Winter 1989

The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals

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From *Connick* to Confusion: The Struggle to Define Speech on Matters of Public Concern†

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**INTRODUCTION**

In 1983, the U.S. Supreme Court held in *Connick v. Myers* that the first amendment’s protection for public employees is not all-encompassing, but extends only to speech on matters of public concern. In *Connick*, the Court determined by a 5-to-4 vote that a questionnaire circulated by an assistant district attorney which sought co-workers’ views on office morale, the need for a grievance committee, and management pressure to work on political campaigns constituted speech on a matter of purely personal interest, and thus did not involve a matter of public concern. Four years later, the Court held in *Rankin v. McPherson* by another 5-to-4 vote that the statement of a deputy constable, upon hearing of the 1981 attempt on President Reagan’s life, “if they go for him again, I hope they get him,” did constitute speech on a matter of public concern.

One who seeks to reconcile *Connick* and *Rankin* can do so by close examination, but no “bright line” emerges from them to guide the public

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I wish to thank Laurie L. Mesibov and Joseph S. Ferrell for their helpful review of the drafts, and Marie B. Russell, J.D., The University of North Carolina at Chapel Hill (1988), for her thorough research assistance.

2. *Id.* at 147.
3. *Id.* at 148.
5. *Id.* at 2895.
6. *Id.* at 2897.
7. In *Connick*, the Court examined the employee’s speech in context and determined that, except for the one question concerning political pressure, the questionnaire essentially amounted to a personal grievance. Applying the balancing test between the interest of the employee in free speech on a matter of public concern and the employer’s interest in efficient government set forth in *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (discussed *infra* text accompanying notes 10-42) to the speech on political pressure, the Court found sufficient evidence of potential disruption in the workplace to warrant dismissal of the employee. *Connick*, 461 U.S. at 142. In *Rankin*, the Court likewise examined the speech in context and found that the offensive remark “was made in the course of a conversation addressing the policies of the President’s administration.” 107 S. Ct. at 2897. Since the overall conversation was on a matter of public concern (President Reagan’s domestic policies), the speech satisfied the first prong of
employer or employee in determining what constitutes speech on a matter of public concern. Given the "enormous variety of fact situations in which critical statements by . . . public employees" may arise, that result is not surprising. However, were one to go further and examine the decisions rendered by the lower federal courts during the four years between Connick and Rankin, one could not predict with certainty whether a given statement by a public employee constitutes speech on a matter of public concern. Instead, one would discover that while certain broad categories of speech may be identified, conflict and confusion exist within those categories. The conflict and confusion are attributable, in part, to the formulation for determining whether speech is protected under Connick, as set forth below.9 This article examines the decisions of the courts since Connick to identify certain categories of cases which have emerged and discusses the variables which influence, but do not absolutely predict, the determination of whether a public employee's statement will be held to constitute speech on a matter of public concern. Following this discussion, the article considers some alternatives to the Connick standard and recommends ways of reducing the conflict and confusion.

I. RECOGNITION OF PUBLIC EMPLOYEES' FREE SPEECH RIGHTS

A. Pickering and its Progeny

It was not until 1968, in Pickering v. Board of Education,10 that the Supreme Court squarely recognized the free speech right of public employees.

the Connick test. Applying the Pickering balance to the speech, the Court found no evidence that the employee's statements had interfered with the government's interest in efficient functioning of the office or had otherwise discredited the office, since the speech was made in private by a low-level clerk to her co-worker/boyfriend. Id. at 2899. Thus, Connick and Rankin are not contradictory decisions, but merely reach different results applying the same rule of law.

9. See infra text accompanying notes 43-212.
10. 391 U.S. 563 (1968). Pickering evolved from a series of cases involving the freedom of association under the first amendment. Many states in the 1950's and 1960's had requirements that public school teachers take loyalty oaths. These oaths were challenged as unconstitutional, beginning with Weiman v. Updegraff, 344 U.S. 183 (1952). In Weiman, a loyalty oath that excluded from public employment persons who had innocent, as opposed to knowing, association with certain subversive associations was held to constitute "an assertion of arbitrary power" by the state. Id. at 191. In Shelton v. Tucker, 364 U.S. 479 (1960), a school teacher refused to sign an affidavit listing organizations to which he belonged. The Shelton Court held that a state's indiscriminate requirement that membership be disclosed in any and all organizations was an abuse of due process. Id. at 490. In Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961), the Court invalidated a requirement that school teachers sign a statement that they had never aided or supported the communist party as too vague to constitutionally warrant termination for refusal to sign. Finally, in Keyishian v. Board of Regents, 385 U.S. 589 (1967), faculty members of the State University of New York successfully argued that the New York statute requiring them to sign a loyalty oath was an unconstitutional infringement on their first amendment right of association.
In *Pickering*, a public school teacher was dismissed for writing a letter to the local newspaper criticizing the school board and the superintendent of schools for funding athletic programs at the expense of academic excellence.¹¹ The Court held that the termination of the school teacher was an impermissible infringement on his protected speech, rejecting the notion "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . . ."¹² Instead, the Court framed the proper inquiry as "arriving at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹³

The balancing test established in *Pickering* was, by necessity, stated in general terms. The Court noted the impossibility of anticipating the variety of circumstances in which a public employee's speech might be balanced against the employer's exercise of managerial efficiency, and held instead that in these types of cases three factors are to be considered in striking the balance.¹⁴ These factors, discussed in turn below, are (1) the parties' working relationship, (2) the detrimental effect of the speech on the employer, and (3) the nature of the issue upon which the employee spoke and the relationship of the employee to that issue.¹⁵

The *Pickering* Court, in evaluating the first factor, the parties' working relationship, noted that the school teacher's letter to the newspaper criticized the policies of the school board—not his direct supervisors with whom he

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¹¹ *Pickering*, 391 U.S. at 566.

¹² *Id.* at 568. Note that the first amendment right recognized by *Pickering* is the citizen's right to comment on matters of public interest. Private speech—that is, speech which does not implicate the relationship of the government to the citizen—does not rise to the level of protected speech recognized by *Pickering*. The subsequent decisions of the Supreme Court proceed from this premise. Thus, there are three categories of speech: first, protected speech, implicating important first amendment interests; second, routine speech, which, although perfectly permissible, constitutes no more than common conversations among persons on subjects of private interest having no first amendment implications (see, e.g., Yoggerst v. Hedges, 739 F.2d 293 (7th Cir. 1984) (public employee's comment to a co-worker concerning rumor that agency director had been fired, "Did you hear the good news?" not protected speech)); and third, outlawed speech, such as obscenity (see, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)) or recklessly false statements (see, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

¹³ *Pickering*, 391 U.S. at 568. Note that while the *Pickering* balancing test applied only to speech on matters of public concern and not to speech of purely private interest, the Court provided no further guidance on distinguishing the two.

¹⁴ *Id.* at 569. Justice Marshall, writing for the Court, indicated that "some of the general lines along which an analysis of the controlling interests should run" in evaluating public employee free speech cases, but left open the possibility that factors other than those in *Pickering* might be controlling, given the "enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal . . . ." *Id.*

¹⁵ *Id.* at 570-72.
had to maintain a close working relationship. The distant nature of the working relationship thus tipped the scales in favor of the employee in this case, as there was no threat to the immediate supervisor's ability to maintain necessary discipline at the work site, nor a demonstration of any disharmony among co-workers resulting from publication of the letter.

The Court evaluated the second factor, the detrimental effect of the speech on the employer, and concluded that the speech did not warrant dismissal of the employee. The employer asserted that any publicly made false statement by the employee was per se harmful to the employer. The Court rejected this per se rule and concluded that the nature and content of the speech must be examined in order to make a case-by-case determination of the detrimental impact of the speech on the public service.

In this case, the statement amounted to nothing more than a difference of opinion over allocation of school board funds, and the mere act of airing an opinion in the newspaper did not have sufficient effect on the school board's ability to make that allocation to warrant termination of the employee.

The third factor, the nature of the issue and the employee's relationship to that issue, was also resolved in favor of the employee in Pickering. The matter of public concern at issue before the Court was the allocation of funds, which was to be resolved through referendum by the voting public. As a school teacher, Pickering and his co-workers were "the members of the community most likely to have informed and definite opinions" on the matter. Where there is a close nexus between the employee and the issue, the possibility that the employee will make a valuable contribution to public understanding tips the scales in favor of protecting the employee's speech.

Three cases decided after Pickering provided clarification of the balancing test. First, in Perry v. Sindermann, further elaboration of the third factor noted above, the relationship of the employee to the issue, was provided by the Court. Sindermann, a college professor, was denied renewal of his employment contract with Odessa Junior College after he testified before

16. Id. at 570.
17. Id. at 571.
18. Id.
19. Id. at 572.
20. Id. at 572-74. The relationship of the employee to the issue is a factor which cuts both ways. In Pickering, the fact that the school teacher had a personal stake in the outcome of the referendum was used to support his free speech claim. As a teacher, he was uniquely qualified to speak on the effect that a failure to pass the bond issue would have on the quality of education in the school district. In some later cases, however, the fact that the employee stood to gain from the position he advocated was used to characterize the speech as a "personal grievance" and not a matter of public concern. Indeed, it is precisely this result of Connick that narrowed the free speech right of public employees. 461 U.S. 138 (1983). Their relationship to the issue is now considered first in determining whether the speech is protected, and then again in determining how to strike the balance between the employee's first amendment rights and the employer's interest in efficient government. Id.
the Texas legislature in favor of a proposal to elevate all junior colleges to four-year institutions. The proposal was opposed by the Board of Regents of Odessa. In evaluating his free speech claim, the Court noted that Sindermann was both a teacher in the system to be changed and a spokesman for the local teacher's association. As such, he was a member of the public who, by virtue of his position, was likely to have special insight on the matter of public concern.\textsuperscript{22} Second, in \textit{Mount Healthy City School District Board of Education v. Doyle},\textsuperscript{23} the Court set forth the burden of proof an employer must meet in dismissing an employee for exercising free speech rights. In \textit{Mount Healthy}, a school teacher was dismissed both for his reporting to a local radio station on the establishment of a teacher dress code and for unprofessional conduct in dealing with staff and students. The Court held that the burden is initially on the employee to show that he was engaged in constitutionally protected conduct, and that this conduct was a motivating factor in the decision to dismiss. Once this prima facie showing is made, the burden then shifts to the employer to show that the termination would have occurred irrespective of the protected activity.\textsuperscript{24} Third, in \textit{Givhan v. Western Line Consolidated School District},\textsuperscript{25} the Court held that the \textit{Pickering} test applied to free speech even in a private setting. In \textit{Givhan}, a school teacher expressed her opposition to certain school board policies as racially discriminatory in one-on-one meetings with her supervisor. She claimed her subsequent termination was in retaliation for expressing her concerns.\textsuperscript{26} The Court held that \textit{Pickering} applied to private discussions between employer and employee, and that in determining the proper balance between free speech and the efficiency of the service, the time, place, and manner of the speech could be considered.\textsuperscript{27}

In sum, \textit{Pickering} established a test that was both a broad framework for balancing the free speech rights of public employees against the public interest in an efficient public service, and, within that framework, a more specific listing of the factors to be considered in striking the ultimate balance. Although the \textit{Pickering} test was clarified by later rulings, the approach to evaluating free speech claims of public employees remained essentially the same until the \textit{Connick} decision.

