

What Is the Meaning of “Like”? The First Amendment Implications of Social-Media Expression

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ABSTRACT

Everywhere the Internet goes, new legal problems are sure to follow. As social media expands and infiltrates our daily lives, society must grapple with how to extend the law to modern situations. This problem becomes increasingly pressing as more and more of our social interactions take place online. For example, Facebook has become a colossal gathering place for friends, families, co-workers, frenemies, and others to disseminate their ideas and share information. Sometimes Facebook replaces old institutions; other times it augments them. Where once a neighbor would show allegiance to a political candidate by staking a sign on the front lawn, a user now clicks Like on a candidate’s Facebook Page instead.

In 2009, a deputy sheriff was fired for doing just that. A U.S. district court, in an opinion that demonstrates the inability of the current legal framework to adequately address social-media activity, held that the termination did not violate the deputy sheriff’s First Amendment rights. The judge reasoned that clicking Like does not constitute speech—let alone protected speech—because it is not substantive.

This Article demonstrates that the court not only failed to follow well-established Supreme Court precedent, but also fundamentally misunderstood the technological consequences of clicking Like, which include textual statements as well as the symbolic thumbs up sign. Liking a political candidate’s Facebook Page is the twenty-first century equivalent of a campaign yard sign and, under the Supreme Court’s First Amendment jurisprudence, should be considered protected speech.

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I. INTRODUCTION

Imagine being fired for liking a political candidate . . . on Facebook. As unlikely as this experience may seem, a federal court recently held that an employer could do just that. Facebook, a social-networking website with more than one billion active users,¹ has become ubiquitous, raising new legal concerns everywhere the Internet reaches. As societies grapple with how to incorporate Facebook activity into their legal systems, they are writing new laws and struggling to apply old ones to novel social-media scenarios.² For example, the government of the Philippines recently

1. Geoffrey A. Fowler, *Facebook: One Billion and Counting*, WALL ST. J. (Oct. 4, 2012), <http://online.wsj.com/article/SB10000872396390443635404578036164027386112.html>.

2. See, e.g., *Hunter v. Va. State Bar*, 2013 WL 749494 (Va. Feb. 28, 2013) (discussing whether an attorney’s blog, which primarily contained posts about cases in which the attorney had

enacted—and quickly suspended—legislation that includes exceedingly broad language on what constitutes online libel, arguably criminalizing Liking or Sharing³ content written by another author.⁴ In India, a student faced three criminal charges for clicking Like on a friend’s political Facebook Status Update.⁵ Following a public outcry, the government dropped the charges and suspended her arrestors.⁶

Although the thought of criminalizing Liking or Sharing may seem outlandish in the United States,⁷ whether such actions merit protection under the Constitution remains unsettled. Social-media activity is testing the traditional boundaries of the First Amendment—including what constitutes speech and whether that speech is protected. Recently, in *Bland v. Roberts*,⁸ a federal district court held that Liking a candidate’s campaign

reached favorable results, constituted commercial speech under the First Amendment). The majority held that an attorney’s blog posts constituted commercial speech that was not protected by the First Amendment because they were potentially misleading. *Id.* at *9. Two judges, however, asserted that the blogs were protected political speech. *Id.* at *11 (Lemons, J., dissenting in part). Further, Congress has introduced several new bills, including the Cyber Intelligence Sharing and Protection Act, which would enable the government to collect private user information from social-networking companies without a warrant. See Gregory Ferenstein, *Hey Internet, Where’s the Outrage?*, WASH. POST IDEAS@INNOVATIONS BLOG (Mar. 13, 2013, 2:27 PM), http://www.washingtonpost.com/blogs/innovations/post/hey-internet-wheres-the-outrage/2013/03/13/caf1f4b2-8c03-11e2-b63f-f53fb9f2fcb4_blog.html.

3. See *infra* notes 19-27 and accompanying text (explaining the concept of Liking a post or Page on Facebook).

4. See Paul Tassi, *Controversial Cybercrime Prevention Act Suspended by Philippines Court*, FORBES (Oct. 9, 2012), <http://www.forbes.com/sites/insertcoin/2012/10/09/controversial-cybercrime-prevention-act-suspended-by-philippines-court> (indicating that a Philippines court suspended the law less than one month after its enactment in response to public outrage). Protests erupted because the Act’s broad language potentially criminalized distributing or endorsing online commentary critical of the government or other state actors. *Cybercrime Law Is Suspended by Philippines Court*, BBC NEWS (Oct. 9, 2012), <http://www.bbc.co.uk/news/world-asia-19881346>.

5. Shivam Vij, *Woman Hits “Like” on Facebook, Gets Arrested in India*, CHRISTIAN SCI. MONITOR (Nov. 12, 2012), <http://www.csmonitor.com/World/Asia-South-Central/2012/1119/Woman-hits-like-on-Facebook-gets-arrested-in-India>. The student had Liked a friend’s Status Update that criticized Mumbai’s mourning the death of a violent political leader. *Id.* The friend, who was also arrested, posted: “Respect is earned, not given and definitely not forced. Today Mumbai shuts down due to fear and not due to respect.” *Id.*

6. Julie McCarthy, *Facebook Arrests Ignite Free-Speech Debate in India*, NPR (Nov. 29, 2012), <http://www.npr.org/2012/11/29/166118379/arrests-ignite-free-speech-debate-in-india>. The student faced three charges, including one under India’s controversial Information Technology Act that prohibits online speech of “grossly offensive or of menacing character.” Vij, *supra* note 5. The possible penalty for just this one click was up to nine years in prison. *Id.*

7. While the United States has not considered laws as severe as those of the Philippines or India, the Stop Online Piracy Act (SOPA), proposed in December 2011, would have created restrictions on online speech in an effort to reduce online piracy and copyright infringement. See James L. Gattuso, *Online Piracy and SOPA: Beware of Unintended Consequences*, HERITAGE FOUND. (Dec. 21, 2011), <http://www.heritage.org/research/reports/2011/12/online-piracy-and-sopa-beware-of-unintended-consequences> (arguing that restrictions placed on websites and individuals may violate free speech rights).

8. 857 F. Supp. 2d 599 (E.D. Va. 2012).

Page on Facebook does not constitute protected speech at all because it was “not the kind of substantive statement that has previously warranted constitutional protection.”⁹ Therefore, the judge in *Bland* held that a public employer could fire an employee for such activity without violating the First Amendment.¹⁰ An NLRB administrative law judge (ALJ), however, found in *Three D, LLC*¹¹ that an employee could not be fired for Liking a Facebook post critical of an employer under the “concerted activity” protection of the National Labor Relations Act.¹² *Bland* and *Three D* demonstrate the ongoing struggle to apply current laws to novel forms of online communication and illustrate that some Facebook activity *is* substantive enough to garner protection.

This Article argues that clicking Like on Facebook, as well as similar online actions, constitutes speech for First Amendment purposes and should be protected in certain circumstances. Part II introduces Facebook and its features, First Amendment jurisprudence in the public-employment context, and the *Bland* and *Three D* cases. Part III argues that Liking something on Facebook constitutes speech under the First Amendment. This Part concludes by demonstrating that the free speech analysis in *Bland* fell far short of justifying the ruling that Liking a political candidate’s campaign Page is not protected speech. More generally, the Article concludes that courts should bring many online activities within the scope of First Amendment protection.

