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Purged by Press Release: First Responders, Free Speech, and Public Employment Retaliation in the Digital Age

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If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

—Justice Robert H. Jackson[1]

Exceptions to the First Amendment are often built on the backs of the powerless and the despised.

—Ken White, free speech attorney and commentator[2]

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[1] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[2] *Fighting Words*, MAKE NO LAW: THE FIRST AMENDMENT PODCAST (Jan. 31, 2018) (downloaded using iTunes).

Doesn't matter what the press says. Doesn't matter what the politicians or the mobs say. Doesn't matter if the whole country decides that something wrong is something right. . . . When the mob and the press and the whole world tell you to move, your job is to plant yourself like a tree beside the river of truth, and tell the whole world, "No, you move."

—Steve Rogers, (a.k.a. Captain America)[3]

It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come.

—Justice Anthony Kennedy[4]

INTRODUCTION

Racial tensions are rising in the United States, with no signs of abating anytime soon.[5] The tragic number of African American deaths resulting from euphemistically titled "officer-involved shootings"[6] has dramatically increased in the last decade, which has spurred heated, sometimes violent, protests.[7] In addition, police departments nationwide are grappling with increased threats to officers' safety.[8] Social media platforms add fuel to the fire because

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3 J. Michael Straczynski, *The War at Home: Part 6 of 7*, THE AMAZING SPIDER-MAN CIVIL WAR, 2012, at 15.

4 Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

5 *See* Art Swift, *Americans' Worries About Race Relations at Record High*, GALLUP (Mar. 15, 2017), http://bit.ly/2NZcAhL (noting that the percentage of Americans who worry a "great deal" about race relations has risen since 2010).

6 Radley Balko, *The Curious Grammar of Police Shootings*, WASH. POST (July 14, 2014), https://wapo.st/2NZ2HQW.

7 *See, e.g.*, F. Brinley Bruton, et al., *Dallas Police "Ambush": 12 Officers Shot, 5 Killed During Protest*, NBC NEWS, https://nbcnews.to/2TB9d6E (last updated July 8, 2016).

8 *See, e.g.*, Max Kutner, *Police Departments Issuing Safety Precautions After Baton Rouge, Dallas*, NEWSWEEK (July 18, 2016, 4:09 PM), http://bit.ly/2O0Ji1Z; Rich Morin, et al., *Behind the Badge*, PEW RESEARCH CTR. (Jan. 11, 2017), https://pewrsr.ch/2O5wJTm (finding that ninety-three percent of police officers have become more fearful for their safety following a rise in high profile incidents involving officers and black individuals); *cf.* Lisa Desjardins, *The History of U.S. Police Deaths in the Line of Duty*, PBS NEWSHOUR (July 8,

they enable nearly instantaneous, bidirectional transmission of both accurate and inaccurate information around the globe. Accordingly, many municipalities have implemented restrictive social media policies for both the public and government employees.[9] Firing a government employee for violating such a social media policy in his or her use of digital communications tools, however, especially when the employee does so on his or her own time, raises stark questions regarding whether and to what extent the policy violates the First Amendment.

Government employers, like their private-sector counterparts, have several legitimate interests in distancing themselves from an employee's opinion, especially when an employee's opinion is discriminatory. For example, employers have an interest in shielding other employees from hostile work environments and protecting themselves from liability for a hostile work environment. Under judicial interpretations of Title VII's language, the standard of proof in a claim alleging a hostile work environment is mere constructive knowledge, and an employer's safe harbors under applicable regulations are narrow.[10] This legal regime can encourage swift termination actions when a subordinate employee's conduct discriminates against another subordinate employee.

Municipalities, in particular, have a compelling interest in regulating police officers' speech. Repugnant police officer views, if published, could ostensibly interfere with a police department's ability to effectively or efficiently deliver public safety services to the city.[11] The

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2016, 8:22 AM), https://to.pbs.org/2O3BBrV (noting that shooting deaths of officers have recently risen). *But see Officer Deaths by Year*, NAT'L L. ENFORCEMENT OFFICERS MEMORIAL FUND, http://bit.ly/2O0jC5G (last visited Jan. 19, 2019) (noting that actual fatalities peaked during the Prohibition Era but have since halved).

9 *See, e.g.*, CITY OF W. HOLLYWOOD COMMC'NS DEP'T, SOCIAL MEDIA POLICY (2016), http://bit.ly/2O0jDXk; CITY OF SEATTLE SOCIAL MEDIA USE POLICY (2009), http://bit.ly/2O2tyf5; Wiley Hayes, *Social Media Policies Installed by Some Municipalities; Commissioners Resist*, CARROLL COUNTY TIMES (Sept. 5, 2015, 10:03 PM), http://bit.ly/2O2jh2l; Ashley Stewart, *Blooming Prairie, Medford Adopt Social Media Use Policies*, BPLEADER.COM (May 19, 2017), http://bit.ly/2O0JDSj; *San Francisco Police Department Social Media Policy*, CITY & COUNTY OF S.F., http://bit.ly/2O0jK5c (last visited Jan. 19, 2019); *Social Media Policy*, HINGHAM POLICE DEP'T, http://bit.ly/2O2eON2 (last visited Jan. 19, 2019); Kathleen O'Toole, *Chief O'Toole Announces New Social Media Policy*, SEATTLE.GOV (Feb. 20, 2015, 2:36 PM), http://bit.ly/2Fa4e3Z; *Niles Police Department Social Media Policy*, VILLAGE OF NILES, http://bit.ly/2F7Rlar (last visited Jan. 19, 2019).

10 *See infra* Part IV Section E.2.

11 David L. Hudson, Jr., *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers*, A.B.A. J. (May 1, 2017, 4:10 AM),

law must balance the city's compelling interests in public safety, however, with a police officer's right to free speech. The rapidly evolving pace of technological advances that enable instantaneous social media communication, and create records of online speech, exacerbate the need for an accurate balance. For example, Nashville, Tennessee, recently fired a police officer for making a comment on his personal social media account, while he was off duty, about the fatal police shooting of an African American man in Minnesota.[12] In the context of the current national conversation on how police officers' uses of force disproportionately affect racial minorities, the officer's Facebook comment was racially insensitive. Despite the controversial connotation of his comment, this episode raises issues surrounding a police officer's speech rights in today's social media–driven information ecosystem. Specifically, this officer's firing demonstrates the need for new contours in civil rights law governing public employees' exercises of free speech rights.

Traditionally, if a jurisdiction bases a law, rule, or policy that restricts speech on the basis of its content, a reviewing court will subject the rule to strict scrutiny. For the restriction to pass muster, the government entity must demonstrate both that it has a compelling interest in encroaching on the speaker's freedom and that the rule is narrowly tailored to achieve the government's purpose. This is a high bar that is difficult for government defendants to satisfy. A different set of rules apply, however, when a government body acts as an employer, rather than a sovereign. A gap exists in the prevailing standards of civil rights law that govern alleged public employment retaliations against culturally abhorrent or politically disfavored speech.

What happens when nobody may have known about a police officer's controversial speech if the government had not published it, or republished it, on a scale and with tools sufficient to foment public outrage in a very short period of time? Current federal law provides no answer. Specifically, § 1983 jurisprudence, as currently conceived, does not account for potential First Amendment violations that result when a municipality publicizes or amplifies a police officer's offensive speech that the public may never have known about but for the municipality publishing or amplifying it, and then fires the officer as a

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http://bit.ly/2F9cxwP ("[F]irst responders . . . require the public's complete trust that they will discharge their duties faithfully and impartially without regard to factors like a person's race, gender or sexual orientation."); *see also infra* Part IV Section E.3.

12 *See infra* Part I.

result of public outrage. Although § 1983 jurisprudence allows municipal employers to override First Amendment protections and fire subordinate employees for offensive speech in certain situations, the current framework does not address whether the Constitution permits this overriding when the employer, rather than the employee, publicizes the speech. This uncertainty risks chilling debate on salient topics and exposing public employees to the threat of wrongful infringements on their constitutional rights to free speech. The lack of predictability will continue to pose challenges as information markets continue to change and become more dynamic through technological progress. There is virtually no limiting principle in the current law that prevents municipal employers from violating their employees' speech rights under the guise of mitigating a hostile work environment, preventing disruptions to public services, or any other number of justifications they might invoke to defend censorious social media policies when the employer amplifies the offending speech.

Against this backdrop, this Article proceeds by first recounting in Part I the tale of former Metropolitan Nashville and Davidson County (Metro) Police Officer Anthony Venable (Venable), whom the city fired in 2017 for comments he posted on Facebook, when he was off duty, about a fatal police shooting (Venable Case). Part II discusses § 1983 and sets forth free speech case law that governs public employment retaliation claims pursuant to the statute. Part III returns to the Venable Case and applies current law to demonstrate the failure of the prevailing retaliation framework to address government-manufactured public opinion crises. Next, Part IV sketches a new rule (Venable Rule) that courts should use in analogous cases. Simply put, taking into account the changing nature of the global information ecosystem and evolving speech paradigms in the digital age, and the primacy of protecting speech in American constitutional law, the Venable Rule first requires proof that controversial speech actually disrupted the efficient delivery of public services. Second, the Venable Rule requires that a terminated public employee has an opportunity to rebut a government employer's evidence of an actual disruption with his or her own proof that the government's republication of the speech, as opposed to the initial utterance, caused the disruption. This Part also provides practical and theoretical justifications for the Venable Rule, further demonstrating how it balances the weighty interests of the speaker, the public employer, and society at large, and better comports with due process of law than the status quo. Part IV additionally explores how the Venable Rule might apply outside the § 1983 context.

I
FIRING ANTHONY VENABLE

Until recently, Venable was, by all official accounts, a model policeman. He received the Field Operations Bureau Police Officer of the Year award in 2014 for his "steady work ethic" and "significant arrests" of felony criminals.[13] But two years later, on July 7, 2016, Metro Police Chief Steve Anderson (Chief Anderson) decommissioned Venable "pending the results of an internal investigation into a post [Venable] made from his personal Facebook account."[14] Venable commented on a video of a fatal police shooting of Philando Castile, an African American man. In the video, a Falcon Heights, Minnesota, police officer shot Castile four times and killed him.[15] In response to other comments on the post, Venable wrote, "I would have done 5," referring to the four shots that the Falcon Heights officer fired at Castile.[16] Venable's insensitive remark was highly controversial in light of growing racial tensions across the country arising from concern over the racial disparity in the use of lethal force in police encounters.

When his superiors asked him about his conduct, Venable maintained that he was replying sarcastically to an online acquaintance who had posted the video.[17] Chief Anderson, however, stated in a city press release (Venable Decommissioned Release) that the police department "treat[ed] this matter very seriously and took immediate action, regardless of what [Venable] claim[ed] the context to have been."[18] Within a week, news of Metro's investigation into the Venable Case quickly spread.[19]

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13 METRO. NASHVILLE POLICE DEP'T, 2014 ANNUAL REPORT 11 (2014), http://bit.ly/2Faag4M. Venable received this commendation for, among other things, arresting a suspect wanted for involvement in child rape, a convicted felon in possession of cocaine, and a marijuana dealer. *Id.*

14 Press Release, *Officer Anthony Venable Decommissioned; Under Investigation for Facebook Post*, METRO. GOV'T OF NASHVILLE & DAVIDSON COUNTY, TENN. (July 7, 2016), http://bit.ly/2TCv4uv [hereinafter *Venable Decommissioned*].

15 *See Police Fatally Shoot Man During Traffic Stop, Aftermath Video Posted*, CBS MINN. (July 6, 2016, 11:12 PM), https://cbsloc.al/2FbJau1.

16 *Venable Decommissioned*, *supra* note 14.

17 *Id.*

18 *Id.*

19 *See, e.g.*, Ariana Maia Sawyer, *Nashville Police Chief Orders Officer Decommissioned After Facebook Post*, TENNESSEAN (July 7, 2016, 10:26 p.m.), http://bit.ly/2F7Tsdt; *see also* Crystal Bonvillian, *Nashville Officer Decommissioned Following Facebook Post About Philando Castile Shooting*, AL.COM (July 8, 2016, 12:04 PM), http://bit.ly/2EZenz5 (updated July 8, 2016, 12:04 PM); Jessica Chia, *"I Would Have*

Seven months later, Metro triumphantly announced that it had fired Venable for his insensitive online remarks, ending his otherwise commendable nine-year career serving Metro citizens.[20] In a letter to Venable at the conclusion of the investigation, charging him with "Conduct Unbecoming an Employee of the Department" and setting a disciplinary hearing, Chief Anderson admonished that

> [t]he effectiveness of a law enforcement agency and its members depends upon community respect and confidence. . . . Whether interacting with citizens, testifying in any court or legal proceeding, or providing information *in any official setting*, the success of a law enforcement agency rests upon the reliability of the member *representing that agency*.
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> Therefore, all members sworn and civilian must conduct themselves in a manner consistent with policies, procedures, rules, regulations, ethical codes, and administrative or executive orders as established by the [police] department or [Metro]. . . . Recognizing that a fundamental and unequivocal duty of all employees is to promote the efficient and effective operation of department and government operation through the pursuit of lawful objectives, *any conduct* which detracts from this respect and confidence is detrimental to the public interest.[21]

With that, Metro terminated Venable.

But was Metro justified, under these circumstances, in firing Venable for exercising his First Amendment right to speak? If not, what causes of action or remedies might he have? While the retaliation claim—a cause of action that accrues when a plaintiff suffers an adverse employment action in retaliation for exercising a constitutional right—is available to a number of putative plaintiffs in a number of

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Done Five": Nashville Police Officer Is Under Investigation for Facebook Post Mocking Philando Castile's Death in Minnesota After Beloved Cafeteria Worker's Girlfriend Said He Was Shot Four Times, DAILYMAIL (July 8, 2016, 10:05 AM), https://dailym.ai/2F2MPsy (updated July 8, 2016, 7:55 PM); Kate Feldman, *Second Metro Nashville Police Officer Decommissioned Within Week for Inappropriate Facebook Post, Changes Profile Picture to Black Panthers Photo*, N.Y. DAILY NEWS (July 11, 2016, 7:04 PM), https://nydn.us/2EYPsMc; Kate Irby, *Officer Suspended for Facebook Comment About Philando Castile*, MIAMI HERALD (July 8, 2016, 9:31 AM), https://hrld.us/2EWzFgJ.

[20] Press Release, *Officer Anthony Venable Fired for Facebook Posting*, METRO. GOV'T OF NASHVILLE & DAVIDSON COUNTY, TENN. (Feb. 15, 2017), http://bit.ly/2EZX1lw [hereinafter *Venable Fired*]. *But see* Liz Lohuis, *Decommissioned Metro Police Officer Had Trouble in the Past*, WSMV.COM (July 14, 2016, 9:42 PM), http://bit.ly/2EVe34p (reporting that Venable used an FBI database to "look up information" about a woman he once arrested, and that he admitted to having an extramarital affair with her).

[21] Letter from Steve Anderson, Chief of Metro Police, to Anthony Venable, former Metro Police Officer 1 (Feb. 2, 2017), http://bit.ly/2F9fJbO [hereinafter *Anderson Letter*] (emphasis added).

contexts, "free speech retaliation claims are asserted predominantly by public employees."[22] Title 42 of the United States Code provides a vehicle for asserting an employment retaliation claim against a municipality: § 1983. The following Part explains the statute's origin and purpose, who can sue or be sued, what a plaintiff must establish in a prima facie case, and the tests that apply to employment retaliations against public employees.

II
SPEECH RETALIATION CLAIMS PURSUANT TO SECTION 1983

Writing for the Supreme Judicial Court of Massachusetts in a well-studied procedural due process case from the late nineteenth century, the learned jurist Justice Oliver Wendell Holmes famously quipped that a police officer

> may have a constitutional right to talk . . . but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . by the implied terms of his contract. The servant cannot [later] complain [about alleged rights violations], as he takes the employment on the terms which are offered him.[23]

This relatively straightforward proposition became the support beam on which the United States Supreme Court would rest its public-retaliation jurisprudence for several ensuing decades.[24] But after a series of decisions arising out of litigation during the Red Scare, the Court turned a corner, and it started providing relief to terminated public employees, specifically where the exercise of their First Amendment rights led to an adverse employment action of some kind.[25] As a result, today "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[26] Thus, any municipal policy that restricts public employees' speech today must satisfy a balancing test to survive a constitutional challenge.

One of the primary vehicles available to terminated municipal (or state) employees to mount these constitutional challenges is § 1983.

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22 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 3.11 [C][1] at 3-435 (4th ed. 2018).

23 McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

24 Connick v. Myers, 461 U.S. 138, 143–44 (1983) (citing *McAuliffe*, 29 N.E. at 517).

25 *Id.* at 144.

26 *Id.* at 142.

The following Section explains the history, policy rationales, and functioning of the statutory claim in vindicating a plaintiff's constitutional rights as against a state or municipality. The subsequent Sections in this Part describe the tests that courts use to measure whether termination of a public employee rises to the level of an unconstitutional retaliation in a given case.

A. The Section 1983 Civil Rights Claim

Reacting to Klansmen in state government fiefdoms who were loath to give newly emancipated slaves a fair shake in life after the American Civil War and pursuant to the authority the states granted to Congress when they ratified the Reconstruction Amendments,[27] the Radical Republicans of the Thirty-Ninth Congress enacted legislation to enforce the Fourteenth Amendment's guarantees against states' deprivations of life, liberty, and property without due process of law.[28] The statute achieved this purpose by creating a federal cause of action for cases in which state actors violated someone's constitutional or federal statutory rights. This cause of action is not coextensive with, but supplemental to, state-law causes of action that may also be available to a plaintiff in a particular case.[29] To defeat the effects of local prejudices, Congress also conferred original jurisdiction on federal district courts to hear § 1983 claims.[30]

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27 *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

28 Enforcement Act of 1871, ch. 22, 17 Stat. 13 § 1 (codified as amended at 42 U.S.C. § 1983 (2012)). *See also Landmark Legislation: The Enforcement Acts of 1870 and 1871*, U.S. SENATE, http://bit.ly/2F9nsH1 (last visited Jan 28, 2019); *The Fight for the 14th*, BOUND BY OATH (Dec. 19, 2018) (downloaded at http://bit.ly/2FbJhpr).

29 Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978). For example, in Tennessee, a terminated public employee can pursue both a § 1983 claim and a claim under the Tennessee Public Employee Political Freedom Act of 1980 for the same alleged speech retaliation. *See, e.g.*, Boone v. Town of Collierville, No. 16-cv-2185-JPM-dkv, 2017 WL 980351, at *8–9 (W.D. Tenn. Mar. 13, 2017) (granting a municipal defendant's motion for summary judgment as to plaintiff's § 1983 claim and declining to exercise supplemental jurisdiction over his claim pursuant to TENN. CODE ANN. §§ 8-50-601–604 (2018)).

30 28 U.S.C. § 1343(a)(3)–(4) (2012); *Monroe*, 365 U.S. at 180 ("It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."); *cf.* 28 U.S.C. § 1441 (2012) (permitting removal of certain civil actions from state court to federal court); Marketing Showcase, Inc. v. Alberto-Culver Co., 445 F. Supp. 755, 760 (S.D.N.Y. 1978) ("[T]he purpose of . . . removal is to secure a presumably unprejudiced forum for one who has been brought unwillingly to the state court."). The

Section 1983 provides, in pertinent part, that

> [e]very 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 [of the United States], shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[31]

In its decisions, the Court has divided (but not limited) § 1983 claims into three broad categories: (1) procedural due process claims arising from deprivations of life, liberty, or property; (2) substantive due process claims arising from violations of fundamental rights; and (3) claims arising from violations of provisions of the Bill of Rights that the Court has incorporated as against the states.[32] To establish a prima facie § 1983 claim, a plaintiff must demonstrate, first, that a defendant took action under color of state law,[33] and second, that the action resulted in a deprivation of rights secured by the Constitution or federal statutes.[34] "[W]hen execution of a [municipal] government's policy or custom" results in a civil rights violation, a plaintiff may bring a claim

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decision to fire a municipal employee on the basis of speech invariably takes into account hyperlocal interests and attitudes and is thus shaped by local prejudices. In a civil case that alleges a constitutional harm, justice may require a more neutral forum, and § 1983 guarantees it.

31 42 U.S.C. § 1983 (2012).

32 Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) ("We should begin by identifying the precise constitutional claims that petitioners have advanced. It is not enough to note that they rely on the Due Process Clause of the Fourteenth Amendment, for that Clause is the source of three different kinds of constitutional protection."). Justice Stevens observed that § 1983 claims are always available to plaintiffs alleging substantive due process theories and claims arising from violations of incorporated rights because "the constitutional violation is complete as soon as the prohibited action is taken," whereas state actors may be able to avoid § 1983 liability "if a procedural due process claim lacks a colorable objection to the validity of the State's procedures, [and thus] no constitutional violation has been alleged." *Id.* at 337–40. Four years later, the Court embraced Justice Stevens's concurrence in *Daniels* when it decided *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

33 *See* United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.").