\textbf{B. The Connick Decision and the Narrowing of Pickering}

Until the decision in \textit{Connick v. Myers}, the Court had never required a separate examination of the speech involved to determine whether the \textit{Pickering} test was applicable. In \textit{Connick}, the Court held that Sindermann's free speech claim failed because his speech was not made in the public forum. Therefore, the burden of proof in dismissing an employee for exercising free speech rights was not shifted to the employer.

\begin{itemize}
  \item \textsuperscript{22} Id. at 594-95.
  \item \textsuperscript{23} 429 U.S. 274 (1977).
  \item \textsuperscript{24} Id. at 287.
  \item \textsuperscript{25} 439 U.S. 410 (1979).
  \item \textsuperscript{26} Id. at 412-13.
  \item \textsuperscript{27} Id. at 415 n.4.
\end{itemize}
ering balancing test was to be applied. In *Connick*, however, Justice White, writing for the majority, stated that the district court "got off on the wrong foot in this case"28 by incorrectly characterizing the questionnaire circulated by Myers as a matter of public concern. The lower court had ruled that because the questionnaire addressed the effective functioning of a public agency, the issues addressed were matters of public concern.29 Defendant Connick argued, in contrast, that because the questionnaire was concerned only with internal office matters, it was not in any manner speech on a matter of public concern.30 Justice White rejected both views and instead constructed a continuum along which speech by a public employee could fall—from speech which has so little value that the state could prohibit it to speech of vital interest to the public.31 The Court held that for a public employee's speech to be protected, it could not simply be characterized as falling generally within the realm of matters of public concern; instead, a threshold determination must be made by examining "the content, form and context of a given statement, as revealed by the whole record."32 Thus, a two-pronged test was framed: Does the speech involve a matter of public concern? If so, does the employee's first amendment interest outweigh the employer's interest in an efficient public service? Finally, if the answer to both prongs of the *Connick* test was "yes," *Mount Healthy* required a showing by the employee that his speech was a substantial or motivating factor in the decision to discipline him, which the employer could rebut only by proving that the discipline would have been imposed irrespective of the protected conduct of the employee.33 It was against this standard that the questionnaire was evaluated.

The questionnaire consisted of fourteen entries.34 Only one entry, the question concerning pressure to work for office-supported candidates, touched on a matter of public concern, according to the Court.35 Because that question

28. 461 U.S. at 143.
29. Myers v. Connick, 507 F. Supp. 752, 758 (E.D. La. 1981) (the court held that a review of the contents of the questionnaire showed that the issues addressed by the questions were, considered as a whole, matters of public concern), aff'd, 654 F.2d 719 (5th Cir. 1981), rev'd, 461 U.S. 138 (1983).
31. *Id.* at 147. Justice White gave as an example of the former, obscenity, and as an example of the latter, Pickering's criticism concerning allocation of school funds.
32. *Id.* at 147-48.
33. *Id.* at 147-54.
34. *Id.* at 155-56. Questions 1 through 5 asked employees to describe their experience with office transfers. Questions 6 through 9 asked employees about the existence of a rumor mill and its effect on morale. Question 10 asked for an assessment of the supervisory staff. Question 11 asked whether employees were pressured to work on political campaigns on behalf of candidates supported by the District Attorney. Questions 12 through 14 asked whether a grievance committee was needed, whether morale in the office was good, and whether any other issue of concern to the employees needed to be addressed.
35. *Id.* at 149.
was "a matter of interest to the community upon which it is essential that public employees be able to speak out freely," application of the *Pickering* balancing test was warranted. The majority then considered the state's right to maintain an efficient office by removing a disruptive employee against the employee's right to redress unwilling participation in political campaigns and resolved the balance in favor of the state.  

Justice Brennan wrote the dissenting opinion in *Connick*, disagreeing with Justice White's characterization of the bulk of the questionnaire as a grievance and, more importantly, criticizing the majority's approach to first amendment analysis. In Brennan's view, the Court's approach was flawed because a matter of public concern was now to be defined by examining the content, form, and context of the statement; further, the context in which the statement was made was now to be considered twice: first in determining the threshold issue of whether the speech is a matter of public concern, and second in determining whether there was undue disruption under the *Pickering* balancing test. Classifying a statement as a matter of public concern simply does not, according to Justice Brennan, depend on where or why it was said. By limiting the subjects which may be characterized as matters of public concern, stated the dissent, the majority had impermissibly narrowed the issues upon which a public employee could speak without fear of dismissal.

In *Connick*, the Court made it more difficult for an employee to invoke the *Pickering/Mount Healthy* standard by holding that a threshold inquiry must be made to classify the speech as a matter of public concern. Further, the Court made the *Pickering* balancing test more difficult to resolve in the employee's favor by ruling that the mere apprehension by a supervisor that disruption of the workplace might occur is a sufficient reason to tip the balance in favor of the state, even though the employee spoke on a matter of public concern.

The *Connick* majority was particularly concerned that employees might contest routine personnel decisions as free speech infringements, stating that "government offices could not function if every employment decision became a constitutional matter." Rather, stated Justice White, "government offi-

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36. *Id.*
37. *Id.* at 153-54.
38. *Id.* at 157-58 (Brennan, J., dissenting). Justice Brennan agreed with the majority that "how and where a public employee expresses his views are relevant" in applying the *Pickering* test, but only in considering the detrimental impact on the employer. Here the majority was giving double weight to the context in which the statement was made, resulting in an unduly narrow definition of matters of public concern. *Id.* at 158.
39. *Id.* at 160.
40. *Id.* at 158.
41. *Connick*, 461 U.S. at 143.
cials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."

The article now examines the aftermath of *Connick*, as measured by the subsequent decisions of the lower federal courts, to determine the effects of the *Connick* standard on speech that is a matter of public concern.

II. Application of *Connick* by the Lower Courts

In the five years since the Court's decision in *Connick v. Myers*, there have been over 300 applications of the *Connick* standard by the federal courts to determine whether a statement by a public employee constituted speech on a matter of public concern and, if so, whose interests should prevail. Certain broad categories of cases may be identified from a review of these decisions, from which some guidelines emerge for determining whether a given statement is speech on a matter of public concern.

A. Speech on Matters of Current Community Debate

At one end of the spectrum devised by Justice White in *Connick* lies a category of cases in which the speech clearly constitutes a matter of public concern; these cases involve speech on an issue of current community debate. In these cases the speech by the public employee is made either in a public forum held to solicit the views of interested parties or through a letter to a local newspaper or administrative body. Irrespective of the forum, the employee takes a position contrary to that taken by his employer. The employee is disciplined (sometimes dismissed) and claims the discipline was in violation of his first amendment right to speak on a matter of public concern.

It is noteworthy that in many of these cases the employee has no direct interest in the outcome of the matter because his employment is not threatened by the ultimate resolution of the issue. Thus, unlike the plaintiff in

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42. *Id.* at 146. The Court further noted that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. The ramifications of broadly defining a matter of public concern include the presumption "that all matters which transpire within a government office are of public concern . . . [and] that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Id.* at 149.

43. Speech on issues of current community debate has long been recognized as serving one of the central purposes of the first amendment: to protect the dissemination of information on the basis of which members of society may make reasoned decisions about the government. Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974); Mills v. Alabama, 384 U.S. 214, 218-19 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964). In the context of public employees' comments on the actions of their employer, the government, the admonition that free speech includes "the manner in which government is operated or should be operated" is noteworthy. *Mills*, 384 U.S. at 218.
Connick whose expression was clearly motivated, at least in part, by concern about her own job security, the plaintiffs in many of these cases speak "as members of the community most likely to have informed and definite opinions." It is also significant that in all of these cases the issue about which the employee speaks is a matter that has received recent attention in the community at large through the newspaper or some other public vehicle. A brief review of a representative sampling of these cases follows.

In Whalen v. Roanoke County Board of Supervisors, plaintiff Richard Whalen, an engineer employed by Roanoke County, Virginia, spoke in March of 1976 before the State Corporation Commission. Whalen voiced his opposition to a power company's proposal to erect power lines through Floyd County, where he lived. When asked, Whalen identified himself as a Roanoke County employee, but did not purport to speak as a representative of the county. The morning after his appearance before the commission, Whalen was fired by his supervisor. That termination was immediately rescinded at the advice of the county attorney, and Whalen continued his employment with the county for another three years. In 1979, Whalen was fired again, allegedly for engaging in a real estate transaction involving county property from which Whalen benefited personally. Whalen claimed his termination was in retaliation for his testimony, three years earlier, before the commission.

Judge Butzner, writing for a divided court, held that the testimony given by Whalen before the commission was speech on a matter of public concern under the first prong of the Connick analysis. Further, held the court, under the second prong of Connick, Whalen's right to comment on a matter of public concern outweighed the county's interest in promoting the efficiency of the public service, particularly where Roanoke County had no interest in the location of a power line in Floyd County. The court noted the county does have an interest in ensuring that employees do not represent it without authority, but that where, as here, the employee spoke for himself and not as a representative of Roanoke County, no such interest was impaired. Applying the Mount Healthy standard, the court upheld the finding by the jury that Whalen was fired for his protected conduct, and that Roanoke County would not have dismissed him absent that conduct.

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45. 769 F.2d 221 (4th Cir. 1985), aff'd, 797 F.2d 170 (4th Cir. 1986) (en banc).
46. Id. at 222-24. The dissent noted the extended time that lapsed between Whalen's testimony and his termination, and argued that "there was no more than a mere remote possibility that Whalen's 1979 discharge resulted from Whalen's 1976 speech." Id. at 229 (Ervin, J., concurring in part and dissenting in part).
47. Id. at 225.
48. Id.
49. Id.
Similarly, in *Micilcavage v. Connelie*, plaintiff Joseph Micilcavage, a New York state police officer, was disciplined for violating a department rule prohibiting public speeches by employees who lacked prior authorization from the superintendent. Micilcavage spoke on drug and alcohol abuse before a local PTA, was issued a letter of censure, and was placed on six-months probation for failing to obtain clearance as required by the New York State Police Administrative Manual. Micilcavage claimed that the disciplinary action violated his free speech rights, and that the regulation was vague and overbroad.

The court held that the speech in this case clearly constituted a matter of public concern under *Connick*, stating that it "concerned a subject that is at the forefront of the public interest." Proceeding to the second prong of the *Connick* test, the court held that the police department's regulation requiring authorization before an officer makes a public presentation was "reasonably related to the promotion of employee discipline and protection of the reputation of the New York State Police." Nonetheless, the court ultimately resolved the matter in favor of Micilcavage, holding that the regulation was vague, overbroad, and a prior restraint on the exercise of his first amendment rights.

The *Whalen* and *Micilcavage* cases illustrate application of the *Connick* test to employee speech in a public forum on a matter of current community debate. The article considers below three cases involving written expression by public employees on matters of current community debate, *Zook v. Brown*, *Anderson v. Central Point School District No. 6*, and *McGee v. South Pemiscot School District R-V*. In these cases, the plaintiffs' speech occurred not in a public meeting, but rather through writing letters to a newspaper or to an administrative body.

