UIC Law Review

Volume 30 | Issue 1 Article 4

Fall 1996

Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases, 30 J. Marshall L. Rev. 121 (1996)

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PUBLIC EMPLOYEE SPEECH AND PUBLIC CONCERN: A CRITIQUE OF THE U.S. SUPREME COURT'S THRESHOLD APPROACH TO PUBLIC EMPLOYEE SPEECH CASES

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INTRODUCTION

Employment with the government is no longer regarded as a privilege that can be conditioned on the employee's willingness to sacrifice his or her constitutionally protected rights, including the right of free speech protected by the First Amendment.[1] Nevertheless, the freedom of speech guaranteed under the First Amendment has never been absolute,[2] and the government has a freer hand in regulating the speech of its employees than it does in regulating the speech of private citizens.[3] In the context of public employment, the extent to which an employee's right to free

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1. "Congress shall make no law ... abridging the freedom of speech ...." U.S. CONST. amend. 1. *See* United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1012 (1995). However, this was not the case until the 1950s and 1960s. *See* Adler v. Board of Educ., 342 U.S. 485, 493 (1952); Garner v. Los Angeles Bd. of Public Works, 341 U.S. 716, 720 (1951); *see also* Keyishian v. Board of Regents Univ. Cal., 385 U.S. 589, 604 (1967); Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961); Wieman v. Updegraff, 344 U.S. 183, 191 (1952); *see generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

2. *See* Vojvodich v. Lopez, 48 F.3d 879, 885-86 (5th Cir. 1995); *see generally* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.7, at 17 (1986).

3. *See* Waters v. Churchill, 114 S. Ct. 1878, 1886 (1994) (plurality opinion); Yniguez v. Arizonans for Official English, 69 F.3d 920, 938 (9th Cir. 1994).

speech is protected depends on the result of a balancing process.

Since the leading case of *Pickering v. Board of Education*,[4] the United States Supreme Court has applied a balancing test to public employee speech cases, whereby the Court balances the employee's free speech interest against the government's interest in the effective operation of its offices.[5] However, the law in this area has evolved. Now, in order to receive the benefit of the *Pickering* balancing, the employee's speech must touch upon a matter of public concern.[6] If the speech merely addresses matters of the speaker's personal interest, the courts will not balance the employee's free speech interest against the public employer's interest in office efficiency; therefore, no First Amendment protection will be available.[7] This has become known as the "public concern" threshold which the Supreme Court first articulated in *Connick v. Myers*.[8] Recently, the Supreme Court, while having made efforts to elaborate on the concept of "public concern,"[9] has chosen to give public employers even wider latitude to regulate the speech of their employees.[10] Since *Connick*, lower federal courts have persistently followed the threshold requirement to unjustifiably deny protection in some public employee speech cases, thereby generating confusing expositions of the approach and inconsistent decisions.

This judicial confusion and inconsistency raises questions as to the jurisprudential justification and practical feasibility of the approach. This Article demonstrates that the threshold approach is unjustifiable and inadequate, and therefore, should be abandoned. Part I gives a brief account of the evolution of the balancing test from its inception in *Pickering* to its present status, which intertwines the "public concern" threshold. Part II discusses the inherent values of free speech which the First Amendment is designed to promote, while examining the jurisprudential incompatibility of the threshold approach with these values. Part III examines the practical complications that arise in the application of the "public concern" threshold to public employee speech cases and

4. 391 U.S. 563 (1968).

5. *Id.* at 568; *see also Waters*, 114 S. Ct. at 1884 (O'Connor, J., concurring); Rankin v. McPherson, 483 U.S. 378, 384 (1987); Connick v. Myers, 461 U.S. 138, 140 (1983).

6. *See National Treasury Employees Union*, 115 S. Ct. at 1493; Fox v. District of Columbia, 83 F.3d 1491, 1493 (D.C. Cir. 1996).

7. *Connick*, 461 U.S. at 140; *see also* Wallace v. Texas Tech Univ., 80 F.3d 1042 (5th Cir. 1996).

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

9. *Rankin*, 483 U.S. at 384.

10. *Waters*, 114 S. Ct. at 1888.

the disservice this approach does to the interests of both the employer and the employee in the public sector. Part IV discusses the feasibility of applying a balancing test in public employee speech cases without the hurdle of a "public concern" threshold. Finally, this Article concludes that a direct balancing test will lead to a sensible and balanced public employment relationship and will prevent abuse. A direct balancing approach will also work better to protect both the interest of public employers in the efficient operation of their offices and the interests of their employees in the freedom of speech and self-expression.

I. THE *PICKERING* BALANCING STANDARD AND THE *CONNICK* "PUBLIC CONCERN" THRESHOLD

While the United States Supreme Court often makes reference to a balancing approach when addressing claims involving free speech generally,[11] the Court first articulated the balancing test applicable to public employee speech issues in the leading case of *Pickering v. Board of Education*.[12] Under this test, when a public employee challenges an adverse employment decision based on an alleged First Amendment violation, the court must balance the interests of the employee in commenting on matters of public concern, against the interest of the government employer "in promoting the efficiency of the public services it performs through its employees."[13] Public employee speech is not protected if the speech interest is less valuable in comparison to the disruption it causes to the efficient functioning of government offices.

In *Pickering*, the plaintiff, a public school teacher, was discharged for criticizing the school board in a letter to the editor of a local newspaper concerning the board's handling of school funds. Applying a balancing test, the Supreme Court found that the speech did not disrupt the operation of the public schools; consequently, the Court held that the plaintiff's First Amendment interests prevailed over the school board's interests.[14] However, in reaching this result, the Court gave considerable weight to the fact that the letter touched on "a matter of legitimate public concern."[15]

The Supreme Court did not have occasion to apply this balancing test again until 1983 when it confronted the case of *Con-*

11. *See* ROTUNDA & NOWAK, *supra* note 2, at 17-23 (discussing the views of some justices on applying a balancing test in the general context of free speech).

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

13. *Id.*

14. *Id.* at 572-73.

15. *Id.* at 571-72.

nick v. Myers[16] in which the Court articulated what has become known as the "public concern" threshold. In *Connick*, the plaintiff, Sheila Myers, a former assistant district attorney, was discharged from her office for opposing her transfer to another branch, and for distribution of the questionnaire. The questionnaire solicited the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work on political campaigns.[17] Myers filed suit contending that the government wrongfully terminated her employment in violation of her constitutionally protected right of free speech.[18] The district court agreed with Myers and held that she was entitled to reinstatement, back pay and damages.[19] The Court of Appeals for the Fifth Circuit affirmed the district court's decision and appeal was taken to the United States Supreme Court.

