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Rankin v. McPherson: The Court Handcuffs Public Employers

Richard M. Glovin

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The United States Constitution guarantees citizens the right to express themselves through conduct, speech or religious practice without interference by the government. In *Rankin v. McPherson*, the United States Supreme Court balanced the interest of a public employee in free speech against the interest of the government in efficiency and discipline in the workplace, holding invalid the discharge of the employee for exercise of the right to speech. The Supreme Court first considered whether statements made in a private conversation at work are of public interest. If the statements are of public interest, the Supreme Court balances the right of expression by the employee against the need of the employer to maintain discipline in the office.

The plaintiff in *Rankin*, Ardith McPherson, was summarily discharged from her county computer data entry job for making a
comment to a co-worker about an assassination attempt on President Reagan.\textsuperscript{6} McPherson sued under Title 42 United States Code, section 1983,\textsuperscript{7} for deprivation of the right to free expression guaranteed to her by the first and fourteenth amendments to the United States Constitution.\textsuperscript{8} The Supreme Court concluded that Rankin’s interest in the discipline of his office did not outweigh McPherson’s rights under the first amendment.\textsuperscript{9}

Part I of this Note examines the historical and legal background leading to the \textit{Rankin} decision, concentrating on the analysis used by the Supreme Court.\textsuperscript{10} Part II summarizes the facts of \textit{Rankin} and discusses the opinion of the Supreme Court.\textsuperscript{11} Finally, Part III discusses the effects and ramifications of the case.\textsuperscript{12}

I. LEGAL BACKGROUND

A. Historical Background: 1892-1983

The initial case concerning the issue of the rights of public employees to freedom of expression is \textit{McAuliffe v. Mayor of New Bedford}.\textsuperscript{13} McAuliffe, a policeman, was terminated for soliciting campaign funds in contravention of department regulations.\textsuperscript{14} The Supreme Court of Massachusetts decided the issue of McAuliffe’s right to be active in politics as this right relates to the interest of the police department in banning political activity of officers.\textsuperscript{15} Justice Holmes stated that

\begin{itemize}
\item \textsuperscript{6} \textit{Id.} at 2895. McPherson’s comment was reported differently in two of the transcripts of the various proceedings. \textit{Id.} at 2895 n.3. In essence her comment was, “I hope if they go for him again, they get him.” \textit{Id.}
\item \textsuperscript{7} Title 42 United States Code, section 1983, provides in part:
\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1976 & Supp. 1979).
\end{quote}
\item \textsuperscript{8} \textit{Rankin}, 107 S.Ct. at 2895. McPherson sought reinstatement, back pay, costs and fees, and any other equitable relief. \textit{Id.}
\item \textsuperscript{9} \textit{Id.} at 2900.
\item \textsuperscript{10} See \textit{infra} notes 13-96 and accompanying text.
\item \textsuperscript{11} See \textit{infra} notes 97-150 and accompanying text.
\item \textsuperscript{12} See \textit{infra} text accompanying notes 151-74.
\item \textsuperscript{13} 155 Mass. 216, 29 N.E. 517 (1892).
\item \textsuperscript{14} \textit{McAuliffe}, 155 Mass. at 217, 29 N.E. at 517.
\item \textsuperscript{15} \textit{Id.}
\end{itemize}
McAuliffe had a constitutional right to "talk politics," but had to forfeit his job to exercise that right.16 On the basis of the McAuliffe decision, until the mid-twentieth century courts have treated public employment as a privilege, requiring forfeiture of first amendment rights by the employee.17

In the 1950s and 1960s, the United States Supreme Court began favoring protection of free expression by public employees.18 A progression of decisions reversed the philosophy of the McAuliffe Court.19 In 1952, the Supreme Court in Wieman v. Updegraff20 protected public workers against restricted employment opportunities due to their political beliefs.21 In Wieman, college faculty members refused to take an oath of loyalty as required by a state act.22 The Supreme Court

