant segment of the public." *Id.* Although the court purported to conduct an analysis similar to that in *Miller* and in *Munroe*, it actually mirrored that of *O'Brien* and *Hemminghaus*. "The fact that Craig's book dealt with a subject of general interest to the public was enough to establish prima facie First Amendment protection." *Id.*

106. See *supra* text accompanying notes 83–84.

107. See, e.g., *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 165 (2d Cir. 2006).

108. 543 U.S. 77, 83–84 (2004) (per curiam).

analysis, how news disseminates in the modern age may potentially obscure the speech's true nature.¹⁰⁹ Part II.B critiques the *Munroe* court's analysis of media attention¹¹⁰ and analyzes the larger implications of media attention in the public concern analysis.¹¹¹

1. Application and Problems in *Munroe*

Quickly after *Munroe* suffered adverse employment action, the national media picked up her story with gusto.¹¹² According to *Munroe*, she gave several interviews to defend her entries and to focus attention on the nebulous "[e]ducation [d]ebate."¹¹³ The court concluded that "the extensive media coverage of [*Munroe*'s] blog and the statements she made to the media generally indicated that *Munroe* met the 'public concern' element."¹¹⁴ However, the court expressed skepticism that the news coverage had significant bearing on the public concern question. The court was "troubled" for two reasons: first, that *Munroe*'s primary motivation in the interviews was to defend herself, and second, that the record contained little-to-no evidence regarding the content of the interviews apart from *Munroe*'s description of them.¹¹⁵ Additionally, the court made a persuasive point—albeit hidden in a footnote—that it was possible that the public did not actually care about *Munroe*'s views on the "education debate," but rather was interested in the blog posts and whether teachers can or should make such comments.¹¹⁶ Indeed, most Internet headlines about *Munroe* do not indicate a concern for modern education¹¹⁷ or anything resembling *Munroe*'s comments about academic integrity.¹¹⁸

109. See *infra* text accompanying notes 137–38.

110. See *infra* Part II.B.1.

111. See *infra* Part II.B.2.

112. See *supra* text accompanying notes 9–10.

113. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 470 (3d Cir. 2015). The court did not provide any further explanation for what the "Education Debate" entails.

114. *Id.* at 470–71.

115. *Id.* at 470.

116. *Id.* at 471 n.8.

117. For example, an ABC headline was *Teacher Defends Insulting Blog Posts About Her Students: 'I Hear the Trash Company Is Hiring.'* Canning & Katrandjian, *supra* note 9; see also Edecio Martinez, *Natalie Munroe Blog: Pa. Teacher Suspended over Online Blasts at Students*, CBS NEWS (Feb. 16, 2011, 11:59 AM), <http://www.cbsnews.com/news/natalie-munroe-blog-pa-teacher-suspended-over-online-blasts-at-students/> [https://perma.cc/9GAD-B225]; Jillian Eugenios, *Teacher Who Called Students 'Loathsome,' 'Rat-Like' Is Fired*, TODAY.COM: NEWS (June 28, 2012, 10:25 AM), http://www.today.com/id/47994422/ns/today-today_news/t/teacher-who-called-students-loathsome-rat-like-fired/#.WMme9c6yxlo [https://perma.cc/B3WW-BF5U]. But see Vicki Glembocki, *Natalie Munroe: A Tale of a Teacher in the Digital Age*, PHILA. MAG (Apr. 29, 2011), <http://www.phillymag.com/articles/natalie-munroe-a-tale-of-a-teacher-in-a-digital-age/5/> (discussing how *Munroe* is "trying to change education") [https://perma.cc/2JF2-6WGY].

118. See *Munroe*, 805 F.3d at 461 ("TWO days after my lofty speeches, and a single day after they all signed the [honesty] pledge and pledge wall . . . someone [described as "that girl in the back in pink"] had consciously made a cheat sheet and brought it in and intended to cheat." (alterations in original)).

The dissent in *Munroe* makes a similar point, arguing that the interviews undoubtedly addressed a matter of public concern because Munroe's interviews focused on an ongoing debate: suspending teachers for criticizing their students online and the "harsh realities of the 21st century classroom."¹¹⁹ However, the dissent confuses the public's reaction to the post and the content of the posts *themselves*—which had nothing to do with how teachers should behave on social media and how schools should respond. If Munroe had blogged about how teachers are disciplined for their social media speech, the dissent's argument would be persuasive. However, Munroe made no such comments.