In *Zook v. Brown*, plaintiff Stephen Zook, a Champaign County, Illinois, deputy sheriff, wrote a letter to the newspaper stating that in his ten years as deputy sheriff he had had the opportunity to observe the work of the current county emergency medical service provider—Arrow Ambulance Service—and that he was impressed with their dedication and professionalism. Zook wrote the letter at the time the county was considering whether to

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51. *Id.* at 976-77.
52. *Id.* at 978. The court distinguished the situation in *Connick* as concerning "a disgruntled employee [who] circulated a petition that largely challenged her employer's administration of the office." By contrast, "[t]here can be little doubt that the public has a legitimate interest in controlling drug and alcohol abuse by the members of society." *Id.*
53. *Id.* at 981.
54. *Id.* at 981-82.
55. 748 F.2d 1161 (7th Cir. 1984).
56. 746 F.2d 505 (9th Cir. 1984).
57. 712 F.2d 339 (8th Cir. 1983).
58. 748 F.2d at 1163.
continue using the current provider or to replace them with another contractor. As in Micilcavage, there existed a department manual prohibiting the expression of public statements or appearances by employees without obtaining prior approval. The manual also prohibited an officer from using his name, photograph, or title in connection with any testimonial or advertisement without obtaining prior approval. Zook’s supervisor read the letter in the newspaper and gave Zook a written reprimand, stating that Zook’s letter placed the sheriff’s department in an “uncomfortable position” and that department employees were to maintain strict neutrality on this issue to avoid the appearance of collusion between law enforcement and emergency service personnel.

Zook challenged the reprimand as violative of his free speech rights. The district court upheld the disciplinary action, finding the sheriff’s action justified under the manual’s provisions and recognizing the department’s interest in limiting the employees’ right to contribute to public debate on the issue. On appeal, the Seventh Circuit remanded the case for a determination of whether the manual’s provisions were unconstitutional as applied to Zook.

Under Connick, held the court, several factors must be considered to determine whether Zook’s expression constituted discussion on a matter of public concern and, if so, whether the balance of interests should be struck in his favor. First, in applying the Connick threshold requirement that the speech be on a matter of public concern, the court noted that it was “important in the context of this case to define the actual scope of the public debate in which Zook claims to have participated.” The court determined that Arrow was the subject of debate in Champaign County. Thus, Zook’s letter commending Arrow was speech on a matter of public concern because to comment on Arrow was to comment on the provision of emergency services in the county. Second, the court held that the scope of the debate must be considered in evaluating the balance between Zook’s first amendment interest and the county’s interest in limiting his expression. If the current service provider was one of many possible contractors, reasoned

59. Id. The manual stated, under the heading “Abuse of Position,” the following: “Use of Name, Photograph, or Title: Officers shall not authorize the use of their names, photographs or official titles which identify them as officers in connection with testimonials or advertisements of any commodity or commercial enterprise, without the written approval of the sheriff.” Under the heading of “Public Statements and Appearances” the manual provided: “When acting as representatives of the department, officers shall receive approval from the sheriff before they address public gatherings, appear on radio or television, prepare any articles for publication, act as correspondents to a newspaper or periodical release, or divulge investigative information or any other matters of the department.” Id.

60. Id.
61. Id.
62. Id. at 1166-67.
63. Id. at 1166.
the court, then Zook’s comments favoring the current contractor could be seen as impairing the county’s professed policy of neutrality. If, however, the current provider was the only one in the county, then the county’s interest in limiting debate would be entitled to less weight because no other contractor’s opportunities for selection were lessened by Zook’s comments. Finally, the court held that the time, place, and manner of Zook’s expression must be considered, with the key issue being whether Zook was acting as a department representative or “merely expressing his own opinions as a private citizen.” The case was remanded to the district court.

In Anderson, a teacher/coach was suspended from coaching for sending a letter to school board members describing his proposal to restructure the athletic program. Plaintiff Anderson sent his letter as a follow-up to remarks he made at an open meeting held by the board to discuss school athletics. The court, applying Connick, held that Anderson’s letter involved a matter of public concern. The court rejected the school district’s argument that because Anderson’s letter contained details of his proposed restructuring which were not of general public interest, the letter fell outside the ambit of protected speech. The court stated:

> It cannot be disputed, however, that the subject of the letter was the athletic program itself, the very subject discussed at the public meeting called by the Board and which the defendants agree was of public concern. The letter should not lose its status as a communication protected by the first amendment merely because it contains some details. Connick does not require every word of a communication to be of interest to the public.

The court also upheld the lower court’s application of the Pickering balancing test in favor of the employee.

Similarly, in McGee, the plaintiff, also a teacher/coach, wrote a letter to the local newspaper in support of continuing the junior high track program. McGee’s letter was prompted by a previous letter signed by three school board members explaining their decision to end the program and claiming that McGee had recommended cutting the program. McGee’s letter disputed that claim. Following publication of McGee’s letter, he was denied renewal of his employment contract. McGee alleged the board’s failure to renew his contract was in retaliation for exercising his free speech rights.
The court held that the question of whether to continue the track program at the junior high school had become a matter of public concern. The court noted that members of the community had circulated petitions urging the school board to reconsider its decision to end the program, that the matter had become a campaign issue during the recent school board election, and that the school board had chosen to defend their decision in a public forum by writing a letter to the newspaper. Applying the balancing test, the court held there was sufficient evidence to support a jury finding that McGee's letter had no adverse impact on the school system, and that his first amendment interests outweighed the employer's interest in preventing disruption. The court remanded the case to consider McGee's requests for equitable relief.

In all of these cases, then, the court held that the subject in question was a matter of public concern because it was a matter of current community debate and interest. This result is not surprising and is clearly the type of speech both the Pickering and Connick courts envisioned as involving matters of public concern. It is also significant that in all but one of these cases the public employee was not in a situation in which resolution of the debate might have an adverse impact on the employee's position. But as we move from this relatively well-defined end of the spectrum, conflicting decisions begin to appear.

B. Speech Alleging Malfeasance or Abuse of Office

Closely related to the first category of cases is a second group of decisions in which the speech by the employee concerns possible malfeasance or abuse of public office.

In Gonzalez v. Benavides plaintiff Edgardo Gonzalez, executive director of a federally funded anti-poverty program, questioned whether the local board of county commissioners and the 'commissioners' court had complied with federal regulations in reinstating an employee whom Gonzalez had terminated. Gonzalez also disputed the commissioners' view that he was subject to evaluations of his performance by the commissioners and refused publicly to acknowledge their authority in conducting these evaluations. Following these incidents, Gonzalez was dismissed; he filed suit claiming his

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72. Id. at 342.
73. Id.
74. Id.
75. In McGee, 712 F.2d at 340-41, the teacher was also the track coach. Thus, if the school board terminated the junior high track program, he would forfeit his responsibilities, and the extra pay, that came with the program.
76. 774 F.2d 1295 (5th Cir. 1985), cert. denied, 475 U.S. 1140 (1986).
dismissal was in retaliation for questioning the propriety of the board's actions.\textsuperscript{77}

The court, in an in-depth analysis of the \textit{Connick} two-pronged test, first held that Gonzalez's speech involved a matter of public concern.\textsuperscript{78} The court reasoned that in raising the possibility that the board's actions in reinstating the terminated employee were in violation of federal regulations, Gonzalez was speaking on a matter which, if true, could result in thousands of county residents losing millions of dollars in federal assistance. Noted the court, "While such a catastrophe may have been unlikely, we believe the importance of the programs at stake raised the issue to a matter of significant public concern."\textsuperscript{79} The court further held that the question of whether the commissioners' court complied with federal regulations was a matter of public concern.\textsuperscript{80} Finally, the court held that the question of allocating authority and responsibilities among the board, the commissioners' court, and the office of the executive director was a matter of public concern.\textsuperscript{81}

Turning to the second prong of the \textit{Connick} test, the court considered the governmental interest at stake. First, the court evaluated the nature of the working relationship of the parties and concluded that no close working relationship between Gonzalez and the board or the commissioners' court was required. However, the court sustained the lower court's finding that, irrespective of the absence of a close working relationship, Gonzalez occupied a particularly sensitive policymaking position in which he could frustrate the policies of the commissioners.\textsuperscript{82} Second, the court examined the government's interest in requiring the loyalty of a key executive employee. The court found that the employer had made no showing that Gonzalez's speech was likely to undermine the commissioners' policies, or that his failure publicly to acknowledge the authority of the commissioners posed a threat to the agency's operation.\textsuperscript{83} Gonzalez had not challenged the authority of the commissioners' court, held the court, but had only protested that, in exercising its authority, the commissioners' court had violated agency regulations.

The court considered the balance between Gonzalez's free speech rights and the governmental interest in maintaining a loyal, non-disruptive working relationship and struck that balance in favor of the employee.\textsuperscript{84} In so doing, the court noted the difficulty of balancing first amendment rights on a case-by-case basis, stating: "In many cases judges are free to decide the case on a hunch. Because of this unpredictability, individualized balancing inevitably

\begin{footnotes}
\item[77] Id. at 1297-98.
\item[78] Id. at 1300-01.
\item[79] Id. at 1301.
\item[80] Id.
\item[81] Id.
\item[82] Id. at 1301-02.
\item[83] Id. at 1302.
\item[84] Id. at 1303.
\end{footnotes}
chills some protected speech even as it discourages government officials from acting vigorously against some unprotected speech.\footnote{85}

Another case involving alleged violations of federal regulations by local government is \textit{Patkus v. Sangamon-Cass Consortium}.\footnote{86} Carol Patkus was the administrator of the Sangamon-Cass Consortium, an agency responsible for administering the Comprehensive Employment and Training Act (CETA) program. An employee filed a complaint over a personnel action taken by Patkus, and the Consortium appointed a hearing officer, Bruce Stratton, to investigate the complaint. Patkus sent a telegram to the Department of Labor stating concerns about the political involvement of Stratton and issuing specific charges against him, and called a meeting of selected members of the Consortium's advisory council at which she referred to the investigation as a "witch hunt." Patkus was dismissed a few days later, with the Consortium citing numerous instances of "insubordinate conduct," including the incidents noted above, as the basis for her dismissal. Patkus claimed she was dismissed in retaliation for the exercise of her first amendment rights.\footnote{87}

The district court held that Patkus's telegram to the Department of Labor constituted speech on a matter of public concern under \textit{Connick}, but that her dismissal was for insubordination—conduct not protected by the first amendment.\footnote{88} The court of appeals agreed with the lower court that the telegram was a matter of public concern.\footnote{89} Turning to her speech before the advisory council, however, the court stated that her comments "do not fit so readily into the recognized areas of public concern."\footnote{90} Of critical importance to the court was the fact that her statements to the council were a "mere extension" of her personal dispute with her superiors.\footnote{91} The court considered the content, form, and context of Patkus's speech as follows:

The content of Patkus's statements consisted of accusations against the absent members and those involved in the Stratton investigation and admonitions that the Advisory Council should not question her actions or communicate with county officials; the form of the statements included

\footnote{85. \textit{Id.}}. The court went on to note, however, that no feasible alternative to a case-by-case approach existed "because public employees speak in a great variety of circumstances [and] individualized balancing seems preferable to a predictable but inflexible categorical approach."\footnote{Id. See also \textit{McKinley v. City of Eloy}, 705 F.2d 1110, 1113-14 (9th Cir. 1983) (discussed infra text accompanying note 137) ("We recognize the courts have had some difficulty deciding when speech deals with an issue of 'public concern.'").}

