PUBLIC EMPLOYEES' FREE SPEECH RIGHTS: *CONNICK V. MYERS* UPSETS THE DELICATE *PICKERING* BALANCE

INTRODUCTION

Does the Constitution protect public[1] employees from employer retaliation for exercising their free speech rights?[2] In the 1968 case of *Pickering v. Board of Education*,[3] the Supreme Court developed a balancing test[4] to be applied to cases in which a public employee alleges that she was discharged or otherwise disciplined because she exercised her first amendment right to speak. *Connick v. Myers*,[5] the most recent case applying the *Pickering* doctrine, vests employers with considerable discretion to penalize employees whose speech they feel will disrupt the functioning of the office. In holding that an employee will be protected against adverse employment decisions only if her speech involves matters of "public concern,"[6] the *Connick* Court has departed from its traditional position that only certain narrowly defined categories of speech, such as libel, obscenity, child pornography, and "fighting words," are outside the protection of the first amendment.[7]

Connick sets a dangerous precedent because it exaggerates the limited importance of the employer's judgment with regard to the constitutional right

1. The scope of this Note is confined to actions arising out of employment relationships in the public sector, for only these situations involve the "state action" necessary for a federal claim under 42 U.S.C. § 1983 (1979). It should be noted that many employees in the private sector are still subject to the employment-at-will rule, under which they are not protected against speech related discipline of any kind. See, e.g., Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

2. The coverage of this Note extends to cases employing the analysis in Pickering v. Board of Educ., 391 U.S. 563 (1968), to adjudicate public employee claims under the first amendment. Other cases relevant to the constitutional status of public employment include those testing the validity of political patronage dismissals, see, e.g., Branti v. Finkel, 445 U.S. 507 (1980), Elrod v. Burns, 427 U.S. 347 (1976); those examining claims to a protected property interest in a job under the fourteenth amendment, and the accompanying procedural due process issues, see, e.g., Arnett v. Kennedy, 416 U.S. 134 (1974), Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); and those challenging statutes placing limitations on the constitutional rights of public employees on vagueness and overbreadth grounds, see, e.g., *Arnett*, 416 U.S. 134, Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

This Note does not discuss protection of public employees' free speech rights under state constitutions and statutes.

3. 391 U.S. 563 (1968).

4. See text accompanying note 22 infra.

5. 461 U.S. 138 (1983).

6. Id. at 143.

7. See, e.g., New York v. Ferber, 458 U.S. 747, 754 (1982), but see Connick v. Myers, 461 U.S. 138, 144 (1983) (noting that the court has only recently held public employee speech protected by the first amendment). See also note 8 infra.

of free speech. The opinion also highlights the inadequacy of the *Pickering* balancing test as a means of securing values central to the first amendment.

This Note uses the *Connick* case as a framework for a critical examination of the *Pickering* test. Part I summarizes the evolution of jurisprudence in this area, the factual background of *Connick*, and the reasoning the court employed in reaching its decision. Part II examines each branch of the *Pickering* inquiry separately, using *Connick* and other important cases to illustrate the test and its negative impact on public employees' first amendment rights. Finally, Part III suggests ways in which the existing adjudicatory standard might be refined to better serve the purpose of protecting the public employee's right to speak freely without fear of retaliation.

I
BACKGROUND

A. Summary of the Law

Until the 1950's, public employees had to accept virtually all conditions placed on the terms of their employment, including limitations of constitutional rights.[8] Public employees' constitutional rights first gained recognition in a series of cases in which the Supreme Court struck down statutes designed to suppress public employees' rights of political speech and association.

A number of these cases examined the constitutionality of requiring public employees, as a condition of employment, to sign "loyalty oaths" denying past or present membership in the Communist party and other "subversive" organizations. In a seminal case, *Weiman v. Updegraff*,[9] the Court established that the state could not deny employment to persons "solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged."[10] In subsequent cases, the Court struck down, on vagueness and overbreadth grounds, loyalty oath statutes that proscribed only knowing membership in "subversive" groups.[11]

In addition to invalidating loyalty oaths, the Court struck down an Arkansas statute requiring teachers to sign an affidavit listing all organizations to which they had belonged or contributed in the previous five years,[12] and struck down a New York City ordinance that denied a public employee the right to invoke the self-incrimination privilege in response to questions concerning subversive activities.[13]

8. See, e.g., Adler v. Board of Educ., 342 U.S. 485, 492 (1952). This principle was set forth by Justice Holmes in his familiar edict in McAulliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892): "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." 155 Mass. at 220, 29 N.E. at 517.

9. 344 U.S. 183 (1952).

10. Id. at 190.

11. Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

12. Shelton v. Tucker, 364 U.S. 479 (1960).

13. Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). But cf. Lerner v. Casey,

The Court's changing attitude toward the state's ability to place conditions on public benefits was strongly asserted in *Sherbert v. Verner*,[14] a case construing the free exercise clause of the first amendment. The plaintiff was a Seventh Day Adventist who had been denied unemployment compensation because she refused to take a job requiring her to work on her Sabbath. In an opinion striking down the regulation as an impermissible limitation on religious freedom, Justice Brennan wrote that "the liberties of religion and expression may [not] be infringed by the denial of or placing of conditions upon a benefit or privilege."[15] *Sherbert* is important in the context of public employee free speech cases because it mandates a higher degree of protection for all forms of first amendment expression than *Connick*.

The Court's first unequivocal statement that constitutional rights attach to public employment came in *Keyishian v. Board of Regents*.[16] In nullifying a New York statute requiring teachers to deny membership in subversive organizations,[17] Justice Brennan concluded that prior cases had rejected the theory that public employment may be subjected to conditions that place limitations on the exercise of constitutional rights.[18]

The milestone case of *Pickering v. Board of Education*[19] arose from the dismissal of a teacher who had written a letter to a local paper criticizing the Board of Education's allocation of social funds between athletics and education. The Court held the dismissal to be unconstitutional under the First Amendment.[20] Justice Marshall, writing for the Court, set out the guidelines that have since been applied in hundreds of challenges to speech related dismissals:[21]

> The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[22]

Justice Marshall's analysis listed several factors to be considered in evaluating the employer's claim that the disciplinary action was necessary to pre-

357 U.S. 468 (1958) (failure to respond to job-related question created reasonable doubt as to employee's reliability, thus discharge was justified).

14. 374 U.S. 398 (1963).

15. Id. at 404.

16. 385 U.S. 589 (1967).

17. The same statute was before the Court in *Adler*, 342 U.S. 485; see note 8 supra.

18. *Keyishian*, 385 U.S. at 605-06.

19. 391 U.S. 563 (1968).

20. Id. at 565.

21. In *Pickering*, Justice Marshall referred almost exclusively to teachers and did not state explicitly that the holding was meant to extend to other categories of public employment. Nevertheless, the Court has never doubted the wisdom of using the *Pickering* criteria to test the validity of all public employee dismissals.

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

serve the efficiency of the services performed by the agency.[23] These include whether the statements were directed toward a person with whom the speaker "would normally be in contact in the course of his daily work";[24] whether "discipline by immediate superiors or harmony among coworkers" was threatened by the speech;[25] whether "close working relationships" requiring "personal loyalty and confidence" were at stake;[26] and whether the employee's action "impeded . . . the proper performance of his daily duties" or "interfered with the regular operation of the [office] generally."[27]

The factors set out in *Pickering* give rise to an important dichotomy. When they are absent, as in *Pickering*, the public employer has no more interest in regulating the speech than it would in regulating a similar communication by the general public, and the employee should prevail.[28] However, where some or all of these factors are present, the speech bears upon the role of the employee *qua* employee, and the state's interest in curtailing the speech will come into play.

Two post-*Pickering* decisions refined the adjudicatory standard to its present state. In *Mt. Healthy City School District Board of Education v. Doyle*,[29] the Court held that when a plaintiff demonstrates that she had engaged in constitutionally protected conduct and that the conduct was a substantial factor behind an employer's disciplinary action, the employer can escape liability by showing that it would have taken the same action even in the absence of the plaintiff's protected activity.[30]

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23. Id. at 568-73.

