

son's constitutionally protected interests. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible."<sup>785</sup>

However, the fact that government does not have carte blanche in dealing with the constitutional rights of its employees does not mean that it has no power at all. "[I]t cannot be gainsaid," the Court said in *Pickering v. Board of Education*, "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."<sup>786</sup> *Pickering* concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. "The problem in any case," Justice Marshall wrote for the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>787</sup>

The Court laid down no general standard, but undertook a suggestive analysis. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close—such as day-to-day personal contact—that problems of discipline or of harmony among coworkers, or problems of personal loyalty and confidence, would

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<sup>785</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citation omitted). In a companion case, the Court noted that the privilege basis for the appeals court's due process holding in *Bailey* "has been thoroughly undermined in the ensuing years." *Board of Regents v. Roth*, 408 U.S. 564, 571 n.9 (1972). The test now in due process and other such cases is whether government has conferred a property right in employment which it must respect, but the inquiry when it is alleged that an employee has been penalized for the assertion of a constitutional right is that stated in the text. A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 416 (1979). See Amendment 14, "The Property Interest," *infra*.

<sup>786</sup> 391 U.S. 563, 568 (1968).

<sup>787</sup> 391 U.S. at 568.