then, unless the speech was made by an employee pursuant to his duties, *Pickering's* balancing test is applied, with the governmental interests in efficiency, workplace harmony, and the satisfactory performance of the employee's duties [816] balanced against the employee's First Amendment rights. Although the general approach is easy to describe, it has proven difficult to apply.[817] The First Amendment, however, does not stand alone in protecting the speech of public employees; statutory protections for "whistleblowers" add to the mix.[818]

Government as Educator.—Although the Court had previously made clear that students in public schools are entitled to some constitutional protection,[819] as are minors generally,[820] its first attempt to establish standards of First Amendment expression guarantees against curtailment by school authorities came in *Tinker v. Des Moines Independent Community School District*.[821] There, high school principals had banned the wearing of black armbands by students in school as a symbol of protest against United States' actions in Vietnam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . On the

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the most unusual of circumstances." 461 U.S. at 147. In *Ceballos*, however, the Court, citing *Connick* at 147, wrote that, if an employee did not speak as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418.

[816] In some contexts, the governmental interest is more far-reaching. *See* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (interest in protecting secrecy of foreign intelligence sources).

[817] For analysis of efforts of lower courts to apply *Pickering* and *Connick*, *see* Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987); and Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988). In Waters v. Churchill, 511 U.S. 661 (1994), the Court grappled with what procedural protections may be required by the First Amendment when public employees are dismissed on speech-related grounds, but reached no consensus.

[818] The principal federal law is the Whistleblower Protection Act of 1989, Pub. L. 101–12, 103 Stat. 16, 5 U.S.C. § 1201 note.

[819] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (flag salute); Meyer v. Nebraska, 262 U.S. 390 (1923) (limitation of language curriculum to English); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (compulsory school attendance in public rather than choice of public or private schools).

[820] *In re* Gault, 387 U.S. 1 (1967). Of course, children are in some respects subject to restrictions that could not constitutionally be applied to adults. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (access to material deemed "harmful to minors," although not obscene as to adults).

[821] 393 U.S. 503 (1969).