The Supreme Court reversed the Fifth Circuit's decision based on its "common-sense realization" that government offices could not function if every employment decision should undergo constitutional scrutiny.[20] In reaching this result, the Supreme Court determined that speech claims by public employees were only entitled to the *Pickering* balancing test[21] when the employee speaks as a citizen upon a matter of public concern.[22] Furthermore, the Court stated that the *Pickering* balancing test is not applicable and there is no First Amendment protection where the employee's speech merely addresses matters of the employee's personal concern.[23] Accordingly, the Court upheld the government's decision to discharge Myers, because the *Connick* Court was convinced that Myers' questionnaire, with the exception of one question pertaining to political campaigns, did "not fall under the rubric of 'public concern.'"[24]

The establishment of this "public concern" threshold is presumably designed to allow government officials to enjoy "wide lati-

16. 461 U.S. 138 (1983).
17. *Id.* at 140-41.
18. *Id.* at 141.
19. *Id.*
20. *Id.* at 147-48.
21. *Id.* at 147.
22. *Id.* at 147.
23. *Id.* at 146; *see also* United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1012-13 (1995). "[W]e have applied the *Pickering* balancing test only when the employee spoke *'as a citizen* upon matters of public concern' rather than *'as an employee* upon matters only of personal interest.'" *Id.* (emphasis added).
24. *Connick*, 461 U.S. at 148.

tude" in their regulation of employee speech without much oversight by the judiciary "in the name of the First Amendment."[25] However, the application of the "public concern" threshold to preclude the *Pickering* balancing strikes an uneven balance in favor of public employers. This approach disregards the fact that the First Amendment protects not only speech that touches upon matters of public concern, but also protects speech that promotes an individual employee's interest in self-realization—an interest that is vital to the preservation of free speech. Furthermore, due to the inherent elasticity of the concept, the outcome of a particular case depends largely on a particular court's perception of matters of public concern, rendering the law in this area inconsistent and unpredictable. Finally, because the public concern threshold gives public employers great latitude in disciplining or discharging employees, it is susceptible to abuse by government officials who might seek to implement policies based on their own personal oppressive desire. Since the inception of the public concern threshold, courts have dismissed many public employee speech claims without applying a First Amendment balancing test because the speech involved a matter of personal rather than public concern.[26] Due to the Supreme Court's failure to provide a generally applicable guideline as to what speech satisfies the public concern requirement,[27] and the inherent elasticity of the concept itself, federal case law in the area of public employee speech has been characterized as confusing and inconsistent.[28]

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25. *Id.* at 146.

26. *See, e.g.*, Garvie v. Jackson, 845 F.2d 647, 651 (6th Cir. 1988) (criticizing procedures with regard to allocation of funds and tenure within department raised no matter of public concern); Wilson v. Littleton, 732 F.2d 765, 767-68 (10th Cir. 1984) (holding that the balancing test is not reached where police officer's wearing of a black shroud to mourn death of another officer was mere expression of personal feeling, rather than a matter of public concern); Sweeney v. Board of Educ., 746 F. Supp. 758, 764 (N.D. Ill. 1990) (finding that where a suit raised incidental public concern issues, retaliation for filing suit was permissible).

27. *See* Paul F. Solomon, *The Public Employee's Right of Free Speech: A Proposal For a Fresh Start*, 55 U. CIN. L. REV. 449, 450 (1986) (criticizing the *Connick* Court's failure to provide clear guidance to lower federal courts).

28. D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 257-62 (1990). The "many faces" of public concern has led to inconsistent and confusing lower court decisions. *Id.*; *see also* Cynthia K. Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1120 (1988).

II. THE "PUBLIC CONCERN" THRESHOLD IS TOO NARROW IN THE PROTECTION OF PUBLIC EMPLOYEE FREE SPEECH

Although freedom of speech is one of the most treasured liberties guaranteed by the United States Constitution, free speech has never meant "unregulated talkativeness."[29] In evaluating any alleged violation of free speech, courts always face the difficult task of balancing the conflicting interests of the speaker and the government.[30] In this respect, the application of a balancing test in public employment context is not entirely unique.[31] However, whenever a court engages in a balancing analysis to resolve a First Amendment question, it must take into account the underlying values of free speech that are secured under the First Amendment.[32] The *Connick* "public concern" threshold renders free speech protection inadequate and incomplete, and therefore, diminishes the value of the fundamental liberty of free speech under the First Amendment.

A careful reading of the Supreme Court cases and the literature in the field of free speech jurisprudence discloses that the principle of free speech promotes at least two separate but closely related interests. On the one hand, freedom of speech is indispensable to the discovery and spread of political truth.[33] On the other hand, freedom of speech also protects the individual's interest in self-expression.[34] With respect to the former, the constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker's interest in self-expression; by protecting the individual speaker from government attack, the First Amend-

29. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF - GOVERNMENT 19 (1948).

30. ROTUNDA & NOWAK, *supra* note 2, at 17-23.

31. *See* Martin H. Redish, *The Value of Speech*, 130 U. PA. L. REV. 591, 624 (1982). If the general rule under the First Amendment is that protection of speech is not absolute because of competing social concerns, application of such a rule is necessarily a form of balancing. *Id.*

32. Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstituionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597, 599 (1986). As one commentator has pointed out, a theory of free expression that supports the promotion of certain values may determine whether First Amendment coverage should be broadened to cover employee speech. *Id.*

33. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980).

34. *Id.* at 534 n.2; First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978).

ment protects the public's interest in receiving information.[35] However, the First Amendment also presupposes that "the freedom to speak one's mind" is "an aspect of individual liberty" apart from the public's perception of the particular speech.[36] Free speech is not only a means of enlightening the public, but also an end in itself.[37] The right to free speech includes "the need of many men to express their opinions on matters vital to them if life is to be worth living"[38] and comports "with the premise of individual dignity and choice."[39] Conversely, the application of a "public concern" threshold to preclude First Amendment protection, rather than safeguard free speech in the context of public employment, goes against the Supreme Court's own precedents and ignores an essential aspect of the First Amendment.[40]

When we talk about the value of free speech in the context of employment, public or private, we cannot help but think of the value of employment itself to the individual, the community and the nation.[41] When we talk about individual self-development or

35. Pacific Gas & Electric Co. v. Public Utils. Comm'n, 475 U.S. 1, 8 (1986). Some commentators ascribe to the First Amendment the enlightened function of promoting competition in the marketplace of ideas, the function of checking the government, and the function of serving as a safety valve for the society. *See* MELVILLE B. NIMMER, ON FREEDOM OF SPEECH § 1.02 (1984). All of these functions promote free speech that addresses matters of public concern. *Id.*

36. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-04 (1984); *Consolidated Edison*, 447 U.S. at 534 n.2.

37. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

38. ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941).

39. Cohen v. California, 403 U.S. 15, 24 (1971). Some commentators even reject the notion of informing the public as the justification for free speech. They believe instead in the self-fulfillment value of speech, which is protected not as a means of collective good, but because it fosters individual self-realization and self-determination. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982); Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

40. *See* Connick v. Myers, 461 U.S. 138, 144-46 (1983). The cases the *Connick* Court relied on as precedents for establishing the "public concern" threshold all stand for the proposition that speech on matters of public concern deserves utmost First Amendment protection. *See id.* at 145 (citing NAACP v. Claiborne Hardware Co., 485 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times v. Sullivan, 376 U.S. 254, 269 (1964); Roth v. United States, 354 U.S. 476, 484 (1957)). It is quite puzzling that the Court did not provide convincing justification as to why those cases could serve as precedential authority for a threshold limitation on the freedom of speech.

41. *See, e.g.*, Lieberwitz, *supra* note 32, at 620 (citing JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 102-03 (1983)). The level of employment, in terms of both quantity and quality, has been tied to the development of the capitalist system. *Id.* The history of capitalism has been, to

self-realization, we cannot help but think about the role that modern government plays, or at least is supposed to play, both as employer and as sovereign, in achieving this goal for the individual members of its population.[42] The government employs people to provide public services. When making employment decisions, government employers act to enhance the efficient operation of their offices.[43] However, the ultimate goal of government in rendering these public services is to further individual members of the public in their pursuit of self-fulfillment.[44] It is unthinkable that the government, in its status as a public employer, should ignore the similar interests of its own employees.