II. BACKGROUND

The First Amendment protects the right to freedom of speech.¹³ Society’s conception about what constitutes speech has evolved over time and now encompasses many forms of symbolic expression in addition to pure speech. The novel forms of expression effectuated by the advent of the Internet and social media have stretched the bounds of free speech jurisprudence and have necessitated a reevaluation—by both society and the courts—of the scope of First Amendment protections, particularly in the public-employment context.

9. *Id.* at 604.

10. *Id.* at 603-04.

11. *Three D, LLC*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Jan. 3, 2012).

12. *Id.* at *1.

13. U.S. CONST. amend. I. The Supreme Court has explicitly incorporated the Free Speech Clause and applied it to the states via the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (asserting that freedom of speech is “among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States”).

A. Facebook, “Liking,” and Other Social-Media Features

Facebook is a free social-networking website that enables users “to connect with their friends and family, to discover what is going on in the world around them, and to share what matters to them and to the people they care about.”¹⁴ Users include individuals and organized entities, such as groups, businesses, and public figures. Facebook Pages are designed for organized entities to convey information, interests, ideas, photographs, and other multimedia.¹⁵ Facebook Profiles¹⁶ provide similar functionality for individual users, who can make such content viewable to either a specific audience or the public.¹⁷ Users frequently disseminate such information through the Like and Share functions.¹⁸

The Like button is depicted by a thumbs-up symbol and the word “Like”; according to Facebook, this provides a means to “[g]ive positive feedback and connect with things you care about.”¹⁹ A user can Like Pages, other users’ Comments and Status Updates, and Internet websites that provide the Like function.²⁰ Liking a Page has multiple effects: (1) the Like shows up on the user’s Timeline as a statement notification; (2) a permanent symbol appears in a separate location listing all Pages a user has Liked; (3) a Like notice is posted on the News Feeds of other users; and (4) the user’s photo and name “appear on the Page as a person who likes that

14. Brief of Facebook, Inc. as *Amicus Curiae* in Support of Plaintiff-Appellant Daniel Ray Carter, Jr. and in Support of Vacatur at 1, *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-16771), available at http://www.aclu.org/files/assets/bland_v_roberts_appeal_-_facebook_amicus_brief.pdf [hereinafter *Facebook Brief*].

15. *Id.* at 4; see, *What is a Facebook Page?*, FACEBOOK, <https://www.facebook.com/help/174987089221178> (last visited June 9, 2013). For example, during the 2012 presidential election, Pages for President Barack Obama and Mitt Romney were used to continually update followers on the candidates’ policies and campaigns. See Organizing for Action, *Barack Obama*, FACEBOOK, <https://www.facebook.com/barackobama> (last visited June 9, 2013); *Mitt Romney*, FACEBOOK, <https://www.facebook.com/mittromney> (last visited June 9, 2013).

16. A Facebook Profile is now called a “Timeline,” which has a different layout but serves a similar function. See *Facebook Brief*, *supra* note 14, at 4. Profiles and Timelines display the user’s recent Facebook activity as well as a separate list of all Pages a user has Liked. See *id.*

17. *Id.*

18. Facebook users generate an average of 2.7 billion Likes and Comments per day. Donna Tam, *Facebook Processes More than 500 TB of Data Daily*, CNET (Aug. 22, 2012, 2:02 PM), http://news.cnet.com/8301-1023_3-57498531-93/facebook-processes-more-than-500-tb-of-data-daily.

19. *Like*, FACEBOOK, <https://www.facebook.com/help/452446998120360> (last visited June 9, 2013).

20. *Facebook Brief*, *supra* note 14, at 4. Similar functions are available on other social-media platforms, such as the Favorite function on Twitter and the Like and Follow functions on Pinterest. See *What is a Favorite?*, TWITTER, <https://support.twitter.com/articles/14214-about-favorites-and-where-to-find-them> (last visited June 9, 2013); *Pinning 101*, PINTEREST, <https://about.pinterest.com/basics> (last visited June 9, 2013).

Page.”²¹ A user has the ability to tailor who can view this information²² and can remove the Like at any time by clicking Unlike.²³

Sharing is another method of disseminating information on Facebook,²⁴ either internally through Facebook or externally via third-party websites.²⁵ A user Shares by clicking a button beneath content on Facebook or by utilizing a third party’s post-to-Facebook function.²⁶ Users can Share content including photos, videos, websites, news articles, other users’ comments and posts, and online promotions or other advertising. The content appears both on the user’s Profile as well as on the News Feeds of other users.²⁷ These novel forms of communication raise difficult and fascinating First Amendment questions that courts have yet to resolve.

B. *What Constitutes Speech Under the First Amendment?*

The Supreme Court has long recognized that freedom of speech is a fundamental right.²⁸ This characterization “reflects the belief of the framers of the Constitution that exercise of the right[] lies at the foundation of free government by free men.”²⁹ Over time, Supreme Court jurisprudence has evolved regarding what constitutes speech for First Amendment purposes.

The First Amendment affords the most stringent protections to “pure speech,” which is defined as “[w]ords or conduct limited in form to what is necessary to convey the idea.”³⁰ Pure speech encompasses both written and spoken words.³¹ Any governmental infringement on such speech receives

21. *Facebook Brief*, *supra* note 14, at 6-7 (describing the effects of clicking Like and providing examples); *Like*, *supra* note 19. Liking specific content, as opposed to an entire Page, differs only in that doing so does not add the liked content to the user’s permanent listing of Likes. See *What’s the Difference Between Liking an Item a Friend Posts and Liking a Page?*, FACEBOOK, <https://www.facebook.com/help/228578620490361> (last visited June 9, 2013).

22. *What Does It Mean to Like a Page or Content Off of Facebook?*, FACEBOOK, <https://www.facebook.com/help/131263873618748> (last visited June 9, 2013).

23. *How Do I Unlike Something?*, FACEBOOK, <https://www.facebook.com/help/226926007324633> (last visited June 9, 2013).

24. See *Sharing*, FACEBOOK, <https://www.facebook.com/help/418076994900119> (last visited June 9, 2013) (describing how users can Share various content that appears in their News Feeds).

25. *Id.* Other social-media platforms have similar functionalities as Sharing, such as the Re-Tweet option on Twitter and the Repin function on Pinterest. See *FAQs About Retweets (RT)*, TWITTER, <https://support.twitter.com/articles/77606-what-is-retweet-rt> (last visited June 9, 2013) (“A retweet is a re-posting of someone else’s Tweet. Twitter’s retweet feature helps you and others quickly share that Tweet with all of your followers.”); *Pinning 101*, *supra* note 20.

26. *What Does It Mean to Like a Page or Content Off of Facebook?*, *supra* note 22.

27. *Id.*

28. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

29. *Id.*

30. BLACK’S LAW DICTIONARY 1529 (9th ed. 2009).

31. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 518, 527 (2001) (finding that a delivery of a tape recording is protected speech). The *Bartnicki* Court explained:

the highest level of scrutiny.³²

Although the Free Speech Clause, by its terms, protects only “speech,” the Court has acknowledged that symbolic acts can also constitute speech under the First Amendment.³³ Recognizing that symbolism is a “primitive but effective” means of communication, the Supreme Court declared that the First Amendment “looks beyond written or spoken words as mediums of expression.”³⁴ The Court extended protection to symbolic conduct as early as 1931 in *Stromberg v. California*,³⁵ in which the Court invalidated California’s criminal prohibition on waving a red flag as an emblem of governmental opposition.³⁶ In finding the law void for vagueness, the Court recognized that this symbolic display was speech.³⁷ Subsequently, the Court has held that several different types of symbolic acts constitute speech.³⁸ In *Tinker v. Des Moines Independent Community School District*,³⁹ for example, the Supreme Court held that wearing armbands in protest of the Vietnam War was symbolic speech protected by the First Amendment.⁴⁰

Not all conduct, however, rises to the level of speech; only communicative conduct qualifies as speech for First Amendment purposes. The Court has articulated a two-pronged test for determining what conduct

[G]iven that the purpose of [delivering a tape recording] is to provide the recipient with the *text* of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of “speech” that the First Amendment protects. . . . [I]f the acts of “disclosing” and “publishing” information do not constitute [pure] speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.