24. Id. at 569-70.

25. Id. at 570.

26. Id.

27. Id. at 572-73.

28. See id. at 574. See also Hurst v. United States Postal Serv., 491 F. Supp. 870, 872-73 (W.D. Mo. 1980) (postal employee protected in writing an insulting letter to the President), rev'd. on other grounds, 586 F.2d 1197 (8th Cir. 1978). Despite this fundamental principle of *Pickering*, the public employee's right to speak as a member of the general public has not been uniformly protected. For example, in Byrd v. Gain, 558 F.2d 553 (4th Cir. 1977), cert. denied, 434 U.S. 1087 (1978), plaintiffs were police officers who issued public statements criticizing the Department's use of "stop and frisk" tactics on blacks. The court held that the officers could constitutionally be reprimanded but did not address the question of whether these statements in any way impaired the officers' ability to perform their duties. Cf. *Letter Carriers*, 413 U.S. at 564 (Hatch Act provisions, prohibiting federal employees from taking part in political campaigns, held a permissible limitation on the employees' free speech rights under *Pickering*).

29. 429 U.S. 274 (1977).

30. Id. at 287. *Mt. Healthy* involved the dismissal of a teacher who had taken several actions offensive to the school board, among them relaying to the local radio station that the school had adopted a teacher dress code. On remand, 670 F.2d 59 (6th Cir. 1982), the court held that the board had successfully established that the teacher would have been dismissed on the basis of his non-speech related activity alone.

Because the district court in *Connick* had made a factual finding that Myers's discharge was actually motivated by her distribution of the questionnaire and not her reluctance to accept a transfer, the "*Mt. Healthy* defense" was not available to the defendant. 461 U.S. at 141.

For a critique of the *Mt. Healthy* defense, see Note, Free Speech and the Impermissible Motive in Dismissal of Public Employees, 89 Yale L.J. 376 (1979).

In *Givhan v. Western Line Consolidated School District*,[31] the Court broadened the sphere of protected speech to encompass private communication between an employee and her supervisor. This development was crucial; if public employees' rights of free speech extended only to public forums, only the boldest critics would be protected.[32] *Givhan* further established that "when a government employee personally confronts his immediate supervisor," the time, place and manner in which the employee spoke are relevant to the *Pickering* balance.[33]

B. The Connick Case

Sheila Myers served for five and a half years as an Assistant District Attorney in New Orleans.[34] In October 1980, Myers learned that she would be transferred to another division of the criminal court. She expressed her opposition to the transfer to several of her supervisors, including District Attorney Harry Connick.[35] Myers also prepared a questionnaire, which she distributed primarily during lunch hours to fifteen assistant district attorneys.[36] The questionnaire concerned office morale and transfer policy, the level of confidence in supervisors, and pressure on employees to work on political campaigns. Connick discharged Myers that same day, explaining that Myers had refused to accept the transfer and that her distribution of the questionnaire was an "act of insubordination."[37]

Myers filed suit under 42 U.S.C. § 1983 claiming that she was fired, not for refusing to accept a transfer, but for exercising her constitutionally protected right of free speech. The district court found that Myers's speech was protected because "the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern."[38] The government's burden, according to the court, was to "clearly demonstrate that [Myers's] conduct substantially interfere[d]" with her official responsibilitites.[39] The court went on to hold in Myers's favor due to the state's failure to show that its interests as set forth in *Pickering* were "either adversely affected or substantially impeded" by Myers's questionnaire.[40]

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31. 439 U.S. 410 (1979).

32. See Egger v. Philips, 710 F.2d 292, 314 n.26 (7th Cir. 1983), cert. denied, 104 S. Ct. 284 (1983). For example, in *Connick*, Myers chose the more discreet route of communicating her dissatisfaction with the way the office was run to her supervisors and coworkers, electing not to create a debate outside the office.

33. 439 U.S. at 415 n.4.

34. *Connick*, 461 U.S. at 140.

35. Id.

36. Id. at 141.

37. Id. See also note 30 supra.

38. Myers v. Connick, 507 F. Supp. 752, 758 (E. D. La.), aff'd, 654 F.2d 719 (5th Cir. 1981), rev'd, 461 U.S. 138 (1983).

39. Id. (quoting Schneider v. City of Atlanta, 628 F.2d 915, 919 (5th Cir. 1980).

40. Id. at 759.

The Court of Appeals for the Fifth Circuit affirmed in a unanimous decision.[41] The Supreme Court, in a decision written by Justice White over four dissenting votes, reversed.[42]

The issues before the Supreme Court were whether Myers's questionnaire was a matter of public concern or an internal employee grievance not entitled to first amendment protection, and whether the district court had imposed an unduly stringent burden on the state once it had found Myers's speech to be protected.

Justice White observed that in order for an employee's speech to be protected, *Pickering* called for a threshold finding by the court that the content of the speech was "of public concern":

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[43]

The reviewing court may determine the protected status of the expression as a matter of law,[44] giving consideration to "the content, form, and context of a given statement, as revealed by the whole record."[45]

The *Connick* majority went on to hold that the portions of Myers's questionnaire dealing with coworker morale and confidence and the need for a grievance committee were not matters "of public import in evaluating the performance of the District Attorney as an elected official."[46] Rather, these questions reflected "one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre."[47]

However, the issue the questionnaire raised as to whether employees felt pressured to work on political campaigns on behalf of office sponsored candidates was, in the Court's opinion, a matter of public concern.[48] Consequently, the Court's duty under *Pickering* was to weigh the competing interests of Myers to solicit information of significance to the community, and of Connick, as her supervisor, to promote efficiency in the office.

In its analysis, the Court evaluated the substantiality of the public concern implicit in Myers's speech, the manner, time and place in which the questionnarie was distributed, and most prominently, "the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[49] The

41. 654 F.2d 719 (5th Cir. 1981).
42. *Connick,* 461 U.S. 138.
43. Id. at 147. See text accompanying notes 59-64 infra.
44. *Connick,* 461 U.S. at 148 n.7.
45. Id. at 147-48.
46. Id. at 148.
47. Id.
48. Id. at 149.
49. Id. at 150.

majority held that the question involving pressure to work on political campaigns was not of "substantial" concern to the public; hence the state's burden in justifying the discharge was reduced.[50] Since Myers's questionnaire had the potential to undermine close working relationships, required her and her coworkers to use office time to prepare and distribute it, and arose in the context of Myers's ongoing dispute with Connick, the discharge was justifiable as an attempt to preserve the orderly functioning of the office.[51]

In his dissent, Justice Brennan pointed to three errors in the majority's reasoning. First, the Court should not have considered the context in which Myers solicited her coworkers' views as a part of the initial inquiry into whether the speech was entitled to first amendment protection. Rather, it should have restricted this consideration to its office efficiency.[52]

Second, Brennan thought that the decision "impermissibly narrow[ed] the class of subjects on which public employees may speak out without fear of retaliatory dismissal."[53] He cited numerous Supreme Court precedents upholding the essential function of the first amendment in protecting the right of citizens to make reasoned decisions about the way government functions.[54] Brennan argued that the portions of Myers's questionnaire concerning office morale and transfer policy would be "of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney . . . discharges his responsibilities."[55] He thus would have held the entire questionnaire to be of public concern and entitled to constitutional protection under *Pickering*.[56]

Finally, Brennan insisted that the Court should have required a more substantial showing of actual disruption of the functioning of the District Attorney's office as a justification for Myers's dismissal.[57] The district court found that the questionnaire did not impair Myers's working relationship with her supervisors, nor did it adversely affect the quality of public services performed by the office.[58] Consequently, Brennan argued, the Court should not have approved an action based solely upon Connick's belief that the distribution of the questionnaire would undermine his authority.

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50. Id. at 150-52.
51. Id. at 154.
52. Id. at 157-58. (Brennan, J., dissenting).
53. Id. at 158 (Brennan, J., dissenting).
54. Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Cohen v. California, 403 U.S. 15 (1971); Garrison v. Louisiana, 379 U.S. 64 (1965); Mills v. Alabama, 384 U.S. 214 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Stromberg v. California, 283 U.S. 359 (1931).
55. *Connick*, 461 U.S. at 163 (Brennan, J., dissenting).
56. Id.
57. Id. at 166-69 (Brennan, J., dissenting).
58. 507 F. Supp. at 759, noted in, *Connick*, 461 U.S. at 167-68.