\footnote{86. 769 F.2d 1251 (7th Cir. 1985).}

\footnote{87. \textit{Id.} at 1254-56.}

\footnote{88. \textit{Id.} at 1256.}

\footnote{89. \textit{Id.} at 1257.}

\footnote{90. \textit{Id.} at 1257.}

\footnote{91. \textit{Id.}}. The court viewed speech which informed the council of important matters relating to the program it oversees as a matter of public concern, but distinguished Patkus's statements before the council as amounting to no more than a personal grievance. \textit{Id.}
terms such as "witch hunt;" and the context in which they were made was a meeting that quite literally created division in a body functioning within the county government. These statements to the Advisory Council go well beyond Patkus’s interest, as a citizen, in commenting on matters of public concern.92

Since the telegram involved a matter of public concern, the court proceeded to the second prong of the Connick test to balance Patkus’s interest against the county’s. Because the telegram had been sent before local officials were given an opportunity to respond to the charges Patkus made, and because the telegram contained statements "likely to create division and controversy among officials of the county for whom Patkus worked,"93 the court struck the balance in favor of the county.94 In so holding, the court stated that Patkus "was engaging in highly disruptive, conflict-creating behavior, even though she was speaking about an important matter of public concern.95

A similar result was reached in Johnson v. Town of Elizabethtown.96 Plaintiff Deborah Johnson, Town Clerk of Elizabethtown, North Carolina, raised certain concerns about town management practices. Specifically, Johnson cited as improper the use of a facsimile signature stamp on town checks by the town administrator, the payment of tax collection fees without first obtaining written authorization by the town administrator, and the notarizing of right-of-way easements not signed in her presence. Johnson also complained to the town administrator about her long hours and low salary. She was dismissed and filed suit, claiming that her termination was in retaliation for her criticism of improper town management.97

The court held that only Johnson’s comments about the facsimile stamp, tax collection, and the notarization procedure constituted speech on matters of public concern.98 Even though her speech was protected, the court found that Johnson’s dismissal was not attributable to her protected conduct, but rather to her hostility and incompatibility with her co-workers.99

92. Id. at 1257.
93. Id. at 1258.
94. Id.
95. Id. at 1259.
96. 800 F.2d 404 (4th Cir. 1986). The Fourth Circuit had previously applied the Connick standard in Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) (concerning the termination of certain sheriff’s department deputies and whether such termination was violative of their first amendment right of political affiliation and their right of free speech, as exercised during the political campaign); and Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984) (discussed infra text accompanying note 101-03).
97. Johnson, 800 F.2d at 405-06.
98. Id. at 406.
99. Id. No showing was made that the town board, in its deliberations on whether to dismiss Johnson, had considered her questioning of proper administrative procedures. Id. at 406-07. The court cited Connick for the proposition that in some situations a supervisor need not tolerate speech on matters of public concern if he reasonably believes the speech would cause undue disruption and undermining of the worksite. Id. at 406. The court simply concluded that this was such a case, without elaborating on the balancing test required by Connick.
Although Johnson's speech was not found to be the basis for her dismissal, the court's determination that the subject matter of her speech—mismanagement of a public agency—was protected, was consistent with previous rulings of the Fourth Circuit and other courts.100 Within the Fourth Circuit, however, a narrow view of what constituted speech alleging mismanagement had prevailed. The court had previously held in Jurgensen v. Fairfax County101 that an internal report detailing administrative problems in a county emergency response office was not a matter of public concern.102 As in Johnson, there was no showing in the Jurgensen case that the "but for" or "motivating" cause of the discipline proposed against the county employee who supplied the report to the newspaper was the exercise of his free speech right. Rather, the discipline was imposed for his insubordination.103 A year later, in Daniels v. Quinn,104 the Fourth Circuit appeared to limit protected speech under Connick to those matters which "relate to wrongdoing or a breach of trust, not ordinary matters of internal agency policy."105


102. Id. at 888. Stated the court:

It seems pretty obvious that the report did not include material of any substantial public concern. As we have said, it brought 'to light [no] actual or potential wrongdoing or breach of trust;' it dealt more accurately with what would be characterized as 'internal office policy' of an agency and with the 'pay, hour and conditions of employment,' which . . . did not qualify of sufficient public concern as to justify First Amendment protection.

Id. (citation omitted).

103. Id. at 888. Jurgensen is reexamined in depth in Part III of this article.

104. 801 F.2d 687 (4th Cir. 1986).

105. Id. at 690. "For example, personal grievances about working conditions do not qualify as matters of public concern," stated the court. Id.
the *Daniels* decision, then, only speech alleging malfeasance or abuse of office was protected, and under *Jurgensen*, the scope of protected speech within this narrow category was limited. But late in 1987, the Fourth Circuit reexamined the scope of protected speech and backed off the narrow view set forth in *Daniels* with the issuance of *Piver v. Pender County Board of Education*.\(^{106}\)

In *Gonzalez, Patkus, Johnson*, and *Jurgensen* the employee was involved in a personal dispute with the public employer. Obviously, that fact was not dispositive, as Edgardo Gonzalez was able to prevail in the application of the second prong of the *Connick* test.\(^{107}\) Yet, where the employee is not involved in a personal dispute with the employer and brings to light allegations of malfeasance or abuse of office, the courts appear more likely to rule that the speech in question is on a matter of public concern.\(^{108}\) The article next examines some of those decisions.

In *Czurlanis v. Albanese*,\(^{109}\) plaintiff John Czurlanis appeared before a county governing board and made allegations of inefficiency, falsification of reports, and the performance of unnecessary repairs in the county motor vehicles department in which he worked. Four days after his appearance, Czurlanis was transferred to a less desirable garage and suspended for ten days for failure to use the grievance procedure to air his complaints. Czurlanis spoke at the next board meeting against certain tax expenditures and received a thirty-day suspension. Czurlanis claimed his first amendment rights were abridged by the suspensions.\(^{110}\)

The court held that Czurlanis's speech was on a matter of public concern.\(^{111}\) Noting that "unlike the plaintiff in *Connick*, it appears that before Czurlanis

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106. 835 F.2d 1076 (4th Cir. 1987).
107. See also Ohse v. Hughes, 816 F.2d 1144 (7th Cir. 1987), cert. granted, 108 S. Ct. 1070 (1988) (judgment vacated and remanded to the Seventh Circuit Court of Appeals). Plaintiff Ohse, a probation officer, first told fellow employees that the chief probation officer (with whom Ohse had a poor working relationship) drank at work and falsified his mileage expenses, and later sent a letter containing the same allegations to four judges, county board members, and the state attorney general's office. Ohse was dismissed, but the court held that his speech was on a matter of public concern (abuse of public office) and that the balance of interests fell in his favor. The court noted that although Ohse and Hughes had a close working relationship and that the letter had a disruptive impact on the office, the matter was of high public concern and that Ohse, as a citizen, was entitled to raise it. Thus, despite Ohse's series of personal disputes with his supervisor, he was able to prevail under the *Connick* analysis.
108. Tacit acknowledgement of the enhanced status of the employee who is not involved in a personal dispute with the employer is arguably found in Judge Ervin's concurring opinion in *Jurgensen*, 745 F.2d at 891: "I cannot accept the clear implication that when the balancing process is appropriate a finding that the employee has been guilty of 'insubordination' in any form and under all circumstances automatically and irrevocably tips the scales in favor of the employer." *Id.* (Ervin, J., concurring).
109. 721 F.2d 98 (3d Cir. 1983).
110. *Id.* at 98-101.
111. *Id.* at 103.
addressed the public meeting . . . he was secure in his position," the court considered the content, form, and context of the speech. The content of Czurlanis's remarks fell "squarely within the core public speech delineated in *Connick*"—whether public officials were properly discharging their governmental responsibilities. In holding that Czurlanis met the first prong of the *Connick* test, the court emphasized that Czurlanis did not discuss his own working conditions as an aggrieved employee, but rather spoke only as a citizen and taxpayer at a public forum called for just such purposes.

Proceeding to the second prong of the *Connick* test, the court found no evidence that Czurlanis's speech undermined the authority of his supervisor, or that the operations of the employer were disrupted; indeed, any disruptions that did occur were the result of his superiors' attempts to suppress his speech. The court also held that the failure to abide by the "chain of command" was excused, finding that "[a] policy which would compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill such speech."

*Brown v. Texas A&M University* provided a similar result. In *Brown*, a university accountant reported to his supervisor a possible mishandling of funds by a faculty member. The employee's relationship with his supervisor deteriorated. The employee eventually resigned "under protest," claiming he had suffered retaliation for speaking on the matter.

The court held that the expression of possible financial impropriety from one public servant to another is a matter of public concern under *Connick*. Brown's speech, in the court's view, was not on a matter only of personal interest, but concerned an attempt to bring to light actual or potential wrongdoing or breach of public trust. The case was remanded for further proceedings.

112. Id. at 104.
113. Id.
114. Id.
115. Id. at 106-07.
116. Id. at 106.
117. 804 F.2d 327 (5th Cir. 1986).
118. Id. at 329-30.
119. Id. at 337.
120. Id. In characterizing the speech as on a matter of public concern, even though the context in which it took place was in a one-on-one office discussion between employee and subordinate, the court said: "It cannot be gainsaid that in our society, pervaded with the ubiquitous and sickening spectre of governmental irregularity and mendacity, an expression relating to possible financial improprieties by a fellow public servant is a 'matter of public concern.'" *Id.* See also Patteson v. Johnson, 721 F.2d 228 (8th Cir. 1983) (employee in state auditor's office discharged for testifying before legislative committee that audit of governor's office was insufficient; court held speech was on matter of public concern and remanded for application of balancing test).
In other decisions public employees who were not involved in any personal dispute brought to light alleged malfeasance or abuse of office constituting, in the courts' view, speech on matters of public concern. For example, in *Thomas v. Harris County*¹²¹ a police officer's criticism of what he perceived to be favored treatment by the department of a private security force in a residential subdivision was held to satisfy the first prong of the *Connick* test.¹²² Similarly, in *Brockell v. Norton*¹²³ the court held that a police officer's telephone call to a municipal training instructor to report that a fellow officer had a copy of an examination to be given was an issue of public concern, noting that the public has a vital interest in the integrity of police officers.¹²⁴ In addition, in *Greenberg v. Kmetko*¹²⁵ a social worker's criticism of the department's handling of certain cases, aired at a meeting of the department's oversight board, was held to constitute speech on a matter of public concern that outweighed the disruptive effect produced by the employee's criticism.¹²⁶ And in *DiFranco v. City of Chicago*¹²⁷ a city employee's complaints that a fellow employee was using city equipment to perform non-city work during work hours and that the mayor's husband was using city-owned photographs on his private Christmas cards were held to be protected speech concerning the diversion of public resources for private or political use.¹²⁸

In this second category of cases, it appears that if the speech concerns malfeasance or abuse of office and the employee speaks as a concerned citizen, not as an aggrieved employee, then the courts appear likely to find that the employee has satisfied both prongs of the *Connick* test. Yet, where the employee who speaks on alleged malfeasance or abuse also has a personal dispute with his employer, the speech may not be deemed protected. Predicting the outcome in this latter category is difficult, however, as evidenced

