Connick v. Myers: New Restrictions on the Free Speech Rights of Government Employees

INTRODUCTION

How much first amendment[1] protection against state sanction of speech must a citizen relinquish by taking a job with the government? The United States Supreme Court has recently provided a partial answer to this important question with its decision in *Connick v. Myers*.[2] Persons pursuing a career in public service who wish to criticize the internal operations of their agency will, after *Connick*, usually not be protected from state retaliation.[3] Thus, despite a national commitment to "uninhibited, robust, and wide-open" debate on public issues[4]—a debate which undoubtedly concerns "the manner in which government is operated or should be operated"[5]—public employees must exercise an inordinate amount of discretion in how they contribute to the discussion of matters critical to self-government. The implications of suppressing their thoughts and ideas are staggering.[6] Public employees are uniquely qualified to give informed opinions on the machinations of government because they observe them on a daily basis. Silencing their criticism of government's internal operations deprives the public of valuable information on whether public institutions are accomplishing their intended tasks.

The Supreme Court in *Connick v. Myers* held that government officials may fire employees with impunity for speech that does not touch on "a matter of public concern."[7] This Note argues that a content prerequisite for first amendment protection of public employee speech is unwarranted as a matter of both precedent and policy. The inconsistent decisions that will inevitably result from such a subjective inquiry will fail to provide adequate

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1. The first amendment to the Constitution of the United States declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These freedoms are protected by the fourteenth amendment from invasion by the states. NAACP v. Caliborne Hardware Co., 458 U.S. 886, 907 n. 43 (1982); Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. 461 U.S. 138 (1983).

3. *See Connick*, 461 U.S. at 146-49.

4. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

5. *See* Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

6. In June, 1983, the number of persons employed by government at all levels was roughly 15 percent of the civilian labor force. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 405, 425. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 563 (1971) (any restrictions placed on such a signifieant portion of the population should be a matter of grave concern).

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

notice to employees as to what topics are appropriate for discussion within a government agency. The uncertainty inherent in the *Connick* analysis will undoubtedly chill a significant amount of constructive criticism of official behavior.

After placing the *Connick* decision in historical perspective, this Note then argues that the majority opinion vests government office managers with far too much discretionary power over the internal operations of public agencies and helps to effect a separation between government control and popular influence.[8] Finally, this Note discusses the problems future courts are likely to encounter when applying the *Connick* rationale. This Note first provides a brief historical overview of the first amendment rights of public employees.

I. PUBLIC EMPLOYEES AND THE FIRST AMENDMENT

A. The Right-Privilege Distinction

Until the mid-twentieth century, public employment was viewed by courts as a privilege that government could bestow on its own terms.[9] Anyone entering the public sector was held to accept the accompanying restrictions on his exercise of first amendment rights.[10] This doctrine, known as the right-privilege distinction, was best articulated by Mr. Justice Holmes when he was a member of the Massachusetts Supreme Judicial Court. Commenting on the petition of a policeman who had been fired for his political activities, Justice Holmes stated: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[11]

Adler v. Board of Education[12] represents the high-water mark of the United States Supreme Court's acceptance of the right-privilege distinction. In *Adler*, the Court upheld a New York law disqualifying from employment in the state's civil service and educational systems any person advocating, or belonging to any organization advocating, the violent overthrow of the government. The Court noted that if public employees "do not choose to work on such terms, they are at liberty to retain their beliefs and association and go elsewhere."[13] The notion, however, that government can condition a

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8. 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, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Stromberg v. California, 283 U.S. 359, 369 (1931). *See also* Healy v. James, 408 U.S. 169, 180-81 (1972); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948) [hereinafter cited as A. MIEKLEJOHN, FREE SPEECH]. *See generally*, Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 439-41 (1983).

9. *See* Coven, *The First Amendment Rights of Policymaking Public Employees*, 12 HARV. C.R.-C.L. L. REV. 559, 563 (1977).

10. *Id.*

11. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

12. 342 U.S. 485 (1952).

13. *Id.* at 492.

privilege or benefit, such as public employment, upon the waiver of first amendment rights has been thoroughly repudiated by the Supreme Court.[14] In *Keyishian v. Board of Regents*,[15] the Court struck down the provision of New York's Feinberg Law, earlier upheld in *Alder*,[16] which permitted the State's Board of Regents to dismiss teachers for knowingly belonging to a subversive organization.[17] In laying the right-privilege distinction to rest, the *Keyishian* decision vastly expanded the constitutional rights of belief and association afforded government workers.[18]

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14. *Connick*, 461 U.S. at 142, 144-46. *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42; Coven, *supra* note 9, at 563-64.

15. 385 U.S. 589 (1967).

16. *See Adler*, 342 U.S. at 492.

17. "We therefore hold that [the laws in question] are invalid insofar as they proscribe mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York." *Keyishian*, 385 U.S. at 609-10.

18. When public employees are punished for their political beliefs and party affiliations, the government must justify its actions by demonstrating that its abridgement of these constitutionally protected rights served a compelling interest. In Branti v. Finkel, 445 U.S. 507 (1980), the Supreme Court held that the firing of two assistant public defenders because of their political party membership violated their first amendment rights of belief and association. The Court concluded that partisan political concerns had no bearing whatsoever on the employees' responsibilities as public defenders. Because the state failed to articulate "an overriding interest . . . of vital importance . . . requiring that a person's private beliefs conform to those of the hiring authority. . . ," the Court held that the first amendment prohibited the firing of the public defenders. 445 U.S. at 515-16 (citations omitted). *See also* Elrod v. Burns, 427 U.S. 347, 359-60 (1976) (plurality opinion of Brennan, J.) (politically motivated terminations in Cook County, Illinois Sheriff's Office of nonpolicymaking employees held violative of the first amendment).

In *Elrod*, the plurality conceded that certain influential policymaking officials may be terminated because of their political beliefs. 427 U.S. at 367-68 (plurality opinion of Brennan, J.). According to the plurality, such a rule was necessary to ensure "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. A majority of the Court endorsed this rationale in *Branti*. 445 U.S. at 517-18. *See* Mummau v. Ranck, 687 F.2d 9, 10 (3d Cir. 1982) (an assistant district attorney is a policymaking employee and can be dismissed because of political beliefs). *But see* McMullan v. Thornburgh, 508 F. Supp. 1044 (E.D. Pa. 1981) (political dismissal of health registrars held impermissible); Shakman v. Democratic Org. of Cook County, 508 F. Supp. 1063 (N.D. Ill. 1981) (simply showing employee occupies a highly confidential position of significant policymaking is not enough to justify political dismissal) (dicta).

Some courts have extended the policymaking exception into the area of free speech. *See* Gonzalez v. Benavides, 712 F.2d 142, 147 (5th Cir. 1983); Mitchell v. King, 537 F.2d 385, 391 (10th Cir. 1976); Micilcavage v. Connelie, 570 F. Supp. 975 (N.D.N.Y. 1983). *See also* Gould v. Walker, 356 F. Supp. 421 (N.D. Ill. 1973); Bennett v. Thomson, 116 N.H. 453, 363 A.2d 187 (1976), *appeal dismissed*, 429 U.S. 1082 (1977); Battaglia v. Union County Welfare Bd., 88 N.J. 48, 438 A.2d 530 (1981). For an excellent discussion of why the policymaking exception should not be extended into the realm of free speech, see Coven, *supra* note 9, at 575-84. *See also* Johnson v. Jefferson County Bd. of Health, 662 P.2d 463, 473-74 n.11 (Colo. 1983):

> The primary purpose of partisan political association is to effect political change through the removal of the incumbent officeholder. . . .The primary purpose of free speech respecting matters of public concern, by contrast, is to communicate important information to the public, usually without regard to the effect of the

B. Public Employees and the Right of Free Speech

1. *Pickering* and Its Progeny[19]

In *Pickering v. Board of Education*,[20] the Supreme Court held impermissible under the first amendment the dismissal of a high school teacher who wrote a letter to a local newspaper criticizing the school board's representations to the taxpayers about the need for additional revenue from yet-to-be approved bond issues.[21] The Court in *Pickering*, the leading case on the free speech rights of public employees, reiterated its rejection of the notion that government servants must, as a condition of their employment, "relinquish the First Amendment rights they would otherwise enjoy as citizens."[22] But Justice Marshall, writing for the majority, declined to grant blanket protection to all employee criticism.[23] Recognizing that the state has a strong interest in efficiently providing quality public services, Justice Marshall announced that future courts must balance each side's interests in determining whether public employee speech is entitled to constitutional protection.[24]

Although the *Pickering* Court refused to enunciate a uniform standard to judge all cases where a public employee is sanctioned because of speech,[25] it did indicate "some of the general lines along which an analysis of the controlling interests should run."[26] Among the factors weighing in favor of the state are its interests in maintaining discipline by immediate superiors,[27] in perpetuating harmony among co-workers,[28] in preserving loyalty and con-

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information on partisan politics.

