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FREDERICK SCHAUER

“PRIVATE” SPEECH AND THE
“PRIVATE” FORUM: GIVHAN v.
WESTERN LINE SCHOOL DISTRICT

Short opinions, like “great” cases and “hard” cases,¹ often make bad law. A satisfactory judicial opinion need not be long. Concise prose and direct analysis are admirable if frequently ignored judicial virtues. They are not necessarily to be found in short opinions.

Constitutional adjudication, particularly by the Supreme Court, must to some extent be both prospective and advisory, anticipating problems to which the announced principles will be applied. No amount of academic prattle about holdings, dicta, and ratio decidendi can dispel the fact that, in courts other than the Supreme Court, the law is what the Supreme Court says by its words as much as it is what the Court holds by its decisions. If the Court were to say that two plus two equals five, as it so frequently does, then for the lower courts two plus two equals five, even when that assertion by the Court was unnecessary to its decision. Thus, brevity may be a judicial vice when it results in the pronouncement of broad prin-

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¹ “Great cases, like hard cases, make bad law.” *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

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ciples that are unqualified and unjustified. When explanation and qualification are lacking, the words of the Supreme Court may be used to support results neither intended by the Court nor covered by an inadequate rationale underlying the opinion.²

A recent example of this phenomenon is the Supreme Court's decision last Term in *Givhan v. Western Line Consolidated School District*.³ In that case, a junior high school teacher had on numerous occasions complained to her principal, in the principal's office, about alleged racial discrimination in the school. These complaints antagonized the principal, and the teacher's contract was not renewed. The district court held that the dismissal violated the First Amendment.⁴ The Fifth Circuit reversed that judgment, ruling that "private" speech such as that involved here was wholly outside the First Amendment.⁵ A unanimous Supreme Court needed only a few pages to reject the Fifth Circuit's view of the First Amendment as "erroneous."⁶ The Court held that the teacher's statements to the principal in his office could not, consistent with the First Amendment, be used to justify the teacher's dismissal. Mr. Justice Rehnquist, speaking for the Court, rejected any distinction between private and public speech, finding such a distinction supported neither by the words of the First Amendment nor by any of the Court's free speech cases.

There are difficult issues involved in the contrast between speech in a public forum and speech in private conversation, as well as in the extent to which the First Amendment protects a public employee who communicates his or her views on the employer's time and on the employer's premises. The complexity of these problems is

² The paradigm is perhaps *Valentine v. Chrestensen*, 316 U.S. 52 (1942). There a "casual, almost offhand" (*Cammarano v. United States*, 358 U.S. 498, 514 [1959] [Douglas, J., concurring]), statement of the commercial speech exception to the First Amendment established a principle that survived for twenty-four years, until its demise in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

³ 99 S. Ct. 693 (1979).

⁴ *Ayers v. Western Line Consolidated School District*, 404 F. Supp. 1225 (N.D. Miss. 1975). This opinion deals only with damages, interest, and attorneys' fees. Judge Smith's prior ruling on the merits is unreported.

⁵ *Ayers v. Western Line Consolidated School District*, 555 F.2d 1309 (5th Cir. 1977).

⁶ 99 S. Ct. at 695.

clouded more than it is illuminated by the Court's conclusory opinion in *Givhan*.

1. THE GIVHAN CASE

A. HISTORY

From 1963 until 1971 Bessie Givhan served as a junior high school teacher in three different schools in the Western Line Consolidated School District, which encompassed part of two counties near Greenville, Mississippi.⁷ The school district lacked a tenure system, and she was employed under a series of one-year contracts. During this period, race relations was a subject of considerable significance and controversy both in the community and in the schools in which Bessie Givhan taught. Since 1969 the schools in the district had been operating under a desegregation order issued by the district court pursuant to the Fifth Circuit's decision in *Singleton v. Jackson Municipal Separate School District*.⁸

On frequent occasions during the 1970-71 school year Givhan objected to various practices within the school. Primarily, she contended that racial segregation existed in the appointment and assignment of nonprofessional employees such as administrative and clerical staff and lunchroom workers.⁹ These objections were presented to the principal, Leach, in his office. Some complaints were presented orally and others in writing; all were characterized by Givhan as "requests" and by Leach as "demands."¹⁰

In 1971 Givhan was informed that she would not be rehired for the following academic year. In making that decision, the superintendent of schools had followed Leach's recommendation, which read in part as follows:¹¹

⁷ The Supreme Court's statement of the facts is elliptical. The facts here are derived from the Supreme Court opinion, the opinion of the Fifth Circuit, note 5 *supra*, the opinion on remedies of the district court, note 4 *supra*, and the unpublished district court opinion on the merits, Appendix to Petition for Certiorari, at 27a.

⁸ 419 F.2d 1211 (5th Cir. 1969), *rev'd and remanded sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970), *on remand*, 425 F.2d 1211 (5th Cir. 1970).

⁹ 555 F.2d at 1314.

¹⁰ *Id.* at 1313.

¹¹ *Id.* at 1312.

Ms. Givhan is a competent teacher, however, on many occasions she has taken an insulting and hostile attitude towards me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students.

Givhan sued the school district, alleging that her dismissal was impermissibly motivated by and based on her complaints to Leach, conduct she claimed was protected by the First Amendment. The district court agreed, finding that "the school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination."¹²

The Fifth Circuit reversed. The Court of Appeals did not find it necessary to consider the balancing analysis for speech by public employees mandated by *Pickering v. Board of Education*¹³ and *Mt. Healthy City School District v. Doyle*.¹⁴ In *Pickering* the Supreme Court held that a teacher could not be dismissed on the basis of a letter to the editor of a local newspaper in which the teacher criticized the board of education.¹⁵ As long as the public expression by a teacher was not intentionally false,¹⁶ the speech was presumptively protected, although it remained necessary to balance the free speech rights involved against the interests of the school as employer in preserving close working relationships, confidentiality, and professional competence.¹⁷ In 1977 the Court held in *Mt. Healthy*

¹² *Id.* at 1314, quoting the unreported opinion of the district court.

¹³ 391 U.S. 563 (1968).

¹⁴ 429 U.S. 274 (1977).

¹⁵ *Pickering* had sent a letter to a local newspaper in connection with a proposed tax increase. The letter was critical of the way that both the board of education and the superintendent of schools had handled previous revenue proposals. He was dismissed because his letter was found to be "detrimental to the efficient operation and administration of the schools of the district." 391 U.S. at 564.

¹⁶ *Pickering* specifically adopted the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). 391 U.S. at 573-74.

¹⁷ 391 U.S. at 568-72. The Court in *Pickering* did little more than hint at ways in which other cases might be differently decided if the speech were different or the nature of the relationship were different. One commentator has gleaned from the *Pickering* opinion fourteen different factors that go into the balance. Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423, 450-51. On *Pickering* generally, see Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 848-54.

that, where a teacher had been dismissed on the basis of the kinds of statements held protected in *Pickering*, the dismissal could still be upheld if the school board could demonstrate by a preponderance of the evidence that it would have dismissed the teacher even in the absence of the protected expression.¹⁸

The Fifth Circuit did not apply this balancing analysis because it did not find Givhan's actions covered in any way by the First Amendment. *Pickering* and *Mt. Healthy* come into play only when the teacher has engaged in First Amendment conduct and when that conduct has played a part in the dismissal. If no First Amendment conduct is involved, then the *Pickering*–*Mt. Healthy* issues are never reached. The Fifth Circuit disposed of the case at this threshold stage.¹⁹

The strong implication of [*Pickering*, *Mt. Healthy*, and *Perry v. Sindermann*²⁰] is that private expression by a public employee is not constitutionally protected. . . . Neither a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school board decision.

The Fifth Circuit's decision is thus based on two distinct but related grounds. First, speech in the "private forum" is not covered by the First Amendment. Second, the First Amendment does not protect the speaker who forces his views on an unwilling listener.