34 Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) ("Once a plaintiff demonstrates that a [federal] statute confers an individual right, the right is presumptively enforceable by § 1983."); Macko v. Byron, 576 F. Supp. 875, 880 (N.D. Ohio 1983) ("[I]t is the Court's view that § 1983 requires an actual infringement of a constitutional right . . . ."), *aff'd* 760 F.2d 95 (6th Cir. 1985).

against a municipality pursuant to § 1983.[35] The legislative history of the 1871 Act reveals that the law's drafters contemplated reaching municipal corporations when they used the word "State" in the statutory text.[36] There are several theories in § 1983 case law under which a terminated public employee could seek to impose liability on a municipality. The most appropriate theory in a case like the Venable Case would be the "official policy" theory of municipal liability because the city's enforcement of a "regulation . . . officially adopted and promulgated" by decision makers in the jurisdiction, like a departmental social media policy, causes the constitutional violation.[37] Metro's enforcement of the policy by firing Venable satisfies the first step of the prima facie case—action under color of state law—while the policy itself satisfies the second step because, as this Article contends, the manner in which Metro enforced it arguably caused a constitutional violation.

Courts apply a number of tests to determine whether a defendant has violated a plaintiff's constitutional rights—the second step in the § 1983 prima facie case. The next three sections explore relevant case law governing public employees' retaliation claims arising from the First Amendment's Free Speech Clause.

B. Pickering *Distinguishes Categories of Speakers and Speech*

When a public employee invokes § 1983 to challenge an alleged retaliation for speech he uttered as a private citizen, courts have, for decades, relied on a quartet of Supreme Court decisions to analyze the claims. In the first of these cases, *Pickering v. Board of Education*,[38] a municipal government issued bonds to raise money to build new schools, but then it failed to pass tax increases to fill funding gaps despite public support from the local teachers' union and superintendent.[39] Marvin Pickering, a district high school teacher, sent a letter to a local newspaper that criticized the way his employer allegedly mismanaged the bond issue and decried how the superintendent allegedly tried to silence opposition to the funding

35 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

36 *Id.* at 663–701 (1978) (analyzing the legislative history of the 1871 act and subsequent case law to conclude that the Court held incorrectly in *Monroe* that cities were immune from the reach of § 1983, and overruling *Monroe* on that issue).

37 *Id.* at 690.

38 391 U.S. 563 (1968).

39 *Id.* at 565–66.

schemes.[40] Displeased with his caustic letter, and believing that he owed the Board of Education various duties of fealty by mere virtue of his employment, school administrators fired Mr. Pickering.[41]

After failing to obtain relief in Illinois courts, Mr. Pickering petitioned the Supreme Court of the United States, alleging that the school board violated his First and Fourteenth Amendment rights.[42] The Court first concluded that its then recent precedents had strengthened First Amendment protections where public employees had spoken on matters of public concern, particularly when criticizing "nominal superiors."[43] It further found nothing in the record to indicate that Mr. Pickering's letter had caused any disruptions to either his personal duties or in the school system more broadly.[44] Accordingly, the Court reasoned that the Board of Education had no more interest in regulating Mr. Pickering's speech than it did in regulating the speech of a hypothetical private citizen sending the same critical letter to the editor.[45] Therefore, the Court held that the Board of Education could not constitutionally fire Mr. Pickering without proof of actual malice, and it remanded the case back to the Illinois courts for further proceedings.[46]

In *Pickering*, the Court implemented a two-pronged balancing test. First, the Court asked whether the employee was speaking as a private citizen on a matter of public concern.[47] Because Mr. Pickering satisfied these factors, the Court next weighed the government's interest in silencing him against his liberty interest in communicating by examining whether his letter to the editor caused a workplace disruption sufficient to undermine the efficient provision of public

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40 *Id.* at 566. Mr. Pickering's letter was rather punchy, even by today's standards, alleging the "totalitarianism" of "push[ing] tax-supported athletics down our throats" and "neglecting the wants of teachers." *See* David L. Hudson, Jr., *Teacher Looks Back on Letter That Led to Firing—And Supreme Court Victory*, FREEDOM FORUM INST. (July 20, 2001), http://bit.ly/2FbJLMh (interviewing Marvin Pickering). "After he drafted his letter, he showed it to his wife. 'She read it and then told me: "You're probably going to get fired." But I went ahead and sent the letter anyway,' he says." *Id.*

41 *Pickering*, 391 U.S. at 566, 568–69.

42 *Id.* at 565. *Pickering* is not a § 1983 case but its free-speech analysis is relevant in determining whether a plaintiff meets the second prong of the prima facie case for § 1983 claims. *See infra* note 110 (collecting cases).

43 *Pickering*, 391 U.S. at 574.

44 *Id.* at 569–70.

45 *Id.* at 574.

46 *Id.* at 574–75.

47 *Id.* at 571–72.

education services.[48] The Court determined that the record was conspicuously devoid of any such evidence.[49] The *Myers* case,[50] described in the next Section, reaffirmed the *Pickering* balancing test and provided additional contours to what constitutes a "matter of public concern" for First Amendment purposes.

C. Myers *Narrows What Constitutes a "Matter of Public Concern"*

The second bellwether of contemporary public employment retaliation jurisprudence arrived fifteen years after *Pickering* when the Court decided *Connick v. Myers*. In *Myers*, the Court refined its *Pickering* analysis by defining what constitutes a "matter of public concern."[51] In *Myers*, New Orleans District Attorney Harry Connick attempted to transfer Assistant District Attorney Sheila Myers to another section of the criminal court.[52] Because she was competent in her job,[53] however, and out of fear that the transfer would raise a conflict of interest with respect to her volunteer activities in a counseling program for criminal defendants on probation in the transferee court,[54] Ms. Myers resisted the proposal and did "some research on the matter."[55] She then prepared a questionnaire for her colleagues to answer "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[56]

Ms. Myers met with Mr. Connick the next morning, and despite his continued urging that she accept the transfer, she said merely that she would think about it.[57] When Mr. Connick left the office, Ms. Myers began circulating her survey on office policy and culture to her colleagues.[58] A Connick loyalist in the department telephoned Mr. Connick to tell him about the survey, warning that Ms. Myers "was

48 *Id.* at 573.
49 *Id.* at 574.
50 Connick v. Myers, 461 U.S. 138 (1983). Unlike *Pickering*, *Myers* was a § 1983 case.
51 *Id.* at 147–48.
52 *Id.* at 140.
53 *Id.*
54 *Id.* at 140 n.1.
55 *Id.* at 140–41.
56 *Id.* at 141.
57 *Id.*
58 *Id.*

creating a 'mini-insurrection' within the office."[59] When Mr. Connick returned, he fired Ms. Myers, purportedly "because of her refusal to accept the transfer," but also because, as he told her, "her distribution of the questionnaire was considered an act of insubordination."[60] Mr. Connick also admitted that he worried what the press's reaction would be if it learned that his subordinates were discussing whether they had confidence in their superiors, or whether any of them felt undue pressure to campaign on their superiors' behalves.[61]

On this canvas, Ms. Myers painted her § 1983 prima facie case: Mr. Connick was clothed with the authority of state law to fire her by virtue of his supervisory position, and he fired her for distributing surveys—a form of speech—at the office. She prevailed at the district court, which determined that her refusal to accept a transfer was but a pretext for firing her and that Mr. Connick had really fired her for speaking about matters of public concern, as the Board of Education had done to Mr. Pickering in 1968.[62] The district court also found, like the trial court in *Pickering*, that the state failed to produce clear evidence of substantial interference to the workplace, and it awarded Ms. Myers back pay, damages, and attorney's fees.[63] The Fifth Circuit affirmed, and the U.S. Supreme Court granted certiorari "to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[64]

The Court began its analysis by surveying pre-*Pickering* case law that stands for the proposition that public employees could not be "'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.'"[65] It found that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'" and that this principle animated its decision in *Pickering*.[66] That is, the subject of

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59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 141–42.

63 *Id.*

64 *Id.* at 142 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

65 *Id.* at 143–45 (citations omitted).

66 *Id.* at 144–45 (citations omitted).

Mr. Pickering's letter to the newspaper, namely the Board of Education's "allocation of school funds between athletics and education and its method of informing taxpayers about the need for additional revenue," was "'a matter of legitimate public concern' upon which 'free and open debate is vital to informed decision-making by the electorate.'"[67] The Court highlighted that cases applying *Pickering* dealt with "safeguarding speech *on matters of public concern*."[68]

The *Myers* Court then modified *Pickering* by clarifying what does and does not fall within the ambit of "matters of public concern." When a public employee's speech "cannot be fairly considered as relating to any matter of political, social, or other concern to the community," then it is not a matter of public concern, and "government officials should enjoy wide latitude in managing their offices," including firing insubordinate employees, "without intrusive oversight by the judiciary in the name of the First Amendment."[69] The Court also announced factors to help determine whether a public employee is truly speaking about a matter of public concern: "Whether an employee's speech addresses a matter of public concern must be determined [as a matter of law] by the content, form, and context of a given statement, as revealed by the whole record."[70]

Applying these factors to Ms. Myers's questionnaire, the Court ruled that, with the exception of the question asking whether her colleagues felt pressure to campaign for their bosses, Myers was not speaking about matters of public concern. The Court reasoned that questions about internal office matters were not questions

> of public import in evaluating the performance of the District Attorney as an elected official. [Ms.] Myers did not seek to inform the public that [Mr. Connick] was not discharging [his] governmental responsibilities . . . [n]or did [Ms.] Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [Mr.] Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo.[71]

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67 *Id.* at 145 (quoting *Pickering*, 391 U.S. at 571–72).

68 *Id.* (emphasis added) (discussing cases applying the *Pickering* test, including *Perry v. Sinderman*, 408 U.S. 593 (1972), which held that a community college professor stated a valid due process violation claim when he alleged that the Board of Regents declined to rehire him because he testified at a legislative hearing about whether the Board should transform his school into a four-year college, an issue of "public disagreement").

69 *Id.* at 146.

70 *Id.* at 147–48.

71 *Id.* at 148.

Having reached this conclusion, the Court declined to shield Ms. Myers from her termination because "[t]o 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 § 1983 claim.[72] While the Court briefly discussed the item on the questionnaire that did address a matter of truly public concern (the question about employees feeling pressure to campaign for their superiors), it held that the *Pickering* balance commanded a conclusion that Mr. Connick justifiably dismissed Ms. Myers.[73] The Court reasoned that, because Ms. Myers prepared and distributed her questionnaire at the office—the creation, distribution, and completion of which distracted from her and her colleagues' duties—Mr. Connick had a constitutionally defensible interest in terminating her.[74] Unlike *Pickering*, in other words, there was evidence in the *Myers* record that Ms. Myers's conduct justified "[Mr.] Connick's fears that the functioning of his office was endangered."[75] In dicta, the Court hammered home its point, observing that

> it would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here.[76]

Myers reinforced the point that, to receive the protection of the First Amendment, and thus for a public employment retaliation to be actionable pursuant to § 1983, a public employee must first speak as a

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72 *Id.* at 149.

73 *Id.* at 150–52.

74 *See id.* at 152–53 ("Private expression . . . may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered." (quoting Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 415 n.4 (1979))). It is difficult to overstate how low a bar this is for government employers to overcome, relative to the strict scrutiny bar governments must meet when acting as sovereigns: Sheila Myers's termination was constitutionally justified simply because she distributed a survey at work. *Id.*; *cf. infra* notes 228–229 and accompanying text (describing tests applicable to content-based and viewpoint-based restrictions for purely private speakers).

75 *Connick*, 461 U.S. at 153.

76 *Id.* at 154.

private citizen about a matter of truly public concern;[77] the Fourteenth Amendment, in other words, is not a "font" of labor law.[78]

The distinction between *Pickering* and *Myers* concerning whether there was evidence in the record that speech actually disrupted the workplace raises an interesting jurisprudential concern. Specifically, the manner in which the Courts of Appeals have interpreted the *Pickering-Myers* test suggests that government employers have an extremely low burden when it comes to invoking a disruption in the workplace or to public services as a defense to a retaliation claim. Some circuits require proof of an actual disruption.[79] The greater weight of authorities, however, suggests that federal courts generally require no evidence of an actual disruption before giving effect to this defense—rather, courts require only some argument going above mere speculation that an employee's speech *would* cause a disruption.[80] The courts that take this question-of-law approach reason that prudential concerns outweigh the employee's freedom to speak: it is simply better public policy, in some courts' views, to allow a municipal employer to remove a potential distraction by firing an employee in certain contexts than to allow tensions to come to boil.[81]

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77 *Id.*

78 *Cf.* Paul v. Davis 424 U.S. 693, 701 (1976) ("But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.").

79 *See, e.g.*, Schalk v. Gallemore, 906 F.2d 491, 496–97 (10th Cir. 1990) ("While these arguments have *superficial* appeal, Gallemore submitted no actual evidence of any disruptive confrontations. . . . Because Gallemore has not alleged any disruption as a result of Schalk's actions, *and we fail to see any*, we hold the *Pickering* balance tips in favor of Schalk." (emphasis added)).

80 *See, e.g.*, Gillis v. Miller, 845 F.3d 677, 685–88 (6th Cir. 2017) (discussing a circuit split between the Tenth and Second, Third, Seventh, Ninth, and Eleventh Circuits on whether the disruption defense to a retaliation claim requires proof of an actual disruption) (citations omitted). In *Gillis*, the Sixth Circuit held that

> a public employer need not show actual disruption of the public agency in all cases. Instead, when the employer does not offer such evidence, we must assess whether the employer could reasonably predict that the employee speech *would* cause a disruption, in light of "the time, manner, and place" the speech was uttered, as well as "the context in which the speech arose."

Id. at 687 (emphasis added) (citations omitted). This approach essentially turns what ought to be a question of fact into a question of pure law, focusing exclusively on the speaker's initial utterance without considering the conduct of other actors. In so doing, the approach also invites life-tenured judges to insert their personal views on offensive utterances into their analyses.

81 *See, e.g.*, *id.* ("[W]e 'do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.'" (quoting Anzaldua v. Ne. Ambulance & Fire Prot. Dist., 793 F.3d 822, 833–34 (8th Cir. 2015))). Courts taking this tack rely on the Supreme Court's

Just over twenty years after *Myers*, the Court revisited its public employment retaliation jurisprudence and issued a decision that overturned the proverbial apple cart. As *Pickering* had done, the new ruling categorized certain public employee speakers and their speech. In so doing, the Court elucidated an absolute defense to public employees' retaliation claims in some situations, as the next Section explains.

D. Garcetti *Severely Limits Speech Protections for Public Employees*

Since 2006, public employees have had no First Amendment protection for speech that they are paid to utter. In *Garcetti v. Ceballos*,[82] the City of Los Angeles took a number of adverse employment actions against Richard Ceballos, a deputy district attorney who, in his official capacity as a municipal criminal lawyer, dared to argue with his supervisors about the veracity of an affidavit that police had used to obtain a search warrant.[83] Mr. Ceballos also testified for the defense in a suppression hearing in that criminal case.[84] Mr. Ceballos was then "reassign[ed] from his calendar deputy position to a trial deputy position, transfer[red] to another courthouse, and deni[ed] a promotion," so he filed a retaliation action in federal district court pursuant to § 1983.[85]

The Court reasoned, however, that it was precisely because Mr. Ceballos had disagreed with his superiors as a calendar deputy that the First Amendment did not shield him from the consequences of his speech, and thus no constitutional violation had occurred:

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plurality opinion in *Waters v. Churchill*, 511 U.S. 661, 673–74 (1994). *Gillis*, 845 F.3d at 686. In *Waters*, the Court acknowledged that "[o]ne could make a respectable argument that . . . even in a government workplace the free market of ideas is superior to a command economy. . . . But we have declined to question government employers' decisions on such matters." *Waters*, 511 U.S. at 673–74. This Article attempts to raise such a respectable argument in partial hope that the Court will one day reconsider the *Waters* plurality's position and begin questioning government employers' decisions where the employer has engaged in conduct that complicates the traditional retaliation analysis. *See infra* Part IV.

82 547 U.S. 410 (2006).

83 *Id.* at 413–15.

84 *See* Ceballos v. Garcetti, 361 F.3d 1168, 1171 (9th Cir. 2004). Mr. Ceballos believed that he had an obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to give the defendant a copy of his memorandum analyzing the veracity of the affidavit. *Ceballos*, 361 F.3d at 1171. He also claimed that, when the defense subpoenaed him to testify in the suppression hearing, his supervisor tried to coach his testimony. *Id.*

85 *Garcetti*, 547 U.S. at 415.

> The significant point is that the memo was written pursuant to [Mr.] Ceballos' official duties. Restricting speech that *owes its existence to a public employee's professional responsibilities* does not infringe on any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.[86]

In some ways, this reasoning is simply the inverse of the Court's reasoning in *Pickering*.[87] Under that analysis, if the employee spoke as a private citizen on a matter of public concern, then the First Amendment shields the employee from retaliation because the employer has no more interest in controlling speech in that context than it would in controlling the speech of a hypothetical private citizen with whom it had no employment relationship. But under the *Garcetti* analysis, if the employee spoke as a "public citizen," even on a matter of public concern (including whistleblowing),[88] then the government employer *does* have a constitutionally defensible interest in controlling the speech.[89] Accordingly, the 5–4 *Garcetti* majority held that no constitutional violation had occurred when Mr. Ceballos's supervisors took action against him because the content of his memorandum was speech he was paid to utter.[90]

In *Garcetti*, the Court established the principle that the First Amendment "[does] not support the existence of a constitutional cause of action behind every statement a public employee makes in the course

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86 *Id.* at 421–22.

87 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572–74 (1968).

88 *See generally* David L. Hudson, Jr., *No Free Speech for You*, SLATE (Aug. 4, 2017, 2:55 PM), http://bit.ly/2FcbxZ7 ("Anthony Kennedy has the chance to undo his worst anti-First Amendment decision. He should take it.").

89 *See Garcetti*, 547 U.S. at 433 (Souter, J., dissenting) (noting that various forms of on-the-job speech, like auditors reporting embezzlement or building inspectors reporting bribes, deserve First Amendment protection because they are in the public's interest). It is worth noting the tension between this reasoning and a lawyer's duty of candor. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2016) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows is false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). Similarly, lawyers have a professional ethical obligation to report certain misconduct of other lawyers; but under *Garcetti*, government lawyers can be fired for doing so with no protection from the First Amendment. *See* MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 2016) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

90 *Garcetti*, 547 U.S. at 421 ("[Public] employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

of doing his or her job."[91] Therefore, Mr. Ceballos necessarily could not make out a prima facie case for a § 1983 claim because he could not establish the second step. While his employers were only able to reassign him because they were "clothed with the authority of state law,"[92] and thus they acted "under color of" state law,[93] they did not violate Mr. Ceballos's constitutional rights because the Free Speech Clause did not protect his arguments with his supervisors over the veracity of the affidavit the LAPD used to obtain the search warrant.

To satisfy the second step of the prima facie § 1983 case against the backdrops of *Pickering*, *Myers*, and *Garcetti*, retaliation plaintiffs must also establish causation by demonstrating that their constitutionally protected speech was a substantial or motivating factor in the employer's decision to take action against them, as the next Section explains.

E. Doyle*'s Causation Analysis*

The final piece to the § 1983 retaliation puzzle is the causation element, which the Court adopted in *Mount Healthy City School District Board of Education v. Doyle*.[94] Fred Doyle was both a teacher in the school district, working consecutive, short-term contracts, and the president of the local teachers' union.[95] In the latter role, he advocated to increase the number of employment matters that would be subject to collective bargaining.[96] Unfortunately, his zealous personality—which may have made him an effective union representative—posed challenges in the workplace, and controversy seemingly followed him wherever he went. For example, one day he got into a verbal argument with another teacher, who slapped him in the face.[97] Instead of letting cooler heads prevail or attempting to move on from the incident, Mr. Doyle pursued punishment for the other teacher until the principal suspended both of them.[98] Mr. Doyle also

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91 *Id.* at 426.

92 United States v. Classic, 313 U.S. 299, 326 (1941).

93 42 U.S.C. § 1983 (2012).

94 429 U.S. 274 (1977), *superseded in part by statute*, Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1) (2012) (establishing a "contributing factor" threshold for adjudicating retaliatory terminations of federal whistleblowers).

95 *Doyle*, 429 U.S. at 281.