16. Id. at 220, 29 N.E. at 517-18.
17. See, e.g., Adler v. Board of Educ., 342 U.S. 485, 492 (1952) (upholding a statute that barred Civil Service employment for expression of political views or membership in organizations advocating the violent overthrow of the United States government); Garner v. Board of Pub. Works, 341 U.S. 716, 720 (1951) (affirming the decision of the city to deny employment to those who refused to take an oath of loyalty); United Pub. Workers of Am., C.I.O. v. Mitchell, 330 U.S. 75, 93 (1947) (ruling that Civil Service employees may be barred from participation in political management and political campaigns by the Hatch Act); United States v. Wurzbach, 280 U.S. 396, 398-99 (1930) (holding government employees subject to criminal prosecution for directly or indirectly soliciting political contributions); see generally Dev. in the Law-Public Employment, 97 Harv. L. Rev. 1611, 1756 (1984) [hereinafter Developments] (tracing the origin and developments of the extension of first amendment rights to public employees).
18. E.g., Developments, supra note 17, at 1756.
19. See Noto v. United States, 367 U.S. 290, 291 (1961) (protecting individuals from criminal prosecution based solely on membership in political organizations). John Noto was convicted of violating the Smith Act which imposes criminal sanctions for knowingly maintaining membership in a political organization that advocates overthrow of the government. Id.; see 18 U.S.C. § 2385 (1982). The United States Supreme Court reversed Noto's conviction ruling that one who is in sympathy with the legitimate goals of the organization but who does not personally advocate violent overthrow cannot be convicted. Noto, 367 U.S. at 299-300; see Elfrandt v. Russell, 384 U.S. 11, 19 (1966) (holding that the state could not condition employment on oaths of political fidelity). Elfrandt extended protection against discrimination due to political affiliations to public employees five years after Noto. Id. at 19. See Sherbert v. Verner, 374 U.S. 398, 399 (1963) (deciding that the state could not discharge and deny workers' compensation privileges on the basis of religion). Sherbert involved an employee who was terminated and denied compensation for not working on a religious holiday. Id. at 399. See also New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964) (ruling criticism of the government officials protected by first amendment unless statements made with knowing or reckless disregard of the truth); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (despite contrary state law, United States Constitution protects accusations by district attorney that local judges are lazy and inefficient). In deciding New York Times and Garrison, the Supreme Court emphasized that the Constitution was intended to protect and encourage energetic discussion and criticism of the government. New York Times, 376 U.S. at 269-71 (establishing "actual malice" standard in libel cases criticizing government officials); Garrison, 379 U.S. at 74-75 (reestablishing that speech concerning public affairs is the essence of self-government).
20. 344 U.S. 183 (1952) (holding that the state could not condition employment on an oath of office requiring renunciation of specified political beliefs).
21. Id. at 191.
22. Id. at 185.
held that the act was an indiscriminate assertion of state power which stifled democratic expression.\(^\text{21}\) In the 1967 decision, *Keyishian v. Board of Regents*,\(^\text{24}\) the Supreme Court invalidated two New York statutes\(^\text{25}\) conditioning public employment on unreasonable restrictions of first amendment rights of employees.\(^\text{26}\) The Supreme Court held that academic freedom was a special concern of the first amendment and laws that curtailed the open exchange of ideas could not be tolerated.\(^\text{27}\) By the late 1960s, the Supreme Court protected most political speech.\(^\text{28}\)

The cases leading up to *Pickering v. Board of Education*\(^\text{29}\) thawed the chill on freedom of expression established by *McAuliffe*.\(^\text{30}\) The Supreme Court used the *Pickering* decision to augment the first amendment as an avenue for the exchange of ideas to promote political and social change.\(^\text{31}\) In *Pickering*, a teacher, acting as a private citizen, wrote a letter to the editor of a local newspaper criticizing support of a tax increase by some school board administrators.\(^\text{32}\) Additionally, Pickering criticized the allocation of available funds between athletics and education.\(^\text{33}\) The Supreme Court established a two-prong test to analyze the competing interests of the state and the employee.\(^\text{34}\) In the first step of the *Pickering* test, a court must determine if the statement

\(^{23}\) *Id.* at 191.

\(^{24}\) 385 U.S. 589 (1967).

\(^{25}\) N.Y. Educ. Law § 3021 (McKinney 1981) (requiring removal of persons from the public school system for subversive statements or acts); N.Y. Civ. Serv. Law § 105 (McKinney 1983) (requiring removal of public employees for seditious or treasonable acts or statements). *See* *Keyishian* v. *Board of Regents*, 385 U.S. 589, 599. The Supreme Court held that using the words "treasonable," "seditious," or "subversive person" without definitions was unconstitutionally vague. *Id.*

\(^{26}\) *Keyishian*, 385 U.S. at 604-06 The employment contracts incorporated statutes that prohibited advocacy of seditious doctrines. *Id.* at 595-96.

\(^{27}\) *Id.* at 603.


\(^{29}\) 391 U.S. 563 (1968).


\(^{31}\) *See* *Pickering*, 391 U.S. at 571-72 (ruling that teachers as a class must be able to speak out without fear of retaliatory dismissal).

\(^{32}\) *Id.* at 566.

\(^{33}\) *Id.*

\(^{34}\) *Id.* at 568, 569-70. The balance test developed by the Supreme Court in *Pickering* involves two parts: first, the court determines whether the content of the speech is of public concern and second, if the speech is a matter of public concern, the employee's right is balanced against the interest in efficiency of the employer. *Id.*
of the employee is a matter of public concern. If the speech is classified as a matter of public concern, the right of the employee to free expression is balanced against the interest of the employer in maintaining efficiency and discipline in the work environment. The Supreme Court held that the topics commented on by Pickering were matters of public concern, noting that open expression was “vital” to a well-informed electorate. The Supreme Court further held that in the absence of knowingly false statements and opinions by Pickering, statements on issues of public importance could not serve as a basis for his discharge from public employment.