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¹²¹. 784 F.2d 648 (5th Cir. 1986).
¹²². *Id.* at 653. The case was remanded to determine whether the officer's speech caused his supervisor to transfer him in retaliation. *Id.*
¹²³. 732 F.2d 664 (8th Cir. 1984).
¹²⁴. *Id.* at 668. This interest outweighed the disruptive effect caused by the officer going outside the "chain of command" and reporting the alleged infraction directly to city authorities, especially where, as here, the requirement that officers first bring complaints to their immediate superiors for resolution had not been strictly enforced. *Id.* See also *Solomon v. Royal Oak Township, 656 F. Supp. 1254, 1262-63* (E.D. Mich. 1986) (no requirement to follow chain of command in police department where to do so would be futile, and regulations requiring officers to follow chain void as vague and overbroad).
¹²⁵. 811 F.2d 1057 (7th Cir.), *reh'g granted, 820 F.2d 897* (7th Cir. 1987), *vacated, 840 F.2d 467* (7th Cir. 1988).
¹²⁶. *Id.* at 1062. Stated the court: "To the extent that [the employee's] role as critic and gadfly impeded his office performance, we believe this negative aspect was offset by the importance his comments had in alerting the courts and state DCFS officials that their orders were being subverted or ignored." *Id.*
¹²⁸. *Id.* at 247.
by the contrary holdings in Gonzalez and Patkus. Recall that in both cases the employee spoke out on alleged failure to follow federal requirements in administration of an anti-poverty program, and that in both cases the employees were involved in personal disputes with their superiors. In Gonzalez, the court held that the employee's speech was on a matter of public concern in spite of the existence of a personal dispute;^29 in Patkus, the court found the speech unprotected because of the dispute.^30 Thus, in this second grouping of cases, the employee may or may not meet the first prong of the Connick test, even if the speech concerns malfeasance or abuse of office. And even if the speech is deemed protected, the balance that will be struck between the competing interests of the parties under the second prong of the Connick test is difficult to predict.

C. Speech on Public Safety and Welfare

A third category of cases may be identified, in which an employee speaks out on an issue that may be broadly characterized as concerning public safety and welfare. In these cases, usually involving public safety personnel, the employee voices concern about the ability of the employer adequately to execute its public safety responsibilities or speaks out on employer practices that allegedly undermine the welfare of employees.

Three recent decisions typify those concerning the question of public safety. In Brown v. Port Authority,^31 a lieutenant in the security force assigned to JFK Airport was disciplined following his writing a memo to his superiors and his union in which he expressed the view that airport security was not sufficient to repel terrorist activity. Although the memo also addressed the plaintiff's personal safety concerns, noted the court, the memo essentially concerned the ability of the airport to respond to a matter of the utmost public concern—terrorism. In Knapp v. Whitaker a public school teacher was discharged after he wrote a letter to school board members concerning, inter alia, the failure of the school system to provide adequate liability insurance for coaches and volunteer parents who transport students to athletic

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129. 774 F.2d at 1300-01 ("[W]e do not read Connick, however, to exclude the possibility that an issue of private concern to the employee may also be an issue of public concern.").
130. The Court stated:
   Informing an entire Advisory Council of important matters relating to the program it oversees would clearly be action similar to that of sending the telegram [and thus protected]. But the actions and statements that occurred here more nearly resemble a 'mere extension' of Patkus's personal dispute with specific individuals. Actions of that sort were determined to be private and not matters of public concern in Connick.
769 F.2d at 1257 (quoting Connick, 461 U.S. at 148).
132. Id. at 521.
133. 757 F.2d 827 (7th Cir.), cert. denied, 474 U.S. 803 (1985).
events. The court held that this speech concerning the adequate indemnification of volunteers was likewise a matter of public concern.° And in Koch v. City of Hutchinson a fire marshall was demoted after he released a copy of his fire inspection report which stated that a fire had been caused by arson, contrary to the findings of other investigators. The local newspaper published stories of internal debate over the cause of the fire, and the city claimed the resulting disruption of the department warranted the employee's demotion. The court held that the release of the report aided the public in evaluating the conduct of the government in discharging its duty to investigate possible arson and to reduce the likelihood of fires and was thus a matter of public concern. 

Related to these cases are those in which the employee voices concern about the treatment and welfare of public employees and the resulting impact on the quality of services provided to the public. For example, in McKinley v. City of Eloy plaintiff Michael McKinley claimed his dismissal from the city police force was in retaliation for his public criticism of the city's decision not to give police officers an annual raise. The court held that McKinley's speech was protected, as it 

dealt with the rate of compensation for members of the city's police force and, more generally, with the working relationship between the police union and elected city officials. . . . [C]ompensation levels undoubtedly affect the ability of the city to attract and retain qualified police personnel, and the competency of the police force is surely a matter of great public concern.

Similarly, the court in O'Quinn v. Chambers County held that a police officer's attempt to secure overtime payment under the Fair Labor Standards Act by filing suit constituted the exercise of speech on a matter of public concern, as congressional intent to protect the working public was at issue. In Cranford v. Moore, however, the court rejected a police officer's claim that his letter to the city manager attempting to secure overtime payment for officers was protected speech.

134. Id. at 841.
135. 814 F.2d 1489 (10th Cir. 1987).
136. Id. at 1497-98.
137. 705 F.2d 1110 (9th Cir. 1983).
138. Id. at 1114, See also American Postal Workers Union v. United States Postal Service, 595 F. Supp. 403, 407 (D. Conn. 1984), rev'd, 766 F.2d 715 (2d Cir. 1985), cert. denied, 475 U.S. 1046 (1986) (speech by postal employee in opposition to transfer of employees, in which he claimed the transfers would cause delayed mail service to customers, held matter of public concern).
142. Id. at 718. The police officer also wrote three letters to the local newspaper: the first
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Thus, a public employee who speaks on matters of public safety and employee welfare may invoke first amendment protection against retaliatory discharge. As in the second category of cases, however, conflicting decisions, typified by O'Quinn and Cranford, appear.

D. Speech on the Quality of Public Education

Numerous cases have arisen in which school teachers and university professors have questioned actions of their employers as undermining the quality of public education. As in the other categories of cases discussed above, the employee is sometimes involved in a personal dispute with the educational institution over the issue in question. The question presented is whether the employee's speech is merely a personal disagreement with the employer, or an issue of educational policy constituting a matter of public concern.

In Johnson v. Lincoln University, plaintiff William Johnson, a professor at Lincoln University, was removed as chair of the chemistry department. Johnson had criticized the president of the university for his proposal to reduce substantially the number of faculty positions, which would, in Johnson's view, lower the academic standards of the university. Indeed, Johnson "was apparently 'in the forefront of the faculty dissidents and was quite outspoken in his criticism of [the university's president].'" Johnson's criticism took two forms: controversies within the chemistry department, which were marked by shouting and name-calling incidents, and letters to the Middle States Association of Schools.

The court held that both the angry speech at department meetings and the letters to the Association constituted speech on matters of public concern. In evaluating the content, form, and context in which the speech took place, the court cited the Supreme Court's ruling in Tinker v. Des Moines Independent Community School District for the proposition that "[i]n an academic environment, suppression of speech or opinion cannot be justified by an 'undifferentiated fear or apprehension of disturbance.'" The court remanded the case for further proceedings on the questions of striking the

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proposed a new method of electing aldermen, the second criticized the aldermen for approving a nuclear power plant, and the third stressed the importance of citizens being able to openly criticize the executive branch of the United States government. The officer was terminated two months later, ostensibly for giving preferential treatment to some citizens in writing parking tickets. The court found an insufficient nexus between the officer's letter-writing activity and his termination. Id.

143. 776 F.2d 443 (3d Cir. 1985).
144. Id. at 448.
145. Id. (quoting Trotman v. Board of Trustees of Lincoln Univ., 635 F.2d 216, 221 (3d Cir. 1980), cert. denied, 451 U.S. 936 (1981)).
147. Johnson, 776 F.2d at 453-54 (quoting Tinker, 393 U.S. at 508).
balance of interests and determining the cause of Johnson's demotion.

An opposite result was reached on comparable facts in *Landrum v. Eastern Kentucky University*. In *Landrum*, a professor claimed he was denied tenure for his expression of multiple criticisms of the dean and department head. The court held that the speech essentially concerned the employee's personal disputes, and that even if some of the expression involved matters of public concern, the university's interest in "conduct[ing] its affairs without constant disruptions due to factionalism and machinations of troublemakers" outweighed the employee's freedom of expression.149

Similar conflicts appear in cases concerning public school employees. In *Jett v. Dallas Independent School District*,50 Norman Jett claimed his dismissal from his position as football coach was in retaliation for his comments, published in the local newspaper, that only two athletes at his school could meet NCAA academic eligibility requirements. The court held that Jett's remarks concerned "the academic development of public high school football players" and "certainly addresse[d] matters of concern to the community."51 The court resolved the Connick balance in the employee's favor. Also, in *Lees v. West Greene School District*,152 plaintiff Karen Lees, a substitute school teacher, claimed her failure to be selected for a permanent position was in retaliation for her speaking at a school board meeting against the proposed transfer of a social studies teacher to an English teaching position. Lees argued that the transfer would undermine the quality of instruction in English, and that the position should be filled by someone with background as an English teacher.53 The court held that Lees's speech addressed the quality of education in public schools and was thus on a matter of public concern.154 And in *Roberts v. Van Buren Public Schools*,155

149. Id. at 246. See also *Jordan v. Board of Regents, Univ. System*, 583 F. Supp. 23, 28 (S.D. Ga. 1983) (personal complaints about the internal operation of the university not protected speech); Ballard v. Blount, 581 F. Supp. 160, 163-64 (N.D. Ga. 1983) (faculty member's grievance concerning the amount of his salary increase, the method of assigning freshman English courses, the appropriateness of a course syllabus, and the procedures for review and approval of course syllabi held to constitute speech on personal, not public, concern); Mahaffey v. Board of Regents, 562 F. Supp. 887, 890 (D. Kan. 1983) (faculty member's advocacy of creating separate department for his area and publicizing to class a student's paper critical of certain administrative decisions within the department are "quintessentially" matters of individual, not public, concern).
150. 798 F.2d 748 (5th Cir. 1986).
151. Id. at 758.
153. Id. It should be noted that Lees had a background in teaching English; obviously, then, she had a personal stake in the outcome of the dispute as a likely candidate for the position. Id.
154. Id. at 1331. The court denied the defendant's motion to dismiss, finding unresolved factual issues with regard to the question of causation for plaintiff's non-appointment. In evaluating the second prong of the Connick test as applied to this case, the court focused on
a teacher’s complaint about the sacrifice of books to allow expenditure for other classroom supplies was held to be a matter of public concern. Finally, in *Piver v. Pender County Board of Education*, a North Carolina school teacher’s criticism of the school board’s proposal to dismiss his principal was held to be protected speech. The Fourth Circuit apparently abandoned its narrow standard, announced only a year earlier in *Daniels v. Quinn*, that only speech alleging malfeasance or abuse of office was protected. Stated the court:

*Pickering*, its antecedents, and its progeny—particularly *Connick*—make it plain that the “public concern” or “community interest” inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely “personal concern” to the employee—most typically, a private personnel grievance. The focus is therefore upon whether the “public” or the “community” is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a “private” matter between employer and employee.