The first amendment freedoms of public employees respecting participation in the political process, however, are far more limited. The Hatch Act, 5 U.S.C. § 7324(a) (1982), prohibits federal employees from participating in political campaigning and management. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding the constitutionality of the Hatch Act). Most states have similar laws. *See* Broadrick v. Oklahoma, 413 U.S. 601, 604 n.2 (1973).

19. Connick v. Myers, 461 U.S. 138 (1983); Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968).

20. 391 U.S. 563 (1968).

21. Pickering questioned the accuracy of the board's representations regarding the allocation of funds, received from past bond issues, between athletic and educational programs. His letter is reprinted in the *Appendix to Opinion of the Court*, 391 U.S. at 575-78.

22. 391 U.S. at 568 (quoting Keyishian v. Board of Regents, 385 U.S. at 605-06).

23. 391 U.S. at 568.

24. *Id.*

25. *Id.* at 569. The Court's reason for refusing to lay down a general standard was that the enormous variety of factual situations involving employee criticism made it inappropriate to do so. *Id.*

26. *Id.*

27. *Id.* at 570.

28. *Id.*

fidence when necessary to a particular employment relationship,[29] and in discharging incompetent employees.[30]

Circumstances strengthening the employee's right to speak include the relationship of the speech to a matter of legitimate public concern,[31] the public context in which the speech is made,[32] the likelihood that the employee would have an informed opinion on the subject matter of his expression,[33] and the ease of the state's ability to rebut the employee's charges.[34] Assuring the flexibility of this *ad hoc* balancing test, the Court gave no indication as to which factors should weigh more, or less, heavily in the balance.[35]

The *Pickering* majority indicated that once a discharged public employee has met the initial burden of demonstrating that he was terminated because of his expression, the state must establish that the employee's conduct either impeded his performance or interfered with the agency's operations.[36] Because the school board introduced no evidence supporting its allegations that his statements "would foment controversy and conflict" among administration, teachers, and the public, Pickering's first amendment interests pre-

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29. The Court noted that:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions 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.

Id. at 570 n.3. *See also supra* note 18.

30. *Id.* at 573 n.5.

31. *Id.* at 571.

32. *Id.* at 569-73.

33. *Id.* at 572.

34. *Id.* at 570-71.

35. *Compare* Note, *Nonpartisan Speech in the Police Department: The Aftermath of Pickering*, 7 HASTINGS CONST. L.Q. 1001, 1027 n.179 (1980) ("The main benefit of the *Pickering* test is that in the balancing of opposing interests there exists an intrinsic flexibility which allows a court to consider the exigencies of justice in a particular case without the confinement of precedent.") *with* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 440 (1980) [hereinafter cited as Emerson, *First Amendment Doctrine*], where one of the leading commentators on the first amendment concluded:

> In essence, the balancing doctrine is no doctrine at all but merely a skeleton structure on which to throw any facts, reasons, or speculations that may be considered relevant. Not only are there no comparable units to weigh against each other, but the test is so vague as to yield virtually any result in any case. In the end, balancing extends to expressiou more a due process than a first amendment type of protection.

See also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 914 (1963) [hereinafter cited as Emerson, *General Theory*]. *See generally* Note, *The Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365, 370-71 n.25 (1977) [hereinafter cited as Note, *Nonpartisan Expression*].

36. *Pickering*, 391 U.S. at 570-71.

vailed.[37] The *Pickering* opinion, however, did not elaborate on the causal showing an employee had to make to establish a constitutional violation. As expected, disagreement soon arose among the lower courts as to whether the employee's speech merited remedy if it was the sole, predominant, or only partial reason for the government's sanction.[38]

The conflict was resolved by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*.[39] Doyle, an untenured public school teacher, conveyed the content of a memorandum he received from the principal regarding teacher dress and appearance to a local radio station.[40] Shortly thereafter, the school board decided not to renew his contract.[41] In deciding that the board's action violated Doyle's right to free speech, the federal district court concluded that the state could not fire an employee anytime such action was based in substantial part on constitutionally protected behavior.[42] Justice Rehnquist, writing for a unanimous Court, rejected that analysis because it opens up countless opportunities for employee windfalls.[43] The rationale behind this conclusion is that an incompetent public employee, near termination, should not be placed in a more favorable legal position because he engaged, at the last minute, in constitutionally protected behavior.[44]

The proper causation test in an employee discharge case, according to the Court, first places the burden of proof upon the employee to show that his expression was both protected and a "substantial" or "motivating factor"

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37. *Id.* at 570-74. In Perry v. Sindermann, 408 U.S. 593 (1972), the second case of the *Pickering* progeny, an untenured teacher was fired for becoming embroiled in a controversy over whether the junior college at which he taught should be elevated from two to four year status—a change opposed by the Texas Board of Regents. The teacher had testified before a committee of the Texas legislature in favor of elevation. He was subsequently fired. The Supreme Court ruled in favor of the teacher and specifically held that the nonrenewal of a nontenured public school teacher may not be predicated on his exercise of first amendment rights. 408 U.S. at 598.

The absence of tenure, however, does affect the procedural due process rights afforded a discharged public employee. In Board of Regents v. Roth, 408 U.S. 564 (1972), decided the same day as *Perry*, the Court declined to extend the requirements of procedural due process to a nontenured teacher of the Wisconsin State University system. The Court held that a nontenured teacher need not receive a hearing as to why his contract was not renewed because his job did not constitute a liberty or property interest within the meaning of the fourteenth amendment. 408 U.S. at 574.

38. *See* Note, *Nonpartisan Expression, supra* note 35, at 375.

39. 429 U.S. 274 (1977).

40. *Id.* at 282. The Court noted that apparently some members in the school administration thought that there was a "relationship between teacher appearance and public support for bond issues." *Id.*

41. *Id.*

42. *Id.* at 283.

43. *Id.* at 285-86.

44. A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

429 U.S. at 285.

behind the government's disciplinary action.[45] The burden then shifts to the state to prove that it would have reached the same decision even in the absence of the protected activity.[46] Thus, "but for"[47] causation analysis, in the Court's view, prevents doomed employees from avoiding their fate simply because their protected behavior was the "last straw" precipitating the employer's termination decision.[48]

In *Givhan v. Western Line Consolidated School District*,[49] the Court held that a public employee who arranges to communicate privately with her employer does not lose first amendment protection for doing so.[50] Bessie Givhan was a teacher in a school district outside Greenville, Mississippi from 1963 until 1971.[51] On several occasions during the 1970-71 school year she presented objections to the principal in his office contending that racial discrimination existed in the appointment and assignment of certain nonprofessional employees.[52] The school district decided not to renew her contract for the following academic year.[53] She sued the school district and won in federal district court.[54] The Fifth Circuit reversed.[55]

The court of appeals found it unnecessary to apply the *Pickering* balancing approach because Givhan's speech was delivered in a private forum.[56] The court interpreted precedent in the area as extending first amendment coverage only to speech delivered publicly.[57] Hence, because Givhan's conduct implicated no first amendment interest, the Fifth Circuit panel concluded that the *Pickering-Mt. Healthy* issues were never reached.[58]

Justice Rehnquist, again writing for a unanimous Court, summarily disposed of the "public forum" requirement articulated by the court of appeals.[59] The Court held speech delivered in the workplace to be constitutionally

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45. *Id.* at 287.

46. *Id.*

47. The Court did not describe the causation test of *Mt. Healthy* as "but-for" until Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 417 (1979).