B. Modern Analyses of the First Amendment Rights of Public Employees

By 1983, when Connick v. Myers was decided, communications by public employees as citizens, public actions by public employees, and private communications between employee and employer were protected by the Supreme Court. Connick came about when Sheila Myers, an assistant district attorney, refused to accept a transfer from the probationer counselling program to the criminal prosecution department. Due to her current counselling assignment, Myers felt the transfer would cause a conflict of interest by forcing her to prosecute repeat offenders whom she had previously counselled, thereby compromising her effectiveness. Ultimately, Myers circulated a questionnaire within the office challenging transfer rules and general office policies regarding management and special assignments. As a result of the mini-insurrection, Myers was terminated for refusing to accept the transfer, interfering with the efficient functioning and morale of

35. Pickering, 391 U.S. at 568.
36. Id. at 571-72.
37. Id. at 572-74.
39. See Perry v. Sindermann, 408 U.S. 593, 603 (1972) (protecting the testimony of a Texas State College teacher before state legislature on upgrading a junior college to a four year institution).
42. Connick, 461 U.S. at 140 n.1. Myers had been employed by the District Attorney's office for five and one-half years. Id. at 140.
43. Id. at 140 n.1.
44. Id. at 141.
the office, and damaging the authority of the District Attorney. The Supreme Court added refinements to the Pickering balancing test by permitting additional constraints on expression by public employees. The Supreme Court held that when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the judgment of the employer is appropriate. The Supreme Court cautioned, however, that a stronger showing by the government may be necessary to justify the termination when the speech of the employee substantially involves matters of public concern. Moreover, the Supreme Court established that greater weight should be accorded to the employer in regulating speech when the employee has threatened the authority of the employer to run the office.

The Supreme Court found that one question on Myers' questionnaire touched on a matter of public concern. Thus, Myers' expression satisfied the classification prong of the Pickering test. However, Myers failed to satisfy the second condition of the Pickering test, balancing the competing interests of the employee and employer because her questionnaire, if released to the public, could not convey useful information to the electorate. Therefore, the Supreme Court found that the expression of Myers was not protected by the first amendment.

Applying the balancing portion of the Pickering test, the Supreme Court in Connick relied on the doctrine announced in Elrod v. Burns and extended by Branti v. Finkel. The Elrod/Branti doctrine predi-

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45. Id.
46. Id. at 151-52.
47. Id. at 152.
48. Id. at 153.
49. Id. at 149. Only Question 11 on the form, whether other assistant district attorneys ever feel pressured to work in political campaigns on behalf of office supported candidates, satisfied the threshold requirement of "public concern" to initiate a balancing of the interests of the parties. Id.
52. Id. at 154.
54. 445 U.S. 507, 519-20 (1980) (holding that Assistant Public Defenders could not be
icated the appropriateness of the discharge on whether political affiliation interfered with effective performance by the employee.\textsuperscript{55} The Supreme Court stated that classification of employees as "policymaking" or "confidential" was not indicative of an employee's ability to effectively perform a job.\textsuperscript{56} Therefore, classification was insufficient to determine when political affiliation was a legitimate factor relevant to office efficiency.\textsuperscript{57} Moreover, requiring an employee to adhere to a particular political affiliation was coercive and violative of the right to freedom of belief and association.\textsuperscript{58} Thus, the status of the employee within the office was no longer a factor in measuring the disruptive impact of the employee.\textsuperscript{59}

The trend of the Supreme Court in deciding cases concerning the protection of public employees under the first amendment is inconsistent.\textsuperscript{60} In \textit{Rowland v. Mad River Local School District, Montgomery County, Ohio},\textsuperscript{61} a high school teacher was not rehired because she admitted bisexual preferences.\textsuperscript{62} Due to findings by the jury that admissions of bisexuality by Rowland had not interfered with the performance of her teaching duties, the district court held that termination based merely on her admissions of sexual preferences was impermissible.\textsuperscript{63} The Sixth Circuit Court of Appeals reversed because Rowland's speech was not about a matter of public concern and, discharged solely because of their political affiliations). Accord \textit{Visser v. Magnarelli, 530 F. Supp. 1165, 1174-75 (1982)} (stating that dismissal of city clerk solely for political reasons violated first amendment rights). \textit{But see Whited v. Fields, 581 F. Supp. 1444, 1457 (1984)} (holding that a sheriff could constitutionally replace deputies and jailers who politically opposed him but not cooks, dispatchers, and secretaries on such grounds).