II
THE *PICKERING* TEST IN OPERATION

A. The First Branch of the Inquiry: What Constitutes Speech of Public Concern?

In *Connick*, the Court stated emphatically that while the first amendment protects all kinds of speech, a public employee suffering speech-related discipline will be protected only to the extent that her speech concerned matters of public concern.[59] The Court puts forth this proposition as an inevitable reading of "*Pickering*, its antecedents and progeny."[60] However, *Pickering* does not compel this conclusion, and the Court has never fully explicated the reasoning behind it.

In *Pickering*, the Court assumed without discussion that Pickering's criticisms of the school board fell within the realm of public concern. Thus, the *Pickering* test applies only to speech on subjects of public concern because speech outside that category was not presented by the facts of the case.[61] Justice Marshall's opinion in *Pickering* did not require a court to subject the content of the expression to rigorous scrutiny to determine if it met any threshold level of relevance; nor did it speak to what protections, if any, would attach to speech by public employees on purely private matters.[62]

Connick implies that Myers's criticisms of the District Attorney, deemed unprotected in her questionnaire, would be protected by the first amendment in an action against her for libel.[63] A logical extension of this principle would be that a state could discharge one of its employees for making critical statements about her superiors, if those statements were not of public concern,

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59. *Connick*, 461 U.S. at 144-46. Justice Brennan took issue with this conclusion in his dissent:

> To the extent that the Court's opinion may be read to suggest that the dismissal of a public employee for speech unrelated to a subject of public interest does not implicate First Amendment interests, I disagree, because our cases establish that public employees enjoy the full range of First Amendment rights guaranteed to members of the general public.

Id. at 157. Justice Brennan may have been referring to language contained in prior Court decisions concerning the first amendment rights of public employees in the context of administration of collective bargaining agreements, see Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977).

The only other form of expression which must rise to a threshold of social value before attaining constitutionally protected status is commercial speech. Under the test set forth in Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980), commercial speech will come within the first amendment if it concerns lawful activity and is not misleading. 447 U.S. at 563.

60. *Connick*, 461 U.S. at 146.

61. See The Supreme Court, 1982 Term, 97 Harv. L. Rev. 164, 167 (1983).

62. Perhaps the reason why no such protections have been developed is that the state has convinced the courts to grant it a sphere of autonomy in which it may act without judicial oversight. This sphere may have been designated as speech on matters of private concern because, under such a standard, the risk of imprudent personnel decisions would fall more on the individual than on the public at large.

63. *Connick*, 461 U.S. at 147.

although it could not enact a law prohibiting that employee from making those identical statements.

It is unjust that public employees may risk their job security for speech that could not be the basis for other adverse state action. *Pickering* justified this principle in suggesting that "the state has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[64] It is true that the quality of services performed by government agencies surely would be hampered if supervisors could not discipline employees for speech that injures others and has no useful content. The existing standard, however, would permit public employee speech outside this category to serve as a basis for retaliatory action in certain cases. An example is Myers's questionnarie in *Connick*, which had a useful content and was not malicious. The state has no interest in regulating speech outside this category, whether or not it arises in the course of public employment, which outweighs the vital liberty interest established by the first amendment. If a line must be drawn between protected and unprotected speech, the distinction drawn in *Connick* between issues of public and private concern excludes much worthy speech from first amendment protection. The purpose behind the public concern inquiry, according to Justice White, is to separate speech on public affairs from speech on matters of purely personal importance.[65] However, it has long been established that "the first amendment does not protect speech and assembly only to the extent that it can be characterized as political."[66] The public concern ignores this principle by excluding non-political speech by public employees from protection. Prior cases treated the public concern inquiry as an examination of the content of a given statement. For example, in *Givhan*, the plaintiff's complaints to her supervisor about racially discriminatory policies at the school at which she taught were protected, even though these complaints were aired in private and could not have led to a public debate.[67]

The *Connick* court, however, viewed public concern to be a function of the timing of the expression, the person making it, and the forum in which it was made. The Court held that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[68] Taking the circumstances surrounding the questionnaire into account, Justice White concluded that while the material in Myers's questionnaire might be of public

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

65. See *Connick*, 461 U.S. at 147.

66. Id., quoting United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967).

67. *Givhan*, 439 U.S. at 415-16. The majority in *Connick* distinguished *Givhan* on the grounds that racial discrimination is "a matter inherently of public concern." 461 U.S. at 148 n. 8. The Court does not discuss how expression which is of public concern due to the context in which it is made is to be distinguished from speech "inherently of public concern." See 461 U.S. at 159-60 (Brennan, J., dissenting).

68. *Connick*, 461 U.S. at 147-48.

concern if aired under different circumstances, "[that] does not answer whether *this* questionnaire is [worthy of protection.]"[69]

An announcement that morale in the local district attorney's office was low, that the employees did not trust one another, and that they were unsatisfied with the employment policies governing the office would be of public concern if published in a newspaper.[70] Moreover, such an article would be of no less concern to the public than a similar article on the subject that the *Connick* majority did deem to be of public concern — official pressure to work on political campaigns. The entire questionnaire, then, was worthy of protection because its content was useful and had the potential to be significant to the public. Yet, the court framed the public concern inquiry to deny protection to most of Myers's speech because of its context. If "speech on matters of public concern" is to have the same meaning for public employees that it has for others, the focus of the first branch of the *Pickering* test should be on content, not context.

Even if public employee speech must rise to a certain level of public concern to be protected by the first amendment, the impact on an employee's free speech rights will ultimately depend upon how rigid the public concern threshold is. The courts should have only limited discretion in this area, lest employers convince them to deny protection on public concern grounds to expression that does not threaten the government employer.[71]

The *Connick* decision places an unreasonably heavy burden upon employees seeking to establish that their speech was of public concern. Read narrowly, *Connick* holds that an employee's solicitation of opinions on the employment policies governing her office, regardless of how pertinent these opinions are to the morale and performance of her coworkers, is not a matter of public concern.[72] This conclusion is dubious. As Justice Brennan stressed in his dissent, the public has a significant interest in "the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end."[73] In evaluating the state's justification for dis-

69. Id. at 149 n.8. If indeed speech on a given issue becomes of public concern because of the circumstances surrounding the expression, it is hard to see why the inquiry should be made as a matter of law, see 461 U.S. at 148 n.7, and not as a matter of fact for the district court to determine.

70. For an excellent discussion of the relation of "newsworthiness" to the concept of public concern, see Egger v. Phillips, 710 F.2d 292, 316-17 (7th Cir. 1983). See also Emerson, The System of Freedom of Expression 553-54 (1970); The Supreme Court, 1982 Term, supra note 61, at 171-72.

71. In his *Connick* dissent, Justice Brennan noted that in defamation suits, the Court had abandoned the "general or public interest" standard for determining whether a publication is privileged. 461 U.S. at 164. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Court in *Gertz* recognized the danger of commiting the determination of what constitutes "general or public interest . . . to the conscience of judges." 418 U.S. at 346.

72. This holding seems to be in conflict with prior cases establishing the right of public employees to comment upon employment policies in the context of collective bargaining agreements. See *Abood*, 431 U.S. at 230.

73. *Connick*, 461 U.S. at 165 (Brennan, J., dissenting).

charging Myers, the Court noted that failure to remove an unsatisfactory employee can lead to reduced morale in the workplace.[74] The implication is that while the government employer has an interest in maintaining morale, the employee will not be protected for commenting upon the level of morale in her office.