Id. (emphasis added; footnote, citations, and internal quotation marks omitted).

32. *See, e.g., id.* at 534 (applying strict scrutiny to invalidate a restriction on disclosure of illegally intercepted oral communications, which the court classified as pure speech).

33. *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1063 (3d ed. 2006) (“To deny First Amendment protection for [symbolic speech] would mean a loss of some of the most effective means of communicating messages.”).

34. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)); *see Texas v. Johnson*, 491 U.S. 397, 404 (1989) (asserting that the Supreme Court has “long recognized that its protection does not end at the spoken or written word”).

35. 283 U.S. 359 (1931).

36. *See id.* at 361.

37. *See id.* at 369-70 (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system. A statute which . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.”). The Court went even further by holding that the speech was protected. *See id.*

38. *See, e.g., Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (holding that a peaceful sit-in protesting segregation constituted speech under the First Amendment).

39. 393 U.S. 503 (1969).

40. *Id.* at 505-06.

is sufficiently communicative to fall within the scope of the First Amendment. In its 1974 *Spence v. California*⁴¹ decision, the Supreme Court analyzed whether a peace sign attached to an upside-down American flag constitutes speech.⁴² In concluding that this conduct was communicative speech, the Court emphasized two factors: “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”⁴³

Fifteen years later, the Court in *Texas v. Johnson*⁴⁴ formalized the *Spence* factors into the two-pronged *Spence-Johnson* test, under which conduct is considered speech for First Amendment purposes if there is (1) an intent to convey a particularized message, and (2) a great likelihood that the message would be understood by those encountering it.⁴⁵ The *Johnson* Court applied this test to find that burning a flag in protest constituted speech.⁴⁶ In so holding, the Court emphasized that, although it previously had refused to adopt “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,” it has also acknowledged that some conduct is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”⁴⁷

Only six years later, the Court seemingly relaxed the particularized message prong of the *Spence-Johnson* test in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.⁴⁸ In *Hurley*, the Court briefly acknowledged its *Spence* holding but explained that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jaberwocky verse of Lewis Carroll.”⁴⁹ Thus, an activity may constitute speech under the First Amendment even if it does not

41. 418 U.S. 405 (1974) (per curiam).

42. See *id.* at 405-06 (invalidating a Washington statute forbidding the display of a U.S. flag with any superimposed words or symbols).

43. *Id.* at 410-11.

44. 491 U.S. 397 (1989).

45. *Id.* at 404.

46. *Id.* at 405-06.

47. *Id.* at 404 (quoting *United States v. O’Brien*, 391 U.S. 367, 375 (1968), and *Spence*, 418 U.S. at 409 (per curiam)) (internal quotation marks omitted).

48. See 515 U.S. 557, 569-71 (1995); Angelica M. Sinopole, Comment, “No Saggy Pants”: A Review of the First Amendment Issues Presented by the State’s Regulation of Fashion in Public Streets, 113 PENN. ST. L. REV. 329, 342-43 (2008) (stating that, although the Supreme Court has never expressly clarified whether the *Hurley* decision altered the *Spence-Johnson* particularized message requirement, many lower courts have interpreted the decision as doing so).

49. *Hurley*, 515 U.S. at 569 (internal citation omitted).

convey a clear message,⁵⁰ and an idea or message need not be original to be speech.⁵¹ The *Hurley* Court applied these principles to hold that marching in a parade constitutes symbolic speech because the marchers make “some sort of collective point” to each other and to bystanders.⁵²

An expansive variety of expressive acts constitutes symbolic speech under these principles. The inquiry, however, does not end after establishing that specific conduct is speech for purposes of the First Amendment; courts must then examine whether the speech is protected.

C. *What Constitutes Protected Speech Under the First Amendment?*

After concluding that an individual engaged in speech, a court must determine whether that speech is protected under the First Amendment. Freedom of speech is not an absolute right⁵³—the government may regulate or even bar some categories of speech. For example, fighting words,⁵⁴ criminal speech,⁵⁵ incitement of illegal action,⁵⁶ and obscenity⁵⁷ enjoy no protection under the First Amendment and may thus be banned outright. Political speech and speech on matters of public concern, on the other hand, receive strict scrutiny, and the government may restrict such speech only for compelling reasons. In some contexts, such as in public workplaces and public schools, the Supreme Court has set out special rules to analyze speech restrictions.

50. *See id.* at 569-70.

51. *See, e.g., id.* at 575 (comparing the selection of parade participants to the selection of advertisements in a daily paper and finding that both constituted speech within the Free Speech Clause of the First Amendment); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (holding that cable operators had been engaged in speech even though they were presenting compilations of programming originally produced by others).

52. *See, e.g., Hurley*, 515 U.S. at 573 (holding that a Massachusetts law violated the parade organizers’ First Amendment rights by requiring private parade organizers to include a group imparting a message with which the organizers disagreed).

53. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925) (stating that the freedom of speech guaranteed by the First Amendment does not grant an authority that protects all uses of language, nor does it prohibit the punishment of a person who abuses the freedom).

54. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (establishing the test for fighting words to be “what men of common intelligence would understand [to] be words likely to cause an average addressee to fight”).

55. *See, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (declaring that speech does not receive First Amendment protection when it is “used as an integral part of *conduct* [that is] in violation of a valid criminal statute” (emphasis added)).

56. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that the government may proscribe advocacy to violate the law or use force when such advocacy “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

57. *See, e.g., Miller v. California*, 413 U.S. 15, 24-25 (1973) (creating a more flexible three-prong test for determining whether speech is obscene, and thus not protected by the First Amendment, and rejecting an “utterly without redeeming social value” test).

1. Political Speech

The underlying purpose of the First Amendment is to protect and foster free discussion of government.⁵⁸ At the heart of the First Amendment—where the Constitution provides the highest level of protection—lies political speech, which includes “criticism of government policy; dissent from the political status quo; direct social advocacy of alternative policies; sharply offensive attacks on prevailing conventions; denunciations of the law itself.”⁵⁹ Because political speech is key to the decision-making process of a democracy,⁶⁰ the Supreme Court views laws restricting such speech with the most stringent level of scrutiny.⁶¹

The medium of communication can be an important factor in a First Amendment analysis involving political or other speech, and residential signs are a particularly valuable medium.⁶² In *City of Ladue v. Gilleo*,⁶³ the Court held that a city’s ban on all residential signs was unconstitutional and emphasized the traditional importance of such signs under the First

58. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”).

