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Public Employees and the First Amendment: *Connick v. Myers*

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NOTES

Public Employees and the First Amendment: *Connick v. Myers*

INTRODUCTION

Uninhibited debate about public issues is a basic requirement for the continued vitality of any democracy. In order to protect this principle, the first amendment guarantees citizens' rights to criticize government officials and agencies.[1] Effective government also depends, however, on the efficient administration of its offices and agencies by these same government officials and agencies.[2] A conflict thus may arise between government efficiency and the first amendment when the citizen exercising his first amendment rights is a public employee. The United States Supreme Court recently addressed the conflict between these crucial interests in *Connick v. Myers*.[3]

Typically, this conflict arises when a public employee speaks criticially about his supervisor and the supervisor retaliates by firing the employee.[4] The employee subsequently sues to get his job back, claiming that his first amendment rights were violated by the dismissal. The government defends its actions by asserting that the employee's critical remarks destroyed any effective working relationship between the parties.

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1. The first amendment states: "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." U.S. CONST. amend. I. *See infra* note 19.

2. Connick v. Myers, 103 S. Ct. 1684, 1691 (1983).

3. 103 S. Ct. 1684 (1983).

4. This was the fact situation giving rise to the plaintiff's claim in *Connick*. *See also* Bush v. Lucas, 103 S. Ct. 2404 (1983) (NASA aerospace engineer demoted for making statements critical of Space Center to the media); Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979) (teacher dismissed for complaining about school's racially discriminatory policies); Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (teacher not rehired after he informed a radio station about principal's memo concerning teacher dress code); Pickering v. Board of Educ., 391 U.S. 563 (1968) (teacher fired for writing letter to newspaper criticizing school board); Berdin v. Duggan, 701 F.2d 909 (11th Cir. 1983) (city maintenance worker fired for suggesting to mayor that more men be added to the work crew); Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981) (county deputies demoted

Courts have resolved this conflict by applying a balancing test, weighing the employee's interest in free speech against the government's interest in efficiency.[5] Prior to *Connick v. Myers*, this test served adequately to protect both of these interests. In *Connick*, however, the Supreme Court tipped the scale toward the government's interests in three ways. First, the Court prescribed a narrow standard for matters of public concern. Second, it limited first amendment protection when speech only partially deals with a matter of public concern. Third, the Court did not require that the government prove that the employee's speech was disruptive to justify her dismissal.

This note traces the background of the conflict between the free speech rights of public employees and the government's interest in efficient operation. *Connick v. Myers* is then examined in light of this precedent. The analysis will focus on how *Connick* destroyed the previous fairness of the balancing test by strongly favoring the government's interest in efficiency. This note will then discuss the impact of these changes on litigation and public employee speech and, finally, will consider indications of a trend in the Supreme Court's approach to public employee's first amendment rights.

BACKGROUND

First Amendment Rights of Public Employees: Case Law

The free expression of ideas is fundamental to a democratic society.[6] Political debate, essential to self-government, as well as

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because of their political affiliations); Schneider v. City of Atlanta, 628 F.2d (5th Cir. 1980) (prison guard transferred because she suggested a "sick out" to other guards to protest discriminatory employment practices); Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980) (policeman fired because he said he supported a "sick-in"); Lindsay v. Board of Regents, 607 F.2d 672 (5th Cir. 1979) (professor dismissed for distributing questionnaire to faculty); Nebraska Dep't of Road Employees Ass'n v. Department of Roads, 364 F. Supp. 251 (D. Neb. 1973) (engineer stated in private meeting that director of roads department was unqualified for the position); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (policeman fired for soliciting money for political campaign).

5. *See infra* text accompanying notes 17-34.

6. The government may prohibit only obscene speech and speech which creates imminent danger. *See* Roth v. United States, 354 U.S. 476, 481-85 (1957) (obscene speech is not protected by first amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 573-74 (1942) (speech which creates a clear and present danger is not protected by the first amendment).

expressions of minor importance, are both protected by the first amendment.[7] Although the government cannot generally interfere with the free expression of ideas, the first amendment does not prevent a private employer from firing an employee for exercising his right of free expression.[8] Unless the employee contracts to work for the employer for a specific duration, either party can terminate the employment at will, i.e., without notice and without cause.[9] Recently, courts have tempered this rule by finding a variety of exceptions;[10] however, the traditional employment-at-will rule survives in almost every jurisdiction in the United States.[11]

Prior to the 1950's, government agencies, like private employers, had free reign to fire their employees for discussing politics or criticizing government officials.[12] The Supreme Court had ruled in a number of cases that because a government job was a privilege, not a right, public employees risked termination when they spoke out on political or other controversial public issues.[13] This power to fire at will was somewhat abridged in the 1950's and 1960's by a series of Supreme Court decisions in which pub-

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

8. For cases illustrating the private employer's right to fire an employee, see Comment, *Freedom of Speech in Private Employment: Overcoming the "State Action" Problem*, 20 AM. BUS. L.J. 102, 103 n.5 (1982).

9. *See* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

10. The exceptions are based on implied contract, public policy tort, and implied covenant of good faith and fair dealing. Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 154 (1981).

11. *Id. See generally* Note, *Contract Law: An Alternative to Tort Law as a Basis for Wrongful Discharge Actions in Illinois*, 12 LOY. U. CHI. L.J. 861 (1981).

12. Justice Holmes, sitting on the Supreme Judicial Court of Massachusetts, epitomized this view in his classic statement: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliff v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (upholding statute prohibiting policemen from soliciting money for political purposes and becoming members of a political committee).