\textsuperscript{55} \textit{Branti, 445 U.S. at 519-20; Elrod, 427 U.S. at 359.}\n
\textsuperscript{56} \textit{Branti, 445 U.S. at 518.}\n
\textsuperscript{57} \textit{Id.}\n
\textsuperscript{58} \textit{Branti, 445 U.S. at 516-18; Elrod, 427 U.S. at 355, 366, 375.}\n
\textsuperscript{59} \textit{Elrod, 427 U.S. at 366. See \textit{Rankin v. McPherson, 107 S. Ct. 2891 (1987).}} Justice Scalia argues in his dissent that the distinction between policymaking and nonpolicymaking employees is irrational. \textit{Id. at 2905.} Since any employee can hurt the operation of an office, the distinction allows nonpolicymaking employees to make remarks that would otherwise permit the employer to discharge the employee. \textit{Id.}\n
\textsuperscript{60} \textit{Compare \textit{Rankin v. McPherson, 107 S. Ct. 2891, 2896 (1987)} (ruling that employee could not be discharged for expressing herself, even if disruptive in the opinion of the employer)} with \textit{Connick v. Myers, 461 U.S. 138, 154 (1983)} (holding that an employer may discharge an employee for disrupting an office if her speech is of limited first amendment interest) and \textit{Rowland v. Mad River Local School Dist., Montgomery County, Ohio, 730 F.2d 444, 449 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985) (Brennan, J., dissenting) (ruling that the discharge of an employee for disruptive lifestyle admissions was valid).}\n
\textsuperscript{61} \textit{730 F.2d 444, 448 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985) (Brennan, J., dissenting) (high school counselor suspended from nontenured position for admitting bisexual orientation).}\n
\textsuperscript{62} \textit{Id. at 454.}\n
\textsuperscript{63} \textit{Id. at 456-58 (Special Verdicts I, II, and III).}
therefore, not protected by the first amendment. Additionally, the record did not reveal how other employees with unusual sexual preferences were treated, making an equal protection analysis unnecessary. Although the Supreme Court denied certiorari, Justice Brennan’s dissent to the denial of a hearing indicated the strong disagreement within the Court regarding constitutional issues and the emphasis given the interests of the employer in maintaining moral discipline among employees. Justice Brennan argued that issues of free speech under a Pickering analysis and equal protection under the fourteenth amendment were recognized by the trial court and should be settled by the Supreme Court. Rowland was the last case considered for hearing by the Supreme Court on the issue of the right to freedom of expression for government employees prior to Rankin.

C. Alternative Standards of Review

The Supreme Court has not settled on one test to evaluate right to free expression by public employees. In addition to the Pickering/
Connick "balance" test, two other analyses are easily applied. The Mt. Healthy City School District Board of Education v. Doyle "mixed motive" test, allows the employer to prove that the termination was justified and no prohibited motive precipitated the discharge. The Board of Regents of State Colleges v. Roth "due process" test prevents an employer from violating the substantive or procedural due process right of employees upon discharge.

1. Mt. Healthy v. Doyle: The Mixed Motive Test

The Mt. Healthy "mixed motive" test is applied in factual contexts where the employer terminates an employee, using a protected right of the employee coupled with some other legitimate administrative concern as reasons for the discharge. In Mt. Healthy, Doyle, a nontenured teacher, was discharged for making an obscene hand gesture to correct a student and making comments to a radio station about school board dress code policies. The Supreme Court found that the school board was entitled to discharge Doyle for the gesture,
but the board violated his right to freedom of expression by discharging Doyle for the comments to the radio station.\textsuperscript{75}

The Supreme Court announced a two-part test requiring the discharged employee to establish the protected conduct as a motivating factor in the decision to discharge.\textsuperscript{76} If the employee successfully establishes that the protected conduct was a substantial factor in the decision to terminate, the burden of proof then shifts to the public employer to show that the decision to discharge the employee was reached regardless of the protected conduct.\textsuperscript{77} Using the \textit{Mt. Healthy} "mixed motive" test, once the employee has established the possibility of an improper motive for discharge, a heavy burden of proof is placed upon the employer to show that the decision would have been made in spite of the protected conduct.\textsuperscript{78}

2. \textit{The United States Constitution: Substantive and Procedural Due Process Analysis}

The United States Constitution guarantees immunity from deprivation by government of life, liberty, and property without due process to all persons within the jurisdiction of the United States.\textsuperscript{79} The application of a due process analysis to a deprivation of protected conduct by a public employer is dependent on either a property or liberty interest in the employment.\textsuperscript{80} An employee can acquire a property or liberty interest in employment through contract\textsuperscript{81} or by