B. THE SUPREME COURT OPINION

The Supreme Court found *Givhan* an easy case. The Fifth Circuit had made an obvious and fundamental error in First Amendment doctrine. For a unanimous Court, Mr. Justice Rehnquist said that it was mistaken to view the activity in question as outside the scope

¹⁸ 429 U.S. at 287. The burden shifts to the school board after the teacher has met the burden of showing that he engaged in constitutionally protected conduct and that that conduct was a "substantial factor" or "motivating factor" in the decision to dismiss or not to rehire. *Ibid.* The relevant conduct in *Mt. Healthy* was a telephone call to a radio station. *Id.* at 281–84.

¹⁹ 555 F.2d at 1318–19.

²⁰ 408 U.S. 593 (1972). *Perry* is best known as the procedural due process case dealing with *de facto* tenure. The opinion also makes it clear, however, that *Pickering* applies to the decision not to retain a nontenured teacher. *Id.* at 598.

of the First Amendment merely because it occurred in the principal's private office. Although the speech in *Pickering*, *Perry*, and *Mt. Healthy* had indeed taken place in the public forum, the fact of the public forum was irrelevant to the holdings in those cases.²¹ And once the distinction between Givhan's complaints in the principal's office and Pickering's letter to a newspaper is removed, Bessie Givhan's case falls squarely within the principles of *Pickering* and *Mt. Healthy*.²² The dismissal can then only be sustained if the school board can involve one of the special justifying reasons found in *Pickering*,²³ or if the school board can demonstrate by a preponderance of the evidence that it would have dismissed her even in the absence of the constitutionally protected conduct. The Court's opinion very strongly suggests that, as to the quality of the speech justifying removal, the result must be the same as in *Pickering*.

²¹ "This Court's decisions in *Pickering*, *Perry*, and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact." 99 S. Ct. at 695-96.

²² In holding that *Pickering* protection was not lost by the private or personal or limited nature of the speech, *Givhan* was consistent with virtually all lower court decisions addressing this issue. The most extensive discussion is in *Pilkington v. Bevilacqua*, 439 F. Supp. 465 (D.R.I. 1977). "Certainly his criticisms do not lose the protection of the First Amendment by reason of their being prudently directed to his co-employees and superiors . . . instead of to the public at large." *Id.* at 474-75. See also *Jannetta v. Cole*, 493 F.2d 1334, 1337 n.4 (4th Cir. 1974); *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 493 n.13 (7th Cir. 1972); *Smith v. Losee*, 485 F.2d 334, 338 (10th Cir. 1973); *Ring v. Schlesinger*, 502 F.2d 479, 489 (D.C. Cir. 1974); *Downs v. Conway School District*, 328 F. Supp. 338 (E.D. Ark. 1971); *Phillips v. Puryear*, 403 F. Supp. 80, 87-88 (W.D. Va. 1975); *Johnson v. Butler*, 433 F. Supp. 531, 535 (W.D. Va. 1977). The strongest precedent for the Fifth Circuit's exclusion of private speech is *Roseman v. Indiana University of Pennsylvania*, 520 F.2d 1364, 1368 (3d Cir. 1975). Some of the foregoing cases dealt with private complaints quite similar to those in *Givhan*. Others dealt with the circulation of petitions or complaints among a number of colleagues. While neither is fully public, the latter seems clearly more so. See *Rosado v. Santiago*, 562 F.2d 114 (1st Cir. 1977) (holding the circulation of a letter among colleagues to be protected speech, but specifically reserving the issue of whether a purely private letter to one's superior is protected).

²³ See note 17 *supra*. Among the most important of these reasons, as suggested in *Pickering*, are a particular threat to internal discipline, 391 U.S. at 569; a particular threat to harmony among co-workers, *ibid.*; jeopardizing a close working relationship with an immediate superior, *id.* at 570; preserving a special need for confidentiality, *id.* at 570 n.3, 572; or statements "so without foundation" as to call into question a teacher's fitness for the position, *id.* at 573 n.5.

ing, where none of the proffered justifications were found acceptable.²⁴ But as to the second factor—-independent grounds for dismissal—the record was less clear. The case had been tried in the district court before *Mt. Healthy* was decided, and thus the school board had neither reason nor opportunity to attempt to prove that it would not have rehired Givhan even without the presence of the constitutionally protected criticism. The Supreme Court therefore remanded the case so that the district court could make the appropriate findings on this aspect of the *Mt. Healthy* analysis.²⁵

The Supreme Court rejected the Fifth Circuit's conclusion that the principal was a captive and unwilling audience. "Having opened his office door to petitioner, the principal was hardly in a position to argue that he was the 'unwilling recipient' of her views."²⁶ The reversal on this point is almost wholly factual. Nothing in the Court's opinion suggests any expansion of the very limited circumstances in which the presence of an unwilling audience diminishes the extent of free speech protection. *Cohen v. California*²⁷ and *Erznoznik v. Jacksonville*²⁸ emerge untouched,²⁹ and so do *Rowan v. Post*

²⁴ In commenting on the conclusion by the Court of Appeals that Givhan's statements may have jeopardized a close working relationship with her immediate superior, the principal, the Court said that "we do not feel confident that the Courts of Appeals' decision would have been placed on that ground notwithstanding its view that the First Amendment does not require the same sort of *Pickering* balancing for the private expression of a public employee as it does for public expression." 99 S. Ct. at 696 (footnote omitted).

²⁵ Givhan had allegedly engaged in several acts of insubordination not involving First Amendment questions, such as a refusal to give certain standardized tests to her students. 99 S. Ct. at 694 n.1, 695 n.2. The Court's opinion suggests that some of these acts, if substantiated, might support a finding that she would not have been rehired even were it not for the complaints. *Id.* at 697 n.5. The brief concurring opinion of Mr. Justice Stevens, directed solely to this point, takes the position that the previous proceedings most likely preclude a successful *Mt. Healthy* claim by the school board. *Id.* at 697-98.

²⁶ 99 S. Ct. at 696.

²⁷ 403 U.S. 15 (1971).

²⁸ 422 U.S. 205 (1975).

²⁹ *Erznoznik* had to some extent been qualified by *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). See Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theatres*, 28 HASTINGS L.J. 1293 (1977); Schauer, *The Return of Variable Obscenity?* 28 HASTINGS L.J. 1275 (1977). And both *Cohen* and *Erznoznik* were called into question on this point by the Court's reliance on captive audience reasoning in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court in *Pacifica* suggested that the distinction may turn on whether the speech takes place inside or outside the home, *id.* at 732 n.5. But by specifically referring to a "balance between the offensive speaker and the unwill-

*Office Department*³⁰ and *Lehman v. City of Shaker Heights*.³¹

The Court did say that time, place, and manner restrictions on teacher complaints would be permissible and that a violation of such restrictions by a teacher could constitutionally be cause for dismissal.³² In this sense *Givhan* is based upon impermissible content regulation,³³ as were both *Erznoznik* and *Chicago Police Department v. Mosley*.³⁴ Just as *Mosley* suggests that a content-neutral prohibition on speech near a school would be permissible, so too does *Givhan* suggest that the principal could limit the access of teachers to his office.³⁵ Only by opening his office to complaints and then basing his action on the substance of those complaints did the principal run afoul of the First Amendment.³⁶ The most relevant

ing audience," *ibid.* the Court left the entire area of offensive speech and intrusive speech wide open for further development and clarification. Compare Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567 (1979), with Schauer, *Pornography and the First Amendment*, 40 U. PITT. L. REV. 605 (1979); see also Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?* 67 NW. U. L. REV. 153 (1972); Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U.L. REV. 761 (1970); Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. CIV. RTS. CIV. LIB. L. REV. 1 (1974).

³⁰ 397 U.S. 728 (1970).

³¹ 418 U.S. 298 (1974). As with *Cohen* and *Erznoznik*, the validity of *Lehman* may be in question on other grounds. *Lehman* is not a content regulation case only because commercial advertising was not in 1974 held to be within the First Amendment. Thus, the creation of a forum for commercial advertising would not then be considered to be the creation of a public forum in First Amendment terms. But if, as is now the case, commercial advertising is within the First Amendment, it may not be possible to avoid creating a public forum by accepting commercial material.

³² 99 S. Ct. at 696 n.4.

³³ See TRIBE, *AMERICAN CONSTITUTIONAL LAW* 672-74 (1978); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1976).