13. *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952) (upholding the Feinberg law, which prohibited members of subversive organizations from teaching); Garner v. Board of Pub. Works, 341 U.S. 716 (1951) (upholding a regulation requiring city employees to swear they were not members of the Communist Party); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75 (1947) (upholding Hatch Act, which prohibits government workers from political campaigning); United States v. Wurzbach, 280 U.S. 396 (1930) (upholding the Federal Corrupt Practices Act, which disallowed public employees from soliciting money for political reasons); *Ex parte* Curtis, 106 U.S. 371 (1882) (upholding statute prohibiting government employees from contributing or receiving money for political campaigns).

lic employees successfully challenged job-required loyalty oaths.[14] The results of these cases, however, still permitted an employee to be fired if his speech disrupted the efficient operation of a

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14. Many of these cases dealt with loyalty oaths designed to determine whether an employee was a member of a subversive (particularly Communist) group. The Supreme Court eventually struck down most loyalty oaths because they infringed on employees' first amendment rights to speak out on broad political issues. *See, e.g.*, Keyishan v. Board of Regents, 385 U.S. 589, 592-604 (1967) (statute barring employment to teachers who belong to subversive organizations held invalid); Elfbrandt v. Russell, 384 U.S. 11, 15 (1966) (loyalty oath struck down because it prohibited "knowing but guiltless" behavior in belonging to subversive organizations); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963) (Seventh Day Adventist could not be denied unemployment benefits because he wouldn't accept a job with Saturday hours due to religious belief); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 285-88 (1961) (loyalty oath denying ever having aided communists held unconstitutionally vague); Torcaso v. Watkins, 367 U.S. 488, 489-96 (1961) (notary public not required to swear to oath that he believed in God); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960) (statute requiring teachers to list organizational affiliations struck down); Wiemann v. Updegraff, 344 U.S. 183, 188-91 (1952) (struck down statute requiring state employees to take loyalty oath denying past affiliation with communists).

For a discussion of freedom of association and loyalty oaths, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 205 (1971); F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 341 (1981); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 795 (1978); E. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 10-8, 12-23 (1978); Note, *The First Amendment and Public Employees—an Emerging Constitutional Right to Be a Policeman?*, 37 GEO. WASH. L. REV. 409, 410 (1968); Note, *Limiting Public Expression by Public Employees: The Validity of Catchall Regulations*, 18 HOUS. L. REV. 1097, 1099 (1981). *Cf.* Note, *Freedom of Speech in Private Employment: Overcoming the State Action Problem*, 20 AM. BUS. L.J. 102 (1982) (employee in private sector cannot rely on constitutional grounds for reinstatement if he is fired because of his speech). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

The Court referred to the potential impact on public employees' freedom of speech as a "chilling effect." A chilling effect discourages people from lawful expression or behavior due to fear of sanctions for illegal conduct which is not clearly defined. This is often a result of an overbroad or vague statute. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 521 (1972) (statute making abusive language a misdemeanor invalid because vague and overbroad); Coates v. City of Cincinnnati, 402 U.S. 611, 614-16 (1971) ordinance prohibiting a gathering of people on sidewalk invalid because overly vague); Keyishan v. Board of Regents, 385 U.S. 589, 603-04 (1967) (statute barring employment to teachers belonging to subversive organizations invalid because unconstitutionally vague); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (Communist Control Law invalid because overly vague); NAACP v. Button, 371 U.S. 415, 433 (1963) (participants in protest protected by first amendment not liable for unlawful non-protected activity of other protestors); Wieman v. Updegraf, 344 U.S. 183, 195 (1952) (loyalty oath invalid due to overbreadth in assuming Communist membership is evidence that employee advocated overthrow of the government). *Cf.* Laird v. Tatum, 408 U.S. 1, 11 (1972) (chilling effect on plaintiff inadequate grounds for injunction to stop lawful surveillance). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Limiting Public Expression by Public Employees: The Validity of Catchall Regulation*, 18 HOUS. L. REV. 1097, 1101 (1981); Note, *Title VI and Congressional Employees: The Chilling Effect and the Speech or Debate Clause*, 90 YALE L.J. 1458, 1477-81 (1981).

government agency.[15] The Supreme Court reasoned that if government supervisors had no authority over employee speech, a disruptive employee could impair office morale, discipline, or working relationships, and thus undermine the efficiency of the office or agency.[16]

In *Pickering v. Board of Education*[17] the Court recognized the need to balance the employee's interest in free speech with the government's interest in efficiency.[18] The plaintiff, a high school teacher, had sought reinstatement after the local school board fired him for writing a letter to a newspaper for criticizing the board's allocation of funds and the unpleasant atmosphere of the school. The Court held that the allocation of school funds was a matter of public concern,[19] and that it was therefore essential that an employee, as a member of the public, be able to discuss the topic without fear of losing his job.[20] The Court also noted that the public's interest in debate and information about government may be enhanced when an individual, such as Pick-

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15. *See, e.g.* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring); *Ex parte* Curtis, 106 U.S. 371, 373 (1882).

16. *See* Arnett v. Kennedy, 416 U.S. at 168 (Powell, J., concurring) (recognizing that the public employee's procedural due process guarantee must be reconciled with the government's interest in the maintenance of employee efficiency and discipline).

17. 391 U.S. 563 (1968).

18. *Id.* at 568.

19. The Supreme Court has held, and frequently reaffirmed, that speech about issues of public concern deserves the strongest protection under the first amendment. *See* Carey v. Brown, 447 U.S. 455, 467-68 (1980) ("Public issue picketing . . . has rested on the highest rung of the hierarchy of First Amendment values. . . ."); New York Times Co. v. Sullivan, 376 U.S. 254, 296-97 (1964) ("[F]reedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion."); Roth v. United States, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance . . . have the full protection of the guarantees. . . ."); Stromberg v. California, 283 U.S. 359, 369 (1931) ("[F]ree political discussion . . . is a fundamental principle of our constitutional system. . . .").

20. 391 U.S. at 571-72. *See also* Perry v. Sindermann, 408 U.S. 593, 599-603 (1972) (nontenured teacher cannot be dismissed without hearing when dismissal based on exercise of his free speech right). *Cf.* Chappell v. Wallace, 103 S. Ct. 2362, 2367-68 (1983) (military personnel penalized for racial reasons cannot maintain suit to recover damages for constitutional violations because of the unique disciplinary structure of the military); Kelley v. Johnson, 425 U.S. 238, 247-48 (1976) (regulation restricting length of policemen's hair held not a violation of constitutional rights, recognizing uniformity of dress and espirit de corps as sufficient government interests applicable only to policemen because of their special role, rather than to all public employees). *But cf.* Pienta v. Village of Schaumberg, 536 F. Supp. 609 (N.D. Ill. 1982), *aff'd*, 710 F.2d 1258 (7th Cir. 1983) (highly restrictive sick leave regulation held a violation of policemen's fundamental rights). *See generally* Hirshman, *Departmental Regulation of Officers' Private Lives*, 6 POLICE L.Q. 32 (Jan. 1977); Yaffe, *Free Speech Rights of Public Employees*, 2 J. COLLECTIVE NEGOTIATIONS 45 (1983).

ering, is permitted to speak about matters of public concern.[21]

For the *Pickering* Court the key issue was whether the subject of Pickering's speech was a matter of public concern. In making this determination, the Court considered the potential influence that debate on an issue might have on electorate decision-making.[22] Since the allocation of school funds was determined by election, public information about that topic was necessary to educate voters.[23]

The Court evaluated the school board's interest in efficiency by determining whether Pickering's letter had impeded the school's operation. Stating that government efficiency often depends on close working relationships between the employee and his supervisor and co-workers,[24] the Court found that there was

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21. 391 U.S. at 571.