Although the *Munroe* court's discussion of Munroe's media attention is brief, the court's affirmation that the media attention had bearing on the public concern question reveals that it is still something that courts consider. Even so, the court is reluctant to place much weight on media attention. Especially in light of the court's questionable assumption that Munroe's speech met the public concern requirement,¹²⁰ it seems that the *Munroe* court grasped to find support for its assumption. Examining the current state of the media may help uncover why the court hesitated to give media attention much analytical significance.

2. Implications in the Social Media Context

Social media has changed the face of journalism.¹²¹ Instead of reading only what editors picked for the front page, many people read what pops up on their social network accounts.¹²² What pops up on social media depends, in large part, on what social media "friends" find interesting.¹²³ And disseminating information on social media is easy; it only requires a click of a button.¹²⁴ As a result, social media allows

119. *Id.* at 483 (Ambro, J., dissenting) (quoting Kayla Webley, *How One Teacher's Angry Blog Sparked a Viral Classroom Debate*, TIME (Feb. 18, 2011), <http://content.time.com/time/nation/article/0,8599,2052123,00.html> [<https://perma.cc/WC5M-APQF>]).

120. *Id.* at 470.

121. See Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1535–39 (2012) (describing the decline of traditional print media); see also Ryan Holmes, *Facebook vs. Twitter vs. Snapchat: Who Will Win the News Wars?*, LINKEDIN (Oct. 14, 2015), <https://www.linkedin.com/pulse/facebook-vs-twitter-snapchat-who-win-news-wars-ryan-holmes>. Since 2009, viewership on top U.S. networks has dropped 19%. *Id.*

122. See Levi, *supra* note 121, at 1550–51 ("Readers do not automatically rely on the editorial judgment of professional newspaper editors even to create the front page. Instead, they depend on their friends and social media networks to recommend what news to follow."); Brian E. Weeks & R. Lance Holbert, *Predicting Dissemination of News Content in Social Media: A Focus on Reception, Friending, and Partisanship*, 90 JOURNALISM & MASS COMM. Q. 212, 214 (2013) (describing how traditional communication through mass media is a "one-way, top-down, sender-driven, time-specific activity," whereas social media communication involves consumer choice).

123. See Levi, *supra* note 121, at 1550–51.

124. Weeks & Holbert, *supra* note 122, at 214. Weeks and Holbert contrast the convenience of using social media to disseminate news with the more "onerous" task of sharing content using traditional media. *Id.* Compare sharing a news story on Facebook with clipping stories out of newspapers to share with friends. See *id.*

immediate "viralization and amplification" of information.¹²⁵

The combination of bottom-up consumer choice and easy dissemination of information raises an important question: Does vast media attention indicate that the content spread is of "legitimate news interest?"¹²⁶ In other words, is what goes viral truly "newsworthy?"¹²⁷ Jonah Berger's and Katherine L. Milkman's seminal study provides valuable insight.¹²⁸ From a psychological perspective, the study aimed to determine what makes something "go viral."¹²⁹ Berger and Milkman found that positive content tends to be more viral than negative content.¹³⁰ However, their results were more complex than a binary positive/negative divide. Berger and Milkman broke positive and negative emotions down further into levels of "activation":

Sadness, anger, and anxiety are all negative emotions, but while sadder content is less viral, content that evokes more anxiety or anger is actually more viral. These findings are consistent with our hypothesis about how arousal shapes social transmission. Positive and negative emotions characterized by activation or arousal (i.e., awe, anxiety, and anger) are positively linked to virality, while emotions characterized by deactivation (i.e., sadness) are negatively linked to virality.¹³¹

If Berger and Milkman are correct, what garners media attention has less to do with the content itself and more to do with the type of emotion the content evokes—which in turn affects *what* is shared. And what individuals choose to share shapes what becomes viral in public discourse.¹³²

Berger's and Milkman's study has important implications for litigation involving social media. Stories that provoke high levels of emotion are more likely to get lots of circulation. This is exactly what happened in Munroe's case. Her blog "went viral," which led to an extreme public reaction in which students and parents voiced "shock and outrage" that Munroe wrote such "derogatory" comments.¹³³ As one scholar noted, "to the extent that the selection of stories is influenced by trending on Twitter, it is possible that attention will be distracted by 'superheated' stories whose relative importance is not assessed."¹³⁴ For example, a 2011 study of trending on

125. Levi, *supra* note 121, at 1553. Note that sharing on social media often snowballs into more sharing using this venue. See Weeks & Holbert, *supra* note 122, at 215 ("The more frequently people receive news via social media, the more likely they are to disseminate it within that same environment.").

126. *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam).

127. See Levi, *supra* note 121, at 1565–66 (discussing what is considered "newsworthy" in the modern age in relation to what is "trending" on Twitter).

128. Berger & Milkman, *supra* note 22.

129. *Id.* at 192.