By contrast, the court in *Renfroe v. Kirkpatrick* held that a non-tenured teacher’s claim that she was not rehired because she had filed a grievance asserting her interest in keeping a full-time job (rather than entering a proposed time-share arrangement) was not protected speech. The court construed the teacher’s speech as amounting to no more than a personal dispute, noting that the mere fact the teacher asserted that hiring her full-time would enhance the welfare of the students was not enough to make the lack of a close working relationship between the teacher and the board. The court stated that “[n]o persuasive argument can be made that the Plaintiff’s work relationship with the school board requires her loyalty and confidence in order for her to properly function as a teacher. Certainly, it is unlikely at best that her job performance was seriously undermined by her speech.” *Id.* at 1332 (citations omitted). *See also* Loya v. Desert Sands Unified School Dist., 721 F.2d 279, 281-82 (9th Cir. 1983) (teacher’s remarks in local newspaper that school system not meeting needs of Mexican children and school board not making efforts to recruit minority teachers held speech on matter of general public interest, as speech was about the preferable manner of operating the school system).

155. 773 F.2d 949 (8th Cir. 1985).
156. *Id.* at 956. The court stated that a teacher may certainly speak on the allocation of public funds, even if that speech is made in a grievance. The fact that the speech was made in private as part of a grievance may be taken into account in striking the balance of interests, but not in determining whether the speech is a matter of public concern. *Id.*
157. 835 F.2d 1076 (4th Cir. 1987).
158. 801 F.2d at 690. *See also supra* text accompanying notes 104-06.
this a matter of public concern.\textsuperscript{161} And in \textit{Daniels}, the court held that a complaint by a teacher's aide about the late arrival of textbooks was not protected speech under \textit{Connick}.\textsuperscript{162}

Thus, several decisions recognize complaints aired by teachers and professors involving the quality of academic services as speech on a matter of public concern. Certainly, however, the cases turn on fine distinctions: The employee complaint about the inadequate facilities (missing textbooks) held to be a personal dispute in \textit{Daniels} is difficult to distinguish from the teacher's complaint about the inadequate facilities (discontinued books) held to be a matter of public concern in \textit{Roberts}. Similarly, the result in \textit{Landrum} is difficult to reconcile with the result in \textit{Johnson}, as both involve speech on how well a university was run, but only one was held to be protected. Again, while one can generally state that speech on the quality of public education is a matter of public concern, it is not at all clear which statements will be found to fit that category.

\textbf{E. Speech Concerning Discrimination}

Another category of cases involve speech by employees concerning discrimination because of race, sex, or union membership. With the Supreme Court's ruling in \textit{Givhan v. Western Line Consolidated School District}\textsuperscript{163} that allegations of discriminatory practices made in a one-on-one meeting between a teacher and her principal were protected speech, the door was opened for other employees similarly to assert that their claims of discrimination constituted speech on a matter of public concern.

In \textit{Dougherty v. Barry}\textsuperscript{164} plaintiff Edward Dougherty, a white fire fighter formerly employed by the District of Columbia, claimed he was passed over for promotion due, in part, to his participation in a rally held to protest discriminatory promotion policies of the District government.\textsuperscript{165} The court cited \textit{Givhan} and \textit{Connick} to support its finding that Dougherty's partici-

\begin{itemize}
\item \textsuperscript{161} \textit{Id. at} 715. \textit{See also} Derrickson v. Board of Educ., 738 F.2d 351 (8th Cir. 1984) (even assuming teacher's criticism of school administration touched on matters of public concern and activities motivated by genuine concern for improving quality of education, his inability to work harmoniously with others warranted his dismissal); Gregory v. Durham County Bd. of Educ., 591 F. Supp. 145 (M.D.N.C. 1984) (essence of plaintiff teacher's complaint was a conflict between mandatory teacher training program and her planned vacation; fact that teacher's letter protesting requirement she attend training also expressed dissatisfaction with school administration did not make the letter speech on a matter of public concern).
\item \textsuperscript{162} 801 F.2d at 690. The court stated that although certain conditions at school, including the late arrival of books, can be argued to be of public concern inasmuch as they affect the adequacy of the educational program, they are best resolved by school boards and administrators, not federal courts. \textit{Id. See supra} text accompanying notes 104-05.
\item \textsuperscript{163} 439 U.S. 410, 413 (1979). \textit{See supra} text accompanying notes 25-27.
\item \textsuperscript{164} 604 F. Supp. 1424 (D.D.C. 1985).
\item \textsuperscript{165} \textit{Id. at} 1428-31.
\end{itemize}
pation in the rally was speech entitled to protection under the first amend-
ment, and that his failure to be promoted was attributable, in part, to his
speech.166

Similarly, in Pollard v. City of Chicago167 plaintiff Henry Pollard alleged
he was suspended and involuntarily transferred as a result of concerns he
voiced to his supervisor that a black woman co-worker was the target of
sexual and racial harassment by other employees. The court held that
Pollard’s “speech identifying potentially actionable discrimination by gov-
ernment employees constitutes a matter of public concern.”168 And in O’Con-
nor v. Peru State College169 the complaints of the women’s physical education
instructor concerning the inadequacy of facilities for the women’s basketball
team were held to constitute speech on a matter of public concern in that
they raised the issue of equal treatment for women athletes.170

By contrast, in a number of cases an employee’s claim that individual
allegations of discrimination constitute protected speech has been held to be
no more than a private dispute with the employer. For example, in Lipsey
v. Chicago Cook County Criminal Justice Commission,171 plaintiff Robert
Lipsey claimed his termination as an assistant planner was in retaliation for
a letter he wrote to his supervisor complaining he was underpaid because he
was black. Lipsey claimed the letter was protected speech concerning the
agency’s policy of race discrimination. Differentiating this case from that
noted above, the court said:

[T]his court is aware that Lipsey’s right to protest race discrimination in
a department of state government is a “matter inherently of public
concern.” The court is also aware that Lipsey does not forfeit that right
when he conveys the message to his superiors in a private forum. The
court is not convinced, however, that Lipsey’s comments, in the factual
setting they were made, took on the character of general allegations of
race discrimination practiced in the department or by the department
supervisors. The content of the memorandum (cited earlier) reveals that
it was made as part of a salary dispute. It does not identify other persons
who have been subjected to such treatment. It does not state that there
is a department policy that prevents him from getting better assignments,
more money, or better working hours. It narrows in on his personal
qualifications and interests, and directs his personal dissatisfaction in his

166. Id. at 1437-39. The court also found that the city failed to promote Dougherty because
he had filed complaints of discrimination with the city’s office of human rights. Id. at 1438.
168. Id. at 1249. See also Patterson v. Masem, 594 F. Supp. 386 (E.D. Ark. 1984) (speech
by school teacher in opposition to production of high school play she thought racist held
protected; however, causal link between speech and denial of promotion not proved), aff’d,
774 F.2d 251 (8th Cir. 1985).
170. Id. at 763. The court found no nexus between the instructor’s speech and the non-
renewal of her contract, however. Id.
compensation to his immediate supervisor and blames his poor pay on his supervisor's racial animus. The dispute is personal; the target is Lipsey's supervisor. Lipsey did not speak "as a citizen upon matters of public concern.”172

Similarly, individual claims of employment discrimination on the basis of sexual preference have been held to be mere personal disputes. In Johnson v. Orr173 a former Air Force Reserve officer was discharged after she sent a letter to her commanding officer declaring herself a homosexual. The court held that the officer was not discharged in violation of her free speech rights because the letter was on "a matter personal to herself and was not a communication or advocacy of a citizen upon matters of public concern."174 And in Rowland v. Mad River Local School District175 a discharged guidance counselor's statement to her co-workers and supervisor that she was bisexual was likewise held to be a personal matter and thus outside the ambit of Connick's protection.176 Where, however, employees can demonstrate that they spoke as citizens "espousing 'or denouncing' either side of the debate [on homosexual employment] it would certainly appear that [their] comments would be protected by the first amendment.”177

Related to these cases are those in which the speech concerns allegations of discrimination based not on race or sex, but rather on union activity. In American Postal Workers Union v. United States Postal Service,178 a postal worker, Joseph Gordon, was discharged after he wrote a column in a union newsletter in which he stated that while he was sorting the mail he had read an anti-union appeal from Congressman Phillip Crane and urged his co-workers to combat Crane's efforts.179 Gordon's discharge was based on his admission in the column that he had read the mail while sorting it, in violation of Postal Service regulations.180

172. Id. at 841-42 (citations omitted).
174. Id. at 176.
176. Id. at 449. Judge Edwards dissented, noting that although the initial disclosure of bisexuality by the employee was made in confidence, her repeated statements to others were part of an effort to establish the right to keep working despite her sexual preference. Since the speech to others was spread to others and became the focus of community debate, it "became a part of the nationwide debate on homosexuality and the rights or lack thereof of homosexuals" and thus was on a matter of public concern. Id. at 452-53 (Edwards, J., dissenting).
178. 830 F.2d 294 (D.C. Cir. 1987).
179. Id. at 297.
180. Id. at 298. Interestingly, Gordon printed a retraction in the next issue of the newsletter, stating that he had not actually read Crane's letter while sorting the mail, but rather had been informed of the letter by a co-worker. Id.
The court held that Gordon was dismissed in violation of his free speech rights. Applying the first prong of the Connick standard, the court held that Gordon's speech addressed a matter of public concern:

Gordon's column, entitled "Workers of the World Unite," was exclusively concerned with efforts to reinvigorate the trade union movement and, more specifically, to combat the threat to organized labor from "right to work" laws. The urge to unionize certainly falls within the category of expression that is "fairly considered as relating to any matter of political, social, or other concern to the community."

The court then applied the second prong of Connick and held that the employee's interest in speaking on this issue outweighed the government's interest in maintaining the "public's confidence in the confidentiality of the mailstream," as no harm to that confidence had been demonstrated. Applying Mt. Healthy, the court concluded that Gordon's dismissal would not have occurred but for his protected conduct and rejected the employer's proffered reliance on violation of regulations to justify his dismissal.

By contrast, the court in Santella v. Grishaber held that a police officer's attempt to characterize his grievance concerning unfair and ineffective employment practices by the city (and thus on matters of public concern) was misdirected, as the grievance concerned only the application of certain employment practices to him. And in Lynn v. Smith the court held that a union steward's grievances over travel time, overtime, and leave requests were of a purely personal nature; nonetheless, the court found that one grievance claiming invasion of employee privacy "may be construed as involving a matter of public concern."

Thus, where an employee's speech addresses general concerns of discriminatory policies or practices by public employers, not limited to individual allegations of discrimination, the courts may hold that the speech is on a...
matter of public concern. Yet no clear guidance emerges from the decisions to predict with certainty whether speech in this area will be deemed protected as the courts retain significant discretion in characterizing the speech as concerning merely personal versus public interest.

F. Matters of Purely Personal Interest

As already noted in the preceding sections, the courts have refused to extend first amendment protection to speech on matters of purely personal interest, consistent with Connick's admonition that "government offices could not function if every employment decision became a constitutional matter."188 This section provides a brief overview of representative decisions, other than those already noted, in which speech by a public employee failed to meet the first prong of the Connick test because it was on a matter of personal concern. These cases fall at the other end of Justice White's spectrum of speech discussed above.

