

1985

The Rights of Public Employees to Speak Out on Job Related Issues (Connick v. Myers)

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Recommended Citation

Mansfield, Thomas (1985) "The Rights of Public Employees to Speak Out on Job Related Issues (Connick v. Myers)," *NYLS Journal of Human Rights*: Vol. 2 : Iss. 2 , Article 5.

Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol2/iss2/5

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COMMENTS

THE RIGHTS OF PUBLIC EMPLOYEES TO SPEAK OUT ON JOB RELATED ISSUES—*Connick v. Myers* — Since its landmark decision in *Keyishian v. Board of Regents*,¹ the Supreme Court has upheld the principle that a public employee's constitutionally guaranteed right to freedom of expression cannot be infringed simply because he is a government employee.² The Court has also recognized that ordinary dismissals from public employment are not subject to judicial review if no fixed tenure agreement or applicable statute has been violated.³ In *Pickering v. Board of Education*,⁴ the Court held that in analyzing alleged infringements of public employees' constitutional rights courts must seek:

a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.⁵

In *Connick v. Myers*,⁶ the Court interpreted and applied the *Pickering* approach in an extremely narrow fashion which raises considerable doubt regarding the protection to be accorded the first amendment rights of public employees in the future.

Connick arose out of the discharge⁷ of Sheila Myers from her position as an Assistant District Attorney in New Orleans.

1. 385 U.S. 589 (1967).

2. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

3. See *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

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

5. *Id.* at 568.

6. 461 U.S. 138 (1983).

7. The term "discharge" will hereinafter be used to denote employees being fired and, in the case of non-tenured positions, not having their contracts renewed.

Myers was allegedly discharged by District Attorney Harry Connick for refusing to accept a transfer to a different section of the criminal court, and for distributing a questionnaire to the other Assistant District Attorneys in the office.⁸ The questionnaire consisted of thirteen questions about office discipline, morale and grievances.⁹ After being discharged, Myers brought suit alleging that she had been wrongfully discharged for engaging in constitutionally protected speech.¹⁰

The district court ordered that Myers be reinstated and receive backpay, damages and attorney's fees.¹¹ The court found that the questionnaire, not the alleged refusal to accept the transfer, was the real reason for Myers' discharge. The court held that the questionnaire involved matters of public concern and that the State had not clearly demonstrated that the questionnaire "substantially interfered" with the operations of the District Attorney's office.¹² The Court of Appeals for the Fifth Circuit affirmed on the basis of the district court's opinion.¹³

The Supreme Court, in a 5-4 decision, reversed.¹⁴ The Court reiterated its support for the principle that "a state cannot condition public employment on a basis that infringes an employee's constitutionally protected interest in freedom of expression"¹⁵ and stated that the balancing test set forth in *Pickering* should be applied to this case.

8. 461 U.S. at 141-42.

9. *Id.* The district court summarized the questionnaire as follows: "Plaintiff solicited the views of her fellow Assistant District Attorneys on a number of issues, including office transfer policies and the manner in which information of that nature was communicated within the office. The questionnaire also sought to determine the views of Assistants regarding office morale, the need for a grievance committee, and the level of confidence felt by the Assistants in their supervisors. Finally, the questionnaire inquired as to whether the Assistants felt pressured to work in political campaigns on behalf of office-supported candidates." Myers v. Connick, 507 F. Supp. 752, 758 (E.D.La. 1981). The full text of the questionnaire can be found in Appendix A of the Supreme Court opinion. 461 U.S. at 155.

10. 461 U.S. at 141.

11. Myers v. Connick, 507 F. Supp. 752, 760.

12. *Id.* at 759.

13. 654 F.2d 719 (5th Cir. 1981). The Supreme Court granted certiorari. 455 U.S. 999 (1982).

14. 461 U.S. 138 (1983). Justice White wrote the majority opinion. Justice Brennan wrote the dissent and was joined by Justices Marshall, Blackmun, and Stevens. Connick also appealed the assessment of damages as being in violation of the eleventh amendment and objected to the award of attorney's fees. Due to the Court's disposition of the case it did not reach these issues. *See id.* at 142 n.3.

15. *Id.* at 142.

Pickering involved a high school teacher who was dismissed for writing a letter to a local newspaper criticizing the Board of Education about its funding and revenue raising policies.¹⁶ In reversing the decision to dismiss *Pickering*, the Court described its approach not as a "general standard against which all such statements may be judged," but as an outline of the "general lines along which analysis of the controlling interests should run."¹⁷

For most of this century it was an accepted principle that a public employee had no right to object to conditions being placed upon the terms of his employment even if those conditions restricted his exercise of constitutional rights. This rule, known as the right/privilege doctrine, is based on the theory that since public employment is offered as a privilege rather than a right it can be accompanied by conditions which restrict the employee's rights.¹⁸ The classic and oft-quoted formulation of this doctrine was made by Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, stated: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹⁹

The Supreme Court applied this principle to cases involving the political activities of government employees,²⁰ loyalty oath requirements,²¹ and the right of government employees and Congressmen to receive money for political purposes from government officials and employees.²² By the early 1960's, however,

16. 391 U.S. at 566.

17. *Id.* at 569. The Court also noted that there is a considerable difference between an employee speaking as a citizen and speaking as an employee. *Id.* at 574.

18. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

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

20. See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding the constitutionality of the Hatch Act which restricts the political activities of federal employees).

21. See *Garner v. Board of Public Works*, 341 U.S. 716 (1951) (upheld Los Angeles ordinance requiring employees to sign affidavits stating they are not presently and were not previously members of the Communist Party). See also *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1952) (if teachers "do not choose to work on such terms [as the State requires], they are at liberty to retain their beliefs and associations and go elsewhere").

22. See *United States v. Wurzbach*, 280 U.S. 396 (1930) (upheld statute forbidding Congressmen from soliciting political campaign funds from government employees); *Ex Parte Curtis*, 106 U.S. 371 (1882) (upheld statute forbidding non-appointed executive officers from receiving money from any government employees).

the right/privilege doctrine had been rejected. Although in 1952 the Court held that a state could not force its employees to deny past affiliation with the Communist Party,²³ it was not until 1963 that the Court declared that it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."²⁴ *Connick* states that "it was therefore no surprise" that in *Keyishian* the Court invalidated New York statutes denying government employment to individuals having membership in "subversive" organizations.²⁵

After reviewing the demise of the right/privilege doctrine and the corresponding expansion of the constitutional rights of public employees, *Connick* emphasizes that the pre-*Pickering* cases dealt with the right of public employees to participate in "public affairs."²⁶ According to the Court, the issue in those cases was whether public employee expression could be "chilled"

23. *Weiman v. Updegraff*, 344 U.S. 183 (1952) (in striking down an Oklahoma statute, the Court distinguished earlier cases saying the statutes previously in question required actual knowledge of disloyal activity while the Oklahoma law required only membership in certain organizations to warrant dismissal).

24. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). The Court has applied the analogous "unconstitutional conditions" doctrine in other areas of constitutional law since the early 1930's. This doctrine held that the government is forbidden from doing indirectly what it cannot do directly. See *Frost & Frost Trucking Co. v. Railroad Comm'n.*, 271 U.S. 583, 594 (1926) ("If the State may compel the surrender of one Constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence"). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

25. 461 U.S. at 144. It should be noted that Justice White, who wrote the majority opinion in *Connick*, joined Justice Clark's *Keyishian* dissent disputing the *Keyishian* majority's claim that the constitutional doctrine that had emerged since *Adler v. Board of Educ.*, 342 U.S. 485 had rejected its right/privilege premise. The dissent asserted that "with due respect . . . our cases have done no such thing." 385 U.S. at 625. Justice Clark's dissent also stated that the issue in that case, New York statutes requiring state employees to take loyalty oaths denying membership in the Communist and other "subversive" parties, did not involve "freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party." *Id.* at 628.