96 *Id.*

97 *Id.*

98 *Id.*

complained to cafeteria employees about not receiving large enough portions, called students "sons of bitches," and made obscene gestures toward female students.[99]

The proverbial straw that broke the camel's back, however, like Marvin Pickering's letter to the editor of a local newspaper, was Mr. Doyle's telephone call to a local radio station to criticize school policies. The principal at Mr. Doyle's school instituted a faculty dress code to try to improve the public's perception of teachers and hopefully increase the district's chances of securing bond funding.[100] Mr. Doyle, who, in his dual role as teacher and union representative, thought that the decision to implement the dress code should result from a joint agreement of faculty and administrators rather than a unilateral decision from the principal, called a disc jockey at a local radio station to complain, creating a broadcast news item.[101] As Mr. Doyle's short-term contract drew near its expiration, the superintendent recommended to the school board that the district not rehire him, and the school board obliged.[102] When he asked why the board would not renew his teaching contract, Mr. Doyle received a letter "citing 'a notable lack of tact in handling professional matters which leaves much doubt to your sincerity in establishing good school relationships'" and referencing the radio station incident and his obscene gestures toward female students.[103]

The district court ruled in a bench trial that Mr. Doyle's call to the radio station "was 'clearly protected by the First Amendment,' and that because it had played a 'substantial part' in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay."[104] The Sixth Circuit affirmed.[105] However, the Court was skeptical because there were several reasons in Mr. Doyle's employment record—incidents independent of the radio station call and obscene gestures—for the school board to decline to renew his contract.[106] The Court held that it was proper to impose a burden on Mr. Doyle to demonstrate both that the Constitution protected his conduct and that his speech was "a 'substantial factor'—or, to put it in

99 *Id.* at 281–82.
100 *Id.* at 282.
101 *Id.*
102 *Id.*
103 *Id.* at 282–83.
104 *Id.* at 283.
105 *Id.*
106 *Id.* at 284–85.

other words, that it was a 'motivating factor' in the Board's decision not to rehire him."[107] Yet the Court also found that the trial record was unclear as to whether the school board "would have reached the same decision as to [Mr. Doyle's] re-employment even in the absence of" the radio station call, and it vacated the Sixth Circuit's judgment and remanded the case.[108] Thus, *Doyle* imposes a burden on retaliation plaintiffs to establish that the basis of an employer's decision to terminate them was the speech itself. If, by a preponderance of the evidence, an employer establishes that it would have fired the employee for some other reason, then speech concerns are not implicated by the decision to terminate, and the plaintiff cannot establish a First Amendment violation as a matter of law, negating the second step of the prima facie § 1983 case.

Later Sections of this Article do not address *Doyle*'s element of causation in Metro's decision to terminate Venable. Rather, this Article assumes, *arguendo*, that Venable's speech was the only reason Metro fired him, because Chief Anderson's letter to Venable, in essence, says so.[109] Moreover, Venable's meritorious service record and prior commendations stand in stark contrast to Mr. Doyle's employment record, which suggested that the former union president was a malcontent who was perhaps ill-suited for a social profession. There is much less question, therefore, as to whether *Doyle*'s causation element is present in the Venable Case.

The Courts of Appeals have uniformly addressed the *Pickering-Myers* balancing test,[110] the *Garcetti* test,[111] and the *Doyle* causation

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107 *Id.* at 287 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

108 *Id.*

109 *See Anderson Letter*, *supra* note 21, at 4 ("[M]aking such comments has disqualified you from serving in a police officer capacity.").

110 *See generally, e.g.*, Nichols v. Dancer, 657 F.3d 929, 932–34 (9th Cir. 2011); Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 337–40 (6th Cir. 2010); Miller v. Clinton Cty., 544 F.3d 542, 547–51 (3d Cir. 2008); Richardson v. Sugg, 448 F.3d 1046, 1061–63 (8th Cir. 2006); Locurto v. Giuliani, 447 F.3d 159, 172–83 (2d Cir. 2006); Love-Lane v. Martin, 355 F.3d 766, 775–79 (4th Cir. 2004); Gustafson v. Jones, 290 F.3d 895, 906–12 (7th Cir. 2002); O'Donnell v. Barry, 148 F.3d 1126, 1132–39 (D.C. Cir. 1998); Brady v. Fort Bend Cty., 145 F.3d 691, 704–10 (5th Cir. 1998); O'Connor v. Steeves, 994 F.2d 905, 912–17 (1st Cir. 1993); Conaway v. Smith, 853 F.2d 789, 795–98 (10th Cir. 1988); Mings v. Dep't of Justice, 813 F.2d 384, 387–89 (Fed. Cir. 1987) Eiland v. Montgomery, 797 F.2d 953, 955–60 (11th Cir. 1986).

111 *See generally, e.g.*, Moss v. City of Pembroke Pines, 782 F.3d 613, 618–21 (11th Cir. 2015); Gibson v. Kilpatrick, 773 F.3d 661, 667–70 (5th Cir. 2014); Bowie v. Maddox, 653 F.3d 45, 46–48 (D.C. Cir. 2011); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d

analysis[112] at length. Yet a gap exists in this legal framework. Specifically, the law fails to address what happens when a municipality fires a public employee speaking on his own time purportedly because the employee's speech caused a disruption in the workplace—tipping the *Pickering-Myers* balance in the government's favor—but the workplace disruption arose because the employer issued a press release that republished the offending speech and organized a disruption against the speaker.[113]

Returning to whether Venable would prevail on a retaliation theory pursuant to § 1983, we will take both the *Garcetti* and *Pickering-Myers* paths to answer the question. If the law and facts take us down the first path,[114] then there would be little reason to write this Article because

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550, 562–64 (4th Cir. 2011); Thomas v. City of Blanchard, 548 F.3d 1317, 1322–23 (10th Cir. 2008); Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1126–29 (9th Cir. 2008); Reilly v. City of Atl. City, 532 F.3d 16, 225–28 (3d Cir. 2008); Ruotolo v. City of New York, 514 F.3d 184, 188–90 (2d Cir. 2008); Spiegla v. Hull, 481 F.3d 961, 965–67 (7th Cir. 2007); Haynes v. City of Circleville, 474 F.3d 357, 363–64 (6th Cir. 2007); Curran v. Cousins, 509 F.3d 36, 44–49 (1st Cir. 2007); McGee v. Pub. Water Supply, 471 F.3d 918, 920–21 (8th Cir 2006).

112 *See generally, e.g.*, Graber v. Clarke, 763 F.3d 888, 898–900 (7th Cir. 2014); Anemone v. Metro. Transp. Auth., 629 F.3d 97, 114–15 (2d Cir. 2011); Davison v. City of Minneapolis, 490 F.3d 648, 654–55 (8th Cir. 2007); Ostad v. Or. Health Scis. Univ., 327 F.3d 876, 882–85 (9th Cir. 2003); Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 169–71 (1st Cir. 1995); Hughes v. Bedsole, 48 F.3d 1376, 1385–88 (4th Cir. 1995); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178–80 (11th Cir. 1992); O'Donnell v. Barry, 148 F.3d 1126, 1133 D.C. Cir. 1998); Schalk v. Gallemore, 906 F.2d 491, 494–95 (10th Cir. 1990); Fowler v. Bd. of Educ. of Lincoln Cty., 819 F.2d 657, 660–61 (6th Cir. 1987); *id.* at 667–68 (Peck, J., concurring); Lewis v. Univ. of Pitt., 725 F.2d 910, 915–16 (3d Cir. 1983); Bowen v. Watkins, 669 F.2d 979, 982–84 (5th Cir. 1982).

113 As discussed in more detail below, that is the novel issue presented here. Although Venable was not fired until February 2017, *see Venable Fired*, *supra* note 20, Metro issued a press release in July 2016 announcing that there was an investigation, *see Venable Decommissioned*, *supra* note 14. It is likely that the July 2016 press release was the cause of the disruption, not Venable's statement itself. This case is therefore different from *Jefferies v. Harlston*, where state university officials issued a press release that republished offensive speech to announce an investigation into the speaker's conduct—but the employee's speech was already highly publicized. 52 F.3d 9, 11 (2d Cir. 1995) (public university professor made televised anti-Semitic remarks at a conference). Venable's case is also distinguishable from *Lancaster v. Indep. Sch. Dist. No. 5*, where a school board issued a press release announcing that it was suspending a high school football coach—but the district characterized the coach's conduct as "an 'internal personnel issue'" and did not repeat his locker-room speech. 149 F.3d 1228, 1232 (10th Cir. 1998). *Jefferies* and *Lancaster* appear to be the only two reported retaliation cases involving a press release, underscoring the notion that the Venable Case presents novel facts.

114 If Venable was paid to speak on Facebook about lethal force, then Metro could constitutionally fire him for anything he said on that point. *See supra* Part II Section D. (discussing *Garcetti*, which established that the First Amendment does not protect every statement by a public employee made during the course of his or her work).

public employees receive no First Amendment protection for speech that a municipality pays them to utter. The second path,[115] however, reveals that the *Pickering-Myers* framework is inadequate to cover the novel facts of the Venable Case and prospective situations like it. Thus, Part III revisits the Venable Case to apply these tenets of free speech law, revealing a deficiency in the framework.

III
THE VENABLE CASE AND THE GAP IN SECTION 1983'S RETALIATION JURISPRUDENCE

Deciding which doctrine applies to the Venable Case should be a relatively easy task. If Venable spoke because he was paid to comment on Facebook about the use of lethal force, then *Garcetti* controls, and the constitutional inquiry ends. Metro could permissibly fire Venable for his insensitive comment, and he would receive no cover from the Free Speech Clause. If Venable spoke as a private citizen on a matter of public concern, and there was evidence in the record that his insensitive comment disrupted Metro's ability to function efficiently and effectively, or there was a plausible argument that his speech alone would cause a disruption, then the *Pickering-Myers* test controls, and Metro should have fired him. However, if Venable spoke as a private citizen about a matter of public concern, and there was no evidence in the record that his speech caused a disruption to Metro's ability to function, or the argument that it alone would cause a disruption amounted to mere speculation, then the *Pickering-Myers* test still applies. But, in this third scenario, the city's sanction of firing for the view Venable expressed on Facebook violated Venable's free-speech rights, and he could state a prima facie § 1983 case. What makes Venable's case novel and exposes the gap in the prevailing framework, is the availability of *some* evidence in the administrative record that his speech disrupted the workplace.[116] But the evidence here is at best suspect and at worst wholly insufficient, largely because of Metro's

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[115] If Venable posted on Facebook as a private citizen, and a police officer's use of lethal force is a matter of public concern, then Metro could constitutionally fire him only if his speech disrupted Metro's efficient delivery of safety services. *See supra* Part II Sections B & C. (discussing *Pickering* and *Myers*).

[116] As discussed previously, a municipality's burden here in many circuits is presumptively very low. It need only argue, above a speculative level, that the speech *would* disrupt agency operations. *See supra* notes 79–81 and accompanying text.

conduct between the time Venable uttered his speech and the ensuing public outcry.

Chief Anderson's letter repeatedly attempts to shoehorn Venable's remarks into the *Garcetti* framework. Specifically, Chief Anderson wrote that "[a]lthough [Venable] did not state [on his Facebook page] that [he was] a police officer, [his] comments would lead a reasonable person to believe [he was] a police officer"; "[Venable] published numerous additional comments that made it sufficiently clear that [he was] a law enforcement officer living in Nashville"; that "[s]ome of the persons engaged in the internet discussion knew [Venable's] identity and [his] place of employment"; and "[i]t only took someone several states away a few keystrokes, on the same World Wide Web on which [Venable was] publishing [his] inflammatory remarks, to confirm [his] identity and [his] employment."[117] *Garcetti*, however, does not apply to Venable's situation because Venable was paid to investigate and arrest criminal suspects, not to comment on Facebook about the use of lethal force.

The *Garcetti* test analyzes whether the offending speech "owes its existence to a public employee's professional responsibilities"[118] or whether the speech was part and parcel of "tasks [a terminated public employee] was paid to perform."[119] Irrelevant to the analysis are the listener's mere awareness that a municipality employs the speaker, what a reasonable person would think when hearing or reading the offending speech, and the extent the speaker holds himself out as a public-sector employee. Venable's Facebook comment, in other words, was no more speech resulting from a "task[] he was paid to perform"[120] simply because a reader *could* identify him as a police officer than written speech on his IRS Form 1040 that lists his occupation as a "police officer." Both mediums identify him as a first responder, but neither "owes its existence to a public employee's professional responsibilities."[121]

Additionally, it is constitutionally irrelevant that Venable spoke about something he ostensibly does in his profession—using deadly force. The Court answered this question in *Lane v. Franks*.[122] A community college in Alabama hired the plaintiff, Edward Lane, on a

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117 *Anderson Letter*, *supra* note 21, at 2–3, 5.

118 Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

119 *Id.* at 422.

120 *Id.*

121 *Id.* at 421.

122 573 U.S. 228 (2014) (9–0 decision).

probationary basis to run a program for underprivileged youth.[123] The program was financially distressed, so Mr. Lane undertook an internal audit and discovered that one of its counselors, Suzanne Schmitz, was receiving pay without working.[124] Mr. Lane's attempts to counsel Ms. Schmitz and improve her performance bore no fruit.[125] Although Mr. Lane had authority to hire and fire in his role as the program director, and despite his attempt to resolve the issue with both Ms. Schmitz and his own supervisors, his supervisors and the college's attorney warned him not to fire the underperforming employee under threat of "negative repercussions for [Mr. Lane]."[126] Nevertheless, Mr. Lane fired Ms. Schmitz, which prompted an FBI investigation into her, and she was indicted for mail fraud and theft of federal funds.[127] Mr. Lane testified at the grand jury hearing as to his reasons for firing her, again under subpoena at her trial, and a third time during her retrial following a hung jury causing the first trial to result in a mistrial.[128] Three months later, Mr. Lane had a new supervisor, Steve Franks, who fired him.[129]

Mr. Lane sued Mr. Franks under § 1983, alleging that he was fired in retaliation for testifying against Ms. Schmitz.[130] The trial court awarded summary judgment to Mr. Franks on qualified immunity grounds, holding that, under *Garcetti*, Mr. Lane had no clearly established constitutional right to testify against Ms. Schmitz because of his supervisory role over her.[131] To conclude that Mr. Lane's testimony deserved no First Amendment protection, the Eleventh Circuit affirmed and relied on *Garcetti*'s holding that "speech '[that] owes its existence to [the] employee's professional responsibilities' and is 'a product that the "employer himself has commissioned or created."'"[132]

The Court reversed, holding that "the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, *outside the scope of his ordinary job responsibilities*."[133]

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123 *Id.* at 231–32.
124 *Id.* at 232.
125 *Id.*
126 *Id.*
127 *Id.* at 232–33.
128 *Id.*
129 *Id.* at 233–34.
130 *Id.* at 234.
131 *Id.* at 234–35.
132 *Id.* at 235.
133 *Id.* at 238 (emphasis added).

Writing for a unanimous Court, Justice Sotomayor noted that

> *Garcetti* said nothing about speech that *simply relates to* public employment . . . the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into *employee*—rather than *citizen*—speech. The critical question under *Garcetti* is whether the speech at issue is itself *ordinarily within the scope of the employee's duties*, not whether it merely concerns those duties.[134]

Therefore, while it may be tempting to justify Venable's firing by arguing that his comment asserted what he might do in duties that he was paid to perform, *Garcetti* is simply inapposite to the Venable Case under *Lane*.[135]

The more appropriate test is the *Pickering-Myers* balancing test. This test asks, first, whether Venable spoke as a private citizen on a matter of public concern, and, second, whether his speech created or would create such a disruption to Metro's work that it gave rise to a constitutionally defensible termination, weighing the city's interest in public safety against Venable's liberties.[136] Since Metro did not pay Venable to comment on social media posts, and he was speaking from his personal social media account on a private network while off duty, a court would likely reason that he spoke as a private citizen when he commented on the Philando Castile shooting. Venable's comments were a matter of public concern because his comments addressed the use of force when detaining Philando Castile during a time when vigorous public debates on the subject raged across the country,[137] even though the context suggests that Venable was trying to irritate and

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134 *Id.* at 239–40 (emphasis added).

135 One could distinguish the Venable Case from *Lane* on its facts. A Facebook comment is clearly not uttered in the same context as sworn testimony given under subpoena in a federal criminal case. Similarly, speaking counterfactually about what one would have done in a certain workplace situation is categorically distinguishable from speaking about what one actually did. Given the reasoning Justice Sotomayor espoused in *Lane*, however, what is determinative as to whether *Garcetti* applies is whether or not the offending speech was speech the employee was paid to utter. That is simply not the case with Venable's Facebook comment.

136 *See* Connick v. Myers, 461 U.S. 138, 142–54 (1983) (discussing the *Pickering* balancing test).

137 Over half of Americans believe that the prevalence of deadly force in police encounters signifies a systemic problem. RICH MORIN ET AL., PEW RESEARCH CTR., BEHIND THE BADGE: AMID PROTESTS AND CALLS FOR REFORM, HOW POLICE VIEW THEIR JOBS, KEY ISSUES AND RECENT FATAL ENCOUNTERS BETWEEN BLACKS AND POLICE 81 (2017), https://pewrsr.ch/2O5wJTm (full report available at the end of article). The disparity is even greater among African-Americans. *Id.*

inflame others in the discussion.[138] Therefore, a court would also likely conclude that he spoke on a matter of legitimate public concern.

Recall the matter-of-public-concern factors the Court set forth in *Myers*: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[139] The content here was an informal, off-duty conversation about the appropriate level of force police can use in a traffic stop that Venable claims was a sarcastic joke.[140] The form was a comment on a private social network.[141] The context was that he was speaking to a social acquaintance while off duty at a time when the propriety of the Castile shooting dominated network, cable, and online news coverage, and a majority of Americans have serious concerns about the amount of force police use broadly in the course of their daily work—especially with racial minorities. The *Myers* Court expressly noted that issues of racial discrimination are constitutionally significant in determining whether a public employee

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138 *See* Jason Lamb, *Ex-Nashville Cop Sues Metro After Being Fired*, NEWSCHANNEL5 (Feb. 14, 2018, 9:15 PM), http://bit.ly/2FaPWQz (collecting screen shots of the offending post).

139 461 U.S. at 147–48.

140 *See* Lamb, *supra* note 138 (showing a screen shot of a post from Facebook user Ed Austin from 1:33 PM on July 7, 2016, expressing disgust for Venable's comment).

141 Facebook provides a number of native privacy controls to allow end users to toggle and adjust the visibility of the content they share on the platform. *See, e.g.*, Brian Barrett, *The Complete Guide to Facebook Privacy*, WIRED (Mar. 21, 2018, 1:10 PM), http://bit.ly/2TB8iTK (providing instructions under the "Friends Focus" heading for limiting accessibility of personal content). It is not clear from either news reports about the Venable Case, the Venable Decommissioned Release, or Chief Anderson's letter whether either Venable or the woman to whose post he was responding had toggled their personal settings to limit the audience for the post and ensuing comments. *See supra* notes 14, 19, 21 and accompanying text. Rather, Facebook is a private entity that provides a platform, governed by private law, where users voluntarily connect to and exchange communications with each other after an invitation process called a "Friend Request." *See generally Adding Friends & Friend Requests*, FACEBOOK HELP CENTER, http://bit.ly/2TEoJ1L (last visited Mar. 3, 2019). This dynamic makes the cyberspace locus for the exchange more like a person's living room, where participants have been invited into the discussion, than a traditional public forum like a park or a sidewalk that "by long tradition or by government fiat [has] been devoted to assembly and debate," where Venable was haphazardly broadcasting his views to anyone within earshot. *Cf.* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Venable's choice to communicate his views on Facebook as opposed to setting up a podium in the middle of Broadway in downtown Nashville with a bullhorn is constitutionally significant. *Cf.* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979) ("Neither the [First] Amendment itself nor our decisions indicate that this freedom [of speech] is lost to the public employee who arranges to communicate privately . . . rather than to spread his views before the public.").

spoke on a matter of public concern.[142] The only inquiry that remains under *Pickering-Myers* is whether Metro could mount a credible case that Venable's comment caused or would plausibly cause a workplace disruption sufficient to trigger Metro's interest in firing him.

Chief Anderson's letter offers scant evidence of any actual workplace disruption.[143] Chief Anderson presented the factual record as:

> On July 7, 2016 the Office of Professional Accountability and Sgt. James Capps received a complaint that you posted an inappropriate comment on Facebook. . . .
>
> . . . Mr. David McMurry, one of the board members of the Madison Chamber of Commerce was notified of the posting. . . .
>
> Google search results yielded that *10 pages . . . of articles relating to this incident* were not only covered locally, but nationally and internationally. . . .
>
> . . . .
>
> . . . *This incident created a disruption in the workplace* which not only affected the Metropolitan Nashville Police Department, but also the Metro Government as a whole.[144]

The letter also described the nature of the disruption that Venable allegedly caused:

> It was because of . . . your inflammatory comments being the subject of several news stories broadcast in Nashville, that the leadership of the police department joined numerous members of the clergy, accompanied by numerous elected officials, including the mayor, and numerous community leaders, gathered on the plaza of the Criminal Justice Center to hold a prayer vigil. In fact . . . *all of these people dropped what they were doing and filled the plaza with little more than two hours' notice*. . . .