Employment serves as one of the focal points in the lives of individuals and in the life of a nation.[45] In the case of an individual, his or her own self-fulfillment, largely depends upon his or her employment status. If free speech protects "the need of many men to express their opinions on matters vital to them,"[46] a public employee's speech concerning his or her employment should be accorded the utmost protection, for there are few matters that are more vital to the life of an ordinary citizen. This being the case, protection of public employee speech should not be restricted by a judicially created doctrine like the "public concern" threshold, unless the right-privilege distinction is maintained.[47] Otherwise, we fail to safeguard fundamental speech rights of citizens solely because of their employment with the government.[48]

As far as the individual employee is concerned, free speech serves at least two aspects of self-realization. On the one hand, free speech promotes an individual's interest in self-governance.[49] This aspect of the self-realization value is furthered by expression, which provides information or opinion that will aid an individual in making decisions about how to conduct his or her employment life.[50] In this regard, employee free speech helps promote commu-

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a great extent, the history of the structure of the workplace. *Id.*

42. *See* Redish, *supra* note 31, at 601. In his assessment of the basic values of the democratic process, Professor Redish concluded that political democracy is merely a means to the much broader value of individual self-realization. *Id.*

43. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987); *Connick*, 461 U.S. at 150-51; Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

44. *See* Redish, *supra* note 31, at 601.

45. *See* JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 102-03 (1983).

46. CHAFEE, *supra* note 38, at 33.

47. See *supra* note 1 and accompanying text for a more detailed discussion of the free speech rights of government employees.

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

49. Redish, *supra* note 31, at 627.

50. *Id.*

nication that will generate information valuable to the individual employee in his or her personal decision-making process. However, self-realization is not limited to this utility value, as free speech is not limited to the utility value of promoting the public's interest in receiving information.[51] Free speech also promotes the employee's interest in the development of his or her human faculties.[52] This aspect of free speech is not entirely instrumental in that it may have nothing to do with the employee's personal decision-making process. The satisfaction derived from this aspect of free speech or expression is emotional, rather than rational, and it serves the individual's inner self.[53] In this respect, the employee's interest deserves to receive some weight on the scale of First Amendment balancing even if it involves matters that are no concern of others.[54]

The application by lower courts of the *Connick* threshold approach has unjustifiably resulted in wider latitude for government officials in regulating employee speech, despite the obvious inconsistencies and inherent lack of logic of the threshold approach. For example, in the recent case of *Luck v. Mazzone*,[55] a court secretary was discharged for sending an anonymous note to a local radio station. The secretary sent the note in an effort to correct a news item that the station previously aired about the air conditioning of the building where the secretary worked.[56] Despite the public nature of the forum and the informative value of the speech involved, and despite the fact that there was no disruption of work, both the district court and the Court of Appeals for the Second Circuit concluded that "this communication concerned an employee's essen-

51. *Connick*, 461 U.S. at 146-47. The "public concern" threshold recognizes only the utility value of free speech for promoting the public's interest in receiving information. *Id.*

52. Redish, *supra* note 31, at 627.

53. *Id.* at 626. Even fighting words might be viewed "as a personal catharsis, as a means to vent one's frustration at a system the speaker deems to be oppressive," and "as a mark of individuality to be able to cry out at a society viewed as crushing the individual." *Id.*

54. *Id.* at 627. "[I]t is considerably more doubtful that an arm of the state should have the authority to decide for the individual that certain means of mental development are better than others." *Id.*

55. 52 F.3d 475 (2d Cir. 1995).

56. *Id.* at 477. In July, 1993, the radio station aired a news item about the meeting room of the Board of Supervisors in the building, stating that the room was not air conditioned and was about the only place in the entire building without air conditioning. *Id.* Two days later, the court secretary sent the radio station an anonymous note, stating that the courtroom/library was also not air conditioned, where she, together with three others, worked seven hours a day, five days a week. *Id.* The note was signed, "an overheated worker." *Id.*

tially private complaint, rather than a matter of public interest."[57] Therefore, the Second Circuit held that the employer did not violate the employee's right to free speech by discharging her for sending the note.[58]

Obviously, both courts failed or refused to see that, apart from its informative value to the public, the speech involved in the *Luck* case was imbued with the intrinsic free speech values of self-realization and self-fulfillment. The court secretary, by sending the note, might simply have desired to correct the inaccuracy in the news report or to enjoy the excitement of her anonymous "celebrity," which she probably did enjoy for a short time. By resorting to the "public concern" threshold, courts refuse to balance the interest of the employee in self-expression against the employer's interest in efficient office operation. Faithful to the *Connick* threshold, the *Luck* court felt obliged to tolerate the oppressive public employer's unfriendly measure against the helpless court secretary, who merely wanted to have some fun with the mass media, and who neither disrupted the operation of the office nor jeopardized the fulfillment of her employment duties.[59] Under the "public concern" threshold approach, it is rather doubtful as to whether the protection of free expression is still the basic tenet of the First Amendment.

The "public concern" threshold, as applied by lower federal courts,[60] entirely ignores the intrinsic value of employee free speech in promoting the individual's interest in self-realization. If the First Amendment protects free speech as an individual liberty, the content of the protection disappears in the context of public employment under the "public concern" threshold. Often, courts will not engage in a First Amendment balancing analysis when confronting situations where a public employee speaks his mind

57. *Id.* The lower courts based their conclusions on the fact that the court secretary referred only to the number of workers who worked in the un-air-conditioned surroundings and the length of their work week, and the fact that the note was signed by "an overheated worker." *Id.*

58. *Id.*

59. *See generally id.* at 475. The *Luck* court opinion contains no reference to instances of office disruption or unsatisfactory job performance. *Id.* Under such circumstances, application of the threshold would not serve the alleged purpose of the doctrine since government efficiency was in no way undermined.

60. Connick v. Myers, 461 U.S. 138, 147 (1983). The *Connick* Court falls short of declaring that speech on matters that are not of public concern is never protected under the First Amendment. *Id.* (stating that "[w]e do not suggest, however, that [the plaintiff's] speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.").

regarding his or her employment and the court determines that the speech is not of public concern.[61] In such a case, the courts totally ignore the liberty interest of the employee.[62] Even if the employee is able to overcome the hurdle of the "public concern" threshold, what is left on the balancing scale are two separate interests, neither of which can be called the employee's; First Amendment protection is only available if the public's interest in receiving the information outweighs the government's interest in regulating it. This approach not only contradicts the basic values underlying the First Amendment, but the lack of generally applicable criteria in its application also makes case law in this area inconsistent and unpredictable.

III. THE "PUBLIC CONCERN" THRESHOLD IS NOT CAPABLE OF UNIFORM OR CONSISTENT APPLICATION

While the *Connick* Court attempted to predicate the availability of the *Pickering* balancing on the distinction between speech concerning issues of significant social, political, or other public importance and speech concerning purely private personnel grievances, the fundamental problem is far more complicated. The determination of whether an employee speaks on a matter of public concern depends upon "the content, form, and context of a given statement, as revealed by the whole record."[63] Although the *Connick* Court referred to instances of employee speech of public concern,[64] those descriptions are said to "have provided enough guidance to confuse everyone."[65]

The "public concern" threshold, even as applied in the context of *Connick*, is susceptible to irreconcilable interpretations. As Justice Brennan aptly pointed out, the *Connick* Court attempted to identify two classes of speech that may overcome the hurdle of the threshold requirement: 1) statements of public import because of

61. *See* Coughlin v. Lee, 946 F.2d 1152, 1156-57 (5th Cir. 1991) (holding that if speech does not address matters of public concern, the court will not scrutinize reasons motivating discharge).

62. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 938 (9th Cir. 1994). Some lower courts seem to have recognized that protection of public employee free speech should cover the employee's liberty interest in free expression as well as the public's interest in receiving information. *Id.*

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

64. *Id.* at 148. The *Connick* Court suggested that a statement would be of public importance in evaluating the performance of an elected official if, by the statement, the speaker sought to inform the public that the government office was not discharging its governmental responsibilities, or to bring to light actual or potential wrongdoing or breach of public trust. *Id.*

65. Smith, *supra* note 28, at 258.

their content, form, and context; and 2) statements that are inherently of public concern.[66] At first blush, it appears to be a reasonable inference that employee speech, which is not inherently of public concern, could in fact concern the public depending on the context and the manner of the speech. Conversely, it is equally plausible to infer, from the way the *Connick* Court handled Myers' claim, that a statement that is inherently of public import can lose the status just because of its content or the form and context in which it is made.[67] As a matter of fact, this is what happened in *Connick*. Despite the Court's efforts to make the distinction, it failed to explain adequately why the plaintiff's questions regarding office morale and efficiency were not matters of public concern, while her question pertaining to political campaigns was such an issue.[68] However, as a result of *Connick*, it seems readily apparent that public employers are able to restrict the free speech rights of public employees severely.[69]

The *Connick* Court's "content, form, and context" approach is not a rule of general applicability, but permits lower courts to engage in their own ad hoc analysis.[70] Although more than a decade has passed since the *Connick* decision, it is still "hazardous to generalize about what matters will be deemed to involve issues of public concern."[71] Since a precise definition of the concept is inherently impossible, lower courts have taken different, and sometimes irreconcilable, approaches to the issue. Due to confusing Supreme Court precedents, even cases decided by the same court may lack clarity or consistency.[72]

First, *Connick* tends to lend support to a subjective standard in determining the issue of public concern. Specifically, this approach focuses on the employee's subjective intent for making the

66. *Connick*, 461 U.S. at 159-60 (Brennan, J., dissenting).

67. Lesher v. Reed, 12 F.3d 148, 151 (8th Cir. 1994) (holding that a public employee's personal complaints to employer, even about a matter of public concern, do not constitute protected speech).

68. Lee, *supra* note 28, at 1120 (noting that such a question has been constantly raised by commentators); Solomon, *supra* note 27 at 460.

69. *See* Solomon, *supra* note 27, at 464 (charging that the tactics employed by the Court represented "a disingenuous attempt to conceal the fact that its decision severely restricts the free speech rights of public employees.").

70. *See Connick*, 461 U.S. at 164 (Brennan, J., dissenting). The *Connick* approach is to literally commit the task of protecting public employee right to free speech "to the conscience of judges." *Id.*

71. 2 ISIDORE SILVER, PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE § 15.5, at 249 (2d ed. 1995).

72. *See generally* Sanford N. Greenberg, *The Free Speech Rights of Public Employees*, 57 GEO. WASH. L. REV. 1281 (1989) (examining D.C. Circuit cases).

speech that allegedly led the public employer to initiate an adverse employment action against the employee speaker. The employee must have intended to discuss an issue that is of concern to the community; there is no First Amendment protection where the employee merely intended to express personal grievances with regard to his or her employment. In *Connick*, the Court held that, with the exception of one question,[73] the plaintiff's questionnaire was not of public concern because the distribution of her questionnaire was designed to oppose her own transfer. furthermore, it was not designed to inform the public about the performance of the government office or wrongdoing by government officials.[74]

The Supreme Court's formulation of the issue has led some lower courts to unwarranted judicial preoccupation with the real or presumed motives of the employee speaker.[75] For example, in *Kock v. City of Hutchinson*,[76] a city fire Marshall was demoted after he offered his opinions in an official report about the cause of a fire. The Court of Appeals for the Tenth Circuit found that the expression did not touch upon a matter of public concern, and therefore, was not protected.[77] In reaching this result, the court noted that the plaintiff was not motivated to expose wrongdoing by other government officials involved in the investigation; rather, in writing the report, the plaintiff was merely performing his employment duties.[78]

In *Murray v. Gardner*,[79] an FBI agent was disciplined after he complained about a proposed employee-furlough plan concerning allocation of funds and office efficiency. The Court of Appeals for the D.C. Circuit held that the expression failed to meet the public concern threshold because it merely reflected the personal dissatisfaction of a discontented employee and concerned the plaintiff's intention to protect his own position interest, rather than inform the

73. *Connick*, 461 U.S. at 155-56. The question concerned whether her coworkers felt pressure from their superiors in political campaigns; all other questions concerned office morale, efficiency, and the need for adequate transfer procedures. *Id.*

74. *Id.* at 148.

75. 2 SILVER, *supra* note 71, at 247.

76. 847 F.2d 1436 (10th Cir. 1988).

77. *Id.* at 1447-48.

78. *Id.* Even where a public employee's motive is to expose wrongdoing, his speech may not be deemed to be of public concern if his or her employment duty was to expose official wrongdoing. *Id.*; *see also* Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992) (concerning a county fraud investigator sued for alleged constructive discharge in retaliation for speaking out about fraud investigation of county official and alleged cover-up).

79. 741 F.2d 434 (D.C. Cir. 1984).

public.[80] What the above cases disclose is that courts can manipulate the public concern threshold to restrict an employee's freedom of speech, even if objectively, the expression touches upon issues of public importance.[81]

On the other hand, lower courts can also rely on *Connick* to apply an objective approach in determining whether the speech involves an issue of public concern. Under this standard, regardless of the employee's intent, his speech could meet the threshold requirement if the subject is inherently of public concern.[82] However, as with the public concern threshold itself, the Supreme Court precedents do not provide clear guidance or criteria for courts to determine whether a particular statement touches upon a matter that is inherently of public concern.[83] The outcome is largely dependent upon how the court characterizes the issue.[84] Moreover, in public employee speech cases, matters of public concern and personal concern are often intertwined. A matter of purely personal concern may also interest fellow employees or the public, and stimulate the employee to raise broader issues and question general government practices.[85] However, the practical

80. *Id.* at 438; *see also* Goffer v. Marbury, 956 F.2d 1045, 1050 (11th Cir. 1992) (noting that, in determining issues of public concern, an important factor is whether the speaker is in pursuit of purely personal private interests). *Cf.* Cliff v. Board of Sch. Comm'rs, 42 F.3d 403, 410 (7th Cir. 1994) (considering the speaker's motive along with other factors); Hubbard v. EPA, 949 F.2d 453, 457 (D.C. Cir. 1991) (holding that the complainant's motivation, "unless personal, is irrelevant to whether the speech itself is a matter of public concern").

81. *See* Lesher v. Reed, 12 F.3d 148, 151 (8th Cir. 1994) (concluding that a public employee's personal complaints to his employer, even if about matter of public concern, do not receive balancing); Linhart v. Glatfelter, 771 F.2d 1004, 1009-10 (7th Cir. 1985) (stating that expression of personal dislike for elected political officials is not protected where the speaker did not intend to expose wrongdoing).