The broader implications of the distinctions drawn in *Connick* between issues of public concern and private employment disputes are also disturbing. In general, federal courts faced with free speech claims arising out of disputes over employee policy will be compelled to hold the speech unprotected.[75] Employers will successfully argue that the form and context in which otherwise useful speech was delivered should bring the speech outside the ambit of public concern.[76] Finally, a public concern requirement may frustrate the first amendment's essential purpose of protecting unpopular and minority views.[77]

B. The Second Branch of the Inquiry: What is the Nature of the State Interest?

Unlike the employee's interest in free speech, the state's interest in promoting the efficiency of its public services is not explicitly protected by the Constitution.[78] Because public employee speech cases involve first amendment rights, the state interest in attaching a penalty to the exercise of these

74. Id. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974)).

75. See Landrum v. Eastern Ky. Univ., 578 F. Supp. 241, 247 (E.D. Ky. 1984):

> In frankness, the court must state that it reads *Connick* as deliberately intended to narrow the scope of [Perry v. Sindermann, *Mt. Healthy* and *Givhan*], even though they were not expressly overruled. A careful study of all these decisions leads to the inevitable conclusion that the First Amendment in the employment context is now to be more narrowly interpreted to give greater scope to the legitimate rights of governmental entities as employers, and also to reduce the burdens on the courts caused by the burgeoning of litigation initiated by the decisions upon which plaintiff relies here.

See also Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983), cert. denied, 104 S. Ct 709 (1984). In *Boyd*, the Court held that under the principles announced in *Connick*, a memorandum from a naval employee to his superiors opposing a planned training program was not entitled to first amendment protection. But see McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983). In upholding the claim of a probationary police officer who was dismissed for publicly criticizing the city's compensation policy, the court held that "the way in which an elected official or his appointed surrogates deal with diverse and sometimes opposing viewpoints from within government is an important attribute of public service about which the members of society are entitled to know." 705 F.2d at 1115.

76. See text accompanying notes 65-69 supra. Of course, the public concern inquiry may aid the plaintiff in certain circumstances. In Brown v. Department of Transportation, Federal Aviation Admin., 735 F.2d 543 (D.C. Cir. 1984), the court found the plaintiff's job-related remarks to his coworkers to be of public concern because they arose in the context of a highly publicized nationwide strike. Id. at 546.

77. See Emerson, supra note 70, at 554.

78. The tenth amendment guarantees the states some autonomy in determining state employee policy. See National League of Cities v. Usery, 426 U.S. 833 (1976). However, the constitutional interest in *Usery* operated only as a limitation on Congress's power under the Commerce Clause. 426 U.S. at 841. Elsewhere, the Court has stated that the "efficacious administration of governmental programs" must yield to other constitutional values. Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (sex discrimination).

rights should be compelling.[79] Unfortunately, the courts have made little attempt to define this compelling governmental interest [80] or to determine what weight to give this interest in constitutional adjudication.

The precise character of the state interest in curtailing public employee speech is hard to distill from the list of factors set forth in *Pickering*.[81] There can be no question that harmony, discipline, and the orderly performance of delegated tasks are all necessary to a well functioning public office. But the need for harmony in the workplace has not stopped Congress and the courts from ensuring that basic constitutional values are protected in the workplace.[82] For example, the state's interest in workplace harmony would almost never be sufficiently compelling to justify a violation of equal protection.[83] Therefore, the need for harmony in the office should not justify an employer's infringement of first amendment rights.

The factors set forth in *Pickering* are not important in themselves; they are only means to the greater end of providing high quality public service. It is unlikely that a government employer would resort to discharging an employee if she did not perceive that the efficiency of her office, or her authority over her employees was threatened to some degree by the employee's speech. Thus, the great majority of public employee dismissal cases will involve speech causing some degree of disruption. But a finding of disruption should only begin the inquiry, the proper objective should be to determine whether the quality of public services offered by the public entity actually suffered as a result of the employee's speech. Courts placing undue emphasis on *Pickering* factors will be compelled to accept self-serving declarations by employers that harmony in the office had been disrupted.

Employees in poorly managed public offices will often speak out to persuade others to help improve the quality of services provided by the office. Such is the case with the "whistleblower" who seeks to expose fraud or corruption in agencies supported by public funds. The public interest in exposing such abuses of power is, of course, substantial; indeed, both federal and state statutes have been enacted to protect whistleblowers from employer retaliation.[84] On the other side of the balance, there is no legitimate state interest in

79. See Henrico Professional Firefighters Ass'n, Local 1568 v. Board of Supervisors, 649 F.2d 237, 243 (4th Cir. 1981); see also text accompanying notes 164-67 infra.

80. See *Arnett*, 416 U.S. at 230 n.32 (Marshall, J., dissenting) (arguing that the standards for removal of nonprobationary federal employees under 5 U.S.C. § 7501(a) were vague and overbroad).

81. See text accompanying notes 23-27 supra.

82. The most prominent example of congressional intent to place constitutional limitations on employers is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

83. Since the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, charges of workplace discrimination have rarely been based on the Equal Protection clause. Note, however, Lee v. Washington, 390 U.S. 333 (1968), holding racial segregation in prisons is unconstitutional. The Court was unpersuaded by the state's argument that the "necessities of prison security and discipline" justified segregation of the prisons. Id. at 334.

84. The principal federal provision is 5 U.S.C. § 2302(b)(8) (1982). For an analogous state provision, see Cal. Gov. Code § 10543 (West 1984).

inhibiting speech that implicates public officials in wrongdoing. Hence, in the absence of statutory protection, the public employee who suffers dismissal for exposing waste and mismanagement should prevail in a first amendment claim.[85] Nevertheless, the likely impact of a whistleblower's speech on the factors enunciated in *Pickering*—harmony, discipline, and proper performance of duties—might well persuade a court that the employee had disrupted the smooth functioning of the office to a degree outweighing her right to speak freely.[86] Thus, claims by whistleblowers will be recognized only by courts willing to look beyond the *Pickering* factors, to the real interest these factors were intended to promote.[87]

Because the plaintiff in *Pickering* spoke as a citizen and not as an employee, the Court had no occasion to test the impact of these considerations upon the plaintiff's free speech rights. As with the question of the public concern in the subject matter of Pickering's letter, the Court did not intimate how it would resolve a case in which the facts were not so strongly in the plaintiff's favor.[88] Subsequent decisions would ascertain the nature of the state interest at stake, and evaluate the respective weights of the factors listed and the first

85. See *Hughes*, 714 F.2d at 1423 (employee's first amendment interest is stronger when he acts as a whistleblower); Rookard v. Health and Hosps. Corp., 710 F.2d 41, 46 (2d Cir. 1983); Williams v. Board of Regents, 629 F.2d 993, 1002-04 (5th Cir. 1980) (allegations of corruption are of public concern), cert. denied, 452 U.S. 926 (1981).

86. For example, in Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), cert. denied, 431 U.S. 937 (1977), the plaintiff was a first assistant district attorney, who had publicly challenged the District Attorney's denials of a conflict of interest in prosecution. The court, giving no consideration to the public's right to be informed of possible corruption in the District Attorney's office, held that plaintiff's dismissal did not violate the first amendment, because his action undermined the close working relationship between him and his supervisor. 546 F.2d at 565-66. The Third Circuit has recently distinguished *Sprague* and offered a more reasoned analysis of the problem of constitutional protection for whistleblowers. See Czurlanis v. Albanese, 721 F.2d 98, 107 (3d Cir. 1983) (disruption of workplace must be balanced with other factors, including the nature of the employee's speech).

A more difficult question is presented when an employee protests corruption by refusing to obey orders which she believes will involve her in conduct that is unlawful or against public policy. One court has held that such a protest does not constitute protected speech. See Berry v. Bailey, 726 F.2d 670, 676 (11th Cir. 1984).

87. The "whistleblower" idea is also relevant to the *Connick* case. Plantiff Myers protested that people in her office were pressured to work on political campaigns. 461 U.S. at 141. The Louisiana Constitution, art. 10, § 9, contains a prohibition against official coercion of public employees to take part in partisan politics. The same policy underlies the restrictions placed on federal employees under the Hatch Act, 5 U.S.C. § 7322 (1982). Clearly then, the speech for which Myers was dismissed drew attention to an unlawful practice by her supervisors.

88. *Pickering*, 391 U.S. at 570 n.3. Justice Marshall plainly intended to reserve judgment on what impact, if any, these mitigating circumstances would have on the employee's free speech rights. See *Arnett*, 416 U.S. at 204 (Douglas, J., dissenting). The Court did not hold that the presence of these factors would definitely swing the balance in favor of the employer.