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142 461 U.S. at 146 (citing *Givhan*). Overtly racist jokes, however, are not matters of public concern—at least not in California or Massachusetts. *See* Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112 (Mass. 2000); D.C. v. R.R., 106 Cal. Rptr. 3d 399 (Cal. Ct. App. 2010).

143 As of this writing, the author has not filed a Tennessee Public Records Act request with Metro to obtain additional evidence to more fully evaluate the Venable Case in the context of the prevailing First Amendment tests, although Tennessee law makes that an option. *See generally* TENN. CODE ANN. § 10-7-503(c)(1), (3) (2012 & Supp. 2017); TENN. CODE ANN. § 10-7-504(g) (2012 & Supp. 2017) (exceptions to disclosure of and additional requester requirements for law-enforcement personnel records). This is perhaps one avenue for future research of the Venable Case and situations like it in states where open records laws permit access to personnel records.

144 *Anderson Letter*, *supra* note 21, at 2 (emphasis added).

> Your declarations on the World Wide Web . . . also created an uncomfortable atmosphere for every employee on the . . . Police Department . . . .[145]

Chief Anderson's letter, however, gives a myopic view of the Venable Case. While Chief Anderson's letter alleges that news stories about Venable's deplorable comments surfaced on July 7, 2016, his letter conspicuously fails to mention that Metro issued a press release about the Venable Case that day.[146] To demonstrate the significance of this omission from the record, one cannot find a single negative report about Venable prior to July 7, 2016, using native search engine tools with customized date ranges.[147] Rather, not until July 7, 2016, does negative press coverage of Venable's Facebook comment surface.[148] Nashville's newspaper of record, *The Tennessean*, did not publish a story about the incident until 10:26 p.m. that day.[149] WSMV Channel 4, the local NBC affiliate, published an online story at 9:53 p.m.,[150] only slightly earlier than *The Tennessean*. Prior to the news coverage of Venable's comments late in the day on July 7, 2016, there is record of only one social media user who complained about Venable's comment at 1:33 p.m.[151] Accordingly, it is not unreasonable to infer that Metro's press release played a predominant role in Metro employees "dropp[ing] what they were doing . . . with little more than two hours' notice"[152] to reassure the public that Venable was just a bad apple in an otherwise wholesome bushel. In fact, based on the nature of the coverage,[153] it strains credulity to think that these news organizations received notice of Venable's comments organically, reported on them, and only then did Metro respond with a press release. Had that been the case, the news coverage would likely have been

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145 *Id.* at 6 (emphasis added).

146 *See id.*; *Venable Decommissioned*, *supra* note 14.

147 *See* Google Search, *"anthony venable"*, GOOGLE, http://bit.ly/2yJ1ipj (last visited Nov. 15, 2017) (using custom date range of January 1, 2001, to July 6, 2016).

148 *See* Google Search, *"anthony venable"*, GOOGLE, http://bit.ly/2AJ3v4K (last visited Nov. 15, 2017) (using custom date range of July 7, 2016, to November 15, 2017). *But see* Lamb, *supra* note 138 (showing a screen shot of a post from Facebook user Ed Austin from 1:33 PM on July 7, 2016, expressing disgust for Venable's comment).

149 Sawyer, *supra* note 19 (reporting that Metro first learned of Venable's post around 3:00 p.m. on July 6, 2016).

150 Stuart Ervin, *Metro Officer Decommissioned over Facebook Post Apparently Referencing MN Shooting*, WSMV.COM (July 7, 2016, 9:53 PM), http://bit.ly/2TCub59.

151 *See* Lamb, *supra* note 138.

152 *Anderson Letter*, *supra* note 21, at 6.

153 *See* Sawyer, *supra* note 19; Ervin, *supra* note 150.

hostile to Chief Anderson, and possibly former Mayor Megan Barry, instead of focusing solely on Venable's comments and Chief Anderson's reaction to them. It is likewise perplexing to think that Venable's speech disrupted police work by itself, simply because Metro had to allocate police resources to monitor a public protest—which is police work in itself[154]—when police cannot always accurately predict when or where they will be needed.[155] Rather, Metro disrupted its own work by publicizing Venable's comments.

It is also not entirely plausible that Venable's comment, standing alone, would have caused a disruption if Metro did not fire him. Only a handful of people knew about his comment,[156] making it unlikely, given "'the time, manner, and place' the speech was uttered, as well as 'the context in which the speech arose,'"[157] that his comment would cause a disruption to the delivery of safety services citywide. Rather, Metro's concern seems like it was speculative at best before it decided to issue a press release that republished the comment on a large scale.

Thus, the Venable Case highlights a gap in the law that the Courts of Appeals and the U.S. Supreme Court should fill. There is no precedent or rule to follow in a case like Venable's, where the public may never have known about a first responder's offensive speech but for the government employer issuing a press release, republishing the speech to convey the basis for an investigation, and effectively organizing the public against the politically incorrect speaker. This is especially true where a municipal employer's burden is presumptively low, and it need not offer evidence of an actual disruption to the

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154 *See, e.g.*, NASHVILLE, TENN. MUN. CODE tit. 2, div. I, ch. 2.44, art. I, § 2.44.020(A) (2006) ("The department of metropolitan police shall be responsible . . . for the preservation of the public peace . . . .").

155 *See Compstat: A Crime Reduction Management Tool*, HARV. KENNEDY SCH. ASH CTR. FOR DEMOCRATIC GOVERNANCE AND INNOVATION, http://bit.ly/2F9an04 (last visited Feb. 11, 2019) (describing the innovative-but-still-reactive statistical tools that enable police departments to more effectively deploy their personnel to manage and reduce the incidence of crime in a given jurisdiction).

156 According to Chief Anderson's letter, the universe of people on July 7, 2016, who knew about Venable's comments was very small: some Facebook users who could identify Venable as a police officer, whoever reported the comments to Sergeant James Capps, and whoever reported the comments to David McMurry of the Madison Chamber of Commerce. *Anderson Letter*, *supra* note 21, at 2. Obviously, as the author of the comments, Venable himself also knew about the comments—but it is highly unclear that a large enough group of people sufficient to "create a disruption" in Metro's operations knew about the comments before Metro issued the press release announcing that Venable had been decommissioned. *See id.*

157 Gillis v. Miller, 845 F.3d 677, 687 (6th Cir. 2017).

delivery of public services in most circuits.[158] Therefore, courts should embrace a new rule because speakers have weighty interests in exercising their rights as freely as possible, and the public has a similarly profound interest in upholding the Free Speech Clause. Moreover, strict application of the *Pickering-Myers* test would result in injustice that subsequent Sections of this Article attempt to remedy. Applying the *Pickering-Myers* test narrowly without considering the totality of the circumstances of the Venable Case or future similar cases would make a mockery of the First Amendment by essentially punishing the plaintiff for the conduct of the government whose *de facto* censorship already harmed the plaintiff.

Part IV attempts to develop a rule that operates within the existing *Garcetti* and *Pickering-Myers* frameworks. That is, the Venable Rule would still permit municipal employers to terminate employees on the basis of the content of offensive speech under the prevailing tests if the employer demonstrates that an employee's speech alone actually disrupted the workplace. But the Venable Rule would protect public employees from retaliation when "the public" may never have heard an employee's offending speech but for the employer's conduct.

Candidly, it is difficult to estimate the breadth of this problem, largely because it is very difficult to know who has suffered an unconstitutional retaliation, where, and when if putative plaintiffs do not file lawsuits. Under the prevailing framework, some terminated employees have no incentive to incur the costs of litigation.[159] It is simply impossible to win on these facts under the status quo, so it is important to resolve these legal issues. Without modification, any municipality with a social media policy is a target-rich environment for public employment decision makers who want nothing more than to sacrifice a rhetorical opponent on the altar of political correctness, even if it risks violating the opponent's civil rights. Although Metro may not solely have sought positive publicity or attempted to promote social justice by publicizing Venable's comments, investigating him, and ultimately firing him, the opportunity for any municipal employer to abuse its powers, combined with its motives to manicure the public's

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158 *See supra* notes 79–81 and accompanying text.

159 Although some § 1983 plaintiffs are able to recover their attorney fees after prevailing in a suit, *see* 42 U.S.C. § 1988(b) (2012) (providing attorney's fees for meritorious § 1983 claims), many plaintiffs may not prevail. Additionally, there are other, nonmonetary costs of litigation—such as the time needed to devote to one's case and the stress that comes with suing one's employer. Those costs cannot be recovered.

perceptions of government, presents the need to modify current civil rights laws.

IV
SKETCHING THE VENABLE RULE

Notwithstanding sociopolitical tensions rising in a divided, pluralistic society, the ease with which Metro fired Venable marks a substantial step backward for a free society. The First Amendment should not tolerate a municipality using technological tools or press releases to organize the public against a disfavored speaker and then justifying its censorship on the basis of the chaos it fomented. Thus, courts should hold an evidentiary hearing when municipal employers invoke the disruption defense to a public employment retaliation claim and, first, require proof of an actual disruption to public services and second, permit § 1983 plaintiffs to rebut their employers' evidence of workplace disruption with evidence that the employers' publication or republication of the offending speech caused the disruption. This approach better comports with due process than the status quo,[160] in that it gives both sides an opportunity to be heard and present evidence as to the source of the dispute.[161] Free-speech theory, how technology potentially alters or intensifies jurisprudential concerns, and other legal and equitable doctrines help explain why the courts should adopt the Venable Rule. The law is highly skeptical of both governmental efforts to regulate the marketplace of ideas and of providing relief or

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[160] *See supra* notes 79–81 and accompanying text (providing that, in many circuits, the disruption analysis is a question of law for courts answered by whether speech merely *would* cause a disruption).

[161] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard." (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)) (internal quotation marks omitted)); *cf.* Jenkins v. McKeithen, 395 U.S. 411, 429 (1969) ("The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause." (citing Morgan v. United States, 304 U.S. 1, 18 (1938)). In fact, a straightforward application of the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), virtually compels this conclusion. Because a terminated employee in an appropriate test case has such a strong private interest in speaking freely, *see infra* Part IV Sections A & C, the employer's interest in fiscal management is negligible since it is already incurring litigation costs in defending a retaliation claim, and it would incur relatively small marginal costs to navigate an evidentiary hearing in that litigation, and the risk of an encroachment on speech rights without a hearing is high without the additional procedural safeguard of a full evidentiary hearing on the cause of an actual workplace disruption, the Venable Rule strengthens due process—the very aspect of the Constitution that § 1983 was designed to enforce. *See Mathews*, 424 U.S. at 355 (discussing *Goldberg*, 397 U.S. at 263–71).

vindication in the courts to litigants who have affirmatively created a legal dispute.

A. Social Progress Through the Marketplace of Ideas—Even Bad Ideas

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.

—Justice Oliver Wendell Holmes[162]

The Anglo-American philosophical tradition has argued for centuries for the protection of free expression. For decades, the law has delivered on that promise in several ways. As early as the mid-seventeenth century, John Milton was imploring the English Parliament to abandon its plan to regulate the content of printed books. Milton urged that great achievements had come to pass across the epochs in Europe due to the vibrant and dynamic information ecosystem that prevailed in Britain:

> Lords and Commons of England! consider what nation it is whereof ye are, and whereof ye are the governors: a nation not slow and dull, but of a quick, ingenious and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point the highest that human capacity can soar to. Therefore the studies of learning in her deepest sciences have been so ancient and so eminent among us, that writers of good antiquity and ablest judgment have been persuaded that even the school of Pythagoras and the Persian wisdom took beginning from the old philosophy of this island. And that wise and civil Roman, Julius Agricola, who governed once here for Caesar, preferred the natural wits of Britain before the laboured studies of the French. Nor is it for nothing that the grave and frugal Transylvanian sends out yearly from as far as the mountainous borders of Russia, and beyond the Hercynian wilderness, not their youth, but their staid men, to learn our language and our theologic arts.
>
> . . . .
>
> What would ye do then? should ye suppress all this flowery crop of knowledge and new light sprung up and yet springing daily in this

[162] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> city? Should ye set an oligarchy of twenty engrossers over it, to bring a famine upon our minds again, when we shall know nothing but what is measured to us by their bushel? Believe it, Lords and Commons, they who counsel ye to such a suppressing do as good as bid ye suppress yourselves . . . . If it be desired to know the immediate cause of all this free writing and free speaking, there cannot be assigned a truer than your own mild and free and humane government. It is the liberty, Lords and Commons, which your own valorous and happy counsels have purchased us, liberty which is the nurse of all great wits; this is that which hath rarefied and enlightened our spirits like the influence of heaven; this is that which hath enfranchised, enlarged and lifted up our apprehensions, degrees above themselves.[163]

Thus, we protect speech today, not only because the speaker herself has a right to her uninhibited expression, but also because, as classical liberal philosopher John Stuart Mill wrote, society at large has a right to the benefits that flow from a market-like exchange that occurs when speakers utter their ideas.[164] When members of the public realize that their beliefs are incorrect and that a speaker's belief is correct, the members of the public benefit from the opportunity to correct their errors. When a speaker is incorrect, the public benefits from a "clearer perception and livelier impression of truth, produced by its collision with error"; members of the public can establish the righteousness of their position by observing the "wrong" position.[165] Accordingly, the Court has recognized a "right to receive information and ideas."[166] This right is reciprocal to the First Amendment's protections of speech and press in two ways: "First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . . More importantly, the right to receive ideas is a necessary predicate to the

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163 John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England*, *in* IDEAS OF THE FIRST AMENDMENT 52, 79–80, 83 (Vincent Blasi ed., 2d. ed. 2012) (1644).

164 JOHN STUART MILL, *On Liberty*, *in* UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 69, 85 (Geraint Williams ed., Everyman Books 1993) (1859). For a meditation on the asymmetry between robust efforts to regulate economic activity in the marketplace and the hands-off approach to regulating speech, see Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 49 UCLA L. REV. 959 (1995).

165 MILL, *supra* note 164, at 85; *see also* First Nat'l Bank v. Belotti, 435 U.S. 765, 783 (1978) ("[The First Amendment] afford[s] the public access to discussion, debate, and the dissemination of information and ideas."). "Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification." *Id.*; *see also* Winters v. New York, 333 U.S. 507, 510 (1948) ("What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

166 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

recipient's meaningful exercise of his own rights of speech, press, and political freedom."[167] In this tradition, uninhibited speech yields robust education and unrestrained creativity, which are critical to social progress and the *sine qua non* of effective self-government.

Another commentator, Jonathan Rauch, has continued to carry the banner for this permissive tradition with what he calls "The Liberal Principle" for divining social truths, the application of which requires "[c]hecking *of* each *by* each through public criticism" once each gets to hear the other's speech.[168] The Liberal Principle springs from the ethical proposition that people generally have no right to not be offended.[169] Using speech to counteract speech is peaceful, and thus society should prefer The Liberal Principle to a more brutal alternative.[170] If the goal of The Liberal Principle's mechanism is to advance social goals through an information exchange that leads to a common understanding of what is "right" and "true" in the world, then it is necessary for the law to permit speech we dislike to flourish alongside speech of which we approve.

Unfortunately, as seems to have occurred in the Venable Case, much of contemporary American society has eschewed The Liberal Principle

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[167] Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion). People can meaningfully and peacefully effect change in government where public debate flourishes because speech is free, and people have access to the voting franchise. *See* VÁCLAV HAVEL, *On the Theme of an Opposition*, *in* OPEN LETTERS: SELECTED WRITINGS 1965–1990 at 25, 26–27 (A.G. Brain ed., Paul Wilson trans., Alfred A. Knopf, Inc. 1991) (1968). Put another way, the free exchange of ideas helps correct information asymmetries in the market for political representation, thereby reducing agency loss. *See, e.g.*, CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 27–41 (Brookings Inst. Press 2006) (describing the market failure of imperfect information and various steps the federal and state governments take to correct the informational imbalance between producers and consumers); *see also* SAMUEL KERNELL & GARY C. JACOBSON, THE LOGIC OF AMERICAN POLITICS 19 (2d ed. 2003) (defining "agency loss" as "the discrepancy between what principals would ideally like their agents to do and how these agents actually behave").

[168] JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 6 (1993) (emphasis added).

[169] *Id.* at 22. This ethic has not manifested fully in Anglo-American law, which imposes liability in many jurisdictions for, among other things, the tort of intentional infliction of emotional distress, sometimes called "outrage." *See* RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (2012).

[170] *See* RAUCH, *supra* note 168, at 20–22 (describing the Islamic response to a Salman Rushdie novel, including Ayatollah Khomeini's missive that "all good Muslims [should] kill Salman Rushdie"). By contrast, imagine, if you will, a world in which twelve *Charlie Hebdo* employees had *not* been murdered in retaliation for satirical cartoons. *Cf.* Editorial, *The Charlie Hebdo Massacre in Paris*, N.Y. TIMES (Jan. 7, 2015), https://nyti.ms/2FaQFBh.

in favor of "thought vigilantism—citizen posses organized to punish people with wrong and dangerous ideas."[171] Sometimes, this vigilantism manifests through the "heckler's veto,"[172] a softer form of regulating the information marketplace in which authorities preemptively silence a speaker to avert a credible threat of physical violence against the speaker, as opposed to dealing with the threat of violence head-on.[173] This reflexive impulse to punish people for speaking, or silence their views, has begun to take harsher form in the law: "Recent years have seen the rapid rise of what have become known as hate-crime statutes, which typically create special criminal offenses or require special sentences for crimes committed 'with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin.'"[174] Similarly, in the civil context, even in the legal profession, a movement has been afoot in recent years to amend the Rules of Professional Conduct across the states to curtail speech related to the practice of law that might offend someone.[175] Recent studies also suggest a growing trend among

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171 *See* RAUCH, *supra* note 168, at 23; *see also cf. generally* RAY BRADBURY, FAHRENHEIT 451 (1953) (using dystopian science fiction to warn against the dangers of censorship through a tale of a "fireman," whose job entails burning books to prevent unorthodox views from corrupting members of the public).

172 Patrick Schmidt, *Heckler's Veto*, FIRST AM. ENCYCLOPEDIA, http://bit.ly/2F8BJ6F (last visited Jan. 29, 2019).

173 *Cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (concluding that wearing black armbands in a public high school to protest the Vietnam War did not credibly give rise to disruptions at school that administrators predicted when it suspended the petitioners for refusing to remove their armbands). At least in the Ninth Circuit, however, and at least in the public high school context, the heckler's veto appears to be good law. *See* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 746 (9th Cir. 2014) (condoning a public high school's decision to require native-born students to remove American flag shirts to avert threats of racial violence on Cinco de Mayo), *cert. denied*, 135 S. Ct. 1700 (2015). For a brief exposition that attempts to thread the needle between competing speech and violence-prevention interests in the educational context, see Suzanne B. Goldberg, *Free Expression on Campus: Mitigating the Costs of Contentious Speakers*, 41 HARV. J.L. & PUB. POL'Y 163 (2018). Given the rising racial tensions in the United States, and threats of violence against police officers, the heckler's veto may be an animating concern of municipal police department social media policies that proscribe certain types of speech.

174 RAUCH, *supra* note 168, at 24. The Court, however, "has never recognized a special category of 'hate speech' that is excluded from First Amendment protection based on its message alone." NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP xxi (2018). *But see* RAUCH, *supra* note 168, at 24 (noting the categorical difference in hate-crimes and hate-speech approaches to speech regulation).

175 David L. Hudson, Jr., *States Split on New ABA Model Rule Limiting Harassing or Discriminatory Conduct*, A.B.A. J. (Oct. 2017), http://bit.ly/2F7qdZa. Despite the support of the Tennessee Bar Association and the Tennessee Board of Professional Responsibility, Rule 8.4(g) ultimately failed in Tennessee. *See* Stephen Elliott, *AG Questions Constitutionality of Attorney Rule Change*, NASHVILLE POST (Mar. 26, 2018),

millennials of tolerating certain kinds of censorship.[176] Regardless of the approach, and notwithstanding that the impulse to regulate or silence offensive speech sometimes even comes from a good, "humanitarian" place, it nevertheless invites policing authorities to abuse their power by, for example, redefining what constitutes a "mistake" or what is "offensive" for self-serving purposes.[177] Courts should, at least, be suspicious of these social tendencies to the extent that they animate public policies restricting speech.

To wit, bringing The Liberal Principle full circle to Milton's impassioned learning-and-human-progress heuristic, and Mill's marketplace-of-ideas framework, Rauch concludes:

> Will someone's [wrong] belief, if accepted, destroy society? Maybe. But more likely not. . . . So often have those who warned us about "dangerous" ideas been wrong, and so often have they abused whatever restraining power they possessed, that I have no hesitation in saying: it is better in every case to let critical public inquiry run its course than to try to protect society from it. . . .
>
> . . . .
>
> So let us be frank, once and for all: creating knowledge is painful, for the same reason that it can also be exhilarating. Knowledge does not come free to any of us; we have to suffer for it. We have to stand naked before the court of critical checkers and watch our most cherished beliefs come under fire. Sometimes we have to watch while our notion of evident truth gets tossed in the gutter. Sometimes we feel we are treated rudely, even viciously. As others prod and test and criticize our ideas, we feel angry, hurt, embarrassed . . . .