82. *See* Connick v. Myers, 461 U.S. 138, 148 (1983). The *Connick* Court offered such a standard when it tried to distinguish *Connick* from *Givhan v. West Line Consolidated School District*, 439 U.S. 410 (1979). *Connick*, 461 U.S. at 148 n.8 (finding that racial discrimination inherently constitutes a matter of public concern despite the employee speaker's choice of a private forum). Furthermore, the *Connick* majority has been criticized for combining the subjective and objective approaches to create some inherent inconsistency. *See* Greenberg, *supra* note 72, at 1287 n.54.

83. *See* Solomon, *supra* note 27, at 466.

84. While the *Givhan* Court concluded that speech protesting racial discrimination was inherently of public concern, the court in *Robson v. Klamath County Board of Health*, 818 P.2d 990, 992 (Or. App. Ct. 1991) found that a discussion of a supervisor's possible sexual harassment was a mere personal grievance.

85. 2 SILVER, *supra* note 71, at 247; *see also* Breuer v. Hart, 909 F.2d 1035,

effect of the objective standard is that a court may still decide to characterize the employee expression as not of public concern, even if the employee speaker had a good faith intention of exposing wrongdoing or informing the public about the performance of a government office.[86] This is due to the many faces of "content, form, and context."[87]

Due to the lack of inherently objective criteria in applying the public concern test, some courts concentrate on the external public attention the employee speech receives in determining the public concern issue.[88] In fact, the *Connick* Court took this approach in determining that one of the questions in the plaintiff's questionnaire touched on a matter of public concern because of the public attention surrounding that situation.[89]

The tendency to focus on actual public attention may have derived its impetus from the Supreme Court decision in *Rankin v. McPherson*.[90] In that case, a clerical employee in a county constable's office was discharged for making a casual comment to a coworker concerning the attempted assassination of President Reagan.[91] The Court held that the remark plainly dealt with a matter of public concern since "[i]t came on the heel of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President."[92] If public attention could

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1039 (7th Cir. 1990) (noting that wrongdoing may often be revealed "only by those who have some personal stake in exposing wrongdoing").

86. *See* Hartman v. Board of Trustees of Community College Dist. No. 508, 4 F.3d 465, 471 (7th Cir. 1993) (noting that "a showing of public concern turns not on the general subject matter of the employee's speech, but on the content, form, and context of a given statement"); *see also* Morgan v. Ford, 6 F.3d 750, 754 (11th Cir. 1993) (stating that complaints on behalf of a co-worker concerning sexual harassment are not of public concern where the main thrust of the speech took the form of a private employee grievance); Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987) (finding that an employee's private complaints of sexual harassment are not a matter of public concern); *but see* Marshall v. Allen, 984 F.2d 787, 796 (7th Cir. 1993) (reasoning that a male coworker's verbal support for victims of sexual harassment constituted speech touching upon a matter of public concern).

87. *Hartman*, 4 F.3d at 471.

88. *See Morgan*, 6 F.3d at 755 (determining that complaints to official bodies regarding sexual harassment were not matters of public concern where the employee did not "relate her concerns to the public or attempt to involve the public").

89. *See* Connick v. Myers, 461 U.S. 138, 149 (1983).

90. 483 U.S. 378 (1987).

91. *Id.* at 381. The comment consisted of the following remark: "shoot, if they go for him again, I hope they get him." *Id.* at 381. The remark was preceded by a discussion of the President's policies, but the employee was discharged for that specific remark. *Id.*

92. *Id.* at 386. The life of the President is arguably a matter of public con-

be the basis for a finding of public concern, the *Connick* Court could have found that Myers' questionnaire satisfied the threshold requirement, since his dismissal attracted extensive media attention.[93] However, as some commentators have observed, a "headline test" for public concern "would undermine the First Amendment's historic neutrality with respect to the impact of expression."[94]

By contrast, the speech involved in *Rankin* did not amount to a matter of public concern in the strict sense of the concept. The remark was nothing more than some small talk that expressed personal opinion. Its public-informing function, if any, was *de minimis*.[95] The employee did not intend to speak on a social or political issue vital to informed decision-making by the electorate.[96] Thus, it is unlikely that the public would have a high degree of interest in what the county clerk had to say on the matter.[97] Yet, the First Amendment should protect the discharged employee in *Rankin* regardless of the lack of public concern. If not, public employees would be forced to remain silent and relinquish their vital free speech right in order to maintain their livelihoods through public employment.[98] The real reason that the First Amendment protects the speech involved in *Rankin* is based on the employee's role in making the remark, rather than in the public's interest in the topic of the speech.[99] When the employee made the remark,

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cern, but the *Connick* threshold is allegedly designed to protect speech that has a public-informing function. In this case, the clerical employee's casual remark had little to inform, and it is highly doubtful that the public was really interested in the employee's opinion.

93. *Connick*, 461 U.S. at 160 n.2 (Brennan, J. dissenting); *see also* Christine M. Arden, Note, *Public Employees and the First Amendment*: Connick v. Myers, 15 LOY. U. CHI. L.J. 293, 307 (1984) (arguing that since the matter attracted the attention of the local media, it was of public concern).

94. *See The Supreme Court, 1982 Term—Leading Cases*, 97 HARV. L. REV. 1, 172 n.65 (1983).

95. In contrast, the public-informing value of the anonymous note in *Luck* was rather high in that it purported to correct the information the public previously received from a radio program. See *supra* notes 55-59 and accompanying text for a further discussion of *Luck v. Mazzone*, 52 F.3d 475 (2d Cir. 1995).

96. *See Rankin*, 483 U.S. at 381-82; *see also* Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968).

97. *See* Berger v. Battaglia, 779 F.2d 992, 998-99 (4th Cir. 1985) (stating that in determining whether speech touches upon a matter of public concern, the focus is whether the public or the community is likely to be truly concerned with or interested in the particular expression).

98. It is already too late to say that public employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. *See* Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967).

99. *Rankin*, 483 U.S. at 388-89. In determining the public concern issue,

she was talking as a citizen rather than a public employee,[100] and her speech did not disrupt the operation of the government office in any manner.[101] Evidently, the Supreme Court had to stretch the "public concern" concept to adapt its analysis to the framework of its public employee speech jurisprudence.[102]

The great differences in approach taken by the various the Circuit Courts of Appeals are not entirely due to different interpretations of the issue of public concern. The problem instead lies in the fact that the concept itself is incapable of precise definition. One of the difficulties in resolving the public concern threshold is that the Supreme Court has not articulated clear-cut guidelines;[103] instead, the Court merely states that courts must determine the issue in light of the "content, form, and context."[104] However, on many occasions, courts may interpret these situations in more than one way, and those interpretations need not be mutually exclusive.[105] Indeed, courts can narrow the public concern threshold to exclude speech normally considered to be of public importance interest like the Court did in the *Connick*, or courts may broaden the threshold to include speech that does not really concern the public like the Court did *Rankin*.[106] In any event, "courts cannot give due weight to employee interests unless they develop a con-

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some lower courts have focused on the employee's role rather than on the public's interest. *See* Bausworth v. Hazelwood Sch. Dist., 986 F.2d 1197, 1198 (8th Cir. 1993).

100. *Rankin*, 483 U.S. at 388-89. Speech is regarded as a matter of public concern when the employee speaks as a concerned citizen, but not when he or she speaks as an employee. *Bausworth*, 986 F.2d at 1198. This is not to say that this approach is correct, since citizens often speak on matters of personal concern and that speech deserves no less protection.

101. *Rankin*, 483 U.S. at 388-89. Here it is a matter of balancing, not a threshold question of public concern.

102. *See id.* at 394 (Scalia, J., dissenting).