In Alinovi v. Worcester School Committee189 a school teacher posted three letters from the school board on parents’ night concerning her refusal to turn over a student case study she had written to her principal and the board’s proposal to discipline her for that refusal. The court held that the employee’s purpose in posting the letters was to bring about a resolution to her own disciplinary problem, not to inform parents about how the school board operated.190 Similarly, in Day v. South Park Independent School District191 the court held that a teacher's letters to school administration officials protesting the negative performance evaluation given her by the principal was purely a private matter.192 By contrast, the court in Wells v. Hico Independent School District193 held that a teacher's protest to the school board of her poor performance evaluation pertained in part to matters of public concern, as the teacher showed the evaluation was in retaliation for her work in a "Right to Read" program not favored by her supervisor.194

In Murray v. Gardner195 the plaintiff, an FBI special agent, criticized at an all-employee meeting the bureau’s lottery method to determine layoffs and was subsequently disciplined. The court held that the agent’s comments

188. 461 U.S. at 143.
189. 777 F.2d 776 (1st Cir. 1985).
190. Id. at 786-87.
191. 768 F.2d 696 (5th Cir. 1985).
192. Id. at 700. See also Gearhart v. Thorne, 768 F.2d 1072 (9th Cir. 1985) (plaintiff's grievance refuting charges of ineptitude not speech on a matter of public concern); Lehpamer v. Troyer, 601 F. Supp. 1466 (N.D. Ill. 1985) (police officer's suspension not in retaliation for speaking out against poor evaluation; individual performance evaluation a purely personal matter not protected under Connick).
194. Id. at 249.
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dealt only with an individual dispute, and that the speech had "no relevance to the public's evaluation of the performance of governmental agencies."\(^{196}\) Stated another way, "the role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontented employee do not."\(^{197}\) By contrast, the court in *Egger v. Phillips*\(^{198}\) held that an FBI agent's allegations of corruption in the Indianapolis office extended beyond his own poor working relationship with his supervisor to implicate public concerns about the effectiveness of the FBI.\(^{199}\)

Although both cases involved free speech claims by FBI agents, the differing circumstances of the cases and the fact that they were decided in different circuits may explain, in part, the different outcomes. The *Murray* decision, however, is particularly noteworthy when compared to another decision, *Krodel v. Young*,\(^{200}\) rendered by the same court shortly thereafter. In *Krodel*, persistent criticism of practices and procedures by a management analyst at the Social Security Administration was found to "conceivably" constitute a matter of public concern.\(^{201}\) However, the court did not reach the *Connick* balancing test because the employee had not pursued his available administrative remedies before filing suit.\(^{202}\)

Perhaps the most frequent reason cited by the courts for finding speech outside the ambit of *Connick* is that the speech arose as part of a grievance. For example, in *Cook v. Ashmore*\(^{203}\) plaintiff Phillip Cook was notified in 1980 that his employment as director of a college continuing education program would be terminated because he had not generated sufficient funds. Cook filed a grievance with the college, claiming his termination was not made with adequate notice. The college sustained his grievance, and his employment was extended to the following year without renewal.\(^{204}\) Cook claimed the failure to renew his contract was in retaliation for his having filed the grievance, in violation of his free speech rights. The court held that the grievance on the amount of notice due Cook was clearly a matter of personal, not public, concern, and thus failed to meet the first prong of the *Connick* test.\(^{205}\) Similar results were reached in *Simon v. City of Clute*,\(^{206}\) in which a written grievance presented to the city council by a group of former and current police officers alleging favoritism and arrogance by the police

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\(^{196}\) *Id.* at 438 (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)).

\(^{197}\) *Murray*, 741 F.2d at 438.

\(^{198}\) 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983).

\(^{199}\) 710 F.2d at 317.

\(^{200}\) 748 F.2d 701 (D.C. Cir. 1984).

\(^{201}\) *Id.* at 711-12.

\(^{202}\) *Id.*


\(^{204}\) *Id.* at 80-81.

\(^{205}\) *Id.* at 84.

chief was held to be a mere personal complaint; in *Singh v. Lamar University*, in which a plaintiff's claim that he was denied tenure in response to his having successfully grieved previous adverse promotion decisions was held to constitute a matter of purely personal interest; and in *Sipes v. United States*, in which an employee's claims of retaliation for complaints of unequal treatment of employees for similar offenses were held to be no more than personal concerns about personnel actions affecting his employment.

The fact that an employee's speech was made in the context of a grievance is not dispositive, however. Rather, the critical inquiry is whether the substance of the grievance, taken as a whole, "deals with individual personnel disputes and grievances . . . of no relevance to the public's evaluation of the performance of governmental agencies, [or] concerns 'issues about which information is needed or appropriate to enable the members of society' to

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208. 744 F.2d 1418 (10th Cir. 1984).
209. See also Saye v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862, 866 (10th Cir. 1986) (teacher's complaints to parents about cut-back on student aide time held extension of her personal dispute with principal, not matter of public concern); Lewis v. Blackburn, 759 F.2d 1171, 1172 (4th Cir. 1985) (per curiam) (protest by magistrate to judge and legislators concerning assignment of additional duties held matter of self-interest, "not public-spirited concern over administration of justice," as stated in dissent to original panel opinion, 734 F.2d 1000, 1010 (4th Cir. 1984)); Davis v. West Community Hosp., 755 F.2d 455, 461-62 (5th Cir. 1985) (surgeon with staff privileges at community hospital criticized hospital personnel and claimed ineffective treatment of patients; speech held to involve only personal grievances against various co-workers and administrators); Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) (claim of retaliation for submission of claim for overtime pay a matter of purely personal interest); Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir. 1984) (officer's urging another officer to appeal suspension not speech on matter of public concern, but a private personnel dispute); Thompson v. McDowell, 661 F. Supp. 498, 500 (E.D. Ky. 1987) (statement that agency needed a 24-hour deadline for equipment repairs, that it did not divide its budget fairly, and that the agency should buy only the best equipment at a fair price was an expression of purely personal interest; "[j]ust because the expenditure of public funds is tangentially implicated does not entitle the expression to protection"); *Lehpamer*, 601 F. Supp. 1466 (police officer's speech on his poor evaluation not speech on matter of public concern, but a personal grievance on personnel matters that do not directly affect the public); Ferrara v. Mills, 596 F. Supp. 1069, 1071 (S.D. Fla. 1984) (complaint by school teacher about class assignments and hiring of athletic coaches to teach social studies, "while tangentially related to matters of public concern, constitutes nothing more than a series of grievances with school administrators over internal school policies"); Owens v. City of Derby, 586 F. Supp. 37, 41 (D. Kan. 1984) (police officer's grievance critical of mayor and other city officials outside ambit of *Connick* because it relates to ongoing dispute between plaintiff and his employer, and "speech related primarily to a personal employment dispute is not protected by the First Amendment"); Cook v. Ashmore, 579 F. Supp. 78, 80 (N.D. Ga. 1984) (grievance concerning amount of advance notice due before dismissal is not a matter of public concern); Ballard v. Blount, 581 F. Supp. 160, 163 (N.D. Ga. 1983) (professor's claims of retaliation for speech concerning course assignments, salary increase, and inappropriate syllabus for course held a personal dispute).

210. *Connick*, 461 U.S. at 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."). See also *Davis*, 755 F.2d at 461 ("The fact, then, that the communications here were inhouse does not necessarily destroy their protection under the First Amendment . . . . ").
make informed decisions about the operation of their government." 211 And, indeed, there are a few instances in which speech made in the context of a grievance has been held protected under the first prong of the Connick test. 212 By and large, however, it is difficult for an employee to overcome the threshold determination required by Connick that the speech address a matter of public concern when that speech is made in a grievance.

III. ALTERNATIVES TO CONNICK AND CONTINUED CONFUSION

As demonstrated by the decisions discussed in Part II, lower federal courts have been anything but consistent in their determination of what speech is protected under Connick v. Myers. 213 Although broad categories of cases can be identified, there exist contradictions within every category, leaving public employees and employers confused as to the scope of their free speech rights and responsibilities. As aptly noted by Professor Massaro, 214 the problem lies in the almost unbridled discretion given the courts under Connick in determining what speech is on a matter of public concern. Massaro states, "In an effort to contain the effects of its decision to apply the Constitution to public employers, the Court has fashioned doctrine that is vague [and] internally inconsistent . . . ." 215

What alternatives are appropriate for consideration? At least three are possible, as discussed below.

First, the courts could continue to apply the Connick two-pronged test on a case-by-case basis, thus establishing a substantial body of precedent over time. As more varying factual situations arose for resolution, the categories of cases noted above would become more refined, and other categories would undoubtedly emerge. The practitioner could perhaps be more likely, with diligent research, to discover a case which paralleled his own to the point that the outcome could be predicted. This alternative, then, is merely to maintain the status quo, with the expectation that over time this area of law will become more settled.

The problem with this alternative, however, is twofold. First, it is impossible to address all the circumstances in which the question of speech on a matter of public concern may arise. 216 Second, even under existing precedent there is substantial contradiction, and there is no reason to anticipate that

211. McKinley, 705 F.2d at 1114 (quoting Thornhill v. Alabama, 310 U.S. 88 (1946)).
212. See Lynn, 628 F. Supp. at 290 (grievance by shop steward alleging invasion of privacy may be construed as involving matter of public concern); Roberts, 773 F.2d at 956 (grievance by teacher over allocation of funds a matter of public concern).
215. Id. at 25.
this conflict will subside over time. Thus, the problem of different courts reaching different results under similar circumstances will continue as long as the broad discretion afforded judges under Connick remains the applicable standard. As a variation on this first alternative, the Supreme Court could, using an appropriate case as a vehicle, grant certiorari to give additional guidance on what constitutes a matter of public concern under the first prong of the Connick test. For example, the Court could clarify the significance, if any, of the fact that an employee speaks as a school teacher on a curriculum issue rather than as a citizen on a zoning dispute. The problem, again, is that even with additional guidance to the lower courts, the myriad of factual settings that will arise and the broad discretion granted the court under the existing Connick standard ensure that similar cases will be judged differently. A second alternative has recently been suggested by Professor Massaro, under which the Connick standard is abandoned in favor of a two-step approach that does not distinguish between public and private speech.\textsuperscript{217} Under Massaro's proposal, step one would determine whether the speech would be "permissible 'street corner' discourse";\textsuperscript{218} if not, government regulation of the speech would be warranted. If the speech were of the type that a given citizen could otherwise express, then step two is an examination of the circumstances to weigh the government's interest in restricting speech against the citizen/employee's first amendment interests.\textsuperscript{219} Massaro's proposal, while correctly identifying the problem of overly broad discretion of the courts in determining what constitutes a matter of public concern, completely eliminates the public concern variable from the equation. As such, Massaro's proposal represents a substantial departure from the premise originally set forth in Pickering v. Board of Education\textsuperscript{220}: that the first amendment interest to be protected is that public employees be allowed to exercise the right "they would otherwise enjoy as citizens to comment on matters of public interest . . . ."\textsuperscript{221} Total elimination of the public concern aspect of public employee free speech analysis goes too far. A third alternative is to retain the principle set forth in Pickering that public employee speech rises to the level of first amendment protection only if it is in the realm of public matters, but to return that principle to its proper place in the equation. Simply stated, the effect of the Connick two-pronged test is to emphasize unduly the first prong of the inquiry; by affording the courts the opportunity to decide close cases on the first prong of the test—that is, to rule as a matter of law that the

\textsuperscript{217} Massaro, supra note 214, at 67.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} 391 U.S. 563 (1968).
\textsuperscript{221} Pickering, 391 U.S. at 568.
matters is not one of public concern—the harder question of proper resolution of interests may be avoided. As recently noted by the Eleventh Circuit:

[I]n most instances speech of a public employee will have aspects or subjects that are worthy of paramount protection under the First Amendment, as well as aspects or subjects that are not worthy of such heightened protection. The task under Pickering is to balance those competing interests and to determine whether the employee's interests in the speech as a whole outweigh the public employer's interests. The approach taken by the district court here [applying the first prong of the Connick test] shortcircuited that balancing process by avoiding the hard choices inherent in the Pickering equation.\(^{222}\)

A better alternative is to return to the standard originally set forth in Pickering, under which the court is required to address the question of whether the speech is on a matter of public concern as part of the broader inquiry into balancing the respective interests of the parties, not as a threshold inquiry. There is little doubt that the effect of Connick has been to narrow the free speech rights of public employees, primarily through the requirement that a court examine the context in which the speech arose as part of the threshold determination.\(^{223}\)

Moreover, under the continuum of speech set forth by Justice White in Connick, it is not enough that the speech address a matter of public concern because some matters are more protected than others.\(^{224}\) A better approach is to err on the side of first amendment interests of employees and assume that speech is on a matter of public concern in close cases, recognizing that if legitimate governmental interests in suppression can be articulated, the ultimate balance will be struck in favor of the employer.