³⁴ 408 U.S. 92 (1972). See *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The virtually unqualified abhorrence of content regulation in *Mosley* (see Karst, note 33 *supra*) seems now in decline, a development primarily the product of Mr. Justice Stevens's opinions in *Young* and *Pacifica*. This in turn seems consistent with Mr. Justice Stevens's flexible approach to constitutional adjudication that eschews distinct categories, rigid rules, and unqualified doctrines. See, e.g., *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring). It is theoretically possible that distinguishing among forms of speech will increase the amount of First Amendment protection. Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 181 (1977). But the results in *Pacifica* and *Young* belie such as possibility.

³⁵ 99 S. Ct. at 696 n.4.

³⁶ A school principal who said that his office was off limits might be on safe constitutional ground. But a principal who totally eliminated access of any kind, by teachers or parents, might be in difficulty under the Petition Clause of the First Amendment.

precedent on this point may be *Southeastern Promotions, Ltd. v. Conrad*.³⁷ Chattanooga need not build a civic center, and thus need not create this particular forum for speech. But having done so it must treat all speech equally. So too must Leach, having created this forum by opening his office door, treat all speech equally. The complainer may not be fired while the apple-polisher is promoted.

A principal could still under some circumstances base a decision, including a termination decision, on what is said in his office. As with the teacher who speaks out in public, the teacher who speaks out in the principal's office is still a teacher. The *Pickering* balancing approach rather than the more absolute principles of *Mosley* provides the framework for the analysis. The principal's voluntary action in opening his office turns the office into the equivalent of a public forum, but it does not remove Givhan's status as a teacher. It does not therefore diminish the extent to which under *Pickering* a teacher may still be disciplined or dismissed for speaking out.³⁸

This approach works, however, only if the forum so created is indeed a First Amendment forum, notwithstanding its cloistered location and notwithstanding that the public at large not only was not invited, but also would not have been permitted entrance. Here the Court relies on its rejection of the distinction between public and private speech. Givhan argued that a complaining teacher might be more prudent in voicing her complaints in the principal's office than in public. It would be anomalous, she claimed, if the more prudent action could result in less constitutional protection.³⁹ This argument appears to have helped persuade the Court that a distinction between public and private speech is untenable.

C. A NOVEL SOURCE FOR FIRST AMENDMENT DOCTRINE

My initial remarks about the brevity of the opinion in *Givhan* were prompted not so much by the length of the entire opinion as by the fact that the discussion of the distinction between public speech and private speech is contained in only three sentences:⁴⁰

³⁷ 420 U.S. 546 (1975). See Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247 (1976).

³⁸ See text *supra*, at notes 17 and 23.

³⁹ Brief for Petitioner, at 16-17.

⁴⁰ 99 S. Ct. at 696-97.

The First Amendment forbids abridgment of the "freedom of speech." Neither the amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

That is it. Nothing about why private communications falls into the same category as spreading one's views before the public, with the exception of one rather unusual source for First Amendment doctrine. The Court looked at and relied on the text of the First Amendment!⁴¹ In the past the text has hardly been a popular source for free speech methodology. Of course, most of our First Amendment doctrine is based on the very strong wording of that amendment, but it is rarely suggested that the amendment gives much guidance to its application in hard cases.⁴² For that heretofore we have looked elsewhere.

The Court here uses the text to say that a particular distinction is untenable. The distinction between public speech and private speech is indeed not suggested by the words "freedom of speech." But neither is the distinction between commercial speech and po-

⁴¹ Mr. Justice Rehnquist's punctuation is intriguing to those of us who labor under the handicap of an exposure to linguistic philosophy. Note that the opinion places the quotation marks after the word "the," although the words in the First Amendment are "the freedom of speech," not "freedom of speech." The inclusion of the word "the" allows a wider range of interpretation than would the words "freedom of speech" standing alone. Mr. Justice Rehnquist's conclusion that the distinction between public speech and private speech is not supported by the text is buttressed by his selective extraction of relevant words. Moreover, even the phrase "freedom of speech" standing alone is far from clear and far from absolute. See Schauer, *Speech and "Speech": Obscenity and "Obscenity"—an Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979); Note, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374 (1973).

⁴² Neither of the two most prominent textual arguments has prevailed. The first is the Douglas-Black argument for an absolute interpretation of the First Amendment. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 143-44 (1959) (Black, J., dissenting); *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting). The other is the textual argument for special protection for the press. See Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Nimmer, *Speech and Press: A Brief Reply*, 23 U.C.L.A. REV. 120 (1975); Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975); Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977); see also *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (Burger, C.J., concurring).

litical speech,⁴³ the distinction between defamatory speech and non-defamatory speech,⁴⁴ the distinction between the broadcast media and other forms of communication,⁴⁵ or the distinction between public figures and private individuals,⁴⁶ all distinctions well established in contemporary free speech doctrine. The text tells us only that the distinction between public speech and private speech is not supported by the wording of the text. It does not tell us that the distinction cannot be found in history, in the intent of the drafters, in the philosophical underpinnings of the concept of freedom of speech, or in the vast realm of constitutional policy. If textual silence regarding a distinction mandates rejection of that distinction, then free speech theory is in need of a major overhaul. And if textual silence is not dispositive, then we need to know why the other sources of First Amendment doctrine do not either command or support this distinction, an inquiry totally absent from the reasoning in *Givhan*.

D. A QUESTION OF COVERAGE

The treatment of private speech by the Court becomes more understandable upon closer examination of the opinion of the Fifth Circuit. The Court of Appeals did not say that Bessie Givhan's words were not protected by the First Amendment. It said that her words were not even covered by the First Amendment.⁴⁷

This distinction between coverage and protection is of major importance in First Amendment theory.⁴⁸ There are some activities

⁴³ *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). See Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUPREME COURT REVIEW 45.

⁴⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴⁵ *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

⁴⁶ *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴⁷ The point is highlighted by the concurring opinion of Judge Roney, in which he agreed that the error was in even "casting this case in the First Amendment terms." 555 F.2d at 1322.

⁴⁸ The distinction has been emphasized primarily by the "definitional balancers," who use the distinction to argue that the First Amendment can be absolute in

that are totally outside the First Amendment. Such conduct includes not only a wide range of nonverbal conduct, such as killing, maiming, speeding, and polluting, but also some linguistic or pictorial conduct, such as verbal betting, price-fixing, acceptance of a contract, extortion, perjury, and hard-core pornography.⁴⁹ In each of these instances the conduct at issue, whether verbal or not, is not taken to be speech in the First Amendment sense, and thus First Amendment modes of analysis are inappropriate.⁵⁰ It is more than the mere use of words that triggers First Amendment considerations.⁵¹ Constitutional law has swallowed enough of the law school curriculum as it is without having to encompass almost all of contract and commercial law.

The key point here is that conduct that is covered is not necessarily protected. Defamatory speech is covered by the First Amendment, but it is not protected if it is false and if it is published either negligently, in the case of private individuals, or with knowledge of falsity, in the case of public figures and public officials.⁵² Speech having political content is plainly covered, but it is not protected if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁵³ Nonprurient offensive speech is covered by the First Amendment but is not protected when

terms of protection without being absolute in terms of coverage. See EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); Kauper, *Book Review*, 58 MICH. L. REV. 619 (1960). But these theories obscure the point that coverage and protection are different even if protection is not absolute. The distinction shows us that the governmental burden of justification is higher within the First Amendment arena than outside it, but it does not command that the burden inside the First Amendment must be insurmountable. See DWORKIN, *TAKING RIGHTS SERIOUSLY* 260-61 (1977), in which Dworkin describes the same distinction as a distinction between the range of a principle (coverage) and the force of a principle (protection).

⁴⁹ See Schauer, note 41 *supra*.

⁵⁰ The First Amendment is of course relevant in drawing the line between that which is covered and that which is not. This is most apparent in the obscenity cases. See Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N. CAR. L. REV. 1 (1978).

⁵¹ "[T]he First Amendment . . . cannot have been, and obviously was not, intended to give immunity for every possible use of language." *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (Holmes, J.).