59. WILLIAM V. VAN ALSTYNE, *THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS* 167 (4th ed. 2011).

60. *See* *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (noting that the government’s “special incentive to repress opposition” necessitates heightened scrutiny of laws restricting political speech (internal quotations omitted)); *see also* *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (internal citations omitted)). Restrictions on political speech often arise in the context of elections and campaign finance. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), held that two types of campaign funding constitute political speech: direct contributions to candidates and candidate-funded campaign expenditures. *Id.* at 43-45. In this case, the Court accepted as a sufficiently compelling interest the government’s argument that the restrictions on direct contributions to candidates were necessary to prevent quid pro quo corruption. *Id.* at 26-27. However, it rejected that argument as a justification for the limitations placed on expenditures from candidates’ personal and family accounts, maintaining such restrictions as improper burdens on the First Amendment right to campaign for oneself. *Id.* at 45. The Court therefore invalidated the restrictions on candidate-funded expenditures but upheld the restrictions on contributions. *Id.* at 143-44. Subsequently, the Court in *Citizens United v. FEC*, 558 U.S. 310 (2010), stated that political expenditures are by their definition political speech. *Id.* at 360. The *Citizens United* Court also held that a film urging viewers to vote against Hillary Clinton before the 2008 presidential primary elections constituted express advocacy, a basic form of political speech. *Id.* at 326.

61. *Citizens United*, 558 U.S. at 340.

62. *See, e.g.,* *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (prohibiting live entertainment); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (banning door to door distribution of literature).

63. 512 U.S. 43 (1994).

Amendment, whether they express political, religious, or other views.⁶⁴ The Court distinguished residential signs from public signs because, unlike residential signs, public signs are not a “uniquely valuable or important mode of communication.”⁶⁵ Front-lawn signs provide a unique opportunity for speech because they provide information about the speaker’s identity, which is “an important component of many attempts to persuade.”⁶⁶ Indeed, the Court reasoned that “[d]isplaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means.”⁶⁷ Moreover, yard signs are unusually inexpensive and convenient, and no adequate alternative channels of expression exist, particularly for individuals with low income or limited mobility.⁶⁸ Finally, residential signs allow speakers to target their messages to specific audiences, namely their neighbors, and there is no suitable substitute to reach this audience as effectively.⁶⁹

2. Public Figures and Matters of Public Concern

First Amendment protection also extends to speech regarding public figures and matters of public concern. Speech about public figures received heightened protection in *New York Times Co. v. Sullivan*.⁷⁰ Emphasizing the historic importance of citizens’ ability to criticize the government and elected officials, the Court held unconstitutional a legislatively imposed fine for libel of state officials printed in a newspaper advertisement.⁷¹ The Supreme Court thereby created a privilege for speakers targeting public officials⁷² or public figures.⁷³

64. *Id.* at 54.

65. *Compare id.* (prohibiting complete ban on residential signs), *with* *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1994) (permitting restrictions on signs placed on public property).

66. *City of Ladue*, 512 U.S. at 56.

67. *Id.*

68. *Id.* at 57.

69. *Id.*

70. 376 U.S. 254 (1964).

71. *Id.* at 272.

72. A person who holds a paid governmental position is considered a public official. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (adding that those who merely appear in court are not considered public officials because such a holding would “sweep all lawyers under the *New York Times* rule as officers of the court”).

73. *See N.Y. Times*, 376 U.S. at 279 (noting that such a rule had already been adopted in many states). A person’s status as a public figure is determined based on one’s notoriety or fame—either in all contexts or in relation to a particular controversy—and is established “by looking to the nature and extent of an individual’s participation in the particular controversy.” *See Gertz*, 418 U.S. at 352 (maintaining that since the petitioner did not comment on the litigation at issue, he “did not thrust himself into the vortex of this public issue”).

In *Time, Inc. v. Hill*,⁷⁴ the Court broadened the protection given to speech involving public figures to include all speech on matters of public concern.⁷⁵ The speech at issue was a magazine article about the release of a play that was based on a story involving the plaintiffs.⁷⁶ The Court held that the article was on a matter of public concern, and thereby enjoyed heightened protection, because it discussed “the opening of a new play linked to an actual incident” that had been prominent in the news.⁷⁷ Whether speech constitutes a matter of public concern is a crucial element to First Amendment analysis, particularly in the public-employment context.

3. The First Amendment and Employee Speech

The First Amendment protects not only the right to freedom of speech, but also the right to be free from government retaliation for exercising that right. This non-retaliation principle derives from the general rule that the government may not condition a benefit on a basis that infringes a person’s constitutionally protected rights—including the right to free speech—even though that person has no entitlement to the benefit in the first place.⁷⁸ By this reasoning, a public employer cannot deny continued employment to its employees, or retaliate against them,⁷⁹ for exercising their right to speak.⁸⁰

74. 385 U.S. 374 (1967).

75. The Court has found speech to be about a matter of public concern in a variety of situations. For example, *Bartnicki v. Vopper*, 532 U.S. 514 (2001), protected the dissemination of stolen material when the disseminator obtained the information legally because the speech involved a matter of public concern. *Id.* at 525. *Bartnicki* involved a conversation between a union negotiator and union president about a collective-bargaining settlement that was recorded by an illegal wiretap and later played on a radio show. *Id.* at 520. Even though the third party had recorded the conversation illegally, the “stranger’s illegal conduct [did] not suffice to remove the First Amendment shield from speech about a matter of public concern.” *Id.* at 535. Also, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), granted First Amendment protection to picketers at a military serviceman’s funeral, holding that although the signs were held at a private funeral and contained some messages targeted at a few individuals, the “overall thrust and dominant theme of [the] demonstration spoke to broader public issues,” including “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy.” *Id.* at 1217.

76. *Time*, 385 U.S. at 377-80.

77. *Id.* at 387-88 (indicating that the play depicted a violent hostage situation, whereas the plaintiffs maintained that they had been held in their home against their will by calm and respectful men).

78. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (applying the unconstitutional conditions doctrine and stating “the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit” (alteration in original) (quoting *United States v. Am. Library Ass’n*, 539 U.S. 194, 210 (2003))).

79. The Supreme Court has established that plaintiffs carry the burden of showing that their First Amendment activity was a substantial or motivating factor in their employers’ alleged retaliatory conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

An employee’s speech right is not the only interest at stake, however. Public employers also have a legitimate interest in ensuring the efficient operation of the workplace.⁸¹

The Supreme Court has formulated a test for speech in the public-employment context in an attempt to balance these conflicting interests fairly. Public-employee speech is protected under the First Amendment if (1) the employee speaks as a citizen on a “matter of public concern,”⁸² and (2) the employee’s speech interest outweighs the government’s interest in “promoting the efficiency of the public services it performs.”⁸³ If employees are speaking pursuant to their “official duties,” then they are not speaking as citizens and the speech is not protected.⁸⁴ The government is free to regulate unprotected speech or even to fire employees for engaging in it.⁸⁵

In *Pickering v. Board of Education*,⁸⁶ the Court established a balancing test for weighing whose interests are greater—the public-employee speaker or the government employer. The Court set forth factors to consider when balancing an employee’s speech interest against the state’s administrative efficiency interest,⁸⁷ including: whether the speech interferes with maintaining both discipline and harmony in the workplace,⁸⁸ whether the employee has a “close working relationship[.]” with the person whom the speech criticizes, such that “personal loyalty and confidence are necessary to the[.] proper functioning” of that relationship;⁸⁹ whether the speech interferes with the employee’s “daily duties” in the workplace;⁹⁰ and whether the speech interferes with the normal operation of the workplace.⁹¹

80. See, e.g., *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011) (stating that the “First Amendment protects not only the affirmative right to speak, but also the ‘right to be free from retaliation by a public official for the exercise of that right’” (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000))).

81. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

82. *Connick v. Myers*, 461 U.S. 138, 143 (1983).

83. *Pickering*, 391 U.S. at 568.

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

85. See *id.* at 424 (permitting the termination of a deputy district attorney for engaging in unprotected speech).

86. 391 U.S. 563 (1968).

87. Administrative efficiency is the sole state interest to be weighed in the balancing test. See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (“[T]he very nature of the balancing test[] make[s] apparent that the state interest element of the test focuses on the effective functioning of the public employer’s enterprise. Interference with work, personnel relationships, or the speaker’s job performance can detract from the public employer’s function; avoiding such interference can be a strong state interest.”).

88. *Pickering*, 391 U.S. at 570.

89. *Id.*

90. *Id.* at 572-73.

91. *Id.* at 573.

At issue in *Pickering* was the retaliatory termination of a teacher who had written a letter, published in a local newspaper, attacking the school board's allocation of financial resources and criticizing the superintendent.⁹² The teacher challenged his termination on the ground that the letter was protected by the First Amendment.⁹³ The Court agreed and found that the letter constituted protected speech for which the teacher could not be terminated⁹⁴ because, in this instance, the teacher's interest in commenting on matters of public concern⁹⁵ outweighed the state's interest in regulating the teacher's speech.⁹⁶ The Court emphasized that teachers are in a unique position to contribute meaningfully to the public debate on how best to allocate school funds because teachers, by the nature of their employment and day-to-day interactions at their schools, are the most likely to have definite and knowledgeable opinions on how to spend school funds.⁹⁷ Accordingly, the Court stated, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."⁹⁸

In *Connick v. Myers*,⁹⁹ the Court modified the *Pickering* test by adding a threshold requirement that the employee speech be on a matter of public concern before courts can proceed to the balancing portion of the test.¹⁰⁰ The Court elaborated that speech addresses a matter of public concern when "the content, form, and context of a given statement"¹⁰¹ relates "to any matter of political, social, or other concern to the community."¹⁰² After articulating this threshold requirement, the Court attempted to clarify the balancing test by stating that the relevant considerations should include the time, place, and manner of the speech at issue, as well as the context of the

92. *Id.* at 566-67.

93. *Id.* at 565.

94. *Id.* at 574 (stating that even the "threat of dismissal from public employment is . . . a potent means of inhibiting speech" and could therefore violate the First Amendment (emphasis added)).

95. *Id.* at 571-72 (ruling that the statements in the letter were on matters of public concern because the letter criticized the school board's policy choices in allocating taxpayer funds).

96. *Id.* at 572-73 (finding that the letter did not impede the teacher's ability to perform his classroom duties or interfere with the normal operation of the school). The Court also noted that the teacher's "employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570.

97. *Id.* at 571-72.

98. *Id.* at 572.

99. 461 U.S. 138 (1983).

100. *Id.* at 146.

101. *Id.* at 147-48.

102. *Id.* at 146 (emphasis added) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.")

speech.¹⁰³ Finally, the Court noted that the state’s burden of proving the disruptive nature of the employee’s speech varies, depending on whether “the employee’s speech more substantially involved matters of public concern.”¹⁰⁴

Applying these principles, the *Connick* Court addressed whether an assistant district attorney’s First Amendment rights were violated when she was terminated for distributing an office survey.¹⁰⁵ The Court determined that most of the questionnaire addressed matters of personal interest regarding internal employment procedures rather than matters of public concern and that the speech was therefore unprotected.¹⁰⁶ The only portion of the questionnaire that the Court deemed related to a matter of public concern was a question regarding political campaigns.¹⁰⁷ On this question alone, the Court applied the *Pickering* balancing test and concluded that the disruptive time, place, and manner in which the questionnaire was distributed,¹⁰⁸ as well as the state’s interest in maintaining close working relationships, outweighed the employee’s interests, which were minimal because the questionnaire only touched on a matter of public concern in a limited sense.¹⁰⁹ The Court therefore concluded that the employee’s termination did not violate the First Amendment.¹¹⁰

*Garcetti v. Ceballos*¹¹¹ added the most recent piece to the public-employee-speech puzzle. The *Garcetti* Court limited the meaning of “citizen” as that term is used in the threshold step of the *Pickering-Connick* test. *Garcetti* held that when public employees speak “pursuant to their official duties,” they are not speaking as *citizens*; rather, they are speaking as *employees*, and therefore their employers are free to discipline them for that speech.¹¹² If a public employee is not speaking as a citizen, then that speech is not protected regardless of whether the speech implicates a matter of public concern,¹¹³ and the court does not reach the balancing test. Speech is considered as being pursuant to official duties when it “owes its

103. *Id.* at 152-53.

104. *Id.* at 152.

105. *Id.* at 141.

106. *Id.* at 148. The survey inquired into her colleagues’ opinions on internal office policy, supervisor job performance, office morale, and institutional pressure to support political campaigns. *Id.* at 141.

107. *Id.* at 149.

108. *Id.* at 153 (noting that “the questionnaire was prepared and distributed at the office[such that] the manner of distribution required not only [the employee] to leave her work, but for others to do the same in order that the questionnaire be completed”).

109. *Id.* at 154 (emphasizing that the questionnaire was primarily a personal grievance).

110. *Id.*

111. 547 U.S. 410 (2006).

112. *Id.* at 421.

113. *Id.*

existence to a public employee's professional responsibilities" or, in other words, when it is part of what the speaker was hired to do.¹¹⁴

In *Garcetti*, Deputy District Attorney Ceballos claimed that his employer retaliated against him after he recommended that a case be dismissed on the basis of purported governmental misconduct in obtaining a key warrant.¹¹⁵ The Court held that Ceballos's speech was not protected and explained that "the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos's case from those in which the First Amendment provides protection against discipline."¹¹⁶

D. "Liking" as Speech: *Bland v. Roberts and Three D, LLC*

Recently, social media, public employment, and the First Amendment collided in the *Bland* and *Three D* cases. In *Bland*, a federal district court in Virginia, in an employment-termination matter, decided that Liking something on Facebook does not constitute speech and, therefore, does not warrant First Amendment protection.¹¹⁷ Six former employees of the Hampton Sheriff's Office brought suit against the Sheriff for violating their First Amendment rights by terminating their employment when he won reelection.¹¹⁸ Each of the employees had supported the Sheriff's opponent, Jim Adams, in various public and private ways;¹¹⁹ they alleged that the Sheriff knew about their support and fired them in retaliation.¹²⁰

Specifically, plaintiff Carter had supported the Sheriff's opponent by Liking his Facebook Page.¹²¹ The court began its analysis of whether the online behavior was protected speech by looking at the Fourth Circuit's iteration of the *Pickering-Connick* test.¹²² As a threshold matter, however,

114. *Id.*

115. *Id.* at 413-15.

116. *Id.* at 421.

117. *Bland v. Roberts*, 857 F. Supp. 2d 599, 604 (E.D. Va. 2012).

118. *Id.* at 602.

119. *See id.* at 603-05 (describing various activities by which the six plaintiffs supported the Sheriff's opposition, including Facebook activity, bumper-sticker display, voting behavior, and private thoughts).

120. *Id.* at 602.

121. *Id.* at 603.