103. *See* Peterson v. Atlanta Hous. Auth., 998 F.2d 904, 916 (11th Cir. 1993) (concluding that "[t]here are simply no guidelines . . . [for] determining whether speech is primarily of public concern or primarily of personal [concern]").

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

105. *Peterson*, 998 F.2d at 916.

106. *See Rankin*, 483 U.S. at 386-87; *Connick*, 461 U.S. at 148. Sometimes this can lead to an anomalous outcome. In *A.P.W.U. v. United States Postal Serv.*, 830 F.2d 294 (D.C. Cir. 1987), a postal employee was discharged for reading a letter he handled and disclosing its content in a union newspaper in violation of Postal Service regulations. *Id.* at 297. The employee was not discharged for speaking out, but for violating agency regulations. *Id.* at 298. However, the D.C. Circuit Court engaged in an extensive public concern analysis in reaching its conclusion that the employee's disclosure to the newspaper article touched upon matters of public concern, and therefore, held that the discharged employee was entitled to reinstatement and full back pay. *Id.* at 299.

ception of those interests that embraces not only the purely instrumental interests in informing the public, but also the personal value of the expression of the employee."[107]

IV. THE CONFLICTING INTERESTS OF PUBLIC EMPLOYERS AND PUBLIC EMPLOYEES SHOULD BE RESOLVED USING A DIRECT BALANCING TEST

In public employee speech cases, the application of a balancing test without the hurdle of the public concern threshold would provide courts with an opportunity to assign the proper weight to employees' interests in free speech. In particular, under this approach, courts can take into account both the intrinsic value of individual expression and the instrumental value of informing the public.[108] Furthermore, this "direct balancing" will not necessarily create an undue burden on the public employer's ability to function, since "[t]he Court could just as simply balance the employee's interest in free speech against the employer's interest in managing the workplace."[109] Accordingly, the public employer's interest in the efficient performance of its enterprise will be given due weight on the balancing scale as well.[110]

In the context of public employment, the government acts both as employer and as sovereign, while the individual acts both as employee and as citizen. A salient characteristic of the relationship is that a public employee is more dependent on his or her government employer for his or her livelihood; thus, the government has more incentive and greater ability to restrict what the employee says about this relationship.[111] Moreover, the public employer acts through its individual officers. Since individuals

107. *Development in the Law - Public Employment*, 97 HARV. L. REV. 1611, 1769 (1984).

108. According to one commentator, "[i]t is not immediately apparent why the Court requires public employee speech to be of public concern as an initial hurdle." Lee, *supra* note 28, at 1121.

109. *Id.*

110. *See* Lee, *supra* note 28, at 1136. Some commentators who reject the public concern approach nevertheless recommend replacing "public concern" with another threshold: clear impairment of function. *Id.* These commentators argue that if the employee's speech, on its face, clearly impairs the government agency's ability to function, there should be no First Amendment protection. *Id.* However, such an inquiry more often than not involves questions of fact and the credibility of witnesses, which a court is unlikely to be able to resolve at the threshold stage. Moreover, the government's interest in its ability to function efficiently is the very interest that should be balanced under the *Pickering* test. Accordingly, an "impairment of function" threshold will render the *Pickering* balancing test worthless.

111. *See* Smith, *supra* note 28, at 249-50.

make the ultimate employment decisions in particular cases, their individual personality and character have much bearing on the way the public employer regulates the speech of its employees. Consequently, courts should subject the speech of public employees to a unique First Amendment balancing test. This should be done not only because "public employees are in a unique position to impair government operations,"[112] but also because they are uniquely easy targets for personal abuse by those in charge under the color of government authority.

When engaging in a direct balancing inquiry without a threshold, a court should give full consideration to the government's interest in the effective and efficient fulfillment of its responsibilities to the public, as *Pickering* requires,[113] and the employee's interest in free speech, both as a means of informing the public and as an end of self-realization. In making this determination, courts should recognize the public employer's interest in ensuring that government agencies have the ability to perform their functions; that their work will not be disrupted; and that they can foster harmonious relationships among employees and their superiors and coworkers.[114] On the other hand, courts should also acknowledge the public employee's free speech rights. This includes the employee's ability to communicate with the public concerning the performance of the government and other matters of importance to the community without fear of retaliation by his or her public employer. In addition, public employers should respect their employees' rights to speak out just for the sake of speaking out, even on matters not of public concern. However, neither interest is absolute. The extent to which one should prevail over the other can only be determined by striking a proper balance between the two.

Employee speech that touches upon matters of public concern deserves the highest degree of protection and courts should afford it the greatest weight on the balancing scale.[115] After all, protection of this category of speech promotes both the instrumental and intrinsic values of free speech.[116] First, the speaker strives to be heard, with a sense of satisfaction that his or her inner self is be-

112. *Id.* at 264.
113. *Connick*, 461 U.S. at 150.
114. *See* 2 SILVER, *supra* note 71, at 256.
115. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980).
116. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also *supra* notes 27-28 and accompanying text describing the two separate interests of free speech.

ing realized or fulfilled.[117] Second, the public benefits from the communication, with more information being supplied and more voices contributing to the public debate regarding matters vital to an informed citizenry.[118] By addressing matters of public concern, employee speech may be of a general social or ideological nature; thus, the employee is speaking as a citizen rather than as a public employee.[119] However, public employees may also speak on matters of public concern as employees or because of their status as public employees, which provides them with access to information that the public at large does not possess.[120]

When an employee speaks as a citizen on a matter of general social or ideological concern, his or her interest in free speech almost always prevails on the balancing scale because this speech rarely has any disruptive effect on the proper functioning of a government agency.[121] Even if an employee's speech offends or displeases a public employee's supervisors, an offended employer driven by a desire to punish bears almost an insurmountable burden to show that its interest as an employer is at stake. This is because courts are ever vigilant "to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[122] Individual officials are not allowed to equate their own sensitivity with the interest of the government agency.[123] In this respect, the *Pickering* test works rather well to protect the public employee from unwarranted interference with his or her right of free speech.

When a public employee speaks out in connection with his or her employment, the subject matter may be of even more public significance if it relates to how the government is functioning.[124] Criticizing a public employer or disclosing wrongdoing by public officials often disrupts working relationships and operation of the

117. See *supra* notes 35-40 and accompanying text for a more detailed discussion of the self fulfillment value of free speech.

118. *See* Pacific Gas & Electric Co. v. Public Utils. Comm'n, 475 U.S. 1, 8 (1986); Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

119. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); *see also Connick*, 461 U.S. at 145.

120. *Pickering*, 391 U.S. at 572.

121. Rankin v. McPherson, 483 U.S. 378, 388-89 (1987).

122. *Id.* at 384.

123. *See Pickering*, 391 U.S. at 571.

124. *See* Barnard v. Jackson County, 43 F.3d 1218, 1225 (8th Cir. 1995). This is often true even if the employee is talking about some personal grievances with respect to his or her own employment. *See* Tao v. Freeh, 27 F.3d 635, 639-40 (D.C. Cir. 1994) (finding that an employee's speech aimed at resolving a personnel dispute may touch upon an issue of public concern).

office.[125] This alone should not preclude First Amendment protection, since the public concern this speech raises weighs heavily against the employer's interest in undisrupted work and operation.[126] The very essence of a balancing test is to safeguard two separate interests. In the context of public employee speech, courts must ensure that employees are not punished for protected speech, unless the government's interest in the effective operation of its offices outweighs the employee's interest in speaking out about matters of public concern.[127] In performing this balancing, the court will not consider the speech in a vacuum; "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose."[128] In this respect, the *Pickering* test effectively upholds the interests of the employee, as well as the interests of the public employer.