26. 461 U.S. at 144-45. The Court also cited *Roth v. United States*, 354 U.S. 476, 484 (1957) and *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), for the principle that the first amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 461 U.S. at 145. The Court continued with a quote from *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964): "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." 461 U.S. at 145.

by the fear of discharge for joining political parties and other associations considered subversive by their supervisors.²⁷ The Court finds these cases especially useful since they highlight the "Constitution's special concern with threats to the right of citizens to participate in political affairs."²⁸ The Court states "that speech on public issues occupies the 'highest rung of the hierarchy of first amendment values,' and is entitled to special protection."²⁹ The reason for the Court's somewhat repetitious account of the importance of the right to participate in and speak out on public affairs soon becomes apparent, for the Court concludes "that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of *public* concern, it is unnecessary for us to scrutinize the reasons for her discharge."³⁰

The *Pickering* test only applies to speech "upon matters of public concern."³¹ Therefore, it would appear that the employee has the burden of proving that the speech in question involved a matter of public concern. Practically all of the lower court decisions applying the *Pickering* test have interpreted this requirement broadly.³² Thus, even if a court initially finds that the employee's speech does not in fact involve a matter of public concern, it will still go on to examine the factors applicable to the second half of the test's determination of the speech's effects on the state's interests as an employer.³³

By holding that it is unnecessary to examine the reasons for a public employee's discharge where the speech in question does not involve a matter of public concern, *Connick* takes a narrow

27. 461 U.S. at 145-46. Although the Court accurately interprets some of these cases, see, e.g., *Weiman v. Updegraff*, 344 U.S. 183; *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), its interpretation of others is misleading. One of the cases cited by the Court, *Torasco v. Watkins*, 367 U.S. 488 (1961), involved a state statute that placed burdens on public employees' freedom of religion. Another case, *Sherbert v. Verner*, 374 U.S. 398, involved a similar statute and dealt with a private citizen rather than a public employee.

28. 461 U.S. at 145.

29. *Id.* (quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

30. 461 U.S. at 146 (emphasis added).

31. 391 U.S. at 568.

32. See *Marcum v. Dahl*, 658 F.2d 731 (10th Cir. 1981). See also *Schmidt v. Fremont County School Dist.*, 558 F.2d 982, 984 (10th Cir. 1977); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972; *Watts v. Seward School Bd.*, 454 P.2d 732 (Alaska 1969), *cert. denied*, 397 U.S. 921 (1970), *reh'g denied*, 397 U.S. 1071 (1970).

33. See *supra* note 32.

approach to the *Pickering* test. The Court cites two lower court cases to support its view of *Pickering*: *Clark v. Holmes*³⁴ and *Schmidt v. Fremont County School District*.³⁵ However, although these decisions found that the speech involved was not on a matter of public concern, they both still considered the effects of the speech on the State's interests as an employer.³⁶ Under *Connick*, this further inquiry will be unnecessary and the discharge of the employee would not be questioned, even if the speech had no effect at all upon the State's interests as an employer. Such a narrow reading of *Pickering* is unwarranted and will have a "chilling effect"³⁷ on public employees who want to speak out on a given subject but are uncertain whether or not it could be considered a matter of public concern.

34. 474 F.2d 928. In *Clark*, a nontenured temporary substitute teacher at a state university alleged that certain teachers and officials had made false charges against him, resulting in his not being rehired. The teacher had been involved in disputes with his superiors and colleagues about the course content and his counseling of students. *Id.* at 931.

35. 558 F.2d 982 (public school principal alleged that his termination was unconstitutional because it was based on certain statements made by him to the Board of Education).

36. Both of these cases are clearly distinguishable from *Connick*. In *Clark*, "the disruptive nature of the [employee's] speech was plainly established." *McGill v. Board of Educ. of Pekin Elem. School*, 602 F.2d 774, 777 (7th Cir. 1979). Myers mentioned this fact in her brief in opposition to *Connick's* petition for certiorari. Brief For Appellant at 8. See *infra* text accompanying notes 131-47 for the significance of actual disruption in these cases. In *Schmidt*, the employee was not even discharged in retaliation for his speech, but rather for "failure to improve the [concerned school's] attendance record and other inadequacies in his performance." 602 F.2d at 778, n.6. As the trial court in *Schmidt* found, "the facts fall short of proving that his indiscrete comments . . . were the primary and only reasons for his termination." *Schmidt* relies on the principle, discarded in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, that a statement made by a public employee in a private forum deserves less first amendment protection than the same speech if aired in a public forum. See *infra* text accompanying notes 80-85 for a discussion of *Givhan*.

37. The phrase "chilling effect" is derived from *Wieman v. Updegraff*, 344 U.S. 183, 195 (Frankfurter, J., concurring). This doctrine recognizes the tendency of individuals to steer well clear of activities which may, under certain circumstances, be prohibited. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanction"). See also *Keyishian*, 385 U.S. at 604 ("When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone' The danger of that chilling effect upon the exercise of vital first amendment rights must be guarded against by sensitive tools which clearly inform [employees] what is being proscribed"). (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1957)); *Pickering v. Board of Education*, 381 U.S. at 574 ("the threat of dismissal from public employment is . . . a potent means of inhibiting speech").

Although the *Pickering* Court did not define what constitutes "a matter of public concern," it described the speech before it in a way that implied a broad meaning of the term. The Court held that the "difference of opinion between *Pickering* and the Board as to the preferable manner of operating the school system" was "clearly" a matter of legitimate public concern.³⁸ Among the factors the Court found determinative on this issue were: whether *Pickering's* expression concerned matters which were to be determined by popular vote or the judgment of the school administration; the principle that "free and open debate is vital to informed decision-making by the electorate"; and the desire to encourage those public employees most likely to have "informed and definite" opinions on a given subject to speak out freely "without fear of retaliatory dismissal."³⁹

A broad reading of the term "a matter of public concern" is further supported by *Pickering's* use of the *New York Times v. Sullivan*⁴⁰ standard for determining whether a given statement is defamatory or libelous. Under the *New York Times* standard, a public official can only recover damages for defamation if he proves that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁴¹ The *Pickering* Court used this standard to indicate that when a public employee speaks out as a citizen he should be treated "as the member of the general public he seeks to be" if it can be shown that "the fact of employment is only tangentially and insubstantially involved in the subject matter" of the statement.⁴²

As the *Pickering* Court notes, this standard has also been applied to suits for invasion of privacy where "a matter of public interest" is involved.⁴³ These and other post-*New York Times*

38. 391 U.S. at 571.

39. *Id.* at 572.

40. 376 U.S. 254 (1964).

41. *Id.* at 279-80.

42. 391 U.S. at 574.

43. *See Time, Inc. v. Hill*, 385 U.S. 374 (1967). *Cf. RESTATEMENT (SECOND) OF TORTS* § 652D(1977):

Publicity Given to Private Life: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

cases all reveal a liberal interpretation of this term.⁴⁴

The Court's post-*Pickering* decisions on the constitutional rights of public employees give few hints as to the meaning of "a matter of public concern" in this context.⁴⁵ Both *Board of Re-*

44. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1966) (alleged "fix" of a college football game is a matter of public concern); *Bon Air Hotel, Inc. v. Time, Inc.*, 295 F. Supp. 704 (S.D. Ga. 1969), *aff'd*, 426 F.2d 858 (5th Cir. 1970) (high prices charged for public accommodations during a major golf tournament held to be a public issue). See also Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1560-62, nn.94-96 (1972) (includes a compilation of cases involving the issue of what constitutes a matter of public concern).