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http://bit.ly/2O0muiY (discussing Rule 8.4(g)'s overbreadth, its potential for arbitrary and capricious enforcement, and other constitutional concerns); Daniel Horwitz, *Tennessee Supreme Court Denies Proposed Rule Change Attempting to Police Discrimination and Harassment*, SUP. CT. OF TENN. BLOG (Apr. 23, 2018), http://bit.ly/2O0qosi ("Despite its laudable goals, the proposed amendments suffered from serious shortcomings."). It is also failing elsewhere as both a content-based restriction and viewpoint-based restriction on lawyers' speech. Kim Colby, *Two More State Supreme Courts Reject ABA Model Rule 8.4(g)*, FEDERALIST SOC'Y (Sept. 17, 2018), http://bit.ly/2O0lA66. For a defense of Rule 8.4(g) in light of its tension with free speech principles, see Robert N. Weiner, *"Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 125 (2018).

[176] *See* Matthew Hennessey, *Zero Hour for Generation X*, CITY J., http://bit.ly/2O3DRzp (last visited May 28, 2018) (reporting that a significant minority of millennials approve of federal government censorship, two-thirds approve of university speech codes, and almost half would permit banning the media from covering campus protests in certain instances).

[177] RAUCH, *supra* note 168, at 123–24 (explaining how the Spanish Inquisition "was a policing action. But by its own lights it was a humanitarian action, too.").

> . . . .
>
> I am certainly not saying that we should all go out and be offensive or inflammatory just for the sake of it. Please don't paint swastikas on the synagogue and say I gave my blessing. I am against offending people for fun. But I am also only too well aware that in the pursuit of knowledge many people—probably most of us at one time or another—will be hurt, and that this is a reality which no amount of wishing or regulation can ever change. It is not good to offend people, but it is necessary. A no-offense society is a no-knowledge society.[178]

Moreover, practically speaking, laws in Rauch's humanitarian-Inquisition mold that attempt to stifle or silence views that hurt people's feelings are not only ineffective but these laws can also breed social resentment that spawns an even larger volume of offensive speech, or speech that gives worse offense, than the original utterance.[179]

Thus, as a general matter, contrary to Justice Frank Murphy's pronouncement in *Chaplinsky v. New Hampshire*,[180] the relative freeness of speech should not turn on what a judge or jury thinks its value to society happens to be. To suggest otherwise would be to suggest that "a higher authority can revoke rights once they cease to serve some vaguely-defined public purpose [of shaping a predetermined social outcome]."[181] Rather, the law should presume that all speech—even and perhaps especially offensive speech—has value to society in the Anglo-American tradition and economic value in the information marketplace. Absent a strong countervailing showing (like strict scrutiny), this presumption yields the conclusion that all speech deserves protection. Any rule we might fashion to bridge the gap in free speech law that the Venable Case exposed must take into account the many benefits that inure to society from the free exchange of even troubling ideas, the practical damage that censorship can do to both speaker and listener, and the way that unconstitutional

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178 *Id.* at 124–26; *see also* STROSSEN, *supra* note 174, at 4 ("[W]e cherish speech precisely because of its unique capacity to influence us, both positively and negatively. But even though speech can contribute to potential harms, it would be more harmful to both individuals and society to empower the government to suppress speech for that reason, except consistent with emergency and viewpoint neutrality principles.").

179 *See* STROSSEN, *supra* note 174, at 133–56 (discussing, with reference to both history and hypotheticals, the many problems with laws that attempt to silence offensive speech).

180 315 U.S. 568, 572 (1942) ("It has been well observed that [there are narrowly limited classes of speech that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest and order in morality.").

181 Joe Albanese, *Free Speech Is Free Speech, Regardless of Whether It Advances One's Societal Goals*, INST. FREE SPEECH (Mar. 28, 2018), http://bit.ly/2O0GcuZ.

retaliation violates the rights of both speaker and listener. These questions take on new weight in the digital information age, as the next Section demonstrates.

B. A New Free Speech Jurisprudence for the Digital Age?

Technology evolves faster than lawmakers and courts can practically match. The evolving communications paradigm may necessitate more stringent protections for speech because online technology gives individuals access to a large volume of information and allows complex interconnections among otherwise isolated actors. Specifically, because of the way technology evolves and produces relative virtues and vices of online communication, courts should modify existing civil rights law sooner, rather than later, to try to deter digitally enhanced abuses. The next subsection discusses some of the democratizing features of online communication that are worth preserving at law.

1. The Virtues of Online Communication

> *Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and news groups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."*
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> —Justice John Paul Stevens[182]

The commercial internet, which is still in its infancy despite how powerful it has become, has completely and forever changed the amount of information that people can access at any given time and the speed with which information travels. These changes have arguably democratized societies around the world, at least to the extent that online tools have decentralized broadcasting power from governments and legacy media gatekeepers.[183] The commercial internet enables fast,

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[182] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[183] *See, e.g.*, MARTIN LISTER ET AL., NEW MEDIA: A CRITICAL INTRODUCTION 10 (2003). *See also generally* JOE TRIPPI, THE REVOLUTION WILL NOT BE TELEVISED: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING (2004) (arguing that the commercial internet had already become, and would continue to develop as, a populist tool for campaigning and political organizing, which would yield progressive victories at the ballot box).

cheap "horizontal knowledge" at scale.[184] Governments also now provide a number of online services that empower people to engage in the democratic process in new ways.[185] Some people use the commercial internet to connect with their local communities.[186] Media scholars were correct when they prophesied that the commercial internet would become a new kind of public sphere for debate and exchange of ideas.[187] Some of the biggest drivers of technological change in the last few decades have been self-styled social visionaries.

For example, Dave Morin, a former Apple marketer who was recruited by Facebook's Dustin Moskovitz and Sean Parker to join the social networking giant, prepared for Facebook's 2007 "f8" platform launch event by reading Alexis de Tocqueville's *Democracy in America* and Adam Smith's *The Wealth of Nations*,[188] staples of Western political and economic thought. He also characterized Facebook's mission as "mak[ing] society more open . . . across more contexts" so that people become empowered to "worry less about being who they actually are."[189]

Mark Zuckerberg, Facebook's creator, was disappointed when software developers started running game applications on the platform, despite the games' promise of profit, because Zuckerberg "wanted his company to help people communicate things that mattered, not make it easier [for people] to play around."[190] He wanted "to help people understand the world around them" by connecting them to each other in ways that no other website or legacy media provider had yet accomplished.[191] As he later told a reporter in Spain in 2008, "[i]f you

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184 GLENN REYNOLDS, AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT AND OTHER GOLIATHS 121 (2006). Professor Reynolds defines horizontal knowledge as "communication among individuals, who may or may not know each other, but who are loosely coordinated by their involvement with something, or someone, of mutual interest," and this knowledge is what imbues people with power in society. *Id.*

185 DENNIS W. JOHNSON, CONGRESS ONLINE: BRIDGING THE GAP BETWEEN CITIZENS AND THEIR REPRESENTATIVES 83 (2004) (describing the Bush administration's 2003 launch of regulations.gov, a website where anyone with internet access can file opinions during an informal agency rulemaking comment period, something that "ha[d] always been an insider's game").

186 *Id.* at 84 (citing WENDY LAZARUS ET AL., THE CHILDREN'S P'SHIP, ONLINE CONTENT FOR LOW-INCOME AND UNDERSERVED AMERICANS: THE DIGITAL DIVIDE'S NEW FRONTIER 9 (2000)).

187 LISTER ET AL., *supra* note 183, at 176–80.

188 DAVID KIRKPATRICK, THE FACEBOOK EFFECT 188, 223 (2010).

189 *Id.* at 207.

190 *Id.* at 228.

191 *Id.* at 143.

give people a better way to share information it will change people's lives."[192]

Zuckerberg's grand vision later paid off on a global scale: Facebook, the platform that evolved from a dormitory room at Harvard University, helped to scale organizational efforts in Tunisia and Egypt during the "Arab Spring" revolution.[193] Facebook also affected domestic politics within a few short years of its founding: young people organized on Facebook to propel Barack Obama, the first African American president, to the White House in 2008.[194]

Today's online ecosystem has many desirable features, and it is still developing. However, the commercial internet also has several downsides that courts should consider as they continue to adjudicate new issues presented by technological progress. The next subsection discusses some of these downsides.

2. The Vices of Online Communication

> *The biggest problem with most predictions about technology is that they are invariably made based on how the world works today rather than on how it will work tomorrow. . . . Politics, economics, and culture constantly reshape the environment that technologies were supposed to transform . . . .*
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> —Evgeny Morozov[195]

There are also several drawbacks to a robust online ecosystem. For example, because people can organize and amplify a message easily on the internet, they can manufacture a digital safe haven for abhorrent

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192 *Id.* at 278.

193 *See* John Pollock, *How Egyptian and Tunisian Youth Hacked the Arab Spring*, MIT TECH. REV. (Aug. 23, 2011), http://bit.ly/2O55lVC. *But see* Sara Reardon, *Was the Arab Spring Really a Facebook Revolution?*, NEW SCIENTIST (Apr. 3, 2012), http://bit.ly/2O2gExq ("While Facebook, Twitter and YouTube certainly played a role in the way the Arab Spring unfolded, their influence was far less critical than many had suggested."). Zuckerberg launched Facebook from his Harvard University dorm room on February 4, 2004. *Our History*, FACEBOOK NEWSROOM, http://bit.ly/2O1Tdoj (last visited Jan. 22, 2019).

194 *See* GARRETT M. GRAFF, THE FIRST CAMPAIGN: GLOBALIZATION, THE WEB, AND THE RACE FOR THE WHITE HOUSE 13, 256 (2007) (recounting how many Obama supporters were able to organize using Facebook groups in a short period of time in 2007).

195 EVGENY MOROZOV, THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM 284 (2011).

views that would find little or no welcome in the material world.[196] The internet also empowers online the "thought vigilantism" that Rauch cautions against.[197] Indeed, Rauch's "speech posses" working online have the power to ruin lives.[198]

When commercial internet technologies first arrived on the scene, the former president of PBS and NBC News presciently hypothesized a number of reasons to be skeptical of the internet's democratizing effects, chief among them that mobs would one day police the information highways, creating a digital wild west:

> Looking at the content and character of the electronic media today, pessimists . . . distrust the judgment of the people at large who, as James Madison suggested, are too easily "misled by the artful misrepresentations of interested men" and "overcome by irregular passion." . . . Whenever the public becomes directly engaged in a major controversial issue, the process of negotiation, compromise, and deliberation—the essence of effective policy making—becomes difficult if not impossible. . . . Competent decisions require not only thoughtful consideration and thorough deliberation but also complicated maneuvering through many divergent interests [that electronic media undercuts].[199]

Due to the high volume of information that is transmitted via the internet, government actors can take inventory on a large scale of what they should be censoring. Thus, when the government does censor an online speaker, it can target the censorship in ways that large swaths of the population are unlikely to notice, in contrast to broad prohibitions

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196 *See* Luke O'Brien, *The Making of an American Nazi*, ATLANTIC (Dec. 2017), http://bit.ly/2NYLGq0 (recounting the story of Andrew Anglin, "the publisher of the world's biggest neo-Nazi website, The Daily Stormer").

197 RAUCH, *supra* note 168, at 23; *see also* Kevin D. Williamson, *When the Twitter Mob Came for Me*, WALL ST. J. (Apr. 20, 2018, 10:34 AM), https://on.wsj.com/2O1689X (describing the conservative author's termination very shortly after his hire at *The Atlantic*, which resulted when the magazine's progressive readers orchestrated an online smear campaign against him). *But see* Deena Zaru, *Kanye West Criticizes Obama and Praises Trump: "The Mob Can't Make Me Not Love Him*," CNN (Apr. 26, 2018, 8:11 AM), https://cnn.it/2O3so2T.

198 *See, e.g.*, Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco's Life*, N.Y. TIMES MAG. (Feb. 12, 2015), https://nyti.ms/2NZuMI3.

199 LAWRENCE K. GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE 171–72 (1995). Grossman also discusses "the increasingly distorting influence of money on the public dialogue; the dangerous growth of professionalism in politics and its apparently growing capacity to manage, manipulate, and exploit public opinion; the expanding role of special interest politics, and the 'dumbing down,' or debasing, of the standards of political information" as reasons to distrust a democratic cyberspace revolution. *Id.* at 182–89.

on speech, which many people would quickly identify as constitutionally problematic.[200]

Even in the absence of government censorship and online mobs, "internet intermediaries" may nevertheless place their thumbs on the scale through alleged content throttling. If and when internet service providers interfere with the flow of information online by favoring their own content over their competitors' content, it is less likely that "individuals [can] speak directly to mass audiences without having to rely on gatekeepers that had long determined the substance of media content."[201] Indeed, net neutrality proponents argue that regulation is necessary to preserving the free flow of information and to preventing intermediaries from throttling disfavored content.[202]

Finally, it is theoretically intuitive that "[t]o be informed is to fulfill part of one's civic duty . . . the informed citizen is the responsible

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200 MOROZOV, *supra* note 195, at 90–91, 100; *cf.* Paul Wiseman, *Cracking the "Great Firewall" of China's Web Censorship*, ABC NEWS, https://abcn.ws/2O3AJn3 (Jan. 22, 2019) ("To Americans and other Westerners, it might seem odd that Internet censorship is still possible at a time when YouTube, satellite TV and online chat rooms produce an overwhelming flow of real-time news and data. . . . No one does it quite like China, which has proved that old-school communist apparatchiks could tame something as wild as the Web."). Government agencies can abuse internet platforms in other ways, too. For example, as Senior District Judge Jon P. McCalla recently ruled, the Memphis Police Department violated a 1978 consent decree with the ACLU by, among other things, creating fake Facebook profiles to "spy" on Black Lives Matter movement members. Phillip Jackson, *Federal Judge Rules Memphis Police Violated Consent Decree After Spying on Protesters*, COM. APPEAL (Oct. 26, 2018, 7:06 PM), http://bit.ly/2T5BxIZ; *see also* Letter from Andrea Kirkpatrick, Dir. & Assoc. Gen. Counsel, Sec., Facebook, to Michael Rallings, Dir., Memphis Police Dep't (Sept. 19, 2018) ("We regard this activity as a breach of Facebook's terms and policies, and as such we have disabled the fake accounts that we identified in our investigation."), http://bit.ly/2F7x7xv.

201 Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 697–98 (2010); *accord* GROSSMAN, *supra* note 199, at 173–79 (warning against consolidation of new media ownership and predicting that "[t]he information superhighway will not be a freeway but an automated private toll road, traveled mostly by those who can afford to pay the price"); LISTER ET AL., *supra* note 183, at 180–81 (arguing that as long as "access to cyberspace remains a scarce resource, determined by economic and social power," and malicious actors can exploit online tools for various forms of malfeasance, like harassment and spreading viruses, the internet is in no meaningful sense a democratic, public sphere).

202 *See, e.g.*, *What Is Net Neutrality?*, AM. CIV. LIBERTIES UNION, http://bit.ly/2F9izxA (last updated Dec. 2017). *But see* MOROZOV, *supra* note 195, at 215 ("Is there a secret plot by the world's largest technology companies to restrict global freedom of expression? Probably not. The sheer amount of content uploaded to all these sites makes it impossible to administer them without making mistakes.").

citizen, and the responsible citizen is an informed one."[203] However, according to some studies, increased information obtained online may not lead to a more informed citizenry and higher levels of meaningful political engagement in fact.[204] Additionally, elected officials, bureaucrats, and citizen end users may have conflicting views of how to use technology to increase public engagement with government.[205] This is especially true when government actors use digital tools to try to shape public narratives about political, social, or economic issues when members of the public go online to participate in public debates and try to shape conversations themselves.[206]

3. The Need for the Venable Rule in an Evolving Speech Paradigm

The commercial internet has changed the way we communicate and interact on a daily basis, and society has much to gain from an unrestrained digital information economy. As Milton observed in the seventeenth century, European societies flourished because of England's historical commitment to a dynamic information ecosystem in printed books.[207] Today, too, courts have an opportunity to preserve a foundation for similarly great achievements resulting from the free exchange of ideas online. Courts should accordingly adapt free speech law to the evolving paradigm. Judges have, to some extent, successfully employed familiar legal tools to new technological phenomena.[208] For

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203 BRUCE BIMBER, INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER 197, 217–24 (2003) ("The bottom line in this analysis is consistent with the psychological approach to information and behavior: The new information environment has not changed levels of political engagement in any substantial way. This analysis does leave the door open, though, to possible refinements as more data become available about the Internet and political behavior.").

204 *See id.*

205 DARRELL M. WEST, DIGITAL GOVERNMENT: TECHNOLOGY AND PUBLIC SECTOR PERFORMANCE 10 (2005).

206 *See* MOROZOV, *supra* note 195, at 116 ("Many early predictions about the Internet posited that it would rid the world of government propaganda. . . . Governments have learned that they can still manipulate online conversations by slightly adjusting how they manufacture and package their propaganda . . . ."); *id.* at 135 ("[A]uthoritarian governments have proved remarkably adept at shaping the direction, if not always the outcome, of most sensitive online conversations.").

207 *See* Milton, *supra* note 163.

208 *See, e.g.*, Liverman v. City of Petersburg, 844 F.3d 400, 407 (4th Cir. 2016) ("Indeed, the particular attributes of social media fit comfortably within the existing [*Pickering-Myers*] balancing inquiry: A social media platform amplifies the distribution of the speaker's message—which favors the employee's free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency. What matters to the First Amendment is not only the medium of the speech, but the scope and content of the restriction [on it].").

example, a pair of recent district court rulings characterized online social networks as public forums in which the Free Speech Clause proscribes government officials from "blocking" followers on social media.[209] Courts have also easily analyzed prophylactic prohibitions of certain kinds of online speech as vague or overbroad. For example, in *Liverman v. City of Petersburg*, the Fourth Circuit analyzed a police department's social media policy that "prohibit[ed] in sweeping terms the dissemination of any information 'that would tend to discredit or reflect unfavorably upon the [Department] . . .'" in light of overbreadth doctrine.[210]

As the gap in the *Pickering-Myers* test demonstrates, however, some doctrinal elements of free speech jurisprudence must be modified in the digital age. Indeed, irrespective of what one thinks about the general virtues and vices of online information ecosystems, governments that use online tools are just as capable as hate groups of using digital tools for nefarious purposes. Of relevance to this Article, this author, who is not a member of the press, received a copy of the Venable Decommissioned Release by email, because Metro makes press releases available to anyone who wants to receive them that way.[211] Metro also posts its press releases online where anyone with an internet connection can see them.[212] Metro therefore uses digital tools to communicate with the public directly, circumventing mainstream media filtering. Just as private citizens can use online tools to more effectively share information and organize, so can municipalities

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209 *See generally* Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. May 23, 2018) (ruling that President Trump blocking people from following the @realDonaldTrump Twitter account violates the First Amendment); Davison v. Loudoun Cty. Bd. of Supervisors, No. 1:16-cv-00932-JCC-IDD (E.D. Va. July 25, 2017) (concluding that the chair of a local government body violated a plaintiff's First Amendment rights when she blocked him from her Facebook page for twelve hours). *But see* David French, *A Federal Judge Blocked Donald Trump from Blocking People on Twitter: Here's Why That's Wrong*, NAT'L REV. (May 23, 2018, 7:30 PM), http://bit.ly/2TwN5dD (refuting Judge Naomi Buchwald's designated-public-forum analysis of the Twitter platform in the @realDonaldTrump blocking case).

210 844 F.3d at 404; *see also id.* at 408 ("Weighing the competing interests on either side of the . . . balance, we begin by noting the astonishing breadth of the social media policy's language. The policy seeks to prohibit the dissemination of any information on social media 'that would tend to discredit or reflect unfavorably upon the [Department].'" (alteration in original)).

211 *Email Updates*, GOVDELIVERY.COM, http://bit.ly/2FbN469 (last visited Jan. 22, 2018).

212 *Police Department Media Releases*, NASHVILLE.GOV, http://bit.ly/2FbNh9r (last visited May 26, 2018).

organize the public against disfavored speakers. Organizing the public against a disfavored speaker to justify firing the speaker is dangerous to society to the extent that it sends offensive views underground, depriving the public of information it needs to self-govern effectively.[213] Municipalities grappling with racial tensions and concerns over police officer safety may, like Metro, inevitably face temptations to violate their employees' civil rights, using online tools to achieve the same speed and scale as the Arab Spring protesters enjoyed.

At the risk of inviting thought vigilantism, a form of excess, the public must have all the facts to function effectively as a "cyberjury"[214] to achieve social progress when measuring the government's performance. Therefore, courts should adopt the Venable Rule to protect the rights of terminated public employees who currently cannot speak on controversial topics for fear of retaliation under restrictive social media policies. Even if the employee's utterance offends someone, or even a lot of people, as controversial speech will invariably do, it is important for the law to maintain the conditions that enable—rather than stifle—digitally enhanced self-government.