122. *Id.* *Bland* cited the test in *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998), in which the circuit court elaborated on the factors to be considered under *Pickering-Connick*. These factors include:

whether the employee's speech (1) impairs discipline by superiors; (2) impairs harmony among co-workers; (3) has a detrimental impact on close working relationships; (4) impedes the performance of the public employee's duties; (5) interferes with the operation of the agency; (6) undermines the mission of the agency; (7) is communicated to the public or to co-workers in private; (8) conflicts with the responsibilities of the

the activity needed to qualify as speech.¹²³ The court determined that merely Liking a Facebook Page is insufficient to be considered speech for First Amendment purposes because it is not “substantive.”¹²⁴ The lack of a substantive statement, in the court’s analysis, distinguished the matter at hand from other Facebook cases that involved more substantial activity.¹²⁵ The court also noted the difficulty of inferring what Carter’s Like actually meant.¹²⁶ For these reasons, the court declined to recognize his Like as speech and thus did not proceed to the *Pickering-Connick* analysis of whether it constituted protected speech under the First Amendment.¹²⁷

Only one other court has directly addressed the implications of Liking something on Facebook. In a recent NLRB decision by an ALJ,¹²⁸ terminated employees relied on the National Labor Relations Act of 1935 because, as private employees, they had no recourse under the First Amendment.¹²⁹ One of the employees had Liked his colleagues’ conversation thread on Facebook discussing their paychecks and suggesting that their boss had mishandled their tax filing.¹³⁰ He was subsequently fired.¹³¹ While this case addressed Section 7 of the National Labor Relations Act, which pertains specifically to freedom of association and other collective-bargaining rights,¹³² the ALJ’s analysis supports the idea that this conduct constituted speech by pointing out that Liking makes a “meaningful contribution to [a] discussion.”¹³³

employee within the agency; and (9) makes use of the authority and public accountability the employee’s role entails.

Id. (quoting *Rankin v. McPherson*, 483 U.S. 378 (1987)) (internal quotation marks omitted).

123. *Id.* (quoting *McVey*, 157 F.3d 271; citing *Rankin*, 483 U.S. 378).

124. *Id.* at 604.

125. *See id.* (noting that *Gresham v. City of Atlanta*, No. 1:10-CV-1301-RWS-CS, 2011 WL 4601022, at *2 (N.D. Ga. Aug. 29, 2011), and *Mattingly v. Milligan*, No. 4:11CV00215, 2011 WL 5184283, at *2-3 (E.D. Ark. Nov. 1, 2011), both involved textual statements rather than clicking activity).

126. *Id.*

127. *Id.* at 603.

128. *See Three D, LLC*, No. 34-CA-12915, 2012 WL 76862, at *1 (N.L.R.B. Jan. 3, 2012) (finding that the employment had been terminated as a result of the employees’ “protected concerted activities”).

129. *See* Melanie Trotman, *For Angry Employees, Legal Cover for Rants*, WALL ST. J., Dec. 2, 2011, <http://online.wsj.com/article/SB10001424052970203710704577049822809710332.html> (indicating that the National Labor Relations Act provides private employees with recourse for adverse employment actions). Constitutional protection only arises in the realm of state action. *See, e.g.*, U.S. CONST. amend. I (forbidding *Congress* from making laws that abridge the freedom of speech).

130. *Three D*, 2012 WL 76862, at *3-4.

131. *Id.* at *5.

132. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

133. *Three D*, 2012 WL 76862, at *9.

III. ANALYSIS

A. *Clicking “Like” on Facebook Constitutes Speech, Both as Pure Speech and as Symbolic Speech*

As the court in *Bland* correctly noted, in order for an act to be protected it must first constitute speech, either pure or symbolic. Otherwise, there is nothing to protect. The court, however, incorrectly found that Carter’s action was not speech because he made no substantive statement when he clicked Like. This conclusion ignores the critical point that clicking Like generates textual statements that are pure speech, or, alternatively, that clicking Like constitutes symbolic speech.

1. Clicking Like on Facebook Constitutes Pure Speech

As previously explained, Liking a Page on Facebook has multiple effects. By clicking Like, the user generates posts on the Liked Page, on the user’s Timeline, and in the user’s biographical information, as well as in other users’ News Feeds.¹³⁴ These posts are all textual statements.¹³⁵ When Carter Liked Adams’ campaign Page, he triggered several events on Facebook that textually conveyed his message of political support and endorsement. Carter caused the slogan “Jim Adams for Hampton Sheriff” and a picture of Adams to appear on Carter’s personal Profile Page.¹³⁶ Further, Carter triggered announcements on his friends’ News Feeds and on the Adams campaign Page stating that Carter Liked the campaign Page.¹³⁷ In this way, when users click Like, they announce to other Facebook users that they *like* whatever they have Liked.¹³⁸ The court in *Bland* distinguished Liking from other types of Facebook posts because the other posts involved “actual statements.”¹³⁹ This analysis missed the crucial generative aspect of clicking Like by ignoring the actual words that users produce when Liking a Page. The ALJ in *Three D*, however, recognized that clicking Like was not just an act, but an action that created a textual statement.¹⁴⁰ Under this correct analysis, clicking Like constitutes pure speech because it generates a textual statement.

134. See *supra* note 21 and accompanying text (describing the effects of Liking a Page).

135. See Ben Patterson, *What Happens When You “Like” Something on Facebook?*, HERE’S THE THING (July 1, 2011), <http://heresthethingblog.com/2011/07/01/facebook> (noting that a textual “blurb” is posted in various places on Facebook when a user clicks Like).

136. See *Facebook Brief*, *supra* note 14, at 7.

137. *Id.*

138. *What Does It Mean to “Like” Something?*, FACEBOOK, <https://www.facebook.com/help/110920455663362> (last visited June 9, 2013).

139. *Bland v. Roberts*, 857 F. Supp. 2d 599, 603-04 (E.D. Va. 2012).

140. *Three D*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Jan. 3, 2012).

2. Alternatively, Clicking Like Is Symbolic Speech

Even if clicking Like is not pure speech, it is symbolic speech because it satisfies the *Spence-Johnson* test.¹⁴¹ The act of clicking Like is “sufficiently imbued with elements of communication” because the user intends to convey a message, and there is a great likelihood that the message will be understood by its viewers.¹⁴² In *Bland*, Carter’s clicking Like constituted symbolic speech.

First, by Liking the Adams campaign Page, Carter intended to convey his support for the candidate.¹⁴³ Regardless of the method—clicking Like rather than writing an actual statement—the user is telling friends or even a larger group of Facebook users about his or her personal beliefs and opinions. When Carter Liked the Adams campaign Page, he was expressing his political opinions and his support for a particular candidate, a candidate who stands for certain policies and beliefs.¹⁴⁴ Clicking Like on the Page of a political candidate communicates a symbolic message of support, much like burning a flag or wearing an armband expresses solidarity with a political movement or ideal.¹⁴⁵ The Supreme Court in *Texas v. Johnson* acknowledged the expressive nature of such actions, maintaining that the First Amendment’s protection does not require spoken or written words.¹⁴⁶ The Court has found that various symbolic acts are akin to speech, including saluting a flag¹⁴⁷ and peaceably protesting.¹⁴⁸ Similarly, by clicking Like, Carter intended to convey a message of his support for Adams and Adams’ campaign objectives.¹⁴⁹

141. See *supra* text accompanying notes 41-45 (explaining that, under the *Spence-Johnson* test, conduct is considered speech for First Amendment purposes if there is (1) an intent to convey a particularized message, and (2) a great likelihood that the message would be understood by those encountering it).