\begin{itemize}
\item \textsuperscript{75} Id. at 284-86.
\item \textsuperscript{76} Id. at 287.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} See id.
\item \textsuperscript{79} U.S. Const. amend. V. The fifth amendment states in part, "No person shall ... be deprived of life, liberty, or property, without due process of law ... " See U.S. Const. amend. XIV, § 1. The fourteenth amendment states in part, "... nor shall any State deprive any person of life, liberty or property, without due process of law ... " Id.
\item \textsuperscript{80} Perry v. Sindermann, 408 U.S. 593, 599-603 (1972) (stating that a contract right guaranteed a teacher procedural due process through a hearing after termination for criticizing college administration); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-79 (1972) (statutory due process rights require notice to the employee on reason for failure to rehire).
\item \textsuperscript{81} See Perry, 408 U.S. at 599-603 (establishing that substantive due process rights are conferred by contract or statutory grant). See also Bishop v. Wood, 426 U.S. 341 (1976) (Brennan, J., dissenting). Bishop, a police officer, terminated by the city manager due to various minor transgressions, had a property right in his reputation and good name. Id. at 343, 348-49. The Supreme Court, however, specifically addressed and rejected Justice Brennan's view that there was a federal common law of property rights and almost every discharge involved a constitutionally protected liberty interest. Id. at 349 n.14.
\end{itemize}
the grant of statutory authority.\footnote{82} The Supreme Court in \textit{Board of Regents of State Colleges v. Roth},\footnote{83} decided whether an employee had a property interest in his job if he had neither a contract nor a statutory guarantee of continued employment. \textit{Roth} involved a nontenured college teacher who was not rehired by the Board of Regents.\footnote{84} Nontenured teachers discharged midterm and tenured teachers discharged any time were given procedural protection by affording them an opportunity to have a termination hearing.\footnote{85} The Supreme Court held that an employee must have a substantive property or liberty interest in employment in order for the procedural due process of the employee to be violated.\footnote{86} Furthermore, the Supreme Court emphasized that property or liberty interests required to create rights of procedural due process claims are determined by existing state laws or employment contracts, not by the United States Constitution.\footnote{87} Because neither state law nor Roth's employment contract provided for the safeguards of procedural due process, the Supreme Court determined that Roth was not entitled to a post termination hearing.\footnote{88}

The companion case to \textit{Roth}, \textit{Perry v. Sindermann},\footnote{89} was decided by the Supreme Court on the same day.\footnote{90} \textit{Sindermann} also involved a college teacher who was not rehired for the following school year.\footnote{91} Sindermann had held his teaching position for ten years. Though not tenured, the rules and procedures of employment promulgated by state officials gave Sindermann a \textit{de facto} tenure.\footnote{92} The Supreme Court held that expectations of continued employment entitled Sindermann to a procedural due process hearing on the reasons for his termination.\footnote{93}

\footnote{82} \textit{E.g.}, \textsc{Cal. Admin. Code} tit. 2, § 282 (1985). Section 282 provides in relevant part, "A limited-term employee may be separated at any time prior to the expiration of the term . . .; provided, however, a limited-term employee may not be separated except for cause . . . ." \textit{Id.}

\footnote{83} 408 U.S. 564 (1972).
\footnote{84} \textit{Id.} at 566.
\footnote{85} \textit{Id.} at 567.
\footnote{86} \textit{Id.} at 577.
\footnote{87} \textit{Id.}
\footnote{88} \textit{Id.} at 578.
\footnote{89} 408 U.S. 593 (1972).
\footnote{90} \textit{Roth}, 408 U.S. 564 (1972); \textit{Sindermann}, 408 U.S. 593 (1972). Both cases were argued January 18, 1972, and decided on June 29, 1972.
\footnote{91} \textit{Sindermann}, 408 U.S. at 594-95.
\footnote{92} \textit{Id.} at 602-03.
\footnote{93} \textit{Id.} at 603.
Recent cases hold that employees, who could not be terminated except for cause, possess a property interest in continued employment. The substantive right afforded by contract or statute to an employee establishes a procedural due process right to a termination hearing. Thus, an employee must be afforded procedural due process even though the regulations of a governmental agency do not specifically provide for a right to a hearing. Consequently, should a court use the Roth/Sindermann "due process" standard of review, the outcome is dependent on whether substantive rights are created by contract, statute, or custom as well as the procedures used in terminating the employee.

II. THE CASE: RANKIN V. MCPHERSON

A. The Facts

Ardith McPherson, a nineteen year old black woman, was employed by the Harris County Constable's Office as a ninety-day probationary data entry clerk. Hired on January 12, 1981, she carried the title "deputy constable" but was not authorized to carry a weapon, make arrests, or wear a uniform. Her job consisted of entering information from court documents into the constable's computer system and occasionally answering the telephone.

On March 30, 1981, McPherson heard a radio newscast announcing the attempt by John Hinckley to assassinate President Ronald Reagan. Immediately upon hearing the news she and Lawrence Jackson, her co-worker and boyfriend, discussed the policies of the President.