While the philosophical and practical justifications for the Venable Rule are significant, the next Sections analyze various legal justifications to guide a court hearing an appropriate test case.

C. Safeguarding Bedrock Free Speech Doctrines

The Constitution's text and jurisprudence interpreting that text protect individual rights and liberties by constraining federal and state governments' powers. For example, the Free Speech Clause recognizes—contrary to the relationship between the English aristocrats in the British Parliament and the common man—that the

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213 *Cf.* WEST, *supra* note 205, at 15. Partisan actors likewise face strong political incentives to deprive the public of information or methods of advocacy in other ways, a softer form of thought vigilantism. *Id.* at 42 (describing how the George W. Bush administration altered and deleted information about abortion from government websites because it offended Congressional conservatives and abstinence-only advocacy groups); *see also, e.g.*, Eli Rosenberg, *Donald Trump's White House Shuts Down Obama-Era Petition Site Without Answering a Single One*, INDEPENDENT (Dec. 20, 2017, 11:47 AM), https://ind.pn/2Tye8oY.

214 Nancy S. Marder, *Cyberjuries: A Model of Deliberative Democracy?*, *in* DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET 35 (Peter M. Shane ed. 2004); *see also* Jason Barabas, *Virtual Deliberation: Knowledge from Online Interaction Versus Ordinary Discussion*, *in* DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET 239 (Peter M. Shane, ed. 2004).

American people are sovereign and have power to "censor" the government, not the other way around.[215] It also recognizes that the right to speak preexists the ratification of the Constitution.[216] During the initial ratifying conventions between 1787 and 1789, Anti-Federalists were highly skeptical that the new Constitution would safeguard the preexisting, sacrosanct freedoms of speech and press that state constitutions already protected.[217] When Pennsylvanians later ratified the Federal Constitution, convention-goer Samuel Bryan penned a statement of dissent citing the widespread Anti-Federalist grievance that the new Constitution did not expressly protect the right to speak from congressional interference. The stringent, mandatory language that Bryan used to describe the Anti-Federalist proposal at the Pennsylvania ratifying convention foreshadowed the mandatory language that the First Amendment later used in stark contrast to the broad, sweeping investiture of legislative power in Congress in Article I's elastic clause.[218] Thus, it is difficult to overstate how powerfully the

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215 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 103 (2005).

216 *See id.* at 316; John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296 (1993) ("I emphasize the word 'the' as used in the term 'the freedom of speech' because the definite article suggests that the draftsmen intended to immunize a previously identified category or subset of speech.").

217 *See, e.g.*, Samuel Bryan, *"Centinel," Number 1*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND COMPROMISES THAT GAVE BIRTH TO OUR GOVERNMENT 232, 232–33 (Ralph Ketcham ed., 1986) (1787) (discussing the impact the new amendment-less national Constitution could have on Pennsylvania's state constitutional protections of speech and press if Pennsylvanians ratified it).

218 *See* Samuel Bryan, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND COMPROMISES THAT GAVE BIRTH TO OUR GOVERNMENT 243, 245–46 (Ralph Ketcham ed., 1986) (1787) ("We offered our objections to the convention, and opposed those parts of the plan, which, in our opinion, would be injurious to you, in the best manner we were able; and closed our arguments by offering the following propositions to the convention. . . . That the people have a right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States."); *see also* AMAR, *supra* note 215, at 319 (noting that, whereas the Necessary and Proper Clause vests Congress with power to "make *all* Laws" that it deems necessary and proper to carry out its other Article I, Section 8 powers, the First Amendment's Free Speech Clause expressly provides that "Congress shall make *no* law . . . abridging the freedom of speech" (emphasis added)). *Compare* U.S. CONST. art. I, § 8, cl. 18, *with* U.S. CONST. amend. I.

Free Speech Clause cabins Congress's powers (and later the states' powers)[219] with respect to this preexisting right.

But the right to speak is not limitless. In a case about a Jehovah's Witness preaching in the street who called a policeman a "fascist" for failing to protect him from a violent mob, Justice Frank Murphy reminded the nation that

> it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—*those by which their very utterance inflict injury or tend to incite an immediate breach of the peace*.[220]

Similarly, in one of the most oft-misquoted, misunderstood, and misapplied passages in all of free-speech debate, Justice Oliver Wendell Holmes quipped, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and

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219 *Cf.* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

220 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (emphasis added). Coincidentally, some of the most significant free speech victories in history came from a set of late-nineteenth and early-twentieth century cases that all involved Jehovah's Witness plaintiffs who had said or done something that offended people of more mainstream spiritual or secular persuasions. *See, e.g.*, *id*. at 568; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1944); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); John E. Mulder & Marvin Comisky, *Jehovah's Witnesses Mold Constitutional Law*, 2 BILL OF RTS. REV. 262, 262 (1942) ("Seldom, if ever, in the past, has one individual or group been able to shape the course, over a period of time, of any phase of our vast body of constitutional law. But it *can* happen, and it *has* happened, here. The group is Jehovah's Witnesses. Through almost constant litigation this organization has made possible an ever-increasing list of precedents concerning the application of the Fourteenth Amendment to freedom of speech and religion."). In one case involving Jehovah's Witnesses from this period, however, the Court ruled 8–1 against a pair of minor school children who were expelled from public school for refusing to salute the American flag during the pledge of allegiance because to do so would have violated their religious consciences. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591–92 (1940), *overruled by* W. Va. Bd. of Ed. V. Barnette, 319 U.S. 624, 642 (1943) ("The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled . . . ."). Their lawyer, Hayden C. Covington, became a Jehovah's Witness himself after finishing law school *en route* to becoming one of the most prolific civil rights attorneys in American history. Interview, *Full Text of "Hayden C. Covington Interview*," ARCHIVE.ORG, http://bit.ly/2F8jGO6 (last visited Jan. 22, 2019).

causing a panic."[221] Free-speech case law thus abounds with balancing tests,[222] and as the *Pickering-Myers* test demonstrates, the public has a strong interest in protecting everyone's speech rights—even (and especially) when we dislike what they say.[223] This trend in free speech law reflects the notion that a vibrant marketplace of ideas has always undergirded American democracy.[224] The law's default posture disfavors government actions that chill speech.[225] Indeed, as the Court recognized in *Myers*, speech on matters of truly public concern—speech that is "fairly considered as relating to any matter of political, social, or other concern to the community"—"falls within *the core* of First Amendment protection."[226] These interests are so strong that two commentators have argued that the Free Speech Clause should also support a common-law "public policy exception" to even private-sector, at-will employment retaliations for whistleblowing.[227]

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221 Schenck v. United States, 249 U.S. 47, 52 (1919); Ken White, *Three Generations of a Hackneyed Apologia for Censorship Are Enough*, POPEHAT (Sept. 19, 2012), http://bit.ly/2TygkN3. Of course, if a theater erupted into flames, and it happened to be crowded, not only would the First Amendment protect someone who yelled, "FIRE!" from liability for inciting a panic, but society would arguably want such a person to so interject to promote personal safety and alert firefighters to the need to try to preserve commercial property.

222 Although many balancing tests exist to determine whether a challenged action violates the Free Speech Clause, the Court recently expressly declined to adopt "a free-floating [balancing] test" that would empower it to add new categories of prohibited speech on an ongoing basis if "the value of the speech [outweighs] its societal costs." *See* United States v. Stevens, 559 U.S. 460, 469–71 (2010).

223 *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 387 (1987) ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

224 *See supra* Part IV Section A.

225 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); *N.Y. Times Co.*, 376 U.S. at 297 (Black, J., concurring) ("An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."); *cf.* Steven J. Mulroy & Amy H. Moorman, *Raising the Floor of Company Conduct: Deriving Public from the Constitution in an Employment-at-Will Arena*, 41 FLA. ST. U. L. REV. 945, 988 (2014) ("It is the very first right listed in the Bill of Rights. . . . [t]here is no individual right more celebrated in the United States.").

226 Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600 (2008) (emphasis added).

227 *See generally* Mulroy & Moorman, *supra* note 225, at 979–92 (analyzing compelled speech, whistleblowing, statutory protections for employee speech, and how to balance an employer's interests against society's interests and a speaker's interests).

The gap in free-speech jurisprudence that the Venable Case unearths rationally incentivizes municipal employers to commit one or both of two constitutional errors: either (1) punish employees on the basis of the content of their speech, which the Constitution forbids for any other private citizen speaking on a matter of public concern, unless the restriction survives strict scrutiny[228] or (2) censor a particular viewpoint, which the Constitution also forbids for any other private speaker.[229] The Free Speech Clause needs a helping hand to prevent these abuses in the public employment retaliation context;[230] the proposed Venable Rule would help deter civil rights violations by undermining governments' defenses to § 1983 employment retaliation

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228 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). *But see* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 118 (2001) (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 790 (1978)) ("Under the doctrine of content neutrality, speech regulations that are not motivated by the content of speech may be subjected to a lesser standard of judicial scrutiny."). Some measure of content-based discrimination is inevitable where a municipal employer satisfies strict scrutiny under the *Pickering-Myers* test. Additionally, courts have traditionally given wider latitude to content-based restrictions when government defendants have acted as employers instead of as sovereigns. DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 8:1 (2012). Because of the weighty public interest in vibrant marketplace of ideas, however, courts should take great pains to curtail the kind of content-based discrimination-by-press release that seems to have occurred in the Venable Case.

229 Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense others."). Some speech, in other words, is not "more equal than" other speech in the eyes of the law. *Cf.* GEORGE ORWELL, ANIMAL FARM 112 (1946) ("ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS."). As with content-based discrimination, some measure of viewpoint discrimination will inevitably occur. That does not mean that courts should abdicate their duty to enforce the Constitution's guarantees when a public employer impermissibly violates an employee's rights. *See* Clark Neily, *Judicial Engagement Means No More Make-Believe Judging*, 19 GEO. MASON L. REV. 1054, 1070 (2012) ("Judicial engagement rejects the premise that it is appropriate for judges to make a genuine effort to police the constitutional bounds of government power in some cases but not in others. Judicial engagement calls for commitment and consistency in reviewing constitutional challenges to government power and an end to judicial abdication in the form of make-believe judging."); *see also Citizens United*, 558 U.S. at 329 ("Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling."). *But see* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749–50 (1961) (applying the avoidance canon to a First Amendment challenge to the Railway Labor Act and declining to resolve the question on constitutional grounds).

230 *Cf.* Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

actions with proof that the government's republication of speech—not the speaker's initial utterance—caused the workplace disruption that harmed the municipality's ability to efficiently deliver public services.

Doctrines outside constitutional law, and the policy rationales underlying them, also provide compelling reasons for courts to adopt the Venable Rule, as the next Section demonstrates.

D. Alternative Theoretical Justifications

For several reasons and in several contexts, the law already disfavors giving shelter or relief to litigants who have helped create a dispute or controversy, or who act in a way as to seriously prejudice the opposing litigant. The following subsections analyze just a few of these doctrines and demonstrate how each provides a rationale for courts to fashion and adopt the Venable Rule for use in adjudicating retaliation claims arising from facts analogous to the Venable Case.

1. Unclean Hands

The law of remedies provides a starting point. Specifically, the rationale underlying the equitable defense of unclean hands, which "operate[s] *in limine* to bar the suitor from invoking the aid of the equity court,"[231] provides the first alternative justification for the Venable Rule. The *Restatement (Third) of Restitution and Unjust Enrichment* explains, in pertinent part, that "[r]ecovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct *in the transaction that is the source of the asserted liability*."[232]

The policy of the doctrine of unclean hands is to curtail conduct that offends the court—not necessarily for the benefit of the party asserting the defense, but because to grant relief to a party with unclean hands with respect to a particular matter before the court ("not collateral to it") would risk undermining the court's very legitimacy.[233] The offending conduct must be "egregious" and "can take the form of '. . . bad faith.'"[234] The doctrine of unclean hands does not require that a

231 McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995).

232 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. LAW INST. 2011).

233 *See* ELAINE W. SHOBEN ET AL., REMEDIES: CASES AND PROBLEMS 190 (6th ed. 2016).

234 Merisant Co. v. McNeil Nutritionals, LLC, 515 F. Supp. 2d 509, 531 (E.D. Pa. 2007) (quoting S&R Corp. v. Jiffy Lube Int'l, 968 F.2d 371, 377 n.7 (3d Cir. 1992)).

litigant be pure as the driven snow, but "it does require that [suitors] shall have acted fairly and without fraud or deceit as to the controversy in issue."[235] That the litigant against whom an opponent invokes the doctrine has "dirty" hands is not dispositive. Rather, how or when he dirtied them is determinative: if "he dirtied them in acquiring the right he now asserts, or [if] the manner of dirtying renders inequitable the assertion of such rights," then the doctrine applies.[236] The doctrine plays such an important role in promoting fair public policies and safeguarding a court's legitimacy that the law of equity confers broad discretion on courts to invoke the doctrine, even *sua sponte*.[237] This amount of discretion is indeed powerful:

> The governing principle is "that whenever a party who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."[238]

In purporting to justify its termination of Venable by claiming that his Facebook comment disrupted the efficient delivery of public services, Metro asks a reviewing court, in effect, to excuse *de facto* censorship that would otherwise be a violation of Venable's rights.[239] However, if Metro has unclean hands because it helped create the workplace disruption by issuing a press release in bad faith, it should not, by way of analogy, receive such a blessing. No court should deny relief to a § 1983 employment retaliation plaintiff in a free-speech action in which the government employer manufactured the very disruption in the workplace that it later invoked to justify an adverse employment action. To do so would make a mockery of the judicial system, and courts have strong interests in preserving their legitimacy. Indeed, any court that would sanction the firing of a public employee

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235 Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814–15 (1945).

236 Republic Molding Corp. v. B.W. Photo Utils., 319 F.2d 347, 349 (9th Cir. 1963).

237 Karpenko v. Leendertz, 619 F.3d 259, 265 (3d Cir. 2010) (citing Highmark, Inc. v. UPMC Health Plan, 276 F.3d 160, 174 (3d Cir. 2001)) ("The doctrine [of unclean hands] may be raised *sua sponte* . . . ."); Fenn v. Yale Univ., 283 F. Supp. 2d 615, 635 (D. Conn. 2003) (quoting Thompson v. Orcutt, 756 A.2d 332, 334 (Conn. 2000)) ("The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the [un]clean hands doctrine is invoked.").

238 Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933) (quoting J. POMEROY, A TREATISE OF EQUITY JURISPRUDENCE § 397 (4th ed. 1905)).

239 *Cf.* Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

for speaking as a private citizen on a matter of public concern, without taking the most critical view possible of a defendant municipal employer's disruption defense by holding an evidentiary hearing that gives the speaker and employer an opportunity to put on proof of who caused the disruption, risks its own credibility as "an impenetrable bulwark"[240] against executive overreach. The Venable Rule embraces the reasoning underlying the doctrine of unclean hands by affording a public employment retaliation plaintiff an opportunity to rebut a municipal defendant's disruption evidence with evidence of the municipality's bad-faith, inequitable conduct.

If courts find analogies to the law of equity unpersuasive in weighing evidence or interpreting the totality of circumstances in public employment retaliation litigation, however, then perhaps analogizing to legal remedial doctrines will provide firmer footing.

2. Contributory Negligence and Comparative Fault

The law of damages in tort provides another lens through which to analyze the Venable Rule: contributory negligence and comparative fault. At common law, even a small portion of fault on the plaintiff's part would completely bar recovery in a tort.[241] Judicial application of contributory negligence led to harsh outcomes.[242] As a result, nearly all jurisdictions in the United States have since adopted some variant of a comparative-fault system that apportions damages to parties in a negligence action, expressed as a percentage, commensurate with whatever level of fault the fact finder attributes to each litigant.[243] Fact finders' identification and apportionment of fault in tort cases suggest that people can recognize when a municipality seeks to shift the blame for its adverse employment actions to a speaker when the municipality is in fact responsible for the harm that purportedly justified the adverse action.

In cases like the Venable Case, the law should be as harsh as the common law contributory negligence approach for two chief reasons.

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240 James Madison, *House of Representatives*, U. CHI. (June 8, 1789), http://bit.ly/2F9oSkP (last visited Jan. 22, 2019).

241 McIntyre v. Balentine, 833 S.W.2d 52, 54 (Tenn. 1992).

242 *Id.* at 57.

243 *Id.* For example, Tennessee embraces the "49 percent rule," which permits recovery so long as a plaintiff's overall proportion of fault in causing her injury was less than the defendant's. *Id.* Oregon has a slightly more generous rule, permitting recovery as long as the plaintiff's share of fault was not more than the defendant's. *See, e.g.*, Towe v. Sacagawea, Inc., 347 P.3d 766, 786 (Or. 2015).

First, right to free speech as we know it was born of the common law.[244] Second, because speech rights are so fundamental and essential to safeguarding the promises of a democratic society,[245] neither courts nor the law should tolerate governmental conduct that manipulates prevailing free speech doctrines for its own ends. The severity of the common law approach to contributory negligence is a feature here, not a bug. The harsher approach recognizes that municipal employers can be as much or more at fault than a terminated employee for any workplace disruption that ostensibly arises from the former employee's offensive speech. It also employs a capable fact finder in the evidentiary hearing—the court—to apportion fault to the governmental employer for its role in creating the dispute.

In the event this analogy to a common law legal remedial doctrine does not persuade the courts, perhaps an analogy to a remedial rule in criminal procedure will suffice as further support for the Venable Rule. After all, remedies in criminal matters strive to preserve justice and fairness when cases implicate constitutional issues.

3. The Exclusionary Rule

The exclusionary rule bars a prosecutor's use of evidence in his or her case in chief that police obtained in violation of a defendant's Fourth Amendment right against unreasonable searches and

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244 4 WILLIAM BLACKSTONE, COMMENTARIES 151 ("Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy . . . freedom."); *Crown v. John Peter Zenger*, HIST. SOC'Y N.Y. CTS., http://bit.ly/2TA3KwT (last visited Jan. 22, 2019) (recounting a colonial-era seditious libel case that "influenced how people thought about [free speech] and led, many decades later, to the protections embodied in the United States Constitution [and] the Bill of Rights"). *Cf.* Richard A. Epstein, *Common Law for the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 1, 7–21 (2018) (propounding a theoretical framework for protecting free speech in the absence of the First Amendment).

245 *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"); Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring) ("An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."). Interested readers should indulge themselves in Jacob Mchangama's excellent new podcast, *Clear and Present Danger: A History of Free Speech*, FREE SPEECH HISTORY (download at http://bit.ly/2Fa8wZ9), in which he traces the role of speech in Western civilization going all the way back to ancient Athens.

seizures.[246] The exclusionary rule's "purpose is to deter [violations]—to compel respect for the constitutional guaranty in the only effective way—by removing the incentive to disregard it."[247] The law should not permit government entities to make out their criminal cases by violating defendants' civil rights; thus, courts colorfully liken illicitly obtained evidence in a criminal case to "fruit of the poisonous tree."[248] Excluding evidence to deter constitutional violations through judge-made law is one important way that courts check the excesses of the political branches.[249]

The exclusionary rule, however, is not absolute. It does not spring from the roots of constitutional text,[250] nor does it create an independent right for criminal defendants. The late Justice Scalia described the limits of the rule as follows:

> Suppression of evidence, however, has always been our *last resort*, not our first impulse. . . . We have rejected "[i]ndiscriminate application" of the rule, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served,"—that is, "*where its deterrence benefits outweigh its 'substantial social costs.*"[251]

Five years later, Justice Alito echoed this balancing test, again noting the extreme nature of the remedy of excluding evidence from admission in a prosecutor's case in chief in a criminal trial:

> Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. *The analysis must also account for the*

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246 *See* Weeks v. United States, 232 U.S. 383, 397–98 (1914). Because the exclusionary rule is meant to deter violations of defendant's constitutional rights, exclusion of evidence is unnecessary where police act in good faith; one cannot practically deter a violation resulting from good-faith conduct. United States v. Leon, 468 U.S. 897, 909 (1984) (quoting Illinois v. Gates, 462 U.S. 213, 255 (1983) (White, J., concurring in the judgment)) ("Nevertheless, the balancing approach that has evolved in various contexts—including criminal trials—'forcefully [suggests] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.'").

247 Elkins v. United States, 364 U.S. 206, 217 (1960).

248 Wong Sun v. United States, 371 U.S. 471, 488 (1963).

249 *Cf.* Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."). *But see* Herring v. United States, 555 U.S. 135, 142 (2009) (quoting *Leon*, 468 U.S. at 908) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that offends 'basic concepts of the criminal justice system.'").

250 *See* U.S. CONST. amend. IV.