Obviously, in applying a direct balancing test without imposing a "public concern" threshold, a court will still have to consider whether the speech for which the employee was discharged or disciplined touches upon a matter of public concern. If so, a court must assign it considerable weight on the balancing scale.[129] However, this approach is quite different from a threshold requirement which tends to preclude any balancing if the threshold is not met. In any balancing process a court considers a variety of factors and circumstances. In this context, the concept of "public concern" need not be defined precisely. A court may effectively resolve the "public concern" issue by simply taking into account "the content, form, and context of a statement,"[130] or "the time, place, and manner of the employee's expression."[131] The fact that a particular ex-

125. *See* Conaway v. Smith, 853 F.2d 789, 798 (10th Cir. 1988) (noting that "whistle blowing might jeopardize harmony of office or tarnish integrity of department").

126. Johnson v. Multnomah County, 48 F.3d 420, 427 (9th Cir. 1995). Whenever there is a clear impairment of the government institution's function, protection should be precluded. *See, e.g.,* Lee, *supra* note 28, at 1136. In performing the balancing, courts tend to focus their inquiry on whether the speech interfered with work, personnel relationships, or the speaker's job performance; implying that if such interference occurred, the balancing process is at an end. *See, e.g., Rankin*, 483 U.S. at 388-89. Such an approach may not be sufficient in cases where employee speech exposes serious wrongdoing or official corruption. In a strict sense, any disruptive effect on government performance is due to the wrongdoing or corruption itself rather than to the speech.

127. *Pickering*, 391 U.S. at 568; *Rankin*, 483 U.S. at 388.

128. *Rankin*, 483 U.S. at 388.

129. *See Pickering*, 391 U.S. at 571-72.

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

131. *See Rankin*, 483 U.S. at 388.

pression is deemed to have touched on a matter of public concern adds weight to the employee's interest on the balancing scale.

In contrast, it is a totally different situation when the public employee speaks as an employee on matters of purely personal concern. The *Connick* "public concern" threshold precludes any balancing when the public employee's speech relates to purely personal matters; consequently, an employee who was disciplined for making such speech is left without any protection from the court. As discussed previously, this approach ignores the employee's liberty interest in self-expression, which is an indispensable component of the freedoms protected by the First Amendment.[132] Fearing that a balancing standard would impair government offices' ability to function "if every employment decision became a constitutional matter," the Supreme Court has refused to employ a balancing test when addressing public employee speech issues that involve matters only of personal concern.[133] However, if the First Amendment protects the speaker's liberty interest as a personal right, as well as the public's interest in receiving information, then public employee speech is inherently a constitutional matter regardless of how a court characterizes it. Therefore, the issue is not whether the speech is protected, but rather, how much weight the court should give the speaker's interest on the balancing scale.

The illegitimacy of this uneasy marriage between the "public concern" threshold and public employee speech adjudication is further illustrated in the case of *Tindle v. Caudell*.[134] In *Tindle*, a white police officer was suspended for wearing bib overalls which offended some African-American members of the department at an off-duty Halloween party.[135] Having found that the police officer wore the costume "strictly to 'have a good time'" and not to convey any message,[136] the Court of Appeals for the Eighth Circuit held that the disciplined police officer was not entitled to First Amendment protection.[137] In so ruling, the court reasoned that, even if the officer's costume and conduct was expressive,[138] it did not touch

132. See *supra* notes 95-107 and accompanying text for a further discussion regarding the shortcomings of the public concern threshold in preserving an employee's interest in free expression.

133. *Connick*, 461 U.S. at 143.

134. 56 F.3d 966 (8th Cir. 1995).

135. *Id.* at 968.

136. *Id.* at 969.

137. *Id.*

138. *Id.* The court rejected the argument that wearing the costume to entertain the other party guests was inherently expressive, because the police officer wore the costume not "to incite debate, to alienate others, to comment on an issue, or even to send a racist message." *Id.*

upon matters that would concern the community.[139] It certainly shocks the conscience that a public employer, without showing any impairment of its interest in government performance, should have free reign to impose sanctions on an employee for wearing a Halloween costume, even if the expression does not touch upon any matter of public concern.[140] The *Tindle* Court, perhaps conscious of the arbitrariness of its analysis if it had stopped at the "threshold," began to focus on whether the government's interest in the effective operation of the police department was undermined by the police officer's conduct at the party.[141] The court concluded that the First Amendment did not protect the police officer because his interest in appearing as he chose at the party did not outweigh the countervailing interests of the government in maintaining a disciplined and harmonious work environment within the police department.[142]

The courts' treatment of the claims of the police officer in *Tindle*[143] and of the court secretary in *Luck*[144] illustrates how the "public concern" threshold can lead to an arbitrary outcome, which might make a judge feel uncomfortable when he or she applies the threshold to the facts of a particular case. While the Eighth Circuit might have been able to justify the *Tindle* decision based on its balance of the police officer's speech interests against the disruption it actually caused, the Second Circuit's decision in *Luck* was completely arbitrary. Even if the employee's anonymous note in *Luck* did not touch upon a matter of public concern, the public employer's interest in efficiency was not at stake. In light of these two cases, it is obvious that, under the "public concern" threshold,

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139. *Id.* at 971.

140. It is no business of the public employer's as to what an employee chooses to wear at an off-duty party if its interest in office operation is not in any way jeopardized. In such a situation, there is ever more need for balancing the interest of the government against that of the employee. A "public concern" threshold, by precluding any balancing, gives officials in charge of the employer's affairs a free hand to taken action, not to promote the employer interest in government performance, but to punish those not in their favor.

141. *Tindle*, 56 F.3d at 971-72.

142. *Id.* at 972. The court's holding might be justified in the sense that the little speech value of the officer's conduct was outweighed by the disruption it caused in the police force when some black members of the police department were offended and several of them actually resigned from the Fraternal Order of Police that organized the Halloween party. *Id.* at 968.

143. See *supra* notes 135-43 and accompanying text for a further discussion of the court's holding *Tindle*.

144. Luck v. Mazzone, 52 F.3d 475, 476-77 (2d Cir. 1995); see also *supra* notes 55-58 and accompanying text for a more detailed discussion of *Luck*.

individual officials in charge of government offices can unjustifiably curtail public employees' right to free speech without asserting an interest in office efficiency. In this respect, the threshold has failed to maintain a balanced employment relationship in the public sector. Furthermore, under the threshold, public employers cannot achieve their two-part goal of functioning as efficient providers of public services and as effective government agencies operating under the constraints of the First Amendment.[145]

A direct balancing test without the public concern threshold will not overly restrict public employers' abilities to run their offices efficiently. After all, the First Amendment does not require employers to sacrifice governmental interests to accommodate the personal whims of its employees. Instead, the First Amendment merely requires a public employer to respect an employee's free speech liberties when the speech does not interfere with the employer's interest in office functioning. When a public employee speaks on a matter that does not concern the public, he or she is advancing only his or her private interest; consequently, the First Amendment does not obligate the public employer to heed such speech. In particular, when an employee's speech relates only to personal matters and impairs a public employer's interest in effective performance, the employer's interest almost always outweighs an employee's interest in self-expression.[146] A direct balancing analysis effectively takes into account the separate and competing interests at issue in public employee speech cases. In addition, unlike the threshold approach which dwells on whether the speech at issue touches a matter of public concern, a direct balancing analysis focuses on whether the speech causes disruption in the workplace.