142. See *supra* text accompanying notes 41-45.

143. See *Bland*, 857 F. Supp. 2d at 601 (citing Carter’s Complaint, which stated that the Sheriff had learned of Carter’s support for Adams via several actions by Carter, including the Liking of Adams’ campaign Page on Facebook).

144. See Eugene Volokh, *Is a Facebook “Like” Not “Substantive” Enough to “Warrant[] Constitutional Protection”?*, VOLOKH CONSPIRACY (Apr. 29, 2012, 12:56 PM), <http://www.volokh.com/2012/04/29/is-a-facebook-like-not-substantive-enough-to-warrant-constitutional-protection/> (“A Facebook ‘like’ is a means of conveying a message of support for the thing you’re liking. That’s the whole point of the ‘like’ button; that’s what people intend by clicking ‘like,’ and that’s what viewers will perceive.”).

145. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding that wearing armbands in schools constitutes protected speech).

146. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

147. See *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (“There is no doubt that . . . the flag salute is a form of utterance.”).

148. See *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (extending First Amendment protection to peaceable protestors gathered in a place where they had a right to be).

149. *Bland v. Roberts*, 857 F. Supp. 2d 599, 601 (E.D. Va. 2012).

Second, this message was likely to be understood by those who encountered it. Facebook users and the general public understand the meaning of Like.¹⁵⁰ In fact, Facebook users are so familiar with the Like button that it is clicked more than 300,000 times every minute.¹⁵¹ Just as flipping the middle finger—a commonly recognized and universally understood gesture that usually conveys a message of disdain or frustration—is within the purview of the First Amendment,¹⁵² so too is giving a thumbs-up. Whether used online or not, this symbol is widely employed and commonly perceived as a message of approval. But the court did not have to rely solely on the commonly understood message that clicking Like conveys; people who actually saw that Carter had Liked the Adams campaign Page testified that they understood the message’s meaning.¹⁵³ For example, former Deputy Sheriff McCoy testified that, after Carter Liked Adams’ campaign Page, “everybody was saying that [Carter was] out of there because he supported Adams openly.”¹⁵⁴ As demonstrated by the witness’s belief that Carter was endorsing the candidate by clicking Like on Adams’ campaign Page, Carter’s intended message was clearly conveyed and understood by those who viewed it.

Even if clicking Like is not a clear and articulable message under the *Spence-Johnson* test, it still meets the relaxed criteria set out in *Hurley*.¹⁵⁵ If Carter did not convey a clear or articulable message by clicking Like on Adams’ campaign Page, the Like at least conveyed some information about Carter’s thoughts, opinions, or beliefs.¹⁵⁶ Surely, the message was clearer than that of a Pollock painting, a Schönberg piece, or Lewis Carroll’s *Jabberwocky* poem—all of which constitute speech.¹⁵⁷

Additionally, there is a compelling public-policy reason to interpret

150. See Volokh, *supra* note 144 (explaining that, although Liking something does not send a highly detailed message, “the First Amendment protects speech even when the speech is not rich with logical argument, or is even vague or ambiguous”).

151. *One Minute on Facebook*, TIME, http://www.time.com/time/video/player/0,32068,711054024001_2037229,00.html (last visited June 9, 2013).

152. See Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1407, 1483-84 (2008) (arguing that using the middle-finger gesture deserves “stringent and steadfast First Amendment protection” as speech critical of the government).

153. *Facebook Brief*, *supra* note 14, at 16.

154. *Id.*

155. See *supra* text accompanying notes 50-52 (indicating that an activity may constitute speech under the First Amendment even if it does not convey a clear message and that an idea or message need not be original to be speech).

156. See Dominick Soar, *What Does It Really Mean to Like Something on Facebook?*, BRANDWATCH (Oct. 24, 2011), <http://www.brandwatch.com/2011/10/what-does-it-really-mean-to-like-something-on-facebook> (detailing some of the possible messages conveyed by clicking Like).

157. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (stating that these forms of expression were “unquestionably shielded”).

Liking as speech, either pure or symbolic, particularly in a political context. There is a strong analogy between Carter Liking Adams' campaign Page and political expression via residential campaign signs.¹⁵⁸ Social media has changed the landscape of political campaigns.¹⁵⁹ It has provided political candidates with a platform to share their ideas with others in an incredibly fast and cost-effective manner and has enabled these candidates to reach and garner support from much larger audiences.¹⁶⁰ Moreover, social media has enabled voters to become more involved in the political process.¹⁶¹ Clicking Like is simply a novel method of communication on the Internet that allows users to voice their opinions of and support for political candidates and ideas.

B. Sharing Content also Constitutes Speech

Sharing, just as Liking, constitutes speech under the First Amendment.¹⁶² A user Shares content by clicking a button on Facebook or by clicking a third-party's post-to-Facebook function.¹⁶³ A user on Facebook may Share photos, videos, websites, news articles, and any other available third-party content.¹⁶⁴ When the user Shares content, it appears on the user's Profile as well as on the News Feeds of the user's friends.¹⁶⁵

As long as the user, in distributing this content, intends to convey a message that would be understood by the target audience, Sharing

158. See *supra* notes 63-69 and accompanying text (emphasizing the strong First Amendment protection afforded to residential yard signs in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), because of they provide a unique opportunity for speech that is inexpensive and convenient).

159. See Sarah Amos, *Social Media Changes Politics in the U.S., Sparks Revolutions Around the World*, ABCNEWS (July 22, 2010), http://abcnews.go.com/WN/youtube-facebook-twitter-social-media-revolutionize-politics/story?id=11230480#UK_OG6WE-fQ (describing how social media can either help a candidate win a national campaign or destroy one in seconds); JD Rucker, *How Social Media Has Changed Political Campaigns*, SOSHABLE (Dec. 11, 2011), <http://soshable.com/social-media-political-campaigns/> (examining how social media has been used by presidential candidates and its impact on their campaigns).

160. See Traci Andrighetti, *6 Ways Facebook Has Changed Politics*, ABOUT.COM, <http://facebook.about.com/od/Advanced/tp/6-Ways-Facebook-Has-Changed-Politics.htm> (last visited June 9, 2013) (describing how Facebook has made politicians more accessible to the general public).

161. *Id.* (noting that campaign organizers use the public's feedback on candidates' Facebook Pages strategically to "target specific groups to rally new and existing supporters and raise funds").

162. Twitter's Retweet function and Pinterest's Repin function may also constitute speech, but a full analysis of those functions is beyond the scope of this Article. See *supra* note 25.

163. See *Sharing*, FACEBOOK, <https://www.facebook.com/help/418076994900119> (last visited June 9, 2013) (describing how to Share and how to control privacy when Sharing).

164. *Id.*

165. *Id.*

constitutes speech under the First Amendment. This analysis applies regardless of whether the content is original. In *Turner Broadcasting Systems, Inc. v. FCC*,¹⁶⁶ the Supreme Court found that the selection of programming by cable networks was considered speech, even though the networks had no hand in creating the content.¹⁶⁷ Moreover, in *Hurley*, the Court determined that including unwanted parade participants violated the parade organizer's speech rights because it forced the organizer to associate with a message it did not wish to convey.¹⁶⁸ Selecting what content to Share is akin to selecting programming or parade participants. Users can control the stories and posts with which they want to associate; each association sends a message about the user. Therefore, Sharing content on Facebook is a symbolic act that, like Liking, constitutes speech under the First Amendment.