48. At least two commentators have argued that the "but-for" causation test of *Mt. Healthy* generally works against the rights of public employees. *See* Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376 (1979); Emerson, *First Amendment Doctrine, supra* note 35, at 470.

49. 439 U.S. 410 (1979).

50. *Id.* at 415-16.

51. Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1312 (5th Cir. 1977), *rev'd sub nom.* Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

52. *Id.* at 1313.

53. 439 U.S. at 411.

54. *Id.* at 412-13.

55. *Id.* at 413.

56. *See id.*

57. *Id.*

58. *Id.; see* Schauer, *"Private" Speech and the "Private" Forum*: Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 221 [hereinafter cited as Schauer, *Private Speech*].

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

439 U.S. at 415-16.

protected.[60] But Justice Rehnquist noted that private expression might bring additional factors, such as the manner, time and place in which the speech was delivered, into the *Pickering* calculus. He did not, however, elaborate as to how those factors would influence the balancing test.[61] A review of the principles stated in *Pickering, Mt. Healthy*, and *Givhan* indicates that a public employee's dismissal, executed in retaliation for his speech, can only be sustained if the government prevails in a *Pickering* balancing of interests or if it demonstrates by a preponderance of the evidence that it would have fired the employee even in the absence of his constitutionally protected conduct.[62]

2. *Connick v. Myers*

The unanimity present in *Mt. Healthy* and *Givhan* disintegrated with the Court's decision in *Connick v. Myers*.[63] In *Connick*, the Court held, in a 5-4 decision, that the firing of an Assistant District Attorney for distributing among her colleagues a survey related to a personal grievance did not violate her first amendment right of free speech. Justice White, writing for the majority, found that the private nature of the questionnaire and the circumstances surrounding its circulation did not warrant judicial reversal of the District Attorney's termination decision.

a. the facts

Sheila Myers had been a conscientious and effective trial lawyer in the Orleans Parish, Louisiana District Attorney's Office for over five years prior to her firing.[64] In early October, 1980, Myers was informed that although she would continue to prosecute cases she was being transferred to another section of the criminal court system.[65] Myers, however, opposed the transfer and voiced her sentiments to First Assistant District Attorney Dennis Waldron and District Attorney Harry Connick.[66] Despite her wishes, her transfer was approved shortly thereafter.[67]

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60. *Id.*

61. "When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." 439 U.S. at 415 n.4.

62. *See* Schauer, *Private Speech, supra* note 58, at 222.

63. 461 U.S. 138 (1983).

64. Myers v. Connick, 507 F. Supp. 752, 753 (E.D. La. 1981).

65. 461 U.S. at 140.

66. *Id.* Myers opposed the transfer for two reasons: 1) she felt comfortable and intellectually stimulated in Section A of the criminal court system, her current assignment, and 2) she had been participating in a counselling program for convicted defendants released on probation in Section 1, the section to which she was to be transferred, and recognized that conflicts of interest would arise if she were called on to prosecute individuals whom she had counselled. 507 F. Supp. at 753; 461 U.S. at 140 n.1.

67. 461 U.S. at 140-41.

Upset over the manner in which her transfer order was confirmed, Myers approached Waldron about the affair.[68] Their conversation transgressed that subject and eventually encompassed a whole range of problems concerning office management and policies.[69] Upon Waldron's suggestion that her general complaints were not shared by the other Assistant District Attorneys, Myers indicated that she would "do some research on the matter."[70]

The following morning, she and Connick discussed her transfer and, after she agreed to " 'consider' it," he left the office.[71] Around lunchtime Myers confidentially distributed a questionnaire[72] that she had prepared the night before pertaining to office policies and morale to fifteen other Assistant District Attorneys.[73] Waldron soon learned of the survey and phoned Connick to inform him that Myers was causing a "mini-insurrection."[74] Connick returned to the office and, after reading the questionnaire, fired Myers.[75]

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68. *Id.* at 141.
69. *Id.*
70. *Id.*
71. *Id.*
72. This is the questionnaire as reprinted in the *Appendix to Opinion of the Court*, 461 U.S. at 155-56:

PLEASE TAKE THE FEW MINUTES IT WILL REQUIRE TO FILL THIS OUT. YOU CAN FREELY EXPRESS YOUR OPINION WITH ANONYMITY GUARNATEED.

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1. How long have you been in the Office?
2. Were you moved as a result of the recent transfers?
3. Were the transfers as they effected [sic] you discussed with you by any superior prior to the notice of them being posted?
4. Do you think as a matter of policy, they should have been?
5. From your experience, do you feel office procedure regarding transfers has been fair?
6. Do you believe there is a rumor mill active in the office?
7. If so, how do you think it effects [sic] overall working performance of A.D.A. personnel?
8. If so, how do you think it effects [sic] office morale?
9. Do you generally first learn of office changes and developments through rumor?
10. Do you have confidence in and would you rely on the word of:
    Bridget Bane
    Fred Harper
    Lindsay Larson
    Joe Meyer
    Dennis Waldron
11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?
12. Do you feel a grievance committee would be a worthwhile addition to the office structure?
13. How would you rate office morale?
14. Please feel free to express any comments or feelings you have.

THANK YOU FOR YOUR COOPERATION IN THIS SURVEY.

73. *See* 507 F. Supp. at 754.
74. 461 U.S. at 141.
75. *Id.* Connick particularly objected to question 10 which asked whether the Assistant District Attorneys "had confidence in and would rely on the word" of various supervisors in the office. He also felt that the question concerning pressure to work in political campaigns for office-supported candidates would be damaging if leaked to the press. *Id.*

He refused to listen to Myers when she told him that she had decided to accept the transfer.[76]

Myers filed suit under 42 U.S.C. § 1983[77] alleging that her termination violated her first amendment right to free speech.[78] The federal district court found her conduct to be constitutionally protected and a "substantial" or "motivating factor" in her firing.[79] The district judge also determined that Myers' questionnaire did not substantially interfere with either her duties or the services provided by the District Attorney's office.[80] Finally, the district judge found that Connick had failed to prove by a preponderance of the evidence that he would have terminated Myers even in the absence of her protected conduct.[81] Consequently, judgment was entered for Myers.[82] The Fifth Circuit affirmed on the basis of the district court's opinion.[83] The Supreme Court reversed.

b. the majority opinion

Justice White interpreted *Pickering* and its progeny to require that an employee's speech pertain to a matter of public concern as a *prerequisite* for the balancing of relevant interests.[84] The majority then characterized most of the questions on the survey as "mere extensions of Myers' dispute over her transfer to another section of the criminal court"[85] and held that her "statements" were not of sufficient import to the public to warrant first

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76. 507 F. Supp. at 755-56. Indeed, Myers had already discussed her caseload with another Assistant District Attorney who, along with Myers, had also been proposed for transfer to Section I. *Id.*

77. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1982).

78. 507 F. Supp. at 756.

79. *Id.* at 759-60.

80. *Id.* at 759.

81. *Id.* at 760.

82. *Id.* at 761.

83. 461 U.S. at 142. The memorandum decision of the court of appeals is noted at 654 F.2d 719 (5th Cir. 1981).

84. "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." (footnote omitted). 461 U.S. at 146.

85. *Id.* at 148.

amendment protection.[86] Further, "[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. . . ."[87] Thus, the fact that Myers' expression "followed upon the heels of the transfer notice"[88] was highly relevant to the Court's determination that the questionnaire "would convey no information at all [to the public] other than the fact that a single employee is upset with the status quo."[89]

Because one of the questions in the survey (relating to official pressure to work for office-supported candidates in political campaigns) touched on a matter of public concern,[90] however, the Court reluctantly embarked on a *Pickering* balancing inquiry.[91] Justice White found that the burden imposed on Connick by the district judge to justify his decision was "unduly onerous."[92] The majority stated that "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[93] Because of the limited first amendment implications of Myers' survey, the Court held that Connick need not "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[94] The majority found Connick's unsupported assertions of disruption[95] sufficient to defeat Myers' claim of abridgement of constitutional rights.[96]

c. the dissent[97]

In his dissent, Justice Brennan strongly disagreed with the majority on three grounds. First, Justice Brennan chided the majority for examining the

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86. *See id.* According to Justice White, the reason why the questionnaire did not broach subjects of public concern was that it failed to inquire into official incompetence or corruption.