45. Lower court cases since *Pickering* are only of limited help in determining what the *Pickering* Court meant by "a matter of public concern." Some decisions examine the content of the employee's statement to see if it involved an elected official, an issue on which the public voted, or the expenditure of public funds. See, e.g., *Hanneman v. Breier*, 528 F.2d 750, 755 (7th Cir. 1976) ("the terms of a collective bargaining agreement covering municipal police officers may include provisions governing matters of important public policy" (footnote omitted)); *Gieringer v. Center School Dist. No. 58*, 477 F.2d 1164, 1167 (8th Cir. 1973), *cert. denied*, 414 U.S. 832 (1973) (the ability of a school district to pay higher salaries to its teachers is a matter of public concern); *Pilkington v. Bevilacqua*, 439 F. Supp. 465, 474 (D.R.I. 1977), *aff'd*, 590 F.2d (1979) ("[t]he public has a legitimate interest in the way public monies are spent [and] the compliance of agencies with state law"); *Watts v. Seward School Board*, 454 P.2d 732. Most decisions, however, merely state that the speech in question was in fact on a matter of public concern and then proceed to an examination of the factors to be weighed in the second half of the *Pickering* balance. See, e.g., *McGill v. Board of Educ. of Pekin Elementary School Dist. No. 108*, 602 F.2d 774, 778 n.6; *Whitsel v. Southeast Local School Dist.*, 484 F.2d 1222, 1229 (6th Cir. 1973); *Lefcourt v. Legal Aid Society*, 312 F. Supp. 1105, 1112 (S.D.N.Y. 1970), *aff'd*, 445 F.2d 1150 (2d Cir. 1971). A few decisions disregard and even defy *Pickering* by protecting private conversations by public employees, *Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 488, 492-93 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973), *cert. denied*, 425 U.S. 963 (1976); speech on "matters concerning [the employee's] employment," *Muller v. Conlisk*, 429 F.2d 901, 904 (7th Cir. 1970); and speech on issues only of concern to the employee and his fellow employees. See, e.g., *Jannetta v. Cole*, 493 F.2d 1334, 1337 n.5 (4th Cir. 1974) ("The First Amendment is not limited in its protection to issues of great social and political impact, however, and [the employee's] petition should not be denied such protection simply because it dealt with matters of a local nature"); *Donahue v. Staunton*, 471 F.2d 475, 481 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Johnson v. Butler*, 433 F. Supp. 531, 535 (W.D. Va. 1977) ("The First Amendment is not restricted to public statements on issues of popular concern but has been extended to protect private conversations by public employees"); *Roberts v. Lake Central School Corp.*, 317 F. Supp. 63, 65 (N.D. Ind. 1970). Finally, some decisions hold, initially, that the speech in question relates to a matter of public concern but then continue, in dictum, to question the logic of limiting the protection accorded public employees in this artificial way. See, e.g., *Pilkington v. Bevilacqua*, 439 F. Supp. at 478 n.11:

Many matters of great import to the daily work of an agency might not qualify as matters of general concern or public record but are important to the vital and accurate functioning of an agency.

*gents v. Roth*⁴⁶ and *Perry v. Sindermann*⁴⁷ dealt with fourteenth amendment claims.⁴⁸ In *Sindermann*, however, the Court held that the teacher's allegations that his nonretention was based on his public statements on the issue of whether his college should be elevated to four-year status presented "a bonafide constitutional claim."⁴⁹

In *Mt. Healthy City Board of Education v. Doyle*⁵⁰ the Court accepted the district court's finding that the concerned teacher's communication to a local radio station of a memorandum from the school's principal concerning teacher dress and appearance was a matter of public concern. As *Connick* notes, the memorandum was "prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of a dress code as a news item."⁵¹

In *Branti v. Finkel*,⁵² the Court recognized that the right of public employees to freedom of belief is as strong as their right to freedom of speech, and gave the government the additional burden of proving "an overriding interest . . . of vital importance . . . requiring that a person's private beliefs conform to

[The employee's] First Amendment rights to speak freely and petition his government surely include his right *qua employee* not *qua citizen* to participate and express his opinions in his place of work without fear of reprisal—so long, of course, as he follows the directives of his superiors.

This is a step beyond the facts of *Pickering* but not beyond the values which *Pickering* teaches and the interests which it protects. For *Pickering* furthers truth-seeking and protects the contribution which those who work, day in and day out, in the public service can make.

46. 408 U.S. 564 (1972).

47. 408 U.S. 593 (1972).

48. *Sindermann* held that "[t]he Fourteenth Amendment does not require opportunity for a hearing prior to the non-renewal of a nontenured state teacher's contract, unless he can show that the non-renewal deprives him of an interest in 'liberty' or that he had 'property' interest in continued employment, despite the lack of tenure or a formal contract." 408 U.S. at 599. See also *id.* at 564. *Connick* cited these two cases for the proposition that "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." 461 U.S. at 146-47.

49. 408 U.S. at 598.

50. 429 U.S. 274 (1977).

51. 461 U.S. at 146.

52. 445 U.S. 507 (1980).

those of the hiring authority."⁵³ Although not faced with the issue of the content of speech, the Court in *Givhan v. Western Line Consolidated School District*⁵⁴ found that statements about the school district's racial policies involved a matter of public concern and were protected speech despite being communicated to the employer in private rather than through a public forum.⁵⁵

If the definition of the term "a matter of public concern" was highly ambiguous up to the time of the *Connick* decision, such is no longer the case. For in *Connick*, the Court articulates and applies a standard judging a given statement by its "content, form and context"⁵⁶ which "impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal."⁵⁷

The majority in *Connick* begins its analysis by repeating the Court's traditional view that the question of whether a public employee's speech is on a matter of public concern is also the standard used in judging actions for invasion of privacy.⁵⁸ However, the Court's discussion of what matters are of public con-

53. 445 U.S. at 515-16 (quoting *Elrod v. Burns*, 427 U.S. 347, 362, 368 (1976)).

54. 439 U.S. 410 (1979).

55. *Id.* at 415-16. Although the expression in *Givhan* and *Connick* was clearly in a private forum, it is not always easy to differentiate between public and private forums. Traditionally public forums were limited to public places historically used for discussing public questions, such as streets and parks. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939). The modern approach is to judge "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Under this approach expression has been protected in such nontraditional public forums as public schools, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), and municipal theaters, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). However, expression in public transportation facilities, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), and on military bases, *Greer v. Spock*, 424 U.S. 828 (1976), has been restricted because of a "basic incompatibility" between "the communication and the primary activity" of the particular forum. *Greer*, 424 U.S. at 843 (Powell, J., concurring).

56. 461 U.S. at 147-48.

57. *Id.* at 158 (Brennan, J., dissenting).

58. *Id.* at 143 n.5. *See supra* notes 44-46 and accompanying text. The Court cited *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), for the principle that "action for invasion of privacy cannot be maintained when the subject-matter of the publicity is [a] matter of public record." 461 U.S. at 143 n.5. It should be noted that in *Cox Broadcasting Justice White*, writing for the majority, stated that "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, . . . are without question events of legitimate concern to the public" *Id.* at 492.

cern is "inconsistent with the broad view of that concept articulated in our cases dealing with the constitutional limits on liability for invasion of privacy."⁵⁹

The Court states that since "the inquiry into the protected status of speech is one of law, not fact,"⁶⁰ it is free to overturn the district court's finding that "taken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's office and are matters of public importance and concern."⁶¹ In reaching its decision, the district court relied upon Fifth Circuit cases that ruled similar statements were matters of public concern.⁶² In particular, the district court felt that *Lindsey v. Board of Regents*⁶³ was relevant since there "the court determined that a university professor's submission of a questionnaire to fellow faculty members regarding the university administration's methods of dealing with the faculty was a matter of 'public importance and concern.'"⁶⁴

The decision in *Connick* does not find it necessary to distinguish *Lindsey* but rather asserts that the district court "erred in striking the [*Pickering*] balance" for Myers because it should have weighed the "context" of the questionnaire, not just its content and form, in determining whether it involved a matter of public concern.⁶⁵ This inquiry into the "how and where"⁶⁶ of a

59. 461 U.S. at 165-66 n.5 (Brennan, J., dissenting). See *supra* notes 44-46 and accompanying text. The dissent cited RESTATEMENT (SECOND) OF TORTS § 652D, comment j (1977):

The scope of a matter of legitimate concern to the public is not limited to "news," in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.

461 U.S. at 166, n.5 (Brennan, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 652D, comment j (1977)).

60. 461 U.S. at 148 n.7. See *Schneider v. City of Atlanta*, 628 F.2d 915, 919 (5th Cir. 1980) for a full discussion in support of this statement.

61. *Myers v. Connick*, 507 F. Supp. 752, 758.

62. *Id.* at 758 n.5. These included *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (fireman's criticism of fire department policies, offered at a private meeting arranged by the department was protected speech) and *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980) (high school teacher's classroom discussion of post-Civil War American history, objected to by the school district because it evoked strong student feelings on racial issues, was protected speech).

63. 607 F.2d 672 (5th Cir. 1979).

64. 507 F. Supp. at 758 n.5.

65. 461 U.S. at 142, 147-48.