251 Hudson v. Michigan, 547 U.S. 586, 591 (2006) (emphasis added) (citations omitted).

> *"substantial social costs" generated by the rule*. Exclusion exacts a heavy toll on both the judicial system and society at large. . . . Our cases hold that society must swallow this bitter pill when necessary, but *only as a "last resort."*[252]

Courts thus limit application of the exclusionary rule to unconstitutional conduct that is "sufficiently deliberate," unlike a good-faith mistake,[253] such that exclusion will serve its deterrent function.[254]

One well-known exception to the exclusionary rule—the "independent source" doctrine—permits prosecutors to admit evidence, even where law enforcement officers commit a Fourth Amendment violation, if the officers obtain the evidence by some other, nonviolative means.[255] The Court announced this exception in *Murray v. United States*[256]:

> Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.[257]

Under this reasoning, prosecutors should be able to introduce evidence of a crime if there is a legitimate basis for police obtaining it, notwithstanding that the police also committed a constitutional violation.

The Venable Rule, like the exclusionary rule, would call a municipality to account for using evidence of workplace or service-delivery disruption when it, in fact, created the disruption—not the terminated employee. The rationale for the Venable Rule, like the

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252 Davis v. United States, 131 S. Ct. 2419, 2427 (2011) (emphasis added) (citations omitted).

253 *See supra* note 246.

254 *See Herring*, 555 U.S. at 144 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system [in excluding otherwise admissible, relevant evidence]."); United States v. White, 874 F.3d 490, 497 (6th Cir. 2017) (applying the *Herring* deliberateness doctrine).

255 Murray v. United States, 487 U.S. 533 (1988) (permitting the admission of evidence of marijuana trafficking obtained pursuant to a valid search warrant even though police officers had previously done a "sneak and peek" investigation in violation of the defendants' Fourth Amendment rights).

256 *Id.*

257 *Id.* at 541.

exclusionary rule, is deterrence. Deterrence is especially important where the government employer has a rational incentive to use such evidence to justify terminating an employee for offensive speech, as the exclusionary rule is when zealous police officers and prosecutors act on rational incentives to use their illicitly obtained evidence to make their criminal cases as strong and expedient as possible.

If a public employee filed a retaliation suit under § 1983 after being fired for speaking as a private citizen on a matter of public concern in a digital forum, and the municipality invoked the disruption defense under the *Pickering-Myers* framework, the Venable Rule requires an evidentiary hearing. In that hearing, the employer would be required to mount proof of an actual disruption to public services, and the plaintiff would have an opportunity to rebut the municipality's disruption defense by submitting evidence that the municipality created the disruption by using digital tools to issue a press release and shape public opinion about the speaker. If the plaintiff successfully made such a showing, then the court should conclude as a matter of law that a constitutional violation occurred.[258] A legal conclusion that the municipality violated the plaintiff's right to speak would both satisfy the second step of the plaintiff's prima facie § 1983 case and, as with application of the exclusionary rule to evidence obtained in violation of a criminal defendant's Fourth Amendment rights, provide a basis for ordering the deterrent remedy of excluding the defendant municipality's disruption evidence. In this way, the Venable Rule would deter municipalities from manufacturing politically convenient crises of public opinion or workplace morale by depriving them of a defense to a retaliation claim,[259] and make the full panoply of statutory

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[258] Before courts apply the exclusionary rule in a criminal case, it must conclude as a matter of law that law enforcement officers violated the Constitution to obtain evidence. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 397–98 (1914). Issuing a press release does not conjure an image of a typical employment action like suspension, demotion, docking of pay, transfer, or termination. However, if a municipality's defense to a retaliation claim hinges on its proof of a disruption to the efficient delivery of public services, then a court should consider the actions that the municipality took before a disruption occurs—marshalling public administrative resources to exert public pressure on an employee—as adverse employment actions. *See also, e.g.*, *supra* Part IV Section B (discussing rationales for expanding the scope of speech protections in the digital age).

[259] Justice Scalia also noted in his opinion for the Court in *Hudson* that § 1983 and *Bivens* actions obviate the need for the exclusionary rule for every constitutional violation. Hudson v. Michigan, 547 U.S. 586, 597–98 (2006). Thus, applying the Venable Rule would both embrace one of the chief policy rationales of the exclusionary rule while employing one of the Court's proposed alternatives to it: a fully litigated civil rights claim.

remedies available to a retaliation plaintiff to enforce his rights.[260] Moreover, applying the Venable Rule, like applying the exclusionary rule, would also help the judiciary preserve its own legitimacy within the broader constitutional structure by imposing checks in the executive.[261]

Finally, consistent with the limits of the exclusionary rule, the Venable Rule effectively balances the public's interests in deterring constitutional violations against social costs. It would curtail the excesses of municipal employers, whom the status quo rationally incentivizes to take adverse employment actions against an employee who utters offensive speech, while avoiding the constitutional injury that results instantly from curbing free speech.[262] A court fashioning and applying the Venable Rule could also find comfort in the rationale of the independent source doctrine. Analogizing to this doctrine would permit a termination where the government employer has issued a press release, but it can also put on sufficient evidence of a workplace disruption that results organically from the offending speech—an independent source. That is, even if, in the evidentiary hearing created by the Venable Rule, the plaintiff demonstrated that the municipality used digital tools to republish the offensive speech in a press release to shape public opinion about him before firing him, the disruption defense would still be available to the municipality if it showed, notwithstanding its public relations efforts, that the disruption came from an independent source of sociocultural angst. Such proof from the municipality would militate against a conclusion of law that a constitutional violation had occurred, both negating the second step of the § 1983 prima facie case and ruling out exclusion as a necessary deterrent.

While well-grounded rationales for the Venable Rule exist in these analogies, a tension persists. That tension arises from municipal employers' interest in firing first responders who say offensive things. The next Section acknowledges, analyzes, and addresses this interest.

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260 *See* 42 U.S.C. §§ 1981a, 1988 (2012) (providing damages to civil rights plaintiffs).

261 *Cf.* Madison, *supra* note 240.

262 *Cf.* Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Although it strains credulity to think that mere utterances could result in measurable harm of any kind to a listener, the record in the Venable Case is conspicuously devoid of any evidence of any cost to society resulting from Venable's speech. *See generally Anderson Letter*, *supra* note 21. Chief Anderson's letter certainly blamed Venable for a spontaneous protest, but the city's issuance of a press release prior to the protest demonstrates how truly disingenuous this line of attack really was. *See supra* Part III.

E. Counterarguments from the Municipality's Interest

Metro undoubtedly had several incentives to terminate Venable for his obtuse, out-of-touch, and, frankly, insensitive remark about the fatal shooting of Philando Castile. Four of the pressures that Metro and Chief Anderson might have faced in the Venable Case include potential liability for police misconduct or a hostile work environment, the appearance of neutrality in service delivery, and political considerations. The following subsections critically analyze each of these incentives and explain why courts should nevertheless adopt the Venable Rule in public employment retaliation cases with facts like the Venable Case.

1. Liability for Police Misconduct

Chief Anderson's letter made a curiously bold claim to justify terminating Venable: "The Metropolitan Government would also face liability for retaining an officer" who said what Venable wrote on Facebook.[263] Although Venable would ostensibly premise a § 1983 case on the "official policy" species of municipal liability, Metro and Chief Anderson may have been worried about the "unofficial policy or custom" variant of municipal liability.[264] In *Brandon v. Holt*,[265] for example, the Supreme Court denied immunity to the City of Memphis in a § 1983 case when Robert Allen, an officer with "a history of violent and irregular behavior that was well known within the Police Department," brutally beat up and stabbed a teenager without

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263 *Anderson Letter*, *supra* note 21, at 4.

264 Under this theory of liability, a § 1983 plaintiff can recover from a municipality with a showing that an informal, yet city-sanctioned, policy or custom of tolerating civil rights violations caused some harm. "Customs" for this purpose include "persistent and widespread . . . practices of [municipal] officials" that, "[a]lthough not authorized by written law . . . could . . . be so permanent and well settled as to constitute a 'custom or usage' with the force of law." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970)) (internal quotation marks omitted). So Metro may have been worried that, if Venable ever did unjustifiably shoot a suspect, its failure to punish him for his insensitive remark could be used as evidence that it tolerated police brutality in a manner "with the force of law." *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (discussing, Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (plurality opinion); Oklahoma City v. Tuttle, 471 U.S. 808, 821, 830–31 & n.5 (1985) (Brennan, J., concurring); Owen v. City of Independence, 445 U.S. 622, 633, 655 & n.39 (1980)) (providing that certain "unjustified" acts of police officers, "without more," will not give rise to liability).

265 469 U.S. 464 (1985).

provocation.[266] In effect, the Court's holding allowed the plaintiff to recover damages directly from the city because the director of the police department "*should have known* that Officer Allen's dangerous propensities created a threat to the rights and safety of citizens."[267]

Brandon is arguably inapposite to the Venable Case, however, because Venable did not actually unjustifiably shoot any criminal suspects five times as opposed to four—or even once. In *Brandon*, Robert Allen, an officer with a well-documented, violent history stabbed a citizen without provocation. Venable, in contrast, had no history of a violent past. There is a strong correlation between Robert Allen's physically violent past and the physical violence he perpetrated on the plaintiffs in *Brandon*. The Memphis Police Department should have been able to predict Allen's actions, based on his record, and fired him before he violated anyone's rights to personal safety. Conversely, Venable's lone Facebook comment about whether to use lethal force in a police encounter with a criminal suspect does not portend a physically violent episode, and it does not warrant prophylactically terminating him to avoid creating an unofficial custom of municipally sanctioned police brutality.

Moreover, *Brandon* was a § 1983 claim based on the plaintiff's constitutional right to his bodily integrity that Robert Allen summarily violated when he beat and stabbed the plaintiff.[268] Citizens of Nashville, by contrast, have no constitutional right to not be offended,[269] so no *Brandon* problem exists as to Venable's Facebook comment.

One might argue that, like Robert Allen's "history of violent and irregular behavior," Venable's crass comment gave Metro notice that he would one day shoot an African-American suspect with excessive force, and thus Metro fired Venable preemptively to avoid civil rights litigation that would invariably ensue. But on the facts of the Venable Case, in which a police officer used poor judgment online one day in contrast to his multiyear meritorious service record, this argument seems like a stretch, to say the least. At any rate, without more,

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266 *Id.* at 466. For a more gruesome account of the facts of the case, see *Brandon v. Allen*, 516 F. Supp. 1355, 1357–59 (W.D. Tenn. 1981), for the trial court's recitation of the incident.

267 *Holt*, 469 U.S. at 467 (internal quotation omitted).

268 *Id.* at 464.

269 "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989) (collecting cases).

Nashvillians have no cognizable legal interest in not being offended that is so weighty as to permit censorship of Venable's speech, even if Metro had a reason to believe Venable might one day publish an off-color remark on Facebook.

But this conclusion alone does not mean that Metro had no legitimate interests in firing Venable. Public employers are not only accountable to their customers and constituents under the law; they are also accountable to other employees.

2. Liability for a Hostile Work Environment

Metro had a legitimate interest in reducing its exposure to liability for violating Title VII of the Civil Rights Act of 1964. Under Title VII, an employer can be held liable if it has, or should have had, knowledge of behavior that creates a hostile work environment. A hostile work environment manifests when: (1) a subordinate employee does or says something discriminatory to, or in the presence of, another subordinate employee,[270] (2) the offending conduct is severe or pervasive enough to "alter the conditions of the victim's employment and create an abusive working environment,"[271] and (3) the employer fails to remediate the situation.[272] Under this framework, federal law holds the employer liable for the discriminatory conduct of the subordinate employee. The standard of proof in a case alleging a hostile work environment can be high: the less severe the offending conduct is, the more pervasive it must be for a claimant to prevail.[273] Similarly, the less pervasive the conduct is, the more severe it must be for a Title VII plaintiff to meet his burden.[274] Once a Title VII plaintiff prevails on a claim for a hostile work environment, he is entitled to a broad swath of statutory remedies, including damages.[275] Therefore, a municipal employer, which is also a steward of the public trust, may be even more

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270 *See* 42 U.S.C. § 2000e-2(a)(1) (2012) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

271 *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal quotation omitted).

272 29 C.F.R. § 1604.11(d) (2017) ("[A]n employer is responsible for acts of sexual harassment in the workplace where the employer . . . *knows or should have known of the conduct*, unless it can show that it took *immediate and appropriate* corrective action." (emphasis added)).

273 *See Harris*, 510 U.S. at 21–22.

274 *See id.*

275 *See generally* 42 U.S.C. §§ 1981a(b), 2000e-5(g) (2012).

likely to fire a subordinate employee for offensive speech to avoid paying a judgment in a Title VII case.

If one of Venable's colleagues alleged a claim under Title VII over Venable's comment, however, the colleague would need to surmount a high barrier to demonstrate that one comment in isolation, which Venable asserts was a sarcastic joke, was severe enough to create a hostile work environment.[276] In addition, standards of decency presumably both evolve over time and vary from place to place.[277] As several commentators have noted, this evidentiary analysis also belies the problematic legal tension between Title VII liability and the Free Speech Clause.[278] Absent a showing of severity, the colleague would need to show pervasiveness of the offending speech beyond a single Facebook comment, which seems highly unlikely. By giving a terminated employee an opportunity to offer proof that the employer's press release made a single offensive utterance pervasive—thus, actionable under Title VII—applying the Venable Rule would protect a subordinate employee's speech rights while directing the force of the Title VII case to the proper defendant: the municipality that made the speech pervasive by republishing it and *ipso facto* failing to remediate its effects on other subordinate employees.

Because it is unclear whether one of Venable's colleagues could meet his or her burden of proof for a hostile work environment claim, Metro may or may not have had a justifiable interest in shielding itself from liability under Title VII by firing him. Nevertheless, Metro has practical interests that it may have considered in a *Pickering-Myers* analysis of the constitutionality of disciplining Venable.

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276 In one very recent case in the U.S. District Court for the Middle District of Tennessee, where Nashville is located, the Court denied a motion for summary judgment in a Title VII case alleging a hostile work environment over a single use of the "n-word." *See* John P. Rodgers, *Once Is Enough: Tennessee Federal Court Rules Single Use of "N-Word" by Co-Worker Sufficient to Get Hostile Work Environment Claim to Jury*, LABOR & EMPLOYMENT INSIGHTS (Mar. 5, 2019), http://bit.ly/2TA41jp. Venable did not use such a racial slur in his Facebook comment, but the law of the Sixth Circuit may yet be changing in this area.

277 *De gustibus non est disputdandum*, as the ancient Latin maxim goes. *Cf.* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

278 *See, e.g.*, DAVID BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 23–34 (2003) (criticizing Title VII's threat to free speech); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995); Jonathan Rauch, *Offices and Gentlemen*, NEW REPUBLIC, June 23, 1997, http://bit.ly/2F9hqGc. *But see* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310 (1999) ("[A] person trapped in a hostile work environment is a 'captive audience' for First Amendment purposes with respect to the speech and conduct that produce the discrimination.").

3. Appearance of Neutrality in Service Delivery

Cities have strong interests in distancing themselves from their employees' controversial views. This is especially true regarding first responders because "first responders . . . require the public's complete trust that they will discharge their duties faithfully and impartially without regard to factors like a person's race, gender or sexual orientation."[279] Simply put, nobody should have to worry when Venable arrives on the scene of an alleged crime that he would arbitrarily shoot them five times. Failing to punish controversial speech may constitute ratification of behavior, thus giving rise to municipal liability under § 1983.[280] Such a failure may also establish an official policy or custom of encouraging private actors to discriminate against racial minorities.[281]

Furthermore, as technological innovation and digital penetration continue to blur the dividing line between public and private spheres, the Court may—although it has not done so yet—revisit the distinctions it drew in *Pickering* and *Garcetti* between a person who speaks as a private citizen versus as a public employee. The Court may yet reject this distinction as a legal fiction when, in the digital age, there really may be no such thing as a public employee speaking as a truly private citizen. Under such a framework, a municipality could separate itself from offensive viewpoints by firing someone without violating the person's rights in any case.

But there may yet be some "social value"[282] to Venable's remarks, precisely because of, rather than in spite of, how offensive they

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279 Hudson, *supra* note 11.

280 *Cf.* City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."). Here again, however, the officer's speech would need to violate citizens' constitutional rights to hold a municipality liable under § 1983. It is doubtful that this would ever be the case, as citizens have no constitutional right not to be offended. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (collecting cases).

281 *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) ("We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."). In *Lombard v. Louisiana*, for example, the mayor's public comments about lunch counter sit-ins could establish an "official policy" because the Mayor may have had final decision-making authority. *See* 373 U.S. 267, 270–74 (1963). Therefore, the defendants in *Lombard* could bring a § 1983 action against the city of New Orleans.

282 *But see* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such

were.[283] If one takes Venable at his word, that he was replying in a mocking fashion to what he perceived to be overblown outrage to the Castile shooting coming from people who had never walked a proverbial mile in a police officer's shoes,[284] then one could view his sarcasm as an attempt to educate the other online commenters with the rhetorical device of hyperbole. He may have been attempting to convey to laypersons that police officers must often act or react in mere seconds to protect themselves and that the law sometimes shields police officers from civil immunity to ensure their maximum efforts at protecting the public.

Humor, including sarcasm, is a well-known tool for teaching adults in higher education. In one pair of studies, for example, experimental groups of students whose instruction included humor earned higher exam scores than students in the control groups, whose instruction included no humor.[285] These conclusions may have resulted because students whose instruction included humor have higher rates of information recall than students whose instruction was traditional.[286] Anecdotally, sarcasm in instruction allows a teacher to convey a point to both an individual student and a group of onlookers (a class of students; in the Venable Case, the other commenters in the Facebook discussion) without more hostile or confrontational tactics.[287] Furthermore, researchers have theorized that, when an educational exchange involves speakers whose primary languages are different, the lack of "sociocultural knowledge" of one party makes the joke a puzzle, and that the process of solving it, developing the lacked sociocultural knowledge, aids permanent understanding (even if it renders the joke unfunny).[288]

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slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

283 *See* Greg Lukianoff, *Twitter, Hate Speech, and the Costs of Keeping Quiet*, CNET (Apr. 7, 2013, 4:00 AM), https://cnet.co/2F7UCqf ("The idea that society achieves something positive by mandating that people with bad opinions must hide them . . . can be dangerous. . . . [M]aking bigoted speech [effectively] illegal . . . can create an overly rosy picture of public sentiment, thus preventing real and festering social problems from being addressed."); *supra* Part IV Section A.

284 *Venable Decommissioned*, *supra* note 14.

285 *See generally* Avner Ziv, *Teaching and Learning with Humor*, 57 J. EXPERIMENTAL EDUC. 5 (1988).

286 R.L. Garner, *Humor in Pedagogy*, 54 C. TEACHING 177, 179 (2006).

287 *See* David Sudol, *Dangers of Classroom Humor*, 70 ENGLISH J. 26, 28 (1981).

288 *See* Douglas Wulf, *A Humor Competence Curriculum*, 44 TESOL Q. 155, 159 (2010). "Much humor is lost once a joke is explained," but *it is still explained*, closing the information gap between the speaker and the listener. *Id*.

Similarly, civilians without police experience effectively speak a different "language" than police officers. Most people do not understand the doctrine of qualified immunity and how it relates to police officers' use of force,[289] because most people do not have legal training or practical police experience.[290] Although Venable was concededly undiplomatic in his delivery, it is incorrect to think that his comment had no social value whatsoever. It was a window into how some police officers think about their duties and, more importantly, how they think about the constant criticism they endure from people without law enforcement experience or legal training. If Venable's comment prompted anyone who read it to try to learn more about qualified immunity, then it resulted in a social good. The law should not permit governmental employers to prevent these kinds of information exchanges by chilling public employee speech under the threat of termination.

As a prudential matter, firing is an extreme remedy that, as here, deprives the municipality and the people it serves the opportunity to counsel an employee's lapse in personal judgment or correct the behavior of a decorated officer whose service record unquestionably demonstrates his high value to the community. Are the people of Nashville better off without Anthony Venable on the police force? We may never know. Applying the Venable Rule would deter municipalities from reaching first for the incredibly harsh tool of employment termination when less restrictive means like counseling (formal or informal) may be available. Metro, however, was also between a proverbial rock and a hard place, politically speaking, in the Venable Case.

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289 *Cf.* Radley Balko, *What Is "Qualified Immunity," and How Does It Work?*, WASH. POST (July 14, 2015), https://wapo.st/2FaHTDn.

290 There were just over 600,000 lawyers in the United States in 2017. U.S. DEP'T LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2017: 23-1011 LAWYERS, http://bit.ly/2F9VD1k (last updated Mar. 30, 2018). Similarly, there were just over 660,000 police officers in the United States in 2017. U.S. DEP'T LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2017: 33-3051 POLICE AND SHERIFF'S PATROL OFFICERS, http://bit.ly/2F8Yh7r (last modified Mar. 30, 2018). By contrast, there are over 320 million people in the United States. U.S. CENSUS BUREAU, U.S. AND WORLD POPULATION CLOCK, http://bit.ly/2FaI29T (last visited May 28, 2018). Many lawyers receive training on immunity doctrines in law school. Police departments also train officers on best practices to preserve immunities in certain situations. *See Mr. Graham and the Reasonable Man*, MORE PERFECT (Nov. 30, 2017) (downloaded using iTunes).