22. *Id.* at 571-72.

23. *Id.* at 571. Much of the Court's treatment of matters of public concern has evolved from cases concerning defamation of public officials. In the interest of encouraging debate on matters of public concern, the Court has placed a very heavy burden on the plaintiff in public figure defamation actions. Before a public figure can win a defamation case, he must prove the defendant spoke with malice or recklessness. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (standard for public figure defamation established when an elected official of Montgomery, Ala., sued the N.Y. Times for statements made in an advertisement which accused him of being responsible for a "wave of terror").

If the court finds a plaintiff to be a public figure, he will probably lose. The Court has extended "public figure" status to include people other than public officials. *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29, 44-45 (1971) (defendant considered a public figure even though he was involuntarily thrust into public limelight); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-65 (1967) (university athletic director considered public figure; therefore, showing of malice required in libel action); Rosenblatt v. Baer, 383 U.S. 75, 84-86 (1966) (extended "public official" to supervisor of county owned ski resort). *Cf.* Hutchinson v. Proxmire, 443 U.S. 111, 133-36 (1979) (research director receiving federal grant not considered a public figure in defamation case concerning senator's attack on grant as wasteful); Time, Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (wife of wealthy individual not considered a public figure in defamation suit concerning divorce proceedings); Gertz v. Robert Welch, Inc., 418 U.S. 324, 352 (1974) (plaintiff not considered a public figure because he did not voluntarily thrust himself into public limelight in the particular controversy giving rise to the defamation). For an overview of the law of public figure defamation, see generally J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS §§ 6:1-7-9 (1976); T. EMERSON, *supra* note 14, at 517; T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 69 (1966); F. HAIMAN, *supra* note 14, at 43; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 781; E. TRIBE, *supra* note 14, at § 12-12; Note, *First Amendment and Public Employees: "Times" Marches On*, 57 GEO. L.J. 134 (1968); Comment, *Source Disclosure in Public Figure Defamation Actions: Toward Greater First Amendment Protection*, 33 HASTINGS L.J. 623, 631-36 (1981).

24. 391 U.S. at 570. More specifically, the Court noted as factors: maintenance of discipline by superiors, harmony among co-workers, and necessary personal loyalty to and confidence in the supervisor. *Id.*

no evidence that the letter had harmed essential working relationships.[25] Consequently, Pickering was reinstated, because his right to speak on a matter of public concern outweighed the threat to the school's efficient operation.[26] Since then, courts have interpreted *Pickering* as requiring that the government must prove either actual impairment or the likelihood of impairment of its operations before an employee's dismissal can be upheld.[27]

In a subsequent case, *Mt. Healthy Board of Education v. Doyle*,[28] the Supreme Court held that a public employee fired because he spoke out on a matter of public concern should not be reinstated if he would have been fired for other legitimate reasons.[29] Doyle, a teacher dismissed for informing a radio station about a memo from the school principal concerning teacher dress code, had behaved unprofessionally on other occasions.[30] The Court held that it would not reinstate Doyle if the school board could prove that it would have fired him based on his incompetence even if he had not contacted the radio station.[31]

Both *Pickering* and *Doyle* involved employees who were fired for speaking publicly with the news media. In *Givhan v. Western*

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25. *Id.* at 571.

26. *Id.* The Court found that the only negative impact Pickering's speech had on the school was to anger the Board. *See generally* Comment, *Free Speech: Dismissal of Teacher for Public Statement*, 53 MINN. L. REV. 864 (1969).

27. *See* Note, *The Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365 n.4, 380. *See also* Berdin v. Duggan, 701 F.2d 909, 912-15 (11th Cir. 1983) (no evidence that employee's speech caused discipline or harmony problem among coworkers); Tygrett v. Barry, 627 F.2d 1279, 1282-83 (D.C. Cir. 1980) (insufficient evidence to prove that policeman's statement that he supported "sick-in" was disruptive to police department).

28. 429 U.S. 274 (1977).

29. *Id.* at 286.

30. *Id.* at 281-82. Doyle had been involved in a number of unprofessional incidents, including arguments with another teacher, students, and cafeteria workers.

31. *Id.* at 287. The Supreme Court remanded, ordering the lower court to determine whether the school district would have rehired Doyle if he had not called the radio station about the principal's memo. *See generally* Note, *supra* note 27, at 375 (employee and employer's burden under *Doyle*).

The Court did state, however, that it would reinstate a competent employee who was fired solely on the basis of speech about a matter of public concern. *Id.* at 285-86. *See also* Wolly, *What Hath Mt. Healthy Wrought?*, 41 OHIO ST. L.J. 385 (1980) (analysis of *Mt. Healthy*); Note, *supra* note 27, at 375-79 (discussion of employee's burden and employer's defense after *Mt. Healthy*); Note, *First Amendment Rights—Public Employees May Speak a Little Evil*, 3 W. NEW ENG. L. REV. 289, 299-301 (1980) (discussion of "but for" test from *Mt. Healthy*) [hereinafter cited as Note, *Public Employees*].

Line Consolidated School District,[32] the Court faced a different situation. The plaintiff, a dismissed teacher, had confined her criticisms of school practices and policies to a series of private meetings with her supervisor. For the first time, the Court extended first amendment protection to a public employee's private communication. It also indicated, however, that the context (i.e., the time, place, and manner) of the private communication would be considered in weighing the threat to the employer's efficiency.[33] If the speech was communicated privately, rather than publicly, the Court was more likely to find that the speech disrupted government efficiency. Private communication was considered more threatening to efficiency because a personal confrontation was likely to harm working relationships without the compensating benefits of public discussion of governmental operations.[34]

Four years after *Givhan*, the Supreme Court granted certiorari in the case of *Connick v. Myers*.[35] *Connick* was factually similar to previous public employee reinstatement cases heard by the Court, posing once again the difficult task of balancing the conflicting interests of free speech by a public employee with the efficient operation of a government agency.