> Unlike the dissent . . . we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others.

Id. The dissent took strong exception to this rather limited view of what subject matter constitutes items of public concern. 461 U.S. at 160-65 (Brennan, J., dissenting).

87. *Id.* at 147-48.

88. *Id.* at 153.

89. *Id.* at 148.

90. *See supra* note 18.

91. *See* 461 U.S. at 149.

92. *Id.* at 149-50.

93. *Id.* at 150.

94. *Id.* at 154.

95. *See* 507 F. Supp. at 759.

96. Realizing that its decision was strongly influenced by the particular facts at hand, the majority reiterated the sentiment expressed in *Pickering* that it was not laying down a general rule by which to judge all employee speech. 461 U.S. at 154.

97. The dissenting justices in *Connick* were Justices Brennan, Marshall, Blackmun, and Stevens.

context in which Myers' questionnaire was distributed to determine if her survey touched on matters of public concern.[98] Justice Brennan asserted that the *context* in which speech is delivered has nothing to do with whether the *content* of such speech pertains to a matter of public concern.[99]

Second, Justice Brennan found that the questionnaire clearly addressed matters of public concern.[100] He stated that, "[u]nconstrained discussion concerning the manner in which the government performs its duties is an essential element of the public discourse necessary to informed self-government."[101] He concluded that Myers' survey contributed to this discussion and was, therefore, worthy of first amendment protection.[102]

Finally, Justice Brennan expressed amazement at the majority's "extreme deference" to Connick's belief that Myers' survey would disrupt the office and undermine his authority.[103] He noted that even though the district judge found that circulation of the questionnaire had no disruptive effect on the office,[104] the Court nevertheless bowed to Connick's claim that Myers' conduct adversely affected the functioning of the District Attorney's Office.[105]

The dissent thought *Tinker v. Des Moines Independent Community School District*[106] determinative of the question of how much disruption government officials must endure when constitutionally protected conduct is being exercised.[107] In *Tinker*, school administrators ordered a group of public high

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98. 461 U.S. at 159 (Brennan, J., dissenting).

99. *Id.* "The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—*regardless of whether it actually becomes the subject of a public controversy.*" *Id.* at 160 (Brennan, J., dissenting) (emphasis added) (footnote omitted). In the footnote to this passage, Justice Brennan noted that *The Times-Picayune/The States-Item*, a widely-circulating New Orleans newspaper, carried several stories concerning Myers' firing as well as a feature pertaining to the physical conditions of the District Attorney's new offices. *Id.* at 160 n.2 (Brennan, J., dissenting). Justice Brennan concluded from these stories that "Myers' comments concerning morale and working conditions in the office would actually have engaged the public's attention had she stated them publicly." *Id.*

100. I would hold that Myers' questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney, an elected official charged with managing a vital governmental agency, discharges his responsibilities.

461 U.S. at 163 (Brennan, J., dissenting).

101. *Id.* at 161 (Brennan, J., dissenting).

102. *Id.* at 163 (Brennan, J., dissenting). The reader should note that the dissent does not specifically disagree with the majority's major premise, which is that public employee speech deserves first amendment protection only if it addresses matters of public concern. The dissent, however, is much more liberal in its view as to what topics constitute matters of public concern. *See id.* at 163-65 (Brennan, J., dissenting). This Note challenges the validity of the majority's major premise.

103. *See id.* at 168 (Brennan, J., dissenting).

104. *See supra* text accompanying note 80.

105. 461 U.S. at 168 (Brennan, J., dissenting).

106. 393 U.S. 503 (1969).

107. 461 U.S. at 168 (Brennan, J., dissenting).

school students not to wear black armbands in school.[108] The armbands represented a protest of America's military involvement in Southeast Asia.[109] The lower court ruled the ban "reasonable because it was based upon [school officials'] fear of a disturbance from the wearing of the armbands."[110] The Supreme Court held this justification inadequate because "in our system, undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression."[111] Applying the *Tinker* standard to the facts of *Connick*,[112] Justice Brennan concluded that because Connick had not met his burden of demonstrating office disruption, the circulation of the questionnaire was protected by the first amendment.[113] *Connick* forbodes potentially dangerous ramifications for the free speech rights of public employees. This Note, therefore, will further scrutinize the Court's analysis.

II. *CONNICK v. MYERS*: A CRITIQUE

A. Departing from the Pickering *Rationale*

Justice White concluded that the first amendment and due process[114] guarantees afforded government employees by the *Pickering* balancing test are not available in reinstatement suits when the employee's speech does not

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108. 393 U.S. at 504.

109. *Id.*

110. *Tinker*, 393 U.S. at 508.

111. *Id.* The Court in *Tinker* concluded that, "[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." *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). *See also* James v. Board of Educ., 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). *Cf.* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (per curiam) (advocating the violent overthrow of the government, in the absence of an imminent possibility of lawless action, is speech protected by the first amendment); Healy v. James, 408 U.S. 169, 188-91 (1972) (state college cannot refuse official recognition of the Students for a Democratic Society (SDS) chapter unless its advocacy met the *Brandenburg* standard); Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 450 (1974) (Ind. law excluding from the ballot any party that would not submit to a loyalty oath held unconstitutional).

112. Justice Brennan thought the *Tinker* standard applicable because of his earlier conclusion that Myers' questionnaire "addressed matters of public importance." 461 U.S. at 169. It is not clear from his opinion if he would support a lower standard if a public employee's speech pertained to matters not of general interest. This Note argues that, with the exception of outright insubordination, the *Tinker* standard should apply in all situations where an employee is sanctioned for his speech.

113. *Connick*, 461 U.S. 138, 169.

114. *See* Emerson, *First Amendment Doctrine, supra* note 35, at 440.

touch on matters of public concern.[115] Further, even if a portion of a public employee's speech addresses a subject of general interest, as was the case in *Connick*, the employee may still be effectively denied a full *Pickering* inquiry if surrounding circumstances indicate that the expression was, in reality, merely a personal grievance.[116] In this latter situation, an unsupported statement by a government official that the employee's conduct will have a disruptive impact on future agency operations appears sufficient to defeat

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115. Connick v. Myers, 461 U.S. at 146. Justice White, however, would have extended protection to Myers' survey if she had been a defendant in a libel action brought by her superiors. *Id.* at 147. The majority, therefore, links first amendment coverage, *see infra* note 118, with the particular government sanction used to regulate employee speech. The *Pickering* Court thought the threat of dismissal from public employment, like criminal sanctions and libel damage awards, was a potent means of inhibiting speech. Pickering v. Board of Educ., 391 U.S. 563, 574. *See* Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion of Brennan, J.):

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

427 U.S. at 359 (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

The retreat from this position in *Connick* is unexplained and unwise. The form of discipline used to sanction the speech of a public employee may be a factor in the relevant balancing of interests but it has nothing to do with the inquiry of whether the content of the expression falls within the ambit of first amendment coverage. This result appears to be a backhanded method of resurrecting the discredited right-privilege distinction.

One commentator has an explanation for this aspect of the Court's analysis. Professor Laurence Tribe has noted that the Court, in recent terms, has tended to analogize government actions to those of private actors. Address by Laurence H. Tribe, *Fifth Annual Supreme Court Review and Constitutional Law Symposium* (Sept. 23-24, 1983), *summarized at* 52 U.S.L.W. 2228, 2233. For example, if suit is brought challenging state action as unduly restrictive on interstate commerce (and thus violative of the commerce clause), the Court focuses on whether the government is functioning as a market participant or market regulator. *Id. See, e.g.*, White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). "[W]hen a state or local government enters a market as a participant and not a regulator, it is not subject to the restraints of the Commerce Clause." 52 U.S.L.W. at 2233. Tribe believes that the Court has extended the participant-regulator theme into the area of free speech. *Id.* Thus, when government functions as an employer (and is a participant in the labor market) the Court may be willing to allow it more latitude in regulating speech. *Id. Cf.* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (school district given wide discretion in regulating access to its internal mail system); Buckley v. Valeo, 424 U.S. 1, 290-91 (1976) (Rehnquist, J., concurring in part and dissenting in part). *See Connick*, 461 U.S. at 147, where the majority stated, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances *not afforded by the First Amendment to those who do not work for the State.*" (emphasis added). Private employees do not hold first amendment rights against their employers unless there is state action. *See* Holodnak v. Avco Corp., 514 F.2d 285, 288-89 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). *But see* Kiiskila v. Nichols, 433 F.2d 745, 749 (7th Cir. 1970):

> A citizen's right to engage in protected expression or debate is substantially unaffected by the fact that he is also an employee of the government . . . . This is so because dismissal from government employment, like criminal sanctions or damages, may inhibit the propensity of a citizen to exercise his right to freedom of speech and association.