94. See Bailey v. Kirk, 777 F.2d 567, 574 (10th Cir. 1985) (property interest in continued employment implicated when Police Chief summarily suspended). See also Brasslett v. Cota, 761 F.2d 827, 847 (1st Cir. 1985) (Fire Chief received procedural due process in the form of a pretermination hearing); Fusco v. Motto, 649 F. Supp. 1486, 1489-90 (D. Conn. 1986) (permanent employee with property interest in continued employment denied procedural due process due to lack of pretermination hearing).
97. Id.
98. Id. at 2894-95.
99. Id. at 2895.
100. Id. at 2895.

1554
and how the policies affected black people. During the conversation McPherson stated that if another attempt was made on the life of the President, she hoped the assassin would be successful. McPherson was unaware that another deputy constable, Captain LeVrier, overheard her remarks. LeVrier reported the statements to Constable Rankin who immediately called McPherson to his office to explain her comments. When questioned, McPherson admitted making the statement. Following their discussion, Rankin summarily discharged McPherson. The day after her discharge, McPherson attempted to see Rankin to further discuss her discharge. Rankin denied McPherson an opportunity to plead her case in an administrative hearing immediately following her discharge.

B. The Majority Opinion

A majority of the Supreme Court quickly disposed of any potential criminal liability of McPherson for threatening the life of the President or advocating the violent overthrow of the government. The Supreme Court held, without analysis, that McPherson's utterances were not of a criminal nature. The Court began the analysis of the civil suit brought by McPherson by stating that a public employee, terminable
at will, could not be discharged for exercising her constitutional right to freedom of expression.\(^{113}\) The Supreme Court then applied the balancing test established in *Pickering v. Board of Education*,\(^{114}\) and refined by *Connick v. Myers*.\(^{115}\)

Under the rubric of the *Pickering/Connick* test, the Supreme Court first considered whether the statements of McPherson were a matter of public concern.\(^{116}\) The district court found the statements of McPherson to be outside the area of public concern.\(^{117}\) The appellate court reversed, holding that matters concerning the life or death of a president were clearly of public concern.\(^{118}\) The Supreme Court affirmed the Fifth Circuit Court of Appeals, holding that remarks about the President were of interest to the public and, therefore, plainly of public concern.\(^{119}\)

The Supreme Court then applied the balancing prong of the *Pickering/Connick* test, weighing the right of the employee against the interest of the government by examining the remarks made by McPherson in context.\(^{120}\) Justice Marshall, writing for the majority, found that statements made by a nonpolicymaking employee with minimal public contact caused minimal disruption to the office.\(^{121}\) Furthermore,
the specific remarks made by McPherson did not impair the efficiency of the office. Therefore, the Supreme Court held that the interest of the state in maintaining office discipline did not outweigh the individual right to free expression and affirmed the judgment of the court of appeal, holding her discharge improper.

C. Concurrence by Justice Powell

In the view of Justice Powell, Rankin was not a complex case because the evidence was undisputed. Justice Powell did not apply the normally extensive analysis required by the Connick v. Myers test for two reasons. First, McPherson intended her comments to be private. Second, the Supreme Court classified the speech of McPherson to be a matter of public concern. Justice Powell concluded that the employer has a difficult task in justifying punishment of employees for the type of private speech that occurs at all levels of the work place. To Justice Powell, the likelihood of office disruption due to a single spontaneous comment was unfathomable. Thus, Justice Powell concurred with the opinion of the Court and provided the fifth vote affirming the appellate decision.

D. The Dissent

Justice Scalia, writing for the four dissenting justices, disagreed with the majority on the application of both the classification and balancing steps of the Pickering/Connick test. First, relying on a string of major first amendment decisions, Justice Scalia limited protected speech to discourse essential to informing the electorate of political rights or

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122. Id. at 2899.
123. Id. at 2900.
124. Id. at 2901.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id. at 2901. (Scalia, J., dissenting joined by Rehnquist, C.J., O'Connor, J., and White, J.)
opinions. The dissent similarly defined speech on matters of public interest to be speech necessary for dissemination of information to the voting public in order to facilitate informed judgments about public officials. Furthermore, protected matters of public interest must fall squarely within the definition recognized by earlier decisions rather than near the limits of first amendment protection. By analyzing "public concern" according to the more rigid interpretation of the earlier cases, Justice Scalia disqualified McPherson's speech as neither nor of public concern and, therefore, not subject to the protection of the first amendment.

Second, even if the statements of McPherson were of "public concern," the balance should favor the strong interest in office discipline of the employer. The issue in Rankin was whether the interest of the constable in preventing the expression of the statements in his agency outweighed the right of expression by McPherson, not Rankin's interest in discharging McPherson. Justice Scalia argued that the constable had the right to admonish McPherson for her statements and discharge was merely an intemperate extension of that right. Therefore, the dissent focused on the right to make or censor speech by both parties, not an interest in discharge balanced against a constitutional right.