CONNICK v. MYERS

Facts

The plaintiff, Sheila Myers, was employed for more than five years as an assistant district attorney in New Orleans. Although she performed competently, Myers was transferred against her wishes to a different section of the Criminal Court.[36] On several occasions Myers informed her supervisors, including District Attorney Connick, that she objected to the transfer.[37] Myers subsequently distributed a questionnaire to fellow workers solic-

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32. 410 U.S. 439 (1979).

33. *Id.* at 415 n.4.

34. *Id. See* Note, *Public Employees*, *supra* note 31, at 305.

35. 455 U.S. 999 (1982).

36. 103 S. Ct. at 1686. No question was raised concerning Myers' competence. The Supreme Court stated in the facts of the case that Myers had performed her duties competently.

37. *Id.* Myers opposed the transfer in part because of a potential conflict of interest created by her participation in a counseling program for convicted defendants. She was

iting their views on office policies, morale, and confidence in supervisors. The questionnaire also asked whether employees felt pressured to campaign in elections.[38] Within a few hours, Connick learned of the questionnaire and fired Myers immediately.[39] Myers sued, contending that her dismissal had resulted solely from her having distributed the questionnaire, that the questionnaire was a valid exercise of her first amendment rights, and that the dismissal was therefore unconstitutional.[40] The district court agreed with Myers' contention that she had been fired because she had distributed the questionnaire.[41] Since the questionnaire addressed the effective functioning of the district attorney's office, the court held that the content of the questionnaire dealt with a matter of public concern.[42] Furthermore, the court found that the questionnaire did not interfere with the efficiency of the district attorney's office.[43] The Court of Appeals for the Fifth Circuit affirmed without opinion,[44] and Connick filed a petition for certiorari with the United States Supreme Court, which was granted.[45]

The Majority Opinion

The primary focus of Justice White's majority opinion was a balancing of Myers' interests with those of the district attorney's office. The Court weighed Myers' interest as a citizen in free speech against the district attorney's interest as an employer in

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afraid that her new position would require her to prosecute defendants that she had previously counseled.

38. *Id.* at 1687. The survey consisted of questions regarding office transfer policy, office morale, rumors and their effect on office performance, the need for a grievance committee, level of confidence in supervisors, and whether workers felt pressured to work in political campaigns. *Id.* at 1694. The Supreme Court has dealt with questionnaries and the first amendment in a number of cases. *See* Federal Election Comm'n v. National Right to Work, 51 U.S.L.W. 4037 (1982); Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Ginzburg v. Goldwater, 396 U.S. 1049 (1970); Schneider v. Smith, 390 U.S. 17 (1967).

39. 103 S. Ct. at 1687. Connick called the distribution of the questionnaire an act of insubordination. He particularly objected to the questions concerning confidence in supervisors, and pressure to work in political campaigns, which, he felt, could cause public relations problems.

40. *Id.* Myers sued under 42 U.S.C. § 1983 (1976 & Supp. IV 1980).

41. 507 F. Supp. 752 (E.D. La. 1981).

42. *Id.* at 758.

43. *Id.* at 759.

44. 654 F.2d 719 (5th Cir. 1981).

45. 455 U.S. 999 (1982).

providing services efficiently.[46] The Court found that Myers had only a limited first amendment right because the questionnaire dealt primarily with internal office policy, and touched only slightly upon a matter of public concern.[47] The Court applied a balancing test to weigh Myers' limited first amendment right against Connick's belief that the questionnaire would disrupt office efficiency, concluding that Connick was justified in firing Myers.[48]

The Court first analyzed Myers' questionnaire to determine whether it dealt with a matter of public concern,[49] examining its context and content.[50] The Court determined that the questionnaire had been distributed within the context of Myers' personal dissatisfaction with her transfer.[51] It was not intended to inform the public about the operation of the district attorney's office, but rather to support Myers in her dispute with her supervisor.[52] Most of the questions dealt with office morale and discipline, topics which the Court found reflected internal office matters, not matters of public concern.[53] Thus, the context indicated that Myers' speech was an employee grievance, not a matter of public concern about the operation of the district attorney's office deserving first amendment protection.[54] The Court reasoned that if the answers to the questionnaire had been publicly released, they would not have conveyed information of value to the public.[55]

The Court recognized, however, that one question which asked whether employees felt pressured to participate in political campaigns was of public import.[56] Since one question in fourteen did deal with a matter of public concern, the Court held that Myers'

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46. 103 S. Ct. at 1685.

47. *Id.* at 1693-94.

48. *Id.* at 1694.

49. *Id.* at 1690. The Court also stated that "the inquiry into the protected status of speech is one of law, not fact." *Id.* at 1690 n.7.

50. *Id.* at 1690. *See infra* notes 65-66 and accompanying text.

51. *Id.* at 1693. *See infra* note 68 and accompanying text.

52. 103 S. Ct. at 1691.

53. *Id.*

54. *Id.*

55. *Id.*

56. The question found to be of public concern asked, "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" *Id.* at 1694.