66. This is how the *Connick* dissent defined the term "context" as used by the *Connick* majority. *Id.* at 159 (Brennan, J., dissenting).

given statement is definitely relevant to the second half of the *Pickering* test's determination of the effects of the employee's speech upon the State's interests as an employer.⁶⁷ This is the first time the Court has indicated that the context of such a statement should be used in the first half of the *Pickering* balance to determine whether the statement is on a matter of public concern. This holding directly undermines, if not overrules, the finding in *Givhan v. Western Line Consolidated School District* that freedom of speech is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."⁶⁸

Although neither party offered evidence on whether the questionnaire addressed subjects that were actually matters of public concern,⁶⁹ *Connick* finds that with but one exception,⁷⁰ Myers' questions were a "mere extension of [her] dispute over her transfer to another section of the criminal court" and were not "of public import in evaluating the performance of the District Attorney as an elected official."⁷¹ The Court does not support this finding with an inquiry into what the answers to Myers' questionnaire might have disclosed.⁷² It merely assumed that "the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo."⁷³ The Court concluded that "the

67. Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered. *Givhan* at 415 n.4.

68. 439 U.S. at 415-16.

69. 461 U.S. at 160 n.2 (Brennan, J., dissenting).

70. The majority held that the question concerning whether the other Assistant District Attorneys felt pressured to work in political campaigns on behalf of office supported candidates was in fact a matter of public concern. See *infra* notes 86-88 and accompanying text.

71. 461 U.S. at 148.

72. The district court did not state whether any answered questionnaires were in fact returned to Myers before she was dismissed. See 507 F. Supp. at 754-55.

73. 461 U.S. at 148. The Court does not attempt to distinguish *Pickering* on this point. In *Pickering* the Court held that the employee's speech was on a matter of public concern despite the fact that the letter in question "was greeted by everyone but its main target, the Board [of Education], with massive apathy and total disbelief." *Pickering*, 391 U.S. at 570.

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 supervisors."⁷⁴

In reaching this conclusion, the Court does not explain why the answers to the questionnaire would not have helped evaluate the performance of the office, an issue which it admits is in fact a matter of public concern.⁷⁵ The Court also does not take notice of the fact that nine of the thirteen questions did not pertain to the office's transfer policy, the subject of Myers' controversy with her superiors.⁷⁶ The Court simply concludes that since the questionnaire admittedly arose in the context of a private disagreement between Myers and her employer, and, since its purpose was therefore not to "bring to light" the fact that the "District Attorney's office was not discharging its governmental responsibilities," it did not involve a matter of public concern.⁷⁷

On its face, this conclusion seems to explicitly overrule *Givhan*. The *Givhan* holding expanded the first amendment rights of public employees by holding that whether a given statement is judged to be a matter of public concern should not depend on whether the statement is aired privately or publicly.⁷⁸ Under *Givhan*, the context in which the statement is expressed is a relevant factor only when the speech is deemed a matter of public concern, at which point it becomes pertinent to the second half of *Pickering's* determination of the effects of the statement on the government's interests as an employer.⁷⁹

The majority opinion in *Connick* unsatisfactorily attempts to distinguish *Givhan*. The Court claims that although both statements were expressed in a private forum, *Givhan's* statement on racial discrimination was "inherently" a matter of public concern but Myers' statement on office morale and discipline was not so because it arose in the context of her disagreement with her employer.⁸⁰ The Court thus "suggests that there are

74. 461 U.S. at 148.

75. *Id.*

76. 507 F. Supp. at 754 n.1.

77. 461 U.S. at 148.

78. 439 U.S. at 415-16.

79. *Id.* at 415 n.4. See *supra* note 69 and accompanying text.

80. 461 U.S. at 148 n.8. Although the Court had supported its findings by stating that the questionnaire would convey very little information if released to the public (see *supra* note 75 and accompanying text), the Court's note stated that such an inquiry was

two classes of speech of public concern: statements 'of public import' because of their content, form and context, and statements that by virtue of their subject matter, are 'inherently of public concern.'"⁸¹ The Court, however, mentions no standard which makes *Givhan's* speech "inherently" a matter of public concern and therefore distinguishable from Myers' speech. The Court also does not distinguish the fact that the purpose of *Givhan's* statements, like Myers', was not to "bring to light" or "inform the public" that the governmental agency in question "was not discharging its governmental responsibilities."⁸² The Court's attempt to distinguish *Givhan* fails because it sidesteps the finding implicit in *Givhan* that "[t]he First Amendment affords special protection to speech that may inform public debate . . . regardless of whether it actually becomes the subject of a public controversy."⁸³

After its attempt to distinguish *Givhan*, the Court found that the question on Myers' questionnaire concerning whether the Assistant District Attorneys felt pressured to work in political campaigns on behalf of office-supported candidates was a matter of public concern.⁸⁴ It has long been held that "official pressure upon [public] employees to work for political candidates not of the worker's own choice constitutes coercion of belief in violation of fundamental constitutional rights."⁸⁵ Because of this principle, the Court singles out the campaign question as a matter of public concern upon which it is "essential" that pub-

irrelevant because such a public disclosure had not occurred in this case. *Id.*

81. *Id.* at 159-60 (Brennan, J., dissenting).

82. *Id.* at 148. See *supra* text accompanying note 79 See also *Givhan*, 439 U.S. at 415-16.

83. 461 U.S. at 160 (Brennan, J., dissenting). The Court's holding produces the anomalous result that if Myers' questionnaire had in fact been released to the public it probably would have been deemed a matter of public concern and therefore protected speech. As the *Connick* dissent notes, matters affecting the internal operations of the New Orleans District Attorney's Office "often receive extensive coverage" in the local newspapers and there was "extensive local press coverage" of Myers' trial and the subsequent appeals and petition for writ of certiorari. *Id.* at 160 n.2 (Brennan, J., dissenting).

84. *Id.* at 149.

85. *Id.*, citing *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976). The Court also cited cases supporting the constitutionality of the Hatch Act, *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1974), for the proposition "that there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." 461 U.S. at 149.

lic employees be able to speak "without fear of retaliatory dismissal."⁸⁶

The Court fails to point out, however, what makes this question "inherently"⁸⁷ a matter of public concern as compared to the rest of the questionnaire. Certainly it could not be the context in which the question was aired because all the questions were expressed in the context of Myers' dispute with her employer.⁸⁸ It is true that the Court has accorded public employees special protection from government acts which infringe upon the individual's right to freedom of political belief.⁸⁹ But it is also true that the Court has given special protection to the "uninhibited, robust and wide-open"⁹⁰ discussion of governmental affairs by persons both inside and outside of government:

There is practically universal agreement that a major purpose of [the First] Amendment was the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.⁹¹

Since the Court admits that the performance of an important government agency such as a District Attorney's office is clearly a matter of interest to the voting public, it is hard to rationalize the Court's holding that Myers' questions about factors which affect the functioning of that office, such as employee discipline and morale, are not matters of public concern.⁹²

86. *Id.*

87. *Id.* at 148 n.8.

88. See *supra* notes 67-79 and accompanying text for a discussion of the importance the *Connick* Court placed on the context of Myers' speech.

89. See *supra* note 87 and accompanying text.

90. *Garrison v. Louisiana*, 379 U.S. 64, 76.

91. *Mills v. Alabama*, 384 U.S. 214, 218 (1966), *quoted in Connick*, 461 U.S. at 161 (Brennan, J., dissenting). In *Bush v. Lucas*, 103 S. Ct. 2404 (1983), the Court in dictum stated that "society as well as the individual has an interest in free speech, including 'a right to disclosure of information about how tax dollars are spent and about the functioning of the government apparatus, an interest in the promotion of the efficiency of the government, and in the maintenance of an atmosphere of freedom of expression . . .'" *Id.* at 2407 (quoting Appendix to Petition for Certiorari at F-23-25).

92. 461 U.S. at 147. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (personnel decisions that adversely affect discipline and morale may ultimately impair an agency's efficient performance of its duties).

Myers' questionnaire also dealt with matters of public concern when judged by the factors mentioned in *Pickering* as being useful for such an inquiry.⁹³ As with *Pickering's* expression, Myers' statement dealt with issues to be determined by popular vote, such as the proper expenditures of public funds and the performance of an elected official. Myers' questionnaire was also in accord with the policy, expressed in *Pickering*, of encouraging public employees with "informed and definite" opinions to speak out freely "without fear of retaliatory dismissal."⁹⁴

The Court has since reaffirmed its support for this policy in *Madison School District v. Wisconsin Employment Relations Commission*.⁹⁵ There the Court stated that restraining a teacher's statements at a public meeting of the school board "on matters involving the operation of the school would seriously impair the board's ability to govern the district."⁹⁶ This decision also recognized that it is often impossible to neatly classify a public employee as either a citizen or an employee when making a given statement, for an employee of government often speaks "not merely as one of its employees but also as a concerned citizen."⁹⁷

Since the *Connick* Court finds that one of Myers' questions was made as a citizen speaking on a matter of public concern it looks to the factors applicable to the second half of the *Pickering* balance to determine what effect the expression had on the District Attorney's interests as an employer. In assessing the weight to be given to each of the pertinent factors, the Court holds that "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."⁹⁸

93. 391 U.S. at 571-72. See *supra* notes 40-46 and accompanying text.