Professor Emerson has suggested that the Court in *Pickering* might have avoided the "dangerous territory" of balancing by basing its holding on the fact that Pickering's speech was unconnected with his employment, rather than arriving at that conclusion through a process of balancing. Emerson, supra note 70, at 581.

amendment rights of the employee.[89]

Of all the factors set forth in *Pickering*, the importance of preserving close working relationships has proved the most difficult to put in perspective.[90] In *Pickering*'s most often cited footnote, Justice Marshall stated that:

> [P]ositions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.[91]

Some courts state that this exception cannot serve as a pretext for stifling legitimate speech or for penalizing public employees who express unpopular views.[92] However, numerous decisions seem to assume that an employee whose speech destroys a close working relationship may not prevail under *Pickering*, regardless of the public concern involved in her expression. In *Sprague v. Fitzpatrick*,[93] a first assistant district attorney publicly stated that his immediate supervisor had not told the truth about a potential conflict of interest, a matter the court found to be "of grave public import."[94] Nevertheless, the court upheld the district attorney's decision to dismiss his subordinate because the court below had found that the "breach of confidence" between the two men "totally precluded any future working relationship between [them]."[95]

Smalley v. City of Eatonville[96] employed a similar analysis. In *Smalley*, the plaintiff was the white finance director of a small black community in Florida. He was suspended by the mayor for writing a letter to an officer of a federal funding program accusing the town administration of racial bias. The Fifth Circuit held the mayor's action to be constitutional under *Pickering* because the letter "threatened serious disruption of a working relationship requiring cooperation and loyalty."[97] The opinion did not mention Smalley's interest in speaking about the important issue of racial bias.

Cases like *Sprague* and *Smalley* are perplexing because the goal of promoting close working relationships is so unrelated to the idea of free speech that a balance between the two becomes virtually meaningless. Of course, public criticism of a supervisor by a subordinate, whether or not of public

89. See Finck, Nonpartisan Speech in the Police Department: The Aftermath of *Pickering*, 7 Hastings Const. L.Q. 1001, 1010-11 (1980).

90. One Supreme Court Justice has suggested that a lower court's failure to consider the "close working relationship" exception might be a reversible error. See Saye v. Williams, 452 U.S. 926 (1981) (Justice Rehnquist dissenting from denial of certiorari).

91. *Pickering*, 391 U.S. at 570 n.3.

92. *McKinley*, 705 F.2d at 1115.

93. 546 F.2d 560 (3d Cir. 1976), cert. denied, 431 U.S. 937 (1977).

94. Id. at 565.

95. Id. (quoting the lower court at 412 F. Supp. 910, 918 (E.D. Pa. 1976)).

96. 640 F.2d 765 (5th Cir. 1981).

97. Id. at 768.

concern, always has the potential to destroy the working relationship.[98]

Understandably, a court may be reluctant to uphold the claims of a former employee asserting a constitutional right not to be dismissed for speaking out when (i) the stimulus for the dismissal was public criticism and (ii) the employee knew that public criticism would make all future cooperation between her and her supervisor impossible. Yet if the courts' true objective is to protect the right of employees to speak out on matters of public concern, we should not attach to this right a condition that the employee limit her criticisms to those with whom she has only a distant working relationship. Also, the relationship will suffer as much if the employee has legitimate grievances which she is not free to voice, as it would if she made those grievances known. The most satisfactory resolution to the dilemma would be to protect speech regardless of the intimacy of the supervisory relationship.

Some courts have articulated for the employer's benefit considerations not mentioned in *Pickering*. For example, in *Byrd v. Gain*,[99] plaintiff police officers were reprimanded in writing for criticizing the Department's use of "stop and frisk" tactics, particularly as they applied to black citizens. The court held that the state had an interest in "safety and order" sufficient to justify the disciplinary action.[100]

Connick's strong statement of the state's interest in promoting the smooth functioning of public offices has led one court to establish yet another factor in favor of the state. In *Gonzalez v. Benavides*,[101] the director of a community action agency was fired for challenging the authority of the County Commissioners Court to supervise his job performance. The Fifth Circuit remanded to the district court to rule upon the narrow issue of whether the "relationship between the commissioners and Gonzalez fell into that narrow band of fragile relationships requiring job security loyalty at the expense of unfettered speech."[102] The court based its creation of a new factor relevant to the state's interest on the grounds that "nothing in the *Pickering* line suggests the irrelevance of other governmental concerns in different fact situations."[103] Moreover, *Connick* had demonstrated that "first amendment issues presented by speaking employees are not answerable by mechanical formulae."[104] The Fifth Circuit has thus interpreted *Connick* as giving lower courts the authority to create new limitations on public employees' free speech rights.[105]

A final question left open by the *Pickering* factors analysis is whether the

98. See *Egger*, 710 F.2d at 322-23.

99. 558 F.2d 553 (9th Cir. 1977), cert. denied, 434 U.S. 1087 (1978).

100. Id. at 554.

101. 712 F.2d 142 (5th Cir. 1983).

102. Id. at 150.

103. Id. at 147.

104. Id.

105. *Gonzalez* is not the only case in which the Fifth Circuit has extended the reach of *Connick*. In McBee v. Jim Hogg County, 730 F.2d 1009, 1016-17 (5th Cir. 1984) (en banc), the court held that a *Connick* analysis should be applied to cases involving political patronage dismissals. However, the dissent considered *Connick* to be inapplicable to the facts of the case, and

magnitude of the state's interest in taking an action against an employee varies with the category of employment. This issue is particularly important in the context of dismissals from police and fire departments and from other emergency-related positions.[106] In *Kelley v. Johnson*,[107] the Supreme Court suggested that while the analogy between law enforcement agencies and the military may be imperfect, both groups have a "need for discipline, esprit de corps, and uniformity."[108] This dicta, which did not purport to have any weight outside the limited scope of the liberty interest protected by the fifth and fourteenth amendments, has been expanded to quite sizable proportions. In *Hughes v. Whitmer*,[109] the Eighth Circuit ruled that a member of a state highway patrol could be transferred for speech that caused conflicts between him and his supervisor. In support of its holding, the court noted that "the Patrol has a significant governmental interest in regulating the speech activities of its officers in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution."[110] Similar rationales have been employed in a number of cases validating speech regulations used to discipline police and fire department employees.[111]

Like the concept of "efficiency" underlying the *Pickering* rationale,[112] the concepts of "order and security" that we automatically associate with law enforcement bodies are shibboleths that alone do not justify a state imposed limitation on freedom of speech. Rather, courts must "go beyond asserting the need for 'discipline' in 'para-military' or 'quasi-military' organizations, and identify the true interest the department has in suppressing the speech and conduct that resulted in . . . dismissal."[113] Law enforcement agencies are authoritarian forces and rely upon some degree of secrecy in their daily operation. To quell the potential for abuse latent in the traditional structure of these agencies, courts examining the constitutionality of their internal regulations must apply a standard for reviewing the disciplinary action no less stringent than that which is applied to other kinds of public employers.

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would have examined the dismissals under the more stringent compelling state interest test set forth in the *Elrod-Branti* line of cases. 730 F.2d at 1017-25 (Rubin, J., dissenting).

106. See generally *Finck*, supra note 89.

107. 425 U.S. 238 (1976) (police department's hair grooming regulations did not impinge upon liberty interest protected by the fourteenth amendment).

108. Id. at 246.

109. 714 F.2d 1407 (8th Cir. 1983), cert. denied sub nom. Hughes v. Hoffman, 104 S. Ct. 1275 (1984).

110. Id. at 149 (quoting Gasparinetti v. Kerr, 568 F.2d 311, 315-16 (3d Cir. 1977), cert. denied, 436 U.S. 903 (1977).

111. See, e.g., Kannisto v. City and County of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976), cert denied, 430 U.S. 931 (1977); Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 26 (2d Cir. 1979).

112. See text accompanying notes 81-87 supra.

113. Leonard v. City of Columbus, 705 F.2d 1299, 1305 (11th Cir. 1983); see also Williams v. Board of Regents, 629 F.2d 993, 1002 (5th Cir. 1980) (interest of employer in preserving discipline did not overcome the public's right to know about the alteration of an accident report), cert. denied, 452 U.S. 926 (1981).