See also Donahue v. Staunton, 471 F.2d 475, 480 (7th Cir. 1972).

116. 461 U.S. at 149-54.

the employee's first amendment challenge to the government's termination decision.[117] These conclusions, however, are at odds with the Court's prior decisions regarding the free speech rights of government employees.

Prior government employee reinstatement suits do not directly support limiting first amendment coverage to speech on matters of public concern.[118] Although Justice White noted that "[t]he repeated emphasis in *Pickering* on the right of a public employee, 'as a citizen, in commenting upon matters of public concern,' was not accidental,"[119] the *Connick* majority did not specifically rely on any of its own cases for this claim.[120] Because the above

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117. *See id.* at 151-52 & n.11.

118. One of the most important themes in first amendment theory is the distinction between coverage and protection. Schauer, *supra* note 58, at 227. Malicious libel, *see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); obscenity, *see* Roth v. United States, 354 U.S. 476 (1957); and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), are types of speech that fall outside the "coverage" of the first amendment and are never "protected." *See* Schauer, *supra* note 58, at 228. The state may proscribe their exercise without justification. *Id. See also* New York v. Ferber, 458 U.S. 747 (1982) (nonobscene child pronography); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (misleading commercial speech); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) (imminent incitement to lawless activity). On the other hand, defamatory speech of public figures is covered but not protected if it is false and published with knowledge of its falsity. *See* New York Times Co. v. Sullivan, 376 U.S. at 279-80.

At least two courts have perceived that the term "protected conduct" is a misnomer. An employees' conduct is "protected" only *after* balancing the interests of employee and employer. One factor *relevant* in weighing the side of the balance favoring the employee is the public interest served by the speech. Thus, describing conduct as protected means that the employee's interests in speaking outweigh those of the government in regulating his speech and *not* that it is outside first amendment coverage. *See* Gonzalez v. Benavides, 712 F.2d 142, 146 n.1 (5th Cir. 1983); Foster v. Ripley, 645 F.2d 1142, 1148 (D.C. Cir. 1981). The fact that an employee's speech relates to a matter of public concern should only *strengthen* his right to speak out. *See Connick*, 461 U.S. at 156-57 (Brennan, J., dissenting).

In determining whether speech is protected by the first amendment, the Burger Court usually utilizes a balancing test (similar to the *Pickering* approach), weighing the personal and social value of the expression against the government's interest in regulating it. *See* Emerson, *First Amendment Doctrine, supra* note 35, at 451. However, the manner in which the Court strikes the balance between the first amendment interest of citizens and those interests of the state have varied widely depending primarily upon the content of the speech and the scope of the regulation. *Id.* at 449-51.

119. *Connick*, 461 U.S. at 143 (quoting *Pickering*, 391 U.S. at 568).

120. Justice White does cite two cases from the federal courts of appeals purporting to hold that only speech of general interest is entitled to constitutional protection. *Connick*, 461 U.S. at 146 n.6; Schmidt v. Fremont County School Dist., 558 F.2d 982, 984 (10th Cir. 1977); Clark v. Holmes, 474 F.2d 928, 931-32 (7th Cir. 1972), *cert. denied.*, 411 U.S. 972 (1973). A disciplined reading of both opinions, however, reveals that each court utilized the *Pickering* balancing test; language suggesting a "public" subject matter requirement remains confused—and unfortunate—dicta.

Both employees lost, as they should have under the *Pickering* factor balancing approach, because the disruption caused by their conduct clearly outweighed their free speech interests. The following language from the *Clark* opinion aptly characterizes the underlying analysis in both cases: "[the public employee] has cited no sound authority for his proposition that he had a constitutional right to override the wishes and judgment of his superiors and fellow faculty members . . . ." 474 F.2d at 931. In *Connick*, Myers eventually decided to accept the transfer. *See* Myers v. Connick, 507 F. Supp. at 756.

statement is not a compelling justification for restricting first amendment protection to certain types of employee speech, a more thorough examination of the *Pickering* rationale is warranted.

Both the *Pickering* and *Connick* opinions are clearly concerned with the potentially harmful effects of employee speech on government operations.[121] Indeed, the *Pickering* Court indicated its sensitivity to the government's interest, as an employer, in ensuring that institutional efficiency and effectiveness not be undermined by employee criticism.[122] In *Pickering*, however, Justice Marshall placed on the school board the burden of proving that the teacher's letter was disruptive of school operations.[123] Because it offered no evidence of harm, the board's interest in curtailing Pickering's speech was held not to be significantly greater than its interest in restricting a similar statement made by a member of the general public.[124] Assuredly, the subject of school appropriations is a matter of general concern to the community. The Court's reasoning, however, leads unmistakably to the conclusion that Pickering's status as a teacher at the high school would militate against his right to criticize the school administration only if his conduct impeded the operations of the school system. There is no suggestion in the *Pickering* opinion that a public employee who wishes to discuss a matter not of general interest must do so at his own risk. Denying a discharged public employee an opportunity to demonstrate that his speech affected neither his own performance nor the operations of the agency because his expression is not of public concern, as the *Connick* decision does, is a drastic and dangerous extension of the *Pickering* rationale.[125]

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121. *See Connick*, 461 U.S. at 151-52; *Pickering*, 391 U.S. at 568.

122. 391 U.S. at 569-73. *See also* Coven, *supra* note 9, at 565 n.27. *Cf.* Bishop v. Wood, 426 U.S. 341, 349-50 (1976); Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (separate opinion of Powell, J., concurring in part and dissenting in part).

123. 391 U.S. at 570.

124. *Id.* at 573. The Court appeared to establish the reckless and knowing standard of New York Times Co. v. Sullivan, 376 U.S. at 283, as the minimum standard for dismissal. Note, *Nonpartisan Expression, supra* note 35, at 1003. But later decisions and the Court's refusal to "make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism," *Pickering*, 391 U.S. at 574, indicate that the *New York Times* standard was not the basis for the *Pickering* decision. Note, *Judicial Protection of Teacher's Speech: The Aftermath of Pickering*, 59 IOWA L. REV. 1256, 1264 n.76. Note that the *New York Times* standard would preclude the need for the due process balancing of interests and the search for detrimental impact if the employee's statement dealt with matters of public importance and no actual malice was shown. *Id.* at 1263-64.

125. By denying first amendment coverage to her speech, the majority effectively equated the bulk of Myers' survey with the few categories of expression which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. at 572 (footnote omitted). *See supra* note 118. Myers' survey, of course, cannot be characterized in the above manner. *Cf.* Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) ("[W]e believe that the first amendment protects . . . 'the American tradition of making passing allusion to the vicissitudes of the boss.'"). *Id.* at 840 (quoting Yoggerst v. Stewart, 623 F.2d 35, 40 (7th Cir. 1980)).