⁵² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁵³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

broadcast over the airwaves⁵⁴ nor protected from content-based zoning regulation.⁵⁵ Commercial speech is now covered by the First Amendment⁵⁶ (although it was not under *Valentine v. Chrestensen*),⁵⁷ but it is not protected if false or misleading or deceptive.⁵⁸

Pickering applies this same analytic structure to public speech by school teachers. The speech is covered, but it is not protected if it can be shown to hamper a close working relationship with an immediate supervisor, if it can be shown to call into question the teacher's competence as a scholar or teacher, if it breaches a legitimate interest in confidentiality, or if it is outweighed by any of a number of other qualifying factors suggested in *Pickering*. The significance of the Fifth Circuit opinion in *Givhan* is that it does not treat private speech merely as unprotected. It treats it as not covered. The First Amendment is not even relevant. The Court of Appeals could alternatively have said that private speech was covered, but that when presented in this manner and under these circumstances the protection was lost. Indeed, the Supreme Court endorsed such an approach, since it said that the private nature of the speech might suggest additional factors in applying the "*Pickering* calculus."⁵⁹

Viewed in this way, the issue is clearly drawn. Is private speech the type of communication to which the First Amendment is addressed? It is this question to which the Fifth Circuit loudly answered "No" and to which the Supreme Court more loudly answered "Yes." And it is that "Yes" answer that requires more analysis than is afforded in *Givhan*.

II. THE PROBLEM OF PRIVATE SPEECH

A. THE MEANING OF "PRIVATE SPEECH"

To weigh the protection afforded to private speech, it is necessary to determine precisely what the Court did and did not hold

⁵⁴ *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁵⁵ *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

⁵⁶ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

⁵⁷ 316 U.S. 50 (1942).

⁵⁸ See Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977).

⁵⁹ 99 S. Ct. at 696 n.4.

in *Givhan*. It is apparent that the Court did not hold that private speech is per se protected by the First Amendment. There is no suggestion in *Givhan* that private speech is more protected than public speech. In holding that speaking publicly is not a necessary condition for the First Amendment protection, the Court did not hold that speaking privately is a sufficient condition.

Since the Court did not hold that private speech is protected by reason of its privacy, it necessarily did not hold that all private speech is protected. Those restrictions that are permissible for public speech remain permissible for private speech, except in those situations where the public nature of the speech provides the justification for the restriction, as with public offensiveness or the provocation of an angry crowd.⁶⁰ If I approach an individual whom I know to be on the verge of committing a political assassination and, with the intent of causing that assassination, specifically urge him to carry out his plan, then this private speech may be punished just as could public counseling of murder in circumstances where it is likely that murder will immediately ensue.

What the Court did hold in *Givhan* is that private speech is not for that reason alone excluded from either the coverage or the protection of the First Amendment. If a certain form of speech would be protected if delivered in print, or to a public audience, then that same speech is equally protected if spoken or published in a closed office, in a living room, or at a table in a quiet restaurant. This implies that the distinction between public speech and private speech is never relevant in First Amendment adjudication, an implication that derives much support from the unqualified nature of the Court's opinion as well as from the Court's statement that the lack of such a distinction is derived directly from the text of the First Amendment.

Several unexplained distinctions serve to obscure the Court's conclusions about private speech. Thus, the public-private distinction discussed here is not the same as the distinction between speech that is in the public interest and speech that concerns only the private personal interests of the speaker or the listener. We are not dis-

⁶⁰ Crowd reaction may be relevant whether the crowd is sympathetic or hostile. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Feiner v. New York*, 340 U.S. 315 (1951). There may not be much left of *Feiner*. *Smith v. Collin*, 436 U.S. 953 (1978); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

cussing private speech in the sense in which Meiklejohn distinguished private speech from public speech.⁶¹ The issue here and in *Givhan* involves the forum and the audience, not the subject matter. Bessie Givhan's complaints plainly related both to the operation of the public schools and to race relations in a community in which satisfactory race relations were vitally important. However narrowly one wishes to define the notion of "speech in the public interest," the speech in *Givhan* is undoubtedly included.⁶² The holding in *Givhan* does not support the conclusion that the same result might have been reached if Bessie Givhan devoted her time in the principal's office to spreading rumors about the private behavior of mutual acquaintances.⁶³

Any distinction between public or important speech and private or trivial speech may be unworkable.⁶⁴ There is certainly such a suggestion in the rejection of *Rosenbloom v. Metromedia, Inc.*⁶⁵ by *Gertz v. Robert Welch, Inc.*⁶⁶ But the impact of *Gertz* on this issue is lessened not only by *Time, Inc. v. Firestone*⁶⁷ but also by *Young*

⁶¹ MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME COURT REVIEW 245. For similar distinctions, see BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

⁶² Indeed, the firing of Bessie Givhan for complaining may not be all that dissimilar to a prosecution for sedition. The ultimate question is the value of loyalty, whether to a nation or to an employer. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REVIEW 191.

⁶³ I am not saying that such a distinction could be supported by current doctrine, only that *Givhan* itself stands as no barrier to the adoption or application of this type of distinction.

⁶⁴ See Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 936 (1978); see also Chafee, Book Review, 62 HARV. L. REV. 891 (1949).

⁶⁵ 403 U.S. 29 (1971).

⁶⁶ 418 U.S. 323 (1974).

⁶⁷ 424 U.S. 448 (1976). The import of *Time* is that at least some degree of legitimate public importance is part of the determination of who is a public figure. It is arguably beyond the human capacity to comprehend all of the different ways in which the Supreme Court has used the word "public." Since "private" is the most obvious antonym for "public," it is not surprising to find the varying use of that word as well.

There is a similar distinction embodied in the "newsworthiness" standard applied in actions for invasion of privacy. See Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUPREME COURT REVIEW 267, 283. Although the Supreme Court has yet to speak to the constitutionality of a true (as

*v. American Mini Theatres, Inc.*⁶⁸ “[F]ew of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”⁶⁹ But the theoretical wisdom or practical workability of distinctions like this is not at issue here. The subject matter of Givhan’s speech did pertain to public issues, and this sense of the public-private distinction is not what is involved in *Givhan*.

Exclusion of the subject-matter sense of “private” still leaves several different concepts of private speech. One is the distinction between face-to-face communication and less personal forms of speech. In upholding constitutional protection for client solicitation by lawyers in *In re Primus*⁷⁰ and denying such protection in *Ohrlik v. Ohio State Bar Association*,⁷¹ the Court drew some support from the presence of “in-person” solicitation in *Ohrlik*, a factor absent in *Primus*.⁷² The Court suggests that in-person solicitation might either be less central to the purposes of the First Amendment or at least more susceptible to abuse. But the letter in *Ohrlik* is also directed to one person only and is as much if not more inaccessible to the public at large. Thus it is hard to see how *Ohrlik* and *Primus* can turn on a public-private distinction, although in-person communication is one of the earmarks of the type of speech at issue in *Givhan*. Mr. Justice Rehnquist’s dissent in *Primus* questions the distinction between face-to-face and other forms of communication,⁷³ and there may be a relationship between this dissent and his opinion in *Givhan*. But the concurrence of the entire Court in *Givhan* leads to the conclusion that the rejection of the public-private distinction there leaves the distinction between in-person and more distant speech intact.

Alternatively, private speech may be taken to mean speech directed to only one person, rather than to a group, or to the general public, or to anyone who cares to listen. Speech that is private in this sense would include both face-to-face communication and a

opposed to false-light) privacy case, the newsworthiness standard has provided the relevant distinction in most such cases in the lower courts. See, e.g., *Briscoe v. Reader’s Digest Association*, 4 Cal.3d 529 (1971).

⁶⁸ 427 U.S. 50 (1976).

⁶⁹ *Id.* at 70; see also *id.* at 61.

⁷⁰ 436 U.S. 412 (1978).

⁷³ 436 U.S. at 445 (Rehnquist, J., dissenting).

⁷¹ 436 U.S. 447 (1978).

⁷² *Id.* at 464–66.

personal letter, but would exclude a speech to a large audience, a mass mailing, or the publication of a book, newspaper, or magazine. Such a distinction is suggested by the current formulation of the "fighting words" doctrine.⁷⁴ The Court has strongly implied that the crucial demarcation between regulable fighting words and protected inflammatory words is the extent to which the former are directed at particular individuals.⁷⁵ Standing on a platform and proclaiming that all police officers are pigs is protected, even if a police officer is in the audience.⁷⁶ But yelling "You're a pig!" to a particular officer may be the subject of prosecution.⁷⁷ Although Paul Cohen has the right to wear a jacket bearing the words "Fuck the Draft,"⁷⁸ he may not have the right to say "Fuck you!" to a particular individual.