The procedural significance of the direct balancing approach is that the employer bears the burden of establishing the disruptive effect. Indeed, the employee should not be required to prove the value of his or her speech since "value" is always dependent on the perception of the evaluator. Furthermore, the self-fulfillment aspect of free speech is an inherent value that cannot be proved by extrinsic evidence. By subjecting public employee speech to a direct balancing analysis, courts will ensure that the freedom of ex-

145. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987).

146. *Id.* at 388. The employer has no obligation to subsidize the employee's liberty interest at the expense of its own interest as an employer. However, in cases like *Luck*, even if the employee's speech is purely of private interest, a direct balancing approach will not allow the employer to punish the speaker with a gauntletted hand where it is not able to show any disruption of work or unsatisfactory job performance.

pression guaranteed to employees has the breathing space it needs to survive.[147] Often, when an employee speaks on a matter relating to his or her employment, the speech is of no concern to anyone other than the speaker. However, this speech might bring displeasure to the employee's superiors, thereby resulting in an adverse personnel decision against the employee despite the fact that there is no disruptive effect on the functioning of the office or job performance.[148] Under the *Connick* approach, an employee discharged or disciplined for such reasons has no remedy in the courts since a federal court is not the appropriate forum for reviewing the wisdom of personnel decisions made by public agencies.[149] Conversely, under a direct balancing approach, the issue of public concern is not relevant to the availability of a federal judicial forum. Instead, courts only take into account the public concern issue when assessing the weight of an employee's interest in speech. Moreover, the public employer bears the burden of showing a disruptive effect.[150] A direct balancing approach is preferable because it prevents personal abuses of power by those in charge.

The burden of proof on a public employer under a direct balancing approach should be different from that currently required under the Supreme Court's *Pickering-Connick* balancing test. Under *Connick*, the employer is only required to prove that "he reasonably believed" that the speech "would disrupt the office, undermine his authority, and destroy close working relationships.[151] This "reasonable belief" standard is rather problematic even where the speech is found to be of public concern.[152] Although the test is phrased in objective terms, it is really a subjective standard since the employer may take action if it subjectively believes there is a potential for disruption.[153] The "reasonable belief" standard would be even more questionable if applied in a direct balancing analysis

147. Bond v. Floyd, 385 U.S. 116, 136 (1966).

148. This is what apparently happened in the *Luck* case. *See Luck*, 52 F.3d at 476.

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

150. *Id.* at 150. This approach would not constitutionalize every public employee grievance case since the complainant still bears the initial burden of establishing that the adverse action taken by the employer was in retaliation for protected speech.

151. *Id.* at 154. Recently, in *Waters v. Churchill*, 114 S. Ct. 1878, 1889 (1994), the Court announced that a public employer can discharge an employee on the basis of a reasonable belief that the employee's speech is not protected, even if a jury could find that the employer's belief was wrong.

152. *See* Bruce Bodner, *Recent Decisions, Constitutional Right - United States Supreme Court Gives Public Employers Greater Latitude to Curb Public Employee Speech*, 68 TEMPLE L. REV. 461 (1995).

153. Lieberwitz, *supra* note 32, at 644.

where the speech is found to be of personal concern. For instance, where a public employee speaks on matters not of public concern, courts determine the level of First Amendment protection by focusing on the existence or nonexistence of disruption in the workplace. When the speech produces a disruptive effect on the performance of the agency, the government's interest almost always outweighs the speaker's interest in pure self-expression. Unlike speech that touches on matters of public concern, which weighs heavily against the employer's interest under the *Pickering* balancing analysis,[154] speech that involves personal concern is given far less weight in a direct balancing analysis.[155] If courts require a public employer to establish only a "reasonable belief" that there is a potential for disruption, the respective interests of the parties will receive treatment that is unduly favorable to the employer. This approach leads to an unequal balance, and therefore, deprives public employees of adequate First Amendment protection. In reality, the threat of dismissal from public employment is a potent means of inhibiting speech;[156] thus, courts should employ a higher standard than mere "reasonable belief" in order to ensure that public employers do not abuse their authority over employees and silence speech simply because it displeases a supervisor.[157]

In contrast, requiring a showing of actual disruption still serves the purpose of accommodating the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment.[158] First, in every public employee speech case, a plaintiff must demonstrate that he or she engaged in protected speech and that the adverse employment decision was substantially motivated by this speech.[159] Only after a plaintiff successfully shows these two prerequisites is a public employer required to prove a disruptive effect. Under this scheme, the plaintiff has a heavy burden of proof. If courts merely require the employer to show its "reasonable be-

154. *See Connick*, 461 U.S. at 152 (cautioning that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved matters of public concern"); *see also* Vojvodich v. Lopez, 48 F.3d 879, 885 (5th Cir. 1995) (a balancing analysis in reality is "a sliding scale or spectrum upon which public concern is weighed against disruption"); Conaway v. Smith, 853 F.2d 789, 797-99 (10th Cir. 1988).

155. In fact, it will be given no weight if disruption is actually shown. See *supra* notes 146-50 and accompanying text for a further discussion of the direct balancing approach.

156. Pickering v. Board of Educ., 391 U.S. 563, 574 (1968).

157. Rankin v. McPherson, 483 U.S. 378, 384 (1987).

158. *Id.*

159. *See* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); 2 SILVER, *supra* note 71, at 243.

lief" that the speech might produce a disruptive effect, the burden on the employee becomes even greater. Furthermore, requiring a public employer to prove actual disruption will not hamper the performance of public functions in the long run.[160] After all, a public employer can still defend speech actions by alleging that, because of its concern regarding the effective operation of its office, it would have reached the same adverse employment decision even in the absence of the protected speech.[161] Finally, a direct balancing analysis effectively reshapes the behavior of public employers and their employees. When taking retaliatory measures against employee speech, a public employer must consider the weight of its own interest in terms of preventing the actual disruption. Conversely, when seeking to bring his or her employer to court, a public employee has to consider the weight of his or her speech interest in terms of public or private concern. In short, a balancing approach that is divorced from the *Connick* threshold will provide a sensible and meaningful balance to public sector employment relations in terms of First Amendment free speech and efficient operation of government offices.

CONCLUSION

Free speech promotes the speaker's interest in self-realization and the public's interest in receiving information. This fact is no different in the context of public employment relations. When a public employer acts to restrict an employee's speech, its interest in doing so must be balanced against the speech interest of the employee. To the extent that courts refuse to subject employee speech issues to a balancing analysis when the speech does not touch on a matter of public concern, these courts ignore fundamental liberties guaranteed under the First Amendment. Apart from the difficulties with its application in the context of public employment, the "public concern" threshold renders First Amendment protection of employee speech incomplete and inadequate. A direct balancing approach, without the hurdle of a threshold, will provide the highest degree of protection for employee speech. This approach will promote public debate concerning how the government should operate and assign due weight to speech that serves the speaker's personal interest in self-realization. Moreover, this approach will lead to a balanced public employment relationship which serves to prevent personal abuse of authority and gives adequate consideration to the conflicting interests involved. By prop-

160. *Rankin*, 483 U.S. at 384.
161. *Mount Healthy*, 429 U.S. at 287.

erly distributing the burden of proof between public employers and employees, a direct balancing approach will fully advance the values of free speech and better accommodate the dual role of public employers as providers of public services and as government entities operating under the constraints of the First Amendment.