B. Connick *and First Amendment Policy*

The radical rule of *Connick* limiting the constitutional protection afforded public employee speech is unwise because it ignores several important policies underlying the first amendment. First, the Court unduly restricts the exercise of speech which has the potential to contribute to the progressive development of society. The rationale for excluding certain types of speech, such as fighting words or malicious libel, is that the probability of such expression ever improving or enlightening American society is infinitesimally minute.[126] Outright prohibition of such speech never impedes the ability of society to make informed reasoned decisions on matters of public importance. This rationale should not apply to personal grievances voiced by public employees. Employee criticism, even that relating to personal grievances, may bring to light deficiencies in office management which, if corrected, could increase the public agency's efficiency and effectiveness. If each employee in the Orleans Parish District Attorney's Office did not approve of Connick's transfer policies, then surely workplace morale would plummet and the vigorous enforcement of the Parish's criminal laws—undoubtedly a matter of public concern—would suffer. Myers' questions relating to office policy possessed a strong potential for avoiding such a situation and, therefore, should have fallen within the ambit of first amendment coverage.[127]

Although the Supreme Court has declared that a core function of the first amendment is to protect speech pertaining to "the manner in which government is operated or should be operated,"[128] the *Connick* decision discourages those persons, perhaps most knowledgeable about government operations, from doing so. Society entrusts elected officials—or persons appointed by elected officials—with the responsibility of formulating the policy of government agencies. Their decisions are extremely important for they directly affect how government services are delivered to the general public. Certainly the structure and internal policies of a government agency play important roles in its smooth and effective operation. Agency employees are in the unique position of being able to observe the internal machinery

126. *See supra* notes 118 and 125.

127. Note that the *Connick* rule denies both *first amendment and due process* protection to employees fired for private speech. "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, *it is unnecessary for us to scrutinize the reasons* for her discharge." Connick v. Myers, 461 U.S. 138, 146 (1983) (emphasis added). *See supra* notes 35 and 118. *Cf.* A. MEIKLEJOHN, FREE SPEECH, *supra* note 8, at 94. Public employees expressing allegedly "private" grievances which may bring to the attention of office managers facts relating to workplace morale should, at the very least, survive the government's motion to dismiss on the pleadings and receive a *Pickering* balancing of interests.

128. Mills v. Alabama, 384 U.S. 214, 218 (1966). *See generally* A. MEIKLEJOHN, FREE SPEECH, *supra* note 8; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. *Cf.* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

of government on a day-to-day basis. Because they are privy to information acquired from hands-on experience, public employees are an invaluable source of information for government managers to tap when in need of advice critical to office operations.[129] The *Connick* rule, however, allows government officials to dismiss with impunity any employee who expresses this information in a critical manner.[130] After *Connick*, public employees should be more than a little apprehensive about offering constructive criticism to their superiors—even if solicited for it. Office managers will be deprived of informed input relating to internal office policy. Restricting the flow of such information also hinders internal efforts to improve the quality of public services. Elected officials undoubtedly have the right to determine internal office policy, but they should not have the right to do so in a vacuum.[131]

Finally, the Court's holding that public employee speech on matters of private concern warrants no first amendment coverage (in reinstatement suits) ignores the value of free speech to the individual. The opportunity to speak freely about subjects one is concerned with facilitates the development of communicative skills.[132] Society benefits from this because an increase in an individual's expressive capabilities eventually leads to a more intelligent contribution to the discussion of issues affecting a broader segment of the community.[133] The *Connick* inquiry into whether speech involves a matter

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129. "Teachers are, as a class, the members of a community most unlikely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent." Pickering v. Board of Educ., 391 U.S. at 572.

130. *See supra* text accompanying notes 114-17.

131. Not only are public employees an invaluable source of constructive criticism for government officials, but they also serve as surrogate spokesmen for the general public. Because the populace cannot be aware of all that transpires within a public agency, and thus form and express an opinion on particular policies, government employees must be allowed to criticize the actions of their superiors so that at least some "public" input is heard regarding an official's decision. Public employees are the best institutional check on the machinations of the government bureaucracy; government and elected officials are servants and not masters of society. *See generally* Coven, *supra* note 9, at 569-75; Meiklejohn, *The First Amendment Is An Absolute,* 1961 SUP. CT. REV. 245, 253-54. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) ("[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.") (emphasis in original); Bork, *supra* note 128, at 23 (also recognizing the special structural role of the first amendment).

132. *See infra* notes 133-34.

133. John Stuart Mill demonstrated that free and open discussion produces social utility. *See* C.L. TEN, MILL ON LIBERTY 75-118 (1980). *See also* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 534 n.2 (1980) (freedom of speech protects the individual's interest in self-expression); Cohen v. California, 403 U.S. 15, 24 (1971) (free expression stems from the premise of individual dignity and choice which underlies the political system); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that the founding fathers valued liberty as both an end and a means). The Supreme Court elaborated upon these concepts in Bose Corp. v. Consumer Union of United States, Inc., 104 S. Ct. 1949, *reh'g denied*, 104 S. Ct. 3561 (1984):

> The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but is also essential to the common quest for truth and the vitality of society as a whole.

of public concern transforms the *Pickering* test into a weighing of the value to society of first amendment freedoms against the value to society of efficient public services.[134] In the final analysis, the *Connick* decision subordinates the individual viewpoints of public employees to those of their bureaucratic superiors. The above discussion should demonstrate, however, that public employees fired for their speech should, at the very least, be afforded an opportunity to answer the charge that their conduct disrupted the operations of the government agency.[135]

III. THE DIFFICULTY OF APPLYING THE *CONNICK* RULE

In the wake of *Connick*, the initial—and crucial—inquiry in cases where a public employee alleges governmental abridgement of free speech rights is whether his expression touched on a matter of public concern. The majority stated that resolution of this issue must be determined by examining the "content, form, and context" of the employee's speech.[136] Though simply stated, the rule raises numerous problems in application.

> Under our Constitution "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Id. at 1961 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)). *Cf.* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (suggesting that the notion that ultimate good is better reached by free trade in ideas is the theory, and the experiment, of the Constitution). *See generally* R.M. DWORKIN, TAKING RIGHTS SERIOUSLY 189-99 (1977); T.I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 581 (1971); Note, *Fourth Circuit Review: First Amendment Rights of Public Employees*, 37 WASH. & LEE L. REV. 477, 479-80 (1980). Several commentators have sharply criticized the view that the first amendment was enacted for the purpose of ensuring an individual's right to freedom of expression. *See, e.g.*, W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 186-87 (1976); Bork, *supra* note 128, at 20 ("Constitutional protection should be accorded only to speech that is explicitly political.").

134. *See* Note, *supra* note 133, at 479 n.10.

135. *See* Waters v. Chaffin, 684 F.2d 833, 838 n.11 (11th Cir. 1982); Donahue v. Staunton, 471 F.2d 475, 481 (7th Cir. 1971). When public employees are punished for their political affiliations, the Court demands from the government a compelling justification for such action. *See supra* note 18. A panel of the Fifth Circuit concluded that the Court's analysis in the patronage dismissal cases was applicable to situations where public employees are fired for their speech. Van Ooteghem v. Gray, 628 F.2d 488, 492-93 & n.4 (5th Cir.), *aff'd on other grounds en banc*, 654 F.2d 304 (5th Cir. 1981). Thus, the panel held that government regulation of constitutionally protected employee speech must be justified by a compelling state interest such as "proof that the regulation of speech was necessary to prevent 'a material and substantial interference' with the operation of the public department." 628 F.2d at 492 (citation omitted). *Cf.* Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980) (implicitly accepting idea that the denial of tenure to professor because of CIA affiliation violated his first amendment rights of association and expression). *But cf.* McMullen v. Carson, 568 F. Supp. 937 (M.D. Fla. 1983) (upholding dismissal of clerk in Sheriff's office beeause of membership in the Ku Klux Klan). The *Connick* decision rejects the analogy. In the context of public employee speech, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150.

136. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

A. The Content Inquiry

The content component of the inquiry provides little guidance to public employees, agency managers, or judges as to what subjects are appropriate for discussion within the office. Justice White's standard—"[Whether] employee expression [can] be fairly considered as relating to any matter of political, social, or other concern to the community"[137]—is unworkable. In modern society, it is difficult to imagine *any* communication not within the parameters of that definition.

Justice White suggests that the level of public awareness and exposure to an issue may determine whether or not it is of general interest.[138] Putting to one side the Court's previous pronouncements that the first amendment protects speech on issues regardless of their timeliness,[139] the majority fails to address any of the obvious evidentiary questions underlying the public concern inquiry. For example, the Court fails to explain what the appropriate level of public dissemination should be before a judge should conclude that the speech is one of general concern. Nor does the Court state whether exposure is necessary[140] or whether public employees must poll the citizenry to substantiate their "public concern" speech claims.[141] In the absence of guidance on these problems, the *Connick* majority ensures that resolution of the public concern inquiry will strongly hinge on the trial judge's (and

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137. *Id.* at 146.