130. *Id.* at 199.

131. *Id.*

132. *Id.* at 201; see also Weeks & Holbert, *supra* note 122, at 213 ("What makes social media a unique platform for news is the ability it affords citizens to now act as efficient content distributors, and it is necessary to understand if and when people disseminate news in this digital environment.").

133. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 463, 469 (3d Cir. 2015).

134. Levi, *supra* note 121, at 1566.

Twitter found that news about Justin Bieber was more popular than news about world affairs.¹³⁵

While public concern is not measured by its “importance,”¹³⁶ factors apart from the content of the speech itself may potentially obscure *why* something is getting media attention.¹³⁷ The problem is acute in social media cases like *Munroe*’s, where the teacher makes offensive comments about his or her students, because these cases are attention grabbing and tend to evoke strong reactions.¹³⁸ There is a danger that courts will conflate “newsworthiness” with “virality,” thus placing the focus on the public’s reaction to the speech rather than the speech itself.

III. BEST WAY TO APPLY THE PUBLIC CONCERN DOCTRINE

Given the rise of social media, a reexamination of the public concern requirement is necessary. While the particular “speech” that a court analyzes often contains more than one statement, the number of statements involved in social media cases is likely to be much more expansive than in traditional media. Moreover, as individuals post ever more frequently on a variety of websites regarding a variety of topics, it becomes easier to share news within social media platforms.

Courts must take these changes into account when analyzing whether the public concern requirement is met in social media cases. This Part suggests how courts should tweak their analyses of the public concern requirement in the social media age. First, Part III.A proposes that courts narrow the scope of the particular speech they examine.¹³⁹ Then, Part III.B suggests that courts should give little consideration, if any, to the amount of media attention that the speech receives.¹⁴⁰

A. Courts Must Narrow the Scope of the Particular Speech They Examine

As the Third Circuit’s opinion in *Munroe* makes evident, determining whether speech on social media meets the public concern requirement can be difficult. The main source of trouble is the potential breadth of online speech. In *Munroe*, the court faced a variety of topics, from favorite foods,¹⁴¹ to frustrating students,¹⁴² to modern

135. *Id.* at 1565–66.

136. *Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1116 (7th Cir. 2013) (“[T]he speech need not address a topic of great societal importance, or even pique the interest of a large segment of the public, in order to be safeguarded by the First Amendment.”).

137. *See supra* text accompanying notes 116–18.

138. *See supra* text accompanying note 133; *see also* Berger & Milkman, *supra* note 22, at 214 (“More emotional, positive, interesting, and anger-inducing and fewer sadness-inducing stories are likely to make the most blogged list. Notably, the effect of practical utility reverses: Although a practically useful story is more likely to make the most e-mailed list, practically useful content is marginally less likely to be blogged about. This may be due in part to the nature of blogs as commentary.” (emphasis omitted)).

139. *See infra* Part III.A.

140. *See infra* Part III.B.

141. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 458 (3d Cir. 2015).

142. *Id.*

music.¹⁴³ To reduce the extent of the speech that courts must deal with—and to zero in on the speech that is germane—courts should focus on specific online posts rather than the social media page’s entirety.

A separate analysis for each post would make it easier for courts to classify the speech properly. Instead of having to determine the overall thrust of a potentially broad array of materials,¹⁴⁴ in most cases courts could focus on a modest amount of speech.¹⁴⁵ This narrow focus would reduce the instances where the court would have to make sweeping, perhaps arbitrary, statements about the overall thrust of the speech.¹⁴⁶

Moreover, courts can focus on posts that are reasonably relevant to the employment action.¹⁴⁷ By focusing on posts that reasonably could have played a role in the school’s termination decision, a court would not need to examine every single one of an individual’s Facebook posts from the page’s inception. Which speech played a role in the employment action may not be abundantly clear in all cases, but it likely would not be difficult for the courts to eliminate evidently irrelevant speech.¹⁴⁸ It is important to remember that establishing that the speech was protected is only a preliminary step in a successful retaliation claim; the employee must also show that there was a causal connection between the alleged retaliatory action and the protected speech.¹⁴⁹ If it is obvious that parts of a blog bear no relation to the employment decision, there is little value in the court deciding whether those parts met the public concern requirement.¹⁵⁰

Even though examining individual posts separately has its benefits, sometimes examining the webpage’s broader context is a useful analytical tool. Social media can be used to tell a narrative. According to Munroe, her blog was “replete with references to her life’s experience as an English teacher in an affluent, suburban Philadelphia School District.”¹⁵¹ The general themes throughout a social media page

143. *Id.* at 460.