4. Political Considerations—and Why They Are Irrelevant

People who work in supervisory roles in government are sensitive to the way the public perceives them and the jobs they do. For example, whatever other issues there may have been with either Marvin Pickering's or Fred Doyle's performance on the job, their school district employers did not fire either of them until both uttered messages that neither employer could control.[291] Similarly, former New Orleans DA Harry Connick worried about what the media's reaction to Sheila Myers's survey would be if the results had become public.[292]

Charitably, Metro's decision to fire Venable reflected a practical political calculation when it faced a Hobson's choice.[293] On one hand, decision makers risked exposing themselves to liability (whether liability for a hostile work environment for failing to remediate the arguably discriminatory conduct of a subordinate employee or § 1983 liability for encroaching on an employee's speech rights). On the other, Chief Anderson and former Mayor Megan Barry risked suffering political blowback, and possibly violence against other Metro police officers, if embarrassing news of Venable's comment later leaked from the department to the public, and Metro had failed to respond to it proactively. Both were bad alternatives. By firing Venable, Metro minimized these risks. Even if Venable filed a lawsuit,[294] he would be an unsympathetic plaintiff because other examples of first responders using bad judgment online abound.[295]

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291 Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 279, 282–83 (1977) (call to a radio station); Pickering v. Bd. of Educ., 391 U.S. 563, 566, 568–69 (1968) (letter to the editor of a local newspaper).

292 Connick v. Myers, 461 U.S. 138, 141 (1983).

293 A Hobson's choice is one in which a person must choose between two equally bad alternatives. BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 466 (4th ed. 2016).

294 Venable has, in fact, retained counsel and sued Metro. Adam Tamburin, *Former Police Officer Fired for "Inflammatory" Remarks About a Cop Who Shot a Black Man Is Suing*, TENNESSEAN (Feb. 14, 2018, 7:20 PM), http://bit.ly/2TEpxUl. The complaint alleges violations of Venable's free speech, due process, and equal protection rights pursuant to § 1983. *See* Complaint at 1–2, 13–17, Venable v. Metro. Gov't of Nashville, No. 3:18-cv-00148 (M.D. Tenn. Feb. 13, 2018).

295 *See, e.g.*, Daniel Connolly & Yolanda Jones, *Shelby County Sheriff's Spokesman Suspended over Comments on Immigrant's Arrests*, COM. APPEAL (Sept. 25, 2017, 5:53 PM), http://bit.ly/2TBOX4C; Ron Maxey, *Firefighter Relieved of Duty, Apologizes, After Saying NFL, NBA Athletes Should Be Shot in Head if They Protest*, COM. APPEAL (Sept. 26, 2017, 9:34 a.m.), http://bit.ly/2Txw0QT; Blake Montgomery, *We Regret to Inform You That One of the Hot Florida Cops Has Milkshake-Ducked*, BUZZFEED (Sept. 14, 2017, 6:18 PM), http://bit.ly/2F7VpaH; *Fire Chief Removed from Post after Racial Slur Directed at Tomlin*, WPXI NEWS (Sept. 26, 2017, 5:45 PM), http://bit.ly/2Fcdkxj.

One cannot overlook or excuse Metro's decision to issue a press release that prompted the very news coverage that purportedly created a workplace disruption that could be used to defend against a public employment retaliation claim under the prevailing free-speech tests. The existential threat of political blowback does not justify a municipality or any of its agents summarily violating an employee's free-speech rights. Shielding all employees from the threat of physical violence that might result from a lone employee's offensive speech offers a more compelling case, especially at a time when municipalities across the country wrestle with questions about the appropriate use of force in police encounters with racial minorities, and some protests lead to actual violence. A municipal employer ought to be able to pierce the Free Speech Clause and fire an employee if it meets its burden of establishing that the employee's speech *actually* caused a workplace disruption that *actually* inhibited the municipality's ability to efficiently deliver services to the public, or that the employee's speech *actually* endangered other employees, as demonstrated by *actual* proof in the record. There is no need to modify the *Pickering-Myers* balancing framework to figure out when the Constitution permits such a termination. Rather, the Venable Rule holds municipalities accountable for a very specific kind of rights violation, which appears to have occurred in the Venable Case. It would deny municipalities the cover of the *Pickering-Myers* balance when the municipal employer's zealous proactivity, not the initial utterance standing alone, created the threat of political blowback or violence to other employees.

F. The Venable Rule Is a Versatile Rule

This Article has thus far analyzed free-speech jurisprudence in the context of § 1983 retaliation claims, which only remediates constitutional violations from actions under color of *state* law. To limit the application of the Venable Rule to § 1983 employment retaliation claims alone, however, would sell it short of its promise. There are two other contexts in which Article III courts adjudicate constitutional violations where the Venable Rule would be useful: judicial review of agency actions and *Bivens* cases. The next two subsections set forth these frameworks and demonstrate how courts might apply the Venable Rule in these other contexts.

1. Federal Administrative Law

The Venable Rule would also be useful in adjudicating the constitutionality of the termination of a federal employee who, like Venable, posted a crude or racially insensitive comment on a Facebook thread. The United States Department of Justice (DOJ) issued guidance in 2014 that set forth rules for agency employees' personal use of social media.[296] Like Metro's policy, the DOJ guidance vaguely discourages speech on "matters affecting the Department," and it encourages federal employees to ask themselves, "Might my use of social media adversely affect the Department's mission?"[297] The guidance also expressly prohibits "comments that can be perceived as showing prejudice based on race, gender, sexual orientation or any other protected basis," even on the employee's personal social media accounts during their personal time.[298] The guidance sets forth the DOJ's rationale for this restriction, which should now seem familiar to readers:

> It is critically important that Department employees act, and are perceived to act by the public we serve, in a fair, just, and unbiased manner. Online comments by Department employees exhibiting animus based on any protected basis, including race, gender, or sexual orientation, that adversely affect our ability to carry out our important mission will not be tolerated. . . .
>
> . . . .
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> Department employees do not surrender their First Amendment rights as a result of their employment; however, the Supreme Court and lower courts have held that the Government may restrict speech of its employees when employees are not speaking as private citizens on matters of public concern or when the Government's interest in the efficient provision of services outweighs its employees' interest in the speech.[299]

The DOJ's guidance thus puts its employees on notice of the *Pickering-Myers* balancing tests with respect to their personal use of social media.

Former Deputy Attorney General James Cole may have diligently drafted this guidance, but the *Pickering-Myers* test still fails to provide concrete answers in a federal analog to the Venable Case. For example, what happens when a deputy attorney general sends a press release to

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296 *See generally* Letter from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All Department Employees (Mar. 24, 2014), http://bit.ly/2F8Yw2l.

297 *Id.* at 1.

298 *Id.* at 2.

299 *Id.*

the *Washington Post* about an assistant U.S. attorney's offensive online speech, uttered on her own time on a personal social network, which no one—at least not enough people to give rise to a disruption that interferes with the DOJ's mission—may have heard about otherwise? Just as Metro did likewise in the Venable Case, this practice would unfairly tip the *Pickering-Myers* balance in the government's favor by creating the very interference with government operations that would legitimize the firing, even though the disruption may never have occurred organically.

If and when a terminated federal employee seeks judicial review of an agency order terminating her employment,[300] the reviewing court should exercise its authority pursuant to the Administrative Procedures Act (APA) to determine whether the firing passes constitutional muster.[301] To make this constitutional determination, this Article argues that after applying the two-pronged *Pickering-Myers* test, reviewing courts should apply the Venable Rule and both require the employer to prove that the speech actually disrupted agency operations and allow a plaintiff to rebut the employer's disruption evidence, because the prevailing *Pickering-Myers* balancing test fails to account for the conduct of government employers who create the disruption that they later invoke to retroactively sanitize *de facto* censorship. Given the still-growing pervasiveness of social media, and the promulgation of policies at all levels of government that try to curb certain kinds of speech on digital platforms, it seems almost inevitable that an

300 The Civil Service Reform Act of 1978 created a number of administrative forums for challenging an alleged wrongful termination. Of relevance here, the quasi-judicial Merit Systems Protection Board (MSPB) has statutory authority under federal law to entertain wrongful termination grievances that arise from federal employment discrimination based on "conduct which does not adversely affect the performance of the employee or . . . others." 5 U.S.C. § 2302(b)(10) (2012). Assuming one could shoehorn an inappropriate social media comment in violation of DOJ's 2014 guidance into the ambit of this provision, a terminated federal employee could bring a wrongful termination claim before the MSPB. The final decisions of the MSPB, however, are subject to review in federal appellate courts, which Congress vested with authority to "set aside any action . . . found to be . . . not in accordance with law." 5 U.S.C. § 7703(b)–(c)(1) (2012).

301 The APA provides that "[a]gency action made reviewable by statute," as is the case with final determinations of the MSPB, *see* 5 U.S.C. § 7703(b), "and final agency action for which there is no other adequate remedy in a court," which would ostensibly be the case where there was nothing procedurally defective about an MSPB adjudication, "are subject to judicial review." 5 U.S.C. § 704 (2012). The APA further sets forth the scope of this judicial review, including, significantly, empowering a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . *contrary to constitutional right*, power, privilege, or immunity." 5 U.S.C. § 706(2)(B) (2012) (emphasis added).

analogous case will arise in the federal employment context. Thus, courts should also adopt the Venable Rule in the appropriate federal public employment retaliation case to fill the gap in the *Pickering-Myers* test.

If the terminated assistant U.S. attorney's petition for judicial review of a DOJ firing pursuant to this guidance failed for some reason, she would not necessarily be without any recourse. She may be able to pursue a *Bivens* claim, which the next subsection explains.

2. Bivens *Claims*

Section 1983 is a postbellum statute that provides a federal cause of action for employment retaliation plaintiffs when someone acting under color of state law violates their civil rights and liberties.[302] Congress has never enacted legislation to provide the same kind of civil rights protections against persons acting under federal law.[303] Nevertheless, a *Bivens* claim is a "federal analog" to § 1983,[304] and courts use the tests established in the jurisprudence of each interchangeably.[305] The Free Speech Clause analysis in this Article could thus apply equally, in theory, to a *Bivens* claim where a federal employer violates an employee's civil liberties.

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,[306] federal law enforcement agents raided Webster Bivens's Brooklyn apartment without a warrant.[307] They tossed every room, looking for evidence of drug crimes, and shackled Mr. Bivens in front of his family, whom they also threatened to arrest.[308] Agents then took him into custody, interrogated him, and strip-searched him.[309] Mr. Bivens filed a federal lawsuit alleging violations of his Fourth Amendment rights and seeking $15,000 in noneconomic damages from each agent for the dignitary harms he suffered, but the district court

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302 42 U.S.C. § 1983 (2012); *see also supra* Part II Section A.

303 *See* BARBARA A. KRITCHEVSKY, CIVIL RIGHTS: CASES AND MATERIALS ON SECTION 1983 LITIGATION 12 (2017) (on file with author) ("What would become of *Bivens* if Congress passed an equivalent of section 1983 applicable to federal officials?").

304 Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006).

305 Doe v. Dist. of Columbia, 697 F.2d 1115, 1123 (D.C. Cir. 1983) ("The bodies of law relating to [§ 1983 and *Bivens*] have been assimilated in most . . . respects."); *see also id.* at 1123 n.18 (collecting cases that apply the same legal standards in both types of cases).

306 403 U.S. 388 (1971).

307 *Id.* at 389.

308 *Id.*

309 *Id.*

dismissed his complaint for failure to state a claim.[310] The Second Circuit affirmed.[311]

On appeal, the Government argued that Mr. Bivens's only remedy was to file a state tort action for damages arising from the violation of his right to privacy, but this argument did not persuade the Court, which was reluctant to treat the dispute as "between two private citizens."[312] Rather, it was precisely because the law enforcement agents were cloaked in the authority of the United States, and because the Fourth Amendment constrains governmental power in all jurisdictions, that the Court was willing to entertain Mr. Bivens's petition for certiorari.[313] Analogizing to federal statutes that provide a "general" right of action to sue for redress of certain harms, and observing that Congress had not enacted a statute *foreclosing* jurisdiction or relief of the kind or on the basis that Mr. Bivens sought, Justice Brennan wrote that Mr. Bivens was entitled to sue the agents for damages (or any other remedy that federal courts have inherent authority to provide) "if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights."[314] The Court read an implied right of action in the Fourth Amendment because "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[315]

In a separate concurring opinion, Justice Harlan added support for the majority's conclusion that federal courts could imply rights of action and fashion remedies for federal constitutional violations. He observed that federal courts had long provided injunctive and other equitable relief in federal cases alleging constitutional violations without particular statutory authorization from Congress.[316] He reasoned that, if courts could imply rights of action and provide equitable relief in federal constitutional cases without an express pronouncement from Congress, then the federal courts could also imply rights of action and provide compensatory damages in federal constitutional cases.[317] Perhaps most stringently, Justice Harlan argued

310 *Id.*

311 *Id.* at 389–90.

312 *Id.* at 390–92.

313 *Id.* at 392.

314 *Id.* at 396–97.

315 *Id.* at 397 (internal quotation omitted).

316 *Id.* at 404 (Harlan, J., concurring) (citations omitted).

317 *See id.* at 405.

that "it is apparent that some form of damages is *the only possible remedy* for someone in Bivens' alleged position," and that equitable relief, like an injunction, would offer little protection against a surprise drug raid that had already happened.[318] Likewise, the exclusionary rule would only bar introduction of evidence obtained in the raid from the prosecution's case in chief; it would not compensate Mr. Bivens or his family for the dignitary harms they suffered—"For people in Bivens' shoes," wrote Justice Harlan, "it is damages or nothing."[319] And while he rejected Justice Black's argument that implying federal rights of action in constitutional provisions would open the floodgates of litigation and strain scarce judicial resources,[320] Justice Harlan argued that even if litigation of this kind strains judicial resources, it is worth expending those resources to safeguard the Constitution's promises.[321]

The primary takeaway from *Bivens*, then, is that federal courts can imply individual rights of action and provide suitable remedies for federal actors' violations of a plaintiff's constitutional rights, provided that there is no alternative remedy available to the plaintiff, and there are no "special factors counselling hesitation" in the absence of such an alternative remedy.[322] Since Congress has not provided a statutory or administrative scheme, or expressed a legislative preference or finding, that offers countervailing public policy or separation-of-powers reasons to decline fashioning a judicial remedy for federal violations of the Free Speech Clause, employment retaliation litigants should be able to petition federal courts for relief using the *Bivens* claim.

As of this writing, there appear to be no reported *Bivens* cases asserting a federal employment retaliation theory for an alleged free speech violation, so it is difficult to determine under what factual circumstances a federal court would permit a terminated federal employee to imply a right of action for speech-based employment

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318 *See id.* at 409–10.

319 *See id.* at 410.

320 *Id.* at 428–29 (Black, J., dissenting).

321 *Id.* at 410–11 (Harlan, J., concurring).

322 *Id.* at 396 (majority opinion). Conversely, where Congress or the States do provide an alternative remedial scheme, the federal courts should dismiss *Bivens* actions for failure to state claims out of respect for separation of powers. *See, e.g.*, Klay v. Panetta, 758 F.3d 369, 373–77 (D.C. Cir. 2014) (declining to permit a *Bivens* claim in a suit by former Navy and Marine Corps servicewomen, who alleged that they were raped and sexually harassed by male counterparts and then fired in retaliation for complaining about their mistreatment, because it invited the judiciary to intrude on military affairs and violate the separation of powers).

retaliation.[323] But despite its reluctance to expand *Bivens* to new contexts, the Court has never foreclosed on the possibility that *Bivens* applies to free speech claims.[324] Indeed, the Supreme Court has "assumed without deciding" that First Amendment claims are actionable under *Bivens*.[325] If given the chance to adjudicate an appropriate test case pursuant to *Bivens*, federal courts should adopt and apply the Venable Rule.

First, pursuant to *Bivens*, a court would imply a federal right of action under the stringent language of the First Amendment.[326] Without this protection, it would be "damages or nothing" for the terminated employee.[327] Then, since federal employers have a similar interest in efficiently delivering services to the public, as do municipal employers, the court would next apply the *Pickering-Myers* balancing test. In so doing, the court would also apply the Venable Rule and give the terminated federal employee an opportunity to rebut any evidence

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323 *But see* Bush v. Lucas, 462 U.S. 367 (1983) (declining to create an independent federal cause of action for damages pursuant to *Bivens* when NASA reduced the pay of one of its aeronautic engineers who made critical public statements about the agency). Yet the Court decided *Bush* on its unique facts: Congress had provided an express administrative remedial scheme in the organic statute, so the Court exercised restraint in declining to imply a separate federal cause of action in the case pursuant to *Bivens*. HOWARD P. FINK, ET AL., FEDERAL COURTS AND THE 21ST CENTURY: CASES AND MATERIALS 296 (4th ed. 2013). So while there is a dearth of reported cases on point, the Court did not foreclose free speech claims pursuant to *Bivens*. *See id.*

324 Justice Thomas and the late Justice Scalia, however, have at least twice argued against the expansion of cognizable constitutional claims in *Bivens* actions. *See* Wilkie v. Robbins, 551 U.S. 537. 568 (2007) (Thomas, J., and Scalia, J., concurring) (citing Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Thomas, J., and Scalia, J., concurring)). Indeed, the Court has been reluctant for several decades to expand *Bivens*. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("Given the notable change in the Court's approach to recognizing implied causes of action, however, the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity. This is in accord with the Court's observation that it has 'consistently refused to extend *Bivens* to any new context or new category of defendants.' Indeed, the Court has refused to do so for the past 30 years." (internal citations omitted)).

325 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (assuming that respondents' Free Exercise Clause claim was actionable under *Bivens* because "[p]etitioners do not press" a contradictory argument); Wood v. Moss, 134 S. Ct. 2056 (2014) ("[W]e have several times assumed without deciding that *Bivens* extends to First Amendment claims. . . . We do so again in this case."); Reichle v. Howards, 132 S. Ct. 2088, 2093 n.4 (2012) ("We need not (and do not) decide here whether *Bivens* extends to First Amendment retaliatory arrest claims.").

326 *See* U.S. CONST. amend. I ("Congress shall make no law . . . ."). The Constitution's use of the words "shall make no law" should help a court disabuse itself of any notion that there are "special factors counselling hesitation" in the protection of speech rights.

327 *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

of workplace disruption that the United States offered to justify its decision to terminate the employee. (The lone federal defendant against whom the Venable Rule would be completely useless, however, is the sitting President of the United States.[328])

CONCLUSION

In his letter to Venable, Chief Anderson posited, in essence, that Metro should be able to fire officers for just about anything with impunity, as long as some member of the public expresses outrage about it. This is not hyperbole: he wrote, "at *any* time *any* action you might take as a Metropolitan Nashville Police Officer that receives *any* public notice, these readily and instantly retrievable publications" can give rise to lawful, retaliatory public employment termination.[329] The potential import of this legal position is breathtakingly alarming because this reasoning could permit all sorts of civil rights abuses. For example, a motivated racist who attained public office could, simply by issuing a press release and shouting "workplace disruption," punish minority police officers who express support for a Black Lives Matter rally. Therefore, filling the gap in § 1983's free speech jurisprudence with the Venable Rule should be of paramount importance to the courts because it will enable them to mitigate the risk of this kind of injury by protecting the rights of employee-speakers while ensuring that municipalities can manage their workforces and retain talented employees, whose conduct exhibits a mere judgmental misstep.

The Venable Rule requires proof of an actual disruption in the workplace and a factual determination as to whether the initial speaker or the employer republishing the offensive speech caused that disruption. Until the federal courts modify their approach to speech-based public-employment retaliation claims, the Free Speech Clause

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328 Nixon v. Fitzgerald, 457 U.S. 731 (1982) (holding that presidents have absolute civil immunity for their official acts undertaken while in office). This issue belies that an Article III court may decline to exercise jurisdiction over some cases arising from the president's decision to fire an executive branch employee in retaliation for disfavored speech, deciding that the case involves a nonjusticiable political question. *See* Davis v. Passman, 442 U.S. 228, 242 (1979) ("At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' we presume that justiciable constitutional rights are to be enforced through the courts." (quoting Baker v. Carr, 369 U.S. 186, 217 (1962))). The Court's interpretation of Article II's Take Care Clause with respect to the president's near-absolute constitutional authority to fire executive branch employees is very well defined. See generally Myers v. United States, 272 U.S. 52 (1926) and its progeny.

329 *Anderson Letter*, *supra* note 21, at 5 (emphasis added).

itself—one of the most hallowed passages in our Constitution—hangs in the balance.