The Supreme Court has consistently condemned pressure on government workers to campaign for political reasons. *See* Branti v. Finkl, 445 U.S. 507, 515-16 (1980) (if employee's position does not require policy-making decision, political differences with supervisor not valid grounds for dismissal); Elrod v. Burns, 427 U.S. 347, 348, 356-57

questionnaire deserved at least limited protection under the first amendment.[57] The relative weights of the two competing interests therefore became a matter of prime importance to the majority's analysis.[58]

In evaluating the questionnaire's potential for disrupting office efficiency, the Court considered the possible threat to working relationships, the time, place, and manner of the questionnaire's distribution, and Myers' motivation for distributing the questionnaire.[59] Actual proof that the questionnaire had disrupted the efficiency of the district attorney's office was unnecessary to justify Myers' dismissal, according to the Court. Since Myers had only a limited first amendment interest and because close working relationships were essential to her job, Connick's fear that the questionnaire might disrupt the office was adequate justification for Myers' dismissal.[60] The Court also questioned Myers' true motive in disseminating the questionnaire, stating that her actions were obviously a result of her dispute with Connick, and, as such strengthened Connick's view that the incident threatened his ability to manage the office.[61]

The Dissenting Opinion

In his dissenting opinion, Justice Brennan disagreed with nearly every aspect of the majority's analysis. Justice Brennan claimed that the manner in which a government agency operates is a matter of public concern.[62] Because office morale and

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(1976) (employee cannot be fired solely because he is not affiliated with the Democratic Party); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (Hatch Act reaffirmed); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 97-98 (1947) (Hatch Act, which prohibits public workers from politically campaigning, held valid); *Ex parte* Curtis, 106 U.S. 371 (1882) (statute prohibiting federal workers from campaigning held constitutional). For a discussion of political campaigning and public employees, see Barrett v. Thomas, 649 F.2d 1193 (5th Cir., 1981) (sheriff not entitled to demote or fire deputies on basis of political affiliations); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 826.

57. 103 S. Ct. at 1694.

58. *Id.* at 1691. If the Court had not found even a limited first amendment right, it would have considered Myers' dismissal a personnel decision. In such a case, the Court would not have reached the issue of whether Connick was justified in firing Myers.

59. *Id.* at 1692. The Court labeled this "the context in which the dispute arose."

60. *Id.* The Court cautioned that "a stronger showing may be necessary if the employee's speech more substantially involve[s] matters of public concern." *Id.* at 1692-93.

61. *Id.* at 1693.

62. *Id.* at 1695 (Brennan, J., dissenting) (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)). In *Mills*, the Court held unconstitutional a statute which provided criminal penal-

transfer policy are factors which may affect efficiency of operations within that government agency, such matters are of public concern.[63] According to the dissent, *Pickering* had established that discussion about how government agencies operate is vital to informed decision-making by the public.[64] A broader standard than the majority had applied was, in the dissent's view, more appropriate in determining whether a subject is of public concern. This broader standard should include subjects with the potential to inform people about the way a government official handled his responsibilities.[65]

The dissent also disagreed with the majority's application of the context factor. The context in which Myers had distributed the questionnaire should not have been considered when determining whether it dealt with a matter of public concern.[66] According to Justice Brennan, how, why, and where a public employee speaks is relevant as to the threat to government efficiency, but irrelevant as to whether that speech is on a matter of public concern. The dissent argued that context should not have been considered in determining whether Myers deserved first amendment protection. *Givhan v. Western Line Consolidated School District*[67] guaranteed that speech on matters of public concern is protected by the first amendment, regardless of how and where it is communicated.[68]

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ties for publication of a newspaper editorial on election day which urged people to vote a certain way. The Court reasoned that a major purpose of the first amendment is to protect discussion about how government operates. 384 U.S. at 218-20.

63. 103 S. Ct. at 1698 (Brennan, J., dissenting).

64. *Id.*

65. *Id.* The determination of whether a matter is one of public concern is often a difficult one because the judge must speculate as to whether the public would consider the topic important. *Id.* at 1698 (Brennan, J., dissenting). *See infra* note 81 and accompanying text.

66. *Id.* at 1696 (Brennan, J., dissenting).

67. 439 U.S. 410 (1979). *See supra* note 32 and accompanying text.

68. 103 S. Ct. at 1698 (Brennan, J., dissenting). *See also Pickering*, 391 U.S. at 571-72. The *Connick* dissent cited *Givhan* as establishing that "context" is improper to consider when determining whether an employee's speech is protected. It is true that *Givhan* protects speech of public importance regardless of "how and where" it is expressed. *Connick*, 103 S. Ct. at 1696-97 (Brennan, J., dissenting) (citing *Givhan*, 439 U.S. at 415 n.4). *Givhan* did not hold, however, that "why" an employee spoke is irrelevant to the question of protection. The *Connick* majority's application of "context" indicates that it was really examining Myers' motivation for speaking, and not how and where she spoke. "[T]he focus of Myers' questions is not to evaluate the performance of the office, but rather to gather ammunition for another round of controversy with her superiors." 103 S. Ct. at 1691 (Brennan, J., dissenting). *See also id.* at 1690, 1693, 1698; *supra* text accompanying

Finally, the dissent disagreed with the holding that Myers' questionnaire deserved only limited first amendment protection. The questionnaire deserved full protection because the Court recognized one question as a matter of public concern.[69] Therefore, the district attorney should have been required to prove that the questionnaire actually disrupted the office in order to justify Myers' dismissal.[70] The controlling and applicable standard, according to Justice Brennan, had been established in *Tinker v. Des Moines Community School District*,[71] which held that only speech which materially and substantially interferes with an institution's operations may be suppressed.[72] According to the dissent, the majority holding in *Connick* was inconsistent with *Tinker* because the *Connick* holding did not require the government to prove that Myers' questionnaire was disruptive. The dissent argued that the broad discretion granted to supervisors by this case would ultimately have the effect of deterring both protected and unprotected speech by public employees.[73] As a result, less information regarding government operations would be available to the public.[74]

ANALYSIS

Changes in the Balancing Test

Connick altered the balancing test to the extent that the government's interest in efficiency of operations is now favored over the first amendment rights of public employees in three ways. First, constitutional protection is now extended to fewer subjects. Second, speech dealing only partially with matters of public concern is afforded only limited protection. Third, evidence that speech was actually disruptive is not required to justify an employee's dismissal.

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notes 32-33. A semantic confusion between the majority and dissent concerning the word "context" weakens the dissent's reasoning.

69. 103 S. Ct. at 1700 (Brennan, J., dissenting).

70. *Id.* at 1702 (Brennan, J., dissenting).

71. 393 U.S. 503 (1969) (*cited in Connick*, 103 S. Ct. at 1701 (Brennan, J., dissenting)).

72. *Id.* at 569-70.

73. 103 S. Ct. at 1701 (Brennan, J., dissenting). The dissent recommended that judges, not supervisors, determine whether the employee's speech was disruptive.

74. *Id.* at 1702 (Brennan, J., dissenting).