144. *See* Schroeder, *supra* note 66, ¶ 191 (“A typical Facebook page, for example, contains numerous text postings and a variety of pictures and videos. These postings likely involve some political or religious speech as well as speech on personal matters.”).

145. Reducing the scope of what the court examines makes the social media speech more finite, more like a single editorial. *See supra* text accompanying notes 73–74.

146. *See supra* text accompanying notes 92–93.

147. Munroe argued that the court should not examine every single one of her posts because some were clearly not a part of the controversy. *Munroe*, 805 F.3d at 469. Her posts on pie recipes, for example, obviously bore no relation to the employment action against Munroe. *See id.*

148. *See id.*

149. *See supra* text accompanying note 53.

150. In *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310–11 (D. Conn. 2008), the court “cherry picked” portions of the teacher’s MySpace page. The court held that only the teacher’s poem about the Iraq War was protected, and thus continued the analysis. *Id.* The court found no evidence of a causal connection between the poem and the school’s employment decision. *Id.* Because complaints about the teacher’s page had to do with his “very peer-to-peer like” posts as well as pictures of naked men, it seems silly for the court to waste words in its opinion analyzing the political poem. *Id.* at 298.

151. *Munroe*, 805 F.3d at 469 (quoting Brief and Appendix for Appellant at 23, *Munroe*, 805 F.3d 454 (No. 14-5309)).

could conceivably provide insight into the nature of a particular post or posts. Perhaps a court could examine a cluster of posts together when their nature is truly ambiguous. But it is unnecessary to discern the webpage's overall theme regarding posts that are obviously *unrelated* to the theme. The purpose of examining posts separately is to excise certain topics from the court's analysis that clearly have no bearing on the employment decision. Allowing courts to escape the "overall thrust" analysis for the *entire* page would save time and words.

B. Media Attention Should Play a Minimal Role in the Public Concern Analysis

Although the court in *Munroe* did not spend a great deal of time discussing Munroe's media attention, the fact that it focused on it at all may have been a mistake. Relying on media attention as support for its "reluctant[] assum[ption]" that the public concern requirement was met,¹⁵² the court shifted focus from the blog's content to the public's reaction to it.¹⁵³ Because considering media attention may obscure the analysis, courts should place little—if any—emphasis on the media surrounding the controversy within the public concern analysis.

If courts do not consider the level of media attention, they will avoid problems of identifying what the media attention was really about. In *Munroe*, for example, the court grappled with the true reason why Munroe's case was making such a splash. Did it have to do with the "education debate,"¹⁵⁴ whether teachers should be fired for making such comments,¹⁵⁵ the pure viciousness of the comments,¹⁵⁶ or something else entirely? If the courts ignore the amount of media attention as a consideration, they will not have to discern whether the public reacted to the posted content itself.

Although media attention may potentially confuse the analysis, media attention *can* play a legitimate role in assessing the public concern inquiry.¹⁵⁷ The big question is whether media attention—which today often involves viral content—is an indication of newsworthiness. There is not a clear answer, but in some cases it seems that the answer is yes. It has been posited that the Black Lives Matter movement¹⁵⁸ and the Egyptian Revolution¹⁵⁹ would not have become as widespread without social

152. *Id.* at 470.

153. *See supra* text accompanying note 114.

154. *See supra* text accompanying note 116.

155. *See supra* text accompanying note 119.

156. *See supra* text accompanying note 138. The importance of whether "virality" is an indication of "newsworthiness" is especially salient in this context.

157. For example, in *Cioffi v. Averill Park Central School District*, a school athletic director was suspended for his letter and press conferences regarding the school's handling of a hazing incident. 444 F.3d 158, 161 (2d Cir. 2006). Although the court did not consider the media attention surrounding the hazing, it noted that "the fact of actual public interest further convinces us that Cioffi's communications touch upon matters of public concern." *Id.* at 165. However, there was already a "media frenzy" surrounding the hazing even before the teacher spoke; unlike in *Munroe*, the media attention was not reactionary. *Id.*

158. *See* Katie Dupere, *How Black Lives Matter Made the Leap from Social Media to Social Action*, MASHABLE (Sept. 19, 2016), <http://mashable.com/2016/09/19/black-lives-matter-social-good-summit-2016/#PCgSevc1Vgqw> [<https://perma.cc/8WVD-62U3>].