To the extent that *Givhan's* rejection of the public-private distinction can be interpreted as a rejection of a distinction between speech directed to the public at large and speech directed at a particular individual, this aspect of the fighting words cases is called into question. This is an issue to which I will return later, since a distinguishing principle seems available.⁷⁹ There is less question about the effect on another area of First Amendment doctrine. The holding in *Givhan* certainly casts grave doubts on the extent to which the principles of *Gertz v. Robert Welch, Inc.* are limited to publications by the media. Such a limitation is supported by the Court's repeated references to the mass media in the *Gertz* opinion.⁸⁰ A num-

⁷⁴ See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Plummer v. City of Columbus*, 414 U.S. 2 (1973). The Court's cryptic decisions in these cases, generally on overbreadth or vagueness grounds, make it difficult to say whether or not there is anything worthy of the title "doctrine." See TRIBE, note 33 *supra*, at 617-18.

⁷⁵ *Gooding v. Wilson*, 405 U.S. 518 (1972).

⁷⁶ *Brown v. Oklahoma*, 408 U.S. 914 (1972).

⁷⁷ See *Cincinnati v. Karlan*, 39 Ohio St.2d 107 (1974).

⁷⁸ *Cohen v. California*, 403 U.S. 15 (1971).

⁷⁹ See text *infra*, at note 103.

⁸⁰ See Shiffrin, *supra* note 64; Collins & Drushal, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE WEST. RES. L. REV. 306, 328-34 (1978); Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1403-08, 1416-19 (1975); Note, *First Amendment Protection against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 SO. CAL. L. REV. 902 (1974) (written before *Gertz*).

ber of lower courts that have been called upon to apply *Gertz* to nonmedia speech have in fact held *Gertz* inapplicable.⁸¹ Recent decisions of the Supreme Court negate the notion that *Gertz* applies only to the organized press.⁸² A majority of the Court has consistently refused to distinguish between the press and other forms of communication, and one can say with a fair degree of confidence that this same majority would apply *Gertz* to public orations as well as to printed or broadcast publications.⁸³ But speech directed to a limited number of identified individuals is more problematic. What if *A* tells *B* that *C* is having an affair with *D*'s wife? The implication in *Givhan* is that this is subject to the same protection as would obtain if *A*'s charges against *C* were published in the *New York Times* or announced on the Boston Common.⁸⁴ The resolution of this lingering issue in the law of defamation may or may not have been the Court's oblique intention, but it is quite likely that that is the result.

A distinction between public speech and private speech may instead (or in addition) be a distinction based on the location of the speech. Some speech takes place in cloistered locations, such as living rooms or private offices. Other speech is more open, taking place in the streets, the parks, or the mass media. The Court does not make clear in *Givhan* whether the speech was private in the sense that it was directed only to the principal or in the sense that it was made in the principal's closed office. It is likely but not certain that the Court rejected both distinctions.

Both the audience-directed and location-directed notions of private speech turn on the concept of who is invited.⁸⁵ A meeting

⁸¹ *E.g.*, compare *Calero v. Del Chemical Corp.*, 68 Wis.2d 487 (1975), with *Jacron Sales Co. v. Sindorf*, 276 Md. 580 (1976).

⁸² This conclusion is drawn from the Court's refusal to recognize a distinct privilege for the press, often on the grounds that no distinguishing features can be developed in any principled manner. See, *e.g.*, *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

⁸³ See *Eaton*, note 80 *supra*, at 1406.

⁸⁴ It is true that this hypothetical case involves speech that is purely private in the subject-matter sense. But there is absolutely no suggestion in *Gertz* that the constitutionalized negligence requirement would not apply to all mass media defamation regardless of subject matter.

⁸⁵ If I have a conversation with a friend in my living room, it is private in that

of the American Bar Association from which the press is excluded is in both senses private, although the audience could be large. The speaker knows the identity of the audience and can also limit the audience.

This suggests that privacy as used here is a complex rather than a simple notion. Its very complexity may suggest a rejection of the public-private distinction on pragmatic rather than theoretical grounds.⁸⁶ It is perhaps best to look at private speech in the context of a paradigm example. In all senses other than the subject-matter sense the truly private speech is a two-person face-to-face conversation in a private living room closed to everyone except the two participants. If we can say that this speech is within the First Amendment, then we can say that forms of speech in some sense less private are within the First Amendment as well.

B. THE VALUE OF PRIVATE SPEECH

Unraveling the different senses of a distinction between public speech and private speech helps in understanding the import of *Givhan* and in applying it to other situations. It remains, however, to examine the Court's conclusion that the distinction is not relevant. Does speech that is private in some or all senses have less First Amendment value?

A distinction between public speech and private speech in the extent of either coverage or protection is least justified under a First Amendment theory derived in whole or in part from some concept of democracy or self-government. The Meiklejohn theory is the most famous,⁸⁷ although it is neither the first nor the only articula-

no one else is invited into my living room to participate. But if I have the conversation with the same friend on a bench in a park, the conversation is every bit as private even though the location is in some senses public. But the important fact is that the conversation is private in either case. It is in all cases restricted to the participants, whether by reason of the laws of private property or by reason of the fact that we will stop talking if anyone comes too close. Aficionados of bad movies or television police shows know that if you want to take out a contract on someone you do not do it in a private house; you do it in a public park. Privacy may be created by crowds or by anonymity as much as by seclusion. It all depends on what you mean by "private," and the Court in *Givhan* does not tell us what it means.

⁸⁶ See Shiffrin, note 64 *supra*.

⁸⁷ See note 61 *supra*.

tion of such a theory.⁸⁸ Under any such theory it is difficult to distinguish between speech in public and speech in private. As much as we may talk about the public forum, we must not avoid recognizing that a great deal of political speech takes place outside of the public forum. To find the "true" forum for political discussion and commentary in this country, we should not journey to the theaters, the parks, or the streets, or read newspapers, magazines, placards, posters, or billboards. Rather, we must go to the pool halls, the factories, the bars, the private offices, the barbershops, and the proverbial living room in Peoria. Although many of these are "public" places, they are all locations where particular conversations are limited to a known, invited, and usually quite small audience. But it is here that politics and public matters are discussed and minds are changed. It is here that arguments about politics and personalities take place.

The public forum is indeed the catalyst for much discussion of public matters. But the public forum is not the end of the process. The culmination of the process is to be found in the discussion among people in much more cloistered settings. The town meeting model so stressed by Meiklejohn relies on dialogue and participation. To see that process outside of the New England town meeting we should look at a forum for discussion and argument, not a forum for unilateral speechmaking and passive listening. This forum for discussion and argument is much more likely to be limited rather than open to all. It may be one sign of a totalitarian society that people are imprisoned for what they say in public, especially if they are criticizing government, its policies, or its leaders.⁸⁹ But the ultimate affront to the notion of a free society occurs when people are imprisoned for what they say in their living rooms. We are in danger when the informer is one member of a large audience, but we are in greater danger when the informer is our next-door neighbor.

From this perspective, we can see that the rejection of the public-

⁸⁸ See KANT, *ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE* 72 (E. B. Ashton trans. 1974); SPINOZA, *TRACTATUS THEOLOGICO-POLITICUS* chap. 20 (1670); Hume, *Of the Liberty of the Press*, in *ESSAYS, MORAL, POLITICAL AND LITERARY* 8 (Oxford ed. 1963); see also *Gilbert v. Minnesota*, 254 U.S. 325, 337-38 (1920) (Brandeis, J., dissenting).

⁸⁹ See *Kalven*, note 69 *supra*.

private distinction is also supported by the "self-expression"⁹⁰ and "catharsis"⁹¹ values often said to justify the principles of freedom of speech. It may be that free speech theories derived from the concept of the marketplace of ideas,⁹² or the search for truth,⁹³ or the principles of self-government,⁹⁴ are theories derived from societal rather than individual interests.⁹⁵ They are directed more toward the interests of society, and also to the interests of the listeners, than they are toward the interests of the speaker. Under such theories we protect speakers only instrumentally in the service of these broader interests. From this point of view one can imagine granting less protection to private speech, since the closed setting reduces the number of listeners and thereby reduces the impact on society at large. But if, instead, we look at free speech as providing a catharsis, an outlet for frustration short of violence, then we should acknowledge that this may occur as easily with private speech as with public speech.