To illustrate the difference in these three alternatives, the article reexamines Jurgensen v. Fairfax County\(^{225}\) under each approach. Once again, the speech in question in Jurgensen was an internal report on problems in a county emergency response office released by a police officer to the Washington Post. The Fourth Circuit, applying the first prong of the Connick standard, held that the internal report released by Officer Jurgensen was "at best [of] limited public concern . . . \(^{226}\) but the court nonetheless proceeded to

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222. Eiland v. City of Montgomery, 797 F.2d 953, 957 (11th Cir. 1986).
224. 461 U.S. at 147.
225. 745 F.2d 868 (4th Cir. 1984).
226. Id. at 888.
apply the second prong of Connick to balance the limited first amendment interest of Jurgensen against the employer's interest in disciplining him for releasing the report in violation of county regulations. The court struck the balance in favor of the employer, given that under the first prong of Connick, "[t]he report in this case had no more the quality of a matter of public concern than the language of the plaintiff in Connick . . . ."228

The first alternative's approach, continuing the application of Connick, is typified by Judge Ervin in his concurring opinion in Jurgensen, in which he found the court's discussion of the second prong of Connick unnecessary, as the first prong was dispositive. Judge Ervin stated:

Being convinced that once a determination has been made that the expression under scrutiny does not deal with a matter of 'public concern,' it is neither necessary nor appropriate to engage in such "interest balancing." I prefer to base the decision solely upon the ground that the audit report did not deal with a matter of 'public concern.'229

Thus, under the first alternative approach, the court, having determined that the report released by Jurgensen was no more than an internal agency matter, was to go no further in its analysis. There was no need for inquiry into the effect of releasing the report on Jurgensen's ability to discharge his duties as a police officer, or on the ability of the Fairfax County Police Department to maintain discipline and order. The result, under the first alternative, is a ruling for the defendant employer because Jurgensen did not speak on a matter of public concern.

Under the second alternative proposed by Massaro, the report is first examined not to determine whether it addresses a matter of public concern, but to determine whether the contents would be "'permissible 'street corner' discourse.'"230 Clearly, the audit report findings do not fall into that narrow band of topics, such as obscenity, that the government may regulate through criminal sanctions; as such, the report satisfies Massaro's first test. Note that under Massaro's alternative, the court is unlikely to encounter speech that may be termed outside the scope of "'permissible 'street corner' discourse'"231 frequently, and thus, unlike alternative one, will not readily dispose of the case under the first prong.

Once the first prong of the Massaro alternative has been answered in favor of the employee, the second prong requires the government to demonstrate that its reasons for disciplining the employee promote valid and important government interests sufficient to outweigh the protected speech.232

227. Id. at 888-89.
228. Id. at 888.
229. Id. at 891 (Ervin, J., concurring).
231. Id.
232. Id. "The Mount Healthy holding would continue to apply, so that discipline that would have been imposed despite the protected speech still would be allowed." Id. at 68.
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Note that Massaro places the burden of proof on the employer. Applying this second prong to Jurgensen, Fairfax County must demonstrate to the satisfaction of the court that in enforcing the regulation prohibiting release of audit reports and disciplining Jurgensen for insubordination, it promoted valid and important government interests—here, maintaining discipline and obedience to orders in the police department. Since Jurgensen's speech is deemed protected under the first prong of the Massaro test, the burden on the employer in justifying the discipline is substantially greater than under the Connick model, in that his act of "insubordination" is no more than exercising his free speech right. The result, under the second alternative, is a ruling for the plaintiff employee because the employer cannot show that disciplining the employee promoted an important government interest sufficient to outweigh Jurgensen's free speech right.

Under the third alternative, the nature of Jurgensen's speech is considered part of the overall inquiry into the interests of the parties. Thus, the content and context of Jurgensen's speech are evaluated in light of his first amendment right to comment on an issue of public concern, and are weighed against the employer's interest in efficiency. As required by Pickering, the parties' working relationship, the detrimental effect of the speech, and the nature of the issue upon which the employee spoke are considered. Judge Butzner, in his dissent in Jurgensen, strikes the balance in favor of the employee; the findings in his dissent furnish the basis for evaluation of this case under the third alternative.

The overall inquiry into the interests of the parties must begin with the realization that Jurgensen released the audit report only after a protracted period following its departmental circulation in which no corrective action was taken. The report was given to the newspaper reporter as a small part of Jurgensen's lengthy discussions with the press concerning deficiencies in the emergency operations center and the resulting danger to the public safety. Indeed, the majority opinion in Jurgensen acknowledged that his overall campaign to call attention to these deficiencies by complaining to his superiors and coworkers, and by speaking at a public meeting of the Civil Service Commission, was a valid exercise of his free speech right.

233. 745 F.2d at 888.
234. The Jurgensen court found ample evidence to support the employer in disciplining the employee, because the speech was not deemed protected. Thus, under Mount Healthy Jurgensen was not able to show that his free speech activities were the "but for" or "motivating" cause of his demotion; rather, the disciplinary action was for violating the regulation, irrespective of the contents of the report. 745 F.2d at 887-88. Under Massaro's test, however, the Mount Healthy standard would be resolved in favor of the employee, since the report would be deemed protected speech, and its release was the "but for" cause of his demotion.
235. See supra notes 10-37 and accompanying text.
236. 745 F.2d at 891 (Butzner, J., dissenting).
237. Id.
238. Id. at 887.
The *Pickering* factors support the conclusion that the speech was protected. The parties' working relationship was not unduly impaired by release of the report; even though Jurgensen was a supervisor, and "he realized that his action would likely displease his superiors . . . ."\(^{239}\) there was no evidence that Jurgensen's performance declined or that his loyalty to the department was suspect after release of the report.\(^{240}\) Nor was there any detrimental effect of the speech demonstrated: "An expert witness, who had years of experience in law enforcement and administration, testified that making the report available to the press would not damage the police department, that it dealt largely with managerial problems, and that similar reports are frequently made available to the press."\(^{241}\) Finally, the nature of the issue upon which the employee spoke (here, the effectiveness of the emergency response center) and the relationship of the employee to the issue (here, an employee of the center "most likely to have informed and definite opinions" on the matter)\(^ {242}\) compel the conclusion that Jurgensen's speech addresses substantial questions of public safety and welfare, and is thus on a matter of public concern.\(^{243}\)

Evaluating the speech in the context set forth above, alternative three results in a ruling for the employee. As stated by Judge Butzner:

> Upon consideration of the record, I conclude that Jurgensen's interest as a citizen, in disclosing the report to the press, outweighed the interest of the county, as an employer, in promoting the efficiency of the communications center through its orders, including those restricting access to the press. Jurgensen disclosed a matter of public interest. He did not merely voice a personal opinion, colored by his own perceptions of the condition of the Center. On the contrary, his disclosure of the Center's problems rested on an authoritative report that revealed in great detail the inefficiencies of the Center and recommended steps, including the expenditure of public funds, to remedy them.\(^{244}\)

Further, Judge Butzner concluded that Jurgensen met his burden of proof under *Mt. Healthy*,\(^{245}\) as his conduct in furnishing the report was protected, and the act of furnishing the report was the motivating or "but for" factor leading to his discipline.\(^{246}\)

Alternative one clearly favors the employer. By evaluating the speech separately and apart from the interests of the parties, an undue burden is placed on the employee. Further, if the court concludes that the speech is

\(^{239}\) Id. at 892 (Butzner, J., dissenting).
\(^{240}\) Id.
\(^{241}\) Id. There was even an opinion ventured by this expert that release of the report to the public would ultimately have a beneficial effect on the department. Id.
\(^{242}\) *Pickering*, 391 U.S. at 571-72.
\(^{243}\) See *supra* notes 131-42 and accompanying text.
\(^{244}\) 745 F.2d at 894 (Butzner, J., dissenting).
\(^{245}\) See *supra* notes 23-42 and accompanying text.
\(^{246}\) 745 F.2d at 896 (Butzner, J., dissenting).
not on a matter of public concern under the first prong of alternative one, no further inquiry into the interests of the parties is required.

Alternative two, while yielding the better result in this case, is overly broad in its definition of protected speech. If one concedes that the public employee can never completely divorce himself from his identity when speaking as a citizen, it follows that a test which ignores his status and, indeed, protects even speech on matters of purely private concern, unfairly discounts the notion that his employer, the government, may have legitimate interests in the effect of the speech on its ability effectively to govern.

Alternative three recognizes the dual status of the speaker as employee and citizen and allows for consideration of legitimate governmental concerns. In weighing the interests of the parties, however, this alternative avoids the trap of unduly focusing on the inquiry of whether the speech may be abstractly categorized as involving a matter of public concern, and rather addresses that issue as part of the larger inquiry into the competing rights of the parties. Because the courts would be required to engage in greater analysis of the competing interests of the parties, the resulting decisions would furnish public employees and employers alike with clearer guidance, thus reducing the prevailing conflict and confusion.

**CONCLUSION**

The Supreme Court clearly telegraphed its concern in *Connick* that public employees might frustrate legitimate discipline by their employers by litigating spurious free speech claims. To avoid that possibility, the Court has constructed a test that unfairly burdens the employee by requiring him to demonstrate that the speech fits neatly into a category of speech on a matter of public concern. The problem, as evidenced by the lower court decisions rendered since *Connick*, is that the courts have not defined with certainty what speech is protected; indeed, little more emerges from a review of the decisions than an identification of the variables, often contradictory, which influence the determination of whether speech is protected. Continued application of the *Connick* standard will only result in more uncertainty and suppression of speech that should be heard. A better alternative is to return to the standard set forth in *Pickering*, so that speech that arguably addresses a matter of public concern is evaluated in the overall context of the legitimate interests of the parties.