As a practical matter, there may no longer be any need to question the usefulness of the factors analysis set forth in *Pickering* and embellished in later cases. *Connick* suggests an entirely different method for ascertaining the strength of the state's interest. Indeed, *Connick* does not even consider the *Pickering* factors systematically. Rather, the Court asserted that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[114] The Court will defer to the employer on the issue of whether an important state interest had been advanced by the challenged disciplinary action.

It is improper for the Court to defer to the position of an interested party on a disputed issue in constitutional adjudication. Deference is particularly inappropriate when, as in *Connick*, the employer takes action in advance of any actual disruption of the office.[115] Until *Connick*, evaluating the nature and magnitude of the state's interest in placing limitations on public employee speech was one of the Court's most sensitive constitutional responsibilities. Now that the responsibility has been entrusted to the employer, courts in future cases will often be bound to resolve these issues against public employees.[116]

C. The Final Branch of the Inquiry: Balancing the Interests of the Employee and the State

If a public employee speaks solely in her capacity as a concerned citizen, and no valid state interest is hindered by the employee's speech, *Pickering* dictates a finding that any disciplinary action against the employee violates the first amendment.[117] However, when the speech of a public employee speaking in her capacity as an employee adversely affects the efficient functioning of government agencies, the court must weigh the competing interests.[118] *Connick v. Myers* is an excellent example of how the application of the *Pickering* test can lead to unpredictable and unjust results.

The premise that underlies any balancing test is that the elements on opposite sides of the balance are in conflict with one another. But this fundamental notion is not entirely applicable in the public employee speech context.

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114. *Connick*, 461 U.S. at 151-52.

115. See id. at 168 (Brennan, J., dissenting).

116. See *Hughes*, 714 F.2d at 1419. Citing *Connick*, the court held that the decision of a state highway patrol that plaintiff's speech had contributed to "dissension within the ranks" and the resulting decision to transfer the plaintiff were entitled to "considerable deference."

117. See text accompanying note 28 supra.

118. See text accompanying note 22 supra. However, in an interesting post-*Connick* case, a district court awarded damages to an employee who was discharged for engaging in protected speech, without considering the state's interest as an employer. In Collins v. Robinson, 568 F. Supp. 1464 (E.D. Ark. 1983), aff'd, 734 F.2d 1321 (8th Cir. 1984), the plaintiff was a sergeant at a county jail discharged for writing a memorandum protesting verbal abuse by a superior officer. Although the abuse was motivated by the officer's belief that the plaintiff was involved in a planned walkout of jail employees, the court found the memorandum to be constitutionally protected. 568 F. Supp. at 1467-68. The court awarded damages without discussing the justification for the discharge offered by plaintiff's superior.

For example, in the case of a whistleblower who exposes unlawful practices by public officials,[119] the interest of the individual in speaking freely and the state's interest in promoting disclosure are in harmony. In a broader sense, it is always in the state's interest to protect reasonable speech by public employees, because discipline and morale in the workplace are undermined when employees know that their coworkers are being subjected to unfair disciplinary action.[120]

The district court in *Connick*, finding Myers's questionnaire to involve issues of public concern, ruled that the burden shifted to the government to "clearly demonstrate" that Myers's speech "substantially interfered" with her official responsibilities.[121] The Supreme Court disagreed. "*Pickering* unmistakably states, and respondent agrees, that the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."[122] The Court offered no citation to *Pickering* on this crucial point and nothing in the *Pickering* opinion requires a court, once it has found the speech to be of public concern, to weigh the substantiality of the speech a *second time* to determine the extent of the government's burden of proof.

This analysis[123] is flawed in several respects. First, weighing the speech a second time renders meaningless the first branch of the test, in which the court purportedly determines whether the content of the speech was of sufficient public concern to entitle it to first amendment protection. For the "protection" afforded the speech at the initial stage of the inquiry is illusory if it has no effect on the state's burden. In a society which places a high value on the free exchange of ideas, it is untenable that a public employee is *twice* required to prove that her communication was of substantial public concern before the government is made to bear the burden of proving that it is entitled to inhibit communication.[124]

Second, although the majority saw this "particularized balancing" as al-

119. See text accompanying notes 84-87 supra.

120. See The Supreme Court, 1982 Term, supra note 61, at 169 n.49.

121. 507 F. Supp. at 758.

122. *Connick*, 461 U.S. at 150 (footnote omitted).

123. Subsequent federal court decisions have adopted the *Connick* standard for fixing the government's burden; see, e.g., Patteson v. Johnson, 721 F.2d 228, 232-33 (8th Cir. 1983), *Brown*, supra note 76, at 546.

Fortunately, in a case in which the employee has spoken on an issue of only minor importance to the public, and the state's interest in discharging an employee is minimal, *Connick* would not seem to require a finding for the employer, see McGee v. South Pemiscot School Dist., 712 F.2d 339 (8th Cir. 1983) (teacher protested school's decision to discontinue junior high school track program).

This "two step" analysis is reminiscent of the Supreme Court's test of the validity of state restrictions on commercial speech, see note 59 supra.

124. Courts have suggested that the two stages of the inquiry into the substantiality of the public concern of the speech are best understood as aspects of a single analysis: "While some cases indicate that certain speech which relates to peculiarly internal matters of governmental employment does not invoke first amendment protection, making a *Pickering* balance unnecessary, [the courts in these cases] are merely *sub silentio* striking the *Pickering* balance in cases which are probably too clear to require extended analysis." *Egger*, 710 F.2d at 316.

lowing "the most appropriate possible balance of the competing interests,"[125] a test so lacking in uniform guidelines may also deprive employees and employers alike of predictable standards to guide their behavior.[126] Another related defect of balancing in constitutional decision-making is the potential for judicial abuse of discretion—the arbitrary fixing of burdens in order to dictate a particular result in a given case.[127]

Third, in some cases the substantiality of the employee's speech will favor, not hinder, the state's attempt to meet its burden of proof. An employee speaking out on a sensitive and controversial subject, such as police brutality, anti-semitism, or abortion, may stir up conflicting passions disruptive of the workplace. Because of the acute public interest in these issues, *Connick* would seem to require a strong showing of a legitimate state interest that can be furthered by limiting the expression.[128] Yet the emotionally and politically charged nature of these issues may give rise to a degree of disruption that will justify state retaliatory action. Thus, as Professor Emerson points out, "the Court is in the position of suggesting that only innocuous expression is entitled to protection."[129] The much publicized case of *Brown v. Department of Transportation, Federal Aviation Administration*[130] illustrates this point. Brown was an air traffic controller dismissed by the FAA for certain comments he made on television during the 1981 PATCO strike. The court found that Brown had spoken on a matter of "urgent" public concern,

125. *Connick*, 461 U.S. at 150. This view is supported in *Finck*, supra note 89, at 1003.

126. See Emerson, supra note 70, at 581; see also Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 912-14 (1963).

127. Justice Black was the Supreme Court's most fervent opponent of balancing:

> I do not subscribe to [the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of the Court thinks that a State might have interest sufficient to justify abridgement of those freedoms,] for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.

Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961).

128. See *Connick*, 461 U.S. at 144-46.

129. Emerson, supra note 70, at 581. See, e.g., Duke v. North Tex. State Univ., 469 F.2d 829 (5th Cir. 1973), cert. denied, 412 U.S. 932 (1973) (Douglas, J., dissenting) (upholding dismissal of university teaching assistant for making inflammatory public speeches on the role of race and class in the university's power structure).

130. 735 F.2d 543 (D.C. Cir. 1984). Plaintiff Harold Brown, employed for 25 years as an air traffic controller, was dismissed by the FAA for certain comments he made before television cameras during the course of the 1981 PATCO strike. The remarks of Brown, himself not a union member or a striker, were not uniformly sympathetic to the strikers' cause. Brown did urge the strikers, however, to "stay together, please, because if you do, you'll win." The Merit Systems Protection Board sustained Brown's removal for misconduct, and Brown appealed.