Similarly, if we look to the value to the speaker of communicating ideas to others, then the size or location of the audience may again be of little importance. Indeed, the value to the speaker may be increased as the size of the audience and the openness of the location decrease. Although self-expression in general is not a First

⁹⁰ See, e.g., TRIBE, note 33 *supra* at 576-736; Dworkin, *Introduction*, in DWORKIN, ED., *PHILOSOPHY OF LAW* 1, 13-16 (1977); Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

⁹¹ See, e.g., EMERSON, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884 (1963); LASKI, *A GRAMMAR OF POLITICS*, 121 (4th ed. 1938).

⁹² See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁹³ MILL, *On Liberty*, in *ESSENTIAL WORKS OF JOHN STUART MILL* 268-304 (Lerner ed. 1961); MILTON, *AREOPAGITICA* 78, 126 (Suffolk ed. 1968); LOCKE, *A LETTER CONCERNING TOLERATION* 151 (Gough ed. 1948); Bagehot, *The Metaphysical Basis of Toleration*, in 2 *LITERARY STUDIES* 422, 425 (Hutton ed., 3d ed., 1884); Jefferson, *First Inaugural Address*, in *THE COMPLETE JEFFERSON* 384 (Padover ed. 1943); *United States v. Associated Press*, 52 F. Supp. 372 (S.D.N.Y. 1943) (L. Hand, J.); See Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

⁹⁴ See notes 61 and 86 *supra*.

⁹⁵ On this distinction in the context of freedom of speech, see 3 POUND, *JURISPRUDENCE* 63-67, 313-17 (1959).

Amendment value,⁹⁶ self-expression by communication has been so regarded in numerous opinions of the Supreme Court.⁹⁷ And so long as this value remains as one core of free speech theory, then it follows that the interests of the speaker are independently deserving of First Amendment protection. When we focus on the interests of the speaker, it is difficult to say that these interests are necessarily diminished by the smallness or seclusion of the audience.

Moreover, there may be societal or listener interests even where there is an individual listener receiving the message other than in the public forum. One of the values of freedom of speech is its function in helping to correct and challenge accepted beliefs.⁹⁸ This is a value that obtains under both the self-government and marketplace-of-ideas arguments. Here the proper focus is on the identity of the listener rather than the number of listeners. Criticism of the President of the United States does more than allow the populace to remove or fail to reelect an unsatisfactory President. It does more than mobilize public opinion in such a way that the President may respond with deeds or reply with words. There is a more direct argument. Criticism of the President is valuable because the President himself may hear the particular criticism and may as a result modify or reject an erroneous policy.

From this perspective the Free Speech Clause merges with the First Amendment right to petition the government for a redress of grievances. One of the *amicus* briefs in *Givhan* relied as much on the right to petition the government as it did on freedom of speech.⁹⁹

⁹⁶ See Schauer, note 41 *supra*.

⁹⁷ See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 783 (1978); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

⁹⁸ See POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966). A forceful criticism of Mill and Popper is Kendall, *The "Open Society" and Its Fallacies*, 54 *AM. POL. SCI. REV.* 972 (1960).

⁹⁹ Brief *Amicus Curiae* of the American Association of University Professors, at 15-20. See also Brief for Petitioner, at 19 n.14. The relationship between the Free Speech Clause and the Petition Clause was suggested by Justice Rutledge in *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This is particularly interesting here because some of the activities in *Thomas* could be characterized as "private" solicitation. The Court recognized that private solicitation of a single individual might create different issues, *id.* at 528-29, and used the combination of the Free Speech and Petition Clauses to suggest that private solicitation would be for one reason or another protected by the First Amendment. *Id.* at 533-34.

The right to petition plainly encompasses administrative bodies as well as legislative ones. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508,

The argument also has some textual support. Because it is impossible to petition the government for a redress of grievances without at the same time speaking, the Petition Clause would be a redundancy if it did not give particular protection for direct criticism of public officials, without regard to whether the criticism is made by public speech, private letter, or private audience.¹⁰⁰ The Free Speech Clause protects my right to stand in Lafayette Park and announce that the President and his policies are demented. It may be the Petition Clause that gives me the right to write him a letter containing the same message.

Regardless of whether the source is the Free Speech Clause or the Petition Clause, it would certainly be odd if some part of the First Amendment¹⁰¹ did not protect the right to criticize a governmental official to his face. Private communication with an officer of government may in many respects be the most effective way of calling that officer to task or pointing out mistakes in judgment that can be corrected. The more the Court continues to rely on arguments about democracy to support the concept of freedom of speech,¹⁰² the more it can be said that direct criticism of public officials lies at the core of First Amendment theory. And, as we increasingly identify this as a core free speech value, a blanket exclusion of private speech appears ever more anomalous.

Of course, there may in many instances be advantages in the kind of public speech that is directed to a large and possibly anonymous

510 (1972). The Petition Clause has been used on numerous occasions in the lower courts to overturn discharges of complaining employees. See, e.g., *Jackson v. United States*, 428 F.2d 844 (Ct. Cl. 1970); *Swaaley v. United States*, 376 F.2d 857, 861 (Ct. Cl. 1967); *Jannetta v. Cole*, 493 F.2d 1334, 1337 n.5 (4th Cir. 1974); *Los Angeles Teachers Union v. Los Angeles City Board of Education*, 455 P.2d 827, 832 (1969).

¹⁰⁰ Direct communication has frequently been considered to be the special concern of the Petition Clause. See *Pell v. Procunier*, 417 U.S. 817, 828-29 n.6 (1974); *Bridges v. California*, 314 U.S. 252, 302-03 (1941) (Frankfurter, J., dissenting).

¹⁰¹ The Court has frequently relied on the connection between the Free Speech and Petition Clauses to hold that conduct is protected by one, the other, or both. See *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 222 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Thomas v. Collins*, 323 U.S. 516, 530-31 (1945).

¹⁰² See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUPREME COURT REVIEW 1.

group. It is a mistake to assume that there is only one core to First Amendment theory. Freedom of speech is more properly regarded as a bundle of different but interrelated concepts, joined together under the oversimplifying rubric of "freedom of speech." One core value of the First Amendment is personal or face-to-face criticism of public officials. But this does not exclude as another core value the right to stand in the public forum, or the right to publish criticism of government for public consumption. The soapbox, the parade, the demonstration, the newspaper, the book, and the magazine all occupy special places in our society, places recognized as special by contemporary First Amendment doctrine. These are all forms of "mass" speech, and their effectiveness increase in direct proportion to the size of the audience.

To the extent that free speech is a societal rather than an individual interest, forms of speech that reach large segments of society may have advantages not possessed by speech that is private in the sense now under discussion. But merely because public speech is in some respects more important than private speech does not mean that in other respects private speech may not be equally if not more important. As long as we realize that free speech is more than one concept, these two positions are not inconsistent. Since the value of public speech may be derived in large part from the private speech that it provokes and fosters, a theory that places public speech above private speech in the First Amendment hierarchy is on shaky ground indeed.