C. *Speech Conveyed by Clicking "Like" and Similar Online Actions Can Be Protected Under the First Amendment*

In the public-employment context,¹⁶⁹ speech that meets the *Pickering-Connick* test is protected by the First Amendment. This test requires that the speech pertain to a matter of public concern and that the government's interest not outweigh the employee's speech interest.¹⁷⁰ Proper analysis of employee speech under *Pickering* and *Connick* is highly fact-specific and requires courts to thoroughly examine the circumstances of each case.

The *Bland* court engaged in only a cursory analysis in deciding whether Carter's clicking Like on Facebook was protected speech. The little analysis the court did perform was unclear at best. The court seemingly surmised that clicking Like is not speech at all—let alone protected speech—but its discussion was incomplete. The remainder of this Article outlines how the *Bland* court should have proceeded with its application of the *Pickering-Connick* test. The court should first have established that Liking constitutes speech under the First Amendment, thereby requiring it to perform a *Pickering-Connick* analysis. In applying this test, the court should have found that Carter spoke as a citizen on a matter of public concern and that Carter's interest outweighed the government's interest in this particular instance.

166. 512 U.S. 622 (1994).

167. *Id.* at 637.

168. 515 U.S. 557, 573-74 (1995).

169. Protection of Liking arises only in the realm of adverse *public-employer* action because First Amendment protection requires action by a government entity against an individual for his or her expressive activity. See *supra* Part II.C.3.

170. See *supra* text accompanying notes 82-84 (describing the *Pickering-Connick* test, including *Garcetti's* caveat for speech pursuant to official duties).

1. Carter’s Clicking “Like” Was Speech as a Citizen on a Matter of Public Concern

In order for Carter’s speech to be protected, he must have spoken as a citizen on a matter of public concern. Carter’s clicking Like on a political candidate’s Facebook Page constituted speech as a citizen because it was not pursuant to his official duties. Nothing in Carter’s responsibilities at the Sheriff’s office required him to Like any political candidates’ Facebook Pages. Such expressive activity is available to any member of the general public with access to the Internet and does not “owe its existence” to employment at the Sheriff’s office.¹⁷¹ Regular citizens not employed at the Sheriff’s office also Liked the candidates’ Pages; thus, voting or campaigning obviously is not contingent on employment at the Sheriff’s office.

Liking a political candidate’s Page touches on a matter of public concern, as an election certainly qualifies as a “legitimate news interest” and a “subject of general interest and . . . value” to the public.¹⁷² Carter engaged in online political speech that pertained to a local public election and was visible to his local community. Even though the network of people who could see his Facebook activity was presumably larger than just those people who could vote in the election, speech can be of general public concern—and thus protected—even if “a relatively small segment of the general public might be interested.”¹⁷³ By clicking Like, Carter was speaking as a citizen on a matter of public concern, and the *Bland* court should have proceeded to the next part of the *Pickering-Connick* analysis.

2. Carter’s Clicking “Like” Was Protected Speech Under *Pickering*

After determining that Carter’s Like was speech as a citizen on a matter of public concern, the court should have weighed Carter’s interest against that of the government.¹⁷⁴ Carter’s interest was significant because his speech concerned an election, and the “electoral process, of course, is the essence of our democracy.”¹⁷⁵ Also, Carter’s speech *substantially* involved a matter of public concern, requiring the Sheriff to meet a higher

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

172. *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004).

173. *Roe v. City of S.F.*, 109 F.3d 578, 585 (9th Cir. 1997); *Dishnow v. Sch. Dist.*, 77 F.3d 194, 197 (7th Cir. 1996).

174. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (holding that a public-school teacher’s interest in commenting on school board decisions outweighed the school district’s interest in suppressing that kind of commentary for the purpose of furthering efficient administration of the public-school system).

175. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 821 (1978).

burden when attempting to establish disruption.¹⁷⁶ The Sheriff's interest, however, was minimal because Carter's speech did not actually disrupt the office's operations based on the speech's context, time, place, and manner. Unlike handing out questionnaires at the office and asking coworkers to fill them out while they are on the clock,¹⁷⁷ clicking Like on Facebook is very unobtrusive and does not require the involvement of any other employees. Therefore, the Sheriff failed to meet his burden.

Carter's interest in expressing his campaign views weighs particularly heavily because political speech is afforded the highest protection from government intrusion.¹⁷⁸ Speech regarding public affairs goes beyond self-expression to the heart of self-governance.¹⁷⁹ Accordingly, the Supreme Court has acknowledged "that the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."¹⁸⁰

Further, little distinguishes Liking a politician's Facebook Page from similarly supporting a politician by displaying yard signs, which the Supreme Court has established is a traditional and well-protected form of political speech.¹⁸¹ As with yard signs, Liking a politician's campaign Page is an outward demonstration of support for the candidate that allows the displayer to take ownership of the support, making it more personal than other anonymous campaign signs.¹⁸² There is no adequate substitution for such a form of political speech.¹⁸³ That yard signs are tangible and external public expressions of support is insufficient to distinguish them from Liking a candidate on Facebook. If Carter had shown his support for the Sheriff's opponent by posting a sign in his front yard, his expression undoubtedly would have been protected.¹⁸⁴

Compared with Carter's interest, the Sheriff's interest was minimal. While Carter's public opposition could reduce the Sheriff's credibility in the eyes of his colleagues as well as the community, diminished credibility

176. See *Connick v. Myers*, 461 U.S. 138, 153 (1983).

177. *Id.* at 141.

178. *Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

179. *Burson v. Freeman*, 504 U.S. 191, 196 (1992).

180. *Id.* (citations and internal quotation marks omitted).

181. See *supra* notes 62-69 and accompanying text (discussing the speech components of showing political support through the display of yard signs).

182. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (affording heightened protection to yard signs because their location is unique in that it "provide[s] information about the identity of the 'speaker'").

183. See *id.* at 55 ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.").

184. *Id.* at 58 (invalidating a city's ban on nearly all residential signs).

alone would likely be insufficient to actually cause internal strife and discord.¹⁸⁵ No evidence suggests that Carter’s speech caused him or the other employees to perform their duties poorly. Instead, he was simply exercising his constitutional right to speak freely, especially on political matters. Therefore, Liking Adams’ campaign Page on Facebook was protected speech. The court should have held that clicking Like was an inappropriate reason for terminating Carter’s employment.

CONCLUSION

In light of the continuing expansion of social media, the current legal framework must adapt to accommodate increased online activity. Technological innovation in the past decade has created new forms of speech not previously contemplated by lawmakers and courts—including the Like and Share functions on Facebook. These emerging forms of social-media expression constitute speech under the First Amendment tests promulgated over the years by the Supreme Court. Additionally, many instances of online speech should be protected, as people often use these mediums to engage in political expression and to comment on matters of public concern. In the public-employment context, an employee’s speech, when made as a citizen on matters of public concern, will be protected by the First Amendment if the employee’s interest outweighs the government’s interest. When such speech does not disrupt the workplace, it should be protected.

The court in *Bland*, however, incorrectly found that Liking was not substantive enough to constitute protected speech. If other courts follow *Bland*’s approach and deem Liking and similar online activities to be outside the scope of the First Amendment, then individuals’ speech will be censored and chilled in ways not contemplated by the Framers of the Constitution. Courts should focus on the extensive generative aspects of clicking Like, find that it is speech that must be protected, and bring their First Amendment jurisprudence into the twenty-first century.

185. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570-71 (1968) (acknowledging that, if there had been “controversy and conflict,” the government’s interest would have been stronger).