138. *See Connick*, 461 U.S. at 148 n.8. The majority noted that "a questionnaire not otherwise of public concern does not attain that status because its subject matter could, *in different circumstances*, have been the topic of a communication to the public that might be of general interest." *Id.* (emphasis added). Speech protesting racial discrimination, however, was described as "a matter inherently of public concern." *Id.* For a similar approach see Cooper v. Johnson, 590 F.2d 559, 562 (4th Cir. 1979). Of course, if employees are prohibited from discussing internal office policies then the prospects of those topics ever becoming ones of more general interest are greatly diminished.

For an absurd interpretation of the language in the Court's footnote 8, see Wilson v. City of Littleton, 732 F.2d 765 (10th Cir. 1984). The court there declared that the murder of a police officer could only be a topic of general interest under certain circumstances. "For example, if a police officer were shot during an ongoing public controversy over the expenditure of public funds to purchase bullet-proof vests for the police force, the topic of police officers' deaths clearly would be of general interest." *Id.* at 769 n.2. This writer was not aware that the subjeet of murder, committed under any circumstances and especially when police officers are the victims, had become so uninteresting.

139. *See* Bridges v. California, 314 U.S. 252, 269 (1942).

140. *Cf.* Egger v. Pillips, 710 F.2d 292 (7th Cir.), *cert. denied*, 104 S. Ct. 284 (1983), where Judge Eschbach noted:

> We do not believe . . . that the scope of an employee's freedom of specch can turn on his ability to convince a newspaper to print a story ahout his plight. The factors which determine whether a story is newsworthy are hardly coterminus with the factors which determine whether the communication has societal ramifications, and in any event, newspaper editors cannot decide the question for us.

Id. at 317 (footnote omitted).

141. Note that the majority ignored a newspaper story in a leading New Orleans newspaper pertaining to the refurbishing of the District Attorney's Office and several stories concerning Myers' dismissal. *Connick*, 461 U.S. at 160 n.2 (Brennan, J., dissenting). *See supra* note 99.

possibly appellate panel's)[142] political and social awareness. Inconsistent decisions will necessarily result because of the highly subjective nature of this task.[143]

Yet another problem with the majority's analysis is its determination that, even though one question on the survey pertained to a matter of public interest, the survey, as a whole, was merely an extension of Myers' personal grievances.[144] The mischief inherent in this approach is extremely disturbing. *Connick* apparently invites future courts to blend speech of significant public interest with other, more "private," expression when determining whether or not the speech touched on a matter of general concern. Not only does the majority's analysis increase the difficulty of content classification, but it provides judges, unsympathetic to the first amendment rights of public employees, with a powerful maneuver to extinguish a substantial number of

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142. The *Connick* Court reiterated its position that "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7. Thus appellate judges are in the same position as trial courts in resolving this issue. *See* Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

143. For a sampling of the inconsistency that is likely to result from the content inquiry, compare National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court without opinion*, 105 S. Ct. 1858 (1985); Berdin v. Duggan, 701 F.2d 909 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 239 (1983) (remark to mayor concerning the understaffing of the city's park district workforce held to be a matter of general interest); Collins v. Robinson, 568 F. Supp. 1464 (E.D. Ark. 1983), *aff'd per curiam* 734 F.2d 1321 (8th Cir. 1984) (internal memo concerning rude behavior of other officer held covered by the first amendment); McGee v. South Pemiscot School Dist., 712 F.2d 339 (8th Cir. 1983) (the elimination of track from a high school's athletic program held a matter of community interest); McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) (rate of compensation of city's police force and relationship between police union and elected officials found a matter of public concern); MacFarlane v. Grasso, 696 F.2d 217 (2d Cir. 1982) (the internal promotion policies of the Connecticut National Guard held to be a matter of public concern); with Murray v. Gardner 741 F.2d 434 (D.C. Cir. 1984) (furlough plan for FBI agents not "remote[ly]" a matter of public concern); Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984) (sexual preference of school faculty members held not a matter of public interest); Mahaffey v. Kansas Bd. of Regents, 562 F. Supp. 887 (D. Kan. 1983) (salary and promotion policies of state college system held not covered by first amendment); Cooper v. Johnson, 590 F.2d 559 (4th Cir. 1979) (unmailed letter to newspaper alleging mistakes in report of police arrest did not survive *Pickering* inquiry to protect first amendment rights); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973) (holding first amendment rights not abridged by school administration's refusal to rehire teacher based on incompatibility of teaching style with pedagogical aims of University).

Justice White stated in *Connick* that the question of whether expression is of legitimate concern to the public is also the standard in determining whether a common law action for invasion of privacy is present. 461 U.S. at 143 n.5. *Cf. Pickering*, 391 U.S. at 573. His further citation of Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975) (television broadcast of the name of a rape-murder victim obtained from public records is constitutionally privileged from an action for invasion of privacy), indicates that issues or facts already in the public forum should receive greater protection. For a similar approach see Cooper v. Johnson, 590 F.2d at 562. Such a standard, however, may discourage public employees from speaking out on official improprieties, especially if they are not obviously egregious. Furthermore, it is arbitrary to limit first amendment coverage to employee expression that *contributes* to the public debate while denying coverage to speech which may *initiate* it.

144. *See Connick*, 461 U.S. at 148.

meritorious claims.[145] By assuring unpredictability as to the constitutional coverage extended certain types of speech,[146] the *Connick* decision will chill speech by citizens who choose to pursue careers in government service.

B. The Context Inquiry

The contextual aspect of the public concern inquiry will also play a critical role in future government employee reinstatement suits.[147] In *Connick*, the majority believed that Myers' survey was meant "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors."[148] Myers' motive in distributing the survey

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145. By diluting the public importance of an employee's speech through the blending process, judges can apply widely divergent burdens on the government to justify its action. *See supra* note 135. Prior to *Connick*, the federal courts of appeals had been fairly consistent in requiring that the government demonstrate that the employee's expression "substantially and materially" interfered with the agency's effectiveness and efficiency before allowing the state to defeat an employee's first amendment claim. *See, e.g.*, McKinley v. City of Eloy, 705 F.2d 1110, 1115 (9th Cir. 1983) (decided with full knowledge of the *Connick* decision); Monsanto v. Quinn, 674 F.2d 990, 995 (3d Cir. 1982); Columbus Educ. Ass'n v. Columbus City School Dist., 623 F.2d 1155, 1160 (6th Cir. 1980); Bickel v. Bickhart, 632 F.2d 1251, 1256-57 (5th Cir. 1980); Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 117 (1st Cir. 1977); Jannetta v. Cole, 493 F.2d 1334, 1336-37 (4th Cir. 1974). *Cf.* Key v. Rutherford, 645 F.2d 880, 884 (10th Cir. 1981); Selzer v. Fleisher, 629 F.2d 809, 815-17 (2d Cir. 1980) (Kanfman, J., dissenting); Tygrett v. Barry, 627 F.2d 1279, 1285-87 (D.C. Cir. 1980); Yoggerst v. Stewart, 623 F.2d 35 (7th Cir. 1980). Some of the circuits, however, have recognized that the disruption standard need not be as high in the area of police and fire protection because of the public's strong interest in assuring continual efficiency and effectiveness in those areas. *See* Hughes v. Whitmer, 714 F.2d 1407, 1421 (8th Cir. 1983) (dicta); Waters v. Chaffin, 684 F.2d 833, 839 n.12 (11th Cir. 1982) (dicta); Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979); Kannisto v. City and County of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976). *But see* Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983) (first amendment interest in protesting racial discrimination within the police department requires strong showing of disruption); Tygrett v. Barry, 627 F.2d 1279, 1285-87 (D.C. Cir. 1980) (substantial disruption still necessary even in police department).

One of the fundamental tenets of first amendment jurisprudence is that content-based restrictions on speech are impermissible absent an inquiry demonstrating that a compelling state interest outweighs the citizen's interest in speaking freely. Waters v. Chaffin, 684 F.2d 833, 838 n.11 (11th Cir. 1982). *See* Regan v. Time, Inc., 104 S. Ct. 3262, 3266 (1984) (citations omitted); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972). The Court's refusal in *Connick* to apply this rule to the regulation of public employce expression is, as mentioned previously, both unexplained and unwise.