A Narrower Concept of Matters of Public Concern

The *Connick* majority found that Myers' questionnaire dealt more with internal grievances than with matters of public concern because debate about transfer policy is not a form of speech which would inform the public about how the district attorney's office had handled its duties.[75] In contrast, *Mt. Healthy Board of Education v. Doyle*[76] held that speech about a teacher dress code was a matter of public concern. Dress code, office policy, and morale are similar subjects in that they all affect employee behavior. By affecting employee behavior, these subjects also tend to affect efficiency within a government agency. Since the subjects similarly affect government efficiency, the contrary holdings in *Connick* and *Mt. Healthy* suggest that the Court has cut back on the subjects that it considers matters of public concern.

This narrowed view is inconsistent with the Court's recognition that a major purpose of the first amendment is to protect speech about the way government operates.[77] Strong protection of such speech assures that voters will remain informed about government operations.[78] The Court's narrow view of matters of public concern leaves "morale and office policy" unprotected by the first amendment,[79] even though these topics affect the operations of government agencies.[80]

Furthermore, the Court has recognized that it is difficult for judges to determine whether a matter is of public concern because such a ruling is inherently subjective.[81] An example of this subjectivity is the disparity of the findings of the majority and the

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75. *Id.* at 1684, 1690 (Brennan, J., dissenting).

76. 429 U.S. 274, 283-84 (the Supreme Court accepted the district court's finding that Doyle's speech was clearly protected by the first amendment).

77. Mills v. Alabama, 384 U.S. 214, 218-19 (1966). Alexander Mieklejohn, an emminent first amendment scholar, viewed only communication that dealt with the process of self-government as being protected by the first amendment, while other speech is protected primarily by the fifth amendment. Another emminent first amendment scholar, Zechariah Chaffee, found it impossible to draw a line between speech about public and private matters. For a discussion of these two viewpoints, see generally Chaffee, Book Review, 62 HARV. L. REV. 891 (1949).

78. *See Pickering*, 391 U.S. at 571-72; Garrison v. Louisiana, 379 U.S. 74, 74-75 (1965); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

79. 103 S. Ct. at 1698 (Brennan, J., dissenting).

80. *Id. See* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

81. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975) ("[T]he citizenry is the final judge of the proper conduct of public business."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1970)) (which

dissent in *Connick*. Five justices held that the subject matter was not of public concern,[82] while four justices reached the opposite conclusion.[83] In addition, a New Orleans newspaper had covered Myers' dismissal extensively, along with a number of other matters affecting the internal operations of the district attorney's office.[84] The publication of these stories suggests that readers were interested in the controversy in *Connick*, thus illustrating that the public considered the issues involved important. The combination of a narrow standard and an inherently subjective ruling creates a risk that some speech deserving protection may be left unprotected. This approach to granting protection to speech is thus inadequate, because it does not incorporate the Court's own view that speech about public matters should be strongly protected.[85]

Limited Protection of Speech Partially a Matter of Public Concern

The majority opinion is ambiguous as to how significantly expression must deal with a matter of public concern in order for it to be fully protected by the first amendment. Myers' questionnaire received only limited first amendment protection because only one question in fourteen concerned a matter of public interest.[86] It is unclear whether Myers' questionnaire would be fully protected if, for example, she had asked only two questions, one protected and one not. It is evident only that one question on an issue of public concern, amidst thirteen other questions of less importance, is not enough to warrant full protection.

In light of the Court's highly protective treatment of fundamental rights,[87] an inquiry about a violation of a fundamental

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recognized the "additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of general or public interest"); Cohen v. California, 403 U.S. 15, 24 (1971) (free expression puts "the decision as to what views shall be voiced largely into the hands of each of us").

82. 103 S. Ct. at 1693-94.

83. *Id.* at 1697 (Brennan, J., dissenting).

84. *Id.* at 1697 n.2 (Brennan, J., dissenting). A New Orleans newspaper, the *Times Picayune*, carried five stories following Myers' case from 1980 through 1982. The paper also ran two stories on internal problems within the district attorney's office. One article discussed the district attorney's new offices. Another article reported that the State Senate prohibited Connick from retaining a public relations specialist.

85. *See supra* note 19 and accompanying text.

86. 103 S. Ct. at 1693-94.

87. The Supreme Court has held that the government must show a compelling inter-

right deserves full protection by the first amendment, even though other less important questions are also asked. The Court was inconsistent when it first noted the importance of the one question concerning coercion to politically campaign,[88] and later stated that the "questionnaire touched upon matters of public concern in only a most limited sense."[89] The Court had recognized that official pressure on public employees to campaign is a violation of a fundamental right.[90] *Connick*'s limited protection of Myers' speech is thus inconsistent with the Court's earlier findings that a public employee has a fundamental right to speak about matters of public concern.[91] Furthermore, *Connick's* holding is inconsistent with *Pickering* because, even though Pickering's letter had criticized the atmosphere of the school,[92] the Court had granted Pickering full first amendment protection.[93] In *Pickering,* once the Court found allocation of school funds a matter of public concern, the letter was fully protected.[94] First amendment protection was not decreased because of other less important topics also discussed in Pickering's letter.

Evidence of Disruption Not Required

Pickering recognized that factors such as maintenance of discipline, harmony among co-workers, and loyalty to and confidence in the supervisor often affect the efficient operation of an office or workplace.[95] The District Court in *Connick* considered these factors in evaluating whether Myers' speech was disrup-

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est to justify infringement on an individual's fundamental rights. *See, e.g.*, Elfbrandt v. Russell, 384 U.S. 11, 16-19 (1966) (law penalizing membership in subversive organization without personal intent to further organization's illegal action held invalid); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963) (government prohibited from denying unemployment benefits to person with religious reasons for not working on Saturdays); NAACP v. Button, 371 U.S. 415, 428-31 (1963) (statute prohibiting attorneys from contacting prospective litigants held invalid when attorneys working without compensation to defend civil liberties violations of clients); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960) (statute requiring teacher to list membership in organizations held to be an unjustifiable interference with freedom to associate).