The foregoing lends support to the conclusion that the Court was correct in saying that the private context of the speech did not dispose of *Givhan* (and this is all the Court decided) and to the corollary conclusion that *Gertz* cannot be limited to the mass media. But what then of the fighting words cases, where a similar distinction seems established? The answer seems to come from an examination of the other side of the First Amendment question. On the one hand, we look at the value of the particular speech or at the value of a particular category of speech. But on the other hand, we look at the justifications for the asserted restriction. In developing categories and approaches to First Amendment analysis, we look at the interests in regulation as well as the interests in free speech. From this vantage point we see in *Ohralik* the interest in preventing potentially coercive and misleading solicitation. In many cases we look at the interests in public order and safety that justify

content-neutral time, place, and manner regulations.¹⁰³ In the fighting words case we look at the interest in preventing "idea-less" provocation.¹⁰⁴

In all of these situations it is the context of speech that governs its regulability. The justification for regulation in these and other situations depends on the context in which the speech exists. This is not the place to analyze each instance of permissible regulation of speech in which the extent of that permission varies with the context. The important point is that there are such instances, although they do not exhaust the category of permissible restrictions.¹⁰⁵ In those instances in which context is established as being the relevant or dispositive factor it would be foolish to say that context may be considered but that the public or private nature must be ignored. The location of the speech may very well give the speech the impact that justifies its regulation. So too with the size of the audience. In the fighting words cases the "privateness" increases the impact of the very factor that justifies the regulation. Private verbal assaults are more likely to provoke violent reactions.¹⁰⁶ The distinction between public speech and private speech may indeed be relevant in determining the extent of protection where the principles that permit regulation would, without the public-private distinction, allow a consideration of context. The private context, as has been seen, cannot create the justification. But where the principles of regulation lead us to context, the location of the speech and the identity of the audience are factors to be considered. This conclusion is supported by the Court's observation that under some circumstances the setting may be relevant to the "*Pickering* calculus,"¹⁰⁷ but the principles extend far beyond *Pickering* alone.

In some instances of regulation justified by context the private

¹⁰³ See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

¹⁰⁴ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁰⁵ Permissible restrictions on defamatory speech, e.g., are largely independent of context.

¹⁰⁶ The more the speech is directed at a particular individual, the more he is likely to react violently. But it is possible that, once the speech is directed at a particular individual, the likelihood of violent reaction increases with the number of observers. Part of the cause of violent reaction may very well be humiliation, which requires an audience.

¹⁰⁷ 99 S. Ct. at 696 n.4.

setting may argue for increased protection. This may be the case in *Givhan*, for the private audience may produce better results with fewer unpleasant side effects. And in *Pickering* the Court suggested that under some circumstances a teacher might be required to make a complaint internally before going public with the complaint.¹⁰⁸ But instances also exist where it is possible that the private setting may decrease the available protection. Fighting words again seem the best example.

With this vital qualification regarding context, we can both justify and qualify the holding in *Givhan*. The private setting alone does not result in forfeiture of First Amendment coverage or protection, but the private setting is indeed relevant to the extent of protection where the extent of protection is to be determined by the context of the utterance at issue.

III. THE PRIVATE CITIZEN AND THE PUBLIC EMPLOYEE

We have seen several senses of the public-private distinction, one in terms of subject matter, another in terms of the forum, and a third in terms of the audience. But there is still another sense, one that leads to a consideration of the other important facet of *Givhan*. For Bessie Givhan was not only a private citizen; she was also a public employee. *Pickering* was decided in large part in reliance on the fact that Pickering was speaking out not as a public employee but as a private citizen.¹⁰⁹ The same is true of both the situation and the Court's opinions in *Perry*,¹¹⁰ in *Mt. Healthy*,¹¹¹ and in *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*.¹¹² In all of these cases it could as easily have been a private citizen not employed by the State who was speaking.

These cases leave undecided the extent of free speech protection where the individual speaks not *qua* citizen but *qua* public employee. *Givhan* is far from illuminating on this issue, but it provides some signposts for exploring this difficult constitutional terrain.

The cases before *Givhan* all involve speech in forums open to the

¹⁰⁸ 391 U.S. at 572 n.4.

¹⁰⁹ *Id.* at 574, noting that the employment "is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher."

¹¹⁰ 408 U.S. at 598.

¹¹¹ 429 U.S. at 282.

¹¹² 429 U.S. 167 (1976).

general public. In each case the Court took pains to point out that it was the teacher as citizen that provided the focal point of the analysis. "He addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government."¹¹³ This language would clearly have been controlling in *Givhan* if Bessie Givhan's complaints about racial discrimination in the schools had been expressed in a letter to the editor of a local newspaper, in a speech in a public park, or at a board of education meeting open to the general public.¹¹⁴ But by expressing her complaints in the principal's office, she utilized a forum not open to the general public. It was open to her solely by virtue of her employment as a teacher.

When a teacher or other public employee speaks out as a teacher, or as a public employee, additional considerations come into play, some of which were suggested in *Pickering*.¹¹⁵ The speech may jeopardize a necessarily close working relationship, it may breach a valid interest in confidentiality, or it may call into question a teacher's very fitness for the position. I have the right to believe that the world is flat or that astrology tells us more than the theories of Newton and Einstein. I also have the right to express these views to anyone foolish enough to listen. But if I am the head of the physics department at a major state research university, I can hardly deny that such public utterances might validly cause my superiors to wonder if perhaps I am in the wrong line of work and to take appropriate action. As a citizen I have the right to interest myself in and comment upon the fortunes of the New York Yankees. But as a teacher of constitutional law I do not have the right to devote my entire course in constitutional law to evaluating the performances of Reggie Jackson and Ron Guidry in the 1978 World Series. It is this latter situation that more closely relates to the facts in *Givhan*. Bessie Givhan was not only speaking out as a teacher, she

¹¹³ *Id.* at 174-75.

¹¹⁴ In *City of Madison* it was the fact that the meeting was open to the public rather than a closed bargaining session that was determinative. *Ibid.*

¹¹⁵ "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as 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." 391 U.S. at 568.

was speaking out on her employer's premises and on her employer's time. Regardless of whether a modern-day McAuliffe might have the right to talk politics on his own time,¹¹⁶ it is clear that he could be legitimately dismissed for delivering a political oration when he was supposed to be directing traffic.

Transposing this to the academic setting, we can see that virtually all of the Supreme Court's references to academic freedom have been little more than excess verbiage. In the most prominent "academic freedom" cases, from *Keyishian v. Board of Regents*¹¹⁷ and *Wieman v. Updegraff*¹¹⁸ to *Pickering* and *Perry*, the speech took place outside of the school and on the teacher's own time. These are not academic freedom cases—they are free speech cases. The issue is only whether a public employee can be penalized for exercising a citizen's right of free speech. The full application of the principle in these cases to public employees who are not teachers demonstrates that the principle is only that dismissal from public employment is just one of many impermissible penalties on protected speech.¹¹⁹ If it is academic freedom that protects a teacher's right to join an organization, or speak out in public, then one who is not an academic has no claim to such rights. Surely this is not true. *Pickering's* right to criticize the school board is no greater than the streetcleaner's right to criticize the sanitation department.¹²⁰

¹¹⁶ *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 (1892) (Holmes, J.). "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220. The accepted wisdom is that *McAuliffe* is the prototypical example of the now discredited right-privilege distinction. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). But *McAuliffe* might not necessarily be decided differently today. See *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

¹¹⁷ 385 U.S. 589 (1967).

¹¹⁸ 344 U.S. 183 (1952). See also *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Shelton v. Tucker*, 364 U.S. 479 (1960); Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3; Jones, *The American Concept of Academic Freedom*, in JOUGHIN, ED., *ACADEMIC FREEDOM AND TENURE* 224 (1967); Murphy, *Academic Freedom—an Emerging Constitutional Right*, 28 L. & CONT. PROB. 447 (1963); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); Schauer, *School Books, Lesson Plans, and the Constitution*, 78 W. VA. L. REV. 287 (1976).

¹¹⁹ See O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Van Alstyne, *The Constitutional Rights of Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A. L. REV. 751 (1969).

¹²⁰ On applications of *Pickering* to nonacademic positions, see, e.g., Donahue

Talk of academic freedom is therefore pointless unless there is something about academic freedom that is special or different. Academic freedom is a meaningful concept only if it protects activities not otherwise protected by the general concept of free speech.¹²¹ Unless academic freedom adds something to freedom of speech its deployment serves only to confuse the analysis.

If there is an independent concept of academic freedom, it is surely derived not only from the First Amendment, in general, but also from the doctrine of freedom of speech, in particular. Yet this does not mean that the two are the same. The values of the intellectual marketplace and of open inquiry into even the most accepted beliefs are arguably served in a special way within the setting of an academic institution. It can also be said that the academic institution has a special responsibility to instill the spirit of inquiry that enables the general notion of free speech to function. If this is true, then the First Amendment may generate a distinct institutional protection for the academy.