94. *Id.* at 572.

95. 429 U.S. 167 (1976).

96. *Id.* at 177.

97. *Id.* at 175 (emphasis added). See *supra* notes 18 and 43 and accompanying text.

98. 461 U.S. at 147-49. The Court commented that Myers admitted this in her brief and oral argument before the Court. *Id.* at 149 n.9. The exact factors applicable to the second half of the *Pickering* balance vary from case to case. In *Pickering* the Court decided not to lay down a general standard for judging all statements (see *supra* text accompanying note 17), but instead indicated factors that may be relevant in any given case: whether the expression was directed toward anyone with whom the employee "would normally be in contact in the course of his daily work"; whether it adversely affected the maintenance of "either discipline by immediate superiors or harmony among

The Court does not question the district court's finding that Myers' questionnaire did not violate a duty of confidentiality or an office policy.⁹⁹ The Court also accepts the conclusion of the district court that "Connick has not shown any evidence to indicate that the plaintiff's work performance was adversely affected by her expression."¹⁰⁰ Nonetheless, the Court decides that the district court did not give enough weight to four factors favoring the State's interests in regulating the speech of its employees. These factors are: the "manner, time, and place" in which the questionnaire was distributed,¹⁰¹ the overall context in which Myers' expression and resulting discharge arose, the effect of Myers' expression on her "close working relationships" with her superiors, and the disruptive potential of her statements.¹⁰²

The first two of these factors were only dealt with briefly by the Court. The inquiry into the "manner, time and place"¹⁰³ of an employee's expression is derived from *Givhan's* finding that a statement made in a private setting "may in some situations" bring up these additional factors which were not relevant in *Pickering* because the statements in question there were aired in a public forum.¹⁰⁴ Although there can be little doubt that this case presents such a situation, the Court points to no facts to support its claim "that the functioning of [the District Attorney's] office was endangered"¹⁰⁵ in the three hours between the

co-workers"; whether the concerned employment relationship was "the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary for [its] proper functioning"; whether the expression "in any way either impeded the [employee's] proper performance of his daily duties . . . or . . . interfered with the regular operations of the [office] generally"; whether the expression call[ed] into question [the employee's] fitness to perform his duties"; and whether the employer could have rebutted without difficulty false statements disclosed to the public by the employee. 391 U.S. at 569-73.

99. 461 U.S. at 153.

100. 507 F. Supp. at 759.

101. 461 U.S. at 152 (quoting *Givhan*, 439 U.S. at 415 n.4). See *supra* note 69.

102. 461 U.S. at 151-52.

103. The "manner, time and place" of a particular statement has traditionally been a key factor in judging whether it is protected under the first amendment. This principle was first set forth in the late 1930's in such cases as *Lovell v. Griffin*, 303 U.S. 444 (1938) and *Cox v. New Hampshire*, 312 U.S. 569 (1941) which judged the constitutionality of municipal ordinances that served to restrict freedom of speech. In *Cox*, the Court stated that a municipality has the authority to give consideration to the "time, place and manner" of public speech "in relation to the other proper uses of the streets." *Id.* at 576.

104. 439 U.S. at 415 n.4. See *supra* note 69.

105. 461 U.S. at 153.

time Myers began distributing her questionnaire and the time she was discharged.¹⁰⁶ The Court also sidesteps *Givhan's* findings that public employee speech on a matter of public concern should be accorded protection whether aired in a public or private forum. The Court distinguishes *Pickering*, but not *Givhan*, by finding that Myers "exercised her rights to speech at the office" and therefore caused a greater threat to her employer than *Pickering* had.¹⁰⁷

The inquiry into the second factor, the overall context in which an employee's expression and resulting discharge arises, is derived from the *Mt. Healthy*¹⁰⁸ decision. There the Court held that a court can find for a discharged employee only if he proves that his expression was both constitutionally protected under the *Pickering* balance and a substantial or motivating factor in his discharge. The employer must also fail to prove that he would have discharged the employee even in the absence of the protected expression.¹⁰⁹ The *Connick* Court accepts the district court's finding that Myers would not have been discharged if she had not expressed herself through the questionnaire. The Court states, however, that since the expression arose in the context of a "persistent" dispute over office transfer policy, additional weight should be given to *Connick's* view that Myers had somehow threatened his authority to run the office.¹¹⁰

106. *Id.* The district court found that Myers did not prepare the questionnaire during her working hours and that "a number of the questionnaires" were distributed during lunch. *Myers*, 507 F. Supp. at 754-55. The *Connick* majority interprets this to mean that "some" of them were distributed at lunch, 461 U.S. at 153 n.13, while the dissent states that "most" were distributed at that time. *Id.* at 166-67 (Brennan, J., dissenting). The district court made no findings regarding whether any of the questionnaires were in fact completed by the other Assistant District Attorneys, nor, if they were completed, whether this was done during working hours as the *Connick* Court claims to have occurred. *Id.* at 152.

107. 461 U.S. at 153.

108. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274.

109. *Id.* at 287. This has been called the *Mt. Healthy* "but for" test, *Givhan*, 439 U.S. at 417, because a court must conclude that but for the employee's protected speech, he would not have been discharged by his employer. In *Mt. Healthy*, the Court was concerned that under the old rule which only considered whether protected activity was a factor, though not necessarily the *only* factor in an employee's discharge, the employee could be placed in "a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S. at 285.

110. 461 U.S. at 153. It is hard to understand how a dispute that had lasted five days at the most can be termed "persistent." See 506 F. Supp. 753-54.

This conclusion alters both the *Pickering* balancing test and the *Mt. Healthy* burden of proof rule in three significant ways. First, it gives additional weight to the employer's side of the balance because Myers' questionnaire was not motivated by a "purely academic interest" but concerned the application of the disputed office policy to her. In doing this, the Court does not realize that most employees do not speak out of "academic interest" but rather because of the effect the disputed policy has on them as employees *and* citizens.¹¹¹ Since almost all public employee speech which results in discharge arises in the context of some type of disagreement between the employee and the person or office he works for,¹¹² this interpretation of the overall context of the dispute will always favor the employer.

Second, the Court implies for the first time that even if the employer cannot prove under the *Mt. Healthy* rule that he would have discharged the employee for reasons not related to the employee's expression, those other reasons become a factor to be weighed in the *Pickering* balance in determining if the employee's speech is constitutionally protected.¹¹³ This undermines the holding in *Mt. Healthy* and *Givhan* that the unrelated reasons for discharging the employee are not relevant unless the employee first proves that his speech was constitutionally protected and therefore an impermissible reason for his discharge.¹¹⁴ In *Connick*, the Court increases the employee's burden by using the unrelated reasons in determining whether the employee's speech is protected.

The third factor, which the *Connick* Court decides the district court did not accord due weight, is the effect of Myers' expression on her close working relationships with her superiors. This factor has been referred to as an "exception"¹¹⁵ to *Picker-*

111. 461 U.S. at 153. By stating that the questionnaire only concerned the application of the disputed office policy to Myers, the Court ignores that nine of the thirteen questions on the questionnaire did not pertain to the transfer policy specifically in dispute. See *supra* text accompanying note 78.

112. See, e.g., *McGill v. Pekin Elementary School Dist. No. 108*, 602 F.2d 774 (employee advocated for a collective bargaining agreement); *Hanneman v. Breier*, 528 F.2d 750 (disclosure of the terms of a collective bargaining agreement by an employee); *Pilkington v. Bevilacqua*, 439 F. Supp. 465; *Roberts v. Lake Central School Corp.*, 317 F. Supp. 63.

113. 461 U.S. at 153-54.

114. *Mt. Healthy*, 429 U.S. at 287; *Givhan*, 439 U.S. at 416-17.