The decision in *Brown* exemplifies the potential of the *Connick* balancing approach to penalize the type of expression the first amendment was designed to protect. Brown had spoken on an issue of "urgent" public concern, yet it was the potential of his remarks to cause controversy which led the Court to uphold his dismissal. Requiring the government in this case to demonstrate a compelling state interest in dismissing Brown would have focused the Court's attention where it belonged, on the actual harmful effects of Brown's speech, rather than on the potentially explosive context in which they were made.

and went on to balance Brown's free speech rights against the Agency's interest in maintaining "cooperation, loyalty and trust" during an illegal, nationwide strike.[131] Guided by *Connick* principles, the court reasoned that the state's burden of proof was reduced in light of the highly charged context in which Brown's statements were made.[132] The court upheld the taking of disciplinary action, remanding to the Merit Systems Protection Board only for reconsideration of the appropriateness of the penalty.[133] Brown had spoken on an issue of "urgent" public concern, yet it was clearly the potential of his remarks to cause controversy which led the court to hold in the employer's favor.

Finally, in numerous cases the state has been able to justify actions taken against employees who have spoken on matters of the utmost public concern, when that speech directly interfered with the employees' ability to perform their duties. For example, in *Goldwasser v. Brown*,[134] a civilian instructor hired to teach English to foreign Air Force trainees was dismissed for discussing the Vietnam War and anti-Semitism during class time. The District of Columbia Circuit held the dismissal to be constitutional under *Pickering* because Goldwasser had aired his views during the limited time required to cover the assigned material.[135] In *Nathanson v. United States*, [136] the plaintiff was assigned to review applications to the Army Corps of Engineers for permits to construct in United States waters. He refused to process several applications, complaining that the proposed projects would be hazardous to the environment. In upholding the dismissal, the court relied on the district court's finding that plaintiff's conduct threatened "the efficiency of performance of his duties."[137]

In both *Goldwasser* and *Nathanson*, the plaintiffs had offered informed opinions on matters of substantial public concern. Yet the dismissals in these cases may have been based not only on the content of the expression, but upon the detrimental effect of that expression on the plaintiffs' job performance. In cases like these, an employer may take corrective action, provided that it conclusively demonstrates that its actions were not motivated by a desire to penalize the employee for expressing a differing viewpoint.[138]Yet this approach seems inconsistent with the idea that the substantiality of the public concern inherent in the speech at issue is the principal factor to be used by the courts in fixing the state's burden of proof.

Applying its own criteria for fixing the defendant's burden of proof, the

131. Id. at 546.

132. Id. at 547-48.

133. Id. at 548-49.

134. 417 F.2d 1169 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) (Douglas, J., dissenting).

135. Id. at 1177.

136. 702 F.2d 162 (8th Cir.), cert. denied, 104 S. Ct. 352 (1983).

137. Id. at 165.

138. See *Egger*, 710 F.2d at 320 n.29.

Connick majority concluded that the portion of Myers's questionnaire that was of public concern, the question about pressure to work on political campaigns, involved only a "limited" first amendment interest.[139] How the Court arrived at this conclusion is perplexing, for at an earlier stage in the opinion, Justice White had cited numerous precedents[140] supporting the view that "whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."[141]

The Court may have found that Myers diluted the public concern implicit in this portion of her questionnaire by including it among other questions concerning only internal office policy. Such speculation is unnecessary, however, because under the *Connick* standard the identical expression may pass one test of public concern and fail the other. In effect, the Court held that Myers's expression was substantial enough for the purposes of the threshold inquiry into protected speech, but insubstantial where it counted—in the balance against the interests of the state.

The "manner, time and place" in which the questionnaire was distributed were also relevant to the majority in assessing the protection to be given to Myers's speech.[142] *Givhan* established that these factors were to be considered in the *Pickering* balance when the employee "personally confronts his immediate supervisor."[143] In *Connick*, since Myers had distributed the questionnaire

139. See *Connick*, 461 U.S. at 154.

140. One of the cases cited by Justice White is his own opinion in United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). *Letter Carriers* reaffirmed the holding of United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), that § 9(a) of the Hatch Act, 5 U.S.C. § 7324(a)(2) (1982), which prohibits federal employees from taking an active part in the management of political campaigns, is a permissible limitation on an employee's free speech rights. *Letter Carriers* is not directly relevant to our inquiry because the case concerned a federal statute and not an employment decision. Nevertheless, Justice White did hold in *Letter Carriers* that Hatch Act proscriptions passed muster under *Pickering* because the state has a substantial interest in protecting the associational freedoms of its employees and in discouraging coerced participation in politics. 413 U.S. at 564. Justice White cites *Letter Carriers* to support the proposition that Myers's question about pressure to work on political campaigns was of public concern. In his view, the policy behind the Hatch Act is that "government service should depend upon meritorious performance rather than political service." *Connick*, 461 U.S. at 149.

As worthy as this policy is, it had no bearing upon the ultimate resolution of the *Connick* case, which upheld the dismissal of an employee who sought to resist official coercion to work on behalf of certain political candidates. If there is a policy of keeping employees free of improper influence, the *Connick* majority paid only lip service to it. The fact remains that in both *Letter Carriers* and *Connick*, the *Pickering* rationale was employed to validate exercises of state power that chilled speech.

141. *Connick*, 461 U.S. at 149.

142. Id. at 152.

143. 439 U.S. at 415 n.4. It is hard to see why these additional considerations must be brought to bear only against the more reticent employee who makes her feelings known in private rather than in public; in principle, the employer may be equally threatened by the time, place and manner of an employee's public criticism. For instance, if Myers had chosen to publish her questionnaire in a local paper, a debate would have been stirred up in the office

at the office, in part during work time, the Court found the time, place and manner considerations to be in Connick's favor.[144] Additionally, the Court noted that the disruptive potential of the questionnaire was enhanced by the fact that it arose in the context of an ongoing employment dispute between Myers and Connick.[145]

Taking these considerations into account, the Court in *Connick* held that "[t]he limited first amendment interest involved [in this case] does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[146] The fact that Connick's fears had not materialized did not affect the majority's opinion: "Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[147] In other words, Connick was able to meet his burden of proof merely by stating that in his judgment, Myers's action was likely to impair the normal functioning of the office.

Justice Brennan, in dissent, levelled strong criticism on the majority position. He argued that the standard set out in *Pickering* precludes the Court from holding "that a public employer's mere apprehension that speech will be disruptive justifies suppression of that speech when all the objective evidence suggests that those fears are essentially unfounded."[148]

The *Connick* Court's holding that the employer can, at least in cases involving a "limited" first amendment interest, discharge an employee for speech that has not actually proved disruptive signals an unwelcome shift in doctrine.[149] The Court has normally required a more substantial showing by a governmental entity seeking to limit constitutionally protected speech.[150] In

which could have affected the "institutional efficiency" of the District Attorney's Office in much the same way as a personal confrontation.

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

145. Id. None of these facts were in dispute. Yet they prove no more than that Myers had challenged Connick's authority. They do not prove that the efficiency of the services performed by the District Attorney's Office was hampered, or that Myers forfeited her first amendment rights.

146. Id. at 154.

147. Id. at 152.

148. Id. at 166 (Brennan, J., dissenting).

149. For a post-*Connick* application of this doctrine, see *Hughes*, 714 F.2d at 1422-23.

150. For example, in order to punish forms of advocacy which it believes present a "clear and present danger" to public safety, the state must prove that "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

In footnote 12 of the *Connick* opinion, 461 U.S. at 152, Justice White cites two cases in support of the proposition that "proof of future disruption [is] not necessary to justify denial of access to [a] non-public forum on [the] grounds that the proposed use may disrupt the property's intended function." In Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983), the Court upheld the school board's denial of access to teacher mailboxes to a rival union after access had been granted to the teachers' exclusive bargaining representative. In Greer v. Spock, 424 U.S. 828 (1976), the Court held that a military installation could constitutionally bar access to partisan political groups. Neither case is directly relevant to the facts of *Connick* however.

this regard, Justice Brennan noted the case of *Tinker v. Des Moines Independent Community School District*,[151] in which a public high school prohibited students from wearing black armbands in school to protest the Vietnam War. In striking down the prohibition, the *Tinker* Court ruled that although a public high school, like a public workplace, was a limited public forum, "[c]ertainly, where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[152]

Equally disturbing is the *Connick* majority's willingness to rely upon the employer's view that the employee's actions will be detrimental to office functioning,[153] rather than "make their own appraisal of the effects of the speech in question."[154] In the absence of any tangible evidence of disruption, the Court will rely upon the employer's estimation of the harmful effects of the expression. Just as the state interest served by a particular disciplinary action should be for the Court and not the employer to determine,[155] so should the court independently evaluate the effects of the speech on the operations of the agency.