88. 103 S. Ct. at 1691.
89. 103 S. Ct. at 1691, 1693.
90. *See supra* note 56.
91. *Pickering*, 391 U.S. at 571-72. *See supra* notes 17-25 and accompanying text.
92. *Pickering*, 391 U.S. at 575-78.
93. *Id.* at 571-72.
94. *Id.*
95. *Id.* at 570.

tive, and concluded that there was no evidence that the questionnaire had adversely affected Myers' work or her relationship with her supervisors.[96] Although the Supreme Court agreed there was no evidence of disruption, it nevertheless held that Connick's fear that there might be disruption was adequate justification for Myers' dismissal.[97]

This broad deference to Connick's fear of disruption appears to modify *Pickering*, which required actual proof of disruption in order to justify dismissal.[98] It also contradicts *Tinker*, which required proof of disruption in an analogous circumstance.[99] Connick's office and Tinker's school were environments which both demanded a sensitive balance of orderly decorum and free expression. It would therefore be reasonable and consistent with the Court's treatment of allegedly disruptive expression to require the same burden of proof for the government in both settings.[100] The Court, in *Tinker*, noted that "students don't shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[101] Likewise, public employees do not shed their rights to free speech at the office doorstep.

Pickering and *Tinker* were astute decisions because they protected both free expresison and government efficiency by requiring actual proof of disruption. In contrast, *Connick* is a much narrower view because it protects only order, and not free expres-

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96. 507 F. Supp. 752, 758 (E.D. La. 1981). *Accord Pickering*, 391 U.S. at 568-73.

97. 103 S. Ct. at 1692, 1694. The Court cautioned that a stronger showing might be required "if the employee's speech more substantially involved matters of public concern." *Id.* at 1693.

98. *Pickering*, 391 U.S. at 570-71. Pickering's dismissal was held unjustified partly because there was no evidence that his speech disrupted the school.

99. *Connick*, 103 S. Ct. at 170 (Brennan, J., dissenting); *Tinker*, 393 U.S. at 506, 509 (noting the "special characteristics" of the school environment). *See supra* notes 69-71 and accompanying text. For a discussion of the burden of evidence in *Tinker*, see J. BARRON & C. DIENES, *supra* note 23, § 3:11; T. EMERSON, *supra* note 14, at 607.

100. "Certainly 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." *Tinker*, 393 U.S. at 509. *See also* Schneider v. City of Atlanta, 628 F.2d 915, 918-19 (5th Cir. 1980) (government required to clearly demonstrate that employee's conduct substantially interfered with his job); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (high school authorities enjoined from forbidding students from wearing "freedom buttons" which did not cause substantial interference with school operations). *Cf.* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966) (prohibition of freedom buttons in a high school held valid because students wearing buttons created a disturbance).

101. *Tinker*, 393 U.S. at 506.

sion, by holding that a mere apprehension of disruption justifies an employee's dismissal. The *Connick* decision indicates that public employees' rights concerning freedom of expression will not be extended in the near future, and that they may be further limited.

IMPACT

Litigation

As a result of the *Connick* decision, it may now be significantly more difficult for a public employee to win a job reinstatement action based on a first amendment violation, because few expressions will meet *Connick*'s narrow standards for according full first amendment protection. If a public employee speaks on an issue recognized as a matter of public concern, as well as other matters that are not protected, he will only have a limited first amendment interest.[102] The protected status of the employee's speech thus will be a crucial point in litigation of this nature. If the employee's speech is not fully protected, he will probably lose the action. The outcome of *Connick* illustrates that a limited first amendment interest is insufficient for an employee to prevail.[103]

Furthermore, if the employee had a limited first amendment interest and his job required close working relationships, the government's burden of proof is apparently a minimal one. It thus will be extremely difficult for an employee to successfully rebut a supervisor's claim that he feared the employee's speech would cause office disruption. Consequently, the government will most likely prevail whenever close working relationships are necessary to the employee's job.[104]

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102. If an employee speaks about private matters, the first amendment still offers some protection. For example, a public employee's criticism of his boss may not protect him from being fired for his remark. The first amendment, however, would still protect him if his boss sued for libel. *See* Bishop v. Wood, 426 U.S. 341, 350 (1976) (Court would not reinstate policeman fired for insubordination because his speech was not constitutionally protected).

103. "The limited first amendment interest here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." 103 S. Ct. at 1694.

104. This will affect many employees, since most jobs require close working relationships. Only an employee who works totally independently of others would not depend on relationships to do his job effectively.

Public Employees' Speech

The most detrimental impact of *Connick* will be its potential chilling effect on public employees' freedom of speech. Employees will be reluctant to speak critically about their employing agencies and supervisors due to fear of job dismissal. The Court noted in *Pickering* that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech."[105] Employee apprehension concerning freedom to speak may be warranted particularly when the topics concern internal agency policies, supervisors, or morale. Most employees are likely to remain silent rather than risk their jobs by discussing unprotected topics.

An even greater threat to free expression is that employees will be silent on topics that *Connick* protects. Because of the subjective nature of determining whether a matter is of public concern, employees are likely to steer clear of unprotected topics as well as remain silent about protected topics.[106] This "chilling effect" on speech is the kind of suppression that the Supreme Court has consistently condemned.[107]

Consider, once again, the facts of *Pickering* in light of *Connick*. Pickering might very well have been discouraged from writing his letter because he would have been unsure of whether a judge would find allocation of school funds a matter of public concern, and thus deserving of protection. Even if he felt confident that "school funds" was a fully protected topic, he might hesitate to include discussion of school atmosphere and morale in his letter because his letter would then be accorded only limited first amendment protection. If *Connick* had been law at that time, it is possible that Pickering would not have written his letter for fear it would cost him his job.

This threat to free expression affects a substantial number of citizens in the United States in that more than fifteen million persons in the United States are public employees.[108] In addi-

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105. *Id.* at 574.

106. "When one must guess what conduct or utterance might lose him his position, one necessarily will 'steer far wider of the unlawful zone'. . . ." Keyishan v. Board of Regents, 385 U.S. 589, 604 (1967) (citing Speiser v. Kandall, 357 U.S. 513, 526 (1958)). *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 824 (1969).

107. *See supra* note 14.