Third, Justice Scalia objected to classification of employees as confidential policymakers or nonpolicymakers as a criteria in determining the disruptive value of remarks made in the work place. Justice Scalia stated that any employee can hurt working relationships

131. Id. at 2902. See Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968) (stating that free and open debate is essential to informed decisionmaking by the voters); First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978) (holding that speech lies at the heart of the first amendment); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (ruling that matters dealing with the essence of self-government are protected); New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (stating that debate must be spontaneous, energetic, and unrestrained).
132. See Rankin, 107 S. Ct. at 2903 (Scalia, J., dissenting).
133. Id. at 2902. Justice Scalia characterized the remarks by McPherson as being only one step removed from completely unprotected speech. Id. at 2903. See Harisiades v. Shaughnessy, 342 U.S. 580, 591-92 (1952) (stating that the first amendment protects advocating lawful but not violent change of the existing order). McPherson advocated her ideas in violent terminology. Rankin, 107 S. Ct. at 2895. Justice Scalia, therefore, considered her speech unprotected. Id. at 2902.
134. Rankin, 107 S. Ct. at 2904.
135. Id.
136. Id.
137. Id. at 2905.
138. Id.
139. Id.

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regardless of job function. By differentiating between employees based on status within the office, ministerial employees are permitted to make remarks that are antithetical to the function of the office. If Rankin, as an employer, was entitled to reprimand McPherson for her remarks, then Rankin was entitled to determine when those remarks were unsuitable in the particular work situation.

Justice Scalia conceded that the discharge was intemperate. However, Justice Scalia concluded that the statements of McPherson were not of public concern and failed the threshold requirement of the Pickering/Connick test. Furthermore, even if the remarks were of public concern, the remarks were not squarely within the parameters protected by the first amendment. Moreover, Rankin had adequate reason to discipline McPherson for her remarks in order to maintain both the esprit de corp and the public image of the office. Therefore, the remarks of McPherson failed to fulfill the criteria of the balancing prong of the Pickering/Connick test.

Lastly, Justice Scalia stated that the Supreme Court is the wrong forum for adjudging administrative matters relating to the severity of discipline. The role of the Supreme Court is not to act as a panel to develop principles for state civil service administrators. Therefore, Justice Scalia, as an additional rationale for his dissent, would hold that the Supreme Court is the wrong forum to determine if Rankin was justified in discharging McPherson for her remarks.

III. Ramifications

*Rankin v. McPherson* broadens the scope of speech classified as “public concern” beyond previous Supreme Court rulings. The
majority adopts the standard used by the court of appeals, equating statements of general public interest with statements of public political concern.\textsuperscript{152} The "public interest" standard\textsuperscript{153} extends the protective umbrella of the first amendment, forcing an \textit{ad hoc} determination of what information is vital to self-government.\textsuperscript{154} The \textit{Rankin} decision also affects some circuit courts of appeal that use a standard that is similar to the position of the dissent, requiring statements to concern information needed by members of the electorate in order to make informed decisions about the operation of their government.\textsuperscript{155} The result of \textit{Rankin v. McPherson} is to broaden the scope of the cases that fulfill the "public concern" portion of the \textit{Pickering/Connick} test by including any topics that interest the public.\textsuperscript{156}

To avoid the expanded first amendment protection afforded by \textit{Rankin}, similar fact patterns might be approached using an analysis other than the \textit{Pickering/Connick} balance test. Using a "mixed motive" test, discharge of an employee is justified only if the termination is not substantially based on protected conduct.\textsuperscript{157} Similarly, additional facts, like contractual and statutory safeguards, as well as the procedures followed by the employer in discharging the employee, are required for a due process analysis.\textsuperscript{158}

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\textsuperscript{152} \textit{See} \textit{Rankin}, 107 S. Ct. at 2897.


\textsuperscript{154} \textit{Gertz}, 418 U.S. at 346-47.

\textsuperscript{155} \textit{See}, e.g., \textit{Allen v. Scribner}, 812 F.2d 426, 431 (9th Cir. 1987) (stating that speech is of public concern only if it has relevance to public evaluation of government performance) \textit{and} McKinley \textit{v. City of Eloy}, 705 F.2d 1110, 1114-15 (9th Cir. 1983) (stating that speech must concern issues of public information).

\textsuperscript{156} \textit{Rankin}, 107 S. Ct. at 2904 (Scalia, J. dissenting).

\textsuperscript{157} \textit{Mt. Healthy School Dist. Bd. of Educ. v. Doyle}, 429 U.S. 274, 284 (1977) (employer must have an administrative reason that independently justifies the termination in order to prevail). \textit{Accord} \textit{Rankin}, 107 S. Ct. at 2896 (majority applied holding of \textit{Mt. Healthy} to probationary employees). Since Constable Rankin discharged McPherson for the statements alone and not for any deficiency in her performance, a similar result using either the \textit{Pickering} balance or \textit{Mt. Healthy} mixed motive tests is anticipated. \textit{Rankin}, 107 S. Ct. at 2899 n.14.