159. *See* Asmaa Mahfouz & the YouTube Video That Helped Spark the Egyptian Uprising, DEMOCRACY NOW! (Feb. 8, 2011), <http://www.democracynow.org/2011/2/8/asmaa>

media platforms and the rise of "digital-enabled citizen journalism."¹⁶⁰ News surrounding the Egyptian Revolution went "viral" and likely contained "subject[s] of legitimate news interest."¹⁶¹

However, if the speech at issue involved events such as the Egyptian Revolution, a court would not likely need to resort to media attention in order to conclude that the speech constituted a matter of public concern.¹⁶² Instead, a court would more likely base its decision primarily on the content.¹⁶³ In easier public concern inquiries, then, examining the role of media attention may not serve as a particularly useful tool.

But what about when the public concern question is not clear-cut? In these instances, courts may examine media attention to support a reasonable answer.¹⁶⁴ When there is uncertainty regarding why the speech garnered media attention, there is a greater concern that a reactionary media obscured the true nature of the speech—perhaps by emphasizing certain aspects of the story that are more emotionally charged without delving into the speech's actual content. *Connick* requires that the speech *itself* must address a matter of public concern to be protected.¹⁶⁵ Thus, courts should not allow media attention to cloud the analysis and detract or distract from analyzing the speech at issue.

CONCLUSION

Given the difficulties that the public concern requirement poses, scholars have called for various solutions. Some scholars suggest that it is best to eliminate public concern from the public employee speech doctrine altogether.¹⁶⁶ Others suggest shifting the public concern element from a threshold requirement to a lesser role in the analysis. For example, public concern could be merely a factor in the balancing

_mahfouz_the_youtube_video_that [<https://perma.cc/7RP9-B98S>]; *see also* Timothy McGrath, *14 Protest Videos That Went Viral and Changed the World*, SALON (Feb. 25, 2014, 9:00 AM), http://www.salon.com/2014/02/25/14_protest_videos_that_went_viral_and_changed_the_world_partner/ [<https://perma.cc/LE2X-LQYT>].

160. Holmes, *supra* note 121.

161. *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam).

162. Political expression is generally protected with little inquiry. *See Spanierman v. Hughes*, 576 F. Supp. 2d 292, 310–11 (D. Conn. 2008) (holding that the teacher's poem about the Iraq War could constitute political expression, which would render it protected under the First Amendment).

163. As the court in *Cioffi* noted, "We do not mean to say that if there is no media interest in the subject matter of the employee's speech that the speech is not of public concern. Rather in this case, the fact of actual public interest further convinces us that Cioffi's communications touch upon matters of public concern." *Cioffi v. Averill Park Cent. Sch. Dist.*, 444 F.3d 158, 165 (2d Cir. 2006).

164. *Munroe* is a good example. *See supra* text accompanying note 120.

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

166. *See, e.g., Papandrea, supra* note 16, at 1630 (noting that the public concern requirement allows the government to restrict speech without showing disruption); *see also* Schroeder, *supra* note 66, at ¶ 182 (arguing that the public concern requirement should be eliminated with respect to a teacher's off-campus speech).

test.¹⁶⁷ While the public concern requirement has its faults, its purpose is still relevant today. The public concern requirement is a gate-keeping tool for federal court claims.¹⁶⁸ Given the rise of social media and the unprecedented fact patterns that court must analyze,¹⁶⁹ the public concern requirement may very well help keep certain claims out of the system.

While judicial efficiency is important, reaching the correct result is imperative. Thus, how courts apply the public concern doctrine should be tweaked to account for unique aspects of social media. Social media pages that contain lots of posts—often unrelated to the litigation—make for a more difficult public concern analysis. To target relevant speech that will actually have bearing on the substantial motivation question and to alleviate a potentially daunting task,¹⁷⁰ courts should analyze posts separately when answering the public concern question. Moreover, to avoid obscuring the speech's true nature, courts should avoid using related media attention as a factor in the public concern analysis. However the courts decide to analyze the public concern requirement in the future, they must continually reassess the doctrine to ensure that it makes sense considering ever-evolving platforms.

167. Seog Hun Jo, *The Legal Standard on the Scope of Teachers' Free Speech Rights in the School Setting*, 31 J.L. & EDUC. 413, 429 (2002). Note that the *Munroe* court essentially injected the weak public concern interest into the *Pickering* balancing test. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015) (“Given our reluctance to assume that the speech at issue here implicated a matter of public concern in the first place, we determine that the interests of *Munroe* and the public in this speech were entitled to (at best) only minimal weight under the *Pickering* balancing test.” (italics in original)).

168. *Melzer v. Bd. of Educ.*, 336 F.3d 185, 193 (2d Cir. 2003); see also *Connick*, 461 U.S. at 149 (“To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.”).

169. Consider also the possibility that new advancements in social media may spark further free speech litigation issues that we cannot now even imagine.

170. See *supra* text accompanying note 53.