108. As of June 1982, 15,817,000 people, or 17.6% of the work force in the United States were in the public employ. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE

tion, the chilling effect may also impede the public's access to information about government.[109] Public employees are a valuable source of information about governmental operations, because their ideas may enhance public debate by adding an "insider's" view of how government operates.[110] Any potential decrease in information about government operations and officials may therefore undermine government officials' efficiency and honesty. In addition, the government's minimal burden of proof will increase public officials' authority over employee speech. This could result in censorship and unnecessary secrecy within government agencies, both of which may pose threats to the democratic process.[111]

RETURN TO THE EQUITABLE BALANCING TEST

The balancing test must be revised in order to weigh fairly both employee and government interests. First, a broader standard for determining matters of public concern should be utilized to expand those areas of protected speech beyond the narrow

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UNITED STATES: 1982-83, 394 (103d ed. 1982). "Any restrictions placed upon the free speech rights of such a large proportion of our work force should be a matter of grave concern." T. EMERSON, *supra* note 14, at 563. *See* Note, *supra* note 27, at 365 n.1.

109. The Supreme Court has recognized that the first amendment protects the listener's right to receive information and ideas. *See* Board of Educ., Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2799, 2807-08 (1982) (disallowed removal of books from library based on students' right to receive information); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (citizens entitled to price information about generic drugs); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (attorney general ordered to grant visa to controversial foreigner who many people were interested in hearing speak); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-401 (1969) (upheld FCC regulations requiring broadcaster to allow editorial replies); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (individual can review obscene information in privacy of own home); Griswold v. Connecticut, 381 U.S. 479, 481-86 (1964) (statute prohibiting distribution of information on birth control held invalid); Marsh v. Alabama, 326 U.S. 501, 505 (1946) (trespass conviction for distributing religious literature in company-owned town reversed). *But see* FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (FCC sanction for broadcast of adult program during daytime upheld); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) (gas company not allowed to include information about low price of natural gas with bills because would encourage energy waste). *See generally* Baldasty & Simpson, *The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment*, 56 WASH. L. REV. 365 (1980); Note, *The First Amendment in the Classroom: Library Book Removals and the Right of Access to Information*, 23 B.C.L. REV. 1471 (1982).

110. *See generally* WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY (R. Nader, P. Petkas, K. Blackwell eds. 1972).

111. *See* New York Times Co. v. United States, 403 U.S. 713, 718-19, 723-24 (1971) (no prior restraint on publication of Pentagon papers); Schenck v. United States, 247 U.S. 47,

confines of *Connick*. Protected subjects should include topics that may inform citizens about how government officials handle their responsibilities.[112] This protection would substantially eliminate the chilling effect, resulting in more information being made available to the public concerning the way government operates. In addition, a broader standard would compensate for the inherently subjective nature of the judicial decision as to whether a particular matter is of public concern.[113] Second, speech that is even partially about a matter of public concern should be fully protected. If an employee speaks about a matter of public concern, as well as an unprotected topic, her protection should not be reduced to a limited first amendment interest. Third, the balancing test must protect the government's interest in efficiency as well as the employee's interest in free and uninhibited debate about governmental operations. The government should have the burden of proving that the employee's speech materially and substantially interfered with office efficiency. The employee could then rebut the evidence of disruption offered by the government. This standard would allow the government to fire an employee whose speech disrupts the office, but it would not allow a dismissal based on a mere apprehension of disruption.[114]

It is likely that *Connick v. Myers* would have been decided differently if the aforementioned alternatives were applied. Myers' questionnaire would have had full first amendment protection, because all questions concerned policies and morale which poten-

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52 (1919) (clear and present danger found justifying restraint of document during wartime). *Cf.* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (heavy burden required to justify prior restraint); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 719-20 (1931) (prior restraint not allowed to protect nonemergency government interest). *See generally* Bickel, *An Examination of the Unruly Contest Between Free Speech and the Needs of Government; The Wide Open First Amendment*, STUDENT LAWYER, Jan. 1973, at 40; Franch, *Balancing National Security and Free Speech*, 14 N.Y.U. J. INT'L LAW & POL. 339 (1983); Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971); Note, *Prior Restraint Enforced Against Publication of Classified Material by CIA Employee*, 51 N.C.L. REV. 865 (1973); Comment, *Government Secrecy Agreements and the First Amendment*, 28 AM. U.L. REV. 397 (1979).

112. 103 S. Ct. at 1698 (Brennan, J., dissenting). For a discussion of the process of informed decision-making and its importance to self-government, see Z. CHAFFEE, BLESSINGS OF LIBERTY 102 (1956); T. EMERSON, *supra* note 14, at 8; A. MEIKELJOHN, FREE SPEECH 1 (1948); J.S. MILL, *Representative Government*, in GREAT BOOKS OF THE WESTERN WORLD 341-50 (R. Hutchins ed. 1952).

113. *See supra* notes 80-84 and accompanying text.

114. 103 S. Ct. at 1702 (Brennan, J., dissenting).

tially affected the efficiency of the office, and would therefore have met the broader standard for matters of public concern. Even if *some* of her questions had not concerned topics which affected office efficiency, her speech would still have been fully protected. In addition, the government's mere apprehension that Myers' questionnaire might be disruptive would not have been adequate jusitification for her dismissal. Since there was no evidence that the questionnaire substantially and materially interfered with the efficient operation of the office, the government would not have met its burden of proof. Consequently, Myers would have been reinstated because her free speech interest would have outweighed the government's interest in the efficient operation of the district attorney's office.

CONCLUSION

When a public employee is fired for speaking critically about his agency or supervisor, a conflict arises between the employee's right to free speech and the government's interest in efficiency. The Supreme Court weighs these conflicting interests by applying a balancing test. This conflict was the central issue in *Connick v. Myers*. For the first time, the Court's application of this test heavily favored the government's interest. The test now provides first amendment protection to fewer subjects than it previously did. In addition, speech that deals only partially with matters of public concern receives only limited protection. Furthermore, the *Connick* test does not require that the government prove that the employee's speech was disruptive as a justification for his dismissal. As a result, government employees are more likely to lose job reinstatement actions based on first amendment claims. More importantly, *Connick* will also deter employees from speaking critically about public agencies and officials, resulting in less information about government agencies being made available to the public.

To avoid these suppressive results, the equitable nature of the balancing test must be restored. Matters of public concern must be defined more broadly, and full protection should be granted to speech that deals even only partially with matters of public concern. The government should also be required to prove that the employee's speech disrupted the efficient operation of the agency in order to justify his dismissal. Restoration of a fair test is

essential to the protection of public employees' free speech rights, and to the government's interest in efficiency of its operations and the public's access to information about its government.

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