Drawing this distinction makes it possible to see *Givhan* in a different light. Prior to *Givhan* there had been only one "true" academic freedom case in the Supreme Court, *Sweezy v. New Hampshire*.¹²² Without the concept of academic freedom there is nowhere in constitutional law an exception to the principle that during working hours employees are to do what their employers tell them to do. But in *Sweezy* the Court suggested that activities in the classroom might be protected, a seeming exception to this general principle. After *Sweezy*, the State as employer is to some extent limited in the extent to which it can mandate what the university teacher as employee can do in the classroom. But this is a somewhat obscure

v. Staunton, 471 F.2d 475 (7th Cir. 1972) (chaplain at mental hospital); Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500 (E.D. Pa. 1973) (psychiatric nurse); Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974) (fireman). In *Rafferty* the court suggested that, if the plaintiff's superiors in the community mental health center were that sensitive to criticism, they perhaps ought to be the patients rather than the supervisors.

¹²¹ By far the best exposition of this distinction is Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS 140 (1972).

¹²² 354 U.S. 234 (1957), in which a state investigation into a lecture delivered in a class at the University of New Hampshire was held invalid. *Epperson v. Arkansas*, 393 U.S. 97 (1968), involved classroom activity, but the case was decided on establishment of religion grounds. Mr. Justice Stewart's concurrence did suggest a possible academic freedom-free speech path to the same result. *Id.* at 116.

dictum in *Sweezy*, and there has been little more guidance from the Supreme Court.¹²³

The paucity of precedent has not deterred the proliferation of an extensive literature on this subject.¹²⁴ There have been several notable lower court cases, most prominently Judge Johnson's opinion in *Parducci v. Rutland*.¹²⁵ But the Supreme Court has said very little about the extent to which either academic freedom or freedom of speech protects utterances on school time and on school property. In *Tinker v. Des Moines Independent Community School District*,¹²⁶ the Court said that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"¹²⁷ but the Court there did little more than protect only those exercises of constitutional rights that are not inconsistent with the educational function. It said nothing about whether freedom of speech is part of the educational function.

To answer this question it is necessary to look closely at the educational process. This is a task that is not manageable here and would be quite far afield from what can be gleaned from *Givhan*. There is also the independent and equally difficult question whether the recognition of such a distinct institutional right can be found in the First Amendment and, also, whether its recognition would be

¹²³ Two additional cases are helpful. In *Healy v. James*, 408 U.S. 169, 180-81 (1972), it was suggested that the classroom was a marketplace of ideas. And in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Mr. Justice Powell talked of academic freedom: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." 438 U.S. at 312. Since the selection of students is not speech, Mr. Justice Powell's opinion goes a long way toward recognizing that academic freedom protects activities not otherwise protected by the concept of free speech.

¹²⁴ In addition to the authorities cited at note 118 *supra*, see Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); Miller, *Teachers' Freedom of Expression within the Classroom: A Search for Standards*, 8 GA. L. REV. 837 (1974); Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971); Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176 (1973).

¹²⁵ 316 F. Supp. 352 (M.D. Ala. 1970). See also *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

¹²⁶ 393 U.S. 503 (1969).

¹²⁷ *Id.* at 506.

consistent with the Court's rejection of independent institutional rights for the organized press.¹²⁸ But if there is such an independent concept of academic freedom, a freedom to teach or to choose class materials, it arguably varies with the type and level of education involved.¹²⁹ For central to the recognition of classroom academic freedom is acceptance of the classroom as more of a public forum than a state-controlled agency for indoctrination. It is not at all unreasonable to suggest that the classroom shifts from indoctrinative to exploratory with the increasing age and sophistication of the students.

But *Givhan* is not a classroom case. It must not be read to suggest that Bessie Givhan's complaints are to be tolerated if she uses the classroom rather than the principal's office as the forum for her grievances. *Givhan* is the intermediate case, dealing with speech out of the classroom but in the school and on school time.¹³⁰ In holding that this was indeed a forum for speech activities, the Court goes at least part of the way toward recognizing an independent concept of academic freedom. Albeit obliquely, it suggests as well that the internal critic has a constitutionally protected position.

Various theories might support these conclusions. First, there is the very real problem in government that critics may be singled out for especially unfavorable treatment. In protecting the internal critic, the gadfly, the Court partially commits itself to a philosophy of workplace democracy. Harmony, uniformity, and obedience may not be the only important values in public employment. The marketplace of ideas is moved from the public forum into the working environment and the employment relationship. This is again quite far from most of the commonly accepted core principles of freedom of speech. But as a question of policy there is much to commend such a theory. If our assumptions about the value of criticism and the value of free interchange of ideas are justified, then those assumptions apply with special force to those, such as em-

¹²⁸ See notes 42 and 82 *supra*.

¹²⁹ Compare *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968); Schauer, note 118 *supra*; and Goldstein, note 124 *supra*, with Note, note 124 *supra*, and Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption*, 27 VAND. L. REV. 209, 235 (1974).

¹³⁰ For such intermediate cases, see, e.g., *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972); *Whitsel v. Southeast Local School District*, 484 F.2d 1222 (6th Cir. 1973).

ployees, who have a particular expertise and a particular concern with the matters at hand. Reference to this special expertise is found in *Pickering* as well.¹³¹ But let there be no mistake. The constitutionalization of the workplace makes it clear, as the procedural due process cases had done earlier, that public employment and private employment are becoming increasingly dissimilar.

This constitutionalized openness may inure to the benefit of the public in several ways. Not only may it be said that the public benefits when institutions are structured on more open lines, but the public may also benefit more directly when public employees can inform the electorate about the business of their agencies without necessarily proceeding through cumbersome and hierarchical grievance structures. By strongly intimating in *Givhan* that the public employee has free speech rights *qua* public employee, the Court takes the first step toward constitutional protection for the "whistle-blower," an increasingly common phenomenon in American public life.¹³²

Finally, *Givhan* may say something special about schools. Possibly much of the foregoing applies only or with stronger force in schools, rather than in public employment generally. When Dwight Eisenhower was president of Columbia University, he addressed the faculty as "employees of the university," only to be interrupted by a senior faculty member who observed that "We are not *employees* of this university. We *are* this university."¹³³ This may strike a responsive chord in those who have witnessed the increasing bureaucracy and hierarchical structure of the American university. The extent to which openness and internal criticism are as valuable in primary and secondary schools as they are in the university is very possibly a quite different matter. The Court, however, may be speaking in more general terms. One may infer from *Givhan* the view that schools are to a degree special, that traditional organization charts and hierarchical structures may be inconsistent with the

¹³¹ 391 U.S. at 571-72.

¹³² See Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. CHI. L. REV. 530 (1975); *The Whistleblowers, a Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption*, prepared for Senate Committee on Governmental Affairs, 98th Cong., 2d Sess. (Feb. 1978); GOVERNMENT ACCOUNTABILITY PROJECT, *A WHISTLEBLOWER'S GUIDE TO THE FEDERAL BUREAUCRACY* (1977).

¹³³ ADAMS, *THE ACADEMIC TRIBES* 15 (1976).

openness that some consider inherent in the processes of education and academic inquiry. This is undoubtedly quite far afield from what is directly found in the opinion in *Givhan*. Yet if these observations about the implications of *Givhan* are correct, the Court may have taken the first step toward recognizing academic freedom as a principle and not a platitude. But, like the issue of public speech and private speech, the Court tells us little and leaves much for speculation.

IV. CONCLUSION

On closer analysis, the opinion in *Givhan*, in rejecting the distinction between public speech and private speech, and in further extending free speech principles within the walls of the schoolhouse, has much to commend it. But the implications of *Givhan* are considerable, and the opinion raises more questions than it answers. The opinion is, thus, both too clear and too obscure. A reading of the opinion may lead lower courts to ignore the extent to which the public-private distinction remains relevant in applying certain accepted justifications for restricting speech. In this sense the words say too much. On the other hand, a reading of *Givhan* may lead lower courts to underestimate its effect on the issue of academic freedom and on the issue of freedom of speech in the academic setting. On both the issue of private speech and the issue of speech in the schools much more remains to be said. We can do little more than guess as to the extent to which the Court will follow the implications of *Givhan*. It is a pity that the brevity of the opinion leaves so much to speculation.