115. *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983); *Pilkington v.*

ing because there the Court was not faced with "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."¹¹⁶ The *Pickering* Court observed that it could imagine jobs in the public sector in which "certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them."¹¹⁷ The Court further stated that "[w]e intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases."¹¹⁸

Since *Pickering*, the Court has not had the opportunity to outline what these "significantly different considerations" would be, but some lower courts have mentioned certain factors thought to be relevant. In *Sprague v. Fitzpatrick*,¹¹⁹ the court held that the district attorney—assistant district attorney relationship is a "close working relationship" and therefore considered three additional factors which would not otherwise be relevant to the *Pickering* balance.¹²⁰ These factors were the "need for loyal and sympathetic employees in positions of discretion, the need to ensure obedience to state policy, and the need to prevent impropriety or its appearance."¹²¹ Largely because of these additional considerations, the *Sprague* court found against the plaintiff even though he had been discharged in retaliation for his apparently accurate disclosure to the media that, contrary to Fitzpatrick's public statements, Fitzpatrick had recommended that a defendant he had represented in private practice be given probation instead of a prison term.¹²² This decision has been widely criticized and it is hard to believe that this is the type of result that the *Pickering* Court envisioned when it held

Bevilacqua, 439 F. Supp. 465.

116. 391 U.S. at 570.

117. *Id.* at 570 n.3.

118. *Id.*

119. 412 F. Supp. 910 (E.D.Pa. 1976), *aff'd*, 546 F.2d 560 (3rd Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).

120. *Id.* at 915. *Cf.* *Lefcourt v. Legal Aid Society*, 312 F. Supp. 1105, 1112 (the relationship between a legal aid staff attorney and his employer is a "close working relationship").

121. 412 F. Supp. at 915-16 (footnotes omitted) (quoting *Nunnery v. Barber*, 503 F.2d 1349, 1361 (4th Cir. 1974) (Butzner, J., dissenting)).

122. 412 F. Supp. at 911-12.

that discharges involving close working relationships should be judged by significantly different considerations.¹²³

There can be little doubt that "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors."¹²⁴ It may also be true that, as *Connick* asserts, when these relationships "are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."¹²⁵ The Court's holding as to what degree of deference is appropriate, however, goes well beyond any of its decisions on the first amendment rights of public employees since the demise of the right/privilege doctrine in the early 1960's.

The Court indicates that the district court did not accord proper deference to *Connick's* opinion as to the disruptive effect of the question which asked whether the Assistants had confidence in and relied upon the word of five named supervisors.¹²⁶ As the dissent notes, this is a curious suggestion since the district court "explicitly recognized that this was petitioner's 'most forceful argument'; but after hearing the testimony of four of the five supervisors named in the question, it found that the question had no adverse effect on Myers' relationship with her superiors."¹²⁷ The *Connick* majority, however, finds that the district court erred by merely examining this and the other questions for their *actual* disruptive effect. The Court thus concludes that the district court did not accord enough weight to the disruptive potential of Myers' questionnaire.¹²⁸

Although the other three factors, which the Court claims the district court failed to give adequate weight to, have been mentioned in previous Supreme Court decisions, the Court has never suggested that a public employee can be constitutionally discharged for engaging in speech on a matter of public concern because of his employer's "mere apprehension that [the] speech will be disruptive."¹²⁹ Such a standard may be justified when the

123. See, e.g., Note, *The Nonpartisan Freedom of Expression of Public Employees*, 76 MICH. L. REV. 365, 391-93 (1977).

124. 461 U.S. at 151 (quoting *Myers*, 507 F. Supp. at 759).

125. 461 U.S. at 151-52.

126. *Id.* at 153.

127. *Id.* at 167 (Brennan, J., dissenting) (quoting *Myers*, 507 F. Supp. at 759).

128. 461 U.S. at 153-54.

129. See *id.* at 166 (Brennan, J., dissenting).

employee's speech threatens to violently disrupt government operations¹³⁰ or is maliciously false as defined by *New York Times v. Sullivan*.¹³¹ But, where the employee's speech does not approach these extremes, there does not seem to be any justification for using the need for close working relationships as the basis for the employee's discharge without proof of an actual impairment of a government interest.

It is true that in *Pickering* the Court stated that "significantly different considerations" would be involved in cases pertaining to close working relationships.¹³² But, even these different considerations must still be considered in light of the overriding test of actual disruption used in *Pickering* and *Tinker v. Des Moines Independent Community School District*.¹³³ In *Pickering* the Court emphasized that although Pickering's statements were "critical of his ultimate employer" they were "neither shown nor can be presumed to have in any way either impeded [his] proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."¹³⁴ The Court rejected the school board's argument that those statements which were false "were *per se* harmful to the operation of the schools" and required the school board to present evidence showing that the letter had actually harmed the schools.¹³⁵

A year after *Pickering* was decided the Court ruled in *Tinker* that it was unconstitutional to prohibit high school students from wearing black armbands in school to express their opposition to the Vietnam War.¹³⁶ School officials had justified the ban because they feared that the armbands would cause a disturbance, but the Court held that "in our system, undifferentiated fear or apprehension of a disturbance is not enough to

130. See, e.g., *Birdwell v. Hazelwood School Dist.*, 491 F.2d 490 (8th Cir. 1974).

131. 376 U.S. 254. See *supra* text accompanying notes 41-42.

132. 391 U.S. at 570 n.3. See *supra* text accompanying notes 119-27.

133. 393 U.S. 503.

134. 391 U.S. at 572-73 (footnote omitted).

135. *Id.* at 571. Furthermore, in *Givhan*, the Court indicated that the factors to be weighed in the *Pickering* balance when the employee's expression is disclosed privately rather than publicly, such as the "manner, time and place" of the statement's delivery, are "additional factors" which are to supplement and not to replace the *Pickering* analysis of whether the expression "interfered with the regular operation" of the governmental body involved. *Givhan*, 439 U.S. at 415 n.4 (quoting *Pickering*, 391 U.S. at 572-73).

136. 393 U.S. at 508-09.

overcome the right to freedom of expression."¹³⁷ Thus, as the *Connick* dissent notes,¹³⁸ the *Tinker* Court concluded that "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."¹³⁹

Justice Brennan, dissenting in *Connick*, states that *Tinker* applies to *Connick* because in both cases "the determination of the scope of the Constitution's guarantee of freedom of speech requires consideration of the 'special characteristics of the . . . environment' in which the expression took place."¹⁴⁰ The Second Circuit applied *Tinker's* material and substantial disruption test to a case involving a teacher who wore a black armband to school. Finding insufficient the principal's argument that such behavior would "tend" to interfere with his job performance and would "possibly" cause disruption, the court ordered the teacher reinstated.¹⁴¹

Furthermore, since *Tinker*, the vast majority of lower court decisions involving the discharge of public employees for allegedly unconstitutional reasons have required the employer to prove that the employee's expression caused or will cause a material and substantial disruption to the working environment.¹⁴²

137. *Id.* at 508.

138. 461 U.S. at 168-69 (Brennan, J., dissenting).

139. 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). *Burnside* held that it was unconstitutional for a school to ban the wearing of protest buttons by its students. The same day that *Burnside* was decided, the same panel of the Fifth Circuit decided *Blackwell v. Issaquana County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), which defined what constitutes a material and substantial interference with a given activity. In *Blackwell*, students wearing buttons were held not to have engaged in constitutionally protected expression because they "had attempted to force unwilling students to wear the buttons. When the offending students were ordered to remove their buttons and cease distributing them in school, they engaged in disruptive activities." See *James v. Board of Educ.*, 461 F.2d 566, 573 n.15 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972). In *Healy v. James*, 408 U.S. 169 (1972), the Court applied *Tinker's* material and substantial disruption test in holding that a college's non-recognition of a campus chapter of the Students for a Democratic Society was an unconstitutional infringement of the freedom of expression and association.

140. 461 U.S. at 168-69 (Brennan, J., dissenting) (quoting *Tinker*, 393 U.S. at 506).

141. *James v. Bd. of Educ.*, 461 F.2d 566.