III

SUGGESTED REFINEMENTS ON THE ADJUDICATORY STANDARD

Public employees will not receive adequate first amendment protection until the courts abandon the capricious balancing test currently employed in favor of a more stringent standard with carefully defined and allocated burdens of proof.

The Court will not soon overturn *Connick*. However, even though the public concern test will remain the prevailing standard for determining what speech is entitled to first amendment protection,[156] there are several ways in which this primary inquiry may be conformed to the first amendment value of securing constitutional protection for all speech of social value.

First, the burden of proof on the issue of whether the plaintiff's speech was of public concern should rest with the defendant state employer. It is more consistent with first amendment jurisprudence that the state employer seeking to place limitations on speech bear the burden of justification for its actions, than it is for the individual to be required to prove that her speech is

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In *Perry*, the challenged provision was necessary to protect the union's designated function as the exclusive bargaining representative of its employees. 460 U.S. at 40-41. And in *Greer*, the access restrictions were applied across the board, without regard to the message of any particular group, as part of the facility's official policy of neutrality. 424 U.S. at 838-39.

151. 393 U.S. 503 (1969), cited in *Connick*, 461 U.S. at 168-69 (Brennan, J., dissenting).

152. Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

153. *Connick*, 461 U.S. at 151.

154. Id. at 168 (Brennan, J., dissenting).

155. See text accompanying notes 115-16 supra.

156. See text accompanying note 59 supra.

constitutionally protected.[157]

To meet its burden, the state would be required to show that the employee's speech related exclusively to the employment relationship and bore no relation to the quality of services provided by the agency.[158] Although the state should not be permitted at this primary stage to argue that the time, place and manner in which an employee spoke brought a potentially relevant issue outside the realm of public concern,[159] certain contextual considerations indicating the public interest in a given expression should be available to the plaintiff in rebutting the state's case.[160]

A court should not create troublesome precedent for future plaintiffs by introducing unnecessarily rigid standards for defining public concern. Instead, there should be a continuing attempt to redefine the public concern concept to reflect traditional first amendment values. Courts should bear in mind that the first amendment protects the public's right to receive information,[161] and the accompanying notion that the public is best equipped to evaluate information.[162] With regard to the dividing line between speech on private employment concerns, and speech concerning the proper functioning of public agencies, the public concern stage of the inquiry should only eliminate speech which could have no conceivable general interest. All doubts should be resolved in favor of first amendment interests at this stage; any contextual considerations are properly reserved for the state interest portion of the inquiry.[163]

Once the protected nature of an employee's speech has been established, and the employee has shown that her speech was the cause of the retaliatory action,[164] the courts should replace *ad hoc* balancing with a compelling state interest test, such as the one employed to test the constitutionality of another kind of state limitation on first amendment activity by public employees, the political patronage dismissal.[165] Under this test, the state would have the burden of proving that it had a "paramount" interest in limiting the employee's

157. For example, the Supreme Court has stated that in cases involving "a significant impairment of First Amendment rights, the burden of justifying the impairment is on the government." Elrod v. Burns, 427 U.S. 347, 362 (1976).

158. See text accompanying notes 86-87 supra.

159. See text accompanying notes 68-70 supra.

160. For example, the fact that an employee's opinions were deemed worthy of publication by a general interest newspaper or periodical might create an irrebutable presumption of public concern. See *Brown*, supra note 76, at 546 (plaintiff's remarks were televised and thus of public concern).

161. See Board of Educ. v. Pico, 457 U.S. 853, 866-67 (1982); Stanley v. Georgia, 394 U.S. 557, 564 (1969).

162. See *Connick*, 461 U.S. at 163-65 (Brennan, J., dissenting).

163. See id.

164. This determination would be made under the "but for" causation test set forth in *Mt. Healthy* , 429 U.S. at 287.

165. See, e.g., Branti v. Finkel, 445 U.S. 507, 515-17 (1980); Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam). This proposed test is analogous to the one set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980), relating to state regulation of commercial speech.

speech,[166] and that the disciplinary action was "closely drawn to avoid unnecessary abridgement" of the constitutional right at stake.[167]

The government would attempt to meet the first part of its burden with arguments similar to those used in the state interest phase of the *Pickering* analysis,[168] incorporating the refinements suggested in the *Connick* dissent and this Note. Most importantly, the state should identify the nature of its interest, i.e., those aspects of the public services it performs which were hampered by the employee's speech.

Once the state has identified its compelling interest, it should be required to demonstrate that its ability to carry out its designated function was impaired materially and substantially by the employee's expression.[169] It is imperative that the state produce convincing evidence of its interest; the courts should not defer to the employer's dismissal absent evidence on which to base an independent appraisal.[170] Moreover, the quantum of proof required here should be more or less uniform in all cases involving protected speech; the courts should not have discretion to determine the government's burden in proportion to its own evaluation of the social value of the speech in question.[171]

The state is not precluded under this proposed test from asserting that special circumstances militated in favor of its employment decision. For example, if the time, place or manner of the employee's expression was particularly disruptive, or if the agency involved performs a function calling for an extraordinary degree of precision in its daily operation, these factors would be relevant insofar as they aid the agency in showing that its operation was impaired. Special circumstances, however, should not be considered, as they were in *Connick*, as affecting the protected status of the speech, or the extent of the state's burden of proof. Rather, such considerations would be put forth by the state to meet its burden of proving that its reasons for taking action against the speaking employee were compelling.

The latter part of the state's burden would require the employer to show that the action it took was the least onerous means of securing its vital interest.[172] In the context of an employment decision, as opposed to a statute or regulation placing limitations on speech,[173] this inquiry is not complicated. Normally, it would consist of a finding that the employer imposed a less severe

166. *Elrod*, 427 US. at 362.

167. Id. at 363 (quoting *Buckley*, 424 U.S. at 25).

168. See text accompanying notes 23-27 supra.

169. Cf. *Tinker*, 393 U.S. at 509; see *Connick*, 461 U.S. at 168-69 (Brennan, J., dissenting).

170. See text accompanying notes 153-55 supra.

171. See text accompanying notes 122-38 supra.

172. See *Elrod*, 427 U.S. at 362-63.

173. Such statutes and regulations have been challenged on the grounds that they are vague or overbroad, see Baggett v. Bullit, 377 U.S. 360 (1964); that the regulation does not "directly advance" the proffered state interest, *Central Hudson Gas*, 447 U.S. at 566; or that the regulation is not narrowly tailored to the precise evils it is designed to prevent, see Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980).

form of discipline, such as a transfer or demotion, over a more severe form, such as dismissal, when that alternative was available and satisfied the objective of restoring the agency to a normal level of harmony and efficiency.

CONCLUSION

Freedom of speech does not have the same meaning for public employees that it has for others. Under *Connick v. Myers*, public employees may be subjected to discipline at their employer's will for expressing themselves on any subject outside the newly narrowed scope of "public concern." On matters of public concern, public employees may voice their opinion only when the state's interest in suppressing their speech is virtually nonexistent.

Connick has undoubtedly worsened the plight of public employees wishing to speak out with the same freedom enjoyed by other members of the public. After *Connick*, a public employee who has spoken on any subject connected with her job has little constitutional protection against employer retaliation.

However, in a larger sense, the problem lies in the *Pickering* balance. The adjudicatory standard in *Pickering*, with its heavy emphasis on the amorphous concept of "efficiency," will inevitably be more faithful to the status quo than to the protection of constitutional rights. The integrity of the individual, even at the expense of efficiency, should be the focus of first amendment jurisprudence.

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