146. *See* Rosenbloom v. Metromedia, 403 U.S. 29, 84 (Marshall, J., dissenting) ("[T]he essence of the discretion is unpredictability and uncertainty.").

147. Note that the blending process condoned by the *Connick* majority dilutes the importance of employee speech with not only other, more "private," statements, but also with the circumstances in which the speech occurred. *See Connick*, 461 U.S. at 147-48. This "double-blending" of content and context is so confusing that judges may ignore it and make decisions based solely on their perceptions of the parties' demeanor at trial. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

148. 461 U.S. at 148. The Court apparently concedes that some speech relating to internal office policies and administration is necessary to inform public debate. If Myers had sought either to "inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecntion of criminal cases" or to "bring

was thus an important factor in the Court's determination that her speech was not of general concern.[149] This emphasis on motive probably means that numerous peripheral issues involving past work performance and real or imagined personality conflicts will be admissible evidence at future trials.[150] Such factual inquiries require the expenditure of an enormous amount of scarce judicial resources. The benefits from this expenditure, however, are unclear at best. Certainly most speech is "motivated" by personal feelings and often spoken with the purpose of advancing the "personal" interests of the speaker. Thus, injecting motive into the analysis is most unwise because it clutters a reinstatement case with irrelevant facts almost always weighing against the employee's first amendment rights. It is, after all, the employee's *speech,* and not his *motive in speaking,* that forms the basis of his first amendment claim.[151] Future courts should limit their evidentiary inquiries accordingly.

The *Connick* majority also viewed the fact that Mycrs' survey was aimed at an office policy directly affecting her as one giving additional weight "to the supervisor's view that the employee has threatened the authority of the

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to light actual or potential wrongdoing or breach of public trust on the part of Connick and others," 461 U.S. at 148, then the majority would have extended first amendment coverage to her speech. Although it does not explain why only these subjects deserve constitutional protection, the Court appears willing to protect the employee who "blows the whistle" on official impropriety. For public employee dismissal eases involving "whistleblowers," see Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984); Foster v. Ripley, 645 F.2d 1142, 1148 (D.C. Cir. 1981); Atcherson v. Sibenmann, 605 F.2d 1058, 1063 (8th Cir. 1979); Porter v. Califano, 592 F.2d 770, 773-74 (5th Cir. 1979). *Cf.* Nathanson v. United States, 702 F.2d 162 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 352 (1984) (upholding dismissal of employee because manner of conveying to superiors various deficiencies in enforcement of environmental laws deemed insubordination); Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), *cert. denied,* 431 U.S. 937 (1977) (upholding discharge of first assistant district attorney because disclosure of improprieties in the office totally undermined employment relationship with superior). *See generally,* Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle,* 42 U. CHI. L. REV. 530 (1975).

Furthermore, it seems that the Court limited the applicability of *Connick* to employee speech that is delivered within the office during working hours. *See* 461 U.S. at 153 n.13. Thus, an employee who speaks on matters not of general interest but outside the office is still entitled to constitutional protection. The Eleventh Circuit has posited that an individual's zone of privacy outside the office is a legitimate interest and can only be overridden by a demonstration that the employee's speech harmed agency efficiency or effectiveness. Waters v. Chaffin, 684 F.2d 833, 837-38 (11th Cir. 1982).

149. *See* 461 U.S. at 154.

150. Myers apparently had some history of criticizing office policies. *See* Testimony of Dennis Waldron, *Joint Appendix To Writ of Certiorari* at 169-70. Myers' distribution of her survey may have been the last harassing activity that Connick was willing to endure. A government claim that an employee's motive in speaking was "private and personal" may, however, be a subterfuge for silencing speech clearly protected by the first amendment. *See* Note, *Nonpartisan Expression, supra* note 35, at 390 n.99.

For a recent case noting the problems involved with weighing employee motive in the *Pickering* balance, and rejecting the state's challenge on this ground, see Smith v. Harris, 560 F. Supp. 677, 698 (1983). *But cf.* Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir. 1984) ("Given the essentially 'private motive' for the speech, plaintiff's firing was not actionable under section 1983."); Janusaitus v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 26 (1979) (court willing to look at motive if part of a broader inquiry into disruption caused by employee conduct).

151. *See* Lewis v. Blackburn, 734 F.2d 1000, 1006 (4th Cir. 1984).

employer to run the office."[152] In other words, Connick's unsupported assertions that Myers had undermined his authority and disrupted the office, factors weighing against Myers in the *Connick* Court's modified *Pickering* balancing analysis,[153] were given credence simply because Myers' criticism was directed at her own transfer order. The Court thus encourages disgruntled employees to have their colleagues air their grievances for them. Office tension will surely increase as rumors abound about who asked whom to complain. Harmony among co-workers[154] would be better served by encouraging forthrightness in the airing of employee grievances. Unfortunately, the *Connick* decision promotes a more strained office atmosphere.[155]

CONCLUSION

The Supreme Court's decision in *Connick v. Myers* is clearly aimed at preventing the first amendment from providing a federal cause of action to government employees embroiled in internal personnel disputes. Courts should recognize this and limit the reach of the *Connick* rationale accordingly. The

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152. 461 U.S. at 153.

153. *See supra* text accompanying notes 27-30. Note that the Court injected the context of Myers' survey into two distinct inquiries. First, the Court viewed the circumstances surrounding the distribution of the questionnaire as bearing on the issue of whether or not the survey touched on matters of public concern. *See Connick*, 461 U.S. at 147-49. Later, the majority thought the context of Myers' speech to be a relevant factor in its balancing of interests. *See* 461 U.S. at 153-54. *See also id.* at 157-58 (Brennan, J., dissenting). Any examination into the context in which speech is delivered, however, should be relevant only in the *Pickering* balancing rationale. Furthermore, an employer's assertion that employee speech will cause disruption in the office should not be conclusive on the question of harm to government operations. Most criticism is bound to ruffle some feathers within the office. An employee's first amendment rights should not depend on the temperament of a single agency manager. Courts should continue to probe into the actual effects that the employee's speech had on government operations.

154. This is one of the factors relevant in the *Pickering* balancing of interests. *See supra* text accompanying note 28. Note that the Court has placed public employees in a "Catch-22" situation. By protesting a policy internally, the employee increases the chance his speech will be considered merely a personal grievance. But protesting publicly increases the likelihood of disruption in government operations—a factor weighing against the employee under the *Pickering* balancing test. *See supra* text accompanying notes 27-30.

155. Note that the *Connick* Court was not faced with the question of whether the punishment of a public employee who criticizes the policies of her employer through proper channels is impermissible. Beeause such expression affords the employee an opportunity to express constructive criticism at a minimum of disruption to office efficiency and effectiveness, it should receive protection from future courts. *Cf.* Boyd v. Secretary of the Navy, 709 F.2d 684, 687-88 (11th Cir. 1982) (court upheld restrictions on time, place, and manner in which employees could write memos relating to the need for certain programs). *But cf.* Czurlanis v. Albanese, 721 F.2d 98, 106 (3d Cir. 1983) ("A policy which would compel public employees to write complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill such speech.") (citations omitted).

The *Connick* majority also noted that Myers' position within the office (an Assistant District Attorney with significant responsibilities in enforcing the criminal laws of New Orleans) was one factor relevant in its balancing of interests. 461 U.S. at 151-52. Courts handling future cases involving nonpolicymaking employees should note the absence of "close working relationships" and weigh the respective interests accordingly. *Cf. supra* note 18.

premise of this Note is that public employees, and the rest of the general citizenry, have a strong interest in the open discussion of governmental affairs. Because public employees provide this nation with invaluable information pertaining to the operations of the government bureaucracy, their free speech rights should not be denied in the absence of demonstrable harm to agency operations. While employee criticism concerning "private" grievances may, in the wake of *Connick*, lead to constitutionally permissible termination, future courts must ensure that society not be deprived of speech about "the manner in which government is operated or should be operated."[156]

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156. Mills v. Alabama, 384 U.S. 214, 218-19 (1965).