142. See, e.g., *Tygett v. Barry*, 627 F.2d 1279, 1282 (D.C. Cir. 1980) (defendant must prove that "the conduct impaired the employee's ability to perform his job or interfered with the efficient operation of the agency he served"); *Janetta v. Cole*, 493 F.2d 1334, 1337 (the State must show a "significant interference with the efficient operation of the

For example, *Pilkington v. Bevilacqua*¹⁴³ held that the employer must show "that the employee's statements either interfered with the employee's performance of his duties, jeopardized his relations with his fellow workers, or actually disrupted the operation of the sector of the government which employed him."¹⁴⁴ Therefore, the district court which heard Myers' case acted in harmony with well-established precedent by giving the government the burden of clearly demonstrating that her conduct "substantially interfere[d] with the discharge of duties and responsibilities inherent in [governmental] employment."¹⁴⁵

The *Connick* Court does not attempt to distinguish *Tinker* or any of the lower court cases applying the material and substantial disruption requirement to public employee discharges. Instead, the Court implicitly supports those few lower court cases which, contrary to *Pickering* and *Tinker*, assume without supporting facts that a certain statement by a public employee is per se disruptive and therefore not protected.¹⁴⁶ The Court may be justified in holding that there is no "necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."¹⁴⁷ However, the Court goes further, holding that since *Connick* "reasonably believed" Myers' questionnaire would disrupt the office and destroy close working relationships, the district court's finding that the questionnaire had not in fact "adversely affected [Myers'] relationship with her superiors"¹⁴⁸ could be ignored.¹⁴⁹ This represents a fundamental shift favoring the State's interests under the *Pickering*

department"); *Holodnak v. Avco Corp.*, 514 F.2d 285, 290 (2d Cir. 1974) (employee's speech could not justify dismissal because it had not interfered with production at defendant's plant), *cert. denied*, 423 U.S. 892 (1975); *Hostrop v. Bd. of Junior College*, Dist. No. 515, 471 F.2d 488, 492-93; *Los Angeles Teachers Union v. Los Angeles City Bd. of Educ.*, 71 Cal.2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969).

143. 439 F. Supp. 465.

144. *Id.* at 473-74.

145. 507 F. Supp. at 758 (quoting *Schneider v. City of Atlanta*, 628 F.2d 915, 919 n.4.

146. *See, e.g., Marcum v. Dahl*, 658 F.2d 731 (10th Cir. 1981); *Kannisto v. City and County of San Francisco*, 541 F.2d 841, 844 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Roseman v. Indiana Univ. of Pa.*, 520 F.2d 1364, 1368 (3rd Cir. 1975), *cert. denied*, 424 U.S. 921 (1976); *Watts v. Seward*, 454 P.2d 732, 735.

147. 461 U.S. at 152.

148. 507 F. Supp. at 759.

149. 461 U.S. at 152.

balance because there will no longer be the need for a trial court evidentiary determination based on fact, not intuition, that the feared disruption would actually have occurred.¹⁵⁰

The Court cautions "that a stronger showing [of disruptive potential] may be necessary if the employee's speech more substantially involved matters of public concern."¹⁵¹ The majority's commitment to this principle, however, is questionable because it had already stated that the one matter of public concern on Myers' questionnaire was an "essential" issue which should weigh heavily in the balancing of the competing interests mandated by *Pickering*.¹⁵²

The Court cites two cases, *Perry Education Association v. Perry Local Educators' Association*¹⁵³ and *Greer v. Spock*,¹⁵⁴ to support its narrow view of the weight to be accorded the disruptive potential of a public employee's speech. These cases dealt with public access to school mailboxes and to a military base, respectively, and though they each held that the state did not have to offer evidence to support an allegation of potential disruption, the first amendment issues raised in each were dissimilar to the constitutional issues raised in cases involving the speech rights of public employees.¹⁵⁵

Connick's holding on the proper weight to be given to the disruptive potential of a public employee's speech in the *Pickering* balance evidences a narrow view of the constitutional rights to be accorded public employees and of the first amendment in general. The Court's holding disregards the well-established principle that "a function of free speech under our system is to

150. See *Butts v. Dallas Independent School Dist.*, 436 F.2d 728, 731 (5th Cir. 1971) (defendant not required to wait until disruption actually occurred, but "what more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right . . .").

151. 461 U.S. at 154.

152. *Id.* at 149.

153. 103 S. Ct. 948 (1983).

154. 424 U.S. 828.

155. In both *Perry* and *Greer*, the State's interests as an employer in maintaining the efficiency of the affected public services was much greater than in *Connick*. In *Perry*, the Court feared that the schools involved would become "battlefield[s] for inter-union squabbles" if the expression at issue was permitted. 103 S. Ct. at 959. In *Greer* the Court held that military loyalty, discipline and morale were such strong State interests that a military commander could forbid the handing out of publications on a military base if they might undermine these interests. 424 U.S. at 840.

invite dispute. It may indeed best serve its high purposes when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."¹⁵⁶ This principle has been applied by several courts faced with *Pickering* problems. In *Los Angeles Teachers Union v. Los Angeles City Board of Education*,¹⁵⁷ the court concluded that although the maintenance of close working relationships among public employees as discussed in *Pickering* is a legitimate government objective "as a general proposition," the "government has no interest in preventing the sort of disharmony which inevitably results from the mere expression of controversial ideas."¹⁵⁸

Secondly, by mandating an extreme degree of deference to the employer's judgment as to the disruptive potential of a public employee's speech, the Court is permitting exactly what *Pickering* prohibited. The Court is condoning the government's use of "the threat of dismissal from public employment . . . [as] a potent means of inhibiting speech."¹⁵⁹ As the *Connick* dissent points out, "if the employer's [rather than the court's] judgment is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors."¹⁶⁰

In its conclusion, the *Connick* Court characterizes Myers' questionnaire "as an employee grievance concerning office policy."¹⁶¹ The Court states that since the questionnaire involved

156. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). See *Tinker*, 393 U.S. at 508-09 ("Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance But our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society"); *James v. Bd. of Educ.*, 461 F.2d 566, 572 ("To preserve the 'market place' of ideas so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement").

157. 71 Cal.2d 551, 455 P.2d 827, 78 Cal. Rptr. 723.

158. *Id.* at 561, 455 P.2d at 833, 78 Cal. Rptr. at 729. See also *Bush v. Lucas*, 103 S. Ct. 2404, 2407 (1983) (dictum that the employee's speech was protected despite "the evidence that his statements caused some disruption of the agency's day-to-day routine"); *Hanneman v. Breier*, 528 F.2d 750, 755 ("At the core of the first amendment is a preference for debate rather than suppression"); *Janetta v. Cole*, 493 F.2d 1334, 1337 (even though a petition by a fireman caused "racial tension" and some "lowering of morale" in the fire department it "occasioned no interference with the operation of the department" and therefore he was ordered reinstated).

159. 391 U.S. at 574. See also *Keyishian*, 385 U.S. at 601.

160. 461 U.S. at 168 (Brennan, J., dissenting).

161. *Id.* at 154.

matters of a public concern "in only a most limited sense" Connick was not required to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."¹⁶² As in *Pickering*, the Court cautions that it is not laying down a general standard against which all statements by public employees may be judged.¹⁶³ Finally, the Court finds that because this case was only an "attempt to constitutionalize [an] employee grievance," its decision is "no defeat for the First Amendment."¹⁶⁴

Justice Brennan's dissent finds three major flaws in the Court's reasoning. According to the dissent, the Court distorts the *Pickering* balance by weighing the context of Myers' expression in determining whether it addressed a matter of public concern, unjustifiably narrows the subjects on which a public employee may speak without fear of retaliation by employers, and misapplies the *Pickering* test by holding that Myers could constitutionally be dismissed "in the absence of evidence that her conduct disrupted the efficient functioning of the District Attorney's Office."¹⁶⁵

Regarding the unjustified narrowing of subjects a public employee may speak out on, the dissent responds to the majority's fear that a broad view "would mean that virtually every remark . . . would plant the seed of a constitutional case"¹⁶⁶ by stating that the proper means to avoid this problem is "not to restrict artificially the concept of 'public concern,' but to require that adequate weight be given to" the State's interests as an employer in preserving employee discipline and harmony.¹⁶⁷ The dissent suggests two major shortcomings with the Court's definition of "public concern."

162. *Id.*

163. *Id.* (quoting 391 U.S. at 569). See *supra* text accompanying note 17.

164. *Id.* at 154.