\textsuperscript{158} \textit{Compare} Cleveland Board of Educ. \textit{v. Loudermill}, 470 U.S. 532, 547-48 (1985) (holding that an employee was entitled to procedural due process in the form of pretermination and post termination hearings as provided by statute) \textit{and} Bishop \textit{v. Wood}, 426 U.S. 341, 348-49 (1976) (holding that an employee must have a property or liberty interest in the employment to afford
The concurrence by Justice Powell severely undermined the balancing prong of the Pickering/Connick test. Justice Powell stated that the threshold criteria determining the remarks as being of public concern is the primary issue for determination. Once speech is classified as being of public concern, only an unusual case will justify the legitimate interests of an employer. Justice Powell effectively established a higher burden of proof on the government by stressing the classification step of the Pickering test almost to the exclusion of the balance portion. Therefore, in establishing a higher level of scrutiny, Justice Powell emasculated the balancing step of the Pickering/Connick test.

The impact of Justice Powell's opinion on the Rankin decision is magnified if Rankin is viewed as a four-four split with a concurrence. Significantly, the membership of the Supreme Court has changed since Rankin was decided. Justice Powell retired and Justice Anthony M. Kennedy from the Ninth Circuit filled the vacancy. During his tenure on the appellate bench, Justice Kennedy decided one case, Kotwica v. City of Tucson, that may foreshadow his response to future cases similar to Rankin.

In Kotwica, a city recreation supervisor violated an agreement with her supervisor by granting an interview to the news media in which she criticized department policies. Justice Kennedy held that the first amendment does not provide absolute protection to government em-
ployees who violate the express directions of their supervisors.\textsuperscript{166} However, Justice Kennedy stated that the holding in \textit{Kotwica} is limited to the specific facts presented.\textsuperscript{167} Despite an apparent alignment with the dissent in \textit{Rankin}, future decisions by Justice Kennedy may be fact bound, making a pure doctrinal prediction impossible.

Finally, the \textit{Rankin} Court resurrected the policymaking/nonpolicymaking employee categories, first established in \textit{Elrod v. Burns},\textsuperscript{168} to evaluate the probable impact of speech on the work environment.\textsuperscript{169} The majority in \textit{Rankin} concluded that a low level ministerial employee has minimal impact on the working environment, and the possibility of disruption from remarks made by the employee are negligible.\textsuperscript{170} However, as the dissent pointed out, the assertion of the majority that a clerk has minimal impact on an office is contrary to reason and experience.\textsuperscript{171} The \textit{Connick} decision illustrates the position of the Supreme Court on the policymaking distinction prior to \textit{Rankin}.\textsuperscript{172} Myers, a nonpolicymaking employee, sufficiently disrupted the District Attorney’s office to justify her discharge using the \textit{Pickering} balance test.\textsuperscript{173} Resurrection of the policymaking distinction effectively grants low level employees immunity from discipline, undermining working relations within an organization.\textsuperscript{174}

\section*{IV. Conclusion}

The parties in \textit{Rankin v. McPherson} constitutionalized a basic termination dispute between a public employee and her employer.\textsuperscript{175} Notwithstanding the apparent trend of the courts in the past,\textsuperscript{176} the case establishes the new limit in the law of first amendment public employee jurisprudence. By expanding the definition of “matters of

\begin{itemize}
\item \textsuperscript{166} Id. at 1185.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} 427 U.S. 347, 375 (1976) (Stewart, J., concurring).
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. at 2905.
\item \textsuperscript{173} \textit{Connick}, 461 U.S. at 154.
\item \textsuperscript{174} \textit{Rankin}, 107 S. Ct. at 2905.
\item \textsuperscript{175} Id. at 2900-01. Justice Powell noted, “It is not easy to understand how this case has assumed constitutional dimensions and reached the Supreme Court of the United States.” Id.
\item \textsuperscript{176} See \textit{Connick}, 461 U.S. at 151-52. (expanding the deference shown to the government in the balance portion of the \textit{Pickering} test); see \textit{also} Allen v. Scribner, 812 F.2d 426, 432 (9th Cir. 1987) (same).
\end{itemize}
public concern,” the Supreme Court retreats from a position favoring employers established by Connick v. Myers.

In light of the unique set of circumstances presented in Rankin, the change in the makeup of the Supreme Court, and the long and troubled route of Rankin through the court system leading to the Supreme Court, the long term judicial effects of the majority opinion in Rankin may be negligible. However, Justice Powell’s strong language upsetting the balancing mechanism of the Pickering test may change the level of scrutiny the Supreme Court applies to future cases like Rankin. Furthermore, Rankin should serve unequivocal notice to public administrators that the courts will not tolerate retaliatory treatment for the utterance of unappealing remarks made by employees. On a more pragmatic level, suits like Rankin might be avoided altogether by a more sensitive approach to employee relations at the local administrative level.

Richard M. Glovin