165. *Id.* at 158 (Brennan, J., dissenting). The dissent's arguments regarding the context and disruptive potential of Myers' expression have been discussed in conjunction with the analysis of the majority opinion. See *supra* notes 67-79 and 128-62 and accompanying text. (To summarize, the dissent asserts that the context in which a statement is made should have "nothing whatsoever to do" with the determination of whether the expression relates to a matter of public concern. On the issue of disruptive potential, the dissent states that the Court should have applied *Tinker's* material and substantial disruption standard rather than deferring so extremely to Connick's "mere apprehension" of disruption). *Id.* at 166-70.

166. *Id.* at 149.

167. *Id.* at 163-64 (Brennan, J., dissenting).

The restriction ignores that "a classification that bases the right to first amendment protection on some estimate of how much general interest there is in the communication is surely in conflict with the whole idea of the first amendment."¹⁶⁸ According to the dissent, the Court has previously articulated a broad view of the meaning of "public concern" in harmony with this concept, where it has had to define the limits of that term's scope.¹⁶⁹

Secondly, the dissent states that the Court's artificial restriction of the concept of "public concern" conflicts with the first amendment protection of the dissemination of information so that "the people, not the courts, may evaluate its usefulness."¹⁷⁰ The majority, by applying its own narrow views of what matters are of public concern to the statements before it in this case, fails to recognize that "the citizenry is the final judge of the proper conduct of public business."¹⁷¹ The dissent also states that the Court ignores *Gertz v. Robert Welch, Inc.*,¹⁷² where "the Court referred to the 'difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of general or public interest and which do not,' and expressed doubt [about] the wisdom of committing this task to the conscience of judges."¹⁷³

168. *Id.* at 164 n.4 (Brennan, J., dissenting) (quoting T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 554 (1970)).

169. *Id.* (Brennan, J., dissenting). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 n.6 (1974) (Douglas, J., concurring) ("public affairs must be broadly construed—indeed, the term may be said to embrace 'any matter of sufficient general interest to prompt media coverage . . ."). See also *Rosenbloom v. Metromedia*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) (Assuming "courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government . . . all human events are arguably within the area of 'public or general concern'"); *Bridges v. California*, 314 U.S. 252, 269 (1941), quoted in *Connick*, 461 U.S. at 165 n.5 (Brennan, J., dissenting) ("No suggestion can be found in the Constitution that the freedom guaranteed for speech and the press bears an inverse ratio to the timeliness and the importance of the ideas seeking expression"); *Williams v. Bd. of Regents*, 629 F.2d 993, 1003 (5th Cir. 1980) ("It has been often stated that First Amendment protection is not dependent upon the 'social worth' of ideas . . .").

170. 461 U.S. at 165 (Brennan, J., dissenting).

171. *Id.* (Brennan, J., dissenting) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495).

172. 418 U.S. 323.

173. 461 U.S. at 164 (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 346).

The dissent concludes that the district court applied the correct legal standard in reaching a proper accommodation between competing interests and that in reversing, the Court is chilling speech by public employees and thus depriving the public of valuable information about the performance of elected officials.¹⁷⁴

Connick represents a reversal of an expansive interpretation of the constitutional protections accorded to public employees. It is too early to predict the exact effect of *Connick* on future cases involving allegedly unconstitutional public employee speech. Some general effects may be gleaned, however, from the opinions of the few lower courts that have attempted to interpret and apply the *Connick* holding.

Such decisions hold that the speech before the court is a matter of public concern and use *Connick* as an example of an individual personnel grievance which does not involve such protected speech.¹⁷⁵ One opinion questions *Connick's* holding by stating that "real, or imagined, disruption is required, and the 'close working relationships' exception cannot serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views."¹⁷⁶ Other courts, however, have followed *Connick's* lead in artificially restricting the meaning of "matters of public concern."¹⁷⁷ One opinion interprets *Connick* as holding that a public employee cannot "bootstrap his individual grievance into a matter of public concern . . . by invoking a supposed popular interest in all aspects of the way public institutions are run."¹⁷⁸

These contrasting interpretations and applications of *Connick* expose the decision's fundamental flaw. The Court is justified in maintaining its support for *Pickering's* holding that it is neither appropriate nor feasible to articulate a general standard against which all critical statements by public employees may be

174. 461 U.S. at 170 (Brennan, J., dissenting).

175. *Leonard v. City of Columbus*, 705 F.2d 1229 (11th Cir. 1983); *McKinley v. City of Eloy*, 705 F.2d 1110.

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

177. *Boyd v. Secretary of the Navy*, 709 F.2d 684 (11th Cir. 1983); *Mahaffey v. Kansas Bd. of Regents*, 562 F. Supp. 887 (D. Kan. 1983).

178. *Mahaffey*, 562 F. Supp. at 890.

judged. However, by incorporating unprecedented and unjustified ad hoc features into the *Pickering* balance process, the Court increases the confusion on the cloudy issue of what types of public employee speech are protected by the first amendment.

The Court reads *Pickering* as placing a threshold burden of proving that the speech in question is in fact a matter of public concern on the employee. Unless the employee can sustain this burden, the Court will not inquire into the effects of the speech on the State's interests as an employer. Given this narrow reading of *Pickering*, the Court articulates no coherent standard by which to define the term "matter of public concern." Its holding that the context of a given statement should be a factor in this inquiry would seem to explicitly overrule *Givhan*. Furthermore, the Court does not mention the standard it used in concluding that, despite the fact that all the questions on Myers' questionnaire arose in the same context, one of the questions was "inherently" a matter of public concern while the others were not. Though the Court's opinion definitely narrows the definition of "matter of public concern," it is still too amorphous a term to be useful as a judicial principle.

In its application of the *Pickering* balance the Court is somewhat clearer about which standards its opinion is based upon. Its extreme deference, however, to the employer's opinion on the issue of the disruption caused by the employee's expression is unjustified and unnecessary. In using the pretext of "close working relationships" to ignore the district court's findings on this issue, the Court replaces the widely supported actual disruption standard with an apprehension of potential disruption standard. This fundamental realigning of the *Pickering* balance only serves to place the decision as to what types of expression will be protected into the hands of the speaker's employer rather than the more objective judiciary.

The *Connick* decision undermines sound principles of public policy and constitutional law. Whether out of confusion as to what is a matter of public concern or out of intimidation by the weight given the employer's opinion, public employees will inevitably be deterred by the Court's decision from making critical statements about the way government agencies and bodies are operated. Thus, government improprieties and scandals will not

be brought to the voting public's attention as frequently.¹⁷⁹ Government agencies may not be as responsive to the needs and grievances of their employees. Government operations will be cloaked in a shroud of secrecy contrary to the intention of the Constitution. The *Connick* decision ignores the underlying principle that the first amendment is based on and continues to derive its strength from the belief that the people, not the courts or the government, possess the right and responsibility to hear and evaluate the usefulness of any given statement no matter where, or by whom, it is articulated.

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179. Regarding the public interest in disclosure of government improprieties, Justice Marshall has stated that "[t]he importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times." *Arnett v. Kennedy*, 416 U.S. 134, 228 (1974) (Marshall, J., dissenting). See also *Kiiskila v. Nichols*, 433 F.2d 745, 748-49 (7th Cir. 1970) (criticism of military police by a former WAC who interacts with many members of armed forces "may be especially valued by society"); *Pilarowski v. Brown*, 76 Mich. App. 666, 677, 257 N.W.2d 211, 217 (1977) (county employee "was performing a public service" in bringing the questionable spending policies of the county board of commissioners to public view); *Appeal of Chalk*, 441 Pa. 376, 384, 272 A.2d 457, 461 (1971) (public assistance caseworker has a unique and valuable perspective from which to criticize the welfare system). See generally Comment, *Government Information Leaks and the First Amendment*, 64 CALIF. L. REV. 108, 113-16, 134-45 (1976); Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right To Blow the Whistle*, 42 U. CHI. L. REV. 530, 538-41 (1975). The *Connick* holding does not take into account the concerns raised in Justice Marshall's *Arnett* opinion and implies that important disclosures by public employees will not be adequately protected when weighed against the State's interests in maintaining the efficiency of the public services. This signals the Court's approval of the dismissal of public employees in such cases as *Sprague v. Fitzpatrick*, 412 F. Supp. 910 (where the employee's "leak" is obviously of great public interest and importance). See *supra* notes 121-25 and accompanying text.

